

FREEDOM OF SPEECH

By Ethan Yale Bordman

AND EXPRESSION IN SPORTS

The balance between the rights of the individual
and the best interests of sport

FAST FACTS:

Free speech and expression in sports have gone hand in hand since the inception of sports itself.

Impositions on athletes' speech affect performance both on and off the field.

People involved in all levels of sport must be treated equally. If one segment is muzzled inappropriately, others ultimately will suffer.

HE DOESN'T DISCRIMINATE— HE HATES EVERYONE EQUALLY

Baseball player John Rocker doesn't discriminate—he hates everyone equally. In a 1999 interview with *Sports Illustrated* magazine, Mr. Rocker stated that he hated homosexuals, mothers on welfare, and people from other countries.¹ As a result of this incident, Major League Baseball Commissioner Alan Selig took action, stating that sports takes seriously its role in America and the social responsibility that it entails.² Rocker was subsequently suspended and ordered to pay fines and to enroll in a diversity-training course. But what about Mr. Rocker's freedom of speech? Moreover, his statements had nothing to do with sports and occurred in an off-the-field interview. Details are discussed later in this article.

Free speech and expression in sports have gone hand in hand since the inception of sports itself. Rooting for a team and its players as well as showing a fan's disdain for the opposing side are elements of competition that make a sporting event more enjoyable than staying at home. Unfortunately, this freedom is frequently taken to levels that go beyond what fans, coaches, the sports media, athletes, and, in particular, courts and sports-governing bodies feel are appropriate. The question remains, however, who will decide when, if ever, the lines of free speech and appropriate behavior have been crossed?

THE ATHLETE'S FREEDOM OF SPEECH AND EXPRESSION

Free speech in sports begins at the heart of the game and its core participant: the athlete. Impositions on athletes' speech affect performance both on and off the field. In an effort to curb players' comments about the game several years ago, the Cincinnati Bengals added an addendum to all contracts, allowing the team to terminate performance bonuses for players who criticized teammates, team management, or game officials.³ The players responded that this restriction would interfere with their ability to perform on the field because it would prohibit them from challenging referees' unsubstantiated calls and opposing teammates' unsportsmanlike conduct.

Free speech in sports has also helped create new legal concepts. Basketball player Oscar Robertson knows how free speech infringement can affect his performance on the field. In 1975, Robertson sued the National Basketball Association,⁴ challenging the legality of the "option" in contracts, alleging that it represented a restraint competition for labor. This "option" or "reserve" clause allowed teams to keep players on after their contracts had expired unless the teams chose to "release" them. Judicial elimination of this option clause created "free agency," allowing players to shop themselves around after their contracts had expired. "[P]layers went from being petrified of speaking their mind"⁵ to having the freedom to speak without the fear of repercussions, said Robertson. Moreover, he stated that, before free agency, if he had made statements that offended the team, his career would have been over. "Free agency" gave way to

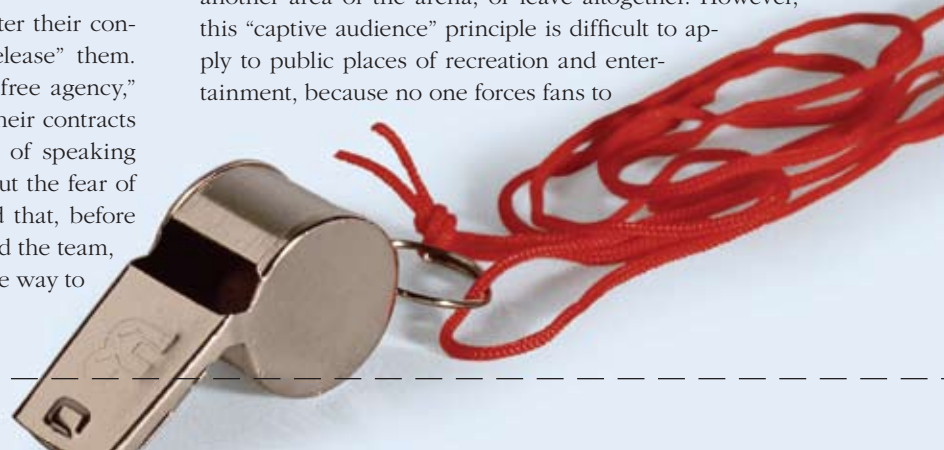
free speech as "no comments were replaced by athletes who looked, played and spoke however they damn well pleased, injecting creativity and innovation on the field...."⁶

FANS SPEAK OUT

Though schools have taken action against fans for spectator drunkenness and for throwing objects, fans are rarely expelled from games for language. In response to fans' unsportsmanlike language, universities have taken steps such as placing signs at stadium entrances, requesting that fans refrain from "foul" language. In 2004, Maryland State University spent over \$30,000 on a campus-wide "sportsmanship" campaign.⁷ Unsportsmanlike speech at games has gotten so out of hand that many schools will not permit their teams to compete at certain university venues because of past fan profanity. In response, the Big Ten, the 10 largest universities in the U.S., adopted a rule banning students from using profane language that singles out an individual player. It seems the athletic association considers it more important to prevent hurting the feelings of one player than those of an entire team.

