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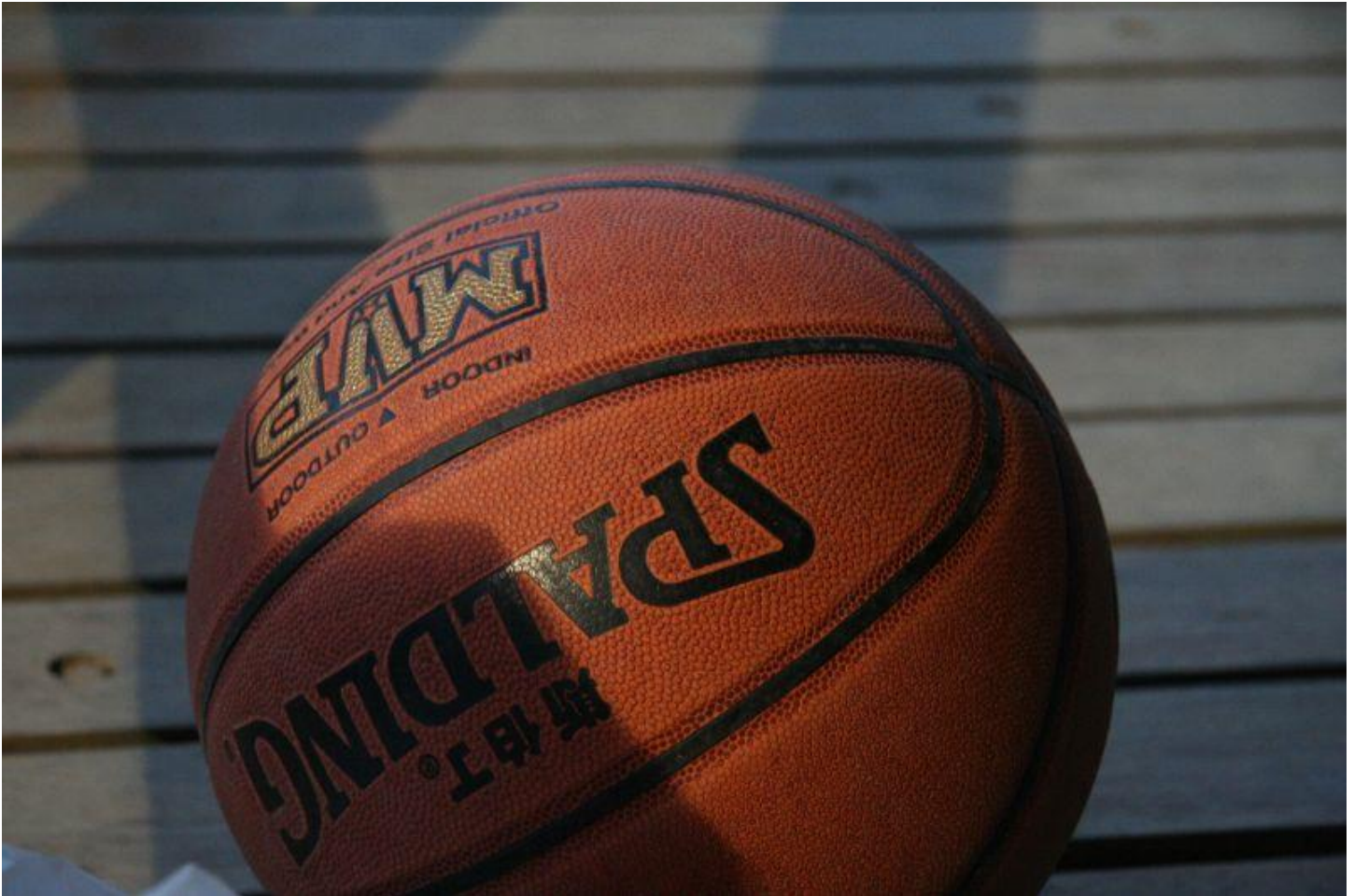
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# The First Amendment's Greatest Protector: The NBA

BY [HAYDEN FARMER](#) / ON OCTOBER 26, 2020



*Photo by Jim Ji from Flickr*

The 2019-2020 NBA season has come to an end with the Los Angeles Lakers winning their 17<sup>th</sup> championship. This accomplishment proves all the worthier when the tumultuous season is put in perspective. The COVID-19 pandemic caused the season to be suspended indefinitely in March and be moved to the Orlando Disney World campus. Basketball legend Kobe Bryant and his daughter, Gianna, along with seven others, died in a tragic helicopter crash in February. As the NBA season resumed, racial injustice across the nation took center stage and led to several reforms within the league. Hidden amidst these tragedies are the leaps and bounds made to protect First Amendment rights of employees in the private sector.

In 2019, a tweet by the Houston Rockets' GM, Daryl Morey, caused the Chinese government to ban NBA programming from China Central Television.<sup>1</sup> The tweet said, "Fight for Freedom. Stand with Hong Kong."<sup>2</sup> The tweet was promptly deleted but was intended to lend support to the antigovernmental protestors in Hong Kong. According to NBA Commissioner Adam Silver, this single tweet may have caused more than \$400 million in lost profits.<sup>3</sup> More recently, China

has reinstated NBA programming on Chinese TV.<sup>4</sup> The ban ceased for Game 5 of the NBA Finals, where LeBron James and the Los Angeles Lakers attempted to seize their 17th championship. As détente has finally been reached, and the NBA season has finally concluded, a wholistic view of the NBA season can be seen as a victory for the First Amendment and the right to free speech in private employment. The NBA not only stood by Morey despite the vast economic repercussions, but also the league continued on this trajectory of protecting player/owner speech through the league's expansive efforts to acknowledge and support the Black Lives Matter movement.

