

## Fouling the First Amendment: Why Colleges Can't, and Shouldn't, Control Student Athletes' Speech on Social Media

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# Fouling the First Amendment: Why Colleges Can't, and Shouldn't, Control Student Athletes' Speech on Social Media

## I. INTRODUCTION AND OVERVIEW

PLAYING FOR THE NATIONAL BASKETBALL CHAMPION University of Louisville Cardinals is a rarefied existence. Players showcase their talents in a new \$238 million state-of-the-art coliseum with 71 VIP suites and hundreds of high-definition television monitors, described by coaches as “the best arena in America.”<sup>1</sup> They benefit from private tutoring at what the university boasts is “the finest academic facility in the nation,” open more than 90 hours a week.<sup>2</sup> They’ve been President Obama’s honored guests at the White House.<sup>3</sup> But there is one luxury Louisville players do not enjoy: Privacy. Since 2011, their university has required athletes to sign a contract agreeing to have their personal social-media accounts reviewed by a monitoring company, UDiligence, which alerts the Louisville athletic department if any of 406 “flagged” words pop up on a player’s Twitter or Facebook page.<sup>4</sup> Some of the words, including the names of sports agents with whom contact

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1. See Marcus Green, *KFC Yum! Center Tipoff Comes After Twists, Turns*, THE COURIER-JOURNAL (Louisville), Oct. 10, 2010, <http://www.courier-journal.com/article/20101010/SPORTS0203/310100025/KFC-Yum-Center-tipoff-comes-after-twists-turns> (describing October 2010 opening of Cardinals’ amenity-filled basketball arena); Eric Crawford, “Big Time Scoring: University of Louisville among nation’s top sports programs financially,” THE COURIER-JOURNAL, Dec. 4, 2011, *available at* <http://www.courier-journal.com/article/20111203/SPORTS02/312030126/University-of-Louisville-sports-revenue> (quoting University of Louisville head men’s basketball coach Rick Pitino praising the new KFC Yum! Center, which was credited with helping make the men’s basketball program the nation’s most lucrative with \$40.9 million in revenue).

2. Univ. of Louisville Dep’t of Athletics, ON CAMPUS, ACADEMICS & SUPPORT, GOCARDS.COM, <http://www.gocards.com/school-bio/student-athletes.html> (last visited Sept. 1, 2013).

3. James R. Carroll, *President Barack Obama Hails University of Louisville for NCAA Championship, Predicts More Success*, THE COURIER-JOURNAL (Louisville), July 23, 2013, <http://www.courier-journal.com/article/20130723/NEWS01/307230060/President-Barack-Obama-hails-University-Louisville-Cardinals-NCAA-championship-predicts-more-success>.

4. Mark Boxley, *UK and U of L Monitoring Many Athletes’ Social Media Postings*, THE COURIER-JOURNAL (Louisville), Aug. 21, 2012, at A1.

is forbidden, plainly suggest red-flag behavior. Others, including a thesaurus-full of synonyms for “breasts,” are potentially more benign.<sup>5</sup>

Louisville is by no means an outlier. College athletic powerhouses from Florida State to Boise State are enforcing curbs—or even wholesale bans—on how athletes use social networking sites.<sup>6</sup> The instructions given to football players at Virginia’s Old Dominion University exemplify how deeply colleges are involving themselves in their athletes’ online lives: Don’t use Twitter—ever. Don’t use Facebook unless you “friend” the athletic department, so administrators can read what you’re saying. Don’t write anything that might “reflect poorly” on the university.<sup>7</sup>

What makes social media novel and empowering—that it is an immediate, unfiltered way to “speak” with thousands of people at once—is also what makes it frightening to campus regulators. The ability to build a vast online audience with no financial investment also brings with it the ability to widely broadcast intemperate remarks revealing prejudices,<sup>8</sup> ethically dubious behavior,<sup>9</sup> or simply a lack of good taste.<sup>10</sup>

Interjecting school authority into what student-athletes say on social media even in their personal, off-campus hours implicates a host of constitutional

5. Eric Bentley, *Unnecessary Roughness: Why Athletic Departments Need to Rethink Whether to Aggressively Respond to the Use of Social Media by Athletes*, 75 TEX. B. J. 834, 838 (2012).

