

TeachableMoment (/teachable-moment)

> Athletes protest racial inequality: Exploring views

Athletes protest racial inequality: Exploring views

October 10, 2017 Marieke van Woerkom (/marieke-van-woerkom)

In this activity, students discuss widespread protests by NFL and other athletes against racial injustice, consider tweets for and against these protests, and discuss how one group of high school athletes decided to act.

Current Issues (/current-issues)

Kaepernick (/kaepernick), Sports (/sports-0), Protests (/protests)

A Backgrounder for the Teacher

This lesson has students consider the widespread protests by athletes against racial injustice. The following background information about this ongoing controversy may be helpful.

NBA and WNBA players have protested police brutality and injustice since 2014, wearing shirts during warm-up games with texts like "I can't breathe"—the last words of the unarmed Eric Garner (<http://www.morningsidecenter.org/teachable->

moment/lessons/our-lessons-garner-and-brown-collected) before he was choked to death by police in Staten Island, NY, in July 2014. Athletes have expressed their concern to the media as well. Football players have made the "hands up don't shoot" gesture before their games – a reference to Mike Brown, the young man who was shot and killed by police in Ferguson, Missouri, in August 2014. Some have worn shirts or shoes with hand-written messages protesting injustice.

During the summer of 2016, entire women's basketball teams and their owners came out in support of the Black Lives Matter movement. On July 9, Minnesota Lynx players showed up in warm-up shirts printed with "Black Lives Matter," "Change Starts with Us," "Justice and Accountability," an image of the Dallas police shield, and the names of Alton Sterling and Philando Castile, the most recent Black victims of fatal police shootings at that time. Some WNBA teams have worn solid black warm-up shirts to protest shootings by and against police officers. WNBA teams have been fined for their protests, as have the individual players. WNBA President Lisa Border explained, "We are proud of WNBA players' engagement and passionate advocacy for non-violent solutions to difficult social issues but expect them to comply with the league's uniform guidelines."

On August 26, 2016, Colin Kaepernick, then quarterback of the San Francisco 49ers, sat down during the singing of the national anthem before the start of a football game. Many people were upset by this and thought it was unpatriotic and disrespectful to the people of the military who fought and died for our country.

Kaepernick explained that he was protesting the treatment of people of color by the police and the government. "I am not going to stand up to show pride in a flag for a country that oppresses black people and people of color," Kaepernick told reporters. Soon after starting his protest, Kaepernick was joined by teammate Eric Reid. They discussed ways of using their platform as professional athletes in the NFL to speak for those who are voiceless. They talked things through with Nate Boyer, a retired Green Beret and former NFL player and came to the conclusion that they should kneel instead of sit during the anthem as a peaceful protest. They choose to kneel because it's a respectful gesture. Reid shared with the New York Times (https://www.nytimes.com/2017/09/25/opinion/colin-kaepernick-football-protests.html?_r=0) that he remembers thinking their posture was like a flag flown at half mast to mark a tragedy.

In the end Kaepernick paid a high price for taking a "stand" for what he believed in. He wasn't drafted by any of the NFL teams during the 2017 season, and many people believe it was because of his controversial protest. Ultimately football is a business and many of the (mostly white) fans are upset by the protest. They feel it is disrespectful and unpatriotic.

Even without Kaepernick in the NFL, the protests continued and grew, especially after President Trump's controversial tweets early in the 2017 season, in which he scolded athletes for taking a knee and demanded respect for "our country, flag and national anthem." "They're ruining the game," Trump said. "That's a total disrespect of our heritage. That's a total disrespect of everything that we stand for." Trump suggested that NFL owners fire players who kneel during the anthem and that fans consider walking out "when somebody disrespects our flag." The president and several athletes went back and forth on Twitter, calling each other names, even adding obscenities at times.

The protests by Colin Kaepernick and other professional athletes against racial injustice and police shootings of unarmed black men have gotten the attention of many young people.

Some students have mounted protests of their own by taking a knee or otherwise protesting during the national anthem or pledge of allegiance. Although some school administrators have tried to stop these student protests (<http://www.pbs.org/newshour/updates/schools-students-protesting-national-anthem/>), the law is clear: Students' right to free speech cannot be curtailed unless it disrupts the educational process. (For more, see this 1½ minute Education Week (<http://www.youtube.com/watch?v=u-L14WBwTOE>) video.)

The protests are also, of course, a teachable moment. As JoAnn Bartoletti (<http://blog.nassp.org/2017/09/29/prohibiting-student-protest-challenges-the-very-purpose-of-school/>), executive director of National Association of Secondary School Principals, writes: "A student's taking a knee can trigger a crucial conversation about the nature of protest, about what taking a knee represents, and even about why it might offend some observers. But students must first know that school is a safe place where they can learn to amplify their voices courageously and constructively. They need to be empowered to have those conversations now so those skills are well practiced when they participate in a democracy."

