

Entertainment, Arts and Sports Law Journal



A publication of the Entertainment, Arts and Sports Law Section
of the New York State Bar Association



Inside

- Holocaust-Era Art Repatriation Claims
- The Performance Rights Act
- New York Museum Deaccessioning
- EASL Annual Meeting
- License v. Sale
- Team Players and Individual Free-Speech Rights
- Copyright and Modern Art
- Florida Statute § 760.08
- Time for a Change in Athletes' Morals Clauses
- Fair Market Value and Buyer's Premium for Estate Tax Purposes
- *Lenz v. Universal Music Corporation*
- Model Rules of Professional Conduct and Ethical Problems for Attorney-Agents Representing Professional Athletes
- Copyright Law for Dance Choreography
- Glory, Heartbreak, and Nostalgia of the Brooklyn Dodgers

There's No "I" in Team Sports

Does being a team player compromise individual free-speech rights?

By Ethan Bordman

"Can't you use a lewd term in America if you want?"¹

John Rocker, the famously outspoken former Major League Baseball (MLB) pitcher, has become a central figure in an ongoing debate about freedom of speech and expression in sports. He asked this question as a challenge to a disciplinary action taken against Chicago White Sox manager Ozzie Guillen by baseball commissioner Bud Selig. In June 2006, during a pre-game interview, Guillen used a derogatory homosexual remark to describe *Chicago Sun-Times* columnist Jay Mariotti. Selig ordered Guillen to attend sensitivity training and pay a fine of an undisclosed amount. Several years earlier, Rocker was similarly fined following comments he made during a 1999 interview with *Sports Illustrated*, in which he was asked how he would feel about playing for a baseball team in New York. His response is infamous:

I would retire first. It's the most hectic, nerve-racking city. Imagine having to take the [Number] 7 train to the ballpark, looking like you're [riding through] Beirut next to some kid with purple hair next to some queer with AIDS right next to some dude who just got out of jail for the fourth time right next to some 20-year-old mom with four kids. It's depressing.²

Rocker also offered his thoughts about New York City in general:

The biggest thing I don't like about New York are the foreigners. I'm not a very big fan of foreigners. You can walk an entire block in Times Square and not hear anybody speaking English. Asians and Koreans and Vietnamese and Indians and Russians and Spanish people and everything up there. How the hell did they get in this country?³

Upon learning of Rocker's remarks, Selig took action, emphasizing in his response that sports occupies a serious role in American society and is therefore accompanied by significant social responsibility.⁴ Rocker was subsequently suspended for 73 days, ordered to pay \$20,000 to a minority-interest organization, and told to enroll in a diversity-training course to be completed during his suspension. Yet what about John Rocker's freedom of speech? Does not an individual have the right to speak his mind and express his feelings?

Freedom of speech and expression in sports have gone hand in hand throughout the history of organized sporting events. Rooting for a team and its players—or showing disdain for the opposing side—is an element of live competition that makes the sporting event more enjoyable, and certainly more exciting than watching at home. In some instances however, this freedom is taken to levels beyond what fans, coaches, athletes, and—in particular—courts and governing bodies that regulate sports believe are appropriate. The question remains: When—if at all—has the line of free speech and inappropriate behavior been crossed?

With the laws of free speech, governing bodies must consider a balance in their decisions. They must take into account not only the words used by the person(s) involved in the controversy, but how future speakers and other individuals will be affected. For a hypothetical example, consider the way an athlete might address a referee during a game regarding a penalty call the athlete believes is unjustified. This interaction affects the athletes of both the home and visiting teams, the coaches, each team's management, and the fans observing it. All of these individuals may be hesitant to speak about their thoughts on the matter, for fear of being punished. The courts and governing bodies must make their decisions clear so that individuals involved in sport understand the limitations of their speech and the reasons why such limitations exist. Doing so makes clear the balance between the rights of the individual and the best interests of sport. Most importantly, the deciding bodies must ensure that their application of these rules, once established, is consistent.

Freedom of Speech and Expression: The Law Limitations on Free Speech

Before looking to the laws that give citizens the "freedom" relating to freedom of speech and expression, it must be noted this "freedom" is not absolute. It is generally known that one cannot yell "FIRE!" in a crowded theater. Shouting the word itself is not illegal, nor is saying the word in a movie or stage theater. The issue is concern for the safety of the crowd—preventing the inevitable stampede as people rush to escape a situation they perceive to be dangerous. This idea is based on the principle that speech may only be restricted if it causes direct and imminent harm to an important societal interest.⁵ The emphasis here is on the word "imminent." If a reaction to the situation does not take place NOW, or is not likely to take place NOW, then speech is most likely protected. As an

example of this concept, if a sports fan shouted, “Kill the coach!” during a sporting event—resulting in the *immediate* killing of the coach—only then would the fan be held responsible for his or her speech.

The case that established this precedent is *Brandenburg v. Ohio*.⁶ In this 1969 case, the United States Supreme Court established limitations on the freedom of speech and expression. Clarence Brandenburg, a leader of a Ku Klux Klan (KKK) group, was convicted under an Ohio statute after organizing a rally held at a farm in Hamilton County, Ohio. The leader was charged with “advocat[ing]...the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform” and for “assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.”⁷ The prosecution presented film, taped by a news reporter and cameraman, which had been broadcast on a national network. The film showed KKK members, wearing hoods and carrying firearms, gathered around a burning wooden cross while one member made a speech.

In reaching its decision, the Court looked to several cases, including *Dennis v. United States*,⁸ in which leaders of the Communist party in the U.S. were indicted under section 3 of the Smith Act for organizing and teaching the overthrow of the government of the United States by force and violence. There, the Court stated convictions based upon speech “as evidence of violation may be sustained only when the speech or publication created a ‘clear and present’ danger of attempting or accomplishing the prohibited crime.”⁹

From this the *Brandenburg* Court stated the principle that:

the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.¹⁰

The Athlete’s Freedom of Speech and Expression Eligibility to Compete

Eligibility for an athlete to compete is paramount; if the athlete cannot play, his or her speech is of no concern in the sports realm. In 1979 in *Kriss v. Brown*,¹¹ Richard Kriss was in his third year of eligibility to play for the North Judson high school varsity basketball team. After finishing the school year, he moved from his mother’s home, within the school district, to the home of Mr. and Mrs. Adrian Richie in the neighboring town of Anderson, hoping to play varsity basketball for Anderson Highland

High School. The Indiana High School Athletic Association charged that Kriss was not eligible to play for Anderson Highland as he had violated rules of recruitment. The Association’s position was that Kriss had moved for the sole purpose of playing for Anderson’s team—not to further his education. In response, Kriss filed suit against Ward E. Brown, the Commissioner of the athletic association, for numerous violations including hindering his freedom of speech. He stated that this freedom was violated per Rule 20 of the organization’s regulations, which stated in part “[t]he use of undue influence by any person or persons to secure or to retain a student...as residents, may cause the student to be ineligible for high school athletics....” Kriss also sued the Anderson Highland School District itself for free speech violations, asserting that the district did not support his eligibility after it had spent time recruiting him. The court stated that the association’s rule only precluded Kriss’ right of free speech regarding unethical recruitment tactics, emphasizing:

[i]f Rule 20 proscribed all communication between student and coach or prohibited a coach from ever providing a student transportation, Kriss might have reason to be concerned about his constitutional rights. Instead, the rule forbids only such actions when they serve as inducements to retain or change residence for athletic reasons.¹²

Kriss further asserted that the association hindered his free speech by not allowing him to appear at the athletic association hearing to explain his actions. The Court responded that per association rules, allowing his legal representation to attend—to make objections during the proceeding to preserve the legal record—was sufficient to protect the player’s due process rights.

The Internet: An Influential Recruiting Tool

The National Collegiate Athletic Association (NCAA) has also taken action against individuals for recruiting violations, especially in the information age. In April 2009, Taylor Moseley, a North Carolina State freshman, received a cease and desist letter from the school’s compliance director, Michelle Lee. The letter referred to a Facebook group Moseley created named “John Wall PLEASE Come to NC State!!!!”¹³ The group, which had more than 700 members, was designed to encourage John Wall, the nation’s number one basketball recruit, to play at the school in the fall.