6. See, e.g., Ken Paulson, *College Athlete Tweet Ban? Free Speech Sacks That Idea*, USA TODAY, Apr. 16, 2012, at 9A (listing athletic programs at Boise State, South Carolina, Mississippi State and Towson among those that have banned or limited athlete’s Twitter usage); David M. Hale, *Seminole Fine With Social Media Ban*, ESPN (Aug. 1, 2012) [http://www.espn.go.com/colleges/fsu/story/\\_id/8193190/florida-state-seminoles-looking-restrict-social-media-use-players](http://www.espn.go.com/colleges/fsu/story/_id/8193190/florida-state-seminoles-looking-restrict-social-media-use-players) (reporting that FSU head football coach banned use of Twitter during football season after “ill-advised” postings, including several during the offseason by athletes critical of the local police department); see also Bentley, *supra* note 5, at 835–36 (2012) (“Rather than run the risk of waiting to see if an athlete will post something damaging to the university, some athletic departments are banning social media, requiring athletes to ‘friend’ a coach, requiring athletes to provide their social media passwords, or even installing an application to be alerted to offensive postings”); Meg Penrose, *Outspoken: Social Media and the Modern College Athlete*, 12 J. MARSHALL REV. INTELL. PROP. L. 509, 521 n.60 (2013) (naming Michigan and Kentucky, in addition to Louisville, as major-college programs that require athletes to accept monitoring of their social-media activity); Patrick Stubblefield, *Evading the Tweet Bomb: Utilizing Financial Aid Agreements to Avoid First Amendment Litigation and NCAA Sanctions*, 41 J.L. & EDUC. 593, 596 (2012) (identifying Loyola University-Chicago as the first to entirely ban athletes from social media sites, followed by Kent State, the University of Minnesota, the University of New Mexico and others).

7. Harry Minium, *Tweet Surrender*, VIRGINIAN-PILOT, Sept. 15, 2012, at 1.

8. Suzanne Haliburton, *Burnette Apologies to Teammates for Posting of Racial Slur*, AUSTIN AMERICAN-STATESMAN, Nov. 6, 2008, at C1 (describing University of Texas’ decision to expel a player from the football team for using a racial slur about newly elected President Obama in a Twitter post on his personal account).

9. See Stubblefield, *supra* note 6, at 596 (describing the case of University of North Carolina at Chapel Hill football star Marvin Austin, whose social-media postings bragging about frequenting posh Miami nightclubs and showing off an expensive watch and sunglasses led to an NCAA investigation of the UNC program resulting in significant penalties).

10. See, e.g., Jake Trotter, *OU Suspends Receiver Jaz Reynolds for Twitter Comments About Texas*, OKLAHOMAN, Sept. 29, 2010, <http://newsok.com/ou-suspends-receiver-jaz-reynolds-for-twitter-comments-about-texas/article/3499714> (last viewed Aug. 2, 2013) (relating story of University of Oklahoma football player suspended for key rivalry game after posting sarcastic Twitter comment encouraging residents of Austin, home to the rival University of Texas, to kill themselves).

uncertainties. The rationales offered for this incursion into individual liberty range from protecting the school (against harm to its image, or from NCAA sanctions for illicit athlete behavior) to protecting the athlete (against self-inflicted reputational damage, or from speech by ill-intentioned outsiders).

Restrictions on athletes' social-media use have ranged from outright bans,<sup>11</sup> to a requirement to disclose passwords and login information so schools can monitor communications that aren't publicly visible,<sup>12</sup> to penalties for specific remarks that officials of the athletic department regard as "inappropriate."<sup>13</sup> The authority of college athletic departments to make and enforce such policies has thus far gone unchallenged in the courts, although it has attracted the attention of legislators in a handful of states where "social media privacy" statutes have been enacted.<sup>14</sup>

At a public institution, the First Amendment protects students' ability to express themselves free from government sanction, and the Due Process Clause protects against the removal of public benefits in an arbitrary way or without adequate notice.<sup>15</sup> Outside the realm of athletics, a public university would be constitutionally estopped from penalizing speech—especially speech that takes place on a personal computer on personal time—merely because it projects an unfavorable image of the student or the school.<sup>16</sup> Is there something so unique about the college/athlete relationship that it justifies discarding well-established constitutional principles?

Colleges point to several justifications for assuming authority over student-athletes' off-campus speech: (1) that a student-athlete is the functional equivalent of an employee because of the exchange of personal services for financial benefits, and like an employee "represents" the school to the public, and (2) that voluntary

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11. See Stubblefield, *supra* note 6, at 596 (identifying Loyola University-Chicago as the first to entirely ban athletes from social media sites, followed by Kent State University, University of Minnesota, University of New Mexico, and others); J. Wes Gay, Note, *Hands Off Twitter: Are NCAA Student Athlete Social Media Bans Unconstitutional?*, 39 FLA. ST. U. L. REV. 781, 796 (2012) (citing the Mississippi State University men's basketball team and the New Mexico State University men's basketball team having implemented bans on social media).

