

“LIKE” IT OR NOT

AN ARGUMENT FOR THE COLLEGE COACH’S RIGHT TO REGULATE SOCIAL MEDIA

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Introduction	206
I. Students’ Rights to Free Speech in the School Setting	210
High Schools	210
Colleges and Universities	216
The Unique Category of the Student-Athlete	218
Contractual Relationship	220
Role Models and Representatives	221
Part of the Team	223
Privacy Concerns.....	224
II. The Coach’s Rights	227
As an Administrator in the School Setting	228
As an Interested Party in the Impact on the Institution	230
As a Leader, Mentor, and Counselor	232
As an Academic Professional.....	233
III. Examples of Schools with Regulations	234
IV. Future Implications.....	241
Conclusion	243

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INTRODUCTION

The Internet isn't written in pencil . . . it's written in ink.

– The Social Network

People who post information on social media websites,¹ specifically social networks, write in an addictively mesmerizing, permanent ink.² With technology ever-increasing at a rapid rate, this has had significant consequences, particularly in the world of intercollegiate athletics. Because of the permanency of online interaction, in that information posted online is never truly erased, and because of the status and visibility of student-athletes, unrestricted use of social media by student-athletes can place colleges and universities at risk. As such, this article discusses the essential need for coaches, athletic departments, and university administrators to monitor and regulate student-athletes' use of social media without facing potential legal exposure for infringement of constitutionally protected free speech rights.

Individuals across the world have embraced the widespread growth of technology, and student-athletes are no exception. Social media invites people to openly and instantly share intimate details of their lives. For example, online social media technologies, such as Facebook, Twitter, YouTube, and Google+ provide users with opportunities to establish a network of other users with whom they can easily share information.³ Not only can people with a smart phone or tablet instantly access the Internet

¹ Social networking sites have been described as “web-based services that allow individuals to (1) construct a public or semi-public profile within a bounded system; (2) articulate a list of other users with whom they share a connection; and (3) view and traverse their list of connections and those made by others within the system.” Danah M. Boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. OF COMPUTER-MEDIATED COMM. 210, 211 (2007).

² Google's online cache may retain information posted on social media even after the material is deleted. Brock Read & Jeffrey R. Young, *Facebook and Other Social-Networking Sites Raise Questions for Administrators*, CHRON. HIGHER EDUC., Aug. 4, 2006, at A29.

³ See, e.g., <http://www.facebook.com>; <http://www.twitter.com>; <http://www.youtube.com>; <http://www.plus.google.com>; Jason R. Sheppard, *The Thrill of Victory, and the Agony of the Tweet: Online Social Media, The Non-Copyrightability of Events, and How to Avoid a Looming Crisis by Changing Norms*, 17 J. INTELL. PROP. L. 445, 451-52 (2010).

to check the score of their favorite team or catch up on the stats of their favorite player, but now, social media offers an outlet for expression and a channel of direct, real-time communication with those teams and their players.

For example, along with the "status update" feature of Facebook, users may also upload photos and videos directly from their computers or from any mobile device.⁴ The "News Feed" provides users with instantaneous access to information posted by their Facebook "friends," and a "thumbs up" signal allows users to "Like" anything another friend posts.⁵ Twitter, another real-time social network, provides its users with a space limited to 140 characters to answer the question, "What's happening?"⁶

Similarly, users can upload these small bursts of information, or "Tweets," from a personal computer connected to the Internet, a mobile phone text message, or from any device with a Twitter application.⁷ Twitter "followers" can immediately respond to a "Tweet," with a "re-Tweet" of the same message or start a public stream of conversation by using a particular "Hashtag," resulting in a never-ending cycle of communication.⁸

Likewise, YouTube enables users to upload and share videos on their own channels through a variety of methods.⁹ The recently developed Google+ allows users to divide their friends into "Circles," create "Hangouts," and discuss thoughts and ideas on the "Stream."¹⁰ With all of these social media platforms, users can contribute their own thoughts, or they can simply use the social networking websites as a way to get the latest information. The majority of problems involving student-athletes and social networking websites, however, result from a student-athlete's own comments made on their personal social networking website.

The proliferation of social media has created a minefield for major athletic programs nationwide. Whether players are kicked

⁴ Facebook Mobile, <http://www.facebook.com/mobile/?ref=pf#/mobile/?ref=pf> (last visited June 26, 2011).

⁵ About Facebook, <http://www.facebook.com/facebook> (last visited June 26, 2011).

⁶ About Twitter, <http://twitter.com/about> (last visited June 26, 2011).

⁷ *Id.*

⁸ *Id.*

⁹ YouTube, <http://www.youtube.com/mobile> (last visited June 26, 2011).

¹⁰ The Google+ Project, <http://www.plus.google.com/about> (last visited July 25, 2011).

out of school for creating a threat in a “status” message,¹¹ posting racist comments about a political election,¹² or simply having a ridiculous answer to an online quiz question re-posted for others to enjoy,¹³ every athletic program faces an array of potential dangers.¹⁴

Imagine that a student-athlete becomes angry over a coach’s decision to bench him during a crucial game in which the team suffers a particularly disheartening defeat.¹⁵ With the simple press of a few buttons, that player’s bitter thoughts are immediately released into cyber world to their friends and followers, and their friends’ own friends and followers; ripe for comment and debate, and ultimately, never to be fully deleted.

Perhaps a player posts a few photos of gifts, restaurant bills, or other impermissible benefits he received while being recruited.¹⁶ The player, the team, and the university could certainly face serious repercussions for the instantaneous message. In addition, the constant access to comments made on social networking sites poses serious problems for coaches and

¹¹ A.J. Daulerio, *Texas Lineman Gets Kicked off Team for Racist Facebook Message to Barack Obama*, DEADSPIN (Nov. 6, 2008, 1:30 PM), <http://deadspin.com/5078513/texas-lineman-gets-kicked-off-team-for-racist-facebook-message-to-barack-obama>.

¹² *Hero for Our Time: Marques ‘Grand Marques’ Slocum*, EDSBS (Aug. 27, 2007, 5:23 PM), <http://www.everydayshouldbesaturday.com/2007/08/22/hero-for-our-time-marques-grand-marques-slocum/>.

¹³ Larry Brown, *Luke Caparelli Kicked off Wake Forest Football for Facebook Comments*, LARRY BROWN SPORTS (Jan. 28, 2008), <http://larrybrownsports.com/college-football/luke-caparelli-kicked-off-wake-forest-football-for-facebook-comments/1259>.

¹⁴ See, e.g., Clay Travis, *Time for Colleges to Ban Facebook?*, AOL NEWS (July 1, 2009, 5:00 PM), <http://www.aolnews.com/2009/07/01/time-for-colleges-to-ban-facebook/>.

¹⁵ For example, less than thirty minutes after a loss to Alabama, Mississippi State University basketball player Ravern Johnson “tweeted,” “Starting to see why people [t]ransfer you can play the minutes but not getting your talents shown because u [sic] watching someone else wit [sic] the ball the whole game shooters need to move not watch why other coaches get that do [sic] not make sense to me.” See Brandon Marcelllo, *Stansbury Bans Use of Twitter Among Team*, THE CLARION LEDGER (Feb. 3, 2011), <http://blogs.clarionledger.com/msu/2011/02/03/tweet-after-loss-incites-fans-deletion-of-players-accounts/>.

¹⁶ For instance, Marvin Austin of the University of North Carolina provided a laundry list of violations for the NCAA when he posted photos of a watch for his younger sister, a bag from an upscale store in Miami, and a \$143 bill from The Cheesecake Factory in Washington on his Twitter. *Sports and Social Media*, THE SANDPIT (August 5, 2011, 1:22PM), <http://thesandpit.com/the-sandpit-blog/2011/8/5/sports-and-social-media.html>

universities in trying to shield their student-athletes and athletic departments from exposure to negative publicity.

As explained below, student-athletes are a unique category of the general collegiate population, and are therefore not entitled to all of the constitutional protections of free speech afforded to the average undergraduate student. Because student-athletes "accept" the privileges of exclusive status and association when joining a collegiate sports team, they effectively waive certain rights and constitutional protections. This sort of contractual relationship binds student-athletes to uphold the ideals of the coach, team, athletic department, and institution; and the terms of the contract very well may include limitations on a player's use of social media. Establishing clear standards for the student athletes will enable coaches, athletic department administrators, and university officials to effectively monitor and regulate the use of social media by their student-athletes without running afoul of the constitutional rights of the student-athletes.

This article explores the conflict between a coach's interest in monitoring a student-athlete's social media use and an individual student-athlete's need for constitutional protections. Specifically, this article addresses the implications of the coach's regulations as related to an athlete's constitutional privileges of speech, expression, and privacy. Finally, this article asserts that the interests of the coach, athletic department, and university should outweigh those of the student-athlete.

Part I of this article discusses the constitutional rights of student-athletes in using social media, offering a brief background concerning the restriction of rights of students in the school setting by evaluating the differences in privileges awarded to high school students, collegiate students, and the unique category of student-athletes. Next, Part II evaluates the rights of coaches, athletic departments, and university administrators to place regulations and restrictions on student-athletes, arguing that their interests in presenting a positive public image, maintaining team harmony, and promoting valuable life lessons of modesty and marketability for young athletes outweighs any First Amendment interest a student-athlete might have in using social media. Part III then offers examples of athletic programs with policies imposing restrictions on athletes' use of social media.

Finally, Part IV briefly assesses the future implications of allowing restrictions on student-athletes' social media use to other applicable areas of law.

