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## Ball Never Lies: How Guaranteed Contracts Provide NBA Players More Security than NFL Players to Advocate for Social Justice

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# **BALL NEVER LIES: HOW GUARANTEED CONTRACTS PROVIDE NBA PLAYERS MORE SECURITY THAN NFL PLAYERS TO ADVOCATE FOR SOCIAL JUSTICE**

Matthew Epstein\*

INTRODUCTION .....	254
I. CURRENT NBA AND NFL CBAS PROVIDE VARYING LEVELS OF JOB SECURITY IN PLAYER CONTRACTS .....	256
II. FORMATION OF THE NATIONAL BASKETBALL PLAYERS ASSOCIATION.....	262
III. THE CREATION OF THE NATIONAL FOOTBALL LEAGUE AND PLAYERS ASSOCIATION .....	267
IV. THE HISTORY OF THE NBA AND NFL ALONGSIDE WATERSHED SOCIAL JUSTICE MOVEMENTS IN THE UNITED STATES. ....	271
A. Player Activism in the NBA from Its Inception Until the Twenty-First Century .....	272
B. Player Activism from the Creation of the NFL Until the Twenty-First Century .....	275
C. Comparing NFL and NBA Responses to Player Participation in Social Justice Reform in the Twenty-First Century .....	277
1. NFL and NBA Responses Following George Floyd's Death.....	282
V. CONTRACT STRUCTURES PROVIDE NBA PLAYERS WITH MORE JOB SECURITY THAN NFL PLAYERS TO PARTICIPATE IN SOCIAL JUSTICE ADVOCACY .....	285
CONCLUSION.....	287

## INTRODUCTION

In 2013, Colin Kaepernick led the San Francisco 49ers to the National Football League (NFL) Super Bowl.<sup>1</sup> That same year, LeBron James dominated the National Basketball Association (NBA) Finals to secure a second-straight title for the Miami Heat.<sup>2</sup> In 2016, Kaepernick took a knee during the national anthem to bring attention to systemic racism and police brutality.<sup>3</sup> Meanwhile, James delivered a speech at the 2016 Excellence in Sports Performance Yearly (ESPY) Awards where he stated “Black lives matter” in support of the movement of the same name.<sup>4</sup> James invited viewers “to look in the mirror and ask ourselves ‘What are we doing to create change[?]’”<sup>5</sup> A year later, in 2017, Kaepernick was cut from the 49ers; no team would sign him because of the knee he took during the national anthem. The same year, James led his team to another NBA championship appearance. Both athletes spoke out, yet only one had his career sidelined for doing so. What can account for this?

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1. Louis Bien, *Super Bowl XLVII: Colin Kaepernick Shines in Losing Effort*, SB NATION (Feb. 4, 2013, 12:45 PM), <https://www.sbnation.com/nfl/2013/2/4/3949488/super-bowl-2013-colin-kaepernick-49ers> [<https://perma.cc/MN7Q-T8G6>].

2. *NBA Finals 2013: Miami Heat Repeat as Champions, and the Celebration Begins*, SB NATION, <https://www.sbnation.com/2013/6/21/4451806/nba-finals-2013-miami-heat-repeat-as-champions-and-the-celebration> [<https://perma.cc/W5X3-CN DW>].

3. See Matt Whitener, *A History of Athletes and Activism*, YARDBARKER, [https://www.yardbarker.com/general\\_sports/articles/a\\_history\\_of\\_athletes\\_and\\_activism/s1\\_32219363](https://www.yardbarker.com/general_sports/articles/a_history_of_athletes_and_activism/s1_32219363) [<https://perma.cc/4GLN-9EBR>].

4. Melissa Chan, *Read LeBron James and Carmelo Anthony’s Powerful Speech on Race at the ESPY Awards*, TIME (July 14, 2016, 11:10 AM), <https://time.com/4406289/lebron-james-carmelo-anthony-espys-awards-transcript> [<https://perma.cc/S448-WDMG>].

5. *Id.*

The NFL and NBA have produced some of America's most beloved celebrities. Athletes from both leagues achieved fame in American society by displaying remarkable talent on the field or court and by leading their teams to victory. For many of these athletes, their accomplishments were not limited to the games they played. Many were involved in social justice efforts and reforms that helped shape American society. Throughout the 20th century, players in both the NFL and NBA were outspoken social activists and advocates, working to combat racism in the United States. Yet, at the turn of the twenty-first century, the extent to which athletes challenged existing social norms started to change across both leagues.

By taking a deeper look into the respective leagues' Collective Bargaining Agreements (CBAs), this Comment provides insight as to why players' advocacy efforts have achieved contrasting levels of success, due in large part to the responses by owners in each league. Part I explains the contrasting salary caps under which each league operates. These salary caps have led to different contract standards in each league with different protections: nonguaranteed contracts in the NFL and fully guaranteed contracts in the NBA. Part II traces the formation and evolution of the NBA with a focus on how the league's players union developed and the negotiations that ensued. Part III explains the creation of the NFL and focuses on the progression of negotiations between the NFL and its players union. Part IV explores how players in each league have been involved in combating social injustice through various watershed events in American history. Here, the repercussions that followed player participation are analyzed and compared across each league. Part V explains why, in the twenty-first century, NBA players have been more protected in their social advocacy efforts than NFL players. To make this point, this Part also examines how some NFL players sacrificed their careers at the expense of speaking out, while NBA players received encouragement and partnership from their league. Finally, the Comment concludes by suggesting how NFL players can obtain greater protection for their social advocacy efforts by either negotiating for significant reforms to their next CBA or, with a coordinated effort by the league's most influential players, negotiating for fully guaranteed contracts.

## I. CURRENT NBA AND NFL CBAS PROVIDE VARYING LEVELS OF JOB SECURITY IN PLAYER CONTRACTS

Both the NFL and NBA have salary caps, as agreed upon in their respective CBAs. CBAs set out the terms and conditions of employment for players in both leagues, as well as the rights and obligations of the teams, leagues, and players unions.<sup>6</sup> Salary caps are determined each year as percentages of projected operating revenues and are defined as the “maximum allowable Team Salary for each Team for a Salary Cap Year.”<sup>7</sup> The goal of the salary cap is to promote competitive balance among teams by setting a league-wide maximum amount that each team can collectively pay its players.<sup>8</sup> Ideally, a salary cap works to distribute talent equally throughout the league so that teams generating more revenue cannot sign more talented players away from lower revenue-generating teams.<sup>9</sup>

NBA teams sign players through free agency, a system where players are able to negotiate and enter into a contract with any team.<sup>10</sup> The NBA has what is known as a “soft” salary cap, which sets the minimum and maximum payroll an owner can pay their team after all the team’s player salaries are aggregated.<sup>11</sup> The salary cap is “soft” because teams are provided with

6. See Ryan T. Dryer, *Beyond the Box Score: A Look at Collective Bargaining Agreements in Professional Sports and Their Effect on Competition*, 2008 J. ON DISP. RESOL. 267, 267 (2008).

7. NAT’L BASKETBALL ASS’N & NAT’L BASKETBALL PLAYERS ASS’N, COLLECTIVE BARGAINING AGREEMENT art. I, § 1 (2017) [hereinafter NBA CBA], <https://cosmic-s3.imgix.net/3c7a0a50-8e11-11e9-875d-3d44e94ae33f-2017-NBA-NBPA-Collective-Bargaining-Agreement.pdf> [<https://perma.cc/XMR3-CNBP>]. See NAT’L FOOTBALL LEAGUE MGMT COUNCIL & NAT’L FOOTBALL LEAGUE PLAYERS ASS’N, COLLECTIVE BARGAINING AGREEMENT, art. 7, § 6, (2020), [https://nflpaweb.blob.core.windows.net/media/Default/NFLPA/CBA2020/NFL-NFLPA\\_CBA\\_March\\_5\\_2020.pdf](https://nflpaweb.blob.core.windows.net/media/Default/NFLPA/CBA2020/NFL-NFLPA_CBA_March_5_2020.pdf) [hereinafter NFL CBA] [<https://perma.cc/XFM8-NKLN>]; see also NAT’L BASKETBALL ASS’N, CBA 101 (2018), <https://cdn.nba.net/nba-drupal-prod/2018-19CBA.pdf> [<https://perma.cc/52YR-3LKS>].

8. NFL CBA, *supra* note 7, art. 13, § 1.

9. Salary caps exist to prevent teams located in larger markets that typically generate more revenue, such as New York, Los Angeles, and Chicago, from being able to use larger profits to gain a competitive advantage. Tyler Brooke, *How Does the Salary Cap Work in the NFL?*, BLEACHER REP. (June 10, 2013), <https://bleacherreport.com/articles/1665623-how-does-the-salary-cap-work-in-the-nfl> [<https://perma.cc/ND6P-Y5T5>].

10. NBA CBA, *supra* note 7, art. XI, § 1.

11. *Id.* at art. VII, § 5; Allen Kim, *NBA vs. NFL Collective Bargaining Agreement*, BLEACHER REP. (Sept. 1, 2010), <https://bleacherreport.com/articles/448351-cba-five-things-the-nba-amp-nfl-can-learn-from-each-other> [<https://perma.cc/5MVR-QVR7>].

various exceptions to exceed the maximum amount they can pay their players.<sup>12</sup> For example, a veteran free-agency exception allows a team to re-sign a player already on its team without that player's salary counting against the team's salary cap.<sup>13</sup> Even if an NBA team does surpass the salary cap after using its exceptions, the CBA stipulates that violating teams must pay a dollar-for-dollar "luxury" tax equal to the amount that they surpass the cap.<sup>14</sup>

In the NBA, the "Salary Cap [each year] is calculated by multiplying projected Basketball-Related Income (or 'BRI') by 44.74% less projected player benefits (like health and welfare benefits), and then dividing the result by 30 . . ." <sup>15</sup> BRI is classified as the revenue generated by the NBA and its subsidiaries, including ticket purchases, concessions, merchandising rights on apparel, and TV broadcasting deals.<sup>16</sup> In a lucrative new broadcasting deal, ESPN and Turner Sports agreed to pay the NBA a combined \$2.6 billion annually, representing a 180 percent increase from the previous broadcasting deal struck in 2007.<sup>17</sup> With a larger broadcasting deal and the league's focus on expanding viewership across the world, revenue in the NBA has increased drastically.<sup>18</sup>

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12. NBA CBA, *supra* note 7, art. VII, § 6.

13. Other exceptions to the salary cap include the mid-level salary exception; bi-annual exception, minimum-salary exception, rookie exception, disabled-player exception, etc. Under the mid-level salary exception, a nontaxpaying team can offer a player a contract for up to four years with maximum annual raises of 5 percent. Under the bi-annual exception, a team can offer a player a contract for up to two years with a maximum raise of 5 percent. Under the minimum-salary exception, a team can offer a player a contract for up to two years' worth of the applicable minimum league salary. There is no limit to the number of players a team can acquire using this exception. Under the rookie exception, a team may enter a rookie scale contract in accordance with Article VIII, § 1 of the NBA CBA. Under the disabled-player exception, a team may sign or acquire one replacement player to replace a player who, because of a disabling injury or illness deemed season ending, is unable to play. *Id.*

14. *Salary Cap Overview*, CBA BREAKDOWN, <https://cbabreakdown.com/salary-cap-overview> [<https://perma.cc/63A6-CXH9>].

15. *Id.*; see NBA CBA, *supra* note 7, art. VII, § 1.

16. See NBA CBA, *supra* note 7, art. VII, § 1.

17. Mike Prada, *NBA to Announce 9-Year, \$24 Billion TV Deal with ESPN, Turner*, SB NATION (Oct. 5, 2014, 10:08 PM), <https://www.sbnation.com/2014/10/5/6916597/nba-new-tv-deal-espn-turner-24-billion> [<https://perma.cc/V92T-BQCF>].

18. See *NBA Rosters Feature 108 International Players in 2019-20*, NAT'L BASKETBALL ASS'N (Oct. 22, 2019, 3:43 PM), <https://www.nba.com/news/nba-rosters-feature-108-international-players-2019-20> [<https://perma.cc/L2JK-RTJR>].

