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## Frustrating Morals: Is There an Implied Reverse Morals Clause in Publishing Agreements?

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# FRUSTRATING MORALS: IS THERE AN IMPLIED REVERSE MORALS CLAUSE IN PUBLISHING AGREEMENTS?

## ABSTRACT

*In response to the #MeToo movement and the widespread condemnation of public figures for misconduct, book publishers adopted a standard contract provision used in other entertainment industries called a morals clause. Morals clauses allow a publisher to terminate the agreement if the author is subject to public condemnation. Although these provisions provide robust protection for publishers, these one-sided clauses provide no such protection for authors if publishers are subject to similar condemnation. Although authors may not have the leverage to negotiate reciprocal morals clauses, some authors may have an implied reverse morals clause through the frustration of purpose defense to breach of contracts claims. This Note argues that in certain circumstances, authors may be able to use the frustration of purpose defense to effectively terminate their publishing agreements in the event that their publisher is subject to widespread condemnation.*

## INTRODUCTION

On October 5th, 2017, the New York Times published an article detailing decades of sexual harassment allegations against Hollywood producer Harvey Weinstein.<sup>1</sup> In response to this breaking story, actress Alyssa Milano, one of those accusing Weinstein of sexual misconduct, tweeted a plea for people who have been “sexually harassed or assaulted” to reply to the tweet by saying, “me too.”<sup>2</sup> As of November 25th, 2022, this post had garnered roughly 20,300 retweets, 17,400 quoting tweets, and 46,300 likes.<sup>3</sup> Additionally, the hashtag “#MeToo” has been used over 19 million times on Twitter as of October 2018.<sup>4</sup> In the wake of this social media firestorm, hundreds of men were accused of sexual assault or sexual harassment and

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1. Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html>; see also *Harvey Weinstein Timeline: How the Scandal Unfolded*, BBC: NEWS (Oct. 24, 2022), <https://www.bbc.com/news/entertainment-arts-41594672>.

2. Alyssa Milano (@Alyssa\_Milano), TWITTER (Oct. 15, 2017, 4:21 PM), [https://twitter.com/Alyssa\\_Milano/status/919659438700670976?s=20](https://twitter.com/Alyssa_Milano/status/919659438700670976?s=20). Alyssa Milano later noted that the term #MeToo was not her original idea and was actually originated by activist Tarana Burke almost ten years prior with the purpose of spreading the message to survivors that they are heard and understood. See Anna North, *7 Positive Changes That Have Come From the #MeToo Movement*, VOX (Oct. 2, 2019), <https://www.vox.com/identities/2019/10/4/20852639/me-too-movement-sexual-harassment-law-2019>.

3. Milano, *supra* note 2.

4. Dalvin Brown, *19 Million Tweets Later: A Look at #MeToo a Year After the Hashtag Went Viral*, USA TODAY (Oct. 13, 2018), <https://www.usatoday.com/story/news/2018/10/13/metoo-impact-hashtag-made-online/1633570002/>.

subsequently lost their jobs.<sup>5</sup> Included among these men were politicians, actors, directors, producers, business executives, and many others.<sup>6</sup>

This movement grew beyond social media posts, causing a seismic cultural shift that shed light on the rampant sexual misconduct of men in power.<sup>7</sup> Although the movement resulted in hundreds of men accused of sexual assault losing their jobs,<sup>8</sup> the purpose of the movement was much broader.<sup>9</sup> Specifically, the objective of the movement was to raise “awareness of the prevalence and pernicious impact of sexual violence.”<sup>10</sup> Ultimately, the goal of the movement was to shift cultural standards to eliminate sexual misconduct.<sup>11</sup> Although there is much work left to be done, there has been significant progress.<sup>12</sup> For example, some states are banning non-disclosure provisions that prevent victims from exposing sexual misconduct.<sup>13</sup>

In the film industry, dozens of projects were negatively affected by sexual harassment allegations made against those involved in the production.<sup>14</sup> For example, in response to allegations made against comedian Louis C.K., Netflix canceled C.K.’s upcoming standup special. In response to the same allegations, The Orchard canceled the release of *I Love You, Daddy*, a film starring Louis C.K.<sup>15</sup> Like most #MeToo allegations, these cancellations were in response to widespread public condemnation of Louis C.K.<sup>16</sup>

The ramifications of the #MeToo movement are not unique to the film industry.<sup>17</sup> In perhaps one of the most shocking series of allegations, several

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5. See Audrey Carlsen et al., *#MeToo Brought Down 201 Powerful Men. Nearly Half of Their Replacements Are Women*, N.Y. TIMES (Oct. 29, 2018), <https://www.nytimes.com/interactive/2018/10/23/us/metoo-replacements.html>.

6. See *id.*

7. See North, *supra* note 2.

8. Carlsen et al., *supra* note 5.

9. North, *supra* note 2.

10. *Id.*

11. *Id.*

12. *Id.*

13. See Stacy Perman, *#MeToo Law Restricts Use of Nondisclosure Agreements in Sexual Misconduct Cases*, L.A. TIMES (Dec. 31, 2018), <https://www.latimes.com/business/hollywood/la-fi-ct-nda-hollywood-20181231-story.html>. A similar law has also been enacted in New Jersey. See Vincent N. Avallone & Meghan T. Meade, *New Jersey’s Latest #METOO Law Goes Beyond Sexual Harassment*, 11 NAT’L L. REV. 84 (Mar. 25, 2019), <https://www.natlawreview.com/article/new-jersey-s-latest-metoo-law-goes-beyond-sexual-harassment>.

14. Brandon Katz, *All of the Recent TV Shows and Movies Affected by Sexual Misconduct Allegations*, OBSERVER (Nov. 10, 2017, 2:06 PM), <https://observer.com/2017/11/tv-shows-films-sexual-misconduct-allegations/>.

15. *Id.*

16. See Quentin Fottrell, *Louis C.K.’s Statement Said: ‘These Stories Are True.’ It Did Not Say: ‘Sorry’*, MKT. WATCH (Nov. 10, 2017, 3:14 PM), <https://www.marketwatch.com/story/kathy-griffin-totally-offended-everyone-but-heres-one-thing-she-did-right-2017-05-31>.

17. For an analysis of how the #MeToo movement shined a light on sexual misconduct within the publishing industry see, Rachel Deahl, John Maher & Jim Milliot, *The Women of Publishing Say #MeToo*, PUBLISHERS WKLY. (Oct. 20, 2017), <https://www.publishersweekly.com/pw/by-topic/industry-news/publisher-news/article/75175-sexual-harassment-is-a-problem-in->

children's book authors were accused of sexual misconduct.<sup>18</sup> Of particular note, James Dashner, author of the popular young adult series *Maze Runner*, was accused of sexual harassment in the comments section of an article posted by a literary magazine marketed to school librarians.<sup>19</sup> These allegations against Dashner caused a significant drop in sales of Dashner's books.<sup>20</sup> To protect themselves against future allegations against other authors and causing a potential drop in sales, publishers began negotiating language into book deals to protect against such scenarios.<sup>21</sup>

Although widely adopted in other entertainment industries, the publishing industry has only recently, and reluctantly, incorporated morals clauses as a standard provision in book deals.<sup>22</sup> Morals, morality, or moral turpitude clauses are contractual provisions that allow for a publisher to cancel a book deal where an author "is accused of immoral, illegal, or publicly condemned behavior."<sup>23</sup> In certain cases, the exercise of these provisions may also require an author to return any advance payments on book sales, which are typical in most book deals.<sup>24</sup> A standard example of such a provision is below:

Publisher may at any time prior to publication choose not to publish the Work if past or future illegal conduct of the Author, inconsistent with the

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publishing.html; *see also*, Anne Ursu, *Sexual Harassment in the Children's Book Industry*, MEDIUM (Feb. 7, 2018), [https://medium.com/@anneursu\\_10179/sexual-harassment-in-the-childrens-book-industry-3417048ccde2](https://medium.com/@anneursu_10179/sexual-harassment-in-the-childrens-book-industry-3417048ccde2).

18. *See* Patricia Cohen & Tiffany Hsu, *Children's Book Industry Has Its #MeToo Moment*, N.Y. TIMES (Feb. 15, 2018), <https://www.nytimes.com/2018/02/15/business/childrens-publishing-sexual-harassment.html>.

