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# TWEET TWEET: A FIRST AMENDMENT WAKE UP CALL REGARDING SOCIAL MEDIA IN THE SPORTS ARENA

SAMANTHA LEVIN\*

## I. INTRODUCTION

“Out of 6 billion people on the planet, 4.8 billion have a mobile [phone] and only 4.2 billion own a toothbrush.”<sup>1</sup> This 2012 statistic reflects the enormous impact of general social media on the world.<sup>2</sup> The widespread effect and growth of social media has been evidenced during events including the 2012 presidential election<sup>3</sup>, the Royal wedding<sup>4</sup>, and especially sporting games<sup>5</sup>. A recent example of the massive growth of social media can be reflected in the Monday Night Football game that took place on September 24, 2012.

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\* J.D. Candidate, The John Marshall Law School, May 2014; Solicitation Editor, Journal of Information Technology & Privacy Law; B.A., Sociology, Indiana University, May 2011.

1. Katy Daniells, *Infographic: Social Media Statistics For 2012*, DIGITAL BUZZ BLOG (Jan. 3, 2012), <http://www.digitalbuzzblog.com/social-media-statistics-stats-2012-infographic/>.

2. *Id.*

3. *Social Media Makes Mark on Presidential Election 2012, But Just How Big Is It?*, PR NEWSCHANNEL (Nov. 5, 2012), <http://www.prnewschannel.com/2012/11/05/social-media-makes-mark-on-presidential-election-2012-but-just-how-big-is-it/>. “Both campaigns in the presidential race 2012 have recognized the importance of social media and have focused a great deal of resources supporting their various channels—be it on Twitter, Facebook or elsewhere.” *Id.* The Twitter Government stated, “with 20 million tweets, Election Day became the most tweeted about event in U.S. political history.” @gov, TWITTER (Nov. 6, 2012), <https://twitter.com/gov/status/266016146204000256>.

4. Shane Richmond, *Royal Wedding Swamps Twitter, Facebook*, TELEGRAPH (Apr. 29, 2011), <http://www.telegraph.co.uk/news/uknews/royal-wedding/8483430/Royal-wedding-swamps-Twitter-Facebook.html>. “Almost two million Americans were also discussing the wedding” on social media websites including Facebook and Twitter. *Id.*

5. Kelsey Cox, *The Game-Changing Effect of Social Media on Sports*, PR DAILY (May 19, 2012), [http://www.prdaily.com/Main/Articles/The\\_gamechanging\\_effect\\_of\\_social\\_media\\_on\\_sports\\_11684.aspx](http://www.prdaily.com/Main/Articles/The_gamechanging_effect_of_social_media_on_sports_11684.aspx) (describing the social media influence on the sports world).

“Touchdown!” “And the crowd goes wild!” However, spectators did not go wild at the Green Bay Packers versus Seattle Seahawks game during Monday Night Football on September 24, 2012. Instead of cheering at the end of the match, individuals took to Twitter to voice their opinions about the controversial ending of the regular season game, which resulted in the Seahawks leaving with a win of 14-12 over the Packers due to the replacement referee’s incorrect call during the last minute of the game.<sup>6</sup> After the game’s shocking finish, individuals posted 50,263 comments per minute on social media websites, including public tweets and Facebook posts alike.<sup>7</sup> Twitter erupted with posts from Packers players<sup>8</sup>, coaches, other NFL players<sup>9</sup>, other professional athletes<sup>10</sup>, as well as fans<sup>11</sup> watching from all over the United States.<sup>12</sup> The tweets were not the typical congratulatory tweets; rather, they were full of obscene language showing frustration and anger over the replacement referee’s call that gave the game to the wrong team.<sup>13</sup> Packers Guard T.J. Lang tweeted his frustration after the game saying, “Got [f\*\*ked] by the refs. Embarrassing. Thanks [NFL].”<sup>14</sup> Even Lang believed that he would be fined for his post on Twitter, because forty minutes after his profane post, he wrote, “[F\*\*k] it NFL. Fine me and use the money to pay the regular refs.”<sup>15</sup> However, none of the players, including Lang, received fines for their Twitter rants that lashed out

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6. Paul Imig, *Twitter Catches Fire After TD Fiasco In Seattle*, FOX SPORTS WISCONSIN (Sept. 25, 2012), [http://www.foxsportswisconsin.com/09/25/12/Twitter-catches-fire-after-TD-fiasco-in-/msn\\_landing.html?blockID=795149](http://www.foxsportswisconsin.com/09/25/12/Twitter-catches-fire-after-TD-fiasco-in-/msn_landing.html?blockID=795149).

7. Will Brinson, *Social Media Explodes for 56,000 Comments Per Minute During Packers-Seahawks Finale*, CBS SPORTS (Sept. 25, 2012), <http://www.cbssports.com/nfl/blog/eye-on-football/20360611/social-media-explodes-for-56000-comments-per-minute-during-packers-seahawks-finale>.

8. *T.J. Lang Rips Replacement Refs on Twitter: Packers Players Lash out After Loss to Seahawks*, HUFFINGTON POST (Sept. 25, 2012), [http://www.huffingtonpost.com/2012/09/25/tj-lang-replacement-refs-twitter-packers-seahawks\\_n\\_1911581.html](http://www.huffingtonpost.com/2012/09/25/tj-lang-replacement-refs-twitter-packers-seahawks_n_1911581.html) (discussing some Packers players who tweeted after the game include TJ Lang and Desmond Bishop).

9. *Web explodes over ‘MNF’ Call*, ESPN (Sept. 25, 2012), [http://espn.go.com/sportsnation/story/\\_id/8422575/web-explodes-replacement-refs-call-packers](http://espn.go.com/sportsnation/story/_id/8422575/web-explodes-replacement-refs-call-packers) (discussing other NFL players that tweeted after the game included Greg Jennings, Tom Crabtree, and CJ Wilson).

10. *Id.*

11. *Id.*

12. Tim Keeney, *Twitter Explodes After Controversial Finish to Packers vs. Seahawks*, BLEACHER REPORT (Sept. 25, 2012), <http://bleacherreport.com/articles/1346860-twitter-explodes-after-controversial-finish-to-packers-vs-seahawks>.

13. *T.J. Lang Rips Replacement Refs on Twitter: Packers Players Lash out After Loss to Seahawks*, *supra* note 8.

14. *Id.*

15. *Id.*

against the NFL.<sup>16</sup> This instance, among with many others, shows the large emergence of social media, the influence it has in modern society, and the problems that arise from its prominence.

When people hear that an athlete has been suspended or dismissed from a team, people commonly think it was a result of drugs or steroids use.<sup>17</sup> However, a common trend has emerged where athletes are suspended or dismissed from sports teams for posting their thoughts on the Internet.<sup>18</sup> As social media continues to integrate into everyday life, everyone is using and adapting to different forms of social media. Once fads, social media websites and tools – from telephones and instant messaging to MySpace, Facebook and Twitter – have become modern ways of life. To keep the law in sync with these established trends, new rules must be put in place in order to affect the functionality between athletes and professional sports organizations.

Social media greatly impacts the world of sports, along with the careers of professional athletes and college student-athletes alike, both on and off the courts.<sup>19</sup> The use of social media websites among athletes carries both advantages and disadvantages for sports players, teams, and coaches. This largely depends on the contents of the player's message once the "send" button is pressed, which can result in either a positive or negative backlash from the public.<sup>20</sup> In the past, athletes have been fined,<sup>21</sup> suspended,<sup>22</sup> and disqualified<sup>23</sup> from their teams for posting certain comments on Twitter.

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16. *Report: Packers Players Won't Be Fined For Ripping NFL On Twitter*, CBS CHICAGO (Sept. 26, 2012), <http://chicago.cbslocal.com/2012/09/26/report-packers-players-wont-be-fined-for-ripping-nfl-on-twitter/>.

17. Lynn Zinser, *To Baseball's Chagrin, Steroid Era Goes On*, N.Y. TIMES (Aug. 24, 2012), <http://www.nytimes.com/2012/08/24/sports/baseball/to-baseballs-chagrin-steroidera-continues.html?pagewanted=all>. Eleven athletes were banned from the 2012 London Olympics for using steroids. *Id.* Most sports have banned the use of steroids and test their athletes for drug use. *Id.* Even though drug suspension was very high in 2005 and then started to descend with the creation of steroid bans, drug suspension is starting to rise once again. *Id.*

18. Maria Burns Ortiz, *Twitter Gaffes Begat Punishment For Athletes*, ESPN (July 27, 2012), [http://espn.go.com/blog/playbook/fandom/post/\\_id/7495/voula-papachristou-inspires-twitter-fail-list](http://espn.go.com/blog/playbook/fandom/post/_id/7495/voula-papachristou-inspires-twitter-fail-list) (listing athletes that have been suspended or disqualified from their sports team for posting on Twitter).

19. Ryan Corazza, *Social Media Spin Web of Odd Judgment*, ESPN (Aug. 5, 2009), <http://sports.espn.go.com/espn/thelife/news/story?id=4378166>.

20. Patrick Murphy, *Overcoming the Disadvantages of Social Media: Covering All the Bases*, BUSINESS 2 COMMUNITY (Aug. 10, 2012), <http://www.business2community.com/social-media/overcoming-the-disadvantages-of-social-media-covering-all-the-bases-0247832>.

21. Ortiz, *Twitter Gaffes*, *supra* note 18 (listing athletes who have been fined for tweeting include Amare Stoudemire, J.R. Smith, Gilbert Arenas, Chris Perez, and Antonio Cromartie).

22. *Id.* (discussing athlete Larry Johnson who was suspended for tweeting).

Due to the rise of social media use in society, restrictions and policies have been placed on social media activity for athletes.<sup>24</sup> However, a problem arises when an athlete decides to post something to Twitter in his leisure time. While this activity would presumably be exempted from violation of the restrictions, there have been various instances in which a player is reprimanded by team management for off-duty website posts. How should this situation be handled? Can athletes be fined, suspended, or disqualified for posting something on their free time? Does barring athletes from tweeting invoke a violation of First Amendment rights? Why are some athletes being fined while others avoid penalty? Because social media is still considered a recent phenomenon, the law has been slow to develop regarding what actions should be taken in these situations.

Laws should be created to draw specific boundaries between what athletes can and cannot post on social media websites, so as to not violate their First Amendment rights. This issue is very controversial and difficult. Although athletes should have the right to post what they want on social media websites, their posts may affect other team players, in addition to other players within the professional league. In considering these factors, a uniform law should be enacted as a directive to all sports teams, to ensure that players' First Amendments rights are not violated by the restrictions placed on social media. The law would also contain specific restrictions so that athletes do not abuse social media websites. Whereas a uniform law would allow athletes the rights of free speech as already enjoyed by the public, a total ban on social media for athletes would be unconstitutional.<sup>25</sup>

This Comment will discuss three different approaches taken by sports organizations regarding social media use in the sports arena to ensure that social media is not abused by athletes. Part II outlines the development of social media with an emphasis on the sports arena, and explains the emergence of restrictions regarding social media among athletes. Part III describes the different approaches employed by organizations to regulate social media and the consequences of those approaches on the athlete. This section also analyzes actionable tweets

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23. *Id.* (mentioning athletes who have been disqualified or lost their scholarships for tweeting include Jaz Reynolds, Miguel Torres, and Yuri Wright).

24. Maria Burns Ortiz, *Guide to Leagues' Social Media Policies*, ESPN (Sept. 27, 2011), [http://espn.go.com/espn/page2/story/\\_/id/7026246/examining-sports-leagues-social-media-policies-offenders](http://espn.go.com/espn/page2/story/_/id/7026246/examining-sports-leagues-social-media-policies-offenders).

25. Bradley Shear, *NCAA Student-Athlete Social Media Bans May Be Unconstitutional*, SHEAR ON SOCIAL MEDIA LAW (Aug. 11, 2011), <http://www.shearsocialmedia.com/2011/08/ncaa-student-athlete-social-media-bans.html>. "[C]reating an outright ban on using Twitter and/or other social media platforms for a select group of students at a public institution is a clear violation of the First Amendment and may be discriminatory against both the students and/or the social media platforms." *Id.*

and compares them in regards to current restrictions and policies placed on social media. Lastly, Part IV offers a proposal that suggests types of social media restrictions that do not impinge upon sports players First Amendment rights or privacy rights.

