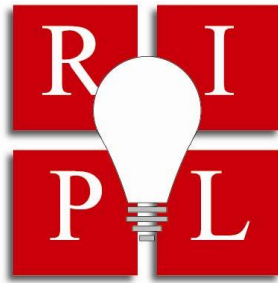


# THE JOHN MARSHALL REVIEW OF INTELLECTUAL PROPERTY LAW



OUTSPOKEN: SOCIAL MEDIA AND THE MODERN COLLEGE ATHLETE

MEG PENROSE

## ABSTRACT

The First Amendment to the United States Constitution grants American citizens the right to free speech. However, in the case of college athletes, this right is not without limitation. In exchange for the privilege of participating in college level athletics, college athletes voluntarily agree to terms that restrict their abilities to speak freely, specifically in the context of social media platforms. This article details situations in which college athletes have made offensive statements *via* social media for which they later needed to delete, explain, and apologize. These examples support the notion that restrictions on college athletes' speech are not only constitutionally sound, but also necessary in light of the challenges universities and colleges may face if their athletes' rights to free speech are not restricted.

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## OUTSPOKEN: SOCIAL MEDIA AND THE MODERN COLLEGE ATHLETE

MEG PENROSE\*

## INTRODUCTION—LIMITING SPEECH IN THE LOCKER ROOM AND BEYOND

Free speech is, perhaps, one of the most complex and misunderstood constitutional rights. Like adolescents testing limits and decrying parental discipline, many Americans object to any consequence relating to speech as a “violation” of First Amendment rights.<sup>1</sup> Yet, the First Amendment does not prohibit *consequences* for poor judgment exhibited in the exercise of speech or conduct, nor does the First Amendment preclude a state from placing limitations, and at times, complete prohibitions, on speech or conduct.<sup>2</sup> Like much of the Constitution, the First Amendment is neither literal nor absolute.<sup>3</sup>

This article considers the First Amendment in a particular context: state-sponsored college athletics. As this article demonstrates, college athletes are constitutionally unique.<sup>4</sup> College athletes regularly agree to rules and regulations

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<sup>1</sup> See U.S. CONST. amend. I. The First Amendment’s free speech protections ensure that “Congress shall make no law . . . abridging the freedom of speech.” *Id.*; see also *Gitlow v. New York*, 268 U.S. 652, 666–67 (1925).

<sup>2</sup> See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (noting that “the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words” are not protected under the First Amendment).

<sup>3</sup> *Id.*; *Gitlow*, 268 U.S. at 666 (asserting that while the First Amendment speaks solely to Congress, the Supreme Court did not hesitate to “incorporate” this right under the Fourteenth Amendment Due Process Clause to apply as a similar barrier to the individual states). Thus, while the literal proscription limits “Congress” from abridging the freedom of speech, early on the Supreme Court expanded this literal protection to apply also as a constitutional obligation on the states. *Gitlow*, 268 U.S. at 666.

<sup>4</sup> *Hysaw v. Washburn Univ. of Topeka*, 690 F. Supp. 940, 945 (D. Kan. 1987) (finding that participation in intercollegiate athletics is a privilege, not a right). Numerous state and federal courts have approved this characterization in declining Due Process and other constitutional protections to student-athletes. See *infra* Part II.B.4. This status impacts, but does not entirely supplant, the First Amendment analysis. Many universities, including the Montana State University at Bozeman, remind their student athletes of this very point in the opening statement under its “Standards of Conduct” provisions for student-athletes. See MONT. STATE UNIV.—BOZEMAN, STUDENT-ATHLETE CODE OF CONDUCT 1, [http://www.montana.edu/bobcats/images/academics/Code\\_of\\_Conduct.pdf](http://www.montana.edu/bobcats/images/academics/Code_of_Conduct.pdf) (last visited May 12, 2013) (“It is a privilege and not a right to be a student-athlete at MSU”). Like many state sponsored universities, MSU requires its student-athletes to note their understanding and agreement to the governing policies by providing their initials and signature on the Code of Conduct. *Id.* at 1–4; see also OHIO STATE UNIV., STUDENT-ATHLETE CONDUCT 50 (2009–2010) [hereinafter OHIO STATE STANDARDS OF CONDUCT], [http://grfx.cstv.com/photos/schools/osu/genrel/auto\\_pdf/2010-11/misc\\_non\\_event/sa-handbook4.pdf](http://grfx.cstv.com/photos/schools/osu/genrel/auto_pdf/2010-11/misc_non_event/sa-handbook4.pdf) (“It is a privilege, not a right, to be a student-athlete at The Ohio State University. Misconduct may

that are not imposed on ordinary college students, including policies relating to grooming, gambling, drinking, pornography, taunting, cursing, and even tobacco use.<sup>5</sup> Simply put, college athletes are considered to be special and different, particularly when it comes to speech and expressive rights.<sup>6</sup>

Part II of this article begins by describing the problem with college athletes and social media. Can too much self-promotion be detrimental to college athletics and the team-focused nature of sports? Can too much unfettered access to college athletes be detrimental to their well-being? Part III offers evidence that explains why state colleges and universities must evaluate their athletes' use of social media, and

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cause loss of privileges associated with membership on an intercollegiate athletic team and/or other sanctions as appropriate.”); N.C. STATE, N.C. STATE ATHLETICS DEPARTMENT 90 (2011–12) [hereinafter N.C. STATE CODE OF CONDUCT], [http://grfx.cstv.com/photos/schools/ncst/sports/osad/auto\\_pdf/2011-12/misc\\_non\\_event/Handbook.pdf](http://grfx.cstv.com/photos/schools/ncst/sports/osad/auto_pdf/2011-12/misc_non_event/Handbook.pdf) (indicating that a student-athlete must agree that “[p]articipation as an NC State student-athlete is a privilege, not a right. In return for the privilege of representing NC State on a varsity team, I must be willing to take personal responsibility for my behavior”).

<sup>5</sup> Hill v. Nat’l Collegiate Athletic Ass’n, 865 P.2d 633, 658 (Cal. 1994) (noting that intercollegiate athletes are subjected to “special regulation of sleep habits, diet, fitness, and other activities that intrude significantly on privacy interests . . . not shared by other students or the population at large”); see also *Student-Athlete Code of Conduct*, UCLA BRUINS, <http://www.uclabruins.com/stu-services/ucla-codeofconduct.html> (last visited May 12, 2013) (“Student-athletes are highly visible representatives of the University. As a result, student-athletes must be concerned with their appearance in public settings . . . [S]tudent-athletes should maintain a well-groomed appearance in terms of their hair, facial hair, and makeup. . . . Your coach will discuss details with you.”); N.C. STATE CODE OF CONDUCT, *supra* note 4, at 91, 103 (prohibiting “gambling activities,” which is broader than the NCAA proscriptions, and stating that alcohol use under the University of North Carolina athletic policy is likewise constricted beyond the legal requirements relating to age and usage); UNIV. OF CONN., STUDENT-ATHLETE HANDBOOK 8 (2011–12), [http://grfx.cstv.com/photos/schools/conn/genrel/auto\\_pdf/2011-12/misc\\_non\\_event/student-athlete.pdf](http://grfx.cstv.com/photos/schools/conn/genrel/auto_pdf/2011-12/misc_non_event/student-athlete.pdf) (reminding its athletes that their “high visibility” results in their being considered “role model[s]” and “[a]s such, [they] are expected to constantly present a wholesome public image. . . . Even after reaching 21 years of age, student-athletes are prohibited from drinking alcoholic beverages when traveling with, or representing, their teams. Additionally, alcoholic beverages are not to be consumed while attending athletic or athletically sponsored events”).

<sup>6</sup> See, e.g., Lowery v. Euverard, 497 F.3d 584, 589 (6th Cir. 2007) (noting the well-established fact that “student athletes are subject to more restrictions than the student body at large”). Increasingly, state universities are requiring their athletes to sign their agreement to the school’s social media policy for student athletes. See, e.g., WASH. ADVENTIST UNIV., PUBLIC MEDIA AND SOCIAL NETWORK POLICY FOR STUDENT-ATHLETES 1 (2012), <http://www.wauathletics.com/d/Social%20Network%20Policy.pdf> (“The Washington Adventist University Department of Athletics prohibits malicious and reckless behavior when utilizing public media outlets”). While “malicious and reckless behavior” is not defined or explained, the policy clearly intends to sanction “inappropriate activity or language.” *Id.* at 2. Such policies most likely qualify as a First Amendment waiver of rights, to the extent that such rights fully extend to student-athletes, and, properly crafted, are a wise option to protect athletes and athletic departments. See, e.g., N.C. STATE CODE OF CONDUCT, *supra* note 4, at 125 (reminding student-athletes that limits to their speech and expression rights include “team and department” policies regarding the use of social media networking sites).

presents several examples of the disruption that such use causes. Part IV delivers the verdict: State colleges and universities are within their legal rights to ban or otherwise limit their athletes' use of social media, just as they have limited their athletes' rights to use profane, vulgar, disrespectful, or taunting language. Part V presents the final judgment: State colleges and universities have enormous control and influence over their athletes, and the First Amendment imposes no impediment to protecting both the athletes and the universities they represent.

This article is intended to primarily address the legal, if not normative, issues relating to college athletes' use of social media, particularly the First Amendment parameters. The article is not, however, intended to serve as a policy proposal or endorsement of the legal rights held by state colleges and universities. Rather, the goal is to dispel the notion, generally posited without clear legal support, that college athletes at publicly supported institutions have robust First Amendment rights. Existing evidence and case law dispels this myth.<sup>7</sup> Admittedly, the issue of social media usage has not been addressed head-on by any court. But ultimately, the highly regulated nature of athletics, coupled with the fact that courts have always viewed athletics as a privilege rather than a right, and the emphasis of a team over the individual in the athletic arena will empower state colleges and universities to limit or ban their athletes' use of social media.<sup>8</sup>

Courts may not have spoken out on this topic, but when they do, it is likely that courts will stand behind the state colleges' and universities' desire to limit the outspoken nature of their athletes. Speech, for better or worse, is different for athletes.<sup>9</sup>

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<sup>7</sup> See, e.g., *Marcum v. Dahl*, 658 F.2d 731, 735 (10th Cir. 1981) (dismissing University of Oklahoma women's basketball players' First Amendment challenge to the loss of their respective scholarships for criticizing the head coach); *Williams v. Eaton*, 468 F.2d 1079, 1083–84 (10th Cir. 1972) (permitting dismissal of several University of Wyoming football team members from the team after a dispute regarding the attempt by these team members to wear black armbands during a game with Brigham Young University to protect race relations in the Mormon Church); *Richard v. Perkins*, 373 F. Supp. 2d 1211, 1219 (D. Kan. 2005) (finding no First Amendment violation when the track coach dismissed an athlete from the team and no “constitutionally protected property or liberty interests in participating in intercollegiate athletics”); *Green v. Sandy*, No. 5:10-cv-367-JMH, 2011 U.S. Dist. LEXIS 114718, at \*16 (E.D. Ky. Oct. 3, 2011) (finding no violation of a player's First Amendment right and dismissing the player from the soccer team for criticizing the women's soccer coach).

<sup>8</sup> See *Green*, 2011 U.S. Dist. LEXIS 114718, at \*15 (noting that a coach need not wait for a student-athlete's behavior to actually disrupt the team before placing limitations on particular speech).

<sup>9</sup> This article does not intend to present a full explication of the First Amendment test that should be adopted by courts analyzing college athletes' speech rights. However, neither the existing *Tinker* nor *Pickering* frameworks provide a workable solution for the *sui generis* nature of college athletes' speech rights. Instead, an entirely new test, addressing the unique nature of college athletes and college athletics, is necessary.

## I. THE PROBLEM—MUZZLING THE GLADIATORS

In no area is the constitutional misunderstanding of the First Amendment more pronounced than in the sports arena. For years, coaches and state universities have punished athletes for their ill-conceived speech and conduct.<sup>10</sup> This is legally permissible because participation in extra-curricular athletics has always been a privilege, not a right.<sup>11</sup> Athletes have always been subjected to greater scrutiny and regulation by the State, via their coaches and state university athletic departments.<sup>12</sup> Nearly all, if not all, state-sponsored athletic departments maintain Student-Athlete Codes of Conduct that are unique to college athletes, which impose a variety of rules and regulations, often oppressive in relation to free speech, that govern athletes' behavior both on and off campus.<sup>13</sup> The advent of Twitter and Facebook has not

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<sup>10</sup> See, e.g., *Wildman v. Marshalltown Sch. Dist.*, 249 F.3d 768, 771 (8th Cir. 2001) (stating that schools have the “authority to prohibit the public expression of vulgar and offensive comments and to teach civility and sensitivity in the expression of opinions,” after a student was prohibited from playing with her team when she refused to apologize for a letter she wrote and disseminated); Greg Joyce, *McCaffrey Suspended for PSU Tweets*, THE HEIGHTS (Nov. 19, 2012), <http://www.bcheights.com/mccaffrey-suspended-for-psu-tweets-1.2956643#.UTOGTfrr9o> (explaining that a female soccer player was suspended for posting inappropriate comments regarding the Pennsylvania State University sexual abuse case).

<sup>11</sup> *Colo. Seminary (Univ. of Denver) v. Nat'l Collegiate Athletic Ass'n*, 417 F. Supp. 885, 896 (D. Colo. 1976) (finding no constitutional right to participate in intercollegiate athletics); see also UNIV. OF ILL. AT URBANA-CHAMPAIGN, STATEMENT OF POLICY: DIVISION OF INTERCOLLEGIATE ATHLETICS 5 [hereinafter URBANA-CHAMPAIGN POLICY STATEMENT], <http://www.athletics.illinois.edu/academics/images/0910policyhandbook.pdf> (last visited May 12, 2013) (“Every student-athlete who participates in intercollegiate athletics becomes a member of a team. By accepting this privilege of team membership, student-athletes accept the following responsibilities in addition to their regular responsibilities as students.”).

<sup>12</sup> See *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, Dambrot's role as a coach is to train his student athletes how to win on the court. The plays and strategies are seldom up for debate. Execution of the coach's will is paramount. Moreover, the coach controls who plays and for how long, placing a disincentive on any debate with the coach's ideas which might have taken place.

*Id.*; see also *Hill v. Nat'l Collegiate Athletic Ass'n*, 865 P.2d 633, 658–59 (Cal. 1994) (upholding random drug testing in intercollegiate sports due largely to the diminished privacy expectations of the student athletes when they had advanced notice of the NCAA's drug testing program and the opportunity to consent to it); *Brennan v. Bd. of Trs. for Univ. of La. Sys.*, 691 So. 2d 324, 329 (La. Ct. App. 1997) (concluding that there was no violation of any privacy interest when administering drug tests to a student athlete and noting that student athletes have a diminished expectation of privacy).

<sup>13</sup> See *supra* note 5 and accompanying text. The many limitations imposed by state-sponsored college athletic departments include limits placed on student-athletes' otherwise legal conduct, such as tobacco use, alcohol use, gambling, and cursing and noting that this conduct is prohibited by the university athletic department as a condition of representing the university on an athletic team. *Id.*

changed the regulatory protocols of college athletes; it has merely brought such regulations into clearer focus.<sup>14</sup>

College coaches and state universities have long prohibited certain speech and conduct as part of the privilege of participating in state supported athletics. This is nothing extraordinary and is certainly not new. Pat Summitt, the legendary Women's Basketball coach for the University of Tennessee, refused to permit any of her athletes to sport tattoos, either refusing to recruit such individuals or requiring them to cover their body art with bandages.<sup>15</sup> Likewise, many renowned coaches, such as Nick Saban, the University of Alabama football coach, prohibit their freshman athletes from talking to or meeting with the media.<sup>16</sup> This "freshman ban" policy is shared by other notable institutions, such as the University of Florida and Texas A&M University.<sup>17</sup> Apparently, great college players have no free speech right to speak to the press and some may not do so unless their coaches grant them this privilege.<sup>18</sup>

Recently, however, as Facebook, Twitter, and fantasy athletic teams seem to engulf Americans' lives, coaches and state universities that place limits on their

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<sup>14</sup> See URBANA-CHAMPAIGN POLICY STATEMENT, *supra* note 11, at 23 ("[N]ot all speech is protected speech. Speech that is threatening, vulgar, lewd or that invades the rights of others will not be protected, even if done in an on-line social network forum"). However, under traditional First Amendment principles, vulgar and lewd speech is still protected. U.S. CONST. amend. I; *Roth v. United States*, 354 U.S. 476, 483 (1957). Increasingly, state schools tell their students that they respect their so-called "First Amendment" rights, but then immediately pull back on those rights by imposing stricter regulations on speech and expression than any contained under First Amendment jurisprudence. See, e.g., N.C. STATE CODE OF CONDUCT, *supra* note 4, at 125 (admonishing students to "not post information about your team or the athletics department that is not public knowledge, such as injury information, roster information, disciplinary actions, etc."). The type of speech the N.C. State Manual references is speech that, under a pure First Amendment analysis, would be protected.