19. *See* Drew Himmelstein, *Children's Publishing Reckons with Sexual Harassment in Its Ranks*, SCH. LIBR. J. (Jan. 4, 2018), <https://www.slj.com/?detailStory=childrens-publishing-reckons-sexual-harassment-ranks>; *see also*, Matt Fernandez, *'Maze Runner' Author 'Deeply Sorry' Over Sexual Misconduct Allegations*, VARIETY (Feb. 15, 2018), <https://variety.com/2018/biz/news/maze-runner-james-dashner-sexual-harassment-allegations-1202700571/>.

20. Jim Milliot, *Taking the Measure of Sexual Misconduct Charges in Publishing*, PUBLISHERS WKLY. (Apr. 20, 2018), <https://www.publishersweekly.com/pw/by-topic/industry-news/publisher-news/article/76673-taking-the-measure-of-sexual-misconduct-charges-in-publishing.html>.

Similarly, other authors with similar allegations also experienced drops in sales. In the month following allegations against author Sherman Alexie, sales of his book, *The Absolutely True Diary of a Part Time Indian*, dipped 7%. In contrast, in the four weeks following the allegations against author Jay Asher, his book, *Thirteen Reasons Why*, saw a 7% jump in sales. However, this could have been the result of the popularity of a Netflix series based on the book. Jim Milliot, *Taking the Measure of Sexual Misconduct Charges in Publishing*, PUBLISHERS WKLY. (Apr. 20, 2018), <https://www.publishersweekly.com/pw/by-topic/industry-news/publisher-news/article/76673-taking-the-measure-of-sexual-misconduct-charges-in-publishing.html>.

21. Rachel Deahl, *In the #MeToo Moment, Publishers Turn to Morality Clauses*, PUBLISHERS WKLY. (Apr. 27, 2017), <https://www.publishersweekly.com/pw/by-topic/industry-news/publisher-news/article/76733-in-the-metoo-moment-publishers-turn-to-morality-clauses.html>.

22. *Id.*

23. *Why We Oppose Moral Clauses in Book Contracts*, AUTHORS GUILD (Jan. 24, 2019), <https://www.authorsguild.org/industry-advocacy/why-we-oppose-morals-clauses-in-book-contracts/>.

24. *Id.*

Author's reputation at the time this Agreement is executed and unknown to Publisher, is made public and results in sustained, widespread public condemnation of the Author that materially diminishes the sales potential of the Work. Should Publisher elect not to publish the Work pursuant to this section, Publisher shall give the Author timely written notice of such decision, all rights in the Work shall revert to the Author, no further advances shall be payable, and the Author shall not be required to repay any sums paid to date.<sup>25</sup>

Under the provision above, the author would be subject to certain consequences for illegal conduct that results in public condemnation and decreases potential sales of the work. Although not always the case, morals clauses may allow the author to retain any advance payments, although this is often a contentious point of negotiation.<sup>26</sup>

Morals clauses present a number of issues for authors. These provisions only protect the publisher from the conduct of the author, while affording no such protection to the authors themselves.<sup>27</sup> This language is often broad, leaving conduct that may trigger the morals clause ambiguous, and potentially giving publishers wide discretion in interpreting the author's behavior.<sup>28</sup> Although publishers are forcing authors to include morals clauses in new agreements, there is no contractual provision holding publishing houses accountable for the behavior of the publishers themselves.<sup>29</sup>

Although other entertainment industries are now competing for the consumer's attention, the publishing industry remains a profitable and important industry, both culturally and financially.<sup>30</sup> In 2019, global book sales reached \$26.8 billion dollars in the United States.<sup>31</sup> In 2017 alone, an estimated 2.72 billion books were published.<sup>32</sup> Non-fiction books continue to make up a majority of books published.<sup>33</sup> Specifically, in 2017, adult non-

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25. *Id.*

26. For an explanation of how advance payments function within the publishing industry see Brian A. Klems, *How Book Advances Work: A Simple Explanation for Writers*, WRITERS DIG. (Mar. 10, 2014), <https://www.writersdigest.com/finances/how-book-advances-work-a-simple-explanation-for-writers>.

27. AUTHORS GUILD, *supra* note 23.

28. *Id.*

29. See Paul S. Levine, *Publishing Contracts 101 (What You Need to Know to Protect Your Work)*, WRITERS DIG. (Oct. 6, 2009), <https://www.writersdigest.com/get-published-sell-my-work/publishing-contracts-101>.

30. See *Book Publishing In the US - Market Size 2005–2027*, IBISWORLD (June 7, 2021), <https://www.ibisworld.com/industry-statistics/market-size/book-publishing-united-states/> [hereinafter *Book Publishing in the US*].

31. *Id.*

32. Bernhard Schroeder, *While \$26 Billion Publishing Industry Is Flat, This Vertical Segment Is Exploding. Leverage These Insights to Ride the Wave*, FORBES (Oct. 30, 2018, 10:51 AM), <https://www.forbes.com/sites/bernhardschroeder/2019/10/30/while-26-billion-publishing-industry-is-flat-this-vertical-segment-is-exploding-leverage-these-insights-to-ride-the-wave/?sh=6ba912aa3761>.

33. IBISWORLD, *supra* note 30.

fiction revenue totaled \$6.18 billion compared to adult fiction revenues of \$4.3 billion.<sup>34</sup>

In many instances, non-fiction authors publish books as part of a broader body of work that transcends multiple mediums.<sup>35</sup> Conduct of publishers that results in widespread public condemnation could negatively affect the endeavors of these non-fiction authors.<sup>36</sup> Under these morals clauses, however, authors with such a mission are afforded no protection when their publishers commit conduct that is at odds with the mission of the author's work.<sup>37</sup>

In this Note, I will propose a solution to the problem posed by morals clauses in publishing agreements. Part I of this note will provide a general background of morals clauses by (1) describing how book deals are typically structured; (2) providing a brief history of morals clauses in various entertainment industries; and (3) explaining how reciprocal morals clauses have recently begun being included in various entertainment agreements. Part II discusses the development of the use of morals clause in publishing contracts. Part III will discuss the issues that are presented by these morals clauses. Part IV will discuss the legal concept of frustration of purpose, an affirmative defense to breach of contract claims. Lastly, Part V will discuss the implied reverse morals clause in publishing agreements that exists through the common law affirmative breach of contract defense, the frustration of purpose.

## I: BACKGROUND

### A. THE STRUCTURE OF A BOOK DEAL

A published book begins its life as a manuscript.<sup>38</sup> Authors seeking representation will submit their manuscript to an agent with the hopes that the agent will read the manuscript, see potential in the work, and agree to represent the author and the work by pitching it to potential publishers.<sup>39</sup> In

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34. Adam Rowe, *Traditional Publishers Are Selling Way More Non-Fiction Than Fiction*, FORBES (Aug. 30, 2018, 8:25 AM), <https://www.forbes.com/sites/adamrowe/2018/08/30/traditional-publishers-are-selling-way-more-non-fiction-than-fiction/?sh=6e5cf77b56d0>.

35. See Dan Schawbel, *Author Malcolm Gladwell Shares His Best Career Advice and Why You Should Always 'Have a Project'*, BUS. INSIDER (May 22, 2021), <https://www.businessinsider.com/malcolm-gladwell-best-career-advice-new-book-bomber-mafia-2021-5>. Malcolm Gladwell is an excellent example of a non-fiction author who uses various mediums to accomplish professional goals. Gladwell has written six non-fiction books and hosts a popular podcast in addition to many years working as a journalist.

36. Jennifer Schuessler & John Williams, *'Imagine This Were Your Sister,' Ronan Farrow Tells Woody Allen's Publisher*, N.Y. TIMES (July 9, 2021), <https://www.nytimes.com/2020/03/03/books/woody-allen-ronan-farrow.html>.

37. AUTHORS GUILD, *supra* note 23.

38. *How to Submit a Book Manuscript to an Agent*, MASTERCLASS (Sept. 9, 2021), <https://www.masterclass.com/articles/how-to-submit-a-book-manuscript-to-an-agent>.

