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## **CONTENT & OPINIONS**

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## FROM THE EDITOR

### Teaching Across Generations

When I began my teaching career over 37 years ago at a small Southern high school, my tools for the classroom included a chalk board and a filmstrip slide projector. I made copies on a mimeograph machine, and inhaling the blurred purple “hot-off-the-press” ink was the recreational marijuana equivalent of its day. As I continued to teach secondary and college students for nearly the next four decades, the tools of the trade definitely improved, and I noticed that unsurprisingly how students learned was changing as well. As classroom devices advanced—chalk boards were replaced with smart boards, film projectors were popped in the utility closet to make way for VCR and DVD players—the student learning experience also took on a contemporary expectation.

Today our business law courses are stocked with the latest of gadgets for content delivery—from Elmo Boards to HyFlex integrated systems—and students are simultaneously continuing to change in the way they access and process information. Traditional lectures have taken a back seat to experiential learning, and multimedia components are nearly indispensable to assignments and classroom exercises. With adult student attention spans of about 10 minutes, it is essential for the classroom environment to incorporate active learning, multimodal delivery, and create practical connections with the real world. This combination of technology and understanding of how individuals learn will help us as teachers with the ultimate goal: graduating students not only armed with a cadre of facts and skills, but with a sense of wholeness—a sense of themselves as being fully capable human beings with the ability to have a meaningful impact in the world.

In this issue of the *Journal of Business Law & Ethics Pedagogy*, the featured authors provide—through the use of technology and examination of important concerns—exercises and research we can apply to help our students develop this “sense of themselves” in the world. Volume 4 Issue 1 includes writings that explore business ethics; use social activism to generate student discussions of employment law, racial injustice, and freedom of speech; apply commonly used social media tools in business law teaching; and describe a practice-orientated, innovative new business degree program.

In the first article, *Content and Location of Business Ethics in the Undergraduate Business Curriculum*, Professors Nancy Lasher, Donna Steslow, and Sue Kong discuss how the mission of including ethics within business school curriculums has been contemplated both historically and in the present. Through their research, the authors provide us with an understanding of how educators are incorporating the ever important lessons of business ethics into their respective programs, and add to our students’ ability to make better ethical and legal decisions in the workplace and life.

Author Brian Levey begins a conversation about freedom of speech and employment law through his case *Oh Say Can You Sit? Colin Kaepernick, Freedom of Speech and the Workplace*. Featuring the widely known social activism of sports figure Colin Kaepernick in 2016, Professor Levey provides this ready-to-use exercise to discuss speech rights—or the lack thereof—in your place of employment. Many students will be surprised to learn that most employees do not enjoy the legal right to speak freely at work (think *Dixon v. Coburg Dairy Incorporated*).

In the article *How Twitter (Unintentionally) Saved my Semester*, author William Murphy explores the use of the social media site *Twitter* as a learning tool to increase student engagement. Professor Murphy’s experience with the content delivery changes associated with the pandemic was the impetus to apply this somewhat unorthodox learning platform. See the effectiveness of this clever

method in the student responses he gathered, and decide if incorporating these contemporary tools would enhance the learning in your own F2F, Online, or Hybrid classroom.

Professors Spenser Robinson, Jeff Thomas, and Joseph Affholter describe an innovative new graduate degree program in their article *Case Study of the New Entrepreneurial Transactions Master's Degree: Filling a Gap in Business And Legal Education*. The authors explain in their writing that the literature identified a need for more practice-oriented, truly cross-discipline education incorporating legal aspects—and thus the “Entrepreneurial Transactions” master’s degree was born. Read about the development of this unique program which blends both business and law, and provides future business owners with head start toward a successful endeavor.

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Christine Ladwig  
EDITOR-IN-CHIEF

# Case Study: Oh Say Can You Sit? Colin Kaepernick, Freedom of Speech and the Workplace

*Brian Levey\**

## **ABSTRACT**

This article describes the use of a case study about Colin Kaepernick and his well-publicized national-anthem protest to stimulate student interest in freedom of speech, employment law and related legal and ethical issues in an undergraduate business law course. The approach is somewhat novel in that it uses a case study about topics that most students already are familiar with—namely, sports, Colin Kaepernick and national-anthem protests—to interest students in legal and ethical issues they may encounter after graduation in a more traditional business. This is something of a twist on the more typical use of case studies where educators use a case study set in the business world—a new environment for many students—to address workplace dilemmas.

**KEY WORDS:** TEACHING, PEDAGOGY, CASE STUDIES, BUSINESS LAW, BUSINESS ETHICS, FREEDOM OF SPEECH, FIRST AMENDMENT, EMPLOYMENT LAW, EMPLOYMENT AT WILL, CODES OF CONDUCT, SPORTS, COLIN KAEPERNICK, NATIONAL ANTHEM, SOCIAL ACTIVISM, RACIAL INJUSTICE, PATRIOTISM

## **I. Introduction**

When Colin Kaepernick sat during the national anthem before an NFL preseason game in August of 2016, he unleashed a national debate about freedom of speech, racial injustice, social activism, patriotism and the like. He also provided those who teach business law with the opportunity to use his actions as a way to explore freedom of speech in the more traditional business workplace, and in particular the clash between the First Amendment and employment at will. What follows are overviews of: (1) the learning objectives of my sophomore business law course; (2) the pedagogical benefits of case studies; (3) the use of sports as a powerful learning tool; (4) the use of a case study based on Colin Kaepernick's social activism to examine freedom of speech in the workplace; and (5) the results, including student feedback. The appendices contain: (1) more detailed data regarding student feedback; (2) a teaching note; and (3) the case study itself.<sup>1</sup> Students responded well to the case and assigned questions, with the vast majority indicating that studying the case was engaging and helped them learn.

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\*Teaching Professor, University of Notre Dame

<sup>1</sup> The case study is at the end of this article so that readers may easily print it along with its endnotes and use it in their own courses. I updated it slightly since using it in class in the fall of 2019, e.g., to reflect the death of George Floyd and the subsequent statement by the NFL.

## **II. Business Law Course Learning Objectives**

At the University of Notre Dame, undergraduates in the college of business typically take the required business law course during their sophomore year. The course's learning objectives are probably familiar to those who teach business law, legal environment of business and similar courses elsewhere:

Law facilitates orderly business transactions and impacts most business decisions. Accordingly, business persons need to be familiar with the legal system and key areas of substantive law to make optimal business decisions.<sup>2</sup>

Among these "key areas of substantive law" are freedom of speech and employment law. Of course, the learning objectives extend beyond subject matter expertise to broader educational, professional and life skills:

Although one objective of the course is to teach students legal rules, this course also seeks to develop students' critical-thinking, problem-solving, communication and research skills as they consider and comment on real and hypothetical legal cases involving businesses. The course also highlights the ethical dimensions of legal issues and business situations.