<sup>15</sup> See ROBERT PALESTINI, A GAME PLAN FOR EFFECTIVE LEADERSHIP: LESSONS FROM 10 SUCCESSFUL COACHES IN MOVING THEORY TO PRACTICE 156 (2008).

<sup>16</sup> Laken Litman, *Why Alabama Freshmen are Off-Limits to Media*, 'BAMAMAG.COM (Oct. 22, 2012), <http://alabama.scout.com/2/1232542.html> (explaining that Coach Saban's policy originated at Michigan State, when a freshman wide receiver, Plaxico Burress, spoke out before their annual meeting with Michigan, and Michigan State lost the game). Burress's comment, as a freshman, was allegedly that "going down [to Michigan] will be like taking candy from a baby." *Id.*

<sup>17</sup> See, e.g., Mike Bianchi, *Will Muschamp is Less Accessible to Media than—Wait for It—Nick Saban*, ORLANDO SENTINEL (Aug. 18, 2012, 8:08 PM), [http://articles.orlandosentinel.com/2012-08-18/sports/os-mike-bianchi-florida-gators-0819-20120818\\_1\\_muschamp-florida-gators-coach-urban-meyer](http://articles.orlandosentinel.com/2012-08-18/sports/os-mike-bianchi-florida-gators-0819-20120818_1_muschamp-florida-gators-coach-urban-meyer) (criticizing the "freshman ban" and noting the irony that "these players are old enough to fight for their country, vote and call audibles in front [of] 100,000 enemy fans . . . but they're not mature enough to talk to the media for 10 minutes after the game?"); Andy Staples, *With Heisman Ceremony Looming, Johnny Football Finally Speaks*, SI.COM (NOV. 26, 2012, 6:03 PM), [http://sportsillustrated.cnn.com/2012/writers/andy\\_staples/11/26/johnny-football-finally-speaks-on-verge-of-heisman/index.html](http://sportsillustrated.cnn.com/2012/writers/andy_staples/11/26/johnny-football-finally-speaks-on-verge-of-heisman/index.html) (indicating that Texas A&M coach, Kevin Sumlin, allowed an exception to his policy of not allowing freshman to speak to the press for Johnny Manziel in hopes of accelerating Manziel's Heisman campaign).

<sup>18</sup> See Staples, *supra* note 17.

athletes' ability to communicate via social media are being greeted with outrage.<sup>19</sup> Amazingly, these limitations have become a source of fierce public debate because athletes and athletic fans want to hear more from their idols, but many of these individuals' speech injures both the athletes speaking and the institution represented.<sup>20</sup> We need look no further than college football's two most successful athletes this past season, Manti Te'o and Johnny Manziel, to recognize the hazards of social media.<sup>21</sup>

However, the hazards of social media do not stop with the most notable athletes.<sup>22</sup> Another example involves a relatively unknown college soccer player,

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<sup>19</sup> See, e.g., Bianchi, *supra* note 17 (criticizing the limitations that the recent Florida Gators coach, Will Muschamp, has placed on access to his team, consisting of "shut[ting] down fan and media access and restrict[ing] the flow of information coming out of his program," and stating that "[s]lowly but surely, . . . this trend will force college fans away from fervently following their teams and eventually they will find something better to do").

<sup>20</sup> See Gregg Doyel, *Coaches' Twitter Ban Isn't Stunting Players, It's Protecting Them*, CBSSPORTS.COM (Aug. 9, 2011), <http://www.cbssports.com/columns/story/15416882> (suggesting that Twitter bans offer protection to athletes and athletic programs). As Doyel notes:

But Twitter isn't for everybody. In the wrong hands, Twitter is a dangerous thing. And a college athlete's hands are awful. Not all college athletes, OK? Maybe not even most of them. But all it takes is a few players unequipped for the freedom that Twitter provides—instant communication, without a filter, to anyone in the *world*—to make a mess of their own reputation, or a team's chemistry, or worse.

*Id.*

<sup>21</sup> See Graham Watson, *Texas A&M's AD Has a Chat with Johnny Manziel About Heisman Responsibility*, YAHOO! SPORTS (Jan. 15 2013, 3:21 PM), <http://sports.yahoo.com/blogs/ncaaf-dr-saturday/texas-m-ad-chat-johnny-manziel-heisman-responsibility-202119698--ncaaf.html> ("Manziel has been the target of ridicule from fans and even some college coaches for pictures he's posted on his Twitter and Instagram accounts. He was also the subject of a TMZ piece, which showed the 20-year-old holding a bottle of champagne at a Dallas nightclub."); Keith Arnold, *The Legend of Manti Te'o Just Got More Complicated*, NBC SPORTS (Jan. 16, 2013, 10:44 PM), <http://irish.nbcsports.com/2013/01/16/the-legend-of-manti-teo-just-got-more-complicated/> (explaining details about the Manti Te'o hoax where he thought his online girlfriend had died, but the girl turned out to be scam by an obsessed fan).

<sup>22</sup> Blair Browning & Jimmy Sanderson, *The Positives and Negatives of Twitter: Exploring How Student-Athletes Use Twitter and Respond to Critical Tweets*, 5 INT'L J. SPORT COMM. 503, 506 (2012). The authors note the invasive nature of college athletics in current society:

For many people, sports fandom is a significant component of their social identity. This identity, grounded in attachments to teams and athletes, can provoke maladaptive behaviors, particularly if athletes or teams do not meet fans' expectations. . . . The emergence of social media has created another realm for confrontations, especially between fans and athletes.

*Id.* (internal citations omitted).



Stephanie McCaffrey.<sup>23</sup> Do we really need to know what the Boston College soccer star thinks about the Penn State sexual abuse scandal? McCaffrey's tweets, mocking Penn State and referencing the showers in the visitor's locker room where several young boys were molested, proved a bit insensitive. Her apparent joke about rapes at Penn State, resulting in rapes in the State penitentiary, was unrelated to her athletic prowess and, thus, was unbecoming of a college athlete. While she may be an extraordinary athlete, her comedic timing fell flat in Happy Valley and was ultimately deemed inappropriate by Boston College, which suspended her from the soccer team during the National Collegiate Athletic Association ("NCAA") Tournament.<sup>24</sup> Is her punishment a violation of free speech or merely a consequence of poor judgment?

And then there was the third-string Ohio State quarterback, Cardale Jones, who infamously tweeted the following: "Why should we have to go to class if we came here to play FOOTBALL, we ain't come to play SCHOOL classes are POINTLESS."<sup>25</sup> Do fans really need more information about the chaos that appears to be Ohio State Football, or should the university be permitted to impose regulations on its athletes while it attempts to polish its image? Does America really need more cynicism about student athletes not truly being students? Do Americans need to be faced with the reality that our hero-worshipping tendencies may be nothing more than foolishly following a poorly-spoken, egocentric, immature nineteen-year-old?

The problem is not simply that outspoken athletes can endanger an athletic program by bringing unwanted and unnecessary attention to the team or individual.<sup>26</sup> The problem is actually complicated by the overexposed, overindulged,

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<sup>23</sup> Josh Moyer, *BC's Stephanie McCaffrey Punished*, ESPN COLLEGE SPORTS, [http://espn.go.com/college-sports/story/\\_/id/8637607/stephanie-mccaffrey-boston-college-eagles-soccer-player-suspended-tweets-penn-state-nittany-lions-jerry-sandusky](http://espn.go.com/college-sports/story/_/id/8637607/stephanie-mccaffrey-boston-college-eagles-soccer-player-suspended-tweets-penn-state-nittany-lions-jerry-sandusky) (last updated Nov. 16, 2012, 11:09 PM) (reporting that Boston College women's soccer player, Stephanie McCaffrey, was suspended following a series of offensive tweets regarding Jerry Sandusky and the Pennsylvania State University sexual abuse case).

<sup>24</sup> *Id.*

<sup>25</sup> Jemele Hill, *Tweet Shows Truth About Academics*, ESPN COLLEGE SPORTS, [http://espn.go.com/college-football/story/\\_/id/8484038/tweet-revealed-truth-student-athletes](http://espn.go.com/college-football/story/_/id/8484038/tweet-revealed-truth-student-athletes) (last updated Oct. 10, 2012, 3:19 PM) (noting that Jones' Twitter account was deleted and he was not allowed to dress for a game due to his tweet).

<sup>26</sup> Josh Jovanelly & Nick Burton, *Social Media Part of 21st Century College Sports*, DAILY TROJAN (Feb. 23, 2011, 11:46 PM), <http://dailytrojan.com/2011/02/23/social-media-part-of-21st-century-college-sports/>. In explaining the unique nature of Twitter and the student athlete, the authors astutely observe:

For the everyday college student, Twitter is the modern-day soapbox. It is a place to express opinions, vent frustrations and share information. For most, it is raw, unfiltered thought, a forum for people to give their take on anything, often without consequences. But for college athletes, the stakes are much higher. Often the highest profile students at their schools, athletes are seen as representatives of the entire institution. Twitter and other forms of social media might be a soapbox for them, but with one important difference. When an athlete

and highly fragile nature of the college athlete's ego.<sup>27</sup> College athletes, though generally much like other college students, face heightened scrutiny and greater popularity and are unique targets for criticism, heckling, and cyber-stalking.<sup>28</sup> It is not uncommon for a college athlete to receive hate-filled tweets or Facebook messages following a particularly poor performance.<sup>29</sup> Fans and foes alike are given new, often unscreened access to college athletes with potentially harmful effects.<sup>30</sup> The University of Michigan helped demonstrate the dangers of social media even before Notre Dame's Manti Te'o was caught up in what became a national scandal.<sup>31</sup>

Several state universities, including the University of Michigan, now require their student athletes to sign Social Media Policies, explaining, vaguely, that severe

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say something potentially inappropriate on Twitter, a lot more people take notice. As a result, Twitter has meant trouble in recent years for some student-athletes at major universities. If athletes are getting attention for things they posted on Twitter, the publicity is rarely positive.

*Id.*

<sup>27</sup> Bruce Feldman, *Social-Media Savvy Grows, Even as Coaches, Schools Try to Keep Up*, CBSSPORTS.COM (Mar. 13, 2012, 4:29 PM), <http://www.cbssports.com/collegefootball/story/17771677/social-media-savvy-grows-even-as-coaches-schools-try-to-keep-up>. Feldman aptly describes the problem:

The level of celebrity for college athletes has never extended further than it does these days. The reason? Start with significantly more TV coverage and 24-hour, wall-to-wall media while the definition of "media" continues to morph into something much different in recent years, mirroring the often-contorted modern-day definition of celebrity. In football, kids become commodities and get famous before they sign with a college as worshipping fan bases and obsessed media hang on their every move. Add in a level of unprecedented accessibility to these players and it's a combustible mix.

*Id.*

<sup>28</sup> See Nicole Auerbach, *The Good and Bad of Twitter and College Athletes*, USA TODAY (Jan. 10, 2013, 9:22 PM), <http://www.usatoday.com/story/sports/college/other/2013/01/10/college-athletes-twitter-criticism-johnny-manziel-kentucky/1823959/>.

<sup>29</sup> *Id.* (noting that, after losing two games in a row, Kentucky men's basketball players "kept hounding [the team] about it"). Blair Browning of Baylor University noted that "[o]f course the [athletes] were attentive to what (negative things) were being said . . . . Though hate mail has always been around, it was a lot harder to get it to people in the past. Now with the immediacy of Twitter, it's immediately in front of their eyeballs." *Id.*

<sup>30</sup> Browning & Sanderson, *supra* note 22, at 506 ("Via social media, fans now have direct access to athletes and routinely direct hostile and vitriolic language toward them. . . . Student-athletes are also targets for inflammatory language, and . . . this is perhaps more problematic, given their age and amateur status.").

<sup>31</sup> See, e.g., Ryan Carreon, *Before Manti Te'o, Michigan Football 'Catfished' Its Own Players*, DESERET NEWS (Feb. 1, 2013, 12:00 PM), <http://www.deseretnews.com/article/865572011/Before-Manti-Teo-Michigan-football-catfished-its-own-players.html?pg=all> (explaining that Michigan football coach Brady Hoke hired an outside consultant to "dupe 20 of his players by using a fake online profile").

penalties can be imposed as a result of postings on social media.<sup>32</sup> Michigan’s new “policy” comes on the heels of Michigan’s own “catfishing” experiment with its athletes and the not-so-unexpected lesson that athletes cannot be trusted on their own because many will, instinctively, underreport or lie about their involvement on social media.<sup>33</sup> Michigan hired an outside communications firm to test its athletes’ online behavior by luring the athletes to “friend” an unknown, but very attractive, individual.<sup>34</sup> Many players, even against the previously rendered advice *not* to do so from the Michigan Athletic Department, willingly friended the individual.<sup>35</sup> Later, when confronted about the episode, many players were less than candid about their behavioral lapses and were stunned to learn that this “friend” had been turning over materials to the athletic department.<sup>36</sup> It was a very bold and controversial lesson.<sup>37</sup> In defending its approach, Michigan, like many other universities, simply

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<sup>32</sup> See UNIV. OF MICH., SOCIAL MEDIA POLICY—STUDENT-ATHLETES 1, <http://www.annarbor.com/University%20of%20Michigan%20social%20media%20agreement%20for%20athletes.pdf> (requiring student athletes to “notify the Athletics Department of any social media accounts they maintain”). This Policy further advises student-athletes that “the athletics department has an interest in ensuring that the conduct of student-athletes on social media sites is appropriate and permissible.” *Id.*; see also *Social Media Guidelines*, MGOBLUE.COM, <http://www.mgoblue.com/compliance/sa-social-media.html> (last visited May 12, 2013) (precluding “offensive language, personal attacks or racial comments” and any “information about your team, the athletic department or the University that is not considered public knowledge”); Viviana Bonilla Lopez, *Student Tweets Causing Controversy for Universities*, USA TODAY (Sept. 18, 2011), <http://www.usatodayeducate.com/staging/index.php/ccp/student-tweets-causing-controversy-for-universities> (describing the University of Kentucky’s social media policy, where students “are held accountable for their actions online and must befriend someone from the compliance office who can monitor their activity”).

<sup>33</sup> Chantel Jennings, *Michigan Gives Online Lessons*, ESPN COLLEGE SPORTS, [http://espn.go.com/college-sports/story/\\_/id/8906034/michigan-wolverines-educate-players-online-hoaxes?src=mobile](http://espn.go.com/college-sports/story/_/id/8906034/michigan-wolverines-educate-players-online-hoaxes?src=mobile) (last updated Feb. 2, 2013, 10:19 AM); Matt Hinton, *Michigan AD ‘Catfished’ Wolverine Athletes, for Their Own Good*, CBSSPORTS.COM (Feb. 1, 2013, 12:39 PM), <http://www.cbssports.com/collegefootball/blog/eye-on-college-football/21627764>.

<sup>34</sup> Jennings, *supra* note 33 (stating that the outside firm, 180 Communications, reportedly has a female staff member whose job requires her to “friend” student athletes and then, once she has access to their social media accounts, turn over damning information about the students to the athletic department).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* A former Michigan women’s soccer player indicated that the approach was:

[D]efinitely a wake-up call for a lot of people about the repercussions of not being smart online . . . . There was a lot of embarrassment in the room when the photos were revealed of the fake (Facebook) profiles, and you knew people around you had received those requests and even responded to them.

*Id.*

underscored its need to protect its athletes and prevent distractions to the team.<sup>38</sup> Due to being seen as both public figures and role models, college athletes develop inflated egos, which tend to make them particularly vulnerable to social media abuse.

A growing number of other universities have banned their athletes' use of social media altogether or at least during the athletic season.<sup>39</sup> Nearly every program that has done so has spoken about the "distractions" of social media, particularly in the form of Twitter and Facebook.<sup>40</sup> Across the board, university teams are stepping in to help protect their student athletes and athletic programs including Washington State football,<sup>41</sup> New Mexico basketball,<sup>42</sup> the Women's basketball team at North Carolina,<sup>43</sup> Nebraska football,<sup>44</sup> Saint John's basketball,<sup>45</sup> Florida State football,<sup>46</sup>

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<sup>38</sup> Hinton, *supra* note 33. Michigan Athletic Director, Dave Brandon suggested the online experiment was a "risk assessment" for the University. *Id.* Brandon indicated that, through this program, Michigan learned of numerous inappropriate social media postings by their athletes. *Id.*

<sup>39</sup> Timothy Liam Epstein, *Student-Athlete.O: Regulation of Student-Athletes' Social Media Use: A Guide to Avoiding NCAA Sanctions and Related Litigation*, 1 MISS. SPORTS L. REV. 1, 32-33 (2012) (stating that Loyola University in Chicago, the University of Minnesota, and Kent State University banned student-athletes from using Facebook, and the University of South Carolina, Kansas University, and Boise State University Football coaches have banned Twitter).