39. *Id.*

cases of highly sought-after books, agents often set up auctions where publishers submit bids to purchase these manuscripts.<sup>40</sup> Although authors may choose to self-publish or self-represent, the general industry consensus is that agents provide much-needed resources to unestablished authors, such as editing expertise, industry connections, and negotiation skills.<sup>41</sup> Additionally, many editors will only consider manuscripts that are submitted to them by a literary agent.<sup>42</sup>

An agent will pitch a manuscript by sending copies to editors the agent believes would be interested in the project.<sup>43</sup> Because agents maintain relationships with editors, they are familiar with each editor's taste and expertise and are, therefore, able to predict which manuscripts might best suit an editor.<sup>44</sup> Once an agent has identified and selected an editor who is willing to buy the manuscript and has agreed on the larger deal points such as royalty rates, the amount of money to be advanced on the royalties, the due dates for edited manuscripts, and the final manuscript length, the agent will then work with the publishing company on negotiating the finer deal points in the final contract.<sup>45</sup>

In most instances, if the agent has an established relationship with the publisher, the agent will handle the negotiations and work from an established agency boilerplate agreement.<sup>46</sup> As part of this negotiation, an agent will handle delivery issues such as deadlines, formats for submissions, and whether illustrations, tables, or charts should be included.<sup>47</sup> Agents will also negotiate what rights are granted and in what manner, such as the scope of the license, the translation rights, subsidiary rights, and territories.<sup>48</sup> Although the royalties for principle formats, such as hardcover, paperback, and e-book formats, are negotiated at the deal stage, finer and more specific royalty rates are negotiated at the contract drafting stage.<sup>49</sup>

In a standard book deal, publishers will include an option to publish the author's next work.<sup>50</sup> These options often take the form of a right of first

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40. Karen Dionne, *When Books Sell at Auction*, HUFFINGTON POST (Aug. 27, 2011), [https://www.huffpost.com/entry/book-auctions\\_b\\_935645](https://www.huffpost.com/entry/book-auctions_b_935645).

41. *What Is a Literary Agent? Pros and Cons of Hiring a Literary Agent*, MASTERCLASS (Aug. 23, 2021), <https://www.masterclass.com/articles/pros-and-cons-of-hiring-a-literary-agent#what-does-a-literary-agent-do>

42. MASTERCLASS, *supra* note 38.

43. Valerie Peterson, *Do You Need a Literary Agent?*, THE BALANCE CAREERS (Sept. 16, 2019), <https://www.thebalancecareers.com/what-does-a-book-agent-do-to-get-your-book-published-2799883>.

44. *Id.*

45. *Id.*

46. *Id.*

47. Howard G. Zaharoff, *Book Publishing Contracts*, MORSE (July 28, 2020), <https://www.morse.law/news/book-publishing-contracts/>.

48. *Id.*

49. *Id.*

50. *Id.*

refusal.<sup>51</sup> If the author negotiates for it, publishers will sometimes concede and structure the option to simply be a good faith negotiation over the next work.<sup>52</sup> Typically these provisions include limitations.<sup>53</sup> For example, the option typically only applies to the author's next work, and the publisher will typically only have a limited time to act on the option.<sup>54</sup> Most contractual clauses are not controversial; however, the morals clause stands out as a hotly-debated provision in book deals.<sup>55</sup>

### **B. THE MORALS CLAUSE – ORIGIN AND USE IN OTHER ENTERTAINMENT INDUSTRIES**

The origin of the morality clause is typically attributed to Universal Pictures and was drafted in response to the conduct of Roscoe “Fatty” Arbuckle (Arbuckle) in 1921.<sup>56</sup> Although it originated in the film industry, similar language has been adopted in advertising, sports, and other various media contracts.<sup>57</sup> In a post #MeToo climate, many entertainment and media companies have a renewed interest in including morals clauses in talent agreements.<sup>58</sup>

In 1921, Arbuckle was at the pinnacle of his career as a comedy actor and had just signed a three-year, \$3 million contract with Paramount Studios.<sup>59</sup> Later in the summer of that same year, during a break from filming, Arbuckle hosted a party in his San Francisco hotel room.<sup>60</sup> Following his party, Virginia Rappe, a twenty-six-year-old actress, was found seriously injured in his hotel room. Several days later, she died of complications from her injuries.<sup>61</sup> Arbuckle was accused of rape and manslaughter.<sup>62</sup> Although he was eventually acquitted of his criminal charges, public condemnation of

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51. *Id.*

52. Zaharoff, *supra* note 47.

53. *Id.*

54. *Id.*

55. AUTHORS GUILD, *supra* note 23.

56. Schuyler Moore, *Morality Clauses in Hollywood: What You Need to Know*, FORBES (Mar. 12, 2018, 5:27 PM), <https://www.forbes.com/sites/schuylermoore/2018/03/12/morality-clauses-in-hollywood/?sh=4dc68ad849a5>. Although the inclusion of morals clauses in Universal's talent agreements was in response to public condemnation of Fatty Arbuckle, Arbuckle was actually signed to Paramount Studios. *Id.*

57. *See id.*

58. *See* Erin Mulvaney, *Workplace Morals Clauses Take Hold Beyond Show Biz in #MeToo Era*, BLOOMBERG L. (Mar. 11, 2020, 5:38 AM), <https://news.bloomberglaw.com/daily-labor-report/workplace-morals-clauses-take-hold-beyond-show-biz-in-metoo-era>.

59. Fernando M. Pinguelo & Timothy D. Cedrone, *Morals? Who Cares About Morals? An Examination of Morals Clauses in Talent Contracts and What Talent Needs to Know*, 19 SETON HALL J. SPORTS & ENT. L. 347, 354 (2009).

60. *Id.*

61. *Id.*

62. *Id.*



Arbuckle never relented.<sup>63</sup> In direct response to this incident, lawyers who represented Universal Pictures stated, “[t]o protect our clients we have advised them to have a morality clause inserted in all contracts.”<sup>64</sup> Universal began inserting the following language into acting agreements:

The actor (actress) agrees to conduct himself (herself) with due regard to public conventions and morals and agrees that he (she) will not do or commit anything tending to degrade him (her) in society or bring him (her) into public hatred, contempt, scorn or ridicule, or tending to shock, insult or offend the community or outrage public morals or decency, or tending to the prejudice of the Universal Film Manufacturing Company or the motion picture industry. In the event that the actor (actress) violates any term or provision of this paragraph, then the Universal Film Manufacturing Company has the right to cancel and annul this contract by giving five (5) days’ notice to the actor (actress) of its intention to do so.<sup>65</sup>

A few decades later, public condemnation of those in the film industry changed focus from morality to politics and took the form of McCarthyism.<sup>66</sup> However, instead of targeting just the public-facing actors, this condemnation affected those behind the screen as well, including several directors and screenwriters.<sup>67</sup> Although initially and primarily utilized in the film industry, the morals clause eventually made its way to other industries as well.<sup>68</sup>

Morals clauses are now included in major sports players’ collective bargaining agreements, including in the National Basketball Association, National Hockey League, National Football League, and Major League Baseball.<sup>69</sup> The morals clauses in these sports agreements are structured differently than those in publishing contracts.<sup>70</sup> For example, the National

63. Noah B. Kressler, *Using the Morals Clause in Talent Agreements: A Historical, Legal and Practical Guide*, 29 COLUM. J.L. & ARTS 235, 237 (2005).

64. *Morality Clause for Films*, N.Y. TIMES (Sept. 22, 1921), [https://timesmachine.nytimes.com/timesmachine/1921/09/22/98743776.pdf?pdf\\_redirect=true&ip=0](https://timesmachine.nytimes.com/timesmachine/1921/09/22/98743776.pdf?pdf_redirect=true&ip=0).

65. Sally Helppie & Amy E. Mitchell, *Off-Screen Behavior Matters: Morals Clauses for Performers*, SOUTH BY SOUTHWEST (Mar. 15, 2018), available at <https://www.sxsw.com/wp-content/uploads/2018/03/SXSW-2018-Morals-Clauses-Presentation.pdf>.

66. 2 THOMAS D. SELZ ET AL., ENTERTAINMENT LAW: LEGAL CONCEPTS AND BUSINESS PRACTICES § 9:106 (3d ed. 2022).

