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# CONTRACTING FOR THE COMPANY'S CULTURE

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## ABSTRACT

*Company culture is not a new phenomenon. It refers generally to a set of beliefs and behaviors that guide how a company's management and employees interact with each other and how they handle external business transactions. A company's culture has always been relevant to employee retention and financial success, but recently its importance cannot be understated. Companies are not immune from the culture wars that divide the United States and countries across the globe. Increasingly, companies have become participants – willingly or not – in a wide range of social and political controversies. A company's stakeholders in these ongoing culture wars include their employees, investors, and consumers. And those stakeholders make choices about which companies they want to work for, invest in, purchase from, and even boycott, based in part on a company's beliefs and behaviors surrounding a variety of social issues like gender equality, diversity, LGBTQ+ rights, sustainability, human health, abortion rights, and so on.*

*These stakeholders are growing more critical of companies' performative attempts to pacify them and often characterize such attempts as greenwashing or blackwashing. They expect more than just a rainbow flag during Pride month and a Black Lives Matter t-shirt featured in an advertisement. They expect companies to embrace these issues and incorporate their values into the way the company operates, both internally and externally. Companies have a vested interest in developing and nurturing a company culture that aligns with their stakeholders' values, and also in telling the story of their company culture to as many stakeholders as possible.*

*While contract drafting is rarely seen as an avenue for developing and communicating company culture, let alone as a vehicle for social change, in this article we propose that contract drafting can be used to achieve both goals. By incorporating narrative techniques and impactful language, companies can use their contracts to tell the stories of the company culture*

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*that has become so important to their success. Because employment relationships embody such a vital role in so many individuals' lives, this article focuses specifically on how companies can draft their employment contracts to better define and implement their company culture and thus improve their employee recruitment and retention, productivity, and financial success.*

*Beyond having an immediate impact on the transacting parties and even a company's workforce, contract drafting can also be used as a vehicle for broader societal change. This is true for several reasons. First, private contracts necessarily have an impact on third parties. Second, while a single individual may lack sufficient bargaining power to seek favorable contract language, groups of individuals may yield great power if they work in tandem. Additionally, if a significant number of individual, unrelated contracts are drafted similarly to address key social issues, there may be a resulting culture shift. The use of the same or similar contract drafting language in numerous unrelated contracts can have a significant impact across an industry, or even more broadly. What may have started as a single company's culture of promoting social good may eventually lead to a societal shift. Contract language also provides the benefit of incentivizing the transacting parties to act in accordance with their expressed intent, while also equipping the parties with the force of legal enforcement and tangible remedies.*

*This article begins by defining company culture and exploring its rising relevance. It will then address the value of incorporating storytelling and narrative techniques in contract drafting, highlighting four techniques that can assist drafters in crafting employment contracts that serve as a tool to develop and embed company culture. These techniques are character and voice; stock stories and counterstories; plot and alternative plot lines; and expressive language. By way of illustration, this article showcases how companies can embed a company culture of empowering women and preventing workplace sexual harassment into their employment contracts. It then explores ways in which companies can leverage their employment agreements to develop a company culture around Environmental, Social, and Governance ("ESG") issues. ESG has emerged as a key factor in engaging today's workforce, with one in three employees preferring to work for companies that are responsible to all stakeholders, not just investors and shareholders. Millennial and Gen Z employees are heavily influenced by employers' ethical values in choosing where they work, and a recent study has shown that ESG values are among the most significant. Employers outside of the U.S. have already begun to find ways to develop a strong ESG culture as a means of attracting and retaining employees. This article explores ways that contract drafting techniques and language can effectively be used to develop and implement an ESG company culture to benefit the employer-employee relationship, the broader workforce, and beyond.*

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## I. INTRODUCTION

Company culture is not a new phenomenon. It refers generally to a set of beliefs and behaviors that guide how a company's management and employees interact with each other and how they handle external business transactions. Company culture has always been important to some entities whose core mission relates to a social goal.<sup>1</sup> And company culture has always been relevant more broadly to employee retention and financial success, but recently its importance cannot be understated. Companies are not immune from the culture wars that divide the United States and countries across the globe. Increasingly, companies have become participants — willingly or not — in a wide range of social and political controversies. A company's stakeholders in these ongoing culture wars include their employees, investors, and consumers. And those stakeholders make choices about which companies they want to work for, invest in, purchase from, and even boycott, based in part on a company's beliefs and behaviors surrounding a variety of social issues like gender equality, diversity, LGBT+ rights, sustainability, human health, abortion rights, and so on.

These stakeholders are growing more critical of companies' performative attempts to pacify them and often characterize such attempts as greenwashing or blackwashing. They expect more than just a rainbow flag during Pride month and a Black Lives Matter t-shirt featured in an advertisement. They expect companies to embrace these issues and incorporate their values into the way the company operates, both internally and externally. Companies thus have a vested interest in developing and nurturing a company culture that aligns with their stakeholders' values, and also in telling the story of their company culture to as many stakeholders as possible.

Blackrock CEO Larry Fink sent a letter to CEOs in 2021 where he stated: "I cannot recall a time where it has been more important for companies to respond to the needs of their stakeholders."<sup>2</sup> By his use of the word "stakeholder" Fink was intentionally referring not just to a company's stockholders, but also its employees, customers, and community members.<sup>3</sup>

Yet despite its rising relevance, companies often struggle with how to develop and embed a strong company culture, and even more so with how to

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<sup>1</sup> See BOMBAS, <https://shop.bombas.com/pages/about-us> [<https://perma.cc/5PNP-HED2>] (an undergarments business that has donated over 100 million essential clothing items to homeless shelters); see also SAND CLOUD, <https://www.sandcloud.com/pages/our-mission> [<https://perma.cc/RQ5G-5K3X>] (seller of Turkish-style beach towels and related products that donates 10% of profits to marine conservation).

<sup>2</sup> Larry Fink, *Larry Fink's 2021 Letter to CEOs*, BLACKROCK, <https://www.blackrock.com/corporate/investor-relations/2021-larry-fink-ceo-letter> [<https://perma.cc/YQ9F-TRAT>]; Gregory H. Shill & Matthew L. Strand, *Diversity, ESG, and Latent Board Power*, 46 DEL. J. CORP. L. 255, 257 (2022).

<sup>3</sup> Shill & Strand, *supra* note 22, at 257.

convince their stakeholders of their commitment to the underlying values. Although contract drafting has rarely been considered a vehicle to develop and embed company culture or to create social change more broadly, it can be a highly effective tool.

While there are potentially a wide range of contracts that can be used to this end, such as supply chain agreements and shareholder agreements, in this article we focus on employment contracts. There are many reasons to do so. First, from an anthropological perspective, work has always been a fundamental part of human life. Work not only provides individuals with income, but it also allows people to socialize with others and provides a sense of identity. It provides individuals with structure and a sense of purpose. It's estimated that the average person will spend about one-third of their life working.<sup>4</sup> Although the average employee is not bound by a formal contract, there still exists an employment relationship that is influenced by agreements like corporate governance agreements, company policies, and employee handbooks.<sup>5</sup> Employees at the executive level are more likely to have formal employment contracts<sup>6</sup> and executive behavior has a trickle-down effect on the entire company.<sup>7</sup>

Second, the data supports such a focus. In 1999, more than sixty percent of all employees were employed by companies with more than 100 employees despite the fact that such companies only made-up two percent of all employers.<sup>8</sup> As such, focusing on large employers has a greater potential to affect company culture overall. Furthermore, in 1999, the largest nine percent of corporations controlled ninety-seven percent of corporate assets.<sup>9</sup> Pragmatically, there is simply more data available on publicly traded

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<sup>4</sup> *Why Workplace Culture Matters*, HARV. DIV. OF CONTINUING EDUC. (Nov. 28, 2023), [https://professional.dce.harvard.edu/blog/why-workplace-culture-matters/\[https://perma.cc/U4PE-EHQ2\]](https://professional.dce.harvard.edu/blog/why-workplace-culture-matters/[https://perma.cc/U4PE-EHQ2]).

<sup>5</sup> See Pauline T. Kim, *Privacy Rights, Public Policy, and the Employer Relationship*, 57 OHIO ST. L.J. 671, 680 n.39 (1996) (“[I]ndividual employment contracts providing job security are extremely rare”); see also Stephen M. Fogel et al., *Survey of the Law on Employee Drug Testing*, 42 U. MIAMI L. REV. 553, 650 n.648 (1988) (citing an earlier N.Y. Times article stating that 70% of American workers are not covered by collective bargaining agreements or employment contracts).

<sup>6</sup> Stewart J. Schwab & Randall S. Thomas, *An Empirical Analysis of CEO Employment Contracts: What Do Top Executives Bargain For?*, 63 WASH. & LEE L. REV. 231, 240–42 (2006) (finding that at least two thirds of CEOs from 865 publicly traded companies surveyed had employment contracts).

<sup>7</sup> Sukhsimranjit Singh, *Working with Corporate Culture: Best Practices for Attorneys in Business*, 56 WILLAMETTE L. REV. 397, 398 (2020) (“[C]ompany leadership sets the tone for corporate culture, decisions made the highest echelon of a business will have a trickle-down effect . . .”).

<sup>8</sup> David Klein et al., *Emerging Technologies and Corporate Culture at Microsoft: A Methodological Note*, 23 BEHAV. SCI. & L. 65, 68 (2005).

<sup>9</sup> *Id.*

companies and publicly traded companies make up many top employers.<sup>10</sup> As such, it is logical to target the top employers from the largest publicly traded companies and this article discusses many such employers.<sup>11</sup>

Employment agreements are not the only contracts with which it is possible to effect social change. Rather, this article focuses on employment agreements because they have power to affect many people across a variety of sections of life.<sup>12</sup> Therefore, we focus on the drafting of employment contracts and argue that they are a viable means to embed company culture into a business, and beyond. How they are drafted has the potential to affect many lives.<sup>13</sup> It is quite easy to understand how the drafting choices made in an individual employment contract can have a profound impact on the transacting parties themselves. But there will also be consequences that extend beyond the individual employee-employer relationship. If some employers start drafting their employment contracts as a means of embedding company culture, they will be able to retain the best talent to work for them, causing other employers to follow suit to remain competitive. If large employers in key industries make embedding company culture the norm, other companies will need to follow suit to succeed. Eventually, the model employment agreements that contract drafters rely on will contain this type of language and that's how broader change across an industry can happen.

Even beyond having an immediate impact on the transacting parties, a company's workforce, and even an industry, contract drafting can also be used as a vehicle for broader societal change.<sup>14</sup> This is true for several reasons. First,

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<sup>10</sup> Please note that we have intentionally excluded government employers from this analysis.

<sup>11</sup> Marcus Lu, *Ranked: The Largest U.S. Corporations by Number of Employees*, VORONI (Apr. 15, 2024), <https://www.visualcapitalist.com/ranked-the-largest-u-s-corporations-by-number-of-employees/> - :~:text=See%20how%20big%20companies%20have%20become%20from%20a%20human%20perspective [https://perma.cc/4DCP-WAZU].

<sup>12</sup> The labor force participation rate as of April 2024 was 62.7%. *The Employment Situation – April 2024*, U.S. DEP'T LAB. 2 (May 3, 2024), [https://www.bls.gov/news.release/archives/empsit\\_05032024.pdf](https://www.bls.gov/news.release/archives/empsit_05032024.pdf) [https://perma.cc/H4XP-MMD9].

<sup>13</sup> We understand that most employees, especially non-executive or lower-level employees, do not often execute formal employment contracts with their employers. However, most employers provide an employee handbook or set of policies that guide the parties' conduct during the employment relationship. Our discussion of employment contracts refers to both the formal and more informal ways in which companies bind themselves and their employees to varied behavior throughout employment.

