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SPORT AND EXPRESSION, SPORT AS EXPRESSION

Howard M. Wasserman*

Sport-related expression garners two mentions in Stanley Fish's book, *The First*.¹

First, he describes sport stadiums as unique places in which “you could say anything that came into your head,” although acknowledging that fans have been ushered out for profanity and taunts.² I share Fish's expansive understanding of protected “cheering speech” at sporting events and agree that expelling fans for their speech violates their free speech rights.³ Second, Fish discusses former NFL quarterback Colin Kaepernick, who was blackballed from the league for kneeling during the pregame national anthem; Fish describes the owners as “fully within their rights” to not want the “baggage associated with someone who performs a political act” on the field.⁴ Kaepernick's actions presaged a wave of male and female professional athletes protesting police violence and systemic racism in 2020—including kneeling,⁵ wearing uniforms with political messages,⁶ and boycotting

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¹ STANLEY FISH, *THE FIRST: HOW TO THINK ABOUT HATE SPEECH, CAMPUS SPEECH, RELIGIOUS SPEECH, FAKE NEWS, POST-TRUTH, AND DONALD TRUMP* (2019).

² *Id.* at 13.

³ Howard M. Wasserman, *Fans, Free Expression, and the Wide World of Sports*, 67 U. PITT. L. REV. 525, 527–28 (2006); Howard M. Wasserman, *If You Built It, They Will Speak: Public Stadiums, Public Forums, and Free Speech*, 14 NINE: J. BASEBALL HIST. & CULTURE 15, 17–18 (2006).

⁴ FISH, *supra* note 1, at 16.

⁵ Chris Cwik, *A's Outfielders Khris Davis and Tony Kemp Raise Fists in Support of Black Lives Matter*, YAHOO!SPORTS (July 24, 2020), <https://sports.yahoo.com/six-white-sox-players-including-tim-anderson-and-lucas-giolito-kneel-during-national-anthem-011501211.html>; Sanya Mansoor, *WNBA Players Walk Off Court Before the National Anthem and Dedicate Delayed Season to Breonna Taylor*, TIME (July 27, 2020), <https://time.com/5871954/wnba-national-anthem-breonna-taylor/>; Tim Reynolds, *NBA Players, Coaches and Referees Kneel in Solidarity as Unprecedented Bubble Season Begins*, TIME (July 30, 2020), <https://time.com/5874083/nba-players-kneel-season-begins/>.

⁶ Ava Wallace, *With the Words on Their Backs, NBA Players Take a Stand*, WASH. POST (July 30, 2020), <https://www.washingtonpost.com/sports/2020/07/30/nba-social-justice-jerseys-names-messages/?arc404=true>.

games.⁷ Athletes in other countries protested in solidarity with the anti-racist cause.⁸

In January 2020—before the world stopped due to the COVID-19 pandemic—the International Olympic Committee (IOC) issued guidelines restricting athlete protests and demonstrations for the Tokyo Games (which were canceled due to the pandemic). Rule 50 of the Olympic Charter states that “[n]o kind of demonstration or political, religious, or racial propaganda is permitted in any Olympic sites, venues or other areas.” The 2020 guidance expounded on Rule 50 to include “[d]isplaying political messages, including signs or armbands” and “gestures of a political nature, like a hand gesture or kneeling.”⁹ The restrictions applied on the playing field, in the Olympic Village, and during medal and other official ceremonies, while allowing political expression in interviews, in media areas, and on traditional and digital media. The IOC insisted that the “focus for the field of play and related ceremonies must be on celebrating athletes’ performance, and showcasing sport and its values.”¹⁰

It is unfortunate that the IOC imposed the ban after Fish completed his book, because it plays into its overarching theme—not every restriction on speaking poses a “free speech” problem. Instead, Fish took to the *Wall Street Journal* editorial pages to discuss the IOC’s actions, in what could have been an additional section in *The First*. “Declaring a politics-free zone is simply an assertion that one kind of activity is appropriate in a particular space and not another.”¹¹ The IOC rule does not ban speech; it recognizes and honors the primary obligations of those who enter a particular arena of practice.¹² For players in the athletic arena, that primary obligation is what Mitch Berman calls the “competitive desideratum,” in which competitors display

⁷ Marc Stein, *Led by NBA, Boycotts Disrupt Pro Sports in Wake of Blake Shooting*, N.Y. TIMES (Aug. 28, 2020), <https://www.nytimes.com/2020/08/26/sports/basketball/nba-boycott-bucks-magic-blake-shooting.html>.

⁸ *Players Kneel Against Racism as Premier League Returns*, DW.COM (June 16, 2020), <https://www.dw.com/en/players-kneel-against-racism-as-premier-league-returns/a-53851835>.

⁹ *Rule 50 Guidelines*, IOC ATHLETES’ COMMISSION (Jan. 2020), <https://www.olympic.org/-/media/Document%20Library/OlympicOrg/News/2020/01/Rule-50-Guidelines-Tokyo-2020.pdf>; Jacob Bogage, *IOC to Athletes: No Kneeling, Hand Gestures or ‘Any Political Message’ at Tokyo Olympics*, WASH. POST (Jan. 9, 2020), <https://www.washingtonpost.com/sports/2020/01/09/ioc-athletes-no-kneeling-hand-gestures-or-any-political-messaging-tokyo-olympics/>; Kelly McLaughlin, *The International Olympic Committee Is Banning Athletes from Making Political Gestures at the 2020 Games in Tokyo, and One US Hammer Thrower Says It’s a ‘Form of Control’*, BUS. INSIDER (Jan. 11, 2020), <https://www.businessinsider.com/olympic-athletes-banned-from-protesting-in-tokyo-ioc-says-2020-1>.

