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An Employment Stance on Taking a Knee

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I. Introduction

At the commencement of the 2016 NFL season, Colin Kaepernick, one of the quarterbacks for the San Francisco 49ers, and Megan Rapinoe, midfielder for the U.S. Women's Soccer Team, among other professional athletes, began exercising their First Amendment freedom of speech by kneeling during the national anthem before their respective professional league games as a protest to promote awareness for social injustice and police brutality.[1] The protests immediately sparked political controversy, and the persisting nationwide social injustice debate was brought into the conversation of a multibillion dollar industry: professional sports.[2, 3] Out of the many professional organizations that employ and represent the athletes, only one has taken formal disciplinary action for the national anthem protest to date.[4] Instead of a kneeling demonstration, the disciplined player Steve Clevenger distastefully expressed personal opinions through Twitter in opposition of the national anthem protests and social injustice conversation.[5]

Organizations, coaches, and players have taken stances either in support or opposition of the actions by individuals surrounding these demonstrations and have drawn the proverbial "line in the sand" regarding the moral and political correctness of the actions. This has effectively separated the political conversation into sides.[6] However, the burning question that has yet to be addressed in the endless hours of media coverage and political opinions is what actions the San Francisco 49ers, U.S. Women's Soccer, and other sports and entertainment organizations legally

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**Note from the author.* This article was originally written in the fall of 2016. The contents of the article were left unchanged to retain the prospective analyses, given the events that were occurring at the time, and continue a year later. Colin Kaepernick is no longer a member of the San Francisco 49ers. Kaepernick opted out of the final season in his contract, and as of August 30, 2017, he remains unemployed as a quarterback in the NFL. It is likely that his current unemployment proves that NFL teams do not find his performance value greater than the nonfootball attention he invites, at least for now. Contractual leverage preserved Kaepernick's opportunity to remain with the 49ers in 2016 and renegotiate midway through the 2016 season. However, the other 31 NFL teams may now hold the leverage over matters that Kaepernick currently finds uncompromisable. The consequences to Kaepernick's playing career is the crux of this article: right or wrong, private employers may freely act without respect to First Amendment rights that have been at the forefront of the discussion surrounding the public demonstrations in the social justice movement.

may take against athletes and entertainer-employees who are exercising their First Amendment freedom of speech rights. The public outcry has focused on the rights of the individuals, but are they entitled to behave at will without repercussions in their employment? This article will explore the legal landscape concerning the First Amendment's freedom of speech within the employment arena involving athletes, entertainers, and organizations, as well as anticipate social and legal consequences for all parties involved.

The following examples illustrate the exercise or restriction of the freedom of speech within a team or private employment in sports and entertainment. On August 14, 2016, Colin Kaepernick sat on the bench during the Star Spangled Banner.[7] However, the protest went unnoticed until August 26, 2016, when he gained national attention by kneeling, joined by other NFL players.[8] Subsequently, on September 4, 2016, Megan Rapinoe supported the protest of Colin Kaepernick by kneeling for the national anthem before her game with the Seattle Reign of the National Women's Soccer League.[9] On September 15, 2016, she repeated her protest by kneeling during the national anthem before the U.S. Women's Soccer Team international game against Thailand.[10]

Because of a free speech demonstration in response to Kaepernick, on September 23, 2016, Steve Clevenger was suspended by the Seattle Mariners without pay for using Twitter as an avenue to express his opinions regarding the social injustice and police brutality protests and demonstrations.[11] On August 29, 2016, on HBO's airing of Hard Knocks, Los Angeles Rams head coach Jeff Fisher spoke to his team about how the players were expected to behave during the national anthem.[12] Fisher addressed body language, the organizational philosophy, and his personal philosophy by explaining where the helmet would be held and where the players would stand.[13] "It's a respect thing; it's a self-respect thing; it's a respect for your teammates; it's a respect for this game; it's a respect for this country. This is important to us, this is what it looks like."[14]

Interestingly less controversial, in light of the 2016 demonstrations, in April of 2010, the NCAA Playing Rules Oversight Panel approved the ban of "messages" on eye black worn by players, effective for the Fall 2010 season.[15] Many have coined this the "Tim Tebow Rule" after Tebow appeared in the 2009 SEC Championship Game with a Bible verse written in silver marker on his eye black, exercising his freedom of speech.[16] Finally, in December of 2013, Duck Dynasty's Phil Robertson voiced his personal views on homosexuality in *GQ* magazine and was subsequently suspended from filming with A&E for a time period.[17]

This article begins with a brief journey through the foundational history of the First Amendment's freedom of speech and an important footnote on constitutional standing in the event of a claim of infringement on constitutionally guaranteed rights of individuals. The next section distinguishes between public and private actor-employers and their employees in terms of First Amendment freedom of speech claims. Employment and contract law are then discussed to address the protections afforded to employees and employers, including the heart of the matter: private contract value. Section V is where the various laws emulsify into a definite and germane form, with an analysis and application of the law combined with the constitutionally charged current event "First Amendment Team" of athletes, entertainers, and their employers. The final sections contain possible solutions for employer-organizations, athletes, and entertainers alike.

II. Free Speech Foundations

> *Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people to . . . petition the government for a redress of grievances.*[18]

The Bill of Rights (1791) was adopted four years after the creation of the Constitution in response to disagreement concerning previously unenumerated natural rights, also known to James Madison as "the great rights of mankind."[19] To respond to antifederalist protests, the Founders agreed to enumerate the rights of the people in response to fears that the Constitution stated what the newly created government could do but did not address its limitations.[20] In the aftermath of the Revolutionary War, the American people feared restriction on their "newly won" inalienable rights.[21] Thus, the Bill of Rights was adopted and the freedoms of religion, speech, assembly, and petition to the government for remedy were enshrined in the Constitution.[22] Interesting and often overlooked is the fact that these freedoms, with some limitation, are a shield against *governmental* action against individuals rather than being a shield against *private* action against individual employees.[23] Other legal remedies are available against private actors, but not by way of a federal claim of constitutional deprivation.[24]

