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THE EYES OF THE WORLD ARE WATCHING YOU NOW:¹
COLIN KAEPERNICK'S COLLUSION SUIT
AGAINST THE NFL

I. YOU CAN BLOW OUT A CANDLE:²
KAEPERNICK'S PROTEST FOR SOCIAL JUSTICE

Colin Kaepernick's ("Kaepernick") silent protest did not flicker into existence out of nowhere; his issues are ones that have a long history, not just in the United States, but around the world.³ In September 1977, South African police officers who were interrogating anti-apartheid activist Steven Biko became incensed when Biko, forced to stand for half an hour, decided to sit down.⁴ Biko's decision to sit led to a paroxysm of violence at the hands of the police.⁵ Eventually, the authorities dropped off Biko's lifeless body at a prison hospital in Pretoria, South Africa.⁶ Given the likely effect the news of Biko's death would have on a volatile, racially-charged scene of social unrest, the police colluded amongst themselves to hide the truth of what had happened in police room 619.⁷ Biko's decision to sit, his death, and the police's collusion to cover

1. See PETER GABRIEL, *BIKO* (Geffen Records 1980) (referencing social justice concerns brought to light by death of Steven Biko in South African prison hospital).

2. See *id.* (noting difficulties presented to authorities in their attempts to contain growing social justice movements).

3. See Billy Witz, *This Time, Colin Kaepernick Takes a Stand by Kneeling*, N.Y. TIMES (Sept. 1, 2016) <https://www.nytimes.com/2016/09/02/sports/football/colin-kaepernick-kneels-national-anthem-protest.html> [<https://perma.cc/FQ33-8ERR>] (discussing Kaepernick's desire to bring attention to social justice issues). For further discussion of social justice protests throughout history, see *infra notes* 4–11.

4. See TRUTH AND RECONCILIATION COMM'N, *Amnesty Hearing Transcripts: Port Elizabeth – 1: Killing of Steve Biko*, 3 (Sept. 8-11, 1977), *available at* <http://www.justice.gov.za/trc/amntrans/amntrans-pdfs/trc-amntrans-am1997-PortElizabeth-01.pdf> [<https://perma.cc/G294-MDFR>] (describing beginning of Steven Biko's interrogation in police room 619).

5. See *id.* at 3–5 (describing multiple scuffles where "Mr Biko's head hit the wall," and he was forced back into standing position, despite evidence "that [Biko] was probably not compos mentes").

6. See *id.* at 5 ("[H]e was driven to Pretoria where the parties arrived on the morning—early hours of the 12th of September. He was lodged in Pretoria Central Prison, where he died on the same day.").

7. See *id.* ("[O]nce the news of his death became known, Goosen gathered all the policemen on the next Saturday and statements were prepared. These statements were false in many aspects Subsequent to that, in a further investigation, the policemen stuck to the story and also at a later inquest hearing this false evidence was perpetuated.").

up Biko's murder led to increased negative focus on the apartheid government, including songs memorializing Biko's death.⁸ At his funeral, an image of a clenched black fist topped Biko's coffin.⁹ The symbol of a raised black fist gained international prominence ten years earlier when United States Olympic athletes Tommie Smith and John Carlos raised their fists in silent protest atop the winners' podium during the national anthem.¹⁰ Their decision to stand, fists raised high, also led to immediate negative consequences, including death threats.¹¹

Fast forward nearly half a century, and Alex Smith, the San Francisco 49ers starting quarterback, suffered a concussion and left the game, opening up a spot for a promising backup named Colin Kaepernick.¹² At the time Kaepernick took over, the San Francisco 49ers held one of the better records in the National Football Conference ("NFC").¹³ Kaepernick's start was inauspicious; he managed to lead the team to a tie.¹⁴ Two games later, Kaepernick's play improved so much that he remained the starter over a healthy Alex Smith.¹⁵ The decision of 49ers' Head Coach Jim Harbaugh worked

8. See PETER GABRIEL, *supra* note 1 (commemorating Biko's death and subsequent rise of anti-apartheid movement in South Africa).

9. See Queen Mentor, *Remembering Steve Bantu Biko: Here's Malema's Touching Tribute + 10 Lesser-Known Facts*, BUZZ SOUTHAFRICA, <https://buzzsouthafrica.com/steve-bantu-biko/> [<https://perma.cc/ME32-C4RG>] (last visited Jan. 10, 2019) (noting "Biko's coffin had been decorated with the motifs of a clenched black fist, the African continent, and the statement 'One Azania, One Nation'").

10. See Ben Cosgrove, *The Black Power Salute That Rocked the 1968 Olympics*, TIME (Sept. 27, 2014), <http://time.com/3880999/black-power-salute-tommie-smith-and-john-carlos-at-the-1968-olympics/> [<https://perma.cc/98BZ-8YR8>] (describing mixed reaction to athletes' silent protest, where "millions of their fellow Americans were outraged").

11. See *id.* ("[Athletes] were vilified at home for their stand. They were suspended from the U.S. team. They received death threats.").

12. See Marc Sessler, *Alex Smith Suffers Concussion For San Francisco 49ers*, NFL (Nov. 11, 2012), <http://www.nfl.com/news/story/0ap1000000093305/article/alex-smith-suffers-concussion-for-san-francisco-49ers> [<https://perma.cc/BCL5-Y5M2>] (reporting NFL quarterback Alex Smith hit during play, was in discomfort, left game later, and was replaced by backup, Colin Kaepernick).

13. See Ann Killion, *Alex Smith's Concussion Hurts 49ers*, S.F. GATE (Nov. 11, 2012), <http://www.sfgate.com/49ers/article/Alex-Smith-s-concussion-hurts-49ers-4028469.php> [<https://perma.cc/PWJ2-LZX3?type=image>] ("And the 49ers missed a golden opportunity to solidify their position as one of the top teams in the NFC.").

14. See *id.* ("Instead of asserting themselves as elite, the 49ers now have a weird little appendage on the end of their record: 6-2-1. They have a 1 1/2 -game lead over Seattle. They have a cloud of doubt about just how good they really are.").

15. See Robert Klemko, *It's Official: Kaepernick Named Starter*, USA TODAY (Nov. 28, 2012), <https://www.usatoday.com/story/sports/nfl/2012/11/28/kaepernick-named-starter-by-niners/1732503/> [<https://perma.cc/MWB7-HDFN>] (quoting Coach Harbaugh, who stated: "We've got two quarterbacks that we feel great about

out, and Kaepernick led the 49ers to Super Bowl XLVII, ultimately losing to the Baltimore Ravens, 34-31.¹⁶ The 49ers failed to repeat their success in subsequent years with Kaepernick as their quarterback, ultimately leading to his benching in favor of backup quarterback Blaine Gabbert in early November 2015.¹⁷

Race relations deteriorated in America in 2015.¹⁸ Tensions rose in Ferguson, Missouri when prosecutors declined to indict the police officer involved in the 2014 killing of Michael Brown.¹⁹ Brown's death led to widespread unrest, introducing the phrase, "hands up, don't shoot."²⁰ Protests also arose in Baltimore, after Freddie Gray died from fatal injuries he sustained in the back of a police paddy wagon.²¹ Additionally, increasing attention on college

as a starting quarterback . . . [b]oth have earned it. What tips the scales is Colin has the hot hand, so we'll go with Colin").

16. See Associated Press, *Baltimore Ravens Survive San Francisco 49ers' Rally To Win Super Bowl XLVII*, NFL (Feb. 4, 2013), <http://www.nfl.com/news/story/0ap1000000135382/article/baltimore-ravens-survive-san-francisco-49ers-rally-to-win-super-bowl-xlvii> [https://perma.cc/2UP5-PGBP] ("The Ravens survived the frenzied comeback by the 49ers for a thrilling 34-31 win Sunday night and their second NFL championship in 11 years.").

17. See Darin Gantt, *Report: 49ers Have Benched Colin Kaepernick For Blaine Gabbert*, PRO FOOTBALL TALK (Nov. 2, 2015), <http://profootballtalk.nbcsports.com/2015/11/02/report-49ers-have-benched-colin-kaepernick-for-blaine-gabbert/> [https://perma.cc/CX67-Z6PD] ("This is how bad things have gotten in San Francisco for Colin Kaepernick. The 49ers have decided Blaine Gabbert is a better option right now.").

18. See Tyler Bishop, *2015: The Year in Race Relations*, THE ATLANTIC (Dec. 29, 2015), <https://www.theatlantic.com/politics/archive/2015/12/2015-the-year-in-race-relations/422019/> [https://perma.cc/3LWL-PNG2] ("The year's events exposed the pervasive nature of racial tension in the United States.").

19. See *id.* ("U.S. race relations were on a downward slide as 2015 began. The previous November, a Ferguson, Missouri, grand jury declined to indict Darren Wilson in the fatal shooting of Michael Brown. The case propelled the issue of police violence—and racism—into the national spotlight. But it was just one of many.").

20. See Nick Gass, *'Hands Up, Don't Shoot' Ranked One of Biggest 'Pinocchios' of 2015*, POLITICO (Dec. 14, 2015), <https://www.politico.com/story/2015/12/hands-up-dont-shoot-false-216736> [https://perma.cc/N5QN-G9UU] ("The phrase took off more than a year ago, becoming a rallying cry for protesters and others trying to draw attention to the death of Brown and other African Americans at the hands of police officers.").

21. See Meghan Keneally, *Freddie Gray's Death Ruled a Homicide, Officers Face Charges*, ABC NEWS (May 1, 2015), <http://abcnews.go.com/US/freddie-grays-death-ruled-homicide-states-attorney/story?id=30728026> [https://perma.cc/KSN3-W8FC] (detailing how police "officers are alleged to have repeatedly ignored Gray's pleas for help and that officers allegedly bound his arms behind his back and put his legs in clamps but did not secure him within the police wagon with a seat belt, which is a violation of Baltimore police policy"); see also *Microaggression*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/microaggression> [https://perma.cc/LUM3-TGU6] (last visited Jan. 10, 2019) (defining term as: "[A] comment or action that subtly and often unconsciously or unintentionally

campuses focused on “microaggressions” resulting in students speaking out about perceived low-level but pervasive injustices and biases.²² Against this background of increased racial tensions, Kaepernick, who was still a sidelined quarterback for the San Francisco 49ers, decided to sit on the bench while the rest of the team stood for the national anthem during the first two pre-season games of the 2016 season.²³ His decision to sit gained attention when he told the media he had done so in response to perceived police brutality in American society.²⁴

Kaepernick’s protest, and his reason for it, drew attention to a divide among Americans and arguably exacerbated that divide.²⁵ Some commentators have gone so far as to speculate this divide in America could lead to another Civil War.²⁶ Kaepernick’s decision to sit, then to kneel, drew criticism from the President of the United States.²⁷ Even National Football League Commissioner,

expresses a prejudiced attitude toward a member of a marginalized group (such as a racial minority”).

22. See Bishop, *supra* note 18 (“Racial tension also reached a tipping point on college campuses. ‘The Coddling of the American Mind,’ ignited discussion about colleges shielding students from reality. Conor Friedersdorf wrote about how ‘microaggressions’ on campus resulted in ‘The Rise of Victimhood Culture.’ He also examined the relationship between increased racial sensitivity and censorship in ‘The New Intolerance of Student Activism.’”).

23. See Mark Sandritter, *A Timeline of Colin Kaepernick’s National Anthem Protest and the Athletes Who Joined Him*, SBINATION (Sept. 11, 2016), <https://www.sbnation.com/2016/9/11/12869726/colin-kaepernick-national-anthem-protest-seahawks-brandon-marshall-nfl> [<https://perma.cc/7PCJ-KA5T>] (“Kaepernick made headlines when he sat during the 49ers third preseason game, but he also sat during the first two games, according to Mike Garafolo of NFL Network. Kaepernick wasn’t in uniform and didn’t play during the first two games.”).

24. See *id.* (quoting Kaepernick, who stated: “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”).

25. See John Kushma, *The Kaepernick Effect Further Divides Our Country*, THE HILL (Sept. 9, 2016), <http://thehill.com/blogs/pundits-blog/celebrity-news/295240-the-kaepernick-effect-further-divides-our-country> [<https://perma.cc/DFM3-QUKZ>] (“Notwithstanding his right to free speech and public protest demonstration, and a justified cause, his action could be an incendiary catalyst toward something that is already out of control in America.”).

26. See *id.* (“Come November, either Donald Trump or Hillary Clinton may have to deal with a national problem more serious than ISIS, Russia, health care, taxes, or sexual assault in the military. They may have another Civil War on their hands.”).

27. See Around the NFL Staff, *Donald Trump on Kaepernick: Find Another Country*, NFL.COM (Aug. 29, 2016), <http://www.nfl.com/news/story/0ap3000000692256/article/donald-trump-on-kaepernick-find-another-country> [<https://perma.cc/K5GJ-QCB2>] (“‘I have followed it and I think it’s personally not a good thing. I think it’s a terrible thing, and you know, maybe he should find a country that works better for him, let him try, it’s not gonna happen,’ Trump told The

Roger Goodell, weighed in on Kaepernick's decision to protest.²⁸ Despite Kaepernick's new role drawing attention to social justice causes, he also remained a National Football League ("NFL" or "the League") quarterback, hoping to land a starting job.²⁹ Kaepernick failed to do so, and later opted out of his contract, becoming a free agent.³⁰ Since that time, Kaepernick has not played another down of professional football.³¹ On October 15, 2017, Colin Kaepernick commenced an enforcement proceeding under the NFL's Collective Bargaining Agreement ("CBA"), alleging that NFL teams had colluded amongst themselves or with the League to prevent him from working in the NFL.³²

This Comment examines Kaepernick's collusion suit against the NFL in light of Kaepernick's specific circumstances, previous controversies involving other players, and applicable laws and rules.³³ Part II examines Kaepernick's career, his protest, and the

Dori Monson Show on Monday, per BuzzFeed."). Kaepernick initially sat on the bench during preseason games before deciding to kneel. *See id.*

28. *See* USA TODAY Sports, *Roger Goodell On Colin Kaepernick: 'We Believe Very Strongly in Patriotism in the NFL'*, USA TODAY, <https://www.usatoday.com/story/sports/nfl/2016/09/07/goodell-doesnt-agree-with-kaepernicks-actions/89958636/> [<https://perma.cc/7CWF-JME5>] (last updated Sept. 7, 2016, 6:13 PM) ("I think it's important if they see things they want to change in society, and clearly we have things that can get better in society, and we should get better. But we have to choose respectful ways of doing that so that we can achieve the outcomes we ultimately want and do it with the values and ideals that make our country great.").

29. *See* Patrick Holloway, *Colin Kaepernick, Blaine Gabbert in Open Competition For Starting Job*, *Jeff Driskel Not Part of It*, NINERS NATION (May 8, 2016), <https://www.ninersnation.com/2016/5/8/11614262/kaepernick-and-blaine-gabbert-are-in-an-open-competition-for-starting> [<https://perma.cc/VTE8-LLPB>] ("In case you didn't know, the starting quarterback for the San Francisco 49ers hasn't been decided upon. That decision comes with Kaepernick v. Gabbert.").

30. *See* Associated Press, *Colin Kaepernick Opts Out of Contract, Becomes Free Agent*, ESPN (Mar. 3, 2017), http://www.espn.com/nfl/story/_/id/18818589/colin-kaepernick-opts-contract-becomes-free-agent [<https://perma.cc/6RLM-75NJ>] ("Colin Kaepernick is a free agent after opting out of his San Francisco 49ers contract Friday.").