67. *Id.*

68. *Id.*

69. NAT’L BASKETBALL ASSOC. COLLECTIVE BARGAINING AGREEMENT art. VI (2011), available at <https://cosmic-s3.imgix.net/3c7a0a50-8e11-11e9-875d-3d44e94ae33f-2017-NBA-NBPA-Collective-Bargaining-Agreement.pdf>; NAT’L HOCKEY LEAGUE COLLECTIVE BARGAINING AGREEMENT, at 311 (2012), available at [https://www.nhlpa.com/the-pa/cba\\_natl\\_football\\_league\\_collective\\_bargaining\\_agreement](https://www.nhlpa.com/the-pa/cba_natl_football_league_collective_bargaining_agreement), at 276 (2021), available at <https://nflpaweb.blob.core.windows.net/website/PDFs/CBA/March-15-2020-NFL-NFLPA-Collective-Bargaining-Agreement-Final-Executed-Copy.pdf>; MAJOR LEAGUE BASEBALL COLLECTIVE BARGAINING AGREEMENT, at 52 (2017), available at [https://d39ba378-ae47-4003-86d3-147e4fa6e51b.filesusr.com/ugd/b0a4c2\\_95883690627349e0a5203f61b93715b5.pdf](https://d39ba378-ae47-4003-86d3-147e4fa6e51b.filesusr.com/ugd/b0a4c2_95883690627349e0a5203f61b93715b5.pdf)

70. Deahl, *supra* note 21.

Basketball Association's collective bargaining agreement (NBA Agreement) contains robust provisions that address specific behavior.<sup>71</sup> The NBA Agreement addresses unlawful violence, the use of firearms and other weapons, unlawful use of alcohol and drugs, arrests, domestic violence, sexual abuse, and child abuse.<sup>72</sup> Further, the NBA Agreement outlines how the league will investigate these incidents and how punishments will be administered.<sup>73</sup>

Unlike the NBA Agreement, the National Hockey League agreement (NHL Agreement) contains broad language that lacks specificity.<sup>74</sup> The language in the NHL Agreement states:

The Player further agrees, to conduct himself on and off the rink according to the highest standards of honesty, morality, fair play and sportsmanship, and to refrain from conduct detrimental to the best interest of the Club, the League or professional hockey generally.<sup>75</sup>

Morals clauses are also used in a variety of other industry's talent agreements, such as the advertising industry. One high-profile instance of a morals clause being exercised was the firing of Kate Moss from an H&M advertising campaign in 2005 after she admitted to using cocaine.<sup>76</sup> Similarly, several sponsors, including Nike and Reebok, severed ties with Michael Vick after he was indicted for illegal dog fighting in 2007.<sup>77</sup> In contrast, the Directors Guild of America and the Writers Guild of America have barred the inclusion of morals clauses in their contracts.<sup>78</sup>

### C. THE RECIPROCAL MORALS CLAUSE

Although not yet widely adopted, some industries have started to institute reverse or reciprocal morals clauses to address similar issues.<sup>79</sup> A reciprocal morals clause is defined as "a reciprocal contractual warranty to a traditional morals clause intended to protect the reputation of talent from the negative, unethical, immoral, and/or criminal behavior of the endorsee-company or

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71. NAT'L BASKETBALL ASSOCIATION COLLECTIVE BARGAINING AGREEMENT, *supra* note 69.

72. *Id.*

73. *Id.*

74. NAT'L HOCKEY LEAGUE COLLECTIVE BARGAINING AGREEMENT, *supra* note 69, at 311.

75. *Id.*

76. Guy Trebay & Eric Wilson, *Kate Moss is Dismissed by H&M After a Furor Over Cocaine*, N.Y. TIMES (Sept. 21, 2005), <https://www.nytimes.com/2005/09/21/business/media/kate-moss-is-dismissed-by-hm-after-a-furor-over-cocaine.html>.

77. Darren Heitner, *The Moral Clause*, BLEACHER REP. (Sept. 16, 2008), <https://bleacherreport.com/articles/58401-the-moral-clause>.

78. Adam Faderewski, *Morals Clauses Multiply in Hollywood*, TEX. L. BLOG (Mar. 21, 2018), <https://blog.texasbar.com/2018/03/articles/sxsw/morals-clauses-multiply-in-hollywood/>.

79. Rick G. Morris, *Media Moguls Risking It All: Contract Clauses in the Entertainment Business in the Age of #MeToo*, 9 ARIZ. ST. SPORTS & ENT. L.J. 1, 44-45 (2019).

purchaser of talent's endorsement."<sup>80</sup> This type of language is gaining popular usage in industries such as sports endorsement.<sup>81</sup> The reciprocal morals clause essentially protects talent from corporate scandals that could harm the reputation of the talent.<sup>82</sup>

In what some have called the "Enron Effect," celebrities are beginning to demand reciprocal morals clauses in their talent agreements.<sup>83</sup> The Enron Effect takes its name from a botched endorsement deal made between the Houston Astros (Astros) and the Enron Corporation (Enron), a Texas-based energy company, for naming rights of the Astros' stadium in 1999.<sup>84</sup> Enron lacked household name recognition despite claiming over \$100 billion in revenue.<sup>85</sup> Seeking to establish recognition, Enron purchased naming rights to the Astros' stadium in a thirty-year, \$100 million deal.<sup>86</sup> In December of 2001, following corruption and fraud committed by Enron, Enron filed for bankruptcy in what was the largest bankruptcy at that time.<sup>87</sup> The fallout from this scandal stirred controversy surrounding the name of the Astros' stadium.<sup>88</sup> The Astros successfully sought to buy out the naming rights contract for \$2.1 million.<sup>89</sup> Advocates of the widespread adoption of reverse-morals clauses have highlighted this exact scenario as an example of a deal that would have greatly benefitted from a reverse morals clause.<sup>90</sup>

The reverse-morals clause is relatively new, and this novel provision presents a few issues.<sup>91</sup> Specifically, there is very little scholarship on these provisions.<sup>92</sup> Although these clauses are being implemented in contracts, parties also have not released the language to the public.<sup>93</sup> This type of provision would not be feasible in the publishing industry for the reasons discussed below.

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80. Porcher L. Taylor, III. et al., *The Reverse-Morals Clause: The Unique Way to Save Talent's Reputation and Money in A New Era of Corporate Crimes and Scandals*, 28 *CARDOZO ARTS & ENT. L.J.* 65, 66-67 (2010).

81. *Id.*

82. Faderewski, *supra* note 78.

83. Helppie & Mitchell, *supra* note 65.

84. Porcher et al., *supra* note 80.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. Taylor et al., *supra* note 80.

90. Porcher et al., *supra* note 80.

91. See Caroline Epstein, *Morals Clauses: Past, Present and Future*, 5 *N.Y.U. J. INTELL. PROP. & ENT. L.* 72, 96 (2016).

92. *Id.*

93. *Id.*

## II: MORALS CLAUSES IN PUBLISHING AGREEMENTS AND BACKGROUND

Despite vocal and sustained opposition from writer advocacy groups citing the ambiguity and subjectivity of the language, morals clauses have become increasingly common in book deals.<sup>94</sup> Despite these objections, and in the wake of #MeToo and public condemnation of several high-profile authors, publishers have fought to include this language in contracts.<sup>95</sup>

Advocacy groups such as the Author's Guild have vigorously opposed the inclusion of morals clauses in publishing agreements.<sup>96</sup> In their "model contract," a template draft of an ideal book agreement, the Author's Guild advises authors to resist including morals clauses. However, if the publisher insists, it instructs authors to endeavor to negotiate language such as the following:

Publisher may at any time prior to publication choose not to publish the Work if Author has been convicted or admitted to illegal or morally repugnant conduct (under commonly accepted, nationwide standards), unknown to Publisher and inconsistent with the Author's reputation at the time this Agreement is executed, where the conduct has become known to the public and resulted in sustained, widespread public condemnation of the Author and that will directly and materially diminish the sales of the Work. In the event Publisher desires to exercise this option in such circumstances, Publisher may terminate this Agreement upon written notice to Author describing the basis for the termination, including the conduct and how sales would be materially diminished; and Publisher shall give Author 30 days to respond and deny such conduct by sworn affidavit or provide evidence that the sales of the book will not be impacted. Upon termination under this section, all rights in the Work will revert to the Author, and Publisher will promptly provide written documentation thereof. No further advances with respect to the unpublished Work shall be payable, and the Author shall not be required to repay any sums paid to date for the unpublished Work.<sup>97</sup>

The Author's Guild further advises that morality clauses should only cover (1) "proven or admitted conduct"; (2) "[c]onduct that is illegal or objectively morally condemnable behavior"; (3) "conduct that has become public"; (4) "conduct that is likely to adversely affect the sale of the book"; and (5) "[c]onduct that the publisher did not know about when it signed the agreement."<sup>98</sup> The Authors Guild further advises that the language should stipulate that the publisher is only able to terminate the agreement and not

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94. AUTHORS GUILD, *supra* note 23.

