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CURBING THEIR ENTHUSIASM: A PROPOSAL TO REGULATE OFFENSIVE SPEECH AT PUBLIC UNIVERSITY BASKETBALL GAMES

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It is the biggest basketball game of the year. Your alma mater is playing its most hated rival for first place. As the game approaches, your mind drifts back to when you were a student. You remember the excitement of past victories, the anguish of defeat, and the relationships formed over the common thread of school spirit. This is the essence of your school's tradition manifested in a single, two-hour event known as the rivalry game. What better way to spend a Saturday afternoon with your two grandsons than to introduce them to feelings of pride and tradition embodied in a game.

As the game's intensity heats up, the student section, usually the role model for school spirit, gets carried away. Instead of focusing on the court, your grandsons are fixated on the expletive-filled cheers echoing throughout the arena. Fearful that such a display will encourage profane behavior by your grandsons, you feel obligated to leave the game early. In fact, you cannot even listen to the game on the drive home, as the same profane language would echo throughout the backseat of your car. Instead of sharing some of the most memorable experiences of your youth with your grandsons, Saturday afternoon has turned into an exercise in child rearing. Rather than discussing the tradition of the school you love so dearly, you are left to explain why the students' actions are inappropriate and irresponsible.

If you went to the University of Maryland, this is the dilemma you might well face in deciding whether to attend the school's basketball

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games.[1] Due to an incident in January 2004,[2] the University of Maryland has been thrust into the spotlight of an issue that is sweeping across public universities nationwide:[3] What can (and should) be done in response to rabid cheering sections that push the limit of common decency?

The University turned to the Maryland Attorney General's Office for answers.[4] In response to the University's request, John K. Anderson, an assistant attorney general for the state of Maryland, issued a four-page memorandum.[5] Anderson concluded that "the University may constitutionally adopt a carefully drafted policy that prohibits offensive speech at" the University's arena.[6] The rationale underlying Anderson's conclusion was his belief that it would be unreasonable to leave the University with no remedy for "a phenomenon that has proved to be upsetting to large numbers of fans."[7] However, Anderson suggested that the University consider the practical problems associated with such a regulation before deciding to adopt a policy regulating offensive speech.[8]

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1. *See* Molly Knight, *University of Maryland Sports Fans Urged To Clean Up Behavior*, BALT. SUN, May 4, 2004, at 1A (chronicling an incident at the University where a man left a basketball game early due to profane student cheers). Clifford Kendall, the Chairman of the Board of Regents at the University of Maryland, referred to the fans' behavior as "simply atrocious" and "just sad" at a game he was forced to leave early to prevent his two grandchildren from being exposed to profanity. *Id.*

2. *See* Barry Svrluga & Craig Whitlock, *Pro-Terps and Profane: U-Md. Officials Seek Legal Guidance on How To Deal with Vulgar Fans*, WASH. POST, Jan. 30, 2004, at D11 (describing an incident where student fans chanted profanities at an opposing player during the waning seconds of a nationally televised game).

3. *See* Knight, *supra* note 1 (referring to the University of Maryland as "center court in a national debate over how to limit rowdy fans without violating free speech"); *cf.* Howard M. Wasserman, *Cheers, Profanity, and Free Speech*, 31 J.C. & U.L. 377, 377 (2005) (mentioning the incident at the University of Maryland as "one of many incidents of offensive or obnoxious cheering by students throughout the country during the 2004 college basketball season"); Erik Brady, *Big Ten's Last Resort on Taunting: Disbanding Student Sections*, USA TODAY, Feb. 6, 2004, at A5 (quoting the Big Ten Commissioner who admitted being "aware that the use of obscenities at games is a big issue in certain places" and remarked that "[n]o one feels good about it").

4. *See* Svrluga & Whitlock, *supra* note 2.

5. *See* Memorandum from the State of Maryland Office of the Attorney General to the University of Maryland President C. D. Mote, Jr. (Mar. 17, 2004), http://www.oag.state.md.us/Topics/offensivespeech.pdf [hereinafter Memorandum].

6. *Id.* at 1.

7. *Id.* at 4.

8. *Id.* Among the factors that Anderson suggested the University should weigh in its decision are the danger that the regulation fails as overbroad or vague, the degree to which fans are put on notice of what is prohibited, the practicality of creating a mechanism for challenging a sanction under the policy, and the employee training required in order to ensure proper enforcement. *Id.* Others familiar with the controversy at the University of Maryland agree that an official policy may not be the best solution. *See* Evan Millar, *Officials get OK To Draft Fan Behavior Guidelines*, DIAMONDBACK (College Park, Md.),

Having received favorable legal advice, the University has proposed to take additional steps to deter inappropriate fan conduct in the wake of the controversy.[9] Furthermore, a sixteen-member student task force conducted a forum in the spring of 2004 to assist the University by formulating suggestions on how the administration might curtail inappropriate behavior at sporting events.[10] However, the University has yet to adopt an official regulation banning certain cheers from its arena.[11]

The Big Ten Conference, however, has chosen to regulate certain fan conduct in hopes of improving fan sportsmanship.[12] In 2003, the Conference passed an initiative holding institutions responsible for

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Mar. 29, 2004, at 1, *available at* http://www.diamondbackonline.com/News/Diamondback/archives/2004/03/29/news1.html (explaining that the co-president of the University's American Civil Liberties Union chapter has warned the school that "going down this legal road would be dangerous") [hereinafter Millar, *Fan Behavior Guidelines*]; Evan Millar, *Students Question Effectiveness of Possible Fan Behavior Policy*, DIAMONDBACK (College Park, Md.), Mar. 30, 2004, at 1, *available at* http://www.diamondbackonline.com/News/Diamondback/archives/2004/03/30/news2.html (quoting the University of Maryland Student Government Association athletics liaison as saying "[u]ltimately [we] want to get [the crowd] to the level where it's self-policed") [hereinafter Millar, *Students Question Policy*]. *But see Incivility and Profanity at Athletic Events, Part II*, 2004 SYNFAX WKLY. REP. 3226, 3227 (concluding that "coaches are more likely to call for better sportsmanship, and fans are more likely to display it, if everyone understands that the more extreme forms of poor sportsmanship are subject to legal sanction").

9. *See* Evan Millar, *Fan Behavior Report Released*, DIAMONDBACK (College Park, Md.), Jun. 24, 2004, at 1, *available at* http://www.diamondbackonline.com/News/Diamondback/archives/2004/06/24/news2.html (listing various recommendations proposed by a student committee including opening a basketball practice to discuss sportsmanship, issuing a newspaper with alternative cheers on game day, and holding a T-shirt exchange program where students could turn in their indecent shirts for new ones); Rick Snider, *Maryland OKs Restrictions on Terps Vulgarity*, WASH. TIMES, Mar. 26, 2004, at A1 (discussing a courtside chat by the basketball coach and a pregame video discouraging vulgar language used for the six home games following the incident). The associate athletic director has also expressed his intent to take additional measures by referring to the Maryland Attorney General's Memorandum as "encouraging because it allows us to take additional steps." *Id.*

10. *See* Knight, *supra* note 1; Evan Millar, *Williams To Join Other Top Terp Coaches at Fan Behavior Forum*, DIAMONDBACK (College Park, Md.), Apr. 29, 2004, at 1, *available at* http://www.diamondbackonline.com/News/Diamondback/archives/2004/04/29/news6.html. Among the prominent figures that spoke at the forum were the head coaches of the University's football and basketball teams, the Chairman of the Board of Regents for the University, the President of the Student Government Association, and a representative of ESPN. Knight, *supra* note 1.

11. *See* Millar, *Fan Behavior Guidelines*, *supra* note 8 (explaining that the University still needs to consider whether to implement an official policy in light of other avenues available to curtail fan behavior). The University is fearful of student backlash from an official speech code and would much prefer the student body to self-police. *See* Millar, *Students Question Policy*, *supra* note 8.

12. *See* Press Release, Big Ten Conference, Big Ten Conference Enacts Crowd Control Initiatives (Aug. 14, 2003) (on file with author) [hereinafter Press Release].

"school sponsored student sections that attack or single out student-athletes."[13] Enforcement of the initiative is known as the three-strike system.[14] The first time a school's student section violates the initiative the school receives a private warning.[15] The second violation results in a public warning.[16] Finally, a third violation requires the school to disband the student section altogether.[17] In defending the initiative, the Commissioner of the Big Ten Conference asserts that regulating certain fan conduct is "not a free speech issue" and that "[n]o one has a constitutional right to attend a basketball game."[18]

Considering that the regulation of student cheers at basketball games concerns a variety of parties' interests (the students' right to freedom of expression, the patrons' right to enjoy the game free from undesired exposure to vulgarity, the parent's right to prevent his or her child from exposure to offensive conduct, and the University's fiscal and public image concerns), the legal issue should continue to receive increased attention as long as scholars disagree as to what measures may be taken without violating the First Amendment.[19] Regardless of whether resorting to regulatory sanctions is the preferred way of deterring offensive conduct at public sporting events,[20] the underlying issue of whether a public university may constitutionally regulate expressive fan conduct at an on-campus sporting event needs to be addressed.[21]

This Comment evaluates a public university's ability to regulate offensive cheers used by those attending on-campus basketball games in

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13. *Id.*

14. *See* Brady, *supra* note 3.

15. *Id.*

16. *Id.*

17. *Id.* The Big Ten Commissioner confirmed that several schools have been warned privately. *Id.*

18. *Id.*

19. *Compare* Memorandum, *supra* note 5, at 1 ("[T]he University may constitutionally adopt a carefully drafted policy that prohibits offensive speech . . . ."), *and Incivility and Profanity at Athletic Events*, *supra* note 8, at 3226 ("It's our view that campus officials have latitude to develop reasonable regulations that limit *disruptive conduct* at sports facilities . . . ."), *with* Wasserman, *supra* note 3, at 391 ("[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 . . . .").

20. *See supra* note 11.

21. Recent concern over fan behavior at university sporting events is well-documented. *See* Marc Fisher, *Lewd, Crude and in Need of Rules*, WASH. POST, Apr. 25, 2004, at C1 (commenting that the University of Maryland has "a responsibility to tell students that certain behavior is not okay in certain places at certain times"); Knight, *supra* note 1 (documenting that the University of Maryland has lost football recruits and could potentially lose television revenue as a result of inappropriate fan conduct); *cf.* Laura Vecsey, *When Sport Is Sullied by Vulgarity, We All Lose*, BALT. SUN, Feb. 3, 2004, at E1 (saying that fans need a reality check).

light of the First Amendment. This Comment first chronicles the Supreme Court's definition of what constitutes "speech" under the First Amendment. Next, this Comment examines the Supreme Court's decision in *Cohen v. California*[22] and explains when the government may regulate offensive speech. Then, this Comment discusses case law subsequent to the *Cohen* decision involving the captive audience doctrine. This Comment next analyzes the ability of a public university to regulate the speech of those attending campus sporting events in light of Supreme Court precedent. Finally, this Comment proposes a model regulation that would pass First Amendment scrutiny as a proper method of protecting individual privacy interests from offensive speech at basketball games.

I. WHAT CONSTITUTES SPEECH: WHEN FIRST AMENDMENT SCRUTINY WOULD APPLY TO A PUBLIC UNIVERSITY REGULATION

The First Amendment expressly provides that "Congress shall make no law . . . abridging the freedom of speech."[23] It is well accepted that public universities are acting "under color of state law" and therefore may not infringe upon a citizen's First Amendment rights without violating the Due Process Clause of the Fourteenth Amendment.[24] Therefore, the threshold determination is whether the cheers that the public universities seek to regulate constitute speech under First Amendment case law.[25]

In *Spence v. Washington*,[26] the Supreme Court promulgated a test for determining when First Amendment scrutiny is applicable.[27] In *Spence*,

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22. 403 U.S. 15 (1971).