31. *See* Marcus Gilmer, *Colin Kaepernick Still Hasn't Been Signed, So People Are Rallying In Front of NFL Headquarters*, MASHABLE (Aug. 8, 2017), <http://mashable.com/2017/08/08/colin-kaepernick-rally/#QqHFZG3NFmqI> [<https://perma.cc/6APB-P2QU>] ("As a new NFL season approaches, an old controversy is being given new life as quarterback Colin Kaepernick still doesn't have a team.").

32. *See* Claimant Colin Kaepernick's Demand for Arb. at 2, *Colin Kaepernick v. Nat'l Football League, et al.*, (2017) [hereinafter *Arb. Demand*], available at <https://www.scribd.com/document/361682669/2017-10-15-Kaepernick-Arb-Demand-002> [<https://perma.cc/EKE4-3WML>] ("Respondents NFL and NFL Team Owners have 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.").

33. For further discussion of Kaepernick's suit, other controversies, and the laws and rules that apply, see *infra* notes 37–279.

response; his Arbitration Demand; the Collective Bargaining Agreement's terms; prior landmark NFL antitrust cases; and other NFL players shunned by the NFL.³⁴ Part III analyzes the effects of distractions on NFL teams' performance; economic effects of the controversy on the NFL and individual teams; the precedents set by other shunned players; the effect of previous antitrust suits; and the evidence Kaepernick would need to prevail in his suit.³⁵ Part IV assesses the strength of Kaepernick's suit against the NFL and ultimately concludes that Kaepernick's suit will need additional evidence, not yet brought to light, in order to demonstrate collusion, given precedent and antitrust rulings.³⁶

II. BUT YOU CAN'T BLOW OUT A FIRE:³⁷ KAEPERNICK'S QUIET PROTEST AND THE SUBSEQUENT BONFIRE

Colin Kaepernick's decision to protest police brutality issues via sitting and then kneeling ignited strong opinions about his behavior, with some, including retired NFL players, derisively calling him a "social justice warrior."³⁸ In Kaepernick's Demand for Arbitration, he alleges his inability to find work is due to collusion in the NFL.³⁹ However, others insist there are non-collusive reasons for Kaepernick's inability to find work.⁴⁰ Either way, Kaepernick is not the first outspoken NFL player the NFL and its member teams have

34. For further discussion of issues related to Kaepernick's suit, see *infra* notes 37–198.

35. For further discussion of the effects of distractions on NFL teams and the efforts to mitigate the same, see *infra* notes 199–279.

36. For further discussion of the strengths of Kaepernick's suit, as well as the author's conclusion, see *infra* notes 281–292.

37. See PETER GABRIEL, *supra* note 1 (referencing wave of internal and international attention focused on South Africa's apartheid regime).

38. See Jon Levine, *Fox News Guest Rips Colin Kaepernick As 'Social Justice Warrior' Who 'Doesn't Fit' With Capitalism*, THE WRAP (Dec. 20, 2017), <https://www.thewrap.com/fox-news-guest-colin-kaepernick-is-social-justice-warrior-who-doesnt-fit-with-capitalism/> [https://perma.cc/LQE8-47TV] (reporting former NFL player Burgess Owens "dismissed Kaepernick as a 'social justice warrior' who was not in-step with capitalism in America. '[Kaepernick's] actually where he is today because he couldn't keep his politics out of the game. These guys are very into what they're doing. They're social justice warriors. That doesn't fit with the capitalist community we have now,' said Owens. The term "social justice warrior" (SJW), was widely popularized during the 2014 Gamergate uproar over sexism in video game culture. It is often used as a pejorative term for individuals advocating a certain flavor of progressive beliefs online—particularly on Tumblr").

39. See Arb. Demand *supra* note 32 (outlining Kaepernick's allegations).

40. For further discussion of performance and team-unity reasons Kaepernick cannot find work, see *infra* notes 86–109 and accompanying text.

shunned due to off-field issues.⁴¹ Kaepernick's case for collusion under the CBA requires, at a minimum, coordination between two NFL teams or one team and the League.⁴² However, courts have often decided past lawsuits examining the extent to which the NFL operates as a single entity or as a collection of thirty-two separately owned teams on narrow grounds.⁴³

A. You Gotta Waken Up:⁴⁴ Colin Kaepernick's Career and First Amendment Protests

1. *Put Me In, Coach, I'm Ready to Play*⁴⁵

Colin Kaepernick's big break came in 2012, when he replaced San Francisco 49ers starting quarterback Alex Smith, who suffered a concussion in the middle of game ten that season.⁴⁶ While the game disappointingly ended in a tie, Kaepernick played well enough and showed enough promise to retain the starting job even after Alex Smith recovered from his concussion.⁴⁷ Capitalizing on a good start to the season, Kaepernick led the 49ers through the play-

41. For further discussion of other players who were not employed by any NFL teams following either their words or actions, see *infra* notes 150–198 and accompanying text.

42. See COLLECTIVE BARGAINING AGREEMENT (Aug. 4, 2011), Article 17, §1 [hereinafter CBA] available at <https://nflabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf> [<https://perma.cc/CR9E-ZW2C>] (prohibiting Clubs from “enter[ing] into any agreement, express or implied, with the NFL or any other Club, its employees or agents to restrict or limit individual Club decision-making” regarding decisions to negotiate, offer Contracts or submit Offer Sheets, among other actions).

43. For further discussion of selected NFL antitrust cases, see *infra* notes 117–149 and accompanying text.

44. See PETER GABRIEL, *supra* note 1 (referencing need for increased attention to social justice concerns brought to light by death of Steven Biko in South African prison hospital).

45. See JOHN FOGERTY, *CENTERFIELD* (Warner Bros. Records 1985) (imploping coach to put player in game).

46. See Kevin Lynch, *Alex Smith Out With a Concussion* S.F. GATE (Nov. 11, 2012), <http://blog.sfgate.com/49ers/2012/11/11/alex-smith-out-with-a-concussion/> [<https://perma.cc/A9TY-X62P>] (“In a possible dramatic turn to this season, Alex Smith exited the Rams’ game because of a concussion and did not return. Smith took a big hit from Rams’ linebacker Jo-Lonn Dunbar in the first quarter after he scrambled from the pocket. However, Smith didn’t exit until the middle of the second quarter. . . . However, once Kaepernick took the field, Smith went down in a crouch and then went to the sideline where he was attended to by doctors and trainers.”).

47. See Bucky Brooks, *Colin Kaepernick Over Alex Smith: Jim Harbaugh Elevates 49ers*, NFL (Nov. 29, 2012), <http://www.nfl.com/news/story/0ap1000000102766/article/colin-kaepernick-over-alex-smith-jim-harbaugh-elevates-49ers> [<https://perma.cc/XR9P-62T2?type=image>] (listing three reasons for retaining Kaepernick over Smith, including Kaepernick’s greater ability to run, Kaepernick’s perceived greater arm strength, and Kaepernick’s ability to avoid blitzes).

offs and into Super Bowl XLVII, before ultimately losing to the Baltimore Ravens in a high scoring affair.⁴⁸ The loss came despite a stretch where Kaepernick led the 49ers to seventeen unanswered points to nearly take the lead.⁴⁹ His performance in the Super Bowl also drew comparisons to NFL legend, Steve Montana.⁵⁰ One year later, during the 2013-2014 season, the Kaepernick-led 49ers advanced to the NFC Championship, where they lost to the ultimate Super Bowl winners, the Seattle Seahawks.⁵¹ Following two strong seasons, Kaepernick signed a new contract with San Francisco.⁵² Extending through the 2020 season, the contract provided Kaepernick with the highest amount of guaranteed money ever offered in an NFL contract to that date.⁵³ That season also represented the high-water mark of Kaepernick's career.⁵⁴

One year later, the team failed to make the postseason, with some ranking Kaepernick's play as "average."⁵⁵ Kaepernick's strug-

48. See *Super Bowl 2013: Ravens Withstand 49ers Rally and Power Outage, Surge to Championship*, CBS NEWS, <https://www.cbsnews.com/news/super-bowl-2013-ravens-withstand-49ers-rally-and-power-outage-surge-to-championship/> [https://perma.cc/V2M2-JKFF] (last updated Jan. 18, 2016) ("A power outage at the Super Bowl put the nation's biggest sporting event on hold for more than a half-hour Sunday, interrupting an otherwise electric, back-and-forth game that ended with Joe Flacco and the Baltimore Ravens as NFL champions thanks to a 34-31 victory over the San Francisco 49ers.").

49. See *id.* ("Moments later, lights lining the indoor arena faded, making it difficult to see. When action resumed, Colin Kaepernick and the 49ers scored 17 consecutive points, getting as close as 31-29.").

50. See Louis Bien, *Super Bowl XLVII: Colin Kaepernick Shines in Losing Effort*, SBINATION (Feb. 4, 2013, 12:45 PM), <https://www.sbnation.com/nfl/2013/2/4/3949488/super-bowl-2013-colin-kaepernick-49ers> [https://perma.cc/ML5W-MD8V] ("Kaepernick's numbers put him in good company. He and former 49ers quarterback Joe Montana are the only two signal callers to pass for more than 300 yards and run for more than 50 in a Super Bowl.").

51. See *Schedules: Post Season 2013*, NFL, <http://www.nfl.com/schedules/2013/POST> [https://perma.cc/43UY-K9WQ] (last visited Jan. 19, 2018) (showing post-season results for 2013 season).

52. See Louis Bien, *Colin Kaepernick, 49ers Agree to Contract Extension*, SBINATION (June 4, 2014, 3:54 PM), <https://www.sbnation.com/nfl/2014/6/4/5780322/colin-kaepernick-49ers-contract-extension> [https://perma.cc/6EH7-NV98] (discussing Kaepernick's contract).

53. See *id.* ("Colin Kaepernick and the San Francisco 49ers have agreed to a contract extension through the 2020 season, according to reports. Per NFL.com's Ian Rapoport, the deal is worth \$126 million with \$61 million guaranteed. That \$61 million is the most ever guaranteed in an NFL contract.").

54. See Mike Tanier, *Five Years After Stirring Emotions at SB XLVII, Kaepernick Still Looms Large*, BLEACHER REP. (Feb. 4, 2013), <https://bleacherreport.com/articles/2756256-five-years-after-stirring-emotions-at-sb-xlvii-kaepernick-still-looms-large> [https://perma.cc/676H-FVV7] (describing 2013 as Kaepernick's high-water mark).

55. See David Fucillo, *PFF Considers How Close the 49ers Were to Being Super Bowl Contenders*, NINERS NATION (Feb. 4, 2015, 2:45 PM), <https://www.ninersnation.com/2015/2/4/7980791/pff-considers-how-close-the-49ers-were-to-being-super>

gles continued, eventually leading to his benching in the middle of the 2015 season.⁵⁶ He sat on the bench through the rest of the season after he injured his non-throwing shoulder.⁵⁷ Because the injured shoulder was on his non-throwing arm, some speculated his poor performance was partly responsible for Kaepernick's decision to undergo surgery in the middle of the year, rather than to wait for the off-season.⁵⁸ He eventually had three surgeries.⁵⁹

2. *Benching Leads to Sitting, Leads to Kneeling*

Kaepernick began 2016 on the downside of a quarterback competition with his 2015 mid-season replacement, Blaine Gabbert ("Gabbert").⁶⁰ Some saw Kaepernick's poor 2014 statistics as a drag on his chances to win the starting position back from Gabbert.⁶¹ It was also during the first two pre-season games, with Gabbert starting and Kaepernick neither dressing nor playing, that Kaepernick

bowl-contenders [<https://perma.cc/US7W-N9DK>] (ranking 23 of 34 players' play as "average," including Kaepernick's play).

56. See *Quarterback Colin Kaepernick Officially Benched By 49ers Coach Jim Tomsula*, THE GUARDIAN (Nov. 4, 2015), <https://www.theguardian.com/sport/2015/nov/04/quarterback-colin-kaepernick-officially-benched-by-49ers-coach-jim-tomsula> [<https://perma.cc/64YS-U2JC>] ("After making a rapid rise from backup to Alex Smith to Super Bowl quarterback in his second season in 2012 under former coach Jim Harbaugh, Kaepernick's career has been on a decline the past two seasons. This year, he's bottomed out.").

57. See Cam Inman, *49ers' Colin Kaepernick Done For Season Because of Shoulder Injury*, MERCURY NEWS (Nov. 21, 2015), <https://www.mercurynews.com/2015/11/21/49ers-colin-kaepernick-done-for-season-because-of-shoulder-injury/> [<https://perma.cc/BP24-WKZM?type=image>] ("Colin Kaepernick's season, and quite possibly his 49ers career, is over. Nearly three weeks since getting benched, the oncedynamic quarterback needs surgery to repair a torn labrum in his left, nonthrowing shoulder, sources said Saturday.").

58. See *id.* ("In my NFL experience, quarterbacks with nonthrowing (shoulder) labral tears have finished the year and had offseason surgery," said Dr. David Chao, who spent 17 years as the San Diego Chargers team physician. "This signals that there may be more than just medical that leads to this decision on the part of one or both parties.").

59. See Matt Barrows, *Kaepernick Takes Over as 49ers Starting QB: 'I'm Itching to Get Out There'* (Oct. 11, 2016), <http://www.sacbee.com/sports/nfl/san-francisco-49ers/article107499337.html> [<https://perma.cc/XY32-923T>] ("After being pulled from the starting lineup, he had three surgeries—to his shoulder, knee and thumb.").

60. See Peter Panacy, *49ers Quarterback Competition: Blaine Gabbert Still Has an Edge Over Colin Kaepernick*, SACRAMENTO BEE (Aug. 11, 2016), <https://ninernoise.com/2016/08/11/49ers-quarterback-competition-blaine-gabbert-still-has-an-edge-over-colin-kaepernick/> [<https://perma.cc/KDW4-99RJ>] ("QBs Blaine Gabbert and Colin Kaepernick have been competing with each other for the starting gig in 2016. Despite no official announcement, Gabbert still should be seen in the lead.").

61. See *id.* (referencing tweet from Pro Football Focus, @PFF, citing "Kaepernick's 46.0 adjusted completion % when under pressure in 2015 was last out of 37 QBs—15.5 percent lower than Gabbert, at 26th").

first sat for the national anthem.⁶² After choosing to sit for a third game, Kaepernick told the media he sat for the anthem in part “because of the oppression of people of color and ongoing issues with police brutality.”⁶³ Kaepernick’s goal was to unify the country.⁶⁴ The next game, Kaepernick changed his method of protest from sitting during the national anthem to kneeling.⁶⁵ Additionally, Kaepernick pledged to donate a million dollars of his salary to charity and told the media he hoped his protests would improve America.⁶⁶ Two days later, Kaepernick officially lost the starting job under new head coach, Chip Kelly (“Kelly”).⁶⁷ Kaepernick retained the back-up role, and Kelly stressed Kaepernick’s recent protests

62. See Sandritter, *supra* note 23 (referencing August 14th and 20th pre-season games, where “[Kaepernick] sat during the first two games, according to Mike Garafolo of NFL Network. Kaepernick wasn’t in uniform and didn’t play during the first two games”).

63. See *id.* (“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.”).

64. See *id.* (“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.”).

65. See *id.* (“We were talking to [Boyer] about how can we get the message back on track and not take away from the military, not take away from fighting for our country, but keep the focus on what the issues really are. And as we talked about it, we came up with taking a knee. Because there are issues that still need to be addressed and it was also a way to show more respect to the men and women who fight for this country.”).