Stated differently, the United States government or one if its entities or actors may not infringe upon the First Amendment rights, or punish an individual or corporation for the exercise of these rights *as a citizen,* which is not to be confused with *as an employee*. Practically speaking, this includes freedom from criminal or civil charges brought by the government or its actors for freedom of speech demonstrations, absent false statements of fact, obscenity, or incitement.[25] Additionally, if a deprivation of an individual right to life, liberty, or property occurs by a state actor, such as a First Amendment freedom of speech deprivation, the Due Process Clauses of the 5th and 14th Amendments ensure that the individual receives a fundamentally fair, orderly, and just judicial proceeding.[26] This guarantee requires the determination of standing.[27]

III. State or Private Actor

In *West Virginia State Board of Education v. Barnette,* the West Virginia Board of Education required every student to salute the U.S. flag.[28] Several Jehovah's Witnesses refused to participate and were expelled from school.[29] The Court affirmed the right to dissent by stating that "no state [actor] can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . ."[30] Thus, *Barnette* clarified that there is no state punishment for a demonstration in disagreement or refusal to participate in a nationalistic ritual.[31] Unlike *Barnette,* any unfavorable commentary, discipline, or behavioral requirements by the sports and entertainment organizations, in the correct context, are based on the rules of the private entity and have not involved law enforcement or used state or federal law to deprive athletes and entertainers.[32]

While *Barnette* demonstrates the right to dissent from state pressures, compelling an individual to act, *Garcetti v. Ceballos* involved a state actor who restricted an employee's freedom of speech while in the role of an employee.[33] The Court

stated, "the First Amendment protects a public employee's rights, in certain circumstances, to speak addressing a matter of public concern."[34] If the employee speaks as a citizen on a matter of public concern, then the freedom extends to the employee.[35] If the employee speaks in his or her official capacity as an employee, the government employer must have adequate justification for treating the employee differently from a member of the general public.[36]

In *Garcetti,* the employee made expressions addressing a matter of public concern in a legal memorandum pursuant to his official duties as a district attorney rather than as an autonomous citizen.[37] Thus, the employee was not insulated from employer discipline.[38] First Amendment protections generally are only found for public employees without a private contractual arrangement, and those protections have limitations.[39] Public employment analysis is inapplicable to the current events discussed above because the First Amendment only prohibits action by Congress, not action by nonstate entities.[40] However, understanding the difference between public and private employment is crucial to understanding the legal ramifications of the current protests and organizational actions regarding employment.[41]

There is one category of state action that involves a private actor; yet, it still falls within constitutionally protected boundaries because the private actor acts under the color of state law and becomes a state actor. In *Wickersham v. City of Columbia,* a private veterans' organization held an air show open to the public.[42] After First Amendment demonstrations by antiwar activists ensued, police providing security at the event threatened to arrest two petitioning individuals at the direction of the private organization.[43] The court held that there was a "close nexus" between the state and the alleged deprivation by the organization.[44] Thus, the private organization was converted into a state actor when the police exercised state authority and violated the First Amendment freedom of speech rights of the activists.[45] Unlike *Wickersham,* the current examples of exercise of free speech cited in Section I have not resulted in state action by way of arrest or governmental restriction. Any unfavorable commentary, discipline, or policy enforced by coaches and organizations have been based on the rules of the private entity that they represent and have not used state or federal law to deprive athletes and entertainer-employees.[46]

The following case involves an individual and a private actor, which is the core of this article. While there are no known cases where freedom of speech has been protected by the courts in private employment, *Arlosoroff v. NCAA* was a constitutional rights challenge concerning Equal Protection and Due Process.[47] The case analyzes restrictions on constitutional liberties that apply to the current events in professional sports and entertainment.[48]

In *Arlosoroff,* the court clarified the ability of private actors to restrict constitutional guarantees. There, a foreign tennis player alleged that the NCAA deprived him of Equal Protection and Due Process by ruling that his eligibility to participate in collegiate sports had expired due to his age and previous involvement in organized competition.[49] The court held that the regulation of NCAA eligibility was not activity traditionally exclusively reserved to the state.[50] Therefore, there was no state action and the NCAA could impose its restrictions through its bylaws as a private governing entity.[51]

Barnette, Garcetti, Wickersham, and *Arlosoroff* serve as important guidelines for the current protesters and the anticipated response of the judiciary in the event

of a freedom of speech or other constitutional deprivation in private employment. Mark Trapp, a Chicago-based employment attorney, stated, "The First Amendment applies only to employees of the government in certain situations, and all citizens when they're confronted by the government. In other words, freedom to speak your mind doesn't really exist in work spaces."[52]

Therefore, if an organization, such as the Seattle Mariners, deprives an athlete of the right to continue free speech demonstrations or terminates a player with proper contractual authority, there is no constitutional violation unless the contracting parties agreed to observe a specific right. This outcome is different from that of *Barnette* because professional sports organizations are private actors with the authority to establish their own rules.[53] In the case of professional sports organizations, a breach of contract claim against the contracting party would be the appropriate cause of action rather than a constitutional deprivation claim, as discussed in the next section.[54, 55]

IV. Employment and Contract Law Freedoms and Protections

As previously discussed, employees are generally grouped into two broad categories: employees of the public sector and those of the private sector. For employment law purposes, the only difference concerning state and private action is that in the former the actor is an employer potentially depriving an employee of constitutional freedoms; and in the latter, the private actor is not required to tolerate the same freedoms of speech that an autonomous individual enjoys.. Historically, public employees have enjoyed more freedom of speech protection than private employees, as indicated in the *Garcetti* Court's analysis. However, with the international acceptance of social media as a private platform for discourse, there have been some changes.[56]

The National Labor Relations Board (NLRB) states, as of 2011, that the National Labor Relations Act protects some social media activity of private employees.[57] Private employees may participate in concerted activity such as the continuance of discussions held at work with coworkers by using social media so long as it "relate[s] to the terms and conditions of . . . employment or seek[s] to involve other employees in issues related to employment.[58] On the one hand, the NLRB's findings may offer more protection for private employee discourse than for public employee discourse because public employee speech is not protected if made pursuant to the employee's official duties.[59] On the other hand, no private employer has challenged the social media positions of the NLRB in court; therefore, it may not remain good law in the future.[60]

