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Howard M. Wasserman

Florida International University College of Law, howard.wasserman@fiu.edu

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CHEERS, PROFANITY, AND FREE SPEECH

HOWARD M. WASSERMAN*

Free speech controversies on college campuses often are grounded in concerns for civility, politeness, and good taste. They also tend to follow the same path: The government regulates speech in an effort to alter the level of discourse, limit the profane, and protect public and personal sensitivities; courts strike down the regulations as violating the First Amendment freedom of speech;¹ and we end up right where we started.

Colleges and universities may be pursuing a similar course in trying to deal with objectionable and offensive cheering by students at sporting events. University of Maryland officials expressed anger and embarrassment following a men's basketball game against conference rival Duke University in January 2004, when fans chanted and sported t-shirts with the slogan "Fuck Duke" and directed epithets at certain Duke players.² This was one of many incidents of offensive or obnoxious cheering by students throughout the country during the 2004 college basketball season.³ John K. Anderson, chief of the Educational Affairs Division of the Maryland Attorney General's Office, advised the university that a written code of fan conduct applicable at a university-owned and operated athletic facility, if "carefully drafted," would be constitutionally permissible.⁴ University of

* Assistant professor, Florida International University College of Law. I thank Thomas E. Baker, Mark Graber, Matthew Mirow, Peter Oh, and Andre Smith for their comments on drafts; I also benefited from e-mail exchanges with Howard Schweber and Eugene Volokh.

1. See, e.g., *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1182 (6th Cir. 1995) (striking down as vague and overbroad a university policy prohibiting discriminatory speech); *UMW Post, Inc. v. Bd. of Regents of Univ. of Wis.*, 774 F. Supp. 1163, 1180 (E.D. Wis. 1991) (same); *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 867 (E.D. Mich. 1989) (same). Compare Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 489 (1990) ("Because civil libertarians have learned that free speech is an indispensable instrument for the promotion of other rights and freedoms—including racial equality—we fear that the movement to regulate campus expression will undermine equality, as well as free speech.") with Charles Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 436 (1990) ("I fear that by framing the debate as we have—as one in which the liberty of free speech is in conflict with the elimination of racism—we have advanced the cause of racial oppression and have placed the bigot on the moral high ground, fanning the rising flames of racism.").

2. See Eric Hoover, *Crying Foul Over Fans' Boorish Behavior*, CHRON. HIGHER EDUC., Apr. 9, 2004, at A1, A35 [hereinafter Hoover, *Crying Foul*].

3. *Id.*

4. See Letter from John K. Anderson, chief of the Educational Affairs of the Maryland Attorney General's Office to C.D. Mote, Jr., president, University of Maryland (Mar. 17, 2004) 1, 4 (on file with author). See also Hoover, *Crying Foul*, *supra* note 2, at A35–36 (discussing Anderson's advice to the University of Maryland).

Maryland Associate Athletics Director Michael Lipitz began working with a committee of students to devise rules of conduct.⁵ The committee ultimately recommended that the university find ways to encourage students to cheer in non-offensive ways, although rules and formal punishment remain a “last resort” if a proposed standing monitoring committee determines voluntary compliance is ineffective.⁶ Other schools currently have, or are studying the need for, similar codes of conduct.⁷

One can envision resulting guidelines restricting profanity and targeted epithets in signs and chants, as well as imposing a general obligation that students keep their cheering stylish, clever, clean, and classy.⁸ The ostensible purpose behind such guidelines is to enable the majority of fans, particularly children, to enjoy the game unburdened by objectionable or offensive signs, messages, and chants.⁹ The sanction for offensive cheering presumably would be removal from the arena.¹⁰ But any such policy, if enacted and intended to be enforced, should not, and arguably will not, survive First Amendment scrutiny. And we end up right where we started.

The speech at issue is expression by fans related to a sporting event, to all aspects of the game, all the participants in the game, and all the circumstances surrounding the game—a broad new category we can call “cheering speech.” Cheering speech can be directed at teams, players, coaches, officials, executives, administrators, or other fans. It can be in support of one’s own players and team, against the opposing players and team, or even critical of one’s own players and team. It can be about events on the field or it can target broader social and political issues surrounding the game, the players, or sport in general.

In advising the University of Maryland that it could regulate cheering speech, Anderson insisted that fans at sporting events, particularly children, are “captive auditors.”¹¹ They are captives in the arena or stadium; the only way to avoid being

5. See Hoover, *Crying Foul*, *supra* note 2, at A37.

6. See Eric Hoover, *U. of Maryland Students Seek to Police Their Peers at Games*, CHRON. HIGHER EDUC., July 9, 2004, at A32 [hereinafter Hoover, *Policing Peers*].

7. See Hoover, *Crying Foul*, *supra* note 2, at A36.

8. See Hoover, *Policing Peers*, *supra* note 6, at A32 (discussing recommendation from student committee at the University of Maryland that the school suggest “creative witty cheers” for students to use); Hoover, *Crying Foul*, *supra* note 2, at A36–37 (discussing “avuncular letter” from former president of Duke University urging students to “clean up their language and . . . ‘taunt with style’”); *Id.* at A36 (describing situations in which university administrators have advised student fans when their chants cross the line or get too personal); *Id.* (describing efforts to “promote more tasteful cheering”); Mike Norris, *Knight Complimentary of Jayhawks After Game*, UNIV. DAILY KANSAN, Feb. 9, 2004, available at 2004 WL 59463433 (quoting University of Kansas Men’s Basketball Coach as saying “The crowd has the right to come, enjoy, and get after their opponent in a funny, clever, class[y] way”).

9. See Anderson, *supra* note 4, at 3–4 (rejecting the argument that fans expect foul language at the game and arguing that the university may respond to conduct that “continues to offend large numbers of fans”); *Id.* at 3 (emphasizing presence of children in the audience at basketball games as a basis for regulation).