Gathering

Read the following quote from September 25, 2017, out loud:

I realize that men and women of the military go out and sacrifice their lives and put their selves in harm's way for my freedom of speech and my freedoms in this country, and my freedom to take a seat or take a knee, so I have the utmost

respect for them, and I think what I did was taken out of context and spun a different way.

Ask students if they know who might have said this and what it is in reference to. Elicit and explain that the quote is by Colin Kaepernick, the Super Bowl quarterback who, while playing for the San Francisco 49ers last year, joined a protest movement against racial inequality and police brutality that had been spreading across professional sports since 2014.

The image of Kaepernick taking a knee during the playing of the national anthem has been widely published, tweeted, and interpreted in many different ways. It has triggered a wide variety of responses. Some people agree with him. Others are angry at him (and other athletes) for expressing themselves on social justice issues in this way.

Explain that in today's lesson plan we'll explore some of the reasons why people are protesting, as well as people's reactions to those protests. We'll watch a video of a group of teenage athletes discussing these issues in their locker room.

Tweets in Response to NFL Protests

Invite students to look at the tweets in **this handout**.

(/sites/default/files/files/Tweets%20on%20NFL%20protests.pdf) In pairs, ask students to discuss, based on these tweets, what they think the response has been to protests by Kaepernick and other athletes.

Note: We've left out tweets that use obscene and disparaging language.

Next, facilitate a large group discussion using some or all of the following questions:

- What are the different perspectives on the protests reflected in these tweets?
- What other perspectives on the issue are you aware of?
- What are your thoughts and feelings about the protests in the NFL and beyond?
- Do you know how Kaepernick came up with the idea of taking a knee during the national anthem and what it represents for him? (If needed, use the backgrounder at the start of this lesson to add to what students know about

Kaepernick's protest.)

- Does learning the rationale behind Kaepernick's (and Eric Reid's) protest change in any way your thoughts and feelings about what's been happening in the NFL?
-

Video: How one high school team took on the issue

Play the following clip from Vice News, either in two separate segments or all the way through:

<https://news.vice.com/story/colin-kaepernick-national-anthem-protest-high-school-football> (<https://news.vice.com/story/colin-kaepernick-national-anthem-protest-high-school-football>)

Setting the stage, part 1 (in the video, 0:00–2:15 min)

- What are your thoughts and feelings about the video?
- What did the students at Berkeley High say about their school (in what is considered to be one of the most liberal cities in the country)?
- What did the students say about racism at their school?
- What was a response from the student body to those acts of racism so far?

Football team meeting and protest, part 2 (in the video, 2:15–7:01)

- What were some of the personal stories the football players shared in the meeting?
- What did the students say the protest would be about?
- What did some of the students suggest the team could do to join the national protest that Colin Kaepernick was involved in?
- Why did students say it was important for the team to do this together?

- How did the coach feel about the protest at the start, and then after the team meeting?
 - How does the coach feel about blocking out the outside world, and proceeding as if BLM and police shootings weren't happening?
 - Who stepped up as leaders in this piece? How?
 - Who stepped up to support them in their efforts? How?
-

Closing

Talk about a time in your life when you took a leadership role, or a time in your life when you were inspired by someone else and supported them in their efforts. What was that like? What were you able to get done? Is there anything you'd be interested in doing as a result of today's lesson?

Related Lessons

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June 8, 2017 Mark Engler (/mark-engler)

ACT UP, 30 Years On (/teachable-moment/lessons/act-30-years)

It's the 30th anniversary of ACT UP. In this lesson, students learn about and discuss the activist organization whose bold, creative organizing forced government action to combat HIV/AIDS. .

Activism (/activism-0), LGBTQ+ (/lgbtq), Protests (/protests)

CURRENT ISSUES (/CURRENT-ISSUES)

January 22, 2017 Laura McClure (/laura-mcclure)

Trump Inaugurated, Women & Allies March (/teachable-moment/lessons/trump-inaugurated-women-allies-march)

Students hear and discuss excerpts from President Trump's inaugural speech, and discuss the Women's March on Washington and its sister marches across the world.

Women's Issues (/womens-issues), Women's History Month (/womens-history-month), Donald Trump (/donald-trump), Protests (/protests)

CURRENT ISSUES (/CURRENT-ISSUES)

December 6, 2016 Rob Lerman (/rob-lerman)

Surprise Victory at Standing Rock (/teachable-moment/lessons/surprise-victory-standing-rock)

Students read about and discuss the movement by the Standing Rock Sioux and their allies to stop a pipeline - and the Army Corps of Engineers' decision to reverse its approval for the pipeline section, for now.