<sup>14</sup> See generally Susan M. Chesler, *Using Private Law as a Vehicle for Social Change: A Feminist Approach*, 15 L. J. SOC. JUST. 138 (2020) (discussing how private law can be leveraged to spur social change); Jonathan C. Lipson, *Against Corporate Social Responsibility* (Temp. Univ. Beasley Sch. of L., Working Paper, Paper No. 2022-24,

private contracts necessarily have an impact on third parties.<sup>15</sup> Performance of the legal obligations of a contract often affects other individuals who are not parties to the agreement. For example, an employment contract that requires or encourages employees to commute sustainably to work can have positive outcomes on air quality, thus affecting individuals and communities well beyond the contacting parties.<sup>16</sup> Second, while a single individual may lack sufficient bargaining power to seek favorable contract language, groups of individuals may yield great power if they work in tandem. For example, after the rise of the #MeToo movement, a group of female employees in the tech industry organized to demand the removal of mandatory arbitration clauses in their employment agreements.<sup>17</sup> Understanding that such clauses generally increase employers' chances of success in sexual harassment claims and often serve to perpetuate a culture of sexual harassment, female tech employees working for varied employers collectively mobilized to force their employers to remove that clause from their respective employment contracts.<sup>18</sup>

Additionally, if a significant number of individual, unrelated contracts are drafted similarly to address key social issues, there may be a resulting culture shift. The use of the same or similar contract drafting language in numerous unrelated contracts can have a significant impact across an industry, or even more broadly.<sup>19</sup> For example, if several large employers (as opposed to just one) began to require or incentivize their employees to commute sustainably to work, that may have a more consequential impact on climate change. And over time a "green commuting" contract term may become the norm and a standard term in form employment contracts. For example, if a major employer and industry leader like Amazon institutes a green commuting policy for its employees, its competitors may seek to follow suit to retain and attract employees who value sustainability. What may have started as a single company's culture of promoting sustainability could lead to a societal shift.

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2022); Victor Fleischer, *Brand New Deal: The Branding Effect of Corporate Deal Structures*, 104 MICH. L. REV. 1581 (2006).

<sup>15</sup> Chesler, *supra* note 1414, at 144.

<sup>16</sup> Milena Klasing Chen, *Shifting Employees' Mobility Behavior is at the Heart of Corporate Sustainability*, WBCSD (Sept. 10, 2021), <https://www.wbcd.org/news/shifting-employees-mobility-behavior-corporate-sustainability/> [https://perma.cc/RP84-LBVX].

<sup>17</sup> See Elizabeth C. Tippet, *The Legal Implications of the MeToo Movement*, 103 MINN. L. REV. 230, 234–36 (2018); see also Jean R. Sternlight, *Mandatory Arbitration Stymies Progress Towards Justice in Employment Law: Where To, #MeToo?*, 54 HARV. C.R.-C.L. L. REV. 155, 202–04 (2019).

<sup>18</sup> See generally Xuan-Thao Nguyen, *Disrupting Adhesion Contracts with #MeToo Innovators*, 26 VA. J. SOC. POL'Y & L. 165 (2019); see also Anat Alon-Beck, *Times They Are A-Changin': When Tech Employees Revolt!*, 80 CASE WEST. LAW REV. 120 (2020) (noting that tech employees are organizing and publicly speaking out against their employers regarding issues of corporate social responsibility).

<sup>19</sup> Chesler, *supra* note 1414, at 146.

Private actors like companies are also not constrained in the same way as legislatures and courts. Their actions by way of contract drafting are immediate; they can implement change much more quickly than the gears of politics, partisanship, and the legal process are able to do.<sup>20</sup> They are free to contract above and beyond the minimum requirements of the law. And the private law of contracting is limited only by the very broad parameters of the law. In essence, the “freedom to contract” allows private transacting parties to be innovative and aggressive in their determination to implement change. In the current environment of governmental inaction and increasing culture wars, there is even more reason to look to private actors to turn the tide. We are not suggesting that contract drafting replace advocating for change through legislative and judicial processes; those pathways are likely to remain the primary avenues for creating change. We do, however, argue that contract drafting can also be used as a vehicle for social change.

This Article will begin by defining company culture and exploring its rising relevance in Section II. It will then address the value of incorporating storytelling and narrative techniques in contract drafting. Section III will specifically highlight four techniques that contract drafters can use to more effectively use employment contracts as a tool to develop and embed company culture. These techniques are character and voice; stock stories and counterstories; plot and alternative plot lines; and expressive language. Section IV contains an illustration of how companies can develop and embed a company culture of empowering women and preventing workplace sexual harassment into their employment contracts. Section V explores ways in which contract drafters can develop a company culture around Environmental, Social, and Governance (ESG) issues. In both sections IV and V, this article provides concrete illustrations of how to embed company culture in the context of employment contracts. Section VI concludes.

## II. COMPANY CULTURE & ITS RISING RELEVANCE

Company culture is not a new phenomenon. It refers generally to a set of beliefs and behaviors that guide how a company’s management and employees interact with each other and how they handle external business transactions. “[C]orporate culture consists, at its core, of a group’s shared beliefs, assumptions, values, or preferences that then drive that group’s behaviors.”<sup>21</sup>

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<sup>20</sup> One of the key limits of public law is that it depends in large part on political will. In the United States, as well as many other countries, politicians and citizens today are extremely polarized in their ideologies and beliefs about social values, which in turn makes change less likely to occur.

<sup>21</sup> Li Hongyi & Eric Van den Steen, *Birds of a Feather ... Enforce Social Norms? Interactions among Culture, Norms, and Strategy*, 6 STRATEGY SCI. 111, 166–89 (2021); see also Jillian Grennan & Kai Li, *Corporate Culture: A Review and*

It can be envisioned as an “informal institution typified by patterns of behaviors and reinforced by people, systems, and events.”<sup>22</sup> The study of company culture focuses on “how an organization thinks about, understands, interprets, and acts on their methods of operation, strategies, and goals.”<sup>23</sup> While company culture is generally envisioned as an internal practice, it also embodies the way in which companies handle external business transactions and interact with individuals, entities, and the public more broadly. Company culture is about the shared norms, values, and practices that form the identity of the company, both internally and externally. Simply put, corporate culture is the spirit of a company and influences all aspects of its business.<sup>24</sup> A company’s leadership sets the tone for corporate culture and influences how both internal and external stakeholders perceive and engage with the business.<sup>25</sup>

Company culture that aligns with values that are attractive to its employees can be beneficial to establishing long-term relationships.<sup>26</sup> It also helps establish a cohesive vision and improve connectivity between coworkers, which ultimately leads to the success and longevity of the company.<sup>27</sup>

The concept of Corporate Social Responsibility (CSR) is strongly linked to company culture.<sup>28</sup> CSR is a business model by which companies make a concerted effort to operate in ways that enhance rather than degrade society and the environment.<sup>29</sup> CSR focuses on a company’s commitment to making positive changes to society by virtue of its business practices.<sup>30</sup> In this business model, companies are acknowledging their responsibility for having positive, rather than negative, impacts on society.<sup>31</sup> CSR programs can also raise morale in the workplace, and in this way may also contribute to a cohesive company

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*Directions for Future Research*, in HANDBOOK OF FINANCIAL DECISION MAKING, 112 (Gilles Hilary & David McLean eds., 2023).

<sup>22</sup> Grennan & Li, *supra* note 2121, at 5.

<sup>23</sup> Klein et. al., *supra* note 88 at 67.

<sup>24</sup> Singh, *supra* note 77, at 102.

<sup>25</sup> Karl Mackie, *Dispute Resolution Skills and Company Culture-A Recipe for Successful Leadership*, CORP. DISPS., Apr.–June 2016, at 133–37.

<sup>26</sup> See Jessica Jeffers & Michael Lee, *Corporate Culture as an Implicit Contract*, SSRN (July 24, 2019), <https://ssrn.com/abstract=3426060>; Marion G. Craine, *Profit, Mission and Protest at Work*, 108 MINN. L. REV. 2243, 2266–70 (2024).

<sup>27</sup> Craine, *supra* note 2626, at 2270.

<sup>28</sup> See generally, *id.*

<sup>29</sup> Jason Fernando, *What is CSR? Corporate Social Responsibility Explained*, INVESTOPEDIA (Mar. 6, 2024), <https://www.investopedia.com/terms/c/corp-social-responsibility.asp> [<https://perma.cc/E8VY-YDXE>].

<sup>30</sup> *Id.*; *Corporate Social Responsibility (CSR): Types, Benefits & More*, IMD (Apr. 2024), <https://www.imd.org/blog/sustainability/csr-types/> [<https://perma.cc/3S9X-9R6S>].

<sup>31</sup> Fernando, *supra* note 2929.

culture around those social values.<sup>32</sup> A strong commitment to CSR is just one way in which companies have historically developed a company culture that empowers employees to work towards a collective social goal.

### A. *The Rise of Corporate Social Responsibility and Company Culture*

While companies have, at least in part, considered social responsibility practices since the Industrial Revolution, social movements in the United States in the 1960s and 1970s spurred companies to develop corporate social responsibility practices around specific social movements, such as civil rights and anti-war protests.<sup>33</sup> By the 1980s, however, companies focused heavily on ethical issues and responding to scandals during that time surrounding managerial and corporate wrongdoing, such as insider trading and consumer pressure around labor standards in manufacturing operations in third world countries.<sup>34</sup>

The term “corporate culture”<sup>35</sup> emerged in the early 1980s and gained widespread recognition by the 1990s.<sup>36</sup> Company culture emanated from company-wide value systems, management strategies, internal work environment, and employee communications;<sup>37</sup> it would go on to include companies’ origin stories as told by charismatic founders and CEOs and become embedded in company logos and trademarks.<sup>38</sup>

In the 1990s and 2000s, companies began to use corporate social responsibility concepts strategically and only when it was to their financial advantage.<sup>39</sup> Most recently, companies have begun to consciously run their operations and brand their image in line with the multitude of social and

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<sup>32</sup> See Tim Stobierski, *What is Corporate Social Responsibility? 4 Types*, HARV. BUS. SCH. (Apr. 8, 2021), <https://online.hbs.edu/blog/post/types-of-corporate-social-responsibility> [<https://perma.cc/2EVP-ENJQ>].

<sup>33</sup> Craine, *supra* note 2626, at 2255–56; ARCHIE B. CARROLL, *A History of Corporate Social Responsibility: Concepts and Practices*, in THE OXFORD HANDBOOK OF CORPORATE SOCIAL RESPONSIBILITY 20, 28–34 (Andrew Crane et al. eds., 2008).

<sup>34</sup> Craine, *supra* note 2626, at 2257–59; CARROLL, *supra* note 3333, at 36.

<sup>35</sup> We intentionally use the term company culture instead of “corporate” culture to include non-corporate and smaller entities.

<sup>36</sup> Evan Tarver, *Corporate Culture Definition, Characteristics, and Importance*, INVESTOPEDIA (Apr. 22, 2024), <https://www.investopedia.com/terms/c/corporate-culture.asp> [<https://perma.cc/N3LV-UXLM>].

<sup>37</sup> *Id.*; Melissa Russell, *How to Build – and Improve – Company Culture*, HARV. DIV. OF CONTINUING EDUC. (June 26, 2024), <https://professional.dce.harvard.edu/blog/how-to-build-and-improve-company-culture/> [<https://perma.cc/4NZ7-EE9B>].

<sup>38</sup> Tarver, *supra* note 3636.

