


September 2017

Fourth & Inches: Marking the Line of Athletes' Free Speech (A Colin Kaepernick Inspired Discussion)

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Recommended Citation

Ryan J. McGinty, *Fourth & Inches: Marking the Line of Athletes' Free Speech (A Colin Kaepernick Inspired Discussion)*, 8 Pace. Intell. Prop. Sports & Ent. L.F. 39 (2017).
Available at: <http://digitalcommons.pace.edu/pipself/vol8/iss1/3>

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Fourth & Inches: Marking the Line of Athletes' Free Speech (A Colin Kaepernick Inspired Discussion)

Abstract

This note addresses the ongoing controversial stance that was ignited when Colin Kaepernick refused to stand for the playing of the national anthem in protest of what he deems are wrongdoings against African Americans and minorities in the United States. The scope of this note does not surround Kaepernick himself, but rather the professional NFL football player in general. Specifically, players are entitled to the full rights of free expression and free speech as human beings and public figures, up and until the line where that right is abused on the field or "on the job," thereby threatening an increase of injury to the NFL, team owners, and the public interest. With anti-American sentiment growing and only 52% of Americans that are "extremely proud" of their country, it is time to start coming together and it is time to appropriately mark that line aforementioned. Professional football players should have a heightened threshold of professional responsibilities that coincide with their elevated status on the field when performing in uniform, and in their professional setting. Through exploring an athlete's freedoms of speech and expression under the Constitution and the National Labor Relations Act while simultaneously navigating through the world of player contracts and working conditions under the NFL Collective Bargaining Agreement, this note will portray a potential solution to the growing issue at hand that when multiplied can devastate the mission of the NFL, and effectually change how our nation's youth perceive this great country.

Part II will lay the foundation of this analysis; by first giving the reader an inside look into the NFL's corporate structure and the interrelations between the NFL League Office, NFL Executive Committee, and team owners. Then I will discuss the NFLPA, the power of unions, and the role of the NFLPA in collective bargaining for the interests of the NFL players. This section will also note the relevant sections of the current 2011 NFL CBA which governs the league. Part III will illustrate a successfully executed demonstration of free speech on the professional sports stage and then introduce the reader to the Kaepernick Stance and its continued effect on our society and popular culture during a major transition of government policy. Here, the facts surrounding the issue will be put on display in a time-line fashion along with notable reactions allowing for the reader to make an independent judgment call for or against the stance and manner at which it has been presented. Furthermore, insight into the impact of social media on political protesting will reveal why the Kaepernick Stance has grown so fast, so quick. Part IV will take the reader back in time and discuss the origins of the National Anthem as well as the right of free expression under the First and Fourteenth Amendment and its continued evolution in terms of its interpretation. Finally Part V will conclude this note with an argument and a proposed solution.

Keywords

free speech, athletes, patriotism, Colin Kaepernick, free expression, NFL, football, protest

PACE INTELLECTUAL PROPERTY, SPORTS & ENTERTAINMENT LAW FORUM

VOLUME 8

FALL 2017

NUMBER 3

FOURTH & INCHES: MARKING THE LINE OF ATHLETES' FREE SPEECH (A COLIN KAEPERNICK INSPIRED DISCUSSION)

*Ryan J. McGinty**

I. INTRODUCTION

IMAGINE that you are one of the top wideouts¹ in the game, stuck playing for a coach you cannot stand, in a city that does not feel like home. To make it this far required you to put in thousands of purposeful hours practicing the fundamentals of the game you love and hate. Sure, you have thousands of fans supporting your name and the colors you wear, but most of them cannot fathom the obstacles and strife that you have endured to become the best. It is a perfect illusion. Fans believe they can relate to you out of some deep mutual passion for the game, yet they do not know your narrative that sets you apart from your teammates. Now you are cemented. You wish to join another organization but your contract and the league will not let you because a single typed written clause does not permit your free movement. You cannot negotiate; you are a slave to the game.

We have come a long way from underrepresentation for athlete's needs and wants in terms of contracting labor agreements and athletes' power to negotiate for better working conditions. Today, athletes have greater legal

* This Note is dedicated to the memory of **ALL** the American lives that have been lost as a result of the racial and systematic divide still prevalent today. May we all find peace and may economic equality be reality. "United we stand, divided we fall." See 145 CONG. REC. H3299 (1999), <https://www.gpo.gov/fdsys/pkg/CREC-1999-05-19/pdf/CREC-1999-05-19-pt1-PgH3299-8.pdf>.

¹ James Adler, *Wideout - A Definition and Explanation*, THOUGHTCO., (Feb. 13, 2017), <https://www.thoughtco.com/about-football-glossary-wideout-1334149>. (explaining that a wideout is also known as a wide receiver or sometimes simply a receiver who is an offensive player responsible for catching passes from the quarterback).

and economic freedoms within much sharpened and commercially run sports leagues, credited to the often forgotten legacies of many who changed the game.² I have displayed the perspective of a professional football player to show that there have been injustices that have infringed on the fundamental rights that players are entitled as individuals. Many still argue that the NFL has a long way to go in finding equal protection for the players under law, but at what cost?

A. Intentions

This note addresses the ongoing controversial stance that was ignited when Colin Kaepernick refused to stand for the playing of the national anthem in protest of what he deems are wrongdoings against African Americans and minorities in the United States. The scope of this note does not surround Kaepernick himself, but rather the professional NFL football player in general. Specifically, players are entitled to the full rights of free expression and free speech as human beings and public figures, up and until the line where that right is abused on the field or “on the job,” thereby threatening an increase of injury to the NFL, team owners, and the public interest. With anti-American sentiment growing and only 52% of Americans that are “extremely proud” of their country, it is time to start coming together and it is time to appropriately mark that line aforementioned.³ Professional football players should have a heightened threshold of professional responsibilities that coincide with their elevated status on the field when performing in uniform, and in their professional setting. Through exploring an athlete’s freedoms of speech and expression under the Constitution and the National Labor Relations Act while simultaneously navigating through the world of player contracts and working conditions under the NFL Collective Bargaining Agreement, this note will portray a potential solution to the growing issue at hand that when multiplied can devastate the mission of the NFL, and effectually change how our nation’s youth perceive this great country.

B. Roadmap

Part II will lay the foundation of this analysis; by first giving the reader an inside look into the NFL’s corporate structure and the interrelations between the NFL League Office, NFL Executive Committee, and team

²Brendan Schwab, *The Rights of Athletes*, CASTAN CTR. FOR HUM. RTS. L., (Sept. 23, 2013), https://www.monash.edu/data/assets/pdf_file/0006/139803/schwab-paper.pdf.

³See *infra* Solution section.

owners. Then I will discuss the NFLPA, the power of unions, and the role of the NFLPA in collective bargaining for the interests of the NFL players. This section will also note the relevant sections of the current 2011 NFL CBA which governs the league. Part III will illustrate a successfully executed demonstration of free speech on the professional sports stage and then introduce the reader to the Kaepernick Stance and its continued effect on our society and popular culture during a major transition of government policy. Here, the facts surrounding the issue will be put on display in a time-line fashion along with notable reactions allowing for the reader to make an independent judgment call for or against the stance and manner at which it has been presented. Furthermore, insight into the impact of social media on political protesting will reveal why the Kaepernick Stance has grown so fast, so quick. Part IV will take the reader back in time and discuss the origins of the National Anthem as well as the right of free expression under the First and Fourteenth Amendment and its continued evolution in terms of its interpretation. Finally Part V will conclude this note with an argument and a proposed solution.

II. INSIDE THE NFL

A. *Corporate Structure*

Headquartered in Manhattan, New York, The NFL is the industry leader of American Football, and what Business Week magazine has deemed, “one of America’s best-run businesses.”⁴ The NFL’s mission statement, maintained for over fifty years, reads: “[t]o provide our fans, communities and partners the highest quality sports and entertainment in the world, and to do so in a way that is consistent with our values.”⁵ The NFL’s obligations to its “fans, communities and partners” all starts at the top of the NFL pyramid with the Executive Committee and NFL Commissioner, Roger Goodell⁶ who has the greatest influence on league policy but must still answer to the team owners who retain the power to vote him out.⁷ The Executive Committee sits on top of the League Office which oversees administrative duties of running a professional football league, including providing and paying league lawyers

⁴ *NFL Company Overview*, NFL, <http://www.nfl.com/careers/about> (last visited June 12, 2017).

⁵ *Values*, NFL, <http://www.nfl.com/careers/values> (last visited June 12, 2017).

⁶ Mark Maske, *NFL forms new owners’ committee of Commissioner Roger Goodell’s closest advisers*, WASH. POST (Aug. 25, 2016), https://www.washingtonpost.com/news/sports/wp/2016/08/25/nfl-forms-new-owners-committee-of-commissioner-roger-goodells-closest-advisers/?utm_term=.c71c676c37b2.

⁷ *League Governance*, NFL, <http://operations.nfl.com/football-ops/league-governance/> (last visited June 12, 2017).

and lobbyists as a huge component of the often convoluted NFL corporate structure.⁸

Originally, the NFL was considered a joint venture of thirty two independently owned and operated franchises when it organized in 1920.⁹ As demand for American football grew, the corporate structure became more complex. In 1963, the individual teams opted out of acting independently in regards to licensing and marketing intellectual property and pooled their interest to form NFL Properties (“NFLP”). Under this collective agreement that ensued following *American Needle v. NFL*, NFLP became solely responsible for the licensing and marketing of trademarks and logos for each team as the advertising sector grew.¹⁰ The Court reasoned that each NFL team is a “substantial, independently owned, independently managed business, whose general corporate actions are guided or determined by separate corporate consciousnesses and whose objectives are not common.”¹¹ In 1994, NFL Ventures (“NFLV”) was created to advertise and market the NFL and its member teams.¹² This specific partnership operates several wholly-owned subsidiaries in charge of NFL’s various sectors including NFLP, NFL Enterprises, NFL Productions and NFL International.¹³

Through its progression, the NFL had operated as a nonprofit entity after receiving an exemption granted to the League Office through the Internal Revenue Code (“IRC”) § 501 (c)(6).¹⁴ This exemption, enjoyed by the League Office alone, is given to organizations that perform operations in furtherance of the industry in which they belong as opposed to its own interests, and includes: “Business leagues, chambers of commerce, real-estate boards, boards of trade, or professional football leagues (whether or not administering a pension fund for football players), not organized for profit and no part of the net earnings of which insures to the benefit of any private shareholder or individual.”¹⁵ This came about when the U.S. Court of

⁸ Will Hobson, *The NFL says its 2014 tax bill would have been \$0, and that’s not as outrageous as it seems*, WASH. POST (May 1, 2015),

https://www.washingtonpost.com/news/sports/wp/2015/05/01/the-nfl-says-its-2014-tax-bill-would-have-been-0-and-thats-not-as-outrageous-as-it-seems/?utm_term=.f3489d9e0c08.

⁹ Kristi Dosh, *Examining NFL’s tax-exempt status*, ESPN (June 4, 2013),

http://www.espn.com/nfl/story/_/id/9342479/examining-nfl-tax-exempt-status-challenged-us-senator-tom-coburn.

¹⁰ *Am. Needle, Inc. v. Nat’l Football League*, 560 U.S. 183, 184 (2010).

¹¹ *Id.* (citing *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752 (1984)).

¹² *Id.*

¹³ *Id.*

¹⁴ Drew Griffin & Sean Kennedy, *Is the NFL skirting the tax man?*, CNN (Sept. 23, 2014), <http://www.cnn.com/2014/09/22/us/nfl-nonprofit-taxes/>.

¹⁵ 26 U.S.C.A. § 501.

Appeals for the Second Circuit confronted what it called the “lexicographer’s task of deciding what is meant by a ‘business league’” in the pivotal case *National Muffler Dealer Assn. v. United States*, where they delegated the decision of IRC enforcement to the Congress and the Secretary of Treasury.¹⁶ The NFL like the National Muffler Dealer Association is an industry wide trade association, and after a series of cases deciphering the language of the Code, in 1966, Public Law 89-800 amended §501 (c)(6) to include professional football leagues as tax-exempt organizations.¹⁷ This exemption was voluntarily relinquished in 2015.¹⁸

Now, still considered a taxable trade association, each of the thirty-two franchises who share in the spoils of most of the \$10 billion spent on the NFL market, pay annual non tax-deductible assessments to the League Office to cover the overhead expenses such as office rent, executive salaries, and game officiating.¹⁹ This category of team expenses makes up the League Office’s major source of revenue which also includes sponsorships and private partnerships to help keep the office afloat. The Office’s main expense are operating expenses for general and administrative activities which can sometimes create a net loss for the Office.²⁰ This means that private sponsors of the NFL hold great importance to the league itself. As you will see, it is this note’s stance that the NFL’s sponsorships and partnerships may be vulnerable to public reaction to the NFL and how it handled the Kaepernick Stance discussed below. For example, Anheuser-Busch will continue its role as the official beer of the NFL through 2022 for the price of \$250 million per year.²¹ This is the same company that ran an “America” themed campaign with America written on the can just last year.²² If the NFL is warranting an aligned pro-America message than, while not likely, Anheuser-Busch could potentially terminate early, re-negotiate terms, ask to pay less money or find the NFL in breach of contract.