<sup>40</sup> See, e.g., Adam Hughes, *Purdue Basketball Twitter Ban: Fan Reaction*, YAHOO! SPORTS (Oct. 17, 2011), <http://sports.yahoo.com/top/news?slug=ycn-10229161>. As Hughes explains:

While fans may enjoy [the athletes'] antics, they do little to shed a flattering light on a university or its programs, so it's not hard to understand [the coach's] hesitancy to let his players hit the Web. Add in the fact that these are young men who don't always show the best judgment, and it's not far-fetched to imagine one or more of them revealing some tidbit or other that would amount to a tactical advantage for their opponents . . . .

*Id.*; see also Heather Dinich, *Twitter Ban Good Move by Jimbo Fisher*, ESPN COLLEGE FOOTBALL (July 26, 2012, 2:00 PM), [http://espn.go.com/blog/acc/post/\\_id/41280/twitter-ban-good-move-by-jimbo-fisher](http://espn.go.com/blog/acc/post/_id/41280/twitter-ban-good-move-by-jimbo-fisher) (noting that Coach Fisher considers Twitter "clutter"). And, like many other coaches than impose social media bans, Fisher simply explains that "it's a lot easier when there are less distractions." Dinich, *supra*.

<sup>41</sup> Christian Caple, *Leach Pulls Plug on Players' Twitter Accounts: WSU Football*, SEATTLE TIMES (Oct. 23, 2012, 9:51 PM), [http://seattletimes.com/html/cougarfootball/2019505833\\_cougarfootball24.html](http://seattletimes.com/html/cougarfootball/2019505833_cougarfootball24.html). Coach Leach informed the media and public that if they saw anything from his team on Twitter after the ban, "I would like to see it because I will suspend [those players]." *Id.*

<sup>42</sup> Bob Frantz, *New Mexico Basketball Coach Wise to Ban Players from Twitter*, S.F. EXAMINER (July 24, 2011, 11:03 PM), <http://www.sfexaminer.com/sports/2011/07/new-mexico-basketball-coach-wise-ban-players-twitter> (explaining that none of Head Coach Steve Alford's "players have found themselves in the white-hot spotlight of public scrutiny for tweeting something embarrassing or inappropriate").

<sup>43</sup> Michael Lananna, *Sylvia Hatchell Bans UNC Women's Basketball Team's Twitter Use*, DAILY TARHEEL.COM, [http://www.dailytarheel.com/article/2012/01/sylvia\\_hatchell\\_bans\\_womens\\_teams\\_twitter\\_use](http://www.dailytarheel.com/article/2012/01/sylvia_hatchell_bans_womens_teams_twitter_use) (last updated Jan. 27, 2012, 12:07 AM) (explaining that Coach Hatchell decried

Purdue basketball,<sup>47</sup> Georgia Tech Football, Toledo basketball,<sup>48</sup> Clemson football,<sup>49</sup> Iowa football,<sup>50</sup> Mississippi State basketball,<sup>51</sup> Boise State football,<sup>52</sup> Villanova basketball,<sup>53</sup> UNLV football<sup>54</sup> the University of Kentucky Women's basketball team,<sup>55</sup>

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the distractions of Twitter and the need for more focus as a team as reasons underlying her decision to ban Twitter).

<sup>44</sup> Josh Harvey, *Husker Twitter Ban is in Effect*, BIGREDREPORT.COM (July 28, 2012), <http://nebraska.scout.com/2/1206186.html>.

<sup>45</sup> Phil Chardis, *Men's Basketball Notes: Social Media Another Issue for Coaches*, JOURNALINQUIRER.COM (Jan. 7, 2011, 12:00 AM), <http://www.journalinquirer.com/articles/2011/01/07/sports/doc4d27486e182b7738391876.txt>. Coach Steve Lavin, like many other coaches who have banned social media, spoke of the distractions that social media causes as the rationale for his “during the season” ban. *Id.*

<sup>46</sup> The Associated Press, *FSU Coach Fisher Bans Twitter*, NCAA, <http://www.ncaa.com/news/football/article/2012-07-27/fsu-coach-fisher-bans-twitter> (last updated July 27, 2012, 2:50 PM); Adam Kramer, *Social Media Under Siege: The Message is Clear, the Lessons are Not*, BLEACHER REPORT (Aug. 2, 2012), <http://bleacherreport.com/articles/1282086-social-media-under-siege-the-message-is-clear-the-lessons-are-not> (providing the reason that coach Jimbo Fisher's social media ban came after one of his athletes posted rap lyrics that were not specified as such, causing controversy and off-field distractions); Maria Burns Ortiz, *Social Media: Twitter Ruling College Sports*, ESPN PLAYBOOK (Aug. 24, 2012, 12:00 PM), [http://espn.go.com/blog/playbook/trending/post/\\_/id/7037/social-media-twitter-ruling-college-sports](http://espn.go.com/blog/playbook/trending/post/_/id/7037/social-media-twitter-ruling-college-sports) (stating that, after banning Twitter, Florida State's on-field record improved to seven-to-one).

<sup>47</sup> Scott Agness, *Purdue's Danny Hope: 'I Don't Get the Twitter Thing'*, VIGILANT SPORTS (Apr. 2, 2012), <http://www.vigilantsports.com/2012/04/02/purdues-danny-hope-i-dont-get-the-twitter-thing/>; Adam Hughes, *Purdue Basketball Twitter Ban: Fan Reaction*, YAHOO! SPORTS (Oct. 17, 2011), <http://sports.yahoo.com/top/news?slug=ycn-10229161>.

<sup>48</sup> Matt Sussman, *College Athletes on Twitter is (Mostly) a Bad Idea*, HUSTLEBELT.COM (Oct. 25, 2012, 1:35 PM), <http://www.hustlebelt.com/2012/10/25/3551082/toledo-basketball-twitter-ban-tod-kowalczyk> (depicting Toledo players' responses to Coach Tod Kowalczyk's in-season Twitter ban).

<sup>49</sup> Greg Wallace, *Clemson Twitter Ban Raises Questions of Education, Abuse*, ORANGE & WHITE (Aug. 10, 2012, 6:40 PM), <http://www.orangeandwhite.com/news/2012/aug/10/clemson-twitter-ban-raises-questions-education-abu/> (“Clemson coach Dabo Swinney says the ban is a matter of keeping his players' minds focused on the field”).

<sup>50</sup> ehageman, *Pat Harty: A Time and Place for Tweeting in College Football*, HAWK CENT. (Aug. 4, 2012), <http://hawkcentral.com/2012/08/04/pat-harty-a-time-and-place-for-tweeting-in-college-football/>.

<sup>51</sup> Brandon Marcello, *Rick Stansbury Bans Mississippi State from Twitter After Criticism*, USA TODAY (Feb. 3, 2011), <http://content.usatoday.com/communities/campusrivalry/post/2011/02/mississippi-state-basketball-twitter-ban/1#.UTAE2Dfrr9o>.

<sup>52</sup> Dave Southorn, *Two Years Later, Petersen Happy With Twitter Ban*, IDAHO PRESS-TRIBUNE (Sept. 12, 2012, 12:39 PM), [http://www.idahopress.com/blogs/sports/dave/two-years-later-petersen-happy-with-twitter-ban/article\\_1f0dc592-fd09-11e1-9b5b-001a4bcf887a.html](http://www.idahopress.com/blogs/sports/dave/two-years-later-petersen-happy-with-twitter-ban/article_1f0dc592-fd09-11e1-9b5b-001a4bcf887a.html) (responding to questions about his decision to ban Twitter, Coach Peterson stated, “I'm glad we do it . . . It just serves no purpose, in my opinion, for what we're trying to do here. It's just distracting”).

<sup>53</sup> Eamonn Brennan, *Villanova Players Wave Goodbye to Twitter*, ESPN MEN'S BASKETBALL (Sept. 28, 2010, 3:45 PM), [http://espn.go.com/blog/collegebasketballnation/post/\\_/id/15803/villanova-players-wave-goodbye-to-twitter](http://espn.go.com/blog/collegebasketballnation/post/_/id/15803/villanova-players-wave-goodbye-to-twitter).

<sup>54</sup> Ryan Greene, *UNLV Coach Bobby Hauck Establishes No-Twitter Policy with Players*, LAS VEGAS SUN (Aug. 16, 2011, 2:00 AM), <http://www.lasvegassun.com/news/2011/aug/16/unlv-coach->

Old Dominion football,<sup>56</sup> and South Carolina football<sup>57</sup> These bans are often prompted by social media postings that have caused team disruption or disrepute to a particular athlete.<sup>58</sup> In many respects, the bans are reactive rather than proactive, but the common theme among programs placing bans on their athletes is that team success outweighs individual attention.<sup>59</sup>

Still, other programs have required their athletes to provide access to their social media accounts to permit constant oversight of speech and conduct.<sup>60</sup> In

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bobby-hauck-establishes-twitter-policy-/ (indicating that the coaching staff noted the distraction of Twitter as part of the reason for imposing the ban).

<sup>55</sup> Les Johns, *UK Hoops Players Banned from Twitter*, KY. KERNAL (Dec. 8, 2011), <http://kykernel.com/2011/12/08/uk-hoops-players-banned-from-twitter/> (defending the Twitter ban, coach Matthew Mitchell explained that it is a protection against potential distractions).

<sup>56</sup> Harry Minium, *ODU Football Twitter Ban Among Most Restrictive in U.S.*, ODUBLITZ.COM (Sept. 15, 2012), <http://hamptonroads.com/2012/09/odu-football-twitter-ban-among-most-restrictive-us> (explaining that participating in the football program at Old Dominion requires athletes to agree to a year-round ban on Twitter because Coach Wilder learned that some of his players were tweeting up to 100 times per day and credited his team's poor academic performance to the Twitter usage).

<sup>57</sup> David Cloninger, *Spurrier Bans Team from Twitter*, GAMECOCKCENTRAL.COM (Aug. 4, 2011), <http://southcarolina.rivals.com/content.asp?CID=1247470> (responding to why he chose to institute the ban, Coach Spurrier explained that “[w]ell, we have some dumb, immature players that put crap on their Twitter, and we don’t need that. So the best thing to do is just ban it”).

<sup>58</sup> See, e.g., Chris Korman, *Towson Twitter Ban Comes as Legislators Move to Protect Student Freedoms*, THE BALT. SUN (Feb. 13, 2012), [http://articles.baltimoresun.com/2012-02-13/sports/bs-sp-towson-twitter-ban-0214-20120213\\_1\\_social-media-bradley-shear-towson-coach-rob-ambrose](http://articles.baltimoresun.com/2012-02-13/sports/bs-sp-towson-twitter-ban-0214-20120213_1_social-media-bradley-shear-towson-coach-rob-ambrose). One of the more noteworthy bans was put in place by Towson Head Coach, Rob Ambrose. *Id.* Towson was forced into the social media arena when a competitor, Lehigh wide receiver Ryan Spadola, re-tweeted a racially disparaging post regarding the Towson team, resulting in Spadola’s suspension by the NCAA. *Id.* In response, Ambrose decided to ban his own team from utilizing Twitter until he felt that the players had a better understanding of the proper use of social media. *Id.*

<sup>59</sup> See, e.g., Wallace, *supra* note 49 (pointing out the obvious problem: Clemson Coach Dabo Swinney states that “[y]ou take an 18, 22 year old young person who’s got 30,000 followers, and it’s just one more distraction, one more thing, one more obligation . . . [, and w]e’re not going to participate in that throughout the season”).

<sup>60</sup> See, e.g., Haley Goldberg, *Athletes’ Social Media Use Monitored by Athletic Department*, MICH. DAILY (Oct. 29, 2012), <http://www.michigandaily.com/news/10u-athletics-formalizes-student-athlete-social-media-policy30> (requiring that all student athletes notify the Michigan University Athletic Department of all social media accounts). According to the Michigan Social Media Policy, “[i]f additional accounts are ‘added or changed,’ athletes must inform the University’s Compliance Services Office.” *Id.* For another approach using monitoring software, see Myron Medcalf, *Policing the Social Media Craze*, ESPN MEN’S BASKETBALL, [http://espn.go.com/mens-college-basketball/story/\\_/id/7876754/policing-social-media-craze-college-sports-ncb](http://espn.go.com/mens-college-basketball/story/_/id/7876754/policing-social-media-craze-college-sports-ncb) (last updated May 1, 2012, 3:53 PM) (describing the difficulty in monitoring athletes’ social media); Mark Boxley, *University of Kentucky, Louisville Monitor Athletes’ Tweets*, USA TODAY, <http://usatoday30.usatoday.com/sports/college/story/2012-08-20/University-of-Kentucky-and-University-of-Louisville-student-athletes-monitored-on-Twitter/57165704/1> (last updated Aug. 20, 2012, 2:46 PM) (“As a condition of participating in sports, the [University of Kentucky and University of Louisville] require athletes to agree to monitoring software being placed on their social media accounts.”); Lopez, *supra* note 32 (explaining that the University of Kentucky requires its student athletes to “friend” someone from the university compliance office in order to permit monitoring of their social media accounts).

response, several state legislatures are passing laws that prohibit coaches and state athletic departments from gaining access to their athletes' passwords and social media accounts.<sup>61</sup> These laws may make banning, as opposed to monitoring, the only legally viable solution for dealing with the NCAA's newly established position that universities can be penalized for failing to properly monitor their student-athletes' social media usage.<sup>62</sup>

Are coaches' and universities' reactions to social media usage outrageous or pragmatic? Are we dealing with First Amendment violations or merely consequences of participating in extracurricular athletics? As one *USA Today* columnist noted:

Coaches don't want to get beat because of a tweet. Increasingly, college coaches are monitoring—and in some cases banning—athletes' use of social media. They're nervous because an ill-conceived tweet can embarrass the program [and serve as a distraction from the goal of competition and team unity], draw the ire of administrators and boosters, and possibly violate NCAA recruitment rules.<sup>63</sup>

This article posits that state colleges and universities retain the right, even under the First Amendment, to limit athletes' speech on social media. Athletes are highly regulated both on and off the court.<sup>64</sup> Access to college athletes has always

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<sup>61</sup> *Employer Access to Social Media Usernames and Passwords*, NAT'L CONF. OF ST. LEGISLATURES (Jan. 17, 2013), <http://www.ncsl.org/issues-research/telecom/employer-access-to-social-media-passwords.aspx> (listing six states that have enacted legislation and fourteen states that have introduced legislation restricting employers or educators from requesting access to social networking sites of employees and students); see also, e.g., CAL. EDUC. CODE §§ 99120–22 (Deering 2012) (prohibiting educational institutions in California from requesting access to student social media accounts, asking for associated usernames or passwords, giving information from such networks, or punishing students for failing to give such information, if asked).

<sup>62</sup> Mary Margaret Penrose, *Free Speech Versus Free Education: First Amendment Considerations in Limiting Student Athletes' Use of Social Media*, 1 MISS. SPORTS L. REV. 71, 76–78 (2012) (detailing how North Carolina football player, Marvin Austin, tweeted about improper benefits, which resulted in the NCAA's penalty against North Carolina for failure to monitor social media).

<sup>63</sup> Ken Paulson, *Column: Free Speech Sacks Ban on College-Athlete Tweets*, USA TODAY, <http://usatoday30.usatoday.com/news/opinion/forum/story/2012-04-15/twitter-social-media-college-sports-coaches-ban/54301178/1> (last updated Apr. 15, 2012, 6:27 PM).

<sup>64</sup> *Univ. of Colo. v. Derdeyn*, 863 P.2d 929, 961 (Colo. 1993) (Erickson, J., dissenting). The *Derdeyn* decision, which has been preempted by the Supreme Court's 1995 decision in *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656–57 (1995), contained a strong dissent based on the highly regulated nature of college athletes. *Id.* Ultimately, it is this regulatory paradigm, unique to student athletes, that prompted Justice Scalia and the Supreme Court to find suspicionless drug testing of student athletes Constitutional. *Id.* Justice Erickson's dissent in *Derdeyn* continues to be the governing view in relation to constitutional challenges brought by student athletes:

The extensive regulation of behavior that student athletes voluntarily submit to further reduces their privacy expectations. Student athletes are

been controlled by coaches and athletic departments. The First Amendment rights of student-athletes are inherently limited, just as their Fourth Amendment rights are less protected than those enjoyed by the general public.<sup>65</sup> Athletes can choose to exercise their right to speak in conflict with a college's or university's governing policies, but such speech will have consequences that may appear to conflict with the First Amendment.<sup>66</sup> However, athletes have long been held to different standards, and their speech rights are qualitatively distinct from the public's at large.