<sup>39</sup> Craine, *supra* note 2626, at 2259.

political issues of the day.<sup>40</sup> At least one commentator has referred to this trend as “woke capitalism.”<sup>41</sup> Management consultants currently advise companies to focus their marketing and branding surrounding these values not only to consumers, but to employees as well.<sup>42</sup> From an employee standpoint, this branding can best be implemented through a strong company culture.<sup>43</sup>

By 2015, company culture was not limited to the personal values of their founders and CEOs but was also influenced by what was happening in the world surrounding them.<sup>44</sup> Companies today are not immune from the culture wars that divide the United States and countries across the globe. Increasingly, companies have become participants—willingly or not—in a wide range of social and political controversies. To this end, they have made public commitments in support of recent social movements, such as Black Lives Matter, #MeToo, and LGBTQ+ rights.<sup>45</sup> The awareness and importance of company culture is more heightened now than ever: consulting firm Deloitte found that over ninety percent of company executives believed that strong company culture is imperative for success.<sup>46</sup>

One of the unexpected results of the Covid-19 pandemic was employees' reevaluation of their priorities and increased expectations from their employers.<sup>47</sup> Employers responded by revising their recruitment and retention

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<sup>40</sup> *Id.* at 2261–62; Yvette Lynne Bonaparte & Martha E. Reeves, *Cause-Related Advertising, the #MeToo Movement, and Implications for Marketers*, 21 ADVERT. & SOC'Y Q., Winter 2020 (examining cause-related advertising campaigns that highlight issues significant to women and the #MeToo movement).

<sup>41</sup> Craine, *supra* note 2626, at 2262; Andrew Edgecliffe-Johnson, *The War on 'Woke Capitalism'*, FIN. TIMES (May 27, 2022), <https://www.ft.com/content/e4a818e5-4039-46d9-abe0-b703f33d0f9b> [<https://perma.cc/3XJD-J2XL>].

<sup>42</sup> Craine, *supra* note 2626, at 2263–66.

<sup>43</sup> *Id.* at 2266–71.

<sup>44</sup> Andrew Winston, *10 Sustainable Business Stories That Shaped 2015*, HARV. BUS. REV. (Dec. 23, 2015), <https://hbr.org/2015/12/10-sustainable-business-stories-that-shaped-2015> [<https://perma.cc/JLC4-TSHW>].

<sup>45</sup> Craine, *supra* note 26, at 2261; *see e.g.*, Tracy Jan et. al., *Corporate America's \$50 billion Promise*, WASH. POST (Aug. 23, 2021), <https://www.washingtonpost.com/business/interactive/2021/george-floyd-corporate-america-racial-justice/> [<https://perma.cc/UW56-XYP6>] (analyzing corporate America's pledge to BLM after the death of George Floyd); *Disney Park Releases New Statement in Support of LGBTQIA+ Cast, Crew, and Guests Opposing Florida's 'Don't Say Gay' Bill*, WDW MAGIC (Mar. 22, 2022), <https://www.wdwmagic.com/other/walt-disney-company/news/22mar2022-disney-parks-releases-new-statement-in-support-of-lgbtqia-cast,-crew-guests-and-fans.htm> [<https://perma.cc/VRS3-8PJL>] (describing Disney's commitment to LGBTQIA+ rights).

<sup>46</sup> Tarver, *supra* note 3636.

<sup>47</sup> Walker Jaroch, *Software's Helping Hand for Labor Ground Support Worldwide*, 30 GROUND SUPPORT WORLDWIDE, Apr. 2022, at 24–25 (discussing the effects of the

strategies to include a focus on prospective and current employees' values. Those employers that targeted employees' values experienced beneficial results such as higher employee retention, enhanced productivity, and reduced training costs, which in turn led to higher profits.<sup>48</sup> When employees with these higher expectations take employment at these companies, they believe that the company's social justice commitments are genuine and that they will be performing work that is consistent with their values.<sup>49</sup> When those expectations are not met, however, the company should not expect to see the positive consequences and may even be forced to respond to employee protests.<sup>50</sup>

Increasingly, companies describe themselves as having a purpose beyond profit that drives their business operations, management practices, and employee hiring and retention.<sup>51</sup> They acknowledge the multitude of stakeholders that they must be sensitive to in making both internal and external decisions. And those stakeholders make choices about which companies they want to work for, invest in, purchase from, and even boycott, based in part on a company's beliefs and behaviors surrounding a variety of social issues. These stakeholders expect more than performative measures; they want

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pandemic on the aviation industry); Maury Gittleman, *The "Great Resignation" in Perspective*, MONTHLY LAB. REV. (July 2022), <https://doi.org/10.21916/mlr.2022.20> [<https://perma.cc/9GSW-SHNR>] (suggesting that alternative explanations, including changing attitudes toward work, must have contributed to 'The Great Recession'); Kate Morgan, *The Great Resignation: How Employers Drove Workers to Quit*, BBC (July 1, 2021), <https://www.bbc.com/worklife/article/20210629-the-great-resignation-how-employers-drove-workers-to-quit> [<https://perma.cc/J56F-8UXA>] ("Many retail and service workers are [accepting jobs in other industries] that actually pay less, but offer more benefits, upward mobility and compassion.").

<sup>48</sup> See Morgan, *supra* note 4747 (discussing how some companies have responded to 'The Great Resignation' to attract new talent).

<sup>49</sup> See Katayoon Beshkardana, *Reversing the Irreversible: Mitigating Legal Risks of Blockchain-Based Data Breach through Corporate Governance*, 14 HASTINGS SCI. & TECH. L.J. 175, 215–16 (2023).

<sup>50</sup> On May 1, 2020, workers from Amazon, Target, Whole Foods, Instacart, and Shipt coordinated a one day "sick out" to protest unsafe working conditions during the COVID-19 pandemic. This strike, along with other coordinated protests in the wave of Covid-19, evidence how a failure to respond to worker expectations can lead to negative consequences. Michael Sainato, *Retail Workers at Amazon and Whole Foods Coordinate Sick-Out to Protest Covid-19 Conditions*, THE GUARDIAN (May 1, 2020, 5:00 AM), <https://www.theguardian.com/world/2020/may/01/retail-workers-at-amazon-and-whole-foods-coordinate-sick-out-to-protest-covid-19-conditions> [<https://perma.cc/T7YD-EREH>]; Nitasha Tiku & Jay Greene, *Instacart, Amazon, Whole Foods Workers Protest for Protections, Hazard Pay*, WASH. POST (Mar. 20, 2020), <https://www.washingtonpost.com/technology/2020/03/30/worker-strike-instacart-amazon-whole-foods/> [<https://perma.cc/DBU4-Q3VD>].

<sup>51</sup> Hubert Joly, *Creating a Meaningful Corporate Purpose*, HARV. BUS. REV. (Oct. 28, 2021), <https://hbr.org/2021/10/creating-a-meaningful-corporate-purpose> [<https://perma.cc/M3L8-TU32>].

companies to embrace these issues and incorporate their values into the way the company operates.

For example, Zappos, the online shoe and clothing retailer, has a company culture based on the concept of “live and deliver WOW.”<sup>52</sup> According to its founder, Tony Hsieh, Zappos’ core values are more than just words; they’re a way of life. The “pay-to-quit” bonus is a perfect example of how the company fosters this culture. Once they complete the New Hire Training program, employees are offered money to leave the company. They must choose between receiving the money or staying, and the large majority choose the latter, thus strengthening Zappos’ culture. There are also hundreds of company-wide events at Zappos, intended to build a strong sense of belonging among its employees. Inclusivity and diversity are a significant part of Zappos’ core mission, as evidenced by Zappos Adaptive program. Under this program, Zappos allows amputees and other people with disabilities to purchase single or different-sized shoes.

According to Victor Fleischer, corporate deal structures and the way in which the contracts are designed have been strategically used by companies, such as Google, to “brand” their company in a way that aligns with their company culture.<sup>53</sup> When Google structured its IPO as an auction, it may not have maximized profit, but it served to bolster the reputation of the company in the eyes of consumers and employees.<sup>54</sup> The Google IPO was not “just a financing transaction; it was a branding moment.”<sup>55</sup> It enhanced Google’s image as an innovative, playful company with integrity. Such branding can have not only an external effect on Google’s customers, but also an internal effect on employees.<sup>56</sup>

Companies who seek to capitalize on the benefits of embracing social values without taking concrete steps to embed such values into their culture and operations should beware that such surface level measures are likely to be scrutinized by the public.<sup>57</sup> Greenwashing is a marketing tactic that attempts to capture environmentally conscious consumers by providing false or misleading information about a company’s products or practices.<sup>58</sup> Backlash

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<sup>52</sup> Gustavo Razzetti, *12 Examples of Successful Workplace Cultures Mapped with the Culture Design Canvas*, FEARLESS CULTURE (Jan. 19, 2023), <https://www.fearlessculture.design/blog-posts/11-examples-of-companies-with-powerful-cultures> [<https://perma.cc/VV8A-36FR>].

<sup>53</sup> See Fleischer, *supra* note 1414, at 1591–1606.

<sup>54</sup> *Id.* at 1596, 1601–04.

<sup>55</sup> *Id.* at 1600.

<sup>56</sup> *Id.* at 1604–05.

<sup>57</sup> See e.g., Deena Robinson, *10 Companies Called Out for Greenwashing*, EARTH ORG (July 17, 2022), <https://earth.org/greenwashing-companies-corporations/> [<https://perma.cc/SMS8-2XL7>].

<sup>58</sup> Kelly Anne Smith, *Greenwashing and ESG: What You Need to Know*, FORBES ADVISOR (Aug. 25, 2022, 9:54 AM),

over unsubstantiated or misleading sustainability claims has even resulted in litigation. Coca-Cola is attributed as the number one plastic polluter and critics of the company have filed suit over their alleged greenwashing attempts. In *Earth Island Institute v. Coca-Cola*,<sup>59</sup> the plaintiff alleges that various of Coca-Cola's statements violate consumer protection laws including a tweet saying, "Business and sustainability are not separate stories for The Coca-Cola Company—but different facets of the same story."<sup>60</sup> That is one example of many where top companies must defend against allegations of greenwashing.<sup>61</sup> Eco-conscious consumers are not the only group to call out companies whose only commitment to a cause is through eye-catching marketing techniques. In addition to greenwashing, companies can fall prey to rainbow (or pink) washing (marketing ploys targeting the LGBTQ+ community), blue washing (to cover human rights violations), and others.<sup>62</sup> Companies who seek to benefit from the consumption of the socially conscious public must demonstrate commitment by embedding such values into their culture, rather than depending on their marketing departments.

### B. *The Benefits of a Strong Company Culture*

A company culture that aligns with prospective employees' values has been shown to be effective in recruiting and retaining workers.<sup>63</sup> Three-

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<https://www.forbes.com/advisor/investing/greenwashing-esg/>  
[<https://perma.cc/J75C-SLNS>].

<sup>59</sup> *Earth Island Inst. v. Coca-Cola Co.*, No. 2021 CA 001846 B, 2022 WL 18492133 at \*2 (D.C. Super. Ct. Nov. 10, 2022).

<sup>60</sup> Clara Hudson, *Coca-Cola Wins in Greenwashing Suits Show Hazy Marketing Limits*, BLOOMBERG L. (Dec. 29, 2022, 3:00 AM), [https://www.bloomberglaw.com/bloomberglawnews/securities-law/X9V9SCKO000000?bna\\_news\\_filter=securities-law#jcite](https://www.bloomberglaw.com/bloomberglawnews/securities-law/X9V9SCKO000000?bna_news_filter=securities-law#jcite) [<https://perma.cc/J5JF-RHXT>].

<sup>61</sup> *Id.*

<sup>62</sup> See Ccrave, *It's a Trap; How to Beware of Greenwashing, Pinkwashing and Bluewashing*, MEDIUM (Oct. 1, 2021), <https://ccrave.medium.com/its-a-trap-how-to-beware-of-greenwashing-pinkwashing-and-bluewashing-b71badebb82b> [<https://perma.cc/G7TN-ZMGS>].