A case study is perhaps the perfect vehicle for students to: (1) apply the legal rules they have learned; (2) perform additional research; (3) think critically about an issue with business, legal and ethical dimensions; and (4) communicate their position.

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<sup>2</sup> These course objectives are fairly standard across all sections of business law regardless of the instructor. I would be happy to share the syllabus. Please contact me at: [blevey@nd.edu](mailto:blevey@nd.edu).

### III. The Pedagogical Benefits of Case Studies

For many members of the Academy of Legal Studies Education (ALSB), the benefits of using cases studies in the classroom are well known. Just for example, long-time readers of the *Journal of Legal Studies Education* (JLSE) know that case studies:

- Stimulate interest by exposing students to intriguing and realistic dilemmas;<sup>3</sup>
- Transform the learning environment from one in which the instructor merely transfers information to students into one in which students must apply that information;<sup>4</sup>
- Force students to consider legal issues in a broader, multi-dimensional, risk-based, business-problem-solving context;<sup>5</sup>
- Foster an appreciation for the open-ended nature of business problems, i.e., there often is no single right answer;<sup>6</sup>
- Offer an opportunity for group work, which compels students to cooperate and collaborate;<sup>7</sup>
- Appeal to a variety of different learning styles;<sup>8</sup> and
- Lead to better retention.<sup>9</sup>

The verdict is in: case studies work!

### III. The Use of Sports as a Powerful Learning Tool

Many members of the ALSB and long-time readers of the JLSE also know that sports are powerful learning tool. JLSE authors who have introduced sports into the classroom have variously described sports as popular, familiar and enjoyable.<sup>10</sup> And so, not surprisingly, authors report that the use of sports in the classroom is engaging, energizing, effective and fun.<sup>11</sup> In addition to more obvious legal subjects like contracts and torts, sports offers a vehicle to teach areas of law as diverse as constitutional law and negotiable instruments.<sup>12</sup> Likewise, the inaugural issue of this journal features an article that demonstrates how to use sports to teach

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<sup>3</sup> E.g., Robert J. Landry III, *Ethical Considerations in Filing Personal Bankruptcy: A Hypothetical Case Study*, 29 J. LEGAL STUD. ED. 59, 63 (2012).

<sup>4</sup> *Id.*

<sup>5</sup> E.g., Diane B. McDonald, *Turning War Stories Into Case Studies*, 9 J. LEGAL STUD. ED. 437, 439 (1991).

<sup>6</sup> E.g., Jordan H. Leibman, *In Defense of the Legal Case Method and the use of Integrative Multi-use Cases in Graduate Business Law Courses*, 12 J. LEGAL STUD. ED. 171 (1994).

<sup>7</sup> E.g., Jeffrey Pittman, *Consumer Electronics v. Jones & Diamond: A Hypothetical Case Study*, 20 J. LEGAL STUD. ED. 117, 119 (2002).

<sup>8</sup> E.g., Michelle Evans, *Trade Secrets in the Legal Studies Classroom—A Case Study*, 29 J. LEGAL STUD. ED. 1, 3-5 (2012).

<sup>9</sup> Pittman, *supra* note 7, at 118.

<sup>10</sup> E.g., Sharlene A. McEvoy, *The Legal Environment of Baseball*, 12 J. LEGAL STUD. ED. 197 (1994) (“The popularity of baseball has grown enormously.”); Adam Epstein & Paul Anderson, *Utilization of the National Collegiate Athletic Association (NCAA) Manual as a Teaching Tool*, 26 J. LEGAL STUD. ED. 109, 110 (2009) (“Many students will have some familiarity with the NCAA . . . .”); Jennifer Cordon Thor & Kenneth M. York, *Take Me Out to the Ballgame, but Keep Me Away from the Concession Stand Workers: A Hypothetical Case Involving Negligent Volunteers at Ballparks*, 33 J. LEGAL STUD. ED. 293 (2016) (“Many of us enjoy attending major sporting events like professional baseball and football games.”).

<sup>11</sup> E.g., Adam Epstein, *Teaching Torts with Sports*, 28 J. LEGAL STUD. ED. 117, 118 (2011).

<sup>12</sup> E.g., Adam Epstein, *Go for the Gold by Utilizing the Olympics*, 29 J. LEGAL STUD. ED. 313, 314 (2012) (Professors can . . . enhance student understanding of constitutional law . . . .”); Glenn Boggs, *Using a Simple Sports Analogy to Help Students Cope with Negotiability, Liability and Holders in Due Course*, 21 J. LEGAL STUD. ED. 299 (1994) (“Applying baseball’s principles to commercial paper . . . .”).



the business ethics portion of an introductory law course.<sup>13</sup> In a similar vein, members of the ALSB have employed a broad array of pedagogical tools to use sports to teach law: from student-led collective bargaining negotiations to online dispute resolution simulations, from short video clips to full length films.<sup>14</sup> And, of course, there are case studies.

### ***A. Colin Kaepernick's Social Activism to Examine Free Speech in the Workplace***

As noted above, educators typically use case studies set in the often-unfamiliar world of business to bridge the gap between classroom theory and practical reality. By comparison, the approach here is somewhat novel in that it uses a case study about topics that most students already are familiar with, i.e., sports, Colin Kaepernick and national-anthem protests, to interest students in legal and ethical issues in the more traditional business workplace. This is something of a twist on the use of case studies set in the business world, a new and alien environment for many students. And so perhaps it is important to note what this case study is not: it is not an examination of the rights of professional football players to protest during the playing of the national anthem under their contracts, collective bargaining agreements and the like.<sup>15</sup> It is an attempt to use such well-known events to get students thinking about their own rights after they graduate and enter the business world.

Although the case could be used in a variety of courses and implemented in different ways, I assign the case and questions as homework in connection with a chapter on employment law late in the semester in a sophomore-level business law course.<sup>16</sup> The course covers constitutional law much earlier in the semester, and so the case also offers an opportunity to review freedom of speech, in addition to applying it in the employment setting. Finally, the case incorporates a discussion of codes of conduct, a topic that the course addresses briefly and much earlier in the context of a chapter on criminal law and again late in the semester as

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<sup>13</sup> Adam Epstein, *Incorporating Sport into the Business Ethics Segment of the Course*, 1 J. BUS. LAW & ETHICS PED. 35 (2018).

