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Colin Kaepernick is being Un-Patriotic and We Should be Thankful for it

BY [SAM MARTIN](#) / ON SEPTEMBER 15, 2016

Colin Kaepernick, back-up quarterback for the San Francisco 49ers, most likely knew that he would not face legal consequences when he decided to indefinitely sit (or kneel) during each pregame performance of the national anthem. Kaepernick also knew that it was a risk that could jeopardize the future of his career. The First Amendment prevents our government from punishing individuals based on their speech, but employers are not bound by this same restriction. When reporters asked Kaepernick if he would be cut from his team as a result of his decision, Kaepernick answered, "If I do, I know I did what's right and I can live with that at the end of the day." The NFL is notorious for blackballing athletes who carry "baggage", so by refusing to stand during the Star Spangled Banner, Kaepernick is jeopardizing not only his current job, but his ability to play for any other NFL team. Whether you agree with him or not, Kaepernick's action should remind us to be thankful for our freedom to do the "unpatriotic."

On August 27th Kaepernick refused to stand for the national anthem before a pre-season home game against the Green Bay Packers. Kaepernick explained afterwards that he "was not going to stand up to show pride in a flag for a country that oppresses black people and people of color." To Mr. Kaepernick, the situation "is bigger than football" adding that "it would be selfish on my part to look the other way. There are bodies in the street and people are getting paid leave and getting away with murder."[\[1\]](#) Since then, he has vowed to continue his protest until significant changes occur in relations between police and the black community. [\[2\]](#)

Unlike Muhammad Ali, who faced incarceration when he protested the Vietnam War by refusing Army induction, Kaepernick does not have to worry about legal retaliation. Through cases like *West Virginia State Board of Education v. Barnette*, our courts have long held that laws compelling individuals to exhibit patriotism are unconstitutional and in violation of the First Amendment.[\[3\]](#) Although many consider Kaepernick's actions un-American, as Justice Jackson explained in *Barnette*, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[\[4\]](#) While offensive to many, especially veterans, Kaepernick's right to kneel should serve as a reminder of our uniquely American liberties.

Unfortunately for Mr. Kaepernick, his first amendment protection only goes so far. The 49ers are free to cut him, and no team is obliged to sign him if the 49ers do. NFL teams are often reluctant to take risks on players who display anti-social or unconventional behavior. Ray Rice, former running back for the Baltimore Ravens, has been unable to make a roster since video footage surfaced of him beating his wife. There are other situations, however, where the NFL's

self-policing culture ruins careers unjustly. Some players claim that they have been cut and unable to find a new team because of their sexual orientation.^[5] There is a strong bond between the military and the NFL. All thirty two teams support the NFL's Salute to Service campaign. As a result, Kaepernick may soon find himself on the outside looking in.^[6] If the 49ers decide to release Mr. Kaepernick, there is good chance that his NFL career will effectively be over. Kaepernick currently makes around \$19,000,000 per year^[7] so the old cliché "put your money where your mouth is" is quite apropos. Although he need not worry about legal action, his crusade is courageous and comes with legitimate risk.

Over the past few weeks, millions have developed opinions on the matter. Some think he is brave, but many others have legitimate gripes. People think that he is disrespecting the country whose military has ensured his freedom and ability to earn millions of dollars per year. Without our soldiers we would not have an NFL, a flag, or even the Star Spangled Banner. But our soldiers' sacrifice is not to allow Colin Kaepernick to play football, it is to protect his right to kneel and your right to boo him if you don't like it.

Sam Martin is a second-year law student at Benjamin N. Cardozo School of Law and a Staff Editor of the Cardozo Arts & Entertainment Law Journal.

^[1] Wyche, Steve, Colin Kaepernick explains why he sat during national anthem, NFL (Aug. 28, 2016 4:33 pm), <http://www.nfl.com/news/story/0ap3000000691077/article/colin-kaepernick-explains-why-he-sat-during-national-anthem>.

^[2] Wagoner, Nick, Colin Kaepernick takes knee for anthem; joined by teammate Eric Reid, ESPN (Sept. 2, 2016), http://www.espn.com/nfl/story/_/id/17444691/colin-kaepernick-san-francisco-49ers-sits-again-national-anthem.

^[3] Sammin, Kyle, The First Amendment Is A Double-Edged Sword For Kaepernick And Rapinoe, The Federalist (Sept. 7, 2016), <http://thefederalist.com/2016/09/07/first-amendment-double-edged-sword-kaepernick-rapinoe/>.

^[4] *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

^[5] Kluwe, Chris, I Was An NFL Player Until I Was Fired By Two Cowards And A Bigot, Deadspin (Jan. 2, 2014 12:52 pm), <http://deadspin.com/i-was-an-nfl-player-until-i-was-fired-by-two-cowards-an-1493208214>.

^[6] NFL, <http://www.nfl.com/salute#campaign> (last visited Sept. 8, 2016).

^[7] Sportrac, <http://www.sportrac.com/nfl/san-francisco-49ers/colin-kaepernick-7751/> (last visited Sept. 8, 2016).