<sup>63</sup> Benjamin Larker, *Company Values Essential for Attracting and Retaining Talent Says LinkedIn*, FORBES (Apr. 23, 2023, 3:42 AM), <https://www.forbes.com/sites/benjaminlaker/2023/04/19/company-values-essential-for-attracting-and-retaining-talent-says-linkedin/?sh=e0e210e231e1> [<https://perma.cc/YNN7-8UE7>] ("[I]t's clear that company values are becoming increasingly essential for attracting and retaining talent."); see *VAST Data's Meteoric Growth Continues, Exceeds \$100 Million ARR Within Three Years*, VAST DATA (Mar. 15, 2023), <https://www.vastdata.com/press-releases/vast-data-meteoric-growth-continues> [<https://perma.cc/XCH6-UTXD>] (attributing record growth to strict adherence to core values, in part because, of their focus on "a single ethos to 'challenge

quarters of Millennials have stated that they consider a company's social and environmental commitments when deciding whether to work for that company.<sup>64</sup> An even higher percentage desire to become active participants in improving the company's commitments to these values.<sup>65</sup> Studies also show that Gen Z employees are interested in joining companies that are committed to social values.<sup>66</sup> A strong company culture around these values may lead to a reduction in a company's labor costs, as executives and lower-level employees may be more likely to accept lower compensation in order to work for a socially responsible company with a strong identity; for example, in one study, seventy-five percent of Millennials responded that they would take a pay cut to work for a socially responsible company.<sup>67</sup> Increased employee satisfaction and retention correlates with increased productivity.<sup>68</sup> This, in turn, may result in more efficient business operations and enhanced customer service. It also helps create a better relationship between the company and its employees. A shared connection around a strong company culture that aligns with employees' values has become a very important asset in the post-pandemic era.<sup>69</sup> Studies have shown that as potential employees weigh a variety of factors when looking for a job, finding employment that aligns with their values is one of the most significant considerations, possibly even more than a higher wage.<sup>70</sup> People now seek

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everything”); Aaron De Smet et al., ‘*Great Attrition*’ or ‘*Great Attraction*’? *The Choice is Yours*, MCKINSEY Q. (Sept. 8, 2021), <https://www.mckinsey.com/capabilities/people-and-organizational-performance/our-insights/great-attrition-or-great-attraction-the-choice-is-yours> [https://perma.cc/K59S-M4QT] (presenting survey data where employees cited feeling valued, a sense of belonging, and work life balance as key drivers for resigning).

<sup>64</sup> *2024 Gen Z and Millennial Survey*, DELOITTE 3 [hereinafter *Survey*], [https://www.deloitte.com/global/en/issues/work/genz-millennial-survey.html?adobe\\_mc\\_sdid=SDID%3D742D04CC7C527AD0-1DEBDC08C95F56E1%7CMCORGID%3D5742550D515CABFF0A490D44@AdobeOrg%7CTS%3D1717594944&adobe\\_mc\\_ref=https:%2F%2Fwww.deloitte.com%2Fglobal%2Fen%2Fissues%2Fwork%2Fcontent%2Fgenz-millennialsurvey.html](https://www.deloitte.com/global/en/issues/work/genz-millennial-survey.html?adobe_mc_sdid=SDID%3D742D04CC7C527AD0-1DEBDC08C95F56E1%7CMCORGID%3D5742550D515CABFF0A490D44@AdobeOrg%7CTS%3D1717594944&adobe_mc_ref=https:%2F%2Fwww.deloitte.com%2Fglobal%2Fen%2Fissues%2Fwork%2Fcontent%2Fgenz-millennialsurvey.html) [https://perma.cc/VEW4-J3B7].

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *3/4 of Millennials Would Take a Pay Cut to Work for a Socially Responsible Company*, SUSTAINABLE BRANDS (Nov. 2, 2016), <https://sustainablebrands.com/read/org-governance/3-4-of-millennials-would-take-a-pay-cut-to-work-for-a-socially-responsible-company> [https://perma.cc/WF83-CPQA].

<sup>68</sup> Clement Bellet et al., *Does Employee Happiness have an Impact on Productivity?* 70 MGMT. SCI. 1656, 1674–75 (2023) (finding that workers are 13% more productive when happy).

<sup>69</sup> Tarver, *supra* note 3636.

<sup>70</sup> *Id.*

employment that provides them not only with income, but also with the opportunity to work for a company with which they share values.

Today, companies have a vested interest in developing and nurturing a company culture that aligns with their stakeholders' values, and also in telling the story of their company culture to as many stakeholders as possible. A strong company culture also leads to benefits for the employees. In a positive company culture, employees feel safe, heard, and appreciated; they are thus engaged and motivated to do their best work because the culture empowers them to find meaning and purpose in their jobs. In a recent study, employees responded that they best understood and felt connected to strong company culture through the company's missions and values, as well as employee recognition and the company's approach to employee performance.<sup>71</sup>

Company culture can also play a role in branding and marketing the company to consumers and to society at large, in essence acting as a form of public relations. If companies do not want to be criticized by their stakeholders for failing to embody their purported values, they need to do more than make superficial statements or prophylactic measures. By embedding their purported values into their contractual agreements (i.e., employee agreements, corporate governance, vendor and supply agreements, and corporate deal structure contracts), they can point to these concrete steps they have taken to make a difference.

A strong company culture can result in positive changes that extend beyond the individual employee-employer relationship. If some employers start doing this, they will be able to retain the best talent to work for them, causing other employers to follow suit to remain competitive. And if more employers begin to do this, it eventually becomes the norm, and other companies will need to get on board to succeed. And the model employment agreements that drafters rely on will eventually contain this type of language, resulting in broader social change.

### III. STORYTELLING & CONTRACT DRAFTING

Despite what most people think, contract drafting does not simply consist of cutting and pasting from form documents.<sup>72</sup> While contract drafters almost

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<sup>71</sup> Belle Wong, *What Is Company Culture? Definition & Development Strategies*, FORBES (Aug. 15, 2023, 7:22 PM), <https://www.forbes.com/advisor/business/company-culture/> [<https://perma.cc/THB4-2RJ6>].

<sup>72</sup> For an exploration of the many roles that the transactional lawyer may take during the negotiating, drafting, and implementing of the transactional document, see Lori D. Johnson, *Redefining Roles and Duties of the Transactional Lawyer: A Narrative Approach*, 91 ST. JOHN'S L. REV. 845, 847 (2017). See also Steven L. Schwarcz, *Explaining the Value of Transactional Lawyering*, 12 STAN. J.L. BUS. & FIN. 486 (2007).

always begin with a form or model agreement, they must tailor those documents to the particular transaction.<sup>73</sup> Drafters must also keep in mind two primary goals when revising and drafting contract language: first, to encourage the parties to perform as promised and, alternatively, to ensure that any third-party decisionmaker interprets the contract according to the parties' intentions, if needed.<sup>74</sup>

Contracts don't just represent generic transactions where parties deal at arm's length with each other in a predictable and sterile way. They very often are made up of stories of individuals and entities and their ongoing relationship. "The purposes of contracts include the building of relationships, the safeguarding of property, and the securing of legacies."<sup>75</sup> For example, a contract may represent the story of a family business being sold after the death of the owner, the story of a couple getting married where one or both have children from a previous relationship, or the story of a college athlete getting signed on to a professional team. Employment agreements, in particular, tell a variety of stories surrounding why and how individuals spend a majority of their time, earn a living to support themselves and others, and develop both professional and personal relationships. They also tell the stories of entities seeking to successfully, productively, and possibly meaningfully engage with a variety of stakeholders.

Contracts can thus be conceptualized as narratives.<sup>76</sup> Contracts are created to educate, inform, and guide the behavior of the transacting parties.<sup>77</sup> In an employment contract, such behavior includes not only the basic terms of the employment relationship like salary and job title, but also possibly the company culture that undergirds that relationship. Conceptualizing the document as a narrative assists the drafter in achieving the primary goals of

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<sup>73</sup> TINA STARK, *DRAFTING CONTRACTS: HOW & WHY LAWYERS DO WHAT THEY DO* 335 (2d ed. 2013).

<sup>74</sup> Susan M. Chesler & Karen J. Sneddon, *The Power of a Good Story: How Narrative Techniques Can Make Transactional Documents More Persuasive*, 22 NEV. L.J. 649, 653 (2022) [hereinafter Chesler & Sneddon, *Telling Tales*]; see generally SUSAN L. BRODY ET AL., *LEGAL DRAFTING* 6 (1994).

<sup>75</sup> Chesler & Sneddon, *Telling Tales* at 122.

<sup>76</sup> Susan M. Chesler & Karen J. Sneddon, *From Clause A to Clause Z: Narrative Transportation and the Transactional Reader*, 71 S. C. L. REV. 247, 267 (2019) [hereinafter Chesler & Sneddon, *From Clause A*]; see HOWARD DARMSTADTER, *HEREOF, THEREOF, AND EVERYWHEREOF: A CONTRARIAN GUIDE TO LEGAL DRAFTING* 99 (2d ed. 2008) ("Legal documents, especially agreements, have a story to tell."); Mark C. Suchman, *The Contract as Social Artifact*, 37 L. & SOC'Y REV. 91, 114 (2003) ("[A] contract, like a script, invokes familiar narrative tropes . . ."). See generally Susan M. Chesler & Karen J. Sneddon, *Once Upon a Transaction: Narrative Techniques in Drafting*, 68 OKLA. L. REV. 263, 266–68 (2016) (explaining how narrative techniques can be utilized in transactional writing).

<sup>77</sup> Chesler & Sneddon, *From Clause A*, *supra* note 7676, at 267; See Suchman, *supra* note 7676, at 92–93 (examining the different legal, psychological, and social functions of contracts).

every contract. The drafter can use narrative techniques to craft a more compelling document that better encourages the parties to perform as promised and any third-party decisionmakers to interpret that contract in line with the parties' intent.<sup>78</sup>

The form documents that drafters use as starting points in the drafting process are already rife with narrative characteristics: they are embedded with characters and plots, and they often tell the stories of the particular types of transactions.<sup>79</sup> The role of the drafter is to construct a cohesive narrative that represents a particular series of events that informs the future actions of the parties.<sup>80</sup>

Drafters can use storytelling and narrative techniques to more effectively draft contracts that achieve these goals. While there are additional techniques that drafters can employ, the following four techniques (character and voice, stock stories and counterstories, plot and alternative plot lines, and expressive language) can best assist the drafter develop and embed company culture through the employment contracts they draft.

#### A. *Character and Voice*

Contracting parties can be envisioned as characters in a story and it is the drafter's job to give them a voice in that contract. Allowing the parties to see themselves in the story gives them a voice, and thus a sense of power in the contractual relationship. This makes them more likely to become engaged with the contract. The inclusion of narrative within transactional documents can help the contracting parties become more immersed in the document and thus lead to more effective outcomes throughout the life of the transaction.

The use of narrative has been shown to cause the audience to process the presented information in a more meaningful manner and retain that information for a longer period of time.<sup>81</sup> This concept is known as narrative transportation, the "phenomenological experience of being transported to a narrative world."<sup>82</sup> Essentially, narrative transportation refers to the ability of

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<sup>78</sup> Chesler & Sneddon, *From Clause A*, *supra* note 7676, at 267; Chesler & Sneddon, *Narrative Techniques*, *supra* note 7676, at 265–68; *see* Suchman, *supra* note 7676, at 114–15.

<sup>79</sup> Chesler & Sneddon, *Telling Tales*, *supra* note 7575, at 122–127; Suchman, *supra* note 7676, at 114.

<sup>80</sup> Chesler & Sneddon, *Telling Tales*, *supra* note 7575, at 122.

<sup>81</sup> Chesler & Sneddon, *From Clause A*, *supra* note 7576, at 250; *see, e.g.*, Roger C. Shank & Tamara R. Berman, *The Pervasive Role of Stories in Knowledge and Action*, in *NARRATIVE IMPACT* 287 (Melanie C. Green, Jeffrey J. Strange, & Timothy C. Brock eds., 2002) (proposing that even basic information "is stored in our memory structured as stories").