According to an NCAA rule, websites like this one—aimed at recruiting athletes—violate recruiting rules.¹⁴ The rule states that “[a]ll electronically transmitted correspondence including, but not limited to, text messaging, Instant Messenger, chat rooms or message boards... within a social networking Web site or through other services or applications remain impermissible.”¹⁵ Lee

warned Moseley of “further action” if he failed to comply with the letter. In response, Adam Kissell, director of the Individual Rights Defense Program at the Foundation for Individual Rights in Education, explained that the NCAA can impose rules on member colleges; however, enforcement depends on whether the institution is private or public.¹⁶ Public universities, like North Carolina State, are unable to enforce the rules if it means punishing a student for expressing an opinion, and therefore violating the student’s right to free speech.

After the warning, Moseley renamed the group “Bring a national title back to NC State!” The page featured a picture of Wall. NCAA spokesman Erik Christianson said that the concern regards “intrusions into a high school student’s life when they’re trying to decide where to go to college.”¹⁷ Regarding this matter, Aden Fine of the American Civil Liberties Union (ACLU) clarified that the NCAA—a private entity—could pursue actions against a student, such as denying access to NCAA-run events. However, the ACLU’s concern was that the letter and threatened sanction came from the university, not the NCAA. “The school is potentially finding themselves in a tricky situation, because of the NCAA rules, but that doesn’t mean public universities can censor lawful speech.”¹⁸

Soon after the Moseley incident, Jimmy Mueller, a sophomore at the University of Akron—and a diehard Duke University Blue Devil fan—received a message on his “John Wall, come to DUKE!!” Facebook page, which had about 100 members.¹⁹ The message was from Todd Meisbov, Duke’s Assistant Athletic Director/Director of Athletic Compliance, in which he requested that Mueller “cease and desist all efforts to recruit John Wall or any other prospective student-athlete to Duke” and to “update or take down the Facebook page so as to ensure compliance with NCAA regulations.”²⁰ Mueller modified the player’s name to read “Wohn Jall, come to school in Durham.” He updated the group’s description and used the intentional misspelling of John Wall’s name to protect Duke from trouble with the NCAA. Mueller then apologized and said he did not want to hurt the Duke University sports program about which he cared so much. The NCAA broadly defines “representative of the institution’s athletic interests” to include fans and supporters who make pitches to recruits.²¹ If he had been uncooperative, Mueller could have been denied access to events at Duke or even “disassociated” from the school, though the latter measure would have had little effect since he was not a student there. According to the Duke Athletics Compliance Office, 10,000 pamphlets are distributed annually to educate boosters and fans about allowable versus violative athlete-recruitment activities.

Sometimes speech related to recruiting can be used to discourage a player from attending the school. In May 2009, Vander Blue, a high school junior who had a

non-binding oral commitment to play basketball for the University of Wisconsin, changed his mind after negative comments were posted about him on a Wisconsin fan message board.²² Blue’s concerns arose when a story was released about his alleged academic problems. People posted comments questioning his attitude, character, and intelligence. Statements such as, “Let’s make him feel like the worst person in Madison right now”²³ upset the 16-year-old. Blue chose to withdraw his commitment, though he did not eliminate the school from his list of potential colleges; he stated he felt like “1,000 people [are] throwing you under the bus.”²⁴

When Athletes Speak Publicly, Loyalty Matters

In an effort to discourage players from publicly criticizing teammates, the Cincinnati Bengals football team added a “loyalty clause” to its contracts beginning in 2000.²⁵ Under this clause, players agree to pay back part of their signing bonuses if they publicly criticize teammates, team management, or coaching staff. The rule was instituted by the team as a result of an incident during the previous season, when wide receiver Carl Pickens publicly criticized coach Bruce Coslet. The comments pertained to Pickens’ amazement that the team would bring Coslet back for another season based on his coaching performance. Bengals owner and president Mike Brown relayed the remarks to the corporate world, stating “we didn’t feel like what (Pickens) did was something that any company would have accepted.”²⁶ He went on to assert that the club did not want any more incidents like this and would expect loyalty from players, since they are employees of the club. Brown emphasized that players “are free to talk internally, and they know that... [a]nd I would tell you that we aren’t looking to restrict players’ conversations unreasonably.”²⁷ There was a concern about interaction with the media, since players might be hesitant to answer reporters’ questions for fear of losing some of their signing bonus. Agents for players chosen in the draft were upset with the clause, which was not part of the contracts they signed when they were chosen. The NFL Players Collective Bargaining Agreement (CBA) section concerning Club Discipline²⁸ states that the club may fine a player a maximum of one week’s salary and/or suspend a player without pay for a period not to exceed four weeks following conduct considered detrimental to the club.

In response, the players’ union counsel Richard Berthelsen said the Bengals’ loyalty clause was an attempt to impose greater discipline than was allowed by the NFL’s CBA.²⁹ Berthelsen stated that the CBA superseded anything a team could do, because it was the “master agreement” in the sport.³⁰ The NFL, in response, stated that it believed the loyalty clause did not contradict the CBA. Bengals’ president Mike Brown asserted that comments like those made by Pickens “undermine the team’s ability to win games.”³¹ The NFL CBA section on Public Statements states:

The NFLPA and the Management Council agree that each will use its best efforts to curtail public comments by Club personnel or players which express criticism of any club, its coach, or its operation and policy, or which tend to cast discredit upon a Club, a player, or any other person involved in the operation of a Club, the NFL, the Management Council, or the NFLPA.³²

An interesting twist to the Bengals' rule is that the clause can actually work against the team and for the benefit of the player. If, after signing a contract, a player wants to be released, he could undertake a campaign to publicly attack the team and coaching staff.³³ This conduct would be considered a clear breach of the loyalty clause and the club could choose to let the player go. By doing so, the team is penalized. Under the NFL salary cap,³⁴ removing a player from the roster requires the team to accelerate any unamortized signing bonus, which would normally be spread out over the years of the player's contract, and apply that amount toward the salary cap for the current year. This could cost the team an opportunity to bring in new players, because financial latitude is restricted. In January 2001, an arbitrator upheld the clause.³⁵

Free Agency Helps Free Speech

Basketball player Oscar Robertson knows how free speech infringement can affect his on-the-field performance. In 1975, Robertson successfully sued the National Basketball Association³⁶ (NBA), challenging the legality of the "option" in contracts by stating that it represented a competitive restraint of labor. The "option" or "reserve" clause allowed the team to keep the player on after his contract had expired—unless the team chose to "release" the player. By eliminating this option, "free agency" was created; this allows players to shop themselves around after the expiration of their contracts. Robertson had an accomplished career. While in high school, he was named Indiana's Mr. Basketball, one of the most prestigious high school awards in the country.³⁷ While a sophomore at the University of Cincinnati, he was College Player of the Year, and helped to desegregate the basketball team. Once he was drafted by the Cincinnati Royals to play professional basketball, he negotiated unprecedented contract advantages—including guaranteeing himself a percentage of ticket sales as well as the right to refuse a trade without his express consent. He served as President of the NBA Players Union and appeared on the cover of *Time* when the featured article spoke about improving the game. Once "free agency" was created, players who were afraid to speak their mind could now do so without any fear of repercussions. According to Robertson, if he had ever made statements that upset team owners, "My career would be over; it was that simple."³⁸ The creation of new

concepts, such as "free agency," has dramatically affected free speech in sport.

Trouble Outside the Sports Arena

In February 2010, Scotty Lago, a bronze medal snowboarder for the United States, ended his Olympic experience on a controversial note.³⁹ He appeared in a picture, taken at a non-Olympic sanctioned party, wearing a "Team USA" T-shirt and his bronze medal, hanging just below his waist. A woman positioned on her knees was kissing the medal. U.S. Olympics CEO Scott Blackmun said Lago's decision to go home came before the federation took action.⁴⁰ U.S. Ski and Snowboard Association (USSA) President and CEO Bill Marolt said in an e-mail, "Scotty Lago is a great athlete, but with that comes a responsibility of proper conduct, and his involvement in this situation is not acceptable."⁴¹ Lago was allowed to keep his medal.

Canada's women's hockey team celebrated its gold medal victory in the Winter 2010 Olympics by drinking beer and smoking cigars on the ice rink.⁴² Following an apology from the team, Michael Chambers, president of the Canadian Olympic Committee, declared the matter to be closed, considering the incident nothing more than an error in judgment during an exciting time.⁴³ Photographs showed team members with beers and cigars in hand, and their gold medals around their necks, standing in front of official Olympic logos. Marie-Philip Poulin, age 18, was pictured with a beer in her hand. The legal drinking age in British Columbia, site of the 2010 Olympics, is 19; in Poulin's hometown of Quebec, it is 18. No disciplinary action was taken against the team. The decisions made by the Olympic Committee to discipline athletes as a result of their activities were so inconsistent that one athlete, an American giant slalom snowboarder, joked "we were thinking about what we could do to rival them"⁴⁴ and get away with it.