I. STUDENTS' RIGHTS TO FREE SPEECH IN THE SCHOOL SETTING

National Collegiate Athletic Association ("NCAA") and local college officials are increasingly scrutinizing student-athletes' use of social media.¹⁷ Athletic departments and coaches alike have enacted new policies to monitor athletes' use of such sites with an increasing concern for both the protection of the university image and the welfare of student-athletes. In response, many players have argued that these policies violate their constitutional rights, namely their First Amendment right to free speech.¹⁸

There are differences, however, in the protection afforded students, depending on the particular level of education and the type of activity involved. As a general rule, in order for a school to prohibit speech and punish a student, the school must establish that the speech materially disrupts the educational environment, creates substantial disorder, invades the rights of other students, or is reasonably foreseeable to do so.¹⁹

High Schools

The Supreme Court established in *Tinker v. Des Moines Independent Community School District* that "[neither] students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."²⁰ Accordingly, high school authorities may limit speech only when there is an actual or reasonably foreseeable risk of a "substantial disruption of or material interference with school activities."²¹ The *Tinker* Court

¹⁷ Frank B. Butts, *NCAA Athletes and Facebook*, 11 THE SPORT J. 1 (2008), available at <http://www.thesportjournal.org/article/ncaa-athletes-and-facebook>.

¹⁸ Noel Johnson, *Tinker Takes the Field: Do Student Athletes Shed Their Constitutional Rights at the Locker Room Gate?*, 21 MARQ. SPORTS L. REV. 293, 297 (2010) ("When student athletes are suspended, regulated, or restricted in some manner, they often bring constitutional challenges.").

¹⁹ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969).

²⁰ *Id.* at 506.

²¹ *Id.* at 514. In *Tinker*, the school authorities violated the students' First Amendment rights to free expression by banning students from wearing black

held that the school district's only interest in banning the speech had been the "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" or "an urgent wish to avoid the controversy which might result from the expression."²² This interest, however, did not justify banning a silent, passive expression of opinion, unaccompanied by disorder or disturbance.²³

Since *Tinker*, courts have carved out a number of narrow categories of speech that school administrators may restrict even without the threat of substantial disruption.²⁴ The first exception to the *Tinker* standard is from *Bethel School District No. 403 v. Fraser*, which involved the prohibition of lewd, vulgar, indecent and plainly offensive student speech made to a captive audience in the school setting that was "wholly inconsistent with the basic educational mission of the school."²⁵

The *Fraser* Court held that the school could punish the student for his offensive nominating speech during a school assembly because the First Amendment does not prohibit schools from encouraging the "fundamental values of 'habits and manners of civility,'" by "insisting that certain modes of expression are inappropriate and subject to sanctions."²⁶ Furthermore, the Court recognized that the rights of students in public schools "are not automatically coextensive with the rights of adults."²⁷ Thus, "[t]he determination of what manner of speech in the classroom or in

armbands in protest of the Vietnam War and by suspending the students who did so. *Id.* at 514.

²² *Id.* at 509-10.

²³ *Id.* at 508. Unlike the protest in *Tinker*, however, student-athletes' social media postings can be much more than "silent, passive expressions of opinion" and may stand on the verge of actual disorder or disturbance. See *infra* notes 121-22 and accompanying text.

²⁴ *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 212 (3d Cir. 2001); see, e.g., *Morse v. Frederick*, 551 U.S. 393 (2007) (prohibiting a student banner referencing drug use at a parade during school hours); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (prohibiting a profanity-laced student speech).

²⁵ *Bethel*, 478 U.S. at 675, 685-86. For an argument for the coach to regulate speech inconsistent with the team's basic mission, see *infra* notes 129-30 and accompanying text.

²⁶ *Id.* at 681, 683.

²⁷ *Id.* at 682.

school assembly is inappropriate properly rests with the school board.”²⁸

The Supreme Court articulated the second exception to the *Tinker* standard in *Hazelwood School District v. Kuhlmeier*, where it held that “educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities [like school-sponsored newspapers] so long as their actions are reasonably related to legitimate pedagogical concerns.”²⁹ The Court gave substantial deference to school officials’ decisions regarding the content of school-sponsored speech because the school could be viewed as endorsing that particular type of speech.³⁰

The Supreme Court added another exception to the general rule of *Tinker* in *Morse v. Frederick*.³¹ At a school-sanctioned and school-supervised event, a high school principal saw a student unfurl a large banner conveying a message that reasonably regarded the promotion of illegal drug use.³² Because of the special characteristics of the school environment and the strong governmental interest in preventing student drug use, school administrators may restrict student expression that can be reasonably regarded as promoting such abuse.³³ The Court found that even though the student created the banner off-campus and was not on school grounds when he displayed it, “a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting

²⁸ *Id.* at 683. For a discussion of the rights of coaches and administrators to regulate athletes’ use of social media to achieve the ultimate goal of both academic and athletic success and to maintain a positive public image of the institution, see *infra* notes 132-40 and accompanying text.

²⁹ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988). Again, this is also an important argument college administrators make in regulating social media use. See *infra* note 131 and accompanying text.

³⁰ *Id.* at 270-71 (finding that school officials are entitled to exercise greater control over “expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school”). Note, that although the *Hazelwood* Court refrained from deciding whether courts should give university officials the same degree of deference as high school principals, a similar argument can be made as to whether university officials and athletic departments may be concerned about public perception based on the actions of student-athletes. *Id.* at 273 n.7.

³¹ *Morse v. Frederick*, 551 U.S. 393 (2007).

³² *Id.* at 396. Specifically, the sign read, “BONG HITS 4 JESUS.” *Id.* at 397.

³³ *Id.* at 408.

illegal drug use.”³⁴ Therefore, Courts have given school officials authority to regulate student speech without fear of constitutional infringement in a certain number of circumstances.

Courts have recently considered the effects of speech in the form of social media in the high school setting. Social media, though traditionally accessed off-campus, can still have an impact on the school’s campus. Thus, even though off-campus student speech is generally protected, it could be subject to analysis under the *Tinker* standard if the speech raises on-campus concerns.³⁵

For example, in *J.S. v. Bethlehem Area School District*, an eighth grade student created a threatening website aimed at a teacher explaining “Why Should She Die” and requesting money “to help pay for the hitman.”³⁶ The website affected the teacher so badly that she ended up taking medical leave from her responsibilities, and the school needed three substitute teachers to take her place.³⁷ As a result, the student’s website, although technically created off-campus, “disrupted the educational process” and “adversely impacted the delivery of instruction” in the educational environment.³⁸

Similarly, in *Wisniewski v. Board of Education of Weedsport Central School District*, the Second Circuit upheld the suspension of a student for creating an image on the internet from his home computer during non-school hours that depicted a gun firing a bullet at a teacher’s head with the words “Kill Mr. VanderMolen” printed beneath; and then, using an instant messenger program, the student sent the image and message to fifteen fellow students.³⁹ The *Wisniewski* court reasoned that “[t]he fact that

³⁴ *Id.* at 402. Coaches may also have the ability to regulate student-athletes’ use of social media if that use promotes drug use or other illegal activity. See *infra* notes 137-40 and accompanying text.

³⁵ See, e.g., *Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 38-39 (2d Cir. 2007) (applying *Tinker*); *J.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1115 (C.D. Cal. 2010) (“[T]he Court must consider whether the school’s decision to discipline is based on *evidence* or *facts* indicating a foreseeable risk of disruption, rather than undifferentiated fears or mere disapproval of the speech.”); *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 865 (Penn. 2002) (“[W]here speech that is aimed at a specific school and/or its personnel is brought onto the school campus or accessed at school by its originator, the speech will be considered on-campus speech.”).

³⁶ *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 851 (Penn. 2002).

³⁷ *Id.* at 852.

³⁸ *Id.* at 869.

³⁹ *Wisniewski*, 494 F.3d 34.

[the student's] creation and transmission of the icon occurred away from school property [did] not necessarily insulate him from school discipline."⁴⁰ Analyzed under the *Tinker* standard, the student's speech would not have been protected by the First Amendment because "it cross[ed] the boundary of protected speech and pose[d] a reasonably foreseeable risk [of] materially and substantially disrupting the work and discipline of the school."⁴¹

Finally, in *Doninger v. Niehoff*, school administrators barred a high school student from running for senior class secretary based on a derogatory blog post about the school's cancellation of an upcoming event because the student's conduct "failed to display the civility and good citizenship expected of class officers."⁴² The Second Circuit Court of Appeals determined that "participation in voluntary, extracurricular activities is a 'privilege' that can be rescinded when students fail to comply with the obligations inherent in the activities themselves."⁴³

Because the student's out of school expressive conduct "created a foreseeable risk of substantial disruption," the Court of Appeals upheld the school's actions.⁴⁴ Though *Doninger* did not specifically involve an athletic team as an extracurricular activity, the court's reasoning is applicable in determining what limited rights student-athletes possess in the college and university setting. It also provides an illustration of how traditional "off-campus" speech now can have an "on campus" presence in the modern virtual world.

On the other hand, in a pair of similar decisions by the Third Circuit, the Court of Appeals recently determined that school districts violated high school students' First Amendment right of free expression by suspending them for creating fake Internet profiles of their school's principal on a social networking website

⁴⁰ *Id.* at 39.

⁴¹ *Id.* at 38-39.

⁴² *Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008), *cert denied*, 80 U.S.L.W. 3068 (U.S. Oct. 31, 2011) (No. 11-113). Similarly, student-athletes are held to a higher standard. *See infra* notes 82-93 and accompanying text.

⁴³ *Id.* (quoting *Doninger v. Niehoff*, 514 F. Supp. 2d 199, 214 (D. Conn. 2007) *aff'd* by 527 F.3d 41 (2d Cir. 2008)).

⁴⁴ *Id.* at 53; *see also* *Kowalski v. Berkeley Cnty. Sch.*, 652 F.3d 565, 572 (4th Cir. 2011) (adopting the Second Circuit's approach in allowing school officials to regulate off-campus speech when it is reasonably foreseeable that the speech will reach the school environment).

from their home computer during non-school hours.⁴⁵ In *Layshock v. Hermitage School District*, the student's parents argued that the suspension violated their Fourteenth Amendment substantive due process rights in caring for their son; and the Court of Appeals found that "[i]t would be an unseemly and dangerous precedent to allow the state, in the guise of school authorities, to reach into a child's home and control his or her actions there to the same extent that it can control that child when he or she participates in school sponsored activities."⁴⁶

Although the school officials could not establish a sufficient nexus between the school and the off-campus creation of the profile, the Third Circuit recognized that the school certainly should have control of students in school-sponsored activities.⁴⁷ Most importantly, the Third Circuit acknowledged the growing technological world and found that since there has been no ruling to the contrary, "*Tinker's* 'schoolhouse gate' is not constructed solely of the bricks and mortar surrounding the school yard" and is thus equally applicable to off-campus speech.⁴⁸

In *J.S. ex rel. Snyder v. Blue Mountain School District*, the Court of Appeals found that unlike the student in *Doninger*, the speech at issue did not reach the school; because the student took specific steps to make the profile "private," and because there was no foreseeable disruption, the school violated the student's First Amendment rights.⁴⁹ The Court found that the *Fraser* "lewd and vulgar" standard does not apply to off-campus speech.⁵⁰ The

⁴⁵ See, e.g., *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205 (3d Cir. 2011); *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011).