<sup>82</sup> Melanie C. Green & Timothy C. Brock, *In the Mind's Eye: Transportation-Imagery Model of Narrative Persuasion*, in *NARRATIVE IMPACT* 315, 315–341 (Melanie C. Green, Jeffrey J. Strange, & Timothy C. Brock eds., 2002).

the narrative to engage the reader, to hold the reader's attention, to potentially influence the reader's attitudes and beliefs, and to prompt subsequent actions by the reader.<sup>83</sup>

Narrative transportation is more likely to occur if the reader identifies with the characters of the narrative.<sup>84</sup> A more favorable impression of the document may also support the reader's belief about the fairness of the document's provisions.<sup>85</sup> Moreover, narrative transportation may help the readers to problem solve and complete gaps in the document in a manner that furthers the goal of the transaction.<sup>86</sup>

This concept of narrative transportation extends to any reader of the contract, not just the contracting parties. The use of character can thus assist the drafter to meet both primary goals: to encourage the contracting parties — or characters— to perform and to ensure that third party decisionmakers interpret the contract as those characters intended.

For example, a drafter can give voice to an employee in an employment contract by acknowledging her skills, experience, and value to the company, but also her personal commitment to environmental equality and sustainability. The employer's character can also be presented by the drafter, as a company with a strong commitment not only to its stockholders, but also to its employees and the community in which it operates. In that way, the employment relationship embodied in the contract is a mutually beneficial one where both parties work together to improve the environmental and economic conditions of the broader community.

## B. *Stock Stories and Counterstories*

The form and model agreements contract drafters rely on are often embedded with stock stories. Since form documents are generalized documents that cover a broad range of situations, it is not surprising that they often reference widely recognized stock stories. For example, a prenuptial agreement often tells the story of a woman who tricks a man into marrying her so she can get his money (a femme fatale). Or the typical employment contract

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<sup>83</sup> Chesler & Sneddon, *From Clause A*, *supra* note 7576, at 255–57.

<sup>84</sup> *Id.* at 261; Annie Neimand, *Science of Story Building: Narrative Transportation*, MEDIUM (May 10, 2018), <https://medium.com/science-of-story-building/science-of-story-building-narrative-transportation-923b2701e286> [https://perma.cc/43TH-Y7XM].

<sup>85</sup> Chesler & Sneddon, *From Clause A*, *supra* note 7576, at 277.

<sup>86</sup> As seemingly comprehensive as a document may be, unanticipated situations and gaps in the terms arise. A tension between over-drafting and under-drafting thus exists. As one commentator described, “[w]hen transactional attorneys write legal documents, their fundamental job is to communicate intentions and meanings accurately through words. At the same time, however, a document should not be too much longer or more complex than necessary.” Joshua Stein, *How to Use Defined Terms to Make Transactional Documents Work Better*, 43 PRAC. LAW. 15, 15 (1997).

relationship being one of David & Goliath where the company has all of the bargaining power.

A stock story, like those mentioned above, is a story that is readily identifiable by the audience; the story need not be told in detail for the audience to understand the story, whether that means the identification of the characters, the plot, the situations, or the outcomes.<sup>87</sup> The recognition of stock stories in form documents is often beneficial because many transactions do in fact follow the narrative of the stock story.<sup>88</sup>

But as a generic stock story, it does not always represent the uniqueness of the individual parties or their transaction. Drafters often need to revise the form contract to present a counterstory, the story that actually represents the parties to the transaction. For instance, at times, people enter into prenuptial agreements where both parties have relatively equal financial resources, but they want to ensure children from an earlier relationship are protected or a family business stays in the family. And at times, the employee is highly sought-after and does have significant bargaining power in negotiating her employment contract.

The drafter as storyteller may thus need to entirely sidestep the stock story embedded within the form agreement to “reveal a new or different reality.”<sup>89</sup> The drafter can use a variety of narrative techniques to supplement the stock story, to supplant the stock story, or to counter the story. For one, the drafter can use the recitals or background section to tailor the form to the parties’ specific transaction.<sup>90</sup> A drafter may effectively use the recitals to consciously reframe the narrative by presenting the parties’ specific intentions and individualized background information and acknowledging the parties’ intent behind the contract, thus replacing the stock story.

By way of illustration, the recitals to an employment contract may provide background information on the employee that counters the stock story of David & Goliath. The drafter might detail the employee’s impressive educational achievements, extensive experience, and successful employment in previous positions at reputable companies. The contract might also inform

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<sup>87</sup> Chesler & Sneddon, *The Power of a Good Story*, *supra* note 7475, at 125; see Linda H. Edwards, *Speaking of Stories and Law*, 13 LEGAL COMM’N & RHETORIC 157, 171–72 (2016).

<sup>88</sup> Chesler & Sneddon, *The Power of a Good Story*, *supra* note 7475, at 125.

<sup>89</sup> Jennifer Sheppard, *What if the Big Bad Wolf in All Those Fairytales Was Just Misunderstood?: Techniques for Maintaining Narrative Rationality While Altering Stock Stories that are Harmful to Your Client’s Case*, 34 HASTINGS COMM’NS & ENT. L.J. 187, 195 (2012).

<sup>90</sup> See, e.g., Gisela M. Munoz, *Writing Tips for the Transactional Attorney*, 21 NO. 3 PRAC. REAL EST. LAW., May 2005, at 33 (describing the order of typical provisions in a contract and sharing drafting tips); DANIEL L. BARNETT, PUTTING SKILLS INTO PRACTICE: LEGAL PROBLEM SOLVING AND WRITING FOR NEW LAWYERS 108 (2014) (“Using the narrative as an organizing principle is often the simplest way to structure an agreement.”).

readers that the parties actively negotiated key terms of the employment agreement, thus presenting a narrative different than the typical unequal bargaining power of employers and employees.

### C. *Plot and Alternate Plot Lines*

Just like stories, contractual relationships can take many twists and turns. The employment relationship may be the beginning of a 20-year career culminating in becoming CEO. Or that sought-after employee may turn out to be a serial harasser or misogynist and the employment relationship needs to end quickly.

The drafter must account for all of these potential alternate plot lines when drafting the contract. The life of a transaction follows certain paths, which can be conceptualized as narrative plotlines. Each contract should be drafted to plan for a variety of potential, or alternative, plotlines. The terms of a contract set forth the sequence of events that will take place during the contract terms and provide for different contingencies, or alternative plotlines, that may occur during that time period.<sup>91</sup> Contract terms enable the parties to understand how to perform their duties in accordance with the anticipated plot. But terms should also be included that protect the parties in the event the other party to the contract breaches its obligations, thus representing a foreseeable alternative plotline. Additional terms may then be added to provide for what is to happen when disputes between the parties arise. By anticipating the various potential splits in the plot of a contract, the drafter can better create contract terms to deal effectively and efficiently with each contingency.<sup>92</sup>

From the perspective of a storyteller, the drafter must think through the life of the contract under varying fact patterns.<sup>93</sup> First, the drafter must hypothesize performance to ensure that the contract contains all of the necessary “rules” and details to assist the parties in knowing how to perform their obligations.<sup>94</sup> Second, the drafter must hypothesize nonperformance and default by addressing what happens if one or both parties fail to perform their obligations under the contract.<sup>95</sup> The contract should be drafted to effectively guide the parties through any potential disputes. At times, how a contractual relationship handles disputes, or even termination of the contractual

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<sup>91</sup> Chesler & Sneddon, *The Power of a Good Story*, *supra* note 7475, at 135; see generally D. Gordon Smith, *The “Branding Effect” of Contracts*, 12 HARV. NEGOT. L. REV. 189 (2007) (exploring the types of problems contracts attempt to address).

<sup>92</sup> Chesler & Sneddon, *The Power of a Good Story*, *supra* note 7475, at 135.

<sup>93</sup> *Id.* at 136; Susan M. Chesler, *Drafting Effective Contracts: How to Revise, Edit, and Use Form Agreements*, 19 BUS. L. TODAY 35, 36 (2009); Asaf Nahum, *Conscious Contract Drafting – Considering the “What Ifs?”*, LEXOLOGY (Apr. 7, 2014), <https://www.lexology.com/library/detail.aspx?g=f4c24857-0aa1-4f9f-9f0e-1fa5ff2ee661> [https://perma.cc/7URK-9MGN].

<sup>94</sup> Chesler & Sneddon, *The Power of a Good Story*, *supra* note 7475, at 136.

<sup>95</sup> *Id.*

relationship, can be as important as how it guides the parties' intended performance. Finally, the drafter should consider the worst-case scenario by assuming that the parties become hostile towards one another, seeking to undermine the other party at every opportunity. The contract must also provide sufficient guidance to a court or other third-party decisionmaker interpreting the contract or imposing remedies, if necessary.<sup>96</sup>

In an employment contract, the primary plot line can include ways in which the company, and to some extent the employee, will perform to further its company culture. For example, this may include an employer's duty to invest a certain amount of its profits to further a particular social good. Alternatively, the drafter should include terms that come into play only when the employment relationship is terminated. This may include a garden leave period after the employment relationship is terminated. During that time, the employer is obligated to pay the employee for a period of time usually less than 90 days, and the employee cannot take employment with another company but is also obligated to perform volunteer service in the community to further that same social good.

#### D. *Expressive Language*

Lastly, a drafter may at times need to use expressive language to draft the contract more effectively. This does not refer to excess verbiage that has no purpose, like the use of "whereas" and other legalese, but instead focuses on using descriptive language where needed to clearly express the parties' intent behind the purpose of this particular transaction and the parties' intent behind key contract terms. It helps the reader, including the transacting parties themselves, understand the motivation behind the inclusion of certain terms and why they are relevant to their particular transaction. This may help encourage the parties to perform as promised.

Expressive language is the general description of a variety of expressions and enhanced descriptions.<sup>97</sup> Although not always legally required, such expressive language can serve a powerful narrative purpose by conveying the parties' motivations, goals, and purposes for entering into the particular transaction with those specific terms.<sup>98</sup> Some may fear that additional, expressive language could lead to ambiguities, inconsistency, and uncertainty and should thus be avoided entirely in transactional documents. However, this concern, while legitimate, is overly reactionary. Ambiguity, inconsistency, and uncertainty can be created in a transactional document without the

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<sup>96</sup> *Id.*

<sup>97</sup> See generally Karen J. Sneddon, *Not Your Mother's Will: Gender, Language and Wills*, 98 MARQ. L. REV. 1535 (2015); Deborah S. Gordon, *Reflecting on the Language of Death*, 34 SEATTLE U. L. REV. 379 (2011).

<sup>98</sup> Chesler & Sneddon, *The Power of a Good Story*, *supra* note 7475, at 132; Sneddon, *supra* note 9697, at 1566–67.

inclusion of expressive language. Thus, while a drafter must be careful to avoid creating any of these types of interpretation errors while including expressive language, and only using such language only where it is useful, the value that can be added outweighs the concerns.

For example, when transacting parties desire to enter into an independent contractor arrangement, as opposed to a traditional employment relationship, it is often imperative that the contract make a clear distinction between the two legal relationships to avoid disputes between the parties and to ensure a court appropriately interprets the contract, if necessary. A drafter's use of expressive language can be helpful in this regard. The drafter can include in the recitals the parties' intent behind their choice, such as the independent contractor's desire not to have an exclusive working relationship with this company, and to have flexible, variable work hours and locations. From the standpoint of the start-up company, the recitals might include its financial interest in not providing traditional employment benefits or committing to a long-term employment relationship. Such expressive language may also assist a court if tasked with interpreting the contract to determine whether the contract's terms are aligned with the parties' intent to create an independent contractor arrangement. In sum, the above-discussed narrative techniques of character and voice, stock stories and counterstories, plot and alternative plot lines, and expressive language can be used by contract drafters to best tell the stories of the transactions behind the document, and to develop and embed company culture through the employment contracts they draft.

