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ESSAY

RACE, SPEECH, AND SPORTS

Matthew J. Parlow *

INTRODUCTION

Race, sports, and free speech rights intersected in a very controversial and public way during the 2016 and 2017 National Football League (“NFL”) seasons. On August 26, 2016, Colin Kaepernick spurred a national debate when he refused to stand during the playing of the national anthem before the NFL preseason game between the Green Bay Packers and the San Francisco 49ers, Kaepernick’s team at the time.¹ After the game, Kaepernick explained the reason for his protest:

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. There are bodies in the street and people getting paid leave and getting away with murder.²

Kaepernick’s protest, which continued throughout the 2016 NFL season, was motivated by the killing of African Americans by police officers—an issue that directly contributed to the recent rise of the Black Lives Matter movement.³ Other NFL players also began to

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1. See Kofie Yeboah, *A Timeline of Events Since Colin Kaepernick’s National Anthem Protest*, UNDEFEATED (Sept. 6, 2016), <http://theundefeated.com/features/a-timeline-of-events-since-colin-kaepernicks-national-anthem-protest/>.

2. Mike Florio, *NFL: Players Are Encouraged but Not Required to Stand for National Anthem*, PRO FOOTBALL TALK (Aug. 27, 2016, 1:50 PM EST), <http://profootballtalk.nbcsports.com/2016/08/27/nfl-players-are-encouraged-but-not-required-to-stand-for-national-anthem/>.

3. See John Branch, *The Awakening of Colin Kaepernick*, N.Y. TIMES (Sept. 7, 2017),

kneel in protest.⁴ Still other players showed their support for Kaepernick's cause by interlocking arms, placing their hands on kneeling players' shoulders (while standing themselves), or raising their fists.⁵ Unsurprisingly, this "take-a-knee" controversy—and other related forms of protest—became a topic of national conversation during the 2016 NFL regular season.⁶

Although Kaepernick was an unsigned free agent the following season—and thus not playing for any team—symbolic acts by players seeking to raise awareness of social injustice continued in the early 2017 season.⁷ The controversy then exploded during the third week of the 2017 NFL season when President Donald Trump waded into the NFL players' protests, urging fans to leave the football stadiums if players kneeled during the national anthem.⁸ At a political rally, President Trump asked the crowd: "Wouldn't . . . you love to see one of these NFL owners, when somebody disrespects our flag, say: 'Get that son of a b[itch] off the field right now. Out. He's fired!'"⁹ The NFL players responded forcefully, with more than 200 players sitting, kneeling, or raising their fists during the

<https://www.nytimes.com/2017/09/07/sports/colin-kaepernick-nfl-protests.html>. To demonstrate his commitment to reversing this problem, Kaepernick pledged to give \$100,000 per month for ten months—a total of \$1 million—to organizations that help ethnic minority and other underprivileged communities. See Marissa Payne, *NFL Players' Union Names Colin Kaepernick Its Week 1 MVP for His Charity Work*, WASH. POST (Sept. 15, 2017), <https://www.washingtonpost.com/news/early-lead/wp/2017/09/15/nfl-players-union-names-colin-kaepernick-its-week-1-mvp-for-his-charity-work/>. The 49ers also pledged \$1 million to two San Francisco Bay area community groups to work to improve racial and economic inequality. Dan Loumena, *49ers to Donate \$1 Million to Charities That Focus on Racial Issues Cited by Colin Kaepernick*, L.A. TIMES (Sept. 9, 2016, 6:40 AM), <http://www.latimes.com/sports/nfl/la-sp-colin-kaepernick-49ers-donation-20160908-snap-story.html>.

4. Arian Foster, *Marcus Peters Among NFL Players Protesting During National Anthem*, SPORTS ILLUSTRATED: SI WIRE (Sept. 11, 2016), <https://www.si.com/nfl/2016/09/11/national-anthem-protest-kneel-sit-players-list>.

5. See Mark Sandritter, *A Timeline of Colin Kaepernick's National Anthem Protest and the Athletes Who Joined Him*, SB NATION (Sept. 25, 2017, 10:28 AM EDT), <https://www.sbnation.com/2016/9/11/12869726/colin-kaepernick-national-anthem-protest-seahawks-brandon-marshall-nfl>; Adam Stites, *Seahawks Players Link Arms During National Anthem Instead of Kneeling*, SB NATION (Sept. 11, 2016, 4:04 PM EDT), <https://www.sbnation.com/2016/9/11/12851174/seahawks-players-national-anthem-protest-link-arms-kneeling>.

6. See Megan Garber, *They Took a Knee*, ATLANTIC (Sept. 24, 2017), <https://www.theatlantic.com/entertainment/archive/2017/09/why-the-nfl-is-protesting/540927/>.

7. See Mark Maske, *Colin Kaepernick Files Grievance Accusing NFL Teams of Colluding Against Him*, WASH. POST (Oct. 15, 2017), <https://www.washingtonpost.com/news/sports/wp/2017/10/15/colin-kaepernick-makes-plans-to-pursue-collusion-case-against-nfl-owners/>.

8. See 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>.

9. *Id.*

national anthem that week.¹⁰ Several players and coaches criticized President Trump's comments.¹¹ Many NFL teams also issued statements in response to President Trump's remarks.¹² President Trump and his surrogates responded, and the controversy consumed the news, politics, and the general public's conversation for months thereafter.