The NFL, however, has a “hard” salary cap, which stipulates that no team can exceed the cap and, further, contains no exceptions.<sup>19</sup> If a team does exceed the hard salary cap, it is subject to penalties, including fines up to \$6.5 million per violation, voided contracts, and loss of draft picks.<sup>20</sup> By not providing exceptions, the hard cap discourages NFL teams from giving players more lucrative deals, as those contracts would take up space needed to sign other players.<sup>21</sup>

The NFL’s hard cap also derives from the revenue the league generates.<sup>22</sup> There are thirty-two NFL teams, each with fifty-three-man rosters, resulting in approximately 1,700 players sharing league revenue with owners.<sup>23</sup> The NFL salary cap is calculated by taking the league’s total revenues, allocating 48.5 percent to players, subtracting a 1.5 percent stadium credit, and then dividing that number by the number of teams.<sup>24</sup> In the 2019 season, the NFL brought in over \$14 billion in revenue.<sup>25</sup> Over half of that revenue derived from national media deals, while \$1.32 billion came from alcohol and food vendors at games.<sup>26</sup> Ultimately, the players’ share of revenue in 2019 amounted to a little under \$9 billion.<sup>27</sup> For each team, the salary cap in 2019 was \$188.2 million.<sup>28</sup>

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19. NFL CBA, *supra* note 7, art. 13, § 2.

20. *Id.* art. 14, § 6; Monica Charlton (Monty602), *A Brief History of the NFL Salary Cap*, CANAL ST. CHRONOS (July 12, 2018, 10:48 AM), <https://www.canalstreetchronicles.com/2018/7/12/17551738/nfl-salary-cap-brief-history-new-orleans-saints-nflpa-collective-bargaining-agreement-mlb-nba> [https://perma.cc/46VW-A4PJ].

21. Kim, *supra* note 11.

22. NFL CBA, *supra* note 7, art. 12, § 6; Scott Carasik, *NFL Capology 101: Salary Cap Basics of the National Football League*, BLEACHER REP. (Feb. 29, 2012), <https://bleacherreport.com/articles/1086021-nfl-capology-101-salary-cap-basics-of-the-national-football-league> [https://perma.cc/EE28-GKA2].

23. NFL CBA, *supra* note 7, art. 12, § 6; Carasik, *supra* note 22.

24. NFL CBA, *supra* note 7, art. 13, §§ 5–8.

25. Mike Lukas, *NFL vs. NBA: Revenue, Salaries, Viewership, Attendance and Ratings*, WORLD SPORTS NETWORK (Aug. 27, 2018), <https://www.wsn.com/nfl/nfl-vs-nba> [https://perma.cc/DGU9-9K8J].

26. *Id.*

27. Michael Colangelo, *The NFL Made Roughly \$16 Billion in Revenue Last Year*, USA TODAY: TOUCHDOWN WIRE (July 15, 2019), <https://touchdownwire.usatoday.com/2019/07/15/nfl-revenue-owners-players-billions> [https://perma.cc/KS96-LBD3].

28. Grant Gordon, *NFL Salary Cap for 2019 Season Set at \$188.2M*, NAT’L FOOTBALL LEAGUE (Mar. 1, 2019, 9:37 AM), <https://www.nfl.com/news/nfl-salary-cap-for-2019-season-set-at-188-2m-0ap3000001020137> [https://perma.cc/Q5Q5-UYQY].

By comparison, the NBA consists of thirty teams, each with twelve to fifteen players, totaling approximately 450 players.<sup>29</sup> Per the NBA CBA, players receive 51 percent of league revenue, which in 2019 amounted to roughly \$3.7 billion.<sup>30</sup> For each NBA team, the salary cap in 2019 was \$109.14 million.<sup>31</sup>

For both the NBA and NFL, when revenue increases, the value of contracts increases simultaneously. Today, when an NBA or NFL player signs a new deal, that deal is reported by news outlets headlining that a player has signed for a certain number of years for millions of dollars. Hardly ever included in the headline is the amount of money the player is actually guaranteed to make under the contract. Star NBA players, such as LeBron James, Steph Curry, and Kevin Durant, currently have contracts for annual averages around \$40 million.<sup>32</sup> In the NFL, the highest-paid position is the quarterback, and almost all elite NFL quarterbacks average less than \$30 million a year.<sup>33</sup>

Thus, NBA contracts are more valuable than NFL contracts on their face because the annual salaries tend to be higher.<sup>34</sup> But NBA contracts are also more valuable because the vast majority of these contracts are fully guaranteed, which provides additional security to players.<sup>35</sup> When a player signs a fully guaranteed contract, the player will actually receive all of the agreed-to compensation over the term of the contract—with room for more depending on agreed-upon incentives.<sup>36</sup> Even if a team cuts that player from the roster, the team must pay out the remainder of the player's contract.<sup>37</sup>

NFL contracts, on the other hand, are based on nonguaranteed money.<sup>38</sup> Only the signing bonus is guaranteed when an

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29. Lukas, *supra* note 25.

30. NBA CBA, *supra* note 7, art. VII, § 12.

31. *NBA Salary Cap Set at \$109.14 Million for 2019-20*, NAT'L BASKETBALL ASS'N (June 30, 2019, 12:48 AM), <https://www.nba.com/news/nba-salary-cap-2019-20-season-set-10914-million> [<https://perma.cc/SL5N-3XAX>].

32. Andrew Brandt, *How NFL and NBA Contracts Differ, and What NFL Players Can Do to Change It*, SPORTS ILLUSTRATED (July 10, 2018), <https://www.si.com/nfl/2018/07/10/nfl-nba-player-contracts-salary-cap-kirk-cousins-aaron-rodgers-lebron-james-chris-paul> [<https://perma.cc/2E7F-A8H3>].

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. Conner Christopherson, *The Art of NFL Contracts Part 1: The Basics*, SPORTS ILLUSTRATED (May 9, 2020), <https://www.si.com/nfl/chiefs/gm-report/the-art-of-nfl-contracts-part-1-the-basics> [<https://perma.cc/P4MM-R279>].



NFL player puts pen to paper.<sup>39</sup> Otherwise, compensation is determined through base salaries, roster bonuses, and particular types of guarantees on a yearly basis.<sup>40</sup> For example, if a player is cut by his team due to a lack of skill compared to the rest of the team, the player might be guaranteed any money left on his contract for the years in his contract that he has a *skill* guarantee.<sup>41</sup> A *cap* guarantee protects a player who has been released by a team to keep itself under the hard salary cap.<sup>42</sup> It ensures that a player released due to a team's need to create room to operate under the salary cap will still receive his salary for the year(s) he has a cap guarantee.<sup>43</sup> Finally, an *injury* guarantee entitles a player to an agreed-upon amount of money if he is released after suffering a football injury.<sup>44</sup> For example, if a player signs a five-year deal with injury guarantees for the first three seasons, then that player would be paid his salary during the first three seasons if he suffers a football-related injury at any point in those years.<sup>45</sup> The player, however, would not be paid the remaining salary for years four and five of the contract.<sup>46</sup>

An NFL contract can include one, two, all, or none of these guarantees.<sup>47</sup> When a contract only includes one or two of these protections, the player does not typically make all of the money advertised when he signed his contract.<sup>48</sup> However, if a player has skill, cap, and injury guarantees for each year of his contract, then his contract fully guarantees he will be paid all of the money advertised when he signed his contract.<sup>49</sup>

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39. *NFL Contracts Explained: Guaranteed Money*, FRONT OFF. FOOTBALL (Mar. 10, 2017), <https://frontofficenfl.com/2017/03/10/nfl-guaranteed-money> [<https://perma.cc/VZ2U-TY78>].

40. *NFL Contracts Explained: Guaranteed Money*, *supra* note 39; see Anthony Holzman-Escareno, *2019 NFL Free Agency Glossary: All the Terms You Need to Know*, NAT'L FOOTBALL LEAGUE (Mar. 8, 2019, 11:23 AM), <https://www.nfl.com/news/2019-nfl-free-agency-glossary-all-the-terms-you-need-to-know-0ap3000001021617> [<https://perma.cc/U48B-URLB>].

41. Holzman-Escareno, *supra* note 40.

42. *Id.*

43. *Id.*

44. *Id.*

45. Marc Lillibridge, *What Numbers Really Matter in an NFL Contract*, BLEACHER REP. (Feb. 20, 2013), <https://bleacherreport.com/articles/1536490-what-numbers-really-matter-in-a-nfl-contract> [<https://perma.cc/L2MC-6FRZ>].

46. *Id.*

47. Zachary Links, *Contract Guarantees*, PRO FOOTBALL RUMORS (June 17, 2019, 10:50 AM), <https://www.profootballrumors.com/2019/06/contract-guarantees-nfl> [<https://perma.cc/LEC5-SMPV>].

48. *Id.*

49. *Id.*

Consequently, most salaries in the NFL are inflated after the first three years to make a player's contract look larger than it actually is.<sup>50</sup> Typically, players earn a base salary during the year for being on a team's roster and earn their contract money during the eighteen-week season.<sup>51</sup> But when a player is cut, given the predominance of nonguaranteed contracts in the NFL, he generally loses his salary, even if he had years remaining on his contract.<sup>52</sup> For example, in 2012, New Orleans Saints quarterback Drew Brees signed a contract for \$100 million over five years.<sup>53</sup> However, only \$60.5 million of his contract was guaranteed.<sup>54</sup> If the Saints had chosen to cut Brees after the third year of his contract, he would have lost \$39.5 million.<sup>55</sup>

Additionally, NFL contract security is often limited to the first year a player signs his contract because the guaranteed money a player typically receives upfront is his signing bonus.<sup>56</sup> Players may qualify for roster bonuses for being on the team after a certain date, workout bonuses for completing a specific number of offseason workouts with the team, and other incentives that reward players for hitting certain thresholds set in their contract.<sup>57</sup> However, after the first year of their contract, players almost always assume all the contract risk.<sup>58</sup> NFL players are highly prone to injury, and owners do not need to pay players who suffer football-related injuries unless a player has an injury guarantee in his contract.<sup>59</sup>

Nonguaranteed contracts also allow owners to cut players, saving money they would have paid one player and directing it

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50. Lillibridge, *supra* note 45.

51. The NFL regular season is eighteen weeks long, and players are paid each week they are on the team. Christopherson, *supra* note 38.

52. *Id.* There are three guarantees an NFL player can qualify for. "Injury guarantees come into effect if a player is released but is unable to partake in football activities or pass a physical. If a player is released and this condition is met, the player is entitled to money that is protected against injury . . . . A skill guarantee will protect a player from being released due to the player not having the requisite skill needed, according to the team. A cap guarantee will protect a player from being released so the team can get under the cap, sign a free agent, or re-sign another player." *Id.*

53. Lillibridge, *supra* note 45.

54. *Id.*

55. *Id.*

56. See Brandt, *supra* note 32.

57. Christopherson, *supra* note 38.

58. *Id.*

59. *Id.*

to another.<sup>60</sup> Conversely, fully guaranteed contracts severely limit, and arguably eliminate, the flexibility owners have to cut players.<sup>61</sup> Since most NBA players' contracts are fully guaranteed, NBA players have much more autonomy and job security than NFL players.<sup>62</sup>

Nothing in either league's respective CBA expressly requires or prohibits guaranteed contracts.<sup>63</sup> Additionally, neither the soft salary cap in the NBA nor the hard salary cap in the NFL requires a fully guaranteed or nonguaranteed contract; rather, players' contracts in both leagues are individually negotiated by their agents.<sup>64</sup> That said, the widespread practice in the NBA is to give players fully guaranteed contracts, as opposed to the NFL where fully guaranteed contracts are simply not the norm.<sup>65</sup> As a result, NFL players have far fewer protections built into their contracts than NBA players do.

However, to understand how these contrasting contract structures became the norms within each league, it is critical to understand how each league's players union was formed and to explore the history of negotiations between the unions and the leagues.