23. U.S. CONST. amend. I.

24. *See* NCAA v. Tarkanian, 488 U.S. 179, 191-93 (1988) (establishing that "[a] state university without question is a state actor"); Lee Ann Rabe, Case Note, *Sticks and Stones: The First Amendment and Campus Speech Codes*, 37 J. MARSHALL L. REV. 205, 206 n.3 (2003). Private universities are not engaged in state action and therefore normally would not owe duties arising from the Constitution not to interfere with free speech. *See* Shelley v. Kraemer, 334 U.S. 1, 13 (1948) ("[T]he principle has become firmly embedded in our constitutional law that the action inhibited by . . . the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful."); Rabe, *supra*, at 206 n.3.

25. *See Incivility and Profanity at Athletic Events*, *supra* note 8, at 3226 (expressing the fact that the Court distinguishes between "expression" and "conduct" and that "campus officials have latitude to develop reasonable regulations that limit *disruptive conduct* at sports facilities, even if such conduct has expressive elements"); Memorandum, *supra* note 5, at 1 n.2 (noting that the University has an "argument that [the cheers are] better regarded as *conduct* outside the scope of First Amendment protection").

26. 418 U.S. 405 (1974).

27. *Id.* at 410-11.

the Supreme Court found that a person flying a United States flag bearing a peace sign was participating in conduct protected by the First Amendment because "[a]n intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it."[28] The Court has allowed regulation of conduct that has incidental limitations on First Amendment freedoms when the government's interest is focused on the noncommunicative aspects of the conduct.[29] However, the Court will not apply the lower level of scrutiny when the connection between the government's interest and the conduct regulated "depend[s] on the likely communicative impact of [the] expressive conduct."[30] Therefore, as long as the regulation focuses on the communicative impact of expressive conduct, the Court will apply heightened First Amendment scrutiny.[31]

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28. *Id.*; *see also* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505-06 (1969) (finding that students wearing black armbands in school to protest a war was expressive conduct protected by the First Amendment); *cf.* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984) (accepting, but not expressly agreeing with, a lower court's finding that a group of people sleeping in a park overnight to manifest the plight of the homeless was expressive conduct protected by the First Amendment). Scholars commonly recognize the language in *Spence* as the test used to determine whether First Amendment analysis is pertinent. *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW § 11.3.6.1, at 1026-28 (2d ed. 2002).

29. *See Clark*, 468 U.S. at 293; City Council v. Taxpayers for Vincent, 466 U.S. 789, 804-05 (1984); Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 647-48 (1981); United States v. O'Brien, 391 U.S. 367, 376 (1968); CHEMERINSKY, *supra* note 28, § 11.3.6.2, at 1028-32.

30. Texas v. Johnson, 491 U.S. 397, 411 (1989); *see also* Boos v. Barry, 485 U.S. 312, 319-21 (1988) (plurality opinion); Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 536-38 (1980); Police Dep't v. Mosley, 408 U.S. 92, 95-96 (1972). The Court in *Johnson* found that a statute imposing criminal sanctions for desecrating the American flag suppressed free expression and was thereby subjected to heightened scrutiny, explaining that "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Johnson*, 491 U.S. at 414.

31. *See supra* notes 26-30 and accompanying text. However, some scholars believe that the line between content-based and content-neutral regulations is not as clear as the Court makes it out to be. *See, e.g.*, Wilson R. Huhn, *Assessing the Constitutionality of Laws That Are Both Content-Based and Content-Neutral: The Emerging Constitutional Calculus*, 79 IND. L.J. 801, 814-27 (2004); Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 142-50 (1981). For a summary of the case law involving communicative conduct, see CHEMERINSKY, *supra* note 28, § 11.3.6.2, at 1028-32.

II. THE LIMITATION ON "OFFENSIVE SPEECH": THE PLIGHT OF THE UNWILLING LISTENER

Although the First Amendment provides broad protection for the expression of ideas, it has never been interpreted as an absolute bar to speech regulation.[32] The Court has articulated that:

> "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words . . . . [S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[33]

The Court has not placed vulgar and offensive language among the categories of speech undeserving of First Amendment protection.[34] However, it has used similar language in explaining that "[b]ecause content of [vulgar, offensive, and shocking speech] is not entitled to absolute constitutional protection under all circumstances, we must consider its context in order to determine whether the [regulatory] action [is] constitutionally permissible."[35] Therefore, while any regulation of

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32. *See* Beauharnais v. Illinois, 343 U.S. 250, 255-57 (1952). However, one Justice has interpreted the First Amendment as an absolute bar to speech regulation. *See* Konigsberg v. State Bar of Cal., 366 U.S. 36, 61 (1961) (Black, J., dissenting). Justice Black "d[id] not subscribe to [the idea that certain classes of speech are not protected by the First Amendment] for [he] believe[d] that the First Amendment's unequivocal command that there shall be no abridgement of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the 'balancing' that was to be done in this field." *Id.* For a summary of Justice Black's interpretation of the First Amendment, see generally Edmond Cahn, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549 (1962) and Sylvia Snowiss, *The Legacy of Justice Black*, 1973 SUP. CT. REV. 187, 227-37 (1973).

33. *Beauharnais*, 343 U.S. at 255-57 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942)).

34. *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726, 747-48 (1978) (plurality opinion) (concluding that public broadcasts of sexually explicit language do not fall under any category not protected by the First Amendment); Hess v. Indiana, 414 U.S. 105, 106-07 (1973) (finding that an antiwar protester telling a police officer that "[w]e'll take the fucking street later" was speech protected by the First Amendment); Cohen v. California, 403 U.S. 15, 16, 20 (1971) (finding that the First Amendment protected a man walking into a courthouse with a jacket displaying the phrase "Fuck the Draft" from criminal prosecution).

35. *Pacifica*, 438 U.S. at 747-48 (plurality opinion).

offensive speech will receive strict scrutiny,[36] the First Amendment does allow offensive speech to be regulated under certain circumstances.

The Court explained the government's right to regulate offensive speech in the landmark case *Cohen v. California*.[37] In this case, a man wearing a jacket bearing the words "Fuck the Draft" entered a California courthouse.[38] He was convicted of violating a section of the California Penal Code that prohibited "maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person . . . by . . . offensive conduct."[39] The Court of Appeal of California upheld the man's conviction and sentence of thirty days in prison by defining his offensive conduct as "behavior which has a tendency to provoke *others* to acts of violence or to in turn disturb the peace."[40] The Court of Appeal concluded that "on the facts of this case, '[i]t was certainly reasonably foreseeable that such conduct might cause others to rise up to commit a violent act against the person of the defendant or attempt to forceably [sic] remove his jacket.'"[41]

The Supreme Court reversed Cohen's conviction.[42] After quickly establishing that the regulation involved the content of speech,[43] the Court found that Cohen's conviction could not be justified under the fighting words doctrine because his statement was not directed towards any person in particular, and that nobody could have reasonably

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36. *See Hess*, 414 U.S. at 107-08 (explaining that Hess' conviction could only be upheld if his offensive language passed the strict scrutiny test adopted in *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)). However, not all scholars agree that the Court has been consistent in requiring all content-based restrictions on protected speech to be narrowly tailored to serve a compelling state interest. *See, e.g.*, Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2417 (1996). After reviewing the Court's history of applying strict scrutiny, Volokh concludes that "some content-based speech restrictions are unconstitutional even though they are narrowly tailored to a compelling state interest." *Id.* at 2460. Volokh proposes that the Court abandon the strict scrutiny analysis in favor of applying "categorical rules and categorical exceptions." *Id.*

37. 403 U.S. 15 (1971).

38. *Id.* at 16-17.

39. *Id.* at 16.

40. *Id.* at 17.

41. *Id.* (alteration in original) (quoting People v. Cohen, 81 Cal. Rptr. 503, 506 (Ct. App. 1969)). From this analysis, the Court of Appeal of California seemed to place the statute within the "fighting words" doctrine, which the Supreme Court has recognized as speech falling outside of the protection of the First Amendment. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942) (defining the "fighting words" doctrine as those words "plainly tending to excite the addressee to a breach of the peace").

42. *Cohen*, 403 U.S. at 26.

43. *Id.* at 18 (asserting that the conviction "quite clearly rests upon the asserted offensiveness of the *words* Cohen used to convey his message to the public" and not on "separately identifiable conduct").

interpreted the statement as a direct, personal insult.[44] Therefore, the Court concluded that Cohen's speech did not fall within any category of speech unprotected by the First Amendment.[45]

In particular, the Court discussed why Cohen's speech was protected even though it was addressed to an unwilling listener.[46] While recognizing that one is sometimes captive in public and subject to offensive speech, the Court concluded that "[t]he ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner."[47] In explaining the reversal of Cohen's conviction, the Court emphasized that the "portion of the statute upon which Cohen's conviction rests evinces no concern . . . with the special plight of the captive auditor."[48] Due to this explanation, the principle has since been labeled the "captive audience doctrine."[49]

In applying this test to the facts of *Cohen*, the Court provided valuable insight into the captive audience doctrine.[50] The Court classified the unwilling listeners present at the courthouse as having "a more

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44. *Id.* at 20. The Court also pointed out that Cohen's words could not be justified as obscene expression because "such expression must be, in some significant way, erotic." *Id.* The Court defines obscenity as works that depict or describe sexual conduct "which, taken as a whole, appeal to the prurient interest in sex [in a] patently offensive way, and . . . do not have any serious literary, artistic, political, or scientific value." Miller v. California, 413 U.S. 15, 24 (1973); *see also infra* note 151.

45. *Cohen*, 403 U.S. at 19-20 ("[T]his case cannot be said to fall within those relatively few categories of instances where prior decisions have established the power of government to deal more comprehensively with certain forms of individual expression simply upon a showing that such a form was employed.").

46. *Id.* at 21.

47. *Id.* This has become the standard by which the government may regulate offensive speech without offending the First Amendment. *See* Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n, 447 U.S. 530, 541 (1980); FCC v. Pacifica Found., 438 U.S. 726, 764 (1978) (Brennan, J., dissenting); Erznoznik v. City of Jacksonville, 422 U.S. 205, 209-11 (1975); Hess v. Indiana, 414 U.S. 105, 108 (1973); 16A AM. JUR. 2D *Constitutional Law* § 475 (1998); 1 RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 5:3 (2004).

48. *Cohen*, 403 U.S. at 22.

49. *See, e.g.*, Edward J. Eberle, *Hate Speech, Offensive Speech, and Public Discourse in America*, 29 WAKE FOREST L. REV. 1135, 1190 (1994) (referencing the *Cohen* test as the captive audience doctrine); Marcy Strauss, *Redefining the Captive Audience Doctrine*, 19 HASTINGS CONST. L.Q. 85, 85 (1991) ("The concept that the government may regulate speech delivered to an unwilling listener is usually referred to as the 'captive audience doctrine.'"); Michael R. Sullivan, Annual Survey of South Carolina Law, *Court Finds No First Amendment Conflict in Ban on 'Loud and Unseemly' Speech*, 46 S.C. L. REV. 22, 27 (1994) (labeling the *Cohen* opinion as "one of the Supreme Court's few majority discussions of the captive audience principle").

50. *Cohen*, 403 U.S. at 21-26.

substantial claim to a recognizable privacy interest" than when "strolling through Central Park," but did not equate the interest to that of the privacy of one's home.[51] However, the Court emphasized that the privacy interest of the unwilling listener does not absolutely defeat the speaker's First Amendment right.[52] Ultimately, the Court concluded that:

> Given the subtlety and complexity of the factors involved, if Cohen's "speech" was otherwise entitled to constitutional protection, we do not think the fact that some unwilling "listeners" in a public building may have been briefly exposed to it can serve to justify this breach of the peace conviction where, as here, there was no evidence that persons powerless to avoid appellant's conduct did in fact object to it, and where that portion of the statute upon which Cohen's conviction rests evinces no concern, either on its face or as construed by the California courts, with the special plight of the captive auditor, but, instead, indiscriminately sweeps within its prohibitions all "offensive conduct" that disturbs "any neighborhood or person."[53]

For these reasons, along with the unwilling listeners' ability to avoid the message by simply "averting their eyes,"[54] the Court found that Cohen's

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51. *Id.* at 21-22.

