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EVERYONE TAKE A KNEE AND LISTEN UP! EXAMINING STUDENT-ATHLETE PROTESTS DURING THE NATIONAL ANTHEM

ZACK ZASTROW*

I. INTRODUCTION

“Everyone huddle around and take a knee!” Many who have participated in team sports throughout their lives have likely heard this cliché sports statement—a head coach itching at the opportunity to give some type of constructive feedback to their team. While “taking a knee” has been a staple of team sports since they became popular over a century ago,¹ many coaches had not anticipated what the phrase “taking a knee” commonly refers to today. Throughout history, sports have always been a medium for individuals to express themselves, both athletically and socially. At the 1968 Summer Olympics, for instance, United States Track and Field gold medalist Tommie Smith and his teammate, bronze medalist John Carlos, raised their fists during the playing of the United States national anthem in a silent protest showcasing African American unity and in a valiant attempt to shed light upon various injustices against lower and middle class families of all races.² The display, largely viewed as a brave gesture by today’s standards, led to the suspensions

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1. While team sports have been a staple of American culture for over a century, which was largely due to the passage of mandatory state schooling laws throughout the country, sports were originally only popular among lower class children. It was not until after World War II ended did middle and upper-class children become more interested and involved in team sports. See Hilary Levey Friedman, *When Did Competitive Sports Take Over American Childhood?*, ATLANTIC, Sept. 20, 2013, <https://www.theatlantic.com/education/archive/2013/09/when-did-competitive-sports-take-over-american-childhood/279868/>.

2. DeNeen L. Brown, *Tommie Smith, John Carlos and the 1968 Black Power Protest Salute That Shook the World*, WASH. POST, Sept. 24, 2017, https://www.washingtonpost.com/news/retropolis/wp/2017/09/24/they-didnt-takeaknee-the-black-power-protest-salute-that-shook-the-world-in-1968/?utm_term=.0de2c88c4876.

of Smith and Carlos from the U.S. track team, and it also caused an influx of death threats made against the Olympians.³

While the “black power” gesture occurred almost exactly fifty years ago, the past few years in the United States have marked a similar increase in political and social expression before, during, and after sporting events. Arguably the most polarizing political movement commonly seen today in the sporting world is the wave of athletes who express themselves through various forms of peaceful protests during the performance of America’s national anthem. While the national media has extensively covered these anthem protests at the professional level throughout professional sports leagues, such as the National Football League (NFL) and National Basketball Association (NBA), protests have also recently arisen on behalf of student-athletes at the collegiate levels and even by students in high school sports. Many protests have surfaced throughout the United States where high school student-athletes are now choosing to peacefully protest during the national anthem by kneeling—or otherwise refusing to stand—during its performance.

For example, in October 2017, four high school football players from Lansing, Michigan, were benched from play after openly stating their intent to kneel during the national anthem.⁴ The star quarterback—and team captain—of Lansing Catholic High School (a private high school), Michael Lynn III, was among those four players.⁵ Lynn III approached his school’s administration a week before the players’ demonstrations and initially received support from the school, but the school later asked him not to kneel.⁶ In fact, the school president at Lansing Catholic released a written statement declaring that any student-athlete who would kneel during the national anthem would “receive consequences” in order for students to “grow in virtue” and because the protests could supposedly “create an unsafe situation for any student involved.”⁷ In response to the school’s actions, Lynn III commented:

I get they are a private school and they can do what they want But that doesn’t make it humane and that does not make it OK that they can do that because that still is my right to peaceful protest I am a young black man in America. I’ve had to deal with certain things that other people will never have

3. *Id.*

4. Charlotte Carroll, *National Anthem Protests: High School Football Players Benched*, SPORTS ILLUSTRATED, Oct. 6, 2017, <https://www.si.com/high-school/2017/10/06/national-anthem-protests-michigan-students-benched>.

5. *Id.*

6. *Id.*

7. *Id.*

to deal with . . . I [told school officials] [t]his feels like you're trying to silence me and it feels like you're not giving me the right to do what Americans should be able to do.⁸

One thousand three-hundred miles south of Lansing, two high school student-athletes in Texas were kicked off the football team after one player raised his fist in the air during the national anthem while other players kneeled.⁹ Cedric Ingram-Lewis raised his fist during the national anthem, while his teammate and cousin, Larry McCullough, took a knee.¹⁰ Soon after, head football coach Ronnie Mitchem, a veteran of the United States Marine Corps and a practicing pastor in the area, kicked the two students off the team and justified his actions by stating the following: “[I] let those guys do their protests. But the rule was, if you did this protest, you wouldn’t be on the team” because the protests were reportedly offensive to anyone who had served in the armed forces.¹¹ Coach Mitchem further stated, “I’m trying to teach the guys respect, and in our program, we do more than just play football. We teach guys how to shake hands with somebody, look them in the eye, be a man.”¹² Like the aforementioned incident in Lansing, Michigan, the two Texas student-athletes were warned by Coach Mitchem that there would be consequences if they decided to protest during the national anthem.¹³

Despite these newfound controversies concerning national anthem protests, the two above incidents are not isolated events. Numerous high schools throughout the country, both private and public, have released written statements denouncing student-athletes who choose to protest during the national anthem. For example, a private school system in New York issued a statement that student-athletes would face “serious disciplinary action” if they protested during the anthem prior to school-sponsored sporting events.¹⁴ And, in Louisiana, a superintendent of another private school issued a statement that students should stand for the anthem because “[i]t is a choice for students to participate in extracurricular activities, not a right . . .”¹⁵ Some high schools have even taken another step of disapproval by specifically outlining

8. *Id.*

9. Jacey Fortin, *High School Students Kicked Off Football Team After Protesting During National Anthem*, N.Y. TIMES, Oct. 2, 2017, <https://www.nytimes.com/2017/10/02/us/high-school-national-anthem.html>.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. Christine Hauser, *High Schools Threaten to Punish Students Who Kneel During Anthem*, N.Y. TIMES, Sept. 29, 2017, <https://www.nytimes.com/2017/09/29/us/high-school-anthem-protest.html>.

