

STUDENT-ATHLETE.O

REGULATION OF STUDENT-ATHLETES' SOCIAL MEDIA USE: A GUIDE TO AVOIDING NCAA SANCTIONS AND RELATED LITIGATION

*Timothy Liam Epstein**

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* Timothy Liam Epstein is a partner and chairman of the Sports Law Practice Group at SmithAmundsen LLC. He also serves as an Adjunct Professor of Law at Loyola University Chicago School of Law, teaching courses in sports and entertainment law. His sports law practice is all encompassing, but focuses on the litigation needs of players, coaches, teams and schools. He would like to acknowledge the tremendous work of Brian Konkel and Luke LeSaffre on this piece.

INTRODUCTION

On July 21, 2011, the University of North Carolina (“UNC”) received a Notice of Allegations from the National Collegiate Athletic Association (“NCAA”) related to several of its football players’ receipt of benefits in violation of NCAA amateurism by-laws. In the letter to UNC chancellor Holden Thorp, the NCAA Committee on Infractions detailed a laundry list of allegations stemming from the receipt of extra benefits totaling more than \$27,000 by seven football players during 2009 and 2010.¹ The NCAA also cited former UNC assistant coach John Blake for providing “false and misleading information” after it was revealed that Blake received \$31,500 from the sports agency firm Pro Tech Management, LLC.² As far as NCAA scandals go, the UNC iteration is hardly unique, as cases of student-athletes getting money from agents seems to be just as much a part of the game as referees. What separates the UNC scandal from others is the fact that, as part of the allegations against UNC, the NCAA included the following:

In February through June 2010, [UNC] did not adequately and consistently monitor social networking activity that visibly illustrated potential amateurism violations within the football program, which delayed the institution’s discovery and compounded the provision of impermissible benefits³

To be sure, the use of Twitter by one student-athlete, in which he boasted of being in a club with an agent and made other remarks that clearly indicated violations of the NCAA’s amateurism rules, was an integral part of the NCAA’s case against UNC.⁴ Still, the fact remains that the NCAA’s Notice of Allegations indicates that a NCAA member institution’s failure to monitor its student-athletes’ social media use could potentially

¹ NCAA Notice of Allegations to University of North Carolina, Chapel Hill (June 21, 2011), *available at* http://grfx.cstv.com/photos/schools/unc/sports/m-footbl/auto_pdf/NCAA_NOA_062111-1.pdf.

² *Id.*

³ *Id.*

⁴ J.P. Giglio, *UNC’s Austin posts more than 2,400 Twitter updates* (last accessed Aug. 15, 2011), *available at* <http://www.newsobserver.com/2010/07/21/590713/austin-prolific-tweeter.html>.

result in greater penalties in an enforcement action. Although the NCAA has not made any formal pronouncement that such a duty exists, the Notice of Allegation is the first sign that the NCAA expects universities to be aware of what its student-athletes are communicating on social media sites like Twitter and Facebook.

The question then becomes, how do NCAA member institutions protect themselves from possible sanctions? One approach would be to do nothing and trust that student-athletes will not say anything that could incur the wrath of the NCAA. However, given the potential ramifications of NCAA violations and the severity of the punishment that the NCAA has handed down in recent cases involving the University of Southern California, the Ohio State University, and others,⁵ entrusting the future of a major college football program to the judgment of 18 to 22 year olds might leave some officials at major universities a bit uneasy. The UNC case demonstrates that a student-athlete's use of social media could cost a school millions of dollars in lost revenue, and the NCAA may find fault where nothing is done to prevent such an occurrence.

In light of this reality, universities may take more affirmative action in confronting this social media menace by either monitoring student-athletes' use of social media sites, or by banning student-athletes from using it altogether. As will be discussed herein, there are instances of schools taking both of these approaches.

Social media use represents a form of expression and behavior, and in the United States where personal freedoms are vigorously defended in the court system by a rather litigious population, any infringement on those freedoms is bound to generate intrigue and phone calls to plaintiffs' lawyers. To date, no NCAA member institution has been presented with a lawsuit related to its social media policy for its student-athletes. However, the potential for such a lawsuit exists.

This article explores the multifaceted risks associated with an NCAA member institution's monitoring of student-athletes'

⁵ Tom Goldman, *Ohio State Scandal Nothing New in College Sports*, NPR.com (June 3, 2011), available at <http://www.npr.org/2011/06/03/136888865/ohio-state-scandal-nothing-new-in-college-sports>.

social media use in the wake of the NCAA's Notice of Allegations to UNC and provides recommendations to both the student-athlete and the institution as a guide to prevent NCAA sanctions and civil litigation. Part I discusses the role that social media plays in American culture and why the scepter of legal challenges based on social media use are unlikely to recede. Part II outlines the NCAA's current policies related to social media usage and the relevant bylaws at issue, which operate as an administrative framework distinct from our United States legal system. Part III discusses potential legal challenges based on a student-athlete's constitutional rights under the First and Fourth Amendments to the United States Constitution. Part IV discusses potential legal challenges based in tort law. Finally, Part V discusses what NCAA member institutions have done to confront the issue of social media and suggests possible courses of action based on the potential for legal liability as well as NCAA violations.

I. A BRIEF HISTORY OF SOCIAL MEDIA

Human beings, by nature, are social. Throughout history, human beings have sought the most effective mode of communicating with others and have always been acutely aware that communication fosters progress. Ancient societies such as the Phoenicians and the Egyptians developed alphabets to supplement spoken language thousands of years ago. In the first century AD, the Romans established a postal system that allowed people to efficiently communicate from remote locations. Samuel Morse developed Morse code in 1835 and, in 1876, Alexander Graham Bell patented the telephone. In 1930, the first television broadcast was aired in the United States. The examples are endless. The development of the Internet is simply another example of a manifestation of human beings' social tendencies.

The United States has always been at the forefront of Internet technology. In 1971, the first email was transmitted between two computers sitting side by side at the Massachusetts Institute of Technology in Cambridge, Massachusetts.⁶ Although such technology did not immediately permeate main stream

⁶ *Social Networking Timeline and Infographics*, Jan. 26, 2011, <http://www.onlinemarketing-trends.com/2011/01/social-networking-timeline-and.html>

culture, by the mid 1990's the emergence of Internet service providers such as America Online, CompuServe, and Netscape, along with a drastic increase in ownership of personal computers brokered a new age of Internet usage. Suddenly, Internet access became the norm rather than the exception. Email became a staple for communication both at home and in the workplace. America Online's Instant Messaging service, launched in 1997, further propelled Internet-based instant communication.

The development and expansion of social networking sites, beginning with MySpace and later Facebook and Twitter, was a natural progression of Internet communication fostering even greater connectedness than ever before. MySpace was started in 2003, and though variations of the social network concept existed before it, MySpace impelled the social network revolution and paved the way for this new media as a global communication tool.⁷ It allowed users to personalize their own profiles and share photographs, music, and videos with friends in their network. This concept was especially appealing to tech-savvy teenagers and young adults. MySpace maintains a steady membership and in 2005, it was sold to News Corp. for \$580 million.⁸ The popularity of MySpace has waned, however, and this sales figure pales in comparison to the value of MySpace predecessors.

In 2004, Facebook launched, originally as a way to connect college students at Harvard University.⁹ The site quickly spread to other universities, and later to the general public. Today, Facebook is the most used social network on the internet, with over 750 million users interacting worldwide.¹⁰ The site has nearly 100 million users in the United States alone.¹¹ Facebook offers less profile personalization options than MySpace, but it has appealed to a greater segment of the population and has become, essentially, its own society. The story of its founding was even made into an Oscar-nominated film "The Social Network."

⁷ The History of MySpace, <http://www.webhostingreport.com/learn/myspace.html>

⁸ *Id.*

⁹ *Social Networking Timeline and Infographics*, *supra* note 6.

