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WHY SO STERN?: THE GROWING POWER OF THE NBA COMMISSIONER

*Michael R. Wilson**

I. INTRODUCTION

Former National Basketball Association (“NBA”) player Dennis Rodman was a source of controversy throughout his career and received significant attention from NBA commissioner David Stern. In 1997, Stern qualified his authority to punish Rodman and NBA players generally, stating “I want to make it clear that I’m not going to punish [Rodman] for what he does off the court. I’m going to let the media crucify him for that. . . This is still America, and my jurisdiction is still the basketball court.”¹

Despite this statement, David Stern has enjoyed expansive disciplinary authority that extends beyond the basketball court, micromanaging virtually all player conduct so long as it is related to a player’s employment with the NBA. During his tenure, Stern has installed wide-ranging rules governing conduct by players, coaches, and team officials, restricting what these individuals may say, wear, and do. While Stern justifies these rules as vital to protect the integrity and image of the league, many have criticized his decisions as paternalistic intrusions into the lives of these professional athletes. Even further, others have questioned whether he has exceeded his authority. Stern’s use of power is arguably unmatched by the commissioners of any of the other three major sports leagues in the United States.²

Part II of this paper will analyze the authority of the NBA commissioner, viewed in light of the powers of the commissioners in the three other major sports leagues. It will also seek to define the contours of

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1. Karen Martin Dean, *Can the NBA Punish Dennis Rodman? An Analysis of First Amendment Rights in Professional Basketball*, 23 Vt. L. Rev. 157, 175 (1998).

2. Along with the NBA, Major League Baseball (“MLB”), the National Football League (“NFL”), and the National Hockey League (“NHL”) are considered the four major sports leagues in the US.

that authority. Part III of this paper will examine the rules that David Stern has implemented in the past several years and determine whether he has exceeded the scope of his authority. Part IV will recommend that the NBA players' union negotiate for further limits on the commissioner's authority.

II. COMMISSIONER AUTHORITY

The MLB was the first league to establish the position of commissioner, primarily in response to the "Black Sox" scandal that occurred during the 1919 World Series.³ The club owners agreed that the position was necessary to protect the integrity of the league, with a specific focus on fighting gambling, and elected Judge Kenesaw Mountain Landis as the first commissioner in 1921.⁴ The NFL and NBA installed their own commissioners shortly thereafter, and the NHL installed the position of commissioner in 1993.⁵

Each league grants similar authority to their respective commissioners through the league constitutions and by-laws. The league, through negotiations with the respective players' unions, further defines the limitations of that authority through Collective Bargaining Agreements. External legal doctrines, such as the National Labor Relations Act, private association law, and the First Amendment of the U.S. Constitution, may also serve to limit commissioner authority.

A. *League Grants of Commissioner Authority*

1. *League Constitution and Bylaws*

Historically, league commissioners have enjoyed expansive authority to regulate their leagues. The constitutions and by-laws for each league are the starting points in defining the authority of each league

3. Eight members of the Chicago White Sox were charged with conspiring to fix the outcome of the 1919 World Series. White Sox Timeline, MLB.com, <http://mlb.mlb.com/cws/history/timeline01.jsp> (last visited May 4, 2009).

4. Brent D. Showalter, *Technical Foul: David Stern's Excessive Use of Rule-Making Authority*, 18 MARQ. SPORTS L. REV. 205, 206-207 (2007).

5. In 1921, Joseph F. Carr became the first President of the American Professional Football League. The title "president" was later changed to "commissioner" and the league was later renamed the National Football League. Maurice Podoloff became the NBA's first commissioner in 1949. Matthew B. Pachman, Note, *Limits on the Discretionary Powers of Professional Sports Commissioners: A Historical and Legal Analysis of Issues Raised by the Pete Rose Controversy*, 76 VA. L. REV. 1409, 1439 n.55 (1990). The NHL was traditionally run by a "president," but that position was eliminated in 1993 when Gary Bettman became the NHL's first commissioner. The NHL commissioner's powers exceeded those formerly accorded to the NHL president. Thomas J. Arkell, *National Hockey League Jurisprudence: Past, Present and Future*, 8 SETON HALL J. SPORTS L. 135, 136 (1998).

commissioner. While the terminology varies slightly,⁶ “the four traditional professional sports leagues in the United States vest their commissioners with what is known as ‘best interests of the sport’ authority.”⁷ This authority gives the position of commissioner broad discretion to protect the integrity and best interests of their sports league.⁸ Each commissioner has the power “to discipline professional athletes for a wide variety of activities, both on and off the field of play.”⁹ Under the grant of authority by the league constitutions and bylaws, the commissioner can regulate any conduct he believes “to be detrimental to the image and integrity of the league.”¹⁰

The powers of the NBA commissioner, as enumerated by the NBA Constitution, specifically permit the commissioner to discipline players “for any statement he makes or endorses which is prejudicial or detrimental to the best interests of basketball and to suspend or fine the player for conduct that is detrimental to the NBA.”¹¹ The NBA Constitution also grants the commissioner the exceptionally broad power to punish players who are “guilty of conduct that does not conform to standards of morality and fair play.”¹²

The commissioners of each league are charged with using their professional judgment to determine what is in the best interest of the league, with few explicit guidelines for each commissioner to follow.¹³ The commissioners’ best interest authority requires no specific act in violation of a league rule and is broad enough to supersede player