95. Deahl, *supra* note 21.

96. AUTHORS GUILD, *supra* note 23.

97. MODEL TRADE BOOK CONTRACT, [https://go.authorsguild.org/contract\\_sections/8](https://go.authorsguild.org/contract_sections/8) (last visited Nov. 20, 2021).

98. *Id.*

pursue any damages.<sup>99</sup> The rights should revert to the author upon termination, and the author should not be forced to pay back any portion of the advance that has been paid.<sup>100</sup>

The inclusion of morals clauses is a relatively recent development.<sup>101</sup> In the first high-profile instance that sparked the conversation around morals clauses, Simon & Schuster (S&S) canceled the publication of Milo Yiannopoulos's (Yiannopoulos) book *Dangerous*.<sup>102</sup> S&S purchased Yiannopoulos's book in December 2016 and received significant backlash within the publishing industry at the time of the deal.<sup>103</sup> This backlash was expected, as Yiannopoulos was a controversial figure.<sup>104</sup> However, an interview resurfaced in 2017 in which Yiannopoulos condoned pedophilia, which caused a renewed and more intense backlash across Yiannopoulos' commercial endeavors.<sup>105</sup> S&S ultimately canceled the publication, citing an unacceptable manuscript.<sup>106</sup> Yiannopoulos filed suit claiming breach of contract and lack of good faith but ultimately dropped the case and self-published the manuscript, which resulted in it landing on Amazon's Best Seller list.<sup>107</sup> Although the publisher did not cancel the book by leveraging a morals clause, the incident sparked an industry-wide discussion of morals clauses and began a push for publishers to renegotiate boilerplate contracts to include morals clauses.<sup>108</sup>

In a similar instance, and one in which other authors were more directly affected, Grand Central Publishing, a division of Hachette Book Group (Hachette), announced in early 2020 that it had purchased the rights to

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99. *Id.*

100. *Id.*

101. See Deahl, *supra* note 21.

102. Although S&S leveraged language regarding the quality of the manuscript, this incident sparked an industry wide discussion about how to address unfavorable conduct of contributors that adversely affect marketability of a book. Deahl, *supra* note 21.

103. *Id.*

104. See *Milo Yiannopoulos: Who Is the Alt-Right Writer and Provocateur?*, BRIT. BROAD. CORP. (Feb. 21, 2017), <https://www.bbc.com/news/world-us-canada-39026870>.

105. Rebecca Hersher, *After Comments On Pedophilia, Breitbart Editor Milo Yiannopoulos Resigns*, NAT'L. PUB. RADIO (Feb. 21, 2017, 3:40 PM), <https://www.npr.org/sections/thetwo-way/2017/02/21/516473521/after-comments-on-pedophilia-breitbart-editor-milo-yiannopoulos-resigns>.

106. Deahl, *supra* note 21.

107. Michael Schaub, *Milo Yiannopoulos Ends His Lawsuit Against Simon & Schuster*, L.A. TIMES (Feb. 20, 2018, 10:20 AM), <https://www.latimes.com/books/la-et-jc-milo-yiannopoulos-suit-20180220-story.html>.

108. Bill Cafero, *Milo Yiannopoulos Sues Simon & Schuster – Bet They Wish They Had a Morals Clause, But What's a Morals Clause?*, L. OFF. WILLIAM CAFERO (July 11, 2017), <https://caferoverdicts.com/2017/07/11/milo-yiannopoulos-sues-simon-schuster-morals-clause/>; see also Jacqui Lipton, *2018: The Year of the Morality Clause*, AUTHORS ALLIANCE (June 6, 2018), <https://www.authorsalliance.org/2018/06/06/2018-the-year-of-the-morality-clause/>.

Woody Allen's (Allen) autobiographical manuscript *Apropos of Nothing*.<sup>109</sup> Allen's son, Ronan Farrow, wrote a book published by another Hachette imprint<sup>110</sup> prior to Allen's announcement accounting for his groundbreaking investigation into the Harvey Weinstein sexual assault scandal.<sup>111</sup> In 1992, Allen was accused of several incidents of sexual misconduct, including an incident involving his daughter Dylan Farrow.<sup>112</sup> Ronan Farrow had been critical of Allen and has always been a believer and supporter of his sister.<sup>113</sup> Following Grand Central Publishing's announcement, Ronan Farrow sent a scathing email to Hachette's CEO criticizing Hachette and threatened to end his publishing relationship with his publisher, Little Brown.<sup>114</sup>

This particular incident with Hachette presents an interesting conundrum and a reverse of the typical situation presented by the need for morals clauses.<sup>115</sup> In Dylan Farrow's situation with Hachette, an author wished to cancel his deal based on the publisher's conduct.<sup>116</sup> Although in this situation, the publisher responded to the widespread condemnation by ultimately canceling the book deal, the relationship between the author and the publisher was damaged.<sup>117</sup> The language commonly used in publishing morals clauses only protects the publisher from conduct attributed to the author. However, publishing agreements rarely, if ever, offer such protection to the author regarding conduct by the publisher.<sup>118</sup>

Although successful in other industries, the incorporation of a reciprocal morals clause as a standard provision in publishing agreements is not an adequate solution. Despite this, publishing houses have remained resilient in the face of competition from digital entertainment. The publishing business

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109. John Williams, *Hachette Says It Won't Publish Woody Allen's Book*, N.Y. TIMES (Mar. 9, 2020), <https://www.nytimes.com/2020/03/06/books/217hachette-woody-allen-apropos-nothing.html>.

110. An imprint is a brand name under which a publisher publishes a book. The large publishers often have several imprints under which they publish. Sarah Rexford, *What is a Publishing Imprint?*, THE BOOK DESIGNER (Sept. 9, 2022), <https://www.thebookdesigner.com/publishing-imprint/>.

111. John Koblin, *Ronan Farrow Goes After NBC News Executives in His New Book*, N.Y. TIMES (Oct. 14, 2019), <https://www.nytimes.com/2019/10/10/business/media/ronan-farrow-catch-kill-nbc.html>.

112. Nicole Sperling, *Filmmakers Look at Woody Allen Abuse Allegations in Four-Part Series*, N.Y. TIMES (Mar. 2, 2021), <https://www.nytimes.com/2021/02/05/movies/woody-allen-farrow-accusations.html>.

113. Ronan Farrow, *My Father, Woody Allen, and the Danger of Questions Unasked (Guest Column)*, HOLLYWOOD RPT. (May 11, 2016, 3:00 AM), <https://www.hollywoodreporter.com/news/general-news/my-father-woody-allen-danger-892572/>.

114. Jennifer Schuessler & John Williams, *'Imagine This Were Your Sister,' Ronan Farrow Tells Woody Allen's Publisher*, N.Y. TIMES (July 9, 2021), <https://www.nytimes.com/2020/03/06/books/woody-allen-ronan-farrow.html>.

115. *See id.*

116. *Id.*

117. *See id.*

118. *See Zaharoff, supra note 47.*

model works under the assumption of tight margins.<sup>119</sup> In fact, the most successful worldwide publishers only operate with a profit margin of roughly 10%,<sup>120</sup> although in recent years these margins have been increasing.<sup>121</sup> Considering these tight margins, publishers have an interest in making conservative business decisions to protect their revenue stream. In contrast to advertising firms, which engage athletes in endorsement deals and derive their profits from sources that are not tied to the talent themselves or the deals in which they are engaged, publishers function with a business model that derives profits nearly entirely based on the deals they ink with authors.<sup>122</sup> If reciprocal morals clauses were to be incorporated into publishing agreements and a publisher were to be subject to public condemnation such that the author would have the option to terminate the agreement by exercising their rights contained in a reciprocal morals clause,<sup>123</sup> all authors in a publisher's catalog could also exercise the same rights. In this case, a publisher would simply lose all revenue and be forced to close its doors.<sup>124</sup> In addition to these concerns, there are several concerns regarding morals clauses that are uniquely present in the publishing industry.

### III: ISSUES WITH MORALS CLAUSES IN PUBLISHING AGREEMENTS

#### A. FREE SPEECH ISSUES

The first and arguably most important issue presented by the inclusion of morals clauses in publishing agreements is the effect on free speech.<sup>125</sup> The notion of the right to free speech is derived from the restrictions placed on the Government contained in the First Amendment.<sup>126</sup> Publishers are aware of their moral duty as gatekeepers of speech.<sup>127</sup> John Sargent, the former CEO

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119. Jim Milliot, *A Profitable Year for Trade Publishers*, PUBLISHERS WKLY. (Mar. 29, 2019), <https://www.publishersweekly.com/pw/by-topic/industry-news/publisher-news/article/79675-a-profitable-year-for-trade-publishers.html>.