66. See Billy Witz, *This Time, Colin Kaepernick Takes a Stand By Kneeling*, N.Y. TIMES (Sept. 1, 2016), <https://www.nytimes.com/2016/09/02/sports/football/colin-kaepernick-kneels-national-anthem-protest.html> [<https://perma.cc/6B4A-2WRF>] (“‘Once again, I’m not anti-American,’ Kaepernick said. ‘I love America. I love people. That’s why I’m doing this. I want to help make America better. I think having these conversations helps everybody have a better understanding of where everybody is coming from.’”); see also Arb. Demand, *supra* note 32, at 3 (“In addition to his silent and peaceful expression of protest by kneeling, Mr. Kaepernick also pledged to donate \$1 million of his 2016–2017 season salary to support organizations helping communities in need.”).

67. See Adam Wells, *Blaine Gabbert Named 49ers’ Starting QB Over Colin Kaepernick*, BLEACHER REP. (Sept. 3, 2016), <http://bleacherreport.com/articles/2640703-blaine-gabbert-named-49ers-starting-qb-over-colin-kaepernick> [<https://perma.cc/NG4E-ND52>] (“The Blaine Gabbert era in San Francisco will continue, as 49ers head coach Chip Kelly named the former first-round pick his starting quarterback over Colin Kaepernick on Saturday for the Sept. 12 season opener against the Los Angeles Rams, per the team’s official Twitter account.”).

did not influence Kelly's quarterback choice.⁶⁸ Instead, Kelly insisted Gabbert won the job through his own efforts.⁶⁹

Kaepernick continued to kneel during the national anthem, and he was joined by other NFL athletes and athletes in other sports.⁷⁰ Additionally, reports surfaced suggesting that a rocky relationship with the 49ers' management influenced Kaepernick's loss of the starting quarterback position.⁷¹ Rumors swirled that Kaepernick appeared less involved in preparing for the position than prior seasons.⁷² Four games into the Blaine Gabbert era, Kaepernick regained the starting position in an attempt to jump-start the team after a series of losses.⁷³ He completed the rest of the 2016 season, continuing his protests, until a contract restructuring allowed him to opt out of his contract and become a free agent in March of 2017.⁷⁴

68. See Carlo Monzon, *Colin Kaepernick To Retire Early After Losing Starting Job at San Francisco 49ers?*, THE GOSPEL HERALD (Sept. 7, 2016, 11:25 AM), <http://www.gospelherald.com/articles/66378/20160907/colin-kaepernick-to-retire-early-after-losing-starting-job-at-san-francisco-49ers.htm> [<https://perma.cc/R22F-UVMV>] ("As stressed by Kelly, the decision to move Kaepernick as the backup quarterback of the 49ers has nothing to do with the athlete's recent activism when he refused to stand up during the national anthem at preseason games. According to the coach, he has no problems with Kaepernick's political and social inclinations since his focus is still on football.")

69. See Cam Inman, *Blaine Gabbert Came To Own 49ers Starting QB Role Through Leadership, Work Ethic*, MERCURY NEWS (Sept. 11, 2016, 11:14 AM), <https://www.mercurynews.com/2016/09/11/blaine-gabbert-came-to-own-49ers-starting-qb-role-through-leadership-work-ethic/> [<https://perma.cc/8TWP-DLGT>] ("He obviously has the athleticism and the skillset to be a quarterback," Kelly said of Gabbert. "But you continue to see on a daily basis how much film he studies, how much time he's in this building, how much work he does on his craft. So, it's a lot of fun to watch a guy that spends that much time trying to make himself better get the opportunity that he's earned on Monday night.")

70. See Sandritter, *supra* note 23 (detailing players on NFL teams, NBA teams, women's soccer teams, high school teams, and honor bands who kneeled or raised their fists through August 13, 2017).

71. See Charles Robinson, *Remember Colin Kaepernick the QB? It's Time the 49ers Did Again*, YAHOO! SPORTS (Sept. 18, 2016, 10:23 PM), <https://sports.yahoo.com/news/remember-colin-kaepernick-the-qb-its-time-the-49ers-did-again-022336328.html> [<https://perma.cc/EUE9-ALZ9>] ("Long ago, Kaepernick lost trust in Baalke and that had a significant impact on the QB's approach this offseason, one source close to Kaepernick said.")

72. See *id.* ("From a mental standpoint, Kaepernick was slow to buy into anything the 49ers were doing this offseason, seeming distant and disinterested in football, a source said.")

73. See Barrows, *supra* note 59 ("Colin Kaepernick is in and Blaine Gabbert is out as the 49ers' starting quarterback, the reverse of the move the team made last year to jump-start its sluggish offense.")

74. See Tim Daniels, *Colin Kaepernick Officially Opt's Out of 49ers Contract*, BLEACHER REP. (Mar. 1, 2017), <http://bleacherreport.com/articles/2695566-colin-kaepernicks-agents-inform-nfl-teams-qb-will-opt-out-of-49ers-contract> [<https://perma.cc/A755-DPH3>] ("San Francisco 49ers quarterback Colin Kaepernick has

B. Never Turn Away⁷⁵: How the World Responded1. *A Jury of Your Peers: Other National Football League Players*

The first NFL player to join Kaepernick on-field to protest was his teammate, safety Eric Reid.⁷⁶ In the following weeks, players from the Denver Broncos, Seattle Seahawks, Miami Dolphins, Kansas City Chiefs, and New England Patriots sat, knelt, raised fists, or linked arms during the national anthem.⁷⁷ As the season progressed, more players joined Kaepernick's protest, including NFL and NBA players, using a variety of methods either instead of or in addition to kneeling.⁷⁸ While protests were sporadic as the 2017 season started, the fire flared up in response to President Trump's comments at a rally on September 22, 2017.⁷⁹ As a result, as many as 204 NFL players chose to sit or kneel during the national anthem.⁸⁰

opted out of the final season of his contract with the organization in order to become an unrestricted free agent, the 49ers announced Friday.”).

75. See PETER GABRIEL, *supra* note 1.

76. See Chris Carlson, *Teammate Joins Colin Kaepernick in Kneeling During National Anthem*, CBS NEWS (Sept. 2, 2016, 8:12 AM), <https://www.cbsnews.com/news/teammate-joins-san-francisco-49ers-colin-kaepernick-in-kneeling-during-national-anthem/> [<https://perma.cc/DU9V-BAEN>] (“Colin Kaepernick and San Francisco 49ers safety Eric Reid knelt during the national anthem Thursday night, continuing the quarterback’s preseason protest of American racial injustice and minority oppression. Kaepernick and Reid dropped to one knee while a naval officer sang ‘The Star-Spangled Banner’ and dozens of military members unfurled an oversized flag at the Chargers’ Qualcomm Stadium.”).

77. See Sandritter, *supra* note 23 (detailing players’ actions from September 1 through September 11, 2016, including sitting Seahawk Jeremy Lane; kneeling Bronco Brandon Marshall; kneeling Dolphins Arian Foster, Michael Thomas, Kenny Stills, and linebacker Jelani Jenkins; arm linking teams Seahawks and Chiefs; and fist-raising Patriots Martellus Bennett and Devin McCourty).

78. See *id.* (detailing players’ actions from September 12, 2016 through August 16, 2017).

79. See USA TODAY Sports, *NFL Player Protests Sweep League After President Donald Trump’s Hostile Remarks*, USA TODAY (Sept. 24, 2017, 1:03 PM), <https://www.usatoday.com/story/sports/nfl/2017/09/24/donald-trump-nfl-player-protests-national-anthem-week-3-response/697609001/> [<https://perma.cc/W7U7-VJYX>] (“NFL players responded in full force Sunday after President Trump repeatedly called for swift punishment against those who chose to protest by not standing during the national anthem.”).

80. See *id.* (“Demonstrations spread throughout the league as many players broke out of their routine by joining the protests or engaging in team-wide displays of unity. The Associated Press estimated 204 players elected to either kneel or sit during the anthem.”).

2. *The Bully Pulpit*.⁸¹ Politicians

At President Trump's September rally, he weighed in on Kaepernick's protest, specifically saying Club owners should fire players who protest.⁸² If President Trump intended his remarks to persuade players and Club owners to end the protests, they had the opposite effect.⁸³ Ignoring any messages the kneeling players were trying to send, President Trump reaffirmed his support for the non-protesting players in a tweet that Sunday afternoon.⁸⁴ As much as Kaepernick drew attention to his cause by kneeling, other politicians besides President Trump showed opposition to Kaepernick, in one case United States Senator Bob Dole deliberately stood for the national anthem, even when it required the aid of others to do so.⁸⁵

81. See *Federal Power: Theodore Roosevelt*, BILL OF RIGHTS INST., <https://billofrights.org/educate/educator-resources/lessons-plans/presidents-constitution/federal-power-theodore-roosevelt/> [<https://perma.cc/8BLR-3N34>] (last visited Nov. 4, 2018) ("Theodore Roosevelt used what he called the 'bully pulpit' ('bully' meaning 'wonderful' and 'pulpit' meaning 'a preaching position') to spread his ideas and solve problems. He said: 'I suppose my critics will call that preaching, but I have got such a bully pulpit!'").

82. See Denis Slattery & Jessica Chia, *Trump Takes Veiled Shot at Kaepernick, Says NFL Owners Should Fire Kneelers: 'Get That Son Of a B— Off the Field'*, N.Y. DAILY NEWS (Sept. 23, 2017, 5:07 AM), <http://www.nydailynews.com/news/politics/trump-takes-veiled-shot-son-b-kaepernick-speech-article-1.3514708> [<https://perma.cc/9SUZ-TMQ2>] ("Wouldn't you love to see one of these NFL owners, when somebody disrespects our flag, say, 'Get that son of a b— off the field right now. Out, you're fired!'") While Trump didn't mention former 49ers quarterback Colin Kaepernick by name, many saw him as the President's main target.").

83. See *id.* (discussing increased protests at first game after President Trump's comments, including how "[s]everal players from the Oakland Raiders, Buffalo Bills, Denver Broncos, New York Giants, Detroit Lions, New England Patriots, New Orleans Saints and Atlanta Falcons were among those who chose not to stand for the anthem. The Miami Dolphins, Tampa Bay Buccaneers, Minnesota Vikings, Philadelphia Eagles, Chicago Bears, Indianapolis Colts, New York Jets, Los Angeles Chargers, Green Bay Packers and Washington Redskins stood with arms locked, though some players from those teams chose to kneel").

84. See Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 24, 2017, 11:20 AM), <https://twitter.com/realDonaldTrump/status/912018945158402049> [<https://perma.cc/R3PG-ECVG>] ("Great solidarity for our National Anthem and for our Country. Standing with locked arms is good, kneeling is not acceptable. Bad ratings!").

85. See Dylan Gwinn, *Watch: Bob Dole Sacks Colin Kaepernick and the NFL While Receiving Congressional Gold Medal*, BREITBART (Jan. 18, 2017), <http://www.breitbart.com/sports/2018/01/18/watch-bob-dole-sacks-colin-kaepernick-nfl-while-receiving-congressional-gold-medal/> [<https://perma.cc/GK98-JBZC>] (discussing Sen. Bob Dole's need for wheelchair for mobility, but noting, "[a]s the Star-Spangled Banner played during Dole's award ceremony on Wednesday, the 94-year-old veteran refused to remain in his wheelchair, and, with the aid of someone nearby, stood for the national anthem . . . If the NFL, or Kaepernick, wondered or cared why people tuned their league this year, they have their answer").

3. *The Neighbors: NFL and Clubs*

Roger Goodell (“Goodell”), the Commissioner of the NFL, commented on Kaepernick’s protests soon after they began.⁸⁶ Straddling the fence, Goodell’s comments highlighted both positive and negative aspects of Kaepernick’s protest.⁸⁷ Goodell also claimed that Kaepernick had a right to protest because of his platform, but there was also a desire that such protests be respectful.⁸⁸ Almost a year later, in response to President Trump’s September rally speech, Goodell called Trump’s comments divisive and accused him of failing to see NFL players and Clubs as an “overwhelming force for good.”⁸⁹

In contrast with Goodell’s public pronouncements, the managers of the NFL Clubs have been less forthcoming with their feelings on Kaepernick and his protest.⁹⁰ However, the managers of some Clubs have expressed disdain for Kaepernick in off-the-record interviews.⁹¹ In addition there are reports indicating that the vast majority of front offices of NFL Clubs would not want Kaepernick on

86. See USA TODAY Sports, *supra* note 28 (reporting comments made by Roger Goodell regarding Kaepernick’s protest).

87. See *id.* (“I support our players when they want to see change in society, and we don’t live in a perfect society. We live in an imperfect society. On the other hand, we believe very strongly in patriotism in the NFL. I personally believe very strongly in that. I think it’s important to have respect for our country, for our flag, for the people who make our country better; for law enforcement, and for our military who are out fighting for our freedoms and our ideals.”).

88. See *id.* (“Players have a platform, and it’s his right to do that. We encourage them to be respectful and it’s important for them to do that.”).

89. See Bob Bryan & Tyler Lauetta, *NFL Commissioner Roger Goodell Says Trump’s Attacks Show An ‘Unfortunate Lack of Respect For the NFL’*, BUS. INSIDER (Sept. 23, 2017, 10:09 AM), <http://www.businessinsider.com/nfl-roger-goodell-on-trumps-colin-kaepernick-protest-attacks-2017-9> [<https://perma.cc/WQG3-2DAH>] (“The NFL and our players are at our best when we help create a sense of unity in our country and our culture. There is no better example than the amazing response from our clubs and players to the terrible natural disasters we’ve experienced over the last month. Divisive comments like these demonstrate an unfortunate lack of respect for the NFL, our great game and all of our players, and a failure to understand the overwhelming force for good our clubs and players represent in our communities.”).

90. See Mike Freeman, *Mike Freeman’s 10-Point Stance: Kaepernick Anger Intense in NFL Front Offices*, BLEACHER REP. (Aug. 31, 2016), <http://bleacherreport.com/articles/2651681-mike-freemans-10-point-stance-kaepernick-anger-intense-in-nfl-front-offices> [<https://perma.cc/L5R7-S2KC>] (“Across NFL front offices, there are team officials who are not offended, and even embrace, the controversial position of Colin Kaepernick. They are out there. Statistically, they have to be. But they are keeping a low profile.”).

91. See *id.* (“‘I don’t want him anywhere near my team,’ one front office executive said. ‘He’s a traitor.’ . . . He wasn’t alone in the anger directed toward Kaepernick. In interviews with seven team executives, each said he didn’t want Kaepernick on his team.”).

their team.⁹² There are also reports that general managers have discussed Kaepernick amongst themselves, crucial to an allegation of collusion.⁹³

Faced with a decline in game attendance, the President of the Baltimore Ravens released an open letter to the team's fans and called the player anthem protests "emotional and divisive."⁹⁴ He also stated the protests were a reason for the decline in attendance, and the numbers of people staying away from games were "higher" and "noticeable."⁹⁵ In support, he said he had spoken with fans, who discussed the decline in attendance as a consequence of the protests.⁹⁶ In contrast, Commissioner Goodell claimed attendance was only down one percent in 2017, compared to the prior season.⁹⁷ However, as of the time of this writing, television ratings for the main Sunday afternoon games have declined in 2017.⁹⁸

92. See *id.* ("All seven estimated 90 to 95 percent of NFL front offices felt the same way they did.").

93. See *id.* ("In my career, I have never seen a guy so hated by front office guys as Kaepernick,' one general manager said.").

94. See Dick Cass, *A Letter From President Dick Cass to Ravens Supporters*, BALTIMORERAVENS.COM (Dec. 22, 2017, 6:09 AM), <https://www.baltimoreravens.com/news/a-letter-from-president-dick-cass-to-ravens-supporters-20063812> [<https://perma.cc/T59K-K4JE>] ("We had the poor showing in London, complicated by the kneeling of a dozen players during the National Anthem. That became an emotional and divisive issue. We know that hurt some of you. Others saw it differently and welcomed the dialogue that followed.").