The public discourse around these events quickly devolved into platitudes around free speech, political protest, firing players, patriotism, and the like: Were the players exercising their free speech rights? Could NFL owners fire players for not standing during the national anthem? Simple answers were given, but they were often-times not grounded in the laws, rules, and regulations governing NFL players and the league as a whole (and, indeed, other professional sports leagues and their players as well).

What was missing from this public debate was the legal context within which these issues should be analyzed. This disconnection led to misperceptions regarding what leagues, teams, and players could and could not do in these circumstances. It also led to oversimplifications that failed to recognize how different sports leagues might have varying abilities to control—or at least address—players' behavior related to the national anthem and political protest. At the same time, this controversy also unearthed—or at least brought back to public consciousness—a long-standing, simmering issue for players: the persistent racial dynamic in sports of an increasingly African American group of players feeling controlled by a group of almost exclusively white, billionaire team owners.¹³

This essay seeks to bring greater clarity to this raging political debate. In particular, it endeavors to construct the legal framework within which the actions and inactions of professional sports

10. Arnie Stapleton, *More Than 200 NFL Players Sit or Kneel During National Anthem*, CHI. TRIB. (Sept. 25, 2017, 10:17 PM), <http://www.chicagotribune.com/sports/football/ct-nfl-national-anthem-kneeling-20170924-story.html>.

11. *NFL Players Who Protested During the National Anthem in Week 3*, ESPN: NFL NATION (Sept. 24, 2017), http://www.espn.com/blog/nflnation/post/_id/249755/nfl-players-who-protested-during-the-national-anthem-in-week-3.

12. Brendan Marks, *Here Are All NFL Statements Issued After Comments by President Trump on Anthem Protests*, CHARLOTTE OBSERVER (Sept. 24, 2017, 1:49 PM), <http://www.charlotteobserver.com/sports/nfl/carolina-panthers/article175144901.html>.

13. See Karen Grigsby Bates, *When It Comes to Race and Sports, Who Owns an Athlete's Opinions?*, NPR: CODE SWITCH (Oct. 21, 2017, 6:04 AM ET), <https://www.npr.org/sections/codeswitch/2017/10/21/557692016/when-it-comes-to-race-and-sports-who-owns-an-athletes-opinions>.

leagues, teams, and players can be analyzed. This essay also aims to situate this controversy in the complex racial dynamics between black players and white team owners in sports. Part I provides a brief history of how sports and political controversy have intersected. Part II explores the various areas of law that apply to leagues, teams, and their players. Part III describes various professional sports leagues' internal rules related to the national anthem and free speech rights. Part IV provides examples of leagues exercising their rights to address player behavior inconsistent with established league rules. Part V explores the racial dynamics in sports that spurred player protests related to racial and socio-economic inequality in society.

I. SPORTS AND POLITICAL PROTEST

In some ways, the take-a-knee controversy in the NFL should not come as a surprise. Athletes have long used their platform in sports to raise awareness about social issues and to express political protest. One of the most vivid examples of political protest in sports was when Tommie Smith and John Carlos raised their fists in the air on the medal stand at the 1968 Olympics in Mexico City.¹⁴ After winning medals in the 200-meter race, Smith and Carlos split a pair of black gloves and raised their fists in the air during the playing of the "Star-Spangled Banner" to protest the treatment of African Americans in the United States.¹⁵ More recently, professional athletes have used media attention around sports to make various social commentaries. For example, in 2004, Carlos Delgado of the Toronto Blue Jays in Major League Baseball ("MLB") chose not to come out on the field during the playing of "God Bless America" to protest the war in Iraq.¹⁶ In 2010, players on the Phoenix Suns of the National Basketball Association ("NBA") wore "Los Suns" jerseys to show support for immigrants in light of Arizona's strict immigration laws and policies.¹⁷ In 2012, members of the NBA's Miami Heat wore hoodie sweatshirts to raise awareness

14. See Michael Zink, *Sports: A Big-Time Player in the Political Arena*, 1 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 207, 209 (2003).

15. *Id.*; Mike Wise, *Clenched Fists, Helping Hand*, WASH. POST (Oct. 5, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/04/AR2006100401753.html>.

16. See Mark Kreidler, *Delgado's Protest No Longer Unnoticed*, ESPN (July 23, 2004), http://www.espn.com/mlb/columns/story?columnist=kreidler_mark&id=1845388.

17. Kat Chow, *A Brief History of Racial Protests in Sports*, NPR: CODE SWITCH (Dec. 2, 2014, 2:16 PM ET), <https://www.npr.org/sections/codeswitch/2014/12/02/367766230/a-brief-history-of-racial-protest-in-sports>.

about Trayvon Martin's death.¹⁸ Finally, shortly after Eric Garner died as a result of a New York City police officer putting him in a chokehold, a number of players in the NBA wore "I Can't Breathe" t-shirts during warm-ups.¹⁹

Many athlete protests have also involved the national anthem. To better explain the phenomenon, it is helpful to understand the history of the national anthem's incorporation into sporting events. The national anthem was first played at a sporting event at the opening baseball game at the Union Grounds Park in Brooklyn, New York, on May 15, 1862.²⁰ While the national anthem was played occasionally thereafter—including during the 1918 World Series in the midst of World War I—it was not until World War II that it became a regular part of MLB games.²¹ The NFL has played the national anthem during its games for several decades.²² Today, at most professional sporting events, the national anthem is played before the game or match begins.²³

When the national anthem is played at such sporting events, federal statutory law states that people in attendance "*should* face the flag and stand at attention with their right hand over the heart."²⁴ It is this tradition that people have used at various points to protest. For example, during the Vietnam War, some fans chose to remain seated during the playing of the national anthem to protest the war.²⁵ In 1996, NBA player Mahmoud Abdul-Rauf refused to stand during the national anthem, citing his Muslim faith as

18. *Id.*

19. Ira Boudway, "*I Can't Breathe*" and the Not-So Protected Speech of Professional Athletes, BLOOMBERG (Dec. 12, 2014, 4:48 PM EST), <https://www.bloomberg.com/news/articles/2014-12-12/nba-nfl-and-mlb-dont-always-enforce-rules-restricting-players-speech>.

