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Jonathan G. Finck

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Can NFL Players Be Punished for Kneeling - An Analysis of the Banter Surrounding the Star-Spangled Banner

**CAN NFL PLAYERS BE PUNISHED FOR KNEELING?
AN ANALYSIS OF THE BANTER SURROUNDING THE STAR-
SPANGLED BANNER**

*By: Jonathan G. Finck**

ABSTRACT

This article explores the different punishments frequently used by the NFL to determine whether they can legally be applied to players who kneel during the anthem. Additionally, this article analyzes how the NFL's 2020 collective bargaining agreement can change to narrow its broad power while still allowing the league to punish reprehensible acts. Finally, this article recommends a way forward through the current anthem controversy.

* J.D. Candidate, 2019 Mitchell Hamline School of Law; B.A. Sociology and English, 2016, Biola University. I am grateful to Professor David Larson for guiding me through this writing process. I am also grateful to Robert Ambrose for helping me develop my topic and for sharing about his experience writing about the NFL conduct policy. Thank you to my mother, Tracey Finck, and my sister, Betsy Alle, for all their lessons in writing and the time spent reading my work. Finally, I want to thank my wife, Mikala Finck, for supporting and encouraging me through law school and the writing of this article.

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I. BY THE DAWN'S EARLY LIGHT – INTRODUCTION

“Wouldn’t you love to see one of these NFL owners, when somebody disrespects our flag, to say, ‘Get that son of a bitch off the field right now, out. He’s fired. He’s fired!’ You know, some owner is going to do that.” – President Donald J. Trump¹

In 2016, San Francisco 49ers quarterback Colin Kaepernick started a movement when he refused to stand for the National Anthem.² He did this to raise awareness of racial injustice in America.³ Kaepernick’s gesture gained momentum as many players around the league followed suit.⁴ These protests created a fault line through our country, and many—including President Trump—are pressuring the National Football League (“NFL”) to ban the protests.⁵ The controversy raises questions about whether the league can punish players for peacefully protesting as they work for their private employer during nationally televised games. This article will explore the different punishments frequently used by the NFL and determine whether they can legally be applied to players who kneel during the anthem. Additionally, this article analyzes how the NFL’s 2020 collective bargaining agreement can change to narrow its broad power while still allowing the league to punish reprehensible acts. Finally, this article recommends a way forward through this issue.

A. *What So Proudly We Hailed*

Colin Kaepernick made an immediate impact on the NFL. In just his second

¹ President Donald Trump, Campaign Rally for Luther Strange in Huntsville, AL (Sept. 22, 2017) (transcript available at <https://factba.se/transcript/donald-trump-speech-luther-strange-rally-huntsville-alabama-september-22-2017>).

² Josh Peter, *Colin Kaepernick Inspires a Movement with his Absence*, USA TODAY SPORTS (last updated Sept. 26, 2017, 9:16 AM), <https://www.usatoday.com/story/sports/nfl/2017/09/25/colin-kaepernick-inspires-movement-his-absence/700808001/>.

³ Steve Wyche, *Colin Kaepernick Explains Why He Sat During National Anthem*, NFL.COM (last updated Aug. 28, 2016, 4:33 PM), <http://www.nfl.com/news/story/0ap3000000691077/article/colin-kaepernick-explains-why-he-sat-during-national-anthem>.

⁴ Peter, *supra* note 2.

⁵ Trump, *supra* note 1; Scott Davis, *NFL Players Are Reportedly Under Pressure from Owners and Management to Stop Protesting During the National Anthem*, BUS. INSIDER (last updated Oct. 9, 2017, 4:39 PM), <http://www.businessinsider.com/nfl-players-national-anthem-protests-2017-10>.

season, he led the San Francisco 49ers to a Super Bowl.⁶ In 2014, he nearly repeated the previous season's success by reaching the NFC Championship Game.⁷ Many thought he was going to permanently change the standard for quarterbacks and go down as one of the greatest to play the game.⁸ Kaepernick became an idol. Embraced by the nation, he flooded the media and was featured on the cover of *GQ Magazine*⁹ and displayed in the *ESPN Body Issue*.¹⁰ The twenty-five-year-old Wisconsin native was loved across the country, becoming a football hero, sex symbol, and even Christian role model.¹¹

After the 2014 NFC Championship Game, the 49ers suffered a steep decline.¹² Kaepernick began the 2015 season poorly and, after losing his starting position, decided to undergo season-ending surgery to mend a torn

⁶ Louis Bien, *Super Bowl XLVII: Colin Kaepernick Shines in Losing Effort*, SBNATION (Feb. 4, 2013, 12:45 PM), <https://www.sbnation.com/nfl/2013/2/4/3949488/super-bowl-2013-colin-kaepernick-49ers>.

⁷ Al Saracevic, *NFC Championship Game Exceeded Expectations*, SFGATE (Jan. 20, 2014, 10:45 AM), <http://www.sfgate.com/49ers/article/NFC-Championship-Game-exceeded-expectations-5158224.php>.

⁸ Associated Press, *Jaworski Praises Colin Kaepernick*, ESPN (Aug. 22, 2013), http://www.espn.com/nfl/trainingcamp13/story/_/id/9590058/ron-jaworski-says-colin-kaepernick-one-greatest-quarterbacks-ever (statement of ESPN analyst Ron Jaworski) ("I truly believe Colin Kaepernick could be one of the greatest quarterbacks ever. I love his skill set. I think the sky's the limit.").

⁹ GQ MAG., Sept. 2013.

¹⁰ Body Issue, ESPN, 2013.

¹¹ See Melissa Steffan, *Tattooed 49ers QB Not the Only Controversial Christian in 2013 Super Bowl*, CHRISTIANITY TODAY (Jan. 31, 2013, 11:12 AM), <http://www.christianitytoday.com/news/2013/january/tattooed-49ers-qb-not-only-controversial-christian-in-2013.html>; Steve Politi, *Is Kaepernicking the New Tebowing?*, CNN (last updated Jan. 18, 2013, 3:21 PM), http://www.cnn.com/2013/01/18/us/colin-kaepernick-nfl/index.html?hpt=hp_abar.

¹² See Doug Williams, *Niners Still Haunted by Jim Harbaugh Mistake*, NBC BAY AREA (Jan. 2, 2017, 8:26 AM), <http://www.nbcbayarea.com/news/local/Niners-Still-Haunted-by-Jim-Harbaugh-Mistake--409323835.html>. Front office politics led to the firing of head coach Jim Harbaugh. See *id.* This was a shocking move as Harbaugh held a record of 44-19 and led the team to three straight NFC Championship games. *Id.* In the two years after Harbaugh was fired, the 49ers had a losing record of 7-25 and fired two different head coaches. *Id.*; *San Francisco 49ers 2015 Schedule*, NFL, <http://www.nfl.com/schedules/2015/REG/49ERS>; *San Francisco 49ers 2016 Schedule*, NFL, <http://www.nfl.com/schedules/2016/REG/49ERS>. Harbaugh is now the head coach of Michigan University, and has denied any interest in returning to the NFL. See Alex Kirshner, *Jim Harbaugh NFL Rumors are 'Lies Made Up By Our Enemies,' He Reportedly Told Players*, SBNATION (last updated Dec. 13, 2016, 8:50 PM), <https://www.sbnation.com/college-football/2016/12/13/13942868/jim-harbaugh-rams-nfl-coach-search-rumors>.

labrum in his left shoulder.¹³ During the preseason of the following year, Kaepernick began to sit during the National Anthem. He later opted out of his contract with the 49ers in 2017 because of failed negotiations for a contract extension¹⁴ and the team's refusal to trade him.¹⁵ Although just four years earlier he led the team to the Super Bowl, the man who seemed destined for Canton, Ohio, walked away unwanted. There is no indication that he left the 49ers because of the anthem controversy, but he is claiming that other teams will not sign him because of it.

The NFL is a quarterback-centered league, and good quarterbacks are hard to come by. Many teams in the NFL are looking for a new quarterback, and the need only grows as players frequently get injured over the course of the season.¹⁶ Despite the need, Kaepernick is still not signed. It is widely believed that Kaepernick's employment status is solely the result of his political actions and completely unrelated to his skill on the football field.¹⁷ Indeed, Kaepernick himself believes this is the reason why he is not signed. In response to months of unemployment, he filed a claim against the league, alleging collusion among the team owners and general managers to silence Kaepernick and his influence.¹⁸

Kaepernick stunned the world back in 2016 when he first remained on the bench as everyone rose for the National Anthem.¹⁹ He explained his actions

¹³ Paul Gutierrez, *Niners Place Colin Kaepernick on IR*, ESPN (Nov. 22, 2015), http://www.espn.com/nfl/story/_/id/14185127/colin-kaepernick-san-francisco-49ers-placed-season-ending-ir.

¹⁴ Joe Fann, *Colin Kaepernick Opts Out of Contract, Becomes a Free Agent*, 49ERS (Mar. 3, 2017), <http://www.49ers.com/news/article-2/Colin-Kaepernick-Opts-Out-of-Contract-Becomes-a-Free-Agent/55f3952d-1f83-4682-bf97-3c423ab26fa8>.

¹⁵ Wyche, *supra* note 3.

¹⁶ See Will Brinson, *The Titans Are Signing Brandon Weeden and Colin Kaepernick Supporters Are Hot*, CBS SPORTS (Oct. 3, 2017), <https://www.cbssports.com/nfl/news/the-titans-are-signing-brandon-weeden-and-colin-kaepernick-supporters-are-furious/>.

¹⁷ Jack Dickey, *There's No Credible Reason Why Colin Kaepernick Isn't on a Week 1 NFL Roster*, SPORTS ILLUSTRATED (Sept. 8, 2017), <https://www.si.com/nfl/2017/09/08/colin-kaepernick-week-1-nfl-roster-not-signed>; Michael Rosenberg, *Colin Kaepernick Can Be an Activist AND a Football Player*, SPORTS ILLUSTRATED (Aug. 15, 2017), <https://www.si.com/nfl/2017/08/15/colin-kaepernick-national-anthem-protests-charlottesville>. But see Will Brinson, *Anonymous NFL Exec on Colin Kaepernick: 'I Don't Think He Can Play'*, CBS SPORTS (Aug. 31, 2017), <https://www.cbssports.com/nfl/news/anonymous-nfl-exec-on-colin-kaepernick-i-dont-think-he-can-play/>.

¹⁸ ESPN, *QB Colin Kaepernick Files Grievance for Collusion Against NFL Owners*, ESPN (Oct. 16, 2017), http://www.espn.com/nfl/story/_/id/21035352/colin-kaepernick-files-grievance-nfl-owners-collusion.