52. *Id.* at 21. The Court recognized that "Cohen's distasteful mode of expression was thrust upon unwilling or unsuspecting viewers," but explained that "the mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense." *Id.* Turning to the facts of the case, the Court contrasted the unwilling listeners in the California courthouse with those "subjected to the raucous emissions of sound trucks blaring outside their residences." *Id.* This was a reference to *Kovacs v. Cooper*, 336 U.S. 77 (1949), a case where the Court found an ordinance barring sound trucks from broadcasting in a loud and raucous manner on the streets consistent with the First Amendment. *Id.* at 89 (plurality opinion). In *Kovacs*, Justice Reed reasoned that "[t]he right of free speech is guaranteed every citizen that he may reach the minds of willing listeners and to do so there must be opportunity to win their attention," thus implying that the listener must have an ability to avoid unwanted communication (in order for the speaker to "lose" their attention). *Id.* at 87. In distinguishing *Cohen* from *Kovacs*, the *Cohen* Court concluded that "[t]hose in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes." *Cohen*, 403 U.S. at 21.

53. *Cohen*, 403 U.S. at 22.

54. *Id.* at 21. Cases subsequent to *Cohen* illustrate the importance of this factor. *See, e.g.*, Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 72 (1983) (concluding that a homeowner is not captive to unsolicited mail because "[r]ecipients of objectionable mailings . . . may '"effectively avoid further bombardment of their sensibilities simply by averting their eyes."'" (quoting *Cohen*, 403 U.S. at 21)); Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n, 447 U.S. 530, 542 (1980) (reiterating that one is not captive in the home from unwanted mail by using the "avert your eyes" language from *Cohen*); Erznoznik v. City of Jacksonville, 422 U.S. 205, 212 (1975) (invalidating an ordinance

conviction violated his constitutional right to free expression.[55] Therefore, although the *Cohen* case hinted that the government may regulate offensive conduct under certain circumstances,[56] it has left a gray area in the law as to when that action may be exercised consistent with the First Amendment.[57]

III. THE EVOLUTION OF THE CAPTIVE AUDIENCE: WHEN AND WHERE THE GOVERNMENT MAY REGULATE OFFENSIVE SPEECH TO PROTECT THE PRIVACY OF THE UNWILLING LISTENER

A. The Right to Privacy at Home

Case law subsequent to *Cohen* involving the privacy of the home has provided valuable insight into how the captive audience doctrine should be applied. One such situation in which these privacy interests are implicated is public radio broadcasts.[58] In *FCC v. Pacifica Foundation*,[59] the dispute before the Court focused on whether the FCC had a right to impose sanctions against Pacifica Foundation for broadcasting an indecent, but not obscene, message across public airways during the daytime.[60] After assuming that the First Amendment normally would protect the speech in question,[61] the Court reiterated that "we must consider [the speech's] context in order to determine whether the Commission's action was constitutionally permissible."[62]

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because "the offended viewer readily can avert his eyes" from a drive-in movie screen); Spence v. Washington, 418 U.S. 405, 412 (1974) (finding that people passing by a flag on the street were not a captive audience because "[a]nyone who might have been offended could easily have avoided the display").

55. *See Cohen*, 403 U.S. at 26.

56. *See id.* at 21; *see also* 16A AM. JUR. 2D *Constitutional Law* § 475 (1998) (using the language from *Cohen* in explaining when the government may shut off discourse to protect the listener); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-19, at 948-49 (2d. ed. 1988) (citing *Cohen* to explain when a state actor can restrict offensive speech without violating the First Amendment).

57. *See* William S. Cohen, *A Look Back at* Cohen v. California, 34 UCLA L. REV. 1595, 1602-04 (1987) (discussing the ambiguity of the *Cohen* opinion) (author not related to the plaintiff); Franklyn S. Haiman, *Speech v. Privacy: Is There a Right Not To Be Spoken To?*, 67 NW. U. L. REV. 153, 193 (1972) (explaining that the *Cohen* test "is of little utility unless the phrases 'substantial privacy interests' and 'essentially intolerable manner' are defined"); Strauss, *supra* note 49, at 86 (commenting that the captive audience doctrine "has become a slogan without substance"). For an interesting summary of *Cohen v. California*, see Ronald J. Krotoszynski, Jr., Cohen v. California: *"Inconsequential" Cases and Larger Principles*, 74 TEX. L. REV. 1251, 1252-56 (1996).

58. *See infra* notes 59-67 and accompanying text.

59. 438 U.S. 726 (1978).

60. *Id.* at 729-31.

61. *Id.* at 746 (plurality opinion).

62. *Id.* at 747-48.

The Court upheld the FCC sanctions, emphasizing that "the airwaves confront[] the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."[63] In distinguishing *Pacifica* from *Cohen*, the Court explained that "broadcasting is uniquely accessible to children" and the broadcast in question "could have enlarged a child's vocabulary in an instant."[64] The Court also distinguished the case from *Cohen* by stressing that *Pacifica* did not involve or justify a criminal prosecution for violating the regulation.[65] The concurrence agreed with the majority's reasoning that the "result turns . . . on the unique characteristics of the broadcast media, combined with society's right to protect its children from speech generally agreed to be inappropriate for their years, and with the interest of unwilling adults in not being assaulted by such offensive speech in their homes."[66] In conclusion, *Pacifica* reiterates the Court's recognition of the government's ability to regulate speech otherwise protected by the First Amendment in order to safeguard the privacy rights of its citizens.[67]

However, the Court has not yet perceived the privacy of the home as an absolute bar to all unwanted messages.[68] In *Bolger v. Youngs Drug Products Corp.*,[69] the Court found a statute that prohibited the mailing of

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63. *Id.* at 748 (majority opinion). The Court has recognized the state's interest in protecting the privacy of the home as "certainly [one] of the highest order in a free and civilized society" and that "[p]reserving the sanctity of the home . . . is surely an important value." Carey v. Brown, 447 U.S. 455, 471 (1980); *see also* SMOLLA, *supra* note 47, §§ 5:4-:5 (discussing the importance the Court places on preserving the privacy of one's home).

64. *Pacifica*, 438 U.S. at 749.

65. *Id.* at 750.

66. *Id.* at 762 (Powell, J., concurring). Justice Powell did not sign on to Part IV-B of Justice Stevens' opinion due to his belief that Justice Stevens had judged the value of the speech, a conclusion that Powell believed was the right of each individual to make rather than the Court. *Id.* at 761; *cf.* Cohen, *supra* note 57, at 1608-09 (explaining that while *Pacifica* "can . . . be explained as [a] narrow, fact-specific holding[]" it is "[m]ore significant . . . for First Amendment theory in situations beyond the specific problem of offensive and profane speech[that *Pacifica*] contradict[s] some of the major premises of Justice Harlan's opinion in *Cohen*").

67. *Pacifica*, 438 U.S. at 748-51; *see also* Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 744-47 (1996) (plurality opinion) (upholding regulation of public access cable channels as analogous to the regulation of public broadcasts in *Pacifica*); Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 127-28 (1973) (discussing "the reality that in a very real sense listeners and viewers [of broadcast materials] constitute a 'captive audience'").

68. *See* Strauss, *supra* note 49, at 91 ("At times, the Court has placed some obligation even on persons within the home to reject the speech."); James J. Zych, Note, Hill v. Colorado *and the Evolving Rights of the Unwilling Listener*, 45 ST. LOUIS U. L.J. 1281, 1294-95 (2001) (providing an excellent summary of how the Court addresses the rights of the unwilling listener at home in the context of mail cases).

69. 463 U.S. 60 (1983).

unsolicited contraceptive advertisements to private homes unconstitutional.[70] The Court reasoned that the unwilling listener could simply avoid the message by averting his or her eyes.[71] Similarly, in *Consolidated Edison Co. of New York v. Public Service Commission*,[72] an order of the New York Public Service Commission suppressing inserts in utility bills that involved controversial issues of public policy was found to be unconstitutional.[73] The Court concluded that an unwilling listener "may escape exposure to objectionable material simply by transferring the bill insert from envelope to wastebasket."[74] These cases illustrate that the Court places great weight on the listener's ability to avoid the message, going so far as to say "[t]he First Amendment permits the government to prohibit offensive speech as intrusive when the 'captive' audience cannot avoid the objectionable speech."[75]

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70. *Id.* at 75. The exact language of the statute that Youngs Drug Products Corporation violated prohibited "'[a]ny unsolicited advertisement of matter which is designed, adapted, or intended for preventing conception is nonmailable matter . . . shall be disposed of as the Postal Service directs.'" *Id.* at 61 (alteration in original). In addition to civil liability, there was also a criminal statute that made it a crime to knowingly use the mail in violation of the civil statute. *Id.* at 62.

71. *Id.* at 72 (citing Cohen v. California, 403 U.S. 15, 21 (1971)). In coming to this conclusion, the Court compared *Bolger* to *Rowan v. United States Post Office Dept.*, 397 U.S. 728 (1970), explaining that in *Rowan* the recipient of unwanted mail had to take affirmative steps to put the mailer on notice that he or she no longer wished to receive the mailer's materials. *Bolger*, 463 U.S. at 72. The Court distinguished *Bolger* by explaining that "we have never held that the Government itself can shut off the flow of mailings to protect those recipients who might potentially be offended." *Id.* In *Bolger*, the Court found that the statute could not be justified as protecting a captive audience because the unwilling listener could simply throw the message in the trash, which the Court concluded was "'an acceptable burden, at least so far as the Constitution is concerned.'" *Id.* (quoting Lamont v. Comm'n of Motor Vehicles, 269 F. Supp. 880, 883 (S.D.N.Y. 1967)).

72. 447 U.S. 530 (1980).

73. *Id.* at 544. This conflict arose after the Consolidated Edison Company of New York placed a bill insert inside their monthly billing statement advocating the use of nuclear power. *Id.* at 532. In response, the Natural Resources Defense Council (NRDC) petitioned the Public Service Commission of the State of New York to open Consolidated Edison's billing envelopes in order for the NRDC to send out a rebuttal against the positives of nuclear power. *Id.* The Commission denied NRDC's request and barred all political bill inserts, concluding that the recipients constituted a captive audience who could not have views on controversial topics forced upon them. *Id.* at 532-33. Subsequently, Consolidated Edison sought judicial review of the Commission's order barring future use of political bill inserts. *Id.* at 533.

74. *Id.* at 542. The Court used this quote to point out that the New York "Court of Appeals erred in its assessment of the seriousness of the intrusion." *Id.* at 541.

75. Frisby v. Schultz, 487 U.S. 474, 487 (1988) (citing *Consol. Edison Co.*, 447 U.S. at 542); *compare id.* (allowing the state to regulate protesters within a certain distance of one's home because the "resident is . . . trapped within the home, and . . . is left with no ready means of avoiding the unwanted speech"), *and Rowan*, 397 U.S. at 737-38 (upholding a regulation which prohibited solicitors from contacting certain households via mail when the household has notified the mailer that he or she desired no further contact

B. The Right to Privacy Outside the Home

The Court has also addressed the unwilling listener's right to avoid offensive speech outside of the home.[76] In *Lehman v. City of Shaker Heights*,[77] Justice Douglas, writing a concurring opinion, argued that an unwilling listener on a public streetcar is considered a captive audience and has a right "to be free from forced intrusions on [his or her] privacy."[78] Since such an audience is unable to leave the premises to avoid hearing the message, Justice Douglas concluded that the speaker could not "force his message upon an audience incapable of declining to receive it."[79] In essence, the concurrence determined that the City of Shaker Heights could prohibit political ads in order to protect the captive audience's privacy interests.[80] The majority opinion agreed with Justice Douglas's assertion, at least in part, when it held that "the risk of imposing upon a captive audience" was one factor that legitimized the City's actions.[81]

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from the mailer), *with* Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton, 536 U.S. 150, 168 (2002) (finding a state's regulation of door-to-door soliciting unconstitutional because the unwilling listener could simply place a no solicitation sign in his or her yard or refuse to engage in conversation with the solicitor), *and* Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 127-28 (1989) (creating a blanket prohibition on indecent interstate phone calls was found to be unconstitutional because services were provided only after the listener took affirmative steps to receive the calls).