20. Louis Jacobson, *A Short History of the National Anthem, Protest and the NFL*, POLITIFACT (Sept. 25, 2017, 5:08 PM), <http://www.politifact.com/truth-o-meter/article/2017/sep/25/short-history-national-anthem-and-sports/>.

21. *See id.*

22. *Id.* While NFL players were not required to stand on the sidelines for the "Star-Spangled Banner" until 2009, the national anthem was played at games well before then. *See* AJ Willingham, *The National Anthem in Sports (Spoiler: It Wasn't Always This Way)*, CNN (Sept. 25, 2017, 5:02 PM ET), <http://www.cnn.com/2017/09/25/us/nfl-national-anthem-trump-kaepernick-history-trnd/index.html>.

23. *See* Willingham, *supra* note 22.

24. 36 U.S.C. § 301 (2012) (emphasis added). Uniformed military personnel in attendance should, instead, stand and salute for the entire song. *See id.*

25. *See* Jacobson, *supra* note 20.

precluding him from participating in such “nationalistic ritualism.”²⁶ Abdul-Rauf was also protesting racial oppression and discrimination in the United States²⁷—similar to Colin Kaepernick and other NFL players two decades later. While these are just a smattering of examples, one can get a sense of the history of athletes and political protest.

II. THE LAW GOVERNING PROFESSIONAL SPORTS LEAGUES, TEAMS, AND PLAYERS

During the public debate regarding the take-a-knee controversy, it was common to hear people defend the players as exercising their First Amendment rights. However, this argument is misplaced because the First Amendment does not apply to the NFL, including its teams and players. The First Amendment applies only to state action,²⁸ and because the NFL is a private association, the First Amendment does not apply to the private employer-employee relationship between NFL teams and their respective players.

Instead, the ability for professional sports leagues and their teams to control or address players’ speech and acts of protest derive from the various governing documents of the leagues: the league constitution, collective bargaining agreement (“CBA”), standard player contract, and league rules. The CBA, standard player contract, and some league rules are negotiated through the collective bargaining process. In this regard, as one scholar notes, “the CBA is the ‘supreme governing authority’ concerning employment” between professional athletes and their leagues and teams.²⁹

26. See Kelly B. Koenig, Note, *Mahmoud Abdul-Rauf’s Suspension for Refusing to Stand for the National Anthem: A “Free Throw” for the NBA and Denver Nuggets, or a “Slam Dunk” Violation of Abdul-Rauf’s Title VII Rights?*, 76 WASH. U. L.Q. 377, 377–78 (1998) (quoting *Player to Stand for Anthem, NBA Lifts His Suspension*, OTTAWA CITIZEN, Mar. 15, 1966, at B2).

27. See *id.* at 378 n.6.

28. See U.S. CONST. amend. I; *id.* amend. XIV; *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 349 (1974) (“In 1883, this Court in the Civil Rights Cases, affirmed the essential dichotomy set forth in [the Fourteenth Amendment] between deprivation by the State, subject to scrutiny under its provisions, and private conduct, ‘however discriminatory or wrongful,’ against which the Fourteenth Amendment offers no shield.” (citations omitted) (quoting *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948))).

29. Michael A. Mahone, Jr., Note, *Sentencing Guidelines for the Court of Public Opinion: An Analysis of the National Football League’s Revised Personal Conduct Policy*, 11 VAND. J. ENT. & TECH. L. 181, 192 (2008) (quoting Jan Stiglitz, *Player Discipline in Team Sports*, 5 MARQ. SPORTS L.J. 167, 168–69 (1995)).

Consistent with the National Labor Relations Act, professional sports leagues—made up of team owners—and their respective players’ unions negotiate, among other things, the terms and conditions of employment for players.³⁰ These include matters like compensation (“wages”), regular season obligations and off-season workouts (“hours”), rules governing endorsements, player wardrobe, and public statements and other forms of player expression (“other conditions of employment”).³¹ Other mandatory subjects of collective bargaining are disciplinary measures and grievance procedures.³² Once the league and the players’ union agree to these various terms related to player employment, the rules and conditions become more or less sacrosanct under the law. Specifically, the conditions of employment are exempt from antitrust laws.³³ Some of the rules and policies governing player actions would otherwise be considered a restraint on trade and thus violate antitrust laws.³⁴ However, because the terms of the CBA are agreed to by both the team owners and the players’ union, they receive this insulation from antitrust laws.³⁵ In this regard, players must abide by employment conditions that would otherwise violate existing laws.

Additionally, the CBA’s special legal status precludes the league from unilaterally changing these terms or imposing new terms

30. See 29 U.S.C. §§ 151–169 (2012); see also Am. League of Prof’l Baseball Clubs, 180 N.L.R.B. 190 (1969) (establishing the National Labor Relations Board’s jurisdiction over professional sports leagues).

31. 29 U.S.C. § 158(d) (“[T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees . . . with respect to wages, hours, and other terms and conditions of employment . . .”); see Cody McElroy, *Take a Knee: Speech Considerations in the NFL*, CIVILIAN (Oct. 5, 2016), <https://sites.lsu.edu/civilian/2016/10/take-a-knee-speech-considerations-in-the-nfl>.