¹⁰ FACEBOOK, <http://www.Facebook.com/press/info.php?statistcs>; Top 15 Most Popular Social Networking Sites, <http://www.ebizmba.com/articles/social-networking-websites>

¹¹ *Facebook Marketing Statistics, Demographic Reports, and News*, CHECK FACEBOOK, <http://www.checkFacebook.com>

Although estimates tend to vary widely, Facebook has been valued at figures as high as \$65 billion, which serves as an indication of the prevalence and staying power of social networking sites, especially when measured against the sale price of MySpace just a few years prior.¹²

The advent of Twitter in 2006 offered a variation on the profile-centric concept developed by MySpace and Facebook and quickly caught on. The Twitter platform offers users the ability to post their thoughts in 140 characters or less and has become a go-to source for breaking news, celebrity gossip, and athlete trash talk. Twitter is also a much more public forum. Although users can personalize their privacy settings and prevent other users from viewing certain postings, celebrity Twitter users, including student-athletes, frequently use the site as a tool to communicate and interact with fans. This instantaneous communication tool tracks worldwide trends that reflect the most discussed events or topics over a given time period. The nature of Twitter makes it difficult to accurately track the number of people using the site, but the statistics are telling. On average, there are over one billion “tweets,” or posts, published per week.¹³ In February 2011, approximately 460,000 new accounts were created each day.¹⁴

It is apparent that these websites have become fully integrated communication tools in our modern society. Phrases such as “Facebook me” and “tweet” have entered our lexicon and virtually any webpage can be shared on users’ Facebook pages or Twitter accounts.¹⁵ It has become commonplace to see broadcasters’ and celebrities’ Twitter handles displayed on graphics during television programs. The advantages of social media are immeasurable, but a platform that offers individuals virtually boundless freedom will inevitably be misused and abused. The difficulty with these new engines of connectivity, like any new phenomenon, is how to regulate use. The jurisprudence involving legal issues related to MySpace, Facebook and Twitter is

¹² Tom Foreman, *How much is Facebook really worth?*, CNN TECH (March 8, 2011), http://articles.cnn.com/2011-03-08/tech/Facebook.overvalued_1_mark-zuckerberg-facebook-worldwide-users?_s=PM:TECH.

¹³ *Twitter Statistics*, KISSMETRICS MARKETING BLOG, (Aug. 15, 2011), <http://blog.kissmetrics.com/twitter-statistics>.

¹⁴ *Id.*

¹⁵ *The Oxford English Dictionary* (3rd ed. 2011).

scarce and is still being formulated, but cases are becoming increasingly common due to the prevalence of those sites in so many facets of society. The NCAA, like our justice system, is also facing increased pressure to address social media issues, as bylaw violations stemming from athletes' use of Twitter and Facebook inevitably become more frequent. Regardless, social media sites simply can no longer be thought of as a passing fad. These sites are an invaluable resource, but can also be a pitfall when used recklessly. A clear and concise framework must be established so that both student-athletes and institutions are conscious of the parameters that dictate permissible action. It is evident that social media will continue to expand and change according to technology, and use by student-athletes cannot be ignored. The issue, however, is whether the NCAA, universities, or students themselves should monitor social media usage, and if so, to what degree should this monitoring be conducted. Analysis of monitoring procedures must focus not only on NCAA rules and regulations, but also on our legal system. It is paramount that all parties involved in the realm of collegiate athletics be aware of these dueling frameworks, which are sometimes antithetical.

II. NCAA SOCIAL MEDIA POLICIES

Much like our court system, the NCAA and its member schools have grappled with ways to regulate, use, and police social media. The NCAA has begun to develop policies made necessary by the accession of social media sites as communication tools between coaches and athletes, and unfortunately, more unscrupulous actors such as agents, rogue boosters, and runners. Yet, because of the breadth and complexity of the NCAA bylaws and the limitations of the NCAA's enforcement staff, the NCAA cannot realistically police every aspect of its rules to guarantee complete compliance. Such was the case before the advent of Facebook and Twitter, and will remain the reality long after some other unforeseen new technology is developed.

The NCAA will, of course, continue to fight the seemingly never-ending battle. The NCAA's first foray into regulating the

use of social media took place in the recruiting realm.¹⁶ Not surprisingly, the rules that have been put into place are still somewhat murky. The NCAA does not allow coaches or current student-athletes to post comments about potential recruits on the institution's social media page.¹⁷ Coaches are permitted to contact potential recruits through a sites' social media messenger function, as the NCAA sees this as analogous to email, which is permitted.¹⁸ But, if a coach becomes aware that said messages are being received via a student-athlete's mobile phone, this communication will be considered more analogous to text messaging, which is currently impermissible at the Division I level¹⁹, along with other forms of electronic communication such as instant messenger, message boards (the Facebook "wall"), and chat rooms.²⁰ Tweeting by coaches is permitted as long as they abide by all other recruiting rules and do not discuss specific recruits.²¹ Of course, not all coaches use social media sites to recruit, but some have acknowledged that Facebook is actually the primary mechanism used to communicate with potential recruits.²² As one can see, however, the instantaneous and streamlined nature of this modern technology makes it unnervingly easy for coaches to slip into a gray area of potential recruiting violations.

The NCAA and its institutions have also used information obtained from social media sites in much the same way that these sites are used by law enforcement during criminal investigations. As noted, the NCAA regulates the use of social media during the recruitment process. Mississippi State University (MSU)'s self-

¹⁶ *Social Media and Recruiting.*, (August 25, 2011), NCAA.ORG, <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Issues/Recruiting/Social+Media+and+Recruiting>.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Text messaging rules are rapidly evolving, as we see Division III voting to deregulate text messaging on January 14, 2012. *Text Messaging Adopted in DIII* (January 17, 2012), NCAA.ORG, <http://www.ncaa.com/news/article/2012-1-17/text-messaging-adopted-diii>

²⁰ *Id.*

²¹ *Id.*

²² Pete Thamel, *Coaches' New Friends*, N.Y. TIMES, at B13, Aug. 10, 2011, available at <http://www.nytimes.com/2011/08/10/sports/facebook-and-twitter-become-the-normal-in-recruiting.html?scp=1&sq=&st=nyt>.

reported secondary NCAA infractions after an assistant football coach tweeted about a recruiting trip and mentioned specific high schools.²³ Twitter also affected MSU's basketball program. Head Coach Rick Stansbury (Stansbury or Coach Stansbury) recently kicked a player off the team for "repeated actions deemed detrimental to the team" after numerous profane tweets.²⁴ Coach Stansbury had previously banned Twitter, but the ban was lifted after the season.²⁵

Monitoring social media can also help police disciplinary problems such as hazing. In 2006, the entire Catholic University Women's Lacrosse Team was suspended after photographs depicting hazing were posted on Facebook.²⁶ The same year, the Northwestern Women's soccer team suffered the same fate.²⁷ The University of Kentucky has used social media sites to convict students of alcohol-related violations.²⁸ It was the famous tweet by UNC's Marvin Austin that spurred the NCAA's investigation into the plethora of academic and amateurism violations by the UNC football team. Given the prevalent role of social media in the lives of college students, manifestation of transgressions by student-athletes is inevitable.

Of course, the primary duty with regard to education and enforcement of NCAA bylaws falls on an institution's compliance staff. Compliance staffs already face a heavy burden to ensure that the institution and its athletic programs maintain an atmosphere of compliance and avoid sanctions. In some sense, social media serves as a tool that provides access to information that can be utilized to anticipate potential compliance issues and prevent or mitigate any damaging effects. But more likely, monitoring social media is only going to increase the burden on an

²³ Brad Locke, *Twitter, Facebook lead to minor infractions for MSU*, NEMS DAILY JOURNAL, July 12, 2011, http://www.nems360.com/view/full_story/14671017/article-Twitter—Facebook-lead-to-minor-infractions-for-MSU?

²⁴ *D.J. Gardner Kicked Off Mississippi State*, ESPN.COM (August 26, 2011), http://espn.go.com/mens-college-basketball/story/_id/6898335/mississippi-state-bulldogs-dismiss-freshman-dj-gardner

²⁵ *Id.*

²⁶ Greg Garber, *Lacrosse culture crisis: Play hard, party hard*, ESPN.COM (May 25, 2006), <http://sports.espn.go.com/ncaa/columns/story?id=2456640>.

²⁷ *Id.*

²⁸ Daniel Solzman, *Facebook and Athletes*, THE KENTUCKY DEMOCRAT, (Jan. 27, 2006), <http://kydem.blogspot.com/2006/01/facebook-and-athletes.html>

institution's administration as it opens up an entirely new category of interaction that must be regulated. The question that arises is to what extent is a compliance department obligated to monitor social media sites?