Do Real Patriots Stand?

Freedom of speech and expression encompasses the right to speak and act, as well as the right not to. In July 2008, Josh Howard of the Dallas Mavericks basketball team attended a charity flag football game sponsored by Allen Iverson, a fellow NBA player.⁴⁵ During the performance of the national anthem, a video taken on a camera phone captured each player's recitation of the anthem. As the camera focused on Howard, he said: "The Star-Spangled Banner is going on. I don't celebrate this shit."⁴⁶ The Mavericks' owner Mark Cuban said that as a result of this incident, Howard would attend "advanced communication-skill sessions" at training camp.⁴⁷ Howard later apologized.

In 2003 Toni Smith, a women's basketball player for New York's Manhattanville College team, turned her back on the flag during the national anthem.⁴⁸ Ms. Smith, then

a 21-year-old senior guard, stated that she took this action as a response to America's involvement in Iraq.⁴⁹ The response from spectators at games following this episode ranged from "We Love Toni!" to "You're a disgrace!" The college's president, Richard A. Berman, declared his support for Smith's right to express her opinion, because she did it in a quiet, dignified way. Berman said, "It is healthy to have kids on college campuses expressing their views. That's where the energy comes from."⁵⁰

Coaches Have a Word

The statement "coaches have a word" is very conservative. In fact, coaches have many words—some might say too many. Their words are sometimes used to encourage players, sometimes to coddle them, and frequently to express frustration at what they are doing wrong. Though the words may be extreme at times, they are always meant to inspire the team to win. However, sometimes problems arise when a coach's words go too far.

Comments on the Game

Fisher DeBerry, the former head coach of the United States Air Force Academy football team, gave a simple explanation of why his team lost to Texas Christian University (TCU) in 2005: TCU "had a lot more Afro-American players than we did, and they ran a lot faster than we did."⁵¹ He clarified this statement saying, "[t]hat doesn't mean that Caucasian kids and other descents can't run, but it's very obvious to me that they run extremely well."⁵² That was not the only time when DeBerry's words proved controversial. A few months earlier, the Air Force Academy sanctioned him for giving religious advice to his team. "Go to church," he told his players.⁵³ The next day he posted a banner in the locker room displaying the "Competitor's Creed," part of which reads: "I am a Christian first and last...I am a member of the Team Jesus Christ. I wear the colors of the cross." Players of all faiths complained that this constituted religious harassment. Hans Mueh, the Air Force Academy's athletic director, responded by saying that there is "a zero-tolerance policy for any racial or ethnic discrimination or discrimination of any kind."⁵⁴ However, he went on to say that Coach DeBerry would not lose his job. DeBerry retired in December 2006, after serving for 23 years as coach for the Air Force Academy, and more than a year after the incident took place.

In the 1997 case of *Brayton v. Monson Public Schools*,⁵⁵ a Massachusetts court addressed the issue of free speech relating to a coach's comments about his team's performance. After the Monson High School varsity soccer team lost a match, a reporter asked the team's coach for a single word to describe the team's poor performance. Gerald Brayton, the team's head coach, responded with "coward." Upon publication of this interview, Brayton was suspended by the Monson Public School District; his

comment was viewed as an embarrassment to the school and the players. His suspension lasted for the season, and Brayton was told that his return the following year would be under consideration. During his suspension, he was prohibited from speaking to other coaches, players, and the public about the soccer program. As a result of these restrictions, Brayton filed suit against the school district, citing infringement of his freedom of expression, and contending that his dismissal violated his due process rights.

Regarding the First Amendment, the court stated that the comment did not rise to protected speech because the comment was not one of "public concern," or information necessary for citizens to make informed decisions about government operations. Regarding due process allegations, the court asserted "[as] a threshold matter, it is doubtful that plaintiff possessed any constitutionally protected right in his position as an extra-curricular soccer coach."⁵⁶ It further noted that the plaintiff's termination as coach did not affect his status as a teacher and that he had no contract with the school system to perform as a coach. As a soccer coach, he had no reasonable basis for an expectation of continued employment; the court could not find a constitutionally protected liberty or property interest to exist.

Athlete Recruitment: The Coach's Perspective

New talent is the lifeblood of success for a sports team. If it is unable to bring it in, a team has no chance to succeed in the long term. In *Holy Cross College, Inc. v. Louisiana High School Athletic Association*,⁵⁷ a coach brought suit against the sports governing body, stating that restrictions on athletic recruitment infringed on his freedom of speech. In the case of *Kriss*, discussed previously, the court addressed a player's right to speak with a coach regarding recruitment; this case addressed the coach's side in recruiting the player. To curtail athletic recruitment abuses, the Louisiana High School Athletic Association enacted a regulation to prohibit member schools from using undue influence over prospective students. It stated that "[n]o player shall receive remuneration of any kind." "Remuneration" in this case consisted of any privileges or consideration not accorded to other students, whether athletes or non-athletes.⁵⁸ Among the examples of undue influence were: free room and board, allowance for transportation, and the promise of help in securing college scholarships. During the fall recruitment season, Holy Cross High School sent Henry Rando, a teacher and coach, to local schools to speak to students about scholastic and academic programs. Based on statements alleged to have been made to prospective players during the presentation, charges were filed in violation of the "undue influence" rule. On appeal, Rando claimed that the rule was an infringement of his free speech, unconstitutionally vague, and therefore unconstitutional as applied to the case. Though the issue was remanded to the district court for review, the appeals court found that the claim of free speech violation was *not* meritless or frivolous.

Fans Speak Out

During one 2004 basketball game, every time Duke University guard J.J. Redick stepped onto the foul line, students from the University of Maryland shouted “(Expletive) you J.J.,”⁵⁹ hoping these words would detract from his performance. These obscenities occurred when games were aired on national television. Maryland athletic officials maintained that they could not eject students from the game because the school was a public institution; therefore, the game is played in a public facility and was bound by the First Amendment.⁶⁰

Particularly for college students, the fun in attending a live game—compared to watching it on television—lies in vocalizing support for or opposition to a team. The question is: Where do sporting organizations draw the line between fans’ enthusiasm and deliberate interruption of an athlete’s performance?

ProFANity

Schools have taken action against individuals who engage in throwing objects and public drunkenness, but fans are rarely expelled from sporting events for using profane language. Universities typically request—before the event—that fans refrain from using foul language; signs are placed at the entrance of the event venue, and public-address announcements may even be made, but these measures never seem effective. In 2003, Maryland State University attempted to address this issue in a new way, and initiated a campus-wide “sportsmanship” campaign that cost more than \$30,000.⁶¹ Many schools will not permit their teams to compete at certain university venues well known for frequent instances of abusive and inappropriate language. In an effort to set expectations of proper behavior, the Big Ten universities adopted a measure that bans students from using bad language to single out an individual player.

“Cheering speech” occurs in a variety of ways. It can be directed at players, coaches, officials, executives, administrators, or other fans, and can be supportive or critical of either the home or opposing team. Kermit Hall, former president of Utah State University, explained that free speech at universities is “at once the most obvious and the most paradoxical of constitutional principles.”⁶² Open expression is essential to academic freedom, but is paradoxical because it must be balanced against imperatives for civility and respect. According to Hall, there are two controlling factors to process at any athletic event.⁶³ First, admission to the event is a license that is freely revocable. After you are admitted, you may be asked to leave for any reason and at any time. The public university has not only a right to eject student who is using vulgar language, said Hall, but a responsibility to do so as a measure of consideration for others in attendance who may find that language offensive. Second, there is an exemption to free speech for “fighting words” that are

used to incite or intimidate, as stated previously in the *Brandenburg* case.