15. *Id.*

punishments for their student-athletes if they so decide to kneel during the national anthem. Some schools have noted that any infraction would cause “removal from the team” because these schools are “committed to creating a positive environment for sporting events that is free of disruption to the athletic contest or game.”¹⁶

While the above incidents involved only high school football players, national anthem protests are not solely limited to the gridiron. Other team sports for both males and females have had similar protests. For instance, referees for the Indiana High School Athletic Association threatened to disqualify female volleyball players if they chose to kneel during the national anthem, despite Indiana’s high school athletics governing body being “silent” on the issue.¹⁷ While some high school administrations have attempted to prohibit national anthem protests during school-sponsored events through instituting various punishments against students—and some coaches openly threatening to voluntarily resign if school administrators allow students to kneel during the national anthem¹⁸—other administrations and coaches see these protests as opportunities for “teaching moments” to stimulate meaningful political discussions about the current state of race relations and social injustice in the United States.¹⁹ Students at San Ramon High School in California even collectively voted to ban the playing of the national anthem during school-sponsored pep rallies and other school-sponsored events.²⁰ Surely, the hysteria, and perhaps fear by some school administrators, of student-athletes protesting during the national anthem has reached critical levels in the United States.

The ensuing analysis examines whether high school officials may adversely discipline a student-athlete for kneeling, or for expressing themselves through

16. *Id.* (quoting Shaun King, @shaunking, TWITTER (Sept. 28, 2017, 8:08 AM), https://twitter.com/shaunking/status/913420254394634240?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetem-bed%7Ctwterm%5E913420254394634240&ref_url=https%3A%2F%2Fwww.ny-times.com%2F2017%2F09%2F29%2Fus%2Fhigh-school-anthem-protest.html).

17. Justin L. Mack, *IHSAA Refs Threaten to Disqualify Players for Anthem Kneeling*, INDYSTAR, Oct. 18, 2017, <https://www.indystar.com/story/news/2017/10/18/ihsaa-refs-threaten-volleyball-players-disqualification-over-national-anthem-protests/775480001/>.

18. Darren Sabedra, *Anthem Protest: Bellarmine Assistant Coach Quits After Players Kneel*, MERCURY NEWS, Oct. 20, 2017, <http://www.mercurynews.com/2017/10/16/anthem-protest-bellarmino-assistant-submits-resignation-after-players-kneel/>.

19. Gregory Pratt et al., *As Protests During Anthem Reach High Schools, A ‘Teaching Moment’ for Some Coaches*, CHI. TRIB., Sept. 29, 2017, <http://www.chicagotribune.com/news/local/breaking/ct-high-school-anthem-protests-met-20170929-story.html>.

20. Sophie Haigney, *San Ramon High School Students Ban National Anthem From Rallies*, SFGATE, Feb. 13, 2018, <https://www.sfgate.com/bayarea/article/San-Ramon-high-school-students-ban-national-anthem-12611370.php>.

other forms of peaceful protest, during the playing of the national anthem before the start of a school-sponsored sporting event. The analysis will consider whether high school administrations have the legal right to discipline student-athletes, either through suspension from gameplay, practice limitations, or an outright expulsion from the team, if the high schools have written policies prohibiting any conduct that may disrupt the school environment or otherwise shed a negative public light on the school. Or, to the contrary, whether student-athletes possess unconstrained First Amendment rights to peacefully express themselves during the national anthem. Perhaps strangely, a comprehensive analysis of the United States Constitution, applicable statutory law, and landmark federal cases answer this issue in both the affirmative and the negative. Put simply, it depends. While public high school administrations are likely barred from disciplining student-athletes who peacefully protest during the national anthem, those punishments may be warranted if the students' protests become violent, they disrupt daily school activities in some substantial way, or if school officials can prove to a court that standing and honoring the national anthem reasonably relates to legitimate goals and values that the school intends to instill in its students.

II. NATIONAL ANTHEM PROTESTS IN PROFESSIONAL AND AMATEUR SPORTS

The current wave of national anthem protests carried out by high school athletes originally stemmed from similar protests by professional athletes in the NBA and NFL. The first legitimate, high-profile protest carried out by a professional player during the national anthem dates back to 1995 when NBA guard Mahmoud Abdul-Rauf refused to stand during the playing of the national anthem.²¹ During the anthem, Abdul-Rauf would either stretch, pray with his eyes closed and hands locked, or stay inside the locker room until the anthem had concluded.²² Abdul-Rauf was one of the NBA's best free throw shooters in league history, yet his career was cut short at the young age of twenty-nine—an age where many NBA players are still considered to be in the prime of their careers—which Abdul-Rauf largely attributes to his unpopular practices carried out during the national anthem.²³ Abdul-Rauf has noted himself that he is not particularly surprised by his shortened NBA career, explaining that professional sports leagues often attempt to slowly retaliate against players who do not conform with the league's desired conduct by using various tactics:

21. Lindsay Gibbs, *Former NBA Star Who Protested the Anthem in 1996 Says Kaepernick Is Being 'Black-Balled' By NFL*, THINKPROGRESS (June 26, 2017), <https://thinkprogress.org/mahmoud-abdul-rauf-protest-anthem-1f4b1a953f25/>.

