

MORE THAN AN ATHLETE: SPORT AS A PLATFORM FOR PROMOTING SOCIAL JUSTICE

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I. Introduction

Fox News Host Laura Ingraham advised Cleveland Cavaliers' LeBron James and Golden State Warriors' Kevin Durant to “shut up and dribble” following their sharp criticism of President Donald Trump.² In response, James posted a photo on Instagram depicting the phrase “I am more than an athlete.”³ The exchange underscores the national policy debate regarding the extent that professional athletes should utilize their platform to offer political commentary and discuss social injustice. This article will explore the history of athlete activism, including the recent phenomenon of kneeling in the NFL, and the legal rights of both public and private sports entities to silence their athletes. This article will suggest that private sports entities should support athletes who promote social justice.

II. A Brief History of Athlete Activism

Activism and athletics have been intertwined for at least the past half-century. Athlete activism has frequently been met with condemnation. On March 9, 1966 Muhammad Ali proclaimed, “My conscience won't let me go shoot my brother, or some darker people, or some poor hungry people in the mud for big powerful America,” as he refused to comply with his induction into the U.S. military to participate the Vietnam War.⁴ Ali's conscientious objection

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² Emily Sullivan, *Laura Ingraham Told LeBron James To Shut Up and Dribble; He Went To The Hoop*, NPR (February 19, 2018), <https://www.npr.org/sections/thetwo-way/2018/02/19/587097707/laura-ingraham-told-lebron-james-to-shutup-and-dribble-he-went-to-the-hoop>

³ https://www.instagram.com/p/BfSIOu_BMHF/?hl=en&taken-by=kingjames

⁴ Krishnadev Calamur, *Muhammad Ali and Vietnam*, THE ATLANTIC (June 4, 2016), <https://www.theatlantic.com/news/archive/2016/06/muhammad-ali-vietnam/485717/>

led to his arrest and conviction, but his punishment transcended the court room, “[Ali’s] license to box was suspended in New York...his title stripped...[and] Ali was unable to obtain a boxing license in the U.S. for the next three years.”⁵ Backlash to Ali was immense: as television host David Susskind submitted, ““He’s a disgrace to his country, his race, and what he laughingly describes as his profession.””⁶ Ali was eventually exonerated and returned to boxing, perhaps, however, at the cost of the prime years of his career.⁷

U.S. Olympic athletes John Carlos and Tommie Smith were met with condemnation following their iconic display at the 1968 Olympic Games.⁸ The duo “took off their shoes to protest poverty. They wore beads and a scarf to protest lynchings. And when the national anthem was played, they lowered their heads in defiance and raised their fists in a Black Power salute that rocked the world.” Both athletes were suspended from the U.S. Track team, and the pair returned to the United States facing death threats.⁹

In the first half of the next decade, tennis champion Billie Jean King used tennis as her platform to fight for gender equality and against pay disparity.¹⁰ King and the eight other members of what came to be known as the “Original Nine” were threatened by their respective tennis associations with suspension and expulsion after organizing the Virginia Slims Circuit in

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ DeNeen L. Brown, *They didn’t #TakeTheKnee: The Black Power protest salute that shook the world in 1968*, THE WASHINGTON POST (September 24, 2017), https://www.washingtonpost.com/news/retropolis/wp/2017/09/24/they-didnt-takeaknee-the-black-power-protest-salute-that-shook-the-world-in-1968/?utm_term=.7752f34c96a6

⁹ David Davis, *Olympic Athletes Who Took a Stand*, SMITHSONIAN (August 2008), <https://www.smithsonianmag.com/articles/olympic-athletes-who-took-a-stand-593920/>

¹⁰ Joshua Barajas, *Equal pay for equal play. What the sport of tennis got right*, PBS NEWS HOUR (April 12, 2016), <https://www.pbs.org/newshour/economy/equal-pay-for-equal-play-what-the-sport-of-tennis-got-right>

protest of pay disparity.¹¹ The United States Lawn Tennis Association suspended every woman who played in the Houston tournament before reinstating them weeks later.¹² Australians Judy Tegart-Dalton and Kerry Melville Reid were also suspended by their association and were forbidden to play in tournaments in Australia.¹³