¹⁰ *Rule 50 Guidelines*, *supra* note 9.

¹¹ Stanley Fish, *Let the Games Begin—and Politics Pause*, WALL ST. J., Jan. 24, 2020, at A11.

¹² *Id.*

their “relative excellence in executing the particular athletic virtues that the sport is centrally designed to showcase, develop, and reward.”¹³

Compatibility is a recurring theme in *The First*, as Fish argues that we must “recognize and honor the primary obligations taken on by those who enter a particular arena of practice.”¹⁴ Free speech—uninhibited, robust, and wide-open¹⁵—is incompatible with the operation and function of most institutions. For example, a university cannot perform its primary function—imparting knowledge—without controlling information.¹⁶ It cannot guarantee individuals the freedom to speak without institutional restraint or discipline; if it did so, “it would cease to be a university because it would have replaced the academic value of freedom of inquiry” with the distinct and incompatible “constitutional value of freedom of expression.”¹⁷

The Olympic games and other competitions are akin to universities. They function as intended only by restricting speech and requiring participants to focus on their primary obligations of their arena—exercising and demonstrating their athletic virtues in competition. IOC rules preventing athletes from speaking during competition are no more an infringement on speech than rules preventing nurses from lobbying for higher wages during an operation.¹⁸

The IOC erred in framing and defending its rule. It insisted on a “fundamental principle that sport is neutral and must be separate from political, religious or any other type of interference.”¹⁹ This “muddie[d] the waters” by insisting on neutrality. Neutrality enters when a space is politically configured; the IOC used a political concept while attempting to maintain the Games’ non-political configuration.²⁰

Rather than muddying the waters, however, the IOC’s paean to neutrality gave the hypocritical game away. Sport, particularly the Olympics, is not neutral and never has been neutral. Sport is expressive, if not political, as Fish uses the term. Sport is a vehicle through which to promote notions and ideals of “the good”—of what society can and should attain, including in

¹³ Mitchell Berman, “Let ‘Em Play”: A Study in the Jurisprudence of Sport, 99 GEO. L.J. 1325, 1358 (2011).

¹⁴ Fish, *supra* note 11, at A11

¹⁵ N.Y. Times v. Sullivan, 376 U.S. 254, 270 (1964).

¹⁶ Fish, *supra* note 1, at 106.

¹⁷ *Id.* at 107.

¹⁸ *Id.*

¹⁹ *Rule 50 Guidelines*, *supra* note 9.

²⁰ Fish, *supra* note 11, at A11.

racial²¹ and gender equality.²² And if sport possesses social, cultural, political, and sociological meaning, the competition expresses that meaning. Consider the message attached to Jesse Owens winning four gold medals at the 1936 Summer Games in Munich, a political challenge to Hitler's visions of a German "Master Race." Consider the messages of gender equity and female empowerment attached to high-level women's sports and successful female athletes and teams—helping women and girls "develop a conception of themselves as agents in their social and physical world."²³ The Olympic message extends beyond mere competition—to express the special message of international peace and cooperation and of athletes playing for love of country—by raising flags at the end of each event and playing national anthems to honor the victors and the nations for which the victors compete.

The IOC policy sought not to maintain neutrality, but to dictate and control the message expressed in the Games. It sought to limit sport's meaning to the IOC's preferred message—the joy of victory and respect for country, with nothing to the contrary in that space. The message of pure love of country is undermined by, most famously, Tommie Smith's and John Carlos' "Black Power" raised-fist salute during the national anthem at the 1968 Mexico City Games, a symbolic protest against the American flag, anthem, and culture. The IOC regulations sought to prevent competing messages towards one nation or between rival nations.

Accepting Fish's conception of compatibility with respect to universities, sport may be more compatible with forms of expression than he allows. If women's athletic participation expresses a message of female empowerment and equality, a t-shirt or ribbon demanding pay equity is not incompatible with the competition; if playing the national anthem honors the winner's nation, a silent protest of that anthem is not incompatible with the ceremony. In both cases, expression of the competing message can co-exist with athletic performance. Any incompatibility arises from the IOC's disagreement with that competing message and the desire to control all expression surrounding its competitions.

We can debate whether the IOC and other sport organizations can or should control all messages surrounding the events. The surge in athlete speech and protest in the United States and worldwide in 2020 suggests that limiting sport-adjacent expression, when it does not interfere with on-field competition, is impossible and misguided.

²¹ HARRY EDWARDS, *THE SOCIOLOGY OF SPORT* 190 (1973).

²² KATHRYN JAY, *MORE THAN JUST A GAME: SPORTS IN AMERICAN LIFE SINCE 1945*, at 165–66 (2004).

²³ Kimberly A. Yuracko, *One for You and One for Me: Is Title IX's Sex-Based Proportionality Requirement for College Varsity Athletic Positions Defensible?*, 97 *NW. U. L. REV.* 731, 791 (2003).

But if they choose this path, they should own and acknowledge what they are doing, without hiding behind vacuous conceptions of neutrality and without pretending that expression and expressive meaning is not occurring. By exploring the real scope of free speech and how it applies (or does not apply) in unique contexts, Stanley Fish's *The First* reveals how.