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 . . . ."<sup>5</sup> These protections rarely transfer over to the private sector, and employees of corporations are often liable for expressing both their beliefs inside the workplace, as well as private speech outside the workplace that the employer believes to poorly impact its reputation. Because the First Amendment does not apply to private actors such as private employers, the free speech protection has only been extended to public employees. This leaves the decision of private employer rights up to each individual state. Most often, a state will enact a statute that just extends the protections of the federal constitution on to private entities registered within the state, which leaves private employers to provide "at-will" employment. This means that an employer is entirely within its rights to fire an employee at any time for any reason.

To understand this issue, we must first turn to the structure of the NBA. Understanding the structure of the NBA allows us to determine what law is applied to employees of the NBA and in what situations a private speech issue might arise. This inquiry is far more aloof than the typical sports fan may presume. The NBA has not been registered as a limited liability partnership, limited liability company, or a corporation in any state, which leads us to believe that the NBA's organizational form is best described as a partnership.<sup>6</sup> A partnership stipulates that each member of the partnership has a duty to act with the requisite degree of care in making partnership decisions. Also, each member would have a duty to act loyally, in the best interest of the NBA, not in the member's own self-interest.<sup>7</sup> Furthermore, as a partnership, the NBA and its members will be subject to state law of New York. The NBA's constitution states no governing law, and since the NBA's chief executive office is in New York, that state's law governs.<sup>8</sup> Because the NBA is a partnership governed by New York law, employees of the NBA can be fired at will. Any conduct or statements made off the court that are politically charged or critical of the NBA can be grounds for removal. A franchise owner or General Manager, such as Daryl Morey, owe a fiduciary duty to the other franchises in the league and are confined to has conduct responsibilities more akin to that of a traditional corporation.

Now that we have established that the NBA is a partnership and should be governed by New York law, now we will move on to the players. The NBA Collective Bargaining Agreement does not list any restriction of speech for off-court activities.<sup>9</sup> Notably, Section 12 of the CBA does

provide restrictions for On-Court Conduct, and Article VI provides guidelines for specified Off-Court Conduct, but neither mentions off-court speech. This agreement is contracted between the NBA as an organization and its players. These rules govern the conduct of the players while stipulating the benefits provided to them. NBA players have traditionally been allowed to speak on political matters off the court, but more recently, the NBA has made huge strides to give the players the same opportunity on the court.<sup>10</sup> To see how far the NBA has come in this regard, it is worth looking back to 1996, when Mahmoud Abdul-Rauf was suspended for one game by the league for refusing to stand for the national anthem.<sup>11</sup> More recently, inside the NBA campus in Orlando, players kneeled in solidarity against racial injustice while the national anthem played. Moreover, "Black Lives Matter" was emblazoned on the court during the three-month stint in Orlando for millions of viewers across the globe to see. The players were given a list of words and phrases associated with the BLM movement that they could put on the back of their jerseys for the televised games.<sup>12</sup> This breadth of First Amendment freedom is rarely seen in the private sector and could indicate that the NBA is on the forefront of the liberalizing of professional sports and private industry as a whole.

While players are usually free to speak their minds and have even been given a larger platform to do so, a different set of rules governs General Managers. If the NBA is to be considered a partnership, then each franchise owes a fiduciary duty to the others to not hinder the league's collective goal. Because the NBA is not a corporation, we cannot assume that their collective goal is to generate profit; rather, it is more likely that their collective goal is to facilitate and develop the reach of basketball throughout the country and also abroad. Daryl Morey compromised the NBA's relationship with an entire nation with a single tweet, so why didn't the league hold him accountable? Perhaps this is because the NBA is a very unique organization that would willingly sacrifice profits before succumbing to political oppression abroad. In an event organized by Time magazine, NBA Commissioner Adam Silver "emphasized what he described as his league's commitment to free speech, even at the potential cost of an ever-growing foothold in the lucrative Chinese market."<sup>13</sup> This came after the Chinese government demanded Morey be fired. Silver responded by saying, "There's no chance we'll even discipline him."<sup>14</sup> Behind Silver's leadership and commitment to free speech, the NBA is trailblazing its own path. In a world where profit and expansion rarely take a back seat to social issues, the NBA offers a glimpse at what the private sector could one day become: a wholly new sector of the globe that is uncompromising in its protection and advocacy for human rights.

This progress is even more impressive when compared to the NFL. The NFL is undoubtedly the most popular league in America, but its commitment to ensure the rights of its players has been abysmal. In 2014, former Washington Redskin's quarterback Robert Griffin III was forced to turn his T-shirt inside out to conduct a press conference. The t-shirt said, "Know Jesus Know Peace."<sup>15</sup> In 2015, the NFL fined Pittsburgh Steeler DeAngelo Williams for having "Find the Cure" written in his eye black. This was in honor of breast cancer awareness.<sup>16</sup> In 2016, before the 15<sup>th</sup> anniversary of September 11<sup>th</sup>, the NFL threatened to fine players for

wearing cleats that honored the victims of the 9/11 terrorist attacks.<sup>17</sup> Instances like these are not single occurrences, they have happened for decades in the NFL and they continue to this day. The NFL provides a stark contrast to the NBA's efforts to give its players a platform to share their messages with the world.

The uncompromising effort to protect the free speech of both players and owners is a far stretch from the protections provided in the American private sector—and they are equally far from the protections offered by other American professional sports leagues. The First Amendment and the private sector have often contrasted one another, but the NBA's push to give its employees and owners a voice, despite the economic consequences, could be the future model for private sector employers.

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