Athletes are prevented by coaches and conferences from being outspoken. They are exposed to a different set of regulations than most Americans and nearly all of their school colleagues,<sup>67</sup> including conference rules mandating "good sportsmanship," penalties imposed during competition for "excessive celebration" or "taunting," comprehensive training regarding social media usage, and application of strict social media policies.<sup>68</sup> Further, coaches work diligently to train student

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regulated by the [NCAA], [their respective conference], [their university], and their individual athletic programs. Among others, the regulations include maintenance of required levels of academic performance, monitoring of course selection, training rules, practice schedules, weight and diet restrictions, curfews, and prohibitions on drug use. . . . In my view, the expectation of privacy of student athletes with respect to the intrusions occasioned by a urine test are greatly diminished based on their voluntary participation in the highly regulated area of intercollegiate athletics.

*Id.*

<sup>65</sup> See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656–57 (1995); *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls*, 536 U.S. 822, 831–32 (2002). In assessing the constitutionality of suspicionless drug testing of public school students participating in extracurricular activities, the Supreme Court focused on the voluntary nature of participating in such highly regulated activities as athletics. *Earls*, 536 U.S. at 832.

<sup>66</sup> See OHIO STATE STANDARDS OF CONDUCT, *supra* note 4, at 50. This code of conduct bars students from posting or contributing to:

any content to any social networking or other internet site(s) that reflects negatively (determined in the sole discretion of the University) on yourself, your team and/or teammates, your coach(es) or the Department of Athletics. The University may monitor such internet site(s) for the sole purpose of determining whether or not you have posted or contributed any content in violation of this section.

*Id.* Such "content-based" and constitutionally vague policies would not pass First Amendment scrutiny were the focus of the policy not an athlete with diminished First Amendment rights.

<sup>67</sup> See *Derdeyn*, 863 P.2d at 961 (Erickson, J., dissenting); *UH Athletics Student-Athlete Code of Conduct*, HOUS. COUGARS, <http://www.uhcougars.com/genrel/011812aaa.html> (last visited May 12, 2013) [hereinafter *UH Code of Conduct*].

<sup>68</sup> See, e.g., URBANA-CHAMPAIGN POLICY STATEMENT, *supra* note 11, at 24 (outlining Illinois's social media policy, which prohibits student-athletes from posting any "[i]ncriminating photos or statements depicting violent conduct; hazing; sexual harassment; [and] gambling," among other proscriptions). Thus, Illinois student-athletes may be permitted to visit Las Vegas, but they are prevented by their athletic department from posting any photos or statements discussing their



athletes to concentrate on positive performance, often using team building exercises to build trust among the athletes. Distractions and public criticisms, where possible, are intentionally kept to a minimum. The goal of sport is victory, not “freedom.” The team has always been a higher ideal in athletics than the individual. Social media complicates and compromises this value system.

Simply by participating in athletics and athletic endeavors, student athletes tacitly and explicitly, through their governing Student-Athlete Codes of Conduct, agree to be bound by rules that ordinary college students never face.<sup>69</sup> These rules are as varied as the athletes themselves and indicate that athletes lack the full panoply of First Amendment rights: class attendance and study hall requirements, bans on tobacco use, prohibiting younger athletes from speaking to the press, random drug testing, gambling prohibitions such as playing fantasy football, grooming restrictions, proscribing derogatory language to describe teammates or opponents, alcohol use prohibitions, nightly curfews requirements to avoid strip clubs and hiring strippers, and a generalized requirement of “good sportsmanship.”<sup>70</sup> It is a constitutional truism that athletes are unique and, accordingly, uniquely treated. Athletes voluntarily cede an enormous amount of power to their coaches and athletic departments.<sup>71</sup> They are held to different standards and receive numerous distinctive benefits for participating in their respective sports, often including fully financed college educations.<sup>72</sup> They are perceived as “role models,” taking on a

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nights of poker, blackjack, or bingo. Such policy would seem to fly directly in the face of the First Amendment, were student-athletes to have full First Amendment rights.

<sup>69</sup> IND. UNIV., STATEMENT OF PRINCIPLES ON THE CONDUCT OF PARTICIPANTS IN STUDENT ATHLETIC PROGRAMS § 2.4 (2003), <http://www.iupuijags.com/custompages/Employee%20Handbook/Handbook/indianauniversityathleticcode.pdf>. The code of conduct instructs its student athletes that:

The conduct of all participants shall reflect the fact that by virtue of their participation in student athletic programs sponsored by Indiana University, they are representing the University. As a result, participants are expected to exhibit a higher standard of behavior than might be expected of other students, staff, and faculty, and to avoid conduct that is likely to appear improper.

*Id.*

<sup>70</sup> See *supra* note 5.

<sup>71</sup> *UH Code of Conduct*, *supra* note 67 (“It is important student-athletes have an understanding of the additional responsibilities they accept when they become members of an intercollegiate athletics team. . . . Because participating in athletics is a privilege, not a right, there may be times when these responsibilities involve sacrifice, which might not be necessary for other university students.”); see also OHIO STATE STANDARDS OF CONDUCT, *supra* note 4, at 50 (informing the Ohio State athletes, unequivocally, that they “shall follow NCAA, Big Ten Conference, University and [their] individual team’s policies, rules and regulations”).

<sup>72</sup> *C.f.* Green v. Sandy, No. 5:10-cv-367-JMH, 2011 U.S. Dist. LEXIS 114718, at \*2–3 (E.D. Ky. Oct. 3, 2011) (noting that, despite being dismissed from the Women’s Soccer team for criticizing the head coach, the college athlete continued to receive a nearly full scholarship); Richard v. Perkins,

heightened sense of responsibility and exposure that traditional college students never face. Student athletes, for better or worse, are constitutionally distinguishable from traditional students.

Whether this difference is explained, legally, through waiver principles or by analogy to the military, another group of highly regulated individuals whose speech is limited through their voluntary participation in a group, the end result is that athletes do not have unlimited freedom during their participation in college athletics.<sup>73</sup> Athletes have no constitutional right to participate in a university's athletic program.<sup>74</sup> This voluntary participation is a privilege, often delimited contractually, and can be withdrawn with little university oversight or legal consequence.<sup>75</sup> An athlete earns his or her right to participate on a team, but that participation holds no corresponding legal entitlement to demand the individual be permitted to actually play or to remain a member of the team.<sup>76</sup> Coaches, like military generals, have extraordinary authority to set team "rules and regulations" by which their players must abide, many of which would not pass constitutional muster were the rules applied generically to college students.<sup>77</sup> College athletes are not interchangeable, legally, with traditional college students.<sup>78</sup> Moreover, the differences between the two groups of individuals carry important legal distinctions. College athletes voluntarily agree to place themselves in heavily regulated, highly

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373 F. Supp. 2d 1211, 1215 (D. Kan. 2005) (noting that a male track athlete remained on full scholarship despite being dismissed from the track team).

<sup>73</sup> See, e.g., *Goldman v. Weinberger*, 475 U.S. 503, 509–10 (1986) (finding that military members lack the full range of First Amendment freedoms available to the civilian public), *superseded by statute*, 10 U.S.C. § 774(a)–(b) (2012) (granting a member of the armed forces the right to wear religious apparel while wearing uniform unless it would interfere with military duties or the apparel is not "neat and conservative"), *as recognized in* *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005). It is understood that student athletes are not a perfect analogy. Whether this connection is legally valid or constitutionally defensible must await another effort where fuller attention can be drawn to the similarities, and differences, between these two groups. The clearest similarity, however, remains that both military personnel and college athletes must always place unit over team and the rules regulating both tend to take this paradigm into account. See *Parker v. Levy*, 417 U.S. 733, 749 (1974).

<sup>74</sup> *Colo. Seminary (Univ. of Denver) v. Nat'l Collegiate Athletic Ass'n*, 417 F. Supp. 885, 896 (D. Colo. 1976). The District Court reaffirmed existing Circuit precedent by noting that "student-athletes have no constitutionally protected property or liberty interest in participation in intercollegiate athletics." *Id.*; see also *Parish v. Nat'l Collegiate Athletic Ass'n*, 506 F.2d 1028, 1031 (5th Cir. 1975) (striking down both Equal Protection and Due Process claims to participate in intercollegiate athletics); *Justice v. Nat'l Collegiate Athletic Ass'n*, 577 F. Supp. 356, 366 (D. Ariz. 1983) (concluding that "participation in intercollegiate athletics is not a constitutionally protected interest").

<sup>75</sup> See OHIO STATE STANDARDS OF CONDUCT, *supra* note 4, at 50.

<sup>76</sup> See *Colo. Seminary*, 417 F. Supp. at 900 (refusing to "constitutionalize amateur sports to protect [student athletes'] interests").

<sup>77</sup> See *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1190 (6th Cir. 1995); *supra* note 71 and accompanying text.

<sup>78</sup> *Hill v. Nat'l Collegiate Athletic Ass'n*, 865 P.2d 633, 658 (Cal. 1994).

restrictive, and physically demanding environments.<sup>79</sup> This choice to voluntarily participate in athletics operates, as least partially, as a waiver of speech and expressive rights. College athletes literally accept these limitations when they sign on to their governing athletic code of conduct.

If athletes desire the full panoply of First Amendment rights and they want to be ordinary college students enjoying the traditional college experience, they have the option to forego their athletic opportunities. Athletes can choose to be outspoken and, in doing so, opt for speech over athletics. This choice, like many choices faced in life, requires a weighing of the options and an assessment of the opportunity costs. However, one thing this choice does not impact is the limited First Amendment rights of college athletes. Those limitations have been in place and successfully enforced for many years. Social media only exposes and amplifies these limitations; it certainly does not change them.

## II. THE EVIDENCE

Not all publicity is good publicity. Moreover, as we are constantly witnessing, self-publicity may be the worst kind of publicity. However, try explaining this concept to individuals between the ages of eighteen and twenty-three who regularly gauge their standings, socially and emotionally, by the number of Facebook friends and Twitter followers they have. Try explaining this to star athletes who believe that their brand is their right and depends on self-publicity.<sup>80</sup> Try explaining to a star athlete that the university brand is as important, and far more enduring, than the athlete's personal brand. Try explaining to a college athlete that his or her Facebook "friends" are probably not really friends in the true sense of the word, nor are their "followers" necessarily supporters. College athletes are easy targets for criticism and ridicule on social media in ways that other, non-public students are not.<sup>81</sup>

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<sup>79</sup> See *Univ. of Colo. v. Derdeyn*, 863 P.2d 929, 961 (Colo. 1993) (Erickson, J., dissenting).

<sup>80</sup> See Chris Richardson, *College Basketball Coach Bans Entire Team from Twitter*, WEBPRONEWS (July 20, 2011), <http://www.webpronews.com/college-basketball-coach-bans-entire-team-from-twitter-2011-07>. New Mexico standout recruit, Jarion Henry, tweeted out his response to Coach Alford's Twitter ban: "Whatever i tweet is just a Freedom of Speech," which was followed by an expletive for emphasis. *Id.* Ironically, Henry ultimately opted against joining Coach Alford and the Lobos and signed a letter of intent to play for the University of Oklahoma after spending one year at a community college. See Bob Przybylo, *Signee Jarion Henry Awaits NCAA Decision*, ESPN SOONER NATION (Dec. 29, 2011, 11:45 AM), [http://insider.espn.go.com/blog/colleges/oklahoma/post/\\_/id/3246/jarion-henry-awaits-ncaa-decision](http://insider.espn.go.com/blog/colleges/oklahoma/post/_/id/3246/jarion-henry-awaits-ncaa-decision).

<sup>81</sup> Browning & Sanderson, *supra* note 22, at 516.

Student-athletes' being ripe candidates for criticism is nothing new, but two things that appear to be escalating are the boldness of the critics and the immediacy of their messages. Twitter's rise has been accompanied by what appears, at least anecdotally, to be a hypercritical society in which people seem to feel empowered to send very demeaning or condemning messages to student-

Not surprisingly, such discussions often fall on deaf, highly distracted, texting, Facebooking, Tweeting, and Instagraming eyes and ears. The athlete's ego craves attention and exposure, not always recognizing that overexposure can cause damage to his or her psyche and his or her team.<sup>82</sup> Ultimately, no matter how famous or infamous a particular individual becomes, his or her successes will eventually yield to the enduring nature of the university. No one person will ever be larger than the legendary Notre Dame, the fabled Michigan, the mythical Penn State, the celebrated Texas A&M, or the illustrious Indiana, Ohio State, and North Carolina. And, most fanatics are more tied to the lasting nature of the institution rather than the fleeting nature of the college athlete. Even for the fans, the end goal is usually about the team's success, not the individual's.

When the student athlete's college career is over, he or she will quickly move on, hopefully to a successful career and family, but the university endures. Its fans remain, often latching on to the next generation of student athletes and abandoning the former ones. The university's brand, unlike the individual's, is permanent. But, while an active part of that brand, the student athlete is under perpetually myopic scrutiny.<sup>83</sup> Is the athlete performing well? Is he or she a "good citizen?" What do athletes do with their spare time? How do I become like them?

College coaches and athletic departments must be careful to ensure just the right amount of exposure for their athletes, so as not to disrupt their educations or their athletic performances. Too much outside criticism can break down an individual, leaving him or her unable to compete at the collegiate level. Too much adoration can transform an athlete into an egocentric figure who destroys team unity

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athletes via Twitter. This brazen confidence stems from the protection users have behind the phone or computer screen. Indeed, while many users list their real names, plenty hide behind the security of anonymity when sending critical tweets.

*Id.*

<sup>82</sup> See *id.* at 506. For example, "during the 2012 college football recruiting period, ESPN.com reported on two student-athletes who received numerous derogatory tweets from fans after they decommitted from football programs they initially announced they would attend." *Id.* (internal citation omitted).

<sup>83</sup> See Doyel, *supra* note 20. One of the most candid columnists underscores the difficulty facing athletes and athletic departments: media scrutiny. As Doyel details, the problem with Twitter is that it is dangerous for athletes, "a chance they don't need to take—because if they screw up, [the media] is waiting." *Id.* Doyel continued:

If a college athlete says the wrong thing on Twitter, people like me are going to hear about [it]. We're going to talk about it on the radio and write about it in the newspaper or on the Internet. By the time we're finished, the player's name will be in shambles and his coach will be performing damage control. As for us, we leave the wreckage in our rear-view and move on to the next guy.

*Id.*

and success. The balance that needs to be struck should be determined by coaches and athletic programs, not judges and legislatures.

From a policy perspective, there are many who would argue that the better approach is to educate these athletes on the proper use and etiquette of social media. The University of Tennessee (“UT”) provides one such example.<sup>84</sup> Kudos can be given to UT and those like UT in their efforts and commitment to education above all other goals. Such educational approach, however, is only one option. Choosing education over protection is a policy decision best reserved for each university, each coach, and, perhaps, each athlete. However, the law does not require education as the only choice. Bans or limits on social media usage likely provides a legally defensible alternative.

University athletic programs are multidimensional entities. They not only serve as university departments, but are also businesses with brands to preserve and athletes to protect. Doubtless, athletic departments do not see their sole purpose as education. Unlike a university’s larger aim of educating its students, athletic departments serve far different purposes, with education among them.<sup>85</sup> Legally, universities can leave education to the classroom teachers and athletic endeavors to the coaches.<sup>86</sup> And athletic departments need not wait until team disruptions or disasters occur to take proactive steps regarding speech to maintain team unity.<sup>87</sup> If universities desire to relegate athletic lessons to coaches in order to protect their athletes and their brands, recognizing that athletic lessons differ materially from classroom lessons, the law permits such structuring.<sup>88</sup> Even under the First Amendment, state colleges and universities retain the right to have athletics focus on important life lessons such as team, discipline, performance, and sportsmanship—leaving social media and all its multi-layered distractions on the sideline.

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<sup>84</sup> Tom Satkowiak, *50 Twitter Tips for Division I Student-Athletes*, CONSPICUOUSIDEAS (July 29, 2011), <http://conspicuousideas.blogspot.com/2011/07/50-twitter-tips-for-division-i-student.html>. Satkowiak is the Associate Media Relations Director at UT, as well as the Men’s Basketball Sports Information Director. *Id.* One such tip is, “[a]fter composing a Tweet, but before you hit send, ask yourself: ‘Would I be comfortable saying this in front of my parents, my grandmother, my pastor?’ If the answer is no, discard it.” *Id.*

<sup>85</sup> *Lowery v. Euverard*, 497 F.3d 584, 589 (6th Cir. 2007) (“Athletic programs may also produce long-term benefits by distilling positive character traits in players. However, the immediate goal of an athletic team is to win the game, and the coach determines how best to obtain that goal.”).