22. *Id.*

23. *Id.*

They begin to try to put you in vulnerable positions They play with your minutes, trying to mess up your rhythm. Then they sit you more. Then . . . the guy just doesn't have it anymore, so we trade him. It's kind of like a setup You know, trying to set you up to fail and so when they get rid of you, they can blame it on that as opposed to [the player's national anthem protests]. They don't want these type of examples to spread, so they've got to make an example of individuals like this.²⁴

Not only, as Abdul-Rauf claims, was he ostracized by various League members working within the NBA, but Abdul-Rauf also received numerous death threats from upset fans and even had his home burned down due to his unpopular stance.²⁵ Despite what has happened to Abdul-Rauf over the years, he still holds no regrets and adamantly states that “[i]t’s priceless to know that I can go to sleep knowing that I stood to my principles Whether I go broke, whether they take my life . . . I stood on principles.”²⁶ While demonstrations like those illustrated by Abdul-Rauf were indeed rare in the 1990’s, they would resurface once more in sporting events of all talent levels by 2016.

The most recent and arguably most iconic professional sports figure to engage in protests during the national anthem is former San Francisco 49ers quarterback, Colin Kaepernick. On August 14, 2016, Kaepernick first decided to kneel during the national anthem as the San Francisco 49ers began pre-season play, but his demonstrations did not gain national media attention until a few weeks later during a 49ers game on August 26, 2016.²⁷ According to Kaepernick, his demonstrations were made to protest various social and racial injustices occurring everyday throughout the United States, especially to highlight police brutality against African Americans.²⁸ Kaepernick continued to kneel throughout the 2016 NFL regular season, which soon persuaded a noteworthy list of other NFL players to join his cause. Former San Francisco 49ers safety Eric Reid,²⁹ Seattle Seahawks cornerback Jeremy Lane, and Denver

24. *Id.*

25. Jesse Washington, *Still No Anthem, Still No Regrets for Mahmoud Abdul-Rauf*, UNDEFEATED (Sept. 1, 2016), <https://theundefeated.com/features/abdul-rauf-doesnt-regret-sitting-out-national-anthem/>.

26. *Id.*

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

28. *Id.*

29. Eric Reid signed as a free agent by the Carolina Panthers on Thursday, September 27, 2018. David Newton, *Carolina Panthers Sign Safety Eric Reid*, ESPN (Sept. 28, 2018), http://www.espn.com/nfl/story/_/id/24812861/carolina-panthers-sign-safety-eric-reid. At the time of writing

Broncos linebacker Brandon Marshall were among those who kneeled during the national anthem.³⁰

However, similar to the protests seen at the high school levels of competition, the list of star athletes protesting did not end with football players. Even Megan Rapinoe, a popular soccer player for the U.S. Women’s Soccer team, joined the cause.³¹ Rapinoe, who is one of the few openly gay professional athletes in the world, stated that “she knows ‘what it means to look at the flag and not have it protect all of your liberties’” and how “‘it’s important to have white people stand in support of people of color’”³² By the time the 2017 NFL season began, over 200 NFL players either took a knee or linked arms with fellow teammates before or during the national anthem over one weekend of competitive play.³³ Not accounting for the players who locked arms or raised their fists during the national anthem, at least twenty NFL players continued anthem protests by personally kneeling throughout the final week of regular season play in December 2017, which constitutes roughly one percent of the league’s players.³⁴ To no surprise, this massive wave of protests by professional sports players drew the attention of the national media and powerful politicians alike. On September 22, 2017, during a speech in Huntsville, Alabama, United States President Donald Trump publicly criticized the various national anthem protests by claiming that professional athletes—who protest—were “ruining the game” and “should be fired.”³⁵

As a result, these powerful political statements made by professional athletes throughout the country are now spilling into the lower levels of amateur sports. Professional sports stars are, of course, often viewed as role models by many of their adolescent peers. Since fall 2017, a season which often signals the start of high school football in America, numerous incidents have arisen in

this Article, Reid still remained unsigned by an NFL team. And at that time, many current NFL players, such as Carolina Panthers wide receiver Torrey Smith, New England Patriots safety Devin McCourty, and Philadelphia Eagles safety Malcolm Jenkins believed Reid had not been signed because of his “unpopular” national anthem protests. See Cody Benjamin, *Panthers’ Torrey Smith Says Eric Reid Is ‘Being Locked Down’ Because of Protests*, CBS SPORTS (Apr. 6, 2018), <https://www.cbssports.com/nfl/news/panthers-torrey-smith-says-eric-reid-is-being-locked-down-because-of-protests/>. In an attempt to secure NFL employment, Eric Reid has openly stated that he will not continue his anthem protests into the 2018 season. *Id.*

30. Sandritter, *supra* note 27.

31. *Id.*

32. *Id.*

33. Jennifer Calfas, *Colin Kaepernick Speaks Out About National Anthem Protest*, TIME, Oct. 8, 2017, <http://time.com/4973843/colin-kaepernick-national-anthem-nfl-kneeling/>.