76. *See, e.g.*, Hill v. Colorado, 530 U.S. 703 (2000) (patrons in vicinity of abortion clinic); Madsen v. Women's Health Center, Inc., 512 U.S. 753 (1994) (patrons in vicinity of abortion clinic); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) (audience of student assembly); Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981) (patrons of public fair); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) (vicinity of drive-in movie theater); Se. Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (theatre audience); Spence v. Washington, 418 U.S. 405 (1974) (passersby of flag); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (patrons of public transportation).

77. 418 U.S. 298 (1974).

78. *Id.* at 307 (Douglas, J., concurring). The City of Shaker Heights had contracted out the management of advertising space on the transit system to Metromedia on the condition that Metromedia would not put up political advertising. *Id.* at 299-300. Harry J. Lehman, a candidate for State Representative, petitioned Metromedia to place an ad on a public streetcar on his behalf. *Id.* at 300. When Lehman's request was denied, he petitioned for judicial relief. *Id.* at 301.

79. *Id.* at 307.

80. *Id.* ("In my view the right of the commuters to be free from forced intrusions on their privacy precludes the city from transforming its vehicles of public transportation into forums for the dissemination of ideas upon this captive audience.").

81. *Id.* at 304 (majority opinion). The disagreement between the majority and Justice Douglas centered on the majority's discussion of commercial speech. *See id.* at 303-04. The majority found that Shaker Heights' decision to allow commercial advertisements but not political advertisements on the city transit system was a reasonable means of increasing revenues and minimizing the risk of political favoritism. *Id.* at 304. Justice Douglas did not rule on the validity of the commercial advertising program because it was not at issue on appeal, but did voice his disagreement with the majority by saying that

The Supreme Court came to a similar conclusion in *Bethel School District Number 403 v. Fraser*.[82] In *Bethel*, a student was punished for using graphic language in a speech to high school students despite warnings from his teachers that use of inappropriate language could result in severe consequences.[83] After recognizing that the school had a legitimate interest in protecting minors from exposure to offensive language,[84] the Court concluded that the school could punish the speaker for using offensive language towards an unsuspecting audience of teenage students without violating the First Amendment.[85] The Court went so far as to conclude that "it was perfectly appropriate for the school to disassociate itself [with the speech] to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education."[86]

However, in *Erznoznik v. City of Jacksonville*,[87] the Court came to the opposite conclusion in evaluating the constitutionality of a city ordinance that prohibited the showing of any movie containing nudity at a drive-in theater visible from a public street.[88] The Court acknowledged a "limited

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"[he] d[id] not view the content of the message as relevant" and that "[c]ommercial advertisements may be as offensive and intrusive to captive audiences as any political message." *Id.* at 308 (Douglas, J., concurring). Therefore, regardless of the disagreement over commercial advertising, both Justice Douglas and the majority were in agreement that passengers on a public streetcar would have been captive to Lehman's political advertisement. *See id.* at 304 (majority opinion); *id.* at 308 (Douglas, J., concurring).

82. 478 U.S. 675, 685 (1986).

83. *Id.* at 677-78. Fraser, while delivering a speech nominating a student for elective office, referred to the candidate "in terms of an elaborate, graphic, and explicit sexual metaphor." *Id.* He was subsequently suspended from school for three days for deliberately violating "Bethel High School['s] disciplinary rule prohibiting the use of obscene language" in school. *Id.* at 678. The rule prohibited "'[c]onduct which materially and substantially interferes with the educational process . . . including the use of obscene, profane language or gestures.'" *Id.* Fraser appealed to federal court claiming a First Amendment violation after having his suspension affirmed by a school official. *Id.* at 678-79.

84. *Id.* at 684. The Court used the *Pacifica* opinion to justify its rationale, thus indicating the Court's willingness to extend the interest in protecting children from offensive language to contexts outside of the home. *Id.* at 684-85.

85. *Id.* at 685 ("The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission.").

86. *Id.* at 685-86.

87. 422 U.S. 205 (1975).

88. *See id.* at 212. Richard Erznoznik, the manager of a drive-in movie theater, was charged with violating Jacksonville's municipal code after displaying a motion picture containing nudity that was visible from the street. *Id.* at 206. The code made it:

> "unlawful . . . for any ticket seller, ticket taker, usher, motion picture projection machine operator, manager, owner, or any other person connected with or employed by any drive-in theater in the City to exhibit, or aid or assist in exhibiting, any motion picture, slide, or other exhibit in which the human male or

privacy interest of persons on the public streets," but concluded that an unwilling viewer could simply avert his or her eyes in order to avoid the movie screen.[89] Ultimately, because the unwilling listener on the street could simply look away, the Court found that the movie theater's right to engage in protected speech outweighed the viewer's privacy interests.[90]

Therefore, while some feel that the Court has properly limited the captive audience doctrine to situations involving the privacy of the home,[91] the case law demonstrates that the Court may be receptive to legislation protecting the captive audience outside the home in certain contexts.[92]

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female bare buttocks, human female bare breasts, or human bare pubic areas are shown, if such motion picture, slide, or other exhibit is visible from any public street or public place."

Id. at 206-07. Erznoznik was able to successfully stay his prosecution and file a separate declaratory action challenging the facial validity of the municipal code. *Id.* at 207.

89. *Id.* at 212.

90. *See id.* The ability of the unwilling listener to avoid the message is an important factor in whether the Court will allow the government to regulate. *See, e.g.*, Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 657 & n.1 (1981) (Brennan, J., concurring in part and dissenting in part) (explaining that people attending a fair would not be a captive audience to those issuing handouts because "fairgoers are fully capable of saying 'no' to persons seeking their attention and then walking away"); Spence v. Washington, 418 U.S. 405, 412 (1974) (concluding that "[a]nyone who might have been offended [by an American flag with a peace sign attached] could easily have avoided the display"); *cf.* Hill v. Colorado, 530 U.S. 703, 715-19 & 718 n.25 (2000) (concluding that a woman entering a health care clinic's interest in avoiding physical and emotional harm suffered from an unwelcome message validates a regulation prohibiting one from approaching a woman without consent within the vicinity of the clinic); Madsen v. Women's Health Center, Inc., 512 U.S. 753, 781 (1994) (Stevens, J., concurring in part and dissenting in part) (labeling women entering an abortion clinic as captive to protesters who "follow and harass" them).

91. *See* Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1833-38 (1992) (concluding that the Court has never upheld a content-based restriction outside the home because it has properly limited the captive audience doctrine to the home by comparing decisions involving the privacy of the home with decisions in other contexts); *cf.* Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn't Bark*, 1994 SUP. CT. REV. 1, 18 (explaining that the captive audience cases establish that "the character of the place seems more important than the degree of audience 'captivity' in explaining the applications of captive audience doctrine"). However, Fallon does not agree with Volokh's assertion that the Court has never used the captive audience doctrine to uphold a content-based regulation outside of the home. *Id.* at 18 n.98. *But see infra* note 129 (making the argument that the captive audience doctrine should focus on the degree of captivity of the unwilling listener rather than the character of the place).

92. *See supra* text accompanying notes 76-91; *see also Erznoznik*, 422 U.S. at 209 (stating that the government should be allowed to regulate when "the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure").

C. Other Factors Influencing the Regulation of Offensive Speech

In overturning Cohen's conviction, the Court in *Cohen* highlighted several other reasons why the California statute was not consistent with the First Amendment.[93] First, the Court emphasized that the statute involved severe criminal ramifications.[94] Second, there was no evidence that anyone in the California courthouse actually expressed displeasure with Cohen's jacket.[95] And finally, the Court concluded that the California statute was overbroad and vague so that it did not put Cohen on sufficient notice to know what offensive conduct was prohibited.[96]

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93. *See* Cohen v. California, 403 U.S. 15, 22, 26 (1971).

94. *See id.* at 26 ("[T]he State may not [, absent a more compelling reason,] . . . make the simple public display here involved of this single four-letter expletive a criminal offense."). The Court's concern with the severity of the penalty was reaffirmed in *Pacifica*. *See* FCC v. Pacifica Found., 438 U.S. 726, 750 (1978) (emphasizing that the Court "ha[s] not decided that an occasional expletive in . . . this broadcast would justify a criminal prosecution"); *cf.* Cohen, *supra* note 57, at 1602-03 (concluding that *Cohen* "has settled the proposition that a criminal statute is unconstitutional if it punishes all public use of profanity without reference to details such as the nature of the location and audience").

95. *See Cohen*, 403 U.S. at 22 (explaining that the presence of unwilling listeners cannot justify a conviction when "there [is] no evidence that persons powerless to avoid appellant's conduct did in fact object to it"). The Court in *Pacifica* also referenced this factor, explaining that "the Commission was responding to a listener's strenuous complaint, and [that] Pacifica d[id] not question [the Commission's] determination that this afternoon broadcast was likely to offend listeners." *Pacifica*, 438 U.S. at 747 n.25 (plurality opinion).

96. *See Cohen*, 403 U.S. at 22 n.4 (comparing the offensive conduct section of the statute to other sections in concluding that Cohen was not put on sufficient notice). This concept is commonly referred to as the vagueness and overbreadth doctrine in First Amendment jurisprudence. *See* JESSE H. CHOPER ET AL., CONSTITUTIONAL LAW 667 (9th ed. 2001) (explaining that "[t]he doctrines of 'vagueness' and 'overbreadth'. . . are deeply embedded in first amendment jurisprudence"). Generally, a "statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties" in order for it to be constitutional. Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926). The Court in *Connally* went on to explain that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Id.*; *see also* Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971) (finding that an ordinance prohibiting three or more people assembled together from "annoy[ing] any police officer or other person who should happen to pass by" was unconstitutionally vague because "[c]onduct that annoys some people does not annoy others").

Overbreadth is closely related to vagueness. CHOPER ET AL., *supra*, at 667. A First Amendment overbreadth argument is a claim that a regulation prohibits more speech than constitutionally permissible to achieve the state's purpose. *See, e.g.*, *Erznoznik*, 422 U.S. at 213-14 (discussing why an ordinance prohibiting the display of nudity at a drive-in movie theater could not be justified based on the government's interest in prohibiting such exposure to children). In *Erznoznik*, the Court reasoned that the ordinance "sweepingly forbids display of all films containing any [nudity], irrespective of context or

Therefore, in addition to the two-prong test established in *Cohen*,[97] a state actor must satisfy these three additional factors when attempting to regulate offensive speech.

IV. UNIVERSITY SPEECH REGULATIONS MUST PASS THE *COHEN* TEST IN ORDER TO SURVIVE FIRST AMENDMENT SCRUTINY

In order for a University's regulation of speech at an on-campus basketball game to pass First Amendment scrutiny, it will receive the same analysis as did the California ordinance in *Cohen*.[98] The issue in

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pervasiveness." *Id.* at 213; *see also supra* note 88 (summarizing the facts of *Erznoznik*). Therefore, even if the Court had recognized the city's interest in protecting children on the street from obscene material as consistent with the First Amendment, the ordinance would have been classified as overbroad. *Erznoznik*, 422 U.S. at 213-14. For a discussion of the First Amendment vagueness and overbreadth doctrine, see CHOPER ET AL., *supra*, at 667-70.