<sup>86</sup> *See, e.g., Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1190 (6th Cir. 1995) (underscoring the stark contrast between a classroom teacher’s role in the educational process and the coach’s separate, more narrowly focused, role “to train his student athletes how to win on the court”).

<sup>87</sup> *C.f. Green v. Sandy*, No. 5:10-cv-367-JMH, 2011 U.S. Dist. LEXIS 114718, at \*16 (E.D. Ky. Oct. 3, 2011) (indicating that, because a coach’s actions do not impede an athlete’s actual “education,” the athlete is not required to damage team unity before the coach can take proactive steps, including dismissal of complaining athletes from the team).

<sup>88</sup> *Lowery*, 497 F.3d at 596–97 (finding the rights of student athletes, limited as they are, to be analogous to public employees’ rights). The *Lowery* court found that “[r]estrictions that would be inappropriate for the student body at large may be appropriate in the context of voluntary athletic programs.” *Id.* at 597.

*A. Exhibit A—Manti Te’o*

Prior to January, 2013, Manti Te’o was perceived as the sympathetic and mythic Notre Dame football god, leading Notre Dame to a 2012 undefeated regular season.<sup>89</sup> His athletic talents were rivaled only by his compelling emotional story. The story began with unthinkable loss: Te’o’s grandmother and girlfriend both died on September 11, 2012.<sup>90</sup> Their respective deaths inspired a gritty and unparalleled season of tenacious performance. Against all odds, fending off unfathomable grief, Te’o carried his team on his shoulders and led them to both an undefeated regular season and the National Championship game.<sup>91</sup> Te’o’s story was magical; it was a story worthy of Rudy, the Gipper, and *God, Country, Notre Dame*. All of America seemed to embrace Te’o. And then, the bombshell.<sup>92</sup>

Apparently, the Te’o myth was truly a myth,<sup>93</sup> or, perhaps, a lie.<sup>94</sup> We may never know. The surreal story keeps growing in odd dimensions and may never have been fully understood.<sup>95</sup> For his part, Te’o claims to have been duped on social media after meeting the “love of his life” on Twitter. He is embarrassed to have been the subject of a “sick joke” or a cruel hoax.<sup>96</sup> His university’s “feel-good” story has been deflated or even defiled. The Notre Dame legend is now a national joke.<sup>97</sup>

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<sup>89</sup> Pete Thamel, *The Full Manti*, SI VAULT (Oct. 1, 2012), <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1206734/index.htm>. Manti Te’o graced the cover of *Sports Illustrated* under the caption, “The Full Manti.” The story that followed included the heart-wrenching tale of a young man who lost two very important women on the same day—his grandmother and his girlfriend. *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> See Frank Schwab, *Notre Dame Finishes an Undefeated Season and Earns a Spot in the BCS Championship Game*, YAHOO! SPORTS (Nov. 24, 2012, 11:36 PM), <http://sports.yahoo.com/blogs/ncaaf-dr-saturday/notre-dame-finishes-undefeated-season-earns-spot-bcs-043651456--ncaaf.html>; see also Arnold, *supra* note 21. Arnold’s article begins very candidly: “Much of what made the 2012 Notre Dame football season feel magical is unraveling before our very eyes.” *Id.*

<sup>92</sup> See Arnold, *supra* note 21; Timothy Burke & Jack Dickey, *Manti Te’o’s Dead Girlfriend, the Most Heartbreaking and Inspirational Story of the College Football Season, Is a Hoax*, DEADSPIN (Jan. 16, 2013, 4:10 PM), <http://deadspin.com/5976517/manti-teos-dead-girlfriend-the-most-heart-breaking-and-inspirational-story-of-the-college-football-season-is-a-hoax> (breaking the Manti Te’o story on January 16, 2013 under the headline “Blarney”). The media storm that followed was unparalleled for any college football player during the post-season.

<sup>93</sup> Burke & Dickey, *supra* note 92 (detailing the timeline of the hoax, including Te’o’s knowledge of the hoax long before it was revealed by Deadspin).

<sup>94</sup> *Id.* While there is no direct evidence that Te’o committed the hoax or was complicit in the year-long saga, the Deadspin.com story cites an unnamed “friend of Ronaiah Tuiasosopo” who was “80 percent sure” that Manti Te’o was ‘in on it,’ and that the two perpetrated Lennay Kekua’s death with publicity in mind.” *Id.*

<sup>95</sup> Arnold, *supra* note 21.

<sup>96</sup> See Burke & Dickey, *supra* note 92 (quoting Te’o as saying, “[t]o realize that I was the victim of what was apparently someone’s sick joke and constant lies was, and is, painful and humiliating”).

<sup>97</sup> See Jordan Zarkarin, *Late Night Hosts Pile on Jokes About Manti Te’o’s Imaginary Girlfriend*, HOLLYWOOD REPORTER (Jan. 18, 2013, 9:41 AM), <http://www.hollywoodreporter.com/live->

People all over the country are now enjoying “Te’o-ing,”—or posing with an imaginary girlfriend and posting pictures of themselves with their imaginary girlfriend online.<sup>98</sup> Hilarious? Not to Notre Dame,<sup>99</sup> and certainly not to Te’o and his family,<sup>100</sup> nor to athletic directors throughout the country.

Instead, the Te’o story is Exhibit A as to why athletic departments should consider their social media options in regard to their student athletes.<sup>101</sup> While Notre Dame is a private university and is, therefore, not bound by the First Amendment in regulating speech or conduct, the Te’o story serves as an admonishment to all universities, private and public.<sup>102</sup> Perhaps muzzling the gladiators is not such a bad idea. Not only does this protect against athletes speaking out, it protects against athletes being mistreated, hoaxed, or heckled.

For followers of Notre Dame, Te’o is not the first Notre Dame athlete to have been victimized by social media. Just two years ago, Notre Dame basketball player, Skylar Diggins, found herself targeted on social media with claims that a nude photo posted on Twitter was Diggins.<sup>103</sup> Diggins resorted to social media to defend herself and, ultimately, changed her account settings in the hopes that such “private” labeling would limit such distractions.<sup>104</sup> But, the very notion that Diggins found herself responding to false postings only proves the potential disruption that social media can cause. Were this to have occurred during the team’s national

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feed/manti-teo-jokes-letterman-fallon-413605 (providing examples of late night comedians poking fun at the Manti Te’o hoax).

<sup>98</sup> See, e.g., Rick Chandler, *Sweet Nothings: ‘Te’oing’ is a Thing Now, so Everyone Grab Your Fake Girlfriend and Join in*, NBC SPORTS (Jan. 17, 2013, 10:03 AM), <http://offthebench.nbcsports.com/2013/01/17/teoing-is-a-thing-now-everyone-grab-a-camera-and-your-fake-girlfriend-and-join-in/>.

<sup>99</sup> Arnold, *supra* note 21 (detailing the hour long media session that Notre Dame Athletic Director, Jack Swarbrick, hosted to address the remarkable, developing story).

<sup>100</sup> See Christina Ng, *Manti Te’o Listens to ‘Girlfriend’s’ Voicemails with Katie Couric*, ABC NEWS (Jan. 24, 2013), <http://abcnews.go.com/US/manti-teo-listens-girlfriends-voicemails-katie-couric/story?id=18302896>. In late January 2013, Manti Te’o sat down with Katie Couric to describe the inexplicable series of events surrounding Manti Te’o and his “impersonated” girlfriend. *Id.* The event was highly publicized and garnered a large audience. *Id.* Even non-football fans began following this surreal story. *Id.*

<sup>101</sup> See Arnold, *supra* note 21 (“[The Te’o story was among] the biggest the [Deadspin] site has ever published, rocketing to over one million pageviews in just over two hours. And in a matter of minutes, Te’o went from one of sports’ gallant warriors to one of its biggest punch lines.”).

<sup>102</sup> See Brian Wassom, *Private Schools and Social Media*, WASSOM.COM (Aug. 30, 2011), <http://www.wassom.com/private-schools-and-social-media.html> (providing that, although private schools are not bound to the same First Amendment restrictions as are public schools, private schools still experience difficulties based on what students post on social media sites).

<sup>103</sup> Penrose, *supra* note 62, at 74–75; Nina Mandell, *Skylar Diggins, Notre Dame Star, Slams Rumors of Naked Picture in Twitter Rant*, DAILY NEWS (Apr. 17, 2011, 2:40 PM), <http://www.nydailynews.com/sports/college/skylar-diggins-notre-dame-star-slams-rumors-naked-picture-twitter-rant-article-1.116126> (sharing that Diggins was forced to defend herself and explain that nude photographs alleged to be her were fake).

<sup>104</sup> See Mandell, *supra* note 103.

championship run, it could have literally cost the team its chance at a national title. In fact, some critics wonder if this very same issue impacted the Notre Dame football team's performance in their national championship game.<sup>105</sup>

Exhibit A underscores the truism that there are two sides to social media. Many focus solely on the right of athletes to speak out, to hold their own so-called "press conferences" about their daily activities and world views. But athletic directors should also pause to consider the invasive nature of social media and how college athletes are targeted, unsuspectingly, by those who would simply take pleasure in mistreating those who have risen to the highest athletic ranks. Athletes and their popularity make them unique targets for pranks, criticisms, and commentary that fans feel justified in sending via social media because athletes have exposed themselves to the online community of anonymous voices.<sup>106</sup>

There are no requirements that individuals use their real names on social media.<sup>107</sup> In fact, there are no requirements that individuals use their real ages, their real photos, their real schools or job affiliations, their real genders, or any other parts of real life.<sup>108</sup> Part of the danger of social media is that it enables individuals to pretend to be something they may not be—an alleged fan turns out to be a harsh critic in hopes of debilitating the athlete's ego, or a true adversary begins to follow an athlete on Twitter only to agitate or expose the individual.<sup>109</sup> Social media is a two-way street. Far too many individuals focus on the "right" of student athletes to send messages out in the cyber world.<sup>110</sup> But by simply having social media accounts,

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<sup>105</sup> See Sandy McAfee, *Mind Games: Did the Hoax Affect Te'o's Championship Play?*, MEDILL REPORTS CHI. (Jan. 24, 2013), <http://news.medill.northwestern.edu/chicago/news.aspx?id=214538> (speculating that the hoax impacted Te'o's play in the National Championship game, based on statistical comparisons of his performance during the season to that of the championship game). Te'o's poor performance in the National Championship game against Alabama was partly the reason why he was not drafted in the first round of the NFL draft. See Associated Press, *Manti Te'o Signs with Chargers*, ESPN (May 10, 2013, 12:18 PM), [http://espn.go.com/nfl/story/\\_/id/9260663/manti-teo-four-san-diego-chargers-draft-picks-sign-contracts](http://espn.go.com/nfl/story/_/id/9260663/manti-teo-four-san-diego-chargers-draft-picks-sign-contracts). The general manager and coach for the San Diego Chargers, the NFL team that drafted Te'o, stated, however, that "they weren't bothered by the scrutiny Te'o [was] under the last four months." *Id.* Nonetheless, if the hoax did affect his performance in the championship game, then it indirectly impacted his NFL career.

<sup>106</sup> See Auerbach, *supra* note 28 and accompanying text.

<sup>107</sup> See Stanton McCandlish, *EFF's Top 12 Ways to Protect Your Online Privacy*, ELECTRONIC FRONTIER FOUND. (Apr. 9, 2002), <https://www.eff.org/wp/effs-top-12-ways-protect-your-online-privacy> (encouraging users not to use their full names in order to protect their online privacy).

<sup>108</sup> *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999) (finding that permitting users to "interact pseudonymously and anonymously with each other so long as those acts are not in violation of the law" and allowing users to speak their minds "without the burden of the other party knowing all the facts about one's identity can foster open communication and robust debate").

<sup>109</sup> *C.f.* Ira P. Robbins, *Writings on the Wall: The Need for an Authorship-Centric Approach to the Authentication of Social-Networking Evidence*, 13 MINN. J.L. SCI. & TECH. 1, 7–8 (2012).

<sup>110</sup> See Kayla Faria, *Law Experts: Stalking Student-Athletes' Twitter, Facebook Presence Increases Universities' Liability*, CAP. NEWS SERV. (Feb. 13, 2013), <http://ensmaryland.org/2013/02/13/law-experts-stalking-student-athletes-twitter-facebook-presence-increases-universities->



those same individuals become vulnerable to receiving messages that may be more damaging than uplifting.<sup>111</sup> Danger truly lurks in 140 characters or less.

The Te'o story, regardless of how it ultimately shakes out, is remarkable. It is also cautionary.

### *B. Exhibit B—Rape Jokes, Gay Jokes and the “N” Word*

#### *1. The “N” Word*

Racist tweets, much like racist language, seem to gain the most attention and garner the most severe penalties. Four notable examples include Buck Burnette, a Texas football player; Ryan Spadola, a Lehigh football standout; Matt Faiella, a Stony Brook football player; and Bradley Patterson, a North Alabama football player. All four athletes were punished either by their team or by the NCAA for their poor choices in posting racially charged messages on social networking sites, each including a variation of the “N” word.<sup>112</sup>

Buck Burnette was the first social media casualty for re-posting on his Facebook account a racial slur that he apparently deemed clever on election night 2008.<sup>113</sup> The statement, “all the hunters gather up, we have a n\*\*\*\*\* in the whitehouse [sic],” quickly netted the attention of his coach and university.<sup>114</sup> Burnett was immediately suspended from the University of Texas football team and, ultimately, transferred to the Division II program at Abilene Christian University.<sup>115</sup> Burnett and his

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liability/ (criticizing schools because the “university officials who ask student-athletes for social media passwords or registered handles to monitor their activity or prohibit them from using social networking sites are violating freedom of speech rights and exposing schools to lawsuits by increasing legal liability.”); Kolten Parker, *Social Media Monitors Targeted*, MY SA (Jan. 26, 2013, 10:54 PM), [http://www.mysanantonio.com/news/local\\_news/article/Social-media-monitors-targeted-4226606.php](http://www.mysanantonio.com/news/local_news/article/Social-media-monitors-targeted-4226606.php) (“Its [sic] insanity for a coach to want to track everything a student does online . . . That’s like bugging their dorm room. It’s a clear violation of First and Fourth Amendment constitutional rights.”).

<sup>111</sup> See Robbins, *supra* note 109, at 7.

<sup>112</sup> See Joseph Duarte, *Longhorn’s Expulsion Shows Need for Caution on Facebook*, HOUS. CHRONICLE (Nov. 11, 2008), <http://www.chron.com/sports/longhorns/article/Longhorn-s-expulsion-shows-need-for-caution-on-1774465.php>; Kevin DeShazo, *Second Student Athlete Suspended by NCAA Over Inappropriate Tweet*, SOCIAL MEDIA EDUC. (Feb. 7, 2012), <http://www.fieldhousemedia.net/second-student-athlete-suspended-by-ncaa-over-inappropriate-tweet/>; Paul Myerberg, *College Football Player Kicked Off Team After Racist Anti-Obama Tweet*, USA TODAY (Dec. 17, 2012, 3:36 PM), <http://www.usatoday.com/story/gameon/2012/12/17/north-alabama-football-player-racist-tweet-president-obama/1774795/>.

<sup>113</sup> See Duarte, *supra* note 112.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*; see also *Recruiting News*, LSC SCOOP (Feb. 4, 2009), <http://www.lscscoop.com/2009/02/recruiting-news.html> (stating that Burnette enrolled at Abilene Christian University).

University of Texas teammates learned firsthand the perils of social media and the lasting consequences of a momentary lapse in judgment that posting or re-posting speech can have.

Ryan Spadola and Matt Faiella learned the same lesson four years later when Spadola re-tweeted Faiella's offensive description of the rival Towson football team.<sup>116</sup> Captured in a website article entitled *The 100 Biggest Twitter Fails of All Time*, Spadola's re-tweet ranked number thirty-eight.<sup>117</sup> Spadola's re-tweet was sent immediately preceding Lehigh's close victory over Towson and resulted in Spadola and Faiella being suspended by the NCAA.<sup>118</sup> Hence, one simple racist comment, forwarded by another player, resulted in two teams losing their respective athletes for at least one game. A screenshot still exists of the "deleted" re-tweet, easily allowing anyone to witness the young men's racially charged message: "let them ni\*\*as talk shit, kids that talk shit tlk [sic] shit because they suck on the field. Its gunna [sic] be a long day for them."<sup>119</sup>

What may seem funny, ironic, or otherwise relevant to an eighteen- to twenty-three-year-old student-athlete can turn drastically ugly before the individual has a chance to "take back" his or her posting. In fact, it is this inability to "take back" or truly delete a posting that continues to lead to suspensions and discipline against many college athletes. The athlete, once his or her speech is discovered as inappropriate, will often rush to take down the posting. But, usually, the tweet or posting has already been screen-captured by other individuals, often people who do not have the athlete's best interest at heart.<sup>120</sup>

Another "N"-word casualty is Bradley Patterson, a walk-on long-snapper for the North Alabama football team.<sup>121</sup> Patterson, who apparently grew frustrated with President Obama's speech responding to the Newtown, Connecticut school shooting, tweeted "[t]ake that n\*\*\*\*\* off the tv, we wanna [sic] watch football!"<sup>122</sup> Patterson was immediately dismissed from the team.<sup>123</sup> Patterson, a relatively unknown

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<sup>116</sup> DeShazo, *supra* note 112.