⁴⁶ *Layshock*, 650 F.3d at 216. The reasoning of this case does not have the same application to collegiate student-athletes, however, as college students are adults.

⁴⁷ *Id.*

⁴⁸ *Id.* at 216, 222 (Jordan, J., concurring).

⁴⁹ *Blue Mountain Sch. Dist.*, 650 F.3d at 929. But see *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 945 (3d Cir. 2011) (Fisher, J., dissenting) ("[T]he profile's *potential* to cause disruption was reasonably foreseeable, and that is sufficient."). Even if this argument is made for student-athletes, however, they are still representatives of the team and university; and thus, do not step out of the school sponsored activity, regardless of their social media settings. Moreover, they have limited privacy rights. See *infra* notes 95-114 and accompanying text.

⁵⁰ *Id.* at 932. The Court was most concerned with the over-application of the *Fraser* standard which, if extended, would allow school officials to punish any speech by a student that takes place anywhere, at any time, as long as it is *about* the school or a school official and is deemed "offensive." *Id.* Conversely, the same argument still

Supreme Court has not determined whether schools can punish students for off-campus speech that is not school-sponsored or at a school-sponsored event and that caused no substantial disruption at school.⁵¹

Therefore, even though social media implicates off-campus speech, through this legal framework and the unique category of the student-athlete as part of a school-sponsored activity, coaches may, as discussed below, regulate their athletes' use of social media because of the impact that speech has on the team, athletic department, and entire university.

Colleges and Universities

Courts have reacted differently to constitutional protections for university students than those of high school students. Because the Supreme Court traditionally considered university attendance a privilege, and not a right, college students did not initially have extensive constitutional protections.⁵² Justice Powell expressed one of the earliest advancements of First Amendment free speech rights of college students, however, in *Healy v. James* with his assertion that "state colleges and universities are not enclaves immune from the sweep of the First Amendment."⁵³ In *Healy*, a college's refusal to give a certain student group the same recognition it gave other groups violated the First Amendment because the college's refusal was based on a generalized fear of disruption.⁵⁴

In *Widmar v. Vincent*, the Court applied a strict scrutiny standard and held that the University of Missouri's refusal to recognize and grant access to university property to a religious

applies because the student-athlete, while engaged in a school-sponsored activity, is a unique exception, as discussed *infra* notes 63-75 and accompanying text.

⁵¹ *Id.*

⁵² David Fellman, *Religion, the State, and the Public University*, RELIGION AND THE STATE 303 (1975) ("Courts tended to look upon attendance at a public college or university as a privilege, not a constitutional right from which it followed that the institution was to insist upon whatever binding conditions of behavior it deemed appropriate."); see also *Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245 (1934); and *Waugh v. Bd. of Tr. of Univ. of Miss.*, 237 U.S. 589 (1915).

⁵³ *Healy v. James*, 408 U.S. 169, 180 (1972).

⁵⁴ *Id.* at 169.

student group violated the First Amendment rights of those students.⁵⁵

Generally, public institutions can limit students' speech only under specific circumstances.⁵⁶ The limitations on speech must be (1) content neutral, (2) further an important or compelling government interest, and (3) be "narrowly tailored" to further that interest.⁵⁷ A governmental interest typically includes the school's desire to ensure a safe, non-disruptive educational environment.⁵⁸

Additionally, the government can regulate certain categories of speech in order to control the "secondary effects" of that speech.⁵⁹ The government created an exception to general content-regulation rules, according to which the government may restrict speech on government property, speech by government employees, or speech by those accepting government funds.⁶⁰

The abundant new avenues for speech created by the Internet have resulted in a new approach to modern First Amendment free speech jurisprudence that broadens regulation of free speech. Online speech casts doubt upon the content and viewpoint-protective First Amendment doctrines,⁶¹ and renders

⁵⁵ *Widmar v. Vincent*, 454 U.S. 263 (1981); *see also Rosenberger v. Rector of the Univ. of Va.*, 515 U.S. 819 (1995).

⁵⁶ *U.S. v. O'Brien*, 391 U.S. 367 (1968).

⁵⁷ *Id.*

⁵⁸ Eric P. Robinson, *Intentional Grounding: Can Public Colleges Limit Athletes' Tweets?*, CITIZEN MEDIA LAW PROJECT (Nov. 9, 2010), <http://www.citimedialaw.org/blog/2010/intentional-grounding-can-public-colleges-limit-athletes-tweets>. Some courts have held that in the context of the school athletic team, this important or compelling interest would also include the ability to punish insubordination within a sports team. *See infra* notes 64-69 and accompanying text.

⁵⁹ *See* Steven G. Guy, *Fear of Freedom: The New Speech Regulation in Cyberspace*, 8 TEX. J. WOMEN & L. 183 (1999) (quoting *Renton v. Playtime Theatres*, 475 U.S. 41 (1986)); *see also* Autum K. Leslie, *Online Social Networks and Restrictions on College Athletes: Student Censorship?*, 5 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 19, 27-28 (2008) (discussing the various categories of protected and unprotected speech as applicable to athletes).

⁶⁰ Guy, *supra* note 59, at 183 (upholding restrictions on speech in a public airport (citing *Int'l Soc'y for Krichna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992))); *see also* *Rust v. Sullivan*, 500 U.S. 173 (1991) (upholding restrictions on speech by those accepting federal funds); *and* *Connick v. Meyers*, 461 U.S. 138 (1983) (upholding restrictions on speech by public employees where speech was an employee's grievance concerning an internal office policy that the employer believed would disrupt the office and undermine his authority). For further discussion on the *Rust* decision as it relates to student-athletes, *see infra* notes 151-52 and accompanying text.

⁶¹ Guy, *supra* note 59, at 184.

obsolete many of the Court's old rationales for regulating speech.⁶² As such, college athletic departments and administrators, as discussed below, will need to seek new approaches to balance the significant constitutional interests of students against the university coaches and officials' need to create an environment in which both academic and athletic success can occur.

The Unique Category of the Student-Athlete

Even though the Supreme Court has carved constitutional safeguards for the general college student's right to free speech, some students are still not guaranteed all of those protections. Since the inception of athletic programs in schools across the country, student-athletes have been placed in a unique category. Courts have consistently held that student-athletes have lesser constitutional protections than the general student population, given their voluntary membership in extracurricular activities and status as role models among the school and community.⁶³

Specifically, the Supreme Court upheld random drug testing of student-athletes in *Vernonia School District 47J v. Acton*. In that case, the court determined that by voluntarily choosing to participate in athletic programs, student-athletes subject themselves to a higher degree of regulation than that imposed on the general student body.⁶⁴ The Court also found that the school's athletes have a reduced expectation of privacy in that by choosing to "go out for the team," student-athletes "voluntarily subject themselves to a degree of regulation even higher than that imposed on [other] students."⁶⁵

In *Lowery v. Euverard*, the Sixth Circuit Court of Appeals found that a challenge to a coach's authority and its effect on team unity were enough to justify a restriction on a student's right to

⁶² *Id.*

⁶³ See, e.g., *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657 (1995); *Lowery v. Euverard*, 497 F.3d 584 (6th Cir. 2007), *reh'g* and *reh'g en banc denied* (6th Cir. Feb. 1, 2008), *cert. denied* 129 S. Ct. 159 (Oct. 6, 2008); and *Wildman ex rel. Wildman v. Marshalltown Sch. Dist.*, 249 F.3d 768 (8th Cir. 2001).

⁶⁴ *Vernonia*, 515 U.S. at 657 (upholding random drug-tests and lesser privacy expectations of student-athletes).

⁶⁵ *Id.*

free speech.⁶⁶ Specifically, student-athletes were punished after they circulated a petition to fellow football players calling for the ouster of their coach.⁶⁷ In addressing the *Tinker* standard and the notion of foreseeable disruption, the Sixth Circuit noted, "*Tinker* does not require the school officials to wait until the horse has left the barn before closing the door . . . [It] does not require certainty, only that the forecast of substantial disruption be reasonable."⁶⁸ The Court of Appeals further found that the punishment was acceptable because the school had to call a team meeting to ensure "team unity," where not doing so "would have been a grave disservice to the other players on the team."⁶⁹ Thus, coaches can impose certain guidelines on their players.

One sports psychologist observed the athlete's familiarity with following specific guidelines and stated:

[T]he athlete lives in a world where one misplaced word or action often threatens the immediate end of his athletic career. From Little League baseball through professional football, the correct attitude is as important as actual athletic skill, and once an athlete is labeled a troublemaker or uncoachable, his athletic career is usually doomed. . . . [A]thletes perceive[] themselves as being in a powerless position within the sports world, and like most power-less groups they survive[] by deferring to authorities—coaches, athletic directors, and professional team owners.⁷⁰

A large body of legal precedent supports the notion that being on a sports team is a "privilege," and not a right;⁷¹ and because of

⁶⁶ *Lowery*, 497 F.3d at 584 (holding that the coach did not violate students' First Amendment free speech right by removing them from the football team).

⁶⁷ *Id.* at 596.

⁶⁸ *Id.* at 591-92.

⁶⁹ *Id.* at 596.

⁷⁰ Robert L. McGahey, Jr., *A Comment on the First Amendment and the Scholar-Athlete*, 6 HUM. RTS. Q. 155, 157 (1976-77) (citing JACK SCOTT, *THE ATHLETIC REVOLUTION* 66 (1971)).