6. The MLB Constitution authorizes the commissioner to take disciplinary action against conduct deemed “not to be in the best interests of Baseball.” Major League Baseball, Major League Constitution art. II, § 3 (2006), available at <http://www.bizofbaseball.com/docs/MLConstitutionJune2005Update.pdf>. The NFL Constitution looks at conduct “detrimental to the League or professional football.” Nat’l Football League, Constitution and Bylaws of the NFL art. 8.13(A) (rev. 1999); see also Showalter, *supra* note 4, at 207. The NHL bylaws give the commissioner authority over conduct “whether during or outside the playing season [that] has been dishonorable, prejudicial to or against the welfare of the League or the game of hockey.” Nat’l Hockey League, NHL Bylaws § 17.3(a) (1990); see also Showalter, *supra* note 4, at 207. The NBA Constitution covers both conduct at or during a game that is “prejudicial to or against the best interests of the Association or the game of basketball” and “conduct prejudicial. . .or detrimental to the” NBA. Nat’l Basketball Ass’n, NBA Constitution art. XXXV(d)-(e) (1989) [hereinafter NBA Constitution]; see also Showalter, *supra* note 4, at 207.

7. Christopher J. McKinny, *Professional Sports Leagues and the First Amendment: A Closed Marketplace*, 13 MARQ. SPORTS L. REV. 223, 235-236 (2003).

8. Jason M. Pollack, *Take My Arbitrator, Please: Commissioner “Best Interests” Disciplinary Authority in Professional Sports*, 67 FORDHAM L. REV. 1645, 1648 (1999).

9. McKinny, *supra* note 7, at 235-236.

10. *Id.*

11. Robert I. Lockwood, *The Best Interests of the League: Referee Betting Scandal Brings Commissioner Authority and Collective Bargaining Back to the Frontcourt in the NBA*, 15 SPORTS LAW. J. 137, 151 (2008).

12. NBA Constitution, *supra* note 6, at art. XXXV(d).

13. *Id.* at 147.

autonomy, “including any sanction that might be directed at individual players for words, conduct, or association with suspect parties.”¹⁴ This expansive amount of control over the lives of professional athletes is not, however, unlimited.

2. *Collective Bargaining Agreement*

Perhaps nothing limits the powers of the commissioner more than the Collective Bargaining Agreements that exist between the players’ unions and their respective leagues. Negotiating with the league to produce a Collective Bargaining Agreement (“CBA”) offers professional athletes an opportunity to impose checks on commissioner power, such as rule change restrictions and arbitration processes, while also reserving certain powers for the commissioner. Because the players’ unions negotiate on behalf of the athletes, the relative strength of a league’s players’ union often determines the extent of the limits on commissioner authority under the CBA.

Due to the strength of the MLB Players’ Association (“MLBPA”), the CBA between the MLB and the union imposes significant limitations on the MLB commissioner. The MLB and MLBPA’s CBA covers all rule changes, requiring the league to give notice of any proposed changes to the MLBPA and to negotiate the change with the union if the rule change alters a player benefit under existing rules or imposes a new obligation upon players.¹⁵ In addition, the MLB and MLBPA’s CBA offers players the opportunity to appeal a disciplinary decision for conduct outside the playing field to an impartial grievance arbitration panel, which will decide whether the commissioner had just cause to impose the punishment.¹⁶

The NHL commissioner’s powers are similarly limited by the CBA between the NHL and the NHL Players’ Association (“NHLPA”). The NHL cannot alter any league or playing rules affecting the terms or conditions of employment without written approval from the NHLPA and cannot enforce any rules which have not been furnished to the union.¹⁷ In the case of “any dispute involving the interpretation or application of, or compliance with, any provision of” the CBA, the league or the union may file a grievance.¹⁸ This language extends the

14. *Id.*

15. Major League Baseball, 2007-2011 Basic Agreement, art. XVIII (2007), available at http://mlbplayers.mlb.com/pa/pdf/cba_english.pdf.

16. *Id.* at art. XI.

17. Collective Bargaining Agreement Between NHL and NHLPA, July 22, 2005 – September 15, 2011, art. XXX § 3 (2005), available at <http://www.nhl.com/cba/2005-CBA.pdf>.

18. *Id.* at art. XVII.

arbitrator's jurisdiction further than the MLB's arbitration process, which reserves exclusive jurisdiction to the commissioner for conduct occurring on the playing field. The NHL and the NHLPA must first meet to discuss the matter, with the goal of reaching a settlement.¹⁹ If they cannot resolve the issue, then the two parties must arbitrate the issue before an impartial grievance arbitrator.²⁰

The CBA between the NFL and the NFL Players' Association ("NFLPA") covers only playing rules. It requires the league to give notice of proposed rule changes to the NFLPA.²¹ The NFLPA may call a meeting with the league to discuss any rule change it believes may affect player safety.²² If no agreement is reached, the NFLPA can request a non-binding advisory decision from an arbitrator.²³ Unlike the other leagues' use of impartial arbitrators, players can only appeal disciplinary decisions to the league commissioner.²⁴

The CBA between the NBA and the National Basketball Players' Association ("NBPA") arguably cedes to the commissioner the most rule-making authority of the four major sports leagues,²⁵ specifically authorizing the commissioner to "promulgate and enforce reasonable rules governing the conduct of players on the playing court" or "conduct that is harmful to the 'preservation of the integrity of, or the maintenance of public confidence in, the game.'"²⁶ As opposed to a plain reading of "on the playing court," the NBA and NBPA's CBA defines the phrase broadly, as "conduct in any area within an arena."²⁷ The CBA imposes no notice, negotiation, or consent requirements on the NBA in regards to rule changes.