## II. BACKGROUND

Although social media began in the 1950's with the rotary dial telephone, it has only recently become popular within mainstream culture.<sup>26</sup> The evolution of social media led to the development of the World Wide Web in 1991.<sup>27</sup> Internet access fostered the expansion of instant messaging, music sharing, and social networking.<sup>28</sup> Social media websites have gained great popularity among members of society, with some of the most popular websites including Facebook, Twitter, MySpace, and LinkedIn.<sup>29</sup>

### A. SOCIAL NETWORKING WEBSITES: FACEBOOK AND TWITTER

In 2004, Mark Zuckerberg<sup>30</sup> founded Facebook, one of the most popular social media sites in the world.<sup>31</sup> Facebook is a social networking service that allows users to connect and communicate with classmates, co-workers, friends, and as of recently, businesses.<sup>32</sup> Users can post status updates, comments, pictures, and "like" something that a different user posted.<sup>33</sup> After Facebook was first launched at the end of 2004, there were 1 million registered users.<sup>34</sup> Today, there are more

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26. Brett Borders, *A Brief History Of Social Media*, COPY BRIGHTER MARKETING (June 2, 2009), <http://copybrighter.com/history-of-social-media>.

27. *Id.*

28. *Id.*

29. *Top 15 Most Popular Social Networking Sites*, EBIZ MBA, <http://www.ebizmba.com/articles/social-networking-websites> (last visited Nov. 26, 2013).

30. Mark Zuckerberg, the 29-year-old Harvard University dropout, is the mastermind behind the creation of Facebook. *Mark Zuckerberg*, FORBES (Sept. 2013), <http://www.forbes.com/profile/mark-zuckerberg/>. The movie, *The Social Network*, which debuted in 2010, is based on Zuckerberg and the origins of Facebook, which became a multi-billion dollar company. *The Social Network (2010)*, N.Y. TIMES, <http://movies.nytimes.com/movie/455955/The-Social-Network/overview> (last visited Sept. 16, 2013).

31. Sarah Phillips, *A Brief History Of Facebook*, THE GUARDIAN (July 24, 2007), <http://www.guardian.co.uk/technology/2007/jul/25/media.newmedia>.

32. Josh Lowensohn, *Newbie's Guide to Facebook*, CNET (Aug. 1, 2007), <http://news.cnet.com/newbies-guide-to-facebook/>.

33. *Id.*

34. *Number of Active Users at Facebook over the Years*, YAHOO! FINANCE (Sept. 11, 2012), <http://finance.yahoo.com/news/number-active-users-facebook-over-years-214600186--finance.html>.

than 950 million registered users on Facebook.<sup>35</sup> “More than 350 million users suffer from Facebook Addiction Syndrome.”<sup>36</sup>

Twitter, another incredibly fast growing social media website, was founded by Jack Dorsey, Biz Stone, and Evan Williams in 2006.<sup>37</sup> Twitter is a real-time information network, which allows each member to post a “tweet” in 140 characters or less on any topic he chooses.<sup>38</sup> Twitter users include celebrities,<sup>39</sup> professional athletes,<sup>40</sup> business executives,<sup>41</sup> presidential candidates,<sup>42</sup> and the general public.<sup>43</sup> Today, there are over 200 million users sending out over 400 million tweets per day.<sup>44</sup> A 2012 survey shows that seventy-six percent of Twitter users update their status compared to forty-seven percent in 2010.<sup>45</sup> To put in perspective, based on the amount of Twitter users, “if Twitter were a country, it [would] be the twelfth largest in the world.”<sup>46</sup>

## B. THE IMPACT OF SOCIAL MEDIA ON SPORTS

“Social networking is rapidly growing in popularity among the general public” and is especially visible in the sports arena, among coaches, players, and fans.<sup>47</sup> “By giving fans real-time access to their favorite teams and players from anywhere, the popularity of sports increases because fans can feel more involved.”<sup>48</sup> Social media has had a large impact on sports and has proven to be “beneficial in terms of

35. *Id.*

36. Danny Brown, *52 Cool Facts and Stats about Social Media (2012 Edition)*, PR DAILY (June 8, 2012), [http://www.prdaily.com/Main/Articles/52\\_cool\\_facts\\_and\\_stats\\_about\\_social\\_media\\_2012\\_ed\\_11846.aspx](http://www.prdaily.com/Main/Articles/52_cool_facts_and_stats_about_social_media_2012_ed_11846.aspx).

37. *Twitter Creator Jack Dorsey Illuminates the Site's Founding Document (Part I)*, L.A. TIMES (Feb. 18, 2009), <http://latimesblogs.latimes.com/technology/2009/02/twitter-creator.html>.

38. TWITTER, <https://twitter.com/about> (last visited Sept. 16, 2013).

39. *Twitter Top 100 Most Followed*, TWITTER COUNTER, <http://twittercounter.com/pages/100> (last visited Sept. 16, 2013) (listing some Twitter celebrities including @ladygaga, @justinbieber, @britneyspears, and @RyanSeacrest).

40. *Id.* (listing some professional athletes on Twitter including @Cristiano, @SHAQ, @KingJames, and @ochocinco).

41. *Id.* (listing some business executives on Twitter including @BillGates, @realDonaldTrump, and @richardbranson).

42. *Id.* (listing the presidential candidates on Twitter including @BarackObama, @MittRomney).

43. *Id.*

44. *Who's on Twitter?*, TWITTER FOR BUSINESS, <https://business.twitter.com/basics/whos-twitter/> (last visited Sept. 16, 2013).

45. Erik Qualman, *10 New 2012 Social Media Stats = WOW!*, SOCIALNOMICS (June 6, 2012), <http://www.socialnomics.net/2012/06/06/10-new-2012-social-media-stats-wow/>.

46. Brown, *supra* note 36.

47. Lauren McCoy, *140 Characters Or Less: Maintaining Privacy and Publicity in the Age of Social Networking*, 21 MARQ. SPORTS L. REV. 203, 212 (2010).

48. *Id.*

promoting the sport, the league, the teams, and the individual players.”<sup>49</sup> However, social media has also shown to be problematic due to the “constant access to the personal thoughts of anyone” and the forum in which the thoughts appear.<sup>50</sup> It is important for the league and its employees to be aware of the advantages and disadvantages that come along with the use of social media and to be “constantly apprehensive about the war between good and bad publicity.”<sup>51</sup>

### 1. *Professional Sports*

Social media has made a huge impact on sports.<sup>52</sup> There are 7,861 total professional athletes on Twitter, including NBA players, MLB players, NHL players, NFL players, as well as soccer players, golfers, and wrestlers.<sup>53</sup> Many athletes and sports organizations have embraced the emergence of social media and use it to connect and communicate with fans, promote their games, ticket sales, and products, and to market and brand themselves as well as their teams.<sup>54</sup> However, some athletes use social media websites to voice their opinions, and sometimes make controversial statements.<sup>55</sup>

With the large increase of social media use among athletes throughout the years, sports organizations are creating social media policies in an attempt to take action and control.<sup>56</sup> While all sports leagues do encourage their players to use social media to communicate with fans and to promote themselves and their teams in a positive way, the NFL, NBA, NHL, and MLB<sup>57</sup> leagues have all created social media policies restricting when athletes can Tweet or use other social media websites.<sup>58</sup> Most professional sports leagues have created social media

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49. *Id.*

50. *Id.*

51. *Id.*

52. Corazza, *supra* note 19.

53. *Professional Athletes on Twitter*, TWEETING-ATHLETES, <http://www.tweeting-athletes.com/> (last visited Sept. 16, 2013).

54. Steve Olenski, *The Lines Between Social Media And Sports Continue To Blur*, FORBES (Feb. 13, 2012), <http://www.forbes.com/sites/marketshare/2012/02/13/the-lines-between-social-media-and-sports-continue-to-blur/>.

55. Amy Bingham, *NFL Punter Goes on Tirade for Gay Marriage*, ABC NEWS (Sept. 7, 2012), <http://abcnews.go.com/blogs/politics/2012/09/nfl-punter-goes-on-tirade-for-gay-marriage/> (discussing statements that were made by NFL players voicing their opinions on gay marriage).

56. Ortiz, *Leagues' Social Media Policies*, *supra* note 24.

57. *Id.* (describing that the MLB does not have specific social media restriction but currently only has restrictions regarding electronic use).

58. *Id.*

policies “relating to on-field conduct”<sup>59</sup> which restrict athletes from posting on social media sites a certain number of hours before, during, and after the games.<sup>60</sup> The restrictions were created to ensure athletes are not distracted by social media interactions during the games, and to further enable players to focus on winning the game.<sup>61</sup> The policies and restrictions clearly list the consequences of broken rules, whether it is a fine or suspension.<sup>62</sup> However, an issue arises when athletes are being fined or suspended for off-field conduct, which is not in violation of the current policies.

The NFL and NBA enacted social media policies, which prohibit players, coaches, and staff from using social media ninety minutes and forty-five minutes before the kickoff and tipoff, respectively.<sup>63</sup> Social media use is allowed to resume after post-game interviews.<sup>64</sup> The most recent league to adopt social media policies was the NHL.<sup>65</sup> This policy restricts personnel, including coaches, managers, and trainers from engaging in social media on game days, and restricts players from using social media during the “blackout” period (two hours before face-off until post-game interviews).<sup>66</sup> The policy also provides that if anyone is in violation of the social media policy, he will be responsible for his comments.<sup>67</sup> However, the MLB currently has a social media policy in place solely for personnel, and not players.<sup>68</sup> The players have to follow rules, which restrict electronic equipment thirty minutes before the game until after the game ends.<sup>69</sup> This technically also includes social media use without actually creating a social media policy, because electronics are used to access social media websites. These examples of the policies show that regardless of the sports league and the time restrictions placed on social media use, sports leagues found it necessary to put social media policies in place due to the its increasing popularity.

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59. Daniel J. Friedman, *Social Media In Sports: Can Professional Sports League Commissioners Punish ‘Twackle Dummies?’*, 2 PACE. I.P. SPORTS & ENT.L.F. 74, 89 (2012), available at <http://digitalcommons.pace.edu/pipsself/vol2/iss1/3>.

60. Ortiz, *Leagues’ Social Media Policies*, *supra* note 24.

61. Friedman, *supra* note 59, at 81.

62. *See id.* at 74.

63. Ortiz, *Leagues’ Social Media Policies*, *supra* note 24.

64. *Id.*

65. *Id.*

66. *Breaking Down NHL’s Social Media Policy*, ESPN (Sept. 15, 2012), [http://espn.go.com/blog/nhl/post/\\_id/11247/breaking-down-nhls-social-media-policy](http://espn.go.com/blog/nhl/post/_id/11247/breaking-down-nhls-social-media-policy).

67. *Id.*

68. Ortiz, *Leagues’ Social Media Policies*, *supra* note 24.

69. *Id.*

## 2. *College Sports*

“Professional athletics is an entirely different animal when it comes to restricting what the individual can and cannot do” because “the compensation is different, the terms of the contract are dissimilar, and the scrutiny from the public varies significantly.”<sup>70</sup> College coaches and heads of the institutions are worried that athletes may not think before posting on a social media website resulting in the destruction of their reputation, as well as the team and the school.<sup>71</sup> There are advantages and disadvantages for the use of social media in college sports, which can go from branding oneself in a positive manner to becoming the most controversial person on a sports team, all in a matter of seconds depending on the positive or negative feedback from society.<sup>72</sup>

The National Collegiate Athletic Association (NCAA) “serves as the athletic governing body for more than 1,300 colleges, universities, conferences, and organizations.”<sup>73</sup> “There are more than 400,000 student-athletes competing in three divisions at over 1,000 colleges and universities within the NCAA.”<sup>74</sup> “The NCAA is committed to the student-athlete and to governing competition in a fair, safe, inclusive, and sportsmanlike manner.”<sup>75</sup> To participate in NCAA athletics, a student-athlete must be an amateur, essentially meaning that he is playing as a volunteer and not an employee because he is not compensated for his services.<sup>76</sup>

Unlike professional sports leagues, the National Collegiate Athletic Association (NCAA) does not have a specific social media policy.<sup>77</sup> Instead, the NCAA stated that individual institutions are responsible for finding an approach to the anticipated problems that may arise as a result of social media use by student athletes, whether it be by creating

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70. Zain Motani, *The Use of Social Media by College Athletes*, WORLD SPORT REPORT, <http://www.worldsportreport.com/?a=37> (last visited November 30, 2012).