10. See Hoover, *Crying Foul*, *supra* note 2, at A36.

11. See Anderson, *supra* note 4, at 3 (suggesting that the university “could adopt a policy to prohibit vulgar, profane, and indecent language at stadium events where ‘captive auditors,’ including children, would be subjected to it”).

offended by chants or signs is to leave the arena or stop coming to games.¹² This captive status, Anderson argues, alters the ordinary First Amendment burden. Rather than requiring objecting listeners to “avert their eyes” (or ears) to avoid objectionable speech,¹³ the university can force speakers, especially students, to alter their manner of communicating to protect the sensibilities of these captive fans.¹⁴

In reality, the captive audience doctrine is far more limited than Anderson suggests.¹⁵ Courts have found listeners to be captives in only four places: their own homes, the workplace, public elementary and secondary schools, and inside and around reproductive health facilities.¹⁶ And even in those places, captive audience status permits government to limit oral speech but not the same message in written form on pickets, signs, or clothing.¹⁷ One certainly could avert one’s eyes to avoid seeing the epithet written on a sign or on someone’s body.

Of course, one problem with cheering speech is that much of it is oral. There have been complaints not only about shirts and signs, but also about chants and taunts directed at players, coaches, and officials, which other fans may be unable to avoid no matter where in the arena they sit. Objecting listeners must perform the more difficult task of averting their ears to avoid offensive cheers, something that

12. *Id.* (“[P]eople attending the game . . . are captives whose only recourse is to leave the stadium or stop attending games.”).

13. *See* *Cohen v. California*, 403 U.S. 15, 21 (1971) (arguing that people “could effectively avoid further bombardment of their sensibilities simply by averting their eyes”); Howard M. Wasserman, *Compelled Expression and the Public Forum Doctrine*, 77 *TULANE L. REV.* 163, 228 (2002) [hereinafter Wasserman, *Compelled Expression*].

14. *See* Anderson, *supra* note 4, at 4 (“[I]t does not seem reasonable for the University to be utterly without any means to address a phenomenon that has proved to be upsetting to large numbers of fans.”).

15. *See* Eugene Volokh, *Freedom of Speech and Appellate Review in Workplace Harassment Cases*, 90 *NW. U. L. REV.* 1009, 1023 (1996) (“The Court has never held that the mere presence of a captive audience justifies speech restrictions.”). *See also* *Cohen*, 403 U.S. at 21 (“[W]e have at the same time consistently stressed that ‘we are often ‘captives’ outside the sanctuary of the home and subject to objectionable speech.’”).

16. *See* *Hill v. Colorado*, 530 U.S. 703, 716–18 (2000) (recognizing government interest in protecting unwilling listeners from offensive messages on the sidewalk outside reproductive health clinics); *Madsen v. Women’s Health Center, Inc.*, 512 U.S. 753, 767–68 (1994) (holding that patients and workers inside a reproductive health facility are captive); *Frisby v. Schultz*, 487 U.S. 474, 484–85 (1988) (emphasizing the different nature of protection for unwilling listeners in their homes); *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (“Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home”); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 210 (3d Cir. 2001) (“[S]peech may be more readily subject to restrictions when a school or workplace audience is ‘captive’ and cannot avoid the objectionable speech.”); *Muller by Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1541 (7th Cir. 1996) (“Children in public schools are a ‘captive audience’ that ‘school authorities acting *in loco parentis*’ may ‘protect.’”); Volokh, *supra* note 15, at 1023 (“[I]t seems clear that workplace speech is generally protected despite the presence of an arguably captive audience.”). *See also* *Hill*, 530 U.S. at 718 (holding that the captive-audience exception applies when the degree of captivity makes it impractical for an unwilling viewer to avoid exposure).

17. *See* *Madsen*, 512 U.S. at 773 (“[I]t is much easier for the clinic to pull its curtains than for a patient to stop up her ears, and no more is required to avoid seeing placards through the windows of the clinic.”).

children may be particularly unable to do. Courts have upheld regulations on sound and noise levels to protect captive audiences.¹⁸ But government never has been permitted to protect captive auditors by doing what a stadium speech code entails: singling out particular profane or offensive oral messages for selective restriction while leaving related messages on the same subject, uttered at the same volume, undisturbed. In fact, the Supreme Court's captive audience cases have gone to great lengths to emphasize that audience-protecting prohibitions are valid precisely because they apply to all speech in that place, regardless of viewpoint, subject matter, or message.¹⁹

More importantly, the captive audience doctrine never has been applied to listeners in public places of recreation and entertainment, places to which people voluntarily go for the particular purpose of engaging in expressive activity, in this case cheering on their favorite college team. Fans who pay to attend a college basketball game at an on-campus arena are not captive auditors there, any more than an individual walking on a city street who stumbles across an objectionable political rally or an individual whose office sits above the route followed by an objectionable parade.

The Hobson's Choice that Anderson believes this creates for fans—leave the arena and stop attending games or tolerate offensive cheers—is precisely the choice people make in any public place at which expression occurs. It is the same choice that people in the California courthouse had to make when confronted with a jacket emblazoned with “Fuck the Draft,” a message and manner of expression that the Court in *Cohen v. California*²⁰ found to be protected from prosecution under a disturbing-the-peace statute.²¹ In fact, leaving was even less an option there for an objecting auditor whose job required her to remain in the courthouse or an objector having business before the court and likely required to be present on pain of contempt or default.²² It is inconceivable that “Fuck the Draft” is a protected message in a courthouse, but “Fuck Duke” is unprotected amid the cacophony of 20,000 screaming basketball fans. It is even more inconceivable that Paul Cohen's intellectual heir could be prohibited from wearing his jacket at a university sports arena governed by a fan speech code.