19. *Id.*

20. *Id.*

21. NFL Collective Bargaining Agreement 2006-2012, art. XIII, § 1(c) (2006), available at <http://www.nflplayers.com/images/fck/NFL%20COLLECTIVE%20BARGAINING%20AGREEMENT%202006%20-%202012.pdf>.

22. *Id.*

23. *Id.*

24. *Id.* at art. XI.

25. Showalter, *supra* note 4, at 215.

26. Nat'l Basketball Ass'n, NBA Collective Bargaining Agreement, art. VI § 12 (2005), [hereinafter NBA CBA] available at http://www.nbpa.com/cba_articles.php; Adam B. Marks, *Personal Foul on the National Football League Players Association: How Union Executive Director Gene Upshaw Failed the Union's Members By Not Fighting the Enactment of the Personal Conduct Policy*, 40 CONN. L. REV. 1581, 1617 (2008).

27. NBA CBA, *supra* note 26, at art. XXXI, § 8(c). ("As used in this Agreement, 'conduct on the playing court' shall mean conduct in any area within an arena (including, but not limited to, locker rooms, vomitories, loading docks, and other back-of-house and underground areas, including those used by television production and other vehicles) at, during or in connection with an NBA Exhibition, All-Star, Regular Season or Playoff game.")

Still, the collective bargaining process can serve “as a vehicle for reigning in the traditional, nearly unlimited, authority of the commissioner in basketball to act unilaterally in the best interest of the league.”²⁸ As one example, the CBA negotiations between the NBA and NBPA in 1995 served to reign in the NBA commissioner’s authority by implementing an internal grievance process similar to the MLB’s.²⁹ Since that agreement, NBA players have been able to appeal disciplinary decisions by the commissioner to a neutral third-party arbitrator.³⁰ This right to appeal is ostensibly limited to discipline for conduct off the court, because the commissioner has the authority to hear all appeals related to activity on the playing court.³¹ The NBA and NBPA’s CBA differentiates on the court conduct, where the commissioner has broad, exclusive disciplinary authority, from off the court conduct, where outside review is allowed.³²

The Jermaine O’Neal case helped define the current contours of the arbitration process. During a fight between players and spectators that occurred at the end of a game at the Palace of Auburn Hills between the Detroit Pistons and the visiting Indiana Pacers in 2004, Pacers player Jermaine O’Neal punched a spectator who had run onto the court.³³ The league subsequently suspended him for twenty-five games, and the NBPA appealed the suspension to a grievance arbitrator.³⁴ That arbitrator interpreted “on the playing court” more narrowly than the definition argued for by the league, defining O’Neal’s conduct as off the court and therefore within the arbitrator’s jurisdiction.³⁵ The arbitrator went on to interpret the standard of review to be whether the commissioner’s imposed discipline is fair and reasonable³⁶ and determined that the arbitrator’s authority included “altering the sanctions that the commissioner had originally imposed.”³⁷ The arbitrator ultimately reduced O’Neal’s suspension to fifteen games.

The NBA responded by challenging the arbitrability of Stern’s decision in district court, arguing that O’Neal’s conduct took place on the playing court and therefore fell within the commissioner’s exclusive jurisdiction.³⁸ After analyzing previous player conduct memos that

28. Lockwood, *supra* note 11, at 158.

29. *Id.* at 154.

30. See NBA CBA, *supra* note 26, at art. XXXI.

31. Marks, *supra* note 26, at 1616.

32. Lockwood, *supra* note 11, at 157.

33. NBA v. Nat’l Basketball Players Ass’n, 2004 U.S. Dist. LEXIS 26244 (S.D.N.Y. 2004).

34. *Id.*

35. Lockwood, *supra* note 11, at 157.

36. *Id.* at 155.

37. *Id.* at 158.

38. NBA v. Nat’l Basketball Players Ass’n, *supra* note 33.

“sought to differentiate between ‘on the court’ and ‘off the court’ conduct,” the district court determined that the conduct was so external to the game that it could not possibly have been contemplated as constituting conduct “on the playing court.”³⁹ The court specifically argued that fighting with a spectator, while inexcusable, “has never been characterized as conduct on the playing court.”⁴⁰ As a result, the district court confirmed the arbitrator’s decision to reduce the length of O’Neal’s suspension.

B. *Externally Defined Contours of Commissioner Authority*

The sports leagues in the U.S. are still subject to substantive external law, including labor law and private association law. In addition, if one can successfully prove that a league constitutes a state actor, it may be subject to the First Amendment protections of free speech and expression.

I. *Labor Law*

Labor law, embodied by the National Labor Relations Act (“NLRA”),⁴¹ helps to support Collective Bargaining Agreements, making them the “supreme governing authority” over all terms and conditions of employment.⁴² The mandatory terms include “wages, hours, and other terms and conditions of employment.”⁴³ The NLRA precludes an employer from changing these terms and conditions without engaging in collective bargaining with the union.⁴⁴ In the context of the four major sports leagues, this “has served to dramatically limit the authority of the commissioners,” because the commissioners serve as the employers of the professional athletes and as the party with which the unions negotiate.⁴⁵

Mandating certain items be subject to collective bargaining provides an important limit on the powers of a commissioner to implement rules that may be to the detriment of the athletes. When the commissioner is required to negotiate on mandatory subjects of collective bargaining, “past union efforts to secure increased rights for members have proved quite successful.”⁴⁶

39. Marks, *supra* note 26, at 1617.

40. *NBA v. Nat’l Basketball Players Ass’n*, 2004 U.S. Dist. LEXIS 26244 (S.D.N.Y. 2004); See also Lockwood, *supra* note 11, at 157.