¹⁶ *Nat’l Muffler Dealers Ass’n, Inc. v. United States*, 440 U.S. 472, 477 (1979).

¹⁷ NAT’L FOOTBALL LEAGUE OFFICE: INDEP. AUDITORS’ REP., *available at* <http://edgocache.deadspin.com/deadspin/nflleagueoffice.pdf>.

¹⁸ Chris Isidore, *NFL gives up tax exempt status*, CNN MONEY (Apr. 28, 2015), <http://money.cnn.com/2015/04/28/news/companies/nfl-tax-exempt-status/index.html>.

¹⁹ *Id.*

²⁰ NAT’L FOOTBALL LEAGUE OFFICE: INDEP. AUDITORS’ REP., *supra* note 21.

²¹ Darren Rovell, *Anheuser-Busch, NFL extend partnership through 2022*, ESPN (Nov. 4, 2015), http://www.espn.com/nfl/story/_/id/14050224/anheuser-busch-nfl-extend-partnership-2022-15-billion.

²² Tom Acitelli, *Why Budweiser is the last beer that should call itself ‘America’*, CHICAGO TRIBUNE (Nov. 15, 2017), <http://www.chicagotribune.com/news/opinion/commentary/ct-budweiser-america-beers-cans-20160511-story.html>.

B. *Players' Rights as Unionized Employees*

As members of the National Football League Players Association (“NFLPA”),²³ National Football League (“NFL”) players today receive proper recognition and representation of their rights and interests.²⁴ Created in 1956, the NFLPA has combated unfair player hours and wages, along with dangerous working conditions on many platforms to help assure that players are treated fairly like any professional ought to be.²⁵ Together with the NFL, the NFLPA is party to the National Football League Collective Bargaining Agreement (“CBA”).²⁶ Pursuant to the National Labor Relations Act (“NLRA”), the union is “the exclusive representative of all the employees in [the bargaining] unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.”²⁷ Also pursuant to the NLRA, the league’s clubs, acting as the league, are obligated to bargain collectively with the unions concerning the “wages, hours, and other terms and conditions of employment” for the players.²⁸

C. *NLRB/NLRA*

To have a greater appreciation of current issues within collective bargaining in the NFL, it is essential to understand that while the NFL today is perhaps the most stable professional sports league in terms of labor disputes, it was not always so. Before unionizing, players in the NFL had been suffering from poor treatment, deplorable working conditions, and low wages without any representation.²⁹ The road to this point was not great, in fact “[T]he NFL has been the sight (sic) of the most virulent labor-relations battles in professional sports.”³⁰ After the merger between the American Football League (“AFL”) and the NFL player associations, the NFLPA was

²³The NFLPA is a labor union formed in the United States.

²⁴*About the NFLPA*, NFL PLAYERS ASSOCIATION, <https://www.nflpa.com/about> (last visited Feb. 6, 2017).

²⁵*Id.*

²⁶*Collective Bargaining Agreement*, NFL PLAYERS ASSOCIATION (August 4, 2011), <https://nflabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf>.

²⁷ 29 U.S.C. § 159; see also *Canada Labour Code*, R.S.C. 1985, c 36(1)(a).

²⁸ 29 U.S.C. § 159.

²⁹ Craig W. Palm, *Strife, Liberty, and the Pursuit of Money: Labor Relations in Professional Sports*, 4 VILL. SPORTS & ENT. L.J. 1 (1997), citing C. Peter Goplerud III, *Collective Bargaining In The National Football League: A Historical And Comparative Analysis*, 4 VILL. SPORTS & ENT. L.J. 13 n.11 (1997).

³⁰ *Id.*

created and certified by the NLRB.³¹ The impact of continuing association with the NLRB was felt when the NLRB secured a \$30 million back pay settlement in 1994, following the 1987 player strike that broke about relations as a union.³² Still, after coming back together, the NFLPA successfully charged the teams for unlawfully refusing to allow back nearly 1,300 returning striking players who wished to participate in the NFL after the strike was over.³³

The benefits of remaining a union have included an increased leverage supported by section 7 of the NLRA,³⁴ which empowers the NLRB to monitor union activity for employee rights.³⁵ Through section 7, Kaepernick or any other player has the right to express himself freely on his social media pages, although we may see an age when restrictions apply to what we say on the Web. If the NFL were to take action against Kaepernick or any other player for posts on social media, they may be at risk of violating section 8(a)(1) of the NLRA which makes it an unfair labor practice for any employer to “interfere with, restrain, or coerce employees in exercising their section 7 rights.”³⁶ This is perhaps why the NFL steers clear from including any real restrictions on players activity concerning personal accounts linked to social media. If the players were to break free from the NFLPA, then they would lose those protections and be at risk by either the organization/team they play for or the league. Lafe Solomon, General Counsel of the NLRB, referred to the epidemic saying, “[A]n employee’s comments on social media are generally not protected if they are mere gripes not made in relation to group activity among employees.”³⁷ It is because Kaepernick incited a chain reaction between other members of the NFLPA that more pressure was put on the league to take the neutral stance they took. If Kaepernick did not have such support fueled by current political turmoil and increased social media activity, then he may have been penalized, but that is speculation.

D. *The Current NFL CBA*

The most current CBA was agreed to on August 4, 2011 and will expire in 2020. As we can see, the CBA is a living labor agreement covering the full

³¹ See History, NFLPA, <https://www.nflpa.com/about/history> (last visited Jan. 2, 2018).

³² *Impact of the NLRB on Professional Sports*, NLRB, <https://www.nlr.gov/who-we-are/our-history/impact-nlr-professional-sports> (last visited Feb. 6, 2017).

³³ *Id.*

³⁴ 29 U.S.C. §§ 151-169 (Enacted by Congress with a mission to protect the rights of both employers and employees).

³⁵ 29 U.S.C. § 157.

³⁶ 29 U.S.C. §§ 157-158 (a)(1).

³⁷ *The NLRB and Social Media*, NAT’L LAB. REL. BOARD, <https://www.nlr.gov/news-outreach/fact-sheets/nlr-and-social-media> (last visited Feb. 9, 2017).

spectrum of negotiations and disputes that inevitably arise as they relate to the game and livelihood of football, providing a means to contract freely so that no player is ever tied down to perform their contractual obligations without the freedom to re-negotiate any unfair labor terms.³⁸ Section 1 of the CBA establishes the Agreement as “supreme law of the land” for the NFL, stating:

“The provisions of this Agreement supersede any conflicting provisions in the Settlement Agreement, NFL Player Contract, the NFL Constitution and Bylaws, the NFL Rules, or any other document affecting terms and conditions of employment of NFL Players, and all players, Clubs, the NFLPA, the NFL, and the Management Council will be bound hereby. For the avoidance of doubt, the NFL shall be considered a signatory to this Agreement.”³⁹

In fact, nearly all of the policies and practices are contained, outlined, and governed by the CBA which is backed by the federal courts and NLRA.⁴⁰ To the extent that federal law does not govern implementation of the CBA, the Agreement shall be interpreted and governed by, “the laws applicable to contracts made and performed in the State of New York.”⁴¹

Player discipline under the CBA can be handed down by the club and club owner or by the NFL commissioner. Notably, a player may be penalized for “Conduct detrimental to Club,” which is undefined but includes potential deactivation⁴² and a “maximum fine of an amount equal to one week’s salary and/or suspension without pay for a period not to exceed four (4) weeks.”⁴³ A memorable example for football fans was the *Terrell Owens Arbitration* which came after the Philadelphia Eagles punished Owens on the heels of detrimental conduct to the team.⁴⁴ They were of course referring to Owens criticizing of the club’s front office staff and his teammate/quarterback, Donovan McNabb during a televised interview, only a day after he reportedly had a locker-room scuffle with former Eagles defensive end, Hugh Douglas.⁴⁵ After a long debate, the Washington-based arbitrator ruled that, due to the

³⁸ *Id.*

³⁹ 2011 CBA, Art. 2, § 1.

⁴⁰ *Id.*

⁴¹ 2011 CBA, art. 70 §1.

⁴² The Non-Injury Grievance Arbitrator’s decision in *Terrell Owens* (Nov. 23, 2005) was expressly overruled as to any Club decision to deactivate a player in response to the player’s conduct.

⁴³ 2011 CBA, art. 42 §1(a)(xv).

⁴⁴ Mark Maske, *Owens Loses Arbitration*, WASHINGTON POST (Nov. 24, 2005) available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/23/AR2005112301409.html>.

⁴⁵ *Id.*

nature of his conduct and its destructive and continuing threat to the team, “the club had shouldered its burden of providing clear and convincing evidence of the player’s misconduct . . . for just cause.”⁴⁶ Of course, the Commissioner could have independently inflicted his own punishment on Owens or any player for that matter. Under Article 46, the Commissioner has discretionary authority over judgments concerning conduct on the playing field detrimental “to the integrity of, or public confidence in, the game of professional football.”⁴⁷

Any rising issue or change in terms and conditions to the CBA must be made with mutual consent between the NFL and NFLPA.⁴⁸ Take for example, the issue of underreported head injuries which is a very significant topic of discussion as it relates to player safety. Statistics show that there are .625 concussions per game in the NFL, a very high number compared to the other “Big Four”⁴⁹ sports leagues.⁵⁰ In response to these concerns, the 2011 CBA between the NFL and NFLPA added numerous health, safety, and welfare provisions and also set aside 11 million per year through 2021 to be dedicated to medical research.⁵¹ Thus the following summer, the NFLPA issued a request for more original research on “new and innovative ways to protect treat and improve the health of NFL Players,” with “Medical Ethics”⁵² and *Football Players Health Study at Harvard University* was established.⁵³ This is important because it raises the point that there are still improvements to be made to the working conditions of NFL players that can be bargained for. Many consider this issue to be of greatest importance.

In section 1, Article 49 of the CBA, there is an antidiscrimination clause that reads, “[T]here will be no discrimination in any form against any player

⁴⁶ *Id.*

⁴⁷ 2011 CBA art. 46 §1(a).

⁴⁸ 2011 CBA, art. 2, § 4.

⁴⁹ The “Big Four” includes the NFL, MLB, NBA, and NHL.

⁵⁰ Christopher R. Deubert, et al., *Comparing Health-Related Policies in Sports: The NFL and Other Professional Leagues: Executive Summary*, HARV. J. OF SPORTS & ENT. LAW 1, 15 (May 2017).

⁵¹ 2011 CBA, Art. 12, § 5.

⁵² Examination of health care contexts to obtain a better understanding of internal morality of these practices, accountability, new preventative measures, appropriate informed consent in context or professional athletics, and consideration of medical care in the labor-management context of professional football.

⁵³ Christopher R. Deubert et al., *Protecting and Promoting the Health of NFL Players: Legal and Ethical Analysis and Recommendations*, THE FOOTBALL PLAYERS HEALTH STUDY AT HARVARD UNIVERSITY (Nov. 2 2016) available at https://footballplayershealth.harvard.edu/wp-content/uploads/2016/11/02_Authors_Disclosures.pdf.

by the NFL, the Management Council, any Club or by the NFLPA because of race, religion, national origin, sexual orientation, or activity or lack of activity on behalf of the NFLPA.”⁵⁴ As this relates to Kaepernick, this assures that his lack of activity should not be discriminated against by all other players and the NFL but not team owners. Perhaps if he leaned more towards the fundamental right of religion, he would have further protection. Under the CBA, the NFLPA may have to give significant consideration to decertifying as a bargaining agent in times of trouble which the league will always look to avoid in the interest of public image and reputation.⁵⁵

III. THE KAEPERNICK STANCE

A. *NFL Players are People First*

Playing football is a profession, not an identity.⁵⁶ N.F.L. veteran Scott Fujita⁵⁷, also a member of the management committee of the NFLPA and an ambassador for Athlete Ally, which fights homophobia in sports⁵⁸, leads by example:

“My three young daughters like most kids, are curious and ask a lot of questions. My wife and I are as open and honest with them as possible. But there’s one question I’m not prepared to answer: “Why aren’t Clare and Lesa married?” “I don’t know how to explain to them what “inferior” means or why their country treats our friends as such.” . . . “Sometimes, people ask me what any of this has to do with football. Some think football players like me should just keep our mouths shut and focus on the game. But we’re people first, and football players a distant second. Football is a big part of what we do, but a very small part of who we are. And historically, sports figures like Jackie Robinson, Billie Jean King and Muhammad Ali have been powerful agents for social change. That’s why the messages athletes send — including the way they treat others and the words they use — can influence many people, especially children.”⁵⁹

⁵⁴ *Id.* at Art. 49, §1 (Player Security/No Discrimination).