¹⁹ Wyche, *supra* note 3.

by stating, “I am not going to stand up to show pride in a flag for a country that oppresses black people and people of color. To me, this is bigger than football and it would be selfish on my part to look the other way.”²⁰ Despite criticism, he has remained steadfast. He moved from sitting on the bench to kneeling by his teammates,²¹ and others around the league slowly joined Kaepernick in support of fighting racial injustice.²² Kaepernick quickly became the most polarizing player in the NFL. He received death threats,²³ yet led the league in jersey sales.²⁴ Some people refuse to watch football when players kneel;²⁵ others refuse to watch until Kaepernick is signed.²⁶ To some he is a traitor,²⁷ to others a patriot.²⁸

²⁰ *Id.*

²¹ Mark Sandritter, *A Timeline of Colin Kaepernick’s National Anthem Protest and the Athletes Who Joined Him*, SBNATION (last updated Sept. 25, 2017, 10:28 AM), <https://www.sbnation.com/2016/9/11/12869726/colin-kaepernick-national-anthem-protest-seahawks-brandon-marshall-nfl> (to open the 2016 NFL regular season, Kaepernick kneeled and was joined by teammate Eric Reid).

²² John Breech, *Here Are the 11 Players Who Joined Colin Kaepernick’s Protest in Week 1*, CBS SPORTS (Sept. 12, 2016), <https://www.cbssports.com/nfl/news/here-are-the-11-players-who-joined-colin-kaepernicks-protest-in-week-1/>.

²³ Eoghan Macguire, *Colin Kaepernick: Quarterback Says He Has Received Death Threats*, CNN (last updated Sept. 22, 2016, 8:30 AM), <http://www.cnn.com/2016/09/21/sport/colin-kaepernick-death-threats/index.html>.

²⁴ Darren Heitner, *Colin Kaepernick Tops Jersey Sales In NFL*, FORBES (Sept. 7, 2016, 7:54 AM), <https://www.forbes.com/sites/darrenheitner/2016/09/07/colin-kaepernick-tops-jersey-sales-in-nfl/#45449eb37aad>.

²⁵ Joe Flint, Amol Sharma & Andrew Beaton, *DirecTV Allows Some NFL Refunds After Anthem Controversy*, WALL ST. J. (last updated Sept. 26, 2017, 4:54 PM), <https://www.wsj.com/articles/directv-allows-some-nfl-refunds-after-anthem-controversy-1506453159> (stating DirecTV offered full refunds to any Sunday Ticket package holders frustrated with kneeling during the anthem); *see also* Brad Tuttle, *5 Ways People Are Boycotting the NFL Because of the National Anthem Controversy*, TIME MONEY (Sept. 27, 2017), <http://time.com/money/4958955/nfl-players-national-anthem-protest-trump-boycott/> (stating that fans have burned NFL jerseys and even game tickets in protest).

²⁶ David Dennis Jr., *Deciding to Skip the NFL Season*, ATLANTIC (Oct. 1, 2017), <https://www.theatlantic.com/entertainment/archive/2017/10/deciding-to-skip-the-nfl-season/541638/>.

²⁷ Jesse Yomtov, *GOP Rep. Steve King on Kaepernick: ‘This is Activism That’s Sympathetic to ISIS’*, USA TODAY (last updated Sept. 15, 2016, 1:20 PM), <https://www.usatoday.com/story/sports/nfl/2016/09/15/steve-king-colin-kaepernick-activism-sympathetic-to-isis/90399954/> (quoting GOP Rep. Steve King “When he steps out on the stage, the world stage, he’s taking advantage of that and he’s undermining patriotism . . . this is activism that’s sympathetic to ISIS.”).

²⁸ Kareem Abdul-Jabbar, *Abdul-Jabbar: Insulting Colin Kaepernick Says More About Our Patriotism than His*, WASH. POST (Aug. 30, 2016), https://www.washingtonpost.com/posteverything/wp/2016/08/30/insulting-colin-kaepernick-says-more-about-our-patriotism-than-his/?utm_term=.81e41cc7ad74 (“What makes an act truly patriotic and not just lip-service is when it involves personal risk or sacrifice.”).

Kaepernick's protests occurred in the midst of a national spotlight on police actions of racial injustice. The technological development of police body cameras and video recording cell phones have led to an exposure of police behavior. Several incidents have overwhelmed the internet and news sources and have shocked our country's moral conscience.²⁹

B. *At the Twilight's Last Gleaming*

Kaepernick's mission is outlasting his employment. Even though the 2017 NFL season started without the anthem protest's patriarch, athletes are still honoring what he represents. To open the season, a handful of players sat or raised their fists for the anthem. The Cleveland Browns linked arms with law enforcement as a sign of unity within the community between racial tensions and the police.³⁰ While not overwhelming, these displays of protest were enough to get the attention of President Trump.

While giving a campaign speech for Luther Strange in Alabama, President Trump went off script to rally the crowds. He spoke harshly of those "disrespecting our flag,"³¹ and went so far as to encourage the NFL owners to fire the players who kneel.³² This statement exacerbated an already divisive issue in the country.³³ The Sunday after President Trump's statement, the NFL had its largest display of protests, including more players kneeling during the anthem than ever before.³⁴ One team even stayed in the locker room until the anthem finished.³⁵

The Trump Administration did not back down from the fight. On October

²⁹ Al Baker, et al., *Beyond the Chokehold: The Path to Eric Garner's Death*, N.Y. TIMES (June 13, 2015), <https://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html>.

³⁰ Ken Belson, *Anthem Demonstrations Include a Show of Unity in Cleveland*, N.Y. TIMES (Sept. 10, 2017), <https://www.nytimes.com/2017/09/10/sports/football/national-anthem-nfl-protests.html>.

³¹ Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 24, 2017, 5:44 AM), https://twitter.com/realDonaldTrump/status/911904261553950720?ref_src=twsrc%5Etfw&ref_url=http%3A%2F%2Fwww.cnn.com%2F2017%2F09%2F24%2Fpolitics%2Fdonald-trump-nfl-sunday-protest-response%2Findex.html.

³² Trump, *supra* note 1.

³³ See *'It's Disgusting': NFL Fans React to National Anthem Protests*, FOX NEWS INSIDER (Sept. 25, 2017, 7:22 AM), <http://insider.foxnews.com/2017/09/25/nfl-fans-react-national-anthem-protests-players-not-respecting-american-flag>.

³⁴ Adam Stites, *NFL Players Respond to Donald Trump with More Protests Than Ever*, SBINATION (last updated Sept. 26, 2017, 1:55 PM), <https://www.sbnation.com/2017/9/24/16354916/nfl-protest-national-anthem-donald-trump>.

³⁵ *Id.*

8, 2017, Vice President Mike Pence left an Indianapolis Colts game because players knelt during the National Anthem.³⁶ President Trump tweeted, “I asked @VP Pence to leave stadium if any players kneeled, disrespecting our country. I am proud of him and @SecondLady Karen.”³⁷ Dallas Cowboys owner Jerry Jones made a statement following the Pence departure declaring that he will sit any players on his team that kneel during the anthem. Jones said, “We cannot in the NFL in any way give the implication that we tolerate disrespecting the flag.”³⁸

II. THROUGH THE PERILOUS FIGHT – THE HISTORY OF SPORTS PROTESTS

A. *O’er the Ramparts We Watched – The History of Anthem Protests in Sports*

This is not the first time in history that an athlete has used the anthem to raise awareness of their political cause. In the 1968 Mexico City Olympics, Tommie Smith and John Carlos stood on the podium, donning their gold and bronze medals for the 200-meter sprint. As the United States Anthem played, the athletes placed a black glove on their hand and raised a fist in a

³⁶ Mike Pence (@VP), TWITTER (Oct. 8, 2017, 10:23 AM), <https://twitter.com/VP/status/917078033491689472> (“While everyone is entitled to their own opinions, I don’t think it’s too much to ask NFL players to respect the Fag and our National Anthem.”); Eli Watkins, *Pence Leaves Colts Game After Protest During Anthem*, CNN (last updated Oct. 9, 2017, 11:28 AM), <http://www.cnn.com/2017/10/08/politics/vice-president-mike-pence-nfl-protest/index.html>.

³⁷ Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 8, 2017, 11:16 AM), <https://twitter.com/realDonaldTrump/status/917091286607433728>. Many commentators found this to be a cheap stunt that cost the taxpayers the money of sending the Vice President to Indiana when it was clear that members of the team were going to kneel during the anthem since many of them have before. Not to mention that it involved Kaepernick’s former team. See Allan Smith, *Mike Pence’s Early Exit from an NFL Game is Starting to Look More and More Like a Political Stunt*, BUS. INSIDER (Oct. 9, 2017, 6:34 PM), <http://www.businessinsider.com/mike-pence-nfl-colts-49ers-game-political-stunt-2017-10>; Jeanna Thomas, *Vice President Mike Pence Leaving the Colts Game Was a ‘PR Stunt’ Says 49ers Safety Eric Reid*, SBNATION (Oct. 8, 2017, 6:59 PM), <https://www.sbnation.com/2017/10/8/16445178/vice-president-mike-pence-pr-stunt-colts-49ers-eric-reid-national-anthem-protest>.

³⁸ Associated Press, *Jerry Jones: Cowboys ‘Will Not Play’ if They Disrespect Flag*, L.A. TIMES (Oct. 9, 2017, 7:10 AM), <http://www.latimes.com/sports/nfl/la-sp-cowboys-jones-flag-20171009-story.html> (statement of NFL owner Jerry Jones) (“If there’s anything that is disrespectful to the flag, then we will not play . . . Understand? We will not play . . . If we are disrespecting the flag, then we will not play. Period.”).

black power salute.³⁹ A clenched fist was the prominent symbol of the Black Panthers at the time, and it generally stood for solidarity and support in the fight for black equality.⁴⁰ The athletes also took off their shoes to protest poverty, and wore beads and a scarf to protest lynching.⁴¹ As punishment, the athletes were kicked out of the Olympics, stripped of their medals, and suspended from the United States Track Team.⁴²

The black power salute has also seeped into the current NFL protests. On September 17, 2017, then Seattle Seahawk and three-time Pro Bowler Michael Bennett celebrated a tackle by putting his fist in the air.⁴³ Bennet tweeted about his actions the next day, posting a picture of his gesture and stating, “The raised fist represents unity or solidarity with oppressed peoples.”⁴⁴ This came roughly a month after Bennett claimed to have been profiled and held at gunpoint by the police.⁴⁵

In 1996, the National Basketball Association (“NBA”) suspended

³⁹ DeNeen L. Brown, *They Didn't #TakeTheKnee: The Black Power Protest Salute That Shook the World in 1968*, WASH. POST (Sept. 24, 2017),

https://www.washingtonpost.com/news/retropolis/wp/2017/09/24/they-didnt-takeaknee-the-black-power-protest-salute-that-shook-the-world-in-1968/?utm_term=.2219b8ec49f1.

⁴⁰ BBC, *Factbox: What is the Black Power Salute?*, SBS (last updated Aug. 26, 2013), <http://www.sbs.com.au/news/article/2012/08/21/factbox-what-black-power-salute> (“The clenched black fist, also known as the Black Power fist is a logo generally associated with black nationalism and sometimes socialism.”).