The NCAA does not have an official policy restricting social media use by student-athletes. The NCAA has, thus far, afforded each member institution the right to choose how it handles social media usage. Although the NCAA appears to be putting more pressure on schools to monitor social media, the NCAA Leadership Council's August 2011 recommendations regarding deregulation of social media recruiting relaxes its own monitoring duty.²⁹

While some schools have already instituted policies regarding student-athletes and social media, others have not, and the UNC case may leave schools scrambling for options. Because the NCAA does not have an official policy in its bylaws or elsewhere, its definition of what it means to "adequately monitor" is ambiguous and devoid of any precedential guidance. How far must an institution go in order to be sure it complies? Furthermore, schools may be placed in a precarious position without sufficient resources to effectuate the NCAA's recommendations. Meeting the NCAA's standard could be financially impracticable for schools with cash-strapped athletic departments. Most importantly, imposing a duty to monitor poses significant and diverse legal risks. All of these factors should be considered when a school decides how it will monitor its student-athletes.

III. LEGAL RISKS POSED BY SOCIAL MEDIA MONITORING: CONSTITUTIONAL CHALLENGES

First Amendment Challenges

The First Amendment to the Constitution provides "Congress shall make no law...abridging the freedom of speech."³⁰ By either

²⁹ Michelle Brutlag Hosick, *DI Leadership Council makes progress on recruiting model*, NCAA.ORG (Aug. 4, 2011), available at <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2011/August/DI+Leadership+Council+makes+progress+on+recruiting+model>.

³⁰ U.S. Const. amend. I. The First Amendment was incorporated to the states through the Fourteenth Amendment by the Supreme Court in *Gitlow v. New York*, 268 U.S. 652 (1925).

monitoring their student-athletes' speech on social media sites or banning student-athletes from using social media altogether, institutions are exposed to potential litigation based on the First Amendment due to the fact that such action invariably threatens a student-athletes' right to free speech.

The predicates for a First Amendment challenge to an NCAA member institutions' social media policy for student-athletes are twofold: (1) the institution implementing the restriction must be a public university, and (2) the restriction on use must not be the product of a contractual agreement between the student-athlete and the institution.

The State Actor Requirement

First Amendment freedoms are provided only to those who are under the control of state actors, not private ones.³¹ Thus, it is essential to determine whether or not an entity is a state or private actor in deciding whether or not the institution must respect First Amendment rights of its students. Traditionally, private colleges and universities, as non-state actors, have avoided challenges to restrictions on student speech based on the First Amendment.³² Courts have extended the First Amendment to apply to private conduct when there is "such a close nexus between the State and the challenged action that seemingly private behavior may be treated as that of the State itself."³³ Courts have yet to state, however, that the operation of a university or college meets this standard.³⁴ In *Carson v. Springfield College*, the Delaware Superior Court dismissed a student's First Amendment claim against a private university

³¹ See, e.g., *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 570-71 (1942) ("It is now clear that 'Freedom of speech and freedom of the press, which are protected by the First Amendment from infringement by Congress, are among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action'")

³² Cory A. DeCresenza, *Re-Thinking the Effect of Public Funding on the State-Actor Status of Private Schools in a First Amendment Freedom of Speech Actions*. 59 Syracuse L. Rev. 471, 472 (2009).

³³ *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001).

³⁴ *Carson v. Springfield Coll.*, No. 05C-10-002-PLA, 2006 WL 2242732, at *1-3 (Del. Super. Ct. Aug. 4, 2006).

which had expelled the student on the basis that there was no state action involved, with the court noting that “[t]he mere fact that a private entity serves the public, or that its services overlap with those provided by the State, does not make the conduct in question attributable to the State.”³⁵

In the event that a student-athlete plaintiff sued the NCAA in a First Amendment claim based on a member institutions’ social media policy, Supreme Court precedent would suggest that a court would dismiss such a challenge on the basis that the NCAA is not a state actor.³⁶ In the landmark case *NCAA v. Tarkanian*, the Supreme Court found that the University of Nevada Las Vegas’s imposition of punishment on its head basketball coach, Jerry Tarkanian, for violation of NCAA rules, did not constitute state action on the NCAA’s part, even though UNLV’s actions were pursuant to NCAA rules and directives.³⁷ In deciding the case, the Court cited the fact that UNLV ultimately imposed the punishment on Tarkanian, and that while the regulation of amateur athletics was a “critical” function, it was “by no means...a traditional, let alone an exclusive, state function.”³⁸

No Contract Requirement

An action against a public university based on the First Amendment will, in all likelihood, be dismissed if the restriction on the student-athletes’ use of social media derived from a contractual agreement between the student-athlete and the university. In exchange for the right to participate in an athletics program at a university, a student-athlete will likely have signed some form of contract with the university in order to play.³⁹ Under principles of contract law, a student-athlete’s relinquishment of his or her right to use social media would likely be considered valid consideration in exchange for the right to participate in intercollegiate athletics.⁴⁰ Courts have also considered the

³⁵ *Id.* at *2.

³⁶ *NCAA v. Tarkanian*, 488 U.S. 179,193 (1988).

³⁷ *Id.* at 192.

³⁸ *Id.*

³⁹ Autumn K. Leslie, *Online Social Networks and Restrictions on College Athletes: Student Censorship?*, 5 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 19, 34 (2008).

⁴⁰ *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 71-94 (1981).

relationship between a college student and a university as contractual in nature, and “that catalogues, bulletins, circulars and regulations made available to the matriculant become part of the contract.”⁴¹ On these grounds, a university could argue that a restrictive social media policy, contained in a student-athlete handbook, becomes part of the contract between the student-athlete and the university.

Protected Speech vs. Unprotected Speech

An additional threshold matter in a student-athlete’s challenge to a university’s social media policy is whether the speech is subject to First Amendment protection. There are four categories of speech that are commonly regarded as receiving First Amendment protection. The first is “political speech,” which refers to expressions that advance “an idea transcending personal interest or opinion which impacts our social and/or political lives.”⁴² The second is “religious speech,” which consists of expressions of deeply held beliefs in a recognized doctrine of faith.⁴³ The third category is “corporate speech,” which denotes the speech of a corporate entity.⁴⁴ Finally, there is “commercial speech,” which includes solicitations and advertisements, and communicates only the financial interests of the speaker.⁴⁵

Speech that is not subject to First Amendment protection is, generally, speech that promotes or produces unlawful ends. This class includes expression that promotes the imminent prospect of actual violence or harm,⁴⁶ fighting words,⁴⁷ hate speech,⁴⁸

⁴¹ *Zumbrun v. University of Southern California*, 25 Cal.App.3d 1, 10 (1972); *Kashmiri v. Regents of University of California*, 156 Cal.App.4th 809, 824 (2007) (“[B]y act of matriculation, together with payment of required fees, a contract between student and the state university is created . . .”).

⁴² *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 682-83 (6th Cir. 2001) (quoting *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1189 (6th Cir. 1995)).

⁴³ *See, e.g., McDaniel v. Paty*, 435 U.S. 618 (1978); *Torcaso v. Watkins*, 367 U.S. 488 (1961).

⁴⁴ *See, e.g., First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

⁴⁵ *See, e.g., Cent. Hudson Gas & Elec. v. Public Serv. Comm’n*, 447 U.S. 557 (1980).

⁴⁶ *See, e.g., Virginia v. Black*, 537 U.S. 808 (2003); *Gooding v. Wilson*, 405 U.S. 518 (1972); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969).

⁴⁷ *See, e.g., Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992) (holding that categories of speech such as obscenity, defamation, and ‘fighting words’ are considered to be

obscenity,⁴⁹ and speech that constitutes or promotes gross disobedience of legitimate rules.⁵⁰

Social Media Bans as Prior Restraint

When a university institutes a total ban on the use of social media for student-athletes, the act is tantamount to a prior restraint on speech. In most instances of prior restraint, a government agency or official attempts to keep a newspaper or some other material from being published.⁵¹ A prior restraint is defined as “any scheme, which gives public officials the power to deny use of a forum in advance of [the] actual expression.”⁵² As Chief Justice Warren Burger stated in the famous prior restraint case, *Nebraska Press Association v. Stuart*, “[i]f it can be said that a threat of criminal or civil sanction after publication chills speech, prior restraint freezes it, at least for the time.”⁵³ In essence, a ban of social media use is an injunction against future speech, and carries with it the promise of immediate sanctions for lack of compliance, as compared to a more permissive approach whereby sanctions are handed down subsequent to publication. In *New York Times v. Sullivan*, which centered on the government’s attempt to prevent the publication of the Pentagon Papers, the Court found that any system of prior restraint bears a “heavy presumption against constitutional validity,” and that the government carries a heavy burden in justifying any such restraint.⁵⁴

The Supreme Court has addressed prior restraints in a number of cases involving college and university students, which

constitutionally proscribable so long as restrictions are not aimed at restricting nonproscribable content).