34. John Branch, *National Anthem Protests Sidelined by Ambiguity*, N.Y. TIMES, Jan. 1, 2018, <https://www.nytimes.com/2018/01/01/sports/nfl-national-anthem-protests.html>.

35. Associated Press, *Trump Says N.F.L. Players Should Be Fired for Anthem Protests*, N.Y. TIMES, Sept. 23, 2017, <https://www.nytimes.com/2017/09/23/sports/trump-nfl-colin-kaepernick-.html>.

high schools throughout the country where student-athletes are kneeling or performing other peaceful demonstrations during the national anthem. The response to these protests have been mixed. Some team coaches, and their overseeing school administrations, encourage such protests, while others have expressly banned the protests and actively punish those who engage in them. Unsurprisingly, the general public's views on national anthem protests are also mixed. A national Marist poll of American adults noted that 48% believed the national anthem protests by NFL players were "a respectful way to attract attention to racial inequality nationwide," while 46% believed the protests were disrespectful.³⁶ Similarly, Virginia Commonwealth University conducted a survey of 788 adults, which yielded responses indicating that roughly half of the respondents "would oppose a rule prohibiting high school athletes from sitting or kneeling during the national anthem," although the remaining half support school rules banning such protests.³⁷

The national polls clearly illustrate that there is currently no public consensus on whether high school student-athletes should be allowed to peacefully protest during the national anthem. Further muddying the waters is the inconsistent response that high school administrations across the country have had to this movement. Peaceful protests are undoubtedly hallmarks of the United States Constitution, which grants American citizens the security to have freedoms of speech, assembly, and expression.³⁸ However, there is a grave danger that today's student-athletes will experience disparate treatment by high school officials if the students are punished or otherwise prohibited from engaging in anthem protests through such inconsistent and arbitrary responses. If high school administrations in each school district throughout the country, over a whopping 132,000 school districts,³⁹ inconsistently treat protesting student-athletes on a varying school-by-school basis, the flood gates for potential litigation will swing open. Parents will flock to file lawsuits against school districts alleging that their children's constitutional rights are being stomped. To prevent an influx of litigation against school districts across the

36. Laura Santhanam, *Poll: Americans Divided on NFL Protests*, PBS NEWSHOUR (Sept. 29, 2017), <https://www.pbs.org/newshour/nation/poll-americans-divided-nfl-protests>. Interestingly, the poll also noted that 80% of the people who identified as Democrats believed that the national anthem protests are respectful, while 90% of self-identifying Republicans found them to be disrespectful, and 75% of African Americans viewed the protests as respectful, while only 45% of white Americans agreed. *Id.*

37. Justin Mattingly, *Virginians Split on National Anthem Protests, VCU Poll Shows*, RICHMOND TIMES-DISPATCH, Jan. 16, 2018, http://www.richmond.com/news/local/education/virginians-split-on-national-anthem-protests-vcu-poll-shows/article_247c3d64-bc99-5fbc-a1f0-e8da816fddec.html.

38. See U.S. CONST. amend. I.

39. See *Number of Public School Districts and Public and Private Elementary and Secondary Schools: Selected Years, 1869-70 through 2010-11*, NAT'L CENTER FOR EDUC. STAT., https://nces.ed.gov/programs/di-gest/d12/tables/dt12_098.asp (last visited Dec. 13, 2018).

United States, school districts and state officials must work together to adequately and consistently address student-athlete protests carried out during the national anthem.

III. HOW THE CONSTITUTION AND CONSTITUTIONAL LAW APPLIES TO FREEDOMS OF STUDENT SPEECH AND PROTESTS IN HIGH SCHOOLS

The above examples portraying how some high school student-athletes were disciplined shows that the issue of whether any school discipline is legally warranted has spread from the professional level to the quiet suburbs of our nation's youth. As a result, the core issue at hand is whether the thousands of high school administrators (and sports coaches) possess the legal authority to punish students for engaging in peaceful protests. In addressing this legal issue, the most logical starting point is to observe perhaps the most fundamental right in American society: the First Amendment to the United States Constitution. The First Amendment, of course, grants every American citizen various freedoms of speech, religion, and assembly.⁴⁰ Specifically, the First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."⁴¹ Americans, however, do not have limitless First Amendment rights, and they may be curtailed in many circumstances to ensure order and safety and to maintain the general goodwill within the community at-large.⁴²

In a similar vein, state and federal courts have tackled numerous complex legal issues involving public high schools functioning as state actors. If high schools are deemed as state actors, the protections afforded by the United States Constitution attach to those students who attend the high school.⁴³ For example, federal cases have arisen where high schools have attempted to curtail student speech and expression during school hours, and even after hours, at school-sponsored events. Arguably the most notable case where student freedom of speech and expression issues intersected with the administration's

40. U.S. CONST. amend. I.

41. *Id.*

42. See generally *What Does Free Speech Mean?*, U.S. COURTS, <http://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/what-does> (last visited Dec. 13, 2018).

