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## **“Finding the 'Public' in 'Public Disrepute” – Would the Cultural Defense Make a Difference in Celebrity and Sports Endorsement Contract Disputes? - The Case of Michael Vick and Adrian Peterson**

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## **“Finding the 'Public' in 'Public Disrepute” – Would the Cultural Defense Make a Difference in Celebrity and Sports Endorsement Contract Disputes? - The Case of Michael Vick and Adrian Peterson**

### **Abstract**

This article will explore this issue by engaging in case studies of the Vick and Peterson scandals to see what would have happened had the two men taken their claims against Nike to court. Part One will discuss the cases in more depth and elaborate on how they might be viewed through the lens of cultural relativity theory and the cultural defense. Part Two will elaborate on what morals clauses are and the legal standards courts use to enforce them. In addition to examining the Mendenhall decision, several other court cases will be discussed, each of which places differing levels of emphasis on how much evidence is needed to meet the public disrepute requirement. Except for the judge in the Mendenhall case, all of the judges in these additional cases were white. This is mentioned because it is possible that the race of the judge may bear some relation to the level of openness they may have to entertaining the cultural defense. Part Three will apply the aforementioned legal standards to the Vick and Peterson cases, with special attention paid to the extent to which courts discussed in Part Two might be open to entertaining the cultural defense in these kinds of disputes.

Part Four will contain my conclusion, which is that most judges will probably not give extra weight to the cultural defense in situations of the type discussed here. There will be a range of approaches to how courts might define public disrepute in these cases, but the overall outcome will be the same. On one side will be a small number of judges, like the judge in Mendenhall, who require both sides to produce detailed evidence to show if expressed minority viewpoints favoring talent outweigh viewpoints that disfavor talent. However, since white football fans outnumber blacks, this will mean that black talent like those discussed here won't benefit from the cultural defense. On the other side will be judges who base their decisions on their own personal take on what the majority of people do (or should) think about the matter. In the main case discussed here where such an approach took place, the judge ruled against talent. Thus, regardless of the rationale for the decision-making expressed in these cases, most talent in these kinds of situations will lose. Nevertheless, there may still be some judges and endorsement company managers who do want to take into account the social dimensions that give rise to the cultural defense in the interests of fairness. My conclusion at the end of the paper will suggest some possible approaches they can adopt to achieve this result.

### **Keywords**

Michael Vick, dog fighting, Adrian Peterson, domestic violence, cultural relativism, public opinion, good faith test, morals clauses

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*Toni Lester\**

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## INTRODUCTION

The sports and entertainment business is a multi-billion dollar industry that fuels a large part of our economy. A sizeable portion of that business is comprised of endorsement agreements between companies and celebrities. For instance, when Nike paid LeBron James, \$15 million for endorsing its products, the company earned \$100 million from the sales of James' signature shoes.<sup>1</sup> Kobe Bryant's endorsement deals with Nike, Coca Cola and Lenovo contributed to an increase in product sales for these companies, earning him \$34 million.<sup>2</sup>

Most endorsement contracts contain so-called morals clauses, which allow companies to terminate contracts where talent behaves in a manner deemed anathema to the public.<sup>3</sup> From a corporate perspective, the clauses are needed because "transgressions [by talent] ... could cause embarrassment for the firm employing ... [talent], especially when ... '[talent] is convicted of a crime or engages in acts of 'moral turpitude.'"<sup>4</sup> Typical morals clauses enable management to fire employees if their conduct brings the company or organization into public disrepute.<sup>5</sup> Judges sometimes require management to submit evidence of the general public's views in these cases,<sup>6</sup> the implication being that if the public thinks it is ok, then the conduct is 'moral', at least for the purpose of fulfilling the requirements of the contract.

But what happens when the public is divided about an issue relating to a morals clause dispute, especially along racial or other cultural lines? This was true in two recent, highly controversial cases involving black football

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1. *Why Big Brands Spend So Much on Athlete Endorsements*, OPENDORSE, <http://opendorse.com/blog/why-big-brands-spend-so-much-on-athlete-endorsements> (last viewed on June 15, 2015).

2. Elyssa Kirkhan, *NBA All Stars: How Much Money Kobe Bryant and LeBron James Make Outside the NBA*, GO BANKING RATES (Oct. 16, 2014), <http://www.gobankingrates.com/personal-finance/kobe-bryant-lebron-james-derrick-rose-net-worth-endorsements> (last viewed June 1, 2015).

3. Adam Epstein, *An Exploration of Interesting Clauses in Sports*, 21 J. OF LEGAL ASPECTS OF SPORTS 23 (2011) (citing National Basketball Association constitution, as discussed in Jan Stiglitz, *Player Discipline in Team Sports*, 5 MARQ. SPORTS L.J. 167, 170 (1995), <http://ssrn.com/abstract=1831664> (last viewed June 15, 2015).

4. Howard Bloom, *Michael Vick – The Dog Days of Marketing Problems*, SPORTS BUSINESS NEWS (July 19, 2007), <http://sportsbiznews.blogspot.com/2007/07/michael-vick-dog-days-of-marketing.html> (last viewed on June 15, 2015).

5. *Haywood v. U. of Pittsburgh*, 976 F. Supp. 2d 606, 626-27 (W.D Pa. 2013). (The University's contract stated that its coach could be fired if his conduct was "seriously prejudicial to the best interest of the University ... that brings the University into *disrepute*; or that reflects ... moral turpitude or refusal or unwillingness to perform his duties.").

6. *Mendenhall v. Hanesbrands, Inc.*, 856 F. Supp. 2d 717, 719 (M.D.N.C. 2012).

players, Michael Vick and Adrian Peterson. Vick was accused of abusing dogs for gaming purposes<sup>7</sup> and Peterson was accused of beating his son.<sup>8</sup> As a result, Nike dropped Vick from a lucrative, \$2 million endorsement contract,<sup>9</sup> and suspended Peterson's endorsement contract so that he could no longer receive money related to the sales of products he endorsed.<sup>10</sup>

A poll conducted by ESPN right after news about the Vick incident broke out showed that "by a margin of 57 percent to 7 percent, the African-Americans surveyed say the media unfairly criticizes black athletes more than white athletes, while the white fans suggest there is no difference in the media's handling of various cases."<sup>11</sup> Some of the frustration reflected in the poll may be grounded in the fact that there seems to be big cultural differences in how the conduct of Vick and Peterson is viewed. Some writers have argued that certain unique aspects of black culture - (dogfighting in the South, for

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7. Howard Bryant, *Vick Case Has Us Confounded by the Race Issue Again*, ESPN (Sept. 27, 2007), <http://sports.espn.go.com/nfl/columns/story?id=3035358> (last viewed June 15, 2015).

8. David Campbell, *Adrian Peterson's Appeal Denied, Suspension Upheld*, BOUNDARY CREEK TIMES (Dec. 12, 2014), [www.boundarycreektimes.com/national/sport/285673301.html](http://www.boundarycreektimes.com/national/sport/285673301.html) (last viewed June 15, 2015). Also, with their endorsement contracts, add placement, and media star status, the line between sports and entertainment has become virtually nonexistent. I will therefore refer to athletes and other kinds of media celebrities as "celebrities" or "talent" for the rest of this paper.

9. *Michael Vick in Nike Endorsement Deal*, CNN MONEY (July 1, 2011), [http://money.cnn.com/2011/07/01/news/companies/michael\\_vick\\_nike/index.htm](http://money.cnn.com/2011/07/01/news/companies/michael_vick_nike/index.htm) (last viewed on June 15, 2015).

10. Stephen Fiorenine, *Nike Suspends Adrian Peterson's Endorsement Deal*, COMPLEX (Sept. 17, 2014), <http://www.complex.com/sneakers/2014/09/nike-suspends-adrian-petersons-endorsement-deal> (last viewed on June 15, 2015). The NFL suspended Vick for almost two years as a result of his behavior, and banned Peterson from playing for almost an entire season. See Mark Starr, *Vick's Punishment*, NEWSWEEK, (Dec. 9, 2015), <http://www.newsweek.com/Vick-punishment-94903> (last viewed June 15, 2015).