71. Mackey Torres, *Athletes and Twitter, a Gateway to Trouble*, THE VENTURE (Nov. 4, 2011), <http://www.theventureonline.com/2011/11/athletes-and-twitter-a-gateway-to-trouble/>.

72. 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), available at [http://chronicle.com/blogs/players/files/2012/12/athletes\\_twitter.pdf](http://chronicle.com/blogs/players/files/2012/12/athletes_twitter.pdf).

73. *2011-2012 Guide for the College-Bound Student-Athlete*, NCAA ELIGIBILITY CENTER, 1, 4, <http://www.ncsasports.org/blog/wp-content/uploads/2011/07/CBSA1.pdf> (last visited Sept. 16, 2013).

74. *Who We Are*, NCAA, <http://www.ncaa.org/wps/wcm/connect/public/ncaa/about+the+ncaa/who+we+are+landing+page> (last visited Oct. 19, 2012).

75. *2011-2012 Guide for the College-Bound Student-Athlete*, *supra* note 73.

76. *Id.* at 11.

77. Ortiz, *Leagues' Social Media Policies*, *supra* note 24.

their own policies and regulations or monitoring what the athletes are saying online.<sup>78</sup>

Some college sports teams have gone as far as to restrict and ban social media use altogether for athletes.<sup>79</sup> While other college sports teams allow their student athletes to partake in social media use, they must “friend” or “follow” their coaches in order to monitor their posts.<sup>80</sup> Another way colleges are monitoring their student-athletes is by hiring third-party social media monitoring software services and mandating the athletes to install social media monitoring software, which tracks their social media posts.<sup>81</sup> Some of these social media monitoring software services include UDiligence, Centrix Social, and Varsity Monitor, which are used to search key words and every time those words are used, the service notifies the authorities that enabled the tracking system.<sup>82</sup> These services allow coaches to track all the posts containing the certain search terms, the big ones including gambling, drugs, money, gifts, and many more.<sup>83</sup> Resembling professional athletes, universities found it necessary to take action regarding social media use whether it be by banning use entirely or monitoring athlete’s social media websites.

### 3. 2012 London Olympics

The first Olympic Games, which date back to 1896 were held in Athens, Greece and were inspired by the ancient Olympic Games.<sup>84</sup> Many years later, the Olympics continue today.<sup>85</sup> The Olympics take

78. Ray Fittipaldo, *Social Media and Sports a Growing Dilemma*, PITTSBURGH POST-GAZETTE, <http://www.post-gazette.com/stories/sports/steelers/social-media-and-sports-a-growing-dilemma-297962/> (Mar. 30, 2012).

79. *Id.*

80. Pete Thamel, *Tracking Twitter, Raising Red Flags*, N.Y. TIMES (Mar. 30, 2012), [http://www.nytimes.com/2012/03/31/sports/universities-track-athletes-online-raising-legal-concerns.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/03/31/sports/universities-track-athletes-online-raising-legal-concerns.html?pagewanted=all&_r=0).

81. Sam Laird, *Inside the Battle for College Athletes’ Social Media Lives*, MASHABLE ENTERTAINMENT (Aug. 20, 2012), <http://mashable.com/2012/08/20/college-athletes-social-media/>.

82. Thamel, *supra* note 80.

83. *Id.* There is a controversy in determining acceptable search terms to be monitored because University of Kentucky had the terms Arabs and Muslims removed from their searches because those terms could have led to potential discrimination charges. Laird, *supra* note 81.

84. *The Modern Olympic Games*, THE OLYMPIC MUSEUM, 1, 2, [http://www.olympic.org/Documents/Reports/EN/en\\_report\\_668.pdf](http://www.olympic.org/Documents/Reports/EN/en_report_668.pdf) (last visited Sept. 16, 2013).

85. *Id.* Pierre de Coubertin of France founded the International Olympic Committee (IOC) with the goal of recreating the Olympic games as they were held in the past. Marcia B. Nelson, *Stuck Between Interlocking Rings: Efforts to Resolve the Conflicting Demands Placed on Olympic National Governing Bodies*, 26 VAND. J. TRANSNAT’L L. 895, 901 (1993). Today, the IOC is the supreme authority of the Olympic Movement. *Id.* The

place every four years and is one of the biggest sports events of all time.”<sup>86</sup>

The most recent Summer Olympics games were hosted in London from July 27 through August 12, 2012.<sup>87</sup> There were twenty-six sports, featuring thirty-nine disciplines, and about 10,500 participating athletes from 204 National Olympic Committees<sup>88</sup> (“NOC”).<sup>89</sup> The athletes who participate in the Olympics are both professional athletes as well as amateur student-athletes. Athletes are not being paid to participate in the Olympics and are considered unpaid entertainers, yet they may receive benefits including money if they win a medal.<sup>90</sup>

The 2012 London Olympics were advertised and promoted as the Social Media Olympics.<sup>91</sup> NBC even teamed up with Twitter during the Olympics.<sup>92</sup> With the large promotion of social media in anticipation of the 2012 Olympics,<sup>93</sup> athletes were all encouraged to use and engage in

IOC is represented by the president, Jacque Rogge, and is the most important committee in the Olympics. *Id.* It “promotes Olympic ideals, ensures the respect and interpretation of the Olympic Charter, selects the sites for Olympic games, creates and applies Olympic rules, and determines qualification requirements for Olympic participants.” *Id.*

86. *Id.* (stating that the Olympic Movement is designed to “link sport with culture and education, promote the practice of sport and the joy found in effort, and help to build a better world through sport practiced in a spirit of peace, excellence, friendship and respect.”).

87. *London 2012 Summer Olympics*, INTERNATIONAL OLYMPIC COMMITTEE, <http://www.olympic.org/london-2012-summer-olympics> (last visited Sept. 16, 2013).

88. *The Organisation*, INTERNATIONAL OLYMPIC COMMITTEE, <http://www.olympic.org/about-iocinstitution?tab=Organisation> (last visited Sept. 16, 2013). The National Olympic Committees’ (NOCs) “mission is to develop, promote and protect the Olympic Movement in their respective countries.” *Id.* “The NOCs are the only organi[z]ations that can select and designate the city, which may apply to organi[z]e Olympic Games in their respective countries.” *Id.* “In addition, they alone can send athletes to the Games.” *Id.* “The Olympic Charter is the codification of the Fundamental Principles, Rules and Bye-laws adopted by the International Olympic Committee (IOC).” *Id.* “It governs the organi[z]ation and running of the Olympic Movement and sets the conditions for the celebration of the Olympic Games.” *Id.*

89. *London 2012 Summer Olympics*, *supra* note 87.

90. Daniel Vinjamuri, *U.S. Athletes are Right About Twitter: Rule 40 Exposes the Flaw in Olympic Thinking*, FORBES (Aug. 1, 2012), <http://www.forbes.com/sites/davidvinjamuri/2012/08/01/the-athletes-are-right-about-twitter-rule-40-exposes-the-paradox-at-the-core-of-the-olympic-games/>.

91. Due to the promotion of social media during the Olympics and the encouragement to use social media, “Ryan Lochte’s Twitter followers increased from 79,000 one month prior to the Olympics to over 1 million following the Olympics.” Email from Erika Wright, Ryan Lochte’s agent, to author (Sept. 2, 2012, 10:40 PM) (on file with author).

92. John D. Sutter, *Welcome to the Twitter Olympics*, CNN (Aug. 1, 2012), <http://www.cnn.com/2012/08/01/tech/social-media/welcome-twitter-olympics/index.html>.

93. “Social media has helped catapult many Olympians into pop culture and mainstream America while allowing their agents and managers to gauge the success of campaigns immediately.” Wright, *supra* note 91.

social media.<sup>94</sup> The International Olympic Committee (“IOC”) created a website that became “the hub of all digital media,” which allowed athletes to connect with fans.<sup>95</sup>

However, there were many restrictions and regulations placed on the way they could use social media and what they can and cannot discuss.<sup>96</sup> The IOC provided athletes with a “lengthy and ambiguous” four page document with rules and restrictions regarding social media activities, which was applicable throughout the period of the Olympic Games.<sup>97</sup> In the past, social media rules for Olympic Games have never been as strict as they were in London 2012<sup>98</sup> and only comprised of a two page document laying out the restrictions and regulations.<sup>99</sup> This might have to do with the fact that Twitter and other social media websites were not as popular in the past and the IOC did not have to worry about creating rules and regulations regarding it.<sup>100</sup> With 986 Olympic athletes on Twitter, the IOC was more inclined to modify the social media, blogging, and Internet guidelines for the 2012 Olympics to attribute to the growth of social media over the years.<sup>101</sup>

While the IOC encourages athletes to use social media websites including Facebook and Twitter, it restricts the content of players’ posts by mandating that players must comment only in a “first person, diary-type format.”<sup>102</sup> In addition, their posts should “not contain vulgar or obscene words or images.”<sup>103</sup> Additionally, participants are not allowed

94. See *IOC Social Media, Blogging and Internet Guidelines for participants and other accredited persons at the London 2012 Olympic Games*, INTERNATIONAL OLYMPIC COMMITTEE (Aug. 31, 2011), [http://www.olympic.org/Documents/Games\\_London\\_2012/IOC\\_Social\\_Media\\_Blogging\\_and\\_Internet\\_Guidelines-London.pdf](http://www.olympic.org/Documents/Games_London_2012/IOC_Social_Media_Blogging_and_Internet_Guidelines-London.pdf). [hereinafter IOC].

95. Cody Ward, *Social Media Takes Gold at the London 2012 Olympics*, PUZZLE MARKETER (July 31, 2012), <http://www.puzzlemarketer.com/social-media-takes-gold-at-the-london-2012-olympics/>; see *Follow Olympic Athletes*, THE OLYMPIC ATHLETES’ HUB, <http://hub.olympic.org> (last visited Sept. 16, 2013) (displaying and connecting Olympic athletes with fans through social media).

96. See IOC, *supra* note 94.

97. Owen Gibson, *London 2012: IOC Rules Mean Athletes Will Have To Tweet Carefully*, THE GUARDIAN (June 15, 2012), <http://www.guardian.co.uk/sport/blog/2012/jun/15/london-2012-ioc-twitter-rules>.

98. Gregory Lee, *London 2012: The First ‘Social Media’ Olympic Games*, BUSINESS 2 COMMUNITY (June 19, 2012), <http://www.business2community.com/social-media/london-2012-the-first-social-media-olympic-games-0196607>.

99. Gibson, *supra* note 97.

100. Sutter, *supra* note 92 (discussing how Twitter has evolved among society so much in the past for years that there were more tweets in a single day at the 2012 London Olympics than there were throughout the entire 2008 Beijing Olympics).

101. *Olympic Athletes on Twitter*, TWEETING-ATHLETES, <http://www.tweeting-athletes.com/index.cfm?CatID=406&People=1>, (last visited Sept. 16, 2013).

102. IOC, *supra* note 94, at 1.

103. Gayle Falkenthal, *Olympic 2012: Athletes on Twitter: Phelps, Solo, Bolt, Franklin, and Lebron*, WASHINGTON TIMES COMMUNITIES (July 26, 2012),

to “report on the competition or comment on the activities of other participants or accredited persons, or disclose any information which is confidential or private in relation to any other person or organization.”<sup>104</sup> According to Olympian swimmer, Heather Arseth, the “rules restricted the athletes from posting about other Olympians regarding what they were doing or saying, especially the ones who are more well-known.”<sup>105</sup> The document also stated that “the IOC will continue to monitor Olympic on-line content to ensure that the integrity of rights-holding broadcasters and sponsor rights as well as the Olympic Charter are maintained.”<sup>106</sup>

In addition, Olympic regulation “Rule 40” states that athletes are not allowed to promote or advertise any brands not sponsoring the Olympics.<sup>107</sup> These rules were implemented due to the large growth, popularity, and promotion of social media in the 2012 London Olympics. The regulations aimed to control both the use and abuse of social media, while simultaneously encouraging athletes to interact with their fans. With the great promotion of social media at the 2012 Olympics, the Olympic organization found it necessary to enhance its previous social media policies to ensure there would be no abuse of social media among the participants.