⁷¹ See, e.g., *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 180 F.3d 758, 763 (6th Cir. 1999), *rev'd on other grounds*, 531 U.S. 288 (2001) ("[S]tudents have no constitutional right to play sports."); *Spath v. Nat'l Collegiate Athletic Ass'n*, 728 F.2d 25, 28 (1st Cir. 1984) ("Since there is no fundamental right to education, there cannot be [a] fundamental right to play intercollegiate ice hockey."); *In re United States ex rel. Mo. State High Sch. Activities Ass'n*, 682 F.2d 147, 154 n.8 (8th Cir. 1982) ("A student's interest in participating in a single year of interscholastic athletics amounts to a mere

that, the coach and school have a reasonable amount of control in determining certain rules and regulations regarding the athletes' conduct for the duration of the players' membership on the team.

There are several approaches to evaluating the unique characteristics of the student-athlete that give coaches and administrators to have the authority to regulate student-athletes' use of social media. First, because student-athletes essentially waive some of their constitutional rights by contract when accepting membership to a particular sports team, they must uphold certain standards in order to maintain membership status with the team.⁷² Second, institutions may require student-athletes to meet specific standards as both role models and representatives of the institution.⁷³ Third, it is vital for team success for athletes to have a healthy, trusting relationship with their coach, and part of that relationship necessarily includes certain guidelines and regulations.⁷⁴ Lastly, student-athletes have lower privacy expectations than members of the general student population because they inject themselves into the public eye by assuming a privileged and prominent role on a university athletic team.⁷⁵

Contractual Relationship

When student-athletes sign an initial agreement to play at an institution, they freely waive their constitutional rights as consideration for the privilege to play at that school.⁷⁶ Such contracts require them to maintain a minimum grade point average, comply with rules of conduct, and conform to the standards of the team.⁷⁷ Specifically, when an athlete signs a National Letter of Intent with a team, the university is subject to any NCAA violations that the athlete commits. Thus, because the school is subject to penalties and liability for their new athlete,

expectation rather than a constitutionally protected claim of entitlement."); *Williams v. Hamilton*, 497 F. Supp. 641, 645 (D.N.H. 1980); *Colorado Seminary (Univ. of Denver) v. NCAA*, 570 F.2d 320, 321 (10th Cir.1978); *Parish v. NCAA*, 506 F.2d 1028, 1034 (5th Cir. 1975);.

⁷² See *infra* notes 76-81 and accompanying text.

⁷³ See *infra* notes 82-93 and accompanying text.

⁷⁴ See *infra* note 94 and accompanying text.

⁷⁵ See *infra* notes 95-114 and accompanying text.

⁷⁶ *McGahey*, *supra* note 70, at 157.

⁷⁷ *Id.*

coaches and athletic departments should have the ability to monitor and regulate the individual's social media use.⁷⁸

Additionally, there are several other agreements that could constitute the official agreement between an athlete and the university, including acceptance of financial aid or actual enrollment in classes. Because of this contractual relationship, players arguably have no basis for challenging the coach's authority to implement policies for the team unless the coach violates their constitutional rights or acts tortuously toward them.

Many schools are now revising the policies they require their student-athletes to sign to incorporate the use of social media.⁷⁹ If schools decide to implement new policies into the agreements after the student-athlete has already signed the document, the players must re-sign, acknowledging the new terms.⁸⁰ If the athlete refused to sign, acknowledging the modified terms, the coach may very well take away the privilege to play under another provision in the contract.⁸¹

Role Models and Representatives

These contracts also cover other areas of a student-athlete's responsibilities. While student-athletes are similar to normal college students in some respects, they are often the subject of public and media scrutiny, thus creating the likelihood that an athlete's negative conduct could reflect poorly on the institution.⁸² As such, schools and athletic departments can impose additional behavioral guidelines as a part of scholarship renewal or continuation of team membership.⁸³ These "codes of conduct" usually govern an athlete's representation of their institution and

⁷⁸ See *infra* notes 132-40 and accompanying text.

⁷⁹ Alex Ruppenthal, *College Coaches Finding Ways to Monitor Athletes' Social Networking Activity*, THE COLUMBIA MISSOURIAN (May 13, 2010, 12:00 AM), <http://www.columbiamissourian.com/stories/2010/05/13/college-coaches-finding-ways-monitor-athletes-social-networking-activity/>.

⁸⁰ *Id.*

⁸¹ Again, this reiterates the notion that playing athletics on the collegiate level is a privilege. McGahey, *supra* note 70, at 157. See *supra* notes 63-71 and accompanying text.

⁸² See *supra* notes 63-75 and accompanying text; *infra* notes 135-43 and accompanying text.

⁸³ Butts, *supra* note 17, at 1.

require the individual to represent the team and university in a positive light.⁸⁴

Recently, however, school administrators have expressed the need to regulate student-athletes' social media accounts based on concerns over the athletes' status as role models.⁸⁵ Accordingly, student-athletes may be asked to sign a policy pledging good conduct on social media sites, particularly social networking sites. Furthermore, athletic departments must consider what punishments to impose when the student-athletes do not adhere to the policy.⁸⁶ For example, punishments can range from monetary fines or community service to a player being benched for a certain number of games.⁸⁷

In severe cases, schools may also impose traditional breach-of-contract remedies, including removing the player from the team.⁸⁸ For instance, the University of Michigan policy states that athletes must maintain a "high standard of honor and dignity" reflective of the university's athletics program when posting on such sites, and that any behavior on the sites that violates university or team rules could result in "team suspension, termination from the varsity team, and reduction or nonrenewal of any athletic scholarships."⁸⁹

Universities depend heavily upon their athletes to maintain a positive public image in order to maintain recruitment efforts, national school rankings, and community support. As public figures and representatives of the institution, athletes forfeit the constitutional protections of other general college students; in fact, they forfeit many of those protections.⁹⁰ Student-athletes have a great deal of pressure to utilize their social media accounts properly—to market their individual talents, communicate with the community and fans, and positively reflect on the coach, team, and institution they attend.⁹¹ Accordingly, if the student-athlete

⁸⁴ *Id.*

⁸⁵ Leslie, *supra* note 59, at 21.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Stu Woo, *U. of Michigan Asks Athletes to Pledge Good Conduct on Social-Networking Sites*, CHRON. HIGHER EDUC., Sept. 29, 2006, at A45.

⁹⁰ See *supra* notes 52-62 and accompanying text.

⁹¹ *Id.*

fails to adequately represent the team and institution, the coaches and administrators can impose punishments.

Although student-athletes may try to analogize their role model status to that of a professional athlete, the two are quite different. A professional athlete may be under contract, but the employment setting offers the professional many more rights and protections. Nevertheless, many professional sports leagues have increased regulation of social networking sites, because the league commissioner has the authority to punish athletes for their off-duty conduct when those actions can negatively impact the league as a whole.⁹² Additionally, professional athletes receive compensation for their contributions to the team, whereas the NCAA prohibits student-athletes from receiving payment for their "services."⁹³

Even if student-athletes could successfully contend that they should be treated as employees and not amateurs, their presence in the academic setting means that they are still students and subjects them to the authority of administrative officials. Therefore, student-athletes, as role models and representatives of the university, do not have the same protections as professional athletes or individuals in the general student population. As a result, coaches and administrators have the authority to regulate the individual speech of their athletes.

Part of the Team

The success of any college athletic team relies greatly on the unique categorical regulation of the student-athlete; and much of that success depends upon the team members' relationships with one another and with the coach. Team unity is essential to accomplishing the ultimate goal: winning. Players often look to

⁹² Lauren McCoy, *140 Characters or Less: Maintaining Privacy and Publicity in the Age of Social Networking*, 21 MARQ. SPORTS L. REV. 203, 215 (2010). For a similar argument for the NCAA's regulation of all college athletes' use of social media, see *infra* notes 153-88 and accompanying text.

⁹³ Duncan Currie, *Should College Athletes Get Paid?*, NAT'L REV. ONLINE (Apr. 5, 2011, 12:41 PM), <http://www.nationalreview.com/corner/263933/should-college-athletes-get-paid-duncan-currie>; see, e.g., Christopher M. Parent, *Forward Progress? An Analysis of Whether Student-Athletes Should Be Paid*, 3 VA. SPORTS & ENT. L.J. 226 (2004).

their coach as a mentor, a parent “away from home,” a counselor, and a leader.⁹⁴

A healthy, trusting relationship is an important part of the team’s overall success, and much of that relationship involves necessary rules and regulations. As part of an athletic team, the student-athlete must be responsible for his own actions to avoid disappointing his fellow teammates, his coach, or his fans. Therefore, coaches should have the ability to monitor and regulate players’ use of social media to help the athlete maintain focus on the ultimate team goal and to promote team harmony—all while instilling the values of leadership, discipline, sportsmanship, and respect.

Privacy Concerns

Student-athletes have lesser privacy expectations than the general student population, based on their voluntary membership in extracurricular activities.⁹⁵ Moreover, they can be considered public figures;⁹⁶ with notoriety, student-athletes lose their sense of anonymity and gain the critical eye of those around them.⁹⁷ In *Bilney v. Maryland*, the Court of Special Appeals of Maryland held that university varsity basketball team members achieved the status of “public figures” solely by virtue of their membership on an athletic team.⁹⁸ Specifically, the court found no tortious invasion of privacy when newspaper articles reported the scholastic standing of basketball team members, because the athletes were considered to be public figures.⁹⁹ Thus, as public

⁹⁴ See *infra* notes 141-50 and accompanying text.

⁹⁵ *Vernonia Sch. Dist. 47J*, 515 U.S. at 657 (1995) (“There is an additional respect in which school athletes have a reduced expectation of privacy. By choosing to ‘go out for the team,’ they voluntarily subject themselves to a degree of regulation even higher than that imposed on students.”).

⁹⁶ Leslie, *supra* note 59, at 21.