⁵⁵ Gabriel A. Feldman, *NFL Lockout: The Legal Issues Behind the NFL-CBA Negotiations*, HUFFPOST (May 25, 2011) available at https://www.huffingtonpost.com/gabriel-afeldman/the-legal-issues-behind-t_b_820579.html.

⁵⁶ Scott Fujita, *Acceptance by Example in the Locker Room and at Home*, New York Times (Mar. 24, 2013), http://www.nytimes.com/2013/03/24/sports/football/scott-fujita-acceptance-by-example-in-locker-room-and-at-home.html?_r=1.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

Mr. Fujita continues to compare his experience in the locker room as a “microcosm of society.”⁶⁰ Professional football players along with the sport of football have become a key pillar in American Society.⁶¹ The *Harris Poll*, conducted annually over the past thirty years, proves that 35 percent of sports fans choose football as their favorite American sport.⁶² Back up a bit, in 1985, the first year of the poll, football was only one percentage point higher over baseball as fans’ favorite sport.⁶³ Today, it is clear that football is America’s number one sport, and its dominance in our culture only continues to widen regardless of the changing labor rules and regulations that coincide with problems and concerns the sport currently faces.⁶⁴

B. A Perfect Example of A Political Movement in Sports

Jack Johnson, Paul Robeson, Joe Louis, Jesse Owens, Jackie Robinson, Althea Gibson, Hank Aaron, Wilma Rudolph, Bill Russell, Curt Flood, Jim Brown, Muhammad Ali, Dick Allen, Tommie Smith, John Carlos, Arthur Ashe, Kareem Abdul-Jabbar, Lynn Swann, J.C. Watts, Magic Johnson, Craig Hodges, Charles Barkley, Kevin Johnson, Mahmoud Abdul-Rauf, John Ameachi, Etan Thomas, David Tyree, Rashard Mendenhall, and the list goes on of black athletes who have voiced outrage against political and social injustice and discrimination that has existed and continues to exist today.⁶⁵

While all these famous athletes have made their mark in history, there are a select few movements during the Civil Rights Movement during the 1950’s and 1960’s that were created to stand the test of time because of the significant change they helped create and the platform they used.⁶⁶ Although American slavery was put to an end following the civil war through the passage of the Fourteenth and Fifteenth Amendments, African Americans only enjoyed the most basic civil liberties.⁶⁷ Through nonviolent protest, and several stands by notable leaders in society, the civil rights movement would forever break the unjust pattern of segregation within public facilities.⁶⁸ In

⁶⁰*Id.*

⁶¹ Mike Brest, *They Sacrifice Everything for Our Entertainment*, ODYSSEY (Sept. 28, 2015) <https://www.theodysseyonline.com/football-players-are-people-too>.

⁶²*Id.*

⁶³(24 percent to 23 percent); *Id.*

⁶⁴*Id.*

⁶⁵Ralph Warner, & Angel Diaz, et al., *The Most Politically Outspoken Black Athletes of All Time*, COMPLEX (Jan. 26, 2012), <http://www.complex.com/sports/2012/01/the-most-politically-outspoken-black-athletes-of-all-time/28>.

⁶⁶ Clayborne Carson, *American Civil Rights Movement*, ENCYCLOPEDIA BRITANNICA (Dec. 8, 2016), <https://www.britannica.com/event/American-civil-rights-movement>.

⁶⁷*Id.*

⁶⁸*Id.*

1954, starting with the decision in *Brown v. Board of Education*, the U.S Supreme Court finally struck down the “separate but equal” doctrine.⁶⁹ Mr. Chief Justice Warren held that to segregate children in public schools based on race is directly in contravention of the Equal Protection Clause of the Fourteenth Amendment.⁷⁰ In the decade that followed, state sanctioned discrimination towards minorities took a back seat to the progressive national attention towards African American’s fight for equality.⁷¹ Civil rights activists including Martin Luther King, Jr., Rosa Parks, Malcolm X, and Andrew Goodman were pivotal to pushing the federal government to create change through protest and civil disobedience.⁷² The Civil Rights Act of 1964, proposed by President John F. Kennedy, ended segregation in public areas and notably banned labor and employment discrimination on the basis of race, color, religion, sex or national origin.⁷³ One year later, congress would expand the civil rights act and bring about additional legislation such as the Voting Rights Act of 1965 to overcome legal obstacles at state and local levels which had prevented African Americans from exercising their right to vote.⁷⁴ With the rise of the Black Nationalism and creation of several working organizations in the 1960’s, newer militant organizations such as the Black Panther Party came about reflecting less peaceful initiatives.⁷⁵

The world of sports was not immune or blind to the growing pains of a still divided nation, and certain remarkable stances that became sacrifices catalyzed the march toward equal opportunity. On October 16, 1968 the men’s 200-meter sprint had concluded at the Olympic Games.⁷⁶ “I was expecting a normal ceremony. I hardly noticed what was happening when I was shooting,” said *Life* magazine photographer John Dominis who was crouched only around twenty feet away from the podium.⁷⁷ Tommie Smith and John Carlos, who had just won gold and bronze medals, became icons on a world stage and front page news.⁷⁸ Wearing black socks and no shoes

⁶⁹ *Brown v. Board of Education of Topeka*, 347 U.S. 483, 495 (1954).

⁷⁰ *Id.*

⁷¹ *Civil Rights Movement*, HISTORY (2009), <http://www.history.com/topics/black-history/civil-rights-movement>.

⁷² *Id.*

⁷³ A+E Networks, *Civil Rights Act*, HISTORY, <http://www.history.com/topics/black-history/civil-rights-act> (last visited Jan. 02, 2018).

⁷⁴ *Voting Rights Act*, HISTORY (2009), <http://www.history.com/topics/black-history/voting-rights-act>.

⁷⁵ *Id.*

⁷⁶ David Davis, *Olympic Athletes Who Took a Stand*, SMITHSONIAN MAGAZINE (Aug. 2008), <http://www.smithsonianmag.com/people-places/olympic-athletes-who-took-a-stand-593920/>.

⁷⁷ *Id.*

⁷⁸ *Id.*

symbolic of African-American poverty, a black glove expressing African-American strength and unity, both men bowed their head and raised a fist during the national anthem in celebration of victory.⁷⁹

Doug Martmann, a University of Minnesota sociologist and the author of *Race, Culture, and the Revolt of the Black Athlete: The 1968 Olympic Protests and Their Aftermath*, described that America hated what the two Olympians had done explaining that, “It was a polarizing moment because it was seen as an example of black power radicalism.”⁸⁰ For their activism and politicizing the Games, U.S. Olympic officials, with pressure from the International Olympic Committee, suspended Smith and Carlos and banished them from the Games.⁸¹ During the turmoil that ensued in line with recent events of that time⁸² many African-American athletes, led by sociologist, Harry Edwards, had talked of joining a boycott of the Olympic Games in general to protest the racial inequalities in America, but it never took place.⁸³ Instead, the two took action into their own hands, and became seen as ‘black-skinned storm troopers,’ in the words of Brent Musburger, who was at the time a columnist for the Chicago American newspaper.⁸⁴

After a brief high note, their action became the beginning of a sacrifice built on death threats and pressure that would become a factor in Carlos’s then-wife’s suicide in 1977.⁸⁵ Smith recalls, “[o]ne minute everything was sunny and happy, the next minute was chaos and crazy . . . I had no job and no education, and I was married with a 7-month old son.” When asked if he regretted his stance in 1968, Smith said no, adding that their protest, “was a cry for freedom and for human rights. We had to be seen because we wouldn’t be heard.” Carlos similarly echoed the powerful words of Smith exclaiming that, “I went up there as a dignified black man and said: ‘What’s going on is wrong.’”⁸⁶

C. *Who Is Colin Kaepernick?*

With the 36th pick in the second round of the 2011 NFL Draft, the San Francisco 49ers famously selected star quarterback, prospect out of the

⁷⁹ *Id.*; Tommie Smith also wore a scarf, and John Carlos wore beads in memory of lynching victims.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Traumas of 1968 included: a surge of antiwar protests, the assassination of Martin Luther King, Jr. and Robert F. Kennedy, the violent beatings of protestors by Chicago police during the Democratic National Convention

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

University of Nevada, Colin Kaepernick.⁸⁷ Born November 3, 1987 in Milwaukee, Wisconsin, Kaepernick has just finished his sixth season with the NFL before the end of 2016.⁸⁸ Growing up with adoptive parents, like so many,⁸⁹ Kaepernick could live out his desire to play nearly every sport growing up as a natural athlete.⁹⁰

Kaepernick, previously second-string to Alex Smith, stepped into the limelight; getting his first start against the Chicago Bears in 2012 after Smith suffered a concussion on Veterans Day.⁹¹ Had Alex Smith not taken such a callous blow that game, there is a very solid likelihood that the “second-year phenom,” an unknown talent, would have never taken a snap that season.⁹² When asked after the 49ers beat the Bears 32-7, offensive coordinator, Greg Roman explained the thought process concerning Kaepernick’s debut.⁹³ The bold change to stick with Kaepernick, who brought a new “swagger” and aptness to the game, as the new starting quarterback so late in 49er season was at first a “shock to everyone.”⁹⁴ Then it became more and more apparent to the staff and players that he was not going to surrender the once in a lifetime opportunity that he had been gifted by mere circumstance.⁹⁵

⁸⁷*Colin Kaepernick Stats*, ESPN, available at

http://www.espn.com/nfl/player/_id/14001/colin-kaepernick

⁸⁸*Id.*

⁸⁹The last time it was calculated in 2008, 135,813 children were adopted in the U.S including, but not limited to, foster care adoptions, inter-country adoptions, and private baby adoptions. Dawn Davenport, *How Many Children Are Adopted Each Year In The US*, CREATING A FAMILY, <https://creatingafamily.org/adoption-category/children-adopted-year/> (last visited Jan. 17, 2017)

⁹⁰ Heidi Russo is Colin Kaepernick’s birth mother who chose to give up her five-week-old baby boy when she was nineteen years old and unmarried. Unfortunately, Heidi Russo, has been denied on several occasions the opportunity to meet and talk with Colin before and after his road to success in the NFL. Rick Reilly, *A call Kaepernick should make*, ESPN (Jan. 30, 2013), http://www.espn.com/espn/story/_id/8897116/colin-kaepernick-birth-mom.

⁹¹*Id.*

⁹²Albert Breer, *Colin Kaepernick over Alex Smith: The truth about a bold move*, NFL (Jan. 29, 2013, 2:03 PM). <http://www.nfl.com/superbowl/story/0ap1000000132169/article/colin-kaepernick-over-alex-smith-the-truth-about-a-bold-move>.

⁹³ *Id.* (quoting Greg Roman saying “You really didn’t know how Kaep was gonna respond.” “You really didn’t in any situation.” You didn’t know how he was gonna handle all the different situational stuff, you didn’t know how he was gonna handle constant pressure, crowd noise, man coverage, zone coverage, this, that, the other. I mean, you just didn’t know. It’s something you work through. You coach through it”).

⁹⁴*Id.*

⁹⁵*Id.*; see also Barry Werner, *Tom Brady made his first start for the Patriots 15 years ago today*, FOX SPORTS (Nov. 15, 2016), <http://www.foxsports.com/nfl/story/tom-brady-made-his-first-start-for-the-patriots-15-years-ago-today-093016>; Jim Corbrett, *Remembering Tom Brady's first-ever NFL start -- against Peyton Manning*, USA TODAY (Jan. 17, 2014),

Continuing in that 2012 season, Kaepernick made Belichick's New England defense look foolish, scoring a whopping forty one points in a win over the Patriots in just his 5th NFL career start.⁹⁶ The Patriots were not the only victim of the new styled dynamic weapon who possessed "all-world athleticism."⁹⁷ On the big stage, the franchise suffered their first and only Super Bowl defeat to the Baltimore Ravens, with Kaepernick coming just short of delivering the game-winning touchdown pass to teammate Michael Crabtree on fourth down of the last drive.⁹⁸ If victorious, Kaepernick would have been named Super Bowl MVP.⁹⁹ This success and new pro-style NFL offense, backed by one of the best offensive lines and well established head coach, Jim Harbaugh, continued into the 2013 season.¹⁰⁰ The 49ers would come just short of back to back Super Bowl appearances, in an NFC Championship Game defeat to the Seattle Seahawks.¹⁰¹ At this moment in time many agreed that Kaepernick was a top quarterback in the league and even Hall of Fame worthy.¹⁰²

As of that time, things have been rough professionally for the competing quarterback.¹⁰³ Unfortunately, the more the organization seemed to place on Kaepernick's shoulders after the 2013 season, the less he has been able to

<http://www.usatoday.com/story/sports/nfl/2014/01/17/afc-championship-tom-brady-peyton-manning-mark-rypien-willie-mcginest/4556375/>. (referring to how football fans are reminded of the skinny sixth round backup quarterback from Michigan, Tom Brady, who got his first taste of the NFL in similar circumstances. Brady would be given his first shot to become a quarterback in the league after star quarterback Drew Bledsoe went down with an injury. Brady never looked back, defeating future rival Peyton Manning in his first start and continuing to upset the St. Louis Rams in Super Bowl XXXVI).