⁴¹ *Id.*

⁴² *See id.* The athletes’ punishment was given pursuant to the International Olympic Committee’s 1968 Model Constitution. *See* INT’L OLYMPIC COMM., MODEL CONSTITUTION FOR A NATIONAL OLYMPIC COMMITTEE (1968).

⁴³ Anthony Barstow, *NFL Players Now Taking Their Protests onto the Field*, N.Y. POST (Sept. 17, 2017, 6:59 PM), <http://nypost.com/2017/09/17/nfl-players-now-taking-their-protests-onto-the-field/>.

⁴⁴ Michael Bennett (@mosesbread72), TWITTER (Sept. 18, 2017, 7:45 AM), https://twitter.com/mosesbread72/status/909790543869120514/photo/1?ref_src=twsrc%5Etfw&ref_url=https%3A%2F%2Fwww.sbnation.com%2F2017%2F9%2F17%2F16323506%2Fmichael-bennett-celebrated-sack-vs-49ers-raised-fist.

⁴⁵ Michael Bennett (@mosesbread72), TWITTER (Sept. 6, 2017, 7:01 AM), <https://twitter.com/mosesbread72/status/905430701595652096> (“Las Vegas police officers singled me out and pointed their guns at me for doing nothing more than simply being a black man in the wrong place at the wrong time.”). Bennet claims that after the prize fight between UFC fighter Conor McGregor and boxer Floyd Mayweather Jr. in Las Vegas, that police singled him out for no reason other than being black. A gun was pointed towards his head while he was forced to the ground so that handcuffs could be placed on him. This was in response to gunshots heard in the area. *See id.*; Jill Martin, *Michael Bennett: Police Singled Me Out, Put a Gun Near My Head*, CNN (last updated Sept. 8, 2017, 5:05 AM), <http://www.cnn.com/2017/09/06/sport/michael-bennett-las-vegas-police/index.html>.

Mahmoud Abdul-Rauf one game for sitting during the National Anthem.⁴⁶ Abdul-Rauf sat because he could not reconcile his Muslim religion with the anthem's meaning. In an interview, Abdul-Rauf said, "You can't be for God and for oppression. It's clear in the Quran, Islam is the only way."⁴⁷ Abdul-Rauf was suspended for one game and fined \$35,000 due to a league rule that required players to stand in a "dignified posture" during the anthem.⁴⁸ The NBA has a similar rule today. According to its official rules, "Players, 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."⁴⁹ NBA Commissioner Adam Silver reaffirmed this rule following President Trump's comments about the NFL.⁵⁰ Abdul-Rauf eventually compromised with the league and stood to pray with his head down during the anthem.⁵¹

However, Abdul-Rauf's career steadily declined after the incident. When his contract expired, no teams offered him a tryout, and he left to play in Europe.⁵² Abdul-Rauf attributes this to the league's aversion to people who try to use their platform for a cause. He said, "They don't want these types of examples to spread, so they've got to make an example of individuals like this."⁵³ Six months before Kaepernick opted out of his contract with the 49ers, Abdul-Rauf foresaw Kaepernick's future. He said, "It's a process of just trying to weed you out. This is what I feel is going to happen to [Kaepernick]."⁵⁴

Major League Baseball ("MLB") faced a similar issue, this time with the song "God Bless America." For the entire 2003 season, Hall of Fame first baseman Carlos Delgado decided to stay in the dugout during the seventh-

⁴⁶ Jesse Washington, *Still No Anthem, Still No Regrets for Mahmoud Abdul-Rauf*, UNDEFEATED (Sept. 1, 2016), <https://theundefeated.com/features/abdul-rauf-doesnt-regret-sitting-out-national-anthem/>.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ NAT'L BASKETBALL ASS'N, OFFICIAL RULES OF THE NATIONAL BASKETBALL ASSOCIATION cmt. II(H)(2) (2017-2018 ed. 2017).

⁵⁰ Brian Mahoney, *Adam Silver Expects NBA Players to Stand During National Anthem*, NBA (Sept. 28, 2017, 8:09 PM), http://www.nba.com/article/2017/09/28/adam-silver-expects-nba-players-stand-during-national-anthem#/ (statement of NBA Commissioner Adam Silver) ("It's been a rule as long as I've been involved with the league, and my expectation is that our players will continue to stand for the anthem.").

⁵¹ Washington, *supra* note 46.

⁵² *Id.* In 2000, after two years overseas, he signed a short contract with the Vancouver Grizzlies. *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

inning stretch playing of the patriotic song in protest of the Iraq war.⁵⁵ While the act was viewed negatively by some spectators, Delgado was never punished for his actions.⁵⁶ The MLB did not have a rule against sitting during the song, and Delgado's agent said that if Delgado were to play for a team that did have such a rule, Delgado would honor it.⁵⁷

Despite many anthem protests across different sports, the issue of whether a player can be punished for these protests has not been thoroughly analyzed. This is in part because of the differences between the events. One key difference is that each sport is governed by its own CBA. The demonstration at the Olympics is even more unique because the International Olympic Committee (a non-profit international organization made up of volunteers) manages the governing rules and decides when to strip the athletes of their medals.⁵⁸

B. *Were So Gallantly Streaming – The NFL's History of Political Statements*

Beyond the protests during the National Anthem, the NFL has dealt with other forms of players voicing their political beliefs. In 1986, quarterback Jim McMahon was annoyed when NFL Commissioner Pete Rozelle fined him \$5,000 for wearing an Adidas headband.⁵⁹ The headband was in violation of a league rule that required all company logos to be covered.⁶⁰ In retaliation, the quarterback wrote "ROZELLE" across a plain white headband and wore it during the NFC Championship Game.⁶¹ No fines were given for this action.

⁵⁵ William C. Rhoden, *Sports of the Times; Delgado Makes a Stand by Taking a Seat*, N.Y. TIMES (July 21, 2004), <http://www.nytimes.com/2004/07/21/sports/sports-of-the-times-delgado-makes-a-stand-by-taking-a-seat.html> (statement of MLB Commissioner Bud Selig) ("I'm in the process of getting more information, but eventually I would like to sit down and discuss it with Carlos. I am very sensitive to this kind of issue, both as a matter of respect for our country and for one's right to express his opinion.").

⁵⁶ Sam Borden, *A MAN OF PRINCIPLE Delgado Makes Headlines Speaking His Mind*, N.Y. DAILY NEWS (Jan. 23, 2005, 12:00 AM), <http://www.nydailynews.com/archives/sports/man-principle-delgado-headlines-speaking-mind-article-1.651402>.

⁵⁷ *Id.*

⁵⁸ *The International Olympic Committee*, OLYMPIC, <https://www.olympic.org/the-ioc> (last visited Apr. 19, 2018).

⁵⁹ Associated Press, *Headband Isn't a Laughing Matter; \$5,000 Fine Stands*, L.A. TIMES (Jan. 14, 1986), http://articles.latimes.com/1986-01-14/sports/sp-28009_1_adidas-headband.

⁶⁰ *Id.*

⁶¹ *Id.*

McMahon continued his headband stunt in the Super Bowl, but channeled his creative energy towards a more positive cause. He had two hand-lettered headbands, the first had the words “JDF Cure” to support a juvenile diabetes foundation, and the second read “POW-MIA” to support U.S. servicemen imprisoned or missing in action from the Vietnam War.⁶² Rozelle publicly supported the message of the headbands, but one NFL official said the league could keep McMahon out of a game until he conforms to the league’s appearance standards.⁶³ McMahon did not test the league’s sincerity.⁶⁴

In 2014, the then St. Louis Rams made headlines when a group of players walked out of the tunnel with their hands held over their heads as a sign of surrender. The gesture was in support of the Black Lives Matter protest after the shooting of Michael Brown.⁶⁵ Brown was a black teenager shot by the police in Ferguson, Missouri.⁶⁶ This sparked “hands up, don’t shoot” protests across the country after witness accounts said that Brown had his hands up in surrender when he was shot.⁶⁷ The Rams Executive Vice President of Football Operations, Kevin Demoff, supported the actions of his players. He said, “I do believe that supporting our players’ First Amendment rights and supporting local law enforcement are not mutually exclusive.”⁶⁸ The NFL decided not to punish the players for their demonstration. Brian McCarthy, Vice President of Communications for the NFL stated, “We respect and understand the concerns of all individuals who

⁶² Associated Press, *McMahon’s Headbands: He’s a Rebel with a Cause*, L.A. TIMES (Jan. 27, 1986), http://articles.latimes.com/1986-01-27/sports/sp-678_1_jim-mcmahon.

⁶³ Matt Schwerha, *1985 Bears Coverage: Rozelle Lays Down the Law*, CHI. SUN TIMES (June 24, 2016, 8:33 AM), <https://chicago.suntimes.com/1985-chicago-bears/1985-bears-coverage-rozelle-lays-down-the-law/> (statement of NFL Commissioner Pete Rozelle) (“In New Orleans, I was concerned with him being able to walk this tightrope of being a colorful personality and maybe something else that’d be getting below the rope.”).

⁶⁴ Bob Verdi, *From the Archives: Bears QB Jim McMahon Enjoys His Rebellious Image*, CHI. TRIB. (Jan. 13, 1986), <http://www.chicagotribune.com/sports/football/bears/ct-jim-mcmahon-david-letterman-bears-20160114-story.html>.

⁶⁵ Michael MacCambridge, *This Wasn’t the First Time Football, Protest and Politics Have Mixed*, HISTORY (Sept. 25, 2017), <http://www.history.com/news/how-football-protest-and-politics-have-always-mixed>.

⁶⁶ *Ferguson Protests: What We Know About Michael Brown’s Last Minutes*, BBC, (Nov. 25, 2014), <http://www.bbc.com/news/world-us-canada-28841715>.

⁶⁷ Michelle Ye Hee Lee, *‘Hands Up, Don’t Shoot’ Did Not Happen in Ferguson*, WASH. POST (March 19, 2015), https://www.washingtonpost.com/news/fact-checker/wp/2015/03/19/hands-up-dont-shoot-did-not-happen-in-ferguson/?utm_term=.29a241d84b0c.

⁶⁸ MacCambridge, *supra* note 65.

have expressed views on this tragic situation.”⁶⁹ The NFL has a history of demonstrating neutrality when players make political statements. So far, the NFL has continued their neutrality throughout the anthem protest.⁷⁰

III. THE BOMBS BURSTING IN AIR – THE LEGALITY OF FIRING SOMEONE FOR KNEELING DURING THE ANTHEM

A. *The First Amendment does not Protect a Player’s Freedom of Speech from being Restricted by a Private Employer*

It seems ironic to call the most watched sporting event in America private, but in terms of the First Amendment, it is. If the First Amendment did apply, it would be a straightforward analysis, and the players would undoubtedly hold the right to protest.⁷¹ However, the First Amendment only protects individuals from governmental intrusion on the rights it establishes.⁷² Because the First Amendment does not shield the NFL players from the employment repercussions of their speech, many analysts have concluded

⁶⁹ SI Wire, *NFL Won’t Discipline Rams Players for ‘Hands Up, Don’t Shoot’ Gesture*, SPORTS ILLUSTRATED (Dec. 1, 2014), <https://www.si.com/nfl/2014/12/01/nfl-discipline-st-louis-rams-players-hands-dont-shoot>.