With an understanding of the differences between the freedoms of public and private employees, the final piece to the employment discussion is the authority of contract law with private employer and employee freedom to enter into a contract. A well-drafted contract is the organizational shield from potential liability when terminating a player or entertainer because contracts commonly have termination "for cause" or "morals clause" sections. A termination "for cause" means that the athlete or entertainer-employee may quit or the employer may terminate the

contract for a specified violation in the contract.[61] A morals clause is a provision in a contract or official document that prohibits certain behavior in an individual's private life.[62] These clauses commonly deal with behaviors such as sexual acts and drug use.[63] They were often used in the contract between actors and actresses and film studios to uphold the public image sought to be portrayed by the studio.[64] Morals clauses are included today in certain contracts of public figures, such as athletes and actors and actresses.[65] If an employee is terminated pursuant to these sections, the private employer management decisions cannot be challenged unless those decisions discriminate on the basis of race, color, religion, sex, national origin, disability, or age.[66]

"Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."[67] Professional sports and entertainment organizations *technically* abide by this standard, terminating employees for reasons such as "deficiency in performance" or "by the judgment of the Club, a failure to conform to personal conduct standards" based on the language within the termination section. [68] However, the true reason for termination can be pretextual and decide the fate of an athlete or entertainer by simply citing a reason that fits the enumerated description in the termination section, rather than because of a discriminatory or unqualified reason.[69] Thus, an athlete or entertainer-employee is at a severe disadvantage because of the subjective nature of unilateral personnel- and performance-based decisions in sports and entertainment.

Further, because athletic performance and organizational needs are commonly subjective evaluations, the recital of a reason in the termination section is often the most politically beneficial method to keep any negative public discussion at bay. This is partly due to the romance between professional sports and the fan base and media. Therefore, not only are constitutional protections nonexistent for private athlete-employees, but contractual protections are, practically speaking, no stronger because of the subjective escape language in the "for cause" termination sections.[70]

The fickle nature of "for cause" termination sections in sports contracts where athletes have devoted their identities and most of their lives and economic livelihoods to the pursuit of the trade, makes negotiation paramount. Even an athlete who is among a sport's elite may still fall within the category that the player is no longer athletically capable, regardless of the objectively determinable value or skill set of the athlete due to this type of contract.[71] Therefore, the *value* of the contract, in terms of the leverage for the player, may determine whether one of these organizational "for cause" reasons for termination is given or the athlete is able to survive the consequences of an event such as a free speech demonstration.[72]

The mid- or low-market athletes, or those who have contracts soon to expire, likely have less incentive to risk termination by exercising constitutional freedoms because of the Top Brass's[73] overly broad and subjective escape language in the contract, such as "If player has engaged in personal conduct reasonably judged by the Club to adversely affect or reflect on Club. . . ."[74] Negative publicity may not be worth the adverse consequences for an organization of allowing an employee to act outside of his employment duties in an individual manner, and it may give the organization reason to turn the page on the athlete's career. This is the essence of unwritten rules and pretextual decisions of a professional sports organization.

V. Analysis of Examples From Current Events

Under First Amendment protections, Kaepernick has every right to kneel for the national anthem as a citizen of the United States.[75] However, as a member of the NFL and the San Francisco 49ers, those freedoms do not guarantee his continued employment. Under private entity employment law principles, in the event that these organizations decided to terminate his contract for his on-the-field demonstrations, or simply cite "deficiency in performance," as previously mentioned, he would not have standing to assert a § 1983 claim for a deprivation of constitutional rights.[76] Neither the NFL nor the 49ers are under an obligation to tolerate free speech or distinguish between his actions as an employee or as a private citizen, as would be required if Kaepernick were a public employee.[77]

It is unlikely that the 49ers will terminate his contract for any pretextual reason, considering the current social volatility felt nationwide and his contract leverage.[78] Nevertheless, unless there are clearly defined free speech guarantees within his player contract, his employment will technically remain at the discretion of the NFL and the 49ers, based on the specific reasons of "for cause" termination in his player agreement. Thus, his saving grace is not the Constitution of the United States, as many believe; it is his 6-year $114 million contract in place at the start of the season, with a $12.3 million signing bonus and $61 million guaranteed.[79] On October 13, 2016, he agreed to restructure his contract with the 49ers to eliminate a $14.5 million injury guarantee for more guaranteed money this season and a one-year deal for 2017, with a player option to extend the term in 2018.[80, 81]

The detriment of allowing Kaepernick to exercise his freedom of speech and kneel during the national anthem, whether the NFL or the 49ers agree with him or not, is probably only outweighed by his contract value if team or league revenues suffer.[82] Further, the coming months of social response will likely dictate the steps that the NFL or the 49ers will take as the demonstrations continue nationwide. Moreover, the ultimate outcome and social acceptance of the protests will give Kaepernick more or substantially less leverage to sign an extension or another contract for similar value with another organization, excluding other performance evaluation factors, such as projected improvement and performance statistics. For an athlete of Kaepernick's social influence and personal wealth, the effects and potential consequences will not be personally comprehended as they would to an independent league professional athlete or arena league footballer with grocery money on the line.[83] For the latter category of athletes, rebellious free speech may be a deathblow to their playing careers, regardless of moral right and wrong.[84]

Rapinoe is in an identical scenario to Kaepernick's with regard to the actions that her private employers, the Seattle Reign and U.S. Women's Soccer, are permitted to take. Different from Kaepernick, she has put her career with both organizations at a much greater risk to support the protests for social injustice as an athlete with a vastly lower contract value. Neither the Seattle Reign nor the U.S. Women's Soccer Team is required to tolerate free speech demonstrations without specific contractual provisions, and her career is more closely related to the aforementioned independent league player or arena league football player in terms of contract value by dollars.