11. *ESPN Asks: "What If Michael Vick Were White?"*, (Aug. 25, 2011), <http://stuffblackpeopledontlike.blogspot.com/2011/08/espn-asks-what-if-michael-vick-were.html> (last viewed June 15, 2015). Studies actually support this sense of unfair media coverage against black athletes. See also, James G. Mohammed, *Stereotypes, the Media and Black athletes who get into trouble*, THE FINAL CALL (Dec. 15, 2009), [www.finalcall.com/artman/publish/National\\_News\\_2/article\\_6656.shtml](http://www.finalcall.com/artman/publish/National_News_2/article_6656.shtml) (last viewed on June 15, 2015) (citing the research of Dr. Richard Lapchick, Director of the Institute for Diversity and Ethics in Sports at the University of Central Florida).

instance<sup>12</sup>, and strict child rearing mores<sup>13</sup>) help explain (and potentially even justify) the behaviors of these men, the inference being that management and the courts should consider these differences before deciding their fate. For those who hold these views, failure to do so is a kind of racism in and of itself.<sup>14</sup>

The idea that the minority mores and culture should be given equal weight in morals clause disputes is in line with cultural relativism, which holds that one culture's practice and morals are equal to another's, even if they are different.<sup>15</sup> Advocates of multiculturalism, cultural relativism's close cousin, also believe that "treating members of minority cultural groups as equals re-quires special accommodations to protect their contexts of choice."<sup>16</sup> In the criminal law arena, such an approach is called the "cultural defense."<sup>17</sup>

While the cultural defense has not been overtly mentioned in endorsement contract court decisions, possible support for its adoption can be found in the 2012 decision, *Mendenhall v. Hanesbrands*.<sup>18</sup> In *Mendenhall*, Hanesbrands dropped black football player, Rashard Mendenhall, from an endorsement contract because of controversial comments he posted to twitter about Osama Bin Laden. The district court judge ruled there was not enough evidence to support a judgment on the pleadings because public reactions to the tweets were mixed.<sup>19</sup> Given that public response to Vick and Peterson was mixed along racial lines, had the two men challenged Nike's decision in court, how would they have faired? Would judges treat the cultural defense

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12. See generally, Kiran Nagulapalli, *Strictly for the Dogs: A Fourteenth Amendment Analysis of the Race Based Formation and Enforcement of Animal Welfare Laws*, 11 RUTGERS RACE & L REV. 217 (2009).

13. Cal Thomas and Bob Beckel, *Common Ground: NFL Sacked by Scandals*, USA TODAY (Sept. 24, 2014), [www.usatoday.com/story/opinion/2014/09/24/common-ground-nfl-sacked-scandals-goodell-ray-rice-peterson-violence-column/16172215/](http://www.usatoday.com/story/opinion/2014/09/24/common-ground-nfl-sacked-scandals-goodell-ray-rice-peterson-violence-column/16172215/) (last viewed June 15, 2015) (discussing black NBA icon, Charles Barkley's statement that corporal punishment is common in the South).

14. Nagulapalli, *supra* note 12.

15. Farnoosh Rezaeeahan Milde, *Theories on Female Genital Mutilation*, <http://ssrn.com/abstract=2250346> (last viewed June 15, 2015).

16. Sarah Song, *Majority Norms, Multiculturalism, and Gender Equality*, 99 AM. POL. SCI. REV., no. 4, 2005, at 473 (citing Kymlicka (1989, 1995, 2001)).

17. Doriane Lambelet Coleman, *Individualizing Justice Through Multiculturalism: The Liberal's Dilemma*, 96 COLUM. L. REV. 1094, n. 5 (1996) (citing Leti Volpp, *(Mis)Identifying Culture: Asian Women and the 'Cultural Defense'*, 17 HARV. WOMEN'S L. J. 57 (1994)).

18. *Mendenhall*, 856 F. Supp. 2d at 6.

19. *Id.*

as just another legitimate example of divided public opinion, and be sympathetic to claims like this in the future, perhaps even granting it greater weight because it raises issues of racial inequality?

This article will explore these questions by engaging in case studies of the Vick and Peterson scandals to see what would have happened had the two men taken their claims against Nike to court. Part One will discuss the cases in more depth and elaborate on how they might be viewed through the lens of cultural relativity theory and the cultural defense. Part Two will elaborate on what morals clauses are and the legal standards courts use to enforce them. In addition to examining the *Mendenhall* decision, several other court cases will be discussed, each of which places differing levels of emphasis on how much evidence is needed to meet the public disrepute requirement. Except for the judge in the *Mendenhall* case, all of the judges in these additional cases were white. This is mentioned because it is possible that the race of the judge may bear some relation to the level of openness they may have to entertaining the cultural defense.<sup>20</sup> Part Three will apply the aforementioned legal standards to the Vick and Peterson cases, with special attention paid to the extent to which courts discussed in Part Two might be open to entertaining the cultural defense in these kinds of disputes.

Part Four will contain my conclusion, which is that most judges will probably not give extra weight to the cultural defense in situations of the type discussed here. There will be a range of approaches to how courts might define public disrepute in these cases, but the overall outcome will be the same. On one side will be a small number of judges, like the judge in *Mendenhall*, who require both sides to produce detailed evidence to show if expressed minority viewpoints favoring talent outweigh viewpoints that disfavor talent. However, since whites football fans outnumber blacks, this will mean that black talent like those discussed here won't benefit from the cultural defense. On the other side will be judges who base their decisions on their own personal take on what the majority of people do (or should) think about the matter. In the main case discussed here where such an approach took place, the judge ruled against talent. Thus, regardless of the rationale for the decision-making expressed in these cases, most talent in these kinds of

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20. For a broad range of essays addressing the extent to which racism may be a factor in judicial decision making, see generally Kimberle Crenshaw, et al, *Critical Race Theory – The Theory That Launched a Movement* (The New Press, 1996). See also John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in A Multicultural World*, 323, 325, in Crenshaw, *id.* ("Law ... is not only an instrument of social control but also a symbolic expression of dominant society. ... "It is through dominant cultural understandings ... that whites act out and reinforce racism as it is found in social relations, in institutional arrangements, and personal behavior:").

situations will lose. Nevertheless, there may still be some judges and endorsement company managers who do want to take into account the social dimensions that give rise to the cultural defense in the interests of fairness. My conclusion at the end of the paper will suggest some possible approaches they can adopt to achieve this result.

I. MICHAEL VICK, ADRIAN PETERSON AND CULTURAL RELATIVITY

*The Michael Vick Case*

Atlanta Falcons quarterback, Michael Vick, was indicted by a grand jury in 2007 for conspiring to run an illegal interstate dog fighting operation on his property.<sup>21</sup> The indictment mentioned that over fifty dogs were found on the property, as well as "a 'rape stand,' used to hold dogs in place for mating; an electric treadmill modified for dogs; and a bloodied piece of carpeting."<sup>22</sup> According to news reports, sometimes dogs who lost fights were drowned, strangled or shot to death.<sup>23</sup>

At the time the first allegations against Vick emerged, Nike, who was party to an endorsement contract with Vick,<sup>24</sup> issued the following press release:

Nike is concerned by the serious and highly disturbing allegations made against Michael Vick and we consider any cruelty to animals inhumane and abhorrent. ... We have ... made the decision to suspend the release of the Zoom Vick V and related marketing communications.<sup>25</sup>

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21. Alfonso Serrano, *Michael Vick Indicted by Grand Jury*, CBS NEWS (July 17, 2007), <http://www.cbsnews.com/news/michael-vick-indicted-by-grand-jury> (last viewed June 15, 2015).

22. *Id.*

23. Alfonso Serrano, *Michael Vick Indicted by Grand Jury*, CBS NEWS (July 17, 2007), <http://www.cbsnews.com/news/michael-vick-indicted-by-grand-jury> (last viewed June 15, 2015).

24. The actual endorsement contract between Nike and Vick is not publicly available, but most likely it contained language about public disrepute similar to the kind discussed in the contracts analyzed in Part Two.

25. Jeremy Mullman, *Nike Suspends Release of Shoe Tied to Michael Vick*, AD AGE (July 19, 2007), <http://adage.com/article/news/nike-suspends-release-shoe-tied-michael-vick/119409> (last viewed on June 15, 2015).



It is possible that the Nike's initial decision to only suspend Vick, as opposed to dropping him from the endorsement contract entirely, was pragmatic in nature since it was in line with the results of a telephone poll conducted right after Vick's grand jury indictment.<sup>26</sup> The poll showed that about 46 percent of respondents said they thought Vick should be fired, and about 46 percent said they should wait until he was convicted by a judge or jury.<sup>27</sup> The pollsters did not reveal the racial breakdown of the respondents.

Vick eventually admitted he was guilty, and entered into a plea deal with the prosecutor in which he was sentenced to 23 months in prison – a harsher sentence than the one received by his co-conspirators.<sup>28</sup> This is because the judge felt that Vick was especially culpable due to the fact that he lied about his role in the dog fighting scheme when the charges against him were first raised. Nike then decided to drop Vick from the endorsement contract entirely.<sup>29</sup>

At the time of the grand jury hearings, numerous black protestors visited the courthouse to support Vick.<sup>30</sup> The email comments (up to 2,208) black ESPN journalist, Howard Bryant, received after publishing an article criticizing Vick typified these divisions.<sup>31</sup> One white fan commented:

Are African-Americans ever at fault for anything? Repression is over, debts for slavery is over. ... Vick did wrong, and he has to pay the penalty ... Who cares what color he is? Don't play the race card because he ... cannot make the correct decisions.<sup>32</sup>

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26. Howard Bloom, *Michael Vick – The Dog Days of Marketing Problems*, SPORTS BUSINESS NEWS (July 19, 2007), <http://sportsbiznews.blogspot.com/2007/07/michael-vick-dog-days-of-marketing.html> (last viewed on June 15, 2015).

27. Howard Bloom, *Michael Vick – The Dog Days of Marketing Problems*, SPORTS BUSINESS NEWS (July 19, 2007), <http://sportsbiznews.blogspot.com/2007/07/michael-vick-dog-days-of-marketing.html> (last viewed on June 15, 2015).

28. *Apologetic Vick Gets 23-month Sentence on Dogfighting Charges*, ESPN (Dec. 11, 2007), <http://sports.espn.go.com/nfl/news/story?id=3148549> (last viewed June 15, 2015).