32. 29 U.S.C. § 158(d) (including “the negotiation of an agreement, or any question arising thereunder” as a subject of collective bargaining); *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 344 (1958) (establishing 29 U.S.C. § 158(d) as defining the scope of “mandatory collective bargaining”); see Stiglitz, *supra* note 29, at 168–69 (describing the typical CBA between a sports league and a players’ union, which contains sections devoted to discipline and the grievance procedure). If either the league or the players’ union refuses to negotiate on a mandatory subject of collective bargaining, it will constitute an unfair labor practice and thus violate the duty to collectively bargain. Brent D. Showalter, *Technical Foul: David Stern’s Excessive Use of Rule-Making Authority*, 18 MARQ. SPORTS L. REV. 205, 218 (2007). In addition, both sides must negotiate in good faith through bona fide, arms-length negotiations. See *Brown v. Pro Football, Inc.*, 518 U.S. 231, 238–39 (1996).

33. See Sean W.L. Alford, *Dusting Off the AK-47: An Examination of NFL Players’ Most Powerful Weapon in an Antitrust Lawsuit Against the NFL*, 88 N.C. L. REV. 212, 223 (2009).

34. See John C. Weistart, *Player Discipline in Professional Sports: The Antitrust Issues*, 18 WM. & MARY L. REV. 703, 705–06 (1977).

35. See Alford, *supra* note 33, at 223.

without going through the collective bargaining process with the players' union.³⁶ In this regard, a professional sports league's CBA prescribes the ability for the league and its teams to regulate and punish athlete behavior, while also setting limits and protections for players based on the agreed-upon terms.

III. LEAGUE RULES ON THE NATIONAL ANTHEM AND PLAYER SPEECH

A. *NFL Rules as an Example of League Regulation of Players' Speech*

The NFL and other professional sports leagues have various rules that regulate player speech, expression, and actions—both related and unrelated to the national anthem. These types of rules start with policies aimed at addressing player conduct on and off the field or court. For example, in paragraph two of the NFL standard player contract, the player agrees to “conduct himself on and off the field with appropriate recognition of the fact that the success of professional football depends largely on public respect for and approval of those associated with the game.”³⁷ Paragraph eleven of the NFL standard player contract provides even stronger protection for a team by allowing the team to terminate a player's contract if the player's “conduct [is] reasonably judged by [the team] to adversely affect or reflect on [the team].”³⁸ The NFL CBA, in article 46, also gives the NFL Commissioner the power to discipline a player “for conduct detrimental to the integrity of, or public confidence in, the game of professional football.”³⁹ These provisions allow a team or the commissioner to discipline—up to and including firing—a player for conduct detrimental to the team, league, or sport.

36. See Stiglitz, *supra* note 29, at 173. A professional sports league can, however, unilaterally change terms that are not mandatory subjects of collective bargaining. See Colin J. Daniels & Aaron Brooks, *From the Black Sox to the Sky Box: The Evolution and Mechanics of Commissioner Authority*, 10 TEX. REV. ENT. & SPORTS L. 23, 32 (2008) (citing 29 U.S.C. § 158(d)).

37. NAT'L FOOTBALL LEAGUE & NAT'L FOOTBALL LEAGUE PLAYERS ASS'N, COLLECTIVE BARGAINING AGREEMENT 256 (2011) [hereinafter NFL CBA], <https://nflabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf>; McCann, *supra* note 8.

38. NFL CBA, *supra* note 37, at 260; McCann, *supra* note 8.

39. NFL CBA, *supra* note 37, at 204; McCann, *supra* note 8.

The NFL also seeks to limit player speech and expression in a variety of ways. For example, the NFL rules state that “[t]hroughout the period on game-day that a player is visible to the stadium and television audience . . . players are prohibited from wearing, displaying, or otherwise conveying personal messages either in writing or illustration” unless the league approves it in advance.⁴⁰ The NFL makes clear that it will not grant permission for player expression related to political activities or causes.⁴¹ Moreover, the NFL forbids players from wearing or otherwise promoting the commercial names or company logos within ninety minutes after a game without permission from the league.⁴² The NFL also seeks to stem player public criticism of the referees, the league, a team, or other players.⁴³

To be sure, not all such NFL policies are geared toward restricting player speech and expression. The NFL CBA states that the National Football League Players Association—the players’ union—“will use its best efforts to ensure that players cooperate with the [teams] and the news media (including television, radio, internet, print) in reasonable promotional activities on behalf of the [teams] and the NFL.”⁴⁴ Moreover, the NFL’s Media Access Policy requires star players to speak to the media after a game and during practices that week.⁴⁵ These provisions demonstrate the importance that the NFL places on media access and players’ participation in media interviews. In these regards, the NFL seeks to limit player speech and expression on a variety of fronts while also

40. Nicolas Chavez, *Kaepernick Rolling Out of the Constitutional Pocket: NFL’s Restriction of Players’ First Amendment Rights*, U. MIAMI RACE & SOC. JUST. L. REV. (Sept. 19, 2016), <https://race-and-social-justice-review.law.miami.edu/kaepernick-rolling-constitutional-pocket-nfls-restriction-players-amendment-rights/> (quoting NAT’L FOOTBALL LEAGUE, 2016 OFFICIAL PLAYING RULES OF THE NATIONAL FOOTBALL LEAGUE 23 (2016), <https://operations.nfl.com/media/2224/2016-nfl-rulebook.pdf> [hereinafter 2016 NFL PLAYING RULES]).