In Rapinoe's player's contract with U.S. Soccer, she earns between $72,000 and $99,000, depending on the number of games won in a 20-game minimum

season.[85] Additionally, a National Women's Soccer League (NWSL) player earns between $6,842 and $37,800 annually.[86] These figures, even if she is at the top of the NWSL, are markedly different from that of Kaepernick.[87] Common sense says that the dangers of athletes in similar situations to Rapinoe's, with less guaranteed earnings, should be cautious about the use of their platform to protest social issues unrelated to their employment if they fear a loss of income. Although effective to bring attention to important matters, Rapinoe's actions may lead her to lose her uniform, and her influence may become de minimis. On the other hand, Rapinoe's convictions may be more valuable to her than employment, with any consequence justified as a necessary sacrifice.

Steve Clevenger's recent suspension by the Mariners brings an interesting piece to the discussion. He, unlike Kaepernick or Rapinoe, has suffered the consequences of exercising his constitutional freedoms, albeit on the opposite side of the silent protesters, and in a distasteful, discriminatory manner.[88] It may be insightful to understand the difference between his actions and those of Kaepernick, Rapinoe, and other national-anthem kneelers. While his actions were entirely off the field, his statements appeared to be in a destructive protest and verbal attack on those protesting social injustice through riots, street barricades, and national-anthem kneeling. In Kaepernick's and Rapinoe's defense, it is more difficult to punish one who neither harms nor speaks ill of another while acting on personal convictions.[89]

Clevenger's contract, which likely has a termination "for cause" section for conduct and citizenship standards, coupled with the freedom of the Mariners, a private governing body, to freely make personnel decisions, have resulted in his suspension. A look at Clevenger's contract salary shows that he earns just $8,500 above the MLB league minimum, which is at $516,000 for 2016.[90] Therefore, his resulting suspension may have been both a decision to make a personnel change and justify his suspension without pay, and a consequence of his minimal leverage as a league minimum salary earner.[91] Further, Clevenger's comments were certainly of a different character than the peaceful protests and would not be considered to be under the NLRB's "concerted action by employers within the realm of normal workplace conduct" because he acted alone and addressed a matter irrelevant to the workplace. [92] Yet, historically, worse mistakes have been made with less severe consequences, such as forced public apologies or private reprimands.[93]

When Jeff Fisher established a national-anthem behavior policy with the St. Louis Rams players, it was completely within the legal confines of private actor regulations.[94] A St. Louis Rams' player would not have constitutional standing to bring a § 1983 civil rights deprivation claim against Fisher or the Rams for the policy because the organization is a private entity.[95] Further, the Rams, just like the 49ers, may restrict free speech as it sees fit to carry out the legal purposes of the private organizations.[96] Any player who decides to disobey the policy is susceptible to the balancing of the contractual factors, such as monetary value, player projected talent level, and the social and political ramifications of a termination or endorsement by the Rams with the termination "for cause" language in the player contract.[97]

It is apparent that by looking through the lens of contract value and organizational investment, more layers of protection impliedly exist for the players who have

overall higher contractual values or objective high market talent level and persuasive public voices. Thus, there is a free speech sliding scale dependent on leverage.

Moving to a restriction that was upheld, similar to *Arlosoroff,* what is an autumn sports conversation without the mention of Tim Tebow?[98] He has admirable character and is a multisport athlete. Time will tell about the latter, as he begins his baseball journey; however, he homered in his first Fall Instructional League at-bat with the New York Mets.[99]

After Tebow professed his faith with "John 3:16" inscribed in his eye black during the 2009 SEC Championship Game, and after the NCAA subsequently banned messages of any kind on player's eye black for the 2010 season, one might argue that this restriction directly violates the constitutional freedoms enjoyed by citizens.[100] Tebow was simply endorsing personal convictions in a nonintrusive manner by nominally supplementing his appearance and displaying personal convictions while obeying league and team rules, which is arguably much less controversial than a peaceful, yet defiant, public protest or an offensive verbal rant.[101]

However, as the Court in *Arlosoroff* found, the NCAA is a private governing entity, not subject to the constitutionally protective boundaries of state governing entities.[102] Further, the "Tim Tebow Rule" decision did not have much backlash by student-athletes against the NCAA the following year, likely because of the lack of negotiating leverage that NCAA student-athletes have, in comparison to professional athletes. As unpaid collegiate athletes, the power to access the playing field rests solely within the NCAA and the respective institutional member.[103]

Most NCAA Division I football players are on athletic scholarship, while the remaining roster players earn their tuitions academically or by walking on and paying their own tuitions.[104] Further, most athlete scholarship contracts are year to year.[105] Due to the stark difference in contractual leverage between collegiate compared to professional athletes, who negotiate individual player contracts at varying values, the NCAA is not forced to balance the pros and cons of permitting an athlete to bring awareness to particular issues through the avenue of a constitutional freedom. Therefore, the NCAA has the authority, as a private actor, and leverage over the student-athletes to restrict Tebow and others from any deviation, however harmless a silver sharpie may have been.[106]

The final member of the "First Amendment Team" is a household name for hunting and reality television enthusiasts. Phil Robertson, the creator of Duck Commander and former starting quarterback at Louisiana Tech, is under contract with A&E to film the "Duck Dynasty reality television series.[107] A&E, a private television network, may, as a private actor, restrict any of the First Amendment freedoms, just like a professional sports organization.[108] Different from a professional athlete's contract, what that allowed action by A&E to punish Robertson for his comments was the fact that "Phil and other family members probably signed contracts containing 'morals clauses' in which they promised to avoid anything that would embarrass or bring shame to A&E or the brand."[109] In a perfect example of the freedom of contract, A&E was not only able to restrict Robertson's speech while on set, but they were also able to restrict his speech in his representative capacity of Duck Dynasty in other speaking engagements.[110]

VI. A "Meeting of the Minds" for Athletes and Entertainer-Employees and Private Employers

The most beneficial way for athletes and entertainers to contractually preserve the First Amendment freedom of speech with private employers is by mutually separating types of speech and explicitly defining the boundaries of expressions that are not harmful to the organizations and simultaneously beneficial to the employees. Zealous advocacy on the part of sports agents, player unions, and employee representatives to promote awareness to the general public and professional organizations will create a cohesive effect if athletes and entertainers strive for cooperation and respect for their employers.