The NBA suspended Mahmoud Abdul-Rauf in 1996 after he refused to stand for the national anthem¹⁴ Abdul-Rauf claimed that the anthem stood for oppression.¹⁵ In 2010 the Phoenix Suns donned jerseys with the team's name in Spanish to protest an Arizona immigration law.¹⁶ The WNBA fined the Indiana Fever, New York Liberty, and Phoenix Mercury teams \$5,000 each and assessed a \$500 penalty on each of the teams' players for wearing warm-up shirts that brought attention to police brutality.¹⁷ The WNBA later rescinded the fines after public outcry.¹⁸

The past two years have been especially rife with examples athlete activism. The Ross Initiative in Sports for Equality (RISE) founded by Miami Dolphins owner Stephen M. Ross

¹¹ Billie Jean King, *The Legacy of the Original 9*, THE PLAYERS' TRIBUNE, <https://www.theplayertribune.com/billie-jean-king-women-tennis-history-original-9/>

¹² Joanne Lannin, Billie Jean King: Tennis Trailblazer 59 (1999).

¹³ Viv Bernstein, *Rebels Who Changed a Sport Reunite*, THE NEW YORK TIMES (April 7, 2012), <http://www.nytimes.com/2012/04/08/sports/tennis/rebels-who-changed-womens-tennis-reunite.html>

¹⁴ Blake Thorkelson, *NBA star who protested the national anthem in 1996 discusses free speech and standing on principle*, YALENEWS (October 31, 2016), <https://macmillan.yale.edu/news/nba-star-who-protested-national-anthem-1996-discusses-free-speech-and-standing-principle>

¹⁵ *Id.*

¹⁶ Billy Witz, *'Los Suns' Join Protest, Then Stop the Spurs*, THE NEW YORK TIMES (May 5, 2010), <http://www.nytimes.com/2010/05/06/sports/basketball/06suns.html>

¹⁷ Nick Eilerson, *WNBA withdraws penalties for players' 'Black Lives Matter' protests*, THE WASHINGTON POST (July 23, 2016), https://www.washingtonpost.com/news/early-lead/wp/2016/07/23/wnba-withdraws-penalties-for-players-black-lives-matter-protests/?utm_term=.f76d33b3bf90

¹⁸ *Id.*

analyzed over 225 examples of athlete activism the latter half of 2016.¹⁹ RISE also released a report in 2017 surveying more than 1,100 examples of athlete activism.²⁰ These instances of athlete activism are highlighted by the NFL's kneeling phenomenon.

Colin Kaepernick began kneeling in the 2016 NFL preseason sparking a league wide movement.²¹ Kaepernick first began his awareness campaign by sitting on the bench during the anthem.²² However, after discussing the protest with teammate Eric Reid and retired Green Beret Nate Boyer, Kaepernick and Reid concluded that they would peacefully protest by kneeling, rather than sitting, as a respectful gesture.²³ Through the end of 2017, hundreds of athletes knelt during the anthem.²⁴ And while NFL Commissioner Roger Goodell has stated his expectation for the players to stand for the anthem, no player has been punished yet.²⁵

III. Legal Analysis

Then Massachusetts Supreme Court Judge Oliver Wendell Holmes famously opined in *McAuliffe v. City of New Bedford*, “[a person] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.”²⁶ It is generally understood that private-sector

¹⁹ The Ross Initiative in Sports for Equality (RISE), *From Protest to Progress: Athlete Activism in 2016* (2017), <https://www.risetowin.org/activismreport2016/>

²⁰ The Ross Initiative in Sports for Equality (RISE), *The Athlete's Quest for Social Justice: An examination of 2017 Goals And Impact* (2018), <http://www.risetowin.org/the-athletes-quest-for-social-justice-an-examination-of-2017-goals-and-impact/>

