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Spectator Free Speech: Is the Right to Cheer a First Amendment Free Speech Right?

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ABSTRACT

This paper explores the parameters of the limits of sport spectator under current law. The nature of the venue will be examined. The difference between the arena of a public university, an arena subsidized by public funds or tax incentives, and a privately owned stadium will be compared and analyzed. Paying customers in a place of public accommodation have the right to speak, be heard and not have to hear offensive speech. Is there an assumption of risk involved in the foreseeability of what is known or culturally expected to occur in the sports or entertainment facility? Should a patron who knowingly purchases a ticket to sit in the right field bleachers of Yankee Stadium, the Blue Seats at Madison Square Garden, the Dawg Pound in Cleveland or in the vicinity of the Cameron Crazies at Duke University consent to predictable community behavior including speech? Does the analysis change based on the actions of the player or fan? Wearing a Boston Red Sox hat at Yankee Stadium or inciting fans by making gestures to the crowd or a competitor dancing on the insignia of the opposing team?

Keywords

Freedom of speech, captive audience, assumption of risk

1 INTRODUCTION

As Civility Codes and safe space zones proliferate college campuses in the name of protecting the individual's rights and their fragile sensibilities, invited speakers are protested and shouted down by both the right and the left. Sports fans may believe they are the last bastion of true content neutral freedom of speech because they are paying for that right. As recent high profile controversies involving former Oklahoma City Thunder player Russell Westbrook and a Utah Jazz fan as well as New York Knicks owner James Dolan and a Madison Square Garden ticket holder remind us there are stakeholders who wish to enforce limits.

This paper examines the law as it relates to captive audiences and places of public accommodation. Is the offended listener a child, a student, or a paying customer? As in the case of Westbrook, how does the law factor in if the offended party is a paid/scholarship performer or player? Does the player/performer also have a right to free speech? Under what circumstances may the player respond to the negative speech of a fan? Would the same laws that regulate fan-athlete behavior apply to the accountant-client interaction? (Memorable Seinfeld episode where Jerry gets revenge against Elaine's co-worker who heckled him during his comedy act by going to her place of work and heckling her)

The paper will look at what conduct may be limited or prohibited. Words, signs, actions all create different legal, societal and cultural arguments for controlling speech and behavior under the law. The culture and history of various sports and entertainment events will be looked at in this section. Spectators chanting during a free throw at the professional, collegiate, and high school level are regulated and interpreted differently. Why is LeBron James shooting a free throw to determine the outcome of a Los Angeles Laker-Golden State Warriors basketball game looked at differently than Tiger Woods trying to make a putt on the eighteenth green at Augusta to win the Masters as it relates to regulating crowd conduct?

Finally, policies that comply with the relevant law to maximize the spectator experience for all while allowing player/performers to practice their craft will be recommended. Suggestions will certainly be debatable to First Amendment scholars, proponents of civility standards as well as "old school purists" who object to music at games, celebrations after every sack, signage at arenas, the three-point line and the designated hitter. No apologies will be offered.

2 FANS SPEAK OUT

“I promise you. You think I’m playing. I swear to God, I swear to God, I’ll f**k you up. You and your wife, I’ll f**k you up.” (Bogage, 2019) - NBA Star Guard, Russell Westbrook to a Utah Jazz fan in response to racial taunts directed at him during his game between Oklahoma and Utah in March 2019.

The fan was banned for life from attending games and Westbrook was fined \$25,000 (Press, 2019).

How did we get here? Freedom of Speech and Sports Fans rooting for their teams is encouraged, iconic and ingrained in American culture. (Michener, 1976) The Westbrook incident earlier this year illustrates a line of demarcation exists and in this instance was crossed by both the fans and the player (Arnold, 2019).

“Yelling and screaming have long been...essential parts of the stadium experience” (Rosensweig, 2005) Fans are encouraged to make noise, be louder, and cheer by stadium signage, bands, scoreboards and team employees (Independent contractors?) aka cheerleaders. Fans become a part of the game developing pregame rituals, songs, chants, and even on field participation. Fans and their families are enticed to purchase tickets through comprehensive sales strategies involving standing on the field for the National Anthem next to players to between innings or halftime contests demonstrations and events to after game base running, concerts or youth games (mlb, 2019).

Fan participation through expression, verbal (e.g. cheers/jeers, fight songs, gestures like the Tomahawk Chop, the Wave and Hook’em Horns) and even sartorial such as rally caps, foam fingers and Hawaiian team shirts is encouraged, expected, and a vital component of consumer behavior and decision making. The appropriate legal limitation depends on many factors.