41. See McElroy, *supra* note 31 (citing 2016 NFL PLAYING RULES, *supra* note 40, at 23).

42. Boudway, *supra* note 19 (citing NAT’L FOOTBALL LEAGUE, 2014 OFFICIAL PLAYING RULES OF THE NATIONAL FOOTBALL LEAGUE 23–24 (2014), <https://operations.nfl.com/images/content/rules/2014rulebook.pdf>). Many professional sports leagues regulate what players can wear before, during, and after games, and players that violate these policies can be subject to league or team discipline. *Id.*

43. Steve Silver, *No Free Speech (or Silence) in the NFL*, LEGAL BLITZ (Nov. 26, 2014), <http://thelegalblitz.com/blog/2014/11/26/no-free-speech-or-silence-in-the-nfl/> (quoting NFL CBA, *supra* note 37, at 216).

44. *Id.* (quoting NFL CBA, *supra* note 37, at 216).

45. See McElroy, *supra* note 31 (citing NAT’L FOOTBALL LEAGUE, 2015 MEDIA ACCESS POLICY 3 (2015), <https://operations.nfl.com/media/1788/2015-nfl-media-access-policy.pdf>).

ensuring that players communicate with the media during the season.

B. *NFL Policies Related to the National Anthem*

The NFL's rules and restrictions on player speech and expression intermittently come into the public consciousness as isolated issues arise. However, nothing drew the public's attention like the take-a-knee controversy. Some of the misperceptions that pervaded the public discourse on this issue may have stemmed from the lack of uniformity among professional sports leagues regarding expected player conduct during the playing of the national anthem. With regard to the NFL, the lack of a detailed policy furthered misunderstandings about what the league required or could require of its players. The NFL CBA is silent on the league's expectations of players regarding the national anthem.⁴⁶ Moreover, the 2017 Official Playing Rules of the National Football League do not provide a national anthem policy either.⁴⁷

The NFL game operations manual, on the other hand, reportedly requires that the national anthem be played before the start of every NFL game.⁴⁸ The policy allegedly states that players must be on the sidelines during the playing of the national anthem and that they "should stand at attention, face the flag, hold helmets in their left hand, and refrain from talking."⁴⁹ The policy even allegedly notes that players failing to do so may face discipline from the league, including fines or suspensions.⁵⁰ However, as the NFL clarified publicly during the height of the take-a-knee controversy, "players are strongly encouraged, but not required, to stand during the national anthem."⁵¹ This clarification may have been made because the NFL game operation manual may not be collectively bargained (and thus cannot be enforced against the players) or because the word "should" is used, which is suggestive but not

46. *See id.*

47. *See* Willingham, *supra* note 22.

48. *See* Jacobson, *supra* note 20 (noting that the "game operations manual" is not publicly available for review online).

49. *Id.*

50. Alex Fitzpatrick, *Does the NFL Require Players to Stand for the National Anthem?*, TIME (Sept. 25, 2017), <http://time.com/4955704/nfl-league-rulebook-a62-63-national-anthem-rule/>.

51. Jacobson, *supra* note 20 (quoting NFL spokesperson Brian McCarthy).

mandatory. In any event, the NFL's governing documents and various policies make clear that the league cannot require players to stand during the national anthem.

C. *Other Professional Sports Leagues' National Anthem Policies*

Major League Soccer, the National Hockey League, and MLB—like the NFL—do not have policies requiring their players to stand for the national anthem, though they do require that the national anthem be played before their respective games.⁵² Unlike these other professional sports leagues, the NBA has a clear policy that requires players—and coaches and trainers—to line up and stand during the playing of the national anthem.⁵³ This long-standing rule has been part of the NBA game operation policies for decades.⁵⁴ During the take-a-knee controversy and before the start of the 2017–2018 season, NBA Commissioner Adam Silver pointed to the rule when stating publicly that the league expected players to stand for the national anthem.⁵⁵ Moreover, the NBA sent a detailed memorandum to its teams reminding them of the rule and encouraging various ways in which teams and their players could build stronger and safer communities.⁵⁶ Nevertheless, while it is clear that the national anthem has a strong and storied tie to professional sports, most leagues do not require their players to stand for the playing of the national anthem.

IV. EXAMPLE OF LEAGUES REGULATING PLAYER SPEECH

Professional sports leagues have exercised their rights under their respective CBAs and governing documents to regulate the speech and expression of their players. One of the most well-known

52. See Kevin Seifert, *How National Anthem Rules Differ Across Sports Leagues*, ESPN (Sept. 29, 2017), http://www.espn.com/nfl/story/_id/20848575/rules-national-anthem-differ-sports-leagues.

53. Tim Cato, *The NBA Actually Has a Rule Against Kneeling for the National Anthem*, SB NATION (Sept. 29, 2017, 9:33 PM EDT), <https://www.sbnation.com/2017/9/25/16358070/national-anthem-protest-kneel-kneel-rule> (citing NAT'L BASKETBALL ASS'N, OFFICIAL RULES OF THE NATIONAL BASKETBALL ASSOCIATION, 2016-2017, at 61 (2016), <https://ak-static-int.nba.com/wp-content/uploads/sites/3/2016/11/2016-2017-Rule-Book.pdf>).

54. Tim Bontemps, *NBA Memo Reinforces National Anthem Rule and Encourages Community Engagement*, WASH. POST (Sept. 30, 2017), <https://www.washingtonpost.com/news/sports/wp/2017/09/29/nba-memo-makes-clear-players-and-coaches-must-stand-for-national-anthem/>.