43. State actors must comply with the various protections guaranteed by the U.S. Constitution. "Section 1983 provides a cause of action against any person who deprives an individual of federally guaranteed rights 'under color' of state law Anyone whose conduct is 'fairly attributable to the state' can be sued as a state actor under §1983." *Filarsky v. Delia*, 566 U.S. 377, 383 (2012). See 42 U.S.C. § 1983 (2018).

right to maintain an orderly school environment arose in the seminal case of *Tinker v. Des Moines Independent Community School District*.⁴⁴

Tinker is the landmark case on freedom of student expression in public high schools over matters of political concern. In *Tinker*, two high school students and one junior-high school student petitioned the United States Supreme Court seeking injunctive relief after the students were punished for devising—and executing—a plan to wear black armbands signifying a protest of the Vietnam War.⁴⁵ In December 1965, the students and a group of adults met in one of the students' homes in Des Moines, Iowa, where they originally hatched the plan to protest during school hours by wearing the black armbands.⁴⁶ School administrators became aware of the students' plan and subsequently met with the students on December 14, 1965 where the students were notified that any student who was caught wearing an arm band on the school premises would be asked to take it off, and if the students refused to comply, they would be indefinitely suspended until returning to school without an armband on.⁴⁷ On December 16, 1965, two of the petitioners in *Tinker* attended school with their black armbands and were, to no surprise, sent home from school and indefinitely suspended.⁴⁸

As a result of the school administrators' conduct, the students filed a Section 1983 civil rights action against the public high school seeking an injunction “restraining the respondent school officials . . . from disciplining the petitioners . . .” but the district court dismissed the complaint, upholding the “constitutionality of the school authorities' action on the ground that it was reasonable in order to prevent disturbance of school discipline.”⁴⁹ The students then appealed to the Eight Circuit Court of Appeals, which affirmed the district court's decision without issuing a written opinion.⁵⁰ The U.S. Supreme Court subsequently granted certiorari and held that high school administrators cannot restrict students from peacefully protesting, or otherwise peacefully demonstrating, in instances where students wore black armbands to protest the Vietnam war, but whom did not otherwise disrupt activities throughout the daily school day.⁵¹ The Supreme Court explicitly noted, “[c]ertainly where there is no finding and no showing that engaging in the forbidden conduct would

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

45. *Id.* at 504–05.

46. *Id.* at 504.

47. *Id.*

48. *Id.*

49. *Id.* at 504–05.

50. *Id.* at 504.

51. *Id.* at 514.

‘materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,’ the prohibition cannot be sustained.”⁵²

In closing, the Supreme Court supported its holding by noting:

[T]he record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred. These petitioners merely went about their ordained rounds in school. Their deviation consisted only in wearing on their sleeve a band of black cloth, not more than two inches wide. They wore it to exhibit their disapproval of the Vietnam hostilities and their advocacy of a truce, to make their views known, and, by their example, to influence others to adopt them. They neither interrupted school activities nor sought to intrude in the school affairs or the lives of others. They caused discussion outside of the classrooms, but no interference with work and no disorder. In the circumstances, our Constitution does not permit officials of the State to deny their form of expression.⁵³

The Supreme Court’s ruling in *Tinker* famously noted the following rule of law in America: “[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”⁵⁴

Despite *Tinker*’s strong language extending broad First Amendment freedoms to high school students, the issue of student expression would once more arise only a mere twenty years later in *Bethel School District No. 403 v. Fraser*.⁵⁵ In *Bethel*, a student at a public high school gave a speech nominating his friend for their school’s student government office during a school assembly, which “was held during school hours as part of a school-sponsored educational program in self-government”⁵⁶ During the speech, which was given to roughly 600 students, aged fourteen to eighteen, the student made various sexual references and metaphors about his fellow classmate, which garnished some cheers from the large student crowd.⁵⁷ Prior to giving the speech, the student met with numerous teachers to discuss the speech, “two of whom advised him

52. *Id.* at 509; see *Burnside v. Byars*, 363 F.2d 744, 748-49 (5th Cir. 1966).

53. *Tinker*, 393 U.S. at 514.

54. *Id.* at 506.

55. See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 675 (1986).

56. *Id.* at 677-78.

57. *Id.*

that it was inappropriate and should not be given.”⁵⁸ Furthermore, prior to the assembly, the assistant principal met with the student, who advised him that the speech would violate the school’s “disruptive-conduct rule,” which barred the use of any “obscene, profane language or gestures.”⁵⁹ Regardless of the teachers’ and administrator’s warning, the student gave the speech, which resulted in him receiving a three-day suspension and being disqualified from giving any speech during the school’s graduation ceremony.⁶⁰

As a result—and similar to the students in *Tinker*—the student, on behalf of his father, filed a Section 1983 lawsuit against the public high school arguing that his First Amendment rights to free speech were violated.⁶¹ The district court, which was later affirmed by the Ninth Circuit Court of Appeals, held that the high school’s punishments violated the First Amendment, the “disruptive-conduct rule” was “vague and overbroad” and removing the student from speaking at the graduation ceremony “violated the Due Process Clause of the Fourteenth Amendment.”⁶² The U.S. Supreme Court subsequently granted certiorari and held that school officials may properly punish student speech with suspensions, or other acceptable administrative punishments, if school officials determine that speech to be lewd, offensive, or disruptive to the school’s basic educational mission.⁶³ Specifically, the Court noted the following:

The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent’s would undermine the school’s basic educational mission. A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students.⁶⁴

Lastly, the Supreme Court reiterated that a high school’s code of conduct rules, or school handbook, “need not be as detailed as a criminal code which imposes criminal sanctions” because schools must have the ability “to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process”⁶⁵

Despite the grand collective importance of *Tinker* and *Bethel*, perhaps the most important federal case that helps to answer whether high school

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 675-76.