41. Nat’l Labor Relations Act, 29 U.S.C. § 158(d) (1994) [hereinafter NLRA].

42. Jan Stiglitz, *Player Discipline in Team Sports*, 5 MARQ. SPORTS L.J. 167, 173 (1995).

43. NLRA, *supra* note 41.

44. Stiglitz, *supra* note 42, at 173.

45. *Id.*

46. McKinny, *supra* note 7, at 253.

2. *Private Association Law*

As a general principle, courts will decline to interfere in the internal disputes involving members of a private association.⁴⁷ This principle has been referred to by some scholars as “private association law.”⁴⁸ Because all four major sports leagues purport to be private enterprises, private association law applies and courts generally will not hear disputes over league rulings. However, this is not an absolute bar to court intervention in disputes over commissioner decisions.

While the courts will not examine the appropriateness of a given disciplinary action or whether a commissioner’s decision is actually in the best interests of the sport, there are three instances where the courts may elect to intervene in the internal actions of a private association.⁴⁹ First, courts may determine whether the commissioner acted in good faith in handing down any disciplinary action.⁵⁰ Second, the courts can decide whether a punishment is in excess of the authority held by the commissioner. Indeed, the courts have determined that commissioners’ decisions to strip teams of draft picks and to unilaterally realign divisions in the league were beyond the authority granted to them by the league constitutions.⁵¹ Finally, the courts may also scrutinize commissioner action for procedural correctness, ensuring that “certain principles of procedural fairness” are present.⁵²

3. *First Amendment*

While the contours of commissioner authority have been established through years of interaction among commissioners, players’ unions, and the courts, the First Amendment of the U.S. Constitution has received little attention as a method to challenge the actions of a

47. Stiglitz, *supra* note 42, at 174.

48. “A most dramatic illustration of this principal occurred in *Carr v. St. John’s University*, 17 A.D.2d 632, 231 N.Y.S.2d 410 (1962), where the court refused to interfere with a university’s decision to expel Catholic students who had participated in a civil marriage ceremony.” *Id.* at 174 n.38. See generally Jeffrey A. Durney, *Fair or Foul? The Commissioner and Major League Baseball’s Disciplinary Process*, 41 EMORY L.J. 581 (1992); McKinny, *supra* note 7, at 236-237.

49. See generally *id.*

50. *Charles O. Finley & Co. v. Kuhn*, 569 F.2d 527, 539 (7th Cir. 1978) (deciding that the MLB commissioner had acted in good faith, and looking no further into the appropriateness of the given punishment).

51. Showalter, *supra* note 4, at 208; Stiglitz, *supra* note 42, at 175; *Atlanta Nat’l League Baseball Club, Inc. v. Kuhn*, 432 F. Supp. 1213, 1223 (N.D. Ga. 1977) (deciding that denying a team a draft choice was outside the scope of the MLB commissioner’s disciplinary authority); *Chicago Nat’l League Ball Club Inc. v. Francis Vincent, Jr.*, No. 92 C 4398 (U.S.D.C., N.D.Ill. 1992) (unreported) (ruling that the MLB commissioner could not unilaterally realign league divisions); *Riko Enterprises v. Seattle Supersonics, Inc.*, 357 F. Supp. 521 (S.D.N.Y. 1993) (ruling that the NBA commissioner could not strip a team of its draft pick).

52. Stiglitz, *supra* note 42, at 176.

commissioner. Part of the reason for this limited attention is the requirement that an entity must be a state actor in order to be restrained by the First Amendment's guarantee of free speech and expression. However, private enterprises may qualify as state actors "when the actions of the private entity are 'so entwined' with the state that the state can be held responsible for the actions of the private entity."⁵³

All four major sports leagues are established as private enterprises, not owned or operated by the state. If the state and a sports league are sufficiently interconnected, the players' union may be able to hold that league subject to the First Amendment and require that the players' rights to free speech and expression remain in tact. The relevant test to determine whether the sports leagues may be considered state actors is the symbiotic relationship test.⁵⁴ This test analyzes "whether there is 'a symbiotic relationship involving the sharing of profits' between the subject entity and the state"⁵⁵ to the extent that "the State has so far insinuated itself into a position of interdependence with [the private actor] that it must be recognized as a joint participant in the challenged activity."⁵⁶ The significant connections between the four major sports leagues and state and local governments open the possibility of satisfying the symbiotic relationship test. David Stern has even said that "ideal partnership is a private/public corporate partnership" between the teams and the local communities.⁵⁷

Given the fact that the vast majority of sports arenas are subsidized by state and local governments, characterizing a sports league as a state actor is not without precedent.⁵⁸ The U.S. District Court for the Southern District of New York decided in *Ludtke v. Kuhn* that the MLB commissioner was a state actor.⁵⁹ In the case, the commissioner banned female reporters from team locker rooms, and a female reporter sued after she was prohibited from the New York Yankees locker room.⁶⁰ The court analyzed the team's entanglement with the city, focusing on the fact that New York City purchased Yankee Stadium using "its power of eminent domain upon a factual showing. . .that [the] purchase of Yankee Stadium was required for a

53. Dean, *supra* note 1, at 158.

54. *Id.* at 160.