95. See *id.* ("We have had significant numbers of no-shows in the past when our play on the field has not met the high standard we and you have set for the Ravens. But this year has been different. The numbers are higher, and it is noticeable. There are a number of reasons for the no-shows, but surely the one-time protest in London has been a factor.").

96. See *id.* ("Others bluntly told us to keep statements and protests out of the game. There are some of you who have stayed away from our games We have also reached out to a number of you who wrote or called about the protest. I personally made a number of phone calls and met with some of you. Some of my Ravens colleagues have also made a number of calls. While we have not been able to reach all of you, we have learned a lot from these interactions.").

97. See Daniel Leberfeld, *Sunday NFL Preview: Goodell Says NFL Attendance Is Down Only 1 Percent in 2017*, BREITBART (Dec. 23, 2017), <http://www.breitbart.com/sports/2017/12/23/sunday-nfl-preview-goodell-says-nfl-attendance-down-only-1-percent-in-2017/> [<https://perma.cc/U7RK-VTXD>] ("Our attendance is off by one percent,' NFL Commissioner Roger Goodell said last week. 'We are over 98 percent filled to capacity, which is about where we've been in the past.' To some this quote might not pass the smell test. There seem to be a lot of empty seats around the NFL, perhaps, in part, due to some players kneeling during the National Anthem.").

98. See Frank Pallotta, *The NFL Can't Seem to Shake a Season of Sluggish Ratings*, CNN MONEY (Oct. 18, 2017, 6:08 PM), <http://money.cnn.com/2017/10/18/media/nfl-tv-ratings-week-6/index.html> [<https://perma.cc/293W-7WAX>] ("NBC's 'Sunday Night Football' through week six of the regular season is down 4% in viewership compared to last year; and the averages of Sunday afternoon games on Fox and CBS are down 7% and 14% respectively, according to Nielsen data. The

C. The Demand: Arbitration

On October 15, 2017, Kaepernick filed a Demand for Arbitration.⁹⁹ He alleged Club owners, Club employees, and NFL employees colluded to prevent him from working, practicing, or even trying out for NFL teams.¹⁰⁰ Kaepernick claimed that such actions were a collusive response to his national anthem protests and pressure from President Trump.¹⁰¹ Finally, the Arbitration Demand requested all remedies under Article 17 of the CBA.¹⁰² In his demand, Kaepernick requested that the proceedings, like his protests, be open to the public.¹⁰³

In an attempt to prove his claim, Kaepernick argued collusion is evident because it is statistically impossible that he “has not been employed or permitted to try out for any NFL team” absent collusion.¹⁰⁴ Additionally, Kaepernick alleged owners directed their teams to prevent him from practicing or trying out.¹⁰⁵ In his claim, Kaepernick arguably also insinuated that racism is a reason for the

NFL is down 6% overall this season and 16% in viewership compared to two seasons ago.”).

99. See generally Arb. Demand, *supra* note 32 (detailing Kaepernick’s Demand).

100. See *id.* at 2 (“During the 2017 NFL season and continuing to the present, the NFL, by and through all NFL team owners, NFL employees, and team employees, have entered into and enforced, implied and/or express agreements to specifically deprive Claimant Colin Kaepernick from employment in the NFL, as well as from practicing with and/or trying out for NFL teams for which Mr. Kaepernick is eminently qualified.”).

101. See *id.* (“Respondents NFL and NFL Team Owners have 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. Further, Respondents have retaliated against Mr. Kaepernick in response to coercion and calculated coordination from the Executive Branch of the United States government.”).

102. See *id.* at 7 (“Claimant Colin Kaepernick requests all relief permitted by Article 17 of the CBA.”); see also CBA *supra* note 42 (detailing treble damages for violations).

103. See *id.* (“Claimant Colin Kaepernick respectfully requests that the NFL and its team owners waive such confidentiality requirements as may exist under Article 15, Section 10 and permit all proceedings to be presumptively open to the public.”).

104. See *id.* at 5 (“The mere suspicion of collusion against Mr. Kaepernick has risen to the level of concrete and actual collusion. It is no longer a statistical anomaly but instead a statistical impossibility that Mr. Kaepernick has not been employed or permitted to try out for any NFL team since the initiation of his free agency period.”).

105. See *id.* at 5–6 (“NFL General Managers and team leaders have referred to directives from NFL owners to not let Mr. Kaepernick so much as practice with a team.”).

owners' collusion.¹⁰⁶ Kaepernick cited the absence of a rule specifically prohibiting players from kneeling during the anthem and his First Amendment rights to protest.¹⁰⁷ He cited favorably his career statistics and age as reasons he should be considered for at least a backup position.¹⁰⁸ He also pointed out that despite numerous starting and backup vacancies, he has not interviewed for any.¹⁰⁹

D. The Remedy: The Collective Bargaining Agreement

Kaepernick is seeking relief under Article 17 of the CBA.¹¹⁰ Specifically, Article 17, Section 1 prohibits Clubs from agreeing between and amongst themselves, expressly, or impliedly, to limit negotiations, offers to, or terms of conditions of employment regarding any player.¹¹¹ However, under Section 3, Clubs are free to decline to negotiate with any player on any grounds not covered in Section 1(a).¹¹²

106. *See id.* at 6 (“In a league that is seventy percent (70%) African American, with not a single African American owner, the NFL and its owners have colluded to deprive Mr. Kaepernick of employment for the purpose of making him an example to other players of the repercussions of challenging the NFL power paradigm, even by peaceful protest.”).

107. *See id.* at 3 (“To date, and specifically from the 2016 season through the present, there has been no NFL rule prohibiting players from kneeling during the national anthem. Mr. Kaepernick has a constitutionally protected First Amendment right to engage in a silent and peaceful protest.”).

108. *See id.* at 8 (“Based on his consistently exceptional career performance, his age, and all other objective metrics, Mr. Kaepernick was an ideal candidate—and, in fact, the best-qualified candidate—to fill the vacant starting quarterback positions on many NFL teams, or at the very least, the numerous vacant backup positions.”).

109. *See id.* at 10 (“NFL teams who ran offensive systems favorable to Mr. Kaepernick’s style of play instead employed retired quarterbacks or quarterbacks who had not played in a regular season game in years, and signed them to significant contracts while prohibiting Mr. Kaepernick from even trying out or interviewing for those jobs.”).

110. *See* CBA, *supra* note 42, at Art. 17, § 1(a) (prohibiting Clubs from agreeing between themselves or them and NFL from restricting number of players’ rights).

111. *See id.* (“No Club, its employees or agents shall enter into any agreement, express or implied, with the NFL or any other Club, its employees or agents to restrict or limit individual Club decision-making as follows: (i) whether to negotiate or not to negotiate with any player; (ii) whether to submit or not to submit an Offer Sheet to any Restricted Free Agent; (iii) whether to offer or not to offer a Player Contract to any player; (iv) whether to exercise or not to exercise a Right of First Refusal; or (v) concerning the terms or conditions of employment offered to any player for inclusion, or included, in a Player Contract.”).

112. *See id.* at § 3 (“Section 2 above does not diminish any Club’s right not to negotiate or contract with any particular player on any policy ground not specified above. In conjunction with other evidence of an alleged violation(s) of Section 1, a Club’s adherence to a policy identified in Section 2 above may be offered as evidence of an alleged violation of Section 1 above, but may not be the basis of any

The CBA provides that Kaepernick can use the Federal Rules of Evidence to gather and present proof of his claim.¹¹³ However, under the CBA, he is required to prove his claim by a “clear preponderance” of the evidence.¹¹⁴ This standard sets a higher bar than a mere preponderance of the evidence.¹¹⁵ If Kaepernick proves his case, then he is entitled to receive up to treble damages, depending on the number of times a Club violated Kaepernick’s rights.¹¹⁶

E. The Precedent: Brief Overview of National Football Antitrust Cases

The NFL and its member Clubs have litigated the NFL’s anti-trust status numerous times since the creation of the League.¹¹⁷ Section 1 of the Sherman Act (“the Act”) prohibits any conspiracies in restraint of trade.¹¹⁸ Although Kaepernick’s claim is based on the CBA, rather than the Act, this section briefly examines previous

separate proceeding seeking any penalty or other relief against any Club or the NFL.”).

113. *See id.* at § 5 (“In any such proceeding, the Federal Rules of Evidence shall apply. Issues of relief and liability shall be determined in the same proceeding (including the amount of damages, pursuant to Section 9 below, if any).”).

114. *See id.* at § 5 (“The complaining party shall bear the burden of demonstrating by a *clear preponderance* of the evidence that (1) the challenged conduct was or is in violation of Section 1 of this Article and (2) caused any economic injury to such player(s).”) (emphasis added).

115. *See Burden of Proof*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“[M]iddle burden of proof (1966)[:] A party’s duty to prove a fact by clear and convincing evidence. This standard lies between the preponderance-of-the-evidence standard and the beyond-a-reasonable-doubt standard.”); *see also* E. LeFevre, *Quantum, Degree, or Weight of Evidence To Sustain Usury Charge*, 51 A.L.R.2d 1087 (1957) (“[Section] 6[c] Intermediate criteria; more than a preponderance, but less than beyond reasonable doubt; ‘clear and convincing’—‘Clear preponderance,’ or the like. Some cases have stated or held that usury must be proved by a ‘clear preponderance,’ or a ‘clear and satisfactory preponderance’ of the evidence.”).

116. *See* CBA, *supra* note 42, at § 9 (c) (“Three times the amount of compensatory damages, plus, for each Club found to have violated Section 1 of this Article for at least the third time, a fine of \$5,000,000 in the event that any of the Clubs found to have violated Section 1 of this Article have committed such violation for at least the third time.”).

117. *See generally* Benjamin Block & Cyril Djoukeng, *A Short History of NFL Labor Disputes*, 30-WTR DEL. LAW. 8 (detailing cases against NFL attempting to reconcile labor law and antitrust law issues).

118. *See* The Sherman Antitrust Act 15 U.S.C. § 1 (2004) (“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony. . .”).

player complaints litigated under the Act for possible applicability to Kaepernick's claims.¹¹⁹

1. *Mackey v. NFL (1975)*¹²⁰

In 1976, the NFLPA, under the leadership of John Mackey, NFL Commissioner at the time, brought suit against the NFL to challenge a rule dealing with the movement of free agents between teams.¹²¹ The rule required the teams to agree on the amount of suitable compensation to be provided to the losing team.¹²² Absent agreement, the rule allowed compensation to be unilaterally determined by the Commissioner.¹²³ The purpose of the rule was to "maintain competitive balance among the NFL teams and protect the clubs' investment in scouting, selecting and developing players."¹²⁴ Players argued this collusion hindered their ability to contract.¹²⁵

This case examined whether the NFL could provide a labor exemption from antitrust laws, without which collective bargaining efforts between multiple employers might not be possible.¹²⁶ The court fashioned a three-part test to determine when the labor exemption applies.¹²⁷ The test requires a court to analyze: (1)

119. See Arb. Demand, *supra* note 32, at 5–7 (alleging collusion among and between Club Owners and NFL).

120. 543 F.2d 606 (8th Cir. 1976) (deciding extent of nonstatutory labor exemption to antitrust laws).

121. See *id.* at 609 ("This action was initiated by a group of present and former NFL players . . . Their complaint alleged that the defendants' enforcement of the Rozelle Rule constituted an illegal combination and conspiracy in restraint of trade denying professional football players the right to freely contract for their services.").

122. See Block, *supra* note 117, at 9 ("If the two teams were unable to agree, the Commissioner had discretion to determine appropriate compensation; he could award players, draft picks, or both to the franchise whose veteran player was signed by another club.").

123. See *id.*

124. *Mackey*, 543 F.2d at 611 (discussing purpose of rule).

125. See *id.* at 622–23 ("In view of our prior discussions with respect to the effect of the Rozelle Rule upon player movement and salaries, we find ample evidence to support the district court's findings that plaintiffs have been injured in their business or property.").

126. See Block, *supra* note 117, at 9 (discussing history of statutory exemption provided by Clayton Act and its interplay with ability for multiple employers to engage in collective bargaining).

127. See *Mackey*, 543 F.2d at 614 ("First, the labor policy favoring collective bargaining may potentially be given pre-eminence over the antitrust laws where the restraint on trade primarily affects only the parties to the collective bargaining relationship . . . Second, federal labor policy is implicated sufficiently to prevail only where the agreement sought to be exempted concerns a mandatory subject of collective bargaining. . . . Finally, the policy favoring collective bargaining is fur-

whether the policy “primarily affects only the parties” involved; (2) whether the policy is a “mandatory subject of collective bargaining;” and (3) whether there was “bona fide arms-length bargaining.”¹²⁸ The *Mackey* court applied this test and found the rule requiring compensation failed the third prong.¹²⁹ The NFL and the player’s union dealt with the decision in *Mackey* a year later in a new Collective Bargaining Agreement.¹³⁰

2. *White v. NFL (1992)*¹³¹

In another class action lawsuit alleging antitrust abuses, Reggie White and others challenged the league-implemented free-agency system in place at the time and known as “Plan B.”¹³² The parties challenged the then-existing structure of the NFL, including free-agency, after a jury found that Plan B’s restrictions on free-agency violated the antitrust provisions.¹³³ The settlement, known as the “White Stipulation and Settlement Agreement,” created the parameters of the current structure of the NFL.¹³⁴

3. *Brown v. Pro Football (1996)*¹³⁵

Nearly two decades after *Mackey*, collective action by the NFL and Club owners led to another suit pitting labor against antitrust

thered to the degree necessary to override the antitrust laws only where the agreement sought to be exempted is the product of bona fide arm’s-length bargaining.”).

128. *Id.* (detailing three prongs of *Mackey* test).

129. See Block, *supra* note 117, at 9 (discussing Eighth Circuit’s opinion deciding Rozelle Rule unfairly restricted player movement between NFL teams).

130. See *id.* (“This CBA replaced the Rozelle Rule with a ‘right of first refusal/compensation’ free agent system.”).

131. 822 F. Supp. 1389 (D. Minn. 1993) (deciding antitrust class action against NFL).

132. See *id.* at 1395 (“The complaint, [sought] both antitrust injunctive relief and damages stemming from the operation of the right of first refusal rules of Plan B, the college draft, the NFL player contract and the preseason pay rules. The second amended complaint also alleges that defendants illegally fixed players’ medical insurance benefits and tortiously interfered with players’ prospective contracts.”).

133. See Block, *supra* note 117, at 10 (“The jury in McNeil found that Plan B violated the antitrust laws because it was more restrictive than necessary to achieve competitive balance. But the jury awarded total damages of only \$543,000, a small fraction of the amount sought.”).

134. See *id.* at 10–11 (“The SSA reflected a new system familiar to fans today—liberalized free agency, a salary cap, franchise and transition players, and a seven-round draft. Commensurate with the White settlement, the parties also agreed to a new CBA that paralleled the SSA’s terms.”).