#### B. FIRST AMENDMENT RIGHTS

The First Amendment protects the freedom of speech.<sup>108</sup> “While the freedom of speech is rightfully cherished, it is also clear that this right of free speech is not absolute at all times and under all circumstances.”<sup>109</sup> Protected speech under the First Amendment includes political speech, religious speech, commercial speech, and corporate

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<http://communities.washingtontimes.com/neighborhood/london-2012-summer-olympic-games/2012/jul/27/top-olympic-games-twitter-phelps-lolo-lebron-bolt/>.

104. IOC, *supra* note 94, at 1.

105. Email from Heather Arseth, Olympic athlete, to author (Sept. 6, 2012, 11:02 PM) (on file with author). Heather Arseth, 20, swam for the island nation of Mauritius at the 2012 London Olympics. *Heather Arseth Profile*, HAWKEYE SPORTS, [http://www.hawkeyesports.com/sports/w-swim/mtt/arseth\\_heather00.html](http://www.hawkeyesports.com/sports/w-swim/mtt/arseth_heather00.html) (last visited Sept. 16, 2013). She currently attends and swims for the University of Iowa. *Id.*

106. IOC, *supra* note 94, at 3.

107. *Id.* at 2.

108. The First Amendment to the United States Constitution provides: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.” U.S. CONST. amend. I.

109. *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 854 (Pa. 2002).

speech.<sup>110</sup> However, certain speech “can be regulated if they are likely to inflict unacceptable harm.”<sup>111</sup> These categories of unprotected speech include fighting words,<sup>112</sup> speech that incites others to imminent lawless action, obscenity, certain types of defamatory speech<sup>113</sup> and true threats.<sup>114</sup>

Laws that prohibit all forms of speech are quite different from laws that regulate “the time, place, or manner of speech.”<sup>115</sup> Prohibiting speech altogether is unconstitutional,<sup>116</sup> but “restrictions on the time, place, and manner in which speech is permitted are constitutional if and only if: they are content neutral, both on their face and as applied; they leave substantial other opportunities for speech to take place; and they narrowly serve a significant state interest.”<sup>117</sup>

The protections of free speech under the First Amendment do not change with the development of communication mediums.<sup>118</sup> According to the precedent established in *Reno v. American Civil Liberties Union*, different communication mediums, including “blogs, social networks, online markets, product review sites, and even gaming platforms, enjoy maximum First Amendment protection.”<sup>119</sup>

### C. THE RIGHT TO PRIVACY

Although the right to privacy is not explicitly stated in the United States Constitution, it is a fundamental right that is continuously evolving in the area of law.<sup>120</sup> Samuel D. Warren and Louis D.

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110. William Fisher, *Freedom of Expression on the Internet*, THE BERKMAN CENTER FOR INTERNET & SOCIETY AT HARVARD LAW SCHOOL (June 14, 2001), <http://cyber.law.harvard.edu/ilaw/Speech/#casestudies>.

111. *J.S. ex rel. H.S.*, 807 A.2d at 854.

112. “A MySpace Internet page is not outside of the protections of the First Amendment under the fighting words doctrine because there is simply no in-person confrontation in cyberspace such that physical violence is likely to be instigated.” *Layshock v. Hermitage Sch. Dist.*, 496 F.Supp.2d 587, 602 (W.D. Pa. 2007).

113. “Defamatory material is not protected speech under the First Amendment.” *Birl v. Phila. Elec. Co.*, 167 A.2d 472, 475 (Pa. 1960). “Under Pennsylvania law, in considering whether a statement is defamatory, courts must consider whether the statement tends so to harm the reputation of another as to lower him in estimation of the community or to deter third parties from associating or dealing with him.” *Id.*

114. *J.S. ex rel. H.S.*, 807 A.2d at 854.

115. *Linmark Assocs., Inc. v. Willingboro*, 431 U.S. 85, 93 (1977).

116. *Shear*, *supra* note 25.

117. Fisher, *supra* note 110 (internal quotes omitted).

118. Adam Thierer, *The Internet’s Free Speech Moment*, FORBES (Jan. 13, 2012), <http://www.forbes.com/sites/adamthierer/2012/01/13/the-internets-free-speech-moment/>.

119. *Id.*

120. Ronald Standler, *PRIVACY IN THE LAW* (May 24, 1998), <http://www.rbs2.com/privacy.htm>.

Brandeis defined the right to privacy in 1890.<sup>121</sup> Warren and Brandeis stated, “protection afforded to thoughts, sentiments, and emotions, expressed through the medium of writing or of the arts, so far as it consists in preventing publication, is merely an instance of the enforcement of the more general right of the individual to be let alone.”<sup>122</sup>

*Griswold v. Connecticut*<sup>123</sup> is a landmark case, which stated that the United States Constitution protected a right to privacy even though the right was not mentioned in the Bill of Rights. The Court held that “the First Amendment has a penumbra where privacy is protected from governmental intrusion.”<sup>124</sup> In addition, the Court held that the right to privacy is recognized in the Third<sup>125</sup>, Fourth<sup>126</sup>, Fifth<sup>127</sup>, and Ninth<sup>128</sup> Amendments to the Constitution.<sup>129</sup>

In *Katz v. United States*,<sup>130</sup> “the Court expanded the Fourth Amendment's protection beyond mere physical intrusions based on the

121. Samuel D. Warren & Louis D. Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193, 196 (1890).

122. McCoy, *supra* note 47, at 206 (quoting Warren & Brandeis, *supra* note 121, at 205).

123. See *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that married couples have a right to privacy). In *Griswold*, appellants were charged with giving information and instructions to married couples regarding contraceptives, which was in violation of a statute. *Id.* at 480. holding that the right to privacy in marriage is a penumbra of the First Amendment and is protected under the Constitution. *Id.* at 483.

124. *Id.*

125. The Third Amendment of the United States Constitution provides: “No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.” U.S. CONST. amend. III.

126. The Fourth Amendment of the United States Constitution provides: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. CONST. amend. IV.

127. The Fifth Amendment of the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

128. The Ninth Amendment of the United States Constitution provides: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” U.S. CONST. amend. IX.

129. *Griswold*, 381 U.S. at 484

130. See *Katz v. United States*, 389 U.S. 347 (1967) (holding that the Fourth Amendment protects individuals with a reasonable expectation of privacy). In *Katz*, Defendant Katz was convicted of transmitting information regarding illegal gambling bets over the phone, which was in violation of the federal law. *Id.* at 348. The FBI had placed

reasoning that the amendment protects people”<sup>131</sup> and to protect those individuals, there had to be a “reasonable expectation of privacy.”<sup>132</sup> “The Fourth Amendment only protects against governmental intrusions on privacy rights that society recognizes as legitimate, and the legitimacy depends on context.”<sup>133</sup> “The legitimacy of the privacy interest will be assessed by considering a variety of contextual factors, including where the individual is asserting that interest, as well as the individual’s relationship with the state actor.”<sup>134</sup>

With the continuing evolution of technology, “the modern adaptation of privacy law creates a greater expectation of privacy despite limited disclosure, and its importance remains with protecting individuals from the intrusion of the media in a social society.”<sup>135</sup> Overall, even though the right to privacy is not explicitly stated in the United States Constitution, it is a fundamental right and an individual’s right to privacy is protected within multiple amendments of the Constitution.

### III. ANALYSIS

With the large emergence of social media into mainstream society, there are three different approaches that sports organizations have taken to ensure that the impact of social media in the sports arena is not abused by players and personnel. However, while the importance of guaranteeing that athletes do not abuse the privilege of being on a sports team with the use of social media, not all of the approaches regarding social media use are appropriate. While some approaches may violate an athlete’s First Amendment rights to free speech and others might invade their privacy, there needs to be an approach that takes into account the athletes’ constitutional rights, as well as the organizations’ desire to ensure a good reputation for the players and the team.

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a listening device on the phone booth and overheard Katz’s side of the conversation. *Id.* The Court held that Katz had a reasonable expectation to privacy when he stepped into the phone booth, even though the phone booth was in public and he is protected under the Fourth Amendment. *Id.* at 351-52.

131. Alexander Naito, *A Fourth Amendment Status Update: Applying Constitutional Privacy Protection to Employees’ Social Media Use*, 14 U. PA. J. CONST. L. 849, 855 (2012).

132. *Katz*, 389 U.S. at 360 (Harlan, J., concurring) (introducing a two-part test which stated that a person must have exhibited an actual expectation of privacy and that expectation must be reasonable).

133. Timothy Epstein, *Regulation of Student Athletes’ Social Media Use: A Guide to Avoiding NCAA Sanctions and Related Litigation*, 1 MISS. SPORTS L. REV. 1, 22 (2012).

134. *Id.*

135. McCoy, *supra* note 47 at 207.

A. BANNING THE USE OF SOCIAL MEDIA FOR ATHLETES IMPINGES UPON  
FIRST AMENDMENT RIGHTS

One approach that guarantees that athletes will not abuse the use of social media or create a bad name for the sports organization is by banning social media use entirely. However, banning the use of social media violates athletes' First Amendment rights. The First Amendment protects the freedom of speech<sup>136</sup> and prohibiting the use of social media entirely for professional athletes or student-athletes "is tantamount to a prior restraint on speech."<sup>137</sup> It has long been established that "freedom of speech and press meant freedom from prior restraint."<sup>138</sup> A prior restraint is "any scheme, which gives public officials the power to deny use of a forum in advance of the actual expression."<sup>139</sup> A ban on social media creates an injunction against future speech and creates the opportunity of immediate punishment for lack of compliance, dismissing the approach of punishment after a publication is made.<sup>140</sup> Placing an internal ban on social media attempts to prevent certain speech before it occurs; however, this internal ban is essentially a prior restraint on the athletes' First Amendment rights, which is unconstitutional.<sup>141</sup>

1. *Professional Teams Do Not Completely Ban the Use of Social Media Among Athletes*

Even though the different sports organizations may provide certain rules and restrictions regarding social media use, some professional sports teams took it upon themselves to make sure their players do not abuse social media by creating stricter rules than those provided by the organizations.<sup>142</sup> For example, the Milwaukee Bucks, Miami Heat, Los Angeles Clippers, and Toronto Raptors created a stricter policy regarding social media, which forbids the use of social media during "team time" which includes practices as well as game days.<sup>143</sup> However, professional sports teams will not ban the use of social media entirely, "mostly because Twitter and Facebook postings are protected by the

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136. U.S. CONST. amend I.

137. Epstein, *supra* note 133, at 14.

138. PAUL BREST, ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING CASES AND MATERIALS, 85 (Vicki Been et al. eds., 5th ed., 2006).

139. Epstein, *supra* note 133, at 14.

140. *Id.*

141. *Id.*

142. Marc Stein, *NBA Dunks Tweeting, Social Media During Games*, ESPN (Sept. 30, 2009), <http://sports.espn.go.com/nba/news/story?id=4520907>.

143. *Id.*

First Amendment.”<sup>144</sup> Considering that a complete ban on social media is a violation of the First Amendment, it is fortunate that professional sports leagues have not attempted to use this approach when dealing with social media issues among the players.

## 2. *Universities that Ban Social Media Use Among Athletes is in Violation of the First Amendment*

While professional sports organizations do not consider it a necessity to ban the use of social media entirely, “college athletes are under much more scrutiny by coaches and administrators.”<sup>145</sup> The 2010 scandal at University of North Carolina (UNC) essentially led to stricter rules and policies regarding social media and the monitoring of athletes’ social media websites.<sup>146</sup> In this case, a Twitter message sent by another player led to an investigation by the NCAA which confirmed that Marvin Austin, defensive end, was receiving and accepting gifts and benefits from agents before he was drafted, which is a violation of the NCAA rules.<sup>147</sup> UNC football players Robert Quinn and Greg Little were also dismissed from the UNC team for receiving “improper benefits from agents,” including travel accommodations and jewelry.<sup>148</sup> UNC ultimately banned the use of social media among its football players.<sup>149</sup> This incident resulted in universities, including University of North Carolina, to monitor what athletes were doing and posting on social media websites.<sup>150</sup>

Because of the social media instances mentioned above, the Mississippi State basketball coach, Rick Stansbury, banned the use of Twitter during the season and then allowed the athletes to use the social media site after the season was over.<sup>151</sup> In addition to Mississippi State, other universities including Villanova<sup>152</sup>, New Mexico<sup>153</sup>, University of Miami

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144. Fittipaldo, *supra* note 78.