## II. FORMATION OF THE NATIONAL BASKETBALL PLAYERS ASSOCIATION

Before the NBA was founded in 1949, professional basketball players belonged to one of two rival American basketball leagues: the Basketball Association of America (BAA) or the National Basketball League (NBL).<sup>66</sup> Top players from both

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60. See Daniel Chase, *Why Aren't There Guaranteed Contracts in the NFL? It Doesn't Matter.*, MEDIUM (July 19, 2019), [https://medium.com/@Daniel\\_Chase\\_/why-arent-there-guaranteed-contracts-in-the-nfl-it-doesn-t-matter-2ff2a8baaa0b](https://medium.com/@Daniel_Chase_/why-arent-there-guaranteed-contracts-in-the-nfl-it-doesn-t-matter-2ff2a8baaa0b) [<https://perma.cc/6Y9A-9NNB>].

61. See Brandt, *supra* note 32.

62. See *id.*

63. See NBA CBA, *supra* note 7; Arash Markazi, *Why NBA Beats NFL When It Comes to Guaranteed Contracts*, ESPN (July 10, 2015), [https://www.espn.com/nfl/story/\\_/id/13235398/why-nfl-lags-nba-guaranteed-contracts](https://www.espn.com/nfl/story/_/id/13235398/why-nfl-lags-nba-guaranteed-contracts) [<https://perma.cc/V44X-NLQK>].

64. Markazi, *supra* note 63.

65. *Id.*

66. Robert Bradley, *Labor Pains Nothing New to the NBA*, ASS'N FOR PROF. BASKETBALL RES., <http://www.apbr.org/labor.html> [<https://perma.cc/23T3-MM42>].

leagues leveraged their rival league to negotiate contracts and benefits for themselves without formal union representation.<sup>67</sup>

In 1949, the NBA was founded when the NBL merged with the BAA, leaving players with two options: play for the NBA under its terms or play amateur basketball without compensation.<sup>68</sup> Shortly after, in 1954, Boston Celtics player Bob Cousy, among others, organized NBA players into a union that would represent their interests, known as the National Basketball Players Association (NBPA).<sup>69</sup> Until then, NBA players had not received a pension plan, per diem, minimum wage, or health benefits—all privileges and protections that exist for them today. In the years following, the NBA began discussions with the NBPA but did so without formally recognizing the NBPA as the voice of the players, thereby preventing players from uniformly negotiating for minimum wages and benefits.<sup>70</sup> In 1957, the NBA agreed to bargain in good faith with the players union but still refused to formally recognize the NBPA as the exclusive bargaining agent for the players.<sup>71</sup>

It was not until 1964 that the NBA recognized the NBPA as the exclusive bargaining union for the players.<sup>72</sup> The NBA was set to have its first-ever televised All-Star Game, and both the league and players recognized the potential exposure that would be generated by airing the game on national television.<sup>73</sup> Realizing the opportunity this presented, players threatened to strike for the game unless the NBA met specific demands.<sup>74</sup> Moments before the game, in order to ensure the game would proceed as scheduled, NBA President Walter Kennedy agreed to

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67. *Id.*

68. *Throwback: Two-League Merger Creates National Basketball Association*, POST GAME (Aug. 3, 2015), <https://www.thepostgame.com/blog/throwback/201508/throwback-national-basketball-association-created-two-league-merger> [<https://perma.cc/K5MS-NZ67>].

69. *NBPA History*, NAT'L BASKETBALL PLAYERS ASS'N, <http://nbpa.com/about> [<https://perma.cc/LKA4-W4X9>].

70. *Id.*

71. Cousy had met with the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) over possible union affiliation. However, conversations between the NBA and NBPA had not yet been deemed “negotiations” because the NBPA had not been recognized by the NBA as representative of the players. Bradley, *supra* note 66.

72. *NBPA History*, *supra* note 69.

73. *Id.*

74. *N.B.A. Players Threaten Strike in Dispute over Pension Plan*, N.Y. TIMES, Jan. 15, 1964, at 34, <https://www.nytimes.com/1964/01/15/archives/nba-players-threaten-strike-in-dispute-over-pension-plan.html> [<https://perma.cc/V85S-P7R5>].

players' demands by guaranteeing a pension agreement, an increase in players' per diem, and league recognition of the NBPA as the exclusive bargaining representative of the players.<sup>75</sup>

A new basketball league emerged in 1967—the American Basketball Association (ABA). Recognizing the threat of losing young talent to the rival league, the NBA opened talks with the ABA about a possible merger.<sup>76</sup> When a merger almost reached fruition in 1970, the NBPA filed *Robertson v. National Basketball Association*, a class-action antitrust suit, to block it.<sup>77</sup> After the NBPA won the suit, owners were forced to recognize that negotiating with the NBPA had become a necessity.<sup>78</sup> That same year, the NBPA and owners agreed on the league's first CBA.<sup>79</sup> That first CBA defined minimum and maximum player salaries, free-agency and trade rules, and league draft procedures.<sup>80</sup>

The NBA and NBPA entered into a new multi-year CBA in 1976, which included a minimum salary of \$30,000, medical coverage, term life insurance, and a higher per diem for players.<sup>81</sup> The ABA and NBA merged shortly after, and players were given the ability to negotiate with more than one franchise within the NBA.<sup>82</sup>

In 1983, the NBA struggled financially and, with the immediate possibility of franchises shutting down and players losing their jobs, both sides came together to agree on a groundbreaking four-year CBA.<sup>83</sup> At the time, players and owners were

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75. Bradley, *supra* note 66.

76. *Id.*

77. NBA players were successful in winning a restraining order to block the merger, and team owners failed to lobby Congress to approve the merger. *Robertson v. Nat'l Basketball Ass'n*, 556 F.2d 682 (2d Cir. 1977); see also *NBPA History*, *supra* note 69.

78. *NBPA History*, *supra* note 69.

79. *Id.*

80. Many other NBA laws are defined in its Collective Bargaining Agreement. Full details can be found in the league's official document at NBA.com. NBA CBA, *supra* note 7; see also *NBPA History*, *supra* note 69.

81. The new CBA was negotiated shortly after players and owners entered into a settlement agreement known as the "Robertson Settlement Agreement," named after Oscar Robertson, the president of the NBPA until 1974. The settlement agreement paid the NBPA \$1 million in legal fees and five-hundred players a total of \$4.3 million to settle the case. See *NBPA History*, *supra* note 69; see also Michelle Hertz, *The National Basketball Association and the National Basketball Players Association Opt to Cap Off the 1988 Collective Bargaining Agreement with a Full Court Press*: In re Chris Dudley, 5 MARQ. SPORTS L. REV. 251, 252 (1995).

82. Bradley, *supra* note 66.

83. *Id.*

focused more on recovering lost revenue than anything else.<sup>84</sup> The new CBA introduced the soft salary cap, the first of its kind in professional sports.<sup>85</sup> The salary cap shared league-generated revenue amongst players and owners, with owners guaranteeing the players 53 percent of all money earned.<sup>86</sup>

As the 1983 CBA approached its expiration, the NBA's owners and players found themselves disagreeing again, which led the players to file another federal antitrust suit against the league.<sup>87</sup> The players and owners settled out of court, agreeing to a new CBA that would run until 1994 and included another watershed change in professional sports: unrestricted free agency.<sup>88</sup> Unrestricted free agency allows a player not under contract to sign with a team of their choosing.<sup>89</sup>

In 1991, the NBPA alleged that some owners were violating the revenue-sharing agreement in the CBA by underreporting income and, thus, reducing players' share of revenue.<sup>90</sup> Resentment toward and severe distrust of owners grew, and tensions rose until the CBA expired in 1994.<sup>91</sup> In 1995, for the first time in NBA history, the league shut down, and a lockout ensued.<sup>92</sup> When a lockout occurs, coaches and staff are not permitted to talk to their players, and players' contracts temporarily expire until a new CBA is agreed upon.<sup>93</sup> In response, NBA players threatened to decertify the NBPA and go to court.<sup>94</sup> Decertification meant the union's right to represent the players would be terminated.<sup>95</sup>

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84. See Melanie Aubut, *When Negotiations Fail: An Analysis of Salary Arbitration and Salary Cap Systems*, 10 SPORTS L.J. 189, 219–21 (2003).

85. *Id.*

86. *Id.*

87. *Wood v. Nat'l Basketball Ass'n*, 809 F.2d 954 (2d Cir. 1987).

88. *NBPA History*, *supra* note 69.

89. NBA CBA, *supra* note 7, art. XI, § 1.

90. *NBPA History*, *supra* note 69.

91. See Bradley, *supra* note 66.

92. The players' and owners' inability to reach an agreement over revenue sharing led NBA players to publicly refuse to play until a fair salary system was reached. *NBPA History*, *supra* note 69.

93. See Larry Coon, *Lockout FAQ: Uncertain Future Ahead*, ESPN (July 1, 2011), [https://www.espn.com/nba/columns/story?columnist=coon\\_larry&page=lockoutFAQ-110701](https://www.espn.com/nba/columns/story?columnist=coon_larry&page=lockoutFAQ-110701) [<https://perma.cc/84PS-PG7S>].

94. *NBPA History*, *supra* note 69.

95. Domonique Foxworth, *All 22: Why Decertification of the NFLPA and Other Unions Could Pay Off Big*, UNDEFEATED (July 25, 2017), <https://theundefeated.com/features/all-22-why-decertification-of-the-nflpa-and-other-unions-could-pay-off-big> [<https://perma.cc/5WJ6-FJSG>].

But the lockout concluded when the owners relented, realizing that the high costs of further litigation and potential decertification—which would make future collective bargaining significantly more challenging—were not worth the continued lockout.<sup>96</sup> In response to earlier conflict over revenue sharing, the players and owners agreed to new sources of revenue, which generated more money for both sides.<sup>97</sup> The new agreement included luxury suites, a \$2.4 billion TV deal with NBC and Turner Sports, other international television contracts, and arena signage.<sup>98</sup>

But the agreement did not last long before a new conflict arose. A second, albeit brief, lockout occurred in 1996 when the NBPA and NBA could not agree on how to split \$50 million in television revenue.<sup>99</sup> Then, in March 1998, players and owners clashed again when owners exercised an option to terminate the CBA, resulting in the league shutting down for a third lockout.<sup>100</sup> The third lockout lasted for six months and ended with an agreement that increased player salaries and benefits.<sup>101</sup>

By 2005, players and owners agreed to a new CBA with a revenue split of 57 percent for players and 43 percent for owners.<sup>102</sup> However, the 2008 economic downturn dramatically slowed revenue growth, and, as a result, twenty-two team owners collectively lost \$370 million during the 2009 season.<sup>103</sup> Feeling the financial repercussions, owners demanded significant rollbacks of the following 2011 CBA, resulting in 40 percent reductions in the value of future contracts.<sup>104</sup> After both sides failed to come to an agreement, the NBA experienced its most recent lockout in 2011.<sup>105</sup>

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96. *NBPA History*, *supra* note 69.

97. *See* Bradley, *supra* note 66.

98. *Id.*

99. The 1996 lockout was lifted after a couple of hours when the agreement was completed. *Significant Dates in the NBA Lockout*, N.Y. TIMES (Jan. 6, 1999), <https://archive.nytimes.com/www.nytimes.com/library/sports/basketball/010799-bkn-labor-timeline.html> [<https://perma.cc/UUZ4-YTB2>].

100. *NBPA History*, *supra* note 69.

101. *Id.*

102. NICHOLAS YAN, THE NEW LANDSCAPE OF THE NBA: THE 2011 COLLECTIVE BARGAINING AGREEMENT'S IMPACT ON COMPETITIVE BALANCE AND PLAYERS' SALARIES (2015) <https://sites.duke.edu/djepapers/files/2016/10/nicholas-yan-dje.original.pdf> [<https://perma.cc/5YA2-RRPQ>].