135. 518 U.S. 231 (1996) (discussing substitute players’ antitrust suit against NFL).

concerns, this time involving reserve players.¹³⁶ After the expiration of the collective-bargaining agreement, negotiations over the next agreement led to the proposal of a rule allowing Clubs to create developmental squads.¹³⁷ Unlike other NFL players, those on the developmental squads were to be paid a fixed salary.¹³⁸ Negotiations broke down, and the NFL unilaterally imposed the squads and salary on the both players and Clubs.¹³⁹ The Supreme Court applied the three factors used in *Mackey* and found the labor exemption to be valid.¹⁴⁰ However, the Court did not completely eviscerate a player's ability to sue under the Act, positing there could be some owner conduct that fell sufficiently far outside the process as to be a violation.¹⁴¹

4. *American Needle v. NFL (2010)*¹⁴²

Players are not the only entities who have sued the NFL under antitrust provisions.¹⁴³ *American Needle*, an apparel manufacturer, sued the NFL and its teams after its license to produce NFL-branded apparel, including hats, was revoked and given to Reebok, another vendor.¹⁴⁴ Key to *American Needle's* claim was that each team had made its own decisions for its intellectual property, in-

136. *See id.* at 235 (discussing “anti-trust liability for restraints on competition imposed through the collective-bargaining process”).

137. See Joseph Covelli, *Brown v. Pro Football, Inc.: At the Intersection of Antitrust and Labor Law*, *Supreme Court's Decision Gives Management the Green Light*, 27 *STETSON L. REV.* 257, 260 (1997) (tracing history of Resolution G-2 to NFL Constitution, allowing rookie or first year players to practice with NFL teams and serve as replacements for injured players).

138. *See id.* at 260–61 (“Furthermore, the resolution called for developmental squad players to be paid a fixed salary instead of being permitted to negotiate their own salaries. This portion of the amendment to the NFL Constitution departed from the customary NFL practice of allowing NFL players to individually negotiate their salaries.”).

139. *See id.* (“The NFL then unilaterally implemented the developmental squad plan and advised club owners that paying salaries above or below \$1000 would result in disciplinary action against the clubs.”).

140. *See id.* at 263 (“Thus, the Court held that the nonstatutory labor exemption extends to multi-employer bargaining units when, after reaching a negotiating impasse, they implement their last, best good-faith offer.”).

141. *See id.* at 284 (quoting *Brown v. Pro Football, Inc.*, 518 U.S. 231, 250 (1996)) (“Despite this holding, the Court noted that a situation could exist in which the conduct of the employers was ‘sufficiently distant in time and in circumstances from the collective-bargaining process that a rule permitting antitrust intervention would not significantly interfere with that process.’”).

142. 560 U.S. 183 (2010) (discussing apparel manufacturer's antitrust suit against NFL).

143. *See generally id.* (allowing petitioner apparel manufacturer to sue respondent NFL).

144. *See id.* at 187 (“In December 2000, the teams voted to authorize NFLP to grant exclusive licenses, and NFLP granted Reebok International Ltd. an exclusive

cluding trademarks, prior to the exclusive grant of the license to Reebok.¹⁴⁵ To decide the case, the Court analyzed the difference between individual and collective action.¹⁴⁶ The Court found even a single entity could engage in anticompetitive activity where that single entity controlled the decisions of a group with otherwise separate interests.¹⁴⁷ The Court held that the creation of National Football League Properties (“NFLP”) was concerted action because the individual Clubs had separate economic agendas.¹⁴⁸ The ruling denied the NFL an exemption from antitrust laws, and the question on remand involved the motive of the League in creating the NFLP, namely whether its motive was to stifle competition or to promote efficiency.¹⁴⁹

F. The Outcasts: Brief Overview of Other Shunned Players

Kaepernick was not the first player to find his employment opportunities limited after he engaged in controversial actions or speech.¹⁵⁰ Previous players and teams have been ostracized for both on-field and off-field actions.¹⁵¹ Their subsequent inability to find work in the NFL draws many similarities with Kaepernick’s.¹⁵²

10-year license to manufacture and sell trademarked headwear for all 32 teams. It thereafter declined to renew American Needle’s nonexclusive license.”).

145. See Gregory J. Werden, *The Application Of the Sherman Act To Joint Ventures: The Law After American Needle*, 12 SEDONA CONF. J. 251, 251 (2011) (“[T]he NFL has 32 separately owned teams, each with trademarks and logos familiar to sports fans. . . . NFL teams had ‘made their own arrangements for licensing intellectual property’ until 1963, when they formed a joint venture called NFL Properties (NFLP) through which they subsequently licensed.”).

146. See *id.* at 252 (“The Court’s legal analysis first reviewed Sherman Act jurisprudence on the basic ‘distinction between concerted and independent action.’”).

147. See *id.* (discussing Court’s analysis of independent versus collective actions).

148. See *id.* (“The Court held that NFLP’s ‘marketing of property owned by the separate teams’ is concerted action because the teams have ‘economic interests that are distinct from NFLP’s financial well-being’ and so ‘are not like components of a single firm that act to maximize the firm’s profits.’”).

149. See Nina Totenberg, *Supreme Court Rules Against NFL in Antitrust Case*, NPR.COM (May 24, 2010, 3:00 PM), <https://www.npr.org/templates/story/story.php?storyId=127095946> [<https://perma.cc/2PP7-J6HR>] (“The justices then sent the case back to the lower courts for a determination as to whether in this particular case, the NFL conspired to stifle competition or was simply operating in the most efficient manner for its business.”).

150. For further discussion of players and teams experiencing difficulties with the NFL or NFL Clubs after First Amendment Speech Issues, see *infra* notes 153–198 and accompanying text.

151. For further discussion of players and teams experiencing difficulties with the NFL or NFL Clubs, see *infra* notes 153–198 and accompanying text.

152. For further discussion of players unable to find work with the NFL or NFL Clubs, see *infra* notes 153–198 and accompanying text.

1. *Chris Kluwe*

During training camp in 2012, Minnesota Vikings punter Chris Kluwe published a letter criticizing a Maryland Congressional Delegate who opposed marriage equality.¹⁵³ That letter came to the attention of the Vikings head coach, who told him to stop speaking on the topic.¹⁵⁴ Kluwe demurred, and the team's owner told Kluwe to continue speaking out on the subject the next day.¹⁵⁵ Thereafter, Kluwe continued to speak out on marriage equality, working with the team's public relations office.¹⁵⁶ Over the next three months, Kluwe came under increasingly hostile verbal harangues from his special teams coordinator, Mike Priefer, who expressed anti-gay sentiments.¹⁵⁷ Kluwe continued to demonstrate, once by wearing a homemade protest patch on his jersey during a December 9, 2012 game.¹⁵⁸ Asked about the patch, Coach Priefer claimed Kluwe's constant speech on the subject of marriage equality was a "distraction."¹⁵⁹ Vikings' coaches also asked Kluwe to stop tweeting about the Catholic Church because the team was receiving negative

153. See Jane McManus, *NFLers Show Support of Gay Marriage*, ESPN (Feb. 28, 2013), http://www.espn.com/nfl/story/_/id/9000545/chris-kluwe-brendon-ayanbadejo-file-amicus-brief-california-favoring-same-sex-marriage [<https://perma.cc/PU3J-TS38>] ("Kluwe previously wrote a passionate and profane open letter to an elected official who had opposed Ayanbadejo's support for marriage equality.").

154. See Chris Kluwe, *I Was an NFL Player Until I Was Fired by Two Cowards and a Bigot*, DEADSPIN (Jan. 2, 2014, 12:52 PM), <https://deadspin.com/i-was-an-nfl-player-until-i-was-fired-by-two-cowards-an-1493208214> [<https://perma.cc/U4C4-4GL3>] ("On Sept. 8, the head coach of the Vikings, Leslie Frazier, called me into his office after our morning special-teams meeting Once inside, Coach Frazier immediately told me that I 'needed to be quiet, and stop speaking out on this stuff'").

155. See *id.* ("On Sept. 9, before our game against the Jacksonville Jaguars, the owner of the team, Zygi Wilf, came up to me, shook my hand, and told me: 'Chris, I'm proud of what you've done. Please feel free to keep speaking out.'").

156. See *id.* ("I told [Viking's head of public relations] that from this point on, any media requests he received were to be forwarded immediately to me. I would take care of them. . . . He assented, and later that day I found three media requests in my locker").

157. See *id.* ("As we sat down in our chairs, Mike Priefer, in one of the meanest voices I can ever recall hearing, said: 'We should round up all the gays, send them to an island, and then nuke it until it glows.'").

158. See *id.* ("On Dec. 9, I wore on my jersey a small patch made out of athletic tape on which I'd written, 'Vote Ray Guy'—a small protest against punter Ray Guy's exclusion from the Pro Football Hall of Fame.").

159. See *id.* ("On Dec. 13, during his weekly media session, Mike Priefer was asked about the patch in a joking manner. He responded tersely: 'I don't even want to talk about it. Those distractions are getting old for me, to be honest with you.'").

public responses.¹⁶⁰ During the NFL draft later that season, the Vikings drafted a new kicker and let Kluwe go.¹⁶¹ Kluwe signed with the Oakland Raiders soon after, but the team cut him before the end of training camp.¹⁶²

The Vikings subsequently conducted an investigation that resulted in a three-game suspension of Mike Priefer for his comments.¹⁶³ Despite this, Kluwe does not think he will ever play in the NFL again, due, in part, to his outspokenness.¹⁶⁴ However, Kluwe has not blamed his endorsement of marriage equality as the reason for his inability to find work in the NFL, pointing instead to the distractions teams think he may bring.¹⁶⁵

2. *Tim Tebow*

Tim Tebow replaced Kyle Orton as quarterback of the Denver Broncos midway through the 2011-2012 season.¹⁶⁶ At the time, the

160. *See id.* (“[General Manager] Spielman later called me and asked me to stop tweeting about the pope because angry people were ringing up team headquarters in Winter Park, Minn.”).

161. *See id.* (“On May 6, I had a meeting with Rick Spielman. He told me that the team was releasing me, and he thanked me for the great work I had done for the Vikings, and also said he would tell other teams how professionally and competently I had executed my duties over the years.”).

162. *See* Tom Pelissero, *Punter Chris Kluwe Gets Cut . . . and Agrees With Move*, USA TODAY (Sept. 1, 2013, 3:20 PM), <https://www.usatoday.com/story/sports/nfl/raiders/2013/09/01/punter-chris-kluwe-cut/2753557/> [<https://perma.cc/M3J4-P9CF>] (“The Oakland Raiders released outspoken punter Chris Kluwe, who had signed a one-year minimum contract with the team shortly after his release from the Minnesota Vikings in May.”).

163. *See* Ben Goessling, *Chris Kluwe, Vikings Avoid Lawsuit*, ESPN (Aug. 19, 2014), http://www.espn.com/nfl/story/_/id/11375100/chris-kluwe-minnesota-vikings-reach-settlement-avert-lawsuit [<https://perma.cc/BK24-BDD8>] (“The Vikings announced a three-game suspension for special-teams coordinator Mike Priefer on July 19, the same day they released a 29-page summary of a six-month independent investigation they commissioned after Kluwe alleged he was subjected to multiple homophobic remarks by Priefer and released by the team in May 2013 because of his support for same-sex marriage.”).

164. *See* Kluwe, *supra* note 154 (“However, it’s clear to me that no matter how much I want to prove I can play, I will no longer punt in the NFL, especially now that I’ve written this account. Whether it’s my age, my minimum veteran salary, my habit of speaking my mind, or (most likely) a combination of all three, my time as a football player is done.”).

165. *See* Pelissero *supra* note 162 (“I don’t think I’m going to punt again in the NFL. Especially writing a piece like this, then you become known as the guy who ratted out on a coach. You’re known as the guy who broke the locker-room silence. Frankly, coaches are going to look at it and they’re going to be like, well, if we picked up this guy, he’s obviously going to bring media attention with him now. People are going to be following what he does.”).

166. *See* *Tim Tebow to Start for Broncos*, ASSOCIATED PRESS (Oct. 12, 2011), http://www.espn.com/nfl/story/_/id/7087660/tim-tebow-replaces-kyle-orton-denver-broncos-starting-quarterback-john-fox-says [<https://perma.cc/4386-FBZ3>] (“Coach John Fox made the switch official Tuesday, announcing Tebow will start

Broncos were barely competent in a horrid AFC West, limping into the playoffs after losing their last three games.¹⁶⁷ Magic struck in the playoffs, though, when Tebow threw an 80-yard touchdown pass in overtime, beating the heavily-favored Pittsburgh Steelers.¹⁶⁸ Unfortunately, the magic did not last, and Tebow lost to the New England Patriots in the next game.¹⁶⁹ However, Tebow achieved nationwide notoriety when he used the same action as Kaepernick: kneeling, albeit under different circumstances than Kaepernick.¹⁷⁰ A fan's picture of Tebow kneeling after a play went viral.¹⁷¹ Tebow soon noticed and commented on the fan's site, explaining what he was doing.¹⁷² Fans mimicked his kneeling, the craze grew, and to date, Tebow has over four-and-a-half million social media followers.¹⁷³ Tebow's kneeling also drew attention to his religious messages.¹⁷⁴ The Broncos traded Tebow to the Jets the next sea-

against the Miami Dolphins when the Broncos return from their bye week. He supplants Orton, who has struggled ever since winning the job with a spectacular training camp.”).

167. See *Denver Broncos 2011 Schedule*, NFL, <http://www.nfl.com/schedules/2011/REG/BRONCOS> [<https://perma.cc/Q4WN-C2PY>] (last visited Feb. 5, 2018) (showing Bronco's regular season schedule and results).

168. See *Tim Tebow Leads Broncos to Playoff Victory*, FOX SPORTS (Jan. 8, 2012, 7:28 PM), <https://www.foxsports.com/other/story/tim-tebow-leads-broncos-to-playoff-victory-010812> [<https://perma.cc/UJJ8-2EKR>] (“Tebow connected with Demaryius Thomas on an electrifying 80-yard touchdown pass on the first play of overtime and the Broncos defeated the stunned Steelers 29-23 in the AFC wildcard game on Sunday.”).

169. See Judy Battista, *With Spotlight on Tebow, Brady Stars*, N.Y. TIMES (Jan. 14, 2012), <http://www.nytimes.com/2012/01/15/sports/football/tom-brady-leads-patriots-to-win-over-tim-tebow-and-broncos.html> [<https://perma.cc/9DKT-GXSN>] (discussing Patriots' victory over Broncos).

170. See Lindsay Jones, *The Story Behind the “Tebowing” Craze*, DENVER POST (Oct. 27, 2011, 3:56 PM), <https://blogs.denverpost.com/broncos/2011/10/27/the-story-behind-the-tebowing-crazy/10368/> [<https://perma.cc/7WZX-WG27>] (describing fan's posting of picture where he mimics Tebow's stance on one knee).

171. See *id.* (describing picture subsequently gaining popularity on Facebook).

172. See Rabbi Joshua Hess, *Embracing ‘Tebowing’*, HUFFINGTON POST (Jan. 2, 2012), https://www.huffingtonpost.com/rabbi-joshua-hess/embracing-tebowing_b_1068522.html [<https://perma.cc/9F9V-AGT3>] (“Tebowing is defined as, ‘to get down on a knee and start praying, even if everyone else around you is doing something completely different.’”).

173. See @TimTebow, TWITTER, <https://twitter.com/TimTebow> [<https://perma.cc/HU37-RSB7>] (last visited Dec. 20, 2018) (showing 4.79 million followers).