⁷⁰ Brian McCarthy (@NFLprguy), TWITTER (Oct. 17, 2017, 10:52 AM), https://twitter.com/NFLprguy/status/920346711335239681/photo/1?ref_src=twsrc%5Etfw&ref_url=https%3A%2F%2Fwww.cbssports.com%2Fnfl%2Fnews%2Fnfl-anthem-policy-unchanged-after-lengthy-meeting-between-players-owners%2F (“As we said last week, everyone who is part of our NFL community has a tremendous respect for our country, our flag, our anthem and our military. In the best American tradition, we are coming together to find common ground and commit to the hard work required for positive change.”); see also Ken Belson, *After Anthem Protests, N.F.L. Plots a Careful Path Forward*, N.Y. TIMES (Sept. 28, 2017),

<https://www.nytimes.com/2017/09/28/sports/football/nfl-trump-anthem.html>; Sean Wagner-McGough, *NFL Anthem Policy Unchanged After Meeting, Players Angry Kaepernick Wasn’t Invited*, CBS SPORTS (Oct. 17, 2017), <https://www.cbssports.com/nfl/news/nfl-anthem-policy-unchanged-after-lengthy-meeting-between-players-owners/> (stating that the Players Association and NFL Owners and players met to discuss the Anthem issue and that no rule change was put into place.).

⁷¹ *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (stating that “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”).

⁷² U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech”).

that the players have no recourse.⁷³ While they might not have Constitutional recourse, there are protections outlined in their employment contracts.⁷⁴

B. NFL Players are not “At Will” Employees

The popular belief held by the media is that NFL players can be fired at any time at their employer’s discretion because they are at-will employees.⁷⁵ This is not true. Black’s Law Dictionary defines *employment at will* as: “Employment that is [usually] undertaken without a contract and that may be terminated at any time, by either the employer or the employee, without cause.”⁷⁶ Employment for players in the NFL does not meet this definition because it is governed by a contract that has a set end date.

The confusion comes because teams frequently drop players from their roster. Every year teams start the preseason with large rosters that need to be trimmed to fifty-three players before the start of the regular season.⁷⁷ Players are also cut during the season or traded without their consent.

However, the team’s prerogative to drop players is specifically related to the player’s ability, the team’s cap space, or the player’s conduct if detrimental to the team. These termination rights are the result of a negotiated process between the NFL Players Association (“NFLPA”) and the League. This agreement is recorded in the Collective Bargaining Agreement (“CBA”). The CBA is a contract that governs the player-league

⁷³ See generally AP, *Legal Experts Split on if NFL Can Punish for Anthem Protests*, USA TODAY (last updated Oct. 11, 2017, 4:35 PM), <https://www.usatoday.com/story/sports/nfl/2017/10/11/legal-experts-split-on-if-nfl-can-punish-for-anthem-protests/106530728/>; Dylan Gwinn, *Dershowitz: NFL Players Don’t Have a Constitutionally Protected Right to Kneel During the Anthem*, BREITBART (Oct. 22, 2017), <http://www.breitbart.com/sports/2017/10/22/dershowitz-nfl-players-dont-have-constitutionally-protected-right-to-kneel-during-the-anthem/>.

⁷⁴ NAT’L FOOTBALL LEAGUE, COLLECTIVE BARGAINING AGREEMENT BETWEEN THE NFL MANAGEMENT COUNCIL AND THE NFL PLAYERS art. 42 (2011), available at <https://nfllabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf> [hereinafter NAT’L FOOTBALL LEAGUE CBA]; Marc Edelman, *Can The NFL Really Fire Players For Kneeling During The National Anthem?*, FORBES (Sept. 28, 2017, 2:27 PM), <https://www.forbes.com/sites/marcedelman/2017/09/28/nfl-trump-kneeling-national-anthem/#5f0a9c4e2976>.

⁷⁵ AP, *supra* note 73.

⁷⁶ *Employment at Will*, BLACK’S LAW DICTIONARY (10th ed. 2014).

⁷⁷ See generally Conor Orr, *What To Watch For On Roster Cutdown Deadline Day*, NFL (last updated Aug. 31, 2017, 11:52 PM), <http://www.nfl.com/news/story/0ap3000000836009/article/what-to-watch-for-on-roster-cutdown-deadline-day>.

relationship. The current CBA was signed in 2011 and is set to expire after the 2020 season.⁷⁸ The liberty teams have to drop players for the interest of the team is outlined in Appendix A, the NFL Player Contract. Section 11 states:

If at any time, in the sole judgment of the Club, Player's skill or performance has been unsatisfactory as compared with that of other players competing for positions on Club's roster, or if Player has engaged in personal conduct reasonably judged by Club to adversely affect or reflect on Club, then Club may terminate this contract.⁷⁹

Furthermore, teams can also cut a player based on the team's salary cap space.⁸⁰ Players who are cut for one of these three reasons may receive some financial compensation, depending on their contract.⁸¹

Based on the nature of their contracts, NFL players are best categorized as fixed-term employees. Fixed term means "work carried out under an employment contract that is due to end when a specified date is reached, a specified event does or does not occur, or a specified task has been completed."⁸² Instead of their employment being at-will, it is governed by a contract agreed to by the parties before the employment. For a team to cut a player, it would have to terminate the contract. One of the reasons for the Player's Association is to protect against arbitrary termination.⁸³ While there are ways that a team can legally terminate the contract unilaterally, teams do not have the power to fire players for any reason whatsoever. Unions historically protect against this very concern, and the NFLPA is no

⁷⁸ NAT'L FOOTBALL LEAGUE CBA, *supra* note 74, art. 1 (defining "final league year" as "the league year which is scheduled prior to its commencement to be the final League Year of this Agreement. As of the date hereof, the Final League Year is the 2020 League Year").

⁷⁹ *Id.* at app. A, § 11.

⁸⁰ *Id.*

⁸¹ *See id.* at art. 10, § 4(c) (outlining one form of guaranteed contract as "fully guaranteed if the player's contract is terminated because of lack of comparative skill; as a result of an injury sustained in the performance of his services under his Player Contract; and/or due to a Club's determination to create Room for Salary Cap purposes.").

⁸² *Fixed-Term Work*, BLACK'S LAW DICTIONARY (10th ed. 2014).

⁸³ NAT'L FOOTBALL LEAGUE PLAYERS ASS'N, NFL PLAYERS ASSOCIATION CONSTITUTION art. 1, § 3 (2007), available at https://ipmall.law.unh.edu/sites/default/files/hosted_resources/SportsEntLaw_Institute/League%20Constitutions%20&%20Bylaws/NFLPA%20Constitution%20-%20March%202007.pdf [hereinafter NFLPA CONST.] (stating the purpose of the union).

different.⁸⁴

Because they are fixed-term employees and do have contracts, players can only be released before their contract expires based on the provisions set forth in the agreement. Therefore, the legality of firing players for protesting the National Anthem is a complicated issue and cannot be answered simply by explaining the limitations of the First Amendment and referencing the line in the Uniform Players Contract that teams have complete discretion.

C. *The Commissioner has Absolute Authority to Punish Players*

To fully analyze the CBA as it relates to a team's authority to punish players, the discussion must be split into the three categories of punishment that the league and teams have historically used. Those categories are (1) being fined, (2) being benched or suspended, and (3) being cut or released.

Authority for punishing a player for kneeling during the anthem needs to be justified under the CBA. There are two relevant clauses that give authority for punishing players for detrimental conduct: one giving authority to the Commissioner, the other to the teams.⁸⁵ These are also known as "morality clauses" or "morals clauses." Morality clauses exist in almost every contract related to talent that represents any sort of company.⁸⁶ One commentator explains why companies that hire talent prefer a broad morality clause by stating, "These companies are almost always looking to include a broad morals clause in contracts because that allows them to terminate talent for any potentially damaging conduct."⁸⁷ One prominent example of the application of a morality clause is an instance involving Denver Bronco linebacker Brandon Marshall.⁸⁸ When Marshall decided to join Kaepernick's movement and kneel during the anthem, he lost two endorsements: Air Academy Federal Credit Union and CenturyLink.⁸⁹ These companies terminated their agreements with Marshall through their

⁸⁴ Darren A. Heitner & Richard Bogart, *Person Foul: Conduct Detrimental to the Team. Penalty Declined?* 5 HARV. J. OF SPORTS & ENT. L. 215, 238 (2014) ("[I]t is important to note that labor laws protect the rights of employees by allowing employee unions, such as the NFLPA, to collectively bargain with sports leagues, such as the NFL, to reach agreements that govern the terms of employment.").

⁸⁵ NAT'L FOOTBALL LEAGUE CBA, *supra* note 74, art. 42, 46.

⁸⁶ Heitner & Bogart, *supra* note 84, at 232.

⁸⁷ *Id.*

⁸⁸ Brad Tuttle, *This NFL Player Lost 2 Endorsement Deals for National Anthem Protests*, TIME MONEY (Sept. 13, 2006), <http://time.com/money/4489790/colin-kaepernick-national-anthem-protests-brandon-marshall/>.

⁸⁹ *Id.*

contracts' morals clauses.⁹⁰

Specifically, Article 46 of the CBA gives the Commissioner the authority to take action against a player for any "conduct detrimental to the integrity of, or public confidence in, the game of professional football."⁹¹ The only limit placed on this discretion is that the Commissioner "shall consult with the Executive Director of the NFLPA prior to issuing, for on-field conduct, any suspension or fine in excess of \$50,000."⁹² A Commissioner need only consult with the NFLPA.⁹³ There is no requirement that the NFLPA agree with the Commissioner's punishment. Therefore, the Commissioner's power to punish a player for conduct detrimental to the club is almost limitless.⁹⁴ The Commissioner's decision to punish a player also supersedes the team's authority.⁹⁵ However, the league's history shows that Commissioners usually leave punishment to the teams' discretion,⁹⁶ and Commissioner Goodell has indicated that he will let the players kneel for the anthem.⁹⁷

D. Teams can Punish Players, but their Authority Rests on a Tentative Foundation

Even though the Commissioner is not threatening to punish the players for

⁹⁰ See generally *id.*

⁹¹ NAT'L FOOTBALL LEAGUE CBA, *supra* note 74, art. 46, § (1)(a).

⁹² *Id.* at art. 46, § (1)(c).

⁹³ *Id.*

⁹⁴ Heitner & Bogart, *supra* note 84, at 223-24. Public perception of the Commissioner's unlimited power has changed over the years and the Commissioner has proven to be ineffective in many aspects of the job, especially player discipline. Compare Robert Ambrose, *The NFL Makes It Rain: Through Strict Enforcement of Its Conduct Policy, the NFL Protects Its Integrity, Wealth, and Popularity*, 34 WM. MITCHELL 1068, 1100-09 (2008), with Bethany P. Withers, *The Integrity of the Game: Professional Athletes and Domestic Violence*, 1 HARV. J. OF SPORTS & ENT. L. 145, 174-75 (2010).