Native Americans (/native-americans), Protests (/protests), Environment (/environment), Organizing (/organizing)

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VIEW PRIVACY POLICY

Dear Littler: Can We Discipline An Employee Who "Took a Knee" During the Anthem?

BY KEVIN KRAHAM ON OCTOBER 16, 2017

Dear Littler: I work for a prominent company in a small city here in the Hoosier State, and we are very involved in our local community. We sponsor a corporate softball team, and last night one of our team members "took a knee" during the national anthem before a game. His supervisor asked if the player can be disciplined for this conduct or at least transferred out of the supervisor's department. I understand the supervisor's frustration, but I don't know how to react. Can we do that? I just can't believe we have to deal with this situation.

—*Irritated in Indiana*

Dear Irritated in Indiana,

Lately it seems like everything is overtly political: from hurricane response to late-night comedy to sports. Your coworker chose to emulate various football players and other celebrities who have kneeled during or before the national anthem at an event, to make a public statement. For better or worse, employers face new challenges in our current, divisive climate, as politics worms its way into workplaces across the country.¹

Your question raises several legal issues, which we will discuss briefly below. As with many sensitive employment issues, the ultimate question before your Indiana employer is not whether it can punish this employee—but whether it should.

Taking a Knee

Before we jump into the legal complexities, let's review the backdrop for your team member's decision to kneel. As you may already know, this particular form of protest began in August 2016 when NFL quarterback Colin Kaepernick sat on the bench during the national anthem for a couple of preseason games. After meeting with at least one military veteran, Kaepernick switched from sitting to kneeling during the anthem.²

Traditionally, kneeling is considered a sign of respect. (Just ask anyone who watches Game of Thrones!) Major religions incorporate genuflecting or sustained kneeling into services or other rituals. And protestors during the 1960s civil rights movement also occasionally knelt during protests. Moreover, it is not unprecedented historically for athletes to chime in on civil rights issues. Two African-American medalists at the 1968 Olympics held up fists on the podium during the playing of the U.S. national anthem. Before becoming a United Nations Messenger of Peace, helping negotiate the release of American hostages in Iraq and receiving the Presidential Medal of Freedom, boxer Muhammed Ali was an extremely controversial activist in the civil rights movement.

As for the present day, Kaepernick has repeatedly explained that he knelt to draw attention to the problems of police brutality and racial injustice in America.³ Throughout last season, a few other football players and fellow athletes (at all levels and in various sports) followed suit. Participation in this form of protest picked up significantly a few weeks ago, however, after President Trump criticized protesting athletes and suggested they should be fired. In response to those statements, more athletes began to "take a knee" or link arms, either to show solidarity with Kaepernick's original message, to assert their rights to free speech, or both.

To be sure, President Trump is not the athletes' only critic. Other voices, too, have disapproved of their choice to protest during the playing of the national anthem. Despite the athletes' insistence that the protest is not intended to be discourteous, but to highlight important civil rights issues, some Americans perceive the refusal to stand for the anthem as disrespectful to the flag and/or the U.S. military. While your question does not recount all of the details, presumably your supervisor shares that view. Whether or not the supervisor actually disputes the athletes' (and coworker's) underlying message, or simply their means of protesting, you and your employer are caught in the crossfire.

The First Amendment

For many people, the first thing that pops to mind when we talk about public protests is the First Amendment of the U.S. Constitution. Among other things, the First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble."

The First Amendment secures many essential rights for Americans—but it does not apply to private employers. The Bill of Rights, which includes the First through the Tenth Amendments, restricts a *government's* ability to interfere with individual liberties, such as freedom of speech, privacy, and religious exercise. It does not restrain private citizens or organizations. While your softball player has a First Amendment right to engage in peaceful public protest without government infringement, the Constitution does not protect him from discipline at work.⁴

State Laws Protecting Employee Activities Outside the Workplace

Although the First Amendment may not apply, there are other laws that may affect an employer's response to this politically- and emotionally-charged situation.