<sup>117</sup> Michael Arceneaux, *The 100 Biggest Twitter Fails of All Time*, COMPLEX (Nov. 29, 2012, 7:57 AM), <http://www.complex.com/tech/2012/11/the-100-biggest-twitter-fails-of-all-time/ryan-spadola-racism>.

<sup>118</sup> Cork Gaines, *Racially Offensive Tweet Leads to Suspension of College Football Player*, BUS. INSIDER (Feb. 8, 2012, 11:39 AM), <http://www.businessinsider.com/racially-offensive-tweet-leads-to-suspension-of-college-football-player-2012-2>. The NCAA report indicated that the comment was considered "unsportsmanlike action" and "discredited the [football] championship overall." *Public Reprimand and Suspension Issued to Lehigh University Football Student-Athlete*, NAT'L COLLEGIATE ATHLETIC ASS'N (Dec. 8, 2011), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2011/December/Public+reprimand+and+suspension+issued+to+Lehigh+University+football+student-athlete>.

<sup>119</sup> Arceneaux, *supra* note 117.

<sup>120</sup> See, e.g., *id.* (depicting a screenshot of the student-athlete's tweet that is captured on a source other than the athlete's Twitter account).

<sup>121</sup> Myerberg, *supra* note 112.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

Division II student athlete, became instantly infamous. The *Sporting News* reported that, within an hour, Patterson had shut down his Twitter account and been kicked off the team.<sup>124</sup>

Patterson, like those before him, and the many that will surely follow, began a public relations campaign to save his own image from further damage. He went on local television to tearfully apologize and proclaim that, despite referring to the President as a n\*\*\*\*\*, he was not racist.<sup>125</sup> In many respects, Patterson merely stated the obvious problem: “I put that on Twitter. I can’t take it back, and it’s always going to be in the back of somebody’s mind that I said that, but I can’t make them forgive me.”<sup>126</sup>

This is the quandary facing college athletic programs today.<sup>127</sup> How do schools prevent these petulant displays that college students are prone to make? How do coaches protect their teams from outspoken personalities who still do not appreciate the ubiquitous nature of social media? How does an athletic program ensure that such inappropriate tweets do not cause disruption to a team or dissension among players?

One commentator remarked that the Spadola and Faiella suspensions have “to serve as a wake up [sic] call to coaches and administrators.”<sup>128</sup> “The NCAA, while not having a policy in place, will take action against student-athletes that are abusing social media.”<sup>129</sup> Ironically, the program that ultimately placed a social media ban on its players was neither Stony Brook nor Lehigh. Instead, it was the Towson coach who, recognizing the potential damage that a single tweet can cause a program, instructed his team to stay off Twitter.<sup>130</sup> Other coaches continue to follow suit.<sup>131</sup>

## 2. Rape Jokes

Courtney Fortson, one of Arkansas’s leading scorers on the men’s basketball team, thought it was appropriate to make a rape joke while at least two of his teammates were under criminal investigation for raping a college freshman at a

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<sup>124</sup> David Steele, *Many Athletes Still Haven’t Learned to Avoid Trouble on Twitter*, SPORTINGNEWS (Dec. 19, 2012, 2:21 PM), <http://aol.sportingnews.com/mlb/story/2012-12-19/twitter-gay-slur-noah-syndergaard-racial-bradley-patterson-obama>.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* As Steele queries: “Do these athletes just not care? Is knowing that their small-mindedness is on display for the whole planet to observe part of the attraction? Are they’re [sic] so self-absorbed, so incapable of getting over themselves, that they enjoy it, and to hell with the consequences?” *Id.*

<sup>128</sup> DeShazo, *supra* note 112.

<sup>129</sup> *Id.*

<sup>130</sup> See Korman, *supra* note 58.

<sup>131</sup> *Id.*

fraternity party.<sup>132</sup> In referencing team practice, Fortson tweeted, “Im gettin [sic] it at workouts like a dude who doesnt [sic] understand the word no from a drunk girl lol.”<sup>133</sup> For those unfamiliar with social media parlance, “lol” indicates the speaker/writer finds something funny as they are indicating the comment makes them “laugh out loud.”<sup>134</sup>

Most observers did not find Fortson’s commentary funny or anything to “lol” about.<sup>135</sup> Rather, the comment simply reflected poorly on the University of Arkansas, its men’s basketball program, and the athletic department. Such insensitivity or ignorance can rarely be fended off in advance. Coaches usually cannot predict which, if any, of their players will garner national attention for their social media presence, rather than for their skill and athleticism. And, once an ill-timed comment is online anywhere, it will soon be available everywhere.

Stephanie McCaffrey, a Boston College soccer player, made a similar mistake.<sup>136</sup> The week of the NCAA Women’s Soccer Tournament, McCaffrey turned to Twitter to make light of the Penn State molestation scandal—perhaps not recognizing that the public humiliation still felt by Happy Valley citizens might result in reverberations, if someone were to exploit the situation.<sup>137</sup> McCaffrey started the night by wondering “if well [sic] get into the visitors [sic] locker room at Penn state. . . I hear the showers are weiners [sic] only, 10 and under.”<sup>138</sup> Not many Americans, much less college athletes who harbor school pride, would seemingly find humor in the proven rape of numerous young children. There is simply nothing funny about the crime, the victims, or even the decimation of the Penn State athletic program.

Rather than stop there, McCaffrey continued with another comedic shot: “Raping at penn state to getting raped in state penn [sic].”<sup>139</sup> A few more tweets degrading the Penn State program followed.<sup>140</sup> Onward State, a Penn State student-

<sup>132</sup> Associated Press, *Fortson Posts Crass Comment to Twitter*, ESPN MEN’S BASKETBALL, <http://sports.espn.go.com/nbc/news/story?id=4463400> (last updated Sept. 10, 2009, 8:17 PM).

<sup>133</sup> *Id.*

<sup>134</sup> *What Does LOL Mean?*, INTERNETSLANG.COM, <http://www.internetslang.com/LOL-meaning-definition.asp> (last visited May 12, 2013).

<sup>135</sup> *Arkansas Fans React to the Suspensions*, SB NATION, <http://www.sbnation.com/2009/11/11/1125997/arkansas-rape-basketball-accused> (last updated Nov. 11, 2009) (stating that as far as offensive tweets go, “that was a particularly inspired effort”); *Twenty Tweets Heard ‘Round the World*, SI.COM, [http://sportsillustrated.cnn.com/multimedia/photo\\_gallery/1107/tweets-heard-round-the-world/content.14.html](http://sportsillustrated.cnn.com/multimedia/photo_gallery/1107/tweets-heard-round-the-world/content.14.html) (last visited May 12, 2013) (noting that Fortson’s tweet was “particularly insensitive” because a few of Fortson’s teammates were accused of rape only weeks earlier).

<sup>136</sup> Rick Chandler, *Boston College Women’s Soccer Player Tweets Sandusky Rape Jokes Prior to Penn State Game, Apologizes, is Suspended*, NBC SPORTS (Nov. 16, 2012, 9:00 AM), <http://offthebench.nbcsports.com/2012/11/16/boston-college-womens-soccer-player-tweets-sandusky-rape-jokes-prior-to-penn-state-game-apologizes-is-suspended/>.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

run blog, somehow intercepted the tweets, captured screen-shots to forever memorialize McCaffrey's poor judgment, and sent word to Boston College.<sup>141</sup>

Like the growing number before her, McCaffrey closed her twitter account, began publicly apologizing to the many individuals she had offended, and was suspended.<sup>142</sup> But the damage done by McCaffrey was not complete. Her team, without her physical presence on the field, lost their NCAA Tournament game at Penn State.<sup>143</sup> These tweets undoubtedly had a direct impact on team unity and, ultimately, team performance, as McCaffrey was the team's second-leading scorer.<sup>144</sup> An entire season was capped off by insensitive jokes spread precipitously on social media and the benching of a star player.

The cautionary tale of McCaffrey and her insensitive references to the Penn State scandal seemingly went unnoticed by Hofstra wrestler, Russell Benner.<sup>145</sup> Onward State successfully managed to find Benner's tweets about the notorious Penn State locker room.<sup>146</sup> Preceding his arrival in Happy Valley, Brenner tweeted, "[a]fter this tournament at Penn State, ill [sic] take the 5 hour drive home before i [sic] shower here. Not foolin [sic] me."<sup>147</sup> And, then, to cap it off, Benner tweeted, "these mofos tryna [sic] fool me to 'shower' fck outta here."<sup>148</sup> Unlike Boston College's response to McCaffrey's tweets, Hofstra apparently did not prohibit Benner from competing at Penn State.<sup>149</sup> He did, however, lose two of his three matches that weekend.<sup>150</sup> And, once sufficient attention was drawn to Benner's tweets, the predictable response ultimately did come: suspension from the team and apologies from both the athletic department and the athlete.<sup>151</sup>

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<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> Joyce, *supra* note 10.

<sup>144</sup> Chandler, *supra* note 136.

<sup>145</sup> Kevin Horne, *Hofstra Wrestler Russell Benner Makes Penn State Rape Jokes on Twitter*, ONWARD ST., <http://onwardstate.com/2012/12/02/hofstra-wrestler-russell-benner-makes-penn-state-rape-jokes-on-twitter/> (last visited May 12, 2013).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* (stating that Benner wrestled in three matches following posting the offensive tweets); see also Scott Burgess, *Wrestling in Trouble on the Mats and on the Internet*, THE HOFSTRA CHRONICLE (Dec. 7, 2012), <http://thehofstrachronicle.com/wrestling-in-trouble-on-the-mats-and-on-the-internet/> (indicating that although McCaffrey was suspended, Benner's punishment had yet to be determined).

<sup>150</sup> Horne, *supra* note 145.

<sup>151</sup> Hofstra Athletic Commc'ns, *WREST: Benner Suspended from Wrestling Program*, HOFSTRA PRIDE (Dec. 6, 2012), [http://www.gohofstra.com/ViewArticle.dbml?DB\\_OEM\\_ID=22200&ATCLID=205821682](http://www.gohofstra.com/ViewArticle.dbml?DB_OEM_ID=22200&ATCLID=205821682).

### 3. *Gay Jokes*

Athletes seem to be drawn to verbal controversy, like moths are drawn to a flame. Therefore, coaches should not be surprised to learn that their athletes are issuing commentary relating to sexual orientation without pausing to consider the consequences. Long before C.J. Leslie, a North Carolina State basketball standout, was glorified for rescuing a wheelchair-bound fan, who had stormed the court following a win,<sup>152</sup> he received significant negative attention for his anti-gay tweets.<sup>153</sup>

Leslie, after watching an ESPN documentary about an openly-gay basketball player, revealed a tad too much candor in tweeting, “I’m no anti gay But [sic] I would rather not have a gay n [sic] the locker room.”<sup>154</sup> He continued, “I’m not sayin [sic] I hate gays but that’s sumthing [sic] that I would not wnt [sic] n [sic] my locker room.”<sup>155</sup> Taking particular aim at the athlete identified as homosexual, Leslie remarked, “John amaechi is to [sic] big to be gay #imjussayin.”<sup>156</sup> Shortly afterwards, Leslie, like those athletes before him and the many sure to follow, deleted the offending tweets.<sup>157</sup> North Carolina State chose not to discipline Leslie for the tweets because they were found to be neither threatening nor a violation of the student code of conduct.<sup>158</sup>

Joining Leslie in expressing his opinion on gay/straight issues, John Bohannon, a UT-El Paso basketball player, tweeted, “#lets be real it’s NOT cool to be gay!”<sup>159</sup> The school was quick to explain that the tweet was simply a reference to a rap song entitled, “These Days,” proving that sexual orientation slights rank somewhere below racist comments and rape commentary.<sup>160</sup> No suspension was issued.<sup>161</sup> The NCAA

<sup>152</sup> Thomas Lake, *A Court-Storming and the Player Who Saved the Man in a Wheelchair*, SI.COM (Jan. 24, 2013, 10:08 AM), <http://sportsillustrated.cnn.com/college-basketball/news/2013/01/24/n-c-state-will-privette/>; Nicole Auerbach, *How C.J. Leslie Saved Wheelchair Court Stormer Will Privette*, USA TODAY (Jan. 12, 2013, 10:52 PM), <http://www.usatoday.com/story/sports/ncaab/2013/01/12/qa-with-north-carolina-state-wheelchair-fan-will-privette/1829185/>.

<sup>153</sup> J.P. Giglio, *NCSU’s Leslie Apologizes for Twitter Posts*, NEWSOBSERVER.COM (May 13, 2011), <http://www.newsobserver.com/2011/05/13/1194460/leslie-apologizes-for-twitter.html>; Brett Friedlander, *C.J. Leslie and the Dangers of (Anti)Social Media*, STAR NEWS ONLINE (May 11, 2011, 5:45 PM), <http://acc.blogs.starnews.com/22752/c-j-leslie-and-the-dangers-of-antisocial-media>.

<sup>154</sup> Giglio, *supra* note 153.

<sup>155</sup> *Id.*

<sup>156</sup> Cyd Zeigler, *NC State Basketball Star CJ Leslie Tweets He Doesn’t Want Gays in His Locker Room*, SB NATION OUTSPORTS (May 10, 2011, 3:14 PM), <http://www.outsports.com/2011/5/10/4051258/nc-state-basketball-star-cj-leslie-tweets-he-doesnt-want-gays-in-his>.

<sup>157</sup> *Id.*

<sup>158</sup> Lopez, *supra* note 32. Paul Cousins, North Carolina State Director of Office of Student Conduct, indicated that students posting messages that could constitute “harassment, threats or illegal activity” would be disciplined. *Id.*

<sup>159</sup> Aaron Rich, *John Bohannon Apologizes for Anti-Gay Tweet*, KTSM NEWS (June 10, 2011, 2:14 PM), <http://www.ktsm.com/news/john-bohannon-apologizes-for-anti-gay-tweet>.

<sup>160</sup> *Id.*

did not get involved. Bohannon, for his part, took to Twitter to make the obligatory apology and explain that, despite his tweet, he does not judge people based on their sexual orientation.<sup>162</sup> Unoriginally, like many of the outspoken athletes preceding him, Bohannon pleaded (on Twitter), “[a]nd would hope you would not judge me by one tweet.”<sup>163</sup>

The problem for coaches and universities is that society *will* judge an individual based on one tweet. While a reputation takes years to build up, it literally takes moments to tear down. The timetable is however long it takes a person to type a message of 140 characters or less. Twitter may well be the downfall of many modern athletes. But Twitter should not likewise become the downfall for many modern athletic programs, which have an enduring duty to protect the entire program and all of the athletes from a few incorrigible ones.<sup>164</sup>

Former North Carolina football coach, Butch Davis, apparently banned his team from using Twitter in response to inappropriate tweets, including Quinton Coples’ anti-gay tweet.<sup>165</sup> Using the hash-tag, “stopthegayness,” Cople’s tweeted that “a dude that looks gay just sat by one of my teammates i think he knows we [sic] laughing at him smh.”<sup>166</sup> Banning student-athletes’ use of social media proactively defends coaches and universities from the hapless individual athlete whose behavior could bring down an entire athletic department or like that which occurred with the Boston College Women’s soccer team, bring a literal end to a season. It is unlikely that the First Amendment requires an athletic department to wait for the storm to erupt and the damage to take hold. Athletes are highly regulated in relation to both speech and privacy. If state-sponsored universities can degrade a student-athlete’s privacy in the name of wholesome and safe competition, then so too can they limit a student-athlete’s speech in the name of team unity and avoiding distractions. The evidence as set forth herein provides a compelling case.

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<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> William Vega, *UTEP Community Responds to Anti-Gay Tweet*, THE PROSPECTOR (June 15, 2011), <http://www.utepprospector.com/news/utep-community-responds-to-anti-gay-tweet-1.2387934>.

<sup>164</sup> *Id.*

<sup>165</sup> Old MacDonald, *Butch Proactively Bans Twitter After Coples’ Anti-Gay Tweet!*, ST. FANS NATION (Oct. 14, 2010), <http://www.statefansnation.com/index.php/archives/2010/10/14/butch-proactively-bans-twitter-after-coples-anti-gay-tweet-day-92/>.