⁹⁵ NAT'L FOOTBALL LEAGUE CBA, *supra* note 74, art. 42(3)(b) ("Any disciplinary action imposed upon a player by the Commissioner pursuant to Article 46 will preclude or supersede disciplinary action by the Club for the same act or conduct.").

⁹⁶ Withers, *supra* note 94, at 168.

⁹⁷ Ahiza Garcia, *Goodell: NFL Players Aren't Trying to Be 'Disrespectful to the Flag,'* CNN MONEY (Oct. 18, 2017, 3:16 PM), <http://money.cnn.com/2017/10/18/news/companies/nfl-national-anthem-protests-roger-goodell/index.html>.

kneeling, certain team owners are.⁹⁸ Article 42 of the CBA gives teams the authority to punish players for conduct detrimental to their team.⁹⁹ The CBA does not provide a definition for detrimental conduct.¹⁰⁰ The broad language is only clarified by specific actions listed elsewhere in the contract.¹⁰¹ For example, throwing a football into the stands has its own category and maximum fine in the CBA,¹⁰² and therefore it does not fall under the category of detrimental conduct under the CBA.

1. A Team can Fine a Player for the Equivalent of One Week's Salary

According to Article 42 of the CBA, for "Conduct detrimental to Club," a team can impose a "maximum fine of an amount equal to one week's salary."¹⁰³ Riley Cooper, a wide receiver for the Philadelphia Eagles, was fined by his team in 2013 when he was recorded using a racial slur at a concert.¹⁰⁴ Cooper's fine was for an undisclosed amount. There is no dispute that an NFL team can punish a player by fining them the equivalent of one week's salary under the conduct detrimental to club clause.

2. It is Legal for a Team Owner to Suspend a Player for Four Games or Fewer, but not for a Longer Period, Unless the Player Continues the Detrimental Conduct

There are three varieties of punishment that involve keeping a player on the team but not letting them on the field. A player can be benched, suspended with pay, or suspended without pay. The CBA also makes a distinction in each of these categories based on duration: four games or fewer, or more than four games because of repeated offenses.

⁹⁸ Ryan Grenoble, *Texans Owner on NFL Protests: 'We Can't Have Inmates Running the Prison'*, HUFF. POST (last updated Oct. 27, 2017, 12:52 PM), https://www.huffingtonpost.com/entry/texans-owner-bob-mcnair-inmates-running-prison_us_59f3492ce4b03cd20b813041 (statement of Texans Owner Bob McNain) ("We can't have the inmates running the prison."). McNain's statement received immediate negative backlash for its race implications, and Texans wide receiver left practice out of protest. *Id.* McNain apologized later calling it a figure of speech. *Id.*

⁹⁹ NAT'L FOOTBALL LEAGUE CBA, *supra* note 74, art. 42, § (1)(xv).

¹⁰⁰ Heitner & Bogart, *supra* note 84, at 225.

¹⁰¹ *Id.* at 225-26.

¹⁰² NAT'L FOOTBALL LEAGUE CBA, *supra* note 74, art. 42, § (1)(a)(v).

¹⁰³ NAT'L FOOTBALL LEAGUE CBA, *supra* note 74, art. 42, § (1)(a)(xv).

¹⁰⁴ *Riley Cooper Sorry for Racial Slur*, ESPN (Aug. 1, 2013), http://www.espn.com/nfl/trainingcamp13/story/_/id/9526303/riley-cooper-philadelphia-eagles-issues-apology-uttering-racial-slur-video.

a. An NFL team has Complete Discretion Regarding When They Bench Players for Four Weeks or Fewer

Perhaps the most likely punishment that would be applied to an NFL player who kneels during the anthem is being benched. In fact, two weeks after President Trump's attacks on the NFL protestors, Dallas Cowboys owner Jerry Jones threatened to bench any player who refused to stand for the anthem.¹⁰⁵ Benching a player is one of the least severe forms of punishment a club can place on a player. Because the player is still paid pursuant to the terms of the contract, the only damage suffered is playing time and on-field exposure to viewers. Of course, this still can be considered a severe punishment since history has proven that athletes have a short window of productive years in the NFL, and playing time leads to future earning through endorsement deals and future contracts.¹⁰⁶

Benching a player is a form of discipline that happens frequently in the NFL. Amid this anthem controversy, New York Giants cornerback Eli Apple was benched for one game. Reports speculate that this punishment was for arguing with the team owner's brother.¹⁰⁷ Pittsburgh Steelers wide receiver Martavis Bryant was also benched for one week after he took to social media to bash the teammate who was taking his playing time.¹⁰⁸

While the CBA does not explicitly address the issue of benching players based on the team's discretionary discipline, the National Labor Relations Act ("NLRA") could prevent the teams from benching players for kneeling during the anthem. National labor law preempts the CBA and has been used

¹⁰⁵ Brandon George, *Cowboys Owner Jerry Jones: Any Player Who Is 'Disrespectful to the Flag' Won't be Allowed to Play*, SPORTSDAY (Oct. 8, 2017), <https://sportsday.dallasnews.com/dallas-cowboys/cowboys/2017/10/08/cowboys-owner-jerry-jones-player-disrespects-flag-allowed-play> (statement of Cowboys Owner Jerry Jones) ("But if there is anything that is disrespectful to the flag then we will not play. You understand? If we are disrespecting the flag then we won't play. Period. . . . We know there is a serious debate in this country about those issues, but there is no question in my mind that the National Football League and the Dallas Cowboys are going to stand up for the flag. Just so we're clear.").

¹⁰⁶ *Jackson v. Nat'l Football League*, 802 F.Supp. 226, 231 (D. Minn. 1992) (stating that suspensions are irreparable damages to NFL players because of the short playing window).

¹⁰⁷ Will Brinson, *Another Giants CB Reportedly Benched for 'Discipline,' Might Have Yelled at Owner's Brother*, CBS SPORTS (Oct. 15, 2017), <https://www.cbssports.com/nfl/news/another-giants-cb-reportedly-benched-for-discipline-might-have-yelled-at-owners-brother/>.

¹⁰⁸ Jeremy Fowler, *Steelers Bench Disgruntled Martavis Bryant for Sunday*, ESPN (Oct. 25, 2017), http://www.espn.com/nfl/story/_/id/21156115/martavis-bryant-pittsburgh-steelers-benched-sunday-game.

before in appeals against the NFL.¹⁰⁹ In fact, a Texas labor union filed a complaint with the National Labor Relations Board (“NLRB”), arguing that Cowboys Owner Jerry Jones is violating Section 7 of the NLRA when he threatens to bench players who kneel during the anthem.¹¹⁰ The NLRA states, “Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, *and to engage in other concerted activities for mutual aid and protection.*”¹¹¹ “Concerted activity for mutual aid and protection” is the phrase that the labor union’s complaint hinges on.¹¹² However, there must be a nexus between the political speech and the workplace for this law to apply.¹¹³ For example, an employee speaking against the minimum wage law would likely establish a sufficient nexus between their workplace and the speech even if the speech was not directed at their specific work. The NFL players are kneeling to draw awareness to racial injustice, not to improve their treatment under their union contract, and not to address racial injustice in the NFL. Therefore, it is likely that the labor union in Texas will have little success in their claim.

If an NFL organization is determined to punish an NFL player for kneeling during the anthem, benching the player for four games or fewer is the safest method. There is nothing explicit in the CBA that forbids a coach from benching as punishment, and benching is commonly used as punishment across the NFL for other discipline. Owners who merely bench a player will also face less scrutiny than they would for issuing more severe punishment, since the players are still getting paid and the team is not profiting from their talent, as the team would be if they fined the player. Further, claims made by labor unions under the NLRA will likely fail because anthem protests are outside the scope of NLRA jurisprudence.¹¹⁴

¹⁰⁹ See generally *Nat’l Football League Players Ass’n v. Nat’l Football League*, 598 F.Supp.2d 971, 977 (D. Minn. 2008) (referencing the League Management Relations Act and its relation to the CBA).

¹¹⁰ Clarence E. Hill & Drew Davison, *Labor Union Files Complaint Against Jerry Jones Over Anthem Threat*, STAR TELEGRAM (last updated Oct. 10, 2017, 8:07 PM), <http://www.star-telegram.com/sports/nfl/dallas-cowboys/article178148431.html>.

¹¹¹ 29 U.S.C. § 157 (2012) (emphasis added).

¹¹² Hill & Davison, *supra* note 110.

¹¹³ See generally *Mohave Elec. Coop., Inc. v. NLRB*, 206 F.3d 1183 (D.C. Cir. 2000).

¹¹⁴ Lisa Nagele-Piazza, *Is ‘Taking a Knee’ a Protected Activity Under Labor Law?*, SOC’Y FOR HUMAN RES. MGMT., (Oct. 13, 2017), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/nfl-kneeling-anthem-protest-labor-law.aspx> (stating that the NLRB board is currently conservative and thus might limit not limit the league’s authority to bench players).

*b. There is Limited Contractual Authority to Punish a Player
More Than Four Games Based on their Behavior During
the National Anthem*

Suspensions can come from either the team or the league. However, serious disciplinary suspensions typically come from the league. The most serious form of deactivation is when players are placed on the Commissioner Exempt List. While the player is still paid, that player cannot participate in practices or attend games.¹¹⁵ This form of league punishment can only be used when a player is accused of criminal violence by physical force or weapon, sexual assault, animal cruelty, or conduct that poses a genuine danger to another's safety.¹¹⁶ A high-profile example is when former Viking's running back Adrian Peterson was placed on the list following a police investigation into allegations that he hit his four-year-old son with a switch.¹¹⁷ Peterson eventually pled no contest to the child abuse charges, and finally had his suspension overturned on February 26, 2015, nearly five months and a whole football season after he was initially placed on the Commissioner Exempt List.¹¹⁸ The NFL Commissioner is not able to place the athletes who kneel during the National Anthem on the Commissioner Exempt List because it is outside the criminal and violent scope for which the list is reserved.

Long-term deactivation was not always limited to the Commissioner Exempt List, and, before the 2011 CBA, teams could suspend players indefinitely. However, long-term deactivation transformed into the Commissioner's Exempt List because of abuse by team ownership. In 2005, former Eagles wide receiver Terrell Owens faced a four-game suspension when he criticized his quarterback and team. Owens gave the Eagles a lot to roll their eyes about, and this criticism proved to be the straw that snapped the ownership's back.¹¹⁹ Owens appealed his suspension, but an arbitrator upheld the decision.¹²⁰ Emboldened by the decision and fed up with Owen's attitude, the Eagles decided to sustain the suspension beyond the original four games and even sought to regain part of his paid contract and half of

¹¹⁵ NAT'L FOOTBALL LEAGUE, 2016 PERSONAL CONDUCT POLICY at 5 (2016).

¹¹⁶ *Id.* at 4.