174. See Michael Frost, *Colin Kaepernick vs. Tim Tebow: A Tale of Two Christians on Their Knees*, WASH. POST (Sept. 24, 2017), https://www.washingtonpost.com/news/acts-of-faith/wp/2017/09/24/colin-kaepernick-vs-tim-tebow-a-tale-of-two-christianities-on-its-knees/?utm_term=.ff7a99d022db [<https://perma.cc/67HV-R9DM>] (“He has been outspoken about his pro-life stance, and his commitment to abstinence from sex before marriage.”).

son.¹⁷⁵ But, Tebow's off-field notoriety did not translate into on-field success as he lasted one, arguably underused season, before the Jets released him.¹⁷⁶ Tebow never played another NFL snap, failing to secure a position on either the Patriots or the Eagles, despite having worked out with both teams.¹⁷⁷

As with Kaepernick, teams are reluctant to go on record with reasons they will not sign Tebow, with some commentators saying Tebow's lack of NFL quarterbacking opportunities is not justified by poor performance.¹⁷⁸ One publication asked each team why they were not hiring Tebow, and the majority of teams did not respond.¹⁷⁹

3. *Ray Rice*

While Ray Rice's banishment from the NFL is not due to a peaceful protest over social justice issues, but rather an highly-publicized domestic violence incident, an examination provides insight over how the NFL has dealt with the negative actions of its players and the publicity surrounding those players, before and after their issues become public distractions.¹⁸⁰ Ray Rice played for the Balti-

175. See *Tim Tebow Traded to Jets*, ESPN (Mar. 22, 2012), http://www.espn.com/nfl/story/_/id/7720305/new-york-jets-denver-broncos-complete-tim-tebow-trade-second-time [<https://perma.cc/3LDP-UXRC>] ("After a big false start, the New York Jets pulled off a Tebow-like comeback Wednesday night, getting the quarterback who turned the Denver Broncos from an also-ran into a playoff team last season and became the NFL's most talked-about player—for a fourth- and sixth-round draft pick.").

176. See Rich Cimini, *Jets Release Tim Tebow*, ESPN (Apr. 30, 2013), http://www.espn.com/nfl/story/_/id/9222870/new-york-jets-cut-tim-tebow [<https://perma.cc/9YAF-ZS5A>] ("One year after bringing Tim Tebow to Broadway, creating a nationwide fascination that slowly evolved into controversy, the New York Jets on Monday made the long-anticipated move of releasing one of the NFL's most popular players.").

177. See Tony Manfred, *Tim Tebow Worked Out For the Philadelphia Eagles After Tom Brady's Coach 'Fixed' Him*, BUS. INSIDER (Mar. 16, 2015, 2:58 PM), <http://www.businessinsider.com/tim-tebow-eagles-2015-3> [<https://perma.cc/QC8K-8ACG>] (describing Eagles working out Tebow after his release from Patriots prior to start of 2013 season).

178. See Steve Matoren, *Why No One in the NFL Wants Tim Tebow*, THE LACES OUT (Sept. 3, 2014), <https://thelacesout.com/why-no-one-in-the-nfl-wants-tim-tebow-26d93b674ab5> [<https://perma.cc/Y9ZU-EEG7>] ("In 14 career NFL regular season starts, Tebow is 8–6 with 17 passing TD's and 12 rushing TD's. That's 29 total TD's in his first 14 games! Keep in mind, Tebow has never entered an NFL season as a starting QB.").

179. See *id.* (reporting only Patriots responded in depth to question why teams will not hire Tebow).

180. For further discussion of how NFL Clubs deal with non-speech related distractions, see *infra* notes 180–191.

more Ravens until September 8, 2014.¹⁸¹ His career came to an end after he was arrested in February 2014 following a fight with his fiancée in an Atlantic City casino elevator.¹⁸² Before this incident, many viewed Rice as a model citizen.¹⁸³ Although there was a video of the fight, Rice entered into a program that would eventually legally clear him of assault.¹⁸⁴ In late July, before the video was publicly available, Rice received only a two-game suspension as punishment from the NFL.¹⁸⁵ Then, in September, the video leaked.¹⁸⁶ Players throughout the NFL chimed in, questioning the two-game suspension and demanding Rice be banned from the NFL.¹⁸⁷ Even President Obama weighed in, saying Ray Rice's actions were contemptible.¹⁸⁸ While the underlying cause—Rice's assault on his girlfriend—had not changed, the NFL's response did, and Commissioner Goodell immediately changed Rice's punishment to an indefinite suspension.¹⁸⁹ Ray Rice appealed, and the

181. See Marc Sessler, *Bisciotti: Decision to let Ray Rice go was unanimous*, NFL.COM (Sept. 11, 2014, 1:23 PM), <http://www.nfl.com/news/story/0ap3000000392323/article/bisciotti-decision-to-let-ray-rice-go-was-unanimous> [<https://perma.cc/DT8X-PGQZ>] (“Yesterday morning Sept 8, all of us saw the video from inside the elevator. It is violent and horrifying. I immediately came to the office and called a meeting . . . The meeting was relatively short. The decision to let Ray Rice go was unanimous.”).

182. See *id.* (“On the morning of Feb. 15, we learned that Ray and his then fiancé, Janay, had been arrested at an Atlantic City casino, and both had been charged with ‘simple assault’ resulting from an altercation with each other.”).

183. See *id.* (“Assessing the situation at the end of February, this is what we knew: A player who had been a model citizen in the community and terrific teammate for six seasons had been charged with simple assault against his fiancé.”).

184. See *id.* (“The police had seen video from inside the elevator. The prosecutor and the judge, who had also seen such video, allowed Ray into the program that would eventually clear him of the assault charge.”).

185. See *id.* (“Commissioner Roger Goodell . . . then announced on July 27 that Ray Rice would be suspended for the first two games of the season.”).

186. See *id.* (“Yesterday morning Sept 8, all of us saw the video from inside the elevator. It is violent and horrifying.”).

187. See Nina Mandell, *Current and Ex-NFL Players Want Ray Rice Banned From the NFL*, USA TODAY (Sept. 8, 2014, 11:30 AM), <http://ftw.usatoday.com/2014/09/nfl-player-reaction-ray-rice> [<https://perma.cc/C85G-SU84>] (listing nine player reactions to Rice video).

188. See *Ray Rice Cut, Then Suspended By NFL*, ESPN (Sept. 9, 2014), http://www.espn.com/nfl/story/_/id/11489134/baltimore-ravens-cut-ray-rice-new-video-surfaces [<https://perma.cc/977V-GWDX>] (quoting statement from President Barack Obama's press secretary, which said “[t]he President is the father of two daughters. And like any American, he believes that domestic violence is contemptible and unacceptable in a civilized society Stopping domestic violence is something that's bigger than football—and all of us have a responsibility to put a stop to it.”).

189. See Will Brinson, *Ray Rice Suspended Indefinitely by Roger Goodell*, CBS SPORTS (Sept. 8, 2014), <https://www.cbssports.com/nfl/news/ray-rice-suspended-indefinitely-by-roger-goodell/> [<https://perma.cc/2UNG-7SBD?type=image>] (“Former Ravens running back Ray Rice—released by the team Monday on the heels of

indefinite suspension was overturned over a month later.¹⁹⁰ While Ray Rice has never since played in the NFL, he has not filed a collusion claim, instead partnering with the NFL to educate other players.¹⁹¹

4. *Dallas Cowboys, 2016*

Five police officers were killed by a gunman at a Black Lives Matter rally in Dallas, Texas in July of 2016.¹⁹² On July 30, 2016, a few months before Kaepernick began kneeling during the anthem, the Cowboys invited the Dallas Police Chief to their practice to address the team.¹⁹³ The Cowboys' message was unity.¹⁹⁴ The Cow-

graphic new video— was suspended indefinitely by the NFL, Roger Goodell announced Monday.”).

190. See Jill Martin & Steve Almasy, *Ray Rice Wins Suspension Appeal*, CNN (Nov. 30, 2014, 12:59 AM), <http://www.cnn.com/2014/11/28/us/ray-rice-reinstated/> [<https://perma.cc/Y5KR-EAXK>] (“Former Baltimore Ravens running back Ray Rice has won his appeal of his indefinite suspension by the NFL for violating its domestic violence policy, the players union said Friday.”).

191. See *Players, Ray Rice, Career Stats*, NFL, <http://www.nfl.com/player/rayrice/941/careerstats> [<https://perma.cc/J7BT-HLJT>] (last visited Dec. 20, 2018) (showing Ray Rice’s last NFL stats ending in 2013); see also Matt Bonesteel, *Ray Rice’s NFL Career is Likely Over, But He’s Partnering With the League On New Educational Video*, WASH. POST (Apr. 18, 2017), https://www.washingtonpost.com/news/early-lead/wp/2017/04/18/ray-rices-nfl-career-is-likely-over-but-hes-partnering-with-the-league-on-new-educational-video/?utm_term=.8ad3bcbb2730 [<https://perma.cc/BPL8-XEGZ>] (“I’ve been building relationships with [the NFL front office], and it’s a mutual thing. The NFL has a great platform, they reach a lot of people. It’s part of our responsibility to reach out for not the on-field opportunity but off-field, too.”).

192. See Patrick McGee et al., *Snipers Kill 5 Dallas Officers at Protest Against Police Shootings*, N.Y. TIMES (July 7, 2016), <https://www.nytimes.com/2016/07/08/us/dallas-police-officers-killed.html> [<https://perma.cc/9XMT-GAX8>] (“Five Dallas police officers were killed and six others were wounded by snipers on Thursday night during a demonstration protesting shootings by officers in Minnesota and Louisiana this week, the Dallas police said.”).

193. See Around the NFL Staff, *Cowboys Stand ‘Arm in Arm’ With Dallas Police Chief*, NFL (July 30, 2016, 3:57 PM), <http://www.nfl.com/news/story/0ap3000000678198/article/cowboys-stand-arm-in-arm-with-dallas-police-chief> [<https://perma.cc/4AJ6-E54A>] (“On the same day that Michael Bennett criticized NFL players for not speaking out on social issues, the Cowboys invited Dallas police chief David Brown and Dallas mayor Mike Rawlings to address the team.”).

194. See Omar Ruiz, @OmarRuiz, TWITTER (July 30, 2016, 4:23 PM), <https://twitter.com/OmarDRuiz/status/759529926223507456/photo/1> [<https://perma.cc/23QU-RTAX>] (displaying photograph of Cowboy’s statement saying, in part, “[t]his was a statement about *unity*. . . . Our players felt that there is no better example of what unity is—and can be about—than a sports team. And they felt they had the opportunity—for the first time they were together this year—to send this very important message”) (emphasis in original).

boys designed a sticker to show their unity with the police and sought permission to wear it during games that season.¹⁹⁵

Initially, the team members believed they had received permission to wear the sticker during pre-season games.¹⁹⁶ However, the NFL denied the team permission to wear the sticker at any point, citing uniform rules.¹⁹⁷ Some commentators saw this refusal by the NFL as a political stance, and conservative commentators lashed out at the NFL for its decision.¹⁹⁸

III. BUSINESS AS USUAL: THE LONG HARD ROAD TO SHOW COLLUSION

In evaluating what is best for their football teams, Clubs often cite the importance of the team over the individual.¹⁹⁹ Coaches balance a player's ability to contribute on the field with the potential disruptions the players may bring to the locker room.²⁰⁰ Coaches also stress the need for players to put the team above their own interests and statistics.²⁰¹ Coaches will even make decisions to

195. See Nick Eatman, @nickeatman, TWITTER (July 30, 2016, 4:09 PM), <https://twitter.com/nickeatman/status/759526479340318720> [<https://perma.cc/6V2V-YVHS>] (showing picture of round sticker with star in middle and words, "ARM IN ARM").

196. See Around the NFL Staff, *supra* note 193 ("The team has received league approval to wear decals reading "Arm in Arm" on their helmets in support of police during preseason games. The Cowboys have also have reached out to the NFL for permission to display the decal during the regular season, too.").

197. See Valerie Richardson, *NFL Bans Dallas Cowboys' Pro-Cop Helmet Decals, Police Supporters Outraged*, WASH. TIMES (Aug. 13, 2016), <https://www.washingtontimes.com/news/2016/aug/13/nfls-ban-dallas-cowboys-pro-cop-helmet-decals-rank/> [<https://perma.cc/T2QA-B3CK>] ("One thing fans won't see during the National Football League preseason: Pro-police decals on the helmets of Dallas Cowboys players, thanks to a league ruling blocking the tribute.").

198. See *id.* (quoting talk-radio host Mark Levin's comments about his opinion NFL are "all liberal Democrats").

199. See Associated Press, *Coughlin: Team is More Important Than Individual* NFL.COM (July 26, 2012, 8:20 PM), <http://www.nfl.com/news/story/09000d5d80976e21/article/coughlin-team-is-more-important-than-individual> [<https://perma.cc/PQ2X-Y434>] ("I think what my position will be and what I think the team will be ready to accept is the fact that the reason we won was because of team," Coughlin said a day before players reported to the University at Albany. "Team over self was why we won.").

200. See *id.* ("However, Shockey was also a distraction that neither Coughlin nor team executives would tolerate.").

201. See *id.* ("I think that with the quality of the individuals that we have, the character of our team, that they certainly are going to realize that the attitude about believing in one another, about supporting one another, about the idea of taking the names off the back of the jerseys, that is what served us best last year," Coughlin said.").

cut or sit players who create distractions, and therefore pose a threat to a team's chances of winning games.²⁰²

A. Individualism Versus Team Play

In his demand for arbitration, Kaepernick cites to his statistics as a reason he should have been considered for a quarterback position in the NFL after his release from the San Francisco 49ers.²⁰³ But, Kaepernick must explore whether his lack of opportunity stems from his decision to protest, or whether his football skills are just not in demand from any NFL teams.²⁰⁴ One question, therefore, is how Kaepernick compares professionally with some of the quarterbacks who received starting or back-up quarterback positions in the league.²⁰⁵ Some stats to consider include a win/loss ratio, completion rate, passer rating and a touchdown to interception ratio.²⁰⁶ These statistics show Kaepernick has a poor completion rate, but a better touchdown-to-interception rate.²⁰⁷ His statistics are similar to those of other quarterbacks who received NFL positions, such as Mike Glennon, who landed a position with

202. See Manish Mehta, *Bill Belichick's Decision to Bench Malcolm Butler Cost the Patriots Another Super Bowl Title*, N.Y. DAILY NEWS (Feb. 5, 2018, 8:00 PM), <http://www.nydailynews.com/sports/football/belichick-decision-bench-butler-cost-patriots-title-article-1.3800804> [<https://perma.cc/4ESD-Q7SP>] (“‘A locker room was divided pre game,’ Browner wrote in a second post. The NFL Network reported Monday that Butler might have been disciplined due to a curfew violation and a poor week of practice.”).

203. See Arb. Demand, *supra* note 32, at 4 (“Based on his consistently exceptional career performance, his age, and all other objective metrics, Mr. Kaepernick was an ideal candidate—and, in fact, the best-qualified candidate—to fill the vacant starting quarterback positions on many NFL teams, or at the very least, the numerous vacant backup positions.”).

204. See *id.* at 5–6 (“It is no longer a statistical anomaly but instead a statistical impossibility that Mr. Kaepernick has not been employed or permitted to try out for any NFL team since the initiation of his free agency period . . . the NFL and its owners have colluded to deprive Mr. Kaepernick of employment for the purpose of making him an example to other players of the repercussions of challenging the NFL power paradigm, even by peaceful protest.”).

205. See Andre Vergara, *The 20 Free-Agent Quarterbacks Signed Ahead of Colin Kaepernick*, FOX SPORTS (June 6, 2017, 8:19 PM), <https://www.foxsports.com/nfl/gallery/2017-nfl-free-agent-qbs-colin-kaepernicks-jay-cutler-mark-sanchez-mike-glennon-brian-hoyer-geno-smith-032417> [<https://perma.cc/R5HF-FSFX>] (“Some NFL writers and fans attribute this to the controversy surrounding Kaepernick, while FOX Sports’ Dieter Kurtenbach is among those who insist he’s not been signed simply because he’s not that good anymore.”).