103. *See id.*

104. *Id.*

105. Players brought antitrust suits but ultimately settled with owners. *Id.*

### III. THE CREATION OF THE NATIONAL FOOTBALL LEAGUE AND PLAYERS ASSOCIATION

The NFL was established in 1920 and existed without disruption from organized player grievances until 1956.<sup>106</sup> Up until then, the NFL had not been the subject of any Supreme Court case involving federal antitrust law.<sup>107</sup> Because the league operated as an interstate entity, it was also unregulated by the business laws of any single state.<sup>108</sup> Therefore, the NFL operated outside of normal fair play and equal opportunity requirements that often accompany antitrust enforcement and business regulation.<sup>109</sup> Throughout this time, players lacked bargaining power, and owners repeatedly rejected their attempts to secure a minimum salary requirement.<sup>110</sup>

Just like the NBA did in 1954, a group of NFL players organized to form the National Football League Players Association (NFLPA) in 1956, which initially existed without formal recognition by the NFL.<sup>111</sup> The players again requested a minimum salary along with other demands and received no response from the league.<sup>112</sup> The players filed suit in 1957 and took the case all the way to the Supreme Court.<sup>113</sup> In *Radovich v. National Football League*, the Supreme Court held that all businesses engaged in interstate commerce were within the scope of antitrust laws and that the NFL could not abuse its monopoly power in violation of those antitrust laws.<sup>114</sup> As a result, benefits for players were introduced, but players still had virtually no bargaining power.<sup>115</sup>

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106. The NFL established itself after a name change from the American Professional Football Association. See *Remembering the NFL's Humble Origins on Its 100th Birthday*, NAT'L FOOTBALL LEAGUE, <https://www.nfl.com/news/remembering-the-nfl-s-humble-origins-on-its-100th-birthday> [<https://perma.cc/L7AX-XM3K>].

107. See Maxwell Keith, *Developments in the Application of Antitrust Laws to Professional Team Sports*, 10 HASTINGS L.J. 119, 124 (1958).

108. *Id.* at 120.

109. *Id.*

110. Dryer, *supra* note 6 at 281.

111. *Id.*

112. 1956: *The Beginning*, NAT'L FOOTBALL LEAGUE PLAYERS ASS'N, <https://nflpa.com/about/history/1956-the-beginning> [<https://perma.cc/7WAT-9JYJ>].

113. *Radovich v. Nat'l Football League*, 231 F.2d 620 (9th Cir. 1956).

114. *Radovich v. Nat'l Football League*, 352 U.S. 445, 449 (1957).

115. 1960s: *AFL vs. NFL*, NAT'L FOOTBALL LEAGUE PLAYERS ASS'N, <https://nflpa.com/about/history/1960s-afl-vs-nfl> [<https://perma.cc/9DGE-B7RZ>].



Players started to gain bargaining power in 1960 when the American Football League (AFL) came onto the scene, which divided professional football into two competing leagues, comparable to the NBA and ABA.<sup>116</sup> In 1964, when the AFL received a larger TV contract with NBC, the NFL found itself competing for talent and thus had to relinquish some of its power to its players.<sup>117</sup> Players still had little power, but they had the ability to leave one league for the other.<sup>118</sup>

To discourage movement, owners did away with pensions for NFL players who left to play for the AFL, effectively eliminating any retirement payment an NFL player could depend on if they decided to join the AFL.<sup>119</sup> However, in 1966, the two leagues merged, which removed any leverage players had derived from competition between the two leagues.<sup>120</sup>

NFL players still had plenty of grievances, and through the NFLPA, they organized a strike in 1968 to protest their compensation.<sup>121</sup> Owners responded with a lockout: players could not use team facilities for practice nor contact their coaches, and no games were held.<sup>122</sup> Shortly after, both sides agreed to the league's first CBA, which lasted four years and established minimum compensation for players, an insurance plan, and a better pension plan.<sup>123</sup> Towards the end of the CBA, the players went on strike again, this time with the slogan "no freedom, no football."<sup>124</sup> The strike ended without an agreement on a new CBA, so the league operated for the next three seasons without one.<sup>125</sup>

In 1976, the Eighth Circuit Court of Appeals held in *Mackey v. National Football League* that the NFL violated the Sherman Antitrust Act by enforcing the "Rozelle Rule," which

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116. *Id.*

117. *See Football Rights Bought By N.B.C.; '65-'69 American League Contract Costs \$36 Million*, N.Y. TIMES, Jan. 30, 1964, <https://www.nytimes.com/1964/01/30/archives/football-rights-bought-by-nbc-6569-american-league-contract-costs.html> [<https://perma.cc/75KJ-4EMA>].

118. *See id.*; Dryer, *supra* note 6 at 281.

119. 1960s: *AFL vs. NFL*, *supra* note 115.

120. *Id.*

121. *Id.*

122. *Id.*; *see also* Barry Wilner, *NFL Lockout: What It All Means*, CBS BOST. (Mar. 1, 2011, 8:42 AM), <https://boston.cbslocal.com/2011/03/01/nfl-lockout-what-it-all-means> [<https://perma.cc/2NY4-LUGR>].

123. Dryer, *supra* note 6 at 281.

124. 1970s: *The NFLPA Becomes a Real Union*, NAT'L FOOTBALL LEAGUE PLAYERS ASS'N, <https://nflpa.com/about/history/1970s-nflpa-becomes-real-union> [<https://perma.cc/EZY8-D6QU>].

125. *See id.*

unreasonably restrained teams from trading players.<sup>126</sup> The Rozelle Rule required that whenever a team signed a free agent (a player not under contract), it had to compensate the player's former team.<sup>127</sup>

The decision in *Mackey* pushed owners to negotiate with the NFLPA, leading to a new CBA in 1977.<sup>128</sup> However, in 1982, the players went on strike a third time after the NFL rejected the players' proposal to receive 55 percent of revenue.<sup>129</sup> The players wanted a share of the revenue from TV and gate money that only owners were entitled to under the 1977 CBA.<sup>130</sup> Instead, a new CBA was signed in 1982 wherein owners paid \$60 million in "money now" to offset what players lost from the strike.<sup>131</sup>

Players' grievances about free agency remained despite the agreement, and frustrations became more apparent when a player survey conducted by the NFLPA showed that free agency was their top priority.<sup>132</sup> After only one player joined a new team out of a pool of five-hundred free agents, the NFLPA decided it was time to negotiate a new CBA centered around free agency, that would allow for more player flexibility.<sup>133</sup>

Unable to come to an agreement in 1987, the players went on strike again.<sup>134</sup> This time, the owners responded by replacing players who protested with football veterans willing to cross the picket line and play under the owners' terms, which allowed owners to avoid negotiating with players on strike.<sup>135</sup> In response, the players filed the antitrust suit *Powell v. National Football League*, which targeted the league's restrictive free agency system.<sup>136</sup>

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126. *Mackey v. Nat'l Football League*, 543 F.2d 606, 623 (8th Cir. 1976).

127. Specifically, the "Rozelle Rule" required any team signing a free agent from a different team to compensate the team with draft picks or players. *Id.* at 610–11.

128. Dryer, *supra* note 6 at 281–82.

129. The strike lasted for fifty-seven days, making it the longest strike in NFL history. *1980s: The Fight for Free Agency*, NAT'L FOOTBALL LEAGUE PLAYERS ASS'N, <https://nflpa.com/about/history/1980s-fight-free-agency> [<https://perma.cc/H634-4AS4>].

130. *Id.*

131. *Id.*

132. *Id.*

133. *See id.*

134. *Id.*

135. *Id.*

136. In 1988, a district court judge ruled in favor of the players in *Powell v. NFL*, but the decision was overturned in 1989 on the grounds that the NFL was exempt from antitrust law because of its nonstatutory labor exemption. The labor

After years of litigation, in 1993, the parties reached a new CBA that improved the NFL free agency system, created a salary floor, and imposed a hard salary cap.<sup>137</sup> Under this new CBA, team violations of the hard salary cap would result in either voided transactions or harsh financial penalties.<sup>138</sup> Also, players received a 38 percent increase in wages from the previous season along with a guaranteed cut of gross revenue for the first time.<sup>139</sup> The same CBA was renewed five separate times until the owners opted out in 2008 due to high costs, resulting in no salary cap for the 2010 season.<sup>140</sup>

Like the NBA in 2011, an NFL lockout ensued in 2011, and players were banned from using team facilities or contacting staff.<sup>141</sup> The NFL sued the NFLPA, claiming the union had not bargained in good faith because the it had planned to decertify, which would have terminated its right to represent the players.<sup>142</sup> After mediation, the NFL collected \$4 billion from TV networks credited as insurance, despite the possibility of no games being played that year.<sup>143</sup> The NFLPA proceeded to decertify as a union, and NFL players consequently filed an antitrust lawsuit against the league.<sup>144</sup> The parties settled, ending the 132-day lockout and permitting the NFLPA to reconstitute as a union to resume CBA negotiations.<sup>145</sup> A ten-year CBA was signed in 2011, which included a \$1 million-per-player increase in benefits and formation of "The Trust," a program that helps all former players who played two or more NFL seasons transition to life post-football by providing them with healthcare, support

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exemption was based on union consent, meaning players did not have the right to sue team owners for antitrust violations because they were represented by a union. *Id.*; see also Powell v. Nat'l Football League, 678 F. Supp. 777 (D. Minn. 1988), *rev'd* 930 F.2d 1293 (8th Cir. 1989).

137. See Dryer, *supra* note 6 at 282.

138. *Id.*

139. 1990s: *Growth of the Union*, NAT'L FOOTBALL LEAGUE PLAYERS ASS'N, <https://nflpa.com/about/history/1990s-growth-of-the-union> [<https://perma.cc/TVF7-5SGL>].

140. 2000s: *A Landmark CBA*, NAT'L FOOTBALL LEAGUE PLAYERS ASS'N, <https://nflpa.com/about/history/2000s-a-landmark-cba> [<https://perma.cc/VEZ8-3CQF>].

141. *Id.*

142. Barry Werner, *Chronology of NFL Labor History from 1968-2020: 2011*, USA TODAY: TOUCHDOWN WIRE (Mar. 15, 2020, 2:39 PM), <https://touchdownwire.usatoday.com/2020/03/15/chronology-of-nfl-labor-history-from-1968-2020/23> [<https://perma.cc/2L4R-XEGK>]; Foxworth, *supra* note 95.

143. *Id.*

144. 2000s: *A Landmark CBA*, *supra* note 140.

145. *Id.*

programs, and other benefits.<sup>146</sup> In 2020, a new CBA became effective, which runs until 2030 and focuses primarily on increasing the number of regular season games.<sup>147</sup>

#### IV. THE HISTORY OF THE NBA AND NFL ALONGSIDE WATERSHED SOCIAL JUSTICE MOVEMENTS IN THE UNITED STATES

While NFL and NBA players were negotiating with their respective leagues, Black Americans were simultaneously struggling to gain equal rights in the United States. An examination of the history of Black activism within each league is critical to understanding the shifts that occurred between the leagues and their respective players unions. And, over time, the effects of those shifts on each league's player contracts demonstrate why a player like LeBron James may freely speak out on racial justice issues while Colin Kaepernick no longer plays in the NFL for doing the same.

Athletes in both the NBA and NFL have advocated openly for racial justice causes since the civil rights movement. Black athletes fought to break down color barriers in both leagues in the 1960s.<sup>148</sup> For example, NBA star Bill Russell participated in the 1963 March on Washington, while NFL star Jim Brown created the Negro Industrial and Economic Union to help promote Black entrepreneurs.<sup>149</sup>

Section IV.A considers how player activism in the NBA has evolved since its inception up to the turn of the twenty-first century. Section IV.B evaluates how NFL players' activism has advanced since the league's founding up until the twenty-first century as well. Finally, Section IV.C compares how the NBA and NFL have responded to their players' participation in social justice reform during the twenty-first century, demonstrating how

146. A full description of "The Trust" can be found in the NFL CBA. NFL CBA, *supra* note 7, art. XII, § 5.

147. NFL CBA, *supra* note 7, art. XII, § 5.

148. *Basketball's Battle for Racial Equality*, UNDEFEATED (Sept. 18, 2018), <https://theundefeated.com/features/excerpt-basketball-a-love-story-battle-for-racial-equality> [<https://perma.cc/765Z-BBJ5>]; Branson Wright, *Is There a Colin Kaepernick Without a Jim Brown?*, UNDEFEATED (Oct. 3, 2016), <https://theundefeated.com/features/is-there-a-colin-kaepernick-without-a-jim-brown> [<https://perma.cc/U7F7-JXYT>].