⁴⁸ See, e.g., *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1189 (6th Cir. 1995).

⁴⁹ See, e.g., *Miller v. California*, 413 U.S. 15, 23 (1973).

⁵⁰ See, e.g., *Boucher v. Sch. Bd. of Sch. Dist. of Greenfield*, 134 F.3d 821, 827 (7th Cir. 1998) (holding that an article about how to hack into school’s computers published in an underground newspaper was not entitled to protection).

⁵¹ See, e.g., *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976).

⁵² BLACK’S LAW DICTIONARY (9th ed. 2009); see also *Alexander v. United States*, 509 U.S. 544 (1993) (a prior restraint is an administrative or judicial order that forbids certain communications when issued in advance of the time that such communications are to occur).

⁵³ 427 U.S. 539 (1976).

⁵⁴ *New York Times v. Sullivan*, 376 U.S. 254 (1964).

provide possible insights into how a court would decide a social media ban. The Court has afforded university students a greater degree of free speech than high school students, where the Court has deferred to school authorities in restricting lewd, offensive or disruptive student speech.⁵⁵ In *Papish v. Board of Curators of the University of Missouri*, one of the earlier university speech decisions, the Court stated “[m]ere dissemination of ideas, no matter how offensive to good taste – on a state university campus may not be shut off in the name alone of ‘convention of decency.’”⁵⁶

Where the university’s restriction has served to prevent students from taking action and expressing themselves altogether, the Court has found such action to be a prior restraint.⁵⁷ In *Healy v. James*, the Court found that a college president’s denial of recognition of a chapter of a left wing group on the grounds that the organization’s philosophies were “antithetical to the school’s policies,” and that the chapter would be a “disruptive influence at the college,” was a form of prior restraint.⁵⁸ Had the college president punished the group for its actions after conferring official status, the presumption of unconstitutionality would be removed since the speech was allowed to occur, and would require the government to meet a lesser burden under a different standard of review.

Prior restraints, however, are not *per se* unconstitutional. A scheme tantamount to a prior restraint will be upheld so long as certain constitutional requirements are met.⁵⁹ First, the scheme must not delegate overly broad discretion to a government official.⁶⁰ Second, “any permit scheme controlling the time, place,

⁵⁵ See, e.g., *Morse v. Frederick*, 551 U.S. 393 (2007); *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988).

⁵⁶ *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667, 670 (1973).

⁵⁷ 408 U.S. 169 (1972).

⁵⁸ *Id.* at 184.

⁵⁹ See, e.g., *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 130 (1992); see also, e.g., *Thomas v. Chicago Park Dist.*, 534 U.S. 316 (2002) (holding that while the challenged ordinance constituted a prior restraint, it was nevertheless constitutional because it contained adequate procedural safeguards and objective standards to guide the hand of the decision maker).

⁶⁰ *Id.* at 130; see also, e.g., *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (noting that “the danger of censorship and of abridgment of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum’s use”).

and manner of speech must not be based on the content of the message”⁶¹ Finally, the scheme “must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternatives for communication.”⁶²

Should a student-athlete challenge an institution’s policy of banning the use of social media, a court would likely find such a policy to be unconstitutional. As in the *Healy* case, where the university president’s refusal to give a student-group official status amounted to a prior restraint on speech, a court would likely find a ban on social media use to be tantamount to a prior restraint. The practical effect of a ban on social media is to prevent certain speech before it occurs, which is the defining hallmark of state actions that have been struck down as unconstitutional prior restraints.

Where a court finds that the state actor’s conduct amounts to a prior restraint, the defendant must meet a heavy burden by satisfying the procedural safeguards outlined above. The first two safeguards, that the scheme must not delegate overly broad discretion to a government official and that the restriction must not be based on the content of the message, will likely cause little problem for a university defendant. A total ban on social media use that prohibits student-athletes from using certain platforms for a period of time does not delegate any discretion to a governmental official, and the restriction, by virtue of its comprehensiveness in covering all communications, is not based on content.

The latter two requirements, that the scheme be narrowly tailored to meet a significant governmental interest and must leave ample alternatives for communication, are more problematic for a university defendant. A university defendant could argue that the ramifications of any NCAA infractions are so severe that banning social media use pursuant to compliance with NCAA rules constitutes a significant governmental interest. Another commonly proffered government interest is the protection of the health, safety, and morals of the student-athlete, although this purpose is illusory, at best.⁶³ The student-athlete plaintiff, on the

⁶¹ *Id.* at 130.

⁶² *Id.* at 130.

⁶³ Leslie, *supra*, note 39 at 20.

other hand, could argue that despite the significance of the interest involved, the scheme is not narrowly tailored to meet such an interest. To that argument, the university defendant could counter by citing the administrative difficulty associated with a more permissive approach to student-athletes' use of social media, which would require monitoring of social media accounts. As to whether a total ban on social media leaves ample alternatives for communication, the issue is even less clear and subject to debate. How a court treats social media amongst the panoply of forms of communication available to a student-athlete and whether it is afforded recognition as a distinct form of communication will be determinative, yet there is little guidance on this issue in prior restraint case law. A student-athlete plaintiff would argue that social media such as Twitter and Facebook are the only means by which a student-athlete can interact with the public at large. On the other hand, a university defendant could cite the fact that student-athletes have plenty of opportunity to interact with fans at their games, and have not been totally cut off from the public.

*Punishment of Speech After Expressed and Content-Based
Restrictions*

Should a university allow student-athletes to use social media, but punish certain speech based on its content, the constitutional analysis is different, but no less troubling for universities. Starting with the Supreme Court's decision in *Healy*, the nation's courts have consistently declined to treat public university students the same as secondary and elementary school students for First Amendment purposes. In a long line of cases, starting with *Tinker v. Des Moines*, the Supreme Court has held that secondary or elementary schools may limit or discipline student expression if officials reasonably conclude that it will materially and substantially disrupt the work and discipline of the school.⁶⁴ Courts have cited the "special needs of school discipline" as an important consideration in regulating speech in public elementary and high schools, and have upheld sanctions for "inappropriate speech" on the grounds that permitting such

⁶⁴ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969).

speech would “undermine the school’s basic educational mission.”⁶⁵

By contrast, as the Supreme Court in *Healy* explained, “the precedent of this Court leaves no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite the contrary, ‘the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.’”⁶⁶ As one court noted in analyzing the constitutionality of a university anti-harassment speech code, although “[s]peech codes are disfavored under the First Amendment because of their tendency to silence or interfere with protected speech...[,] public secondary and elementary school administrators are granted more leeway [to restrict speech] than public colleges and universities...”⁶⁷ Public colleges and universities are capable of restricting student speech, but under *Tinker*, the university would bear the burden of showing a constitutionally valid reason for regulating speech beyond “a mere desire to avoid...discomfort and unpleasantness.”⁶⁸ The free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another’s race or national origin or that denigrate religious beliefs.⁶⁹ Moreover, a school must show that speech will cause actual, material disruption before prohibiting it.⁷⁰

It is clear from the foregoing that a public university faces significant legal hurdles in attempting to punish speech based on its content through a social media policy. To be sure, a number of public universities have seen their speech-restrictive policies challenged in federal court, the majority of which have been struck down as unconstitutional.⁷¹ The main argument against

⁶⁵ *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986)

⁶⁶ *Healy*, 408 U.S. at 180.

⁶⁷ *DeJohn v. Temple Univ.*, 537 F.3d 301, 316 (3d. Cir. 2008), *quoting* *Sypniewski v. Warren Hills Reg’l Bd. of Educ.*, 307 F.3d 243, 258-259 (3d. Cir. 2002).

⁶⁸ *Tinker*, 393 U.S. at 509.

⁶⁹ *See, e.g.*, *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

⁷⁰ *DeJohn v. Temple Univ.*, 537 F.3d 301, 317 (3d Cir. 2008).