The case that addressed freedom of speech regarding the use of obscenities was *Cohen v. California*,⁶⁴ which involved an individual’s view on military drafts. In 1968, Paul Robert Cohen appeared in the corridor of a California courthouse—in the presence of women and children—wearing a jacket that bore the words “FUCK the draft.” The obscene word was fully spelled out on Cohen’s jacket. Cohen was convicted and sentenced to 30 days’ imprisonment for violating California Penal Code § 415, which prohibited “maliciously and willfully disturb[ing] the peace of any neighborhood or person... by...offensive conduct....” Although he was found guilty, the lower court noted, “[t]he defendant did not engage in, nor threaten to engage in, nor did anyone as the result of his conduct in fact commit or threaten to commit any act of violence.”⁶⁵ The decision was subsequently overturned by the U.S. Supreme Court, which declared that the statement itself could not plausibly conjure up sufficient stimulation to provoke a confrontation with Cohen; therefore, the words on the jacket were considered protected speech.

Regarding the issue of free speech at a game, a primary concern is that a fan is captive to the vocal audience around him; it is difficult—but possible—to *immediately* leave the event. Traditionally, courts have held that there are four places considered “captive” areas: an individual’s own home, an individual’s workplace, public elementary and secondary schools, and the inside of and area surrounding a reproductive health facility.⁶⁶ These are considered places where a person is “forced” to be present—though a reasonable level of choice in the matter is involved. The idea of a captive audience becomes a problem at sporting events. A fan upset by words “taunting” a team or player has three choices: to stay in his seat and endure the comments, to move to another area of the arena, or to leave altogether. However, the “captive audience” principle is difficult to apply to public places of recreation and entertainment because fans are not forced to attend events. Individuals who choose to attend must understand that by doing so, they choose to accept the activities of other patrons at that game. The alternative is to watch the game at home. Howard Wasserman, associate professor of law at Florida International University School of Law, explains:

[b]ecause word choice and communicative manner are essential components of free speech, it becomes impossible to enforce any fan-conduct code in a uniform, non-arbitrary way. The state cannot neutrally define what words or manner are offensive, nor can it establish any meaningful standard to measure offensiveness.⁶⁷

Private universities are in a different situation than public schools. Saint Joseph's University in Philadelphia has ejected students for using profane language. "If you can't say it in the classroom, the library, or the chapel, you can't say it in the gym," declared athletics director Don DiJulia, continuing: "You're electing to come to school here, and this is part of what you're buying into."⁶⁸ One proposed solution for schools has been to disband the student sections of the stadium. Jim Delany, the Big Ten commissioner, came up with a three-strike system designed to stop the taunting of opposing players. The first violation of the rule results in a private warning for the school. The second violation elicits a public warning. After the third violation, the school is required to disband the student section. According to Delany, this is *not* a free speech issue, because "no one has a constitutional right to attend a basketball game."⁶⁹

Sometimes, fans' speech is not obscene, but simply unsportsmanlike. In November 2010, after his school's basketball team prevailed against Utah State, a student employee for Brigham Young University's (BYU) information technology center decided to rub salt in the losing team's wounds.⁷⁰ He displayed the following message on the scoreboard at the Marriott Center: "Dear UT St.: Enjoy the LOSS! (Love), Your Big Brother BYU!" BYU's athletic director Tom Holmoe apologized to Scott Barnes, Utah State's athletic director, for the inappropriate message, stating that it did not reflect the sentiment of BYU Athletics or the university. The student also apologized for what he thought was a humorous message. Later in the day, a message was posted on the BYU basketball team's Facebook page that read: "Thanks to Utah State for a great game. As fans, we need to remember that anything we do off the court should not take away from how great our respective athletes perform on the court. We are sorry for the message that appeared on the video board post game."⁷¹

Freedom Is Silence as Well

Free speech also involves the choice not to speak. Silence can powerfully affect fan speech as well as a team's performance. At Indiana's Taylor University, on the Friday before fall final exam week students uphold the tradition of remaining silent until its men's basketball team scores the tenth point of the game.⁷² Once this occurs, a celebration erupts. The "Silent Night" tradition was created by a former assistant coach more than 20 years ago—it is now the athletic department's biggest event of the year, based on attendance and student interest. At the end of the game—if the team wins—the crowd sings "Silent Night" in unison.

Fans Against Fans: Be Careful Where You Sit

Sometimes fans turn against each other. In July 2010, a Cleveland Indians baseball fan wore Miami Heat basketball player LeBron James' jersey to an Indians game.⁷³

Due to James' infamous decision not to continue playing for the Cleveland Cavaliers at the end of the previous season, this man's decision to wear the basketball star's jersey did not go over well. Fans in the surrounding seats shouted obscenities, and chanted "Kick him out!"⁷⁴ In an effort to avoid an escalating problem, police escorted the man outside the stadium. The man never spoke to the crowd; he simply chose a shirt that offended fans seated around him.

A Gesture Is Worth a Thousand Words

At a sporting event, gestures are often more incendiary than words. Gestures may be exchanged between athletes; in 2010, New York Islanders defenseman James Wisniewski was suspended for two games for using an obscene gesture during a game against the New York Rangers.⁷⁵ Wisniewski used his hand and mouth to gesture at Rangers forward Sean Avery after the two were separated by officials for arguing. Wisniewski was considered a repeat offender under the CBA because of a previous incident; he paid a fine of \$79,268.30.

Sometimes gestures may be made by athletes to the crowd; in 2010, Detroit Lions safety Louis Delmas gave Minnesota Vikings fans the middle finger.⁷⁶ Although Delmas did not receive an NFL fine, the Lions fined him \$5,000 for unsportsmanlike conduct. There have also been instances where team management has employed this gesture; Chuck Cecil, the Tennessee Titans defensive coordinator, was fined \$40,000 by the NFL after he extended his middle finger to game officials.⁷⁷ Cameras caught Cecil's gesture, made in protest of a penalty call against his team.

Team owners and head coaches have displayed gestures as well. In 2009, Bud Adams, the 86-year-old owner of the Tennessee Titans, used both middle fingers to indicate his disdain for Buffalo Bills fans during the game; this resulted in a \$250,000 fine by the NFL.⁷⁸ He later apologized, explaining that he was caught up in the excitement of the day. Yet when Rex Ryan, head coach of the New York Jets, was photographed displaying the offensive gesture to a fan at an event in Florida, the NFL did not fine him.⁷⁹ The Jets fined Ryan \$50,000 and the NFL was satisfied with this action. Ryan apologized the next day.

There have also been instances where a non-profane act can be found objectionable, even when it is intended to promote team spirit. Nike's Pro Combat clothing line is a big hit with teams, but not with the NCAA. Its "Vapor Jet" gloves are specially designed to feature "premium Magnigrip CL technology." The thumb and middle finger are of the glove are black, and the other three fingers are white. When the wearer's hands are brought together with palms facing outward, the colors on the fingers are designed to form the letter "O." Jim Tressel, Ohio State's coach, showed the team how to form the "O" when the

gloves were first distributed. In the fall of 2010, Ohio State receiver DeVier Posey displayed this “O,” in honor of his school, after completing a touchdown pass in a game against the University of Michigan.⁸⁰ Referees flagged him with a 15-yard penalty for taunting, deemed to be unsportsmanlike conduct. During the next quarter of the game, left tackle Mike Adams repeated the sign after his teammate Daniel Herron scored. The team was again given a 15-yard penalty for what Herron thought “was just teammates having fun....”⁸¹ Two other Ohio State players, Dane Sanzenbacher and Jordan Hill, also made the “O” sign earlier in the game after scoring the first two touchdowns—but neither was penalized.

Fans and Signage: Your Banner Is Banned

The case of *Aubrey v. City of Cincinnati*⁸² addressed the issue of fans bringing non-profane banners to support their team. During the 1990 World Series, Cincinnati Reds management sought to enforce its regular-season stadium banner policy. According to this policy: “[B]allpark patrons are permitted to bring signs and banners to the Stadium. They must be in good taste (as determined by Reds management) or the banner will be removed....”⁸³ The policy went on to specify that “Reds management reserves the right to remove any banner or sign that is viewed to be in bad taste or is causing an obstruction.”⁸⁴ The only restriction was that the signs would not be permitted to interfere with the line of sight of players or officials, or with fans’ general enjoyment of the game.

At the second World Series game, Reverend Guy Anthony Aubrey brought a sign bearing the words “Go Reds, John 3:16.” In the Bible, John 3:16 states: “[F]or God loved the world so much that he gave his only Son so that anyone who believes in him shall not perish but have eternal life.” Upon discovering the two foot by three foot sign, stadium security informed Aubrey of the banner policy; they subsequently confiscated the sign and he filed suit. He maintained that he had previously carried religious signs showing similar messages to nationally televised football, hockey and basketball games without incident.