149. Wright, *supra* note 148; Bill Russell, *Bill Russell's Firsthand Account of MLK's 'I Have a Dream' Speech*, ESPN VIDEO, [https://www.espn.com/video/clip/\\_id/29759526](https://www.espn.com/video/clip/_id/29759526) [<https://perma.cc/82MS-TK5S>].

the NBA has been far more supportive of their players' efforts than the NFL.

A. *Player Activism in the NBA from Its Inception Until the Twenty-First Century*

When the NBA debuted in 1949, it was primarily comprised of White players.<sup>150</sup> In the 1950s, a culture of racism pervaded the NBA.<sup>151</sup> During that time, there was an unspoken rule among owners that an NBA team could not have more than three Black players on its roster.<sup>152</sup> Owners believed that too many Black players would be bad for business.<sup>153</sup> NBA legend Bill Russell called out Walter Kennedy, the NBA commissioner at the time, by saying, "Every single team in the NBA had three [B]lack players . . . . Is there a quota or is this an accident or what?"<sup>154</sup> In a letter Russell authored in 2020, he reminisced about his time in Boston and the celebration of racism he witnessed:

I remember when a monument honoring Confederate soldiers was built in 1963 in Boston, even though we weren't in the South, and even though it honored people who had fought for slavery, and even though it had been 100 years since Lincoln issued the Emancipation Proclamation. That monument was built in response to desegregation . . . It was nostalgic of a time when Black people were enslaved, when there was pride in the fight against freedom, and it remains a clear example

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150. Earl Lloyd became the first Black NBA player when he joined the Washington Capitols in 1950. *Earl Lloyd Becomes First Black Player in the NBA*, HISTORY (Nov. 16, 2009), <https://www.history.com/this-day-in-history/earl-lloyd-becomes-first-black-player-in-the-nba> [<https://perma.cc/CA68-PF4Q>].

151. Walter Brown, owner of the Celtics, dealt with harsh criticism after he drafted Chuck Cooper because fans and owners called drafting a "negro" a mistake. See Spencer Young, *Revisiting the State of Racism in the NBA*, MEDIUM (June 10, 2020), <https://medium.com/basketball-university/sick-and-tired-of-it-revisiting-the-state-of-racism-in-the-nba-2306be2c931> [<https://perma.cc/HG4F-DB28>].

152. *Basketball's Battle for Racial Equality*, *supra* note 148.

153. *Id.*

154. *Id.*; Bill Russell was outspoken about the injustices he faced as a Black player in Boston, and NBA owners worried Russell would be hard to market to fans and consumers of the league. Bill Simmons, *Julius Erving: MJ Before MJ (with Brian Koppelman)*, YOUTUBE (Nov. 17, 2020), [https://www.youtube.com/watch?v=Ewq2HMS7M7s&feature=emb\\_logo](https://www.youtube.com/watch?v=Ewq2HMS7M7s&feature=emb_logo) [<https://perma.cc/46LV-EADB>].

of how the heartbeat of the past thumps on into the present.<sup>155</sup>

Russell was one of the most outspoken athletes during the civil rights movement, and many of the NBA's first activists were involved at the same time.<sup>156</sup> Lew Alcindor joined Bill Russell by marching in protest after Martin Luther King Jr. was murdered.<sup>157</sup> Shortly after, Alcindor boycotted the 1968 Olympics because he felt that attending would seem like he was "either fleeing the [civil rights] issue or more interested in [his] career than in justice."<sup>158</sup> Alcindor converted to Islam and changed his name to Kareem Abdul-Jabbar shortly after.<sup>159</sup>

In the 1970s and 1980s, America finally started embracing Black athletes, looking beyond skin color and seeing athleticism and skill.<sup>160</sup> However, the NBA found itself struggling with viewership in the 1980s after a cocaine scandal involving many of its players damaged the league's reputation, drawing attention away from the activism of players.<sup>161</sup> NBA legends Earvin "Magic" Johnson and Larry Bird became known for saving the NBA from low viewership, which consequently brought

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155. Bill Russell, *Racism is Not a Historical Footnote*, PLAYERS TRIBUNE (Sept. 14, 2020), <https://www.theplayertribune.com/articles/bill-russell-nba-racial-injustice> [<https://perma.cc/9XD2-LJ8Z>].

156. In 1962, Bill Russell and his Black teammates were refused service at a Kentucky restaurant, and in response, he led a boycott of a game. Russell was not the only Black player to use his stature to advocate for change. In 1958, Elgin Baylor boycotted a game in West Virginia after being told that he and two other Black teammates could not stay at a team hotel the night before the game. Baylor also helped lead a protest before the first nationally televised All-Star Game, demanding owners recognize the NBPA. Whitener, *supra* note 3.

157. See Russell, *supra* note 149.

158. See Kareem Abdul-Jabbar *Details Passing on 1968 Olympics in New Book*, NBC SPORTS (May 22, 2017), <https://olympics.nbcsports.com/2017/05/22/kareem-abdul-jabbar-olympics-boycott> [<https://perma.cc/QU3Q-WMXN>].

159. *Legends Profile: Kareem Abdul-Jabbar*, NAT'L BASKETBALL ASS'N, <https://www.nba.com/history/legends/profiles/kareem-abdul-jabbar> [<https://perma.cc/DU87-X7GW>].

160. Jesse J. Holland, *Black Athletes in 1980s, 90s Not Outspoken, but Not Silent*, ASSOC. PRESS (Feb. 16, 2018), <https://apnews.com/article/3753fab5175343e09a12d85c718c008c> [<https://perma.cc/39XV-N292>].

161. Bob Garcia IV, *Michael Jordan Faced a Room Full of Drugs and Women His Rookie Year*, SPORTSCASTING (Apr. 16, 2020), <https://www.sportscasting.com/michael-jordan-faced-a-room-full-of-drugs-and-women-his-rookie-year> [<https://perma.cc/9W5Y-CVXC>].

attention back to player activism.<sup>162</sup> However, in the late '80s and early '90s, the great Michael Jordan rose to unprecedented fame, and for the first time, the NBA became associated with one player.<sup>163</sup> In contrast to his league peers, Jordan did not use his voice to speak out, largely out of a fear of the financial consequences of potentially losing his endorsements outside the NBA.<sup>164</sup> At the same time, racial tensions were high due to the crack epidemic, the O.J. Simpson trial, and police brutality fueling the Rodney King riots.<sup>165</sup>

Though Jordan did not use his voice, other players in the 1990s spoke up on social issues, showing how less prominent NBA players at the time felt comfortable with social justice advocacy despite Jordan's hesitancy to do so himself.<sup>166</sup> Their activism simply was less publicized because of the attention centered around Jordan.<sup>167</sup> For example, Craig Hodges, Jordan's teammate, gave President George H.W. Bush a letter in 1991 that urged concern for Black Americans facing injustice.<sup>168</sup> In 1995, Mahmoud Abdul-Rauf stretched or stayed in the locker room during the national anthem to protest racial inequality.<sup>169</sup> Thus, even in times when social justice was not as prevalent in the NBA as a whole, many players still had fingerprints on social issues.<sup>170</sup>

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162. Andy Katz, *From Coast to Coast, a Magical Pair*, ESPN, <http://www.espn.com/endofcentury/s/century/katz.html> [<https://perma.cc/LLQ4-KQHB>].

163. For other players, the popularized slogan "Be like Mike" not only resembled his athletic ability but also his financial success. Holland, *supra* note 160.

164. *Id.* (Michael Jordan was asked to endorse Democratic candidate Harvey Gantt in a Senate race against Republican incumbent Jesse Helms but refused to do so because "Republicans buy shoes, too.").

165. *Id.*

166. See Dan Woike, *NBA Players' Activism is Not New, but Shaping Change Would Be*, L.A. TIMES (July 25, 2020, 5:00 AM), <https://www.latimes.com/sports/story/2020-07-25/nba-players-activism-is-not-new-but-shaping-change-would-be> [<https://perma.cc/F8GF-MNVY>].

167. *Id.*

168. *Id.*

169. See Zack Zastrow, *Everyone Take a Knee and Listen Up! Examining Student-Athlete Protests During the National Anthem*, 29 MARQ. SPORTS L. REV. 157, 161 (2018).

170. Other examples include Alex English, an NBA player from the Boston Celtics, who starred in the movie *Amazing Grace and Chuck*, which criticized nuclear armament in 1987. Additionally, Magic Johnson became a voice and face of the fight against HIV-AIDS in the early 1990s. Woike, *supra* note 166.

*B. Player Activism from the Creation of the NFL Until the Twenty-First Century*

Few Black athletes played in the NFL during its initial years, and the handful that did played without a contract.<sup>171</sup> From 1933 through most of the 1940s, there were no Black players in the NFL.<sup>172</sup> Black players did not simply decide not to play in the NFL nor was there a formal rule that prevented them from doing so.<sup>173</sup> Instead, Black players were barred by some of the league's most influential team owners who had a tacit agreement not to sign Black players.<sup>174</sup>

Starting in 1946, shortly after the end of World War II, the NFL began to develop more teams and expand out west.<sup>175</sup> The Cleveland Rams relocated to Los Angeles, where they played in a publicly owned stadium funded by taxpayers.<sup>176</sup> Fans there expected the team to be integrated, and as a result, the Rams signed Kenny Washington in 1946.<sup>177</sup> Washington became the first Black player to sign an actual contract in the NFL, breaking the league's unofficial ban on Black players.<sup>178</sup> After Washington's signing, almost every team began to integrate during the 1950s, and despite expectations, football was becoming the most popular sport in America.<sup>179</sup>

171. Rhiannon Walker, *The Day Kenny Washington Ended the NFL's Unofficial Blackout*, UNDEFEATED (Mar. 21, 2018), <https://theundefeated.com/features/the-day-kenny-washington-ended-the-nfls-unofficial-blackout> [<https://perma.cc/N5RY-8NNX>].

172. *Id.*

173. Nancy Armour, *What NFL 100 Isn't Commemorating: League's 12-Year Ban on Black Players*, USA TODAY (Jan. 30, 2020, 4:13 PM), <https://www.usatoday.com/story/sports/columnist/nancy-armour/2020/01/30/super-bowl-2020-nfl-isnt-commemorating-12-year-ban-black-players/4614669002> [<https://perma.cc/96HH-5E7Z>].

174. *Id.*

175. Steve Fiorillo, *History of the NFL: From the 1890s to the Present*, STREET (Oct. 29, 2018, 4:55 PM), <https://www.thestreet.com/lifestyle/sports/nfl-history-14761022> [<https://perma.cc/QV5K-PCBF>].

176. Walker, *supra* note 171.

177. *Id.*

178. *Id.*

179. Doug Williams, the first Black quarterback to win a Super Bowl, said that if "you look at the draft now . . . it's hard for people who don't know the history to understand that we [Black players] just weren't allowed to play any position we wanted to." Jason Reid & Jane McManus, *The NFL's Racial Divide*, UNDEFEATED, <https://theundefeated.com/features/the-nfls-racial-divide/> [<https://perma.cc/MM87-M2PF>]; see also Kyle Siler, *Race and Social Class in College Football Positions: Why Black Quarterbacks are Economically Poorer than Black Running Backs*, SOC'Y PAGES (Oct. 9, 2019), <https://thesocietypages.org/engagingsports/2019/10/09/race->



Despite the gradual integration of the league, racial tensions flared again in 1965 after Black players in the NFL's rival league, the AFL, were denied service in New Orleans due to Jim Crow laws at the AFL's All-Star Game.<sup>180</sup> At that point, the NFLPA had not yet become a steady voice for NFL players to vocalize social and political issues of importance.<sup>181</sup> Eventually, the NFLPA started to get its footing in the 1970s, and according to the NFLPA President at the time, Ed Garvey, it was "driven by the African-American players, who knew there was an unwritten quota on most teams where there would not be more than a third [B]lacks on any one team."<sup>182</sup>

In the early 1970s, players nonetheless advocated for themselves, knowing they had the backing of a union.<sup>183</sup> Several players took public stands by joining clothing workers and bank employees in various labor strikes.<sup>184</sup> In 1988, retired Jim Brown, one of the game's most famous activists, founded the Amer-I-Can program, an organization dedicated to stopping gang violence.<sup>185</sup> That year, a breakthrough also occurred when Doug Williams became the first Black quarterback to win a Super Bowl.<sup>186</sup>

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and-social-class-in-college-football-positions-why-black-quarterbacks-are-economically-poorer-than-black-running-backs [https://perma.cc/4SA2-LK4H]. Warren Moon was the first African-American quarterback inducted into the Professional Football Hall of Fame. In his biography, he chronicles the racism he encountered during his time playing football. See generally WARREN MOON, NEVER GIVE UP ON YOUR DREAM: MY JOURNEY (2009). In particular, he highlights many stories of Black players being moved to different positions from quarterback. Moon said, "Supposedly, we weren't smart enough or had the leadership qualities or whatever it took." Jason Reid & Jane McManus, *supra* note 179.