Certain states prohibit employers from taking adverse actions against employees (*i.e.*, firing, demoting, etc.) because of their lawful, off-duty conduct—including political activity.⁵ In California, for example, employers may not coerce employees, discriminate or retaliate against them, or take any adverse action because they have engaged in political activity.⁶ Similar prohibitions exist in other states, including Colorado, Louisiana, New York, South Carolina, and Utah. Connecticut actually extends the First Amendment protection of free speech to the employees of private employers.⁷

Meanwhile, the District of Columbia lists “political affiliation” as a protected category under the human rights law, along with race, religion, and similar categories, such that private employers generally cannot discriminate against or harass individuals on the basis of their endorsement of a particular party.⁸ Absent some exception, the proposed discipline of an anthem-kneeling-employee because of lawful, off-the-clock political expression could be illegal in certain locations.⁹

That being said, Indiana does not offer such protections for employees engaging in lawful political activity outside the workplace. The Indiana statute restricts certain employer conduct only where related to an employee’s firearms ownership or use of tobacco products.¹⁰

National Labor Relations Act (NLRA)

Thus far, we’ve seen that neither the U.S. Constitution, nor state law, appear to prevent your employer from granting the supervisor’s request to punish the protesting employee. We would be remiss to overlook the NLRA, however, which potentially applies to the employee in question.

The National Labor Relations Act (NLRA)—which generally covers both unionized and non-unionized non-supervisory employees working in the private sector—provides under Section 7 that “[e]mployees shall have the right . . . to engage in . . . concerted activities for the purpose of . . . mutual aid or protection.”¹¹ The U.S. Supreme Court has interpreted this provision to mean that employees may organize as a group to “improve their lot” outside of the employer-employee relationship.¹² Essentially, employees may engage in protected political advocacy so long as it relates to labor or working conditions; “advocacy” can mean contacting legislators, testifying before agencies, or joining protests and demonstrations. Employers are generally barred from retaliating against employees who participate in these types of political activities outside the workplace.

While the connection is not always obvious between the political advocacy and the benefit to workers, the General Counsel for the National Labor Relations Board (NLRB) has offered guidance that includes the example of an employee attending a demonstration in favor of immigration reform as being protected by Section 7. In the example offered by the NLRB, because some employment verification legislation could be deemed to chill even legal hiring activity, a demonstration against immigration reform sufficiently relates to employees’ “mutual aid or protection” to be protected activity.¹³ According to the NLRB, the inquiry focuses on “whether there is a direct nexus between the specific issue that is the subject of the advocacy and a specifically identified employment concern of the participating employees.”¹⁴

In the anthem-kneeling situation, it is hard to tell whether an adequate nexus exists between the protest and a "specifically identified employment concern." The protest did not begin, for example, in opposition to a particular employment-related legislative bill or in support of any specific reform. A more detailed analysis would be necessary to fully evaluate if this employee's conduct qualifies for Section 7 protection—but for now, we will assume that it does not.

Additional Legal and Practical Implications

Even if the U.S. Constitution, state law, and the NLRA may not impact your decision, there are a few more important legal and practical concerns.

First, you should consider consulting existing company policies to see whether they touch on this scenario. Does your employer maintain a policy, for example, limiting political discussions in the workplace?¹⁵ If so, is it regularly enforced? Would the policy extend to this softball player's conduct on the corporate team outside of work hours? Even if it applies, would discipline be warranted under the policy? In assessing options, your employer should act consistently with any applicable policy, as well as with prior responses to any analogous situations.

Second, employers in this position should remain cognizant of their obligations under federal and state antidiscrimination laws, such as Title VII. If the protesting employee falls within a protected class (e.g., he is African-American), and is subjected to an adverse employment action, he may feel that he has been discriminated against because of his race or another unlawful factor and may pursue legal action. No matter how defensible your employer's position may seem, it still has to deal with the consequences.

Finally, and aside from any legal ramifications, your employer should carefully consider what message it chooses to send about this employee's conduct—and about broader issues, including the rights of its employees and how it values its workers. It is clear that your employees, like so many Americans, feel very strongly about the issues associated with the ongoing protests. Choosing one side over another will likely make matters worse. Because of this delicate situation, your company must decide, as an employer, what it wants to achieve.

Additional questions to consider, before taking any further action, might include:

- Is there a specific reason, perhaps based on the nature of your business, that disciplining or reassigning the employee because of his protest might be either appropriate or inappropriate?
- Would it be useful to speak with the employee to find out his precise rationale for taking a knee at the game? Would he be willing to share his perspective with others, including perhaps the supervisor or their department?
- Likewise, would it be helpful to speak with the supervisor about his or her viewpoint? Would he or she be willing to share it with others?
- Might there be any other reasons, beyond the anthem incident, underlying the supervisor's interest in disciplining or reassigning the employee? Have there been prior incidents between these coworkers, or others, that should be factored in your analysis?