145. *Id.*

146. Thamel, *supra* note 80.

147. *Id.*

148. *Agent Scandal Costs UNC 3 Players*, ESPN (Oct. 11, 2010), <http://sports.espn.go.com/nfl/news/story?id=5673405>.

149. *Butch Davis Bans Twitter Among Players*, ESPN (Oct. 15, 2010), <http://sports.espn.go.com/nfl/news/story?id=5686121>.

150. Thamel, *supra* note 80.

151. Fittipaldo, *supra* note 78.

152. Mike J., *Villanova Basketball Players Apparently Banned from Twitter*, VU HOOPS (Sept. 26, 2010), <http://www.vuhoops.com/2010/09/26/twitter/> (mentioning Villanova basketball coach bans the use of Twitter among players).

153. Fittipaldo, *supra* note 78 (mentioning New Mexico State football coach DeWayne Walker banning the use of Twitter among the players during the season).

in Florida<sup>154</sup>, South Carolina<sup>155</sup>, Boise State<sup>156</sup>, Missouri<sup>157</sup> and Kansas<sup>158</sup> prohibited the use of social media during the season for certain sports teams as well.

However, banning the use of social media is a violation of the athletes' First Amendment right to free speech. Coaches are not allowed to place prior restraints on their speech to prevent speech before it has even occurred. These institutions need to find a new approach to deal with the use of social media among student-athletes rather than taking the easy way out and just banning it all together. If coaches want to ensure that student-athletes are not abusing the use of social media, creating rules and restrictions that regulate the time in which an athlete can use social media would be a better approach than restricting it entirely throughout the entire season. In addition, the schools that completely ban athletes from using social media are creating a prior restraint on speech, which violates the athletes' rights to free speech by prohibiting them to speak their minds.

### 3. *Olympic Athletes Banned From Using Social Media During the Games is a Violation of the First Amendment*

Whether banning the use of social media for a whole team or an individual player, the fact that banning social media creates a prior restraint on free speech is a violation of the First Amendment. One tweet could end someone's career if it is not interpreted in the way the person who posted it intended. For example, Greek Olympic athlete Voula Papachristou posted an offensive remark about African immigrants on Twitter, which resulted in her being suspended from competing in the London Olympics.<sup>159</sup> Papachristou posted "with so many Africans in

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154. The Associated Press, *Miami Issues Ban on Twitter*, N.Y. TIMES (Sept. 14, 2010), [http://www.nytimes.com/2010/09/15/sports/ncaafootball/15sportsbriefs-canes.html?\\_r=0](http://www.nytimes.com/2010/09/15/sports/ncaafootball/15sportsbriefs-canes.html?_r=0) (mentioning Miami University football coach Randy Shannon banning the use of Twitter among the players).

155. *Steve Spurrier Bans His Team From Using Twitter*, SPORTING NEWS (Aug. 4, 2011), <http://www.sportingnews.com/ncaa-football/story/2011-08-04/steve-spurrier-bans-south-carolina-gamecocks-from-using-twitter> (discussing South Carolina football coach Steve Spurrier banning the use of Twitter among the players during the season).

156. Fittipaldo, *supra* note 78 (mentioning Boise State football coach Chris Peterson banning their players from using Twitter during the season).

157. *Id.* (mentioning Missouri basketball coach Mike Anderson banning their players from using Twitter during the season).

158. Darren Rovell, *Coaches Ban of Twitter Proves College Sports Isn't About Education*, CNBC (Aug. 8, 2011), [http://www.cnbc.com/id/44058540/Coaches\\_Ban\\_Of\\_Twitter\\_Proves\\_College\\_Sports\\_Isn\\_t\\_About\\_Education](http://www.cnbc.com/id/44058540/Coaches_Ban_Of_Twitter_Proves_College_Sports_Isn_t_About_Education) (mentioning Kansas football coach Turner Gill banning the use of Twitter among the players).

159. Katherine Faulkner & Nick McDermott, *London 2012 Olympics: Greek Athlete Voula Papachristou Banned Over Racist 'Joke' on Twitter*, MAIL ONLINE (July 26, 2012), <http://www.dailymail.co.uk/news/article-2178836/London-2012-Olympics-Greek-athlete->

Greece, the West Nile mosquitoes will be getting home food.”<sup>160</sup> After this incident, the Greek Olympic governing body did not allow any of their athletes to use social media during the games.<sup>161</sup>

Similar to the universities that prohibit athletes’ use of social media, banning the use of all social media during the games is a violation of competitors’ First Amendment freedom of speech rights by placing a prior restraint on speech and prohibiting the speech before it has occurred. However, Papachristou posted her comment before the Olympics began and the IOC stated that the social media and blogging rules are *only* for during the competition.<sup>162</sup> Since her post was made before the Olympics began, she should not have been punished for her Twitter posts in accordance with the IOC regulations and she should have been able to speak her mind. Even though it would not be guaranteed that the content of her speech would be protected under the First Amendment, the IOC should still not punish her because she was not in violation of those social media guidelines. Regardless of whether or not Papachristou’s tweet was in violation of the IOC guidelines, the fact that the Greek team was prohibited from using social media during the games impinges on their rights to free speech by placing a prior restraint on speech.

In another instance, certain individual players were prohibited from using social media during the Olympics. Australian swimmers Nick D’Arcy and Kenrick Monk, were allowed to participate in their particular competition, but were banned from using social media due to a picture the swimmers posted on Facebook.<sup>163</sup> The picture, which was taken before the Olympics, showed the two men in a gun shop in California.<sup>164</sup> The Australian Olympic Committee decided this was sufficient punishment since the picture post did not violate the IOC rules.<sup>165</sup> Again, similar to Voula Papachristou’s Twitter post, the swimmers should not have been punished for their post and by doing so, they are

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Voula-Papachristou-banned-racist-joke-Twitter.html. Paraskevi "Voula" Papachristou, 24, is a Greek triple jumper. *Voula Papchristou Photos: Greek Babe, Twitter Troll*, RIGHT ENTERTAINMENT (July 26, 2012), <http://www.rightentertainment.com/?p=5607>. She won two gold medals at the European Athletics U23 Championships and represented Greece at the 2011 World Championships in Athletics, until she was dismissed for her Twitter post. *Id.*

160. *Id.*

161. Sean Gregory, *The Social-Media Olympics: Are Officials Restricting Free Speech?*, TIME (July 26, 2012), <http://www.olympics.time.com/2012/07/26/the-social-media-olympics-are-officials-restricting-free-speech/>.

162. See IOC, *supra* note 94 (discussing the introduction of the IOC social media and blogging guidelines provide that the rules apply to athletes “during the period of the Olympic Games.”).

163. Gregory, *supra* note 161.

164. *Id.*

165. *Id.*

being restricted of their ability to express themselves without the IOC rules in place. Because they were not in violation of the rules but still punished for their posts, this is a violation of their First Amendment rights to free speech. Despite whether their post was in violation of the restrictions, the coaches are placing a prior restraint on their free speech by prohibiting them from engaging in social media during the Olympics, which is not an appropriate approach to dealing with social media issues.

Overall, no matter whether it is a professional athlete, student-athlete, or Olympic athlete, sports organizations cannot ban the right to use social media websites for an individual or the team as a whole. Placing a complete ban on social media violates the athletes' First Amendment rights by placing a prior restraint on their free speech. Sports organizations that ban the use of social media should consider adopting a different approach to deal with social media issues because placing a complete ban on social media use is unconstitutional.

#### B. SOCIAL MEDIA RESTRICTIONS AND REGULATIONS CAN STILL VIOLATE ATHLETES' CONSTITUTIONAL RIGHTS

Another approach taken by some sports organizations is to create rules and policies that restrict a time period in which the athletes are not allowed to use social media websites.<sup>166</sup> The rules also clearly lay out that if an athlete violates the policies, they will be sanctioned.<sup>167</sup> While these social media restrictions seem to be doing a good job by ensuring that athletes are not tweeting during games and punishing those who violate the rules, having social media restrictions can still violate an athlete's First Amendment rights. An infringement of an athlete's constitutional rights occurs when the athlete is punished when not in violation of the social media use restrictions. This would result in sanctions for speech that would otherwise be protected under the First Amendment.

##### 1. *Professional Athletes Restrictions and Regulations Regarding Social Media*

###### *a. Professional Athletes' Speech that Violates Restrictions is Rightfully Punished*

The majority of athletes, under sanction, have been punished for *when* they post comments on Twitter, which is in violation of the

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166. Friedman, *supra* note 59, at 89-95.

167. *Id.*

policies and restrictions, rather than *what* they Tweet.<sup>168</sup> For example, Chad (Ochocinco) Johnson was fined \$25,000.00 for tweeting during the Cincinnati Bengals versus Philadelphia Eagles game on August 20, 2010.<sup>169</sup> Johnson was rightfully fined for his Tweet because it was in violation with the NFL social media policy requiring that athletes cannot tweet ninety minutes before, during, or after the game.<sup>170</sup> Milwaukee Bucks guard Brandon Jennings was fined \$7,500.00 for tweeting after winning in double overtime game against Portland in December 2009.<sup>171</sup> Like Ochocinco, Jennings was rightfully fined because he was in violation of the NBA social media regulations, which prohibit players from using social media forty-five minutes before, during, and after the game.<sup>172</sup> Regardless of whether the athletes' tweets are considered protected speech under the First Amendment, they violated their sports leagues current social media rules and restrictions, which is reasonably punishable.

*b. Professional Athletes' Off-Field Speech Is Protected by the First Amendment*

Although less problematic than banning social media use entirely, the creation of social media restrictions and regulations may also infringe on athletes' First Amendment rights of free speech. When athletes are punished for tweets or Facebook posts that are not in violation of the current social media restrictions, a large problem occurs. Athletes' off-field speech is protected under the First Amendment, unless it falls into a category of unprotected speech. Therefore, athletes that post on social media websites at their leisure should not be disciplined or sanctioned because they were not subject to social media regulations at the time of their posts.

Although the majority of social media violations have been as a result of the time in which an athlete tweets, athletes have been punished for the content of their tweets as well.<sup>173</sup> However, there are no restrictions regarding the content of what an athlete can tweet.

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168. *Id.* at 97.

169. Jamison Hensley, *Chad Ochocinco Fined \$25K*, ESPN (Aug. 25, 2010), <http://sports.espn.go.com/nfl/trainingcamp10/news/story?id=5493157> (stating that Ochocinco was fined for the following Twitter post: "Man I'm sick of getting hit like that, its the damn preseason [expletive]! 1day I'm gone jump up and start throwing hay makers, #Tylenolplease.").

170. Ortiz, *Leagues' Social Media Policies*, *supra* note 24.

171. *Jennings Fined For Timing of Twitter Post*, ESPN (Dec. 18, 2009), <http://sports.espn.go.com/nba/news/story?id=4754931> (stating that Jennings was fined for the following Twitter post: "Back to 500. Yess!!! '500' means where doing good. Way to Play Hard Guys.").

172. *Id.*

173. Friedman, *supra* note 59, at 97.

Nevertheless, creating restrictions that would prohibit certain speech would infringe upon their First Amendment rights. With no restrictions in place regarding the off-field conduct of athletes' use of social media, athletes should not be punished for those tweets that were made on their own time. Yet, there have been several instances where athletes have been punished for the content of their posts that were not within the time restrictions, resulting in treating each instance of social media disaster on a case-by-case basis.<sup>174</sup>

In one instance, the former NFL player for the San Diego Chargers, Antonio Cromartie, was fined \$25,000.00 for tweeting about the "nasty food" they were being served at training camp.<sup>175</sup> According to the NFL policy, the only restrictions placed on social media related to time restrictions, yet Cromartie was fined for his off-field conduct and the content of his post.<sup>176</sup> In this instance, Cromartie was not in violation of the social media restrictions; therefore, his speech would have been protected under the First Amendment. His tweet did not contain fighting words, speech that incites others to imminent lawless action, obscenity, certain types of defamatory speech, or true threats. Since individuals are guaranteed a right to free speech, they should not be punished for stating their opinions about the food being served at training camp.

Another instance in which an athlete was punished for off-field conduct occurred when Larry Johnson, running back for the Kansas City Chiefs, criticized head coach Todd Haley and used homophobic slurs to criticize a Twitter user.<sup>177</sup> Johnson was suspended and later released from the Kansas City Chiefs.<sup>178</sup> In addition, Amare Stoudamire, a New York Knicks player, was fined \$50,000.00 for tweeting a derogatory message including a gay slur.<sup>179</sup> In these instances, both Johnson and Stoudamire used homophobic slurs in their tweets.<sup>180</sup> Even though homophobic slurs may not be protected under the First Amendment, their Twitter posts were not in violation of the current social media restrictions and therefore the athletes should not have been fined or suspended for their tweets.