⁹⁶*Id.*

⁹⁷Sam Monson, *Is Colin Kaepernick Done As A Good NFL Starter?*, PRO FOOTBALL FOCUS, <https://www.profootballfocus.com/is-colin-kaepernick-done-as-a-good-nfl-starter/>. (explaining that prior to reaching the Super Bowl, Kaepernick and the 49ers did a number on the Green Bay Packers, recording an amazing 263 yards passing and 181 yards rushing in the playoffs).

⁹⁸JP Starkey, *Super Bowl 2013: 49ers fans disappointed with loss to Ravens*, SB NATION (Feb.13, 2013, 4:00 PM), <http://www.sbnation.com/nfl/2013/2/13/3950124/2013-super-bowl-xlvi-niners-nation>.

⁹⁹*Id.*

¹⁰⁰Michael David Smith, *NFL Morning After: The Decline of Colin Kaepernick*, NBC SPORTS (Oct. 24, 2016), <http://profootballtalk.nbcsports.com/2016/10/24/nfl-morning-after-the-decline-of-colin-kaepernick/>.

¹⁰¹*Id.*

¹⁰²*Id.*; Ron Jaworski is even quoted saying that, "I truly believe Colin Kaepernick could be one of the greatest quarterbacks ever." Now that Kaepernick has found himself coming on and off the bench, people enjoy mocking Jaworski's comment concerning Kaepernick, which would not have been so easy to criticize a couple of years ago.

¹⁰³ *Id.*; Colin Kaepernick lost the starting quarterback position to Blaine Gabbert two seasons ago after previously assuming the role as starting quarterback and leading the 49ers to Super Bowl XLVII in the 2012-2013 season.

carry his team efficiently up to date.¹⁰⁴ In fact, some would argue that, “He has rapidly declined from a very good quarterback to a terrible quarterback, at an age when most quarter backs are still acquiring more skill.”¹⁰⁵

D. Kaepernick Takes a Knee

Today, there is a new reason why everyone is talking about Colin Kaepernick. His heroism yet again was ignited at the start of the 2016 NFL season which has just wrapped up, as Kaepernick became a headline name when he refused to stand for the National Anthem.¹⁰⁶

He expressed, “[I]’m going to go out and show everything I can these next two games to make sure I put my best foot forward to show this organization, this team, this coaching staff what I’m capable of.”¹⁰⁷ Colin Kaepernick made this comment before the San Francisco 49ers took the field against the Green Bay Packers for the third pre-season game of the season.¹⁰⁸ Suited up and in uniform for the first time of the year, Kaepernick was definitely a man of his word who did just that, but not in the way the normal spectator would predict.¹⁰⁹

Most spectators participate in what was considered the most noteworthy aspect of the pregame ritual, the passionate singing rendition of the National Anthem by whichever notable singer or star was selected.¹¹⁰ Perform it well, and maybe become a top-20 hit single just like five-octave powerhouse, Whitney Houston, with her rendition during the Persian Gulf War and again after 9/11.¹¹¹ Perform it poorly and risk losing your professional singing career like Dominican singer Kat Deluna did at a 2008 Dallas Cowboys home game.¹¹²

¹⁰⁴*IS COLIN KAEPERNICK DONE AS A GOOD NFL STARTER?*, PRO FOOTBALL FOCUS, available at <https://www.profootballfocus.com/is-colin-kaepernick-done-as-a-good-nfl-starter/>

¹⁰⁵*Id.*

¹⁰⁶*Niners QB Kaepernick refuses to stand for anthem in protest*, USA TODAY (Aug. 17, 2016, 12:15pm) available at <http://www.usatoday.com/story/sports/nfl/2016/08/27/niners-qb-kaepernick-refuses-to-stand-for-anthem-in-protest/89478580/>.

¹⁰⁷Creg Stephenson, *Packers vs. 49ers NFL preseason 2016 live stream, live score updates*, AL.COM (Aug. 26, 2016), http://www.al.com/sports/index.ssf/2016/08/what_time_tv_channel_is_packer_1.html.

¹⁰⁸*Id.*

¹⁰⁹*Id.*

¹¹⁰Trevor Anderson, *Top 10 Super Bowl National Anthem Performances*, BILLBOARD (Feb. 06, 2017) available at <https://www.billboard.com/articles/news/super-bowl/6867098/super-bowl-national-anthem-performances-whitney-beyonce>.

¹¹¹*Id.*

¹¹²*10 Worst National Anthem Performances Ever*, BILLBOARD (July 2, 2015),

On Friday, August 26, Kaepernick, for better or worse, would change the focus before a football game forever.¹¹³ By way of “silent” protest, with the goal to show support towards people of color who have and are still being oppressed in the United States, Kaepernick has taken a stance, or rather a knee, against the National Anthem and police brutality he and many others now associate with the song:

I am not going to stand up to show pride in a flag for a country that oppresses black people and people of color, Kaepernick said, via NFL.com. To me, this is bigger than football and it would be selfish on my part to look the other way. There are bodies in the street and people getting away with murder. This is not something that I am going to run by anybody. I am not looking for approval. I have to stand up for people that are oppressed. If they take football away, my endorsements from me, I know that I stood up for what is right.¹¹⁴

Now, the central focus before any game is on the players who decide to sit or kneel during the National Anthem.¹¹⁵ Originally, Kaepernick was alone in his stance and even went unnoticed.¹¹⁶ Initially, only few spectators such as Mike Garafolo of the NFL Network and ESPN’s Adam Schefter observed that Kaepernick did not stand for the first two preseason games.¹¹⁷ The only difference was that Kaepernick was not dressed in uniform nor did he get any playing time in either of the team’s previous two preseason games.¹¹⁸ No one really talked about Kaepernick and his refusal to stand for the anthem until a picture was taken and shared via twitter which went viral and has had the nation talking ever since.¹¹⁹

Two days after the 49ers released a statement confirming that Kaepernick sat during the rendition of the National Anthem; he met with media to explain

<http://www.billboard.com/articles/list/513562/10-worst-national-anthem-performances-ever>.

¹¹³Mark Sandritter, *A Timeline of Colin Kaepernick’s National Anthem Protest and the Athletes Who Joined Him*, SB NATION (Oct. 11, 2016),

<http://www.sbnation.com/2016/9/11/12869726/colin-kaepernick-national-anthem-protest-seahawks-brandon-marshall-nfl>.

¹¹⁴*Id.*; see also Adam Wells, *Colin Kaepernick Sits During National Anthem Before Packers vs. 49ers*, BLEACHER REP., (Aug. 27, 2016, 9:05AM),

<http://bleacherreport.com/articles/2660085-colin-kaepernick-sits-during-national-anthem-before-packers-vs-49ers>.

¹¹⁵*Id.*

¹¹⁶Maske, *supra* note 46.

¹¹⁷*Id.*

¹¹⁸Elektra Kokinakis, *Colin Kaepernick Sat During National Anthem in First 2 Preseason Games*, FANSIDED (Aug. 27, 2016), <http://fansided.com/2016/08/27/colin-kaepernick-protested-national-anthem-before/>.

¹¹⁹Maske, *supra* note 46.

and re-iterate that his action, or inaction, was to give a voice to people who didn't have a voice of their own.¹²⁰ He followed with:

“I am going to continue to stand with the people that are being oppressed. To me this is something that has to change. When there's significant change and I feel that flag represents what it's supposed to represent, and this country is representing people the way that it's supposed to, I'll stand.

This stand wasn't for me. This is because I'm seeing things happen to people that don't have a voice, people who don't have a platform to talk and have their voices heard, and effect change. So I'm in the position where I can do that for people who can't.

It's something that can unify this team. It's something that can unify this country. If we have these real conversations that are uncomfortable for a lot of people. If we have these conversations, there's a better understanding of where both sides are coming from. .
.”¹²¹

In his continued mission to evoke change, but as not to directly disrespect troops around the globe¹²², Kaepernick shifted his stance from sitting during the anthem to taking a knee during the anthem after meeting with former Green Beret, Nate Boyer.¹²³ Boyer, who had a brief stretch in the NFL as a long snapper, helped Kaepernick realize that he wants to avoid any disrespect to the men and women fighting for our country, and that a compromise of some sort was in order to make sure fans did not confuse his intentions.¹²⁴

On September 1, for the first time, a teammate, Eric Reid expressed his support of the stance by taking a knee alongside Kaepernick before the preseason matchup against the San Diego Chargers.¹²⁵ Jeremy Lane of the Seattle Seahawks followed suit, becoming the first non-teammate to join the

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* (quoting Kaepernick: “[I]’ve seen videos, I’ve seen circumstances where men and women in the military have come back and been treated unjustly by the country they fought for, and have been murdered by the country they fought for, on our land. That’s not right.”)

¹²³ *Id.* (explaining “I have great respect for the men and women that have fought for this country. I have family, I have friends that have gone and fought for this country. And they fight for freedom, they fight for the people, they fight for liberty and justice, for everyone. That’s not happening. People are dying in vain because this country isn’t holding their end of the bargain up, as far as giving freedom and justice, liberty to everybody. That’s something that’s not happening.”)

¹²⁴ *Id.* (Kaepernick received much criticism for disrespecting armed forces which he did not mean to do).

¹²⁵ *Id.* (Both players were seen and documented applauding for military families and the playing of God Bless America).

growing protest as he sat during the National Anthem just minutes later.¹²⁶ Again, Kaepernick met with the media following the victory, but this time announced that he would be donating \$1 million¹²⁷ to various community organizations that focus on racial issues.¹²⁸ Using his words, it was time for him to put his money where his mouth was now that he has everyone's attention.¹²⁹

E. Expanding Beyond the NFL

The buzz or hype of the protest moved into other sports following the Thursday night football matchups.¹³⁰

The following week, Brandon Marshall, former college teammate of Kaepernick during his time at the University of Nevada, and linebacker of the Denver Broncos took the opportunity to be the first NFL player to take a knee during the anthem in the regular season. The Denver Post reported Marshall's reason for kneeling saying:

"I'm not going against the military. I'm not against the police or America. I'm against social injustice. Kaep, he's using his platform how he wants to use it, to reach the masses. We have freedom of speech. But then we use our platform, and we get bashed for it. It's almost like they want us to only go with the grain. And once we go against the grain, it's an issue."¹³¹

¹²⁶*Id.*

¹²⁷ See *infra* note 143.

¹²⁸ David Fucillo, *Colin Kaepernick donating first \$1 million of Salary this year to community organizations*, SB NATION (Sep 1, 2016, 11:05pm), <http://www.ninersnation.com/2016/9/1/12767276/colin-kaepernick-donating-one-million-dollars-to-community-organizations/in/12463381>.

¹²⁹*Id.*

¹³⁰ On Sunday, September 4, Megan Rapinoe of the Seattle Reign FC, took a knee during the national anthem just as Kaepernick would have done. Rapinoe, being a gay women sympathizes with Kaepernick's mission to bring light to the many injustices and inequalities that exist in America saying, "It's important to have white people stand in support of people of color on this . . . standing in support of them is something that's really powerful." Ultimately, moves were made to deny Rapinoe her right to protest at her next game against the Washington Spirit by having the National Anthem play before either team stepped onto the pitch. Rapinoe is one of many who are concerned with the traditionally scrutinized belief of Equal Protection for same-sex couples. Hector Diaz, *NWSL's Washington Spirit reschedule the national anthem to prevent Megan Rapinoe from protesting*, SB NATION (Sept. 7, 2016), <http://www.sbnation.com/2016/9/7/12842910/nwsls-washington-spirit-reschedule-the-national-anthem-to-prevent-megan-rapinoe-from-protesting>; see *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (citing pertinent law that protects the fundamental right of marriage).

¹³¹ Maske, *supra* note 46.

Few corporations have taken issue with the stance, including Air Academy Credit Union and CenturyLink whom both terminated their sponsorship agreements with Marshall.¹³² Fortunately, “any publicity is good publicity,” and others such as PG Sports and CEO of Rush Communications and founder of Def Jam Records, Russell Simmons, have offered Marshall their own endorsement deals.¹³³ As for Kaepernick, his sponsors which include, Apple-owned Beats¹³⁴ and Electronic Arts (“EA”)¹³⁵ have been placed in a quagmire where both dropping and keeping him may have negative impact towards their respective brand name. The endorsement conundrum Kaepernick has found himself in can be analogized to the NFL as a whole who may suffer similar treatment as before mentioned.