First Amendment scrutiny begins with a public v private sector analysis. Is the stadium restricting a fan’s speech a “government actor? (Burton v Wilmington Parking Authority, 1961) A person’s First Amendment freedom of speech right is a right from government limitation. Private actors have the right to limit speech. (e.g. Yankee fans are not welcome in my house when I watch my pathetic New York Mets play)

Whether a stadium on a private college campus, a stadium on a public college campus or a publically funded stadium of a professional team is a government actor subject to constitutional free speech constraints is still a matter of legal debate (Brentwood Academy v Tennessee Secondary School Athletic Association, 2001).

3 COLLEGE SPORTS

Public Universities are state actors bound by the First Amendment. The Island Federal Credit Union Arena. Home to the men’s and women’s basketball teams of Stony Brook University is constrained in their regulation of fan speech under established First Amendment limitations. (Crue v Aiken, 2004) Private Universities are not bound in the same way by First Amendment limitations. They have broader latitude in enforcing speech codes. Even schools participating in the same NCAA conference such as Duke University and North Carolina State University have differing rights to enforce limitations on speech in their stadia. (Wasserman, 2006)

Whether through NCAA recommendations, school administrators’ recommendations or attorney generals’ assurances of legal compliance, Codes of Conduct limiting fan or student speech on public college campuses rarely survives First Amendment challenge. (Gewolb, 2019)

Attempts to regulate fan civility and good conduct are most successful when they are voluntary. Examples of coaches personally taking the microphone asking for crowd conduct modification is not uncommon. From Bobby Knight (yes I appreciate the irony) to Roy Williams, coaches, players and public address announcers have pleaded for better fan behavior. (Norlander, 2016)

A creative argument to regulate fan speech in a public arena is the captive audience argument. Fans are unwilling listeners with limited options to avoid objectionable speech. The government therefore has an interest and additional rights to control and limit the speech a captive audience listener is subjected to (Hill v Colorado, 2000).

The captive audience argument has been construed very narrowly by the courts. It is unlikely fan speech that is not within one of the established categories of speech not protected under First Amendment analysis would be analyzed differently (Snyder v Phelps, 2011).

4 PROFESSIONAL SPORTS

Somewhere in between publicly owned facilities and privately owned facilities lies the very common hybrid of privately owned and operated professional sports teams playing in facilities that are publically owned or publically subsidized. (Stepman, 2017)

The subsidies vary from tax breaks to land donations to infrastructure costs. (Ballparks, n.d.) This private-public hybrid is the subject of complex “state actor” analysis for First Amendment application.

Yankee Stadium was found to be a “state actor” when the Yankees attempted to ban females from the clubhouse. The court applying the Symbiotic Relationship Test ruled the necessary symbiotic relationship existed between the public and private entities because of the public funds used to fund stadium construction and the city’s funding and role in stadium upkeep. (Ludtke v Kuhn, 1978)

A second “state actor” test utilized by some courts is the Public Function Test. Is the private entity exercising powers that are traditionally exclusively reserved for the state? (Wolotsky v Huhn, 1992) The partnership that owned the Cleveland Indians, Gateway Economic Development, was found to be a state actor in its operation of a sidewalk outside the stadium, Jacobs Field. So when it limited fan speech by prohibiting protests on the sidewalk, a violation of free speech rights was found by the federal court. (United Church of Christ v Gateway Economic Development Corp., 2004)

5 FAN CODES OF CONTRACT

If the “state actor” status is met and constitutional protections attach, only content neutral restrictions will survive constitutional challenge. Restrictions on both profane speech and sexual innuendo have been held as protected speech by the U.S. Supreme Court. So, prohibiting “Fuck Duke” fan speech at the University of Maryland is no more likely to survive a First Amendment challenge as “Fuck the Draft.” (Cohen v California, 1971) In 2017 the United States Supreme Court reaffirmed that there is no hate speech exception in the First Amendment. Racially disparaging hate speech is not unprotected speech. (Matal v Tam, 2017)

Content neutral restrictions by stadia if not overbroad may be enforceable. A balancing of interests test could find a ban on signs, regardless of what the sign says, may be enforceable. The theory being if your sign substantially impedes my view of the game it is a reasonable limitation.

Whether language on a purchased ticket or signage at the ticket booth or website amounts to a contract, adhesion or otherwise, is legally unclear. Limiting contract language that gives up First Amendment is questionable at best.