63. *Id.* at 675.

64. *Id.* at 685.

65. *Id.* at 686; *see* Arnett v. Kennedy, 416 U.S. 134, 161 (1974).

administrators can legally punish student-athletes for peaceful protests during the national anthem arose just two years after *Bethel* was decided. In *Hazelwood School District v. Kuhlmeier*, the Supreme Court further elaborated upon high school limitations of student speech and expression.⁶⁶ Former high school students filed suit against a school district and its officials arguing that their First Amendment rights to free speech and expression were violated after the high school edited out content contained in a school-sponsored newspaper, which was written in a journalism class taught at the school, when the students wrote an article discussing controversial issues like teen pregnancy and divorce.⁶⁷ The school justified its conduct by claiming that “the article’s references to sexual activity and birth control were inappropriate for some of the younger students,” and the article’s references to divorce were inappropriate because it explicitly referenced a student complaining about his father, which would be published without the father’s consent.⁶⁸

The district court sided with the school’s argument and held that the school did not violate any of the former students’ First Amendment rights, but the Eighth Circuit Court of Appeals reversed.⁶⁹ As a result, the Supreme Court granted certiorari. The Supreme Court introduced a legal test that determines when a public school may limit the style or content of student speech in school-sponsored activities, which would include the realm of school-sponsored sporting events.⁷⁰ Regarding this test, the Supreme Court noted that “[e]ducators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.”⁷¹ The Supreme Court further noted a difference between the test set forward in *Tinker* and the accompanying *Hazelwood* test, stating, “we conclude that the standard articulated in *Tinker* for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression.”⁷² Lastly, the Court supported its findings by noting that it was “consistent with our oft-expressed view that the education of the Nation’s youth is primarily the responsibility of parents, teachers, and

66. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 260 (1988).

67. *Id.*

68. *Id.*

69. *Id.* at 260–61.

70. *Id.* at 273.

71. *Id.*

72. *Id.* at 272-73.

state and local school officials, and not of federal judges.”⁷³ Thus, the Supreme Court appeared to distinguish between two separate tests: the *Tinker* test applies in cases of in-school student speech, especially pertaining to matters of political concern, while the *Hazelwood* test applies to matters of student speech in school-sponsored activities, such as voluntary school clubs and school sports.

Due to these three landmark cases, lower federal courts have applied these various tests in subsequent cases that have arisen over the past thirty years, especially in the context of school-sponsored activities like high school sports. For example, in *Wildman ex rel Wildman v. Marshalltown School District*, the Eighth Circuit Court of Appeals held that a high school student-athlete who was punished by school officials for “insubordinate speech,” after the student wrote a strongly worded statement containing profanities, did not have unbridled First Amendment rights, especially given the circumstances that the student refused to apologize after speaking critically about her coach over the internet.⁷⁴ Specifically, the court stated the following:

[The Plaintiff’s] letter, containing the word “bullshit” in relation to other language in it and motivated by her disappointment at not playing on the varsity team, constitutes insubordinate speech toward her coaches. Here, in an athletic context void of the egregious conduct which spurred the football player’s speech about the hazing incident in *Seamons*⁷⁵ and where Wildman’s speech called for an apology, no basis exists for a claim of a violation of free speech.⁷⁶

The court explicitly distinguished *Wildman* from the unique—and disturbing—facts presented in *Seamons*. Thus, federal courts appear to side with school officials to allow for the punishment of students and student-athletes when those students use profane, vulgar, or insensitive language, or they otherwise do something to legitimately disrupt a school-sponsored activity or other daily activities during the school day.

The final case of importance addressing concerns over First Amendment rights held by high school student-athletes is *Pinard v. Clatskanie Sch. Dist.*

73. *Id.* at 273 (citing Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 208 (1982); Wood v. Strickland, 420 U.S. 308, 326 (1975); Epperson v. Arkansas, 393 U.S. 97, 104 (1968)).

74. See *Wildman ex rel. Wildman v. Marshalltown Sch. Dist.*, 249 F.3d 768, 768 (8th Cir. 2001)).

75. To avoid potential confusion, the *Seamons* case involved a high school student-athlete who alleged that his “football coach asked the player to apologize to the football team by reporting to the police and to school authorities a hazing incident in which the player was assaulted in the high school locker room by a group of his teammates” *Id.* at 772 (quoting *Seamons v. Snow*, 206 F.3d 1021, 1027 (10th Cir. 2000)).