97. *See supra* note 47 and accompanying text.

98. *See supra* Part I. In applying the test articulated by the Court in *Spence* to the context of fan behavior, there is little doubt that any regulation would fall within the reach of the First Amendment. Fan behavior is afforded the protection of the First Amendment when the speaker intends to communicate a message and the message is likely to be understood by those receiving it. *See* Spence v. Washington, 418 U.S. 405, 410-11 (1974). Regulating expressive fan conduct passes the first element of the *Spence* test because the intent of those participating in the various cheers is to communicate a message to the players, whether it's encouragement for the home team or disdain for the visitors. *See Incivility and Profanity at Athletic Events*, *supra* note 8, at 3226-27 (explaining that fans hope to have an impact on the game by making the arena a "tough place to play"). In looking to the controversy created by the incident at the University of Maryland, it is clear that the second element of the test is satisfied, because those who hear the chants have a clear understanding of the message. *See* Snider, *supra* note 9 (noting that the conduct at University of Maryland's arena "angered and embarrassed school officials and alumni"); Vecsey, *supra* note 21 (commenting on the embarrassment caused by the University of Maryland students' behavior); *cf.* Dick Heller, *No Cheers for the Rude and Crude Fans*, WASH. TIMES, May 5, 2004, at C1 (explaining that the damage to the University's image caused by the chants broadcast nationally "seemed almost incalculable"). Therefore, any attempt by a public university to regulate expressive fan conduct should receive First Amendment scrutiny.

However, the First Amendment does not require heightened judicial scrutiny in all situations. *See supra* notes 29-30 and accompanying text. As articulated by the Court in *Texas v. Johnson*, 491 U.S. 397 (1989), a regulation implicating the First Amendment will only receive heightened judicial scrutiny when the purpose of the regulation involves the communicative impact of the conduct being regulated. *Id.* at 411. Turning to a university's desire to prevent certain obscene words from being forced onto those attending a game, any regulation preventing such conduct will concern the content of the cheer. *See, e.g.*, Brady, *supra* note 3 (quoting the Big Ten Conference Commissioner as saying "[w]e're aware that the use of obscenities at games is a big issue in certain places"); Memorandum, *supra* note 5, at 1 (commenting that the University of Maryland's purpose in regulating would be "to prohibit and punish use of certain language"). Unless the University attempts to prohibit all cheering from the arena, and thus defeating a primary purpose of being a fan, *see Incivility and Profanity at Athletic Events*, *supra* note 8, at 3226-27 (explaining that part of being a fan is "making the arena a 'tough place to play' for

Cohen was whether the defendant could be convicted and punished due to the "offensiveness" of the phrase "Fuck the Draft" on his jacket without violating his First Amendment rights.[99] Similarly, the issue facing public universities is whether authorities may implement regulations on profane and vulgar fan language, because of its offensiveness, without violating the Constitution.[100] Since the university's reason for regulating the language at campus sporting events is the same as California's purpose in enacting the statute at issue in *Cohen*,[101] public universities will have to demonstrate that "substantial privacy interests are being invaded in an essentially intolerable manner" in order to not violate the speaker's First Amendment rights.[102]

V. A CLOSER LOOK AT *COHEN*: HOW A UNIVERSITY CAN DRAFT A REGULATION CONSISTENT WITH THE CAPTIVE AUDIENCE DOCTRINE

The test articulated in *Cohen*, as clarified in subsequent case law, requires the public actor to satisfy two elements.[103] First, the regulation must be closely tailored to protect substantial privacy interests.[104] In addition, the actor, in this case a public university, must show that the privacy interests it seeks to protect are being invaded in an essentially intolerable manner, in the sense that an unwilling listener cannot easily avoid the unwanted speech.[105]

A. Substantial Privacy Interests

Based on Supreme Court precedent, a university should be able to regulate fan speech for the benefit of substantial privacy interests. As demonstrated by case law subsequent to *Cohen*, the interest of the

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opposing teams" through various cheers), any interest in singling out certain cheers for regulation will inevitably be tied to their content (in this situation, their "offensiveness"). *See* Wasserman, *supra* note 3, at 379-80 (contrasting the idea of singling out particular profane or offensive oral messages as prohibited while allowing other related messages with a content-neutral regulation of sound and noise levels). For these reasons, although the issue of disruptive conduct has been recommended to circumvent heightened First Amendment scrutiny, *see* Memorandum, *supra* note 5, at 1 n.2 (explaining that an argument could be made that the regulation involves conduct outside the scope of the First Amendment), any university proscription of fan behavior at sporting events will receive heightened judicial scrutiny.

99. *See Cohen*, 403 U.S. at 16-18.

100. *See* Brady, *supra* note 3; Barry Svrluga, *U-Md. is Advised on Offensive Speech at Comcast Center*, WASH. POST, Mar. 27, 2004, at D1 (highlighting the University of Maryland's concern over profanity at games).

101. *Cohen*, 403 U.S. at 16-18.

102. *Id.* at 21; *see also* 16A AM. JUR. 2D *Constitutional Law* § 475 (1998).

103. *Cohen*, 403 U.S. at 21.

104. *Id.*

105. *Id.*; *see also* 16A AM. JUR. 2D *Constitutional Law* § 475 (1998).

unwilling listener to be left alone at home is a substantial privacy interest.[106] Therefore, the University could regulate on behalf of the privacy interests of those watching the game on television or listening to the game on the radio.[107]

Furthermore, in reversing Cohen's conviction, the Supreme Court acknowledged in dictum that a privacy interest may exist outside of one's home.[108] Despite ultimately overturning Cohen's sentence, the Court explained that "one has a . . . substantial claim to a recognizable privacy interest when walking through a courthouse corridor."[109] In cases subsequent to *Cohen*, the Court has reinforced its willingness to recognize the privacy interests of citizens outside of the home in certain contexts.[110]

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106. *See* Frisby v. Schultz, 487 U.S. 474, 484-85 (1988); FCC v. Pacifica Found., 438 U.S. 726, 748 (1978); Rowan v. U. S. Post Office Dept., 397 U.S. 728, 736 (1970). *But see* Strauss, *supra* note 49, at 95 (arguing that the Court has "broadly painted a picture of the captive audience within the home, and minimized a court's unwanted obligation to scrutinize whether an at-home recipient of unwanted information is able to avoid the speech").

107. *See Pacifica*, 438 U.S. at 748. Congress has also expressed recent interest in protecting children from exposure to indecent broadcast programming. *See* Broadcast Decency Enforcement Act of 2004, S. REP. NO. 108-253, at 1; Broadcast Decency Enforcement Act of 2004, H.R. REP. NO. 108-434, at 5. In the House Report, Congress listed a number of recent incidents on television and radio broadcast involving indecent and profane behavior "inappropriate for family viewing, particularly given that so many children were apt to be watching it on television." *Id.* at 6. Indecent, profane, and obscene language on public radio or television broadcast is already subject to fines and even incarceration in some circumstances. *See* 18 U.S.C. § 1464 (2000). However, in response to the recent concern over indecency, Congress explained that "[a]ll of these examples [of indecency] have highlighted the need for stronger penalties for broadcast obscenity, indecency and profanity." H.R. REP. NO. 108-434, at 6. In pushing for stronger enforcement requirements, Congress emphasized that "American families should be able to rely on the fact that, at times when their children are likely to be tuning in, broadcast television and radio programming will be free of indecency, obscenity, and profanity." *Id.* at 7. This explanation displays society's recent increase in support for protecting children from exposure to inappropriate language and lends support to a university's justification for regulating fan speech at sporting events. Further, an increase in FCC penalties for indecent broadcasts could increase the probability that a public television or radio station would cease to broadcast a particular university's games if the university's crowd develops a reputation for inappropriate conduct. Tying the hands of a university in such a situation by not allowing them to deter harmful behavior surely would not be equitable.

108. *See Cohen*, 403 U.S. at 21-22.

109. *Id.* at 21.

110. *See, e.g.*, Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 684 (1986) (recognizing the interest in restricting vulgar language at a public school assembly in order to protect minors); Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 657 & n.1 (1981) (Brennan, J., concurring in part and dissenting in part) (recognizing a privacy interest of fairgoers implicitly by establishing that the fairgoers were not a "captive audience" from solicitors approaching them with pamphlets because the fairgoers could simply refuse the pamphlets and walk away); Erznoznik v. City of Jacksonville, 422 U.S.

In particular, the Court in *Fraser* recognized the state's interest, acting in loco parentis, in protecting teenage students in a captive audience from indecent speech at a public school.[111] By directly citing *Pacifica*, the Court established that a parent's privacy interest in protecting his or her child from inappropriate language extends beyond the home.[112] Furthermore, while a sports arena environment involves more open discourse than a public school, other cases have supported the unwilling listener's entitlement to some privacy in environments where people commonly communicate publicly.[113] In fact, the Court has even acknowledged that there may be a claim to privacy on the public streets,

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205, 212 (1975) (referencing "the limited privacy interest of persons on the public streets"); Lehman v. City of Shaker Heights, 418 U.S. 298, 307 (1974) (Douglas, J., concurring) (allowing state to prohibit political ads on streetcars to protect passengers from "forced intrusions on their privacy"); Rosenfeld v. New Jersey, 408 U.S. 901, 907 n.1 (1972) (Powell, J., dissenting) (referring to the audience of public school board meeting as captive); *see also* Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1383 (explaining that the Court has recognized the privacy right of the unwilling listener outside of the home as "a legitimate right to be reckoned with under the First Amendment"). *But see* Strauss, *supra* note 49, at 109-16 (proposing a more stringent test for establishing an unwilling listener's right to be left alone). Specifically, Strauss argues that "[t]hree specific interests underlie the right to be let alone in the captive audience context: the right to make individual choices (autonomy); the right to repose; and the right to be free from offense." *Id.* at 108. Strauss believes that the captive audience doctrine advances these interests imprecisely because the Court simply asserts the right to be left alone. *Id.*

111. *Fraser*, 478 U.S. at 683-84.

112. *See id.* at 684. In allowing the public school to regulate, the Court concluded that "[t]he process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class" and that the older students, as role models, should "demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class." *Id.* at 683. An argument could be made that the fans affiliated with a public university sports team are equally scrutinized by younger fans as role models, considering society's overwhelming obsession with modern-day sports. *See* TOM MCMILLEN WITH PAUL COGGINS, OUT OF BOUNDS 21-25 (1992) (explaining that the popularity of sports among the youth of America has "passed beyond a pleasant diversion and bec[o]me a national obsession in our country"). However, *Fraser* can be distinguished by the fact that the purpose of the public school system is to teach students the "fundamental values of 'habits and manners of civility' essential to a democratic society." *Fraser*, 478 U.S. at 681. A public university hosts sporting events to provide entertainment for the students and alumni and to raise revenue for the University. Therefore, while a university speech code could not be justified using the same reasoning used in *Fraser*, the large impact that sporting events have on children, *see* MCMILLEN, *supra*, at 21-25, certainly should be noted as a factor in establishing a privacy interest.

113. *See, e.g.*, Hill v. Colorado, 530 U.S. 703, 716-17 (2000) (recognizing privacy interests in various public environments); *Lehman*, 418 U.S. at 307 (Douglas, J., concurring) (acknowledging "the right of the commuters [on a public streetcar] to be free from forced intrusions on their privacy"); *see also* Gormley, *supra* note 110, at 1383.

a traditionally public forum.[114] Therefore, based on the Court's emphasis on the importance of protecting children from indecent language[115] and the high probability that many children will be subjected to offensive language,[116] a university has a justifiably substantial interest in protecting children at basketball games from offensive language.[117]

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114. *See Erznoznik*, 422 U.S. at 212 (recognizing a "limited privacy interest of persons on the public streets"); Hague v. Comm. for Indus. Org., 307 U.S. 496, 515-16 (1939) (establishing the streets and parks as a public forum). Even though the Court recognized a limited privacy interests on public streets in *Erznoznik*, it ended up invalidating the ordinance because the unwilling listeners on the street could avoid the offensive speech by averting their eyes. *See Erznoznik*, 422 U.S. at 212. However, the fact that the Court went into the captive audience analysis rather than denying the unwilling listener any claim to privacy on a public street displays the Court's willingness to consider privacy interests in most contexts. *Cf.* Gormley, *supra* note 110, at 1383; Zych, *supra* note 68, at 1291 (referring to the Court's "continuum of privacy interests in public spaces").