⁷¹ *See, e.g.*, *DeJohn* (declaring Temple University sexual harassment policy facially unconstitutional); *Coll. Republicans at San Francisco State Univ. v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007) (enjoining enforcement of university civility policy); *Roberts v.*

the university defendants is that the restrictive policies at universities are overbroad on the basis that the proscription of unprotected speech also proscribes protected speech.⁷² Although the Supreme Court has not resolved student free speech cases on the basis of the overbreadth doctrine, the Court has stated that the overbreadth doctrine may be appropriately utilized in the school setting.⁷³

The challenge for schools that endeavor to create a social media policy that proscribes certain speech is crafting one that is not overbroad. If the social media policy for student-athletes is to survive a constitutional challenge, the proscribed language must be limited to those categories of speech that are unprotected by the First Amendment. What's troubling for universities is the fact that the type of speech that schools would want to restrict in order to avoid NCAA scrutiny is likely protected speech. Short of advocating unlawful behavior, the type of speech that would incur NCAA punishment is unlikely to be offensive outside of the NCAA context. For instance, in Marvin Austin's case, the former UNC player whose tweets prompted the NCAA's investigation into the UNC athletic program, the Twitter posts that started the controversy related to Austin's receipt of impermissible benefits in violation of NCAA bylaws.⁷⁴ Only within the confines of the NCAA rules does such language have any significance, juridical or

Haragan, 346 F. Supp. 2d 853 (N.D. Tex. 2004) (finding the university's sexual harassment policy unconstitutional because of the requirement that public areas in the university must serve or benefit the university community); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003) (enjoining enforcement of university harassment policy); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995) (finding the university harassment policy facially unconstitutional); *UWM Post, Inc. v. Bd. of Regents*, 774 F. Supp. 1163 (E.D. Wis. 1991) (declaring university racial and discriminatory harassment policy facially unconstitutional); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989) (enjoining enforcement of university discriminatory harassment policy).

⁷² *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 258-259 ("A regulation of speech may be struck down on its face if its prohibitions are sufficiently overbroad that is, if it reaches too much expression that is protected by the Constitution.")

⁷³ *DeJohn*, 537 F.3d at 313-14.

⁷⁴ NCAA Bylaw 12.3.1, "An individual shall be ineligible for participation in an intercollegiate sport if he or she ever has agreed (orally or in writing) to be represented by an agent for the purpose of marketing his or her athletics ability or reputation in that sport."

otherwise. To be sure, the First Amendment protects speech that is far more repugnant than Austin's boastful tweets.⁷⁵

Fourth Amendment Challenges

Colleges and universities also face the threat of being accused of violating the Fourth Amendment for conducting illegal searches of student-athletes' social media pages and accounts. Under the Fourth Amendment, the government, including state actors, shall not violate, "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . ." The Supreme Court has held that this provision also applies to public school officials.⁷⁶ The application of the Fourth Amendment to institutions' monitoring programs raises a wide array of issues and questions that must be considered.

The threshold issue is whether monitoring of student-athletes' social media use even constitutes a search protected by the Fourth Amendment. The answer to this question is less than clear. The Supreme Court has historically been reluctant to afford Fourth Amendment protection to information that has been voluntarily turned over to third parties.⁷⁷ Certainly the argument could be made that when a person creates a Facebook profile and posts information to the site, he or she has voluntarily turned the information over. Case law, however, seems to suggest that there is at least some expectation of privacy for information published by an individual on the Internet.⁷⁸ Yet, an obvious distinction can be made to *United States v. Maxwell*. In that case, the privacy expectation involved personal email communication, not postings made available to all Facebook "friends" and Twitter "followers."

⁷⁵ For instance, in *R.A.V. v. City of St. Paul*, the Supreme Court struck down a hate-crime ordinance, which was challenged when a juvenile was convicted under the ordinance for burning a cross on the lawn of a neighboring African American family. 505 U.S. 377 (1992).

⁷⁶ See *New Jersey v. T.L.O.*, 469 U.S. 325, 336-337 (1985).

⁷⁷ See *United States v. Miller*, 425 U.S. 435 (1976) (holding that a search of bank records does not violate the Fourth Amendment, as information contained therein was voluntarily conveyed to the bank); see also, *Smith v. Maryland*, 442 U.S. 735 (1979) (search of telephone records was not protected by Fourth Amendment).

⁷⁸ See, e.g., *United States v. Maxwell*, 45 M.J. 406 (C.A.A.F. 1996) (one has a limited expectation of privacy in email).

This issue has not been directly touched upon in the context of social networking websites such as Facebook and Twitter.

Facebook allows individuals to personalize profiles with a wide array of information. The person lists interests, can post thoughts and comments, and can upload pictures and videos. Often times, this information is of a very personal nature, and unlike *Smith v. Maryland* and *United States v. Miller*, this content goes beyond mere statistical data. The fact that this information is stored on an electronic platform rather than in a tangible medium does not automatically put it outside the scope of the Fourth Amendment. The argument could be made that one's Facebook profile is actually more akin to a diary or photo album, which would certainly be protected by the Fourth Amendment. While Facebook may own the website itself, the information on individual profiles, for practical purposes, belongs to that individual, and Facebook's privacy settings allow users to choose what information it intends to share with whom.⁷⁹ Given the privacy choices afforded Facebook users, it may be that the Fourth Amendment protects some, but not all, of the content posted by a user. As such, a public institution must be aware that monitoring its student-athletes' use of social media may run afoul of Constitutional protections.

Assuming that a court would find at least some content to be protected under the Fourth Amendment, one must next consider whether these monitoring programs meet the "reasonableness" standard that has been established by Supreme Court jurisprudence addressing invasion of personal privacy. Courts will first look to whether the search in question was contemplated in the passage of the Fourth Amendment, but when there has been no practice either approving or disapproving the type of search at issue, the reasonableness of the search is assessed by balancing its intrusion on the individual's Fourth Amendment rights against its promotion of legitimate governmental interests.⁸⁰ Obviously this balancing test applies in this context, as the framers of the Constitution did not have the forethought to contemplate the

⁷⁹ Facebook Data Use Policy, Facebook (Sept. 21, 2011) http://www.facebook.com/#!/full_data_use_policy.

⁸⁰ *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995) (citing *Skinner v. Railway Labor Executives' Ass'n.*, 489 U.S. 602, 619 (1989)).

invention of the Internet two hundred years after the Bill of Rights was drafted.

In most instances, when a school monitors its student-athletes' social media use, such monitoring is without suspicion, and certainly without a warrant. Schools will monitor all of its student-athletes regardless of suspicion, and in fact, the NCAA's notice of allegations to UNC suggests that this is the proper course of action. Searches without the requisite suspicion, or no suspicion at all, such as random searches without cause, have been upheld in a variety of circumstances⁸¹, but it is essential that universities be aware of the analysis that courts will employ when assessing the reasonableness of the search. Three factors will be considered: (1) the nature of the privacy interest upon which the search intrudes, (2) the character of the intrusion complained of, and (3) the nature and immediacy of the governmental concern.⁸²

The Fourth Amendment only protects against governmental intrusions on privacy rights that society recognizes as legitimate, and the legitimacy depends on context.⁸³ The legitimacy of the privacy interest will be assessed by considering a variety of contextual factors, including where the individual is asserting that interest, as well as the individual's relationship with the state actor.⁸⁴ Fortunately for colleges and universities, courts will likely find that student-athletes' legitimate expectation of privacy regarding their social media use to be quite low. First and foremost, social media websites are, by nature, a public forum. Anyone can log onto the Internet to access Facebook and Twitter. Information on an individual's Facebook page or Twitter account that is publicly available depends on personalized privacy settings, but access can be achieved with minimal effort. Anyone who uses these sites knows or should know that information

⁸¹ See, e.g., *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995); *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602 (1989) (upholding random drug testing of railroad workers); *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990) (upholding drunk driving checkpoints); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (upholding drug testing of Federal officers who carry fire arms or are involved with drugs); *United States v. Martinez-Fuerte*, 428 U.S. 543, 560 (1976) (upholding automobile checkpoints for immigration purposes).

⁸² *Acton*, 515 U.S. at 654-60.

⁸³ *T.L.O.*, 469 U.S. at 337.

⁸⁴ *Acton*, 515 U.S. at 654.

disclosed is almost certain to enter the public realm. Thus, the legitimate privacy expectation is severely diminished.

The privacy expectations of student-athletes are further reduced as a product of their relationship with the institution that they attend. It has long been held that primary and secondary schools have broad power to regulate the behavior of unemancipated adults,⁸⁵ and although such broad oversight power is not as extensive in the university context, the student body is still bound by certain restraints and is generally expected to uphold standards of conduct set forth by the institution.