55. *Id.* at 162.

56. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961)

57. Sean Gregory, *10 Questions for David Stern*, p. 2, TIME, Mar. 12, 2008, available at <http://www.time.com/time/arts/article/0,8599,1721861-2,00.html>.

58. Dean, *supra* note 1, at 163-165.

59. *Ludtke v. Kuhn*, 461 F. Supp. 86, 96 (S.D.N.Y. 1978).

60. *Id.* at 88.

'public use.'"⁶¹ The City then leased it to the Yankees, rather than the highest bidder, after a statutory declaration by the state legislature that the team was of "cultural, recreational and economic" importance to the city and state.⁶² These facts led to the determination that the team, and by extension the MLB commissioner, was a state actor, and therefore could not discriminate against female reporters in this manner. Similarly, in *Hertel v. City of Pontiac*, a U.S. District Court in Michigan found that the NFL's blackout rule constituted state action in regards to the Detroit Lions, who subleased the Silverdome from the City of Pontiac.⁶³ The City possessed a financial interest in the stadium, receiving revenue from concessions and parking, and retained responsibilities for "maintenance, repair, and police supervision."⁶⁴ This was sufficient for the court to find that the league's rule constituted state action. Neither of these determinations have been explicitly affirmed or rejected by any higher courts, but both remain influential in their application to the many sports teams who lease their stadiums from a state or local government.

If the NBA, or any other league, is successfully shown to be a state actor, then most speech must be protected in public forums. David Stern has punished players and coaches for making derogatory comments about religious groups and racial minorities and for making remarks critical of referees while in NBA arenas.⁶⁵ However, "NBA arenas are most accurately characterized as public forums open for communication in which valid restrictions on speech are significantly limited," and if the First Amendment applies to the NBA, then the league could no longer punish players or coaches for engaging in protected speech.⁶⁶ As long as the speech does not fall into an unprotected category, such as "fighting words, libel, advocacy that is directed to or likely to produce imminent unlawful activity, or obscenity,"⁶⁷ then coaches and players would have greater freedom to speak.

III. DAVID STERN'S COMMISSIONERSHIP

Over the past several years, David Stern has implemented numerous rules without input from the NBPA. Stern has installed many of

61. *Id.* at 92.

62. *Id.*; see also Dean, *supra* note 1, at 163.

63. *Hertel v. City of Pontiac*, 470 F. Supp. 603, 605 (E.D. Mich. 1979). The blackout rule "prohibits television broadcasts of 'home' football games in areas within 75 miles of the 'home' stadium." *Id.* at 604.

64. *Id.* at 604-605.

65. Dean, *supra* note 1, at 157.

66. *Id.* at 159.

67. *Id.* at 168.

these rules with the desire to improve the league's image. This push was spurred by perceived image problems facing the league,⁶⁸ especially since the 2004 fight between players and fans at the Palace of Auburn Hills.⁶⁹ Few dispute Stern's authority to govern what occurs on the court during NBA games, but many are concerned about what they perceive to be Stern pushing the limits of his authority over conduct occurring outside of the game.

Many of Stern's recent rule implementations have not focused on safety or the integrity of the game, but "instead, there has even been a shift from simply disciplining on-court actions to one where there is a need to control off-court behavior that might damage the public image of the league."⁷⁰ As commissioner, Stern is responsible for upholding and promoting the financial viability of the league,⁷¹ and for this reason, he "has increasingly become focused on making sure that those who play in the NBA comport to an image that is acceptable to the audience who pays to watch this form of entertainment, as well as to a group of vocal owners who view socially objectionable behavior as damaging to their financial bottom line."⁷² Stern has pursued this goal by implementing such rules as a dress code, various uniform rules, immediate technical fouls for excessive complaining, a possible ban on certain nightclubs, and stricter punishments for criticizing referees in any context.

Perhaps the most controversial of the new rules has been the dress code, implemented at the beginning of the 2005-2006 season to "soften the NBA's hip-hop image and increase the league's appeal to its fans."⁷³ The dress code requires all players to "wear Business Casual attire whenever they are engaged in team or league business," including while they are traveling to and from the respective NBA arena.⁷⁴ In addition, players attending games and sitting on the bench or in the stands when injured or otherwise unable to play must wear a

68. Rich Kurtzman, *David "Too" Stern Correctly Cracks Down on Complaining in NBA*, bleacher report, Oct. 15, 2010, available at <http://bleacherreport.com/articles/492552-david-ld-quotoordquo-stern-correctly-cracks-down-on-complaining-in-nba>.

69. See *supra*, Part II.A.2.

70. Lockwood, *supra* note 11, at 160.

71. Showalter, *supra* note 4, at 209 (pointing out Stern's role in leading the NBA to its period of greatest growth).

72. Lockwood, *supra* note 11, at 160.

73. Showalter, *supra* note 4, at 210.

74. NBA Player Dress Code, NBA.com, Jan. 20, 2006, http://www.nba.com/news/player_dress_code_051017.html. Business casual is defined as: "A long or short-sleeved dress shirt (collared or turtleneck), and/or a sweater. Dress slacks, khaki pants, or dress jeans. Appropriate shoes and socks, including dress shoes, dress boots, or other presentable shoes, but not including sneakers, sandals, flip-flops, or work boots." *Id.*

sport coat.⁷⁵ The dress code also bans certain articles of clothing, including hats, chains, and sunglasses while indoors.⁷⁶

The dress code was implemented by Stern unilaterally, using his “best interests” authority. However, as discussed in Part II of this paper, that authority is limited. A dress code affects a player’s terms and conditions of employment, meaning that any change must be bargained for in the NBA and NBPA’s CBA under the NLRA.⁷⁷ While the league discussed the dress code with the NBPA, it engaged in no formal bargaining.⁷⁸ Because the dress code was not bargained for by the league, if the NBPA were to object, there is a very strong possibility that the code would have to be modified or eliminated.⁷⁹ However, because the union has not formally objected since the dress code was implemented, that seems unlikely.