¹¹⁷ Gregg Rosenthal, *Vikings Deactivate Adrian Peterson Indefinitely*, NFL (last updated Sept. 17, 2014 9:42 PM), <http://www.nfl.com/news/story/0ap3000000396097/article/vikings-deactivate-adrian-peterson-indefinitely>.

¹¹⁸ *Adrian Peterson Timeline*, NFL (last updated April 16, 2015 9:08 PM), <http://www.nfl.com/news/story/0ap3000000485782/article/adrian-peterson-timeline>.

¹¹⁹ *Eagles Officially Deactivate T.O.*, ESPN (Dec. 5, 2005), <http://www.espn.com/nfl/news/story?id=2249078>.

¹²⁰ *Id.*

his signing bonus.¹²¹ They were successful in recovering his \$2.3 million signing bonus.¹²² This unchecked power became a point of tension during the 2006 CBA negotiations, and eventually the Player's Association negotiated with the league to place limits on team suspensions.¹²³

The current CBA references the *Owens* decision, and explicitly overrules it. It states, "[A]ny such deactivation, even with pay, shall be considered discipline subject to the limits set forth in this section. The Non-Injury Grievance Arbitrator's decision in *Terrell Owens* (Nov. 23, 2005) is thus expressly overruled as to any Club decision to deactivate a player in response to the player's conduct."¹²⁴ This language is key. Here, the CBA states that long-term suspensions "even with pay" are a violation of this agreement. While some people think this curtailed the power of the teams too much in disciplining their players,¹²⁵ it eliminated the possibility a team had to bury a player on their team simply to make an example and demonstrate authority.

Because of the changes made to the CBA after the *Owens* appeal, a long-term deactivation is off limits for the teams.¹²⁶ The Commissioner is also not allowed to exercise power by placing the athlete arbitrarily on the Commissioner's Exempt List. A long-term suspension is not a possible punishment that the league can impose on players who kneel during the National Anthem. This leads to the question, What happens when teams continually hand one-game suspensions to players who kneel?

*c. NFL Teams Have the Contractual Authority to Punish
Players who Repeatedly Kneel for as Many Games as they
Choose*

The 2011 CBA allows a team to punish a player through a suspension of four games or less, but limits the team's power for long-term suspensions. On its face, this creates a chasm that hinders effectiveness. A punishment that can only be enforced once has little deterrent effect. The CBA accounts for this, and allows teams to reinforce suspensions if the player recommits

¹²¹ *Terrell Owens Still Owes the Eagles*, BLEACHER REP. (Jan. 31, 2008), <http://bleacherreport.com/articles/8140-terrell-owens-still-owes-the-eagles>.

¹²² *Id.*

¹²³ Heitner & Bogart, *supra* note 84, at 222.

¹²⁴ NAT'L FOOTBALL LEAGUE CBA, *supra* note 74, art. 42, § (1)(a)(xv).

¹²⁵ David C. Weiss, *How Terrell Owens, Collective Bargaining, and Forfeiture Restrictions Created a Moral Hazard that Caused the NFL Crime Wave and What it Meant for Michael Vick*, 15 SPORTS L. J. 279, 305–11 (2008).

¹²⁶ NAT'L FOOTBALL LEAGUE CBA, *supra* note 74, art. 42, § (1)(a)(xv).

their actions. The contract states:

Nor shall anything in this Section preclude a Club from imposing a fine and/or suspension without pay for conduct detrimental to the Club, as set forth in Section 1(a) above, in any case in which the same player has committed repeated offenses in the same League Year . . . [T]he NFLPA expressly reserves the right to challenge the imposition of such discipline for conduct detrimental to the Club based upon the absence of just cause and/or any other allowable bases for opposing discipline.¹²⁷

The language of the contract clearly allows teams to reinforce their previous suspensions, with the operative language being “just cause.” This language will likely be contested through the appeals process.¹²⁸ It is safe to say that if the club has the authority to punish players with a short-term suspension once, then they have that authority to punish them again when the player repeats the reprimanded conduct.

3. NFL Teams can Cut or Release Players from their Team for Any Reason, but they are Required to Pay the Price Associated with Dropping Players

The question of whether an NFL team can cut a player for kneeling during the anthem is best split up into two issues: (1) whether the team can remove the player from its roster, and (2) whether the team can avoid paying the player for the rest of their contract.

Cutting a player is terminating the contract. This is what President Trump is arguing for, and what many commentators feel the team can do because they believe the athletes have at-will status. However, as expressed earlier, NFL players are not at-will employees. McCann wrote, “An NFL player is in a different position. He has an employment contract. If he or his team ends the employment relationship before the contract expires, then the contract has been breached.”¹²⁹ There is an exception if the termination is

¹²⁷*Id.* at art. 42, § (7).

¹²⁸ Michael David Smith, *Kedric Golston: Players Should Blame Ourselves for Giving Goodell Power*, NBC SPORTS (July 21, 2016, 11:56 AM), <http://profootballtalk.nbcsports.com/2016/07/21/kedric-golston-players-should-blame-ourselves-for-giving-goodell-power/>.

¹²⁹ Michael McCann, *Can An NFL Owner Legally ‘Fire’ A Player For Protesting?*, SPORTS ILLUSTRATED (Sept. 23, 2017), <https://www.si.com/nfl/2017/09/23/donald-trump-fired-roger-goodell-player-protest>.

done in a manner allowed by the contract.

The Uniform Player Contract's morality clause states that "if a Player has engaged in personal conduct reasonably judged by Club to adversely affect or reflect on Club, then Club may terminate this contract."¹³⁰ Some commentators believe that this option is only available to the team after they have suspended the player for four games,¹³¹ but there is nothing in the contract to suggest this. NFL teams can terminate a player's contract if the player behaves in a manner the team believes reflects poorly on the club.¹³² Firing an athlete for kneeling during the anthem would fall under this broad discretion.

If a contract is terminated based on the morality clause, a player forfeits the remainder of their salary. Section 6 of the Uniform Player Contract states that "if this contract is terminated . . . the yearly salary payable to Player will be reduced proportionately and Player will be paid the weekly or biweekly portions of his yearly salary having become due and payable up to the time of termination."¹³³ A player cannot lose money already earned.¹³⁴ If it is found that a player can be terminated for kneeling during the anthem under the morality clause, then a player is entitled to the rest of their contract *only* if portions are guaranteed.¹³⁵

While a reading of the contract suggests a team may "fire" a player for kneeling during the anthem, there is still a lot of uncertainty. The NFLPA has already pledged support for players who kneel, and it is almost certain that they would appeal any contract termination. On top of that, increasing punishment also increases the likelihood of a reversal on appeal, and increases the amount of damages the player would be owed.

¹³⁰ NAT'L FOOTBALL LEAGUE CBA, *supra* note 74, at app. A, § 11.

¹³¹ Heitner & Bogart, *supra* note 84, at 233 ("NFL teams are limited to suspending a player (the talent) for up to four games before deciding whether to release the player.").

¹³² Patricia Sanchez Abril & Nicholas Greene, *Contracting Correctness: A Rubric for Analyzing Morality Clauses*, 74 WASH. & LEE L. REV. 3, 12 (2017) ("Based on the language, it is plausible to conclude that a team could terminate a player if in its sole discretion it believes his behavior could adversely affect or reflect on the team, regardless of actual damage.").

¹³³ NAT'L FOOTBALL LEAGUE CBA, *supra* note 74, at app. A, § 6.

¹³⁴ *Id.* at art. 4, § (9).

¹³⁵ McCann, *supra* note 129 ("The contract stipulates whether the player is still owed money. Although NFL contract generally do not 'guarantee' money, some players sign contracts with guarantees that require future payments. A 'fired' player would still receive those payments.").

E. If the NFL Chose to Punish Players for Protesting the National Anthem, the Agreed-Upon Appeals Process Would Allow the Players a Remedy

The appeals process laid out in the CBA is one of the main checks on the Commissioner's power. One analyst concluded that professional sports teams and the league offices have complete discretion in deciding who gets fired from the league.¹³⁶ In support of his argument, he referenced two large suspensions that were handed down by the Commissioner of the respected league: the suspension of pitcher John Rocker and the banishment of Los Angeles Clippers owner Donald Sterling.¹³⁷

During the turn of the century, Atlanta Braves reliever John Rocker was suspended for seventy-three days after making racist and homophobic comments in a magazine article.¹³⁸ MLB Commissioner Bud Selig exercised his power in ordering the hefty penalty.¹³⁹ This exhibition of power is what was cited to support the assertion that leagues have complete control over their suspensions.¹⁴⁰ The irony of this example is that, instead of showing the power of the Commissioner, it shows the power of the players association and the appeals process. The MLB Players Association appealed the suspension and an arbitrator significantly reduced punishment, allowing Rocker to return after the first two weeks of the season and knocking \$450 off his \$500 fine.¹⁴¹

Sterling's story also offers little support for this claim. The NBA fined Sterling \$2.5 million, banished him from the league, and threatened to seize and auction the team he owned after his girlfriend recorded and released

¹³⁶ Jimmy Golen, *Trump Wants NFL Owners to Fire Protesting Players. Can They?*, DENV. POST (Sept. 26, 2017, 8:14 AM), <http://www.denverpost.com/2017/09/26/can-nfl-owners-fire-protesting-players/>.

¹³⁷ *Id.*

¹³⁸ Jeff Pearlman, *At Full Blast Shooting Outrageously From the Lip, Braves Closer John Rocker Bangs Away at His Favorite Targets; the Mets, Their Fans, Their City and Just About Everyone in it*, SPORTS ILLUSTRATED (Dec. 27, 1999), <https://www.si.com/vault/1999/12/27/271860/at-full-blast-shooting-outrageously-from-the-lip-braves-closer-john-rocker-bangs-away-at-his-favorite-targets-the-mets-their-fans-their-city-and-just-about-everyone-in-it>; *see generally* Golen, *supra* note 136; Murray Chass, *BASEBALL; Rocker States His Case at Appeal of Suspension*, N.Y. TIMES (Feb. 11, 2000), <http://www.nytimes.com/2000/02/11/sports/baseball-rocker-states-his-case-at-appeal-of-suspension.html>.

¹³⁹ Phil Rogers, *Arbitrator's Ruling Rocks Selig's Power*, CHI. TRIB. (March 2, 2000), http://articles.chicagotribune.com/2000-03-02/sports/0003020312_1_mr-rocker-and-disregards-john-rocker-atlanta-clubhouse.

¹⁴⁰ *See generally* Golen, *supra* note 136.

¹⁴¹ *See generally* Rogers, *supra* note 139.

remarks Sterling made to her about how it bothered him when she hung out with black people.¹⁴² Besides the fact that Commissioner Silver did not have the authority by himself to kick Sterling out of the league and needed the league owners to vote on it,¹⁴³ the example is also discredited because unusual circumstances deprived Sterling of the appeals process, and the team was sold independent of league action. After filing his appeal, Sterling's wife, Shelly Sterling, sold the team for \$2 billion. The team had been placed in a public trust six years prior when Donald Sterling showed signs of Alzheimer's. The Second District Court of Appeals said that Shelly Sterling properly sold the team to avoid an extraordinary loss to the trust.¹⁴⁴ Donald Sterling did not get to exercise his appeal through the NBA CBA because his wife sold the team. Instead, he sued her and lost.