<sup>14</sup> E.g., Corey A. Ciocchetti, *Employment Law, Negotiation, and the Business Environment: A Cooperative Collective Bargaining Negotiation of the National Hockey League Lockout of 2004*, 25 J. LEGAL STUD. ED. 127 (2008); Lucille M. Ponte, *The Case of the Unhappy Sports Fan: Embracing Student-Centered Learning and Promoting Upper-Level Cognitive Skills Through and Online Dispute Resolution Simulation*, 23 J. LEGAL STUD. ED. 169, 184 (2006) (using a simulation based on “an e-commerce dispute about the quality and authenticity of rare baseball cards purchased in an online marketplace”); Epstein, *supra* note 10, at 117 (“Videos are an invaluable technological tool to demonstrate various torts to the students, and sports videos are ubiquitous.”); Judith Kish Ruud, William N. Ruud & Farzad Moussavi, *You’ve Got A Deal! Using the Film Draft Day to Teach Fundamental Contract Law and Analytical Skills*, 34 J. LEGAL STUD. ED. 41, 47 (2017) (“[T]oday’s students prefer active pedagogies like film and learn better with them. Students particularly enjoy films about sports.”).

<sup>15</sup> See, e.g., Julie D. Pfaff & Brian J. Halsey, *Teaching the Intersection of the First Amendment and Employment Law: Professional Football as a Classroom Illustration of the Limits of Political Speech*, 21 Atlantic Law Journal 193 (2019) (for an article addressing a player’s right to ‘take a knee’ during the anthem in protest).

<sup>16</sup> I also use the case in *Ethics in Sports*, a three-credit elective in the college of business. And so while the questions posed in the case as written are relevant for that course as well, a whole host of additional ethical, legal and business questions abound. Just for example, there are questions specific to sports:

- How is a sports franchise or league like any other business? Or unlike any other business?
- Do athletes have an obligation to speak out regarding important issues of the day? Are athletes role models? Should they be?
- Do professional teams and leagues have an obligation to let athletes use sporting events as forums to speak out? Or should athletes speak out on their own time? Or not at all?
- What if the views athletes express—whether in connection with a sporting event or on their own time—are bad for business?
- If a team’s sponsor does not support an athlete’s position, can it simply walk away from its sponsorship agreement with the team? What are the legal consequences of such an action?
- If you were the decision maker in the San Francisco 49ers, what would you have done when Colin Kaepernick sat and later took a knee during the national anthem? Why?

And then there are questions that broaden the case to examine more traditional workplaces:

- What should an employee do when his or her employer requires participation in some activity that collides with the employee’s personal beliefs?
- As a future business leader, what will you do when an employee takes a stand about a personal belief?
  - In the workplace?
  - Outside of the workplace?
  - Does the specific nature of the activity and the belief matter?

Finally, there are questions relevant to both settings:

- What ethical paradigms, theories or principles are most relevant in this case?
  - What stakeholders are involved?

part of the examination of employment law. During the class for which the case study is assigned, students prepare their answers to the questions in advance, discuss their answers with neighboring students during class and then volunteer to share their answers with the entire class.<sup>17</sup>

### ***B. Student Response to Kaepernick Case Study***

In the fall of 2019, I asked students to complete a survey after we had finished the exercise, agreeing or disagreeing with several statements. The results (Appendix A) were positive, most notably:

- Of the eighty eight (88) students who participated, eighty six (86) or ninety eight percent (98%) responded “Strongly Agree” or “Somewhat Agree” with the statement “Studying this case helped me understand that employers’ rights under the doctrine of employment at will typically are greater than employees’ rights to freedom of speech in the workplace.”
- Similarly, ninety two percent (92%) strongly agreed or somewhat agreed with the statement “Studying this case was engaging.”
- Likewise, ninety five percent (95%) strongly agreed or somewhat agreed with the statement “Studying this case helped me learn.”

While these questions measure student opinion and do not definitively demonstrate actual engagement and learning, the results certainly support continued use of the case.

## **IV. Conclusion**

By using a current event from sports to engage students about the more traditional business workplace, students bridge the gap from the familiar to the unknown, applying knowledge across diverse contexts. The hope is that this facilitates their ability to apply what they have learned, both today in the classroom and at a later time elsewhere in life, arguably the central goal of education.

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<sup>17</sup> The class has total enrollment of roughly 100 students, and so we often engage in variations of “think, pair, share.”

**APPENDIX A: Student Feedback**

Feedback from 88 Students

Case Study: Oh Say Can You Sit? Colin Kaepernick, Freedom of Speech and the Workplace  
 Business Law  
 Fall 2019

Questions	Strongly Agree	Somewhat Agree	Not Sure / No Opinion	Somewhat Disagree	Strongly Disagree
Studying this case gave me an opportunity to review and apply what I learned earlier in the semester about freedom of speech.	63 (71.6%)	23 (26.1%)	2 (2.3%)	0	0
Studying this case gave me an opportunity to apply what I just learned about employment at will.	44 (50.0%)	43 (48.9%)	1 (1.1%)	0	0
Studying this case helped me understand that employers' rights under the doctrine of employment at will typically are greater than employees' rights to freedom of speech in the workplace.	44 (50.0%)	37 (42.1%)	3 (3.4%)	3 (3.4%)	1 (1.1%)
Studying this case was engaging.	64 (72.7%)	17 (19.3%)	6 (6.9%)	1 (1.1.2%)	0
Studying this case helped me learn.	53 (60.2%)	31 (35.2%)	2 (2.3%)	2 (2.3%)	0

## APPENDIX B: Case Teaching Note

*This teaching note was prepared by the author and is intended to be used as a basis for class discussion. The views represented here are those of the author and do not necessarily reflect the views of the Journal of Business Law and Ethics Pedagogy. The views are based on professional judgment.*

### A. Case Overview

Although the case study is about Colin Kaepernick and his well-publicized national-anthem protest, it poses four questions that challenge students to review the law and think about it in the context of their own business careers, which likely will not include playing quarterback for the San Francisco 49ers nor invoke collective bargaining agreements and the like. As noted previously, although the case could be used in a variety of courses and implemented in different ways, I assign the case and questions as homework in connection with a chapter on employment law late in the semester in a sophomore-level business law course. The course covers constitutional law much earlier in the semester, and so the case also offers an opportunity to review freedom of speech by posing the following questions:

- 1) What does the right to freedom of speech generally include? What are some limits on this right?
- 2) The legal relationship between a sports franchise and a player is often governed by specialized contracts, CBAs and the like. What is the typical legal relationship between a more traditional employer and employee?
- 3) In a more-traditional employment relationship, what freedom of speech rights does an employee typically enjoy? In the workplace? Outside of the workplace?
- 4) Generally speaking, codes of conduct and related policies define an employer's expectations of its employees. The better codes and policies also define what an employee can expect of his or her employer. Think of an employer that you would like to work for after graduation. See if you can find its code of conduct and any related policies on its website. What does the code say about:
  - a) Freedom of speech in and out of the workplace?
  - b) Political speech and related activities?
  - c) The nature of the employment relationship?
  - d) Conflicts of interest?