In addition to concerns over whether Stern properly bargained for a dress code, many have criticized it as overly paternalistic and “some NBA players have characterized this management-driven dress code as racist and emblematic of the commissioner’s desire to use his best interest authority to limit player autonomy.”⁸⁰ Many also oppose the dress code as unnecessary and unrelated to the job, a point emphasized by “the fact that reasonable alternatives to the NBA Dress Code exist — moderation in jewelry as opposed to its complete prohibition.”⁸¹

In a 2006 interview, Washington Wizards player Antonio Daniels made the observation that he “always thought the dress code would

75. *Id.*

76. *Id.* The full list of banned articles of clothing includes: “Sleeveless shirts, Shorts, T-shirts, jerseys, or sports apparel (unless appropriate for the event (e.g., a basketball clinic), team-identified, and approved by the team), Headgear of any kind while a player is sitting on the bench or in the stands at a game, during media interviews, or during a team or league event or appearance (unless appropriate for the event or appearance, team-identified, and approved by the team), Chains, pendants, or medallions worn over the player’s clothes, Sunglasses while indoors, Headphones (other than on the team bus or plane, or in the team locker room).” *Id.*

77. Showalter, *supra* note 4, at 221.

78. Posting of Michael McCann to Sports Law Blog, available at <http://sports-law.blogspot.com/search?q=%22nba+dress+code%22> (Oct. 25, 2005, 17:42 EST).

79. The head of the NBPA, Antonio Davis “has not consented to exactly what the NBA unilaterally implemented (because Davis said he is only “willing to go so far”). Thus, presumably the association has not entirely consented, and the association could bring an unfair labor charge against the league claiming that a dress code is a mandatory subject and, therefore, must be negotiated with the association and the league can’t unilaterally implement it. On the other hand, if the union did in fact consent to the dress code, then this dissident group of players could bring an unfair labor charge against the union claiming that the association members were denied access to information and the right to vote.” *Id.*

80. Lockwood, *supra* note 11, at 159.

81. Mark R. Bandsuch, *The NBA Dress Code and Other Fashion Faux Pas Under Title VII*, 16 VILL. SPORTS & ENT. L.J. 1, 44-45 (2009).

expand to other things and it has.”⁸² The next unilateral change implemented by the league was the introduction of a new type of basketball. The ball was universally panned, and “because neither the NBPA nor the players were consulted before introduction of the ball, the NBPA filed an unfair labor practice charge claiming that the ball adversely affected working conditions and, therefore, could not be unilaterally implemented by Stern.”⁸³ The case was ultimately rendered moot when Stern eliminated the new ball from NBA play.⁸⁴

Stern also pursued an effort to ban NBA players from certain nightclubs, requiring “its security forces to promulgate a list of nightclubs in all NBA cities that players should not visit. Once such locations are identified, ‘the league will send a directive to teams mandating that players avoid those spots or be subject to a substantial fine.’”⁸⁵ Such a ban would also be a mandatory subject for collective bargaining under the NLRA, and therefore Stern likely would not be able to withstand a challenge to it by the players’ union.⁸⁶

During his tenure, Stern has imposed numerous uniform rules, governing what the players can wear on the court. He began by restricting the length of the shorts the players can wear. As of the 2006-2007 season, NBA players “can wear one 4-inch wristband on each wrist[, which] cannot be worn on the bicep. . . headbands can be no wider than 2 inches, [and players] can no longer [wear] tights or long compression socks.”⁸⁷ The ban on wearing tights was implemented in response to some players who were wearing them for the look, and the reasoning behind the ban was that “the league simply does not like the look of players wearing visible hose.”⁸⁸ Players are now required to send the league a doctor’s note testifying to a medical need for the tights in order to wear them.⁸⁹ “Other uniform rules that are more strictly enforced and subject players to discipline for the season are

82. Michael Wilbon, *NBA Players Need to Play by the Rule*, WASHINGTON POST E01, Nov. 11, 2006, available at http://www.washingtonpost.com/wp-dyn/content/article/2006/11/10/AR2006111001938_pf.html. “Daniels is 31 years old and a player who never needed a dress code because he comes well dressed to every single game, period. He does not need a behavior code because he’s never flailing and gesticulating. Yet he said before last night’s game: ‘I hate the crackdown. Hate it.’” *Id.*

83. Showalter, *supra* note 4, at 211.

84. *Id.*

85. *Id.* As the nightclub ban was only promulgated via internal directive, it is unclear as to whether it ever went into effect. There are no available stories featuring player complaints about the ban going into effect.

86. *Id.*

87. *Id.*

88. Darren Rovell and Marc Stein, *League would amend uniform code to ban tights*, ESPN.com, Mar. 31, 2006, available at <http://sports.espn.go.com/nba/news/story?id=2390599>.