206. See *id.* (listing statistics critics and supporters use to compare quarterbacks).

207. See *id.* (“Critics point to his 3-16 record the past two seasons and poor completion rate (59.8 percent). Supporters point to his career TD/INT ratio of 72 to 30 and his 88.9 passer rating.”).

the Chicago Bears.²⁰⁸ Gabbert, who has only a slightly higher passer completion rate, previously duelled with Kaepernick for the position in San Francisco and was picked in 2017 to play as the quarterback for the Arizona Cardinals, with only a slightly higher passer completion rate.²⁰⁹ Interestingly, the Philadelphia Eagles picked up Super Bowl LII MVP Nick Foles as a backup instead of Kaepernick, despite Foles' poor performance in the previous two years.²¹⁰ The Steelers chose Landry Jones, whose statistics were nearly identical to Kaepernick's, to back up Ben Roethlisberger in Pittsburgh.²¹¹ Tim Tebow has statistics that are lower than, but similar to, Kaepernick's.²¹² However, unlike Kaepernick, Tebow tried out with both the New England Patriots and Philadelphia Eagles after he was released by the New York Jets.²¹³ Kaepernick points out, therefore, that despite the fact that his statistics are similar to other quarterbacks who received NFL tryouts and eventual positions, he has not even tried out for any NFL teams.²¹⁴

However, as discussed previously, coaches have cut or benched players who have become distractions to the concept of team unity.²¹⁵ Kaepernick could cite Chip Kelly, San Francisco head coach at the time Kaepernick opted out of his contract, who

208. See *id.* (discussing Gannon's 59.4% completion rate and 84.6 passer rating, both of which are lower than Kaepernick's).

209. See *id.* (discussing Gabbert's career high 63.1 completion percentage in 2015, one year before being replaced by Kaepernick in San Francisco).

210. See *id.* ("Like Kaepernick, Foles hasn't had the best past two years. He went from three-year starter in Philly to one-year bust with the Rams (after being traded for Sam Bradford) to a backup in Kansas City."); see also Jeremy Bergman, *Eagles Quarterback Nick Foles Wins Super Bowl LII MVP*, NFL (Mar. 29, 2018, 8:33 PM), <http://www.nfl.com/news/story/0ap30007000914463/article/eagles-qb-nick-foles-wins-super-bowl-lii-mvp> [<https://perma.cc/9BWM-6U7L>] (reporting on Foles' unlikely journey from backup quarterback to Super Bowl MVP).

211. See Vergara, *supra* note 205 ("Pittsburgh is happy having Jones backing up Ben Roethlisberger, and vice versa. That pretty much sums up his two-year, \$4.4 million deal. Jones has been doing it for three years and has been moderately successful, completing 60.3 percent of his passes with an 82.8 passer rating.").

212. See *Tim Tebow Stats*, ESPN, http://www.espn.com/nfl/player/stats/_/id/13200/tim-tebow [<https://perma.cc/TXM9-3P63>] (last visited Dec. 20, 2018) (showing 47.9 percent completion rate and 75.3 passer rating over three year career).

213. See Manfred, *supra* note 177 (discussing Tebow's training camp with New England Patriots and his workout with Philadelphia Eagles).

214. See Arb. Demand, *supra* note 32, at 5 ("It is no longer a statistical anomaly but instead a statistical impossibility that Mr. Kaepernick has not been employed or permitted to try out for any NFL team since the initiation of his free agency period.").

215. See Associated Press, *supra* note 199 (discussing Shockey as distraction to the team he was unwilling to tolerate).

claimed Kaepernick was not a distraction to the team.²¹⁶ Kelly said Kaepernick was singularly focused on the team.²¹⁷ Kelly, who is no longer in the NFL himself, also thinks Kaepernick possesses the skills to be a NFL quarterback.²¹⁸

However, Kelly's opinion is not shared universally throughout Club management in the NFL.²¹⁹ Some Club executives feel Kaepernick's protests are un-American.²²⁰ According to some reports, such feelings may be shared by an overwhelming majority of NFL Club executives.²²¹ Some reports cite Club executives prophesy Kaepernick will "never play in the NFL again."²²² The same reports accurately predicted Kaepernick's failure to secure NFL employment as well as Kaepernick's turn to social activism.²²³

216. See *Chip Kelly: 'Zero Distraction' From Colin Kaepernick Last Season*, NBC SPORTS (Mar. 30, 2017, 4:04 PM), <http://www.nbc.com/sports/bayarea/49ers/chip-kelly-zero-distraction-colin-kaepernick-last-season> [https://perma.cc/6AU8-457W] ("There was zero distraction,' Kelly said to the Monday Morning Quarterback. 'He met with the team immediately after [his first protest]. He met with the other team leaders. He explained his position and where he was coming from.'").

217. See *id.* ("After Kaepernick met with his teammates, Kelly saw one focus in his signal caller—football only. 'Literally, that was it. Colin was focused on football. He was all about the team and trying to help us win,' Kelly said.").

218. See *id.* ("Do I think he is one of the top 64 quarterbacks in the world? There is no question. Does he have the ability to play quarterback on a winning team in the NFL? There is no question,' Kelly said.").

219. See Freeman, *supra* note 90 ("Across NFL front offices, there are team officials who are not offended, and even embrace, the controversial position of Colin Kaepernick. They are out there. Statistically, they have to be. But they are keeping a low profile. They seem to be far outnumbered by the members of NFL front offices who despise him. Truly, truly hate him.").

220. See *id.* ("I don't want him anywhere near my team,' one front office executive said. 'He's a traitor.'").

221. See *id.* ("All seven [executives interviewed] estimated 90 to 95 percent of NFL front offices felt the same way they did. One executive said he hasn't seen this much collective dislike among front office members regarding a player since Rae Carruth."); see also David Newton, *Former Panthers WR Rae Carruth released from prison*, ESPN (Oct. 22, 2018), http://www.espn.com/nfl/story/_/id/25052227/former-carolina-panthers-wr-rae-carruth-released-prison [https://perma.cc/C2Y2-2V7N] (discussing Carruth's release from prison after serving time for conviction of conspiracy to murder his pregnant girlfriend).

222. See Freeman, *supra* note 90 ("Each executive said he believes Kaepernick will likely get released by the 49ers—and never play in the NFL again.").

223. See *id.* ("I've heard from people close to Kaepernick that he fully expected to be released by the 49ers once everyone became aware of his actions, and he also knew his football career would be in jeopardy. I've also been told Kaepernick would then dedicate his life to one of social activism."); see also Daniel Rapaport, *Colin Kaepernick Donates Final \$10K, Completes Million Dollar Pledge*, YAHOO! SPORTS (Jan. 31, 2018, 12:33 PM), <https://sports.yahoo.com/colin-kaepernick-donates-final-10k-173341057.html> [https://perma.cc/D3Y2-S335] ("Former NFL quarterback Colin Kaepernick has completed his pledge to donate \$1 million to charities that serve oppressed communities across the nation.").

B. Economic Issues: Hurting the Brand

The NFL is in the business of making money.²²⁴ When a player might cost a team revenue, ownership will take that into consideration.²²⁵ Baltimore Ravens Owner Steve Bisciotti admitted fan concerns played a role in the Baltimore Ravens' decision not to pursue Kaepernick.²²⁶ Bisciotti said he did not like Kaepernick's initial method of protest, preferring when Kaepernick knelt instead of sitting.²²⁷ Despite his reservations, Bisciotti considered hiring Kaepernick.²²⁸

John Mara, owner of the New York Giants, stated he had received warnings from fans who threatened to stop attending football games if the Giants hired Kaepernick.²²⁹ Commissioner Goodell indicated his understanding that multiple Clubs fielded similar sentiments.²³⁰ Goodell acknowledged teams needed to take

224. See Daniel Kaplan, *NFL Halfway to \$25B Goal*, SPORTS BUS. DAILY (Feb. 29, 2016), <https://www.sportsbusinessdaily.com/Journal/Issues/2016/02/29/Leagues-and-Governing-Bodies/NFL-revenue.aspx> [<https://perma.cc/Z8YY-MM2B>] ("NFL Commissioner Roger Goodell established a goal for the league six years ago to secure \$25 billion in annual revenue by 2027.").

225. See Jeffrey Dorfman, *Colin Kaepernick Confirms That the NFL is a Business*, FORBES (Oct. 23, 2017, 9:00 AM), <https://www.forbes.com/sites/jeffreydorfman/2017/10/23/colin-kaepernick-confirms-that-the-nfl-is-a-business/#59bb926237b3> [<https://perma.cc/8YYV-JR5W>] (discussing effect of distractions on teams' revenue).

226. See Cindy Boren, *Ravens Owner Admits That Colin Kaepernick's Protest is a Factor in Whether to Sign Him*, S.F. GATE (July 31, 2017, 7:40 AM), <http://www.sfgate.com/news/article/Ravens-owner-admits-that-Colin-Kaepernick-s-11720207.php> [<https://perma.cc/G4CB-7J3J?type=image>] ("Bisciotti and Ravens President Dick Cass explained why the Ravens bolstered their quarterback roster with an indoor league player rather than a Super Bowl quarterback while Joe Flacco is out nursing a sore back. Their reasons include Kaepernick's national anthem protest of police brutality.").

227. See *id.* ("I know that we're going to upset some people, and I know that we're going to make people happy that we stood up for somebody that has the right to do what he did. Nonviolent protesting is something that we have all embraced. I don't like the way he did it. Personally, I kind of liked it a lot when he went from sitting to kneeling [as his protest].").

228. See Thomas Barrabi, *Roger Goodell Denies Colin Kaepernick is Being Blackballed by NFL*, FOX BUS. (July 31, 2017), <http://www.foxbusiness.com/features/2017/07/31/roger-goodell-denies-colin-kaepernick-is-being-blackballed-by-nfl.html> [<https://perma.cc/6KGG-RBWG?type=image>] ("At the same event, Baltimore Ravens owner Steve Bisciotti confirmed that his club has considered offering Kaepernick a contract. The Ravens' starting quarterback, Joe Flacco, is currently dealing with a minor back injury.").

229. See Boren, *supra* note 226 ("John Mara of the New York Giants admitted that fans had threatened in letters to never come 'to another Giants game. It wasn't one or two letters. It was a lot. It's an emotional, emotional issue for a lot of people, more so than any other issue I've run into.'").

230. See Barrabi, *supra* note 228 ("He can't be [blackballed] because we're not' Goodell told reporters Sunday during a fan forum event at M&T Bank Stadium in Baltimore. 'The clubs are making those individual evaluations to make

Kaepernick's protest into account during their decision-making process.²³¹ But, Goodell denied any role in influencing individual Clubs' decisions.²³²

Kaepernick may argue that despite Tebow's large Twitter following and the distractions his craze created, Tebow was able to secure tryouts with NFL teams after his release from the New York Jets.²³³ However, Tebow was still unable to land a job as a quarterback in the NFL.²³⁴ Likewise, Chris Kluwe also failed to secure any NFL positions after his release from the Oakland Raiders.²³⁵ Kluwe indicated his belief that his outspokenness on a controversial issue would render him too controversial to be hired by any teams in the NFL.²³⁶ Additionally, some reports indicated that Kaepernick would not continue his protests if he could obtain a position on another team.²³⁷ However, Kaepernick himself squelched the rumor.²³⁸ With the distractions inherent in his protests still in play, it is hard to separate the effects of the controversy with the benefits his talent would bring.²³⁹

the determination whether they think he can help them win, and that's true with any player.'").

231. *See id.* ("Obviously, everyone's aware of the fact of his protests last year, and that's something individual clubs will either weigh or not weigh.").

232. *See id.* ("Those are decisions I don't get involved with, decisions that rightfully belong with the club," [Goodell] added.").

233. *See* Manfred, *supra* note 177 (discussing Tebow's workouts with Patriots and Eagles).

234. *See id.* (discussing Tebow's inability to get hired in NFL).

235. *See* Kluwe, *supra* note 164 and accompanying text (describing Kluwe's belief he will not be able to obtain future NFL work).

236. *See* Pelissero, *supra* note 165 and accompanying text (describing Kluwe's belief his media attention would be too much distraction to potential team).

237. *See* Adam Schefter, *Colin Kaepernick to Stand During National Anthem Next Season*, ESPN (Mar. 3, 2017), http://www.espn.com/nfl/story/_/id/18805744/colin-kaepernick-stand-national-anthem-next-season [<https://perma.cc/95P7-Z4C5>] ("Quarterback Colin Kaepernick will stand during the national anthem next season, sources told ESPN on Thursday. Kaepernick no longer wants his method of protest to detract from the positive change he believes has been created, sources told ESPN.").

238. *See* Harriet Sinclair, *Colin Kaepernick Says It's a Lie He Would Stand For Anthem If He Signed to NFL Team*, NEWSWEEK (Oct. 8, 2017, 5:21 PM), <http://www.newsweek.com/colin-kaepernick-hits-back-report-he-would-stand-anthem-if-signed-nfl-team-lie-680347> [<https://perma.cc/W593-WAS6>] ("Former San Francisco 49ers star Colin Kaepernick has hit out at a report he would stand for the national anthem if he was offered a spot on an NFL team, deeming it a lie.").

239. *Cf. supra* notes 199–236 and accompanying text (describing effect of controversies on Tebow and Kluwe's inability to secure NFL employment).

C. Collusion Outside the CBA: Antitrust Options

Players and outside entities have sued the NFL for antitrust violations many times in its history.²⁴⁰ However, the landmark suits involving antitrust issues either occurred outside of a collective bargaining agreement, or related to codified systems put in place by the NFL or Club owners.²⁴¹ The NFL and its players' union dealt with the ruling in *Mackey* by contracting around the issue under a collective bargaining agreement.²⁴² The *White* case discussed the system of free-agency players operated under, and was finally resolved by a grand settlement.²⁴³ The suit in *Brown* involved unilateral action imposed by the NFL to set the salary for players on teams' developmental squads.²⁴⁴ Finally, *American Needle* arose after a definite action by the NFL to create an entity to control the intellectual property marketing for each Club.²⁴⁵

In all of these cases, there was a tangible NFL policy at the heart of the dispute.²⁴⁶ In contrast, in Kaepernick's case, he alleges the existence of an implied agreement between teams, and does not challenge an NFL policy.²⁴⁷ For this reason, it would be difficult for a court to conduct a *Mackey* analysis, because there is no tangible policy to analyze.²⁴⁸ In addition, Kaepernick is not challenging the imposition of a policy by the NFL that he claims is illegally modifying or outside the scope of the CBA.²⁴⁹ Instead, he is

240. For further discussion of some of the lawsuits filed by players and vendors against the NFL, including antitrust suits, see *supra* notes 117–149 and accompanying text.

241. For further discussion of the notable cases involving the NFL and which have been unrelated to NFL created systems, see *supra* notes 117–149 and accompanying text.

242. For further discussion of the CBA put in place as a result of negotiations post ruling, see *supra* notes 120–130 and accompanying text.

243. For further discussion of the changes to free agency formed as a result of the settlement, see *supra* notes 131–134 and accompanying text.

244. For further discussion of rules imposed outside of a collective bargaining agreement, see *supra* notes 135–141 and accompanying text.

245. For further discussion of the standard under which a single entity stifled competition or promoted efficiency, see *supra* notes 142–149 and accompanying text.

246. For further discussion of cases involving antitrust issues, see *supra* notes 117–149 and accompanying text.

247. See *Mackey supra* note 120 (discussing purpose of rule); see generally *Arb. Demand, supra* note 32 (alleging implied agreements to prevent Kaepernick from contracting with any NFL team).