180. Steve Wulf, *Athletes and Activism: The Long, Defiant History of Sports Protests*, UNDEFEATED (Jan. 30, 2019), <https://theundefeated.com/features/athletes-and-activism-the-long-defiant-history-of-sports-protests> [https://perma.cc/82GN-XRST].

181. Peter Dreier & Kelly Candaele, *Where Are the Jocks for Justice?*, NATION (June 10, 2004), <https://www.thenation.com/article/archive/where-are-jocks-justice> [https://perma.cc/WN8B-QK82].

182. Garvey brought the NFLPA into the AFL-CIO so that the players would have a broader sense of unity with the labor movement. Garvey described the players' response to this move by saying, "Now they're making enough money, so they want to keep their heads down." *Id.*

183. *Id.*

184. *Id.*

185. JIM BROWN: ALL AMERICAN (Home Box Office Mar. 22, 2002).

186. Reid & McManus, *supra* note 179.

C. *Comparing NFL and NBA Responses to Player Participation in Social Justice Reform in the Twenty-First Century*

This Section explores the ways in which the NFL and NBA have responded to their star players participating in social justice reforms in the twenty-first century. It first looks at how the NBA has consistently supported its players' advocacy efforts, then contrasts this with the way NFL owners have responded to their players, particularly by quietly blackballing one of the league's preeminent players. The Subsection concludes by showing how these responses have set differing standards for the leagues and how those standards have shaped league support of its players following the death of George Floyd.

Throughout the 2010s, NBA players were outspoken in fighting social injustice and were met with support and cooperation by the league's commissioners and many owners.<sup>187</sup> In 2012, members of the Miami Heat wore hooded jackets before a game to protest the death of Trayvon Martin.<sup>188</sup> Miami Heat owner, Micky Arison, and his executives responded, "We support our players and join them in hoping that their images and our logo can be part of the national dialogue and can help in our nation's healing."<sup>189</sup> In 2014, audio tapes surfaced of Donald Sterling, then Los Angeles Clippers owner, making racist remarks to his girlfriend about Clippers players.<sup>190</sup> Clippers players responded by displaying their warm-up shirts inside out to hide the "Clippers" team name in protest of Sterling's comments.<sup>191</sup> Two days later, NBA Commissioner Adam Silver banned Sterling from the NBA for life.<sup>192</sup> Later that year, NBA players wore warm-up shirts with "I Can't Breathe" printed on them during a pregame as a tribute to Eric Garner, who died after being suffocated by police officers in New York.<sup>193</sup> League superstar

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187. Woike, *supra* note 166.

188. Trayvon Martin, an unarmed Black teenager, was shot and killed by a neighborhood watchman. Wulf, *supra* note 180.

189. *Heat Don Hoodies After Teen's Death*, ESPN (Mar. 23, 2012), [https://www.espn.com/nba/truehoop/miamiheat/story/\\_id/7728618/miami-heat-don-hoodies-response-death-teen-trayvon-martin](https://www.espn.com/nba/truehoop/miamiheat/story/_id/7728618/miami-heat-don-hoodies-response-death-teen-trayvon-martin) [https://perma.cc/7FXL-BJYG].

190. *Basketball's Ongoing Fight for Social Justice*, ESPN, [https://www.espn.com/espn/feature/story/\\_id/29439678/nba-wnba-players-decade-demanding-justice](https://www.espn.com/espn/feature/story/_id/29439678/nba-wnba-players-decade-demanding-justice) [https://perma.cc/BJT3-3DTM].

191. *Id.*

192. *Id.*

193. Wulf, *supra* note 180.

Carmelo Anthony marched with protestors in Baltimore in 2015 after the death of Freddie Gray while wearing a “Cassius Clay” hoodie, the birth name of famous boxer and civil rights advocate Muhammad Ali.<sup>194</sup> The following year, in an unprecedented move, Carmelo Anthony, Chris Paul, Dwayne Wade, and LeBron James opened the 2016 ESPN ESPY Awards show, a nationally televised event, with a call to action on the issues of gun violence and police brutality.<sup>195</sup>

In 2017, Golden State Warriors players declined a visit to the White House to celebrate their championship after President Donald Trump suggested that NFL players should be fired for kneeling during the national anthem.<sup>196</sup> In 2018, Fox News host Laura Ingraham told LeBron James to “shut up and dribble” after a video of him criticizing President Trump went viral.<sup>197</sup> James responded by creating a three-part documentary to chronicle the lives of early basketball stars, such as Bill Russell and Kareem Abdul-Jabbar, who used their position to effect change and encouraged other athletes to do the same.<sup>198</sup> In 2019, the Utah Jazz banned a fan for life after he yelled racist slurs at superstar Russell Westbrook at a game.<sup>199</sup>

NFL players have also been active in speaking out for social justice in the last decade; however, the responses by the league and owners have not always been supportive.<sup>200</sup> Of all the NFL

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194. Freddie Gray died from police officers' use of excessive force. *Id.*

195. *Basketball's Ongoing Fight for Social Justice*, *supra* note 190.

196. LeBron James tweeted in support of his fellow players and called the President a “bum” after the President retroactively withdrew his invite to the Warriors. A few days later, players and coaches of the Los Angeles Lakers and Minnesota Timberwolves locked arms for the entirety of the anthem. *Basketball's Ongoing Fight for Social Justice*, *supra* note 190.

197. *Id.*

198. SHUT UP AND DRIBBLE (Showtime Nov. 3, 2018).

199. *Basketball's Ongoing Fight for Social Justice*, *supra* note 190.

200. After the death of Michael Brown in 2014 due to police brutality and the ensuing civil unrest centered in Ferguson, Missouri, the players from the Oakland Raiders and St. Louis Rams raised their hands during pregame introductions in a “hands up, don’t shoot” pose. The NFL’s VP of Communication responded with a statement saying, “We respect and understand the concerns of all individuals who have expressed views on the tragic situation.” *No Fines for Rams Players’ Salute*, ESPN (Dec. 1, 2014), [https://www.espn.com/nfl/story/\\_/id/11963218/the-five-st-louis-rams-players-saluted-slain-teenager-michael-brown-sunday-game-not-fined](https://www.espn.com/nfl/story/_/id/11963218/the-five-st-louis-rams-players-saluted-slain-teenager-michael-brown-sunday-game-not-fined) [<https://perma.cc/G8JV-FCKH>]; see also Adam Kilgore, ‘Sometimes Quiet is Better’: NFL Players Express Fear of Speaking Out Amid Colin Kaepernick Situation, WASH. POST (Aug. 20, 2017), <https://www.washingtonpost.com/news/sports/wp/2017/08/20/sometimes-quiet-is-better-nfl-players-express-fear-of-speaking-out-amid-colin-kaepernick-situation> [<https://perma.cc/4FET-LUH6>].

social justice protestors in recent years, perhaps most well-known is former 49ers quarterback Colin Kaepernick, who took his team to the Super Bowl in 2013.<sup>201</sup> Kaepernick's reputation drastically changed after he sat on the team's bench in protest during the national anthem before a 2016 preseason game, a move that shocked many Americans and created a media frenzy.<sup>202</sup> The NFL responded by issuing a "statement regarding its policy that players are encouraged, but not obligated, to stand for the anthem."<sup>203</sup> Various star NFL players, such as Drew Brees and Alex Boone, criticized Kaepernick for sitting and demanded he show respect for the country's flag.<sup>204</sup> Then presidential candidate Donald Trump called Kaepernick's sitting "a terrible thing" and directed Kaepernick to find another country to live in.<sup>205</sup>

Outspoken disdain primarily followed Kaepernick's actions while his supporters remained quiet and kept a low profile.<sup>206</sup> Shortly after, former NFL player and Green Beret Nate Boyer wrote an open letter to Kaepernick encouraging him to change his protest to kneeling, which Kaepernick proceeded to do at his next game.<sup>207</sup> NFL Commissioner Roger Goodell issued a

201. Bien, *supra* note 1.

202. Kaepernick responded to the national uproar by continuing to sit silently for the anthem before games in the weeks that followed, explaining the move as an objection to issues regarding racism, specifically the increasing cases of police violence against minorities in America. Whitener, *supra* note 3.

203. *National Anthem Protests Against Racism Timeline*, COURAGE UNDER FIRE, <https://courage-under-fire.com/national-anthem-protest-timeline> [<https://perma.cc/2SNL-E8CP>].

204. Mike Triplett, *Drew Brees 'Wholeheartedly' Disagrees with Colin Kaepernick's Method of Protest*, ESPN (Aug. 29, 2016), [https://www.espn.com/blog/new-orleans-saints/post/\\_id/23063/drew-brees-wholeheartedly-disagrees-with-colin-kaepernicks-method-of-protest](https://www.espn.com/blog/new-orleans-saints/post/_id/23063/drew-brees-wholeheartedly-disagrees-with-colin-kaepernicks-method-of-protest) [<https://perma.cc/V6LR-882V>]; Ben Goessling, *Alex Boone on Ex-Teammate Colin Kaepernick: 'Show Some Respect'*, ESPN (Aug. 28, 2016), [https://www.espn.com/nfl/story/\\_id/17411286/alex-boone-minnesota-vikings-calls-ex-teammate-colin-kaepernick-decision-sit-national-anthem-shameful](https://www.espn.com/nfl/story/_id/17411286/alex-boone-minnesota-vikings-calls-ex-teammate-colin-kaepernick-decision-sit-national-anthem-shameful) [<https://perma.cc/J4QJ-HWRC>].

205. *Donald Trump: Colin Kaepernick Should Find Another Country*, SPORTS ILLUSTRATED (Aug. 29, 2016), <https://www.si.com/nfl/2016/08/29/donald-trump-colin-kaepernick-national-anthem-protest-comments> [<https://perma.cc/D68S-LVDR>].

206. Mike Freeman, *Mike Freeman's 10-Point Stance: Kaepernick Anger Intense in NFL Front Offices*, BLEACHER REP. (Aug. 31, 2016), <https://bleacherreport.com/articles/2651681-mike-freemans-10-point-stance-kaepernick-anger-intense-in-nfl-front-offices> [<https://perma.cc/C5QX-37DT>].

207. Nate Boyer, *An Open Letter to Colin Kaepernick, From a Green Beret-Turned-Long Snapper*, ARMY TIMES (Aug. 30, 2016), <https://www.armytimes.com/opinion/2016/08/30/an-open-letter-to-colin-kaepernick-from-a-green-beret->

statement saying, “I don’t necessarily agree with what he is doing.”<sup>208</sup> At his next game, Kaepernick was benched as the starting quarterback for the San Francisco 49ers.<sup>209</sup>

After the season, Kaepernick became a free agent and said he would begin standing during the next season for the national anthem.<sup>210</sup> Regardless, a report was released that teams wanted nothing to do with Kaepernick due to his protest.<sup>211</sup> Kaepernick remained unsigned, and after many quarterbacks with far fewer career accomplishments and less perceived talent were signed, it became clear that owners were quietly blackballing him.<sup>212</sup> Despite expressing his desire to return to the NFL, Kaepernick remains unsigned to this day.<sup>213</sup>

While most NFL sidelines remained devoid of anthem displays following Kaepernick, some players like Seattle Seahawk Michael Bennett decided to protest by sitting during the national anthem in 2017 while Kaepernick was being

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turned-long-snapper [<https://perma.cc/D7XD-NX8G>]; see also *National Anthem Protests Against Racism Timeline*, *supra* note 203. Kaepernick’s teammate Eric Reid along with Jeremy Lane of the Seattle Seahawks became the first two other NFL players to join Kaepernick in kneeling. Other professional, collegiate, and high school athletes around the country joined in Kaepernick’s protest by also kneeling during the anthem. *A Timeline of Colin Kaepernick’s National Anthem Protest and the Athletes Who Joined Him*, SB NATION, <https://www.sbnation.com/2016/9/11/12869726/colin-kaepernick-national-anthem-protest-seahawks-brandon-marshall-nfl> [<https://perma.cc/DLW4-NZ6T>].