29. *Nike Drops Vick, But Keeps Roethlisberger?*, NPR- TALK OF THE NATION (April 22, 2010), <http://www.npr.org/templates/story/story.php?storyId=126194493> (last viewed on June 15, 2015). Four years later, Nike renewed its relationship with Vick. *See Nike re-signs Michael Vick as Endorser*, ESPN (July 4, 2011), <http://sports.espn.go.com/nfl/news/story?id=6730833> (last viewed June 15, 2015).

30. Dan Wetzel, *Racial Divide*, YAHOO SPORTS (July 26, 2007), <http://sports.yahoo.com/nfl/news?slug=dw-vickhearing072607> (last viewed June 15, 2015).

31. Bryant, *supra* note 7.

32. *Id.*

While a black fan said: "Black people don't care about this. They're [meaning the animals exploited in the Vick's case] just dogs. You care about them because your white bosses tell you to care."<sup>33</sup> White *Time Magazine* writer, Sean Gregory, in contrast to Bryant, encouraged whites to cultivate more understanding about the cultural differences that might have lead Vick to do such a thing. In an article for *Time*, he wrote:

During my interviews in Philadelphia neighborhoods, many African-Americans were upset that dog owners rooting against Vick, the majority of whom were white, failed to realize that dogfighting has long been a part of black culture ... [and] ... for many poor residents, dogfighting is a way to make a much-needed buck. And since Vick grew up in that culture, couldn't they understand that, maybe, Vick didn't realize he was committing such a monstrous act? ... And ... in the face of all this public outrage ... fueled by mostly white animal advocates – where was the concern about the young black people being murdered in Philadelphia? All these white people were getting worked up about dogs, but they paid no attention to the human victims in their own backyard."<sup>34</sup>

In addition, some likened the crowd of white anti-Vick protestors who stood outside the Atlanta Falcon's headquarters (one held a placard that said: "Neuter Vick") to whites who lynched blacks throughout the South from 1882 to 1959.<sup>35</sup> David Wright, writing for *ColorLines Magazine* said: "Anything that smites of a re-incarnation of Jim Crow injustice raises ire and provokes action. ... it's a logical response to an oft-perpetuated, tangible threat."<sup>36</sup> Citing the fact that most black males between the age of 25 and 29 are in jail, Wright lamented that this "seems to be less important to whites that the abuse of dogs."<sup>37</sup> Even Vick himself said in a later interview that he felt "white people simply don't understand that aspect of black culture."<sup>38</sup>

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33. Bryant, *supra* note 7.

34. Sean Gregory, *What ESPN's White Michael Vick's Story Got Wrong*, TIME (Aug. 26, 2011), <http://keepingscore.blogs.time.com/2011/08/26/what-espns-white-michael-vick-story-got-wrong> (last viewed June 15, 2015).

35. David Wright, *Why Black People Support Michael Vick*, COLORLINES (Oct. 3, 2007), [www.colorlines.com/articles/why-black-people-support-michael-vick](http://www.colorlines.com/articles/why-black-people-support-michael-vick) (last viewed on June 15, 2015).

36. *Id.*

37. *Id.*

38. Gregory, *supra* note 34.

In line with the above observations, law scholar, Kiran Nagulapalli, has argued that our animal protection laws reinforce these racial disparities. He maintains those laws are racist because they hypocritically give greater protections to animals most favored by whites (i.e. dogs), without taking into account that nonwhites may have different attitudes about animal welfare issues. Thus, Nagulapalli contends:

“If a minority group does not value dogs and acts contrary to the AWA [i.e. Animal Welfare Act] because of these differing values, the minority group will inevitably be subject to the ramifications of the AWA. If this group is largely composed of a racial minority, the AWA will undoubtedly have a disparate impact on the racial minority group.”<sup>39</sup>

Nagulapalli's arguments about constitutional 14<sup>th</sup> Amendment equal protection dimensions to animal protection laws are not without merit. We have historical examples in the US of animal protection laws being used to discriminate against certain minority groups. In perhaps the most famous case, *Church of the Lukumi Babalu Aye v. City of Hialeah*,<sup>40</sup> the United States Supreme Court ruled that an ordinance passed in a Florida town with a majority Jewish population designed to make ritual animal sacrifice associated with the Afro-Cuban influenced Santeria religion illegal, violated the First Amendment and the Fourteenth Amendment equal protection clause of the U.S. Constitution. The town ordinance allowed ritual kosher slaughter, but not the slaughter of chickens for Santeria ritual purposes.<sup>41</sup> Similar allegations of unjust, racialized, treatment of Adrian Peterson emerged when he was accused of child abuse.

### *The Adrian Peterson Case*

In 2014, Vikings football player, Adrian Peterson was charged with child abuse for beating his four year old son with a tree switch, causing the son to have welts and bruises on his legs, hands and private parts.<sup>42</sup>

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39. Nagulapalli, *supra* note 12, at 231.

40. *Church of the Lukumi Babalu Aye v. City of Hialeah* (91-948), 508 U.S. 520 (1993), Cornell Legal Information Institute, <https://www.law.cornell.edu/supct/html/91-948.ZO.html> (last viewed June 15, 2015).

41. *Id.*

42. Brittney Cooper, *The Racial Parenting Divide: What Adrian Peterson Reveals About Black vs. White Child-rearing*, SALON, (Sept. 16, 2014), [www.salon.com/2014/09/16/the\\_racial\\_parenting\\_divide\\_what\\_adrian\\_peterson\\_reveals\\_](http://www.salon.com/2014/09/16/the_racial_parenting_divide_what_adrian_peterson_reveals_)

Apparently Peterson texted his son's mother to tell her what he had done, adding that he knew he had probably overreacted and didn't appreciate the extent of the physical harm he had caused because the son did not cry.<sup>43</sup> He also is supposed to have texted that he "remember[ed] how it feels to get whooped with an extension cord,"<sup>44</sup> implying that this was a part of his upbringing.<sup>45</sup>

When news about Peterson's conduct broke, Peterson's black colleagues, Roddy White and Mark Ingram, responded in disbelief. White said: "[Peterson] can't play Sunday for disciplining his child[.] Jesus help us."<sup>46</sup> And Ingram said his parents beat him numerous times because "they just wanted [him] to be the best human possible."<sup>47</sup> These endorsements of corporal punishment lead one black journalist to remark: "cultures of violent punishment are ingrained within African-American communities. In fact, they are often considered marks of good parenting."<sup>48</sup>

Noting that blacks have every reason to be suspicious when they are accused of questionable child rearing, another black writer said:

"For some folks, the very act of questioning black parenting triggers concerns about racism. ... The absolute devastation of the black family during slavery shaped the very definition of freedom around the ability to raise one's own children. ... Even today, a black woman is *much more likely* (than a white woman under the same conditions) to be investigated for child abuse and have her children removed."<sup>49</sup>

The author goes on to say that many black parents believe that, especially in the era of heightened awareness about police brutality charges against young black men, corporal punishment helps remind their children "that being a black child in America is a dangerous enterprise. The severity of their beatings warns black children that they can't afford to mess up. And

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about\_black\_and\_white\_child\_rearing (last viewed on June 15, 2015). Dave Campbell, *Adrian Peterson's Appeal Denied, Suspension Upheld*, BOUNDARY CREEK TIMES (Dec. 13, 2014), [www.boundarycreektimes.com/national/sport/285673301.html](http://www.boundarycreektimes.com/national/sport/285673301.html) (last viewed on June 15, 2015).

43. *Id.*

44. *Id.*

45. *Id.*

46. Khadijah Costley White, *Adrian Peterson Is Not a Racial Symbol*, THE ATLANTIC, (Sept. 15, 2014), [www.theatlantic.com/entertainment/archive/2014/09/adrian-peterson-is-not-a-symbol/380199](http://www.theatlantic.com/entertainment/archive/2014/09/adrian-peterson-is-not-a-symbol/380199) (last viewed on June 15, 2015).

47. *Id.*

48. Cooper, *supra* note 41.

49. White, *supra* note 45 (emphasis added).

the anger, fury, and pain of heavy hands convey their parents' profound fear."<sup>50</sup> Right after the arrest, Peterson's lawyer made a public announcement foreshadowing the cultural defense when he said Peterson: "used the same kind of discipline with his child that he experienced as a child growing up in East Texas. Adrian has never hidden from what happened. He has cooperated fully with authorities ..."<sup>51</sup>

While the prosecutor in the case believed that Peterson's conduct was unreasonable even within these parameters, the judge disagreed, and allowed the plea deal to go forward, deeming Peterson guilty of committing a misdemeanor, and requiring him to pay a small fine, take parenting classes and do community service.<sup>52</sup> At that time, Peterson "acknowledged physically disciplining the boy as he had been as a youth, but he said he meant no harm and was sorry for the trouble he caused."<sup>53</sup>

Initially, Nike issued a press release saying it did not condone child abuse.<sup>54</sup> It also suspended Peterson's endorsement contract and stopped selling his jerseys.<sup>55</sup> All of this took place before Peterson had had a chance to present his side of the story at trial. Public reaction to the case was swift. For instance, Minnesota Governor, Mark Dayton, said that Peterson:

is a public figure, and his actions, as described, are a public embarrassment to the Vikings organization and the State of Minnesota. Whipping a child to the extent of visible wounds, as has been alleged, should not be tolerated in our state. Therefore, I believe

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50. White, *supra* note 45 (emphasis added).