The concept of *in loco parentis* has a long rooted history in the university setting.⁸⁶ Nonetheless, the literal interpretation of the term, meaning “in place of parent,” has changed drastically over the last century, and now, colleges campuses are the epicenter for activism and independence among young adults.⁸⁷ Schools, however, retain the power to enforce rules prohibiting certain conduct by its students, particularly when the conduct threatens the health and safety of the student body. The preservation of the right to police students is especially true when it comes to student-athletes. In fact, the *in loco parentis* doctrine grew, at least in part, out of the need to regulate collegiate athletic contests in the late nineteenth century, and not surprisingly, it is the realm of intercollegiate sport where the doctrine most lives on today.⁸⁸

Consequently, as a subset of the student population, the legitimate privacy expectation of the student-athlete is even smaller, as they are subjected to even greater regulation than that which is imposed on the student population as a whole.⁸⁹ In its affirmation of random drug testing for high school student-athletes, the Court in *Acton* discussed various regulations to which high school student-athletes regularly subject themselves, including maintenance of a minimum grade point average, dress codes, rules of conduct, and study hours.⁹⁰ Collegiate student-

⁸⁵ See, e.g., *T.L.O.*, 469 U.S. at 339; See also *Acton*, 515 U.S. at 655.

⁸⁶ See *Gott v. Barea College*, 161 S.W. 204 (Ky. 1913).

⁸⁷ BLACK'S LAW DICTIONARY (9th ed. 2011).

⁸⁸ See W. Burlette Carter, *Responding to the Perversion of In Loco Parentis: Using a Nonprofit Organization to Support Student-Athletes*, 35 IND. L. REV. 851 (2001).

⁸⁹ *Acton*, 515 U.S. at 657.

⁹⁰ *Id.*

athletes are subject to an even greater set of rules, as they are bound not only by the standards set forth by individual coaches, athletic departments, and conferences, but also by restrictions enumerated in the NCAA bylaws. Perhaps most importantly, NCAA student-athletes contractually waive certain rights when they choose to attend the school of their choice. For example, student-athletes are required to sign NCAA form 08-3a which states in relevant part, “You authorize the NCAA. . . to use your name or picture to generally promote NCAA championships or other NCAA events, activities or programs.” Interestingly, the use of student-athletes’ likenesses is currently the focus of an ongoing class action suit against the NCAA and the video game manufacturer, EA Sports, Inc., demonstrating student-athletes’ reluctance to relinquish their privacy rights.⁹¹

While it is unlikely that universities are using images from student-athletes’ social media pages to promote NCAA activities, the waiver of the right to use one’s name or likeness is a privacy right in and of itself and serves as a strong indicator that collegiate student-athletes have virtually no legitimate expectation of privacy. To be sure though, schools are not completely inoculated. Universities should make it clear to all students, including athletes, that they reserve the right to monitor social media use. Presenting language regarding search policies that places students on notice further reduces the expectation of privacy.

The second factor that courts will consider when assessing the reasonableness of search and monitoring schemes is the nature of the intrusion upon the student-athlete’s privacy rights. The nature of the intrusion will be assessed by analyzing the invasive aspects of the search, including the methodology and the information it discloses. This factor favors the institution, as well. A simple comparison to cases in which random drug screening has been upheld suggests that the privacy intrusion is minimal. In *Acton* and *Skinner*, the validity of random drug testing programs

⁹¹ *In Re NCAA Student-Athlete Name & Likeness Licensing Litigation*, No. 09-cv-01967 (N.D. Cal. filed Mar. 10, 2010) (consolidated class action suit alleges that the NCAA and EA Sports engaged in a price fixing conspiracy/group boycott, and further alleges that the licensing agreement between the co-defendants violates student-athletes’ right of publicity).

was upheld. While the *Skinner* court noted that the collection of samples intrudes upon a “function traditionally shielded by great privacy[.]”⁹² ultimately the degree of intrusion depends on the manner in which the search is conducted.⁹³ In both cases, the privacy interests compromised by the processes used in the search were negligible.

Monitoring of social media constitutes far less of an intrusion into one’s privacy interest than the collection of a urine sample. First, as previously noted, social media websites and the Internet in general have never been traditionally shielded by great privacy, as the *Skinner* court articulated in reference to drug testing through urinalysis.⁹⁴ Furthermore, the methodology of the searches, in most cases simple monitoring of activity on a periodic basis, has no measurable effect on the life of the student-athlete unless the search were to manifest impropriety. The student-athlete is not required to actually do anything when an institution is merely monitoring his or her social media use.

In an assessment of the nature of the intrusion, courts will also analyze the information disclosed by the search when it assesses the overall level of intrusion.⁹⁵ For this reason, institutions should use great care in crafting methods of monitoring. Information available on social media websites, Facebook in particular, is potentially unlimited in scope. Most of the information contained on student-athletes’ profiles will have little or no bearing on their eligibility or reputation, or the reputation of the institution. Schools should limit the scope of the searches in order to guard against an allegation based on a privacy intrusion stemming from an over expansive search. Additionally, it is critical that colleges and universities limit access to the information disclosed by the monitoring programs. The court in *Acton* stressed that the results of the student-athlete’s drug tests were only revealed to personnel who had a need to know, which limited the invasive nature of the privacy intrusion.⁹⁶ Institutions must implement safeguards that limit

⁹² *Skinner*, 489 U.S. at 626.

⁹³ *Acton*, 515 U.S. at 658.

⁹⁴ *Skinner*, 489 U.S. at 626.

⁹⁵ *Id.*

⁹⁶ *Acton*, 515 U.S. at 658.

access to confidential information to a narrow pool of officials who need such access. Schools must also never, under any circumstance, use information acquired by the searches for any other purpose other than protection of the institution and its student-athletes. Any damaging information discovered through monitoring of student-athletes' social media use should be addressed privately by athletic directors, compliances officers, coaches, and if necessary, the NCAA.

Lastly, a court is going to assess the nature and immediacy of the government interest in the context of the means in which it is seeking to achieve its objective. The crux of this analysis is whether the government interest is important enough to justify the particular search at hand.⁹⁷ The privacy expectation of the student-athlete and the invasiveness of the privacy intrusion will be considered in the court's analysis of whether the search is justified.

The interests that would be advanced by the university defendant as justification for social media monitoring are attenuated at best. The most commonly suggested objective for this monitoring is protection of the health, safety and morals of the student-athlete.⁹⁸ Certainly there is some credence to this purpose. Monitoring social media will undoubtedly allow institutions to better recognize when a student-athlete has jeopardized his or her health or safety or acted immorally. Yet, this ostensible purpose could be overshadowed by what seems to be the real reason schools monitor its athletes: to remain in compliance with NCAA bylaws. The fact that the NCAA has "suggested" that schools monitor its student-athletes lends support to this. The NCAA markets student-athletes, and its member institutions rely on the eligibility of their athletes in order to remain competitive and turn a profit. Depending on the circumstances, a court could be underwhelmed by the government interests proffered, especially if the student-athlete is not genuinely at risk of harm.

As noted, however, the government interest will be viewed in the context of the means in which it is being achieved. With social media monitoring, a court would likely conclude that interests

⁹⁷ *Id.* at 661.

⁹⁸ Leslie, *supra* note 39 at 20.

were sufficient given the non-invasive nature of the monitoring, thus inoculating the university-defendant. Overall, although a Fourth Amendment claim would likely fall short on the merits, colleges and universities that monitor social media usage should be cognizant and take preventative steps to avoid liability because, under the right circumstances, a good faith Fourth Amendment claim could certainly be advanced against a school which could undoubtedly inflict unwanted economic and legal consequences regardless of the ultimate outcome of the suit.

IV. LEGAL RISKS POSED BY SOCIAL MEDIA MONITORING: CHALLENGES BASED ON TORT LAW

Negligence

It is feasible that an institution could be held liable in a negligence action brought by a student-athlete. As noted, one of the central justifications for social media monitoring is the protection of the health, safety, and morals of the student-athlete.⁹⁹ Regardless of the sincerity of this goal, schools that purport to undertake to monitor student-athletes for this purpose must exercise reasonable care in performing the task. Under the Restatement (Second) of Torts, “[o]ne who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other’s person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm suffered is because of the other’s reliance upon the undertaking.”¹⁰⁰ Generally, this voluntary undertaking rule applies when the defendant should recognize the service rendered as necessary for the protection of the other person.¹⁰¹ A school that monitors student-athletes’ social media use for the benefit of that athlete, whether such purpose is ostensible or not, undertakes a duty to do so and must act accordingly.

⁹⁹ *Id.*

¹⁰⁰ RESTATEMENT (SECOND) OF TORTS § 323 (1965).

¹⁰¹ See *id.* at Comment (a).