Companies such as LinkedIn have made conscious efforts to lead with compassion and mindfulness inspired by the leadership of CEO Jeff Weiner.[111] While an employee without boundaries on his or her speech may prove destructive for the organization and society, an avenue of effective communication could be a method where employees feel heard and have safe spaces to voice concerns or personal convictions in a manner that is a benefit to the larger conversations that affect both employment and social justice. "The great companies know how to go around or through a wall," says Weiner, and LinkedIn's mission to lead its employees with clarity, courage, and effective communication is an example of a private organization that is seeking a solution for employees to contribute to the success of the company by making them feel valued and heard.[112]

Most high-ranking decision makers in private organizations were common employees in some fashion along their career journeys. By remembering their desires to have a better employment experience and by empathetically listening to suggestions for improvement, or by contractually allowing a limited avenue to express nonemployment-related concerns about public events, employers can help employees feel less comparable to assembly line workers and more like key players in companies that contributes to the economy and the human experience. The employee–employer lines would not be blurred by implicit boundaries, and the employees' personal lives would not be separate from their work lives and career passions. Individuals would have boundaries of expression and proper avenues for discourse on nonwork-related events without fear of employment repercussions.

An employee who feels heard may respond by joining in the company's mission and effecting change in the efficiency of the company and in the community.[113] Organizations that permit forms of free speech for one reason or another, such as the NFL for the time being, also have players' unions that may be effective middlemen between individual athletes and individual organizations during these mutual-agreement discussions.[114]

In response to a new method of approved athlete and entertainer-employee expression, the employees must become supportive of the goals and aspirations of the company, rather than abuse the privilege and use the company as a platform for individual motives that could hurt the company's image. Kaepernick, Rapinoe, and other national-anthem protesters have a platform as celebrity athletes in a country that often values their opinions ahead of those of scholars or successful businessmen. Therefore, they must be aware of their influence and continue to show character worthy of the platform.

If professional athletes and entertainers are permitted to speak their convictions in a manner that shows respect for all citizens, either at work or home, they will contribute to a socially just solution. This will further the freedoms of those living in the United States and the benefits of receiving tremendous compensation by the multibillion dollar organizations in sports and entertainment.

VII. Conclusion

The law and current events surrounding athletes and entertainers presented above provide a couple of avenues of response for the American public. As proposed, there is opportunity to advocate for the rights of athletes and entertainers for free speech in and out of the workplace. If private employers endorse constitutional principles and support those who have risked their careers to advocate for change, anyone watching these actions, including other businesses or future business owners, may see the benefit of a more liberal approach to employment and a new movement in athlete and entertainer employment with the utmost respect for the employer-organizations at the forefront.

With expanded off-the-field freedoms in private organizations for athletes and entertainers, the latter will not feel a betrayal to personal convictions by freedom of speech restrictions. Additionally, the employer may trust that the contract agreement with the player for the purpose of performing the sport will not be abused by these convictions, because there is an agreed method of communicating opinions regarding events external to employment.

Further, the law and current events provide the opportunity to support the athletes and entertainers who have protested in response to social injustice, just as schools such as Seattle's Garfield High School and members of the East Carolina University Marching Band did. [115, 116] At Garfield High School, the players and coaching staff kneeled in unison during the playing of the national anthem prior to the football game. Garfield's coach stated, "Multiple players on the team have dealt with police brutality or racial profiling."[117] Similarly, twelve members of the East Carolina band kneeled during the national anthem before a football game against Central Florida.[118]

While the athletes cited in the present paper may have risked their playing careers for the movement, their actions inspired individuals of all backgrounds nationwide, which could be the necessary catalyst for needed social change. The current inaction by the private organizations concerning the peaceful protests and actions against Robertson, Clevenger, and others for their narrowly focused discriminatory opinions may be a collective recognition that there are social injustices that are affecting the country, whether explicitly stated or not.

On the other hand, the public may, in the name of tradition, lash out against athletes, entertainers, and the teams that have allowed free speech demonstrations and overlooked the significance of the national anthem to the United States Armed Forces. Many of these athletes and entertainers have not only violated team policy but have also deliberately disrespected two symbols of the nation, the flag and the Star Spangled Banner.[119] While protesters use social injustice as justification for the disrespect, the flag and Star Spangled Banner symbolize more than social law and policy for many. This includes lives lost, freedoms earned through the sacrifice of

devastating wars, and the community privileges that are enjoyed by citizens of the United States each day, separate from encounters with law enforcement.

While there is a platform that the athlete or entertainer has available, is it no longer reasonable to assume that there remain rules of decorum within professional sports and the entertainment industry, regardless of personal opinions on matters external to the employment? There is a difference in a demonstrative action toward a referee in disagreement of a football play and a demonstrative action targeted outside the sport in disagreement with social policy that is wholly external, yet made in a player's uniform while "on the clock."

Each of the possibilities indicates that easy solutions are not yet apparent and public discourse will likely continue. Whether it be a fist raised, a knee taken, or a social media comment posted, there are no employment guarantees outside of contract for employed athletes and entertainers, beyond the right to be free from criminal or civil state action, for exercising the constitutional right to free speech.[120]

Regardless of the solution that is deemed most appropriate, athletes, entertainers, and their employers should be aware of the rights of all parties and the risks involved. Therefore, a movement toward a mutually beneficial arrangement to contribute positively to society and the companies they represent, while refining and contributing to the mutual well-being of each other, is a healthy alternative to erratic speech and determinative action for reasons wholly separate from the original purpose of the relationship. Relationships in which both parties feel respected and heard are the most prosperous, and that begins with effective communication and mutual understanding. Perhaps, for the athletes and entertainers of this great nation, aspiring to such a vision is worth the risk of forfeiting a professional career.

Notes

1. The Associated Press, *Soccer Star Megan Rapinoe Follows Colin Kaepernick in Kneeling for Anthem* (Sept. 5, 2016), http://www.usatoday.com/story/sports/soccer/2016/09/04/soccer-star-rapinoe-knells-during-national-anthem/89875384/.