The real import of *Cohen* is the principle that a speaker's choice of words and

18. See *Madsen*, 512 U.S. at 772–73 (“The First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests.”); *Ward v. Rock Against Racism*, 491 U.S. 781, 796–97 (1989) (holding that the city has a substantial interest in controlling sound volume at park band shell, both to protect residential neighbors and others using the park); *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949) (“We think it is a permissible exercise of legislative discretion to bar sound trucks with broadcasts of public interest, amplified to a loud and raucous volume, from the public ways of municipalities.”).

19. See *Hill*, 530 U.S. at 719–20 (emphasizing that restriction on speech outside reproductive health facilities was content-neutral, applying to any expression by any demonstrators); *Frisby*, 487 U.S. at 496 (Stevens, J., dissenting) (arguing that prohibition on “targeted picketing” outside house would outlaw sign reading “Get well Charlie—Our Team Needs You” held by fifth-grader outside his friend's house).

20. 403 U.S. 15 (1971).

21. See *id.* at 26; Ronald J. Krotoszynski, *Cohen v. California: “Inconsequential” Cases and Larger Principles*, 74 TEX. L. REV. 1251, 1252 (1996).

22. See Volokh, *supra* note 15, at 1023.

manner of communication are essential elements of the overall message expressed, and government cannot prohibit certain words or manner without also suppressing certain messages in the process.²³ A cheering fan's point of view is bound up in the decision to formulate a particular message by telling an opponent that he "sucks" or by targeting individual issues, such as an opposing player's legal or personal difficulties or an opposing coach's temper.²⁴ The choice of particular topics, words, or phrases in cheers reflects, in part, the intensity, passion, and emotion of fans' feelings in support of their team or in opposition to their rival.²⁵ "Fear the Turtle," "We Hate Duke," and "Duke Sucks" are three ways of cheering for the Maryland Terrapins, as well as expressing the different idea of cheering against Duke. But each conveys a distinct message and point of view and each must be protected within the expressive milieu of a college sports stadium.²⁶

Because word choice and communicative manner are essential components of free speech protection, 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.²⁷ That leads to Justice Harlan's memorable turn in *Cohen* that "one

23. See *Cohen*, 403 U.S. at 26 ("[W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process."); Heidi Kitrosser, *From Marshall McLuhan to Anthropomorphic Cows: Communicative Manner and the First Amendment*, 96 NW. U. L. REV. 1339, 1350 (2002) (arguing that "the *Cohen* Court laid the doctrinal groundwork for the notion that the manner in which one chooses to express one's self can have as much communicative significance as one's underlying message . . ."); Krotoszynski, *supra* note 21, at 1253 ("Ultimately, the ability to define language becomes the ability to control thoughts."); Howard M. Wasserman, *Symbolic Counter-Speech*, 12 WM. & MARY BILL RTS. J. 367, 388–89 (2004) [hereinafter Wasserman, *Symbolic Counter-Speech*] (arguing that "[p]oint-of-view includes everything surrounding and contributing to the message," including choice of words, choice of communicative manner, the choice to appeal to visceral emotion, and the time, place, and circumstance in which the message is presented).

24. See Hoover, *Crying Foul*, *supra* note 2, at A1 (describing controversial examples of cheering speech, including fans waving signs referencing an opposing player's girlfriend who had posed in *Playboy*, chanting "rapist" at a player who had pled guilty to sexual assault, and waving fake joints at a player with a history of drug use). See also JOHN FEINSTEIN, A SEASON ON THE BRINK 181 (1986) (describing students displaying signs at basketball game reading "Give Bobby Knight the chair" (a reference to the opposing coach having thrown a chair during a game the previous year) and "Extradite Bobby Knight" (a reference to the opposing coach having been arrested for assaulting a police officer in Puerto Rico several years earlier)).

25. As the *Cohen* Court stated:

[W]ords are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.

Cohen, 403 U.S. at 26; See Kitrosser, *supra* note 23, at 1349–50 ("[T]he Court's discussion suggested that word choice, and possibly other aspects of manner of speech, can have as much communicative significance . . . and thus should be similarly protected, regardless of the nomenclature used to categorize such communicative choices.").

26. See Wasserman, *Symbolic Counter-Speech*, *supra* note 23, at 390 ("[A] different speaker using a different communicative medium and manner . . . is, in fact, presenting a different point of view—something else worth saying and needing to be said.").

27. See Kitrosser, *supra* note 23, at 1394 ("It is far too easy . . . to transform an intuitive

man's vulgarity is another's lyric,"²⁸ and the inability to make principled distinctions means "the Constitution leaves matters of taste and style so largely to the individual."²⁹ Government cannot define a baseline for when particular protected content becomes too offensive or objectionable, thus the First Amendment refuses to allow government to even try.³⁰

The baseline for offensiveness cannot be the most sensitive person in the crowd; the level of permissible expression cannot be reduced to what the least tolerant listener will accept.³¹ Nor can offensiveness be measured from the standpoint of children in the crowd, because the level of discourse for adults cannot be reduced to what is fit or proper for children.³² The university sports arena exemplifies the problem of the mixed audience—how can government regulate speech in the interest of protecting children from harmful speech when the speech reaches a mixed audience of children and adults? The pithy answer is that it simply cannot do so.³³ There is no, and can be no, baseline for oral speech before a mixed audience; either children unavoidably hear some "adult" expression or we reduce the level of speech to what is suitable for a sandbox.³⁴

Moreover, even if government could define a baseline by reference to the target audience of particular expression (perhaps meaning that acceptable cheering

sense of dislike for, or unworthiness of, a particular instance of expression, into a conclusion that a restriction upon such expression is not particularly problematic.").

28. Cohen, 403 U.S. at 25.

29. *Id.*

30. This was the key point in *Hustler Magazine, Inc. v. Falwell*:

If it were possible by laying down a principled standard to separate the one from the other, public discourse would probably suffer little or no harm. But we doubt that there is any such standard, and we are quite sure that the pejorative description 'outrageous' does not supply one. 'Outrageousness' in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression.