Rules of conduct prohibiting disruptive behavior or for safety reasons such as throwing objects or running out onto the playing field are routinely enforced and either go unchallenged or are upheld during legal challenges. A North Carolina Appeals Court upheld the lifetime ban imposed on a fan who sexually harassed UNC soccer players and athletic department employees. (Press, Greensboro.com, 2014)

6 CONCLUSION

Teams who attempt to insulate players from fan criticism have many alternatives that do not violate constitutional protections. NBA and College basketball fans are encouraged to participate in the action more than many other sports because of their proximity to the court, bench, and players. As additional netting is installed at baseball stadia and glass boards and protections are expanded at hockey arenas, basketball remains the most vulnerable due to the fan-player proximity. The Raptors and Knicks at the same time seek to monetize Drake and Spike Lee while regulating the behavior of fans who are sold alcohol and provided with accommodations close enough to touch players and coaches.

Limiting fan access to devices which enhance the volume of their cheers/jeers and their physical access to the participants is a more constitutionally feasible approach to avoiding many of the Russell Westbrook, James Dolan and Mark Stevens, the Golden State Warriors minority owner who pushed Toronto Raptor’s Kyle Lowry during Game 3 of the 2019 NBA Finals conflicts.. (Golliver, 2019) While fans hurling insults at players from the stands has been a part of fandom since the beginning of spectatorship, it has only recently become a safety and legal issue.

The inadvertent consequence of creating fan-friendly close to the action experiences is the physical proximity that creates an interrelationship that is not always favorable. Getting fans more involved in the action and creating a closer relationship between fans and players to sell more tickets, sponsorships, and merchandise has resulted in a dynamic that has sometimes also had unanticipated negative, inflammatory, cultural and legal results.

7 REFERENCES

Arnold, J. (2019, March 12). Forbes. Retrieved from Sports Money: <https://www.forbes.com/sites/jeffarnold/2019/03/12/nba-fines-russell-westbrook-25000-utah-jazz-permanently-bans-fan-following-verbal-altercation/#69d14848267a>

Ballparks. (n.d.). Retrieved from <http://ballparks.com>

Bogage, J. (2019, March 15). Washington Post. Retrieved from <https://www.washingtonpost.com/sports/2019/03/15/utah-jazz-owner-backs-russell-westbrook-tells-fans-we-are-not-racist-community/?noredirect=on>

Brentwood Academy v Tennessee Secondary School Athletic Association, 531 U.S. 288 (United States Supreme Court 2001).

Burton v Wilmington Parking Authority, 365 U.S. 715 (US Supreme Court 1961).

Cohen v California, 403 U.S. 15 (United States Supreme Court 1971).

Crue v Aiken, 370 F.3d 668 (U.S. Circuit Court of Appeals (7th Cir.) 2004).

Gewolb, H. S. (2019). FIRE'S Guide to Due Process and Campus Justice. FIRE.

Golliver, B. (2019, June 6). Washington Post. Retrieved from <https://www.washingtonpost.com/sports/2019/06/06/raptors-kyle-lowry-says-fan-who-shoved-him-should-be-banned-all-nba-games-forever/?noredirect=on>

Hill v Colorado, 530 U.S. 703 (United States Supreme Court 2000).

Ludtke v Kuhn, 461 F. Supp. 86 (United State District Court (S.D.N.Y) 1978).

Matal v Tam, 582 U.S. _____ (United States Supreme Court 2017).

Michener, J. A. (1976). Sports in America. Random House.

mlb. (2019). Retrieved from <https://www.mlb.com/mets/tickets/promotions/themes/family-fun>

Norlander, M. (2016, December 1). Retrieved from CBS Sports: <https://www.cbssports.com/college-basketball/news/roy-williams-criticizes-unc-supporters-asks-they-behave-more-like-indianas-fans/>

Press, A. (2014, September 12). Retrieved from Greensboro.com: https://www.greensboro.com/sports/college/n-c-court-upholds-ban-of-fan-from-unc-sports/article_d8764e06-32b7-11e4-889c-001a4bcf6878.html

Press, A. (2019, March 13). Market Watch. Retrieved from <https://www.marketwatch.com/story/russell-westbrook-gets-into-heated-altercation-with-fans-2019-03-12>

Rosensweig, D. (2005). Retro Ball Parks: Instant History, Baseball, New American City. Univ Tennessee Press.

Snyder v Phelps, 562 U.S. 443 (United States Supreme Court 2011).

Stepman, J. (2017, September 26). The Daily Signal. Retrieved from Here's How Much Money the NFL Rakes In From Taxpayers.

United Church of Christ v Gateway Economic Development Corp., 383 F. 3d 449 (United Stats Circuit Court of Appeals (6th Cir.) 2004).

Wasserman, H. M. (2006). Fans, Free Expression, and the Wide World of Sports. University of Pittsburgh Law Review, 525-583.

Wolotsky v Huhn, 960 F. 2d 1331 (United States Circuit Court of Appeals (6th Cir.) 1992).