51. Ryan Wilson, *Adrian Peterson indicted in child injury case in Texas*, CBS SPORTS (Sept. 12, 2014), <http://www.cbssports.com/nfl/eye-on-football/24706732/report-adrian-peterson-indicted-in-child-injury-case-in-texas> (last viewed June 1, 2015). Peterson was lucky he lived in a state where corporal punishment laws are more favorable to parents than others. Texas law allows parents to discipline their child by hitting them with belts and brushes, but not electric cords, ropes or shoes as long as "the force is necessary to discipline the child or to safeguard or promote his welfare." See Juan, A. Lozano, *Adrian Peterson Avoids Jail with Plea Deal in Child Abuse Case*, HUFFINGTON POST (Nov. 4, 2014), [www.huffingtonpost.com/2014/11/04/adrian-peterson-child-abuse-plea\\_n\\_6102284.html](http://www.huffingtonpost.com/2014/11/04/adrian-peterson-child-abuse-plea_n_6102284.html) (last viewed on June 15, 2015).

52. Juan A. Lozano, *Adrian Peterson Avoids Jail with Plea Deal in Child Abuse Case*, HUFFINGTON POST (Nov. 4, 2014), [www.huffingtonpost.com/2014/11/04/adrian-peterson-child-abuse-plea\\_n\\_6102284.html](http://www.huffingtonpost.com/2014/11/04/adrian-peterson-child-abuse-plea_n_6102284.html) (last viewed June 1, 2015).

53. Campbell, *supra* note 8.

54. Darren Rovell, *Nike Suspends Adrian Peterson Deal*, ESPN (Sept. 17, 2014), [http://espn.go.com/nfl/story/\\_/id/11542737/nike-suspends-adrian-peterson-endorsement-contract](http://espn.go.com/nfl/story/_/id/11542737/nike-suspends-adrian-peterson-endorsement-contract) (last viewed on June 15, 2015).

55. *Id.*

the team should suspend Mr. Peterson, until the accusations of child abuse have been resolved by the criminal justice system.<sup>56</sup>

Two months later, after Peterson pleaded no contest to reckless assault allegations and apologized publicly for what he had done, Nike terminated the contract.<sup>57</sup> It made no statement, however, about the extent to which it did or did not weigh the racially divided nature of the public's reaction to his behavior.

The next section will describe cultural relativism and how it applies to the Vick and Peterson cases.

### *Application of Cultural Relativism to the Vick and Peterson Cases*

Culture is often defined as a "the customs, beliefs, arts, and way of life and social organization of a particular country or group of people."<sup>58</sup> Strict cultural relativists maintain "there is no superior, international, or universal morality, that the moral and ethical rules of all cultures deserve equal respect."<sup>59</sup> Further, such rules should be "exempt from legitimate criticism by outsiders ... [because of] notions of communal autonomy and self-determination."<sup>60</sup>

While cultural relativism is largely associated with discussions about international human rights law, some cases in the U.S. illustrate how it has been used in the domestic legal sphere to assess the guilt or innocence of new immigrants to the country. In one case, a Japanese American mother who drowned her two children argued that she had engaged in the traditional practice of parent-child suicide.<sup>61</sup> In another case, a Chinese-American man who murdered his wife justified the act on the grounds that he had committed a traditional honor killing because she was unfaithful.<sup>62</sup> In the first case, the

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56. Josh Katzowitz, *Nike pulls Adrian Peterson merchandise off Twin Cities shelves*, CBS SPORTS (Sept. 16, 2014), <http://www.cbssports.com/nfl/eye-on-football/24712073/nike-pulls-adrian-peterson-merchandise-off-twin-cities-shelves> (last viewed on June 15, 2015).

57. Melvin Backman, *Adrian Peterson No Longer a Nike Athlete*, CNN MONEY (Nov. 6, 2014), <http://money.cnn.com/2014/11/06/news/nike-drops-adrian-peterson/index.html> (last viewed on June 15, 2015).

58. Milde, *supra* note 15.

59. *Id.*

60. Jack Donnelly, *Cultural Relativism and Universal Human Rights*, 6 HUM. RTS. Q., 4 (1984) at 400.

61. Coleman, *supra* note 17, at 1093.

62. *Id.*

woman spent one year in jail.<sup>63</sup> In the second case, the man was acquitted, partly because of the testimony of an expert anthropologist who explained that honor killings were part of the man's culture.<sup>64</sup>

The strategy of using cultural differences to prove the accused does not have the requisite mens rea (i.e. guilty mind) in criminal cases is called the "cultural defense."<sup>65</sup> Advocates for the cultural defense believe "it is a good thing to afford defendants individualized justice, and where immigrants are concerned, to do this with particular sensitivity toward multiculturalism."<sup>66</sup> In the parallel universe of domestic endorsement contract disputes discussed here, such individualized civil (as opposed to criminal) justice might entail the company fining talent, as opposed to firing them.<sup>67</sup>

At least in the context of using the cultural defense to temper how new immigrants are treated in domestic violence cases, however, law scholar, Doriane Lambelet Coleman, concludes that its use "is anathema to ... [a] fundamental goal of the progressive agenda, namely the expansion of legal protections for some of the least powerful members of American society: women and children."<sup>68</sup> In sum, she favors "choosing rights over culture".<sup>69</sup> This rights based approach is in line with international human rights arguments that "core rights are universal, transcending national or cultural boundaries - that all peoples are entitled to basic protection..., and that international law and oversight are essential in ensuring that protection."<sup>70</sup>

One of the chief sources of international law in this area is the United Nations Declaration of Human Rights. The Declaration states that everyone should be entitled to life, liberty, and security and that torture or cruel treatment by the state should be prohibited.<sup>71</sup> Some critics of the human rights

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63. Coleman, *supra* note 17, at 1093.

64. *Id.*

65. *Id.* at 1094, n. 5 (citing Leti Volpp, *(Mis)Identifying Culture: Asian Women and the 'Cultural Defense'*, 17 HARV. WOMEN'S L. J. 57 (1994)).

66. *Id.* at 1132.

67. Loeb & Loeb LLP's Sports Practice Group, *United States: Armstrong's Endorsement Contracts and The 'Morals Clause'*, (Nov. 13, 2012), <http://www.mondaq.com/unitedstates/x/205932/Sport/Armstrongs+Endorsement+Contracts+and+the+Morals+Clause> (last viewed on June 15, 2015).

68. Coleman, *supra* note 17, at 1095.

69. *Id.* at 1098.

70. Milde, *supra* note 57. See also, Karen Musalo, *When Rights and Cultures Collide*, Markkula Center for Applied Ethics, at [www.scu.edu/ethics/publications/iie/v8n3/rightsandcultures.html](http://www.scu.edu/ethics/publications/iie/v8n3/rightsandcultures.html) (last viewed June 15, 2015).

71. Donnelly, *supra* note 59, at 415.

approach contend that it is Eurocentric in focus, largely privileging the moral stances of former imperialist, white-dominated, colonizers who want to assert their paternalistic values and beliefs on people they formerly dominated.<sup>72</sup> Critical race theorists have made similar points about the role of white privilege and bias in how our legal system meets out justice for black Americans, especially black males.<sup>73</sup>

But as one author put it, "post-colonial paternalism can be overcome by means other than justifying domestic human rights violations. The negativity directed at human rights as a product of Euro-American conspiracy is misplaced and only fuels ready-made excuses for governments to act without regard to human suffering."<sup>74</sup> Further, feminist ethics scholar, Susan Moller Okin, urges us to be on guard against "intragroup inequalities",<sup>75</sup> especially in cases where there is a risk that women and girls may suffer unduly at the hands of men.<sup>76</sup> Coleman concurs that the cultural defense should not be allowed to "reverse our relative success in elevating the rights of [women and girls] ... to the level traditionally enjoyed by propertied men of European descent."<sup>77</sup> Finally, political scientist and anthropologist professor, Alison Dundes Renteln, maintains it is dangerous form of essentialism to equate one person's conduct with an entire group, since this inappropriately stereotypes the entire group.<sup>78</sup>

Renteln tries to strike a balance between the above opposing

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72. The view that human rights ideals are unique to European culture is shortsighted, however, since some nonwestern cultures have a long history of honoring the rights of individuals. For instance, the basic tenets of Buddhism are to reduce suffering and honor the life of all beings, and the Dali Lama has endorsed the UN Declaration on Human Rights. See *Universal Human Rights and Cultural Relativism: A Fresh View from the New Haven School of Jurisprudence*, (March 5, 2011), <http://ssrn.com/abstract=1778124> (last viewed June 15, 2015). See also, the West African Aka ethnic group's belief in the divine force, called, "okra", which implies that each person is "the recipient of a destiny, to pursue that unique destiny assigned to him by God." *Id.*, at 8 (citing Kwasi Wiredu, *Human Rights in Africa: Cross-Cultural Perspectives* (Abdullahi An-Na'im and Francis M. Deng, eds., 1990), in *THE PHILOSOPHY OF HUMAN RIGHTS*, 299 (Patrick Hayden ed., 2001).