89. *Id.*

that ‘players must keep their uniform shirts tucked into their pants’ while they are on the court and are prohibited from wearing rubber bands.”⁹⁰ Antonio Daniels lamented the wristband restriction, stating, “I liked wearing a wristband with my daughter’s name on it. But the rule says that now I cannot do that. I can only wear a wristband with my name or number.”⁹¹

In early 2009, the NBA officially outlawed the “Wade Aid,” a band-aid worn by Miami Heat player Dwyane Wade beneath his left eye first to cover a cut but later solely for the style.⁹² The “Wade Aids” included “his name, nickname ‘Flash’ and even the American flag on the Band-Aid.”⁹³ The NBA explained the ban as a desire to halt the self-promotion, limiting band-aids to “healthcare purposes, but it shouldn’t have any name or identifications on it.”⁹⁴ In October 2010, the NBA issued another uniform rule, micromanaging player attire even further. The NBA barred players from wearing headbands upside-down, even though it is unlikely that many viewers of NBA games ever noticed that any player was wearing his headband upside-down.⁹⁵

The 2006-2007 season also saw renewed emphasis on conduct during the National Anthem, requiring “players, coaches and trainers. . .to stand and line up in a dignified posture along the sidelines or on the foul line.”⁹⁶ Players were also no longer allowed to chew gum or shift as they stood in line during the National Anthem.⁹⁷

Stern also sought to improve the image of the league by reducing tolerance for complaining about a referee’s call, authoring officials “to call a technical foul for behavior that reflected poorly on the overall league image.”⁹⁸ Supporters of the rule justify it by arguing that excessive complaining disrupts the game, opens referees to direct abuse, and creates the potential for violent conduct.⁹⁹ However, Stern’s most recent declarations have targeted not just excessive complaining but

90. Showalter, *supra* note 4, at 211.

91. Wilbon, *supra* note 82.

92. *NBA Bans Wade’s Band-Aid*, Yahoo! Sports, Feb. 28, 2009, available at <http://sports.yahoo.com/nba/news?slug=txheatwadebandaid&prov=st&type=lgns>.

93. *Id.*

94. *Id.*

95. Kelly Dwyer, *The NBA has banned upside-down headbands*, Yahoo! Sports, Oct. 27, 2010, http://sports.yahoo.com/nba/blog/ball_dont_lie/post/The-NBA-has-banned-upside-down-headbands;_ylt=AvB4rQE_IiP2y6RPKaQPQJk5nYcB?urn=¶nba-280453.

96. Showalter, *supra* note 4, at 211.

97. *Id.*

98. Bandsuch, *supra* note 81, at 44.

99. Kurtzman, *supra* note 68, available at <http://bleacherreport.com/articles/492552-david-ld-quotoordquo-sterne-correctly-cracks-down-on-complaining-in-nba>.

any responses to the NBA's referees at all. Guidelines issued by Stern and the NBA for the 2010-11 season now require referees to call technical fouls on players for any "body language to question or demonstrate displeasure."¹⁰⁰ The guidelines specifically require technical foul calls for aggressive gestures, running up to a referee to complain, and "excessive inquiries about a call, even in a civilized tone."¹⁰¹ The new guidelines threaten to drive emotions out of the game of basketball, even those emotions generally seen as positive such as camaraderie, as Grant Hill, widely seen as one of the nicest players in the league, was ejected in a pre-season game for "exchanging butt pats with Reggie Evans after Hill tripped in the game."¹⁰² While the arguments are favor of reducing complaining are credible, logical, and justifiable, Stern's new rules appear to overreach, barring natural reactions that occur in the heat of the contest.

Alterations to the uniform rules and the technical foul policy are much more likely to fall under the scope of Stern's authority. In addition, the uniform rules likely do not affect the conditions of a player's employment, and therefore would not receive the same scrutiny under the NLRA.¹⁰³ However, that does not necessarily make his decisions appropriate, and if players are legitimately concerned about Stern's use of power, then the NBPA should engage in negotiations to limit this kind of unilateral rule-making.

Comments about referee performance made outside of the game do not carry the same concerns as berating officials during the game, and yet, the league regularly fines players, coaches, and team officials for criticizing officials after games. While Stern's expansive powers allow him to discipline individuals for conduct that occurs within the NBA arena, thereby covering comments made during post-game press conferences, he has not limited his discipline to speech in NBA arenas. He has fined players, coaches, and team officials for any speech, including criticism that appears on blogs.¹⁰⁴ The criticism can be implicit or constructive,¹⁰⁵ and the league will still fine individuals. In fact, in March 2009, the NBA took the unprecedented step of fining

100. Henry Abbott, *NBA expands rules on technicals*, ESPN.com, Sept. 24, 2010, available at <http://sports.espn.go.com/nba/news/story?id=5609817>.

101. *Id.*

102. Kurtzman, *supra* note 98.

103. Showalter, *supra* note 4, at 221.

104. David DuPree, *NBA Fines Cuban \$250,000 for Behavior after Game 5*, USA TODAY, Jun. 21, 2006, available at http://www.usatoday.com/sports/basketball/playoffs/2006-06-20-cuban-fine_x.htm. Mark Cuban has been fined over \$1.5 million by the NBA for criticism of referees over the years. *Id.*

105. *Id.* (citing Cuban's blog about how to improve officiating).

Dallas Mavericks owner Mark Cuban \$25,000 for a single comment he posted on his Twitter page, reading “how do they not call a tech on JR Smith for coming off the bench to taunt our player on the ground?”¹⁰⁶ Fining someone for a single line on a social networking site is well beyond the scope of the NBA commissioner’s enumerated authority.