#### IV. DEVELOPING COMPANY CULTURE AFTER THE #METOO MOVEMENT

Activist Tarana Burke originally coined the phrase “me too” in 2006. In 2017, the #MeToo hashtag went viral and alerted the world to the magnitude of the problem of sexual assault and harassment in the workplace. This resulted in the exposure and ultimate firing of many public figures. There have been many responses to the #MeToo movement from both public actors/governments as well as private actors/companies. In response to the public revelation of copious examples of egregious sexual harassment in the workplace and the resulting claims made by women against their employers,<sup>99</sup>

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<sup>99</sup> Sydney Cone et al., *Workplace Conduct Still Needs Improvement After #MeToo*, BL, (Oct. 24, 2022, 1:00 AM), <https://news.bloomberglaw.com/daily-labor-report/workplace-conduct-still-needs-improvement-after-metoo> [<https://perma.cc/F3CF-5F78>]; Stefanie K. Johnson et al., *Has Sexual Harassment at Work Decreased Since #MeToo?*, HARV. BUS. REV. (July 18, 2019), <https://hbr.org/2019/07/has-sexual-harassment-at-work-decreased-since-metoo> [<https://perma.cc/N4NE-AZWX>]; OFF. OF ENTER. DATA & ANALYTICS, U.S. EQUAL EMP. OPPORTUNITY COMM'N DATA HIGHLIGHT NO. 2, SEXUAL HARASSMENT IN OUR NATION'S WORKPLACES (2022).

companies scrambled to both limit future misconduct and protect themselves from liability. While applauded, responses to date have most often been reactionary and piecemeal.<sup>100</sup> To put an end to workplace sexual misconduct and create a safe working environment for all employees, companies must take a broader approach. They should aim to develop a company culture that empowers women, disincentivizes and punishes sex-based misconduct, and creates a working environment where all employees regardless of gender work collaboratively to end workplace sexual misconduct.

### A. *Empowering Women and Preventing Workplace Sexual Harassment*

In the wake of the #MeToo movement, there has been a significant increase in the prevalence of what Arnow-Richman, Hicks, and Solomon refer to as “MeToo termination rights” in executive employment contracts.<sup>101</sup> Such contract terms expand the definitions of causes that permit companies to terminate CEOs without severance pay because of sex-based misconduct. By expanding the definition of cause, companies increased their ability to terminate executives in the face of sex-based misconduct.<sup>102</sup> This term may also act as a deterrent for executives to engage in such impermissible behavior.

The #MeToo movement also spurred governments to act in response. There are now restrictions on the ability of employers to use Non-Disclosure Agreements to keep employees silent about potential sexual misconduct in the workplace, and some states have expanded requirements for training and lengthened the statute of limitations for sexual misconduct claims.<sup>103</sup>

While such efforts are certainly laudable and have made some strides, companies should also address these issues by developing and embedding a strong company culture of no tolerance through their employment contracts. Companies have the ability to act more quickly and more vigorously to

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<sup>100</sup> *Id.*; Kimtee Kundu, *The #MeToo Movement: Investigating the Lasting International Impacts*, HARV. INT’L REV. (Jan. 31, 2024), <https://hir.harvard.edu/metoo-movement-international/#:~:text=For%20those%20who%20could%20connect,over%20thirteen%20percent%20since%202017> [https://perma.cc/24JU-UJ23] (suggesting that improvements regarding sexual violence prevention in the wake of the #MeToo movement can be attributed to new legislation and other initiatives).

<sup>101</sup> Rachel Arnow-Richman et al., *Do Social Movements Spur Corporate Change?*, 98 IND. L. J. 125, 133 (2022).

<sup>102</sup> *Id.* at 142.

<sup>103</sup> John F. Birmingham, *Speak Out Act Speaks (But Not Dramatically)*, NAT’L L. REV. (Dec. 19, 2022), <https://natlawreview.com/article/speak-out-act-speaks-not-dramatically> [https://perma.cc/76J4-ENN4]; Doreen S. Martin et al., *The List of States Regulating Non-Disclosure Provisions Continues to Grow*, VENABLE LLP (June 6, 2024), <https://www.venable.com/insights/publications/2024/06/the-list-of-states-regulating-nondisclosure> [https://perma.cc/6PL4-J239].

eliminate sexual wrongdoing in their own workplaces, which in turn can positively impact society more broadly. Below is an illustration of how a company can develop and embed a company culture of empowering women and preventing sexual misconduct in the workplace through effective contract drafting techniques. This illustration is based on a chapter in *Feminist Judgments: Corporate Law Rewritten*.<sup>104</sup> The chapter is comprised of a rewritten employment agreement based on the agreement originally entered into between Harvey Weinstein and the Weinstein Company Holdings LLC (TWC) in 2015 as drafted by one of the authors of this article, Susan Chesler, and commentary by Professor Alexandra Andhov.<sup>105</sup> The rewritten employment agreement, while never actually entered into, is an example of how contract drafting and narrative techniques could have been used to potentially not only prevent Weinstein from continuing his reprehensible behavior but also to create an atmosphere of no tolerance for sexual misconduct at TWC and beyond.

## B. *Illustration*

### 1. *Before*

On October 20, 2015, Weinstein and TWC entered into an employment agreement (2015 Agreement).<sup>106</sup> In 2015, Weinstein was co-chair and CEO of TWC, and the 2015 Agreement contained revised terms and conditions of his continued employment at TWC.<sup>107</sup> The agreement was executed by Weinstein both on behalf of TWC and for himself.<sup>108</sup> By October 2015, TWC was aware of at least one woman, Ambra Battilana Gutierrez, who made claims of sexual assault and harassment against Weinstein.<sup>109</sup> The 2015 Agreement represented one way in which Weinstein was able to maintain his control over TWC, and it arguably served to enable Weinstein to continue his behavior of sexual misconduct with little to no consequence.<sup>110</sup>

The 2015 Agreement contained a very broad indemnification clause, providing that TWC would indemnify Weinstein for any expenses and settlement amounts in connection with a lawsuit against him of “any nature”

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<sup>104</sup> ALEXANDRA ANDHOV, *Commentary on Agreement Between Harvey Weinstein and The Weinstein Company Holdings LLC, as of October 20, 2015*, in *FEMINIST JUDGEMENTS: CORPORATE LAW REWRITTEN* 161, 161 (Anne M. Choike et al. eds., 2023).

<sup>105</sup> Alexandra Andhov is Associate Professor at the University of Copenhagen Faculty of Law.

<sup>106</sup> ANDHOV, *supra* note 104, at 161.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 163.

<sup>110</sup> *Id.* at 161, 165.

so long as he “acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation.”<sup>111</sup> In addition to being so broad in scope, the clause also provided that Weinstein “shall be entitled to a presumption that [he] acted in good faith.”<sup>112</sup> The 2015 Agreement also provided that in the event Weinstein was sued for sexual harassment or other misconduct, he was required to pay TWC liquidated damages of “\$250,000 for the first instance, \$500,000 for the second such instance, \$750,000 for the third such instance, and \$1,000,000 for each additional instance.”<sup>113</sup> In other words, Weinstein’s payment of these fines allowed Weinstein to “cure” his misconduct.<sup>114</sup> While such an escalation clause might serve to deter some employees from continuing to engage in the proscribed misconduct, for a wealthy Weinstein, who ultimately owned TWC, such payments did not act as a disincentive.<sup>115</sup>

While the 2015 Agreement did permit TWC to terminate Weinstein for “cause,” it essentially tied the Board’s hands such that it was unable to terminate him on the grounds of sexual misconduct.<sup>116</sup> The clause defined cause to include “a willful violation of the Code of Conduct if it is determined by a vote of a majority of the Board, including the vote of at least one of the Co- Chairmen, that such violation has caused serious harm to the Company.”<sup>117</sup> The Co-Chairmen at the time were Weinstein and his brother Bob Weinstein.<sup>118</sup> In addition, the termination clause permitted Weinstein to cure his misconduct, which based on the terms of the 2015 Agreement itself would be satisfied by the payment of liquidated damages to TWC.<sup>119</sup> This clause thus restrained the ability of TWC’s board to take any meaningful action against Weinstein for his continued sexual misconduct.<sup>120</sup> Additionally, the 2015 Agreement provided that any claim against TWC by Weinstein, or any claim against Weinstein by TWC “arising from, out of or relating to this Agreement, the breach thereof, or the employment or termination thereof of you” must be resolved through mediation or, if that is unsuccessful, through arbitration.<sup>121</sup> This would include claims relating to Weinstein’s sexual misconduct, again serving to continue the secrecy and cover-up of such claims from potential future victims and the public.

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<sup>111</sup> *Id.* at 166; First Amended Class Action Complaint, Exhibit B at 4–5, Geiss et al. v. The Weinstein Company Holdings LLC et al., No. 1:17-cv-09554 (S.D.N.Y. Dec. 6, 2017) [hereinafter FAC].

<sup>112</sup> FAC at 5.111

<sup>113</sup> FAC at 11.

<sup>114</sup> ANDHOV, *supra* note 104104, at 167.

<sup>115</sup> *Id.* at 167–68.

<sup>116</sup> *Id.* at 169.

<sup>117</sup> FAC, *supra* note 111111, at 13.

<sup>118</sup> ANDHOV, *supra* note 104104, at 170.

<sup>119</sup> *Id.* at 169.

<sup>120</sup> *Id.*

<sup>121</sup> FAC, *supra* note 111111, at 16.

Weinstein's control over TWC is revealed through both what is contained in the Agreement's express terms and what is omitted from the Agreement. There is no language supporting the notion that TWC cared to eliminate, or even lessen, the known predatory behavior of its employee Weinstein. To the contrary, the contract's language in both substance and style lead the reader to the conclusion that TWC would ignore, and arguably condone, such misconduct.

## 2. *After*

The 2015 Agreement did not contain any recitals or background section. The rewritten agreement does; the added background section gives the reader insight into the intent of the parties, primarily of TWC, to address the past misconduct of Weinstein, and to deter Weinstein and all of TWC's employees from engaging in such conduct in the future.<sup>122</sup> It states, in part:

TWC is a multimedia film and television production and distribution studio that is committed to ensuring that the organization, its employees, and others associated with it do not violate applicable rules, regulations, or norms. TWC recognizes that its executive employees, including you, set the tone for the culture of the organization. TWC recognizes its stature as a leading Hollywood studio with significant worldwide influence on the film and television industries as well as on broader cultural norms. TWC also recognizes the unequal power dynamics within the film and television industries, in particular the power that studio executives possess. TWC also recognizes that the film and television industries consistently undervalue women through their portrayal of women using gendered stereotypes, heteronormativity, and overemphasis of female characters' physical appearance. Such considerations, among others, necessarily animate this Agreement. Therefore, TWC wishes to highlight, among other provisions in this Agreement, those that pertain to creating and ensuring both a safe workplace and working relationships for all of its employees, free from sexual harassment, sexual assault, and any form of sexual misconduct . . .<sup>123</sup>

This section also directly addresses the fact that TWC was aware of Weinstein's misconduct prior to executing this employment agreement: "In spite of its knowledge about currently existing claims of Sexual Wrongdoing

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<sup>122</sup> ANDHOV, *supra* note 104104, at 171–72.

<sup>123</sup> *Id.* at 179.

against you, TWC believes that it can create and ensure a safe workplace free from Sexual Wrongdoing in the future and can take concrete steps now to fairly treat prior complainants . . . ”<sup>124</sup>

The 2015 Agreement does not use the words “sexual harassment” or anything along those lines; it does not expressly address Weinstein’s known predatory behavior.<sup>125</sup> The rewritten employment agreement does. For one example, it includes a broad definition of sexual wrongdoing:<sup>126</sup>

“Sexual Wrongdoing” means non-consensual sex or other forms of unwanted sexualized behavior, including but not limited to sexual assault, sexual harassment, verbal or physical advances, sexually explicit statements, and other unprofessional and inappropriate conduct.<sup>127</sup> Sexual Wrongdoing is not limited to behavior at the physical workplace itself but also includes behavior that occurs while working off-site, at TWC-sponsored events, or traveling for business.”<sup>128</sup>

This expansive definition is aimed at including all the types of misconduct that Weinstein (and others in powerful positions) often used against their victims.