<sup>166</sup> *Id.*; see also Sara Gregory, *Let’s All Learn from Coples’ Mistake*, DAILY TARHEEL.COM, [http://www.dailytarheel.com/article/2010/10/lets\\_all\\_learn\\_from\\_coples\\_mistake](http://www.dailytarheel.com/article/2010/10/lets_all_learn_from_coples_mistake) (last updated Oct. 15, 2010, 1:29 AM). Within hours, Coples’ drafted and tweeted the requisite apology. *Id.* His apology, however, appeared far from heart-felt: “im [sic] not aginst [sic] gay people im [sic] just heterosexual.” Gregory, *supra*.

#### 4. Permanency—The Intractable Nature of Twitter

The inability to permanently, or even genuinely, delete social media content is precisely why schools should not have to wait for an athlete's foolish behavior to injure his or her team before a university can act.<sup>167</sup> Team unity, discipline, and on-field success are foremost among the goals of participating in student-athletics.<sup>168</sup> Putting the rights of the individual before these athletic goals violates the underlying value of a team and allows the proverbial tail to wag the much more important dog. Fortunately, the First Amendment does not place the individual above his or her team.

The Sixth Circuit's decision in *Lowery v. Euverard* is most instructive in this regard.<sup>169</sup> In upholding several high school athletes' dismissals from their football team for speech deemed detrimental to the team, the court noted:

Defendants in the instant case were not obligated to wait until the [speech] substantially disrupted the team before acting, nor are they now required to demonstrate that it was certain that the [speech] would substantially disrupt the team. Rather, Defendants must show that it was reasonable for them to forecast that the [speech in question] would disrupt the team.<sup>170</sup>

Due to the continued nature of athletes behaving badly on Facebook, Twitter, and Instagram, state-sponsored universities need not wait for their athletes to be caught misbehaving on social media networks before they place restrictions and bans on such communications as a condition of participating on the team. Why wait for your star soccer player to send out a detrimental tweet before a crucial game? Why sit mute while your athletes send racially charged messages on Facebook or Twitter and face NCAA suspension and harsh publicity? Why allow your star athlete to be caught up in a cruel hoax about life, love, and death? All of these episodes can distract a team from its main goal: performing at the highest athletic level. The threat of social media interfering with an athletic team's ability to stay focused and win is not abstract. The threat is very real, very present, and very ominous.

State-sponsored schools are constitutionally entitled to help protect athletes from themselves by limiting their resort to social media. Further, coaches should be allowed to protect their teams from renegade athletes whose words inflict injuries on

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<sup>167</sup> Auerbach, *supra* note 28. Florida Atlantic's Patrick Chun explains that social media postings are "what's called a virtual tattoo . . . You tweet something or Facebook something, and it could be there forever." *Id.*

<sup>168</sup> See *Wildman v. Marshalltown Sch. Dist.*, 249 F.3d 768, 771 (8th Cir. 2001) (observing that "an educational environment conducive to learning team unity and sportsmanship and free from disruptions and distractions that could hurt or stray from the cohesiveness of the team" may well limit a student-athlete's First Amendment rights).

<sup>169</sup> *Lowery v. Euverard*, 497 F.3d 584, 593 (6th Cir. 2007).

<sup>170</sup> *Id.*



the teams and institutions or from hero-worshipping fanatics whose behavior can devastate players and destroy teams.<sup>171</sup> We already accept coaches' complete "ban" on freshmen speaking to the media and their limiting of players' literal access to the press. We accept this ban despite its reasoning being based solely on the athlete's alleged unpreparedness to answer questions posed by reporters. Why is limiting social media, which essentially allows an individual to hold his or her own perpetual "press conference" by posting messages, statements, and photos to his or her "friends" and "followers," any different than the policies of coaches who completely exclude their athletes from speaking to the press? Constitutionally speaking, there is likely no difference. As courts have regularly elevated the notion of team over individual, it is doubtful that limited speech policies relating to social media will be struck down on First Amendment grounds.<sup>172</sup>

##### 5. *The Verdict—To Ban First or Punish Later?*

In 1981, three University of Oklahoma women's basketball players learned that the First Amendment has limited application to college athletes.<sup>173</sup> Their "free speech" attempts to have their head coach removed resulted in them losing their athletic scholarships.<sup>174</sup> The Tenth Circuit upheld the University's decision not to renew the scholarships because the athletes' speech caused "disharmony among the players and disrupted the effective administration of the basketball program."<sup>175</sup> Interestingly, the Tenth Circuit analyzed this case under the public employment line of cases established by *Pickering v. Board of Education*.<sup>176</sup> Finding that the athletes' speech in criticizing their coach did not rise to the *Pickering* level of "matters of public concern," the court permitted Oklahoma to strip these athletes of their respective scholarships.<sup>177</sup> The Tenth Circuit in *Marcum v. Dahl* appeared hesitant to find that what goes on in a locker room rises to the level of speech that *Pickering*

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<sup>171</sup> See Browning & Sanderson, *supra* note 22, at 506, 517.

<sup>172</sup> See *William v. Eaton*, 443 F.2d 422, 433–34 (10th Cir. 1971) (denying summary judgment on a First Amendment claim of the University of Wyoming football players to wear black armbands during a football game against Brigham Young University to protest the Mormon Church's racial policies); *Williams v. Eaton (Eaton II)*, 468 F.2d 1079, 1084 (10th Cir. 1972) (rejecting football players' First Amendment challenge to wear black arm bands following trial under *Tinker v. Des Moines*). This distinction may prove critical to the decision regarding state sponsored universities' ability to ban their student athletes' social media usage. But, this larger issue—the governing legal standard—is best relegated to another effort. For now, under either paradigm, state schools have the constitutional right to limit their student athletes' social media use.

<sup>173</sup> *Marcum v. Dahl*, 658 F.2d 731, 734–35 (10th Cir. 1981).

<sup>174</sup> *Id.* at 733 (noting that the university took the position that the ladies' scholarships should not be renewed because "of plaintiffs' attitude and behavior" in publicly criticizing their head coach).

<sup>175</sup> *Id.* at 734.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 734–35.

and its progeny protect.<sup>178</sup> The *Marcum* case supports the idea that issues relating to team unity, players' satisfaction with their coach, and athlete discipline fall short of pure First Amendment protection.<sup>179</sup> Further, under a strict *Pickering* analysis, such issues were held to be internal team issues and not constitutionally cognizable matters of public concern.<sup>180</sup>

Because case law is mixed regarding whether a college athlete, as such, is a university employee, there are some reservations about applying a pure *Pickering* analysis to the unique setting of college athletics.<sup>181</sup> Such an ambitious assessment regarding *Pickering's* applicability is best reserved for another day, another article. While *Pickering* may not be the ideal paradigm to analyze college athletes' speech rights, little has changed factually since the Tenth Circuit's decision upheld the University of Oklahoma's right to restrict its athletes' speech in the name of team unity. Thus, the outcome of *Marcum*, limiting the First Amendment rights of college athletes, remains reliable, regardless of whether the analysis could withstand modern application.

Case law, addressing both high school and college athletes, seems to suggest that coaches and state-sponsored institutions can place restrictions on their athletes' speech, including their use of social media.<sup>182</sup> Even the Supreme Court has recognized that student athletes who choose to "go out for the team" have diminished expectations of privacy.<sup>183</sup> As Justice Scalia explained, students participating in extracurricular sports "voluntarily subject themselves to a degree of regulation even

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<sup>178</sup> *Id.* at 734 (finding that the "problems created by the controversy between the scholarship and non-scholarship players were internal problems [on the team] with which the defendants were required to deal in their official capacities" and were not matters of "general public concern and the plaintiffs' comments to the press did not invoke First Amendment protection").

<sup>179</sup> *See id.* (finding that athletes' First Amendment rights were not violated by the university's decision not to renew the athletes' athletic scholarships based on comments made by the athletes that publicly criticized the university officials' leadership of the team).

<sup>180</sup> *Id.*

<sup>181</sup> An important limitation to the public employee analysis hinges on the few cases finding employment status. From a contextual standpoint, the cases addressing this issue are contained in the Worker's Compensation arena, a fact that further complicates the analysis. *See, e.g.,* Van Horn v. Indus. Accident Comm'n, 219 Cal. App. 2d 457, 466 (1963) (finding that a football player who died on a school-sponsored airplane trip was an employee for Worker's Compensation purposes); Coleman v. W. Mich. Univ., 336 N.W.2d 224, 228 (Mich. Ct. App. 1983) (finding that a football player on scholarship was not an employee for Worker's Compensation purposes).

<sup>182</sup> *See* *Marcum v. Dahl*, 658 F.2d 731, 733–35 (10th Cir. 1981) (justifying the non-renewal of three University of Oklahoma Women's Basketball team members for the public criticism of their coach to the press); *Eaton II*, 468 F.2d 1079, 1084 (10th Cir. 1972) (noting that the University of Wyoming was well within its rights to protect the invasion of the rights of other teammates as a basis for prohibiting the wearing of armbands as a form of hostile speech toward the Mormon religion); *Lowery v. Euverard*, 497 F.3d 584, 593 (6th Cir. 2007) (noting the "top-down" nature of school authority, particularly in relation to athletics); *Wildman v. Marshalltown Sch. Dist.*, 249 F.3d 768, 771 (8th Cir. 2001) (requiring player to apologize to the team prior to rejoining the team after publicly criticizing the coach did not violate First Amendment rights of the student-athlete).

<sup>183</sup> *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657 (1995).

higher than that imposed on students generally.”<sup>184</sup> The Court noted that from regulations relating to grade point average minimums to extensive codes of conduct established by the head coach and athletic director, student athletes are constitutionally different and “have reason to expect intrusions upon normal rights and privileges, including privacy.”<sup>185</sup>

In athletics and the team-centered universe of sport, coaches have extraordinary authority over their athletes.<sup>186</sup> The Supreme Court tacitly approves this structure and its resulting distinction between student athletes and other students.<sup>187</sup> For better or worse, coaches—and athletic conferences—can impose codes of conduct and rules that stringently limit behavior, including language.<sup>188</sup> While an ordinary college student may be free to indiscriminately utter an expletive word or wear clothing bearing an expletive word on campus and to class, student athletes most likely lack that privilege.<sup>189</sup>

Uniformly, courts have held that participation in athletics—at the high school and college levels—is not a constitutionally protected right.<sup>190</sup> But this generally unprotected status, with no liberty, property, due process, or equal protection right to participate in athletics, does not immunize state schools from facing First Amendment scrutiny for their policies relating to speech and expression. Rather, any attempt by a state college or university to regulate their student-athletes’ speech will be evaluated through a First Amendment prism that takes into consideration the

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<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Lowery*, 497 F.3d at 594 (“The ability of the coach to lead is inextricably linked to his ability to maintain order and discipline.”).

<sup>187</sup> *Vernonia*, 515 U.S. at 657 (suggesting that student athletes are like adults who choose to participate in a highly regulated industry and, as such, voluntarily relinquish certain rights that would otherwise exist).

<sup>188</sup> *Wildman v. Marshalltown Sch. Dist.*, 249 F.3d 768, 772 (8th Cir. 2001) (noting that “coaches deserve a modicum of respect from athletes, particularly in an academic setting” in upholding a player’s dismissal from the basketball team for refusing to apologize for distributing a letter complaining about the coach’s “bullsh\*t”).

<sup>189</sup> *See, e.g., Lowery v. Euverard*, 497 F.3d 584, 597 (6th Cir. 2007) (“Restrictions that would be inappropriate for the student body at large may be appropriate in the context of voluntary athletic programs”).

<sup>190</sup> *See Colo. Seminary (Univ. of Denver) v. Nat’l Collegiate Athletic Ass’n*, 417 F. Supp. 885, 896 (D. Colo. 1976) (“[S]tudent-athletes have no constitutionally protected property or liberty interest in participation in intercollegiate athletics”); *Parish v. Nat’l Collegiate Athletic Ass’n*, 506 F.2d 1028, 1034 (5th Cir. 1975) (striking down both Equal Protection and Due Process claims to participate in intercollegiate athletics); *Angstadt v. Midd-West Sch. Dist.*, 377 F.3d 338, 344 (3rd Cir. 2004) (dismissing a First Amendment freedom of association challenge to participate in high school athletics); *Alerding v. Ohio High Sch. Athletic Ass’n*, 779 F.2d 315, 319 (6th Cir. 1985) (finding that participation in interschool athletics is not a fundamental right under the Privileges and Immunities Clause); *Niles v. Univ. Interscholastic League*, 715 F.2d 1027, 1031 (5th Cir. 1983) (finding no constitutional right to participate in interscholastic athletics under either a right to travel challenge or a freedom of association claim).

highly regulated nature of athletes.<sup>191</sup> *Tinker v. Des Moines* provides an adequate framework for considering college athletes and their highly regulated behavior.<sup>192</sup> Unlike high school students, college athletes are traditionally considered adults, in the legal sense, and choose to forego numerous freedoms in exchange for wearing a school's uniform. Although a pure *Pickering* approach may not be ideal, *Pickering*, however, offers a far superior approach than *Tinker*. An analytical approach, which appreciates the student-athlete's unique relation to a state athletic department as qualitatively distinct from a high school student's desire to attend class, requires greater deference than the *Tinker* framework offers. An individual's desire to participate in extracurricular athletics is, for First Amendment purposes, *sui generis*. Athletes are not identical to traditional students. Athletes are not identical to military personnel.<sup>193</sup> And athletes may not be true employees of a university. Yet,

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<sup>191</sup> See, e.g., *Hysaw v. Washburn Univ. of Topeka*, 690 F. Supp. 940, 946 (D. Kan. 1987) (assessing First Amendment challenge in light of coach's policies possibly excusing the player's absence from practice).

<sup>192</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969).

<sup>193</sup> Much like American servicemen and women, college athletes' membership on a team is not compelled, it is chosen. Embedded within this choice is a deep appreciation of three key points: (1) membership is voluntary; (2) membership is highly regulated; and (3) membership merges individual with team. In choosing membership on a team, college athletes voluntarily agree to forego the more traditional, much less regulated college experience. In this regard, the more apt analogy for First Amendment purposes may be the limited First Amendment rights enjoyed by military members.

In this regard, college athletes are more like members of the United States military than traditional civilians seeking First Amendment protection. See *Penrose*, *supra* note 62, at 91–94. Much like the Jewish Air Force psychologist that longed to wear his yarmulke to work on base, citing the First Amendment, college athletes crave to place themselves in the center of attention via social media. See *Goldman v. Weinberger*, 475 U.S. 503, 506 (1986), *superseded by statute*, 10 U.S.C. § 774(a)–(b) (2012) (granting a member of the armed forces the right to wear religious apparel while wearing uniform unless it would interfere with military duties or the apparel is not “neat and conservative”), *as recognized in* *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005). The United States Supreme Court for reasons not entirely or equally suited to state athletic departments—appropriately recognized that members of the military forfeit many of their First Amendment rights. *Id.* at 503. Focusing on the highly structured environment of the military, the Supreme Court confirmed that Goldman was required to adhere to military requirements of dress and discipline, which ultimately meant no yarmulke. *Id.* at 507. *Goldman* is consistent with past decisions giving military commanders extensive power over their respective units. See, e.g., *Parker v. Levy*, 417 U.S. 733, 758 (1974). As Justice Rehnquist noted:

While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.

*Id.*

there is no debating that athletes' conduct is highly regulated and regularly subjected to disciplinary approaches not suitable to the classroom or workplace.

As set forth above, athletes' speech is strictly restrained under the ubiquitous "sportsmanship" policies enacted by colleges and universities, the various athletic conferences, and the NCAA. These policies often demand that student-athletes refrain from using "offensive" or "unsportsmanlike" language or conduct, regulations that, under a "void for vagueness" challenge, would ordinarily fail constitutional scrutiny.<sup>194</sup> Under traditional First Amendment jurisprudence, regulations that lack sufficient guidance or that put absolute discretion to discipline in a decision-maker often fail constitutional challenge. But athletes are different, constitutionally speaking.<sup>195</sup> For athletes, such elastic regulations regarding "sportsmanship" and team unity are binding and can result in suspension or exclusion from athletic participation, even if the condemned conduct is not isolated as prohibited in advance.<sup>196</sup> As set forth above, college athletes are not typical, and the laws governing college athletes are similarly atypical.<sup>197</sup>

The Supreme Court has held that student athletes are subject to more restrictions than the student body at large. This greater degree of oversight is due to the differing natures of the classroom and playing field. One of the purposes of education is to train students to fulfill their role in a free

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Admittedly, the military is not identical to athletic competition. One deals with imperative issues of national security, while the other merely instills school pride and recognition. But both require dedication of self to the unit, relinquishing one's sense of individuality for the greater good of the team. Victory is the goal. Individual accomplishment is merely a by-product of participation in the larger venture. Both are voluntary. Both demand discipline and uniformity. Both share a goal of winning through constant dedication to authority, sacrifice and unit. Perhaps an analytical framework that recognizes the similarities of athletes and military members would be more appropriate than the traditional *Tinker* model. Again, such construct must await another effort.