### B. Discussion Question Answers

#### 1) What does the right to freedom of speech generally include? What are some limits on this right?

In order to understand freedom of speech, students might start with the language of the First Amendment itself: "Congress shall make no law . . . abridging the freedom of speech . . ." <sup>18</sup> Next, they might review the relevant portions of the textbook, for some a distant memory from much earlier in the semester:

#### Freedom of Speech

A democratic form of government cannot survive unless people can freely voice their political opinions and criticize government actions or policies. Freedom of speech, particularly political speech, is thus a prized right, and traditionally the courts have protected this right to the fullest extent possible.

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<sup>18</sup> U.S. CONST. amend. I.

Symbolic speech—gestures, movements, articles of clothing, and other forms of expressive conduct—is also given substantial protection by the courts. The Supreme Court has held that the burning of the American flag as part of a peaceful protest is a constitutionally protected form of expression. Similarly, wearing a T-shirt with a photo of a presidential candidate is a constitutionally protected form of expression.<sup>19</sup>

As the textbook also explains, the limits on freedom of speech are many and varied, ranging, e.g., from disturbing the peace to threatening speech to obscene speech to defamation.<sup>20</sup> Of course, students are welcome to go beyond the textbook and perform additional research. Most probably do not, but if they do, they might come upon an important additional point:

[T]he bill of rights . . . restrains what government can do to individuals, not what individuals can do to one another. The First Amendment and the rest of the Bill of Rights safeguard the powerless from the powerful in public life, not, for the most part, from the powerful in private life.<sup>21</sup>

And so that brings us back to the language of the First Amendment, which says “*Congress shall make no law . . . abridging the freedom of speech . . .*”<sup>22</sup> It does not say anything about employers and the workplace.

**2) The legal relationship between a sports franchise and a player is often governed by specialized contracts, CBAs and the like. What is the typical legal relationship between a more traditional employer and employee?**

Although not as familiar or well understood, employment at will should be fresh in most students’ minds because I assign the case for the same class session as the chapter on employment law. And so once again, students need look no further than the textbook:

Employment relationships have traditionally been governed by the common law doctrine of employment at will. Under this doctrine, either party may terminate the employment relationship at any time and for any reason, unless doing so violates an employee’s statutory or contractual rights.

Today, the majority of U.S. workers continue to have the legal status of “employees at will.”<sup>23</sup>

Of course, once again students are welcome to go beyond the textbook and perform additional research.

**3) In a more-traditional employment relationship, what freedom of speech rights does an employee typically enjoy? In the workplace? Outside of the workplace?**

Here is where it gets interesting! This may be the first time students have ever thought about this issue and at least some of them most likely assume that the constitutional right to freedom of speech trumps the common law doctrine of employment at will. After all, freedom of speech is prominently embedded in the

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<sup>19</sup> KENNETH W. CLARKSON ET AL., BUSINESS LAW: TEXT AND CASES 76-7 (15th ed. 2021, 2018) (emphasis omitted).

<sup>20</sup> See generally *id.* at 32-37, 115-18.

<sup>21</sup> BRUCE BARRY, SPEECHLESS: THE EROSION OF FREE EXPRESSION IN THE WORKPLACE 26 (2007) (emphasis omitted).

<sup>22</sup> U.S. CONST., *supra* note 18 (emphasis added).

<sup>23</sup> *Id.* at 639.

Bill of Rights, in the First Amendment to the U.S. Constitution no less, whereas employment at will is nowhere to be found.<sup>24</sup>

In answering this question, students will probably have to go beyond what they think they know about freedom of speech as well as the textbook to find an answer, but a simple internet search will yield the often-surprising truth: “[d]espite what many employees think, your rights to freedom of speech are fairly limited at work, and it’s often perfectly legal for an employer to take action against a worker for something they said or wrote.”<sup>25</sup> Students will learn that there are exceptions, e.g., where the government is the employer, certain union activities, if state law says otherwise, but those exceptions are at the margins.<sup>26</sup> Why?

At the risk of an overgeneralization . . . , the civil religion that underpins work and employment in the United States is the religion of markets. In other words, we view our lives at work—the relationship between employer and worker—through a lens of property rights and contracts. The system works well, by this view, when employers are given the right of “property” ownership over not just *what* they manage but *how* they manage. Employees, in the strict market view, either accept a given employer’s conditions of work or move on in the marketplace for their labor to something more preferable.<sup>27</sup>

Simply stated then, it is the power of property rights, contracts and the marketplace that prevails in the employment relationship, and so most employees do not enjoy the legal right to speak freely at work, or outside of work, without their employer potentially taking adverse employment action.<sup>28</sup>

- 4) Generally speaking, codes of conduct and related policies define an employer’s expectations of its employees. The better codes and policies also define what an employee can expect of his or her employer. Think of an employer that you would like to work for after graduation. See if you can find its code of conduct and any related policies on its website. What does the code say about:**
- a) Freedom of speech in and out of the workplace?
  - b) Political speech and related activities?
  - c) The nature of the employment relationship?
  - d) Conflicts of interest?

The results here were disappointing, not because of the efforts of our students but rather because most codes of conduct do not seem to address this issue directly and any policies that might give additional guidance do not seem to be publicly available. As something of an experiment, but admittedly not a comprehensive

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<sup>24</sup> This may help explain the disparity in the student survey results between the number of students who strongly agree that that studying this case helped them review and apply what they learned earlier in the semester about freedom of speech (76.1%) and the number who strongly agree that studying this gave them an opportunity to apply what they just learned about employment at will (50%) and strongly agree that studying this case helped them understand that employers’ rights under the doctrine of employment at will typically are greater than employees’ rights to freedom of speech in the workplace (50%): coming into the class, free speech rights are at least somewhat familiar, employment at will much less so, and the fact that employment at will trumps free speech in the workplace less so still and often surprising. See Appendix A, *supra*.

<sup>25</sup> Tom Spiggle, *Your Free Speech Rights (Mostly) Don’t Apply at Work*, FORBES (September 28, 2018), <https://www.forbes.com/sites/tomspiggle/2018/09/28/free-speech-work-rights/#7ba25e4738c8>.

<sup>26</sup> *Id.*

<sup>27</sup> BARRY, *supra* note 21 at 5 (emphasis in original).