²¹ Eric Reid, *Eric Reid: Why Colin Kaepernick and I Decided to Take a Knee*, THE NEW YORK TIMES (September 25, 2017), <https://www.nytimes.com/2017/09/25/opinion/colin-kaepernick-football-protests.html>

²² *Id.*

²³ *Id.*

²⁴ Natalie Weiner, *The NFL's Last Men Kneeling*, B/R MAG (January 3, 2018), <http://bleacherreport.com/articles/2752195-the-nfls-last-men-kneeling>

²⁵ Ken Belson, *Goodell and N.F.L. Owners Break From Players on Anthem Kneeling Fight*, THE NEW YORK TIMES (October 10, 2017), <https://www.nytimes.com/2017/10/10/sports/football/nfl-goodell-anthem-kneeling.html>

²⁶ 155 Mass. 216, 220, 29 N.E. 517, 517 (1892)

employees do not have the constitutional right to free speech in the workplace, as the First Amendment protects citizens against government censorship.²⁷ The limits on speech by private employees are not absolute.²⁸ For example, private employees may engage in concerted speech to discuss issues related to employment.²⁹ Though, while the standard employment contract in the United States creates an “at-will” employment relationship,³⁰ contracts in professional sports leagues often have “for cause” termination clauses.³¹ But such provisions are “fickle” and may be invoked as a pretext for termination.³² To wit, an employer of a professional athlete can justify terminating a player by concluding that the athlete is no longer athletically capable despite the absence any objective measure of ability.³³ Thus, while a professional athlete can exercise their freedom of speech, by kneeling for instance, their employer may be free to terminate the athlete’s employment regardless of a “for cause” clause.³⁴

Whereas professional leagues may prohibit athletes from using the platform to promote social justice, student athletes at public institutions likely have a constitutional right to use sport to engage in social activism. Students do not generally have a constitutional right to participate in extracurricular athletics.³⁵ The Supreme Court has held that students that do participate in extracurricular athletics voluntarily submit themselves to higher degrees of regulation than students generally; “[s]omewhat like adults who choose to participate in a ‘closely regulated

²⁷ Cynthia L. Estlund, *Free Speech and Due Process in the Workplace*, 71 IND. L. REV 102, 116 (1995)

²⁸ Bobby Bramhall, *An Employment Stance on Taking A Knee*, 27 J. Legal Aspects Sport 109, 113 (2017)

²⁹ *Id.*

³⁰ Estlund, *supra* note 27, at 116

³¹ Bramhall, *supra* note 28, at 113

³² *Id.* at 114

³³ *Id.*

³⁴ *Id.* at 115

³⁵ *Lowery v. Euverard*, 497 F.3d 584, 588 (6th Cir. 2007)

industry,' students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges..."³⁶ But whether the NCAA or other public institutions can constitutionally ban speech or punish and remove athletes is context dependent. Regulation of students' speech must be "...justified by a showing that the students' activities would materially and substantially disrupt the work and discipline of the school."³⁷ It is unlikely that specific instances of speech by student athletes to raise awareness for a social cause can meet the requirements necessary to be constitutionally prohibited by public institutions under the First Amendment.

For example, in *V.A. v. San Pasqual Valley Unified Sch. Dist.*, the court granted a preliminary injunction against the defendant school district and its officers, enjoining policies that would restrict students from sitting or kneeling during the national anthem during athletic events.³⁸ The court acknowledged that the act of peaceful and silent kneeling during the national anthem to protest racial injustice is one that constitutes speech.³⁹ This form of speech, the court reasoned, is akin to the constitutionally condoned practice of students wearing black armbands to protest the Vietnam War.⁴⁰ Similarly, kneeling did not cause a substantial disruption school activities or the material interference of other students' rights, nor did the act threaten students' safety.⁴¹ Hence, the court held that Plaintiff was likely to succeed on the merits of a first amendment claim when applying *Tinker*.⁴²

³⁶ *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657 (1995)

³⁷ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969)

³⁸ No. 17-CV-02471-BAS-AGS, 2017 WL 6541447, at *9 (S.D. Cal. Dec. 21, 2017)

³⁹ *Id.* at *5

⁴⁰ *Id.* at *6

⁴¹ *Id.*

⁴² *Id.* at *7

IV. Discussion and Recommendations

While public institutions are likely constitutionally required to tolerate athlete activism, public institutions should *encourage* student athletes to express their opinions about social issues. The goals of public education are best served when schools encourage civic participation and political involvement.⁴³ Moreover, professional sports leagues should refrain from exercising any ability to prevent such speech.