Moreover, in implementing such rules, Stern has displayed an increasingly authoritarian tone. During the 2010 NBA Playoffs, Stern made public statements demanding that coaches and players halt any criticism, overt or subtle, of NBA referees, declaring that “if someone wants to try me in the rest of this playoffs, you know, make my day.”¹⁰⁷ He accompanied this threat by claiming that fines of \$35,000 were modest and that he planned to drastically increase fines for criticizing referees in the future.¹⁰⁸ Stern’s conduct begs the question: how far is too far?

IV. CONCLUSION

While David Stern, as NBA commissioner, has expansive authority to discipline the conduct of players, coaches, and team officials, he has pushed the limits of this authority by implementing rules unilaterally, without input from the players’ union. In addition, he has imposed several rules with little basis behind them, citing only a personal dislike for the aesthetics of the banned items. These are troubling signs of Stern’s willingness to govern at his whim as opposed to acting solely in the best interests of the league and of a larger trend toward the league minimizing the opinion of the players.

Some of the rules Stern has imposed clearly fall within the powers of the NBA commissioner, while others arguably should have been bargained for with the union prior to implementation. Despite the opposition to some of these rules by many NBA players, the NBPA has not formally opposed any of the changes, except for the change to a new type of basketball. In that instance, once the NBPA publicly opposed the change, the NBA quickly eliminated the ball, showing that the NBPA is able to stand up to the league on behalf of the players and effectuate meaningful change.

106. *NBA Fines Mark Cuban \$25,000 for Twitter Comment*, THE EXAMINER, Mar. 30, 2009, available at <http://www.examiner.com/x-1192-NBA-Examiner~y2009m3d30-NBA-fines-Mark-Cuban-25000-for-Twitter-comment>.

107. Trey Kirby, *David Stern has had enough of your whining, NBA coaches*, Yahoo! Sports, Apr. 23, 2010, available at http://sports.yahoo.com/nba/blog/ball_dont_lie/post/David-Stern-has-had-enough-of-your-whining-NBA-?urn=nba-236283.

108. *Id.*

The current CBA between the NBA and NBPA expires in 2011, with an option for the league to extend the agreement by one year.¹⁰⁹ At that time, the NBPA will have the opportunity to halt the trend of unilateral implementation of rules by the commissioner. While the union will be unlikely to challenge any of the recently implemented image rules, it should act to protect itself in the future. Specifically, the NBPA should follow the MLBPA and NHLPA's lead by negotiating with the league to require that the commissioner give notice to the player's association prior to the implementation of new rules. The NBPA should also argue for a process similar to the MLB, which requires a negotiation period in which the NBPA can have input on new rules before the commissioner imposes them. Including a notice and negotiation requirement in the CBA between the NBA and NBPA will improve the public perception of the rules, because the players, through their union representatives, will have approved of those rules in advance.

Protection of players' First Amendment rights is another point that the NBPA could negotiate into the CBA. In response to the league's frequent restrictions on speech, "it would seem perfectly reasonable to amend league constitutions and CBAs to contain 'First Amendment-like' rights. For example, league constitutions could contain provisions requiring commissioners to consider First Amendment jurisprudence when dealing with free speech and religious expression-related issues."¹¹⁰ In addition, the union could negotiate to limit the NBA's reach into players' lives by exempting speech in certain locations, such as on social networking websites or in personal blogs. Such a clause could be constructive for both sides. As noted earlier, the NBA may constitute a state actor and therefore be required to offer full First Amendment protection to players. By contracting with the union, the league could escape potential liability for restricting speech and could preserve some limits on speech. On the other side, with such a provision, players would receive at least some speech protection as opposed to receiving the significant fines that are currently imposed for speaking about a variety of subjects.

If the NBPA hopes to impose any limits on commissioner authority, it must take a harder stance than it has in recent years, when it has offered little opposition to the league's new rules. What the union is able to get in the next CBA negotiations depends in part on the NBA's agenda. David Stern has already been public about his inten-

109. NBA CBA, *supra* note 26, at art. XXXIX, §§ 1-2.

110. McKinny, *supra* note 7, at 254.

tion to raise the NBA's age limit to twenty, as well as altering various components of the salary cap.¹¹¹ The NBPA must assure that it gains as much as it concedes. The difficult economic situations facing the league and teams are going to prohibit the players from getting a significantly larger portion of the league's profits.¹¹² Instead of focusing the negotiations solely on increasing the amount of money the players get, the NBPA should instead push for greater limitations on the commissioner's right to impose rules and levy fines against players.

Each new rule that the NBA imposes without engaging in formal bargaining with the players' union is accompanied by vocal opposition from individual players. The NBA and the NBPA can avoid these complaints by incorporating notice and negotiation requirements on rule changes and speech protections into the CBA. These changes can halt the troubling trend toward David Stern acquiring unlimited, unrestrained authority.

111. Sean Gregory, *10 Questions for David Stern*, p. 1, *TIME*, Mar. 12, 2008, available at <http://www.time.com/time/arts/article/0,8599,1721861,00.html>; Posting of Oly Sandor to Hoopsvibe.com, available at <http://www.hoopsvibe.com/nba-blog/cba-drama-5-reasons-for-nba-work-stoppage-in-2011-ar50296.html> (Mar. 21, 2009).

112. See Bill Simmons, *Welcome to the No Benjamins Association*, *ESPN*, available at <http://sports.espn.go.com/espn/page2/story?page=simmons/090227> (last visited Oct. 20, 2010).