120. Jim Milliot, *The 10% Standard*, PUBLISHERS WKLY. (Apr. 6, 2012), <https://www.publishersweekly.com/pw/by-topic/industry-news/publisher-news/article/51412-the-10-standard.html>.

121. Jim Milliot, *America's Biggest Publishers Keep Posting Profits*, PUBLISHERS WKLY. (Apr. 1, 2022), <https://www.publishersweekly.com/pw/by-topic/industry-news/publisher-news/article/88925-america-s-biggest-publishers-keep-posting-a-profit.html>.

122. See Andrew Franklin, *The Profits from Publishing: A Publisher's Perspective*, THE BOOK SELLER (Mar. 2, 2018), <https://www.thebookseller.com/blogs/profits-publishing-publishers-perspective-743231>.

123. See Porcher et al., *supra* note 80.

124. See Franklin, *supra* note 122.

125. AUTHORS GUILD, *supra* note 23.

126. See *What Does Free Speech Mean?*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/what-does> (last visited Nov. 20, 2021).

127. John Sarjent, *Why the First Amendment Is Important for Publishers*, LITERARY HUB (Apr. 27, 2017), <https://lithub.com/why-the-first-amendment-is-important-for-publishers/>.

of Macmillan Publishing, said in 2017, “I hope we will apply the principles of the First Amendment and have the courage to resist the great power of polarized opinion.”<sup>128</sup> Despite this commitment to the free expression of ideas, publishers have leveraged language contained in contracts to cancel controversial books.<sup>129</sup> The inclusion of morals clauses in author’s agreements goes against publishers’ purported commitment to free speech by allowing publishers to cancel books utilizing vague contractual language simply because a book is controversial.<sup>130</sup>

One instance of this occurred in 2021 when S&S purchased the rights to a manuscript written by Josh Hawley, a junior senator from Missouri.<sup>131</sup> Immediately prior to the January 6th insurrection, as Hawley entered the Capitol building to ratify the votes of the Electoral College, Hawley raised his fist in a gesture of solidarity directed towards protestors demonstrating against the election results and who were soon to storm the capitol building.<sup>132</sup> In the wake of January 6th, 2021, condemnation of public figures seen as accessories to the insurrection were widespread and intense.<sup>133</sup> As a result of this controversy, S&S leveraged its morals clause to cancel Hawley’s book.<sup>134</sup> This cancellation is evidence that publishing houses are censoring controversial opinions.<sup>135</sup>

As illustrated by the above example, private companies are not bound by the First Amendment.<sup>136</sup> Specifically, the First Amendment only applies to government actors.<sup>137</sup> The First Amendment specifically states:

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128. *Id.* John Sarjent is the former Chief Executive Officer of Macmillan. Macmillan is one of the four largest publishing houses in the United States, accounting for a significant portion of the trade publishing industry. Alexandra Alter, *Macmillan C.E.O. John Sargent Is Departing*, N.Y. TIMES (Sept. 17, 2020), <https://www.nytimes.com/2020/09/17/books/macmillan-john-sargent.html>; see also Michael Schaub, *The Big Five Become the Big Four*, KIRKUS (Nov. 25, 2020), <https://www.kirkusreviews.com/news-and-features/articles/the-big-five-become-the-big-four/>.

129. See Elizabeth A. Harris, *How Getting Canceled on Social Media Can Derail a Book Deal*, N.Y. TIMES (Feb. 11, 2021), <https://www.nytimes.com/2021/02/11/books/morals-clause-book-deals-josh-hawley.html>.

130. See, *PEN America on “Morality Clauses”*, PEN AMERICA, <https://pen.org/pen-america-on-morality-clauses/> (last visited Mar. 4, 2023).

131. *Id.*

132. Danny Hakim & Elaina Plott, *Josh Hawley, Vilified for Exhorting Jan. 6 Protesters, Is Not Backing Down*, N.Y. TIMES (Mar. 8, 2021), <https://www.nytimes.com/2021/03/08/us/politics/josh-hawley-vilified-for-exhorting-jan-6-protesters-is-not-backing-down.html>.

133. *See id.*

134. Despite widespread controversy in response to Hawley’s cancellation and a nearly industry-wide opposition to morals clauses, many industry insiders considered S&S’s decision to cancel the right one. Harris, *supra* note 129.

135. *Id.*

136. Brian Sullivan, *Morals Clauses and the First Amendment in the Social Media Age: Freedom of Speech Does Not Mean Freedom from Consequences*, FORBES (June 22, 2020, 3:07 PM), <https://www.forbes.com/sites/legalentertainment/2020/06/22/morals-clauses-and-the-first-amendment-in-the-social-media-age-freedom-of-speech-does-not-mean-freedom-from-consequences/?sh=32a35e3d2b10>

137. *The First Amendment: Where it Is Implicated, and Where it Is Not*, JD SUPRA (Jan. 12, 2021), <https://www.jdsupra.com/legalnews/the-first-amendment-where-it-is-3482126/>.



Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.<sup>138</sup>

Although private companies are not bound by the First Amendment, the value placed on the First Amendment by the American public is so hefty that censorship by publishing companies has potential social ramifications. Major publishers have expressed a “commitment and devotion to free speech as a fundamental right.”<sup>139</sup> Despite this purported commitment, publishers continue to fight to include morals clauses in publishing agreements, giving them contractual power to censor controversial books.<sup>140</sup>

### B. VARIATION AMONG PUBLISHERS

The next major issue presented by the inclusion of morals clauses in publishing agreements are the variations among publishers of the language used. Language varies from publisher to publisher and even varies within each publisher from agent to agent.<sup>141</sup> This variation is a product of the nature of the negotiation process, which is standard in the publishing industry.<sup>142</sup> Authors may be represented by agents that negotiate on their behalf.<sup>143</sup> As such, each agency typically has its negotiated boilerplate agreement unique to them.<sup>144</sup> Incident to this specific language variation is the variation of the function of the language and the ramifications of violative conduct.<sup>145</sup>

The first of such variations is what sort of conduct triggers the morals clause. Variations of this language use terms such as “moral turpitude,” “public condemnation,” “widespread public condemnation,” or other variations.<sup>146</sup> These terms are vague and could change meaning throughout the term of the agreement, and the life of the book as society’s sociopolitical and ethical climates change.<sup>147</sup> Author advocacy groups have drawn comparisons to McCarthyism in the 1950s.<sup>148</sup> A byproduct of the Cold War, McCarthyism was an attempt to weed out Communists working in the United

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138. U.S. CONST. amend. I.

139. *Protecting Our Authors’ Right to Freedom of Speech and Expression*, PENGUIN RANDOM HOUSE (Apr. 2018), <https://authornews.penguinrandomhouse.com/protecting-our-authors-right-to-freedom-of-speech-and-expression/>

140. AUTHORS GUILD, *supra* note 23.

141. Harris, *supra* note 129.

142. Kristin Nelson, *We Have A Contract Boilerplate?*, NELSON LITERARY AGENCY (Oct. 4, 2006), <https://nelsonagency.com/2006/10/we-have-a-contract-boilerplate/>.

143. MASTERCLASS, *supra* note 41.

144. See, Nelson, *supra* note 142.

145. See, AUTHORS GUILD, *supra* note 23.

146. *Id.*

147. *Id.*

148. *Id.*

States.<sup>149</sup> Specifically, some see the inclusion of morals clauses in publishing agreements as a way of blacklisting authors in the same way that Hollywood insiders were blacklisted as a result of McCarthyism.<sup>150</sup>

Throughout the 1950s, Senator Joseph McCarthy, as chair of the Senate Committee on Government Operations and the Permanent Subcommittee on Investigations, led investigations into Communist Party members and sympathizers employed either in the United States government or by government contractors.<sup>151</sup> Commonly associated with McCarthyism, the House Committee on Un-American Activities investigated communism in the Hollywood movie industry in 1947.<sup>152</sup> These investigations resulted in ten Hollywood professionals being blacklisted from working in the film industry.<sup>153</sup> Advocacy groups cite society's constantly changing sociopolitical and ethical views and historical events, such as the McCarthy era, as contributing factors to the unacceptable ambiguity presented by these phrases in the context of morality.<sup>154</sup> Further, it is occasionally difficult to predict what sort of conduct will trigger widespread condemnation.