The protest took a step further on 9/11/16. As a unified nation, we remember and annually memorialize the near 3000 American lives that were lost on September 11, 2001 during the tragic terrorist attack by Islamic extremist group, al-Qaeda.¹³⁶ Across the league tributes were held that culminated in the singing of the national anthem out of respect and honor towards all who were affected. As a way to draw more attention to the protest, Miami half back Arian Foster, along with Michael Thomas, Kenny Stills and Jelani Jenkins stood during the 9/11 video tribute before the game and then collectively took a knee for the anthem during a highly emotional time.¹³⁷ After the game, Foster tweeted the strong message, “[D]on’t let the love for

¹³²*Id.* (quoting CenturyLink when approached on the topic, they responded: “While we acknowledge Brandon’s right, we also believe that whatever issues we face, we also occasionally must stand together to show our allegiance to our common bond as a nation. In our view, the national anthem is one of those moments. For this reason, while we wish Brandon the best this season, we are politely terminating our agreement with him”).

¹³³Simon Ogus, *Denver Broncos' Brandon Marshall Receives Endorsement Deal in Midst of Protest*, FORBES (Sept. 16, 2016), <http://www.forbes.com/sites/simonogus/2016/09/16/denver-broncos-brandon-marshall-reeives-endorsement-deals-despite-protest/>.

¹³⁴ George Selfo, *So You Sponsor Colin Kaepernick, Now What?*, AD AGE (Aug. 31, 2016), <http://adage.com/article/digital/colin-kaepernick-puts-brands-tough-spot-working/305658/> (paraphrasing a statement of Jimmy Smith) (The roots of Beats is Dr. Dre, a infamous rebel of his own time who has a record entitled ‘F*** the Police,’ so it would be hypocritical to drop Kaepernick who stars in the headphones commercial where he does not listen to the background noise around him).

¹³⁵ *Id.* (explaining that EA’s endorsement is specifically tied to Madden 2017, a football game franchise that has recently updated the advertisement video to include commentary of acknowledgement to Kaepernick’s stance, and that EA also has a popular Battlefield franchise, centered on American military units taking down terrorists that EA needs to be weary of).

¹³⁶9/11 ATTACKS, HISTORY (2010) <http://www.history.com/topics/9-11-attacks>.

¹³⁷Alan Pyke, *National anthem protests spread, mutate as NFL season opens on 9/11 anniversary*, THINKPROGRESS (Sept. 3, 2016) <https://thinkprogress.org/nfl-anthem-protests-911-ea51717ca59a#.1a8yv6ia9>.

a symbol overrule the love for your fellow human.”¹³⁸ Meanwhile, both the Seattle Seahawks and the Kansas City Chiefs linked arms and stayed standing as their way of honoring the flag and keeping the talk alive to show that each and every team has a different policy and opinion.¹³⁹ The now national protest throughout the NFL has impacted athletes of all ages. On September 16, the entire Garfield High School football team, coaches included, took a knee for the anthem which head coach, Joey Thomas said would continue throughout the remainder of the season.¹⁴⁰ Thomas added:

“Everybody wants to talk about how this is disrespecting to American flag,” Garfield coach Joey Thomas said. “That’s a smokescreen. How about we talk about the issues people are kneeling and fighting for? If we could start addressing the issues and finding solutions to the issues, we won’t have to kneel.”¹⁴¹

It seems most of the backlash is directed to the song’s third verse which has some have found to be racist.¹⁴² In fact the unsung end of the third verse reads, “[N]o refuge could save the hireling and slave from the terror of flight or the gloom of the grave, and the star-spangled banner in triumph doth wave o’er the land of the free and the home of the brave.”¹⁴³

The protest has continued to heighten each week as more and more athletes on every level have banded together in silent protest. Twelve additional high school students followed suit at Laguna Creek High School amidst upset parents yelling at them to stand up.¹⁴⁴ The school district supported the student-athletes right to express freely despite an audience that

¹³⁸ *Id.*

¹³⁹ Maske, *supra* note 46. (Additionally, individual players, Marcus Peters, and Martellus Bennett with Devin McCourty of the New England Patriots held up a fist during the anthem in support of Kaepernick. The 49ers and Colin Kaepernick were not scheduled to play that Sunday, but did continue to kneel for cause before Monday Night Football against the Los Angeles Rams. This time, Kaepernick and Reid were joined by teammates Eli Harold and Antoine Bethea who stood with fists raised. Across the field, opponents Robert Quinn and Kenny Britt stood close-eyed with their fists up as well in solidarity).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Jon Schwarz, *Colin Kaepernick Is Righter Than You Know: The National Anthem Is a Celebration of Slavery*, THE INTERCEPT (Aug. 28, 2016, 3:08PM) <https://theintercept.com/2016/08/28/colin-kaepernick-is-righter-than-you-know-the-national-anthem-is-a-celebration-of-slavery/>; see also Mark Sandritter, *A timeline of Colin Kaepernick’s national anthem protest and the athletes who joined him*, SB NATION (NOV. 6, 2016) <http://www.sbnation.com/2016/9/11/12869726/colin-kaepernick-national-anthem-protest-seahawks-brandon-marshall-nfl>. (Kaepernick still urges his audience to focus on the message of fighting oppression of all kinds and not his method).

¹⁴⁴ *Id.*

called for disciplinary methods.¹⁴⁵ At the AT&T Nation's Football Classic, Howard University's cheerleaders made the decision to kneel as a unit during the opening performance of the anthem and faced some criticism.¹⁴⁶

On September 18, 2016, Kaepernick continued his own pregame ritual.¹⁴⁷ This time, more of his teammates, Antoine Bethea, Eli Harold, Jaquiski Tartt and Rashad Robinson joined the protest by raising their fists before they took the field against the Carolina Panthers.¹⁴⁸ On a high note for the protest, Colin Kaepernick was featured on the October issue of Time magazine, as the center piece and main story on athlete's activism in the patriotism debate that has been fueled.¹⁴⁹

F. A Politically Divided America Reacts

Kaepernick has been harshly criticized on one end and yet loudly applauded on the other while the NFL has shied away from it whenever possible.¹⁵⁰ Head coach of the San Francisco 49ers, Chip Kelly addressed the media in a way that defended Kaepernick, saying "it's his right as a citizen," and that "it's not my right to tell him not to do something."¹⁵¹ The NFL later acknowledged that Kaepernick is not necessarily breaking any rules and released a neutral statement saying that, "players are encouraged but not required to stand during the playing of the national anthem."¹⁵² Obama is just one of the noteworthy advocates to speak out in favor of Kaepernick exercising a constitutional right.¹⁵³

¹⁴⁵*Id.*

¹⁴⁶*Id.*

¹⁴⁷*Id.*

¹⁴⁸*Id.* (The day after, four Philadelphia Eagles also raised their fists during the anthem).

¹⁴⁹*Id.*

¹⁵⁰Laura Donovan, *Colin Kaepernick Responds to Ruth Bader Ginsburg Criticizing His National Anthem Protest*, ATTN (Oct. 13, 2016), <http://www.attn.com/stories/12068/colin-kaepernick-responds-to-ruth-bader-ginsburg-critique>.

¹⁵¹Steve Wyche, *Colin Kaepernick Explains Why He Sat During National Anthem*, NFL (Aug. 28, 2016), <http://www.nfl.com/news/story/0ap3000000691077/article/colin-kaepernick-explains-why-he-sat-during-national-anthem>.

¹⁵²*Id.*; Even Barack Obama has touched on the issue, saying that he respects Kaepernick for not standing during the national anthem. As former commander in chief, Obama believes that honoring our flag and our anthem helps bind us together, but also understands that there are so many different opinions and we have to respect them. However, he added that protestors ought to be aware that it is because people fight for them to be able to share their opinions freely.

¹⁵³*Id.* (quoting Obama that, "[T]he test of our fidelity to our Constitution, to freedom of speech, to our Bill of Rights, is not when it's easy, but when it's hard. We fight sometimes so that people can do things that we disagree with . . . As long as they're doing it within the law, then we can voice our opinion objecting to it but it's also their right.

However, there are many who have voiced their opinion against the protest, including the President, Donald Trump. In an interview with Dori Monson from KIRO radio of Seattle, President Trump responded to Kaepernick's stance and his statement calling Trump, "openly racist" by suggesting that America may not be the right place for Kaepernick.¹⁵⁴ Another one of these voices belongs to notable ESPN analyst Trent Dilfer who has described the stance as "ridiculous."¹⁵⁵ Dilfer also expressed that he did not like that Kaepernick was putting his personal view above his team.¹⁵⁶ He added:

"No matter how passionate you are, no matter how much of a burden you have for social issues, you don't let it get in the way of the team. This is a backup quarterback whose job is to be quiet and sit in the shadows and get the starter ready to play in week 1. Yet he chose a time where all of the sudden, he became the center of attention."¹⁵⁷

Dilfer and many players, coaches and others around the league truly believe in the football first mentality that Kaepernick has been insulting in their eyes.¹⁵⁸ Jim Fraser, a well-respected former marine and father of fallen marine Grant B. Fraser, attended a protest against the stance criticizing Kaepernick as well.¹⁵⁹ Shortly after, U.S. Pacific Commander Admiral Harry

I want the protestors to listen to the pain that may cause somebody who, for example, had a spouse or a child who was killed in combat and why it hurts them to see somebody not standing. But I also want people to think about the pain he may be expressing about somebody who's lost a loved one that they think was unfairly shot.")

¹⁵⁴Charlotte Wilder, *Donald Trump Says Colin Kaepernick Should Find A New Country*, USA TODAY SPORTS (August 30, 2016 9:33AM), <http://ftw.usatoday.com/2016/08/donald-trump-colin-kaepernick-new-country-national-anthem-protest-response>. (He explained, "I think it's personally not a good thing, I think it's a terrible thing . . . maybe he should find a country that works better for him . . . it won't happen").

¹⁵⁵ Martin Rogers, *Colin Kaepernick Fires Back at Trent Dilfer Over Anthem Protest Criticism*, USA TODAY SPORTS (Sept. 13, 2016), <http://www.usatoday.com/story/sports/nfl/49ers/2016/09/13/colin-kaepernick-response-trent-dilfer-criticism-national-anthem-protest/90293914/>. (He went on to address, "[p]eople aren't tuning in to hear about what we feel about all these social issues").

¹⁵⁶*Id.*

¹⁵⁷ *Id.* (Dilfer who at one time had the same platform that Kaepernick has (being an NFL quarterback), decided not to use his position to address issues he was disturbed by because he did not want to disrupt the flow of his team).

¹⁵⁸*Id.*

¹⁵⁹Luke Kerr-Dineen, *Marine slams Colin Kaepernick on Fox News: 'go play in Cuba'*, USA TODAY SPORTS (December 5, 2016 2:20 PM) <http://ftw.usatoday.com/2016/12/fox-news-colin-kaepernick-protest-49ers-marine-national-anthem>; *see also Id.* (quoting Fraser, "[W]hy don't you take that multi-million dollar contract, take a few million and invest in programs for disadvantaged children. Or for programs, whatever your cause – which honestly, I haven't figured out yet – or go sign a contract to play in Cuba").

Harris spoke at a Pearl Harbor 75th Anniversary event hosted in Honolulu adding, “[Y]ou can bet that the men and women we honor today and those who died that faithful morning 75 years ago never took a knee and never failed to stand whenever they heard our national anthem being played.”¹⁶⁰ The union of police officers who work patrol for the San Francisco 49er home games at Levi Stadium were not too excited about Kaepernick’s public protest either which has included him wearing socks depicting cops as cartoon pigs.¹⁶¹ While the public has voiced mixed views on the stance through various avenues, one thing is for certain; Kaepernick upholds much help and support fueled most by a digital landscape that includes the “likes” of social media giants like Twitter, Facebook and Instagram.

G. Unregulated Social Media Has Major Impact

Social media can be defined as any web-based application or program that is open to public users who may instantaneously contribute, modify, and share content.¹⁶² It has become increasingly discernible that it will be extremely rare to think of any significant political protest, upheaval or major stance without social media being part of both the ensuing incident and continued narrative in the 21st century.¹⁶³ Social media impacts the development of protest movements by rapidly building them on the web, helping recruit and encourage new member participation, and spreading information to larger populations of people with little to no cost which could devastate an organization like the NFL overnight.¹⁶⁴

Relying on social psychology, social media has been shown to make it easier to transmit and receive messages conveying a sense of moral outrage or group potency that link today’s political developments to shared

¹⁶⁰Charles Curtis, *Navy officer rips Colin Kaepernick in Pearl Harbor speech: Those we honor 'never took a knee'*, USA TODAY SPORTS (December 8, 2016 11:47 am) <http://ftw.usatoday.com/2016/12/colin-kaepernick-navy-pearl-harbor-didnt-take-a-knee-national-anthem-video>.

¹⁶¹AJ Perez, *Police union rescinds boycott threat of 49ers games over Kaepernick protests*, USA TODAY (Sept. 9, 2016) <http://www.usatoday.com/story/sports/nfl/49ers/2016/09/07/colin-kaepernick-police-boycott-san-fransico-49ers-games/89983326/>. (There are about seventy Santa Clara police officers that voluntarily patrol Levi Stadium, with the help of an additional fifty officers from other jurisdictions).