- How would you justify any discipline or reassignment to the employee? Will the employer listen to his position if he challenges the decision?
- How would you explain any discipline or reassignment to other employees—and your community—particularly since the decision is not based on the protesting employee's work performance?
- How would you explain to the supervisor a decision not to discipline or reassign the protestor? Can you bring the supervisor on board with the employer's decision, no matter what it is?
- Are there other options for engaging in or accommodating the debate? While it may be uncomfortable, you might need to think outside the box on this issue. Depending on your circumstances, it may be in your employer's best interest to address "the elephant in the room," rather than let the situation fester.

To the extent possible, try to keep your personal politics out of the assessment. At the end of the day, your employer should strive to make an informed, deliberate business decision, regardless of the political context.

Employers, do you have a vexing workplace issue? Send your question to DearLittler@littler.com.

¹ See Kevin Kraham, *Addressing Post-Election Tensions in the Workplace*, Littler Insight (Nov. 18, 2016).

² See Sean Gregory, *All Across the Country, Athletes Are Fueling a Debate About How America Defines Patriotism*, Time, Sept. 22, 2016.

³ Kaepernick was not signed to play in the NFL this season, an absence that has raised its own questions.

⁴ Note that public employees (*i.e.*, those that work for a governmental entity) are entitled to some First Amendment protections in their workplace because their employer is a government. Special rules may also apply to employees who have written contracts with their employers or are subject to a collective bargaining agreement, depending on the terms of those contracts.

⁵ Zoe Argento, *Dear Littler: Can A Boss Fire Someone for Off-Duty Political Activities?*, Dear Littler (Jan. 20, 2017).

⁶ Cal. Lab. Code §§ 98.6(a), 1102. The law also covers employees who are family members with people who have engaged in conduct protected by the law. Cal. Lab. Code § 98.6(e).

⁷ Conn. Gen. Stat. § 31-51q. Some of these laws provide exceptions for public or religious employers, or for off-duty employee conduct that creates a material conflict with respect to the employer's business interests.

⁸ D.C. Code §§ 2-1401.01, 2-1401.02, 2-1402.11.

⁹ For purposes of this discussion, we assume the employee's conduct is "off-duty" and constitutes "political activity" within the meaning of such laws. Moreover, "taking a knee" during the playing of the national anthem is entirely legal. While a federal code suggests how citizens should behave during the anthem, it is not criminal; it is purely informational. 36 U.S.C. § 301 (stating that individuals in uniform "should give the military salute," service members not in uniform may choose to do so, and "other persons present should face the flag and stand at attention with their right hand over the heart"). The First Amendment prohibits the government from enforcing these guidelines against private citizens. Indeed, it is well-settled that individuals have a Constitutional right to burn the flag in protest, if they choose to do so. *Texas v. Johnson*, 491 U.S. 397 (1989).

¹⁰ For example, a private employer in Indiana cannot require an applicant or employee to divulge whether he or she is a firearms owner or condition employment on his or her agreement to forego such ownership. Ind. Code § 34-28-8-6.

¹¹ 29 U.S.C. § 157.

¹² *Eastex, Inc. v. N.L.R.B.*, 437 U.S. 556, 564–65 (1978).

¹³ Ronald Meisburg, N.L.R.B., *Guideline Memorandum Concerning Unfair Labor Practice Charges Involving Political Activity*, Memorandum GC 08-10 at 8 (July 22, 2008).

¹⁴ *Id.* at 7.

¹⁵ If so, or if your employer contemplates adopting such a policy, be aware that such policies are generally permissible—so long as they are tailored to purely political speech and comply with guidance issued by the NLRB. The NLRB has asserted that workplace rules or policies that dissuade non-supervisory employees from exercising their rights to advance their "mutual aid or protection" can run afoul of Section 7. See Richard F. Griffin, Jr., N.L.R.B., *Report of the General Counsel Concerning Employer Rules*, Memorandum GC 15-04 (Mar. 18, 2015); see also Ilyse Schuman & William E. Trachman, *Election 2016: Political Speech and Activity in the Workplace*, Littler Insight (Sept. 29, 2016).

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The New York Times

How N.F.L. Sponsors Have Reacted to 'Take a Knee' Protests

By **Maggie Astor**

Sept. 27, 2017

The N.F.L. has been loud lately. Its sponsors, not so much.

The debate over players' kneeling during the national anthem — simmering since last year, when the San Francisco 49ers' Colin Kaepernick knelt to protest police brutality against African-Americans — boiled over last week when, during a speech in Alabama, President Trump declared that players like Mr. Kaepernick ought to be fired. Far from discouraging the protests, Mr. Trump's remarks galvanized them, and on Sunday, players nationwide knelt or locked arms in a show of solidarity against the president.

In one of his signature Twitter outbursts, Mr. Trump called on football fans to boycott the N.F.L. It is hard to say whether the fans are on board, but the league's sponsors evidently are not. Few of them have commented on the protests at all — perhaps reflecting a calculation that this is a controversy best kept out of — and what response they have given has consisted, for the most part, of bland statements.