73. See Erin Texeira, *Black Men Quietly Combating Stereotypes*, WASH. POST (July 1, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/07/01/AR2006070100462.html> (last viewed June 15, 2015).

74. *Universal Human Rights and Cultural Relativism*, *supra* note 71, at 33.

75. Susan Moller Okin, *Multiculturalism: Some Tensions*, 108 *ETHICS*, no. 4, 1998 at 4.

76. *Id.* at 681-684.

77. Coleman, *supra* note 60, at 1166.

78. See Alison Dundes Renteln, *Making Room for Culture in the Court*, 49 *THE JUDGES' JOURNAL*, no. 2, 2010.



perspectives. While she thinks the cultural defense should be entertained in certain situations (to explain "cognition and conduct"<sup>79</sup>), she also believes it should not be allowed in cases where "irreparable harm to others"<sup>80</sup> has taken place. Examples of irreparable harm are largely based on the motivation behind the conduct (i.e., and would include a "parent who disciplines his child in anger", as opposed to "a parent who tries to heal a child").<sup>81</sup> To aid judges in learning about relevant cultural differences, Renteln suggests that academics expert in folk traditions of various cultures be allowed to offer expert testimony in such cases.<sup>82</sup>

Those who see the US legal system as deeply fraught when it comes to the extent to which black Americans, especially black men, are treated unfairly, will find much in the way of solidarity with cultural relativists. At the least, they would say, Vick and Peterson should have received greater leniency from Nike because the two men were acting in accordance with the alleged norms of their culture of origin. As members of a racial minority in the US that has a long history of unequal treatment in the law and society, this should have been taken into account. The need to do this is even more important because of the level of negative stereotyping in the U.S. that occurs regarding black males.<sup>83</sup> Indeed, critical legal race theorists have been making these claims for decades.<sup>84</sup>

Will most judges give weight to the cultural defense in endorsement contract disputes where there is evidence that black community mores may differ from those of whites? Before tackling this question, the general legal standards courts adopt to decide these cases will be examined.

## II. MORALS CLAUSES, PUBLIC OPINION AND THE GOOD FAITH TEST

Endorsement contract disputes are a matter of state law. Some of the cases discussed in this section were decided in federal court because the parties resided in two different states and chose to ask for federal court diversity jurisdiction. In such instances, the federal judge applied either the state law referenced in the contract's choice of law provision or the law of the

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79. *Id.* at 7.

80. *Id.*

81. *Id.* at 6.

82. *Id.* at 7.

83. Teixeira, *supra* note 72.

84. See generally, Crenshaw, *supra* note 20.

state where the center of contract gravity occurs.<sup>85</sup> Thus, the question of what court will here claims of parties like Vick and Peterson in future cases will be determined by these factors. Regardless of where parties end up bringing their claims, however, there are still general tendencies that can be culled from the decisions.

Courts expect management to make good faith efforts to determine if there is a fair basis for enforcing morals clauses. A big part of that good faith assessment is looking at the extent to which management made efforts to ascertain public opinion. This was one of the main issues in *Haywood v. University of Pittsburgh*,<sup>86</sup> where the judge allowed the university to use media reports, and the personal opinion of the main decision maker – the chancellor of the university – as a stand in for public opinion.

*Haywood v. University of Pittsburgh*

Haywood<sup>87</sup>, a white college football coach, was arrested for allegedly committing domestic battery against the mother of his young son.<sup>88</sup> Both the New York Times and ESPN reported the arrest immediately thereafter.<sup>89</sup> The college learned about the arrest after getting a call from ESPN.<sup>90</sup> After a series of phone calls and emails between various officials and team staff at the college, the university chancellor decided to rely on the morals clause in Haywood's contract to fire him on the grounds that it had "just cause" to do so.<sup>91</sup>

The morals clause in the contract provided that:

Just cause ... is defined as, ... as determined by the University, any conduct of Employee that is seriously prejudicial to the best interest of the University ... that brings the University into disrepute; or that reflects ... moral turpitude or refusal or unwillingness to perform his duties.<sup>92</sup>

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85. *Mendenhall*, 856 F. Supp. 2d 717, 723. *See also*, *Haywood*, 976 F. Supp. 2d 606, 611.

86. *See generally*, *Haywood*, 976 F. Supp. 2d 606.

87. *Haywood*, 976 F. Supp. 2d 606.

88. *Id.* at 617.

89. *Id.*

90. *Id.* at 618.

91. *Id.* at 634.

92. *Id.* at 626-627.

The judge said that contracts of this type contain an implied covenant of good faith and fair dealing,<sup>93</sup> meaning, "a jury would need to assess whether the University acted in good faith in making its determination that Haywood caused the University disrepute."<sup>94</sup> No further guidance was offered by the judge as to how the standard of good faith would be met in any objective or quantifiable sense.

When Haywood was asked by the university's chancellor to explain his conduct, he admitted he forced his way through a door that was blocked by his son's mother to prevent him from entering.<sup>95</sup> This, along with the news reports, convinced the chancellor that Haywood had brought the college "into disrepute and engaging in conduct which was 'seriously prejudicial to the best interest of the University ...'"<sup>96</sup> Haywood, however, argued that the chancellor's decision was not based on good faith because the investigation of the situation was not thorough enough.<sup>97</sup> The judge, however, ruled that "a reasonable jury could only find—based upon Haywood's own statements ... the University had just cause to terminate Haywood's employment and exercised good faith in making that determination."<sup>98</sup>

The chancellor only looked at a few factors to render his decision: one television and one print report (i.e. CNN and the New York Times), information supplied to him by other university officials, as well as his conversation with Haywood. There is no indication the judge also required the chancellor to submit extra proof to show that the "public" part of "public disrepute" provision in the contract was met. Such proof might have included feedback from the general public, as well as obvious stakeholders, such as current students concerned about the college's reputation and the message the behavior would send to other athletes, alumni who could threaten to cease making donations to the college, board members who might threaten to quit, or others at the university (including other victims of domestic violence) who disapproved of domestic violence.<sup>99</sup> None of this was mentioned in the case. Instead, the judge treated the chancellor's views and the mere fact that

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93. *Haywood*, 976 F. Supp. 2d at 627.

94. *Id.* at 630.

95. *Id.* at 634.

96. *Id.* at 634.

97. *Id.* at 624.

98. *Haywood*, 976 F. Supp. 2d 634, 635.

99. Bill Vidonic and John Grupp, *Pitt Fires Haywood as Football Coach*, (Jan. 2, 2011), [http://triblive.com/x/pittsburghtrib/sports/college/pitt/s\\_716289.html#axzz3egNyOTKY](http://triblive.com/x/pittsburghtrib/sports/college/pitt/s_716289.html#axzz3egNyOTKY) (last viewed June 15, 2015).

Haywood's behavior was covered in the news as proxies for the public's negative views on the matter.

It is important to note that it does not appear from the decision that anyone expressed support for Haywood, so we don't know how the judge would have decided had that been the case. This is in contrast to the support Mendenhall received for the tweets he posted.<sup>100</sup>

*Mendenhall v. Hanesbrands*

Pittsburgh Steeler running back, Rashard Mendenhall, who is black, entered into an endorsement contract with Hanesbrands, the maker of Champion sports products.<sup>101</sup> The contract in part said that the company could terminate its contract with Mendenhall if he became:

involved in any situation or occurrence tending to bring ... [him] into *public disrepute*, contempt, scandal or ridicule, or tending to shock, insult or offend the *majority of the consuming public* or any protected class or group thereof.<sup>102</sup>

Mendenhall had a twitter account, where he posted a wide variety of comments designed to promote dialogue about politics and other social matters. Some of his posts addressed his views about women and Islam, and one post even compared the NFL to the slave trade.<sup>103</sup> Hanesbrands never objected to any of this.<sup>104</sup> In May 2, 2011, just eight months after the September 11th attacks against the World Trade Center in New York, Mendenhall tweeted the following:

It's amazing how people can HATE a man they never even heard speak. ... I believe in God. I believe we're ALL his children. And I believe HE is the ONE and ONLY judge. For those of you who said we want to see Bin Laden burn in hell and piss on his ashes, I ask how would God feel about your heart? There is not an ignorant bone in my body. I just encourage you to #think@dkller23 We'll never know what really happened. I just have a hard time believing a plane could take a skyscraper down demolition style.<sup>105</sup>

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100. *Mendenhall*, 856 F. Supp. 2d 717.

101. *Id.* at 725.

102. *Id.* (emphasis added).

103. *Mendenhall*, 856 F. Supp. 2d 717, 720.

104. *Id.*

105. *Id.*

Two days later, apparently because he received some negative responses to his twitter post comment, Mendenhall posted a qualified apology, which said:

Nothing I said was meant to stir up controversy. ... everything that I've said is with the intent of expressing a wide array of ideas and generating open and honest discussions ... I apologize for the timing as such a sensitive matter, but it was not meant to do harm. I apologize to anyone I unintentionally harmed with anything that I said. It was only meant to encourage everyone reading it to think.<sup>106</sup>

Hanesbrands dealt with these events by terminating its contract with Mendenhall, claiming that it "was a strong supporter of the government's efforts to fight terrorism," and that Mendenhall's conduct was contrary to the "values of the Champion brand."<sup>107</sup> Mendenhall challenged this decision in court.