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174. *Id.* at 97-98.

175. *Chargers Fine CB Cromartie 2500 for Twitter Post Ripping Camp*, NFL, <http://www.nfl.com/trainingcamp/story?id=09000d5d811a8aaf&template=without-video-with-comments&confirm=true> (last visited Sept. 16, 2013).

176. Ortiz, *Leagues' Social Media Policies*, *supra* note 24.

177. Charles Robinson, *Johnson's Twitter Page Contains Haley Rip, Slur*, YAHOO! SPORTS (Oct. 26, 2009), <http://sports.yahoo.com/nfl/news?slug=cr-johnsontwitter102609>.

178. Ortiz, *Twitter Gaffes*, *supra* note 18.

179. *Amare Stoudemire Slapped With Hefty Fine for Suing Gay Slur on Twitter*, SPORTING NEWS NBA (June 26, 2012), <http://aol.sportingnews.com/nba/story/2012-06-26/amare-stoudemire-twitter-fine-apology-gay-slur>.

180. Robinson, *supra* note 177; *see also* Stoudemire, *supra* note 179.

If the sports leagues choose to punish athletes for their off-field conduct on Twitter, the social media policies should incorporate more provisions regarding those concerns, because currently players' off-field conduct is not in violation with the social media policies. However, restricting athletes from posting certain things on social media sites inevitably prohibits the athletes from expressing their First Amendment rights. On the other hand, it is problematic to discipline athletes for posts not in violation with the current social media policies and restrictions. Therefore, the sports leagues need to determine a way to approach this issue so they are fair to all athletes and not infringing on their First Amendment rights to free speech as well as making sure athletes do not abuse the use of social media.

## 2. *Student-Athletes Punished When There Are No Restrictions Impinges on Their First Amendment Rights*

Professional athletes are either punished for violating the restrictions, which is reasonable, or they have been punished when they were not in violation of the restriction, which is unreasonable, depending on whether their speech was protected under the First Amendment.<sup>181</sup> However, student-athletes have been punished for their social media posts when there are no restrictions in place, which creates another problem of sports organizations violating the First Amendment rights of the athletes.<sup>182</sup>

In one instance, the Mississippi State point guard, D.J. Gardner, was dismissed from his team after posting on Twitter that he was lied to and deceived, which resulted in him asking to be redshirted.<sup>183</sup> This meant that he would not play during the season, but he was still eligible to play during his college career.<sup>184</sup> With no guidelines or restrictions regarding acceptable social media content, how does a coach determine when to take action into his own hands? Furthermore, can

181. Ortiz, *Leagues' Social Media Policies*, *supra* note 24.

182. *Id.*

183. *2012-2013 Statistics' Policies & Guidelines*, NCAA, 1, 2-3 (Jan. 22, 2013), <http://fs.ncaa.org/Docs/stats/ForSIDs/Policies.pdf> (explaining that an athlete's class rank is based on how many seasons they have left to play if they are redshirted and stating that only the official games prior to the athlete being redshirted will count towards their overall career statistics).

184. Brandon Marcello, (*UPDATED*) *D.J. Gardner Booted from Team after Profane Tweets*, MISSISSIPPI STATE SPORTS (Aug. 26, 2011), <http://blogs.clarionledger.com/msu/2011/08/26/d-j-gardner-booted-from-team-after-profane-tweets/>. Gardner was dismissed from the Mississippi State basketball team for the following Twitter post: "These b\*\*\*es tried to f\*\*k me over. That's y I red shirted.. But I wish my homies a great as\* season.. I don't even know y I'm still here." *Id.* Later Gardener posted "Call em and tell more... I can't stand liars and that's all they did since I started being recruited.. R.I.p. To that contract I signed." *Id.*

the coach control what the athletes are posting on social media websites? Gardner was severely punished for speaking his mind. In addition, Ravern Johnson, a Mississippi State basketball player, was also dismissed for his tweet criticizing the coach.<sup>185</sup> Both instances provide examples of violations of Gardner and Johnson's First Amendment freedom of speech rights. Speech is protected regardless of the communication medium, so even a Twitter post is protected speech under the First Amendment unless it falls into the categories in which speech is unprotected.<sup>186</sup> In these situations, neither player should have been punished for his Twitter posts because his speech is protected under the First Amendment. More students are being punished or suspended for criticizing their coaches on Twitter, but this just seems like the coaches taking advantage of their official roles by hurting feelings and punishing the athletes. They can do this because the NCAA has no regulations saying not to.<sup>187</sup> Since there are no rules or restrictions in place regarding the content of speech that can be posted on social media websites,<sup>188</sup> coaches need to be careful not to overstep their authoritative boundaries and punishing athletes when they do not deserve to be punished.

Student-athletes should not be disciplined for posting on social media websites any posts that are not in violation of the non-existent guidelines presented by the NCAA. Accordingly, if coaches want to restrict what athletes are posting on social media websites, they should create fair and reasonable social media policies and regulations rather than going beyond their duties to monitor what athletes are posting.

### 3. *Olympics Athletes' Restrictions and Regulations Regarding Social Media*

#### *a. Olympic Athletes' Speech that is in Violation of Restrictions Results in Proper Sanctions*

Similar to professional sports, the Olympics have restrictions and regulations as well.<sup>189</sup> When Olympic athletes violate the rules, they are disciplined. Swiss Olympic athlete Michel Morganella posted a racist comment on Twitter, which resulted in him being dismissed from

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185. James Carskadon, *Gardner Dismissed from Program*, THE REFLECTOR (Sept. 30, 2011), <http://www.reflector-online.com/mobile/sports/gardner-dismissed-from-program-1.2616461>.

186. Thierer, *supra* note 118 (discussing the progression of the Internet as it applies with the First Amendment and free speech).

187. Ortiz, *Leagues' Social Media Policies*, *supra* note 24.

188. *Id.*

189. See IOC, *supra* note 94.

continuing to compete in the London Olympics.<sup>190</sup> Morganella posted an offensive tweet aimed towards South Koreans after his team lost against them.<sup>191</sup> Even though he apologized for his offensive tweets, he was dismissed from the team for violating the IOC rules and regulations regarding social media and blogging for posting vulgar and obscene words.<sup>192</sup> In this situation, the Twitter post was made during the competition while the social media rules and regulations were enacted.<sup>193</sup> Due to the racist content of the post, which would be in violation of the IOC rules,<sup>194</sup> it is understandable that an athlete would be dismissed from competing in the Olympics. Regardless of whether or not the speech would normally be protected, the fact that it was in violation of the restrictions contributes to the proper sanctions.

*b. Olympic Athletes in Violation of Restrictions But NOT Punished Creates Problems*

Another issue pertaining to social media rules and regulations is when someone is in violation of the rules but he is not sanctioned. Hope Solo, an American soccer player, was in the spotlight after disrespecting commentator Brandi Chastain through Twitter posts by saying that Chastain knows nothing about soccer and should “lay off commentating about defending and goalkeeping until she is educated.”<sup>195</sup> Solo was not dismissed or suspended from the team and the USA women’s soccer coach did not make her stop tweeting.<sup>196</sup> According to the IOC social media rules, Solo should have been punished; yet, she has the freedom to express her opinion on social media websites without being punished. The issue is in determining how obscene or vulgar the content of a post

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190. ESPN Staff, *Morganella expelled from Swiss Olympic squad for racist tweet*, ESPN FC (July 30, 2012), [http://espnfc.com/news/story/\\_/id/1128500/morganella-expelled-from-swiss-olympic-squad-for-racist-tweet?cc=5901](http://espnfc.com/news/story/_/id/1128500/morganella-expelled-from-swiss-olympic-squad-for-racist-tweet?cc=5901). Swiss footballer, Michel Morganella, 24, plays as the defender for Palermo, Novara, and the Switzerland football team. *Michael Morganella*, ESPN FC, [http://soccernet.espn.go.com/player/\\_/id/100508/michel-morganella?cc=5901](http://soccernet.espn.go.com/player/_/id/100508/michel-morganella?cc=5901) (last visited Sept. 16, 2013).

191. *Id.* (in his tweet, Morganella referred to South Koreans as “a bunch of mongoloids and they can go burn”).

192. *Id.*

193. *Id.*

194. *See* IOC, *supra* note 94.

195. Associated Press, *Hope Solo Stands by Critical Tweets*, ESPN (July 31, 2012), [http://espn.go.com/los-angeles/story/\\_/id/8214811/2012-london-olympics-us-women-soccer-goalie-hope-solo-back-critical-tweets-brandi-chastain](http://espn.go.com/los-angeles/story/_/id/8214811/2012-london-olympics-us-women-soccer-goalie-hope-solo-back-critical-tweets-brandi-chastain). Hope Amelia Solo, 32, is an American soccer goalkeeper and a two-time Olympic gold medalist from Richland, Washington. *Hope Solo*, BIOGRAPHY, <http://www.biography.com/people/hope-solo-20883135> (last visited Sept. 16, 2013). She helped the U.S. Women’s Soccer Team win gold medals at the 2008 Beijing Olympic games and the 2012 London Olympic games; Solo has also appeared on *Dancing with the Stars* in 2011. *Id.*

196. Associated Press, *Hope Solo Stands*, *supra* note 195.

has to be before an individual is punished for it. According to the United States Olympic Committee (USCO), there are no rules or guidelines regarding social media.<sup>197</sup> Each National Olympic Committee is allowed to give out punishments as they see fit for the violation.<sup>198</sup> If each country has different standards, then the IOC needs to figure out a new approach for the social media regulations. For example, if one country does not think an athlete needs to be punished for violating the rules, the athlete will not be punished, but this same speech may be punished in another country with different standards. However, another problem exists when certain National Olympic Committees punish athletes for a social media post that was not in violation of the IOC rules and guidelines, which is largely similar to professional athletes being punished for off-field conduct not in violation with the current restrictions.

When looking at the instances mentioned above regarding what the athletes posted in relation to the IOC rules and regulations, the IOC is not determining the punishments of the athletes and it is up to the home countries to determine how to approach these social media dilemmas. Yet again, as in professional sports, the problem arises when athletes are punished but were not in violation of the restrictions or when they are not punished when they are in violation of the restrictions. While placing restrictions and regulations on social media use is currently the best approach, these restrictions may still infringe on athletes' First Amendment rights.

*c. IOC Restrictions and Regulations Violate First Amendment Rights of Athletes*

Another controversial provision of the social media and blogging rules drafted by the IOC is known as Rule 40,<sup>199</sup> which states that athletes are not allowed to post anything on social media that can be considered advertising or sponsoring another brand that is not associated with the Olympics.<sup>200</sup> Even though this rule has been around for many years, the popularity of social media is recent.<sup>201</sup> Because social media is taking over, and many athletes have noticed a problem with this rule,

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197. Email from Sara Clark, Athlete Ombudsman Specialist, United States Olympic Committee, to author (Sept. 11, 2012, 6:54 PM) (on file with author).

198. *Id.*

199. *See* IOC, *supra* note 94.

200. Shira Ovide & Christopher Stewart, *Twitter's Olympic Moment*, WALL STREET JOURNAL (Aug. 1, 2012), <http://online.wsj.com/article/SB1000087239639044405804577561211511205968.html>

201. *Id.*

many athletes are demanding change.<sup>202</sup> Andrew Brandt, a current NFL business analyst on ESPN, stated that “individual sponsors want to get their names out there, the athletes want to get their names out, and the IOC wants to protect their sponsors and make a ton of money.”<sup>203</sup> However, Rule 40 is restricting social media speech, and the IOC is taking the speech away from athletes to protect sponsors.<sup>204</sup> Robert Thompson, professor of TV and popular culture at Syracuse University stated, “the IOC says without sponsors, there would not be the games but there would not be games without athletes either.”<sup>205</sup>

Leo Manzano, U.S. sprinter, tweeted a picture of his shoes and their performance, which he had to remove because it mentioned a footwear brand that was not an official sponsor of the Olympics and thus in violation of Rule 40.<sup>206</sup> Rule 40 prohibits the freedom of expression during the Olympic Games, which includes personal time as well as the time before, during, and after sporting events.<sup>207</sup> The rules are very restrictive and violate athletes’ First Amendment rights to free speech by prohibiting their ability to advertise whatever products they want to.<sup>208</sup>

There was a lot of controversy regarding whether Michael Phelps, U.S. swimmer, would be stripped of his medals because a photograph was leaked during the 2012 Olympic games, where he was promoting Louis Vuitton.<sup>209</sup> Whether the scandal is a violation of Rule 40 has yet to be determined.<sup>210</sup> Critics say that it was a violation of Rule 40 because he was obviously promoting a brand that is not an official sponsor

202. *Id.* (discussing that Olympic athletes have been posting #WeDemandChange on Twitter in regards to IOC’s Rule 40).