248. For further discussion of the requirements for a court to examine a tangible policy, see *supra* note 128 and accompanying text.

249. See *Arb. Demand, supra* note 32, at 1 (“PLEASE TAKE NOTICE THAT CLAIMANT COLIN KAEPERNICK hereby commences an Enforcement Proceed-

proceeding under terms outlined by the CBA.²⁵⁰ In addition, Sections 2 and 3 of the current CBA severely limit a player's ability to sue for antitrust violations outside of the province of the System Arbitrator.²⁵¹ Because Section 2 allows for players to assert breaches of the CBA to be heard by an arbitrator, which is the conduct here, Kaepernick is unlikely to be able to successfully bring an antitrust suit.²⁵²

D. Colin's Burden: The Case for Collusion

Colin Kaepernick needs to prove his claim by a "clear preponderance" of the evidence.²⁵³ Under this intermediate standard, Kaepernick needs to show an agreement between NFL Clubs, either express or implied, to restrict Kaepernick's opportunities.²⁵⁴ Kaepernick specifically alleges he was prevented from negotiating with teams, receiving offers or receiving a contract.²⁵⁵ However, under the CBA, Clubs retain the right to conduct business—to hire and fire—as they see fit with a few specific exceptions.²⁵⁶ Because Section 2 grants Clubs great leeway in their ability to decide whether to enter or not into a contract on any reason other than

ing pursuant to Articles 15 and 17 of the National Football League (NFL) Collective Bargaining Agreement (CBA).").

250. *See id.* (referring to Articles 15 and 17 of NFL CBA).

251. *See CBA, supra* note 42, at Art. 3, § 3 ("The NFLPA on behalf of itself, its members, . . . releases and covenants not to sue, or to support financially or administratively, . . . any suit or proceeding . . . against the NFL or any NFL Club or any NFL Affiliate with respect to any antitrust or other claim asserted in *White v. NFL* or *Brady v. NFL* . . .").

252. *See id.* at Art. 3, § 2 ("[N]othing contained in this Section 2 will prevent the NFLPA or any player from asserting that any Club, acting individually or in concert with other Clubs, or the NFL, has: (1) breached the terms of this Agreement, the NFL Player Contract, or the NFL Constitution and Bylaws, and from processing such asserted breach . . . or asserting any claim before the System Arbitrator . . .").

253. *See id.* at Art. 17, § 5 ("The complaining party shall bear the burden of demonstrating by a clear preponderance of the evidence . . .").

254. *See id.* at Art. 17, § 1 ("No Club, its employees or agents shall enter into any agreement, express or implied, with the NFL or any other Club, its employees or agents to restrict or limit individual Club decision-making as follows. . ."); *see also Burden of Proof, supra* note 115 (discussing clear preponderance standard).

255. *See Arb. Demand, supra* note 32, at 1–2 ("(i) whether to negotiate or not to negotiate with any player; . . . (iii) whether to offer or not to offer a Player Contract to any player; . . . or (v) concerning the terms or conditions of employment offered to any player for inclusion, or included in, a Player Contract.").

256. *See CBA, supra* note 42, at Art. 17, § 3 (banning policies against refusing to contract due to player's College Draft status, Franchise Player designation; or because player has refused Contract for prior season, or because player is Restricted Free Agent or Unrestricted Free Agent; or has been subject to any Right of First Refusal).

prior negotiations with other Clubs, Kaepernick cannot simply argue Clubs avoid him because of his protests.²⁵⁷

E. Burden of Proof

Kaepernick's Arbitration Demand alleges NFL Clubs have exhibited unusual behavior.²⁵⁸ According to Kaepernick, the unusual behavior was the refusal of some Clubs to explain why they did not hire him despite expressing an interest in him, as well as statements made by other Clubs that they had no interest in hiring Kaepernick.²⁵⁹ However, no provision in Section 2 of Article 17 of the CBA, requires Clubs to disclose their reasons for declining to hire a player, so long as those reasons are not prohibited under Section 2.²⁶⁰

Moreover, conjecture is not evidence.²⁶¹ Kaepernick needs to uncover prohibited conduct, show that the Defendants' conduct violated the CBA, and demonstrate that the conduct caused Kaepernick economic injury.²⁶² Under the terms of the CBA, Kaepernick must gather evidence pursuant to the discovery rules provided under the Federal Rules of Evidence.²⁶³ Under that loose relevance standard where evidence is usually discoverable even if it would not be admissible at trial, Kaepernick is likely to obtain voluminous records from the NFL clubs.²⁶⁴ Reports indicate discovery

257. *See id.* at Art. 17, § 3 (allowing Clubs wide range of reasons to not negotiate with players).

258. *See* Arb. Demand, *supra* note 32, at 4 ("NFL teams exhibited unusual and bizarre behavior regarding Mr. Kaepernick's prospective employment.").

259. *See id.* ("Multiple NFL head coaches and general managers stated that they wanted to sign Mr. Kaepernick, only to mysteriously go silent with no explanation and no contract offer made to Mr. Kaepernick. Other NFL teams stated they had no interest in Mr. Kaepernick and refused to explain why.").

260. *See* CBA, *supra* note 42, at Art. 17, §3 (allowing teams to decline to contract for any non-prohibited reason).

261. *See* FED. R. EVID 401 (defining evidence as a "*fact . . . of consequence in determining the action*") (emphasis added).

262. *See* CBA, *supra* note 42, at Art. 17, § 5 ("The complaining party shall bear the burden of demonstrating by a clear preponderance of the evidence that (1) the challenged conduct was or is in violation of Section 1 of this Article and (2) caused any economic injury to such player(s).").

263. *See id.* at Art. 17, §5 ("[A]ny player or the NFLPA, acting on that player's or any number of players' behalf, may bring an action before the System Arbitrator alleging a violation of Section 1 of this Article. In any such proceeding, the Federal Rules of Evidence shall apply.").

264. *See* FED. R. EVID. 401, *supra* note 261 ("Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence . . .").

has already commenced producing records.²⁶⁵ As of the time of this writing, enough information has seemingly been unearthed to allow Kaepernick's case to proceed, even though that information has not been made public.²⁶⁶

Kaepernick also argues that statements and tweets made by President Trump were designed to retaliate against Kaepernick and those who chose to follow Kaepernick's decision to kneel during the anthem.²⁶⁷ Kaepernick reportedly anticipates exploring the extent that NFL Clubs heeded President Trump's statements.²⁶⁸ However, President Trump's comments not only called Kaepernick and those who also knelt during the anthem "sons of b****es," but President Trump also exhorted Clubs to fire them.²⁶⁹ Kaepernick's evidence here is troublesome from a cause and effect standpoint, because the number of protesting players *increased* after President Trump's comments.²⁷⁰

In fact, many Clubs chose to protest together, with tacit or overt approval from team management.²⁷¹ Specifically, the Arbitra-

265. See Jason La Canfora, *Colin Kaepernick's Grievance Against NFL Moving Forward, Dates To Be Determined*, CBS SPORTS (Feb. 6, 2018), <https://www.cbssports.com/nfl/news/colin-kaepernicks-grievance-against-nfl-moving-forward-dates-to-be-determined/> [<https://perma.cc/XDQ3-SKP5>] ("Colin Kaepernick's grievance against the NFL is moving forward, according to a source with knowledge of the situation, with his attorneys and the league recently exchanging almost 100,000 documents.").

266. See Ken Belson, *Colin Kaepernick's Collusion Case Against the N.F.L. Will Advance*, N.Y. TIMES (Aug. 30, 2018), <https://www.nytimes.com/2018/08/30/sports/colin-kaepernick-collusion-case-nfl.html> [<https://perma.cc/WMS5-AQ4C>] ("In a ruling this week that was disclosed Thursday, the arbitrator, Stephen B. Burbank, who was appointed by the league and the N.F.L. Players Association, said lawyers for Kaepernick had unearthed enough information in the past year for the case to proceed to a full hearing.").

267. See Arb. Demand, *supra* note 32, at 5 ("Since then, President Trump and Vice President Mike Pence have posted Tweets and engaged in various public relations stunts designed to retaliate against Mr. Kaepernick and other players that have joined in Kaepernick's peaceful protest.").

268. See La Canfora, *supra* note 265 ("[Kaepernick's legal team is] expected to pursue the role of Donald Trump—who is close to some owners and spoke out against [sic] Kaepernick and other players publicly—played in setting a climate in which the former star quarterback could not secure a tryout for a job in the NFL last season.").

269. See Slattery & Chia, *supra* note 82 and accompanying text (describing President Trump's statement and tweets).

270. See USA TODAY Sports, *supra* note 79 (detailing increased numbers of player protests as result of President Trump's comments).

271. See Benjamin Hoffman, Victor Mather & Jacey Fortin, *After Trump Blasts N.F.L., Players Kneel and Lock Arms in Solidarity*, N.Y. TIMES (Sept. 24, 2017), <https://www.nytimes.com/2017/09/24/sports/nfl-trump-anthem-protests.html> [<https://perma.cc/XKD7-TPU9>] (describing how nearly entire Oakland Raiders team kneeled or sat for anthem, with head coach acknowledging he was aware of plans to protest prior to game).

tion Demand states “NFL owners threatened players with fines and suspension if they refused to stand for the national anthem in the following weeks.”²⁷² While there is some evidence that a few owners agreed with Trump and ordered their players to stand, publicly-available evidence does not also indicate NFL involvement in those decisions.²⁷³ While those threats came after President Trump’s comments, and carried the threat that players would be disciplined for a violation, head coach Jason Garrett made it clear that no players were, in fact, disciplined.²⁷⁴ Additionally, teams reacted in different ways to President Trump’s exhortations which, while not dispositive, belies the theory that the NFL coordinated Clubs’ responses in support of the President.²⁷⁵ Further, the NFL did not enforce an NFL rule mandating teams to be present on the field during the anthem, either standing, sitting, or kneeling.²⁷⁶ Thus, even if evidence demonstrates some owners followed the demands of President Trump, that should not prove Kaepernick’s collusion claim, because the claim requires collusion between Clubs, or between at least one Club and the NFL.²⁷⁷ There is also a question as to whether owners who required players to stand were doing so because they were colluding with other teams, the NFL, or President Trump, or if in their role as owners they were simply making a permitted decision under CBA Article 17, Section 3.²⁷⁸ Some owners may have made that business decision.²⁷⁹

272. Arb. Demand, *supra* note 32, at 6 (alleging NFL colluded with owners).

273. See *Jerry Jones Tells Cowboys Players To Respect the U.S. Flag*, FOX4 NEWS (Oct. 9, 2017, 10:37 PM), <http://www.fox4news.com/news/jerry-jones-tells-players-to-respect-the-flag> [<https://perma.cc/3XN9-HEWY>] (“‘We know that there is a serious debate in this country about those issues,’ he said. ‘But there is no question in my mind that the National Football League and the Dallas Cowboys are going to stand up for the flag. So we’re clear.’”).

274. See *id.* (“[Head Coach Jason Garrett] did speak to two players who raised fists after the anthem was over . . . Garrett says ‘absolutely not’ when asked if the players will be disciplined.”).

275. See Benjamin Hoffman, *supra* note 271 (describing Seahawks’ team decision to not participate in national anthem).

276. See *id.* (“An N.F.L. executive said teams that did not take the field during the playing of the national anthem, including the Steelers, would not be fined. According to league rules, all teams are required to be on the sideline during the national anthem, though they do not specify whether players must stand.”).

277. See CBA, *supra* note 42, at Art. 17, § 1 (defining parties required for collusion under CBA).

278. See *id.* at Art. 17, § 3 (allowing any non-prohibited business reason to not contract).

279. See Ken Belson, *Goodell and N.F.L. Owners Break From Players on Anthem Kneeling Fight*, N.Y. TIMES (Oct. 10, 2017), <https://www.nytimes.com/2017/10/10/sports/football/nfl-goodell-anthem-kneeling.html> [<https://perma.cc/X9LF-8GC6>] (“‘At this moment, Jerry Jones has made a business decision,’ said Frank Zaccanelli, a former part owner of the Dallas Mavericks who knows Jones well.

IV. "YOU CAN'T BLOW OUT A FIRE,"²⁸⁰ BUT YOU DON'T NEED TO START A BONFIRE IN YOUR LIVING ROOM.

In 1977, Steven Biko's decision to sit in the face of threats cost him his life.²⁸¹ Years later, threats came to Olympic athletes who chose to stand with raised fists.²⁸² So too has Colin Kaepernick suffered for his decision to sit and kneel.²⁸³ Kaepernick's decision has not cost him his life, but it appears to have cost him his livelihood.²⁸⁴ While it seems obvious that teams will not sign him, the question is why that is the case.²⁸⁵ Some players, such as Ray Rice, were shunned as a result of NFL disciplinary actions, while others were shunned without public comment.²⁸⁶ Kaepernick's protests were instead met with mixed responses, including a measure of official support from the Commissioner, rather than a public directive in opposition.²⁸⁷

But Kaepernick needs more than a mixed response in order to prevail in his collusion suit.²⁸⁸ He needs to show by a clear preponderance of the evidence that Clubs colluded between themselves or with the NFL to deprive him of his ability to contract.²⁸⁹ However, at the time of this writing, there has been no public evidence di-

'He's in Dallas, Texas, and owns America's Team. If any business took a 10 to 12 percent business hit, red lights would be going off. If you've got 50 percent of your people against you, you are going to have drastic changes. If this continues down this road, you'll see a deterioration that will be significant.'"). For a discussion detailing the Ravens declining attendance as a result of protests, as well as declining television ratings, see *supra* notes 94–98 and accompanying text.

280. PETER GABRIEL, *supra* note 1.

281. See TRUTH AND RECONCILIATION COMM'N, *supra* note 4 (describing circumstances surrounding Biko's death).

282. See Cosgrove, *supra* note 10–11 (discussing death threats to Tommie Smith and John Carlos).

283. See TRUTH AND RECONCILIATION COMM'N, *supra* note 4 (detailing Biko's death at hands of South African police).

284. See Gilmer, *supra* note 31 (describing Kaepernick's inability to find work in NFL).

285. For further discussion of collusion and racism as possible factors for Kaepernick's lack of opportunities, see *supra* notes 105–106 and accompanying text.

286. For further discussion of Ray Rice's assault against his then girlfriend, see *supra* notes 180–191 and accompanying text; for further discussion of Kluge and Tebow, who both failed to secure lasting work in the NFL after being associated with distractions, see *supra* notes 153–179 and accompanying text.

287. See USA TODAY Sports, *supra* note 28 (discussing Goodell's positive comments in favor of Kaepernick's right to protest).

288. For further discussion of evidentiary standards, see *supra* notes 253–257 and accompanying text.

289. See CBA *supra* note 42 (discussing clear preponderance standard).

rectly linking the actions of one team with another.²⁹⁰ Without specific evidence uncovered in the discovery process, Kaepernick will likely not prevail in his collusion suit.²⁹¹ NFL rules allow teams to make decisions to minimize distractions, and whether or not he kneels in potential future games, Kaepernick has become a distraction greater than past controversial players such as Tebow, Kluwe, or Rice.²⁹²

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290. For further discussion of the implied case for collusion set forth in Kaepernick's Arbitration Demand, see *supra* notes 104–109 and accompanying text.

291. See CBA, *supra* note 42 and accompanying text (discussing other grounds allowing Clubs to decline to contract with players).

292. For further discussion of the controversies following Kaepernick's decision to protest, see *supra* notes 86–98 and accompanying text.

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