According to the Uniform Player Contract, any dispute between the player and team involving interpretation of the player's contract or CBA "will be submitted to final and binding arbitration in accordance with the procedure called for in any collective bargaining agreement in existence at the time the event giving rise to any such dispute occurs."¹⁴⁵ This arbitration process is laid out in Article 43 of the CBA.¹⁴⁶ This outlet is designed to allow players, either individually or through the NFLPA, to challenge rulings that are brought against them. The appeals take place in front of an impartial arbitrator, chosen by the league and NFLPA beforehand.¹⁴⁷ Impartial arbitrators are given exclusive jurisdiction over the appeal.¹⁴⁸ History has shown that close calls usually result in filing a temporary restraining order on the suspension.¹⁴⁹ This is because forcing a player to miss games is an irreparable harm.¹⁵⁰ However, if the appeal involves a suspended player,

¹⁴² Associated Press, *Appeals Court Upholds \$2 Billion Sale of Clippers*, ESPN (Nov. 16, 2015), http://www.espn.com/nba/story/_/id/14147968/donald-sterling-loses-appeal-reverse-2-billion-sale-los-angeles-clippers; Kevin Trahan, *How NBA Owners Can Force Donald Sterling to Sell the Los Angeles Clippers*, SBNATION (April 29, 2014, 3:10 PM), <https://www.sbnation.com/nba/2014/4/29/5665502/donald-sterling-suspension-la-clippers-sale-adam-silver>.

¹⁴³ Trahan, *supra* note 142.

¹⁴⁴ Associated Press, *supra* note 142.

¹⁴⁵ NAT'L FOOTBALL LEAGUE CBA, *supra* note 74, at app. A, § 19.

¹⁴⁶ *Id.* at art. 43, § 1 ("Any dispute . . . will be resolved exclusively in accordance with the procedure set forth in this Article, except wherever another method of dispute resolution is set forth elsewhere in this agreement.").

¹⁴⁷ *Id.* at art. 16, § 7.

¹⁴⁸ *Id.* at § 1.

¹⁴⁹ Nat'l Football League Players Ass'n v. Nat'l Football League, 874 F.3d 222, 231 (5th Cir. 2017).

¹⁵⁰ *See generally* Nat'l Football League Players Ass'n v. Nat'l Football League, No. 4:17-CV-00615, 2017 WL 4124105 at *6 (E.D. Tex. Sept. 18, 2017).

then there is an expedited appeals process.¹⁵¹ Under this process, the hearing will take place seven days after the filing, and the decision will be produced no later than five days after the hearing.¹⁵²

But appeals have also had a history of informal reviews. In 2010, Pittsburgh Steelers quarterback Ben Roethlisberger was suspended six games for violating the league's personal conduct policy.¹⁵³ This penalty came after the quarterback was accused of sexually assaulting a twenty-year-old girl.¹⁵⁴ After meeting with the Commissioner, Roethlisberger reduced his six-game suspension to four games.¹⁵⁵

IV. GAVE PROOF THROUGH THE NIGHT – REWRITING THE NFL MORALITY CLAUSE

Despite its faults, the morality clause does serve a vital function. When reworked, it should remain a clause in the CBA. Morality clauses protect businesses from being attached to personalities who represent their business when that personality has behaved in a way that reflects badly on the business.¹⁵⁶ These clauses have grown in popularity.¹⁵⁷ Now, almost any individual who represents a company has a morality clause in their contract.¹⁵⁸ The morality clauses' rise in popularity is similar to the rise of the non-compete clause, but morality clauses have not been subject to the same level of judicial scrutiny.¹⁵⁹

¹⁵¹ NAT'L FOOTBALL LEAGUE CBA, *supra* note 74, art. 43, § 4 ("If the grievance involves a suspension of a player by a Club, the player or NFLPA will have the option to appeal it immediately upon filing to the Notice Arbitrator and a hearing will be held by an arbitrator designated by the Notice Arbitrator within seven (7) days of the filing of the grievance.")

¹⁵² *Id.*

¹⁵³ Mike Reiss, *NFL Players Have Good Success Rate with Appeals*, ESPN: NFL NATION (Sept. 3, 2015), http://www.espn.com/blog/new-england-patriots/post/_id/4782412/detailing-how-nfl-players-have-fared-in-recent-appeals.

¹⁵⁴ *Ben Roethlisberger's Ban at 4 Games*, ESPN (Sept. 4, 2010), <http://www.espn.com/nfl/news/story?id=5527564>.

¹⁵⁵ *Id.*

¹⁵⁶ Abril & Greene, *supra* note 132, at 5-7 (referencing Fernando M. Pinguelo & Timothy D. Cedrone, *Morals? Who Cares About Morals? An Examination of Morals Clauses in Talent Contracts and what Talent Needs to Know*, 19 SETON HALL J. SPORTS & ENT. L. 347 (2009)).

¹⁵⁷ *Id.* at 18 ("While a 1997 survey found that less than half of all endorsement contracts included morals clauses, in 2003 that number had risen to at least 75%.")

¹⁵⁸ *Id.* at 7 ("[A]ny talented individual who is or may become associated with a company or organization in the minds of the public is likely to have a morals clause included in his or her contract." (quoting Pinguelo & Cedrone, *supra* note 156, at 366)).

¹⁵⁹ *Id.* at 35.

At their best, morality clauses encourage businesses and talent to portray a good image to society; at their worst, they stifle the freedoms of the talent at the discretion of the business. Morality clauses differ based on how broadly they can be interpreted.

A. The CBA Needs a Morality Clause, but the NFL and NFLPA Will Likely Want it to Read Differently

The league and teams will likely want to keep the morality clause as broad as possible.¹⁶⁰ A broad clause decreases liability.¹⁶¹ They can use the athlete as the face of the league until that athlete steps out of bounds. When he does, the league or team can punish the player to dissociate themselves with that player's actions. The broader the clause, the greater discretion the league and teams have in when they choose to dissociate themselves.

There are also positive reasons why the league and team would want a broad morality clause. One is that the league and teams should have broad power in promoting behavior that makes the league look good¹⁶² because it serves the interests of everyone involved.¹⁶³ It is also very difficult to list every action the league might want to deter.¹⁶⁴ Drafting a narrower morality clause would undoubtedly result in a list that fails to include some behavior that the league wishes it could punish, but no longer can.

The NFLPA will obviously try to negotiate for a narrower morality clause.¹⁶⁵ A narrower morality clause would provide clarity to the NFL players.¹⁶⁶ In the instance of kneeling for the anthem, a player could be fired from a team or suspended without pay for up to four weeks because of behavior that falls under this clause. It is only fair that they have sufficient warning before choosing to act.¹⁶⁷ The amount of speculation by sports and legal analysts is a sure indication that the broad language of the contract did not provide the athletes with sufficient warning.

¹⁶⁰ Pinguelo & Cedrone, *supra* note 156, at 370 (“[C]ompanies are almost always going to seek to include a broad morals clause in their agreements. By including a broadly-worded morals cause, the company seeks to give itself extensive flexibility to terminate the talent agreement for any potentially damaging conduct of the talent.”).

¹⁶¹ *See id.*

¹⁶² Heitner & Bogart, *supra* note 123, at 236.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ Pinguelo & Cedrone, *supra* note 156, at 370.

¹⁶⁶ Heitner & Bogart, *supra* note 123, at 238.

¹⁶⁷ *Id.* (“Additionally, players ought to know when they are breaking the rules if they are threatened with potentially facing severe penalties upwards of \$1,000,000 in some cases.”).

A broad morality clause also silences the voice of many people.¹⁶⁸ Athletes are on a unique platform with a large audience. Occasionally, as is the case with Kaepernick, that unique platform motivates them to challenge the status quo. Another prominent example is when Steelers running back Richard Mendenhall tweeted that people should not celebrate the death of Osama Bin Laden.¹⁶⁹ While neither the NFL or the Steelers punished Mendenhall for the tweets,¹⁷⁰ Champion terminated their endorsement contract with Mendenhall.¹⁷¹ Currently NFL players are taking advantage of their platform by kneeling during the National Anthem to bring awareness to racial injustice committed by the police. To punish them would be to silence their voice.¹⁷²

B. The NFLPA Should Consider Possible Alternatives to the Broad Morality Clause in the CBA

The current CBA is set to expire in 2020. The negotiations for the new CBA will likely be contentious, as the union's relationship with the league has been tested in recent years. The league will be looking for a win-win solution, keeping revenue and power while appeasing the talent. One way to do this would be through a narrower morality clause. There are two ways to limit the morality clause: scope and discretion.

The simplest way to limit the scope of the morality clause would be to list certain instances to which it applies. However, this sounds a lot easier than it is. There are some categories that can easily be included, like racist or homophobic speech and criminal accusations. Where it gets difficult is finding the balance between a team's desire to shape the environment of their team and a player's desire for free expression. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.* wrestled with a similar balancing act when children wore black armbands to their school to protest the Vietnam War.¹⁷³ The Court in *Tinker* held that, "In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere

¹⁶⁸ Abril & Greene, *supra* note 132, at 43 ("Broad morality clauses chill speech and free expression.").

¹⁶⁹ Dashiell Bennett, *Rashard Mendenhall's Controversial Osama Bin Laden Tweets Cost Him a Sponsorship*, BUS. INSIDER (May 6, 2011, 4:19 PM), <http://www.businessinsider.com/rashard-mendenhall-champion-sponsorship-2011-5>.

¹⁷⁰ Heitner & Bogart, *supra* note 123, at 228.

¹⁷¹ Bennet, *supra* note 169.

¹⁷² Michael Starr Hopkins, *NFL Should Respect Players Rather than Punish Them for Protesting*, HILL (Oct. 12, 2017, 10:00 AM), <http://thehill.com/opinion/civil-rights/355084-if-jerry-jones-is-a-real-cowboy-he-will-let-his-football-players-protest>.

¹⁷³ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”¹⁷⁴ The school had a legal obligation to strike this balance. The NFL is under no legal obligation since the First Amendment does not apply. Instead, they are only governed by the contract. Given the league’s past and the player’s heightened interest in using their platforms for political speech, it is possible that the Union applies enough pressure in the 2020 CBA negotiations to gain language like *Tinker* in the next CBA. That would eliminate the broad justification teams would likely use in claiming player conduct as a distraction, while still allowing teams to act against serious morality issues. In the case of kneeling during the National Anthem, the only distraction is the media and the efforts the teams take to avoid the issue.¹⁷⁵ Therefore, kneeling during the anthem would be allowed under a morals clause with this wording.

The new CBA could also have limits on how much a player can be fined under the conduct detrimental to league clause.¹⁷⁶ As it stands, there is no limit as to how much the Commissioner can fine a player for exhibiting conduct deemed detrimental to the league. This gives the Commissioner too much power. The conduct detrimental to league clause should have the same limits as the conduct detrimental to club clause: a fine not more than one week’s salary.