485 U.S. 46, 55 (1988).

31. See *Cohen*, 403 U.S. at 25 ("Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us.").

32. See *Reno v. ACLU*, 521 U.S. 844, 875 n.40 (1997) ("Government may not 'reduc[e] the adult population . . . to . . . only what is fit for children.'") (quoting *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 128 (1989)); *Butler v. Michigan*, 352 U.S. 380, 383 (1957) (striking down a state law whose effect was to "reduce the adult population of Michigan to reading only what is fit for children" and stating that to do so was to "burn the house to roast the pig").

33. See *Reno*, 521 U.S. at 876 (stating that restricting speech whenever it is known that one member of the intended audience is a minor would burden adult-to-adult communication, where there is no effective way to filter out non-adult members of the mixed audience). See also MARJORIE HEINS, NOT IN FRONT OF THE CHILDREN: "INDECENCY," CENSORSHIP, AND THE INNOCENCE OF YOUTH 256 (2001) ("The ponderous, humorless overliteralism of so much censorship directed at youth not only takes the fun, ambiguity, cathartic function, and irony out of the world of imagination and creativity; it reduces the difficult, complicated, joyous, and sometimes tortured experience of growing up to a sanitized combination of adult moralizing and intellectual closed doors.").

34. See *Reno*, 521 U.S. at 875 (quoting *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74-75 (1983)).

speech at a college basketball game is different from at a high school game or a little league game), the target audience for college athletics is not young children. The target is the university community, particularly eighteen to twenty-two-year-old undergraduate students, adults whom the team is thought to represent and on whose behalf the team is thought to be playing.³⁵ While families—including children of faculty, alumni, or area residents—perhaps are an expected part of that audience, they are not the target and should not provide the guidepost for the appropriate manner of fan expression.

In seeking to control abusive cheering speech, universities apparently fail to distinguish among expressive forms. On one hand is blatant profanity; on the other hand are epithets or chants that do not employ any of the seven dirty words, but that target opposing teams, players, coaches, or officials, perhaps with references to a player's personal life or legal difficulties. The presumption in Anderson's recommendation to the University of Maryland was that a public university could serve the same interest in protecting children through a single conduct policy that restricted "Fuck Duke" t-shirts and chants, as well as signs or taunts targeting a player accused of sexual assault. One can imagine efforts to require students to keep things "polite" or "positive"—cheer for your team and your players, but do not jeer or criticize the opponent, opposing coaches, or officials. Even conceding a governmental interest in protecting sensitive and juvenile ears from the seven dirty words in public spaces, government goes a step beyond when it begins to restrict particular non-profane messages that bear on the game played on the court or on the participants in that game.³⁶

Perhaps it turns on the subtlety of the cheers. Students are obvious when they use profanity, chant "rapist," or wave fake joints.³⁷ But what of Maryland students chanting or wearing t-shirts bearing the slogan "Duck Fuke?" This is an obvious play on the profanity that created controversy at Maryland, drawing meaning only by reference to that profanity, but it does not use (as opposed to hinting at) dirty words. Should hinting at profanity be enough to justify a restriction on a protected

35. See JAMES L. SHULMAN & WILLIAM G. BOWEN, *THE GAME OF LIFE: COLLEGE SPORTS AND EDUCATIONAL VALUES* 3–4 (2001) ("Sports can play an important role in creating a campus ethos—in part through public ritual (the Saturday afternoon game), but also through the banner on the dorm room wall and the stories on the back page of the student paper."). On the other hand, student attendance actually has declined in recent years. See *id.* at 273 ("The long-term decline in student attendance at college sporting events reminds us, however, that this contribution of intercollegiate competition to the campus ethos has become less and less important.").

36. The sexual assault example presents an additional wrinkle: Jeering or taunting a player who has been accused of sexual assault may be, at least in part, a social or political statement, protesting or drawing attention to the fact that this player continues to be allowed to play for the school despite his off-court conduct or to the problem of athlete misbehavior generally. In a similar vein, one might expect opposing fans to taunt University of Colorado football Coach Gary Barnett, who retained his job as of April 2005 despite reports of sex, drugs, and alcohol being used to recruit players, numerous allegations of sexual assault by female students against football players, and Barnett's own objectionable remarks about a female former football player. See *Colorado Reinstates Football Coach Despite Scandal*, N.Y. TIMES, May 28, 2004, at D7. Such jeers might function in part as criticism of Barnett's management (or lack thereof) of his players and program and a protest of his keeping his job despite the scandal.

37. See *supra* note 24 and accompanying text.

manner of expression? Or what if the offensiveness is lost on those who might otherwise be offended? Students at the University of Kansas were praised for their cleverness during the 2004 season when they chanted "salad tosser" at Texas Tech Basketball Coach Bob Knight.³⁸ On the surface, this was a reference to Knight's infamous verbal altercation several days earlier with the Texas Tech chancellor at a salad bar in Lubbock, Texas.³⁹ But the phrase also is a slang term for a particular sexual act, a double entendre the students almost certainly knew (which explains why they chose that particular phrase), but many listeners likely did not.