55. *Id.*

56. *Id.*

examples involved former MLB player John Roker. Expressing his dislike for New York baseball fans, Roker made racist, homophobic, and other insensitive remarks to a reporter.⁵⁷ In response, MLB Commissioner Bud Selig suspended Roker from spring training and regular season games through the first month of the season, mandated that Roker pay \$20,000 to the National Association for the Advancement of Colored People or a similar organization that promoted diversity, and required Roker to complete a diversity training program.⁵⁸ The Major League Baseball Players Association—the players' union—filed a grievance on behalf of Roker challenging the punishment.⁵⁹ While the arbitrator reduced Roker's punishment—finding it disproportionate given past precedent—he validated Commissioner Selig's authority to discipline Roker for his comments that were not in the best interest of baseball.⁶⁰

Another high-profile example of league discipline of player expression and speech was when former NBA player Mahmoud Abdul-Rauf chose not to stand during the playing of the national anthem during the 1994–1995 NBA season.⁶¹ In response to reporters' questions about his decision, Abdul-Rauf stated that he chose not to stand because of his Muslim faith and his opposition to racial oppression.⁶² The NBA sought to find a resolution to the controversy by offering Abdul-Rauf the option of staying in his team's locker room during the playing of the national anthem, but he refused.⁶³ The NBA subsequently suspended him for one game without pay, and thereafter Abdul-Rauf stood for the national anthem and prayed during its playing.⁶⁴

There are any number of instances of smaller player speech or expression infractions that do not rise to the level of a national controversy but that, nevertheless, are addressed through discipline

57. See *Major League Baseball Players Ass'n v. Comm'r of Major League Baseball*, No. 104 (Nov. 30, 2000) (Manfred, Fehr & Das, Arbs.), in 1 UNDERSTANDING BUSINESS AND LEGAL ASPECTS OF THE SPORTS INDUSTRY 767, 769 (PLI Intellectual Prop., Court Handbook Series No. G-638, 2001).

58. *Id.* at 770.

59. *Id.* at 769.

60. *Id.* at 804–06.

61. Koenig, *supra* note 26, at 377–78.

62. McElroy, *supra* note 31.

63. Seifert, *supra* note 52.

64. *Id.*

by professional sports leagues.⁶⁵ Some examples are illustrative. In 2014, Colin Kaepernick was fined \$10,000 for wearing Beats by Dre headphones in the locker room, a violation of NFL rules forbidding players from wearing items with commercial names or logos close to game time.⁶⁶ In 2009, NFL player Dunta Robinson was fined \$25,000 by his team, the Houston Texans, for writing a message on his cleats urging management to give him a larger contract.⁶⁷ MLB suspended Yunel Escobar of the Toronto Blue Jays for three games during the 2012 season for writing an anti-gay slur on his eye black.⁶⁸ The NFL also disciplined Cam Heyward of the Pittsburgh Steelers for writing “Iron Man” on his eye black.⁶⁹ Despite Heyward’s intent to honor his father’s battle with cancer, the NFL still fined him for violating the NFL’s rule against personal messages.⁷⁰ Finally, the NFL fined DeAngelo Williams of the Pittsburgh Steelers for wearing pink on his uniform for the entire season—as opposed to a designated month, as is NFL tradition—to honor his mother, who died of breast cancer.⁷¹

While these examples of league discipline may seem harsh, there are a number of other circumstances where professional sports leagues chose not to punish players for their speech or expression, even when it was seemingly permissible to do so. For example, to mark the tenth anniversary of the September 11, 2001 terror attacks, the NFL allowed Lance Briggs and other players to wear special patriotic athletic gear during a game.⁷² In 2014, the NFL chose not to discipline players who staged a “hands up, don’t shoot” demonstration in honor of Michael Brown before a game.⁷³ Even during the take-a-knee controversy, the NFL chose not to discipline players and, instead, expressed support for the players’ social

65. See McElroy, *supra* note 31. Professional sports leagues also have punished players for not abiding by required media obligations. For example, the NFL fined Marshawn Lynch of the Seattle Seahawks \$75,000 for failing to make himself available to the media pursuant to the league’s Media Access Policy. *Id.*

66. See Boudway, *supra* note 19.

67. See *id.*

68. *Id.*

69. Jake Thorne, *NFL vs. Freedom of Expression*, MICH. REV. (Nov. 18, 2015), <https://www.michiganreview.com/the-nfl-vs-freedom-of-expression/>.

70. *Id.*

71. *Id.*

72. See Boudway, *supra* note 19.

73. Chavez, *supra* note 40. On the other hand, the NFL refused to permit members of the Dallas Cowboys from wearing decals on their uniforms to honor Dallas police officers that had been murdered. *Id.*

protest.⁷⁴ Moreover, MLB decided not to punish Bruce Maxwell of the Oakland Athletics when he kneeled during the national anthem in September of 2017 in solidarity with NFL players.⁷⁵

Indeed, these anecdotal examples seem to give credence to the theory that professional sports leagues are more likely to discipline in instances involving wearable items and insensitive speech, but less likely to do so when players speak or otherwise express themselves on social issues.⁷⁶ This informal line of demarcation may be due to some of the underlying racial dynamics in sports between black players and (largely) white owners and decision makers.