Federal district court Judge James Beaty, Jr., who was asked to rule on a motion to dismiss the judgment on the pleadings,<sup>108</sup> stated that the main issue in the case was whether or not Hanesbrands exercised good faith and fair dealing in its determination of whether or not to trigger the morals clause.<sup>109</sup> Honoring the New York state choice of law provision in the contract, the judge said the company would have to show its decision was based on broad public opinion, as opposed to its *individual* beliefs about Mendenhall's statements.<sup>110</sup> In response, the company cited Mendenhall's posting an apology immediately after his first tweet as evidence that he knew the original tweet was problematic.<sup>111</sup> However, Mendenhall actually received a mix of responses – some supportive and some critical – like the ones listed next:

@R\_Mendenhall At first I was upset about ur tweets but like ur goal it got me thinkin mad respect for u man Love a man of God ...

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106. *Id.* at 721.

107. *Id.*

108. *Id.* at 719.

109. *Mendenhall* 856 F. Supp. 2d 717, 723-25. The case was brought to the federal district court via diversity jurisdiction, because the parties resided in two different states. The contract had a New York state choice of law provision, so that it the state law that the judge applied to the case.

110. *Id.* at 725.

111. *Id.*

@R\_Mendenhall // appreciate your thought provoking tweets. it's time people stop living a selfishly blind life.<sup>112</sup>

In light of the mix of responses, the judge refused to rule on the pleadings, stating that the case should go to trial so that more extensive evidence about public opinion could be reviewed.<sup>113</sup> Soon after the decision, Mendenhall signed a private settlement agreement with Hanesbrands.<sup>114</sup> Even though we are not privy to the agreement's terms, it is highly likely that he received some kind of monetary settlement for his trouble and that his endorsement deal was terminated.

*Mendenhall* shows that on line posts and comments can be used as evidence to prove or disprove public opinion in a morals clause dispute. Since the case was eventually settled out of court, however, it's still unclear how many twitter posted comments, or what other kind of social media outlets, would have been considered sufficient for Mendenhall to have prevailed on his claim. Nevertheless, we are left with the impression that unless there is clear evidence that the weight of public opinion leans against talent, talent has a good chance of making its case. The judge did not say Hanesbrands was required to produce evidence about what *most* people think, however. No true objective standard - one that required statistical evidence of the kind found in polling results, for instance - was articulated. Thus, *Mendenhall*, while raising the evidentiary bar for proof about public opinion, still leaves a great deal of room for subjectivity on the judge's part.

Further, Judge Beaty never mentions the racist or anti-Muslim sentiment that might have been implicitly present in some of the anti-Mendenhall posts. He focuses only on the number of pro and con comments, telling the parties they needed to produce evidence about that. Most of the public's reaction referenced in the decision does not seem to be overtly focused on racial or cultural differences relating to what Mendenhall said. However, it is hard to believe that racism did not play a part in some of it, especially since Mendenhall later explained that one of the main reasons he

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112. *Id.* at 727.

113. *Id.* at 727-28.

114. Marc Edelman, *Rashard Mendenhall Settles Lawsuit with Hanesbrands over Morals Clause*, FORBES SPORTS MONEY (Jan. 17, 2013), [www.forbes.com/sites/marcedelman/2013/01/17/rashard-mendenhall-settles-lawsuit-with-hanesbrands-over-morals-clause](http://www.forbes.com/sites/marcedelman/2013/01/17/rashard-mendenhall-settles-lawsuit-with-hanesbrands-over-morals-clause) (last viewed on June 15, 2015).

decided to resign from the NFL was because he had been subjected to a great deal of racism – both on line and on the field.<sup>115</sup>

In the next two cases, a white male actor<sup>116</sup> and a Latina television reporter<sup>117</sup> in morals clause disputes argued that their employers failed to exercise good judgment (a concept similar to "good faith") when they discriminated against them under employment discrimination law. In both cases, media coverage played a prominent part of the judicial narrative relating to what constitutes public opinion.

*Nader v. ABC Television*

ABC fired Michael Nader<sup>118</sup>, a popular actor on the soap opera, "All My Children", for being arrested for illegal drug possession and for being a *current* drug user. The arrest was widely reported in the press.<sup>119</sup> Nader claimed that he was really fired because he had a disability – his drug *addiction*. The morals clause in the contract between the two parties said:

If, in the opinion of ABC, Artist shall commit any act or do anything which might tend to bring Artist into *public disrepute*, contempt, scandal, or ridicule, or which might tend to reflect unfavorably on ABC, ... may, upon written notice to Artist, immediately terminate the Term and Artist's employment hereunder.<sup>120</sup>

The appeals court said that to prevail on the ADA claim, Nader had to show in part that "the disability "was a significant factor" in the employer's decision."<sup>121</sup> The court said that even if Nader had been able to prove he had a disability under the ADA, the company was still within its rights to fire him because of the arrest,<sup>122</sup> the inference being that the arrest was the primary reason, not the disability.

The appeals court also addressed the question of whether or not ABC used "good judgment" when it triggered the morals clause in order to

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115. See Rashard Mendenhall, *Why I Retired at 26*, HUFFINGTON POST (March 9, 2014), [www.huffingtonpost.com/rashard-mendenhall/rashard-mendenhall-retirement-\\_b\\_4931316.html](http://www.huffingtonpost.com/rashard-mendenhall/rashard-mendenhall-retirement-_b_4931316.html) (last viewed on June 15, 2015).

116. See generally, *Nader v. ABC Television*, 150 Fed. Appx. 54 (2005).

117. *Galviz v. Newsweek Stations*, 2009 U.S. Dist. LEXIS 59603 (W.D. Tex. 2009).

118. *Nader v. ABC Television*, *supra* note 115.

119. *Id.* at 55.

120. *Id.* at 345, 346 (emphasis added).

121. *Nader v. ABC Television*, 150 Fed. Appx. 54, 55.

122. *Id.* at 56.

terminate Nader. It said: "The undisputed facts that Nader was arrested and that the arrest *generated media attention* brings his conduct well within any reasonable interpretation of the clause."<sup>123</sup> This was in line with lower district court's observation that Nader's actions put him into "public disrepute", since Nader's "arrest occasioned publicity and media attention ...".<sup>124</sup>

Unlike the *Haywood* or *Mendenhall* cases, neither the district court nor the appeals court judges in *Nader* referenced how many news outlets reported the arrest or what they said. The appeals court still, however, placed a great deal of weight on the fact that Nader and ABC received negative coverage in the press, and was arrested. The arrest, a public document, seemed to function for the court as a proxy for negative press coverage. Negative press coverage was also a key factor in the judge's ruling in the next case, *Galviz v. Newsweek Stations*.<sup>125</sup>

### *Galviz v. Newsweek Stations*

Virginia Galviz worked as a crime reporter for a local Texas television station.<sup>126</sup> The contract she signed with the station provided:

If at any time Employee fails to conduct ... herself with due regard to *public morals* and decency, or if Employee commits any act or becomes involved in any situation ... which brings Employee into *public disrepute*, contempt, or scandal, or which materially and adversely affects the reputation or business ... [the Employee] shall have the right to terminate the Agreement on twenty-four (24) hours notice to Employee.<sup>127</sup>

During her time of employment, Galviz was involved in a tumultuous relationship with three men. The first was a city councilman.<sup>128</sup> On one occasion the police were called because both accused the other of assault. Later that same day councilman allegedly pointed a gun at Galviz and hit her while they were dining at a restaurant.<sup>129</sup> Even though there were nine articles

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123. *Id.* at 56 (emphasis added).

124. *Id.* at 348.

125. *Galviz*, 2009 U.S. Dist. LEXIS 59603, at 116.

126. *Id.*

127. *Id.* at 9 (emphasis added).

128. *Galviz*, 2009 U.S. Dist. LEXIS 59603 at 11-12.

129. *Id.* at 12.



covered in the press about the restaurant incident, all of which listed Galviz as an employee of the station,<sup>130</sup> the station did not fire Galviz.<sup>131</sup>

Two years later, Galviz was involved in an incident with the second boyfriend. A police report was filed stating that the two had a dispute about the boyfriend's involvement with two other women.<sup>132</sup> The station still took no action against her. Finally, just 1 ½ years later, Galviz was arrested for assault in connection with a 3<sup>rd</sup> boyfriend, for which she spent a night in jail.<sup>133</sup> A great deal of media attention ensued with respect to the last event. This included local television reports of a video of the plaintiff handcuffed as she was taken to the police station, as well as internet and newspaper reports, some of which referenced the previous incidents.<sup>134</sup> The station then fired the plaintiff, stating that it was doing so via the contract morals clause.<sup>135</sup>

Galviz sued the station, arguing that it was guilty of sex discrimination because men who had behaved similarly at the company were not fired. For instance, she noted that one on air male reporter who was also arrested for a domestic violence event that was covered in the press was not fired even though he had agreed to a morals clause.<sup>136</sup> While the company admitted that the arrest damaged its reputation, it stressed that the male employee was only involved in one incident, whereas Galviz was involved in several.<sup>137</sup> Siding with the station, the judge ruled that she "was involved in multiple domestic incidents that were either of a *public nature or involved the police*, while, ... each of the alleged comparators was involved in one incident ... [and that the company's] decision-makers identified this distinction as an important factor in their decision to terminate Plaintiff's employment."<sup>138</sup>

Galviz essentially lost her case because of the arrest record (which, in a manner similar to the *Nader* case, was treated like just another example of a public event), as well as the television, internet and other press coverage. Sometimes, as is true in the *Calton* case to be discussed next, judges simply insert their own personal views about what should or should not be

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130. *Id.* at 12-13.