While under the 2015 Agreement, TWC was required to indemnify Weinstein for claims against him, the rewritten agreement provides for the opposite result. It states: “[Weinstein] must indemnify and hold TWC harmless from any claim, liability, loss, cost, or expense incurred by TWC that arises out of or relates to claims, potential claims, or legal proceedings against you for Sexual Wrongdoing. This applies to past, present, and future claims or potential claims of that nature.”<sup>129</sup> Weinstein is also required to pay TWC \$1,000,000 in liquidated damages for each claim, potential claim, or legal proceeding that is made against Weinstein or TWC relating to Weinstein’s alleged Sexual Wrongdoing.<sup>130</sup>

In the rewritten agreement, TWC has much broader authority to terminate Weinstein for his misconduct, without requiring Weinstein or his brother to approve such termination. It provides that “TWC may, at its sole discretion and by a vote of a majority of the members of the Board exclusive of

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<sup>124</sup> *Id.*

<sup>125</sup> *See id.* at 172–73.

<sup>126</sup> *Id.* at 179.

<sup>127</sup> *Id.* at 180.

<sup>128</sup> *Id.* at 180 (stating that “Sexual Wrongdoing does not include any unfounded claims for which there is no credible evidence to support the allegation” in an effort to respond to the expected criticism that unfounded claims of sexual wrongdoing may be brought against Weinstein simply to extort money from him).

<sup>129</sup> *Id.* at 181.

<sup>130</sup> *Id.* at 182.

Weinstein, terminate him for cause.”<sup>131</sup> Cause is specifically defined to include a breach by Weinstein of any of his duties relating to Sexual Wrongdoing.<sup>132</sup> Weinstein is not permitted to “cure” his misconduct by payment to TWC and upon termination, TWC has the option of repurchasing Weinstein’s shares in TWC.<sup>133</sup>

In an effort to respond to the pre-existing claims against Weinstein for his sexual wrongdoing, the rewritten agreement requires Weinstein and TWC to retroactively eliminate any non-disclosure agreements (NDA) that may have been contained in prior settlement agreements, and such NDAs were not permitted for any future settlement agreements.<sup>134</sup> Weinstein was also required to personally compensate victims for any expenses they incurred as a result of making such claims against him, and to issue an apology.<sup>135</sup> The mandatory arbitration requirement from the 2015 Agreement was eliminated for any claims between Weinstein and TWC relating to Weinstein’s sexual wrongdoing.<sup>136</sup> These terms aim to lift the veil of secrecy over these claims against Weinstein.

Weinstein was not the only party who was contractually obligated to respond to claims of sexual wrongdoing against him. Under the rewritten agreement, TWC was required to conduct timely, neutral investigations into any claims of sexual wrongdoing. It provides:

Upon receipt of any complaint, information, or knowledge of suspected Sexual Wrongdoing, TWC must immediately undertake a prompt, impartial, and thorough investigation conducted by qualified personnel, preserving confidentiality to the extent possible. TWC must retain outside counsel no later than 24 hours after receipt of such complaint, information, or knowledge to lead the investigation. TWC must take any reasonable steps necessary to ensure that all persons involved, including complainants, witnesses, and alleged perpetrators, are accorded due process to protect their rights to a fair and impartial investigation. TWC must also take any reasonable steps necessary to protect anyone who in good faith reports, provides information, or assists in any investigation about suspected Sexual Wrongdoing from any retaliation or Adverse Action, including but not limited to

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<sup>131</sup> *Id.* at 185.

<sup>132</sup> ANDHOV, *supra* note 104104, at 185.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 182.

<sup>135</sup> *Id.* at 183.

<sup>136</sup> *Id.* at 186.

taking disciplinary action against TWC's employees or Board members.<sup>137</sup>

### C. *Analysis*

As Professor Alexandra Andhov states in her Commentary on the rewritten Weinstein agreement,

[c]arefully drafted contractual provisions give parties the power to improve the balance of rights, obligations, and liability to achieve a more just society. A contract is a legal tool that addresses one relationship at a time. However, a contract between a corporation and a CEO and other executives has a much greater consequence. As demonstrated by the Rewritten Agreement, a contract can transform the relationship across an entire organization, provide the voice for other stakeholders, and foster a culture that respects women's dignity.<sup>138</sup>

The use of storytelling techniques in the rewritten agreement set the tone for a company culture that TWC **could have** developed around sexual wrongdoing, and that could have had an impact across the entertainment industry and possibly beyond.

Weinstein's past and potential victims became characters in the transactional story and were given a voice in the rewritten employment agreement. The stock story surrounding sexual harassment at that time was overhauled in this revised contract. By adding expressive language to the recitals and some of the key operative terms, the readers of this contract begin to see a story not necessarily of a sexual predator with great bargaining power, but of a company committed to not continuing on that path. Instead, the contract language was used to elucidate a company committed to empowering women and ensuring a safe workplace and working relationships for all of its employees, free from sexual misconduct.

The rewritten agreement included contract terms that addressed not only the desired and anticipated plot of reducing sexual harassment and empowering women in the workforce, but also alternative plot lines, such as what would happen in the wake of continuing sexual wrongdoing by Weinstein or any of TWC's employees.

Imagine what might have happened if the 2015 Harvey Weinstein agreement contained this drafting language and operative terms. While it is impossible to truly know whether the rewritten agreement would have prevented Weinstein from attempting to continue engaging in sexual

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<sup>137</sup> *Id.* at 184.

<sup>138</sup> *Id.* at 178.

misconduct, it is clear that it would have given TWC the tools to respond more meaningfully and in a way that aligns with a company culture of empowering women and preventing sexual misconduct. The claims against Weinstein may have been made public much earlier than they were, and the industry's response to sexual wrongdoing may have been more robust and swifter. If a company like TWC, at the time a leader in the film and television industries, developed a strong culture of no tolerance for sexual wrongdoing, it could have had a great influence on other companies in the industry. Such a company culture may certainly have given TWC the competitive advantage on attracting and retaining talent, and thus have served as incentive for other companies to act in the same way. The restrictions on NDAs, which took the government years to enact, could have been instituted almost immediately. And the public's knowledge about the extent of sexual wrongdoing would have been revealed earlier, which can only have done more good than harm.

These same drafting techniques can be used to develop and embed a company's culture relating to a myriad of social issues through their employment agreements. For example, it is not difficult to imagine how an employment agreement could be used to develop a company culture around diversity and inclusion (D&I). In addition to a robust background section detailing the parties' intentions to create a diverse and inclusive workplace, the contract could provide for equity for all groups across company policies, programs, and practices (including pay equity), and hold executive leaders accountable for driving D&I outcomes.<sup>139</sup>

One aspect of company culture that is becoming increasingly important to a variety of stakeholders revolves around Environmental, Social, and Governance (ESG). The following section will discuss the rising relevance of ESG in the workplace and address how an employer can develop a company culture around ESG values through contract drafting.

## V. DEVELOPING COMPANY CULTURE AROUND ESG

Companies' ESG credentials are gaining increasing importance, reflecting a shift in expectations from investors, the workforce, customers, and regulators.<sup>140</sup> ESG refers to a broad range of environmental, social, and governance factors against which companies can be assessed by a variety of stakeholders. Traditionally, these concepts have focused on investors and regulators wanting to ensure that companies follow basic guidelines surrounding ESG, like human rights violations by suppliers of goods or labor.

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<sup>139</sup> See *id.*; Chesler, *supra* note 1514, at 144–50; Adam N. Eckard, *Contracting for Social Change*, 32 U. MIA. BUS. L. REV. 255, 285–88, 290–91 (2024).

<sup>140</sup> Beshkardana, *supra* note 4949, at 220.

The environmental aspect of ESG is most often a measure of a company's impact on the natural environment, such as a company's carbon footprint.<sup>141</sup>

Due in part to a declared policy change by the prominent national business group Business Roundtable, as well as the growth of benefit corporations, efforts to incorporate ESG into corporate purpose has grown since 2020.<sup>142</sup> The Business Roundtable represents the CEOs of America's leading companies and in 2019, it redefined the purpose of corporations to "promote an economy that serves all Americans."<sup>143</sup> This was a shift away from the shareholder profit-driven purpose of corporations. At around the same time, there was a growth in benefit corporations (B-corps), which are corporations that are expressly authorized to pursue public interest alongside profit. To be classified as a B-corp, the company must have an explicit social or environmental mission.<sup>144</sup>

Even outside the realm of B-corps, companies' ESG credentials are gaining increasing momentum. This reflects a shift in expectations from the workforce, among other stakeholders, for employers to act in ways that are aligned with the values enmeshed in ESG credentials. This focus on ESG values has also had a positive impact on companies' overall success.<sup>145</sup> In his 2021 letter to CEOs, Blackrock's CEO Larry Fink stated that "companies with better ESG profiles are performing better than their peers" and are enjoying a "sustainability premium" due to their efforts in this regard.<sup>146</sup> This statement, by the CEO of the world's largest asset manager at the time, was intentionally focused on companies' varied stakeholders, not just their shareholders.

In the employment context, the environmental aspect of ESG includes things like sustainable commuting and volunteering for climate change organizations. The social aspect measures how employers treat their workforce, customers, suppliers, and the wider community. It includes a company's approach to gender, diversity, equality, and human rights.<sup>147</sup> The

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<sup>141</sup> *ESG: Environmental, Social and Governance Investing Explained*, IMD (Jan. 2024), <https://www.imd.org/blog/sustainability/esg-environmental-social-and-governance/> [https://perma.cc/U82C-FZY9].

<sup>142</sup> Shill & Strand, *supra* note 32, at 309.

<sup>143</sup> *Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans'*, BUS. ROUNDTABLE (Aug 19, 2019), [https://www.csulb.edu/sites/default/files/document/business\\_roundtable.pdf](https://www.csulb.edu/sites/default/files/document/business_roundtable.pdf) [https://perma.cc/WY9Q-MA8B].

<sup>144</sup> Shill & Strand, *supra* note 32, at 313.

<sup>145</sup> See Jun Xie et al., *Do Environmental, Social and Governance Activities Improve Corporate Financial Performance?*, 28 BUS. STRAT. & ENV'T. 286, 297–98 (2018); see also Harrison G. Hong & Inessa Liskovich, *Crime, Punishment and the Halo Effect of Corporate Social Responsibility*, (NAT'L BUREAU OF ECON. RSCH., Working Paper Series No. 21215, 2015) (finding that companies with higher CSR ratings receive better settlements from prosecutors and have higher market valuations).

<sup>146</sup> Fink, *supra* note 22.

<sup>147</sup> *ESG: Environmental, Social and Governance Investing Explained*, *supra* note 141143.

governance aspect measures how a company operates in terms of leadership, executive pay, internal controls, and shareholder rights. It includes, for example, a company's whistleblower policies and pay equity audits.<sup>148</sup>

For purposes of this article, we focus on how companies can use contract drafting to develop and embed a strong company culture surrounding the environmental prong of ESG. First, we discuss the rise in importance of ESG credentials, especially the environmental prong, among employees. Because developing a strong company culture that aligns with the values of its employees is beneficial to the overall success of the company, we explain how a company can better leverage their employment contracts by incorporating the four narrative drafting techniques discussed in Part III. Lastly, we provide a concrete illustration of contract drafting language that companies could use to achieve that goal.

#### A. *Sustainability and ESG in the Workplace*

As explained above, ESG has emerged as a key factor in engaging today's workforce, with one in three employees preferring to work for companies that are responsible to all stakeholders, not just investors and shareholders.<sup>149</sup> Millennial and Gen Z employees are heavily influenced by employers' ethical values in choosing where they work, and a recent study has shown that ESG values are among the most significant.<sup>150</sup> While many of these same Gen Z employees may not enter into formal employment contracts with their employees, often being at-will employees or possibly independent contractors, highly-skilled and compensated employees typically do. But because contract drafting language can, and does, have an advantageous impact on parties not subject to the agreement and society more broadly, contracts can still be effectively used to meet Gen Z employees' interests. This is particularly true with respect to embedding company culture because the company culture developed and promoted based on executive-level employee contracts will necessarily trickle down throughout the entire organization.