The platform sports provide is a powerful tool. Athlete activism has a meaningful and tangible impact on the communities and social causes that athletes and sport entities choose to support. The Super Bowl 50 Host Committee helped raise over \$13 million to support more than half a million low-income families.⁴⁴ Colin Kaepernick donated \$1 million to various charities to serve the oppressed communities he strived to raise awareness for by kneeling.⁴⁵ His fellow athletes such as Stephen Curry, Kevin Durant, and Serena Williams matched Kaepernick's last \$100,000 of donations.⁴⁶ Following the kneeling protests, the NFL committed over \$90 million to social justice causes.⁴⁷ MLS' Diego Valeri has supported foster care families and domestic

⁴³ Laura Rene McNeal, *From Hoodies to Kneeling During the National Anthem: The Colin Kaepernick Effect and Its Implications for K-12 Sports*, 78 LA. L. REV. 145, 195 (2017)

⁴⁴ Sebastian Buck and Neill Duffy, *In 2018, Sports Can Build a Social Movement Better Than Politics*, VICE IMPACT (December 28, 2017), https://impact.vice.com/en_us/article/ne4ekg/in-2018-sports-can-build-a-social-movement-better-than-politics

⁴⁵ Daniel Rapaport, *Colin Kaepernick Donates Final \$10K, Completes Million Dollar Pledge*, SPORTS ILLUSTRATED (January 31, 2018), <https://www.si.com/nfl/2018/01/31/colin-kaepernick-usher-million-dollar-pledge-charity-donation>

⁴⁶ *Id.*

⁴⁷ Barry Wilner, *NFL Committing \$90 Million to Social Justice Causes*, AP (December 1, 2017), <https://www.usnews.com/news/sports/articles/2017-12-01/nfl-committing-90-million-to-social-justice-causes>

violence victims.⁴⁸ WNBA's Seattle Storm raised tens of thousands of dollars for Planned Parenthood after donating \$5 of every ticket sold for a July 2017 game.⁴⁹ The NHL's Hockey is For Everyone (HIFE) campaign annually donates \$50,000 to minority and low-income youth.⁵⁰ The NHL and its teams have also supported LGBTQ+ groups.⁵¹ The NBA and NBPA lead over 70 social justice initiatives.⁵² The NBA and its players have also helped to recruit over 50,000 volunteers to work with "My Brother's Keepers," a mentorship program started by former President Barack Obama.⁵³ These examples are merely a selection of numerous efforts designed to address social issues.

Teams and leagues should support social justice initiatives. The Ross Initiative in Sports for Equality asserts that while individual athletes' efforts to raise awareness are often met with criticisms, collective efforts by teams are met with public support.⁵⁴ The NBA's policies regarding athlete expression sets the standard for professional sport entities. Notwithstanding the NBA's general policy regarding athlete activism, the league prohibits kneeling during the

⁴⁸ Jules Boykoff, *Beyond Soccer, Timbers' Diego Valeri is dedicated to social justice*, STREET ROOTS NEWS (June 8, 2017), <http://news.streetroots.org/2017/06/08/beyond-soccer-timbers-diego-valeri-dedicated-social-justice>

⁴⁹ Emily Giambalvo, *Seattle Storm holds pregame rally supporting Planned Parenthood, amid mild protest*, THE SEATTLE TIMES (July 18, 2017)

<https://www.seattletimes.com/sports/storm/seattle-storm-holds-pregame-rally-supporting-planned-parenthood-amid-mild-protest/>