2. A report by PricewaterhouseCoopers LLP found that the total revenue for the North American sports market was worth $60.5 billion and predicted that it would exceed $73 billion by 2019. Darren Heitner, *Sports Industry to Reach $73.5 Billion by 2019* (Oct. 19, 2015), http://www.forbes.com/sites/darrenheitner/2015/10/19/sports-industry-to-reach-73-5-billion-by-2019/#10c765f41585.

3. "A study of how much money various professional sports leagues bring in by Howmuch.net, a cost information website, shows that the NFL made $13 billion in revenue last season. The league with the next highest revenue figure was Major League Baseball, with $9.5 billion." Steven Kutz, *NFL Took in $13 Billion in Revenue Last Season—See How it Stacks Up Against Other Pro Sports Leagues*, market watch (July 2, 2016), http://www.marketwatch.com/story/the-nfl-made-13-billion-last-season-see-how-it-stacks-up-against-other-leagues-2016-07-01.

4. Steve Adams, *Mariners Suspend Steve Clevenger Without Pay for Remainder of Season* (Sept. 23, 2016), http://www.mlbtraderumors.com/2016/09/mariners-suspend-steve-clevenger-without-pay-for-remainder-of-season.html.

5. *Id.*

6. Relevant to the national conversation surrounding the national anthem protests is an active codified Congressional statute, 36 U.S.C. § 301 (2008), which describes the suggested behavior

of citizens during the playing of the Star Spangled Banner. However, state punishment for disobeying the statute would be unconstitutional under the First Amendment and the statute merely suggests what "should" be done. 36 U.S.C. § 301(b) states:

(b)Conduct During Playing.—During a rendition of the national anthem—

(1) when the flag is displayed—

(A) individuals in uniform should give the military salute at the first note of the anthem and maintain that position until the last note;

(B) members of the Armed Forces and veterans who are present but not in uniform may render the military salute in the manner provided for individuals in uniform; and

(C) all other persons present should face the flag and stand at attention with their right hand over the heart, and men not in uniform, if applicable, should remove their headdress with their right hand and hold it at the left shoulder, the hand being over the heart; and

(2) when the flag is not displayed, all present should face toward the music and act in the same manner they would if the flag were displayed. *Id.*

7. Mark Sandritter, *A Timeline of Colin Kaepernick's National Anthem Protest and the Athletes Who Joined Him* (Oct. 4, 2016). http://www.sbnation.com/2016/9/11/12869726/colin-kaepernick-national-anthem-protest-seahawks-brandon-marshall-nfl.

8. *Id.*

9. Associated Press, *supra* note 1.

10. USA Today Sports, *Megan Rapinoe Kneels for National Anthem Before U.S. Friendly vs. Thailand* (Sept. 16, 2016), http://www.usatoday.com/story/sports/soccer/2016/09/15/megan-rapinoe-national-anthem-protest-us-friendly-thailand/90438652/.

11. Steve Adams, *supra* note 4.

12. Jeff Fisher, Hard Knocks (HBO 2016).

13. *Id.*

14. *Id.*

15. Joe Schad and the Associated Press, *Eye Black Messages, Wedge Blocks Out,* ESPN (Apr. 16, 2010), http://www.espn.com/college-football/news/story?id=5092774.

16. Todd Kaufmann, *Tim Tebow Rule: The NCAA Bans Eye Black "Messages,"* Bleacher Report (Feb. 15, 2010), http://bleacherreport.com/articles/346014-tim-tebow-rule-the-ncaa-bans-eye-black-messages.

17. *"Duck Dynasty" Star Phil Robertson Suspended by A&E*, Fox News Entertainment (Dec. 19, 2013), http://www.foxnews.com/entertainment/2013/12/18/phil-robertson-suspended-after-comments-about-homosexuality.html.

18. U.S. Const. amend. I.

19. *The Bill of Rights: A Brief History,* ACLU, https://www.aclu.org/other/bill-rights-brief-history?redirect=bill-rights-brief-history (last visited Oct. 4, 2016).

20. Roberta Baxter, *The Bill Of Rights 8-14* (Capstone, eBook Collection, EBSCOhost) (2013). Without the Bill of Rights, the anti-federalists believed that there would be no limit to the power of the federal government or adequate protection for the rights of individuals. *Id.*

21. *Id.*

22. U.S. Const. amend. I.

23. *Id.*

24. It is common for a deprivation of rights claim to be brought under 42 US.C. § 1983, which states,

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."

42 US.C. § 1983 (1996).

Under §1983, the complaint must allege a deprivation of a "right, privilege, or immunity secured by the Constitution and laws," by a state actor to be actionable. However, in some situations, a private party may act under color of state or federal law, which would allow the private party to be sued under §1983. Otherwise, the observation of inalienable rights such as due process and freedom of speech do not apply against private actors, unless the parties have privately contracted to include them. *Id*.

25. *Gertz v. Robert Welch,* 418 U.S. 323 (1974), *Miller v. California,* 413 U.S. 15 (1973), *Chaplinsky v. N.H.,* 315 U.S. 568, 572 (1942), *Butler v. Michigan,* 352 U.S. 380 (1957). *See also Texas v. Johnson,* 491 U.S. 397 (1989) (concluding that defendant's burning of an American flag in protest of Ronald Reagan was symbolic speech protected by the First Amendment).

26. U.S. Const. amend. IV, U.S. Const. amend. XIV. The Due Processes Clauses of the 5th and 14th Amendments are applicable to the federal and state governments, respectively. *Id*.

27. To bring a constitutional claim in court for remedy, "Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.'" *Valley Forge Christian College v. Americans United for Separation of Church & State,* 454 U.S. 464, 472 (1982) (citing *Gladstone, Realtors v. Village of Bellwood,* 441 U.S. 91, 99 (1979), *Simon v. Eastern Kentucky Welfare Rights Org*., 426 U.S. 26, 38, 41 (1976)).