Some U.S. companies have begun to successfully incorporate these values into their business operations. For example, as part of its annual reporting on ESG, Home Depot highlighted its achievements in focusing on its employees, operating sustainably, and strengthening its communities. The company has invested more than 1 million hours per year in training to help front-line employees advance in their careers, aims to produce or procure 100% renewable energy to operate its facilities by 2030, and has plans to spend \$5

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<sup>148</sup> *Id.*

<sup>149</sup> Fatima Fasih, *ESG Success: Employee Engagement Best Practices*, SAFETYSTRATUS (Apr. 1, 2022), <https://www.safetystratus.com/blog/esg-success-employee-engagement-best-practices/> [<https://perma.cc/GK8F-7F79>].

<sup>150</sup> *Id.*

billion per year with diverse suppliers by 2025.<sup>151</sup> In addition, General Motors won the Sustainability Leadership Award from Business Intelligence Group in 2022 and was among Diversity Inc.'s top 50 companies for diversity for a seventh consecutive year in 2021. According to its latest Sustainability Report, the automaker provided \$60 million in grants to more than 400 U.S. nonprofits focusing on social issues, and it has agreements in place to use 100% renewable electricity at its U.S. sites by 2035.<sup>152</sup>

While such companies' efforts should be lauded, most companies are not as successful in embedding a strong company culture of environmental values to better attract and retain employees. Companies have traditionally relied on corporate social responsibility (CSR) concepts to do so and have failed to consider contract drafting as an even more valuable tool. Professor Jonathan C. Lipson<sup>153</sup> agrees, arguing that instead of relying on CSR and the law of corporate governance, companies should look to contract law to more effectively achieve social good: "Where corporate governance is largely discretionary and permissive, contract can create legally recognized and binding commitments; where corporate law is general and oblique, contract can be specific and tailored; where corporate law operates on (and within) entities, contract can bridge entities, and in so doing can transmit social norms to distant places with serious [ESG] challenges."<sup>154</sup>

A company's use of contracts as a means of achieving social responsibility has the potential of being more impactful than a company's CSR policies.<sup>155</sup> Yet "contract as a mechanism to advance ESG goals is surprisingly underdeveloped."<sup>156</sup> Contracts can provide an incentive for the transacting parties to perform in accordance with their agreed-upon social responsibility terms in a way that traditional CSR norms cannot.<sup>157</sup> Contract terms carry the weight of legal enforcement and the potential for assessment of remedies.<sup>158</sup> And contracts can have a broader reach than internal CSR policies.<sup>159</sup>

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<sup>151</sup> *ESG Report 2022*, HOME DEPOT, [https://corporate.homedepot.com/sites/default/files/2022-08/2022\\_ESG\\_Report\\_FINAL\\_0.pdf](https://corporate.homedepot.com/sites/default/files/2022-08/2022_ESG_Report_FINAL_0.pdf) [<https://perma.cc/RAW9-NFQP>].

<sup>152</sup> *2023 Sustainability Report: Journey to Zero*, GEN. MOTORS 4, 8, [https://www.gm.com/content/dam/company/docs/us/en/gmcom/company/GM\\_2023\\_SR.pdf](https://www.gm.com/content/dam/company/docs/us/en/gmcom/company/GM_2023_SR.pdf) [<https://perma.cc/46V7-ZFK3>].

<sup>153</sup> Harold E. Kohn Professor of Law, Temple University Besley School of Law.

<sup>154</sup> Jonathan C. Lipson, *The End(s) of Corporate Social Responsibility*, in *CONTRACTS FOR RESPONSIBLE AND SUSTAINABLE SUPPLY CHAINS* 125, 126 (Susan A. Maslow & David V. Snyder eds., 2023).

<sup>155</sup> Jonathan C. Lipson, *Promising Justice: Contract (as) Social Responsibility*, 2019 WISC. L. REV. 1109, 1115 (2019); Lipson, *supra* note 154, at 126; Lipson, *supra* note 1414, at 2.

<sup>156</sup> Lipson, *supra* note 154, at 136.

<sup>157</sup> Lipson, *supra* note 1414, at 3.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

Specifically, companies can draft their employment contracts to better define and implement a company culture surrounding their commitment to environmental values and sustainability. According to authors Gadinis and Miazad, “the strongest indication of ESG’s strength as a movement is evidence that companies are changing their incentive structure and governance to incorporate ESG into executive performance.”<sup>160</sup> In so doing, companies are also tying individual incentives to broader social goals. Contract drafters can use storytelling techniques to effectively embed a company’s culture into their employment contracts, and thus into their workforce and beyond.

In the following section, we illustrate how a company can draft its executive employment agreements to effectively develop and embed a company culture surrounding a commitment to sustainability and environmental values.

### B. *Illustration*

As illustrated in Section IV(b)(2) above, the recitals or background section of a contract presents an ideal opportunity to apply narrative techniques to tell the story of the company’s culture. The background section can set the tone by describing the parties’ intentions to commit to a company culture focusing on environmental values. While the recitals do not create legally enforceable obligations, they provide the opportunity to present the transacting parties as characters dedicated to social values, and to express the parties’ intentions behind the terms of the contract. The recitals can explain to the reader why the company and the employee are undertaking obligations aimed at preserving the environment.

Since a company’s commitment to a workplace culture necessarily involves the buy-in and cooperation of its leadership team, executive employment agreements, in particular, should include not only requirements that the executive’s leadership duties include promoting environmental values, but also incentives. The executive’s financial pay structure and bonuses can be tied to ESG performance.

The employee benefits provided by the company should also reflect the ESG values. Some examples include allowing remote and hybrid working arrangements, providing green commuting incentives, and permitting employees to take paid volunteer leave to work for organizations and on issues relating to sustainability and the environment.

The employment agreement should also include robust whistleblowing policies. Effective whistleblowing procedures and a strong ‘Speak Up’ culture not only help to evidence a commitment to environmental values but can also ensure that breaches are prevented before they escalate.

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<sup>160</sup> Stavros Gadinis & Amelia Miazad, *Corporate Law and Social Risk*, 73 VAND. L. REV. 1401, 1419–20 (2020).

Upon termination of the employment relationship, “garden leave” can be an effective way for employers to protect themselves from unfair competition while also providing for their former employees and promoting their company culture. Most commonly used in the U.K., Australia, and New Zealand, garden leave is the transition period between an employee’s termination from the company and future employment.<sup>161</sup> During the garden leave period, the employee remains on the payroll, but is prohibited from working for a competitive business.<sup>162</sup> One way to structure garden leave would be to require that the employee participate in volunteering activities focusing on sustainability in exchange for their salary during the transition period.

To illustrate how one of these terms might be drafted for inclusion in an employment contract as a way of embedding and expanding the company’s culture around environmental values, below is a sample Sustainable Commuting operative term<sup>163</sup> and related background language:

**Background:**

Company is dedicated to creating a work culture where both the Company and its employees are committed to operating in ways that promote sustainability and decrease Company’s impact on the environment.

As such, Company is committed to promoting sustainable commuting practices by providing incentives for employees who choose to commute to work using environmentally friendly methods such as biking or public transportation.

Employee is likewise committed to using their best efforts to choose sustainable commuting methods whenever practicable. As part of Company’s executive team, Employee is also committed to encouraging other employees to consider and commit to sustainable commuting methods.

The operative term might provide as follows:

**Sustainable Commuting:**

1. Commuting Incentive:

1.1 Employee shall use best efforts to commute to work using sustainable methods, including but not limited to biking, walking, using public transportation, or carpooling.

1.2 In recognition of Employee's commitment to sustainable commuting, Company shall provide the following incentives:

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<sup>161</sup> While U.S. companies have not to a significant degree begun to include ESG-related terms in their employment contracts, companies in the United Kingdom, Australia, and New Zealand, among others, have begun to do so.

<sup>162</sup> Julia Kagan, *Garden Leave: What it is, Pros and Cons for Employers, Employees*, INVESTOPEDIA (May 6, 2024), <https://www.investopedia.com/terms/g/gardening-leave.asp> [<https://perma.cc/TK3R-RTKE>].

<sup>163</sup> The sample contract language here was drafted in part using ChatGPT 3.5.

a) Monthly Commuting Allowance: Employee may receive a monthly commuting allowance in the amount of [Amount] per month.

b) Preferred Parking: Employee may receive access to preferred parking spaces located near the workplace, subject to availability and applicable parking policies.

c) Flexible Work Hours: Employee may be eligible for flexible work hours to accommodate their commuting schedule, subject to the Company's discretion and operational requirements.

## 2. Sustainable Commuting Reporting:

2.1 Employee must provide periodic reports to Company regarding their sustainable commuting activities. Such reports will include information about the mode of transportation used, the frequency of sustainable commuting, and any related expenses incurred.

2.2 Company reserves the right to request supporting documentation, such as receipts or transportation passes, to verify Employee's sustainable commuting activities.

## C. *Analysis*

The use of storytelling techniques and inclusion of a Sustainable Commuting term in an executive employment agreement can pave the way for embedding a strong company culture. The recitals portray the company and the employee as characters dedicated to having a positive environmental impact. By adding expressive language to the recitals, the readers of this contract would see a story of commitment surrounding sustainability and environmental values. Both transacting parties are undertaking commitments above and beyond what may ordinarily be included in an employment relationship to achieve a broader social goal.

The inclusion of a sustainable commuting term in an executive employment agreement exhibits the company's and its employees' aligned commitment to the same social value. The company is undertaking a commitment to provide tangible incentives to the employee for relying on sustainable commuting methods and the employee is undertaking a promise to use their best efforts to utilize such sustainable commuting methods. The parties are "putting their money where their mouth is," so to speak.

This contract language tells the story not of a typical company dedicated solely to financial gain, or an employee focused solely on narrowly tailored job responsibilities and the freedom to choose the easiest or quickest way to work. Instead, it tells the story of both parties' commitment to a broader social good of protecting the environment.

And while the contract language is aimed at ensuring that the parties perform their contractual duties as promised, it also reflects the potential that the employee may not live up to their commitment, by including a reporting requirement. This employment agreement could also elsewhere address

possible consequences if one or both of the parties fail to perform as intended. With the threat of legal enforcement, such contract language could result in encouraging the parties to perform their obligations.

This single contract term and related language could arguably have a much bigger impact than it may seem at first glance. If included in all employee contracts entered into by the company, it may have a significant impact on the company's culture surrounding ESG values. Such a culture may in turn lead to better employee acquisition and retention. Accordingly, other companies may follow suit and the reach of this contract language is extended further into the workforce.

## VI. CONCLUSION

A sustainable commuting provision is only one method for a company to embed their company culture towards sustainability into their employment contracts. If a core value of the company is to promote sustainability and reduce their impact on the environment, they can, and should, thread this value into every fabric of the business, including in their employment agreements, corporate governance agreements, executive bonus compensation benefits, supply agreements, and vendor agreements. While contract drafting has rarely been envisioned as a means of developing and embedding company culture, it has great potential for effectively doing so. By incorporating narrative techniques, drafters can craft contracts that firmly establish a company's commitment to those social values that directly align with their stakeholders' values, including those of their employees. Stakeholders have been increasingly interested in a company's commitment to social values that align with their own and grown more critical of companies' performative attempts to satisfy them. As such, a company's success has progressively become tied to their ability to establish and communicate a strong company culture around such shared values.

And beyond having an impact on the transacting parties and even the company's workforce, contract drafting can also be used as a vehicle for broader societal change. What may begin as a single company's culture and commitment to ESG may in turn become the norm across an entire industry, and then an even broader impact on the environment and society.