<sup>28</sup> This is another example of a broader point that many students find surprising: unless free citizens in a democracy, typically through their elected or appointed representatives, have made something illegal, in this case an employer terminating an employee because of the employee’s speech, it is legal. Perhaps then, this is a chance to remind students that, although freedom of speech is important and goes back the founding era of our country, this broader point is ultimately what we fought a revolution over.

study or survey, I asked a teaching assistant to look at the codes of conduct of the twenty employers that had hired the most students from our undergraduate business program during the previous year. Just for example, the largest employer makes no mention of freedom of speech or employment at will in its code.<sup>29</sup> The code does mention political activities, but only in the context of lobbying, use of firm resources and political action committees (PACs).<sup>30</sup> Although there is a section on conflicts of interest, it focuses on largely on not advancing one's own personal economic interests or family relationships.<sup>31</sup> And so a new employee would have to look elsewhere to understand his or her rights in this area, perhaps to some internal policy or by contacting the ethics helpline.<sup>32</sup> This makes this case study all the more important: if a student does not understand his or her lack of rights in this area, a prospective employer is unlikely to make it clear in its code.<sup>33</sup>

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<sup>29</sup> *Code of Ethics and Shared Values*, DELOITTE (2016). A newer version is available online, but with the same results. *Code of Ethics and Shared Values*, <https://ecode.deloitte.com/codedetails/4>.

<sup>30</sup> *Id.* at 11.

<sup>31</sup> *Id.* at 19.

<sup>32</sup> *Id.* at 6-7.

<sup>33</sup> Of the top twenty employers, none mention freedom of speech rights in their codes. Most discuss political activities, but again the focus is on lobbying, use of company resources, PACS and the like. All of the codes express a prohibition against conflicts of interest, but less than half explain employment at will.

## **APPENDIX C: Teaching Case**

### **Oh Say Can You Sit? Colin Kaepernick, Freedom of Speech and the Workplace**

*Brian Levey, University of Notre Dame*

#### **Background & Instructions**

**Purpose:** The purpose of this assignment is to help you learn about speech rights in the workplace.

**Approach:** To the extent that undergraduate business classes use case studies, those case studies are typically set in the business world in order to bridge the gap between classroom theory and practical reality. The problem is that the practical realities of the business world may be unfamiliar to a significant number of you. By comparison, the approach here is to use topics that most of you already are familiar with, i.e., sports, Colin Kaepernick and national-anthem protests, to spark your curiosity about legal and ethical issues in the workplace. And so perhaps it is important to note what this case study is not: it is not an examination of the rights of professional football players to protest during the playing of the national anthem under their contracts, collective bargaining agreements and the like. It is an attempt to use such well-known events to get you thinking about your own rights after you graduate and enter a more traditional workplace.

**Knowledge:** This assignment will also help you learn more about freedom of speech and employment at will, and introduce you to corporate codes of conduct.

**Skills:** This assignment will help you:

- Research legal principles like freedom of speech and employment at will, as well as corporate codes of conduct that often govern legal rights in the workplace;
- Evaluate competing legal principles to arrive at an answer; and
- Communicate by organizing your thoughts, writing and speaking.

**Assignment:** To complete this assignment you should:

- Read the case study;
- Review relevant portions of our textbook and conduct additional research, as needed, in order to answer the questions at the end of the case;
- Evaluate what you found as a result of that review and research;
- Answer in writing the questions at the end of the case; and
- Be prepared to discuss your answers in class.



## **Oh Say Can You Sit? Colin Kaepernick, Freedom of Speech and the Workplace**

*Brian Levey, University of Notre Dame*

*This case was prepared by the author and is intended to be used as a basis for class discussion. The views represented here are those of the author and do not necessarily reflect the view of the Journal of Business Law and Ethics Pedagogy. The views are based on professional judgment.*

### **Introduction**

In the summer of 2016, controversy surrounded the San Francisco 49ers as the season approached: would newly hired head coach Chip Kelly and his up-tempo spread offense succeed with the 49ers, just one season after the Philadelphia Eagles had fired Kelly, conceding failure?<sup>i</sup> As it turned out, controversy did erupt, just not the one that the 49ers had feared, for prior to the start of the third preseason game, 49ers quarterback Colin Kaepernick sat through “The Star-Spangled Banner,” igniting a debate from “sea to shining sea.”<sup>ii</sup> The 49ers, and the rest of the league and its fans, were “ready for some football,” as country singer Hank William, Jr. used to announce at the start of each Monday night broadcast, but they were not ready for this.<sup>iii</sup> When subsequently questioned about his actions—or perhaps, more accurately, inactions—Kaepernick responded: “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.”<sup>iv</sup> And so attention shifted from Kelly’s innovative offense to freedom of speech, racial injustice, social activism, patriotism and the like. A little further afield, some may have begun to wonder about their own speech rights in more traditional workplaces.

### **Colin Kaepernick: Quarterback**

Before he gained the attention of the American public for his social activism, Colin Kaepernick was better known to sports fans as a college and NFL quarterback. Born of mixed race on November 3, 1987 in Milwaukee, WI, Kaepernick was adopted just a few weeks after his birth by a white couple, Rick and Teresa Kaepernick.<sup>v</sup> The family moved to California and by the time he reached high school, it was obvious that Kaepernick was a gifted athlete.<sup>vi</sup> At Pitman High School in Turlock, California, Kaepernick was a first-team All-District, All-Conference and All-Academic quarterback, and an even better pitching prospect.<sup>vii</sup> But football was his first love and so Kaepernick turned down baseball scholarships from the likes of Arizona State and Tennessee to play football at the University of Nevada-Reno for Coach Chris Ault, who took something of a chance on the 6’4” 160 pounder with an unorthodox throwing motion.<sup>viii</sup> Kaepernick did not disappoint. By the time he completed his final home game in 2010, Kaepernick had become the only player in NCAA history to amass 2,000 yards passing and 1,000 yards rushing in three consecutive seasons.<sup>ix</sup>

A second-round pick of the San Francisco 49ers in the 2011 draft, during his rookie season Kaepernick served as a backup to longtime starter Alex Smith.<sup>x</sup> Late in the 2012 season, however, Kaepernick took over for the injured Smith.<sup>xi</sup> Impressed by Kaepernick’s performance, Coach Jim Harbaugh named Kaepernick the permanent starter, even after Smith returned from injury.<sup>xii</sup> Once again, Kaepernick rewarded his coach’s faith, leading the 49ers past the Green Bay Packers in the first round of the playoffs by rushing for 181 yards, an NFL record for a quarterback.<sup>xiii</sup> Next was a come-from-behind victory over the Atlanta Falcons in the NFC championship game, followed by a comeback against the Baltimore Ravens in the Super Bowl that fell just short, 34-31.<sup>xiv</sup> Still, Kaepernick gained nearly 400 yards in total offense (rushing and passing) and scored two touchdowns against the Ravens’ vaunted defense.<sup>xv</sup> He

finished the season with an overall quarterback rating of 98.3, which would have placed him in the top ten in the league if spread out over an entire season.<sup>xvi</sup>