Interestingly, Anderson supported his advice to the University of Maryland with reference to broadcast indecency cases. His argument was that, as with indecent radio broadcasts, offensive language at the basketball game comes without warning, is heard by children, and cannot be avoided by the captive audience.⁴⁰ This argument ignores the narrow context to which the Court took great pains to limit *Pacifica*—the "uniquely pervasive" broadcast medium of radio or television received in the privacy of the home⁴¹—and extends it to a heretofore-protected expressive forum. Anderson apparently defines "broadcast" to mean any loud oral expression directed to and heard by a large crowd, even if not through government-owned airwaves. By that expansive definition, any mass-dissemination of oral expression to a sizeable audience constitutes "broadcasting," subject to the same child-protective limitations that long have applied only to radio and television broadcasting, never to other media or to public spaces at large.⁴²

At the same time, Anderson ignored the one case that arguably supports the university's position. In upholding a state law requiring speakers to remain eight feet away from unwilling members of their target audience when leafleting, counseling, or protesting outside reproductive health facilities, the Supreme Court in *Hill v. Colorado*⁴³ emphasized a legitimate government interest in protecting unwilling listeners from being bombarded by unwelcome and objectionable messages even on public streets and sidewalks, those places historically intended and recognized as forums for expression.⁴⁴ *Hill* suggested that an objecting

38. See Norris, *supra* note 8.

39. *Id.*

40. See Anderson, *supra* note 4, at 3 ("Foul-mouthed fans 'broadcast' their words to the audience just as offensive language was broadcast by *Pacifica*.") (referencing *Denver Area Educ. Telecom. Consortium v. FCC*, 518 U.S. 727 (1996) and *FCC v. Pacifica Found.*, 438 U.S. 736 (1978)).

41. See *Pacifica*, 438 U.S. at 748; *Id.* at 744 (narrowing the prohibition to the factual context of that case); *Id.* at 750 (emphasizing the narrowness of the holding in the case); *id.* at 762 (Powell, J., concurring in part and concurring in the judgment) ("The result turns instead on the unique characteristics of the broadcast media . . ."); Thomas G. Krattenmaker & Marjorie L. Esterow, *Censoring Indecent Cable Programs: The New Morality Meets the New Media*, 51 *FORDHAM L. REV.* 606, 628 (1983) ("The Court's opinion is, in fact, narrowly confined to cases concerning both the precise language conveyed and the particular medium of communication. . . . *Pacifica* is about dirty words on radio.").

42. See *United States v. Playboy Entertainment Group*, 529 U.S. 803, 814 (2000) (stating that "unique problems" of cable and broadcast media may justify regulations that are unacceptable in other contexts).

43. 530 U.S. 703 (2000).

44. See *id.* at 717–18.

listener suffers a degree of captivity even in a public space, triggering a governmental interest in protecting that listener's sensibilities.⁴⁵ Of course, like *Pacifica*, *Hill* may be limited to a specific context: face-to-face encounters between women seeking reproductive health care who do not wish to engage in conversation and anti-abortion advocates trying to "counsel" them or "educate" them against their choices.⁴⁶ But *Hill* recognizes (arguably for the first time) that government may, in a public forum, balance the interests of the speaker against those of the unwilling listener and cause the former to yield.⁴⁷ Cheering speech, however, generally will not entail such face-to-face, close-proximity encounters.

Dissenting in *Cohen*, Justice Blackmun derided Paul Cohen's conduct as "an absurd and immature antic."⁴⁸ By contrast, Justice Harlan's majority opinion insisted that the expression at issue was, in fact, of "no small constitutional consequence."⁴⁹ Free speech scholars rightly laud *Cohen* for recognizing and applying the principle that government must leave matters of expressive taste and style to the individual.⁵⁰ One could dismiss offensive or profane signs, t-shirts, and chants at college basketball games as similarly absurd and immature antics. However, like *Cohen*, the instant skirmish about what cheering speech should and will be permitted at public university sporting events is of no small constitutional consequence.

College sports have become, for better or for worse, a central part of college life

45. See *id.* at 718 ("[W]e are merely noting that our cases have repeatedly recognized the interests of unwilling listeners in situations where 'the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure.'").

46. See *id.* at 718 n. 25. Justice Scalia argued in dissent:

What is before us, after all, is a speech regulation directed against the opponents of abortion, and it therefore enjoys the benefit of the 'ad hoc nullification machine' that the Court has set in motion to push aside whatever doctrines of constitutional law stand in the way of that highly favored practice.

Id. at 741 (Scalia, J., dissenting). See also Kitrosser, *supra* note 23, at 1406 (emphasizing that "the communicative impact of face-to-face speech is particularly direct, immediate, and personally focused").

47. Compare *Hill*, 531 U.S. at 718 (rejecting the suggestion that the interests of unwilling listeners cannot be balanced against the rights of speakers) with *id.* at 771 (Kennedy, J., dissenting) ("In a further glaring departure from precedent we learn today that citizens have a right to avoid unpopular speech in a public forum."). See also Kitrosser, *supra* note 23, at 1369 (arguing that *Hill* is based on concerns that "close-proximity speech might prove emotionally disturbing to listeners").

48. *Cohen v. California*, 403 U.S. 15, 27 (1971) (Blackmun, J., dissenting). See also Krotoszynski, *supra* note 21, at 1254, 1254 n.24 (discussing Justice Blackmun's characterization of Cohen's actions).

49. See *Cohen*, 403 U.S. at 15. See also Krotoszynski, *supra* note 21, at 1255 (praising Justice Harlan's "ability to get beyond the strong emotional pull of the facts before the Court").

50. See HEINS, *supra* note 33, at 78 (arguing that *Cohen* was "an important step away from the notion that the First Amendment protected only polite and rational discourse"); Krotoszynski, *supra* note 21, at 1251 ("I like the case because it speaks eloquently to values that transcend its facts, and does so in a way that vindicates core civil liberties . . ."); Wasserman, *Symbolic Counter-Speech*, *supra* note 23, at 431 ("[C]ore free speech values typically leave to the individual speaker the choice of whether to be fully, or even minimally, effective or persuasive or simply obnoxious.").

and culture.⁵¹ The prevailing belief among university administrators is that successful athletic teams, particularly high-profile football and basketball teams, are a source of university pride, publicity, media attention, revenue, and increased donations.⁵² The non-athlete students who pack the stadium provide an essential ingredient of that overall culture. Students are encouraged to attend games and make noise, to be excited and passionate about their school, to cheer for their team and players (and against the opposing team and players), and to create a playing environment that will be intimidating or distracting to the opponent and will give their team a home-court advantage.⁵³ Indeed, it is somewhat ironic that Duke players were targets of the taunts that prompted schools to consider arena speech codes. Duke students have attained the widest notoriety for their sometimes-clever, sometimes-offensive cheering speech and the headaches they give to opposing teams and players.⁵⁴