⁵⁰ Beth Maiman, *Hockey Is For Everyone helping to grow the game*, SPORTS ILLUSTRATED (March 22, 2016), <https://www.si.com/nhl/2016/06/28/nhl-hockey-is-for-everyone-inner-city-youth-programs>

⁵¹ Chris Hine, *NHL names LGBTQ ambassadors for each team; Andrew Shaw to represent Canadiens*, CHICAGO TRIBUNE (February 2, 2017), <http://www.chicagotribune.com/sports/hockey/blackhawks/ct-nhl-lgbtq-ambassadors-andrew-shaw-20170202-story.html>

⁵² Mia Hall, *Bigger Than Basketball: How the NBA is Supporting Social Justice*, NBC NEWS (February 16, 2017), <https://www.nbcnews.com/news/nbcblk/bigger-basketball-how-nba-supporting-social-justice-n717901>

⁵³ *Id.*

⁵⁴ RISE, *supra* note 19

national anthem.⁵⁵ NBA players' adherence to the anthem rule can be attributed to the league's player friendly policies. When LeBron James was asked if he would kneel for the anthem, he explained that his voice was more powerful than taking a knee.⁵⁶ This is because the NBA's policies amplify its athletes' voices.

Commissioner Adam Silver has publically encouraged NBA players to participate as citizens and assured that such participation does not put the players careers at risk.⁵⁷ Silver acknowledged that part of the culture of the league includes the obligation to speak about issues of importance.⁵⁸ Thus, When the NBA emphasized the national anthem rule by memo, the league also suggested steps to develop impactful community programs.⁵⁹ One of the key messages outlined in the memo was that the “[NBA] support[s] and encourage[s] players to express their views on matters that are important to them.”⁶⁰ Embracing athlete activism does not seem to have hindered the NBA's success. In April 2017, the NBA reported that it eclipsed its record for

⁵⁵ Steve Aschburner, *NBA commissioner expects players to stand during anthem*, NBA.COM (September 28, 2017), <http://www.nba.com/article/2017/09/28/nba-commissioner-adam-silver-expects-players-stand-during-anthem#/>

⁵⁶ Gabriel Burns, *LeBron talks equality, kneeling: 'My voice is more powerful than my knee'*, DAYTON DAILY NEWS (September 25, 2017), <https://www.daytondailynews.com/sports/lebron-talks-equality-kneeling-voice-more-powerful-than-knee/MpWB217glFICGXtQSQXtYP/>

⁵⁷ Ahiza Garcia, *The NBA is not afraid to on social justice*, CNNMONEY (February 19, 2018), <http://money.cnn.com/2018/02/16/news/companies/nba-adam-silver-player-activism/index.html>

⁵⁸ *Id.*

⁵⁹ Tim Bontemps, *NBA memo reinforces national anthem rule and encourages community engagement*, THE WASHINGTON POST (September 30, 2017), https://www.washingtonpost.com/news/sports/wp/2017/09/29/nba-memo-makes-clear-players-and-coaches-must-stand-for-national-anthem/?utm_term=.6aaa8601ff01

⁶⁰ *Id.*

regular-season attendance for the third straight year.⁶¹ The NBA's online retail sales were also up 15% from the previous year.⁶²

The NBA's recent success casts doubt on claims by many that athlete activism, and particularly kneeling during the anthem, is the cause of the NFL's decline in viewership.^{63, 64, 65,}

⁶⁶ The claim is inconclusive. There are many variables to consider when analyzing the NFL's TV viewership numbers such as the quality of match, star power of the players, and the television window each game is broadcasted in.⁶⁷ Additionally, millions of households that have participated in the "cord-cutting revolution."⁶⁸ While there is a general downward trend in NFL viewership across the four main television windows, ratings are also down across all television programming except for cable news.⁶⁹ Hence, the NFL is not the only league experiencing a

⁶¹ Official Release, *NBA breaks attendance record for third straight season*, NBA
<http://www.nba.com/article/2017/04/13/nba-breaks-all-time-attendance-record-third-straight-season>