Similar to conduct that triggers leverage of a morals clause, the ramification and response of the conduct is also varied among publishers.<sup>155</sup> Some provisions require that any advance payments on sales of the book be paid back to the publisher, while others allow the author to retain any payments.<sup>156</sup> Additionally, publishers use varying terms to describe conduct that triggers the provision.<sup>157</sup> One example of conduct that allows publishers to cancel is the following:

If Author's conduct evidences a lack of due regard for public conventions and morals, or Author commits a crime or any other act that will tend to bring Author into serious contempt, and such behavior would materially damage the Work's reputation or sales.<sup>158</sup>

In contrast, the following is another example of such a variance:

In the event that Author is publicly accused of the violation of law, the infringement or invasion of the rights of any third party, inciting infringement or invasion of third-party rights by others, or is otherwise accused of libel, slander, or defamatory conduct, or any other conduct that subjects, or could be reasonably anticipated to subject Author or Publisher

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149. Marc G. Pufong, *McCarthyism*, THE FIRST AMEND. ENCYCLOPEDIA (2009), <https://www.mtsu.edu/first-amendment/article/1061/mccarthyism>.

150. See, AUTHORS GUILD, *supra* note 23.

151. Pufong, *supra* note 149.

152. Brandon R. Burnette, *Blacklists*, THE FIRST AMEND. ENCYCLOPEDIA (2009), <https://mtsu.edu/first-amendment/article/984/blacklists>.

153. *Id.*

154. AUTHORS GUILD, *supra* note 23.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

to ridicule, contempt, scorn, hatred, or censure by the general public or which is likely to materially diminish the sales of the Work, Publisher may terminate . . . .<sup>159</sup>

These variations create ambiguity in the industry definition of these provisions.<sup>160</sup> Further, this ambiguity allows the publisher to police what conduct is egregious enough to trigger a cancellation.<sup>161</sup> Author advocacy groups have pointed to this as unacceptable, citing ambiguity as a way for publishers to arbitrarily cancel controversial books.<sup>162</sup> Without a consistent industry standard definition of misconduct, authors are left with little guidance on what conduct will trigger these morals clauses.<sup>163</sup>

### C. MORALS CLAUSES CREATE INEQUITABLE AUTHOR-PUBLISHER RELATIONSHIPS

The subjective and ambiguous nature of this language, combined with the power to stifle controversial books, gives the publisher inequitable power in the deal.<sup>164</sup> Publishers are given the unilateral ability to determine what conduct is severe enough to trigger termination.<sup>165</sup> Although platforms like Amazon have made self-publishing more attainable and somewhat profitable, traditional publishers still retain a large market share.<sup>166</sup> Considering that traditional publishers are the most lucrative option for authors to get their works published, publishers are given an unfair advantage at the bargaining table.

Traditional publishers provide a rich network of resources to ensure a book's success that self-published authors simply do not have. For example, most publishing companies have a robust marketing and publicity department that can place copies of books into the hands of reviewers.<sup>167</sup> Additionally, for books that are expected to be large revenue generators, marketing departments at publishing houses can plan author tours, book author appearances, and sponsor promotional giveaways.<sup>168</sup>

In addition to marketing resources, publishers also have resources to simply produce a better product.<sup>169</sup> Publishers can provide editors, copy editors, and managing editors to guide authors through the process and help

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159. *Id.*

160. AUTHORS GUILD, *supra* note 23.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. Schroeder, *supra* note 32.

167. Nathan Bransford, *The Package of Services Publishers Provide Authors and How This is Changing*, NATHAN BRANSFORD (Aug. 24, 2010), <https://nathanbransford.com/blog/2010/08/package-of-services-publishers-provide>.

168. *Id.*

169. *Id.*

refine a book into a better product as far as content.<sup>170</sup> In addition, publishers maintain in-house design departments that can create beautiful and eye-catching covers and ensure that the layout of the book is appealing.<sup>171</sup>

Finally, and most importantly, Publishers have established industry connections and a dedicated salesforce to ensure that the product gets properly and effectively distributed.<sup>172</sup> This not only applies to in-store shelf space but also applies to e-book sales platforms.<sup>173</sup> Without effective distribution, books are not marketable and thus not profitable.

These resources are not easily affordable or available to self-published authors.<sup>174</sup> If an author wishes to have an easy avenue to success, traditional publishers are the most effective and efficient route.<sup>175</sup> This network of resources gives publishers an unfair advantage when it comes to the negotiation stage of the book deal.<sup>176</sup> Publishers are aware of this inequity and are less likely to budge when it comes to negotiating these terms.<sup>177</sup> Given this inequity in bargaining position, authors have significantly less leverage than the publisher when negotiating these terms.

#### IV: FRUSTRATION OF PURPOSE

Frustration of purpose is an affirmative defense to breach of contract claims that may provide a solution, in part, to the issues presented by the inclusion of morals clauses in publishing agreements.<sup>178</sup> Under New York law, in order for the defense to be valid, three conditions must be met.<sup>179</sup> First, there must be a contingency—in other words, there must be some circumstance that was unforeseeable at the time the contract was created.<sup>180</sup> Second, the risk of the contingency must “not be allocated by agreement or otherwise.”<sup>181</sup> Finally, although both parties can perform the contractual obligations, one of the parties would no longer give the other “what induced him to make the bargain in the first place as a result of the contingency.”<sup>182</sup>

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170. *Id.*

171. *Id.*

172. *Id.*

173. *The Indie Author's Ultimate Guide to Book Distribution*, SELF PUBLISHING ADVICE (Dec. 7, 2020), <https://selfpublishingadvice.org/authors-guide-book-distribution/>.

174. See *How to Assess the Costs of Self Publishing a Book*, MASTERCLASS (Aug. 17, 2021), <https://www.masterclass.com/articles/how-to-assess-the-costs-of-self-publishing-a-book#what-factors-affect-publishing-costs>.

175. *See id.*

176. Rick Lauber, *17 Pros and Cons of Traditional Publishing vs. Self-Publishing*, WRITER'S DIGEST (Oct. 26, 2021), <https://www.writersdigest.com/getting-published/17-pros-and-cons-of-traditional-publishing-vs-self-publishing>.

177. Model Trade Book Contract, *supra* note 97.

178. 28A Glen Banks, *New York Practice Series: Contract Law* § 20:18 (2022).

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

The Second Restatement of Contracts includes the frustration of purpose defense:

Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.<sup>183</sup>

Perhaps the most famous example of the frustration of purpose is from England in 1902. In *Krell v. Henry*, the plaintiff rented the defendant's apartment for the purpose of watching the parade following the coronation of King Edward VII.<sup>184</sup> The plaintiff agreed to pay the defendant seventy-five pounds as a rental fee.<sup>185</sup> Nowhere in the written correspondence between the parties did the plaintiff mention that the purpose of renting the apartment was to use it to watch the parade.<sup>186</sup> The plaintiff paid a deposit of twenty-five dollars to reserve the apartment. Unfortunately for the plaintiff, King Edward VII fell sick, and the parade was canceled.<sup>187</sup> The court acknowledged that the parties both knew that the subject of the contract between them was the coronation of King Edward VII. Without this condition, the contract was frustrated.<sup>188</sup>

The Court of Appeal of England held that when an implied condition of the contract ceases to exist, the contract is void.<sup>189</sup> This principle of law, commonly referred to as impossibility, can be traced back to *Taylor v. Caldwell*, and even further back to Roman law.<sup>190</sup> Lord Judge Vaughn Williams went on to extend the principle of impossibility from necessary conditions to also apply to conditions that are viewed as essential to the contracting parties.<sup>191</sup> This extension of impossibility became known as frustration of purpose and created a defense for breaching parties where the purpose for which they entered into a contract is undermined.<sup>192</sup>

In New York common law, there are a few other rules that govern the frustration of purpose defense.<sup>193</sup> Courts need to analyze the facts of the case at issue to determine the intent of the contract, as evidenced in the "language and structure of the agreement."<sup>194</sup>

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183. Restatement (Second) of Contracts § 265 (1981).

184. *Krell v. Henry*, 2 K.B. 740, 740 (Eng. 1903).

185. *Id.*

186. *Id.* at 741.

187. *Id.* at 740.

188. *Id.* at 743–744.

189. *Id.*

190. 28A Glen Banks, New York Practice Series: Contract Law § 20:18 (2022).

191. *Krell v. Henry*, 2 K.B. 740, 746 (Eng. 1903).