The university-owned basketball arena is the vital forum at which fans (primarily, although not exclusively, student fans) engage in cheering speech. The controversy over what fans can say there brings us to public forum analysis.⁵⁵ The

51. See, e.g., SHULMAN & BOWEN, *supra* note 35, at 1 ("One fact is clear to all: however one feels about them, intercollegiate athletic programs have become thoroughly institutionalized within American higher education."); ANDREW ZIMBALIST, UNPAID PROFESSIONALS: COMMERCIALISM AND CONFLICT IN COLLEGE SPORTS 12 (1999) (describing the "cultural dominance" of intercollegiate sports over campus life).

52. See SHULMAN & BOWEN, *supra* note 35, at 4 ("These 'bonding' effects can be important in attracting students and in making the campus a pleasant place for everyone. They are also thought to sustain alumni loyalty and, over the long run, contribute to the financial strength of the institution and to its reputations within its state and beyond."); *Id.* at 273 ("Campus interest in attending sports events still serves as one way of bringing students, faculty, alumni/ae, and townspeople together under the school's banner."); *Id.* at xix-xx (describing how Northwestern University's surprise run to the Rose Bowl in 1995 captured the imagination of college sports fans all over the country); ZIMBALIST, *supra* note 51, at 14-15 ("The logic is that athletic triumphs bring notoriety which, on the one hand, entice more student applications, thereby allowing for greater selectivity in admissions, and, on the other, stimulate alumnae and local boosters to open their wallets for the school's endowment.").

That the prevailing belief may be inaccurate, (see SHULMAN & BOWEN, *supra* note 35, at 309; ZIMBALIST, *supra* note 51, at 15) does not change the point that this is the basic theory under which colleges and universities operate big-time athletic programs and under which they construct arenas in which the games can be played before large crowds of screaming fans.

53. See DANIEL L. WANN, ET AL., SPORTS FANS: THE PSYCHOLOGY AND SOCIAL IMPACT OF SPECTATORS 62 (2001) ("[F]ans often view their favorite teams as an extension of themselves. Fans experience the 'thrill of victory' when their team wins and the 'agony of defeat' when their team loses."); *Id.* at 65 (noting that many college teams have built new arenas in recent years hoping to attract greater numbers of fans); Hoover, *Crying Foul*, *supra* note 2, at A36 ("[S]tudents know that administrators welcome most of the noise they make."); *Id.* (describing students who view themselves as participants in the event and ways in which universities encourage that); *Id.* (stating that the student-section seats at Maryland's on-campus arena rise at a steep angle to create a "wall of fans" on top of the action).

54. See Hoover, *Crying Foul*, *supra* note 2, at A36 (describing the views of one Duke student as to the effect student cheering has on opposing players and the efforts to keep students from crossing the line with their taunts).

55. See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001); *Ark. Educ. Television Comm'n*, 523 U.S. 666, 677 (1998); *Int'l Soc'y of Krishna Consciousness v. Lee*, 505 U.S. 672, 678 (1992); Calvin Massey, *Public Fora, Neutral Governments, and the Prism of*

stadium grandstand should be understood as a limited designated public forum for fans and for cheering speech.⁵⁶ The university builds, owns, and operates the arena and intentionally invites fans to fill the stands for specifically expressive purposes—speaking at a high volume to support, oppose, cheer, jeer, praise, criticize, and even taunt teams, players, coaches, and officials in that game.⁵⁷

Seats at the arena are open to all members of the university community and public at large willing to pay a determinate admission fee.⁵⁸ Although space limits access to a first-come-first-serve basis, no special permission is necessary to purchase a ticket.⁵⁹ No inquiry is made into a fan's intended (legal) activities at the game, her intended cheering interests, or the content of her cheering speech; no one is asked which team she intends to root for or how she intends to root. Having designated a public forum for fans to express themselves on the game, a public university has ceded control over the manner in which they do so,⁶⁰ at least within the parameters of protected speech.⁶¹ Profanity or chants by members of a large audience, separated from the playing field, targeting the participants in the game on the field below cannot conceivably fall into any unprotected First Amendment categories. This is particularly true when the asserted government interest underlying the proposed limitation on the scope of the forum—protecting the captive auditor—is inapplicable.⁶²

That the manner of expressing a message affects the point of view expressed again becomes vital to the analysis. Although government can define the contours of a forum, it cannot define them as to allow some viewpoints and not others.⁶³

Property, 50 HASTINGS L.J. 309, 321–22 (1999).

56. See *Good News Club*, 533 U.S. at 106; *Ark. Educ. Television*, Comm'n., 523 U.S. at 677 (1998); *Lee*, 505 U.S. at 678; Massey, *supra* note 55, at 321–22.

57. See *Ark. Educ. Television*, 523 U.S. at 679 (holding that government creates a designated public forum when it makes its property generally available to a certain class of speakers or speech); Steven G. Gey, *Reopening the Public Forum—From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535, 1570 (1998) (arguing for an analysis focusing on the physical and operative characteristics of the property and the compatibility between speech and other uses of the forum); Massey, *supra* note 55, at 323 (arguing that when the “public is invited in for some speech,” some type of public forum is created).

58. See *Forsyth County v. The Nationalist Movement*, 505 U.S. 123, 133–34 (1992) (striking down county ordinance that allowed permit fee for public forum to vary based on the content of the speaker's expression); *Id.* at 130 (criticizing ordinance for leaving amount of fee to the discretion of the administrator).

59. See *Arkansas Educ. Television*, 523 U.S. at 679–80 (stating that general access for speakers to a location suggests the creation of a public forum).