12. See Bentley, *supra* note 5, at 836.

13. See Gay, *supra* note 11, at 798–802 (2012).

14. See David L. Hudson Jr., *Site Unseen: Schools, Bosses Barred from Eyeing Students', Workers' Social Media*, A.B.A. J., Nov. 2012, at 22, 22–23 (describing Delaware's Higher Education Privacy Act, which prohibits colleges from requiring that students or applicants either surrender social-media password information or log into any password-protected website so as to enable a school representative to view its contents).

15. U.S. CONST. amend. XIV, § 1; see also Bentley, *supra* note 5, at 836.

16. See Bentley, *supra* note 5, at 836; Gay, *supra* note 11, at 796; see also Jamie P. Hopkins et al., *Being Social: Why the NCAA has Forced Universities to Monitor Student-Athletes' Social Media*, 13 U. PITT. J. TECH. L. & POL'Y, Spring 2013, at 1, 34 ("[U]nprotected language is not the primary issue that schools are seeking to address . . . yet, bragging about perks given by the athletic department, discussion about recruits, or trash-talking coaches is not unprotected speech. But in fact, these are precisely the kind of topics that schools are seeking to prevent from being posted by their athletes in order to avoid a bad reputation and NCAA sanctions.").

participation in athletics waives—either implicitly or by written agreement—a degree of individual freedom in exchange for the “privilege” of participation.<sup>17</sup>

These justifications at best are legally suspect and at worst—depending on the intensity of control that schools exercise and the measure of punishment they impose—are wholly without constitutional grounding. Heavy-handed restraints on student-athletes’ ability to express themselves are inconsistent with concern for public safety and with sound educational policy. Narrower and more educationally productive alternatives exist to maintain team discipline while teaching “best practices” in the use of online media. Where a more limited incursion into free expression would fulfill the government’s legitimate objectives, the Constitution requires taking that path.

This article looks both at the significant burdens that a college would face in justifying restrictions on athletes’ use of social media in the event of a constitutional challenge, as well as the hurdles that an athlete plaintiff might encounter in trying to persuade a court to entertain this relatively novel claim not perfectly analogous to any of the more familiar First Amendment fact patterns. It concludes that only in narrowly limited circumstances may a public institution force an athlete to accept constraints on the content of lawful off-campus speech.

## II. LEGAL STANDARDS

### A. Free Expression Fundamentals

In the off-campus world, government constraints on the content of speech are viewed with justifiably deep skepticism. As the Supreme Court has declared: “The First Amendment generally prevents government from proscribing speech . . . because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid.”<sup>18</sup> While the government has somewhat greater leeway to

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17. See Gay, *supra* note 11, at 797–802 (arguing that schools and coaches consider speech by student-athletes to be a “privilege” as opposed to a right); Robert A. McCormick & Amy C. McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 156 (2006) (arguing that although grant-in aid athletes in revenue-generating sports at Division I NCAA schools meet the legal definition of employees, they are classified as student-athletes so that colleges can avoid having to provide them with “the protections of employee status”); Mary Margaret Penrose, *Free Speech Versus Free Education: First Amendment Considerations in Limiting Student Athletes’ Use of Social Media*, 1 MISS. SPORTS L. REV. 71 (2011); Patrick Stubblefield, *Evading the Tweet Bomb: Utilizing Financial Aid Agreements to Avoid First Amendment Litigation and NCAA Sanctions*, 41 J.L. & EDUC. 593, 599 (2012).

18. *R. A. V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (quoting *Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991)); see also *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46–47 (1986) (“This Court has long held that regulations enacted for the purpose of restraining speech on the basis of its content presumptively violate the First Amendment.”).

manage the use of its own property for communicative purposes,<sup>19</sup> regulations targeted purely to the content of private individuals' speech on private property—for instance, restricting the types of books that may be sold or films that may be exhibited—almost never survive constitutional scrutiny.<sup>20</sup> A restriction on what students can say during personal, off-campus time would fall into this especially suspect category. Courts apply especially exacting scrutiny to regulations with the purpose or effect of discriminating based on viewpoint.<sup>21</sup> While a content-based regulation may occasionally pass constitutional muster—for instance, a regulation dictating that public commenters at a city council meeting must limit their comments to city business—a regulation allowing comments only by those representing one side of a contested issue would be impermissible.