¹⁶²Joshua A. Tucker & Megan Metzger, et al., *Protest in the Age of Social Media*, INTERNATIONAL PEACE AND SECURITY PROGRAM (Jan. 8, 2015) <https://medium.com/carnegie-corporation-international-peace-and/protest-in-the-age-of-social-media-7ae9fd940b06#.rrif9jvgk>.

¹⁶³*Id.*

¹⁶⁴*Id.*

grievances within social structures.¹⁶⁵ Another huge aspect of social media is its ability to incite potential participants and supporters by providing live updates of protests in progress and different information that may appeal to different audiences such as the number of people or how to deal with an array of safety concerns.¹⁶⁶ What deserves more awareness, is that social media networks can and do span traditional national boundaries. A perfect example of social media's effect on protesting was the *Ukrainian Euromaidan Movement*,¹⁶⁷ which brought a lasting change in a revolutionary way that organizations seeking to use armed resistance such as ISIS have engaged.¹⁶⁸

While Kaepernick may not have intended to start his non-violent protest with social media, it did in fact begin with a tweet that ignited an explosion on twitter.¹⁶⁹ ESPN has collected data suggesting that his daily following has surged an astounding 35,394 percent since he first sat during the playing of the national anthem on August 26, 2016.¹⁷⁰ Since sitting for the anthem, Kaepernick added 98,730 Twitter followers which is his most popular page.¹⁷¹ Not only has social media been the best source of information, but it has been the best avenue for Kaepernick to advertise his promises.¹⁷² One example is Kaepernick's promise to donate royalties from the sales of his

¹⁶⁵*Id.* (Social media content expands on the volume of a protest, but also creates an easier social identification triggered by magnetic group empowerment. You see others doing it and you want to do it too which creates a sense of belonging).

¹⁶⁶*Id.*

¹⁶⁷ This was a response to the Ukrainian government's, under Yanukovich, decision to suddenly refuse to sign the agreed upon association agreement with the European Union. This suggested instead, that Yanukovich would seek stronger ties with Russia instead. Through the use of social media platforms to fulfill certain tasks, it was concluded through research by The New York University Social Media and Political Participation (SMaPP) Laboratory that: (1) social media without a doubt helped consolidate people and get them to Euromaidan protests, (2) social media platforms assisted with logistical support, (3) by tracking important political developments the link between Facebook and Twitter usage and intensity of movement grew more robust with each successive wave.

¹⁶⁸The Islamic State in Iraq and Syria have been accused of using social media to bridge physical gaps around the world and spread propaganda, plot insurgency, and potentially recruit young new members.

¹⁶⁹Tucker, *supra* note 163.

¹⁷⁰Darrell Rovell, *Colin Kaepernick's social media following spikes 35,394 percent*, ESPN (Sept. 9, 2016) available at http://www.espn.com/nfl/story/_/id/17505052/colin-kaepernick-san-francisco-49ers-sees-social-media-following-spike-35394-percent.

(According to social media tracking company, *Hookit*, Kaepernick has had an average of 17,797 new followers daily up from roughly fifty on his Twitter, Facebook and Instagram accounts. More data collected by *Hookit* shows that since sitting, there are nearly 16,825 posts per day up from 98 per day with Kaepernick mentioned or tagged).

¹⁷¹*Id.*

¹⁷²*Id.*

jersey, which in turn rose to the best-selling jersey in the NFL.¹⁷³ While social media has indeed revolutionized the way individuals communicate and socialize as well as adding to business landscapes, it does have its drawbacks.¹⁷⁴ Jason Whitlock, of Fox Sports, interpreted how social media, specifically the “hole of Twitter information” has created what Whitlock is calling a “fad,” comparing it to the “dab” last year.¹⁷⁵ He stressed:

“When you’re a multi-millionaire with a platform as an NFL quarterback, gestures – and that’s all this is, is a gesture – is not what you’re called upon to do. He’s not John Carlos and Tommie Smith. Those guys in the 1960’s, when they were making gestures, that was all they could do. They weren’t wealthy. They didn’t have the power or the platform that Colin Kaepernick and these modern-day athletes have.”¹⁷⁶

Fair or unfair, social media creates a reclusive virtual interaction that often ignores the real world that surrounds us and may make Kaepernick’s message less genuine and more social than political to people such as Mr. Whitlock.¹⁷⁷ To add to that, besides those who follow Kaepernick on social media, there was hardly any unusual talk of Kaepernick’s views or posts before he sat for the anthem.¹⁷⁸ Perhaps, the regular level of traction before Kaepernick first took a seat in protest is proof that more action is needed than banter and promises through a social media campaign.

H. Kaepernick Delivers on His Promises

Through the Colin Kaepernick Foundation, Kaepernick has developed his stance into a substantive movement. On his website you will find the *Know Your Rights Camp*, which stresses awareness on higher education, self-

¹⁷³*Id.*

¹⁷⁴Jenny Q. Ta, *What Impact Has Social Media Truly Had on Society*, BUS. 2 COMMUNITY (Aug. 13, 2014), <http://www.business2community.com/social-media/impact-social-media-truly-society-0974685#VtDyKrwSBpQ2vd2H.97>.

¹⁷⁵ Josh Levin, *Colin Kaepernick’s Protest Is Working*, SLATE (Sept. 12, 2016, 6:54 PM), http://www.slate.com/articles/sports/sports_nut/2016/09/colin_kaepernick_s_protest_is_working.html.

¹⁷⁶*Id.*

¹⁷⁷Ta, *supra* note 175.

¹⁷⁸Cork Gaines, *Colin Kaepernick has been vocal about social injustice for months and hardly anybody noticed until he sat down during the national anthem*, BUS. INSIDER (Aug. 29, 2016, 3:26 PM), <http://www.businessinsider.com/colin-kaepernick-social-injustice-sat-national-anthem-2016-8>. (To point out one example, Kaepernick posted a photo commemorating the founding of the Black Panther party which practiced self-defense of the black community against incidents of police brutality. This photo and many others were met with an average response rate for a famous athlete according to data analytics).

empowerment, and instruction to properly interact with law enforcement properly.¹⁷⁹ The youth learn the *10 Points*: that they have the right to be free, healthy, brilliant, safe, loved, courageous, alive, trusted, educated, and know their rights.¹⁸⁰ Kaepernick who is quoted making his million dollar pledge saying, “I will donate one million dollars plus all the proceeds of my jersey sales from the 2016 season to organizations working in oppressed communities, 100k a month for 10 months.”¹⁸¹ For the first three months, Kaepernick has delivered on his promise and it would do the NFL good to help support his message. In this past October, Kaepernick donated his first \$100,000. He allotted \$10,000 to the *Justice for Josiah Campaign*, tasked by *Silicon Valley De-Bug* (“*De-Bug*”)¹⁸² with healing and strategic planning for California families suffering from losing loved ones to police violence.¹⁸³ He then allocated donations strategically to help develop education for impoverished class.¹⁸⁴

¹⁷⁹ *Know Your Rts. Camp*, KAEPERNICK7, <http://kaepernick7.com/know-your-rights-camp/> (last visited Jan. 17, 2017).

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*; see also *About Silicon Valley De-Bug*, SILICON VALLEY DE-BUG, <http://www.siliconvalleydebug.org/about/> (last visited Jan. 17, 2017) (Silicon Valley De-Bug is a media and organization platform for social injustice campaigns in the South Bay region).

¹⁸³ *Know Your Rts. Camp*, *supra* note 180.

¹⁸⁴ *Id.* The next \$2,500 was donated to a group in San Jose working with *De-Bug* for the creation of a specific tool in the form of a video seminar to assist families within the first twenty four hours to better position themselves to seek justice for losing a loved one to police brutality. An additional \$2,500 was granted for a similar video seminar for underprivileged families to receive a better outcome after an arrest of a loved one. Also in San Jose, another \$2,000 went towards public education and media presence aimed at bringing police accountability to the courtroom that was inspired by the Henry Sires case. A grant of \$8,000 was given to *De-Bug* to produce three social biography videos to stop youths from being charged as adults and losing potential to fulfill meaningful lives. Kaepernick gifted the next \$25,000 to *CausaJusta :: Just Cause* (“*CJJC*”), a grassroots organization working to achieve justice for low-income San Francisco and Oakland residents. Specifically, this money will pay for the stopping of forced displacement and evictions of minority and working-class families through providing adequately competent tenant rights counseling services to the individuals. Kaepernick set up an agreement with *Urban Underground*, located in Milwaukee, to create a stipend retreat program for youths to learn about new employment and entrepreneurial opportunities such as creating your own t-shirt printing business. Along with inventory including seven updated Mac computers and a van for transportation, *Urban Underground* will receive \$25,000 for their help and services. The last \$25,000 of Kaepernick’s October donations was bestowed to an organization called *Mothers Against Police Brutality*. Respectively, \$11,000 of that sum of money will be paid for a first response team for contacting the family and providing any identified witnesses and other articles of evidence. On a set date, \$5,000 of the donation will pay for the *Clinton R. Allen Youth Speak out against Police Brutality Event* with

Kaepernick also followed through, continuing his promise in the month of November and again in December.¹⁸⁵ Following Kaepernick's actions, the 49ers franchise announced that they too would donate \$1 million to what chief executive, Jed York described as, "the cause of improving racial and economic inequality and fostering communication and collaboration between law enforcement and the communities they serve here in the Bay Area."¹⁸⁶

IV. U.S. HISTORY & CONSTITUTIONAL RIGHTS

A. *The National Anthem, A Mainstay of American Sports*

Competition, battle, victory, and pride. . . The National Anthem or "The Star-Spangled Banner" was written by American author and poet, Francis Scott Key after observing a lone American flag that remained flying over Fort McHenry after the British bombardment during the War of 1812.¹⁸⁷

"The Star-Spangled Banner," adopted as the national anthem on March 3, 1931, "echoes the past and gives voice to our present."¹⁸⁸ The original poem that was paired with a popular English drinking tune¹⁸⁹ has become a vehicle of devotion to this nation, but also a witness of contradiction¹⁹⁰ and a

several workshops and a distinguished panel of speakers. Additionally, six mothers will be chosen, using \$5,500 of the grant, to advocate for a nine-step policy change proposal at the local, state, and national level. Lastly, the last \$3,500 will be reserved for distribution towards headstones for victims in unmarked graves.

¹⁸⁵ *Id.* (explaining that he donated \$25,000 to the *Black Youth Project in Chicago*, \$25,000 to *The Gathering For Justice/Justice League* in New York City, \$25,000 to the *Communities United for Police Reform Organization* in New York City, and \$25,000 to the *I will Not Die Young Campaign* in Milwaukee. This past December, Kaepernick again donated another \$100,000 to organizations of his choosing, as he has continued to make his mission a reality).

¹⁸⁶ Maske, *supra* note 46.

¹⁸⁷ *The Lyrics*, SMITHSONIAN, <http://amhistory.si.edu/starspangledbanner/the-lyrics.aspx>; *see also Key Pens Star-Spangled Banner*, HISTORY <http://www.history.com/this-day-in-history/key-pens-star-spangled-banner> (Sept. 13, 2009); *see also Id.* (expressing that the war of aggression was hard fought after a series of trade disagreements which resulted in the deaths of many Americans as well as the scorching of the monumental White House, Capitol Building and Library of Congress. The American flag that remained, to which we show tribute today for a multitude of reasons, has found its home at the Smithsonian Institution's Museum of American history in Washington, D.C. as a relic of America's hard fought foundation).

¹⁸⁸

Id.

¹⁸⁹ HISTORY, *supra* note 188.

¹⁹⁰ The original Star-Spangled Banner includes, "No refuge could save the hireling and slave from the terror of flight or the gloom of the grave . . . O'er the land of the free and the home of the brave." Many have interpreted this as a contradiction in that it was not the land

recent vehicle for social interpretation.¹⁹¹ Still, as a proud nation, we continue the tradition of performing the National Anthem before the inception of every professional sporting event.¹⁹² The Star Spangled Banner, which shares its conceptual DNA with the United States, is a reminder to all of us that we should be grateful to live in such a free democratic country.¹⁹³

It is first, a battle song with its climax referencing the many rockets and bombs that were set off, followed by other verses referencing the “havoc of war,” and the “gloom of the grave.”¹⁹⁴ Secondly, it serves as a taunt, a boastful missile aimed at the defeated combatants for failing to capture our flag.¹⁹⁵ This competitive nature exists on the battlefield and the playing field alike. Thus, for now, The Star Spangled Banner and American athletics are inseparably intertwined in our nation’s identity.¹⁹⁶ It is nearly impossible to think about sports without the song or battle cry that was hatched during the culmination of one war and then institutionalized in a later war (WWI).¹⁹⁷ Protocol suggests that all citizens in attendance, except for those in uniform, should “stand” at attention facing the flag with the right hand over the heart . . .¹⁹⁸ Currently, this rich American pastime and the protocol that unites the rendition is under attack.