208. Bob Hille, *Roger Goodell Breaks Silence, Says He Disagrees with Colin Kaepernick*, SPORTING NEWS (Sept. 7, 2016), <https://www.sportingnews.com/us/nfl/news/roger-goodell-colin-kaepernick-national-anthem-protest-49ers-nfl/1duc4ojxnqlwf1c85t9jfpigy6> [<https://perma.cc/32UR-QNL2>].

209. See *National Anthem Protests Against Racism Timeline*, *supra* note 203.

210. Adam Schefter, *Colin Kaepernick to Stand During National Anthem Next Season*, ESPN (Mar. 2, 2017), [https://www.espn.com/nfl/story/\\_/id/18805744/colin-kaepernick-stand-national-anthem-next-season](https://www.espn.com/nfl/story/_/id/18805744/colin-kaepernick-stand-national-anthem-next-season) [<https://perma.cc/L53V-JXWM>].

211. A report of seven NFL executives reflected views that there was a widespread hatred of Kaepernick for being “un-American.” The report claimed that no executive wanted Kaepernick on their team, and that these sentiments were estimated to be shared by 90 to 95 percent of front offices. Freeman, *supra* note 206.

212. Eric Reid was left without a job that following season as well. Tadd Haislop, *Colin Kaepernick Kneeling Timeline: How Protests During the National Anthem Started a Movement in the NFL*, SPORTING NEWS (Sept. 13, 2020), <https://www.sportingnews.com/us/nfl/news/colin-kaepernick-kneeling-protest-timeline/xktu6ka4diva1s5jxaylrscse> [<https://perma.cc/N5GV-CMGU>]; See David Steele, *Is Colin Kaepernick Being Blackballed by NFL Teams? Prove He’s Not*, SPORTING NEWS (Mar. 18, 2017), <https://www.sportingnews.com/us/nfl/news/colin-kaepernick-free-agency-rumors-news-updates-quarterback-signings-contract/xuaiqfa1k1z41bshdrqbylbw7> [<https://perma.cc/Y4QP-5UPR>].

213. Haislop, *supra* note 212.

blackballed.<sup>214</sup> Bennett was one of the league's prominent players and said other players had quietly reached out to him seeking advice on how to address social issues.<sup>215</sup> However, players were hesitant to speak out, fearing for both their well-being and their jobs.<sup>216</sup> In 2018, the NFL announced a policy that fined players who did not stand during the anthem but allowed players to remain in the locker room, but the league rescinded the policy just a few weeks later after public backlash and criticism from then-president Donald Trump.<sup>217</sup> Kaepernick's fate became what players expected would happen if they spoke out on racial issues in America, rather than the outlier.<sup>218</sup>

NFL owners and speculators have suggested other reasons as to why Kaepernick remains unsigned.<sup>219</sup> First, it has been suggested that fans do not want a polarizing player like Kaepernick on their team because it detracts from the enjoyment of watching football.<sup>220</sup> Second, owners have suggested that a polarizing figure like Kaepernick is a distraction within the locker room and to the ultimate goal of winning games.<sup>221</sup> Finally, many have said that Kaepernick remains a free agent because he is replaceable despite his accomplishments and that many

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214. Jerry Jones, owner of the Dallas Cowboys, responded by saying he would bench any of his players who disrespected the flag during the national anthem. *National Reaction to Jerry Jones: Michael Bennett, Others Blast Cowboys Owner's Anthem Stance*, DALL. MORNING NEWS (Oct. 18, 2017, 8:00 PM), <https://www.dallasnews.com/sports/cowboys/2017/10/19/national-reaction-to-jerry-jones-michael-bennett-others-blast-cowboys-owner-s-anthem-stance> [https://perma.cc/KH6P-E9MX].

215. Michael Bennett said that many players felt Kaepernick should have been in the league based off his ability and stats alone compared to the other quarterbacks playing in the league. Kilgore, *supra* note 200.

216. *Id.*

217. Erik Ortiz, *New NFL Policy: Teams to Be Fined if Players Kneel During Anthem*, NBC NEWS (May 23, 2018, 8:32 PM), <https://www.nbcnews.com/news/us-news/nfl-announces-new-national-anthem-policy-fines-teams-if-players-n876816> [https://perma.cc/4D69-37BS].

218. Kilgore, *supra* note 200.

219. *You Probably Forgot How Bad Colin Kaepernick Was Last Year*, FOX SPORTS (Nov. 15, 2016), <https://www.foxsports.com/stories/nfl/you-probably-forgot-how-bad-colin-kaepernick-was-last-year> [https://perma.cc/YB3H-PW4Q].

220. Armando Salguero, *Dear Sports: Stick to Sports*, MIA. HERALD (Oct. 1, 2017, 1:58 PM), <https://www.miamiherald.com/sports/spt-columns-blogs/armando-salguero/article176389926.html> [https://perma.cc/9KU7-Q5PT].

221. *You Probably Forgot How Bad Colin Kaepernick Was Last Year*, *supra* note 219.

less-divisive quarterbacks are waiting for a chance to play in the NFL.<sup>222</sup>

Yet, Black protest is central to the history of the NFL, and in many ways, the NFL is a story of Black protest. Today, the success of the NFL is a direct result of the decades of activism by Black athletes, just as much as it is due to the games played. Just as NFL owners had an unspoken agreement to bar Black players in the 1930s and '40s, the blackbaling of Kaepernick by NFL owners is a disgraceful attempt to put a Black man in his place. In 2020, Black athletes comprised 70 percent of the NFL and 75 percent of the NBA.<sup>223</sup> Both leagues would be nowhere near as popular today were it not for the profits derived from the hard work of Black athletes. Additionally, the conversations surrounding the issues Kaepernick drew attention to have not ceased since he was blackballed. Rather, the NFL's treatment of Kaepernick due to his protest ignores the decades of value added by Black athletes and, indeed, diminishes the impact of Black NFL activists who came before him.

#### 1. NFL and NBA Responses Following George Floyd's Death

After the murder of George Floyd, athletes in both the NBA and NFL spoke out, participated in nationwide protests, and demanded change.<sup>224</sup> Both coaches and players in the NFL and NBA shared social-media posts bringing attention to police brutality, demanded policy change to combat systemic racism, and called for the officers involved in Floyd's killing to be charged and convicted.<sup>225</sup>

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222. Des Bieler, *Joe Montana Calls Colin Kaepernick 'Distraction,' Likens QB Skills to Those of Tim Tebow*, WASH. POST (July 12, 2017), <https://www.washingtonpost.com/news/early-lead/wp/2017/07/12/joe-montana-calls-colin-kaepernick-distraction-likens-qb-skills-to-those-of-tim-tebow> [<https://perma.cc/AW7W-KNDH>].

223. Walter Sharp, *What Percentage of NFL Players Are Black?*, SPORTSKEEDA (Feb. 9, 2021), <https://www.sportskeeda.com/nfl/what-percent-nfl-players-black> [<https://perma.cc/835M-V6UL>]; *Share of Players in the NBA From 2010 to 2020, by Ethnicity*, STATISTA (Aug. 28, 2020), <https://www.statista.com/statistics/1167867/nba-players-ethnicity> [<https://perma.cc/3H4Q-JHTX>].

224. *Basketball's Ongoing Fight for Social Justice*, *supra* note 190; Robin Lundberg, *Sports World Reacts to George Floyd's Death: Unchecked*, SPORTS ILLUSTRATED (May 28, 2020), <https://www.si.com/nba/2020/05/28/sports-world-reacts-to-george-floyds-death> [<https://perma.cc/9UJ5-8FRV>].

225. Lundberg, *supra* note 224.

At the time of the protests, the NBA was approaching a resumption of its season, which had been paused due to the COVID-19 pandemic.<sup>226</sup> The NBA met with the NBPA and agreed to resume play in a “bubble,” where food would be catered from Black-owned businesses and a smartphone app with curated reading lists and Black cinema would be available to players.<sup>227</sup> Shortly after play resumed, the Milwaukee Bucks refused to take the court for a playoff game after Jacob Blake, a Black man, was shot seven times in the back by police after attempting to break up a fight in his neighborhood.<sup>228</sup> In response, every other team scheduled to play that evening protested as well.<sup>229</sup> After a players-only meeting, NBPA leadership met with the league to determine substantive efforts that could be undertaken by the league and its owners to combat systemic racism and prevent killings of minorities at the hands of police.<sup>230</sup> The league announced it would donate over \$300 million in the coming decade to boost economic growth in the Black community.<sup>231</sup> LeBron James worked with the league using his “More Than A Vote” campaign to utilize ads and social-media platforms to encourage citizens to register to vote in the 2020 election.<sup>232</sup> Team owners and the NBPA agreed to a plan to petition for each team arena to be used as a polling place for the 2020 election.<sup>233</sup>

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226. See Woike, *supra* note 166.

227. The NBA also announced it would display “Black Lives Matter” on courts for every game played and allow players to display statements, such as “Say Their Names,” on the back of their jerseys during games. *Id.*; Tyler Tynes, *The Great NBA Awakening*, RINGER (Sept. 1, 2020, 8:10 AM), <https://www.theringer.com/nba/2020/9/1/21409894/nba-social-justice-movement-for-black-lives-strike> [<https://perma.cc/7Q3M-PMAG>].

228. Tynes, *supra* note 227.

229. Ethan Sacks, *NBA-Led Walkout Over Jacob Blake’s Shooting Marks Evolution of Protest in Pro Sports*, NBC NEWS (Aug. 28, 2020, 3:00 AM), <https://www.nbcnews.com/news/sports/nba-led-walkout-over-jacob-blake-s-shooting-marks-evolution-n1238544> [<https://perma.cc/W77V-8WLW>].

230. Tynes, *supra* note 227.

231. Isabel Togoh, *The NBA is Donating \$300 Million Over the Next Decade to Black Empowerment*, FORBES (Aug. 6, 2020, 5:45 AM), <https://www.forbes.com/sites/isabeltogoh/2020/08/06/the-nba-is-donating-300-million-over-the-next-decade-to-black-empowerment/?sh=7a38bb051af4> [<https://perma.cc/T3JA-73KD>].

232. Tim Reynolds, *As Election Draws Closer, the NBA Continues Calls to Vote*, ASSOC. PRESS (Oct. 8, 2020), <https://apnews.com/article/nba-udonis-haslem-miami-elections-archive-d8a5673aa7773436105cd226e4ad6764> [<https://perma.cc/2GC5-A79L>].