⁹⁷ Kyle Veazey, *Learning to Navigate the Pitfalls of Social Network*, CLARION LEDGER, Feb. 13, 2011, at 1C, 4C. (“That’s why it’s critically important you understand that everybody’s watching you and you’re living in a glass house. It’s important you handle that in a first-class way.”) *Id.* (quoting Mississippi State University Athletic Director Scott Stricklin).

⁹⁸ *Bilney v. Md.*, 406 A.2d 652 (Md. Ct. Spec. App. 1979).

⁹⁹ *Id.*

figures, student-athletes must be held accountable for their actions.¹⁰⁰

Although a student-athlete may assert an enhanced right of privacy in information posted on a personal social media account from his or her home computer based on *Stanley v. Georgia*,¹⁰¹ the widespread publicity associated with social media and the general information-sharing nature of social networks undermines this contention.

Social networking websites generally promote user-sharing information and are "set up to provide individuals with a means for communicating and interacting with one another."¹⁰² For example, Facebook and MySpace provide a clear privacy statement to inform users about the limits of protection that the sites maintain for the information shared, as well as how the site will use the personal information provided.¹⁰³ Moreover, the default settings on many of these social media accounts are set to "public" or "everyone."¹⁰⁴

Another reason social media should no longer be considered private for the benefit of the student-athlete is because it can sometimes be seen as part of the public record. The Library of Congress recently acquired Twitter's entire Tweet Archive.¹⁰⁵ The Library received all public tweets from the 2006 inception of the service to the present.¹⁰⁶ Therefore, student-athletes, along with average college students, do not have an expectation of privacy in a social media account, and coaches cannot monitor an individual's online activities without constitutional infringement.

As a result, a student-athlete may experience difficulty in trying to assert a reasonable expectation of privacy in social media. Using *United States v. Katz*, when considering the reasonableness of an individual's expectation of privacy, a court

¹⁰⁰ *Id.*

¹⁰¹ *Stanley v. Ga.*, 394 U.S. 557 (1999).

¹⁰² Dianne M. Timm & Carolyn J. Duven, *Privacy and Social Networking Sites*, 124 NEW DIRECTIONS FOR STUDENT SERVICES 89, 92 (2008).

¹⁰³ See generally Matthew J. Hodge, *The Fourth Amendment and Privacy Issues on the "New" Internet: Facebook.com and Myspace.com*, 31 S. ILL. U. L.J. 95 (2006).

¹⁰⁴ *Id.*

¹⁰⁵ Matt Raymond, *Twitter Donates Entire Tweet Archive to Library of Congress*, LIBRARY OF CONGRESS (Apr. 15, 2010), <http://www.loc.gov/today/pr/2010/10-081.html>.

¹⁰⁶ *Id.*

must first consider whether the individual has an actual, legitimate expectation of privacy.¹⁰⁷ Courts may look to see whether the individual has sought to preserve something as private¹⁰⁸ or whether he or she has exposed that information to the public.¹⁰⁹

Determining whether an individual or student-athlete maintains an expectation of privacy in social media remains highly contested, given the information-sharing nature of the sites, which forces the user to take additional privacy measures to protect his or her information and keep an expectation of privacy.¹¹⁰ Furthermore, when the information becomes available to a third-party, it is no longer private.¹¹¹

Also, under *Katz*, courts must evaluate whether society is prepared to recognize an expectation of privacy in the material.¹¹² Because social media is still a rapidly growing area of technology, it remains an open question as to whether an expectation of privacy in social media is reasonable.¹¹³ Unfortunately, the Supreme Court has not yet delineated the limits of privacy expectations in the context of social media. As a result, athletic departments and universities must remain alert to any changes of law in the field of privacy as related to social media.

Even if the athletes can effectively assert an actual expectation of privacy in their social media, and it is an expectation society is prepared to accept as in fact reasonable, institutions would probably still have the authority to regulate their student-athletes' use under the contractual relationship in which athletes waive their rights.¹¹⁴

Nevertheless, student-athletes on social media can immediately convey unfiltered information at the spur of the moment to the whole world. In the heat of the moment, some

¹⁰⁷ United States v. Katz, 389 U.S. 347 (1967).

¹⁰⁸ *Id.* at 351.

¹⁰⁹ *Id.*

¹¹⁰ Hodge, *supra* note 103, at 95.

¹¹¹ *Katz*, 389 U.S. at 351 (“What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.”).

¹¹² *Id.*

¹¹³ See Bryce Clayton Newell, *Rethinking Reasonable Expectations of Privacy in Online Social Networks*, 17 RICH. J.L. & TECH. 12 (2011).

¹¹⁴ See *supra* notes 76-81 and accompanying text.

players simply do not understand that once they put something "out there for everyone to see," they cannot take it back.¹¹⁵ The "disconnect" or lack of face-to-face interaction and the "open-mic" nature associated with social media posted from a smart phone or mobile device often results in a statement made that a student-athlete may later regret.¹¹⁶ This information, as previously discussed, is permanent, and no longer private.¹¹⁷ Therefore, coaches should have the ability to offer guidelines and to implement policies regarding such behavior, just as coaches presently have authority to monitor press conferences.¹¹⁸

It is evident that social media has become a vehicle for self-expression and communication among student-athletes nationwide.¹¹⁹ Freedom of expression is certainly an integral part of the education process, but with student-athletes, this right is essentially waived upon accepting an athletic scholarship or signing the National Letter of Intent. While school administrators and athletic department officials undoubtedly appreciate the importance of student-athletes' rights to freely express themselves, they also understand the necessity of imposing certain restrictions in order to maintain a successful environment for everyone involved. Because participation in college athletics is a privilege and not a right, fewer constitutional protections likely will be available for student-athletes.

II. THE COACH'S RIGHTS

"Execution of the coach's will is paramount."¹²⁰

¹¹⁵ Brad Locke, *Twitter Bomb from Johnson Another Blow for MSU Hoops*, THE DAILY JOURNAL, Feb. 4, 2011 at B1, B3.

¹¹⁶ Veazey, *supra* note 97, at 4C.

¹¹⁷ *Id.* at 4C ("[T]here's a digital footprint and digital archive that is just not going to go away. [The student-athletes] should actually be giving more thought to [posting information].").

¹¹⁸ *Id.* at B3.

¹¹⁹ Butts, *supra* note 17.

¹²⁰ *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1190 (6th Cir. 1995). "Unlike the classroom teacher whose primary role is to guide students through the discussion and debate of various viewpoints in a particular discipline, [the role of a coach] is to train his student-athletes how to win on the court. The plays and strategies are seldom up for debate." *Id.*

Although student-athletes may assert the right to speak freely, the speech may have detrimental consequences. As a result, coaches and athletic departments should have the ability to monitor a student-athlete's speech, specifically, in social media, in certain clearly-defined circumstances. Serving as an administrator in the school setting, as someone with a vested interest in the actions of student-athletes' impact on the university, as a leader, mentor, and friend, and as an academic professional, a coach has a strong interest in regulating his athletes' social media use.

As an Administrator in the School Setting

As administrators of the team, coaches and athletic department officials certainly have the right to maintain control of their student-athletes. As evidenced by *Tinker* and similar cases, courts allow for such regulation when necessary to prevent a substantial disruption or material interference with the rights of others.¹²¹

Thus, schools may penalize students for specific Tweets or posts on social media that are likely to lead to a "substantial disruption or material interference" or, in some cases, a foreseeable disruption, with the team and its activities, but cannot impose a prior restraint on athletes in mere anticipation of such a comment.¹²² As an agency of the state, a public university and its employees, when in their capacity as employees, also serve as agents of the state.¹²³ Accordingly, actions of athletic department administrators and coaches alike constitute state action.¹²⁴

Because school administrators cannot impose a prior restraint, completely banning the use of social media by student-athletes may present certain constitutional problems.¹²⁵

¹²¹ See *supra* notes 20-51 and accompanying text.

¹²² Robinson, *supra* note 58.

¹²³ Breen v. Runkel, 614 F. Supp. 355, 358 (D.C. Mich. 1985).

¹²⁴ *Id.*

¹²⁵ Robinson, *supra* note 58. Several coaches have imposed a ban on social media use. For example, the Mississippi State University basketball coach banned team use of Twitter after a player took to the site to express his frustration with the team's loss. Locke, *supra* note 115, at B1, B3. The MSU Athletic Department fully supported Coach Stansbury's decision, citing decisions by coaches at North Carolina, Boise State, and Kentucky to ban the use of social media. *Id.* Instead, the university uses social media to market the athletic programs itself. See *infra* notes and accompanying text.

Specifically restricting the use of social media immediately preceding a game or event, however, may be acceptable. This allows the athlete to fully concentrate on the importance of the game.¹²⁶

In crafting appropriate social media policies and provisions, universities, athletic departments, and coaches should include specific provisions requiring that student-athletes agree not to put the team, its coaches, the university, or perhaps even the fans in a negative light on any social media platform.¹²⁷ Like many of the professional leagues, athletic departments should consider appropriate "blackout" periods before, during, and after games, team meetings, or practices.¹²⁸ By providing guidelines on acceptable conduct for players regarding social media platforms, an institution can foster mutual trust and respect between the coach and his players.

Similar to school administrators, coaches should be allowed to regulate speech and activities that are inconsistent with the basic mission of the team,¹²⁹ since some courts have agreed that this authority would include the ability to punish insubordination within a team.¹³⁰ Additionally, coaches can contend that athletic teams and sporting events are school-sponsored activities, and regulation of social media use is reasonably-related to the team's legitimate concerns of success as well as the institution's

¹²⁶ Many professional athletic organizations have made restrictions on players' use of social media. See generally *The Twitter Ban in Pro Sports: Is It Affecting First Amendment Rights?*, THE BLEACHER REPORT (Oct. 3, 2009), <http://bleacherreport.com/articles/265790-professional-sports-ban-twitter-is-it-affecting-first-amendment-rights>. The NBA does not allow Twittering forty-five minutes before and after each game; and teams are allowed to add their own restrictions, as well. *Id.* For example, Miami Heat members are not allowed to Tweet at any time while in the Heat complex. *Id.* The NFL takes a more strict approach, prohibiting Tweeting ninety minutes before the game, and also including "represented" coaches. *Id.* The NHL, on the other hand, is much more lenient, allowing their players access up to thirty minutes before a game. *Id.*

¹²⁷ Irwin A. Kishner & Brooke E. Crescenti, *The Rise of Social Media: What Professional Teams and Clubs Should Consider*, 27 ENT. & SPORTS LAW. 24, 25 (2010).