More success followed for both Kaepernick and the 49ers in 2013: a 12-4 regular season record followed by a playoff run that ended with a close loss to the Seattle Seahawks in the NFC championship game.<sup>xvii</sup> Kaepernick finished the season with an overall quarterback rating of 91.6, tenth in the league.<sup>xviii</sup> The 49ers rewarded Kaepernick with a seven-year, \$126 million contract.<sup>xix</sup>

But both Kaepernick and the 49ers had peaked. The 2014 season ended with an 8-8 record, the last under Coach Harbaugh, who agreed to part ways with the 49ers.<sup>xx</sup> And although Kaepernick completed 289 of 478 attempted passes for 3369 yards and a completion percentage of 60.5—all personal bests—his quarterback rating continued to slip to 86.4, twentieth in the league.<sup>xxi</sup>

During the 2015 season, Kaepernick lost his starting job to back-up Blaine Gabbert, before ultimately sitting out the final games with a shoulder injury.<sup>xxii</sup> Kaepernick was 2-6 as a starter with a quarterback rating of 78.5, thirty first in the league.<sup>xxiii</sup> Things hit bottom in the offseason, with Kaepernick's request for a trade going unfulfilled.<sup>xxiv</sup> Still, there was some reason for optimism with the arrival of Coach Kelly that same offseason, with his pioneering offense and reputation for getting the most out of quarterbacks.<sup>xxv</sup>

### **Colin Kaepernick: Social Activist**

The optimism did not last. Entering the preseason, prognosticators seemed to think Kelly would name Gabbert as the starting quarterback.<sup>xxvi</sup> To make matters worse, injuries sidelined Kaepernick for the first two preseason games.<sup>xxvii</sup> And so it was not until sometime after the third preseason game that anyone even noticed that Kaepernick, dressed in street clothes, had sat on the bench during the playing of the national anthem before those first two games.<sup>xxviii</sup> Kaepernick's protest only came to light when a reporter tweeted a photo that happened to show—if one looked very closely—Kaepernick sitting during the national anthem prior to the third preseason game.<sup>xxix</sup> After that game, Kaepernick made his first statement to the media, indicating that he sat to protest the oppression of people of color and police brutality.<sup>xxx</sup> Two days later Kaepernick elaborated:

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

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

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

I have great respect for the men and women that have fought for this country. I have family, I have friends that have gone and fought for this country. And they fight for freedom, they fight for the people, they fight for liberty and justice, for everyone. That's not happening. People are dying in vain because this country isn't holding their end of the bargain up, as far

as giving freedom and justice, liberty to everybody. That's something that's not happening. I've seen videos, I've seen circumstances where men and women that have been in the military have come back and been treated unjustly by the country they fought for, and have been murdered by the country they fought for, on our land. That's not right."<sup>xxxix</sup>

Although Kaepernick's activism caught many by surprise, it had been developing for some time. In a 2015 interview, Kaepernick describes knowing that he "was different" from his "parents and . . . older brother and sister" from his earliest days.<sup>xxxix</sup> He remained conscious of his skin color throughout his childhood:

"We used to go on these summer driving vacations and stay at motels . . . . And every year, in the lobby of every motel, the same thing always happened, and it only got worse as I got older and taller. It didn't matter how close I stood to my family, somebody would walk up to me, a real nervous manager, and say: 'Excuse me. Is there something I can help you with?'"<sup>xxxix</sup>

By college, simple misunderstandings had mushroomed into potentially deadly confrontations with police for Kaepernick and his friends:

"I've had times where one of my roommates was moving out of the house in college and because we were the only black people in that neighborhood the cops got called and we had guns drawn on us. Came in the house, without knocking, guns drawn on my teammates and roommates. So I have experienced this. People close to me have experienced this. This isn't something that's a one-off case here or a one-off case there. This has become habitual. This has become a habit. So this is something that needs to be addressed."<sup>xxxix</sup>

And so perhaps it should have come as no surprise in July 2016 when Kaepernick responded to the death of Alton Sterling at the hands of Baton Rouge, Louisiana police officers on Instagram:

"This is what lynchings look like in 2016! . . . . Another murder in the streets because the color of a man's skin, at the hands of the people who they say will protect us. When will they be held accountable? Or did he fear for his life as he executed this man?"<sup>xxxix</sup>

By the time of his anthem protest, Kaepernick was ready to face the consequences of his positions and actions:

"This is not something that I am going to run by anybody . . . . I am not looking for approval. I have to stand up for people that are oppressed. . . . If they take football away, my endorsements from me, I know that I stood up for what is right."<sup>xxxix</sup>

### **Management Reaction**

The 49ers issued a statement about Kaepernick's protest, walking something of a tightrope: "The national anthem is and always will be a special part of the pre-game ceremony. It is an opportunity to honor our country and reflect on the great liberties we are afforded as its citizens. In respecting such American principles as freedom of religion and freedom of expression, we recognize the right of an individual to choose and participate, or not, in our celebration of the national anthem."<sup>xxxix</sup> Kelly added that Kaepernick's decision not to stand during the national anthem is "his right as a citizen" and said "it's not my right to tell him not to do something."<sup>xxxix</sup> Apparently trying to avoid any backlash from players and

fans alike, the NFL said as little as possible: "Players are encouraged but not required to stand during the playing of the national anthem."<sup>xxxix</sup>

### **The Protest Spreads**

By the fourth game of the preseason on September 1st, Kaepernick was no longer alone. 49ers safety Eric Reed joined Kaepernick in kneeling during the anthem, a slight modification of the protest designed to show greater respect for the military, at the suggestion of former Green Beret and NFL long snapper Nate Boyer.<sup>xi</sup> On that same day, Seattle Seahawks cornerback Jeremy Lane sat during the anthem prior to the Seahawk's game with the Oakland Raiders.<sup>xii</sup> Three days later the protest spread to other sports: before a North American Women's Soccer League match, Seattle Reign midfielder and U.S. women's national team member Megan Rapinoe took a knee during the anthem in solidarity with Kaepernick.<sup>xiii</sup> From there, the protest continued to grow and spread, capturing the nation's attention, e.g.:

- September 9: Denver Broncos linebacker Brandon Marshall took a knee during the anthem prior to the first game of the NFL regular season;
- September 11: Seahawks, Dolphins, Chiefs and Patriots players demonstrated during the anthem on the first Sunday of the regular season and the fifteenth anniversary of the 2001 terrorist attacks;
- September 16: all of the players and coaches from Seattle's Garfield High knelt during the anthem;
- September 17: Howard University's cheerleaders knelt during the anthem prior to the AT&T Nation's Football Classic against Hampton University;
- September 21: the entire Indiana Fever team locked arms and knelt during the anthem prior to the first game of the Women's National Basketball Association playoffs;
- September 22: Time magazine featured Kaepernick on its cover;
- October 1: Members of the East Carolina University marching band took a knee during the anthem prior to the game against the University of Central Florida; and
- October 4: Players from the National Basketball Association's (N.B.A.) Houston Rockets and New York Knicks stood and locked arms across team lines during the anthem, prior to their preseason game.<sup>xliii</sup>