B. Historic Freedom of Speech & Expression

Each citizen of the United States of America is afforded rights. “If liberty means anything at all, it means the right to tell people what they do not want to hear.”¹⁹⁹ Everyone has an opinion and right to be heard that is protected

of the free because slavery had still existed.

¹⁹¹Mark Clague, *'Star-Spangled Banner' Critics Miss the Point*, CNN (Aug. 31, 2016, 11:15 PM), <http://www.cnn.com/2016/08/31/opinions/star-spangled-banner-criticisms-opinion-clague/>.

¹⁹²Luke Cyphers & Ethan Trex, *The Song Remains the Same*, ESPN (Sept. 8, 2011), http://www.espn.com/espn/story/_/id/6957582/the-history-national-anthem-sports-espn-magazine (The “unbreakable bond” that is said to have been notably struck before Babe Ruth’s final postseason appearance with MLB’s Boston Red Sox).

¹⁹³*Id.*

¹⁹⁴*Id.*

¹⁹⁵*Id.*

¹⁹⁶*Id.*

¹⁹⁷*Id.*

¹⁹⁸*Protocol for the National Anthem and Pledge of Allegiance*, THE DAILY FLAG (Feb. 13, 2011), <http://www.thedailyflag.com/2007/02/13/protocol-for-the-national-anthem-and-pledge-of-allegiance/>.

¹⁹⁹Lynne Olsen, *Two men who fought totalitarianism in sharply different ways*, THE WASHINGTON POST (June 2, 2017) available at https://www.washingtonpost.com/opinions/two-men-who-fought-totalitarianism-in-sharply-different-ways/2017/06/02/fc93a4a4-26bc-11e7-bb9d-8cd6118e1409_story.html?utm_term=.c0da75e65510; see also, Brian Levin, *Liberty: The*

by the Constitution. While Kaepernick certainly has that right to be heard, the reader is asked to question whether Kaepernick has abridged the rights of others, and certainly, if he has a constitutional defense to back up his actions that are not associated with any government action.

English poet and philosopher, John Milton, is widely recognized as the voice of “the earliest complete statement of the absolute protection to be accorded controversial ideas” with his piece, *Areopagitica*.²⁰⁰ Delivered to parliament of England, and clearly influenced by the works of the early Greeks, Milton expressed his views on free expression in his speech for the liberty of unlicensed printing writing in his 1644 tract:

“And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting, to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?”²⁰¹

Nineteenth century philosopher, John Stuart Mills also espoused his ideas on freedom of speech and expression, specifically focused on the importance of unpopular speech in his essay *On Liberty*.²⁰² Justice Oliver Wendell Holmes continues the conversation when he eloquently put forth his perspective on the necessity of free speech in our American society early on in its development, saying:

“[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is

Right to Tell People What They Don't Want to Hear, HUFFPOST (Feb 17, 2015) available at https://www.huffingtonpost.com/brian-levin-jd/liberty-the-right-to-tell_b_6349214.html.

²⁰⁰Jonathan Blumen, *Introduction: The Free Speech Rulebook*, THE ETHICAL SPECTACLE, (Feb. 1996), <http://www.spectacle.org/296/rulebk.html>; see also *Id.* (quoting, “[I]n his choice of title, Milton alludes to an analogous written oration of Socrates presented in 355 B.C. to the Athenian Ecclesia, advocating a return of certain powers to the aristocratic Council of the Areopagus.”)

²⁰¹John Milton, *Areopagitica* (1644). reprinted in Renaissance Editions, available at <http://www.uoregon.edu/~rbear/areopagitica.html>. John Locke, at a time before monopoly power was regulated, “opposed the licensing system because it ‘injured the printing trade.’” (quoting Leonard W. Levy, *Freedom of the Press From Zenger to Jefferson* (Bobbs-Merrill)(1966)).

²⁰²Blumen, *supra* note 8. (quoting John Stuart Mills, *On Liberty* (London, Longmans, Green, and Co.) (1865))(citing, “[T]he peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error”).

better reached by free trade in ideas - that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.”²⁰³

Justice Holmes is not finished here. In his 1925 dissent in *Gitlow v. New York*,²⁰⁴ Holmes touches up the definition of free speech as the right to expressive belief: “If in the long run the beliefs expressed in proletarian dictatorship²⁰⁵ are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.”²⁰⁶ Holmes is suggesting that inclusion in any lower social class should not exclude you from being able to express your political beliefs especially when are much more than a minority way of thinking. Applicable to Keapernick’s Stance in that Keapernick views himself as an oppressed class, Holmes would agree that Keapernick have the right to express the beliefs of many minority U.S. citizens whom he looks to represent. This historic foundation of a fundamental right in today’s society to speak freely would go on to develop long before we became the United States of America, and long before Colin Keapernick sat for our National Anthem.

C. Early Controversy and Development of Free Speech in America

There is an idiom that utters, “[G]ive me the liberty to know, to utter, and to argue freely according to conscience, above all liberties.”²⁰⁷ On its face, freedom of speech is definitely the most fundamental liberty of a democracy of free persons not to be scrutinized but encouraged. However, as a country, our commitment to free speech was painfully challenged before the turn of the 19th century,²⁰⁸ long before the first game of American football was played on November 12, 1882.²⁰⁹ During the late 1790’s, the United States developed what is today commonplace: the two-party political system. The

²⁰³*Abrams v. United States*, 250 U.S. 616, 630 (1919).

²⁰⁴*Gitlow v. New York*, 268 U.S. 652, 673 (1925).

²⁰⁵ *Dictatorship of the proletariat*, ENCYCLOPEDIA BRITANNICA (July 7, 2002), <https://www.britannica.com/topic/dictatorship-of-the-proletariat> (Referring to Marxism by which the economic and social class need to voice their concerns to create a new class-less society).

²⁰⁶*Id.* at 673.

²⁰⁷ John Milton, *Areopagitica; A speech of Mr. John Milton for the Liberty of Unlicenc’d Printing, to the Parliament of England* at 35 (November 23, 1644).

²⁰⁸ U.S. Const. amend. I: Freedom of Speech § 1:2.

²⁰⁹ *Birth of Pro Football*, PRO FOOTBALL HALL OF FAME, <http://www.profootballhof.com/football-history/birth-of-pro-football/> (last visited Feb. 6, 2017)

Federalist majority in congress at the time passed a law known as the Sedition Act of 1798, which made it a high-class misdemeanor to publish “false, scandalous, and malicious writing against the government of the United States. . . .”²¹⁰ The Sedition Act of 1798 was as ugly as its name suggests, and created for an early American History conflict. The act criminalized speech and provided that future defendants- those charged with violating the Sedition Act of 1798- would have the burden of proving the contested statements were correct. What followed, as Justice Brennan noted years later in his influential opinion in *New York Times Co. v. Sullivan*, was a crystallization of national awareness of the “central meaning of the First Amendment.”²¹¹

The test of free expression did not stop there. In fact, free expression is tested in federal courts with great frequency and emotion on a broad range of issues. One thing for sure though is that the importance of free expression to our national identity and democratic consciousness is underlined in the very first amendment to the Constitution of the United States. It states: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise hereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”²¹²

Additionally, the First Amendment is echoed in the Fourteenth Amendment, passed in 1868,²¹³ to apply directly to the states: “[N]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . .”²¹⁴ Importantly, this protection afforded to individuals absorbed in the privileges and immunities absorbed by the Fourteenth Amendment under the U.S. Constitution applies to state action and not to the actions of private parties necessarily. However, a private employer may be deemed a state actor in some circumstances thereby granting First Amendment protection to employees.²¹⁵ Noted by Cardozo in *Palko v. Connecticut*, the due process clause of the Fourteenth Amendment will protect individuals from any state statute, rule or regulation that abridges free speech, free expression, freedom of the press and/or free exercise of religion,²¹⁶ all of which are still under attack today. In Cardozo’s words, “Freedom of expression is the matrix, the indispensable condition, of

²¹⁰ *League Governance*, *supra* note 8.

²¹¹ *New York Times Co. v. Sullivan*, 376 U.S. 254, 273 (1964).

²¹² U.S. Const. Amend. I.

²¹³ U.S. Const. Amend. XIV.

²¹⁴ *Id.*

²¹⁵ See generally *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961).

²¹⁶ *Palko v. State of Connecticut*, 302 U.S. 319, 58 S. Ct. 149, 82 L. Ed. 288 (1937)

overruled by Benton v. Maryland, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969).

nearly every other form of freedom.”²¹⁷

Alexander Meiklejohn, former President of Amherst College, and publisher of the book, *Free Speech and its Relation to Self-Government* has adapted a more modern theory. Meiklejohn's particularistic motivations for writing *Free Speech* were clear enough, but the strategy he employed in formulating his theoretical position suggested that he was reacting to a larger jurisprudential concern occurring with the evolution of free speech.²¹⁸ The "most general thesis" of his argument, stated, "that our civil liberties, in general, are not all of one kind."²¹⁹ He demonstrated instead that they are of two kinds which, though radically different in constitutional status, are easily confused. They are speech open to restriction by the government, and speech not open to such restriction.²²⁰ This brings the audience back to the essential question of government involvement.

D. Is Necessary Government Involvement Present?

Even the NFL has spoken publicly, touching on Kaepernick's freedom of speech. However, this defense or protection is only guaranteed under the

²¹⁷ *Id.*; see also *Free Speech*, ACLU, <https://www.aclu.org/issues/free-speech> (last visited Feb. 6, 2017).

²¹⁸ Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (1948).

²¹⁹ *Id.* at x-xiii.

²²⁰ *Id.* at 29. Meiklejohn began his discussion of the clear and present danger test by asserting that it "annuls the most significant purpose of the First Amendment" and "destroys the intellectual basis of our plan of self-government." His primary emphasis was on the inadequacy of the "market place metaphor discussed above that was offered by Holmes in his *Abrams* dissent. In just one of his passages, Meiklejohn writes out his issue with the metaphor:

"We Americans . . . have taken the "competition of the market" principle to mean that as separate thinkers, we have no obligation to test our thinking, to make sure that it is worthy of a citizen who is one of the "rulers of the nation." That testing is to be done, we believe, not by us, but by "the competition of the market." Each one of us, therefore, feels free to think as he pleases, to believe whatever will serve his own private interests. We think, not as members of the body politic . . . but as farmers, as trade-union workers, as employers, as investors. . . . And our aim, as we debate in those capacities, is not that of finding the truth. . . . Our aim is to "make a case," to win a fight, to make our plea plausible, to keep the pressure on. And the intellectual degradation which that interpretation of truth-testing has brought upon the minds of our people is almost unbelievable. Under its influence, there are no standards for determining the difference between the true and the false. The truth is what a man or an interest or a nation can get away with. That dependence on intellectual laissez-faire, more than any other single factor, has destroyed the foundations of our national education"

U.S. Constitution from the infringement of government bodies.²²¹

The NFL is a private entity that sets forth its own conduct rules and has the power to dictate what an employee can or cannot say.²²² For example, choreographed celebrations, taunting, and uniform alterations are all against the NFL rulebook, and pleading the First Amendment won't stop an employee/player from being penalized.²²³ Thus, Colin Kaepernick would have to stand for the National Anthem if the NFL had a rule that called him to do so. Free speech in the workplace applies to the state; however, in some circumstances a private party steps into the shoes of the state for constitutional purposes. Thus, a brief look into the San Francisco 49ers and Levi Stadium for example, will assure whether there is in fact a possible relationship that creates a nexus rendering the 49ers a state actor and thus fulfilling government action on a rational basis review.

Home of the San Francisco 49ers, Levi Stadium is one of the more modern and luxurious sports and entertainment venues.²²⁴ The \$1.3 billion stadium was funded by a combined effort.²²⁵ In an era when the federal government has on occasion helped to subsidize professional sports stadiums,²²⁶ the 49ers built Levi Stadium without a direct public subsidy and thus cannot be deemed publicly financed.²²⁷ This means that the 49ers franchise was able to steer clear of certain financial obligations to the federal government and is not a state actor by which a nexus is created and Kaepernick afforded additional rights. Instead, The Santa Clara Stadium Authority, a public agency of the city and county, was designated the responsibility to make sure that city and state money or “coffers” were not

²²¹ U.S. Const. Amend. I.

²²² Angela Lee, *NFL: Non-Profit or Corporation? Which team are you on?*, ROCKET LAWYER (Jan. 29, 2015) <https://www.rocketlawyer.com/blog/nfl-non-profit-or-corporation-which-team-are-you-on-916494>.

²²³ Carter Woodiel, *What Exactly Are The Free Speech Rights Of NFL Players?*, NEWSY (Sept. 18, 2016) <http://www.newsy.com/stories/kaepernick-protest-brings-up-question-of-free-speech-in-nfl/>.

²²⁴ *About*, LEVI STADIUM, <http://www.levisstadium.com/about-levis-stadium/>.