131. *Id.* at 13.

132. *Id.* at 3.

133. *Id.* at 15.

134. *Galviz*, 2009 U.S. Dist. LEXIS 59603 at 16.

135. *Id.* at 17.

136. *Id.*

137. *Id.* at 22.

138. *Id.* at 22-23 (emphasis added).

considered immoral, even in the face of conflicting evidence that public opinion is divided on the matter.

*Calton v. CV Radio Associates*

Radio host, Larry Calton, was party to a talk radio show contract with CV Radio Associates, in which he was to host a talk radio show.<sup>139</sup> The morals clause in the contract said:

If you shall commit any act which would bring you into public disrepute, contempt, scandal or ridicule, or which reflects unfavorably on WKNR, WKNR may, upon written notice to you, immediately terminate your employment hereunder.<sup>140</sup>

On one occasion, Calton used the anti-semitic phrase, "jew you down", in response to a question from a call in listener about trading baseball players.<sup>141</sup> Initially, four call-in listeners, as well as "numerous" listeners who called off-air, complained they thought the language was offensive.<sup>142</sup> One listener called to support Calton.<sup>143</sup> The station then proceeded to terminate Calton's contract pursuant to the morals clause and issued a public apology for his conduct.<sup>144</sup> Subsequent to this, the station received a combination of calls and letters – all divided as to the merits of Calton's comments and the station's treatment of him.<sup>145</sup> The case does not mention how many calls were received.

The appeals court stated that it is *commonly* understood that making an ethnic slur like the one Calton expressed would make the station look bad.<sup>146</sup> It asserted that Calton "failed to demonstrate that the phrase at issue is subject to differing interpretations,"<sup>147</sup> even though there were a variety of reactions to the incident in question – some supportive of Calton and some negative. Calton therefore suggests that *any* level of negative response from the public, no matter how small, is sufficient to meet the public disrepute requirement, especially if it is in line with the judge's own views. In such

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139. Calton v. CV Radio Assoc., L.P., 639 N.E.2d 1249-1250 (Ohio Ct. App. 1994).

140. *Id.* at 1251.

141. *Id.* at 1250.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Calton*, 639 N.E.2d 1249, 1250.

146. *Id.* at 1251.

147. *Id.*

cases, contradictory responses can simply be ignored if the judge sees fit to do so.<sup>148</sup>

The assertion in *Calton* that the judge knows what is commonly understood about certain types of behavior, is echoed in two other cases from the parallel universe of education law involving teacher dismissals under statutory morals clause provisions. For instance, in *Barringer v. Caldwell Cnty Bd. of Ed.*,<sup>149</sup> an appeals court was asked to review a school board decision to fire a teacher pursuant to a morals clause in the statute governing public school teachers. The court determined that the conduct of a North Carolina teacher who walked into a poolroom with a loaded shot gun and pistol was immoral.<sup>150</sup> The court observed that "by *common judgment* [the teacher's behavior] reflects upon a teacher's fitness to teach."<sup>151</sup>

The same approach was taken by the court in *Cape Girardeau School District v. Thomas*,<sup>152</sup> which ruled that "immoral conduct is conduct which is *always wrong*,"<sup>153</sup> because "the intentional shooting of another without legal justification or excuse was sufficiently contrary to justice and good morals to meet the definition of immoral conduct."<sup>154</sup> Embedded in the judge's statement is a value judgment - that the immoral nature of the conduct is self-evident.

The *Mendenhall* decision discussed earlier heavily influenced the last case from 2012 to be discussed here, *Bernsen v. Innovative Legal Marketing*.<sup>155</sup>

### *Bernsen v. Innovative Legal Marketing*

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148. *Calton*, 639 N.E.2d at 1252 ("The fact that appellant submitted various letters, phone messages and faxes which criticized management's judgment in terminating him is irrelevant to the trial court's construction of the terms of the instant agreement and the parties' intent in entering into that agreement. Appellant's remark angered and alienated numerous members of WKNR's audience. It subsequently prompted significant audience and media attention thereby exposing the station to the controversy and disfavor it contracted to avoid.").

149. *Barringer v. Caldwell Cnty. Bd. of Educ.*, 473 S.E.2d 435 (N.C. Ct. App. 1996).

150. *Id.* at 381.

151. *Id.* (emphasis added).

152. *In re Thomas*, 926 S.W.2d 163, 164 (Mo. Ct. App. 1996).

153. *Id.* at 4 (emphasis added).

154. *Id.* at 5.

155. *Bernsen v. Innovative Legal Marketing*, 2012 U.S. Dist. LEXIS 115324, at 1 (U.S. Dist. Ct. for Eastern Dist. VA, 2012).

Actor Corbin Bernsen, who was one of the stars in the popular television series, "LA Law", entered into an endorsement arrangement in 2009 with Innovative Legal Marketing, wherein Bersen was to be a spokesman for certain law firms in a marketing campaign, called "The Big Case".<sup>156</sup> The agreement contained the following provision: "Talent agrees to not commit any act or do anything which may tend to bring Talent into public disrepute, contempt, scandal or ridicule or which might tend to reflect unfavorably on the Network, their clients or on the Talent."<sup>157</sup> Within two years of his signing the contract, Bernsen was involved in several incidents that lead the company to sever their relationship on the grounds that he violated the morals clause.<sup>158</sup> For instance, while a guest on a television comedy show, Bernsen used vulgar humor in a skit.<sup>159</sup> In another incident, he was the subject of press coverage that there was a tax lien on some of his property.<sup>160</sup> In still another, he revealed in a television interview that he had abused drugs and was promiscuous as an adolescent.<sup>161</sup> Other incidents included an argument at a hotel and an altercation with someone in a bar, both of which were covered in the press.<sup>162</sup>

In contrast to the other cases covered in this section, the court in *Bernsen* did not apply the good faith test to determine if the company triggered the morals clause appropriately or not. This was in part due to the fact that the actual clause was placed in a section of the contract that left doubt about the circumstances under which the company could trigger the moral clause.<sup>163</sup> The court thus applied the traditional test used to determine if a contract has been breached by one of the parties - the material breach test. It said that the company's termination of the contract would only be upheld if it could be shown that Bersen's breach was a material, as opposed to a minor breach of his obligations.<sup>164</sup> Even though this is a more rigorous test than the good faith test, the judge still concluded that the "record ... [showed] a genuine dispute of material fact as to whether Bernsen breached the morality clause in the Agreement and whether that breach was material."<sup>165</sup>

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156. *Bernsen* 2012 U.S. Dist. LEXIS 115324 at 2.

157. *Id.*

158. *Id.* at 3-8.

159. *Id.* at 5.

160. *Id.*

161. *Id.* at 5-7.

162. *Bernsen* 2012 U.S. Dist. LEXIS 115324 at 6-7.

163. *Id.* at 15, 19.

164. *Id.*

165. *Id.* at 18.

The court decided that, with respect to all of the incidents combined, Bernsen's behavior was relatively minor, and certainly did not rise to the level of materiality to justify him being dropped from his contract with Innovative. It said the company: "produced no evidence that ...[it] or any ... client was actually affected by Bernsen's conduct. Bernsen has produced extensive deposition testimony suggesting ... [the company's] clients either did not know of the matters or considered them irrelevant to their marketing decisions."<sup>166</sup> Citing the *Mendenhall* decision, it concluded the case was best left to a jury to decide, since "a reasonable fact-finder could conclude that his conduct did not 'tend to bring [him] into public disrepute... or reflect unfavorably on the Network.' "<sup>167</sup> Thus, Innovative Marketing's motion for summary judgment on this issue was denied. Bernsen settled his claim with *Innovative Legal* immediately after the commencement of the jury selection process.<sup>168</sup> Although the terms of the settlement were not made public, no doubt he received some compensation for his endorsements.

In many ways *Bernsen* answers a key question that was left open in *Mendenhall* - what specific kinds of (and how much) public opinion evidence is needed to prove that talent fully fell into public disrepute. Building on *Mendenhall*, *Bernsen* indicates that television coverage clearly leaving the viewer with the impression that talent's conduct was inappropriate, and evidence that the endorsement company's *lost profits* were caused by that coverage, all would support a finding in favor of the company. Would evidence about differing views along racial lines be enough to support a ruling in the opposite direction?

### III. WOULD JUDGES ENTERTAIN THE CULTURAL DEFENSE IN CASES SIMILAR TO THE VICK AND PETERSON CASES?

Based on the case law discussed above, I suspect that none of the judges would rule in favor of Vick and Peterson, but for different reasons. It might seem at first blush that Vick and Peterson would have the best chance of winning their claims if the judge in *Mendenhall* heard their claims. Even though he made no overt references to the racialized or cultural nature of the on line feedback about Mendenhall's tweets, his willingness to allow Mendenhall to show evidence of specific support for his actions definitely

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166. *Bernsen*, 2012 U.S. Dist. LEXIS 115324 at 23-24.