V. THE COMPLICATED RACIAL DYNAMICS IN SPORTS

The take-a-knee movement in the NFL—and, to a lesser degree, other professional sports—focuses on racial disparity in American society. In particular, player protests have centered on the inequality that they believed African Americans face in the criminal justice system. Social protest by athletes is not uncommon, as the examples above demonstrate.⁷⁷ However, players' beliefs about race and the criminal justice system do not provide the entire context for why so many players participated in the take-a-knee movement, and with such strong feelings and statements.

A major driving force behind the players' social protest was a similar racial dynamic in sports that they resented: that is, the control exerted by owners and decision makers—almost all white—over players, many of whom are black. Sports have a checkered past with matters regarding race. At the same time, many view sports as a key vehicle for helping change societal attitudes about race—as Jackie Robinson breaking the color barrier in baseball demonstrated. Moreover, it is understandable how, in what many view as a post-racial society (and with the significant salaries that

74. Jacobson, *supra* note 20.

75. Jeremy Woo, *Athletics' Bruce Maxwell Becomes First MLB Player to Kneel for National Anthem*, SPORTS ILLUSTRATED (Sept. 23, 2017), <https://www.si.com/mlb/2017/09/23/bruce-maxwell-national-anthem-protest-oakland-athletics>; see *Athletics' Bruce Maxwell First MLB Player to Kneel During National Anthem*, ESPN (Sept. 24, 2017), http://www.espn.com/mlb/story/_id/20796662/oakland-athletics-catcher-bruce-maxwell-kneels-national-anthem.

76. See Chavez, *supra* note 40. In fact, after much internal discussion, the NFL owners chose not to adopt a rule requiring players to stand for the national anthem. Ken Belson, *After Two Days of Talks, N.F.L. Owners Leave Anthem Rules Intact*, N.Y. TIMES (Oct. 18, 2017), <https://www.nytimes.com/2017/10/18/sports/football/nfl-anthem-kneeling.html>.

77. See *supra* text accompanying notes 14–27.

professional athletes are paid), people may mistakenly believe that those historically problematic racial dynamics play a lesser role in sports today. The take-a-knee movement brought this simmering racial dynamic back to the surface, though it is hardly the only example in recent years. These issues have been highlighted recently in the growth of collegiate sports, as well as earlier this decade in the NBA collective bargaining negotiations during the lockout in 2011. These examples help provide greater context for the players' reactions in 2017.

College athletics—primarily through the National Collegiate Athletic Association (“NCAA”)—is a multi-billion dollar industry.⁷⁸ However, very little of that money is passed on to student athletes. In fact, two legal scholars described the high-revenue-producing sports—football and men's basketball—as “legal servitude” for black athletes “for the profit and entertainment” of whites.⁷⁹ Nobel Prize-winning economist Gary Becker described amateur athletics as a regressive transfer of wealth from poor minority athletes to those who profited off collegiate sports, who are largely white.⁸⁰ Even Walter Byers—the former executive director of the NCAA—criticized the collegiate athletic system as having a “neo-plantation mentality.”⁸¹

To be sure, the NCAA does not intend to discriminate in its system of amateur athletics.⁸² However, the impacts of this system expose significant racial disparity.⁸³ African Americans make up a disproportionate percentage of athletes in the sports that make the NCAA, colleges, universities, and their corporate partners extraordinary amounts of money.⁸⁴ Those who benefit from the NCAA's

78. *Fair or Foul?*, ECONOMIST (Apr. 27, 2013), <https://www.economist.com/news/unit-ed-states/21576688-unpaid-student-athletes-are-heart-multi-billion-dollar-industry-fair-or-foul>.

79. Patrick Hruby, *Four Years a Student-Athlete: The Racial Injustice of Big-Time College Sports*, VICE (Apr. 4, 2016, 2:25 PM), https://sports.vice.com/en_us/article/ezexjp/four-years-a-student-athlete-the-racial-injustice-of-big-time-college-sports; see Robert A. McCormick & Amy Christian McCormick, *Major College Sports: A Modern Apartheid*, 12 TEX. REV. ENT. & SPORTS L. 13, 16 (2010).

80. Hruby, *supra* note 79.

81. *Id.* (citing WALTER BYERS, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 2–3 (1995)).

82. *See id.*

83. *See id.*

84. *See id.*

system of amateur athletics are overwhelmingly white.⁸⁵ This economic contrast has led to lawsuits against the NCAA to pay college athletes beyond tuition, housing, and modest amounts of money, as the current system allows.⁸⁶ Understandably, student athletes feel they are exploited by the NCAA and amateur athletics.

It is unsurprising that these dynamics flowed over into professional sports—especially those leagues in which the same college athletes move on to play. The 2011 NBA lockout provides a prime example.⁸⁷ Leading up to the lockout, several NBA decisions and policies exacerbated the racial dynamics between an almost all-white ownership and a predominantly black player base. For the 2005–2006 season, the NBA implemented a dress code for players, justifying the move as needed to reflect a desired level of professionalism for the league.⁸⁸ Many reporters and scholars—and players as well—viewed the dress code as aimed at precluding players from wearing clothes that black players preferred wearing.⁸⁹ One player went as far as to state that the NBA policy targeted “part of our culture,”⁹⁰ and another player claimed that the dress code was “a racial statement.”⁹¹ The players’ perception that the dress code was implemented by white owners for a largely white fan base and group of sponsors only served to flare racial tensions within the league.⁹²

Two other controversies further heightened the tensions between the NBA players and owners leading up to the 2011 lockout. First, the NBA restricted players from attending certain nightclubs, a policy adopted after some embarrassing incidents involving players at the establishments.⁹³ Players viewed this rule as paternalistic and involving racial overtones.⁹⁴ Second, the NBA

85. *See id.*

86. *See, e.g.,* O’Bannon v. Nat’l Collegiate Athletic Ass’n, 802 F.3d 1049 (9th Cir. 2015).