At trial, the Reds’ management asserted that its policy was intended to include signs that must be related to the game at hand. The court decided that the stadium’s policy of “good taste” was vague; no fan could know which terms or phrases would be considered acceptable and which would not. Moreover, the regulation was deemed overbroad because it gave exclusive discretion for Cincinnati officials to determine, without any standards for decision-making, what speech is and is not permissible or related to the game. It was demonstrated that in games past “God Loves The Cincinnati Reds” was found to be acceptable, as were signs favoring the Iraq war—neither of which had anything to do with baseball or sports.

To make the case a state action in denying his constitutional rights, Aubrey had to demonstrate an affirmative

link between the stadium and the city as a government municipality. Aubrey contended that the city made an affirmative decision to support the regulations; both on-duty police officers and off-duty officers, acting as private security, spoke to him about his sign. He was also questioned in the stadium’s police room. The court accordingly agreed that enforcement of the banner policy by Cincinnati’s police was a valid connection to the allegation that Aubrey’s constitutional rights had been violated. The court denied summary judgment for the city and the Reds, and allowed partial summary judgment regarding the Reds’ banner policy, holding that it was substantially vague and overbroad.

In contrast to *Aubrey*, there have been instances affecting specific content on signs displayed at games. George Steinbrenner, the late owner of the New York Yankees, directed that banners critical of him be confiscated. These banners displayed statements including “George Must Go” and “George, YOU Are The Problem.”⁸⁵ In response, the ACLU sent a letter to Steinbrenner warning him that using his personal preferences to determine an acceptable viewpoint was discriminatory and violated free speech laws. Two weeks later, Steinbrenner announced “Banner Night” at Yankee Stadium. During this event, he allowed the display of some critical banners, but he confiscated those with religiously based criticism, such as “Forgive him, Father, for he knows not what he does.”⁸⁶ A spokesperson for Steinbrenner asserted that the content of such signs was “blasphemous.”

Calls Can Be Costly

Professional Referee Associations Speak Out

Though it may seem outlandish that a sports official would take a threat from a spectator seriously—given that fans always yell at referees—evidence shows otherwise. In 2002, the National Association of Sports Officials (NASO) issued a report entitled “Officials Under Assault.”⁸⁷ Over the years, officials have been spat upon, punched in the face, and even threatened with firearms as fans voice objections to their calls.⁸⁸ As a result, many states have created laws to address sports-related assaults. Florida’s “Sports Official” bill states that anyone who commits an assault or battery against a referee, umpire, or linesman during a school athletic game will have the charge “reclassified” as an offense one degree higher than the customary charge.⁸⁹ Under this law, for example, a battery misdemeanor of the second degree would move up to a first-degree misdemeanor. New Jersey places assaults against sports officials in the same category as an assault of a police officer, public servant, or fireman.⁹⁰

Defamation Against the Referee

Phil Lockett, the head referee, was the center of attention from the beginning of a 1998 NFL game between the Detroit Lions and the Pittsburgh Steelers.⁹¹ Both teams’

captains came to the center of the field for the customary coin toss to determine which team would kick off the ball. Under NFL rules, the initial choice is irrevocable. The Pittsburgh captain hesitated during the toss, and his call sounded like “Heh-uh-TAILS.” Lockett decided the choice of “heads” would prevail. After Pittsburgh lost the game, many blamed the loss on his coin toss call. In the words of one reporter, by not honoring tails the referee was calling the team’s captain a liar; another said that even his 5-year-old daughter knows the difference between heads and tails.⁹² The issue here is whether a referee can sue for defamation or if words spoken to a referee are simply part of the events that occur during a game.

Regarding defamation of a sports official, the key issue is whether the official is a “public figure” or a “private individual.” If the individual is a public figure, then the statement against him or her must be of a malicious nature, and made “with knowledge that it was false or with reckless disregard of whether it was false or not.”⁹³ In contrast, a private individual must prove the statement was made negligently—with the reasonable degree of care under the circumstances.

One could argue that a sports official is both a public figure and a private individual. Though, in general, officials have not achieved “pervasive fame or notoriety” and are not individuals whose faces will be recognized on the street, they become public figures by being at the center of a public controversy.⁹⁴ In the case of *Chuy v. Philadelphia Eagles Football Club*,⁹⁵ the court decided that an individual is considered a public figure among sports fans, having “...chosen (court’s emphasis) to engage in a profession which draws him regularly into regional and national view....” The court further noted that, as shown by “Nielsen (broadcast) ratings, the American public is fascinated by professional sports,”⁹⁶ and with individuals involved in them.

Comments About the Referee

Since they have the most at stake, players often find it hard not to comment on referees’ calls. Rasheed Wallace, a forward for the Boston Celtics, was fined \$35,000 after criticizing game officials in his comments to the media on April 19, 2010 regarding Game 1 of the Eastern Conference Finals.⁹⁷ Wallace said, “I know that certain referees were trying to bait me to get a tech (technical foul).” He added, “I just don’t like to be cheated. Bottom line.”⁹⁸ This was the third time during the season that he received a fine for commenting about officials.

On the day of Wallace’s third incident, NBA Commissioner David Stern—who is also an attorney—stated in a press conference that the “corrosive” comments about referees upset him, and that he would begin suspending coaches and players for postseason games if the criticism continued.⁹⁹ He remarked that “referees go out there and

knock themselves out to do the best job they can,” and added that negative comments about referees “erode fan confidence and then you get some of the situations that we have.”¹⁰⁰

Sporting Organizations Have Concerns

Developing a set of consistent free-speech regulations begins with an analysis of the rules created by the sports’ governing bodies. The player, by choosing to participate in a sport, is forced to accept the rules in the player’s code of conduct or he or she cannot compete. The dilemma for sports organizations is when to consider taking action against inappropriate speech, and what, if any, penalties should be imposed.

Upholding Professional Standards When Speech Is Not Related to Sport

In 2000, NBA player Allen Iverson—performing as his rap music persona “Jewelz”—released “40 Bars,” a song from his album *Non-Fiction*. The lyrics, which discussed murder and used derogatory terms to refer to women, shocked the professional basketball community. Iverson, voted the league’s Most Valuable Player in 2001 and co-captain of the U.S. Olympic Basketball Team in 2004, was widely criticized by the media, gay and lesbian groups, civil rights groups, and NBA Commissioner Stern, who made the following statement:¹⁰¹

The NBA is a private organization. Whatever constitutional right of free speech an individual may have, there is no constitutional right to participate in the NBA and I have the power...to disqualify players who engage in offensive conduct—including inappropriate speech.¹⁰²

Stern acknowledged his ability to sanction Iverson regarding the song’s lyrics even though Iverson’s rap performance did not interfere with his role as a professional athlete and his lyrics did not pertain in any way to basketball or sports. Iverson later agreed to change some of the song’s lyrics.¹⁰³

The commissioner of each professional sports league has the authority to act, provided the action is in the “best interest” of the sport. Although the Iverson incident was not directly related to his sport, as an athlete he is a public figure and a representative of the NBA. The commissioner has historically had “control over ‘whatever and whoever’ had to do with”¹⁰⁴ the sport; Stern exerted his influence because Iverson’s performance of a song with offensive content reflected poorly on the basketball community.

Courts are hesitant to interfere when it comes to private organizations and associations. As established in *Rewolinski v. Fisher*,¹⁰⁵ the processes of an internal asso-

ciation “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.” The rationale here is that an organization—especially one related to sports—knows more about itself than the courts do. The governing body of any given sport appoints a commissioner to exercise discretion and sound judgment.

The boxer Muhammad Ali was involved in one of the best-known cases in which the courts intervened after sanctions were handed down by a sporting organization. Ali maintained that his religious beliefs as a practicing Muslim prohibited him from serving in the Vietnam War. He was drafted, but refused—four times—to report to the National Selective Service (draft) board. The World Boxing Association took action, suspending him and revoking his world championship title, stating that his refusal to serve in the military was detrimental to the best interests of boxing. The New York State Athletic Commission revoked Ali’s boxing license and he filed suit¹⁰⁶ in federal court. Ali’s position was that the Commission acted impulsively in revoking the license; he pointed out that other boxers had committed heinous crimes, yet they were permitted to continue competing. The U.S. District Court of New York determined that he had a case under private association law, because the New York State Athletic Commission was a private organization. His boxing license was accordingly reinstated. Though the case primarily addressed freedom of religion, it also dealt directly with Ali’s right to vocally oppose the war—a world event unrelated to boxing.