¹²⁸ *Id.*

¹²⁹ The mission of most athletic teams is to win; thus anything that detracts from that should allow the coach the ability to monitor and/or regulate.

¹³⁰ Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986). See *supra* notes 25-27 and accompanying text.

legitimate concerns of upholding a positive public image.¹³¹ Finally, anything that would interfere with the team's overall unity and success, including social media use, could be a factor in a "code of conduct" or other policy implemented by the coach or athletic department.

As an Interested Party in the Impact on the Institution

Both coaches and schools have legitimate concerns about the impact a negative decision by an athlete using social media could have on the team, athletic department, university, potential recruits, and alumni. Because colleges seek financial stability in their athletic programs, one negative statement could contribute to a bad public image, resulting in declining revenues and recruiting difficulties.¹³²

Furthermore, coaches have valid concerns about the widespread publicity associated with a student-athlete's social media account.¹³³ Because of the information-sharing nature of websites, coaches must worry not only about what the players post, but also what content others post to the players' individual profiles or accounts. For example, a Kentucky court recently determined that even though one's permission is not required to be "tagged" in a photo on Facebook, it may still be admissible in a legal proceeding.¹³⁴

This reminds coaches that student-athletes must be accountable for all aspects of their online activities because agents, news reporters, stalkers, and others with ulterior motives may search for incriminating information online.¹³⁵ Thus, administrators should be able to regulate student-athletes' use of social media because the actions of current athletes can have a

¹³¹ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988). See *supra* notes 29-30 and accompanying text.

¹³² Jason Peck, *Sports and Social Media: Why Should Coaches Care?* TAKE A PECK: SOCIAL MEDIA, SPORTS, MARKETING, AND MORE (Aug. 27, 2010), <http://www.jasonpeck.com/2010/08/27/sports-and-social-media-why-should-coaches-care/>.

¹³³ Timm & Duven, *supra* note 102, at 92.

¹³⁴ *Lalonde v. Lalonde*, No. 2009-CA-002279-MR, 2011 WL 832465 (Ky. Ct. App. Feb. 25, 2011).

¹³⁵ Travis, *supra* note 14.

secondary effect on future recruits, the university's public image, national ranking, and overall reputation.

Moreover, the modern technological cases have shown that even though generally protected in the high school environment, off-campus student could be subject to the *Tinker* standard if the speech raised on-campus concerns.¹³⁶ Information posted on social media accounts could have a serious impact on-campus and could raise multiple issues within a sports team, athletic department, or even an entire university.¹³⁷

For instance, if a student-athlete "tweets" a message or "checks in" using Facebook Places from a club the night before an important game, coaches may have no choice but to sanction the athlete for violating curfew restrictions. Similarly, San Diego State University penalized four female soccer players for pictures depicting alcohol use and partying; two athletes at the University of Colorado received citations for harassment by the campus police based on racially offensive messages posted on their personal profiles; Louisiana State University dismissed swimmers after posting degrading comments about their coaches;¹³⁸ Oregon football coaches removed former quarterback Jeremiah Masoli from the football team following a series of arrests for stolen items;¹³⁹ and Northwestern University women's soccer team members received serious discipline for photos on a social networking website of team hazing events involving underage drinking that took place "off-campus."¹⁴⁰ Regardless of the fact that the student-athletes' actions may have taken place "off-campus," the effect of those actions "on-campus," on the team, on the athletic department, and on the university *through their use of social media* makes them subject to regulation.

¹³⁶ See *supra* notes 35-51 and accompanying text.

¹³⁷ See Caleb Johnson, *Scandalized by the Web: College Sports Edition*, HUFFINGTON POST TECH (Oct. 1, 2009, 2:20 PM), available at <http://www.switched.com/2009/10/01/scandalized-by-the-web-college-sports-edition/>.

¹³⁸ *Id.*

¹³⁹ Ted Miller, *Masoli Booted After Series of Arrests*, ESPN.COM (July 9, 2010, 3:47 PM), http://espn.go.com/blog/ncfnation/post/_id/23018/masoli-booted-after-another-arrest.

¹⁴⁰ *Id.*

As a Leader, Mentor, and Counselor

Many student-athletes often rely on their coaches as their closest associates, mentors, and counselors. A student-athlete may feel closer to a coach than any other older person and may frequently seek parental-like assistance from that coach.¹⁴¹ The relationship frequently develops when the student-athlete experiences homesickness due to the long distance from his family or friends along with the pressure-filled arena of collegiate athletics.¹⁴² Because of the high pressure often placed on athletes, coaches sometimes serve as a sounding board, providing emotional and psychological support for the players.¹⁴³

Because coaches are called on to serve as role models who create relationships with their players, they must take advantage of “teachable moments” involving modern technology to educate student-athletes in social contexts about the appropriate use of the technology. Not only must coaches instill values of respect and discipline in their players in order to prepare them for their futures, but they must also make sure their players understand the *right* way to utilize social media and educate the team members on how to manage their social networks in a manner that positively reflects the teams for which they play.¹⁴⁴ For instance, several universities have implemented social media training for student-athletes to learn the hazards associated with improper use.¹⁴⁵ By providing proper training, athletes will learn to avoid using social media in ways that could hurt fans’ perceptions of the coach, team, or university.¹⁴⁶ For example, the athletics director at Baylor University notified student-athletes that material acceptable for other students to post on social media

¹⁴¹ See Harry M. Cross, *The College Athlete and the Institution*, 38 LAW AND CONTEMP. PROBS. 150, 168-169 (1973); and Gil Fried & Lisa Bradley, *Applying the First Amendment to Prayer in A Public University Locker Room: An Athlete’s and Coach’s Perspective*, 4 MARQ. SPORTS L.J. 301 (1994).

¹⁴² Fried & Bradley, *supra* note 141.

¹⁴³ *Id.*

¹⁴⁴ Peck, *supra* note 132.

¹⁴⁵ See Jon Cooper, *Ole Miss Now Has Social Media Training for Student Athletes*, SATURDAY DOWN SOUTH (July 8, 2011), <http://www.saturdaydownsouth.com/2011/social-media-training-for-athletes/>.

¹⁴⁶ Veazey, *supra* note 97, at 1C, 4C. For example, University of Mississippi basketball coach Andy Kennedy reminded his players to “think before they tweet” in order to make sure nothing sensitive “gets out.” *Id.*

may not be appropriate for the student-athletes' accounts.¹⁴⁷ Similarly, Wake Forest's athletic department officials instructed athletes that anything administrators deem inappropriate would not be tolerated.¹⁴⁸ Students give up some freedom and subject themselves to regulations when joining an athletic team.¹⁴⁹ The freedoms student-athletes forfeit may be transferred to the coach who has authority to take the necessary steps to produce both a winning team and successful season.

Regulating a players' use of social media is no different than a coach's policy governing other conduct; stripping the coach of his full ability to lead and to maintain order can have detrimental effects on a team. Poor decisions on social media accounts affect an individual player, his coach, and the team in general.¹⁵⁰ When everyone puts in the hard work and diligence to become a successful team, but one player fails to uphold his end of the bargain, the whole team suffers.

Therefore, it is essential for a coach to be able to monitor and guide a player in a variety of ways to avoid negative consequences for the entire team; because ultimately, each player must be held accountable for his or her individual actions.

As an Academic Professional

From an academic point of view, regulation of players' use of social media is beneficial to both the team and the individual player's academic success. Student-athletes must be efficient with time management skills and often have little time to waste with social media, without facing some academic consequences. By limiting the amount of time spent online, coaches can help keep players from the distracting, addictive nature of social media and ultimately help to improve the players' grade point averages.

Furthermore, administrators may be able to restrict or limit student-athletes' use of social media based on scholarships

¹⁴⁷ Erik Brady & Daniel Libit, *Alarms Sound Over Athletes' Facebook Time*, USA TODAY, Mar. 8, 2006, at 1C, available at http://www.usatoday.com/tech/news/internetprivacy/2006-03-08-athletes-websites_x.htm.

¹⁴⁸ Nate Dougherty, *Faceless New World*, ATHLETIC MANAGEMENT (Aug. 13, 2007), http://www.athleticmanagement.com/2007/08/13/faceless_new_world/index.php

¹⁴⁹ Butts, *supra* note 17, at 1.

¹⁵⁰ Veazey, *supra* note 97, at 1C.

awarded. Because athletes are often on scholarship, and some of the scholarships are part of federal funds, the government or school administration may prohibit certain speech of athletes. In *Rust v. Sullivan*, the Supreme Court upheld restrictions of speech on people who accepted federal funds.¹⁵¹ The regulations in *Rust* ensured that appropriated funds were not used for activities, including speech, outside the scope of the federal program.¹⁵² Thus, because student-athletes are often recipients of federal scholarship dollars, institutions can monitor and restrict the social media speech of student-athletes.

III. EXAMPLES OF SCHOOLS WITH REGULATIONS

Although the NCAA has a complex series of rules with regard to technological advancements and recruiting,¹⁵³ the NCAA has not adopted a formal position on the use of social media by student-athletes, instead, allowing the institutions to determine appropriate standards for their student-athletes.¹⁵⁴ The possibility of sanctions from student-athlete use of social media, though, has resulted in a need for athletic departments across the country to be proactive about the potential public relations nightmares their student-athletes can cause in creating official policies governing student-athletes' use of social media.¹⁵⁵ Currently, the monitoring conducted by athletic departments ranges from merely advising athletes on proper postings to totally banning athletes' use of

¹⁵¹ *Rust v. Sullivan*, 500 U.S. 173 (1991) (upholding a restriction on recipients of government funds from engaging in abortion counseling and referral).

¹⁵² *Id.* at 176.