"Cheering speech" occurs in a variety of ways. It can be directed at players, coaches, officials, or other fans, and can support or criticize the home or opposing team. Kermit Hall, president of Utah State University, stated that free speech at universities is "at once the most obvious and the most paradoxical of constitutional principles."⁸ Open expression is essential to academic freedom, yet paradoxical, because it must be balanced against imperatives for civility and respect. Hall states that two controlling factors are at work at any athletic event. First, admission to an event is a license that is freely revocable; a fan may be asked to leave a game for any reason. Second, an exemption exists to the principle of free speech for "fighting words," i.e., words used to incite or intimidate, as established in *Brandenburg v Ohio*.⁹

In the area of free speech at a game, the biggest concern is that a fan is a captive when surrounded by vocal fans, because it is difficult, though possible, to leave the event *immediately*. Traditionally, courts have held that four places are considered "captive" areas: a person's own home, a person's workplace, public schools, and inside and around reproductive health facilities.¹⁰ All are areas in which a person is thought to be "forced" to be, though a reasonable level of choice is involved. Similarly, the notion of a captive audience can pose a problem in the sporting realm: fans who are upset by words "touting" or castigating a team or player have three choices—stay in their seats, move to another area of the arena, or leave altogether. However, this "captive audience" principle is difficult to apply to public places of recreation and entertainment, because no one forces fans to





attend games. People who choose to attend an event may need to understand that if they attend, they consent impliedly to subject themselves to the activities of those around them, or they may choose to stay home and watch the event on television.

Though most speech heard at a game includes words or phrases that are considered derogatory, the opposite occurs just as often. The case of *Aubrey v City of Cincinnati*¹¹ addressed the issue of fans supporting their team by bringing banners that use non-profane language. During the 1990 World Series, the host city, Cincinnati, sought to enforce the banner policy it had at the stadium during the normal sports season: “Patrons are permitted to bring signs and banners to the Stadium. They must be in good taste or the banner will be removed.”¹² The only restriction was the signs must not interfere with the players’, officials’, or fans’ line of sight to play or enjoy the game. Reverend Guy Aubrey brought a sign to the first game of the World Series that stated, “Go Reds, John 3:16.” Stadium security informed Reverend Aubrey of the policy and confiscated the banner. Reverend Aubrey filed suit. During the trial, the stadium’s policy was challenged as so vague that fans would not know which phrases were acceptable and which were not. Moreover, the regulation was challenged as overbroad, as it gave exclusive discretion to Cincinnati officials to determine what constitutes permissible speech. It was demonstrated that in games past, “God Loves The Cincinnati Reds” was found to be acceptable, as well as signs favoring the wars overseas, which had nothing to do with baseball or sports. The court stated that the case would result in a draw, as both sides had made valid arguments.

REFEREES FEAR THEIR CALLS

The U.S. National Society of Sports Officials takes a proactive approach to free speech, in particular to the rising number of lawsuits arising from player and fan reaction to plays called during an event.¹³ Over the years, officials have had food thrown at them and been spit on, battered, and even shot because people were upset with the officials’ calls during play of the game.¹⁴ Because of this, many states have enacted laws specifically addressing sports-related assaults. Florida’s “Sports Official” bill states that anyone who threatens to assault or assaults a referee, umpire, or linesman during a school athletic game is subject to criminal charges of up to three years in jail.¹⁵ The State of New Jersey places assaults against sports officials in the same category as that of assaulting a police officer.¹⁶ These are only a few of the actions taken by the government to protect sports officials and to emphasize to the public the importance of maintaining an impartial, unthreatening environment in sports.

DEFAMATION AGAINST THE REFEREE

During the 1998 National Football League (NFL) game between the Detroit Lions and the Pittsburgh Steelers, Phil Luckett, the game’s head referee, was at the center of attention from the start of the game.¹⁷ Under NFL rules, the initial choice during the coin toss is irrevocable. The Pittsburgh captain stated, “heh-uh-

TAILS” and, as a result, it was decided that “heads” would prevail as the choice. After Pittsburgh lost the game, it seemed everyone shifted the blame of the loss to the referee’s coin toss call. One reporter stated that, by not honoring tails, the referee was calling the team’s captain a liar. The issue at hand was, can a referee sue for defamation or is speech toward a referee simply part of the comment on events that occur during a game?