Around this same time, President Obama entered the fray when questioned during a presidential town hall: "I believe that us honoring our flag and our anthem is part of what binds us together as a nation. But I also always try to remind folks that part of what makes this country special is that we respect people's rights to have a different opinion."<sup>xliv</sup>

### **Social Activism in Sports**

Of course, social activism in sports is nothing new, with the playing of the national anthem in particular serving as an opportunity for protest. Jackie Robinson famously broke Major League Baseball's color barrier in 1947.<sup>xlv</sup> Heavyweight boxing champion Muhammad Ali refused to serve in the military during the Vietnam War.<sup>xlvi</sup> Sprinters Tommie Smith and John Carlos stood atop the medal platform in the 1968 Olympics, each with a single fist raised in the black-power salute as the anthem played.<sup>xlvii</sup> Perhaps less-well known is the 1996 protest of Mahmoud Abdul-Rauf of the N.B.A.'s Denver Nuggets; he initially refused to stand for the anthem, but after a suspension by the league, he silently recited a Muslim prayer while standing with his head bowed.<sup>xlviii</sup>

### **The Star-Spangled Banner and Sports**

To some extent the examples of Kaepernick and Abdul-Rauf's beg the question then, why do we play "The Star-Spangled Banner" before sporting events? As one commentator noted: "They don't play the anthem before big concerts. Or plays. Or movies. Or the opening credits of a television show. Or before work (in most cases). Or during the morning commute. Or so on and so on."<sup>xlix</sup>

The origins of the song's lyrics are well known to most Americans: Francis Scott Key penned his famous words during the War of 1812, inspired by the American flag flying high over Fort McHenry after a bombardment by the British fleet.<sup>1</sup> What is less well known is that Key set his poem—"The Defence of Fort McHenry"—to the melody of a popular drinking song—"The Anacreonic Song"—and soon thereafter a Baltimore music store reprinted the words and the music together under the name "The Star Spangled Banner."<sup>li</sup> The song gained popularity over the course of the nineteenth and early twentieth centuries, especially in connection with military ceremonies and other public events.<sup>lii</sup> Fast forward to game one of the 1918 World Series between the Cubs and the Red Sox, when a military band played the song during the seventh-inning stretch.<sup>liii</sup> With the nation at war, a patriotic crowd, already on its feet, began to sing and ultimately applaud at the end of the song.<sup>liv</sup> The scene continued in games two and three, but when the series shifted to Boston, the Red Sox owner brought in a band to play the song before the start of each game.<sup>lv</sup> And the rest, as they say, is history. After the war, the song continued to be played before games on special occasions, before officially becoming the national anthem in 1931. It was embedded as a pregame fixture before all games during World War II. From there, it spread to other sports, including professional football.<sup>lvi</sup>

After the war, NFL Commissioner Elmer Layden declared that the practice should continue: "The National Anthem should be as much a part of every game as the kick-off . . . We must not drop it because the war is over. We should never forget what it stands for."<sup>lvii</sup> And players have been standing for the anthem, with some exceptions, ever since.<sup>lviii</sup>

### **Colin Kaepernick: Free Agent, Litigant & Winner?**

Having inspired protests in the NFL and beyond while injured and wearing street clothes, Kaepernick did ultimately see the field in 2016. Highlights include starting 11 games and posting his best individual statistical season since 2013, including:

- a 90.7 passer rating that was his best in three years and ranked seventeenth in the NFL;
- a 4-1 touchdown-interception ratio that was tied for sixth;
- 468 rushing yards that were second among quarterbacks; and
- 6.78 yards per carry that were first.<sup>lix</sup>

But Kaepernick's 59.2 percent completion rate was twenty sixth, and the 49ers posted a 1-10 record in games he started.<sup>lx</sup> After discussing his future with 49ers management, Kaepernick opted out of his contract for the 2017, choosing to become a free agent.<sup>lxi</sup> Although 49ers general manager John Lynch initially called that conversation "positive," he subsequently told the media that the 49ers would have cut Kaepernick if he had had not opted out because he did not fit new head coach Kyle Shanahan's offense.<sup>lxii</sup> A free agent for the first time in his career, Kaepernick went searching for a new football home, a search that continues to this to this day. Along the way there some near misses,<sup>lxiii</sup> but no team signed Kaepernick even as a backup. Was it his play or his politics? Opinions varied. For as much as he admired Kaepernick's stand, former NFL quarterback Michael Vick declared that Kaepernick's status "has nothing to do with him being blackballed. . . . Colin didn't have his best two years his last two seasons."<sup>lxiv</sup> But longtime NBC analyst Cris Collinsworth captured the sentiment of many others as the

2017 season began with Kaepernick still unsigned: “It’s really tough to argue that he’s not one of the best sixty four.”<sup>lxv</sup> And so a little over a month later, Kaepernick’s lawyers filed a grievance under the collective bargaining agreement (CBA), contending that NFL owners:

“colluded to deprive Mr. Kaepernick of employment rights in retaliation for Mr. Kaepernick’s leadership and advocacy for equality and social justice and his bringing awareness to peculiar institutions still undermining racial equality in the United States.”<sup>lxvi</sup>

The season saw more protests, some in response to President Trump’s tweet that players who kneel during the anthem should be fired.<sup>lxvii</sup> Through it all, Kaepernick remained unsigned.

In the spring of 2018, the NFL launched a much-criticized anthem policy that became the subject of its own grievance under the CBA that summer.<sup>lxviii</sup> The 2018 season began and ended with Kaepernick still unsigned. And then seemingly out of the blue in February 2019, the NFL and Kaepernick settled their dispute in exchange for a sizeable payment to Kaepernick, although the specifics remain unknown with each party bound by confidentiality.<sup>lxix</sup> Many saw Kaepernick as the winner in his grievance with the NFL,<sup>lxx</sup> but several years after his last snap Colin Kaepernick’s playing days appear to be over, notwithstanding, or perhaps in part because of, an ill-fated, NFL-sponsored tryout in November 2019.<sup>lxxi</sup>

In the wake of the death of George Floyd and related protests in June of 2020, NFL Commissioner Roger Goodell admitted that “we were wrong for not listening to NFL players earlier and encourage all to speak out and peacefully protest. We, the NFL, believe Black Lives Matter.”<sup>lxxii</sup> Noticeably absent from Goodell’s statement was any mention of Colin Kaepernick.