167. *Id.* at 24.

168. *Corbin Bernsen Settles Dispute with Virginia Beach Company*, NBC WASH. (Nov. 9, 2012), [www.nbcwashington.com/entertainment/celebrity/Corbin-Bernsen-Settles-Dispute-With-Virginia-Beach-Company-178265941.html](http://www.nbcwashington.com/entertainment/celebrity/Corbin-Bernsen-Settles-Dispute-With-Virginia-Beach-Company-178265941.html) (last viewed on June 15, 2015).

opens the door for Vick and Peterson to share evidence of the massive amount of support and sympathy they received largely from black fans about their conduct. *Mendenhall* is a case in which the topic of review involved highly charged political and religious issues. And as I mentioned previously, some of the commentary may actually have been motivated by racism, given Mendenhall's later explanations for why he left football. Nevertheless, the judge never assessed the substantive merits of the arguments on either side of the debate. He took an agnostic approach, implying the focus instead should be on how many comments could be attributed to each side. I therefore don't think he would give extra weight to the minority-based comments or cultural differences discussed in Part One.

In many ways, for courts following *Mendenhall*, it will be a game of numbers. Recent studies show:

Of people who identified themselves as part of the NFL fan base 83 percent were white, 64 percent were male, 51 percent were 45 years or older, only 32 percent made less than \$60,000 a year, and, to finish the point, registered Republicans were 21 percent more likely to be NFL fans than registered Democrats. Another factoid: NFL fans were 59 percent more likely than the average American to have played golf in the last year.<sup>169</sup>

Thus, if Nike can produce objective polling evidence that most of the above NFL fans and white consumers of football endorsement products at large found Peterson's and Vick's behavior inappropriate, the judge would probably rule that the tide of overall public opinion is in Nike's favor, regardless of black public opinion.

In addition, while *Bernsen* builds on *Mendenhall*, by opening the door for future judges to be sympathetic about mixed public opinion, *Bernsen* also left the inference that companies should show a connection between negative public opinion and lost profits. It is possible that the people most likely to buy Nike products endorsed by black athletes are black. Indeed, there is some evidence that blacks are generally more loyal to product brands than whites.<sup>170</sup> In fact, there is a long history in the civil rights movement of certain companies being boycotted by blacks because of their perceived racist

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169. Neal Gabler, *NFL: Last Sports Bastion of White, Male Conservatives*, REUTERS, (May 30, 2014), <http://blogs.reuters.com/great-debate/2014/05/30/nfl-last-sports-bastion-of-white-male-conservatives> (last viewed June 15, 2015).

170. Frank McCoy, *How Valuing Black Consumers Pays Off*, THE ROOT (Sept. 25, 2012), [http://www.theroot.com/articles/culture/2012/09/black\\_buying\\_habits\\_study\\_shows\\_that\\_brand\\_loyalty\\_matters.html](http://www.theroot.com/articles/culture/2012/09/black_buying_habits_study_shows_that_brand_loyalty_matters.html) (last viewed on June 15, 2015).

practices to which the two men could point.<sup>171</sup> If Vick and Peterson can prove black loyalty to Nike products would be compromised if they were treated poorly by Nike, *Berser's* judicial progeny might rule in favor of Nike. However, Vick and Peterson were extremely popular with both white and black fans, thus making it more likely that white fans holding negative views about the two men would have the greatest impact on Nike's bottom line. Thus, any judge using *Berser* as a precedent would probably ultimately reject the cultural defense and rule against the two men as well.

As to the *Haywood* decision, the judge there gave the University of Pittsburgh's chancellor a great deal of deference with respect to the factors he considered before firing Haywood. Thus, in the current situation the judge would most likely defer to Nike's management, on the grounds that they would know best if the press coverage would significantly hurt their reputation or not. Further, *Nader* and *Galviz* also both emphasize the role that press coverage played in justifying how talent was treated. Thus, both courts would probably rule in favor of Nike as well, since the Vick and Peterson fiascos were extensively covered in the press.

Finally, if the judge in *Calton* had reviewed the claim, he might articulate a point of view sounding very similar to the human rights analysis discussed in Part Two. Namely, that abusing children and animals is *obviously* immoral and wrong, and that no amount of evidence about public opinion (black or white) on the matter can refute that fact. Indeed, with respect to Peterson, the judge would find support for this in the remarks of black writer, Khadijah Costley White, who said: "The bruises on [Petersons'] ... little boy's body are not symbolic. His fear and trauma are not due to some grand media conspiracy. And hiding and rationalizing violence against weak and helpless people represents the very worst of humankind."<sup>172</sup> And with respect to Vick, the judge would probably feel a kinship with noted utilitarian and animal rights philosopher, Peter Singer who contends that:

it is necessary to take the interests of animals seriously ... Humans have failed to do this ... because of a species bias, or specieism, that results in a systematic devaluation of animal interests. ... specieism is no more morally defensible than racism, sexism, or other forms of

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171. D.L. Chandler, *Little Known Black History Fact: Operation Push Boycotts*, BLACK AMERICA WEB (Aug. 10, 2014), <http://blackamericaweb.com/2014/08/10/little-known-black-history-fact-operation-push-boycotts> (last viewed June 15, 2015).

172. White, *supra* note 45.

discrimination that arbitrarily exclude humans from the scope of moral concern.<sup>173</sup>

One suspects the judge in *Calton* would also agree with scholar Alison Dundes Renteln's suggestion earlier that cases where irreparable harm occurs – in this case, extreme corporal punishment of young children, and animal exploitation – should be disqualified from using the cultural defense because most people would find these acts distasteful. Just as he completely ignored evidence that some people supported the radio commentator's remarks, he would ignore evidence that a sizeable number of black Americans supported Vick and Peterson.

As the discussion here indicates, my general sense is that Vick, Peterson and others like them in similar situations would not convince most judges that they should be vindicated via the cultural defense in endorsement contract disputes. With the exception of *Calton*, most judges steer away from making overt value judgments about the conduct under review. Instead, they point to media coverage, public commentary, arrest records, and the views of management (usually in some combination with these other factors) to assess if public disrepute has occurred in these forums. Even in cases where it can be shown public opinion is divided, I suspect that resourceful companies will simply look to *Mendenhall* and employ highly paid polling companies to document the direction in which the public leans on these matters. And as long as whites are in the majority in terms of the viewing public and endorsement company consumers, the statistics will always lean against minority viewpoints.

Just because companies can convince judges to reject the cultural defense, however, doesn't necessarily mean they should ignore the unequal societal conditions that made the cultural defense necessary to begin with. Many companies have adopted mission statements that say they believe in conducting business that reflects and celebrates a multiracial, multicultural world. For instance, the Coca Cola Company states that its mission is to: "mirror the rich diversity of the marketplace ... [it serves] and be recognized for ... leadership in Diversity, Inclusion, and Fairness in all aspects of our business, including Workplace, Marketplace, Supplier and Community, enhancing ... [its] social license to operate."<sup>174</sup> For those companies who want

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173. Gary L. Francione, *Animal Rights Theory and Utilitarianism: Relative Normative Guidance*, <https://www.animallaw.info/article/animal-rights-theory-and-utilitarianism-relative-normative-guidance> (last viewed June 15, 2015).

174. *Global Diversity Mission*, COCA COLA JOURNEY, [www.coca-colacompany.com/our-company/diversity/global-diversity-mission](http://www.coca-colacompany.com/our-company/diversity/global-diversity-mission) (last viewed June 15, 2015).



to try to live up to this standard, there are a range of possible approaches they might consider taking. First, sociologists, anthropologists, and historians can be hired to give context to the minority behavior and mores in question, and help assess the extent to which those behaviors and mores are representative of the culture in question and worthy of consideration. If this is the case, then it might be fair to treat talent less severely in such cases. For instance, companies could choose to suspend contracts as opposed to terminating them, or require talent to engage in remedial education about the consequences of their behavior and/or genuinely engage in public service to make up for the harm that occurred. Such an approach would be in line to what is often done in the criminal justice system.

However, companies need to be extremely careful to not condone egregious conduct that seriously harms the vulnerable. There are indeed instances where talent's behavior is simply wrong. In such instances, Dundes Renteln's recommendations discussed earlier are probably best applied – i.e. to not adopt the cultural defense in cases where irreparable harm has occurred. This would mean that cases such as Vick's and Peterson's would not be granted leniency, since situations involving violence against children and animal abuse definitely involve extreme harm to the vulnerable. As to children, this frame of thinking is definitely in line with the 1989 United Nations Convention on the Rights of the Child, which requires that countries “take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse.”<sup>175</sup> Domestic violence against women and hate crimes would also fall into this category. Finally, companies should make sure that *all* talent, regardless of their race or cultural of origin, is penalized similarly for perpetuating these forms of irreparable harm. Companies who enter into endorsement contracts with celebrities should be equal opportunity enforcers in all such circumstances.

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175. Jennifer E. Lansford, *The Special Problem of Cultural Differences in Effects of Corporal Punishment*, 73:89 LAW & CONTEMP. PROBS. 104 (2010).