<sup>194</sup> Compare UCLA INTERCOLLEGIATE ATHLETIC DEP'T, STUDENT ATHLETE HANDBOOK AND DAY PLANNER 36 (2012–13), [http://grfx.cstv.com/photos/schools/ucla/genrel/auto\\_pdf/2012-13/misc\\_non\\_event/12-13-SA-Handbook.pdf](http://grfx.cstv.com/photos/schools/ucla/genrel/auto_pdf/2012-13/misc_non_event/12-13-SA-Handbook.pdf) (expecting student athletes to contribute to a productive learning environment by refraining from "using offensive or explicit language or comments"), and N.C. STATE CODE OF CONDUCT, *supra* note 4, at 6 (explaining that "[u]nsportsmanlike conduct in others never justifies retaliation with unsportsmanlike conduct"), with *City of Chi. v. Morales*, 527 U.S. 41, 56 (1999) (determining that a law will be void for vagueness if it "fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits [or] . . . it may authorize . . . arbitrary and discriminatory enforcement").

<sup>195</sup> See *Vernonia Sch. Dist. 47j v. Acton*, 515 U.S. 646, 657 (1995) (indicating that student-athletes have a lower expectation of privacy and are held to different standards than non-athletes).

<sup>196</sup> See, e.g., *Marcum v. Dahl*, 658 F.2d 731, 733 (10th Cir. 1981) (indicating that the university had the right to revoke scholarship privileges from student athletes who openly criticized the coaching staff at the university).

<sup>197</sup> See *Colo. Seminary (Univ. of Denver) v. Nat'l Collegiate Athletic Ass'n*, 417 F. Supp. 885, 895–96 (D. Colo. 1976) (noting that NCAA rules and regulations relating to amateurism do not give rise to either a constitutionally protected liberty or property interest despite plaintiff's suggested importance of intercollegiate athletics as a forum for future professional opportunities).

society. Thus, it is appropriate for students to learn to express and evaluate competing viewpoints. The goal of an athletic team is much narrower. Of course, students may participate in extracurricular sports for any number of reasons: to develop discipline, to experience comradery [sic] and bonding with other students, for the sheer “love of the game,” etc. Athletic programs may also produce long-term benefits by distilling positive character traits in the players. However, the immediate goal of an athletic team is to win the game, and the coach determines how best to obtain that goal.<sup>198</sup>

The majority view among the circuit courts supports stringent limitations on athletes’ speech at state-sponsored schools.<sup>199</sup> The few notable cases where a student-athlete’s speech was protected are easily distinguishable from both a factual and a constitutional perspective.<sup>200</sup> The majority view demonstrates that there may be restrictions as to how far an athletic program can go in regulating its athletes’ speech, but those limits are at the far edges of the margin and generally only protect expressions that have value beyond the individual speaker. The ordinary speech case seems to favor team over individual, coach over player, and state over citizen.<sup>201</sup> Athletic speech, it appears, is constitutionally tapered.

For this reason, using the many cases that side with the institution over the athlete, state colleges and universities are well within their power to regulate their student-athletes’ use of social media. Schools likely have the power, under a traditional “time, place, and manner” regulation, to restrict their student-athletes from using social media, including Facebook, Twitter, and Instagram, at least during the athletic season. To be fully protected, a state school could simply condition acceptance of any scholarship or state property, such as practice gear, shoes, or game uniforms, and acceptance of travel privileges on the agreement that the student will forego usage of social media during all times they are associated with the program

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<sup>198</sup> *Lowery v. Euverard*, 497 F.3d 584, 589 (2007).

<sup>199</sup> While most of the cases continue to focus on high school athletes’ speech as opposed to college speech, the results similarly uphold a school’s right to prohibit and punish speech that causes dissension or disruption on the team.

<sup>200</sup> *See, e.g., Pinard v. Clatskanie Sch. Dist.* 6J, 467 F.3d 755, 758 (9th Cir. 2006) (distinguishing punishable conduct—failure to board the bus in protest of the coach—from the protected First Amendment right of players to circulate a petition against the coach); *Seamons v. Snow*, 206 F.3d 1021, 1023 (10th Cir. 2000) (requiring an apology to teammates for reporting sexual assault by teammates as a condition for rejoining the team was a violation of the student’s free speech rights).

<sup>201</sup> *See Wildman v. Marshalltown Sch. Dist.*, 249 F.3d 768, 771–72 (8th Cir. 2001); *Lowery*, 497 F.3d at 596–97; *Marcum*, 658 F.2d at 733–35 (choosing coach and team over three individual players); *Eaton II*, 468 F.2d 1079, 1083–84 (10th Cir. 1972) (choosing team over individual players’ rights to protest and cause a potential disturbance).

and receiving state benefits. In this regard, the government-employee analysis provides a strong basis for First Amendment restrictions under *Pickering*.<sup>202</sup>

In the end, most cases have found that student-athletes have limited speech rights regardless of whether the case is analyzed under *Tinker* and its progeny or *Pickering*. These limitations are based, generally, on two distinct facts: (1) student-athletes are highly regulated both on and off the field or court, and (2) team unity outweighs any unfettered right to free expression. While neither *Tinker* nor *Pickering*, standing alone, provide the ideal paradigm to evaluate the speech of student athletes, speech, at least for athletes, is not so free after all.

#### THE FINAL JUDGMENT—IS SPEECH EVER REALLY FREE?

Twitter, Facebook, Instagram, and all such individual speech outlets are antithetical to team competition. Just as coaches deplore athletes who study the game statistic sheets for personal performance, coaches struggle with athletes who focus on Twitter followers *versus* team performance. Imagine a coach's outrage when his or her player explains that, while the team lost the game, the individual player performed well.<sup>203</sup> Individualism is not embraced in sports; the team is. Hence, there are justifiable, non-content-related reasons for state institutions to limit or ban their athletes from social media. Just as the player fixated on his or her individual statistics diminishes the team concept, Twitter and Facebook give heightened value to "followers" and "friends," many of whom are completely unknown to the athlete.

Player safety, team distractions, individualism, and geocentricism undermine the athletic need for unity. Nascent laws that prohibit coaches from monitoring athletes' social media activity in the alleged name of privacy put schools at greater risk of NCAA violations and sanctions. State-sponsored colleges and universities have valid, content-neutral reasons for limiting or banning their athletes' participation in social media and are well within their legal rights to do so. A growing list of coaches and state universities recognize this fact. The most outspoken critics tend to be non-athletes—those who have never submitted to an athletic department's rules or a coach's mandates. Athletes, whose entire lives have centered around the discipline imposed by coaches, including limits on speech and expression,

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<sup>202</sup> See *Marcum*, 658 F.2d at 733–35 (applying the *Pickering* analysis to three Oklahoma University scholarship athletes); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 565, 568 (1968).

<sup>203</sup> See, e.g., Nina Mandell, *Renardo Sidney, Mississippi State Banned from Twitter After Outburst from Ravern Johnson*, N.Y. DAILY NEWS (Feb. 3, 2011, 8:21 PM), <http://www.nydailynews.com/sports/college/renardo-sidney-mississippi-state-banned-twitter-outburst-ravern-johnson-article-1.133146>. Raven Johnson, frustrated with his playing time, tweeted: "Starting to see why people transfer 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 not [sic] make sense to me." *Id.*

recognize that they are different. And, athletes' speech, like their privacy, will likely be treated distinctly by the courts.<sup>204</sup>

As this article has conveyed, the First Amendment is neither absolute nor literal. Yet, Americans still clamor that their "First Amendment" rights have been violated whenever consequences are imposed for speech deemed vulgar, inappropriate, racist, or otherwise offensive. Athletes, however, often find themselves suspended, kicked off the team, and their respective scholarships withdrawn or not renewed for poor speech choices.<sup>205</sup> Athletes are taught that strict compliance with rules, including rules relating to expression, is an essential component of the team concept.<sup>206</sup> An absolutist view toward athletic speech and an athlete's purported "right" to utilize social media is both naïve and uninformed. More importantly, "free speech" is antithetical to the team-centered nature of athletics.<sup>207</sup> Free speech has always had consequences and limitations, and college athletes, who are some of the most regulated and monitored individuals in our society, have some of the most restricted free speech rights.

Many college sports enthusiasts are all for allowing student-athletes to continue posting on Twitter and Facebook under alleged Free-Speech principles. For some, it is precisely the indiscretions and unexpected commentary that is most highly anticipated and consumed. Who, after all, has not savored the Manti Te'o scandal or "Johnny Football's" off-field exploits? Both stories have received inordinate levels of attention due to either hero-worship issues or the desire of some to see our heroes fall. Te'o's remarkable Twitter story has resulted in an interview with Katie Couric, repeated headlines and timelines exploiting the story ("Did Notre Dame Know," "Is Manti Te'o Gay?"), and his hoaxer even getting his own television interview with Dr. Phil, in which he admitted he was "in love" with Te'o. None of this attention has been good for the athlete, his well-being, his team, or the university. One can only imagine how damaging it would have been had the hoax been revealed during the season.

In contrast to the damage sustained by Te'o and Notre Dame, the ratings have been amazing! The public appetite has seemed insatiable. Athletes and their lives are certainly entertaining and Americans relish controversy, but many of these First

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<sup>204</sup> At least two Tenth Circuit cases suggest that intercollegiate athletes have limited speech rights. See *Marcum*, 658 F.2d at 733–35; *Eaton II*, 468 F.2d at 1083–84.

<sup>205</sup> See *Marcum*, 658 F.2d at 733–35 (refusing to renew University of Oklahoma Women's Basketball players' scholarships for comments and a campaign against the head coach); *Eaton II*, 468 F.2d at 1083–84 (dismissing University of Wyoming football players from the team after an attempted arm band protest during a Brigham Young University game).

<sup>206</sup> See *Hill v. Nat'l Collegiate Athletic Ass'n*, 865 P.2d 633, 658 (Cal. 1994) (noting that intercollegiate athletes are subjected to "special regulation of sleep habits, diet, fitness, and other activities that intrude significantly on privacy interests . . . not shared by other students or the population at large").

<sup>207</sup> See, e.g., *Lowery v. Euverard*, 497 F.3d 584, 593 (2007) ("[A]bstract concepts like team morale and unity are not susceptible to quantifiable measurement, yet they undeniably have a large impact on a team.").



Amendment rights proponents are the first ones calling for harsh punishment for those athletes who somehow defile the privilege of using Twitter and Facebook when the athlete's posts go too far. If an individual is calling for absolute "First Amendment" freedoms, the individual likely is not a former college athlete. Athletes know very well the limitations they have endured in relation to speech and expression. The trade-off is usually well worth the sacrifice.

It is this contradictory notion of wanting more exposure for athletes, but supporting punishing those that misbehave, that encourages state universities and their athletic departments to craft stringent social media policies.<sup>208</sup> It is the need for team unity over individual attention—which can be highly distracting from the athletic task at hand—that justifies coaches and universities in responding to their athletes' social media usage. Policies banning or limiting social media usage for college athletes are legally acceptable solutions and constitutionally sound. Their wisdom is a policy judgment best left to the universities and coaches themselves.

College athletes remain some of the most highly regulated individuals in the country. They are also some of the most visible, and thereby vulnerable, individuals in the country. College athletes are role models and likely have been for most of their lives. These young men and women are often told, in mandatory terms with enforceable consequences, whether they can drink (regardless of age or being in or out of season), can speak to the press, can use tobacco, can miss class (a regular pastime of college-aged students), must conform to a particular curfew, can ski, can play intramural sports, or can engage in other dangerous activities, along with a host of other regulations including maintaining minimum grade point averages higher than the typical university standard and random drug testing programs.<sup>209</sup> College athletes are extraordinary and are not, legally speaking, identical to other college students. Courts recognize this.

For those individuals who worry for the college athlete subjected to incredible, and often invasive, regulations, fear not—these athletes get extraordinary perks by participating in college athletics.<sup>210</sup> Participating in college athletics is a trade-off. College athletes and former athletes know this. They crave the competition, the exposure, and the educational values that intercollegiate athletics provides. Chief among the perks enjoyed by college athletes include a diminished admission standard that is distinct from non-athletes attending the university, special dining tables and eating opportunities, special weight room and work-out facilities, special medical treatment including free optical care at some schools, special study-halls and tutoring opportunities, athletic gear, uniforms, exotic travel, and, often, free college

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<sup>208</sup> See *supra* notes 32–38 (discussing the University of Michigan's newly configured social media policy and regulations).

<sup>209</sup> See *supra* notes 170–182 and accompanying text.

<sup>210</sup> See, e.g., *Colo. Seminary (Denver Univ.) v. Nat'l Collegiate Athletic Ass'n*, 417 F. Supp. 885, 895 (D. Colo. 1976) (urging by plaintiffs that that the importance of college athletics is that they are "a vital training ground for professional athletic careers").

tuition, room, and board.<sup>211</sup> These students are far from typical and far from deprived.<sup>212</sup>

So should anyone be speaking out for the right of college athletes to speak out? Maybe so. But more speech will not likely change the reality that state colleges and universities have significant latitude in regulating their athletes. Pat Summit prohibited her athletes from allowing any tattoo to be visible when representing the University of Tennessee Women's Basketball team.<sup>213</sup> Brian Kelly kept his Notre Dame Football team under a strict 11:00 p.m. curfew during the 2013 National Championship trip to Miami.<sup>214</sup> Nick Saban prohibits his freshman athletes from speaking to the media at all times.<sup>215</sup> Many other coaches limit their athletes' ability to smoke, drink, gamble, or even cuss when representing particular college brands.

Such limitations are permissible because participating in athletics remains a privilege, not a right,<sup>216</sup> and these regulations are aimed at athletic success, not academic enrichment. The football field is not an actual classroom. The basketball court is not a lecture hall. The soccer pitch is not a laboratory where scientific experiments are conducted. The points scored during athletic contests are not academic credits adding to a student's grade point average. Athletics may be educating—instilling discipline, self-confidence, and teamwork among other laudatory attributes. But let us be honest: Athletics are not part of the educational curriculum that underlies the university experience. The study of football film is not anything akin to the study of Shakespeare. Athletics may be part of a school, at least tangentially, but the education provided through athletics is of a totally distinct variety than that of the classroom experience.

Athletes who want to speak freely and without any athletically-imposed regulations relating to social media have a choice: play your sport under the governing athletic rules or play freely by your own rules. The reason this issue has not been litigated and has received little attention in the courts is that athletes absolutely understand their choice. And, for most student athletes, the choice is clear. Playing college athletics is the privilege of a lifetime. It provides a different

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<sup>211</sup> Dennis A. Johnson & John Acquaviva, *Point/Counterpoint: Paying College Athletes*, THE SPORT J., <http://www.thesportjournal.org/article/pointcounterpoint-paying-college-athletes> (last visited May 12, 2013); Paul D. Umbach et al., *Intercollegiate Athletes and Effective Educational Practices: Winning Combination or Losing Effort?*, 47 RES. IN HIGHER EDUC. 709, 710 (2006) (stating that athletes already experience “preferential treatment” in the admissions process).

<sup>212</sup> Satkowiak, *supra* note 84. The author admonishes college athletes not to “use Twitter as an outlet to complain about how rough your life is. You are getting a college education, traveling to interesting places, getting free athletic shoes and apparel and more. Thousands of people would crawl over glass for the chance to enjoy the opportunities you have.” *Id.*

<sup>213</sup> See PALESTINI, *supra* note 15, at 156.

<sup>214</sup> Brian Hamilton & Chris Kuc, *Notre Dame Trying to Establish Routine*, CHI. TRIBUNE (Jan. 2, 2013), [http://articles.chicagotribune.com/2013-01-02/sports/ct-spt-0103-bits-notre-dame-alabama-bcs--20130103\\_1\\_bcs-title-charter-plane-sec-title](http://articles.chicagotribune.com/2013-01-02/sports/ct-spt-0103-bits-notre-dame-alabama-bcs--20130103_1_bcs-title-charter-plane-sec-title).

<sup>215</sup> See Litman, *supra* note 16.

<sup>216</sup> See *supra* note 11 and accompanying text.

kind of education—a non-traditional experience that is not bound by the First Amendment in the same manner as political science and psychology. If participating in college athletics means these individuals receive a watered-down version of First Amendment rights, so be it. The experiences gained on and off the field or court during college is well worth this limited sacrifice.

And, maybe, just maybe, these individuals will turn out to be the fortunate ones who were saved by their coaches and athletic departments from themselves. It takes years to build up a reputation and brand. It takes less than 140 characters or a careless photo to destroying one. In the end, state colleges and universities have the right to determine whether, and to what extent, their student-athletes may be outspoken. In the world of college athletics, the First Amendment simply is not all that formidable an adversary.