In a hypothetical scenario in which a school could be held liable, the monitoring of the student-athlete would be considered the “service” rendered by the university. The idea that monitoring social media would be considered a service seems farfetched. After all, information disclosed through monitoring is far more likely to be used against a student-athlete than it is to be deployed for their benefit. It is important to keep in mind, however, that the well-being of student-athletes would be posited by the school as its defense in an action based upon a violation of the student-athlete’s First or Fourth Amendment rights.¹⁰² Thus, a school could be estopped from denying this purpose in an action brought in negligence. If a student-athlete were to be injured, in a hazing or alcohol-related incident for example, it is possible that such injury could have been foreseen if a school had been adequately performing its voluntarily undertaken duty to monitor. Perhaps a tweet or Facebook post would have exposed the dangerous situation and allowed school officials to take preventative measures. If a school voluntarily undertakes to monitor and protect student-athletes and fails to exercise reasonable care in doing so, it could suddenly be liable for this failure because it increases the risk of harm to the student-athlete. Of course, comparative fault principles would still apply, and depending on the state in which the suit was brought, this could pose a significant hurdle for a plaintiff student-athlete.

Again though, herein lies the dilemma that schools face in balancing the interests of student-athletes with NCAA compliance. While state courts differ on the issue, the distinction between nonfeasance and misfeasance is problematic. Essentially, monitoring to a lesser degree may be worse than not monitoring at all. Two recent Illinois cases demonstrate this predicament. In *Bell v. Hustell*, the Illinois Supreme Court held that parents who were present at a party hosted by their minor child were not liable for an injury suffered after an intoxicated underage partygoer drove into a tree leaving the party.¹⁰³ The Court reasoned that the parents’ inaction precluded liability, as they did not take any affirmative acts to prohibit the illegal consumption of alcohol by

¹⁰² Leslie, *supra* note 39, at 20.

¹⁰³ *Bell v. Hustell*, No. 110724, 2011 Ill. Lexis 777 (Ill. May 19, 2011).

minors.¹⁰⁴ In an identical context, the Illinois Supreme Court held that a social host who exerted control over a highly intoxicated minor voluntarily assumed a duty, and thus was held liable in negligence because the actions undertaken were detrimental to the minor.¹⁰⁵ These holdings seem to encourage authority figures to turn a blind eye to improprieties and dangerous situations, contrary to what one would likely consider appropriate given the circumstances.

This analysis is salient to the issue of social media monitoring. While it seems contradictory that inaction would serve as the best course of action when it comes to protecting others, this is often the legal reality. In essence, schools such as Penn State that do not monitor student-athletes' social media use are virtually immune from a suit based in negligence, yet the school simultaneously exposes itself to NCAA sanctions based on the same inaction.¹⁰⁶ Further complicating matters is that it is unclear from either an NCAA or a legal standpoint the scope of the duty assumed by the school. Must a school monitor its student-athletes around the clock, or is a periodic check sufficient? Again, schools are forced to analyze policies in place and balance the potential ramifications. The ideal monitoring scheme would be one that fulfills the NCAA's recommendation on monitoring while concurrently maintaining the legal standard of an exercise of reasonable care. The problem is that neither the NCAA bylaws, case law, nor statutory law offer any guidance as to what will satisfy both requirements.

To bring clarity to this quagmire, colleges and universities should make clear to its student-athletes the extent to which their online activity will be monitored. This will help clarify the policies in place and inform the student-athlete as to what it can reasonably expect from the school. Such will also clarify the legal duty assumed by the school and lessen the threat of legal liability by affording a court less discretion, especially as to a student-athlete's reasonable reliance. Also, given that colleges and

¹⁰⁴ *Id.* at *22.

¹⁰⁵ *Wakulich v. Mraz*, 785 N.E.2d 843 (2003).

¹⁰⁶ Matt Dunning, *Social Media Has Schools on Defense: NCAA Signals Need to Monitor Activity, but Liability Feared*, *Business Insurance* (July 24, 2011), available at <http://www.businessinsurance.com/article/20110724/NEWS07/307249975>

universities comprise the membership of the NCAA, university administrators should work together to draft a clear and coherent standard that outlines the NCAA's expectation regarding a school's responsibility to monitor. Overall, monitoring should be thorough, but a school should not undertake what it cannot reasonably accomplish given its resources because doing so would place it at greater risk for a negligence suit and would also make it more susceptible to an NCAA "failure to monitor" charge.

Vicarious Liability

Colleges and universities must also be apprised of the possibility that a third-party could bring suit against the school for vicarious liability based on the actions of a student-athlete under the doctrine of *respondent superior*. In the social media context, a vicarious liability claim would likely stem from a student-athlete causing some level of harm to third-party through its use of the Internet. Irrespective of the likelihood of such event actually occurring, the subsequent claim would almost certainly be dismissed.

Courts have long held that student-athletes are not considered employees.¹⁰⁷ The rationale behind this is that a student-athlete is a buyer of education. The education gained is retained by the student-athlete, and is not for the benefit of the university.¹⁰⁸ Furthermore, scholarships are not considered wages.¹⁰⁹ This is true regardless of any current or future reciprocal benefit obtained by the institution.¹¹⁰ In *Kavanagh v. Trustees of Boston University*, an opposing team's player sued Boston University, alleging that it was vicariously liable for the alleged negligent acts of its student-athlete that occurred during a basketball game.¹¹¹ Kavanagh argued that regardless of a

¹⁰⁷ *State Compensation Ins. Fund v. Industrial Comm'n of Colo.*, 314 P.2d 288 (Colo. 1957) (rejecting workers' compensation claim stemming from injury to student-athlete); *Coleman v. Western Mich. Univ.* 336 N.W.2d 224 (1983) (Same); *Korellas v. Ohio St. Univ.* 779 N.E.2d 1112 (Ohio Ct. Cl. 2002)(scholarship athlete not immune from suit as a public "employee").

¹⁰⁸ *See, e.g., Hanson v. Kynast*, 494 N.E.2d 1091 (Ohio 1986).

¹⁰⁹ *See, e.g., Rensing v. Indiana State Univ. Bd. Of Trustees*, 444 N.E.2d 1170, 1173 (Ind. 1983) (noting that scholarship proceeds are not taxable income).

¹¹⁰ *Kavanagh v. Trustees of Boston Univ.*, 795 N.E.2d 1170, 1175 (Mass. 2003).

¹¹¹ *Id.* at 1174.

student-athlete's standing as an employee (or lack thereof), that the court should treat them as agents for their schools because they are representatives of the school.¹¹² The Court rejected this attenuated contention because students do not represent schools in the sense of acting on behalf of schools. Students lack authority to bind schools to contractual agreements.¹¹³ The claim in *Kavanagh* stemmed from an incident occurring during athletics competition, but the rationale extends to a suit stemming from extracurricular actions of the student-athlete, including social media use. Barring an overhaul of the NCAA's amateurism standards and a movement toward payment of student-athletes, a vicarious liability claim against an educational institution lacks merit.

Again though, despite the improbability of success on the merits of a vicarious liability claim, institutions must remain aware of any and all potential lawsuits, because even the least meritorious claim requires diligent defense and the eventual reparation of the school's public image. Lawsuits are invariably damaging to the institution, and the damage extends beyond the purely economic costs of defending a suit. Reputational harm can be devastating and have an adverse effect on enrollment, recruitment, and the overall standing of the institution. Colleges and universities must undertake to educate and monitor student-athletes to prevent a lawsuit from even becoming a possibility. A proactive approach will serve to best immunize institutions from potentially substantial harm.

V. SOCIAL MEDIA REGULATION: A BALANCING ACT

Methods of Monitoring

The legal risks of monitoring social media usage are very real, but so too are ramifications that may stem from potential NCAA violations. Obviously institutions want to avoid repercussions from both, but preventative actions that best inoculate a school from the consequences of each are not always congruent. Balancing these potential risks is an arduous task, and

¹¹² *Id.* at 1176.