Looks Matter: Regulating the Appearance of Athletes

Beginning in November 2005, the NBA enacted a players’ dress code.¹⁰⁷ The policy states that players are expected to wear “business casual” attire when they appear in team or league activities, arrive at and leave games, conduct interviews, and make promotional or public appearances. The guidelines are general, listing collared shirts, dress slacks, and sport jackets as appropriate attire for players sitting on the bench, but they also address concerns about athletes serving as role models to young people. Banned items include visible chains, pendants, and medallions; sunglasses worn while indoors; headgear; and musical headphones worn while sitting on the bench during games.

In April 2010, the NCAA football association passed a rule that cracked down on “eye black” messages worn by players.¹⁰⁸ The NCAA Playing Rules Oversight Panel approved the rule, starting in the 2010 season, that players will no longer be allowed to wear eye black that contains any message, word, or number on it. Dave Parry, the national coordinator of officials for the NCAA, stated, “There were people fearful that something uncompli-

mentary or provocative might be written, which could promote ill will, so the idea is to make it solid black.”¹⁰⁹

Controlled Celebrations

Along with the eye-black regulation, the NCAA simultaneously passed harsher punishments regarding taunting—designed to curb excessive on-field celebrations—set to begin during the 2011 season. The NCAA section on Unsportsmanlike Conduct Fouls¹¹⁰ prohibits “[a]ny delayed, excessive, prolonged or choreographed act by which a player (or players) attempts to focus attention upon himself (or themselves).” Historically, excessive celebration resulted in a dead-ball foul; the team is penalized with the ensuing kickoff or the extra-point try—but the touchdown counts. Under the new rule, “if a player starts to taunt, flaunt, point, or high-step before reaching the end zone, the touchdown will be wiped out, and the team will be penalized 15 yards from the spot of the infraction.”¹¹¹ Parry said the infraction should be “clear and obvious, where an official would say there was no choice because (the act) was premeditated and excessive.”¹¹²

What are the guidelines for “obvious” or “excessive”? In October 2009, A.J. Green, a receiver for Georgia, was fined 15 yards for excessive celebration in a game against Louisiana State University.¹¹³ After he caught the ball, Green fell down, got up and chest-bumped his teammate, a fellow receiver—after which his teammates ran over to congratulate him. The entire display took 20 seconds. A spokesperson for the Southeastern Conference (SEC) stated that “following a brief team celebration, Green made a gesture to the crowd calling attention to himself.”¹¹⁴ Green was surprised by the referee’s call. The SEC later admitted it made the wrong call in penalizing Green, but this admission would not affect the final score. After watching the call on video, Rogers Redding, the SEC’s officials coordinator, said “we concluded that the video did not support the call.”¹¹⁵

The Collective Bargaining Agreement

In response to John Rocker’s statements, discussed earlier, the Major League Baseball Players Association took action, stating the Commissioner’s punishment was without cause.¹¹⁶ According to the CBA, created by both Players Association and team owner representatives, matters involving the league are subject to arbitration. Specifically, the Players Association argued to the arbitrator that “speech—even if offensive—should not be grounds for punishment.”¹¹⁷ Although the arbitrator agreed that the Commissioner had the authority to discipline the off-season, off-the-field speech-related conduct, it was decided that the punishment imposed was severe. Therefore, Rocker’s suspension was significantly reduced, from 73 days to 14, as was his fine—from \$20,000 to \$500.¹¹⁸

The issue of free speech is not restricted to the players' side of the owner-player unions. In 1993, Marge Schott, the former owner of the Cincinnati Reds baseball team, was suspended by the league for one year and fined \$25,000 for using "language that is racially and ethnically insensitive, offensive, and intolerable."¹¹⁹ Schott had referred to African-American players as "million dollar n*****s" and openly declared her opinion that Adolf Hitler was a good person. MLB's executive council stated that Schott "has brought substantial disrepute and embarrassment to the game—and is not in the best interest of baseball."¹²⁰ The ACLU defended Schott, stating that although the league had the right to punish her via a fine, abolishing her right to manage her team—essentially to control her own business—was overstepping her free speech rights. In response, the league maintained that the reason for the severe punishment was that racist remarks made by an owner had a significant impact on other team-related functions, such as hiring practices.¹²¹

Tweet Me, but AFTER the Game

With the growth of new technology designed to facilitate instantaneous communication, professional sporting organizations have instituted policies to stay current. In September 2009, the NBA announced its guidelines for new social media.¹²² The use of cell phones, personal digital assistants, and other electronic communication devices is prohibited for players, coaches, and other team personnel during games. This restriction limits access to interactive sites such as Twitter and Facebook. The league's definition of "during games" encompassed a 45-minute period before opening tip-off, halftime, and "after the postgame locker room is open to media and coaches, and players have first fulfilled their obligation to be available to media attending the game."¹²³

Coaches have their opinions about the tweeting policy. Stan Van Gundy, coach of the Orlando Magic, stated that tweeting facilitates certain comments that would never otherwise be made. "There's a lot of things said out of the court, and I'm sure in all sports in a very competitive environment...if people knew all of it they would find a lot...inappropriate," he stated.¹²⁴

In September 2009, the NFL announced a policy similar to that of the NBA's; players, coaches, and operations personnel would no longer be permitted to update their accounts or profiles on social-networking sites in the time before and after games.¹²⁵ The football league's rules ban all communication by an individual 90 minutes before kickoff, and extend to anyone representing him on his social media account. As with the NBA, teams are allowed to set more stringent rules. The Broncos, Patriots, Bills, Colts, Saints, and Lions all restrict use on practice fields; the Dolphins imposed restrictions on players, reporters, and spectators during training camp.

There are concerns with the NFL social media rules. In developing rules for players, the NFL also instituted

guidelines for how fans can use social media. Fans are encouraged to discuss teams, but are prohibited from posting play-by-play accounts of actual games.¹²⁶ Furthermore, fans in attendance at games are prohibited from posting lengthy self-made videos on sites like YouTube or Facebook, because the league sells exclusive broadcast rights to the games. Fans who violate the rule will first be warned by the league to stop posting; subsequent violations may result in a lawsuit.

The NFL "has no property right over fans' tweets," says Wendy Seltzer, a fellow at Harvard's Berkman Center for Internet and Society.¹²⁷ Professor Seltzer further notes that fans have the same First Amendment rights as any news organization, even in play-by-play form, to publish accounts of the game. One theoretical claim the NFL could pursue, explained Seltzer, would be violation of the league's trademarks by using team and player names, but this claim would be unlikely to hold up in court.¹²⁸ It could insert a clause on the back of tickets to inform fans that they are prohibited from using recording equipment in the stands, but enforcement would be difficult; however, Seltzer argues that the NFL would have no property right over the footage. It would have to prove to a court that the posted videos reduced the value of television broadcasts—doing so would be difficult. In the 1990s, when use of personal pagers was at its peak, the NBA sued Motorola to block the operating service that sent continuously updated sports scores and game information to customers.¹²⁹ The NBA stated that the service violated league copyright and misappropriated its commercial property. The court denied both claims.

On February 8, 2007, Professor Seltzer took a 35-second clip of an NFL game between the Indianapolis Colts and Chicago Bears from a few days prior and posted it on YouTube.¹³⁰ She also played the clip in her copyright class. The clip showed a portion of the game, including an announcement to viewers that had been made during the game, which informed them of the NFL's ownership of the broadcast rights. The first 10 seconds of the clip, which shows players and coaches, as well as the official logo of the NFL, declares: "This telecast is copyrighted by the NFL for the private use of our audience. Any other use of this telecast or of any pictures, descriptions, or accounts of the game without the NFL's consent is prohibited."¹³¹

In response to the posting on YouTube, to which the NFL did not consent, NFL spokesman Brian McCarthy stated that this was a violation of the organization's rights under the Digital Millennium Copyright Act (DMCA). He also commented on Seltzer's Fair Use defense, asserted in her blog, regarding copyright infringement:

We are entitled to disagree, in good faith, with her asserted defense, absent a court decision. [] We have valid grounds to disagree with the professor's fair use

argument. Had she simply used the clip in her classroom, before students, she might have had a stronger argument that the context was educational and entitled to fair use deference. But it was posted without any of this context, and in a manner available for anyone in the world to see, not just her students.¹³²

Sports agents have also used Twitter as a communication aid. Alvin Keels, Andre Smith's agent, used Twitter to assist his client in his negotiations with the Cincinnati Bengals.¹³³ Keels tweeted "[s]ent over what I thought was a very good and fair proposal today to the Bengals! Let[] s hope it does the trick. [I]f not back to square one!" Smith later signed a four-year deal with the Bengals.¹³⁴

What Is Offensive Expression in Sports?