²²⁵ *Levi's Stadium is a model for privately financed venues*, SAN FRANCISCO CHRONICLE (Feb. 4, 2016) available at <http://www.sfchronicle.com/opinion/editorials/article/Levi-s-Stadium-is-a-model-for-privately-6808683.php>.

²²⁶ *NFL, NBA, MLB Stadium Funding: How The Federal Government Loses Billions Subsidizing Sports Venues*, INTERNATIONAL BUSINESS TIMES (Sept. 9, 2016), <http://www.ibtimes.com/nfl-nba-mlb-stadium-funding-how-federal-government-loses-billions-subsidizing-sports-2413872>. (explaining that since the turn of the century, the government has subsidized \$3.2 billion worth of stadium construction. An additional \$500 million is added to the \$3.2 billion to make \$3.7 billion because of high-income bond dividends that investors will gain after holding the tax exempt municipal bonds up to maturity).

²²⁷ Cyphers, *supra* note 193.

being used for stadium costs.²²⁸ These costs include an approximately \$950 million construction loan granted from the Authority, a \$200 million loan from the NFL and the 49ers annual rent of \$24.5 million on a 40 year lease, that they have taken the risk of paying off through revenues brought in by the team.²²⁹ What this means, is that everyone has a hand in the pot, and the Stadium is technically still publicly funded through the state. Still, the 49er franchise does not own Levi Stadium which is owned by Santa Clara or “Silicon Valley”.²³⁰ The franchise, valued by *Forbes* at \$1.6 billion, on the other hand is a private entity under the ownership of Denise DeBartolo and John York.²³¹ Not only does the NFL has the discretion to create rules Kaepernick must abide by, but Debartolo, the majority owner, also has the right to create his own in-house team rules. Thus, if it comes to it, Kaepernick will not be able to successfully claim freedom of speech under the First Amendment, because he has given up that freedom to be employed by the NFL and the 49ers.

V. MY SOLUTION

A. *Bradwell Argument*

Under the Amendments of the Constitution there are specific liberties and rights that everyone is granted. In the Fifth Amendment, an individual is guaranteed the right to not be tried for the same crime twice. In the Fourteenth Amendment, the states guarantee Equal Protection of laws to each individual group. However, while the Constitution’s Amendments guarantee much more, there is no right guaranteed to an individual to a certain profession. While every person is entitled to the equal opportunities of attempting to secure employment, there is no specific right to working.

There is a seminal case, *Bradwell v. State of Illinois* that proves this point. In *Bradwell*, Myra, a woman in 1873, applied for bar admission in the state of Illinois.²³² The state denied her admission citing the fact that being a lawyer is extremely stressful.²³³ This “strife”, the court stated, would surely lead to the destruction of her femininity.²³⁴ Bradwell appealed to the

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ Paul Gutierrez, *San Francisco 49ers ownership at a glance*, ESPN (March 18, 2015) http://www.espn.com/blog/san-francisco-49ers/post/_/id/12664/san-francisco-49ers-ownership-at-a-glance.

²³¹ *Id.*

²³² *Bradwell v. State*, 83 U.S. 130, 137 (Apr. 15 1873).

²³³ *Id.*

²³⁴ *Id.*

Supreme Court.²³⁵ The Supreme Court analyzed this case through the lens of the Privileges and Immunities Clause of the Fourteenth Amendment which states, “[T]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”²³⁶ This was taken to mean that one’s state could not treat citizens of other states in a discriminatory manner. The Court determined that the right to practice a profession was not included among these privileges, which led to a very narrow reading of the Privileges and Immunities Clause.²³⁷ This further meant that states could regulate how someone received and maintained a profession.²³⁸ So although Ms. Bradwell was completely qualified to practice law, she had no protected Constitutional right to that practice.

While Colin Kaepernick is a talented football player, he also does not have a right to be employed by the NFL. First, the NFL again is a private entity and thus the protection of the Constitution does not extend to the employees of the NFL; they only apply to government employees.²³⁹ However, it is important to keep the framework of the *Bradwell* case in mind because it sets the overarching tone of employment. There is no right to your employment. There is however, the right to contract freely granted to an individual by Article I, section 10, clause 1. *Lochner* was the seminal case that defined this right to contract. Supreme Court Justice Peckham wrote for the majority: “Under that provision no state shall deprive any person of life, liberty, or property without due process of law.”²⁴⁰ The right to purchase or to sell labor is part of the liberty protected by this amendment.”²⁴¹ Thus while you do have the right to enter into a contract, you do not have the right to renew that contract after it is expired.²⁴² Thus, for Colin Kaepernick it is in his best interest to follow whatever rules the NFL sets out in his CBA. Today, he remains an un-signed free agent.

B. An Attempt at Negotiation

Labor law as applied to professional sports presents many unique characteristics. The teams or private institutions that make up the NFL arguably enjoy certain one-sided rights. The system created by the NFL Constitution²⁴³ characterizes a system in which the rights to an individual

²³⁵ *Id.*

²³⁶ *Id.* at ***7.

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Lochner v. New York*, 198 U.S. 45, 53 (1905).

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ Constitution and Bylaws of the National Football League (1988).

player's services are restricted to one team of the joint venture upon entry of that player into the league. This effectively has transformed the NFL into a "monopsony."²⁴⁴ With only one buyer, being the team that signs the individual player, the team enjoys incredible bargaining leverage obvious in a system without any competing buyers.²⁴⁵ This disadvantage to players in the NFL was addressed through arbitration, but also indirectly by *American Needle v. National Football League*, using the Rule of Reason analysis.²⁴⁶ Justice Stevens held that "licensing activities for individual teams' intellectual property, conducted through a corporation separate from the teams and with its own management, constituted concerted action that was not categorically beyond the coverage of § 1 of the Sherman Act, which made illegal a contract, combination, or conspiracy in restraint of trade."²⁴⁷ This case, piggybacking off of *Radovich*,²⁴⁸ raised the central question concerning antitrust law: which kind of joint ventures, professional sports leagues included, should receive immunity under the Sherman Act as single entities?²⁴⁹ Why is this important? The players bargaining power is a separate issue beyond the scope of this Note. However, this Note takes the stance that certain restrictions on player movement should be lifted in exchange for increased limitations on player's freedom of expression on the field. This along with other working conditions should be exchanged for a rule that requires players and personnel to stand for the National Anthem.

This issue will not just dissipate. It is because of the platform Kaepernick has been given that he should not be sending any political message to youngsters in a manner that creates a divide. As a country, we are going through some testing times, and notable sports figures who have achieved the "American Dream" should not be bashing the hand that feeds them. If the NFL wants to keep its image as America's number one sport, then it needs to make sure the players honor what this country stands for. Staying neutral during the protests and killings that surrounded this past election is one thing, but the NFL should propose a provision that requires 36 U.S. Code §301 is followed during the National Anthem. It is disproportionate and hypocritical

²⁴⁴*Monopsony*, Black's Law Dictionary 908 (5th ed. 1979) (defining it as a market where there is only one purchaser).

²⁴⁵Note, *Unsportmanslike Conduct: The Lack of Free Agency in the NFL.*, 64 S. Cal. L. Rev. 797.

²⁴⁶*Am. Needle, Inc.*, *supra* note 11.

²⁴⁷*Id.* at 2204.

²⁴⁸*Radovich v. NFL*, 352 U.S. 445, 447 (1957) (landmark case where Supreme Court first held the NFL was subject to Sherman Act.)

²⁴⁹*Is the NFL a "single entity" (and therefore exempt from many anti-trust laws)? A round-up*, SMART FOOTBALL (Oct. 3, 2009) <http://smartfootball.com/grab-bag/is-the-nfl-a-single-entity-and-therefore-exempt-from-many-anti-trust-laws-a-round-up#sthash.KA2OqyOF.dpbs>.

to fine a player for wearing 9/11 themed cleats and yet stay quiet when players show blatant disrespect to those who stand around them. The NFLPA exists to address players concerns when negotiating with the NFL. There are many concerns that they can use this stance as leverage for. For example, players often risk large chunks of their money when contracting because it is allocated to non-guaranteed clauses and action to prevent the risk of losing money to a player who cannot finish the season. Injuries occur often in the NFL. The league should do the right thing by the players by offering them more guarantees and protections if they are hurt during work. The attention that Kaepernick and his stance has drawn can now be leveraged when re-negotiation the CBA in the future. Currently, the players pay their own health studies and others like it out of the Player Cost Amount²⁵⁰ due to the way clubs and players split revenue. More in depth, the Harvard Health Study in particular is funded from the players' share of net revenues, half of all new NFL ventures, less 47.5% of the Joint Contribution Amount which is significant.²⁵¹ Collective bargaining is inherently a give-and-take dynamic where the negotiating power and leverage of each side plays an important role in the outcome to effectuate change. This is something that the league could be paying for and would probably concede to with more evidence of head trauma and the recent 2013 mediation that ensued where 18,000 retired players agreed to a \$765 million settlement over concussion-related brain injuries.²⁵²

Further, In the National Basketball League (“NBA”), for example, there is a longstanding rule under Basic Principles for team conduct that states that, “[P]layers, coaches and trainers are to stand and line up in a dignified posture along the sidelines or on the foul line during the playing of the National Anthem.”²⁵³ In fact, this provision has even been enforced before when Mahmoud Abdul-Rauf refused to stand for the national anthem, explain that doing so would conflict with his faith in 1996.²⁵⁴ The point guard responded, “I don't criticize those who are standing, so don't criticize me for sitting.”²⁵⁵ After a one game suspension, Mahmoud was allowed to look down and pray

²⁵⁰ 2011 CBA, Art. 12, § 6(c)(i).

²⁵¹ *Id.*

²⁵² *Ex-players agree to \$765M settlement in concussions suit*, NFL (Aug. 29, 2013), www.nfl.com/news/story/0ap1000000235494/article/nfl-explayers-agree-to-765m-settlement-in-concussion-suit.

²⁵³ *Official Rules of the National Basketball Association*, NBA, <http://www.nba.com/media/dleague/1314-nba-rule-book.pdf> (last visited Feb. 6, 2017).

²⁵⁴ Carter Woodiel, *What Exactly Are The Free Speech Rights Of NFL Players?* NEWSY (Sept. 18, 2016) <http://www.newsny.com/stories/kaepernick-protest-brings-up-question-of-free-speech-in-nfl/>.

²⁵⁵ *Id.*

during the anthem.²⁵⁶ The NFL should work out an agreement where a similar provision is added to the new CBA to mimic that of the NBA to avoid any confusion. Likewise, expect the NLRB to work on a new set of guidelines covering the limits of free speech on social media channels. A potential amendment to the NFL CBA could read: “All persons representing a private American NFL team shall stand respectfully during the playing of national anthems at any event in which the American NFL team is represented.”

C. Conclusion

While the NFL is still America’s most watched sport, NFL’s ratings have dropped by about 12 percent on average for the last few years.²⁵⁷ It is also no secret that NFL ratings are again down after this year, even with the first ever overtime win in a Super Bowl attracting 111.3 million viewers.²⁵⁸ Nonetheless, a recent poll from Seton Hall surveyed and asked 841 adults across the U.S. to identify seven separate factors as a reason for this year’s NFL ratings drop, allowing for a yes or no option for each choice.²⁵⁹ According to this specific poll, the leading factor was the national anthem protests, scoring a “yes” rate of 56 percent with coverage of the presidential election as a close second scoring a “yes” rate of 50 percent.²⁶⁰

I stand with those who agree with Kaepernick’s right to protest, just not when he is uniform and on the job representing the NFL and the team that hired him. With that aside, I too wish I could help solve the injustices of the world and applaud Kaepernick for all he has done. I do think we should be addressing the issues that he has mentioned in a way that does not create further divide. I know this country is good in nature and that our flag represents our growth through good times and bad. The National Anthem is a creed that should bond us though not further divide us. Even Martin Luther King Jr. sang the national anthem before his “I have a Dream” speech and then quoted the Declaration of Independence within it.²⁶¹ There is always a

²⁵⁶ *Id.*

²⁵⁷ Matt Dolloff, *Poll: National Anthem Protests Leading Cause For NFL Ratings Drop*, CBS BOSTON (Oct. 27, 2016), available at <http://boston.cbslocal.com/2016/10/27/nfl-ratings-national-anthem-protests-poll/>.

²⁵⁸ Joe Flint, *First-Ever Overtime Super Bowl Attracts 111.3 Million TV Viewers*, THE WALL STREET JOURNAL (Feb. 6, 2017), available at <https://www.wsj.com/articles/patriots-comeback-ranks-as-one-of-most-watched-super-bowls-1486396041>.

²⁵⁹ *Am. Needle, Inc.*, *supra* note 11.

²⁶⁰ *Id.*

²⁶¹ David Brooks, *The Sharp Decline in American patriotism*, The Seattle Times, (Sept. 16, 2016) available at <http://www.seattletimes.com/opinion/the-sharp-decline-in-american-patriotism/>.

way to make things better.