203. Dave Smith, *Rule 40 and the 2012 London Olympics: Should Athletes be Free to Tweet?*, INTERNATIONAL BUSINESS TIMES (Aug. 2, 2012), <http://www.ibtimes.com/rule-40-and-2012-london-olympics-should-athletes-be-free-tweet-737406>.

204. *Id.*

205. *Id.*

206. Scott Olmos, *Athletes Tweet Demands for Change to IOC Rules*, USA TODAY (July 30, 2012), <http://usatoday30.usatoday.com/sports/olympics/london/story/2012-07-29/olympic-athletes-tweet-demand-for-change/56581574/1>.

207. See Vinjamuri, *supra* note 90.

208. *Id.*

209. Nancy Kercheva, *Leak of Phelps Ad Wasn’t Olympic Violation, Agent Says*, BLOOMBERG (Aug. 18, 2012), <http://www.bloomberg.com/news/2012-08-18/leak-of-phelps-ad-wasn-t-olympic-rule-40-violation-agent-says.html>. Michael Fred Phelps, 28, is a retired American swimmer who started competing in the Olympics at the age of 15. *Michael Phelps Biography*, BIOGRAPHY, <http://www.biography.com/people/michael-phelps-345192> (last visited Sept. 16, 2013). He is the most decorated Olympian of all time, with a total of twenty-two medals. *Id.*

210. *Michael Phelps Leaked Photos Scandal 2012 Battles Rule 40, Louis Vuitton*, L.A. LATE (Aug. 17, 2012), <http://news.lalate.com/2012/08/17/michael-phelps-leaked-photos-scandal-2012-battles-rule-40-louis-vuitton/>.

of the Olympics.<sup>211</sup> However, Phelps' agent says that it was not a violation of Rule 40 because in order to be a violation, the athlete needs to permit the use of his name for the brand and in this case, Phelps did not leak this photo.<sup>212</sup>

Due to the expansion of social media, Rule 40 is affecting athletes' free speech. It is also preventing them from being able to market and brand themselves, which is essentially what social media enables the athletes to do. How does one determine when Rule 40 has been violated? For example, someone could hack an athlete's social media account and post brands and products that are not sponsored by the Olympics, which would be in violation of Rule 40. The rules restricting an athlete from being able to market and advertise his sponsors need to be rewritten because the main point of sponsorships is to share the brand with the world. With the Olympics being promoted as the social media games<sup>213</sup>, the rule makers need to take into account that athletes want to promote themselves as well as their official sponsors and they should not be restricted from this ability to do so.

Even though having a social media policy is the smart thing to do, there are still many problems that arise. The IOC needs to understand that their guidelines have prohibited and restricted the free speech of athletes and this problem will not go away anytime soon as social media only seems to be expanding. The social media and blogging guidelines as a whole are limiting what an athlete can say during a time period, even if what he wants to say is not related to the Olympics. These strict and lengthy guidelines need to be changed or rewritten to alleviate the problem of restricting athletes' First Amendment rights.

Overall, creating social media rules and regulations is a better approach than banning the use of social media entirely. While the approach of creating social media rules and regulations is headed in the right direction, it does not mean it is not violating an athlete's First Amendment rights. If there are rules, they need to be followed and players cannot be punished for the content of their speech if it was not in violation of the rules presented, unless the speech is unprotected by the First Amendment.

### C. SOCIAL MEDIA MONITORING IS AN INVASION OF PRIVACY

Social media monitoring is the third approach that sports organizations are taking to ensure that athletes do not abuse social media.<sup>214</sup> In this approach, coaches and employers act as "Big Brother," watching

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211. *Id.*

212. *See Kercheva, supra* note 209.

213. *See Gregory, supra* note 161.

214. *See Thamel, supra* note 80.

what athletes are doing and saying on social media websites.<sup>215</sup> However, this current method of social media monitoring is an improper approach because it invades the athletes' privacy.<sup>216</sup> A larger problem arises when athletes are asked to hand over their personal social media login usernames and passwords, which is an invasion of privacy.<sup>217</sup>

Since social media websites are public forums, most Twitter and Facebook posts are available for everyone to view and access the page, depending on the privacy settings that are enabled.<sup>218</sup> In a public Twitter or Facebook profile, whatever information is publicly accessible on the account becomes available for the public to view, including an employer, a manager, or a coach.<sup>219</sup> This makes it much more difficult for an individual to claim that his privacy has been invaded.<sup>220</sup> However, athletes' privacy rights are violated when they are asked to disclose their usernames and passwords so that their personal social media accounts may be accessed and monitored.<sup>221</sup>

In *Pietrylo v. Hillstone Restaurant Group*, plaintiffs posted about their employer in a private "invite-only" group on MySpace.<sup>222</sup> The employer demanded the plaintiffs' personal information to their MySpace pages.<sup>223</sup> Because the plaintiffs feared that denying the employer this information would result in consequences, they gave the manager their usernames and passwords.<sup>224</sup> The plaintiffs were terminated from employment after the employer read the comments and remarks that were made on the social media website.<sup>225</sup> The New Jersey District Court

215. *Id.*

216. *Id.*

217. *Id.*

218. Depending on the privacy settings enabled for certain social media accounts, there are certain restrictions as to what is visible on public forums. *Fact Sheet 35: Social Networking Privacy: How to be Safe, Secure and Social*, PRIVACY RIGHTS CLEARINGHOUSE (July 2013), <https://www.privacyrights.org/social-networking-privacy>. For example, some settings that prevent a fully visible social media page are if someone has a private page on Twitter, if you are not someone's Facebook friend, or if someone has changed his Facebook settings to limit certain information from being shown to particular groups of people. *Id.* These settings will prevent a public viewer from seeing everything that is on a personal social media account that a person might want to remain private. *Id.*

219. *Id.*

220. *Id.*

221. See Thamel, *supra* note 80.

222. *Pietrylo v. Hillstone Rest. Grp.*, 2009 WL 3128420 (D.N.J. 2009). A similar case is *R.S. ex rel. S.S. v. Minnewaska Area Dist. No 2149*, 2012 WL 3870868 (D. Minn. 2012), where a middle school student was punished for a post she wrote on Facebook after school and she was later asked to turn over her personal information to her social media accounts, including her Facebook and email account. *Id.* The court stated that requiring students to hand over their personal passwords is a violation of the student's First and Fourth Amendment rights. *Id.*

223. *Pietrylo*, 2009 WL 3128420.

224. *Id.*

225. *Id.*

found that because the employer unlawfully accessed the employees' personal social media accounts, this was an invasion of privacy and a violation of the Stored Communications Act<sup>226, 227</sup>

The facts in *Pietrylo* are analogous to situations in which athletes are disclosing personal information to coaches based on a fear of the consequences if they do not give the coach the information. Students "may not feel free to deny their athletic departments and/or third parties access to their password protected social media accounts; thus, these services may be advising schools to violate the [law]."<sup>228</sup> "Requiring public school students to [...] Facebook Friend university employees or agents may also violate the [First] and [Fourth] Amendments along with the Electronic Communications Privacy Act, and multiple other federal and state laws."<sup>229</sup>

Several states have passed social media privacy laws that make it illegal for employers to request personal information from employees.<sup>230</sup> Maryland was the first state to enact a social media privacy law, which went into effect on October 1, 2012.<sup>231</sup> This law prohibits all employers from requesting login usernames and passwords to personal social media accounts and makes it illegal to deny employment to applicants who refuse to provide the information.<sup>232</sup> It also restricts employers from firing employees for not providing access to their social media accounts.<sup>233</sup> Illinois was the second state that passed a bill, which made it "illegal for employers to ask job applicants for passwords to their online profiles."<sup>234</sup> This law does not prevent employers from viewing the public accounts of the applicants, but rather restricts them from asking for

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226. The Stored Communications Act (SCA), enacted in 1986, is a federal statute, which governs the stored Internet communications in the United States. Orin S Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 GEO. WASH. L. REV., 1, 1 (2004).

227. *Pietrylo*, 2009 WL 3128420.

228. Bradley Shear, *Are UDiligence and Varsity Monitor Advising NCAA Schools to Violate the Stored Communications Act*, SHEAR ON SOCIAL MEDIA (May 18, 2012), <http://www.shearsocialmedia.com/search?updated-min=2012-05-01T00:00:00-04:00&updated-max=2012-06-01T00:00:00-04:00&max-results=4>.

229. *Id.*

230. Martin Austermuhle, *Maryland Social Media Law Takes Effect Today*, DCIST (Oct. 1, 2012), [http://dcist.com/2012/10/maryland\\_social\\_media\\_law\\_takes\\_eff.php](http://dcist.com/2012/10/maryland_social_media_law_takes_eff.php); Jason Keyser, *Illinois Facebook Password Law Bars Employers From Asking For Social Media Logins*, HUFFINGTON POST (Aug. 1, 2012), [http://www.huffingtonpost.com/2012/08/01/illinois-facebook-passwor\\_0\\_n\\_1730396.html](http://www.huffingtonpost.com/2012/08/01/illinois-facebook-passwor_0_n_1730396.html); Ken Yeung, *California Becomes Third State to Protect Social Media Privacy*, THE NEXT WEB (Sept. 27, 2012), <http://thenextweb.com/insider/2012/09/27/california-social-media-privacy-law/>.

231. Austermuhle, *supra* note 230.

232. *Id.*

233. *Id.*

234. Keyser, *supra* note 230.

their personal information.<sup>235</sup> California became the third state to enact a social media privacy law, which will go into effect in 2013.<sup>236</sup> The governor of California passed a bill that “would forbid schools from asking students to provide their social media user names and passwords.”<sup>237</sup> According to social media lawyer Bradley Shear, “school and employee monitoring may already be illegal in light of existing legislation and the First, Fourth and Fifth Amendments.”<sup>238</sup> These social media privacy laws are a step in the right direction when dealing with the privacy issues that may arise with the increasing use of social media in everyday life, and sports officials should follow this trend concerning athletes’ use of social media.

It is understandable that athletes’ posts on social media websites are a part of a public forum for everyone to see, which negates the idea that the posts are private.<sup>239</sup> However, sports team officials using the social media monitoring approach need to be aware that an infringement upon athletes’ privacy rights exists when officials require athletes to friend or follow their coaches or to install social media monitoring systems.<sup>240</sup>

#### 1. *Professional Athletes Mild Monitoring of Social Media*

Some professional sports leagues have utilized this approach of social monitoring by either having the coach or staff “monitor players’ tweets and talk to them immediately if [they] see something inappropriate.”<sup>241</sup> Some teams that utilize this approach include the San Diego Chargers, the New York Jets, and the Buffalo Bills.<sup>242</sup> However, no professional sports team has yet to enlist in the help from a third party

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235. *Id.*

236. Yeung, *supra* note 230 (discussing the California laws which are Assembly Bill 1844 and Senate Bill 1349).

237. Jeff Roberts, *California Bill Protects Students’ Social Media Passwords*, TECH NEWS AND ANALYSIS (Aug. 22, 2012), <http://gigaom.com/2012/08/22/california-bill-protects-students-social-media-passwords/>; see Kevin DeShazo, *Bills to Protect the Online Privacy of Student-Athletes Move Forward*, FIELDHOUSE MEDIA (Aug. 15, 2012), <http://www.fieldhousemedia.net/bills-to-protect-the-online-privacy-of-student-athletes-move-forward/>.

238. Roberts, *supra* note 237.

239. Thamel, *supra* note 80.

240. *Id.* (according to Bradley Shear, “a key difference in monitoring a student’s online activities, as opposed to an issue like drug testing, was that the content being searched for was inappropriate as opposed to illegal”).