The second way to change the morality clause would be to tailor its discretion. Changing discretion means changing who makes the determination to punish under the morality clause.¹⁷⁷ One option would be to require mutual assent between the league or team and the NFLPA when determining how to punish a player. This is unlikely because the league would almost surely never agree to it. Additionally, the NFLPA has shown a precedent of challenging almost any league punishment.¹⁷⁸ If this were to be the rule, then there would be very few suspensions.

Another option would be to reformat the arbitration portion of the CBA. When a player is disciplined for conduct detrimental to the league, the

¹⁷⁴ *Id.* at 509.

¹⁷⁵ See generally Joseph Zucker, Report: ‘Tension Was Palpable’ in Steelers Locker Room After Anthem Protest, BLEACHER REP. (Sept. 27, 2017), <http://bleacherreport.com/articles/2735527-report-tension-was-palpable-in-steelers-locker-room-after-anthem-protest>.

¹⁷⁶ Heitner & Bogart, *supra* note 123, at 239

¹⁷⁷ Pinguelo & Cedrone, *supra* note 156, at 371.

¹⁷⁸ See generally Andrew Mahoney, Tom Brady Joins List of Successful NFL Appeals, BOS. GLOBE (May 15, 2015), <https://www.bostonglobe.com/sports/2015/05/15/history-successful-nfl-suspension-appeals/ihViYTnTUt2cEwpTvOQKkN/story.html>.

Commissioner can appoint himself as the “independent” arbitrator.¹⁷⁹ This has become one of the more controversial portions of the CBA¹⁸⁰ and will likely get changed during the next contract negotiation.¹⁸¹ In fact, the NFLPA president, Eric Winston, stated that, “There has to be a neutral arbitrator. You can’t tell me keeping Roger Goodell in the position he’s in as arbitrator is going to win the confidence of the players. That’s long gone. You can’t go back and fix what’s happened.”¹⁸²

Although the league and teams have not punished players for kneeling, the NFLPA should proactively narrow the broad morality clauses in the CBA. This can be done by changing the scope and discretion of the clause.

V. THAT OUR FLAG WAS STILL THERE – THE NFL SHOULD STAND FIRMLY BEHIND THE PLAYERS

While a strict legal analysis suggests that a player can be benched for kneeling during the anthem, the league and teams should avoid this political tar pit. The NFL has little to lose and almost everything to gain from standing behind the players. According to polling done on October 24, 2017, fifty-one percent of the country believes that sports leagues should not require their players to stand during the National Anthem.¹⁸³ This number has risen by a remarkable eight percent since Kaepernick began his crusade in September 2016.¹⁸⁴ The country is sympathetic towards the players’ demonstrations and the racial equality movement in general.¹⁸⁵

Most of the pressure against the league is that viewership has dropped at an alarming rate in recent years. Between the 2016 and 2017 season alone,

¹⁷⁹ NAT’L FOOTBALL LEAGUE CBA, *supra* note 74, art. 46, § (2).

¹⁸⁰ Heitner & Bogart, *supra* note 123, at 231.

¹⁸¹ Mark Maske, *NFLPA President: ‘Hard to Imagine’ a New CBA with No Changes to Roger Goodell’s Role in Discipline*, WASH. POST (Aug. 5, 2015), https://www.washingtonpost.com/news/sports/wp/2015/08/05/nflpa-will-address-roger-goodells-power-to-hear-disciplinary-appeals-in-next-labor-deal-union-president-says/?utm_term=.ece2637ec55a (statement of Bengals lineman Eric Winston) (“I’m not against setting boundaries. [But] there has to be a neutral arbitrator. You can’t tell me that keeping Roger Goodell in the position he’s in as arbitrator is going to win the confidence of the players. That’s long gone. You can’t go back and fix what’s happened.”).

¹⁸² *Id.*

¹⁸³ Marist Poll, *10/24: Growing Support for Anthem Protests*, MARIST POLL (Oct. 24, 2017), <http://maristpoll.marist.edu/1024-growing-support-for-anthem-protests/>.

¹⁸⁴ *Id.*

¹⁸⁵ *See generally id.*

viewership has dropped five percent.¹⁸⁶ Even though many view the numbers to be a direct result of the new wave of technology and the phenomena of cord cutting,¹⁸⁷ the nation's largest fingers are pointing at the anthem protests. President Donald Trump repeatedly blames the rule changes that protect players from brutal hits and the protests. Papa John's Pizza, one of the NFL's biggest sponsors, blames their loss in profits on the NFL anthem protests and threatens to pull their commercials because of it.¹⁸⁸ John Schnatter, Papa John's founder and CEO, who frequently appears on the company's commercials, is blaming Commissioner Goodell.¹⁸⁹ He said, "Leadership starts at the top, and this is an example of poor leadership. The NFL has hurt Papa John's shareholders."¹⁹⁰

Although the NFL is facing this financial pressure, it should remember that this is not the first time in sports that change has brought a short period of doubt. In 1965, players protested the All-Star Game because they were receiving racist treatment when they arrived in New Orleans days before the game.¹⁹¹ The league decided to stand behind their players, and the game was moved to Houston.¹⁹² Not only did the league go to the trouble to tackle the logistics of moving the game, they also jeopardized the expansion of the NFL. Two years after the all-star game protest, New Orleans got the Saints in the 1967 expansion.¹⁹³

Commissioner Goodell should stand behind the players kneeling to reshape his legacy. In 2014, Goodell botched the domestic violence investigation on Ray Rice in such a way that it permanently damaged Goodell's

¹⁸⁶ Frank Pallotta, *Yes, the NFL's TV Ratings Are Down, But So is the Rest of Network Television*, CNN MEDIA (Oct. 26, 2017, 2:59 PM), <http://money.cnn.com/2017/10/26/media/nfl-ratings-tv-networks/index.html>.

¹⁸⁷ *Id.*

¹⁸⁸ Kate Taylor, *Papa John's Could Kill Its NFL Sponsorship Deal After National Anthem Protest Controversy*, BUS. INSIDER (Nov. 3, 2017, 5:29 PM), <http://www.businessinsider.com/papa-johns-could-end-nfl-sponsorship-after-anthem-protests-2017-11>.

¹⁸⁹ Nathaniel Meyersohn, *Papa John's Says NFL Protests Are Hurting Sales*, CNN MEDIA (Nov. 1, 2017, 4:59 PM), <http://money.cnn.com/2017/11/01/media/nfl-papa-johns-protests/index.html>.

¹⁹⁰ *Id.*

¹⁹¹ Olivia B. Waxman, *This Football Player Fought for Civil Rights in the '60s. Here's What He Thinks About National Anthem Protests*, TIME (Sept. 8, 2017), <http://time.com/4933400/nfl-anthem-protests-boycott-history/>.

¹⁹² *Id.*

¹⁹³ Peter Finney Jr., *The Story of New Orleans Being Awarded the Saints*, NEW ORLEANS SAINTS (Nov. 1, 2016), <http://www.neworleanssaints.com/news-and-events/article-1/The-story-of-New-Orleans-being-awarded-the-Saints/85274ed6-fe34-4cdc-a463-85299df82b3f>.

reputation.¹⁹⁴ This dropped Goodell's approval rating to twenty-eight percent.¹⁹⁵ The public's confidence in Goodell took a bigger hit when the league produced little evidence in their accusation of the Patriots organization and their hall-of-fame bound quarterback, Tom Brady.¹⁹⁶ Brady was suspended four games but his team still managed to win Super Bowl LI, and Goodell had to hand the Super Bowl MVP trophy to Brady.¹⁹⁷ Amidst all of this, national press was highlighting that the NFL tried to suppress evidence that concussions during football lead to loss of brain function and mental health problems as the players age. To top off his slew of negative press, Goodell asked for a contract extension of nearly fifty million and a private jet for life.¹⁹⁸

Goodell needs to make a strong statement that will overshadow his mistakes—one that history will remember as proactive and good for the league. Supporting the players and their right to use their platform would at least help in correcting his negative reputation.

VI. DOES THE STAR-SPANGLED BANNER YET WAVE? – CONCLUSION

President Trump sparked a national debate when he attacked the players who kneel during the National Anthem. He called for the teams to fire those players who protest, and sports analysts and legal commentators across the country affirmed the teams' rights to terminate a player's contract under the morality clause. While a team probably can terminate a player's contract

¹⁹⁴ Juliet Macur, *Ray Rice Ruling Highlights Roger Goodell's Missteps*, N.Y. TIMES (Nov. 28, 2014), <https://www.nytimes.com/2014/11/29/sports/football/ray-rice-ruling-highlights-roger-goodells-missteps.html>.

¹⁹⁵ Ray Frager, *Roger Goodell's Approval Rating Is Lower Than President Obama's*, FOX NEWS SPORTS (Feb. 10, 2016), <http://www.foxnews.com/sports/2016/02/10/roger-goodell-approval-rating-is-lower-than-president-obama.html>.

¹⁹⁶ Sally Jenkins, *Why Roger Goodell, Not Tom Brady, Is Deflategate's Real Loser*, WASH. POST (July 19, 2016), https://www.washingtonpost.com/sports/redskins/why-roger-goodell-not-tom-brady-is-deflategates-real-loser/2016/07/19/946c09b2-4dcc-11e6-a422-83ab49ed5e6a_story.html?utm_term=.9e11037d9db8.

¹⁹⁷ Lorenzo Reyes, *Super Bowl MVP Tom Brady, Roger Goodell End Season with One Last Awkward Moment*, USA TODAY (Feb. 6, 2017, 11:52 AM), <https://www.usatoday.com/story/sports/nfl/patriots/2017/02/06/tom-brady-mvp-trophy-roger-goodell-deflategate-super-bowl-2017/97549474/> (describing the event by stating, "As Brady approached the podium, Goodell stopped to look up at him with some apparent confusion of what to do next, paused briefly, and then pulled closer to Brady—who had started to look around with uncertainty himself.").

¹⁹⁸ James Dator, *Roger Goodell is Asking for \$50M Salary, Private Plane and Health Insurance for Life, Per Report*, SBNATION (Nov. 12, 2017, 12:17 PM), <https://www.sbnation.com/lookit/2017/11/12/16639956/roger-goodell-50-million-salary-plane-insurance-nfl>.

for participating in this historical process, the authority is not clearly established. The Commissioner has a clear right to punish however he feels necessary, subject to an appeal where he can appoint himself the arbitrator. Teams have a more limited right. They can suspend a player for four games, fine him for the equivalent of one week's salary, or terminate his contract and release him to free agency. These actions would be subject to the review of an independent arbitrator on appeal.

In order to protect the players' right in the future to use their platform, the current overly broad morality clause would need to be reworded at the 2020 CBA negotiations. This can be done by changing the scope or discretion of the clause. Regardless of the contract's language, the Commissioner should stand behind the league to redeem his legacy.

The CBA's morality clause is too broad, and the players should not stand for it.