¹¹³ *Id.*

schools have employed a wide array of tactics to avoid trouble. Given the prevalence of social media sites and the potentially devastating consequences that could arise from abuse of these sites, some level of monitoring is advisable. Keeping a watchful eye on the student body has always been an important function of any university, however, student-athletes seem to draw additional scrutiny. Administrators attempt to justify additional monitoring of student-athletes in light of their unique stature within the campus community.¹¹⁴ As seen in *Acton*, this argument is bolstered by the fact that student-athletes have a contractual relationship with the school, and are often the face of the university.¹¹⁵ The Supreme Court affords some credence to this line of reasoning in cases dealing with high school student-athletes.¹¹⁶ Schools watch over student-athletes with the ostensible goal of preserving their health, safety, and morals, and the nature of social media websites make a natural tool for such oversight.¹¹⁷

Some schools have taken an uncompromising approach to social media use by instituting a complete ban on student-athletes' use of Facebook and Twitter. In 2006, when Facebook was still predominantly used only on college campuses and had yet to reach its status as a global communication tool, Loyola University in Chicago became the first school to ban its student-athletes from using the site.¹¹⁸ Other schools, including public schools such as the University of Minnesota and Kent State University, followed suit. Schools have since declined to institute outright bans on social media for student-athletes, in part at the urging of the American Civil Liberties Union, which threatened to bring suit on behalf of students in response to the Kent State University ban,¹¹⁹

¹¹⁴ Leslie, *supra* note 39, at 20.

¹¹⁵ *Id.*

¹¹⁶ See *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646,663 (1995) (upholding random drug testing of high school student-athletes).

¹¹⁷ *Id.*; Leslie, *supra* note 39 at 20.

¹¹⁸ *Id.*; see also Erik Brady & Daniel Libit, *Alarms Sound Over Athletes' Facebook Time*, USA Today (Mar. 8, 2006), available at http://www.usatoday.com/tech/news/Internetprivacy/2006-03-08-athletes-websites_x.htm.

¹¹⁹ Whitney McFerron, *University Lifts Facebook Ban for Student-athletes*, Student Press Law Center (July 10, 2006), available at <http://www.splc.org/news/newsflash.asp?id=1299>.

though for reasons discussed, private schools generally have greater leeway to do so.

Interestingly, although a complete ban on social media usage would seem to be the most draconian form of “monitoring,” it could still leave schools susceptible to NCAA sanctions. Consider a hypothetical situation in which a school bans Facebook use by student-athletes, periodically checks to ensure student compliance, but does not devote any significant time into checking for potential deleterious content under the assumption that the rules were being followed. If a student-athlete were to then break a NCAA rule and a UNC type situation were to occur, the mere imposition of a ban may not be enough to exonerate the institution of failure to monitor charges. Given the expansive reach of sites like Facebook and Twitter, an outright ban on their use by student-athletes is neither legally prudent nor practically feasible.

More commonly, universities have chosen to monitor, rather than prohibit, student-athletes’ social media usage. The methodology and degree of monitoring has varied. Sometimes such a task is left up to individual coaches, who may choose to ban their team’s use regardless of the university’s or athletic department’s general policy. As noted, Mississippi State Basketball Coach Rick Stansbury previously employed this tactic. Recently, University of South Carolina Football Coach Steve Spurrier banned his team from using Twitter after a player tweeted details about a fight and subsequent arrest of another player, neither of which actually occurred.¹²⁰ Some coaches, such as former Kansas University Football Coach Turner Gill, and Boise State University Football Coach Chris Petersen, preemptively banned Twitter before any such incident could occur.¹²¹ One is left to wonder: would former UNC Football Coach Butch Davis and Athletic Director Dick Baddour, both of whom resigned in the wake of the scandal, still be employed at UNC if they had taken similar preventative measures?

A select number of schools have taken a hands-off approach to student-athletes’ social media use, disregarding the

¹²⁰ Gregg Doyel, *Coaches’ Twitter Ban Isn’t Stunting Players, It’s Protecting Them* CBS Sports (Aug. 9, 2011), available at <http://www.cbssports.com/columns/story/15416882>.

¹²¹ *Id.*

recommendations of the NCAA. As noted, Pennsylvania State University chooses not to monitor its students' social media accounts, athletes or otherwise.¹²²

A Penn State official stated, "if people want to post a comment about us or about whatever it is they want, they have to be accountable for it individually. We're not their parents."¹²³ This refusal to assume a duty to monitor may actually be the most legally sound tactic, but it is in direct contrast to the NCAA's recommendations and could leave the school susceptible to sanctions, which could be equally detrimental, personifying the predicament facing institutions.¹²⁴

Increasingly, colleges and universities are turning to third parties to assist in monitoring student-athletes. UDiligence is a company that has become a leader in this field. Former Texas A&M Assistant Athletic Director Milton Overton said of UDiligence, "[b]efore [it], the only ways to find out about problems on student-athletes' social networking pages was by manually searching, which was not only inefficient, it rarely produced any results."¹²⁵ This trend of utilizing third-party monitoring vendors is likely to continue in light of the NCAA recommendations regarding monitoring. Others in this field include Varsity Monitor, which was created for the specific purpose of ensuring NCAA compliance,¹²⁶ and Centrix Social, whose client list includes Mississippi State University, among others.¹²⁷ These programs offer efficient and affordable alternatives that by most accounts produce a more thorough review than could be performed by individual athletic departments and compliance staffs. Monitoring social media is certainly more favorable legally than a complete

¹²² Matt Dunning, *Social Media Has Schools on Defense: NCAA Signals Need to Monitor Activity, but Liability Feared*, Business Insurance (July 24, 2011), available at <http://www.businessinsurance.com/article/20110724/NEWS07/307249975>.

¹²³ *Id.*

¹²⁴ In light of the sexual abuse and related allegations against Penn State with regard to actions of former coach Jerry Sandusky, it will be interesting to see if Penn State changes its social media policy.

¹²⁵ <http://www.udiligence.com/testimonials.aspx>.

¹²⁶ Varsity Monitor, www.varsitymonitor.com.

¹²⁷ Jon Solomon, *What to Do about Social Media? Colleges Tackle How to Monitor What Athletes Are Saying*, Birmingham News (July 24, 2011), http://blog.al.com/sports_impact/print.html?entry=/2011/07/what_to_do_about_social_media.html.

ban, however, as discussed in Parts III and IV, this too is not without legal risks. Moreover, it is unlikely that a third-party monitor, hired by the institution, would preclude a suit against the school itself.

Regardless of the avenue a school chooses to pursue when it comes to its social media policy, it must be cognizant of the potential consequences. An overly strict or an overly relaxed policy could affect recruiting, which is directly related to on-field performance, which in turn has a substantial impact on revenue. It is easy to imagine a coach using the school's policy as a tool to lure student-athletes. Young adults rely on social networking sites for communication with peers. A school that proscribes use could see a backlash. Conversely, a school with a strict policy would be appealing to a parent who wants their son or daughter to be closely monitored. A school's policy could affect its on-field performance in other ways as well. Athletes have been known to engage in competitive banter with opponents via Twitter, which could induce greater motivation in an opponent, or, conversely, could bolster camaraderie amongst teammates. On the other hand, some believe that technology has been detrimental to team chemistry, with athletes talking on the Internet instead of to each other.¹²⁸ These intangible effects may be tough to measure, but social media will continue to impact athletic teams, for better or worse. At the institutional level, universities must acquiesce to the growing eminence of technology yet recognize that the voice of its students often project onto the school, for better or for worse. Ultimately, some level of control must be exerted, or else institutions could face consequences that are not only tangible, but could be quite severe.

CONCLUSION

It is patently clear that uncertainty reigns in the realm of social media regulation. While social networks such as Facebook and Twitter have engendered a new era of communication that is both useful and enjoyable, as a corollary, this new technology has

¹²⁸ Adrian Dater, *Team Bonding Suffers in Tech Age* Sports Illustrated (Aug. 25, 2011), *available at* http://sportsillustrated.cnn.com/2011/writers/adrian_dater/08/25/technology.teambonding/index.html.

also fostered new controversy. Courts have not articulated a clear standard, statutory law is decidedly void of any mention of social networking, and attempted analogies to related issues are attenuated at best. The NCAA's Notice of Allegations to UNC further exacerbated this lack of clarity in the field of collegiate athletics. Thus, in the collegiate context, it is of utmost importance that all parties educate themselves. Student-athletes and university administrators have rights, but the same parties must also be keenly aware of associated risks. From an institutional standpoint, the best course of action is to implement a monitoring system that is both fair and reasonable, and also make clear to its student-athletes the parameters of the policy in place. Student-athletes could completely protect themselves by abstaining from social media use, but in lieu of this extreme safeguard, they should avoid detrimental posts, and be sure that proper privacy settings have been selected. In due time, these ambiguities will be clarified, but until then, sensible actions by all parties involved will serve as the best safeguard against both NCAA sanctions and potential legal action.