Thus, absent the direction of state authority or a separate agreement between the parties in observance of constitutional rights, a plaintiff does not have standing to sue a private party for a constitutional rights deprivation, and a private party is not required to recognize the freedoms within the scope of its operations, with one potential exception discussed in Section III. *Id*.

28. *West Virginia State Bd. of Educ. v. Barnette,* 319 U.S. 624, 626 (1943).

29. *Id.* at 629.

30. *Id.* at 642.

31. *Barnette,* 319 U.S. at 642.

32. Mark Sandritter, *supra* note 7.

33. *Garcetti v. Ceballos,* 547 U.S. 410 (2006).

34. *Id.* at 417.

35. *Id*.

36. *Id*. at 418.

37. *Id*.

38. *Id*.

39. *Id*.

40. U.S. Const. amend. I.

41. A review of freedom of speech protections for employees of public actors is beyond the scope of this article, which focuses on private employment.

42. *Wickersham v. City of Columbia,* 481 F.3d 591, 594 (8th Cir. 2007).

43. *Id.* at 595.

44. *Id. at 598.*

45. *Id.*

46. Steve Adams, *supra* note 4, Jeff Fisher, *supra* note 12, Todd Kaufmann, *supra* note 16, Fox News Entertainment, *supra* note 17.

47. *Arlosoroff v. NCAA,* 746 F.2d 1019 (4th Cir. 1984).

48. *Id.*

49. *Id.* at 1020.

50. *Id.* at 1021.

51. *Id.* at 1022.

52. Michael Dolgow, *Where Free Speech Goes to Die: The Workplace*, Bloomberg (Aug. 3, 2012, 5:25 PM), http://www.bloomberg.com/news/articles/2012-08-03/where-free-speech-goes-to-die-the-workplace.

53. *Id.*

54. Dr. Gregory Ioannidis, *Termination of a Contract of Employment in Football Law and "Just Cause"* (Aug. 12, 2013), http://lawtop20.blogspot.com/2013/08/termination-of-contract-of-employment.html; Josh Harrison, Major League Uniform Player's Contract, *Termination* p. 3 (Apr.8, 2015).

55. It may be unwise for a professional sports organization to permit an athlete to have complete constitutional freedoms protected in his or her player agreement because many professional athlete contracts with the organizations allow a unilateral termination "for just cause," which means that either party may terminate the contract upon the occurrence of specific violations by the parties. *Id*. Thus, it would take away this unilateral power of termination by the organization for specific violations. *Id*.

56. *Garcetti,* 547 U.S. at 418.

57. Memorandum from the NLRB Acting General Counsel Concerning Social Media Cases, (August 18, 2011) (on file at https://www.nlrb.gov/news-outreach/fact-sheets/nlrb-and-social-media).

58. *Id.* at 13.

59. *Garcetti,* 547 U.S. at 421.

60. NLRB, *supra* note 57.

61. Dr. Gregory Ioannidis, *supra* note 53.

62. Caroline Epstein, Morals Clauses: Past, Present and Future, *New York University Journal of Intellectual Property and Entertainment Law*. Vol 5, No.1 72, 109 (Fall 2015).

63. *Id.*

64. *Id.*

65. *Id.*

66. NLRB, *supra* note 57.

67. Restatement (Second) of Contracts § 205 (1981).

68. The "for cause" termination section of National League All-Star Josh Harrison's 2015 Major League Baseball Player's Contract states reasons for termination such as "fail, refuse or neglect to conform his personal conduct to the standards of good citizenship and good sportsmanship, to keep himself in first-class physical condition, to obey the Club's training rules, fail, *in the opinion of the Club's management* (emphasis added), to exhibit sufficient skill or competitive ability to qualify or continue as a member of the Club's team. . . ." Josh Harrison, Major League Uniform Player's Contract, *Termination* p. 3 (Apr.8, 2015).

69. *Id.*

70. Dr. Gregory Ioannidis, *supra* note 53.

71. See *supra,* text accompanying note 68.

72. Associated Press, *supra* note 1.

73. Top Brass means the most important or high-ranking officials or leaders, as in politics, industry. *Top Brass*, Collins English Dictionary—Complete and Unabridged (12th ed. 2014).

74. NFL player contract section 11: skill performance and conduct.

75. U.S. Const. amend. I.

76. See *supra* text accompanying note 27.

77. *Arlosoroff,* 746 F.2d at 1022; *Garcetti,* 547 U.S. at 421.

78. In 2014, Kaepernick became the second-highest paid quarterback in the NFL, and at the start of 2016 he was the highest-paid player on the 49ers. *San Francisco 49ers 2016 Salary Cap,* Spotrac, http://www.spotrac.com/nfl/san-francisco-49ers/cap/ (last visited Oct. 4, 2016).

79. *Colin Kaepernick—Current Contract,* Spotrac, http://www.spotrac.com/nfl/san-francisco-49ers/colin-kaepernick-7751/ (last visited Oct. 4, 2016).

80. Adam Wells, *Colin Kaepernick, 49ers Agree to New Contract: Latest Details and Reaction* http://bleacherreport.com/articles/2668267-colin-kaepernick-49ers-agree-to-new-contract-latest-details-and-reaction# (last visited Oct. 18, 2016).

81. For further analysis of the new contract, see Jason La Canfora, *Colin Kaepernick Can Actually Earn More Money in 2016 With His New Contract* (Oct. 16, 2016) http://www.cbssports.com/nfl/news/colin-kaepernick-can-actually-earn-more-money-in-2016-with-his-new-contract/.

82. "A percentage of fans are boycotting the NFL due to the national anthem protests and/or the lack of discipline from the league offices resulting from them." Matt Dolloff, *NFL Boycotts, Kaepernick Backlash Becoming Major Factor as NFL Ratings Drop Yet Again in Week 4,* CBS Boston (Oct. 5, 2016), http://boston.cbslocal.com/2016/10/05/nfl-ratings-week-4-boycott-colin-kaepernick-national-anthem-protests/.