Here's a roundup of advertisers' reactions, most of which come from public statements made by the companies. Anheuser-Busch and Bose spoke with Yahoo Finance.

NIKE: "Nike supports athletes and their right to freedom of expression on issues that are of great importance to our society."

ANHEUSER-BUSCH: "At Anheuser-Busch we have a long heritage of supporting the institutions and values that have made America so strong. That includes our armed forces and the national anthem as well as diversity, equality and freedom of speech. We proudly employ over 1,100 military veterans and we work every day to create an inclusive environment for all of our employees. Because only together can we achieve our dream of bringing people together for a better world."

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BOSE: “Bose was founded in the United States, and our world headquarters is in Massachusetts, where it’s been for over 50 years. It’s now surrounded by several other Bose facilities — and at all of them, at all times, we proudly fly the American flag. It’s a symbol of our great country which protects the freedom for every person to express their views. We respect that freedom, whether we agree with those views or not.”

FORD: “We respect individuals’ rights to express their views, even if they are not ones we share.”

HYUNDAI: “We stand for and respect individuals’ freedoms to express their First Amendment rights in any peaceful manner in which they choose. We also stand for inclusion, freedom and all that represents those values.”

UNDER ARMOUR: The company “stands for the flag and by our athletes for free speech, expression and a unified America.”

The N.F.L.’s other sponsors include Barclays, Bridgestone, Campbell’s, Castrol, Dannon, DMI, Extreme Networks, FedEx, Frito-Lay, Gatorade, Marriott, Mars, Microsoft, Nationwide, News America, Papa John’s, PepsiCo, Procter & Gamble, Quaker, USAA, Verizon and Visa.

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The NFL's New Anthem Policy and Free Speech in the Workplace

By **Grant Alexander and Sean Crain** | July 17, 2018 at 06:51 PM[f](#) [in](#) [twitter](#) [G+](#) <http://www.almreprints.com>

Photo: John Bazemore/AP

In September 2016, San Francisco 49ers quarterback Colin Kaepernick took a knee during the national anthem before the 49ers played the San Diego Chargers. This led to a firestorm of press coverage, national debate and involvement from politicians, talking heads, team owners and National Football League (NFL) players as other NFL players and athletes around the country also began to protest during pre-game ceremonies. As these events transpired, national press outlets and talking heads alike claimed that, as “employees” of their teams, professional athletes had a right to free speech in the workplace, i.e., players were permitted under the law to protest during the national anthem and, more importantly, could not be fined or otherwise disciplined by their employers (the teams and the NFL) for

engaging in the exercise of free speech in their “workplace.” Unfortunately, this argument exhibits a fundamental misunderstanding of the law on free speech.

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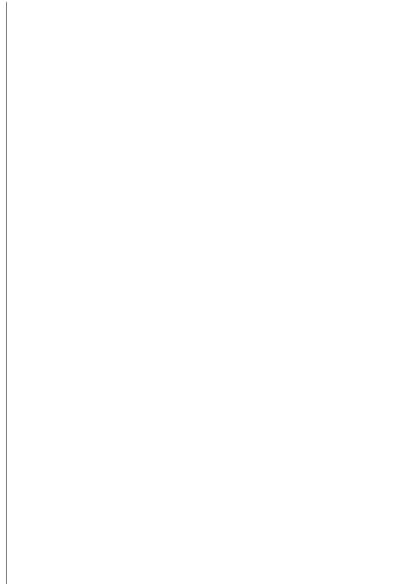
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JOSEPH KIMBLE | JULY 31, 2018

Textualism, the theory of interpretation espoused by current and former members of the U.S. Supreme Court and many other state and federal judges, focuses intensely on the words and syntax of a law to decide cases.

MGM's Suits Against Las Vegas Shooting Victims Are Unprecedented, Lawyers Say (/2018/07/18/mgms-suits-against-las-vegas-shooting-victims-are-unprecedented-lawyers-say/)

[AMANDA BRONSTAD \(/AUTHOR/PROFILE/AMANDA BRONSTAD/\)](#) | JULY 18, 2018

MGM Resorts International has filed nine lawsuits across the country against 2,500 victims of the Oct. 1, 2017, mass shooting in Las Vegas in an unprecedented move that had plaintiffs lawyers accusing the entertainment conglomerate of forum shopping and defense lawyers scratching their heads.