115. *See Fraser*, 478 U.S. at 684; FCC v. Pacifica Found., 438 U.S. 726, 749-50 (1978); *Erznoznik*, 422 U.S. at 212 ("It is well settled that a State or municipality can adopt more stringent controls on communicative materials available to youths than on those available to adults."); Ginsberg v. New York, 390 U.S. 629, 639 (1968).

116. *See supra* note 112 (highlighting the popularity of sports among youth audiences). The popularity of sports among young people results in a large number of children in attendance at sporting events, which is essential to justifying a prohibition on indecent speech. *See, e.g.*, Broadcast Decency Enforcement Act of 2004, H.R. REP. NO. 108-434, at 7 (explaining that the FCC prohibits public broadcast of indecent speech between the hours of 6 a.m. to 10 p.m. because it is "the time period when children are most likely to be watching television and listening to the radio"). In explaining the need to increase penalties on public broadcasters for broadcasting indecent programming within this time frame, Congress emphasized incidents of inappropriate behavior at "family friendly" events where "many children were apt to be watching it on television." *Id.* at 6. In particular, Congress mentioned the halftime show of Super Bowl XXXVIII, which ended in the exposure of Janet Jackson's breast, as a paradigmatic example of the need for stricter measures to ensure indecent conduct does not reach a family-oriented audience. *Id.* Using this logic, a university should justify its prevention of indecent cheers as necessary to create a "family friendly" environment, where many children are in attendance. Similar to FCC regulation during hours when children are likely to be watching television, *id.* at 7, a university could justify its regulation of indecent speech in certain circumstances, such as the sporting arena during a basketball game, due to the increased presence of children at the game. *See infra* note 117.

117. *See* New York v. Ferber, 458 U.S. 747, 756-57 (1982). In *Ferber*, the Supreme Court used the following language to establish the strength of a state actor's interest in protecting children:

> It is evident beyond the need for elaboration that a State's interest in "safeguarding the physical and psychological well-being of a minor" is "compelling." "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens." Accordingly, we have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights.

Id. (citations omitted); *see also* Prince v. Massachusetts, 321 U.S. 158, 165 (1944) ("It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed

B. Essentially Intolerable Manner

The second element of the *Cohen* test requires that a university regulate on behalf of a captive audience's privacy interests. In overturning Cohen's conviction, the Court emphasized that "the statute upon which Cohen's conviction rests evinces no concern . . . with the special plight of the captive auditor."[118] Assuming that this analysis in *Cohen* was not mere surplusage,[119] the Court should uphold a regulation

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. . . citizens."). This language was used to establish the FCC's compelling state interest in regulating indecent public broadcast during times when large numbers of children are watching. *See* Action for Children's Television v. FCC, 58 F.3d 654, 661-64 (D.C. Cir. 1995). A university should be able to use the same justification for its regulation of indecent speech at a basketball game on behalf of the privacy interest of the large number of children in attendance. *See supra* note 112.

118. Cohen v. California, 403 U.S. 15, 22 (1971).

119. Some scholars cast serious doubt about the validity of this language by arguing that the Court has yet to uphold a content-based regulation outside of the home based on the captive audience doctrine. *See, e.g.*, Volokh, *supra* note 91, at 1833 ("[T]he Court . . . has never upheld . . . a [content-based] restriction [based on the captive audience doctrine] outside the home."). In making this conclusion, Volokh compared *Rowan v. United States Post Office Department*, 397 U.S. 728 (1970), with *Cohen*. *See* Volokh, *supra* note 91, at 1834-35. He argued that "[t]he viewers in *Cohen* were actually more captive than the householder[s] in *Rowan*" because the householders could dispose of the mail while the viewers in the courtroom could only avert their eyes from Cohen's jacket. *Id.* Therefore, Volokh concluded that the protection granted the householders in *Rowan* must have turned on their presence at home. *See id.*

However, Volokh failed to consider the complete factual basis behind the *Rowan* decision. The statute at issue in *Rowan* prevented a mailer from sending materials to a household only after the mailer was put on notice that specific addresses no longer desired to receive the materials. *See Rowan*, 397 U.S. at 732. In finding the statute valid, the Court articulated that "the mailer's right to communicate is circumscribed only by an affirmative act of the addressee giving notice that he wishes no further mailings from that mailer." *Id.* at 737. Absent this affirmative act, the Court would likely not find the householder a captive audience. *See supra* notes 68-75 and accompanying text. Therefore, the key fact that distinguishes *Rowan* from *Cohen* is that the audience in *Rowan* had put the speaker on notice that it no longer wished to receive the message rather than the fact that audience happened to be at home when receiving the message.

Volokh also compared *Rosenfeld v. New Jersey*, 408 U.S. 901 (1972), with *FCC v. Pacifica Found.* to support his conclusion. Volokh, *supra* note 91, at 1835. He concluded that the audience at the public school board meeting in *Rosenfeld* was more captive than the audience of the radio broadcast in *Pacifica* because the audience of a radio broadcast may turn off the radio while the audience of a public meeting is forced to leave the room in order to avoid the message. *Id.* Using similar logic as his comparison of *Cohen* to *Rowan*, Volokh concluded that the Court distinguished these two cases based on the privacy of the home. *Id.*

Again, Volokh erred in his analysis of the facts. The Court vacated Rosenfeld's conviction and remanded the case to the Superior Court of New Jersey so that the lower court could reconsider the conviction in light of *Cohen* and *Gooding v. Wilson*, 405 U.S. 518 (1972), which the Court decided subsequent to Rosenfeld's conviction. *See Rosenfeld*, 408 U.S. at 901-02; *Gooding*, 405 U.S. at 518 (listing date of decision as subsequent to Rosenfeld's conviction). On remand, the Supreme Court of New Jersey found that the

of speech when its purpose is to protect a captive audience.[120] In fact, subsequent case law applying the *Cohen* test has established that there must be a captive audience in order to prove that privacy interests have been invaded in an intolerable manner.[121]

Having established its importance, the captive audience doctrine needs clarification. In *Frisby v. Schultz*,[122] the Court upheld an ordinance prohibiting picketing outside one's home because "[t]he resident is figuratively, and perhaps literally, trapped within the home, and . . . is left with no ready means of avoiding the unwanted speech."[123] Similarly, in *Lehman*, the city was allowed to prohibit political ads on public transportation because the "audience [was] incapable of declining to receive it."[124] These two decisions emphasize the importance the Court places on the unwilling listener's ability to avoid the unpleasant message.[125]

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statute used to convict the speaker was unconstitutionally overbroad and therefore upheld the vacated conviction. *See* State v. Rosenfeld, 303 A.2d 889, 892-93 (N.J. 1973). Not only did the Supreme Court not issue an opinion on whether the audience of a public school board meeting would be captive to offensive speech, the Supreme Court of New Jersey vacated the conviction based on the unconstitutionality of the statute's language rather than on the specific facts of the case at bar. *See id.* at 894. Volokh's comparison of *Rosenfeld* to *Pacifica* is unpersuasive because the *Rosenfeld* opinion did not establish whether the audience was captive, and is not binding authority.

Even accepting Volokh's argument, the premise that no content-based regulation on behalf of the captive audience outside of the home would ever be valid is tenuous. The statute in *Cohen* prohibited "offensive speech," which the Court established as effectively a prohibition on restricting content-based speech. *See Cohen*, 403 U.S. at 16, 18-19. However, instead of concluding that California is absolutely barred from prohibiting "offensive speech" in public (the position Volokh supports), the Court used a different rationale to invalidate the statute. *See supra* text accompanying note 118. Based on this analysis, the *Cohen* opinion provides support for the proposition that a state may regulate "offensive speech" in public in certain situations. *Id.*

120. *See Cohen*, 403 U.S. at 22.

121. *See* Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n, 447 U.S. 530, 541-42 (1980) ("[T]he First Amendment does not permit the government to prohibit speech as intrusive unless the 'captive' audience cannot avoid objectionable speech.").

122. 487 U.S. 474 (1988).

123. *Id.* at 487.

124. Lehman v. City of Shaker Heights, 418 U.S. 298, 307 (1974) (Douglas, J., concurring). While this language comes from the concurring opinion, the majority opinion in *Lehman* agrees with Douglas' conclusion that the unwilling listeners were captive and used this conclusion as a factor in its decision to invalidate the statute. *See supra* note 81 and accompanying text.

125. *See supra* notes 122-24 and accompanying text; *see also* Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 744 (1996) (plurality opinion) (emphasizing that the broadcast media contacts the recipient without sufficient warning to avert one's eyes); FCC v. Pacifica Found., 438 U.S. 726, 748-49 (1978) (finding that the audience of a public radio broadcast is exposed to unexpected program content without warning); Columbia Broad. Sys., Inc. v. Democratic Nat. Comm., 412 U.S. 94, 127 (1973)

However, in *Erznoznik*, the Court found the prohibition of movies containing nudity at drive-in movie theaters to be unconstitutional because "[t]he ordinance seeks only to keep these films from being seen from public streets and places where the offended viewer readily can avert his [or her] eyes" and "the screen of a drive-in theater is not 'so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it.'"[126] The Court used similar analysis in *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*,[127] where a prohibition on door-to-door solicitation was found to be unconstitutional because the privacy of a resident can be protected by using a "No Solicitation" sign or by simply refusing to engage in conversation with the solicitor.[128]

In comparing these decisions, it appears that the key factor in determining whether the unwilling listeners are captive is the listener's ability to avoid the message.[129] In making this distinction, the Court will analyze the practicality of the alternatives available for the unwilling listener in deciding whether the listener's privacy interest should

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(documenting "the reality that in a very real sense listeners and viewers [of public broadcasts] constitute a 'captive audience'").

126. *Id.* at 212 (quoting Redrup v. New York, 386 U.S. 767, 769 (1967)); *accord* Heffron v. Int'l. Soc'y For Krishna Consciousness, Inc., 452 U.S. 640, 657 n.1 (1981) (Brennan, J., concurring in part and dissenting in part) (concluding that fair attendants are not a captive audience in relation to pamphleteers because "fairgoers are fully capable of saying 'no'. . . and then walking away"); Spence v. Washington, 418 U.S. 405, 412 (1974) (finding that viewers of a doctored American flag were not a captive audience because "[a]nyone who might have been offended could easily have avoided the display"). *But see* Hill v. Colorado, 530 U.S. 703, 718 & n.25 (2000) (finding that the risk of causing physical and emotional harm to a woman entering a health care clinic by approaching her without consent is sufficient to allow the government to prohibit such conduct).

127. 536 U.S. 150 (2002).

128. *See id.* at 168; *accord* Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 128 (1989) (finding that indecent phone calls were not imposed on a captive audience because the recipient must take affirmative steps to receive contact); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 72 (1983) (holding that recipients of objectionable mailings are not a captive audience because they may simply avert their eyes or throw the message away).