## Questions

Before class, you should spend some time reviewing applicable sections of our textbook, conducting additional research as needed, evaluating what you found and answering in writing the following questions. During class, you should be prepared to discuss your answers.

- 1) What does the right to freedom of speech generally include? What are some limits on this right?
- 2) The legal relationship between a sports franchise and a player is often governed by specialized contracts, CBAs and the like. What is the typical legal relationship between a more traditional employer and employee?
- 3) In a more-traditional employment relationship, what freedom of speech rights does an employee typically enjoy? In the workplace? Outside of the workplace?
- 4) Generally speaking, codes of conduct and related policies define an employer's expectations of its employees. The better codes and policies also define what an employee can expect of his or her employer. Think of an employer that you would like to work for after graduation. See if you can find its code of conduct and any related policies on its website. What do they say about:
  - a) The nature of the employment relationship?
  - b) Conflicts of interest?
  - c) Freedom of speech in and out of the workplace?
  - d) Political speech and related activities?

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<sup>i</sup> See *San Francisco 49ers 2016 Team Preview and Prediction*, ATHLON SPORTS (July 14, 2016, 9:30 AM), <https://athlonsports.com/nfl/san-francisco-49ers-2016-team-preview-and-prediction>; Brandon Lee Gowton, *More Details Emerge as to Why Chip Kelly Was Fired by the Eagles*, BLEEDING GREEN NATION (Dec. 30, 2015, 12:12 AM), <https://www.bleedinggreennation.com/2015/12/30/10686914/chip-kelly-eagles-jeff-lurie-organization-franchise>.

<sup>ii</sup> E.g., Peter King, *Peter King's Monday Morning QB: The Kaepernick Aftermath*, SPORTS ILL. (Aug. 29, 2016), <https://www.si.com/mmqb/2016/08/28/colin-kaepernick-national-anthem-49ers-nfl-peter-king>.

<sup>iii</sup> E.g., Erika Berlin, *45 Years of Monday Night Football's Memorable Theme Music*, MENTAL FLOSS (Sept. 21, 2015), [HTTP://MENTALFLOSS.COM/ARTICLE/68832/45-YEARS-MONDAY-NIGHT-FOOTBALLS-MEMORABLE-THEME-MUSIC](http://MENTALFLOSS.COM/ARTICLE/68832/45-YEARS-MONDAY-NIGHT-FOOTBALLS-MEMORABLE-THEME-MUSIC).

<sup>iv</sup> Steve Wyche, *Colin Kaepernick Explains Why He Sat During National Anthem*, NFL.COM.

<sup>v</sup> *Colin Kaepernick*, BIOGRAPHY, <https://www.biography.com/people/colin-kaepernick-21132801>.

<sup>vi</sup> *Id.*

<sup>vii</sup> *Id.*

<sup>viii</sup> *Colin Kaepernick—Biography*, JOCKBIO, (Aug. 25, 2017).

<sup>ix</sup> *Id.*

<sup>x</sup> Smith earned one of the league's highest passer ratings on the way to taking the 49ers to the NFC championship game. BIOGRAPHY, *supra* note v.

<sup>xi</sup> *Id.*

xii *Id.*

xiii *Id.*

xiv JOCKBIO, *supra* note viii.

xv *Id.*

xvi Colin Kaepernick, PRO FOOTBALL REFERENCE, <https://www.pro-football-reference.com/players/K/KaepCo00.htm>.

xvii BIOGRAPHY, *supra* note v.

xviii PRO FOOTBALL REFERENCE, *supra* note xvi.

xix Cork Gaines, *Colin Kaepernick Received Less Than One-third of His 'Record' \$126 Million Contract*, BUSINESS INSIDER (Sept. 10, 5:37 PM), <https://www.businessinsider.com/colin-kaepernick-record-49ers-contract-2017-8>.

xx Doug Farrar, *Jim Harbaugh, San Francisco 49ers Mutually Agree to Part Ways*, SPORTS ILL. (December 29, 2014), <https://www.si.com/nfl/2014/12/28/san-francisco-49ers-jim-harbaugh-coaching-black-monday>.

xxi PRO FOOTBALL REFERENCE, *supra* note xvi.

xxii Cam Inman, *49ers' Colin Kaepernick Done for Season Because of Shoulder Injury*, MERCURY NEWS (August 11, 2016), <http://www.mercurynews.com/2015/11/21/49ers-colin-kaepernick-done-for-season-because-of-shoulder-injury/>.

xxiii PRO FOOTBALL REFERENCE, *supra* note xvi.

xxiv Nunzio Ingrassia, *Colin Kaepernick Discusses Why He Asked to be Traded in First Comments since Last Season*, FOXSPORTS.COM (June 9, 2016), <http://www.foxnews.com/sports/2016/06/09/colin-kaepernick-discusses-why-asked-to-be-traded-in-first-comments-since-last.html>.

xxv *Id.*

xxvi *See e.g.*, Jeff Risdon, *2016 NFL Preseason Preview: San Francisco 49ers*, REALGM (Aug. 25, 2016), <https://football.realgm.com/analysis/2834/2016-NFL-Season-Preview-San-Francisco-49ers>.

xxvii Adam Wells, *Colin Kaepernick Is Active vs. Green Bay Packers*, BLEACHER REPORT (last updated Aug. 26, 2016), <http://bleacherreport.com/articles/2643740-colin-kaepernick-injury-updates-on-49ers-stars-shoulder-and-return>.

xxviii Mark Sandritter, *A Timeline of Colin Kaepernick's National Anthem Protest and the Athletes Who Joined Him*, SBNATION (last updated Sept 25, 2017, 10:28 AM), <https://www.sbnation.com/2016/9/11/12869726/colin-kaepernick-national-anthem-protest-seahawks-brandon-marshall-nfl>.

xxix *Id.*

xxx *Id.*

xxxi *Id.*

xxxii Andrew Corsello, *Mr. Colin Kaepernick*, MR. PORTER, [HTTPS://WWW.MRPORTER.COM/JOURNAL/THE-LOOK/MR-COLIN-KAEPERNICK/535?CM\\_MMC=LINKSHAREUS-\\_-TnL5HPStWNw-\\_-CUSTOM-\\_-](https://www.mrporter.com/journal/the-look/mr-colin-kaepernick/535?CM_MMC=LINKSHAREUS-_-TnL5HPStWNw-_-CUSTOM-_-)



LINKBUILDER&RANMID=36592&RANEID=TnL5HPSTWNw&RANSITEID=TnL5HPSTWNw&SKIMLINKS.COM&SITEID=TnL5HPSTWNw-5UiLMX3.NA23IXE9Nf4VXQ.

xxxiii *Id.*

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