192. 28A Glen Banks, New York Practice Series: Contract Law § 20:18 (2022).

193. *Id.*

194. *Id.*

Further, courts have held that changes in market conditions do not establish a frustration of purpose.<sup>195</sup> In *Health-Chem Corporation v. Baker*, as terms of a settlement in litigation between the parties, an agreement was reached where the defendant agreed to authorize the plaintiff to sell the plaintiff's stock and sever ties with the company.<sup>196</sup> In return, the plaintiff agreed to pay the deficiency between the actual price sold for and the value of the stock at the time of the agreement, in addition to a further lump sum payment.<sup>197</sup> At the time of the suit, the plaintiff had not yet sold the stock, but the stock had dropped significantly, causing the deficiency to be worth over \$11 million dollars.<sup>198</sup> The plaintiff sued, seeking a declaratory judgment that the plaintiff was obligated to renegotiate the terms of the agreement, among other actions.<sup>199</sup> The court held that the change in the price of the stock did not frustrate the purpose of the contract because the plaintiff assumed the risk of taking the deal.<sup>200</sup>

This legal doctrine is prevalent throughout U.S. jurisdictions, not just in New York.<sup>201</sup> Further, frustration of purpose has gained renewed interest in the real estate industry as a result of the COVID-19 pandemic.<sup>202</sup> Several retailers throughout the country have attempted to use the defense to avoid paying rent claiming that the pandemic frustrated the purpose of the lease by preventing customers from shopping in the stores.<sup>203</sup> Courts have generally been reluctant to allow defense in these retail cases claiming that the pandemic would rather trigger force majeure language.<sup>204</sup>

Despite a wide breadth of case law and its inclusion in the Second Restatement, some have erroneously argued that this legal doctrine may actually be a myth.<sup>205</sup> Specifically, opponents of this doctrine suggest that courts may be reluctant to allow a breach of contract for the sale of goods and services when both parties have not agreed that the purpose of the agreement has been frustrated.<sup>206</sup> However, despite this assertion, there is substantial case law and academia that continues to support this doctrine.<sup>207</sup>

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195. *Id.*

196. *Health-Chem Corp. v. Baker*, 737 F. Supp. 770, 771 (S.D.N.Y. 1990).

197. *Id.*

198. *Id.* at 772.

199. *Id.*

200. *Id.* at 776.

201. 28A Glen Banks, New York Practice Series: Contract Law § 20:18 (2022).

202. See Charlotte Floyd, *Frustration of Purpose and Impossibility Doctrines in the COVID-19 Era*, JD SUPRA (Apr. 12, 2021), <https://www.jdsupra.com/legalnews/frustration-of-purpose-and-3444937/>.

203. *See id.*

204. *See id.*

205. See Nicholas R. Weiskop, *Frustration of Contractual Purpose-Doctrine or Myth?*, 70 ST. JOHN'S L. REV. 239, 242–43 (1996).

206. *See id.* at 241.

207. *See id.*

## V: THE AUTHOR'S IMPLIED MORALS CLAUSE: FRUSTRATION OF PURPOSE

In an era of social media dominating the attention of most consumers, and in a post #MeToo environment where the public is holding entertainers, politicians, newscasters, filmmakers, and others in the spotlight accountable for their actions, publishers need protection to ensure that they have the option to terminate book deals if the market for a book dries up.<sup>208</sup> Publishers as corporations, some of which are publicly traded, have a mission of earning profits.<sup>209</sup> As such, the defense of frustration of purpose is not available to them if they are in need to breach a contract.<sup>210</sup> Because of this, publishers must include provisions to allow them to terminate deals.<sup>211</sup> As shown in instances such as the Woody Allen book deal or Milo Yiannopoulos's deal, publishers are fully able to cancel deals without the need for morals clauses.<sup>212</sup> However, authors have no such express provision to provide protection for a sour deal.<sup>213</sup>

Although other industries have adapted to issues of inequality between companies and talent by incorporating reciprocal morals clauses, such a solution would not work in the publishing industry.<sup>214</sup> If a publishing company were to include a reciprocal morals clause in all of their book deals, and the company was to commit conduct that would trigger such language, the publisher could face a situation where all sources of revenue could dry up by seeing all authors leave.<sup>215</sup> Reciprocal morals clauses work in other industries, such as advertising, because the talent in advertising is not creating the product which will generate revenue.<sup>216</sup>

However, the current industry standard of including morals clauses that only apply to the author's conduct needs to be adjusted to become more equitable for both parties.<sup>217</sup> Although a shift in the language used in

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208. See *The Effect of the #MeToo Movement on Publishing*, EVAN MARSHALL AGENCY (2021), <https://www.evanmarshallagency.com/the-effect-of-the-metoo-movement-on-publishing/>.

209. See Jonathan Weber, *The Top 3 Book Publishing Stocks Today*, SURE DIVIDEND (Mar. 15, 2019), <https://www.suredividend.com/book-publishing-stocks/>.

210. 28A Glen Banks, *New York Practice Series: Contract Law* § 20:18 (2022).

211. See AUTHORS GUILD, *supra* note 23.

212. Williams, *supra* note 109; Cafero, *supra* note 108.

213. See AUTHORS GUILD, *supra* note 23; BRIANNA L. SCHOFIELD ET AL., UNDERSTANDING AND NEGOTIATING BOOK PUBLICATION CONTRACTS 250–258 (2018), available at [https://www.authorsalliance.org/wp-content/uploads/2018/10/20181003\\_AuthorsAllianceGuidePublicationContracts.pdf](https://www.authorsalliance.org/wp-content/uploads/2018/10/20181003_AuthorsAllianceGuidePublicationContracts.pdf).

214. See Oliver Herzfeld, *Why Jay-Z and Other Talent Should Seek Morals Clause Mutuality*, FORBES (Jan. 2, 2014), <https://www.forbes.com/sites/oliverherzfeld/2014/01/02/why-jay-z-and-other-talent-should-seek-morals-clause-mutuality/?sh=f40897659c3f>.

215. See Franklin, *supra* note 122.

216. See Taylor et al., *supra* note 80.

217. See AUTHORS GUILD, *supra* note 23.

contracts is unlikely, the frustration of purpose defense may present a better solution.<sup>218</sup>

The Ronan Farrow situation presents a unique contractual scenario that needs a solution.<sup>219</sup> Although not necessarily an issue in fiction genres, in many cases, non-fiction authors are writing books as part of a larger body of work with a specific ambition.<sup>220</sup> In fact, major publishers receive more revenue from non-fiction titles than fiction titles.<sup>221</sup> Specifically, in 2017 adult non-fiction revenue totaled \$6.18 billion, while adult fiction revenues totaled \$4.3 billion.<sup>222</sup> With the absence of language that holds the publisher accountable for the actions of their employees, authors may use the frustration of purpose defense as a de facto reverse morals clause.

This solution is not without its problems. First, frustration of purpose as a defense may not be available to all authors.<sup>223</sup> For example, a fiction author may not have a mission that is clear enough for a court to find evidence that it was frustrated by anything other than a dried-up market. Additionally, this solution does not address the free speech or variance issues presented by morals clauses.<sup>224</sup> By retaining morals clauses in publishing agreements, publishers retain the ability to cancel controversial books simply for the controversy stirred by the author.<sup>225</sup> Additionally, the frustration of purpose defense does not address the language contained within the agreement but is rather an extra-contractual defense.<sup>226</sup>

Although this solution does not address all of the issues presented, the use of the frustration of purpose defense as an implied reciprocal morals clause does provide authors with more equity and the ability to functionally cancel book deals where the author no longer wishes to be associated with a publisher who has committed egregious conduct.

## CONCLUSION

As the publishing industry continues to respond to the #MeToo movement, morals clauses are likely to remain a standard provision of a publishing contract. Despite the inherent inequity in the language commonly used in morals clauses, some authors may have recourse in cases where their publisher is the subject of public condemnation. The frustration of purpose defense may present an implied reverse morals clause and allow certain authors the ability to cancel their book deal in such instances.

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218. Moore, *supra* note 56.

219. Williams, *supra* note 109.

220. See Schawbel, *supra* note 35.

221. Rowe, *supra* note 34.

222. *Id.*

223. See Weiskop, *supra* note 205.

224. See AUTHORS GUILD, *supra* note 23.

225. *Id.*

226. See 28A Glen Banks, New York Practice Series: Contract Law § 20:18 (2022).



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