¹⁵³ See, e.g., David Conway, *NCAA social networking regulations provide challenge for MU compliance department*, COLUMBIA MISSOURIAN (July 16, 2011), <http://www.columbiainmissourian.com/stories/2011/07/16/ncaa-social-networking-regulations-provide-challenge-mu-compliance-department>. For example, the NCAA banned text messaging recruits in 2007; and although contacting recruits via Facebook message is permissible, contacting them through the chat function is not. *Id.* Similarly, contact via Twitter is allowed unless the recruit receives text messages updates from Twitter. *Id.*

¹⁵⁴ Butts, *supra* note 17.

¹⁵⁵ *Id.*

social networking.¹⁵⁶ Some institutions heavily monitor their athletes' use while others simply threaten to do so.¹⁵⁷

The NCAA's silence on social media use is likely to be short-lived. For the first time, the NCAA took a stance on the responsibility of the university as related to student-athletes' social media use. Recently, the NCAA charged the University of North Carolina with failure to adequately and consistently monitor the social media use of its student-athletes.¹⁵⁸ Cameron Schuh, associate director of public and media relations for the NCAA, said the organization simply recommends that schools check on the social networking sites of their athletes.¹⁵⁹

Thus, even though the NCAA does not mandate its member institutions to monitor social network sites affiliated with the institution, "institutions are encouraged to do so" because "[t]heir oversight can only help ensure individuals associated with the institution (i.e. staff, student-athletes, etc.) are not violating NCAA rules nor jeopardizing the eligibility of student-athletes on these platforms."¹⁶⁰

The NCAA's pending case against North Carolina has serious implications for compliance directors and athletic departments nationwide in monitoring student-athlete social media use. Schools including Boise State, Indiana University, New Mexico State, Texas Tech, the University of North Carolina, and Mississippi State University have all established limits on their athletes' use of social media.¹⁶¹ *USA TODAY* researched social networking policies for twenty-seven schools in six major conferences. Five of the schools, including Auburn, Iowa State, Ohio State, Miami, and North Carolina, already have specific monitoring in place;¹⁶² while other schools warn athletes of the potential dangers associated with social media through handbook

¹⁵⁶ Brady & Libit, *supra* note 147 (discussing the recent bans on student-athlete use of social media at Loyola University and Mississippi State University).

¹⁵⁷ *Id.*

¹⁵⁸ University of North Carolina Tar Heels Official Athletics Site (June 21, 2011), http://tarheelblue.cstv.com/auto_pdf/p_hotos/s_schools/unc/sports/m-footbl/auto_pdf/NCAA_NOA_062111.

¹⁵⁹ Conway, *supra* note 153 (quoting Schuh).

¹⁶⁰ Brady & Libit, *supra* note 147.

¹⁶¹ *Id.*

¹⁶² *Id.*

policies, meetings, coaches' discussions, and workshops. Oddly enough, Ohio State actually *requires* athletes to have a public social media website and to add coaches and administrators as "friends" or "followers" as part of the monitoring process.¹⁶³

Furthermore, in lieu of a specific policy, some schools allow coaches to monitor the players' sites at their discretion, authorizing the coaches to take action if inappropriate material online is reported.¹⁶⁴ For example, the Missouri track and field coach prefers a more "old school" method by entrusting the team captains to monitor their fellow athletes' pages.¹⁶⁵

Some coaches encourage certain behavior online by reminding student-athletes of their futures. Kentucky football coach Joker Phillips, for example, tells his players to pretend they are interviewing when tweeting and imagine each post beginning with "Dear General Manager."¹⁶⁶

Other athletic departments remind players of their young fans. For instance, Arkansas running back Knile Davis stated that because the athletics department monitors the players' language and who athletes accept as friends and followers, "I'm not gonna [sic] say anything because I know I have young kids following me. I'm gonna [sic] keep it PG."¹⁶⁷ Alabama linebacker Dont'a Hightower said, "[I]t's just common sense" on what to post; and as Auburn defensive lineman Nosa Eguae simply put it, "If you won't say it to your mama, it shouldn't be something you write."¹⁶⁸

Other coaches like Houston Nutt and former Tennessee coach Phillip Fulmer intimidate or embarrass their players in team meetings by presenting slideshows or providing printed copies of

¹⁶³ *Id.*

¹⁶⁴ Kyle Oppenhuizen, *Schools Creating New Rules for Social Networking Policies*, USA TODAY, July 7, 2008, at 1C, available at http://www.usatoday.com/sports/college/2008-07-27-social-networks_N.htm.

¹⁶⁵ Ruppenthal, *supra* note 79.

¹⁶⁶ SEE JON SOLOMON, *WHAT TO DO ABOUT SOCIAL MEDIA? COLLEGES TACKLE HOW TO MONITOR WHAT ATHLETES ARE SAYING*, The Birmingham News (JULY 24, 2011, 8:00 AM), [HTTP://WWW.AL.COM/SPORTS/INDEX.SSF/2011/07/WHAT_TO_DO_ABOUT_SOCIAL_MEDIA.HTML](http://www.al.com/sports/index.ssf/2011/07/what_to_do_about_social_media.html) ("THAT'S WHO YOU'RE SENDING IT TO. . . [Y]OU'RE NOT JUST SENDING IT TO A FRIEND OR A FAN. YOU'RE SENDING IT TO EVERYBODY ACROSS THE COUNTRY. SOME GENERAL MANAGER IS GOING TO GET WHAT YOU SAID.").

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

pictures, statements, and other information from the players' profiles before telling the team to remove the mentioned items.¹⁶⁹

As a result of the NCAA investigation at UNC, some universities and athletic departments may increasingly seek third-party services that monitor student-athletes' social media accounts for a monthly fee.¹⁷⁰ For example, "reputation management" software automatically scans student-athletes' social networking sites for any listed "flagged" words; when a "questionable" post or bit of information appears, the service will notify the coach, and the team then deals with the issue. Mississippi State University and Auburn University use Centrix Social, which allows schools to customize a list of words to be tracked and it notifies compliance departments and coaches of any "hits" on the key words.¹⁷¹

Serious questions remain as to the extent of NCAA regulatory requirements. For instance, if the athletic department *never* monitored a student-athlete's social networking website, then it may be reasonable to charge the university with violations.¹⁷² On the other hand, if the athletic department had a specific policy in place and regularly monitored student-athletes' sites, then the NCAA may be less inclined to file a charge against the institution.

Regardless, the UNC scandal could potentially dictate a new standard for athletic departments and member institutions nationwide. Because some schools allow coaches of each athletic team to determine how to monitor their athletes' Internet use and because of the various approaches to regulation, the NCAA's upcoming decision may make compliance directors and athletic departments adopt a more unified approach to regulating social media use.

¹⁶⁹ See Travis, *supra* note 14.

¹⁷⁰ See, e.g., UDILIGENCE: RESPONSIBLE SOCIAL NETWORKING, <http://www.udiligence.com> (listing clients as listing as clients Florida, Ole Miss, Baylor, Missouri, Nebraska, Texas A&M, Louisville, Memphis, Texas and Texas Tech); CENTRIX SOCIAL, <http://www.centrixsocial.com>.

¹⁷¹ See Solomon, *supra* note 166. (At Mississippi State, some words being tracked by Centrix Social include "murder," "fight," "bet," "alcohol," "benjamins," "crunk," "rape," "robbery," and the names of around 200 sports agents.)

¹⁷² Mike Casazza, *Athletes and Social Media May Be Dickey Combination*, CHARLESTON DAILY MAIL (June 28, 2011), <http://www.dailymail.com/Sports/201106275987>.

By implementing social media policies, athletic departments and universities will be able to maintain control over their own players through a contractual approach, as opposed to having a blanket regulation by the NCAA. As previously discussed, the athlete enters the contract expecting to pursue a four-year education under conditions spelled out at the time of signing or enrollment.¹⁷³ Thus, the terms of the contract or student-athlete handbook should include anything ranging from grade point average requirements to study hall participation, and most importantly, terms prohibiting improper social media use. Indeed, most Student-Athlete Handbooks typically start with the sports privilege explanation: “Participation in intercollegiate athletics at the University is a privilege, not a right.”¹⁷⁴

Such policies often continue by stating, “While the Athletic Department does not prohibit student-athlete involvement with Internet-based social networking communities, this high standard of honor and dignity encompasses comments and postings made to Internet sites.”¹⁷⁵ Policies sometimes impose certain guidelines for their student-athletes including: (1) reminding student-athletes that everything posted online is public information and out of their control immediately after placed online; (2) cautioning student-athletes about whom they allow to access their sites; (3) expressing the importance of limiting information about whereabouts or plans to minimize the potential of negative publicity; (4) reiterating the significance of the student-athletes’ future employers or graduate school officials with access to their information; and (5) articulating that disrespectful comments

¹⁷³ See *supra* notes 76-81 and accompanying text.

¹⁷⁴ Ruppenthal, *supra* note 79 (giving an example of Missouri’s student-athlete handbook); see also the University of North Carolina student handbook, which states: The UNC Department of Athletics recognizes and supports its student-athletes’ rights to freedom of speech, expression, and association, including the use of social networks. In this context, however, each student-athlete must remember that playing and competing for The University of North Carolina is a privilege, not a right. As a student-athlete, you represent the University and you are expected to portray yourself, your team, and the University in a positive manner at all times. Any online postings must therefore be consistent with federal and State laws, and team, Department, University, and NCAA rules and policies.

UNIVERSITY OF NORTH CAROLINA STUDENT-ATHLETE HANDBOOK, available at http://tarheelblue.cstv.com/auto_pdf/p_hotos/s_schools/unc/genrel/auto_pdf/sa-handbook2010-11 (last accessed July 31, 2011).

¹⁷⁵ Ruppenthal, *supra* note 79.

online directed at athletic departments or university officials or violations of the university code of conduct would not be tolerated.¹⁷⁶

Any such policy should also inform student-athletes which coaches or university officials may be responsible for regular monitoring of the content of their social networking sites.¹⁷⁷ Furthermore, the athletic department should reserve the right to take any action against any currently enrolled student-athlete engaged in behavior that violates university, department, NCAA or team rules, including unacceptable postings on the Internet.¹⁷⁸ Some of the punishments may range from notice to remove the posting to team suspension, dismissal from the team and/or reduction or non-renewal of any athletic scholarships.