129. For an excellent argument as to why the captive audience doctrine's focus must be on the speaker's ability to avoid the message, see J.M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295, 2311-13 (1999). Balkin emphasizes that "[c]aptivity in [the] sense [of the captive audience doctrine] is a matter of practicality rather than necessity" and that the point of the doctrine is that it is unfair for the speaker to be able to coerce the unwilling listener into a difficult choice. *Id.* at 2312. In summary, Balkin argues that the "[c]aptive audience doctrine should not focus on particular *spaces*" but "[r]ather, it should regulate particular *situations* where people are particularly subject to unjust and intolerable harassment and coercion." *Id.*; *cf.* Strauss, *supra* note 49, at 89 (explaining that the captive audience doctrine turns on the burden that would be placed on the unwilling listener in avoiding the message).

outweigh the speaker's First Amendment right.[130] That being said, the Court may be more receptive to finding the audience captive when they are subject to oral, rather than written, communications.[131] Therefore, a university regulation should focus on inappropriate fan cheers rather than offensive signs or apparel.

C. Other Factors

In addition to the captive audience doctrine, the Court will consider three other factors in determining the constitutionality of a speech regulation. The Court will consider the severity of the penalty imposed for violating the regulation.[132] In addition, the unwilling listeners must voice their objection to the controversial speech.[133] Finally, the

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130. *See* Cohen v. California, 403 U.S. 15, 21 (1971) (explaining that the unwilling listeners in the courthouse could simply look away from the offensive message); *compare* Lehman v. City of Shaker Heights, 418 U.S. 298, 307 (1974) (Douglas, J., concurring) (finding passengers of a streetcar to be captive because they cannot avoid advertisements), *with Bolger*, 463 U.S. at 72 (explaining that the recipients of unwanted mail are not a captive audience because the recipient can simply avert his or her eyes and throw the mail away). For an interesting discussion of the balancing of conflicting rights in the context of the captive audience doctrine, see Strauss, *supra* note 49, at 116-21. Strauss proposes that the Court should balance three factors in employing the captive audience doctrine: the justification for protecting an unwilling audience, the difficulty for the listener to avoid the speech, and the significance of "the infringement on the First Amendment right to freedom of expression." *Id.* at 116.

131. *Compare* Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 744 (1996) (plurality opinion) (finding the audience of public access cable channels a captive audience), *and* FCC v. Pacifica Found., 438 U.S. 726, 748 (1978) (concluding that listeners of radio broadcasts are a captive audience), *with* Heffron v. Int'l Soc'y For Krishna Consciousness, Inc., 452 U.S. 640, 657 n.1 (1981) (Brennan, J., concurring) (finding that recipients of pamphlets are not a captive audience), *and* Bigelow v. Virginia, 421 U.S. 809, 828 (1975) (explaining that readers of newspaper advertisements are not a captive audience). The Court even mentioned this distinction in *Pacifica* by saying that oral communications have a greater chance of reaching children than written communications. *See Pacifica*, 438 U.S. at 749-50. This case law is consistent with the Court's explanation in *Cohen* that the audience "could effectively avoid further bombardment of their sensibilities simply by averting their eyes." *Cohen*, 403 U.S. at 21. For an analysis of the oral/written distinction in the context of the captive audience doctrine, see Haiman, *supra* note 57, at 182-85.

132. *See Pacifica*, 438 U.S. at 750 (emphasizing that the Court "ha[s] not decided that an occasional expletive in . . . this broadcast would justify a criminal prosecution"); *Cohen*, 403 U.S. at 26 (explaining that "the State may not [absent a more compelling reason] make the simple public display here involved of this single four-letter expletive a criminal offense"); *cf.* Cohen, *supra* note 57, at 1602-03 (concluding that *Cohen* "has settled the proposition that a criminal statute is unconstitutional if it punishes all public use of profanity without reference to details such as the nature of the location and audience").

133. *Compare Pacifica*, 438 U.S. at 747 n.25 (plurality opinion) (emphasizing that "the Commission was responding to a listener's strenuous complaint, and [that] Pacifica d[id] not question [the Commission's] determination that this afternoon broadcast was likely to offend listeners"), *with Cohen*, 403 U.S. at 22 (explaining that the presence of unwilling

regulation must put the audience on sufficient notice of whatever behavior is prohibited.[134]

In light of this analysis, a university may regulate offensive fan behavior at campus sporting events if: 1) the purpose of the regulation is to protect the substantial privacy interests of unwilling listeners, 2) the unwilling listeners are a captive audience, 3) the sanctions imposed by the regulation are not excessive, 4) there is documentation that there are in fact unwilling listeners, and 5) the regulation clearly defines the prohibited behavior.

VI. THE BIG TEN CONFERENCE'S REGULATION IS INCONSISTENT WITH THE CAPTIVE AUDIENCE DOCTRINE

The pertinent part of the Big Ten Conference's Crowd Control Initiative holds a university responsible for "school sponsored student sections that attack or single out student-athletes."[135] The initiative was adopted after the 2002-2003 athletic season, focusing mainly on the security and welfare of student-athletes, coaches, officials, and fans.[136]

In analyzing the objective of the initiative, its primary focus is on protecting the student-athlete from a harmful environment.[137] With that purpose in mind, it is difficult for the Big Ten to justify its actions based on the privacy interests of student-athletes. In looking at the type of conduct the Big Ten hopes to prevent,[138] it appears to be more interested in protecting each student athlete's personal life.[139] Any argument for protecting the personal life of a student-athlete is difficult to justify because the Court is likely to find that the student-athlete chose to thrust himself or herself into the spotlight of such criticism.[140]

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listeners cannot justify a conviction when "there was no evidence that persons powerless to avoid appellant's conduct did in fact object to it").

134. *See supra* note 96.

135. Press Release, *supra* note 12.

136. *Id.*

137. *See id.*

138. *See, e.g.*, Brady, *supra* note 3 (describing an incident where a student section chanted "No means no!" towards an opposing player who was recently indicted on sexual assault charges).

139. *See id.* (quoting the Big Ten Commissioner as saying "[t]hey harass an 18-, 19- or 20-year-old kid for two hours. That's not right").

140. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 352 (1974) (demonstrating that the Court will treat those of general fame and notoriety different in the context of defamation law); New York Times Co. v. Sullivan, 376 U.S. 254, 270-72 (1964) (explaining that First Amendment rights are heightened in areas of public concern). For a summary on the Court's case law surrounding a public figure's right to privacy, see generally CHOPER ET AL., *supra* note 96, at 609-45.

Even if the Court upholds the Big Ten Conference's purpose, the initiative regulates conduct that would not violate the student-athlete's privacy interest in an intolerable manner. By preventing the crowd from singling out student-athletes,[141] the initiative prohibits certain conduct that should receive protection from the First Amendment because it does not distinguish among the types of media used to deliver the message.[142] For example, a sign displaying the message "Player *X* does drugs" would most likely qualify as a violation of the initiative even though Player *X* (or any other offended viewer) could simply avert his or her eyes.[143] Therefore, the Court would likely find that the Big Ten Conference's initiative violates the second element of the *Cohen* test.

However, even if the Court were to uphold the regulation, the Big Ten Conference could adopt a more effective way to alleviate its concern over the use of obscenities at public university sporting events.[144]

VII. SANITIZING THE ARENA: A SOLUTION TO OFFENSIVE SPEECH AT PUBLIC UNIVERSITY BASKETBALL GAMES

A. Proposed Model Regulation

The following model regulation achieves a public university's goal of preventing offensive speech without violating the audience's First Amendment rights:

> Section (1): For the purposes of this regulation, the following definitions apply:
>
> > Indecent language—language that depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs.[145]
> >
> > Obscene language—language that, when taken as a whole, appeals to the prurient interest in sex, portrays sexual

141. *See* Press Release, *supra* note 12.

142. *See supra* Part V.B.

143. *See* Cohen v. California, 403 U.S. 15, 21 (1971) (explaining that the unwilling listeners could avert their eyes from Cohen's jacket). In fact, an argument can be made that the ambiguity of the Big Ten's initiative unnecessarily sweeps in conduct in support of a student-athlete, such as a sign stating "Player *X* helps the homeless." *See* Press Release, *supra* note 12 (failing to distinguish between types of conduct singling out players in prohibiting all "school sponsored student sections that . . . single out student-athletes").

144. *See* Brady, *supra* note 3 (documenting the Big Ten Commissioner's concern for the use of obscenity at games).

145. This definition of indecency mirrors the FCC's definition of indecency. *See infra* note 152 and accompanying text.

> conduct in a patently offensive way and does not have serious literary, artistic, political, or scientific value.[146]
>
> Profane language—language that, when measured by contemporary community standards, naturally tends to provoke violent resentment, or denoting language so grossly offensive to members of the public who actually hear it as to amount to a nuisance.[147]

Section (2): The University recognizes that collegiate basketball games are observed by a significant number of minors, either by attending the game directly, watching the game on public television, or listening to the game on public radio. While the University understands the significance of the fans' right to express themselves, that right must be balanced against the state's and parents' interest in protecting children from exposure to indecent, obscene, and profane language, and against the privacy interests of those attending the game or listening to the game on television or radio. The University therefore concludes that it is appropriate to enact a regulation that prohibits indecent, obscene, and profane speech while attending a school-affiliated basketball game on the University's campus.

Section (3): Any person attending a school-affiliated basketball game on the University's campus is prohibited from participating in or attempting to start an obscene, indecent, or profane cheer.

Section (4): Any person in violation of Section (3) of this regulation is subject to the following disciplinary measures:

a) A first-time violator is subject to an official warning from a University employee that future violations of this regulation may result in ejection from the game and ban from future school-sponsored events.

b) A second-time violator may be ejected from the premises by an official University employee.

c) A violator of Section (3) of this regulation more than two times within a one-year time span may be banned from all

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146. The Supreme Court adopted this definition of obscenity in *Miller v. California*. *See infra* note 151 and accompanying text.

147. The FCC has used this language to define profanity. *See infra* note 153 and accompanying text.

> University sporting events for a period not to exceed one year from the most recent violation.

B. The Proposed Model Regulation Is Not Unconstitutionally Vague

The proposed model regulation provides detailed definitions of the regulated conduct.[148] In fact, the reference to obscene, indecent, and profane language mirrors a section of the United States Code.[149] In defining obscene language, the model regulation uses a standard that has been upheld by the Supreme Court.[150] Further, in defining indecent language, the model regulation uses the same standards as the FCC in its enforcement of the ban on obscene, indecent, or profane language in radio broadcasts.[151] Finally, the United States Court of Appeals for the

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148. *See supra* Part VII.A., § 1.

149. *See* 18 U.S.C. § 1464 (2000).

150. *See* Miller v. California, 413 U.S. 15, 24 (1973); *supra* Part VII.A., § 1. In explaining the application of the *Miller* test, the Court set out guidelines for the trier of fact to use in determining whether material is obscene:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller, 413 U.S. at 24 (citations omitted). The Court recognized the difficulty in establishing clear standards as to what constitutes obscenity, but nonetheless concluded that succumbing to an "absolutist, 'anything goes' view of the First Amendment" would be "'inconsistent with [the Court's] duty to uphold the constitutional guarantees.'" *Id.* at 29 (citations omitted). Based on the *Miller* opinion, the standard for obscenity in the proposed regulation places the speaker on sufficient notice to overcome any vagueness challenge. For a summary of obscenity law, see CHOPER ET AL., *supra* note 96, at 645-67.

151. *See* Indus. Guidance on the Comm'ns Case Law Interpreting 18 U.S.C. § 1464 & Enforcement Policies Regarding Broad. Indecency, 16 F.C.C.R. 7999, 8002 (2001) [hereinafter Industry Guidance]; *supra* Part VII.A., § 1. In determining whether the material is patently offensive, and therefore indecent, the FCC considers three principle factors:

> (1) the *explicitness or graphic nature* of the description or depiction of sexual or excretory organs or activities; (2) whether the material *dwells on or repeats at length* descriptions of sexual or excretory organs or activities; (3) *whether the material appears to pander or is used to titillate*, or *whether the material appears to have been presented for its shock value.* In assessing all of the factors, and particularly the third factor, the overall context of the broadcast in which the disputed material appeared is critical.
>
> . . . .
>
> The more explicit or graphic the description or depiction, the greater the likelihood that the material will be considered patently offensive. Merely because the material consists of double entendre or innuendo, however, does not preclude an indecency finding if the sexual or excretory import is unmistakable.