⁶² *Id.*

⁶³ Darren Rovell, *Antehm Protests led poll of reasons viewers tuned out*, ESPN (July 27, 2017),
http://www.espn.com/nfl/story/_/id/20171611/national-anthem-protests-no-1-reason-viewers-tuned-nfl-games

⁶⁴ Michael McCarthy, *Shock poll: A third of NFL viewers boycotting games because of Colin Kaepernick-led protests*, SPORTING NEWS (October 5, 2016),
<http://www.sportingnews.com/nfl/news/nfl-tv-ratings-rasmussen-reports-poll-colin-kaepernick-anthem-protest-reaction-effect/95jdoch1ngj103xvbkllcbvk>

⁶⁵ Thomas Franck, *Wall Street's NFL worries mount as viewership slides with tough weeks ahead*, CNBC (November 16, 2017), <https://www.cnbc.com/2017/11/16/nfl-worries-climb-with-tough-weeks-ahead.html>

⁶⁶ Frank Pallotta, *'Sunday Night Football' takes a big hit as NFL ratings still struggle*, CNNMONEY (December 15, 2017), <http://money.cnn.com/2017/12/14/media/nfl-ratings-sunday-night-football/index.html>

⁶⁷ Derek Thompson, *Yes, NFL Viewership Is Down. No, It's Not All Trump*, THE ATLANTIC (September 27, 2017), <https://www.theatlantic.com/business/archive/2017/09/nfl-ratings-trump-anthem-protests/541173/>

⁶⁸ *Id.*

⁶⁹ *Id.*

decline in viewership. NASCAR's TV ratings were down 17% last year.⁷⁰ NASCAR's viewership dropped despite threats by owners that any employee of their teams that protests the anthem would be fired, and despite NASCAR's protest free events.^{71, 72} Viewership for college football broadcasts on CBS, ABC, NBC, and ESPN declined in 2017.⁷³ English Premier League ratings for games broadcasted in the United States were also down in 2017.⁷⁴ No causal conclusion can be drawn between athlete activism and viewership decline.

V. Conclusion

Sport and athlete activism have long been intertwined. The debate about the role of athletes in public discourse continues through today. Regardless of the ability of sport entities to prevent athletes from engaging in such dialogue, sport entities would be best served by allowing athletes to communicate freely on issues that are important to them. It is especially important that stakeholders within sport entities adhere to a unified message, encouraging the platform to be used to promote social justice.

⁷⁰ Lindsay Gibbs, *NASCAR provides the ultimate proof that the NFL's rating decline isn't because of politics*, THINKPROGRESS (November 17, 2017), <https://thinkprogress.org/nascar-provides-the-ultimate-proof-that-the-nfls-rating-decline-isnt-because-of-politics-8825ba535701/>

⁷¹ Michelle R. Martinelli, *NASCAR's reaction to the national anthem debate was disappointing – but not surprising*, USA TODAY SPORTS (September 26, 2017), <http://ftw.usatoday.com/2017/09/nascar-national-anthem-protest-nfl-dale-earnhardt-jr-donald-trump-richard-petty-childress-team-owners-fire-drivers-confederate-flag>

⁷² Dan Gelston, *Trump 'proud of NASCAR' for protest-free New Hampshire race*, CHICAGO TRIBUNE (September 25, 2017), <http://www.chicagotribune.com/sports/breaking/ct-nascar-national-anthem-protest-donald-trump-20170925-story.html>

⁷³ Richard Deitsch, *Media Circus: College Football Ratings Are on the Decline*, SPORTS ILLUSTRATED (December 10, 2017), <https://www.si.com/tech-media/2017/12/10/college-footballs-declining-ratings-2017-media-circus>

⁷⁴ Richard Deitsch, *Media Circus: How NBC Plans to Revive Premier League Ratings for 2017 Season*, SPORTS ILLUSTRATED (August 10, 2017), <https://www.si.com/tech-media/2017/08/10/media-circus-nbc-premier-league-tv-schedule-preview>