From a marketing perspective, it is necessary for athletic departments to monitor athletes' social media use—as the impact current athletes have on potential recruits and alumni is enormous. Athletic departments function as business enterprises that depend on athletes to produce positive marketing campaigns for fans, future recruits, and alumni. Evidence of social media of team members involved in undesirable activities clearly has the potential to dissuade prospective athletes from joining the school's athletic program.¹⁷⁹ Likewise, team members or other fans may contribute to a potential recruit's change of plans. For example, a top Mississippi State football recruit deactivated his Facebook account after fans "made [his] recruiting experience a living nightmare" by sending overwhelming messages after finding out he planned to attend the rival University of Mississippi instead.¹⁸⁰

Universities can also benefit from the numerous positive aspects of social media. Not only does social media allow student-athletes to meet potential roommates, reducing anxiety and encouraging strong relationships, but it also offers a positive

¹⁷⁶ UNC, *supra* note 174.

¹⁷⁷ *Id.*

¹⁷⁸ Ruppenthal, *supra* note 79.

¹⁷⁹ Elizabeth F. Farrell, *Judging Roommates by Their Facebook Cover*, CHRON. HIGHER EDUC., (D.C.), Sept. 1, 2006, at A66.

¹⁸⁰ Cameron Smith, *Top Recruit Quits Facebook After Following "Living Nightmare"*, RIVALSHIGH FROM YAHOO SPORTS (Jan. 31, 2011, 9:03 AM), http://rivals.yahoo.com/highschool/blog/prep_rally/post/Top-recruit-quits-Facebook-following-living-nig?urn=highschool-313954.

outlet for networking, and provides the student athlete with academic support from the University.¹⁸¹

Several coaches have successfully utilized social media for marketing purposes. Pete Carroll, while at the University of Southern California, used his Twitter profile to post viral videos of team meetings, off-field activities, engaging “Twitpics,” and unique moments at practice.¹⁸² With the Seattle Seahawks, Carroll has used social media to connect with the local Seattle community, providing real-time updates detailing team progress, promoting his book tour, and ultimately thanking fans for their support.¹⁸³ Similarly, John Calipari has over a million Twitter followers and uses social media as a way to interact with fans and the community.¹⁸⁴

While it is clear that social media offers numerous opportunities related to sponsorship, marketing, scholarships, and growing a fan base, promotional efforts are probably best left under the control of each university’s media relations department or athletic department rather than with the student-athletes. Perhaps an overall NCAA social media policy would encourage universities, as opposed to individual student-athletes, to delve into the social media markets to offer a more direct interaction with fans, alumni, and sponsors.¹⁸⁵ Furthermore, universities can take advantage of the numerous marketing opportunities associated with social media. For example, the Athletic Department at Mississippi State University is the first to encourage fans to interact while watching football games by painting messages with Twitter hashtags in the endzone.¹⁸⁶

¹⁸¹ *Id.*

¹⁸² Brady & Libit, *supra* note 147.

¹⁸³ Peck, *supra* note 132.

¹⁸⁴ *Id.*

¹⁸⁵ Kishner & Crescenti, *supra* note 127.

¹⁸⁶ Sam Laird, *First Football Endzone Hashtag Touches Down in Mississippi*, MASHABLE (Nov. 22, 2011), <http://mashable.com/2011/11/22/football-twitter-hashtag/>. During the annual battle for the Golden Egg against Ole Miss, Mississippi State’s message included the school’s traditional rallying cry and fight song “#HAILSTATE.” *Id.* Similarly, the Athletic Department at Delta State University regularly posts periodic updates on Facebook of athletic event scores for fans and followers; and to promote its mascot, the Fighting Okra, Delta State media directors “tweet” with the hashtag “#FeartheOkra.” *See, e.g.*, Delta State Statemen, Facebook, <http://www.facebook.com/home.php#!/dsustatesmen> (last visited Nov. 7, 2011);

Similarly, the Athletics Director at the University of Arizona recently used Twitter to officially announce the hiring decision of its new football coach.¹⁸⁷ Thus, fans would be able to have meaningful contact with the team, and the athletic department would avoid any chance of an individual athletes' public mishap.

Even though the technology is new, universities' expectations of student-athletes' behavior have not changed.¹⁸⁸ Student-athletes must conduct themselves appropriately in all forums. Universities have an obligation to ensure that the student-athletes properly represent both themselves and the school. It is vital that coaches take time to explain the consequences of negative public images to their players, and schools must make their standards clear.

IV. FUTURE IMPLICATIONS

Allowing universities, athletic departments, and coaches to regulate student-athletes' use of social media will not cause a major infringement of the athletes' constitutional rights. Furthermore, no chilling effect or slippery slope will result as long as the regulations are within reason.

For college athletes, social media should still be available for an individual player's use. Athletic departments and coaches regulating and monitoring social media use are mere reminders of the best interests of the athlete and not really a form of censorship. As representatives of the school, and as potential professional athletes, student-athletes must be responsible for what they put on the Internet.¹⁸⁹ As long as college administrators do not try to completely eliminate a student-athletes' ability to use social media, no constitutional infringements should occur.

Allowing coaches and administrators to regulate athletes' use of social media will not change the legal landscape, because courts have already considered involvement in athletics to be a privilege

DSUStatesmen, TWITTER, <http://twitter.com/#!/DSUStatesmen> (last visited Nov. 7, 2011).

¹⁸⁷ The entire tweet stated "And the new Arizona football coach and his family is....." Greg_Byrne, *Greg Byrne*, TWITTER, http://twitter.com/#!/Greg_Byrne (Nov. 21, 2011, 10:30 AM). The post included a link that, when clicked, would lead to a brief biography and photo of the new coach. *Id.*

¹⁸⁸ Brady & Libit, *supra* note 147.

¹⁸⁹ See *supra* notes 82-93 and accompanying text.

and not a right, and participation in an athletic team is a school-sponsored activity within the *Tinker* standard.¹⁹⁰

Although social media use is still a relatively new area of law that courts have yet to fully develop, its application in sports law is straightforward. Coaches and administrators should have the ability to regulate and monitor their players' use of social media.

Social media applications could have implications in other areas of law as well. The growing concern for privacy interests in social media presents a conflict. Given the proliferation of social media and the predilection for players to log on and sound off, the potential for problems is ever-increasing.¹⁹¹ University administrations may try to extend social media policies into the general student body regarding students' rights to use social media and engage in online interactions in general.

If the average student signs a "code of conduct" upon enrollment, the university may also assert that the general student has waived his or her protections in social media. Additionally, universities may assert that off-campus speech is subject to regulation if it has an effect on-campus.¹⁹² Institutions may also extend restrictions to coaches, faculty, staff, and other administrative officials. These potential situations simply reiterate that social media users everywhere need to be more aware of the dangerous consequences for their posts online; because after all, it is permanent.¹⁹³

Eventually, the NCAA, as a private entity, may implement a policy governing all of its athletic programs and all NCAA athletes' use of social media beyond recruiting; until then, individual athletic departments and institutions must set their own guidelines. Some schools may choose more strict guidelines than others, but one thing is clear—there is a growing concern over the amount and content of information student-athletes post online. These new policies may also create an increase in

¹⁹⁰ See *supra* notes 20-51, 63-75 and accompanying text.

¹⁹¹ Ruppenthal, *supra* note 79.

¹⁹² See *supra* notes 35-51 and accompanying text.

¹⁹³ President Barack Obama reiterated the permanency aspect of social media, stating "I want everybody here to be careful about what you post on Facebook, because in the YouTube age, whatever you do, it will be pulled up again later somewhere in your life." *Obama Warns U.S. Teens of Perils of Facebook*, REUTERS (Sept. 8, 2009), <http://www.reuters.com/article/idUSN0828582220090908>.

monitoring programs schools use, which may raise additional questions as to whether third-party services have the right to access the student-athletes' information.¹⁹⁴

If athletic departments and coaches eliminate use of social media completely, student-athletes, general students, parents, and the general population will be negatively impacted. As long as guidelines are within reason and applied equally, no constitutional infringement should occur.

Therefore, as a matter of policy, the law must recognize the contractual relationship between the unique category of the student-athlete and the institution, including the student-athlete's waiver of rights; and the law must uphold the rights of coaches and university administrators to set forth guidelines and policies for student-athletes.

CONCLUSION

Courts continuously consider the special characteristics of athletic teams and the school's need to manage those sports teams in a safe and uniform manner in ruling on constitutional challenges brought by student-athletes. Although social media typically allows users to share uncensored information without regard for image or fear of reprisal, these considerations do not apply to the student-athlete. By observing the student-athletes' use of social media through a contractual lens, courts will appreciate the unique circumstances surrounding the student-athlete and will understand a coach's need to restrict speech that challenges authority, breaks down the chemistry of a team, and damages the reputation of the institution.

Because of the rapid growth of social media platforms and the new types of content uploaded each minute, it is imperative that coaches, athletic departments, and university officials properly harness student-athletes' use of social networking. In doing so, universities and athletic departments will be able to embrace the future of communication and take advantage of unprecedented opportunities to reach alumni, fans, potential fans, and sponsors.

Congress has recognized the importance of sports, stating, "Participation in sports teaches youth critical life skills and has a

¹⁹⁴ See *supra* notes 170-71 and accompanying text.

significant positive impact on all areas of their lives.”¹⁹⁵ It is time for coaches and athletic departments to teach important skills to their players about the use of social media to make a positive impact on both the players’ lives and on the institution.

Because the interests of the school and team outweigh the right of the individual student-athlete in the evolving and unpredictable world of social media, college athletic department administrators and coaches should have the ability to monitor and regulate their players’ use of social media through the unique categorization of the student-athlete and through the contractual relationship with the institution.

¹⁹⁵ High School Athletics Accountability Act of 2009, H.R. 2882, 111th Cong. § 2(a)(1) (2009).