Assistant SG Rachel Kovner Channels Scalia at Confirmation Hearing for EDNY Seat (/2018/08/01/assistant-sg-rachel-kovner-channels-scalia-at-confirmation-hearing-for-edny-seat/)

[MARCIA COYLE \(/AUTHOR/PROFILE/MARCIA COYLE/\)](#) | AUGUST 01, 2018

Text and original public meaning were the most important tools in interpreting the Constitution, said Rachel Kovner, an assistant to the U.S. solicitor general who's a Trump nominee for the U.S. District Court for the Eastern District of New York. Kovner appeared Wednesday on Capitol Hill for her confirmation hearing.

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NFL Sponsors Treading Lightly On 'Take A Knee'

The recent tumult has divided Americans in unprecedented fashion, pitting not just politicians and sportspeople against each other, but putting fans, veterans and activists among others at odds as well.



DIANA MARSZALEK // 02 OCT 2017 // 5:09PM GMT



As unprecedented social activism plays out on American football fields, sports marketing leaders say sponsors are wisely treading lightly before taking stances on the combustible issues surrounding the movement.

"The most important things brands have to do is listen to to what's being said in the public marketplace and make sure it's aligned with their core



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values,” said Joe Favorito, a sports marketing vet who’s handled communications for the New York Knicks and Philadelphia 76ers among others.

“You are dealing with people’s emotions and you have to weigh both sides. This is going to be a long-term process,” he said. “You have not seen one brand saying they are leaving the NFL or the NBA or the WNBA. It’s not in the conversation.”

Favorito’s remarks last week came amidst highly charged discord surrounding the recent groundswell in athletes’ activism, most notably among NFL players -- specifically kneeling during the U.S. national anthem.

The Take a Knee movement started last year when Colin Kaepernick, then a San Francisco 49er, knelt in protest of police brutality. But President Trump, in a Sept. 22 speech, inflamed passions on both sides of the contentious issue, by attacking demonstrators, calling on NFL owners to fire players who don’t stand for the anthem.

The sports world responded in a myriad of ways. The Sunday following Trump’s attack, the Dallas Cowboys, along with owner Jerry Jones, linked arms and took a knee on the field before the anthem was played. Most of the Pittsburgh Steelers, meanwhile, skipped the pre-game ceremony altogether.

Although big-league sports are no stranger to politicking (think icons like Mohammed Ali and Billie Jean King), the recent tumult has divided Americans in unprecedented fashion, pitting not just politicians and sportspeople against each other, but putting fans, veterans and activists among others at odds as well.

Opponents are accusing each other of being racist, and anti-military. The movement has started permeating other sports organizations from NASCAR to the Oakland A’s.

Whether Kaepernick’s original message withstands the cacophony remains to be seen.

“The biggest danger is people speaking without being informed,” Favorito said. “The biggest issue we have is people shouting not listening.”

So it is not surprising that the brands backing the NFL, as well as particular teams and players, so far are playing this one safe and keeping relatively quiet – and likely will continue to as long as they’re able, sports marketers said.

For instance, the majority of sponsors have limited their actions to issuing statements, which isn’t necessarily equivocal to taking a stand. Ford, Under Armour and Anheuser-Busch affirmed their beliefs in players’ rights to express themselves, but also nodded to patriotism and the flag. Nike and Hyundai were more direct in backing players.

Industry watchers say sponsors’ ability to do that so far has been boosted

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by the apparent lack of acrimony on the issue within the NFL itself, and that there is no obviously egregious act, like a violent crime, in play.

“This has been pretty easy for the sponsors to deal with,” said Levick chairman and CEO Richard Levick. “The show of unity between players and owners (the weekend of Sept. 23) really took any heat off the sponsors.”

The Take a Knee movement is also still in its infancy, making brands wary of taking any drastic action before knowing its potential impact. “You have not seen one brand saying they are leaving the NFL, or the NBA or the WNBA,” Favorito said. “It’s not even in the discussion.”

Yet how long the NFL’s corporate backers will be able to remain at the periphery of the goings-on depends on a range of factors, including whether President Trump continues to inflame controversy surrounding the football league, Levick said.

At the same time, we’re living in an age when consumers simply expect big business to take responsibility for their alliances and the like, said Finsbury VP Jeff Heckelman.

“Amid the rise of social activism within the sports world, it seems that fans and others are increasingly looking for brands to have a voice and to participate in issues in an authentic way – to the point where they might even be at risk by staying on the sidelines,” he said. “As NFL sponsors are brought into this debate, it’s important for them to demonstrate that they are thoughtful and respectful without alienating customers – or employees – who may have particularly strong feels on the issue.”

Levick also noted that while the NFL may be unscathed by this particular controversy, the league is fraught with other challenges that threaten its reputation, from concussions to where it really stands on players Taking a Knee.