It is said that "beauty is in the eye of the beholder." The same rationale can be applied when determining what type of expression is considered offensive, since individuals' backgrounds and values influence their interpretations of words and gestures. Though we want to respect the rights of the individual—to behave as individuals—steps must be taken so that everyone involved in sport, no matter their occupation, position, or popularity, follows the same rules of speech and expression.

The player, by choosing to participate in the sport, is forced to accept the rules in the player's code of conduct or choose not to compete. The dilemma for the organization when the speech rises to a certain level is when to consider taking action and what penalties to impose—if any. There have been numerous incidents where one athlete's conduct was sanctioned while another's was disregarded, often without a warning. Regardless of the speech or circumstances, people in all levels of sport must be treated equally, for one position is dependent on the other. The governing organization needs teams, teams need coaches, coaches need players, and players need fans. Eliminate one and the rest fail.

For free speech and expression to work in sports and their related fields, concrete rules must be established as to precisely what is and is not permitted. Free speech must be used to encourage communication from all who are involved in these activities. This debate is what makes sports what they were designed to be—fun.

Endnotes

1. David Haugh, *For Rocker, it's been there, done that*, CHI. TRIB., June 25, 2006, available at http://articles.chicagotribune.com/2006-06-25/sports/0606250045_1_sun-times-columnist-jay-mariotti-john-rocker-sensitivity-training.
2. Jeff Pearlman, *At Full Blast*, CNN/SI, Dec. 23, 1999, available at <http://sportsillustrated.cnn.com/features/cover/news/1999/12/22/rocker/>.
3. *Id.*

4. Christopher J. McKinney, *Professional Sports Leagues And The First Amendment: A Closed Marketplace*, 13 MARQ. SPORTS L.J., 223, 246-7 (2003).
5. *See Freedom of Expression In The Arts And Entertainment*, A.C.L.U., Feb. 27, 2002, available at <http://www.aclu.org/free-speech/freedom-expression-arts-and-entertainment>.
6. 395 U.S. 444 (1969).
7. Ohio Rev. Code Ann. § 2923.13.
8. 341 U.S. 494 (1951).
9. *Id.* at 505.
10. 395 U.S. at 447.
11. 180 Ind. App. 594 (Ind. App., 1979).
12. *Id.* at 607.
13. *See NCAA: Fan Facebook site violates rules*, Apr. 11, 2009, available at <http://sports.espn.go.com/ncaa/news/story?id=4060673>.
14. *See Social media and recruiting*, available at <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Issues/Recruiting/Social+Media+and+Recruiting>.
15. *Id.*
16. *See supra* note 13.
17. *Id.*
18. *Id.*
19. Ben Cohen, *Duke acts on NCAA Facebook bylaw*, DUKE CHRON., Apr. 14, 2009, available at <http://dukechronicle.com/node/149096>.
20. *Id.*
21. *Id.*
22. Gary Parrish, *Wisconsin decommitment a lesson for message-board miscreants*, CBS SPORTS, May 22, 2009, available at <http://www.cbssports.com/collegebasketball/story/11776517>.
23. *Id.*
24. *Id.*
25. *Bengals seek loyalty clause in new contracts*, CNN/SI, June 12, 2000, available at http://sportsillustrated.cnn.com/football/nfl/news/2000/06/11/bengals_contracts_ap/.
26. *Id.*
27. *Id.*
28. NFL Collective Bargaining Agreement 2006–2012, Mar. 8, 2006, art. VIII, sec. 1.
29. Mark Curnutte, *Brown writes to defend loyalty clause*, CINCINNATI ENQUIRER, July 18, 2000, available at http://bengals.enquirer.com/2000/07/18/ben_brown_writes_to.html.
30. *Id.*
31. *Id.*
32. NFL Collective Bargaining Agreement, *supra* note 28, art. LV, sec. 6.
33. Mike Brown, *Loyalty Clause is needed*, CINCINNATI ENQUIRER, July 18, 2000, available at http://bengals.enquirer.com/2000/07/18/ben_loyalty_clause_is.html.
34. *See NFL Collective Bargaining Agreement*, *supra* note 28, art. XXIV, sec. 7.
35. *Bengals Team Loyalty Clause Upheld in NFL Arbitration Case*, Jan. 23, 2001, available at <http://www.sportsbusinessdaily.com/Daily/Issues/2001/01/Issue-85/Franchises/Bengals-Team-Loyalty-Clause-Upheld-In-NFL-Arbitration-Case.aspx>.
36. *Robertson v. National Basketball Association*, 389 F. Supp. 867, (S.D.N.Y. 1975).
37. Matt Welch, *Locker-Room Liberty: Athletes who helped shape our times and economic freedom that enabled them*, REASON MAG., May 2005, at 1.
38. *Id.*