76. *Id.*

6J.⁷⁷ In *Pinard*, the Ninth Circuit Court of Appeals considered whether high school student-athletes' protected speech were a motivating factor in the school authority's decision to suspend the students.⁷⁸ Student-athletes for a varsity high school basketball team in Clatskanie, Oregon were suspended by high school officials after they openly spoke out against their coach, including various students asking the coach to resign.⁷⁹ The students filed suit against the school district claiming that the punishments violated their First Amendment rights of free speech, but the district court was unpersuaded by the students' arguments and granted summary judgment in favor of the district, reasoning that the student-athletes were "not engaged in a constitutionally protected activity because their speech did not involve a matter of public concern."⁸⁰ Further damning evidence against the student-athletes, the district court concluded, was that the students refused to board the team bus to play in a scheduled basketball game, which "substantially and materially interfered with a school activity."⁸¹ As a result, the students appealed to the Ninth Circuit. Ultimately, the Ninth Circuit Court of Appeals held that:

[T]he district court erred in adopting from the government employment context the public concern standard for determining whether the First Amendment protects student speech. Under the proper standard articulated in *Tinker* . . . the students' petition and complaints against the coach were protected speech because they could not reasonably have led school officials to forecast substantial disruption of or material interference with a school activity. However, we agree with the district court that the students' refusal to board the bus was not protected by the First Amendment because, even if expressive conduct, it substantially disrupted and materially interfered with the operation of the varsity boys basketball program.⁸²

The court also succinctly—and helpfully—summarized the above cases and clarified how the various legal tests apply to real-life situations inside and outside the classroom. The court summarized as follows: "(1) vulgar, lewd, obscene and plainly offensive speech is governed by *Bethel School District v.*

77. 467 F.3d 755 (9th Cir. 2006).

78. *Id.*

79. *Id.* at 758-59.

80. *Id.* at 759.

81. *Id.*

82. *Id.* at 759-60.

Fraser; (2) school-sponsored speech is governed by *Hazel-wood*; and (3) speech that falls into neither of these categories is governed by *Tinker*.⁸³

IV. CAN HIGH SCHOOL ADMINISTRATORS *REALLY* PUNISH STUDENT-ATHLETES FOR PEACEFUL EXPRESSION DURING THE NATIONAL ANTHEM?

Based on the cases discussed above, it appears that officials at both private and public high schools may have the legal right to adversely punish student-athletes who choose to protest during the national anthem, even if those protests are silent or otherwise peacefully carried out. Here, the first prong of the legal analysis requires the aggrieved party to file a Section 1983 lawsuit,⁸⁴ which requires them to have adequate legal standing to do so. High school students—or parents on behalf of those students who have not yet turned eighteen-years-old at the time of filing—have standing to file suit against all public high schools and against private high schools that belong to state sporting associations.

For instance, if a student-athlete in Wisconsin was suspended from his football team for two games after he knelt during the national anthem before a team game, that student would nonetheless have standing to file a Section 1983 lawsuit against the high school in federal court, even if that school was private, so long as the private high school belonged to Wisconsin's high school sporting association, the Wisconsin Interscholastic Athletic Association (WIAA). As mentioned above, all public high schools are state actors, but all private high schools are also considered state actors if they are voluntary members to a public high school sports organization, like the WIAA. The U.S. Supreme Court in *Brentwood Academy v. Tennessee Secondary School Athletic Association* held that “[t]he [private] Association’s regulatory activity is state action owing to the pervasive entwinement of state school officials in the Association’s structure”⁸⁵ Furthermore, “[a] school district, as a quasi-municipal agency, can be sued for monetary, declaratory, or injunctive relief for depriving someone of constitutional or civil rights”⁸⁶ even if the infringing high school was private in nature. Thus, *Brentwood* further clarifies that student-athletes have standing to file suit in federal court for any alleged breaches of their constitutional rights, regardless of whether they attend a private or public high school, so long as the private high school belongs to a state sporting association operating in a public manner.

83. *Id.* at 765 (internal citations omitted).

84. *See* 42 U.S.C. § 1983.

85. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 288 (2001).

86. *Seamons v. Snow*, 206 F.3d 1021, 1029 (10th Cir. 2000). *See Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690 (1978).

The next step of the legal analysis is to ascertain which of the three legal tests conveyed in *Tinker*, *Hazelwood*, and *Bethel* applies to student-athlete expression at school-sponsored sporting events. Based on the above cases, particularly after considering *Wildman* and *Pinard*, high school sporting events are clearly school-sponsored activities. It is also evident that a student-athlete who decides to kneel during the national anthem is engaging in expressive speech. If *Tinker* were to govern the issue of student-athlete protests during the national anthem, the “material and substantial interference” test would apply.⁸⁷ Based on the *Tinker* test, it is extremely unlikely—perhaps even impossible—that a court would determine a student-athlete’s decision to kneel or to otherwise peacefully protest during the national anthem before a school sporting event materially and substantially interferes with any school activities. There is, of course, an extremely low likelihood that any student who engages in such silent and peaceful gestures, like kneeling during the national anthem, would have the ability to substantially interfere with daily school objectives. Therefore, under *Tinker*, high school officials would not have any adequate justifications for adversely punishing student-athletes who decide to kneel during the national anthem, so long as the students’ conduct does not disrupt any of the everyday functions of the school in some substantial manner.

However, if *Hazelwood* governs the legal issue at hand, the “legitimate pedagogical concern”⁸⁸ test would apply. In applying the *Hazelwood* test, high school officials would likely have legitimate justifications to lawfully prohibit, or to otherwise punish, student-athletes from kneeling during the national anthem because those punishments are likely reasonably related to “legitimate pedagogical concerns.” For instance, high school officials could feasibly argue that school administrations consistently seek to teach their students various positive life values, such as the virtue of showing respect for one’s peers and one’s country.⁸⁹ This justification appears to be adopted by many, if not all, of the high school administrations that have already punished student-athletes for anthem protests, as discussed in the earlier news articles. High school administrations may also potentially argue that the anthem protests could be carried out through politely and silently standing during the national anthem, as opposed to kneeling or raising a fist during it. Moreover, high school administrations may cite to federal statutes in support of their actions. For

87. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505 (1969).

88. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

89. The news articles mentioned earlier are littered with statements from school administrations claiming that the punishments are meant to preserve team unity, to show respect for the United States military, and to show respect for the United States flag. All of these justifications could reasonably be tied to “legitimate pedagogical concerns” within the teaching classroom as positive and desirable human traits that schools seek to instill in their students.

example, school administrators could point to Title IV, Section eight of the United States Code, which states that “[n]o disrespect should be shown to the flag of the United States of America . . .”⁹⁰ Thus, kneeling during the national anthem, or not facing the flag during it, could potentially be viewed by bystanders as disrespecting the U.S. flag in violation of 4 U.S.C. Section 8. Lastly, the U.S. Supreme Court has explicitly stated that student-athletes may lawfully be restricted to less freedoms than those guaranteed to a typical student within the classroom.⁹¹ Therefore, since school sporting events are undeniably school-sponsored events, the *Hazelwood* test applies. Since the *Hazelwood* test likely applies in the instance of student-athlete protests during school-sponsored games, there is a strong likelihood that high school officials may lawfully punish their student-athletes who choose to protest during the national anthem, so long as the high school administration does not arbitrarily punish the students and the administration is able to put forth some reasonable justification behind the punishment in relation to legitimate teaching goals of the high school.

V. POTENTIAL SOLUTIONS

While a compelling argument can be made for high schools to lawfully punish those student-athletes who choose to protest during the national anthem, high schools should nonetheless be more proactive to minimize the risk of legal conflicts arising. A one-size-fits-all solution to student-athlete protests would be difficult to administer and largely depends on which legal test laid forth from *Tinker* or *Hazelwood* applies. If *Tinker* applies, high school administrators must allow the protests to continue, and they should be wary of punishing any student-athlete who chooses to participate. School districts would be prudent to amend their school policy handbooks to include explicit language directly addressing any form of student protest that is carried out during the national anthem. The language contained in the school handbook would feasibly allow student-athletes to express themselves, but only to the degree that it is peaceful and insofar as it does not disrupt the everyday goals and functions of the school. To support this suggestion, Wisconsin officials of the WIAA have stated that

90. 4 U.S.C. § 8 (2018).

91. Lauren E. Rosenbaum, Comment, *Your Coach Is Watching: Can a High School Regulate Its Student-Athletes' Use of Social Media?*, 25 MARQ. SPORTS L. REV. 329, 342 (2014). The Supreme Court explicitly stated:

[B]y choosing to ‘go out for the team,’ they voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally Somewhat like adults who choose to participate in a ‘closely regulated industry,’ students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy.

Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 657 (1995) (other citations omitted).

“National Anthem protocols and policies are determined by local [school] administrators.”⁹² It is therefore the responsibility of each school to be proactive enough to minimize the risk of litigation in their communities.

Furthermore, despite reaching vastly different conclusions on whether student-athlete protests are legally punishable by high school administrations depending on which of the *Tinker* and *Hazelwood* tests apply, the preventative solutions are identical. An adequate legal solution would be similar even if the *Hazelwood* test applied because, while high school officials could likely prohibit student-athlete protests during the national anthem, school districts should once more be prudent in implementing explicit language addressing such conduct in their school policies and school handbooks. Doing so would further shield high schools from legal liability if they choose to discipline student-athletes, even if the schools are already lawfully allowed to do so, by being yet another piece of supporting evidence for courts to consider if brought to the courtroom.

VI. CONCLUSION

While “taking a knee” may hold a notably different connotation in the sports world than it did a few decades ago, the phrase should nonetheless be respected by school administrations and their coaches. Similar to when athletes are expected to respectfully kneel upon listening to what their coach has to say, coaches and high school administrators alike should also be mindful of the expressive decisions made by their student-athletes, so long as those students express themselves in a peaceful and respectful manner. Both public and private high schools throughout America may suffer legal consequences if school officials adversely punish student-athletes for kneeling during the national anthem. *Tinker* makes clear that any student speech extending to a school-sponsored activity, like sporting events, is protected by the First Amendment to the United States Constitution, so long as the student’s speech does not substantially interfere with the school’s ability to effectively administer school activities.⁹³ However, a caveat to the *Tinker* rule exists. Pursuant to the legal test set forth in *Hazelwood*,⁹⁴ school officials can likely come forward with some justifiable rationale behind punishing students for protesting during the national anthem if schools can convince courts that standing and honoring the national anthem reasonably relates to legitimate values that the school intends

92. Matt Campbell, *Madison High School Football Players Kneel During National Anthem*, TMJ4 (Sept. 29, 2016), <https://www.tmj4.com/news/local-news/kneel-national-anthem-madison-wisconsin-high-school>.

93. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969).

94. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

to instill in their students. Regardless of the outcome, school officials must be cognizant of the potential legal ramifications that could ensue if they choose to adversely discipline students protesting during the national anthem. Certainly, it may be time for school administrations, themselves, to finally take a knee and listen to what their students are trying to say.