“They NFL got a pass, but it is very true that the NFL has still not hired back Colin Kaepernick,” Levick said.

“To those who say keep the politics out of the NFL, they are living in a fantasy.”

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Taking A Knee: The Rights Of Students To Peaceful Protest

Silent protest is a longstanding tactic used to call attention to issues and highlight the need to address injustice. Such protests, including sit-ins at segregated lunch counters during the civil rights movement of the 1960s and today's football players taking a knee during the national anthem, can produce powerful images and raise strong emotions.

When the silent protest is by a student – kneeling before the national anthem, refusing to stand for the pledge of allegiance – teachers and administrators often find that they lack guidance on how they can and how they should respond. There are two different questions at play. First, can school personnel discipline or reprimand a student for protesting? A school's ability to do this is clearly limited by a student's constitutional rights. Second, and perhaps more challenging, how can schools take a moment of protest and turn it into an opportunity for learning and dialogue?

The ACLU believes that both questions need to be answered, and is doing so in related advisories. This one addresses the rights of students to free speech and freedom of religion, and what actions they are entitled to take without fear of punishment, harassment, or interference. The related advisory "From Protest to Dialogue" provides suggestions and examples of best practices on how schools can advance learning and dialogue around highly emotionally charged issues like race and racism.

The landmark U.S. Supreme Court ruling in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), provides a clear and eloquent discussion of the First Amendment rights of students to silent protest. It came in the midst of the Vietnam War. Emotions were running high on both sides when school administrators learned that some students intended to wear black armbands to school to protest the war. The administration immediately adopted a rule banning black armbands. Three students wore armbands to school and were suspended from school. The Supreme Court found that action to be an unconstitutional violation of the students' First Amendment rights.

The Court confirmed that the wearing of armbands, like kneeling during a ceremony or pledge, is the type of symbolic speech that is protected by the First Amendment.^[1] It rejected the school's argument that suppressing the speech was necessary to prevent disruption. The Court powerfully stated that:

It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate..^[2]

. . . .

[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the

majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, ... and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

[3]

. . . .

. . . .

When [a student] is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without 'materially and substantially interfer(ing) with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others.[4]

The holding of *Tinker* that peaceful protest and symbolic speech are protected, and that students may not be punished because the administration disapproves of the message or fears the debate that will ensue, has been reaffirmed repeatedly by the courts.[5] Particularly important are the reaffirmations that students may not be excluded from their classrooms or otherwise harassed because they choose to exercise their rights of free speech.[6]

Although many of the current protests relate primarily to social and political issues, it is important to remember that students similarly have a constitutional right to freedom of religion and can refuse to participate in activities that are contrary to their beliefs; the school must accept the student's declaration of those beliefs.[7]

This doesn't mean that students are not subject to any restrictions. Active disruption such as shouting down a teacher or damaging property can clearly be regulated,[8] as can speech promoting illegal drug use[9] as well as lewd and indecent speech.[10] Peaceful political speech, however, even on topics of great sensitivity, is not only protected in public schools, it is essential to the training of our future leaders.

'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' [Shelton v. Tucker, \(364 U.S. 479\)](#), at 487 (81 S.Ct. 247, 5 L.Ed.2d 231). The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection.' [11]

Schools thus must respect and protect speech, even on difficult topics.

At the same time, schools should foster civic competence and responsibility.^[12] That includes fostering the ability to engage in thoughtful and respectful discussion on difficult issues that often give rise to silent protest. Suggestions on how to move from protest to dialogue can be found in our [Curriculum Resources](#).

[1] *Tinker*, 393 U.S. at 505.

[2] *Id.* at 506.

[3] *Id.* 508-09.

[4] *Id.* 512-13.

[5] *See, e.g.*

[6] *See, e.g., Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1268–69, 1276-77 (11th Cir. 2004); *Frain v. Baron*, 307 F.Supp. 27, 33–34 (E.D.N.Y. 1969).

[7] “The First Amendment thus guarantees to the plaintiffs the right to claim that their objection to standing is based upon religious belief, and the sincerity or reasonableness of this claim may not be examined by this or any other Court.” *Shelton v. Fannin*, 221 F.Supp 766, 755 (D. Ariz. 1963), *citing United States v. Ballard*, 322 U.S. 78 (1944), *Cantwell v. Connecticut*, 310 U.S. 296 (1940). *See also, West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

[8] *See, e.g.,*

[9] *Morse v. Frederick*, 551 U.S. 393 (2007).

[10] *Bethel School District v. Fraser*, 478 U.S. 675 (1986).

[11] *Tinker*, 393 U.S. at 512, quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

[12] No Child Left Behind Act of 2001, Subpart 3, sec. 2341-43.





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