39. Eddie Pells, *Lago Back Home With Bronze in Hand, Joke to Tell*, ABC NEWS, Feb. 20, 2010, available at <http://abcnews.go.com/Sports/wireStory?id=9894801>.
40. *Id.*
41. *Id.*
42. Greg Beacham, *Canadian Women's Hockey Team Celebration: IOC Unhappy, Team Apologizes*, HUFFINGTON POST, Feb. 26, 2010, available at http://www.huffingtonpost.com/2010/02/26/canadian-womens-hockey-te_n_478314.html.
43. *Id.*
44. *Id.*
45. Eddie Sefko, *Dallas Mavericks' Josh Howard disrespects national anthem*, DALLAS MORNING NEWS, Sept. 19, 2008, available at <http://www.conservativeunderground.com/forum505/showthread.php?t=5046>.
46. *Id.*
47. *Id.*
48. Bill Pennington, *Player's Protest Over the Flag Divides Fans*, N.Y. TIMES, Feb. 26, 2003, available at <http://www.nytimes.com/2003/02/26/sports/college-basketball-player-s-protest-over-the-flag-divides-fans.html>.
49. *Id.*
50. *Id.*
51. See *Air Force reprimands DeBerry for race remarks*, Oct. 27, 2005, available at <http://sports.espn.go.com/ncf/news/story?id=2204771>.
52. *Id.*
53. Sally Jenkins, *Football's Religious Kick*, WASH. POST, May 21, 2005, at D01.
54. See *supra* note 51.
55. 950 F. Supp. 33 (D. Mass., 1997).
56. *Id.*
57. 632 F.2d 1287 (5th Cir. 1980).
58. *Id.* at 1288.
59. Erik Brady, *How Free Should Speech Be At Campus Games?*, USA TODAY, Feb. 5, 2004, at 4.
60. *Id.*
61. *Id.* at 6.
62. *Id.*
63. *Id.*
64. 403 U.S. 15, (1971).
65. *Id.* at 16-17.
66. Howard M. Wasserman, *Cheers, Profanity, And Free Speech In College Sports*, FLA. INT'L U. C. OF L., Aug. 9, 2004, at 5.
67. *Id.* at 8.
68. Brady, *supra* note 59.
69. *Id.*
70. Diamond Leung, *BYU apologizes for student's taunt of USU*, ESPN, Nov. 18, 2010, available at http://espn.go.com/blog/collegebasketballnation/post/_/id/18304/byu-apologizes-for-students-taunt-of-usu.
71. *Id.*
72. Jeff Eisenberg, *Never heard of Taylor University's Silent Night? You're missing out*, YAHOO, Dec. 13, 2010, available at http://rivals.yahoo.com/ncaa/basketball/blog/the_dagger/post/Never-heard-of-Taylor-University-s-Silent-Night-?urn=ncaab-295229.
73. Pat McManamon, *Fan Wearing LeBron James Heat Jersey Draws Ire of Indians fans*, FANHOUSE, July 28, 2010, available at <http://mlb.fanhouse.com/2010/07/28/fan-wearing-lebron-james-heat-jersey-draws-ire-of-indians-fans/>.
74. *Id.*
75. See *NHL suspends Wisniewski 8 games*, Mar. 18, 2010, available at <http://sports.espn.go.com/chicago/nhl/news/story?id=5005504>.
76. Paula Pasche, *Lions fine Delmas for middle-finger salute to Vikings fans*, OAKLAND PRESS, Oct. 1, 2010, available at <http://www.theoaklandpress.com/articles/2010/10/01/sports/doc4ca63d871b5b7148883634.txt>.
77. *Chuck Cecil's Middle Finger Gesture Caught On Tape!*, HUFFINGTON POST, Oct. 4, 2010, available at http://www.huffingtonpost.com/2010/10/04/chuck-cecil-middle-finger-gesture_n_748920.html.
78. See <http://profootballtalk.nbcsports.com/2009/11/16/nfl-fines-bud-adams-250000/>.
79. *NFL won't punish Ryan*, ESPN, Feb. 3, 2010, available at <http://sports.espn.go.com/nfl/news/story?id=4881332>.
80. Ken Gordon, Tim May, and Bill Rabinowitz, *Ohio State notebook: Gloves likely to come off after penalties*, COLUMBUS DISPATCH, Nov. 28, 2010, available at <http://www.dispatch.com/live/content/sports/stories/2010/11/28/gloves-likely-to-come-off-after-penalties.html>.
81. *Id.*
82. 815 F. Supp 1100, (S.D. Ohio, 1993).
83. *Id.* at 1102.
84. *Id.*
85. Lawrence A. Israeloff, *The Sports Fan v. The Sports Team Owner: Does A Franchise Prohibition Of Spectators' Banners Violate The First Amendment?*, 24 COLUM. J.L. & SOC. PROBS., 419, 420 (1991).
86. *Id.* at 20.
87. Bob Still, Special Report, *Officials Under Assault*, NAT'L ASS'N OF SPORTS OFFICIALS, 2002, available at <http://www.naso.org/rprt/SpeReptAssault.pdf>.
88. *Id.* at 20.
89. FLA. STAT. ANN. § 784.081 (West 2004).
90. New Jersey, § 2712—Assault on sports official.
91. Darryll M. Halcomb Lewis, *Defamation Of Sports Official*, WASHBURN L.J. SYMPOSIUM ON TORTS AND SPORTS, 782-84 (Summer 1999).
92. *Id.*
93. *New York Times v. Sullivan*, 376 U.S. 254, 280 (1964).
94. Lewis, *supra* note 91, at 794.
95. 431 F. Supp. 254, 267 (E.D. Pa. 1977).
96. *Id.*
97. See http://www.bostonherald.com/sports/basketball/celtics/view/20100120celtics_wallace_fined_35k_for_criticizing_refs/.
98. *Id.*
99. Scott Howard-Cooper, *Stern Threatens Suspensions For Continued Criticism Of Referees*, Apr. 22, 2010, available at <http://hangtime.blogs.nba.com/2010/04/22/stern-threatens-suspensions-for-continued-criticism-of-referees/>.
100. *Id.*
101. See McKinney, *supra* note 4, at 223-24.
102. *Id.* at 224-25.
103. Eric Schumacher-Rasmussen, *Hoopster Iverson Agrees To Change Rap Lyrics*, VH1 NEWS, Oct. 16, 2000, available at http://www.vh1.com/news/articles/1430378/20001016/id_1161189.jhtml.
104. McKinney, *supra* note 4, at 235-6. This is illustrated in *National League Baseball Club v. Kuhn, Inc.*, 432 F.Supp. 1213, 1222 (N.D. Ga., 1977), where the Court stated “the judicial interpretation of

- the 'best interests' authority suggests the extremely wide degree of latitude commissioners are granted in making disciplinary determinations."
105. 444 So.2d 54, 58 (Fla. Dist. Ct. App. 1984).
 106. *Ali v. State Athletic Comm'n of New York*, 316 F. Supp. 1246, (S.D.N.Y. 1970).
 107. See *NBA Player Dress Code*, NAT'L BASKETBALL ASS'N, available at http://www.nba.com/news/player_dress_code_051017.html.
 108. Jack Carey, *Wedge blocks, eye black messages banned by NCAA*, USA TODAY, Apr. 16, 2010, available at http://www.usatoday.com/sports/college/football/2010-04-15-ncaa-rules-changes_N.htm.
 109. *Id.*
 110. *NCAA Football Rules and Interpretations*—Section 2, Article 1 Rule 1 (d)—Unsportsmanlike Conduct Fouls.
 111. Carey, *supra* note 108.
 112. *Id.*
 113. Tyler Estep, *Excessive Celebration: Georgia's A.J. Green Didn't Do It*, BLEACHER REPORT, Oct. 5, 2009, available at <http://bleacherreport.com/articles/266661-excessive-celebration-georgias-aj-green-didnt-do-it>.
 114. *Id.*
 115. Ken Sugiura, *SEC official says penalty on Green was a bad call*, ATLANTA-J. CONST., Oct. 5, 2009, available at <http://www.ajc.com/sports/uga/sec-official-says-penalty-155154.html>.
 116. McKinney, *supra* note 4, at 247.
 117. *Id.*
 118. *Braves closer gets suspension and fine reduced*, CNN/SI, Mar. 2, 2000, available at http://sportsillustrated.cnn.com/baseball/mlb/news/2000/03/01/rocker_suspension_ap/.
 119. Joel McNally, *Marge Schott Suspended From Operating Cincinnati Reds*, A.C.L.U., July 29, 1996.
 120. *Id.*
 121. McKinney, *supra* note 4, at 250.
 122. Marc Stein, *NBA Social media guidelines out*, ESPN, Sept. 30, 2010, available at <http://sports.espn.go.com/nba/news/story?id=4520907>.
 123. *Id.*
 124. NBA.com. "Van Gundy bashes tweeting in-game comments," November 5, 2010.
 125. Barry Wilner, *NFL: Social media OK before, after games*, BLEACHER REPORT, Aug. 31, 2009, available at <http://bleacherreport.com/articles/245797-nfl-social-media-ok-before-after-games>.
 126. Evan Hessel, *Why Twitter Scares The NFL*, FORBES, Sept. 2, 2009, available at <http://www.forbes.com/2009/09/02/nfl-pro-football-business-sportsmoney-nfl-football-values-09-twitter.html>.
 127. *Id.*
 128. *Id.*
 129. *Id.*
 130. Wendy Seltzer.org/blog/. NFL/DMCA, February 8, 2007.
 131. *Id.*
 132. Wendy Seltzer.org/blog/. Second Down and Goal? April 5, 2007. This is the response or portion thereof from the NFL that Professor Seltzer posted on her blog.
 133. Mark Maske, *New Proposal in Andre Smith Negotiations*, WASH. POST, Aug. 13, 2009, available at <http://views.washingtonpost.com/theleague/nflnewsfeed/2009/08/new-proposal-in-andre-smith-negotiations.html>.
 134. *Bengals sign first-round pick Smith*, Aug. 30, 2009, available at <http://www.nfl.com/news/story/09000d5d8124341d/article/bengals-sign-firstround-pick-smith-ending-lengthy-holdout>.

Ethan Bordman received an LL.M. in Entertainment Law from the University of Westminster in London, England and an LL.M. in International Sports Law from Anglia University in Cambridge, England. He earned a J.D. from the University of Detroit School of Law and an M.B.A. from the Wayne State University School of Business. He is a member of the EASL's Young Entertainment Lawyers and Motion Pictures Committees. He practices entertainment law in New York, Michigan, and Illinois.

In The Arena

The EASL Section's Publications Committee is seeking authors for its upcoming book about sports law—*In The Arena*.

Chapters will focus on the following issues and topics: NCAA and college/university athletic rules; arena football; right of publicity and privacy of athletes; doping; eminent domain; Pete Rose/gambling and the Baseball Hall of Fame; Title IX; Insurance; and Medical safety issues (i.e., concussions and helmets). We are also accepting other suggestions regarding topics. Please note that this topic list is preliminary and subject to change. The target date for publication is 2013.

The book's editors are Elissa D. Hecker and David Krell.

Elissa is Chair of EASL's Publications Committee and Editor of the *EASL Journal* and Blog. Elissa also co-edited the popular NYSBA books *Entertainment Litigation: Know the Issues and Avoid the Courtroom* and *Counseling Content Providers in the Digital Age*.

David is The Writing Guy™. He is the writer of *Krell's Korner*, an article series in the *EASL Journal*. David has also written more than 60 articles and 100 commentaries about popular culture.

Please email Elissa at heckeresq@yahoo.com if you are interested in contributing to this book.