60. See *Lee*, 505 U.S. at 696 (Kennedy, J., concurring in the judgments) (arguing for recognizing “limits on the government's control over speech activities on property suitable for free expression”); Massey, *supra* note 55, at 336 (“Since the objective of negative free speech theory is to prevent governmental departures from neutrality in public discourse, the first question is whether the purpose of any given speech restriction is to alter the content or outcome of public discourse.”).

61. See *Cohen v. California*, 403 U.S. 15, 20 (1971) (holding that the profane message on Cohen's jacket did not fall into any categories of unprotected expression such as fighting words or words provoking a hostile crowd to imminent violence); Krotoszynski, *supra* note 21, at 1252 (emphasizing that *Cohen* was not about unprotected categories of speech).

62. See *supra* notes 11–19 and accompanying text.

63. See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106–07 (2001) (stating that

The university could not define the forum as a place only for pro-Maryland cheering speech or as a forum only for positive, non-critical cheering speech—both are plainly viewpoint-discriminatory exclusions from the forum. That same limitation arguably denies the university the power to make the forum available for fans shouting “Go Terps,” but to exclude fans shouting the different viewpoint (on the same subject of cheering for Maryland) represented by “Fuck Duke.”⁶⁴

Alternatively, under a more speech-protective approach, government may limit a forum to particular speakers or subject matters only in very broad and general terms.⁶⁵ Government may create a limited public forum for “art,” but cannot limit it only to “decent art.”⁶⁶ Similarly, the university can open the arena as a forum for “cheering speech,” but cannot limit it only to “non-profane cheering speech.” Fans must remain free to jeer, as well as cheer, players and teams, and to do so in as blatant, obnoxious, or profane a manner as they wish.

A more expansive and speech-protective approach defines a public forum where speech is compatible with—or does not interfere with—other uses of the space.⁶⁷ For present purposes, that means actual interference with the game or with the ability of other fans to watch the game and to engage in their own cheering speech from their place in the stands. Because some cheering speech, in some form, is an expected, encouraged part of college sports, by definition no cheering speech can interfere or be incompatible with the game, unless the university impermissibly examines the substance of some expression. Interference must take the form of more than objecting fans “not liking” what is being said by other fans or being drowned out by louder chants; interference does not build a listener’s veto or heckler’s veto into the forum.⁶⁸ Rather, incompatibility or interference arises only

the state’s power to reserve a forum for certain groups or subjects does not allow the state to discriminate against speech on the basis of viewpoint); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829–30 (1995); Massey, *supra* note 55, at 322 (arguing that the Court has avoided inconsistencies in government behavior by concluding that “a limited public forum can be created by content-based but not viewpoint-based means”).

64. *Cf. Rosenberger*, 515 U.S. at 831 (holding that university had engaged in impermissible viewpoint discrimination in excluding speech about campus issues from a Christian perspective from a public forum created for discussion of campus issues).

65. *See Gey*, *supra* note 57, at 1608.

66. *Id.*; Wasserman, *Compelled Expression*, *supra* note 13, at 224.

67. *See Int’l Soc’y of Krishna Consciousness v. Lee*, 505 U.S. 672, 698–99 (1992) (Kennedy, J., concurring in the judgments) (emphasizing that a public forum should be defined by “whether expressive activity would tend to interfere in a significant way with the uses to which the government has as a factual matter dedicated the property” and whether “expressive activity would be appropriate and compatible” with other uses); *Gey*, *supra* note 57, at 1576:

The question whether an instrumentality of communication is a public forum depends on whether expressive activity would tend to interfere in a significant way with the government’s own activities in that forum. If the government cannot prove the strong likelihood of significant interference, the forum is deemed ‘public’ and the speech must be permitted, subject only to the application of narrow time, place, and manner regulations.

See also Massey, *supra* note 55, at 328–29 (“The ‘incompatibility’ test appears to presume that all public property is open to speech unless the government can demonstrate that the particular speech is ‘incompatible’ with the ‘normal’ governmental uses of the public property.”).

68. *See Kitrosser*, *supra* note 23, at 1369–70, 1370 n.170 (describing listener’s veto as law allowing unwilling audience members legally to halt another’s expression); Wasserman, *Symbolic*

when one fan's expression or actions actually prevent others from watching the game or from engaging in their own cheering speech, as by blocking their view of the action.⁶⁹

This makes the forum about more than expression focused on the teams, players, coaches, officials, and game at hand. Speech about sport in general is compatible with this designated public forum. Messages of protest—be it Paul Cohen's anti-war jacket,⁷⁰ a chant criticizing the university's over-emphasis on athletics at the expense of academics,⁷¹ or a sign criticizing the funding of women's sports at the expense of men's sports⁷²—belong in this particular forum. In fact, most political speech and counter-speech becomes fair game at sporting events, given that the national anthem is played in a patriotic symbolic ritual prior to the start of every game.⁷³

One might suggest at this point that the university simply include on all tickets a warning to fans: "In purchasing this ticket, you agree to comport yourself in a proper, civil, and non-profane manner." Thus warned, fans cannot complain if they are excluded from the arena when their cheering becomes obnoxious or offensive. But the point of public forum analysis is that the First Amendment

Counter-Speech, *supra* note 23, at 416–17 ("The private listener's objections to offensive speech only become an impermissible heckler's veto when the listener causes government to exercise sovereign power to restrict that speech to protect her sensibilities.").

69. *Cf. Barrett v. Khayat*, No. CIV. A. 397CV211BA, 1999 WL 33537194, at *4 (N.D. Miss. 1999) (upholding state university ban on flags larger than twelve by fourteen inches at football stadium, grounded in concerns for safety and enjoyment of the game by other fans).