233. Samantha Raphelson, *NBA Agrees to Use Arenas as Polling Places in Deal to Resume Playoffs*, NPR (Aug. 28, 2020, 3:54 PM), <https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/08/28/907101601/nba-agrees-to>



At the same time, the NFL was in its offseason, and questions surrounding the league's continued blackballing of Kaepernick resurfaced.<sup>234</sup> Led by Patrick Mahomes, the league's reigning MVP, many NFL stars posted a social-media video calling on the league to condemn racism and admit wrongdoing when it asked players not to kneel during the anthem.<sup>235</sup> NFL commissioner Roger Goodell released a statement regarding George Floyd's death and said the NFL "recognize[s] the power of our platform in communities and as part of the fabric of American society. We embrace that responsibility and are committed to continuing the important work to address these systemic issues together with our players, clubs and partners."<sup>236</sup> However, players and celebrities criticized the statement as hypocrisy and empty rhetoric.<sup>237</sup> Goodell responded by pointing critics to the ongoing "Inspire Change" social justice effort, an initiative created by the NFLPA and the NFL Players Coalition.<sup>238</sup> The initiative committed \$89 million to reducing barriers to social justice.<sup>239</sup> Goodell also said Kaepernick was a free agent and teams could sign him if they wanted to.<sup>240</sup> While Goodell admitted the league was wrong for not listening to players who kneeled in the past, some commentators and players felt the appropriate move would have been an apology to Kaepernick coupled with action to correct their prior wrongs.<sup>241</sup>

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use-arenas-as-polling-places-in-deal-to-resume-playoffs [https://perma.cc/N6SS-6L5M].

234. Janelle Griffith, *'Shame on You': NFL's Roger Goodell Accused of Hypocrisy in Protest Response*, NBC NEWS (May 31, 2020, 2:11 PM), <https://www.nbcnews.com/news/us-news/shame-you-nfl-s-roger-goodell-slammed-statement-george-floyd-n1220331> [https://perma.cc/C2FA-V5XM].

235. Evan Bleier, *NFL Stars Call on League to Condemn Racism in Viral Video*, INSIDE HOOK (June 5, 2020, 11:17 AM), [https://www.insidehook.com/daily\\_brief/sports/nfl-stars-condemn-racism-viral-video](https://www.insidehook.com/daily_brief/sports/nfl-stars-condemn-racism-viral-video) [https://perma.cc/6AKF-RT QR].

236. Griffith, *supra* note 234.

237. *Id.*

238. The NFL Players Coalition is an organization founded by the NFL in 2017 to oppose social injustice and racial inequality. *Id.*

239. *See id.*; *NFL Teaming with Jay-Z on Entertainment and Social Activism*, NBC NEWS (Aug. 13, 2019, 2:04 PM), <https://www.nbcnews.com/news/nbcblk/nfl-teaming-jay-z-entertainment-social-activism-n1041996> [https://perma.cc/7CP8-UH 4X].

240. Griffith, *supra* note 234.

241. Leah Asmelash, *In Reactions to Roger Goodell's Mea Culpa, Most Seized on What He Didn't Say*, CNN (June 6, 2020, 9:46 AM), <https://www.cnn.com/2020/06/05/us/colin-kaepernick-roger-goodell-statement-trnd/index.html> [https://perma.cc/57HC-4CCG].

V. CONTRACT STRUCTURES PROVIDE NBA PLAYERS WITH MORE JOB SECURITY THAN NFL PLAYERS TO PARTICIPATE IN SOCIAL JUSTICE ADVOCACY

NFL owners have various ways to cut players without facing any financial consequences because of the nature of players' non-guaranteed contracts, described in Section I above. NFL players do not have the same protections as NBA players, who have negotiated for fully guaranteed contracts. As a result, NFL owners can blacklist players for speaking out, just like they could bar Black athletes from playing in the 1930s and 1940s without facing any consequences.

The differences in contract structures between the NFL and NBA are a result of the negotiations between the leagues and their respective players unions. For NFL players, nonguaranteed contracts mean tenuous job security and result in player reticence to share their opinions on social matters out of a fear of backlash from team owners.<sup>242</sup> Under completely nonguaranteed contracts, owners can release a player at any point in the season, not pay out the contract's remaining value, and then turn around and sign another player, making the potential repercussions of speaking out significant for NFL players.<sup>243</sup>

The normalcy of nonguaranteed contracts is unlikely to change any time soon. Most NFL rosters are filled with players making far less than the elite players who can demand big contracts.<sup>244</sup> With approximately half of players signed to minimum salaries,<sup>245</sup> recent CBA negotiations focused primarily on raising the minimum salary, not demanding more fully guaranteed contracts.<sup>246</sup>

As recent CBA negotiations have illustrated, NFL owners will continue to try to limit their spending. As such, the hard salary cap provides an excuse to continue offering players nonguaranteed contracts, which allow owners to take advantage of players. For owners, the ability to cut a nonguaranteed player for underperformance allows them to improve their teams by

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242. Kilgore, *supra* note 200.

243. Diana Moskovitz, *It's Time for the NFL to Guarantee Contracts for All Players*, UNDEFEATED (July 23, 2020), <https://theundefeated.com/features/its-time-for-the-nfl-to-guarantee-contracts-for-all-players> [<https://perma.cc/BZX5-FAWC>]; Brandt, *supra* note 32.

244. Moskovitz, *supra* note 243.

245. *Id.*

246. *Id.*

signing the best players possible without having to always pay the players they cut along the way. Also, the nature of football brings a high potential for injury, and nonguaranteed contracts provide owners with more financial security to cut injured players. While nonguaranteed contracts do provide these legitimate benefits to NFL owners, the nature of nonguaranteed contracts also allows owners to cut players if they use their voices to speak out against racism. With nonguaranteed contracts, the owners have all the power and can ignore the long history of Black players' contributions to the growth and success of the NFL.

Indeed, with nonguaranteed contracts, NFL players appear to be wary of speaking out due to the risk of pretextual termination under the auspices of "underperformance," one of the permissible grounds for cutting a player. Owners can claim underperformance as a pretext to cut a player and avoid financial consequences for exceeding their salary cap. This risk, along with the fear that their already-short NFL careers could be further shortened if they speak out, can lead to players remaining silent. That is, speaking out can curtail a player's career even faster than injury and underperformance can. NFL superstar Vernon Davis encapsulated the mentality of many NFL veterans post-Kaepernick when he said, "I advise any young guys, just do your job . . . Sometimes quiet is better."<sup>247</sup>

There is nothing in the NFL's CBA that legally bars fully guaranteed contracts.<sup>248</sup> In fact, the league and its teams have hundreds of millions of dollars in excess profit they could reallocate towards fully guaranteed contracts.<sup>249</sup> However, at this point, nonguaranteed contracts are the deeply engrained norm in the NFL.<sup>250</sup> In contrast, fully guaranteed contracts are the long-standing norm in the NBA, ensuring that players receive full payouts even if they vocalize their opinions, as many young players feel comfortable and empowered to do.<sup>251</sup>

Currently, the NBA is being shaped by a younger generation of players defined by not only on-court talent but also how they use their voices to affect change.<sup>252</sup> Young up-and-coming players like Jaylen Brown and Trae Young were at the frontlines of

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247. Kilgore, *supra* note 200.

248. Moskovitz, *supra* note 243.

249. *Id.*

250. *Id.*

251. See Woike, *supra* note 166.

252. *See id.*

Black Lives Matter protests in Atlanta and Oklahoma City.<sup>253</sup> Kyle Kuzma of the Los Angeles Lakers has been a vocal leader in raising awareness for the Flint, Michigan, water crisis.<sup>254</sup> Donovan Mitchell of the Utah Jazz signed a contract extension worth up to \$196 million and, less than a week later, donated \$12 million to his old community to build a new gym and provide scholarships for students from lower socioeconomic backgrounds.<sup>255</sup> Fortunately for these players, they have the certainty, through fully guaranteed contracts, that they will be paid the amount of money they signed for, despite any controversy created by their social activism.

### CONCLUSION

The NBA's norm of fully guaranteed contracts provides the security for its players to go against the status quo and advocate for social justice. Even when NBA players have not initiated protests themselves, they have nonetheless demonstrated an unfettered willingness to be at the forefront of societal movements for social justice and to use their collective power to advocate for change. By contrast, current NFL players have yet to gain the protection of fully guaranteed contracts en masse. While the potential for elite players to receive a fully guaranteed contract structure is not entirely out of the picture, the reality is that most NFL players—paid closer to the league minimum than elite player salaries—are focused on negotiating a higher minimum salary, not on changing the NFL's norm of nonguaranteed contracts.

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253. Ben Ladner, *Trae Young Organizes Peaceful Protest in Oklahoma*, SPORTS ILLUSTRATED (June 1, 2020), <https://www.si.com/nba/hawks/news/trae-young-organizes-peaceful-protest-in-oklahoma> [<https://perma.cc/2VC5-2BCG>]; Ben Pickman, *Celtics' Jaylen Brown Leads Peaceful Protest in Atlanta, Says 'Our Voices Need to Be Heard'*, SPORTS ILLUSTRATED (May 31, 2020), <https://www.si.com/nba/2020/05/31/jaylen-brown-celtics-protest-nba> [<https://perma.cc/T7F6-FB3G>].

254. Ashish Mathur, *Lakers' Kyle Kuzma Points to Hometown of Flint, Michigan as Evidence of Systemic Racism*, CLUTCH POINTS (June 16, 2020), <https://clutchpoints.com/lakers-news-kyle-kuzma-points-hometown-flint-michigan-as-evidence-systemic-racism> [<https://perma.cc/LVM8-456J>].

255. Shanna McCarriston, *Jazz All-Star Donovan Mitchell Donates \$12 Million for Scholarships and New Gym at His Former School*, CBS SPORTS (Dec. 4, 2020, 10:22 PM), <https://www.cbssports.com/nba/news/jazz-all-star-donovan-mitchell-donates-12-million-for-scholarships-and-new-gym-at-his-former-school> [<https://perma.cc/DU39-8RY6>].

If the NFLPA wants to change this norm, there are likely two ways they could accomplish it. First, the NFLPA could approach the next CBA negotiations with the nonnegotiable term of changing the salary cap structure to a soft cap. A soft cap would operate like the NBA's by providing teams with certain exceptions if they go over the salary cap rather than imposing automatic financial consequences. Teams would gain flexibility to spend on player contracts, and NFL owners would feel less pressure to cut players at deadlines in order to sign players, as is the norm with nonguaranteed contracts.

But the history of CBA negotiations in the NFL has shown that this route may ultimately result in players going on strike. NFL players were successful in 1968 when they organized a strike to protest compensation. While NFL players did not receive the 55 percent of revenue they hoped for in their 1982 strike, they did obtain a more favorable CBA. Most recently in 2011, when NFL players went on strike and threatened to decertify, the strike accomplished a new CBA that included a \$1 million-per-player increase in benefits.

Further, even this solution would not necessarily dictate that NFL owners offer fully guaranteed contracts. It would simply provide owners more flexibility to maneuver salaries. It could result in more players getting cut because NFL owners would have the ability under a soft cap to make even more moves than they are currently able to with a hard cap.

The other, more likely solution would be if individual star players with more influence took greater control over their free agency by insisting upon fully guaranteed contracts. Since nothing in the NFL's CBA expressly bars fully guaranteed contracts, the best players in the NFL are free to approach their contract negotiations with whatever priorities they desire. Lawyers can play a role here as agents by helping NFL players normalize fully guaranteed contracts. A star player can go to their team when their contract is up with a hard offer and insist upon a fully guaranteed contract or threaten to leave. If the team considers that player to be irreplaceable, then the player will have the leverage to force a change to the contract model. Even if the team refuses to give a fully guaranteed contract, competing teams might jump at the opportunity to sign that player with fully guaranteed terms.

However, there are significantly more NFL players than NBA players, making good players more replaceable in the NFL

than in the NBA. Therefore, this effort would likely need to be a coordinated effort amongst the NFL's top talents to bring effective change. If star players follow this approach in their contract negotiations, then other less-known players could also gain power over time as fully guaranteed contracts slowly become the league norm. Though select NFL players have the tools to change league norms, fear of retaliation might act as a barrier given the NFL's historical treatment of players that fall out of line, especially Black players.

Ultimately, until NFL players normalize fully guaranteed contracts, they may not feel they have the job security to participate in social justice advocacy to the extent NBA players do. The average NFL player fears losing millions of dollars in salary—and being blackballed like Colin Kaepernick—if he speaks out against the status quo. Maybe CBA negotiations for NFL players to ensure fully guaranteed contracts are the beginning. Perhaps they are the end goal. Regardless, until NFL players have more job security, they remain without sufficient bargaining power or job security to participate in social justice advocacy efforts to the extent NBA players do with their fully guaranteed contracts.