83. *Id.*

84. See *supra* text accompanying note 68.

85. Rachel Gillett, *Soccer Star Megan Rapinoe on Athlete's Salaries: "Equal Pay Is Just the Right Thing To Do,"* Business Insider (Apr. 13, 2016, 12:06 PM), http://www.businessinsider.com/soccer-star-megan-rapinoe-explains-why-she-and-her-teammates-are-suing-the-ussf-2016-4.

86. Jeff Kassouf, *Chasing the Dream,* NBC Sports, sportsworld.nbcsports.com/nwsl-players-chasing-the-dream/ (last visited Oct. 4, 2016).

87. Spotrac, *supra* note 79.

88. Bob Nightengale, *Steve Clevenger: How a Catcher Tweeted His Way Out Of a Major League Career,* usa today sports (Sept 23, 2016, 9:37 PM), http://www.usatoday.com/story/sports/mlb/columnist/bob-nightengale/2016/09/23/steve-clevenger-tweets-suspended/90912142/.

89. Associated Press, *supra* note 1.

90. *Seattle Mariners 2016 Payroll,* Spotrac, http://www.spotrac.com/mlb/seattle-mariners/payroll/ (last visited Oct. 4, 2016); Associated Press, *MLB Minimum Salary Remains at $507,500 for 2016*, ESPN (Nov. 18, 2015), http://www.espn.com/mlb/story/_/id/14161690/mlb-minimum-salary-remains-507500-2016.

91. *Id.*

92. NLRB, *supra* note 57.

93. Without legal or monetary consequence, Alex Rodriguez admitted to taking performance-enhancing drugs in 2009 and apologized for his actions. *Top 10 Most Memorable Apologies,* real clear sports (May 17, 2013), http://www.realclearsports.com/lists/memorable_apologies/alex_rodriguez_steroids.html?state=stop.

94. *Arlosoroff,* 746 F.2d at 1022.

95. See *supra* text accompanying note 24.

96. Michael Dolgow, *supra* note 52.

97. Sample NFL Player Agreement shared in confidentiality, paragraphs 2 and 11 (2016). NFL contract "for cause" language includes: "Player agrees to conduct himself on and off the field with appropriate recognition that the success of professional football depends largely on public respect for and approval of those associated with the game." *Id*. at paragraph 2. Further, "If Player has engaged in personal conduct reasonably judged by Club to adversely affect or reflect on Club, then Club may terminate his contract." *Id*. at paragraph 11.

98. *Arlosoroff,* 746 F.2d at 1022.

99. SI WIRE*, Watch: Tim Tebow Hits Home Run off First Pitch in First At-Bat,* Sports illustrated (Sept. 28, 2016), http://www.si.com/mlb/2016/09/28/tim-tebow-hits-home-run-video-mets-mlb-video.

100. Joe Schad and the Associated Press, *supra* note 15.

101. *Id*.

102. *Arlosoroff,* 746 F.2d at 1022.

103. *NCAA Members By Division—Division I Members*, NCAA, http://web1.ncaa.org/onlineDir/exec2/divisionListing?division=d1 (last visited Oct 13, 2016).

104. The 2015–2016 maximum number of scholarships allowed is 85 per football team. *College Athletic Scholarship Limits,* http://www.scholarshipstats.com/ncaalimits.html (last visited Oct. 13, 2016).

105. *Scholarships,* NCAA, http://www.ncaa.org/about/frequently-asked-questions-about-ncaa (last visited Oct. 13, 2016).

106. *Arlosoroff,* 746 F.2d at 1022; Joe Schad and the Associated Press, *supra* note 15.

107. *Phil Robertson,* Duck Commander, http://duckcommander.com/meet-the-family/phil-robertson (last visited Oct. 13, 2016), Robertson was the starting quarterback ahead of Terry Bradshaw, the four-time Super Bowl Champion, for two seasons at Louisiana Tech. Doug Williams, *How Good Was Phil Robertson at Football?* espn (Mar. 21, 2013), http://www.espn.com/blog/playbook/fandom/post/_/id/18740/how-good-was-phil-robertson-at-football.

108. The First Amendment only says that *Congress* shall make no law restricting those freedoms. U.S. Const. amend. I.

109. Scott Collins, *"Duck Dynasty": A&E Warned Phil Robertson About Speaking Out Too Much,* Los Angeles Times (Dec. 20, 2013). http://www.latimes.com/entertainment/tv/showtracker/la-et-st-duck-dynasty-ae-warned-phil-robertson-about-speaking-out-too-much-20131220-story.html.

110. *Id*.

111. *Super Soul Sunday: Jeff Weiner* (OWN television broadcast 2016).

112. *Id*.

113. Lewis Maltby, author of "Can They Do That?", argues that it makes no sense for employees to have only negligible rights in the workplace considering the military and economic sacrifices our country has made to preserve constitutional freedoms for the people. We enforce these values on other nations and in our personal lives, but once the payday begins, they disappear. Maltby

advocates for a change in the law for employers to be required to respect individuals' freedoms. Lewis Maltby, *supra* note 61.

114. *About the NFLPA,* NFLPA, https://www.nflpa.com/about (last visited Oct. 13, 2016).

115. *Seattle High School Football Team Kneels in Unison During National Anthem,* Sports Illustrated (Sept. 17, 2016), http://www.si.com/more-sports/2016/09/17/seattle-garfield-high-school-football-kneels-national-anthem.

116. *North Carolina radio station drops college football game over national anthem protest,* the Associated Press (Oct. 4, 2016), http://www.denverpost.com/2016/10/04/north-carolina-radio-station-drops-college-football-game-over-national-anthem-protest.

117. *Id.*

118. *Id.* An apology from band officials was issued following the demonstration. *Id.*

119. Jerry Jones, owner of the Dallas Cowboys stated: "The forum of the NFL and the forum on television is a very significant thing. I'm for it being used in every way we can to support the great, great contributors in our society and that's people that have supported America, the flag . . . . For anybody to use parts of that visibility to do otherwise is really disappointing." However, this comment was not directed toward Cowboys players as no Cowboy has kneeled to date. Dan Evon, *Playing the Patriots,* Snopes (Sept. 26, 2016), http://www.snopes.com/jerry-jones-speech-911/.

120. U.S. Const. amend. I.