87. *See* Matthew J. Parlow, *Lessons from the NBA Lockout: Union Democracy, Public Support, and the Folly of the National Basketball Players Association*, 67 OKLA. L. REV. 1, 23–30 (2014).

88. Max N. Panoff, Note, *Black, Tie Optional: How the NBA’s Dress Code Violates Title VII*, 8 VA. SPORTS & ENT. L.J. 275, 278–79 (2009).

89. *See id.* at 282.

90. Angela Onwuachi-Willig, *Volunteer Discrimination*, 40 U.C. DAVIS L. REV. 1895, 1904 (2007) (quoting Paul Pierce).

91. *Id.* (quoting Stephen Jackson).

92. *See* Mark R. Bandsuch, *The NBA Dress Code and Other Fashion Faux Pas Under Title VII*, 16 VILL. SPORTS & ENT. L.J. 1, 10, 19–20 (2009).

93. *See* Showalter, *supra* note 32, at 212.

94. Parlow, *supra* note 87, at 27.

negotiated into the NBA's 2005 CBA a minimum age requirement for players entering the league: nineteen-years-old and one year after high school graduation.⁹⁵ Players and scholars alike viewed the minimum age limit as problematic because it disproportionately impacted black athletes.⁹⁶ These three conflicts set the stage for some of the racial tension that erupted during the 2011 NBA lockout and attendant collective bargaining negotiations.

In the summer of 2011, the NBA owners locked out players when they failed to reach an agreement on a new CBA.⁹⁷ While there were a number of areas of conflict between the two sides, the owners' rigidity in seeking concessions on players' pay, contract length, and free agency led many players to feel that race played a role in the negotiation's dynamics.⁹⁸ In fact, prominent television journalist Bryant Gumbel equated NBA Commissioner David Stern to a plantation overseer trying to exert power and control over black players.⁹⁹ NBA star Dwyane Wade echoed this sentiment in snapping at Stern during negotiations telling him, "You're not pointing your finger at me. I'm not your child."¹⁰⁰ With the race-related controversies leading up to the 2011 lockout, players reacted negatively to what some may view as traditional CBA bargaining points.¹⁰¹ Players saw the terms the owners sought as an attempt to collectively gain greater power and control over players—gains which generations of NBA players had fought hard to obtain.¹⁰² The racial implications of these core terms of the CBA—and the broader context within which they were sought—could not be overlooked.

95. *NBA Collective Bargaining Agreement Ratified and Signed*, NBA (July 30, 2005, 1:16 AM), www.nba.com/news/CBA_050730.html.

96. See Michael A. McCann, *Illegal Defense: The Irrational Economics of Banning High School Players from the NBA Draft*, 3 VA. SPORTS & ENT. L.J. 113, 164 (2004).

97. See Parlow, *supra* note 87, at 1.

98. See *id.* at 23.

99. *Id.* at 24 (citing Kurt Helin, *Bryant Gumbel Compares David Stern to "Plantation Overseer"*, NBC SPORTS (Oct. 19, 2011, 12:36 AM EDT), <http://nba.nbcsports.com/2011/10/19/bryant-gumbel-compares-david-stern-to-%E2%80%9Cplantation-overseer%E2%80%9D/>).

100. Kurt Helin, *Report: Dwyane Wade Yelled at Stern During Labor Talks*, NBC SPORTS (Oct. 1, 2011, 4:08 AM EDT), <http://nba.nbcsports.com/2011/10/01/report-dwyane-wade-yelled-at-stern-during-labor-talks/> (quoting Dwyane Wade).

101. See Parlow, *supra* note 87, at 29–30.

102. See *id.*

CONCLUSION

The take-a-knee controversy in the NFL sparked a nationwide normative conversation about what rights the players and league should have regarding social protests involving the national anthem. But as this essay shows, the public's perceptions of—or at least its rhetoric regarding—the rights of each side were oftentimes disconnected from the realities of professional sports law. While professional athletes do not necessarily have the free speech protections afforded by the First Amendment, neither can professional sports leagues and teams unilaterally restrict players' speech and expression. These parameters of player speech and expression—and the league's ability to discipline players for such speech or expression—is largely dependent on the terms of the CBA negotiated in good faith by both sides. Professional sports leagues vary in what their CBA and other governing documents permit and restrict in terms of players' speech and expression, and therefore the general arguments heard during this public debate were oftentimes over-inclusive.

These player protests also reminded observers of the ongoing racial tension between white owners and black players. These longstanding dynamics have ebbed and flowed over the years, but as the NFL players' response to President Trump's incendiary comments demonstrated, they still play a prominent role in the players' perceptions of their treatment by their respective leagues—despite player CBA gains over time. These issues persist because of what many scholars and others see as an issue within the NCAA: that is, black players in the two largest revenue-earning sports helping make colleges, universities, and their corporate partners high profits, but not truly sharing in those profits. Indeed, as the NBA lockout in 2011 showed, even in professional sports leagues where players earned tens of millions of dollars, the persisting racial dynamic of white owners having a significant degree of power and control over predominantly black players leads to great tension and distrust between the two sides. Any resolution of these issues—or at least progress being made along these lines—inevitably will need to come from the collective bargaining process and perhaps the changing demographics of professional sports league ownership and decision makers.