Industry Guidance, *supra*, at 8003-04. This definition and explanation of indecent language gives the speaker ample notice of what constitutes indecent language.

Seventh Circuit has upheld the definition of profanity used in the model regulation.[152] Therefore, based on the precedent upholding the definitions used in the model regulation, along with the recent movement towards protecting children from inappropriate language,[153] the model regulation places the audience on sufficient notice of what language is prohibited.

C. *The Proposed Model Regulation Will Pass First Amendment Scrutiny as a Legitimate Means of Protecting Privacy Interests at Home*

The model regulation is consistent with the captive audience doctrine and does not violate the First Amendment. It is a valid exercise of a state's right to protect the privacy interest of its citizens at home. As stated in section (2) of the proposed regulation, one of its primary purposes is to prevent children's exposure to inappropriate language via a public television or radio broadcast.[154] The Supreme Court has recognized this purpose as a legitimate protection of one's privacy interest in the home.[155]

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152. *See* Tallman v. United States, 465 F.2d 282, 286 (7th Cir. 1972). In defending this definition of profanity, the Court concluded that "the term 'profane' was inferentially approved" by the Supreme Court. *Id.* at 285 (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 572-73 (1942)). The Circuit Court also refuted the petitioner's claim that the definition was unconstitutionally vague, explaining that the Supreme Court "'has consistently held that lack of precision is not itself offensive to the requirements of due process'" and that "[a]ll that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.'" *Id.* (quoting Roth v. United States, 354 U.S. 476, 491 (1957)). The FCC has recently applied this definition of profanity to a professional singer's use of expletives in a nonsexual manner during the Golden Globe Awards. *See* Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 19 F.C.C.R. 4975, 4981-82 (2004) [hereinafter Golden Globe Awards]; Katherine A. Fallow, *The Big Chill? Congress and the FCC Crack Down on Indecency*, COMM. LAW., Spring 2004, at 1, 26. In adopting the definition of profanity as articulated in *Tallman*, the FCC overturned a portion of the decision in *Pacifica* that interpreted the isolated or fleeting use of the "F-Word" as not covered by 18 U.S.C. § 1464. *Golden Globe Awards*, *supra*, at 4980. Having adopted a new definition of profanity, the FCC now considers the use of "the 'F-Word' and those words (or variants thereof) that are as highly offensive as the 'F-Word'" between the hours of 6 a.m. and 10 p.m. (the hours children are most likely to be in the audience) to be in violation of 18 U.S.C. § 1464, regardless of the context. *Id.* at 4981-82. Based on this precedent, a university can defend its definition of profanity as putting the audience on sufficient notice.

153. *See supra* note 107.

154. *See supra* Part VII.A., § 2.

155. *See* Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 747 (1996) (plurality opinion) (recognizing a state's interest in protecting children from inappropriate material); FCC v. Pacifica Found., 438 U.S. 726, 748 (1978) (referencing all citizens' right to be left alone in the privacy of the home); *supra* note 67.

These profane and obscene chants have a high probability of being broadcast into the homes of those watching a game on television or listening to a game on the radio.[156] The Supreme Court has found that unwilling listeners of public television and radio broadcasts are considered a captive audience for the purpose of First Amendment analysis.[157] While a viewer or listener is free to change the station, the Court has found that such an explanation is equivalent to "saying that the remedy for an assault is to run away after the first blow."[158]

In addition, the Court's concern for unnecessarily severe criminal sanctions is not at issue in the model regulation.[159] Not only does the proposed regulation impose no criminal penalties, the first violation of the regulation imposes only a simple warning rather than any substantial consequences.[160] Therefore, even if the person did not receive notice of the regulation prior to attending a university event, he or she would have to violate the regulation twice before being ejected.[161] Furthermore, in contrast to the facts of *Cohen*,[162] disapproval of offensive fan behavior at collegiate sporting events has been well documented.[163] For these reasons, the model regulation of fan behavior at a public university sporting event is a valid means for a university to protect the unwilling listeners at home.

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156. *See* Knight, *supra* note 1 (noting that vulgar chants during a basketball game were audible on a national television broadcast).

157. *See Denver Area Consortium*, 518 U.S. at 744 (plurality opinion); *Pacifica*, 438 U.S. at 748-49; Columbia Broad. Sys., Inc. v. Democratic Nat. Comm., 412 U.S. 94, 127 (1973).

158. *Pacifica*, 438 U.S. at 749.

159. *See id.* at 750 (emphasizing that the Court "ha[s] not decided that an occasional expletive in . . . this broadcast would justify a criminal prosecution"); Cohen v. California, 403 U.S. 15, 26 (1971) (explaining that "the State may not [absent a more compelling reason] . . . make the simple public display here involved of this single four-letter expletive a criminal offense").

160. *See supra* Part VII.A., § 4.

161. *Id.*

162. *See Cohen*, 403 U.S. at 22 (noting that no one actually complained about Cohen's jacket).

163. *See* Wasserman, *supra* note 3, at 377 (mentioning the incident at the University of Maryland as "one of many incidents of offensive or obnoxious cheering by students throughout the country during the 2004 college basketball season"); Brady, *supra* note 3 (quoting the Big Ten Commissioner as being "aware that the use of obscenities at games is a big issue in certain places" and the "[n]o one feels good about it"); Knight, *supra* note 1 (referring to the University of Maryland as "center court in a national debate over how to limit rowdy fans without violating free speech").

D. The Proposed Model Regulation Will Pass First Amendment Scrutiny as a Legitimate Means of Protecting the Unwilling Listeners Attending the Game

The model regulation also passes First Amendment scrutiny as a legitimate means for protecting the privacy interests of those unwilling listeners attending the game. Section (2) of the model regulation provides that a primary reason for the University's regulation is to protect children attending the game from exposure to inappropriate language.[164] The Supreme Court has recognized the protection of children from offensive and vulgar language as a legitimate privacy interest.[165]

Additionally, children in attendance at sporting events are a captive audience with respect to obscene and vulgar fan cheers. Similar to the passengers riding in a streetcar in *Lehman*,[166] and the audience attending the school speech in *Fraser*,[167] the obscene message engages children who have no means of avoiding the conduct.[168] Although an argument can be

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164. *See supra* Part VII.A., § 2(b).

165. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 684 (1986). As explained in Part V.A. of this Comment, a strong argument can be made based on Supreme Court precedent that the Court would recognize a privacy interest at a sporting event. *See supra* notes 106-16 and accompanying text.

166. *See* Lehman v. City of Shaker Heights, 418 U.S. 298, 306-07 (1974) (Douglas, J., concurring).

167. *See Fraser*, 478 U.S. at 684-85.

168. *But see* Haiman, *supra* note 57, at 193 (proposing that the "substantial privacy interests are being invaded in an essentially intolerable manner" language in *Cohen* should be interpreted to not allow the government to regulate "*the initial impact of any kind of communication, but that the law should protect* [the unwilling listeners'] *right to escape from a continued bombardment by that communication if they wish to be free from it*"). Haiman even addresses the issue of protecting children from harmful speech directly, explaining that children are exposed to inappropriate material on a daily basis and that exposure to the realities of a free and independent society has some beneficial effects on the youth of society. *Id.* at 197-99. However, *Pacifica*, which was decided subsequent to Haiman's article, takes the opposing view in protecting children from offensive language. *See* FCC v. Pacifica Found., 438 U.S. 726, 749-50 (1978). The Court pointed out that "prior warnings cannot completely protect the listener or viewer from unexpected program content" and that "[t]o say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow." *Id.* at 748-49. While this language has led scholars to conclude that *Pacifica* was decided incorrectly, the Court has yet to directly overrule the opinion. *See, e.g.*, Strauss, *supra* note 49, at 120 (concluding that the Court should not have found the unwilling listener in *Pacifica* captive to the broadcast because the option to change the radio station was readily available). However, the model regulation is still consistent with Haiman's proposition that a speaker must violate the regulation at least two times (thus constituting "a continued bombardment") before he or she is forced to leave the arena. *See supra* Part VII.A., § 4.

made that a spectator has the simple alternative of not attending the game to avoid the message, this argument is without merit.[169]

Justice Brennan's concurrence in *Heffron* is a perfect example of why requiring fans to leave a game is not the proper solution.[170] Justice Brennan found that attendants of a state fair were not a captive audience because "fairgoers are fully capable of saying 'no' to [pamphleteers] seeking their attention and then walking away."[171] By coming to this conclusion through analysis of the medium the speaker was using, Justice Brennan shows that the purpose of the public venue (that is, the entertainment of a state fair versus the necessity of public transportation or public school) is irrelevant in determining the existence of a captive audience.[172] If he had taken the necessity of the venue into consideration, Justice Brennan would have concluded that attendees of a state fair can never be considered captive because the alternative of leaving is always available. Instead a captive audience claim should be negated only when the unwilling listener has the option of averting his or her eyes.[173] Using this same logic, fans at a public university sporting event can be a captive audience, depending on the means of communication used by the speaker, even though they could avoid the offensive speech by not attending the event.[174]

Furthermore, for the same reasons as articulated in Part VII.C of this Comment, the statute satisfies the third, fourth, and fifth factors of the

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169. *See* Haiman, *supra* note 57, at 194-95. In his interpretation of the Cohen standard of regulating offensive speech, Haiman emphasizes "that *considerations of voluntarism with respect to the target's initial presence at the scene of communication should be regarded as irrelevant.*" *Id.* at 194. Instead, he focuses on "*the degree of voluntarism available to* [the unwilling listener] *for getting out of* [the unwanted communication situation]." *Id.* at 195. This rationale supports the proposition that an audience attending a sporting event is captive of offensive cheers, as the only recourse available, leaving the game, results in financial and emotional loss. In fact, Haiman uses the example of buying a ticket to attend the theater, a situation where the viewer is spending money to voluntarily enter an enclosed venue for entertainment purposes, as support for this proposition. *Id.* This example demonstrates that Haiman's proposition is consistent with allowing a university to regulate offensive speech on behalf of unwilling listeners.

170. Heffron v. Int'l Soc'y For Krishna Consciousness, Inc., 452 U.S. 640, 657 n.1 (1981) (Brennan, J., concurring in part and dissenting in part).

171. *Id.*

172. *See id.* (finding that the fairgoers were not a captive audience because they could easily avoid the pamphlet's message rather than emphasizing the viewers' option to leave the fair altogether); *accord* Cohen v. California, 403 U.S. 15, 21-22 (1971) (analyzing the unwilling listeners' interests without mentioning the ability to leave the courthouse).

173. *Cf. supra* Part V.B. (emphasizing the viewer's opportunities to avoid the message as the key factor in determining whether an audience is captive).

174. *Cf.* Haiman, *supra* note 57, at 195 (concluding that the relevant question is the unwilling listener's ability to avoid the message once exposed rather than the freedom with which the unwilling listener entered into the communication situation).

Cohen test.[175] Therefore, the Court would find that the model regulation passes First Amendment scrutiny regarding the university's interest in regulating on behalf of the privacy interests of the unwilling listeners attending a basketball game on the university's campus.

VIII. CONCLUSION

Regulating the content of speech on a public university's campus requires a delicate balancing of the speaker's First Amendment rights with a university's right to maintain an orderly campus. While the suppression of controversial content necessarily imposes an element of censorship, it is required in certain contexts in order to protect the rights of the unwilling listener. The regulation proposed by this Comment attempts to sanitize a very limited part of a public university's campus: a sports arena during a basketball game. In balancing the competing interests, a university protects the privacy of its patrons without unreasonably censoring others' ability to express their reaction to the game. Considering the tradition associated with families attending sporting events, such a regulation is necessary to preserve the excitement and passion surrounding collegiate sports today.

175. *See supra* notes 160-64 and accompanying text.