70. A present-day wearer might be protesting recent proposals to revive the draft or criticizing the policy of extending military reservists' tours overseas as a back-door draft. *See* Terence Neilan, *Kerry Turns Up the Volume with Litany of Critiques for Bush*, NYTIMES.COM, at <http://www.nytimes.com/2004/09/01/politics/campaign/01CNDKERR.html?ex=1110603600&en=f3470c7b0a58b2c1&ei=5070> (Sept. 1, 2004).

71. *See* KATHRYN JAY, *MORE THAN JUST A GAME: SPORTS IN AMERICAN LIFE SINCE 1945* 193 (2004) ("The growing revenue streams available in college basketball led schools to make decisions based more on finances than on what might be best for their student-athletes."); SHULMAN & BOWEN, *supra* note 35, at 3 ("As many faculty critics have pointed out, there is no direct connection between organized athletics and the pursuit of learning for its own sake."); *Id.* at 27 ("As time passed, even the less intensive programs, which were once viewed as ancillary, consumed more and more institutional resources—money, admissions slots, and administration time."); ZIMBALIST, *supra* note 51, at 150–51 (describing disputes as to whether big-time athletic programs make profits or drain revenues).

72. *See* JAY, *supra* note 71, at 188 (describing arguments that notions of equality underlying support for women's sports should not take precedence over the demands of the marketplace and the creation of revenues); SHULMAN & BOWEN, *supra* note 35, at 124 ("[O]ne can empathize with the male athletes and coaches who feel that their sports programs now face restrictions, and who in some cases see gender equity as the cause of those restrictions . . ."); ZIMBALIST, *supra* note 51, at 6 (describing arguments by university athletic directors that "it is justifiable to put more resources into men's than women's sports, because men's sports generate more revenue"); Kimberly A. Yuracko, *One for You and One for Me: Is Title IX's Sex-Based Proportionality Requirement for College Varsity Athletic Positions Defensible?*, 97 NW. U. L. REV. 731, 732 (2003) (describing criticism of Title IX for guaranteeing female students proportional athletic opportunities even if they have lower levels of athletic interest and ability than male students).

73. *See* Wasserman, *Symbolic Counter-Speech*, *supra* note 23, at 392–93. *See also id.* at 395, 419, 443 (describing controversy surrounding female basketball player who turned her back to the flag during the national anthem as a protest against the war in Iraq).

prohibits the university from imposing this admission condition and from limiting the expression that occurs in the forum in this way. The problem is not one of notice or how that notice is provided; it is the impermissibility of the condition on speech.

Traditional public forums, such as streets and parks, possess special status because they “time out of mind, have been used for purposes of assembly.”⁷⁴ They attained that status because they historically had been the places that a speaker would go to communicate with the masses, to speak the truth, and to win (or maintain) support for her causes.⁷⁵ But speakers took to the streets in the first instance because that is where they would find an audience—that is where they could find people to whom to speak. The value of the street corner as an expressive forum lessens once the street corner ceases to be a primary relevant gathering place.⁷⁶ Instead, there must be new and alternative government-operated public forums at which that audience can be reached.⁷⁷ Because big-time college sports have become so central to the university community, the basketball arena has become that new public gathering place. It is the new public forum at which a speaker will find a mass audience, at least for speech consistent with the game and the broad mix of cheering speech that permeates the event. Having built and opened the forum, the university cannot exclude the speaker who wishes to engage in cheering speech merely because her message may be objectionable or offensive to others in that forum.

Perhaps one may not particularly enjoy sitting, or having one’s children sit, in an arena while students direct taunts and expletives at players, coaches, and officials throughout the game. But commitment to a neutral free speech principle means tolerating a great deal of speech that one personally does not like or support.

Moreover, there is nothing wrong with hortatory efforts by the university, coaches, and, most importantly, other students to encourage fans, especially student fans, to keep their cheering stylish, clean, classy, and creative.⁷⁸ The “voluntary compliance” policies recommended by the student committee at the University of Maryland included a profane-t-shirt exchange program, contests that

74. See *Int’l Soc’y of Krishna Consciousness v. Lee*, 505 U.S. 672, 679 (1992).

75. See Gey, *supra* note 57, at 1538.

76. See *id.* at 1538–39 (arguing that “the street corner has long since ceased to be a focal point” of free speech, but that there necessarily are places within a society and culture in which uninhibited expression flows).

77. See C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 170–71 (1989) (arguing that government must provide new and different locations for expressive activity); Lillian R. BeVier, *Rehabilitating the Public Forum Doctrine*, 1992 SUP. CT. REV. 79, 101–02 (stating that the Enhancement Model of the First Amendment “sometimes imposes affirmative duties on government to maximize the opportunities for expression”); Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1409 (2001) (“[T]he needs of individuals for free speech opportunities have not been satisfied by the traditional public forum.”); Massey, *supra* note 55, at 328 (arguing that under affirmative theories “[g]overnments are obligated to make every effort to promote more speech”); Wasserman, *Compelled Expression*, *supra* note 13, at 197 (“[D]emocratic government is obligated to provide such forums for private speakers and for private expression to ensure that people can speak and be heard . . .”).

78. See Hoover, *Crying Foul*, *supra* note 2, at A36; Norris, *supra* note 8.

would encourage students to create appropriate signs and banners, having coaches address students about the need for good sportsmanship and fan behavior, and distributing newspapers with “creative witty cheers” for students to use.⁷⁹ Perhaps it worked. Duke played at Maryland in men’s basketball in February 2005, and the Maryland fans reportedly behaved, for the most part.⁸⁰

The point is that a state university may not formally punish—even via non-criminal sanction such as removal from the arena—those students who depart from generally accepted norms by loudly wielding a particular loaded word to inform officials or opposing players that they are not very good at the game they play.

79. See Hoover, *Policing Peers*, *supra* note 6, at A32.

80. See Eric Prisbell, *Terps Topple No. 7 Duke*, Wash. Post, Feb. 13, 2005, at E1.