To answer the question of defamation of a sports official, the core issue to be decided is whether a sports official is a “public figure” or a “private individual.” If the individual is a “public figure,” then the *New York Times* test is used to determine if the statements were of a malicious nature, that is, made “with knowledge that it was false or with reckless disregard of whether it was false or not.”¹⁸ Subsequent cases have demonstrated that a sports official is both a “public figure” and a “private individual.” Though they have not achieved “pervasive fame or notoriety” and usually are not recognized on the street, sports officials become “public figures” by being at the center of a public controversy or event.¹⁹ In *Chuy v Philadelphia Eagles Football Club*,²⁰ the court stated that a referee is “considered a public figure among sports fans,” having “chose(n) to engage in a profession which draws him regularly into regional and national view.” The appeals court confirmed this finding, stating that, as shown by “Nielson (broadcast) ratings, the American public is fascinated by professional sports”²¹ and individuals involved in those events.

SPORTING ORGANIZATIONS HAVE CONCERNS

The commissioner of each professional sports league has the inherent authority to act in the “best interest” of the sport. The problem with this power is that it is so clearly discretionary that the courts will *not* intervene to determine whether the actions of the league or commissioner were appropriate or if “best interests” applied under the circumstances. Courts have traditionally found that internal association processes were subject to judicial intervention and reversal *only if* (1) the association’s action adversely affects “substantial property, contract or other economic rights” and the association’s own internal procedures were inadequate or unfair; or (2) the association acted maliciously or in bad faith.²² The reasoning behind these rigid limitations is that a sports organization knows more about itself and its best interests than the courts do.

The leading case in which the courts intervened to review sanctions imposed by a sporting organization was that of boxer

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Muhammad Ali. The issue arose when Ali stated that his Muslim religious beliefs prohibited him from serving in the Vietnam War. After he was drafted and refused four times to report for the draft, the World Boxing Association suspended him and revoked his world championship title, stating that Ali's refusal to serve was detrimental to the best interests of boxing. Shortly thereafter, the New York State Athletic Commission revoked Ali's boxing license, and he filed suit²³ in federal court. Ali claimed that the Commission acted capriciously in revoking his license, pointing out that other boxers had committed more heinous crimes, yet were allowed to continue to compete. The U.S. District Court of New York determined that, though none of Ali's constitutional rights were violated, he had a case under private association law, as the New York State Athletic Commission was a private organization. His license to compete was accordingly reinstated, returning Ali to his previous boxing status. Though the case primarily addressed the freedom of religion, it also dealt directly with Ali's right to vocally oppose the war—a world event that had nothing to do with boxing.

THE COLLECTIVE BARGAINING AGREEMENT

Returning to the opening example, in response to baseball player John Rucker's hate speech, the Major League Baseball Players Association, the union that represents athletes' interests, took action, stating that the commissioner's punishment was without cause. Per the collective bargaining agreement, created by representatives from the Players Association and representatives from team owners, matters involving the league are subject to arbitration. The players' union argued to the arbitrator that "maintain(ing) that speech—even if offensive—should not be grounds for punishment."²⁴ Though the arbitrator agreed that the commissioner had the authority to discipline the off-season, off-the-field, speech-related conduct, he found that the punishment imposed was unduly severe and significantly reduced it.

Free speech concerns are not restricted to the players. In 1993, Marge Schott, the former owner of the Cincinnati Reds baseball team, was suspended by the league for racist and anti-Jewish remarks.²⁵ Schott referred to African-American players as "million dollar [N-words]," and openly declared that Adolph Hitler was a good person. The American Civil Liberties Union defended Schott, arguing that, though the league had the right to punish her with a fine, taking away her right to manage her team—in effect, denying her control of her own business—overstepped her free speech

rights. In response, the league stated that the reason for severe punishment was that, in contrast to an individual player's expression of similar opinions, racist remarks by an owner impacted other team-related areas, such as hiring practices.²⁶

CONCLUSION

Free speech has helped sports by creating new concepts, such as free agency. However, no matter the content of the speech, or the circumstances, people in all levels of sport must be treated equally, for all are dependent on each other. The organization needs teams, teams need coaches, coaches need players, and players need fans. If one segment is muzzled inappropriately, others ultimately will suffer. A balance must be achieved. Sportsmen should not have to "check their rights" at the door like a suitcase, simply because they are in the public eye. ■

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FOOTNOTES

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20. *Chuy v Philadelphia Eagles Football Club*, 431 F Supp 254, 267 (ED Pa, 1977).
21. 595 F2d 1265, 1280 (CA 3, 1979).
22. This was established in *Rewolinski v Fisher*, 440 So2d 54, 58 (Fla Dist Ct App, 1984).
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