241. Michael McKnight, *Twitter Provides a Voice—and Added Risk—for Modern Athletes*, SPORTS ILLUSTRATED (Sept. 20, 2012), <http://sportsillustrated.cnn.com/2012/more/09/19/twitter-downside/index.html>.

242. *Id.*

social media monitoring service.<sup>243</sup> Even though professional leagues are not currently using social media monitoring services, the privacy of athletes may still be invaded. Depending on how the coaches and staff police the players' social media accounts, either by asking for their personal information or viewing their public postings, the extent of the monitoring will determine whether there was an invasion of privacy. Despite the few professional teams that do monitor their players, the majority of professional teams rely on the social media restrictions approach to prevent the abuse of social media websites.<sup>244</sup>

## 2. *Universities that Monitor Social Media Invade the Privacy of the Student Athletes*

Some coaches believe that it might be better that there are no restrictions or guidelines telling athletes what they can and cannot post on social media websites and it would be better to monitor the student's accounts instead.<sup>245</sup> Yet, how is it okay for coaches to control and monitor the athletes' accounts, viewing their posts and pictures, reading their personal diary? This creates grave issues regarding athletes' privacy.

In addition to the assistant coach's typical job of helping the head coach, he has a new job.<sup>246</sup> At Harvard, the assistant coach was assigned to monitor the social media websites of the athletes and "what players on the team are saying on their personal Twitter accounts."<sup>247</sup> Additionally, a college football player said that the coaches at his school had "spies" or aids that would create fake accounts and would friend them on Facebook or follow them on Twitter.<sup>248</sup> If the spies or aids found something that they deemed "crazy" or inappropriate, they would tell the coaches and then the coaches would confront the athletes and demand that the post be taken down.<sup>249</sup> It seems as though the coaches knew that they were doing something wrong because they had to create

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243. *Id.* Jeramie McPeck, vice president of the Phoenix Suns, said that third party social media monitoring services "seem a bit overboard;" "when talking about professional athletes, they're grown men;" and "we can't control everything they do, nor do we want to." *Id.*

244. *Id.*

245. Fittipaldo, *supra* note 78.

246. Jacob Feldman, *Coaches Monitor Athletes Online in the Age of Twitter*, THE HARVARD CRIMSON (Feb. 3, 2012), <http://www.thecrimson.com/article/2012/2/3/athletes-twitter-basketball-monitor/>.

247. *Id.*

248. Text Messages with J.J., student-athlete and professional football player, who requested to remain anonymous for confidentiality purposes (Oct. 15, 2012) (on file with author) (he is a 23-year-old football player from Wisconsin and he was a guard on his college team and is currently a guard in the NFL).

249. *Id.*

fake accounts so that they could spy on the athletes. Even though it technically is not spying when the posts are made on a public forum,<sup>250</sup> it feels as though this is an invasion of privacy when “spies” are keeping an eye on athletes’ personal accounts.

In addition, the University of Kentucky and University of Louisville monitor what their athletes are posting on social media websites through third-party social media software services.<sup>251</sup> Other universities that monitor their athletes include the University of Texas at Austin, Louisiana State University, University of Florida, and Harvard.<sup>252</sup> Bradley Shear says, “forcing student athletes to have their social posts monitored creates a legal liability for schools.”<sup>253</sup> Demanding that students install social media monitoring software onto their computers so their personal accounts could be monitored is an invasion of privacy.<sup>254</sup> According to the social media privacy laws that were created in a few states<sup>255</sup>, it is illegal for employers or coaches to ask their student-athletes for their usernames and passwords to their personal accounts.<sup>256</sup>

### 3. *Olympics and Social Media Monitoring*

As mentioned above, in the IOC social media guidelines, there is a provision stating that the IOC will monitor “on-line content” during the Olympics game.<sup>257</sup> Unless brought to the IOC’s attention, no “team” monitors the athletes’ social media posts.<sup>258</sup> Even though social media monitoring may not have been as visible in the 2012 London Olympics, the IOC needs to come up with a new approach for the future Olympics regarding social media issues because this monitoring social media posts is an invasion of the athlete’s privacy.

Overall, regardless of whether the athletes are professionals or amateurs, social media monitoring is clearly an invasion of privacy.<sup>259</sup> Coaches and officials should not be allowed to monitor what the

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250. *Fact Sheet 35*, *supra* note 218.

251. Laird, *supra* note 81.

252. Feldman, *supra* note 246.

253. Laird, *supra* note 81.

254. Feldman, *supra* note 246.

255. Austermuhle, *supra* note 230; Yeung, *supra* note 230.

256. Thamel, *supra* note 80.

257. *See* IOC, *supra* note 94.

258. Clark, *supra* note 197 (Clark stating “It’s sort of like a trademark issue where no one can use the Olympic marks but we don’t actively search out *every single* infraction, we just can’t allow the ones to continue that come to our attention that we know about.”) (emphasis in original).

259. Smith, *Privacy Invasion: Social Media Monitoring Required to Attend College or To Be Hired?*, NETWORK WORLD (Mar. 7, 2012), <http://www.networkworld.com/community/blog/privacy-invasion-social-media-monitoring-required-attend-college-or-be-hired>.

athletes are saying on their personal social media websites. A better approach would be to create specific guidelines and policies that would result in sanctions if they were violated. Monitoring the social media websites of athletes creates more problems regarding their First Amendment rights and privacy rights, especially if the coaches are requiring the athletes to hand over their personal information including their passwords.

#### IV. PROPOSAL: PLANNING FOR THE FUTURE

No matter the sports organization, these social media policies, restrictions, and monitoring of social media sites pose problems regarding an athlete's First Amendment rights and privacy rights.<sup>260</sup> Banning social media use altogether infringes on the athlete's First Amendment rights to free speech.<sup>261</sup> Even if social media restrictions for professional athletes are not found to unconstitutionally prohibit speech, another issue arises when the lack of uniformity in social media policies causes some athletes to be sanctioned for social media posts which were not in violation with the current restrictions.<sup>262</sup> In addition, monitoring students' social media usage is an invasion of privacy.<sup>263</sup> Although there have been no challenges from student-athletes or professional athletes regarding the social media ban or monitoring, this does not preclude the possibility of future lawsuits.<sup>264</sup> While it is a good approach to create social media policies for athletes, sports leagues and institutions need to be aware that some of the restrictions and regulations that they are imposing on athletes may be violating their constitutional rights.

It is very surprising that no athlete has yet to bring a claim regarding a violation of their First Amendment rights or privacy rights due to some of the approaches regarding social media. Yet, it is evident that there is a problem regarding social media regulation in sports, as social media is expanding and becoming extremely popular as one of the most used forms of technology. Once society becomes more accustomed to social media, more athletes may fight for their rights against social media restrictions if the rules are not changed. Problems arise in the ways that employers and coaches are trying to control social media,

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260. Thamel, *supra* note 80.

261. Alicia Jessop, *Banning Student-Athletes From Social Media: A Potential First Amendment Violation*, BUSINESS OF COLLEGE SPORTS (Sept. 4, 2012), <http://businessofcollegesports.com/2012/09/04/banning-student-athletes-from-social-media-a-potential-first-amendment-violation/>.

262. Ortiz, *Leagues' Social Media Policies*, *supra* note 24.

263. Sam Laird, *Social Media Privacy For College Athletes? California Senate Says Yes*, MASHABLE ENTERTAINMENT (Aug. 21, 2012), <http://mashable.com/2012/08/21/social-media-privacy-for-college-athletes-california-senate-says-yes/>.

264. Jessop, *supra* note 261.

which either violates the athletes' First Amendment rights to free speech or invades their privacy.

With the minimal social media restrictions and guidelines that are given to the athletes regarding social media use, the time restrictions are beneficial since the main reason for them is to prevent athletes from focusing their attention on something else other than the game.<sup>265</sup> This is a good start for professional sports leagues and it would be beneficial for the NCAA to use this as a guideline while creating social media restrictions as well.

However, one main problem that needs to be addressed and resolved is when athletes are punished for a social media post that was made during their leisure time, which was not in violation of the restrictions. Handling this situation may be difficult because placing more restrictions on social media use regarding content and what one person can or cannot say may be infringing on the athletes' First Amendment rights to free speech.

Social media privacy laws that are currently enforced in three states<sup>266</sup> should be enforced in all the states. Social media privacy laws are enacted to protect athletes and employees from an invasion of privacy when their coaches or employers are demanding they hand over their personal information to their social media accounts. This is an obvious invasion of privacy issue and these laws are very important and a step in the right direction of acknowledging the present problem and trying to resolve it. Accordingly, athletes cannot be required to download social media monitoring software, which allows third-party services to follow their social media websites to make sure that the athletes are not posting anything that might be deemed inappropriate.<sup>267</sup>

Some universities educate athletes, as well as coaches and employers, about social media and the rights that come along with posting on a public forum.<sup>268</sup> This is a helpful and reasonable approach to take because it allows athletes to understand that what they are posting is for the public to view and certain speech is unprotected by the First Amendment. This approach also allows coaches and employers to understand that they cannot act as a "big brother" to control and monitor everything that athletes are saying because most speech is protected under the First Amendment.<sup>269</sup>

Resolving these issues now before they worsen is the main goal because athletes will start fighting for their rights, claiming that they

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265. Friedman, *supra* note 59.

266. Austermuhle, *supra* note 230; Keyser, *supra* note 230; Yeung, *supra* note 230.

267. Feldman, *supra* note 246.

268. Services, FIELDHOUSE MEDIA, <http://www.fieldhousemedia.net/services/> (last visited Oct. 19, 2013).

269. *Id.*

have been violated. In order to resolve these issues, sports leagues and institutions need to be able to understand and properly address the concept of social media. Because it is a recent phenomenon, this process may take more time, research, and education to fully understand.

In addition, there is a conflict of interest regarding social media use and other communication mediums, especially in the sense that athletes are allowed to give interviews before and after a game but they are not allowed to send out a tweet. Addressing these current issues and anticipating issues that might arise in the future with the expansion of social media is a good place to start. Creating a uniform law that protects the privacy of athletes as well as their rights to free speech while at the same time making sure that they are not saying anything outrageous and inappropriate that would negatively affect the team, is the overall goal.

## V. CONCLUSION

With social media being a recent phenomenon, the rules and regulations placed on social media for athletes are not perfect. No matter whether an athlete is a professional, amateur student-athlete, or volunteering to play for their country, the social media rules and regulations need to be adjusted so that they do not infringe on the athletes' First Amendment rights and privacy rights. The main problem with having rules and regulations regarding social media is that some athletes are getting in trouble for posting social media content that was not in violation of the rules and restrictions placed on them.<sup>270</sup> Because there are no guidelines or restrictions regarding social media,<sup>271</sup> each institution has the ability to treat social media instances in a way that they see fit. Many of these institutions monitor what the student-athletes are posting on social media websites, either by following them themselves or by subscribing to social media monitoring services. This is a complete invasion of privacy. Institutions should prohibit social monitoring of athletes' social media websites and coaches should not be allowed to keep a close eye on their personal postings. Lastly, some professional teams, institutions, and home countries are banning the use of social media completely, which prohibits an athlete from expressing himself and places a prior restraint on speech.

Overall, athletes should be able to speak their minds and state their opinion without worrying about being suspended or fined. These issues regarding social media use need to be resolved now because social media is continuously evolving and intertwined in everyday life.

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270. Ortiz, *Leagues' Social Media Policies*, *supra* note 24.

271. *Id.*

Developing social media guidelines and regulations, like the ones the professional sports leagues have created placing time restrictions on athletes social media use, is currently the best approach to dealing with social media. However, if athletes are being punished for not violating the rules presents a larger dilemma. If there are rules and regulations restricting the time period for when an athlete could use social media, he should not be punished for using social media on his own time. This is a controversial topic, which is hard to address with just one rule. However, whatever the rules are regarding social media, the awareness that the athletes have First Amendment rights and privacy rights should be paramount when determining what the rules should be.

If these issues regarding social media in sports are not addressed or resolved, there will be an increase in athletes fighting for their First Amendment rights and their privacy rights. Social media in sports has become very popular and with practice and experience, proper standards regarding social media use in the sports arena will arise that do not violate the athlete's rights as well as protect the reputation of the sports organization. As for now, athletes just have to "think before [they] tweet."<sup>272</sup>

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272. Torres, *supra* note 71.