Only the narrowest subset of speech is categorically unprotected by the First Amendment, including “true threats” to commit violence,<sup>22</sup> the incitement of imminent unlawful activity,<sup>23</sup> or “patently offensive” sexual material that is so lacking in any redeeming value as to be legally obscene.<sup>24</sup> Particularly in recent years, the Supreme Court has reasserted just how limited these exclusions are, refusing to legitimize content-based restraints even on speech of exceedingly low value, such as the anti-gay hate speech of military-funeral protestors affiliated with Westboro Baptist Church.<sup>25</sup>

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19. A somewhat different (and doctrinally murky) set of legal standards applies when the government is regulating the expressive use of public property. See *Perry Ed. Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 44 (1983) (“The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differently depending on the character of the property at issue.”). The Supreme Court has developed a construct – the forum doctrine – that provides varying degrees of protection for speakers depending on the nature of the public property the speaker seeks to use. *Id.* at 45 (describing the forum doctrine). The regulation of students' speech on social media should present no “forum analysis” questions, except in the unlikely occurrence that a student seeks to use a university-provided conduit for expression, such as posting comments to a Facebook page maintained by the athletic department.

20. See, e.g., *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975) (declaring unconstitutional a municipal ordinance that banned drive-in movie theatres from exhibiting films depicting nudity on screens that might be visible to children on public thoroughfares).

21. See *Rosenberger v. Rectors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (declaring, in case involving a college's refusal to fund a student newspaper because of its Christian perspective, that viewpoint discrimination is “an egregious form of content discrimination” and elaborating that the government “must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction”). Indeed, even on government property that is not a public forum at all, regulators may not preferentially pick-and-choose among speakers on the basis of viewpoint. See *Holloman v. Harland*, 370 F.3d 1252, 1280 (11th Cir. 2004) (“Government actors may not discriminate against speakers based on viewpoint, even in places or under circumstances where people do not have a constitutional right to speak in the first place.”).

22. *Virginia v. Black*, 538 U.S. 343, 358–60 (2003).

23. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

24. *Miller v. California*, 413 U.S. 15, 24 (1973).

25. *Snyder v. Phelps*, 1301 S. Ct. 1207, 1220 (2011) (concluding that anti-gay picketing outside military funerals by Westboro Baptist Church, an extremist religious group, “is certainly hurtful and its contribution to public discourse may be negligible” but that the speech nevertheless is constitutionally protected).

When a government restraint on speech is not narrowly tailored so as to restrict only the speech that the government has a compelling interest in preventing, the restraint is vulnerable to challenge under the overbreadth doctrine.<sup>26</sup> In its recent ruling invalidating the Stolen Valor Act, which criminalized lying about having won military honors, the Supreme Court explained, “[t]he First Amendment requires that the Government’s chosen restriction on the speech at issue be ‘actually necessary’ to achieve its interest. . . . There must be a direct causal link between the restriction imposed and the injury to be prevented.”<sup>27</sup> A law may be invalidated as facially overbroad if “a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.”<sup>28</sup> Assurances that enforcement discretion will be used judiciously do not salvage a facially overbroad statute. As the Court stated in striking down a federal statute that criminalized the distribution of images depicting animal cruelty, “the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.”<sup>29</sup>

The government may enforce reasonable regulations on the “time, place and manner” of speakers’ expression, so long as the regulations are drawn and applied without regard to content.<sup>30</sup> The regulation need not be the least speech-restrictive means of accomplishing the government’s objective, but it must be “narrowly tailored to serve a significant governmental interest.”<sup>31</sup> Even a content-neutral regulation may be overturned if it has the effect of closing off so many avenues for speech that a speaker has no reasonable opportunity to reach the intended audience.<sup>32</sup>

Open-ended restrictions on the content of speech also are vulnerable to challenge under the Due Process Clause. A regulation may be declared void for

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26. See *United States v. Williams*, 128 S. Ct. 1830, 1838 (2008) (“[A]ccording to our First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech.”).

27. *United States v. Alvarez*, 132 S. Ct. 2537, 2549 (2012).

28. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008) (citations omitted).

29. *United States v. Stevens*, 130 U.S. 460, 480 (2010).

30. See *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972) (citing as examples of permissible time, place and manner regulations a scheduling system that prevents two parades from competing for space on the same street at the same time, or a noise ordinance limiting the decibel level of amplified speech in residential areas). If a purported “time, place and manner” restriction is found to be content-based, it is unconstitutional unless it can survive strict scrutiny. See *Burk v. Augusta-Richmond Cnty.*, 365 F.3d 1247, 1255 (11th Cir. 2004) (applying strict scrutiny and striking down a permitting ordinance that required only those planning political protests, but not other public gatherings of comparable size, to obtain a permit).

31. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

32. See *Heffron v. Int’l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 655 (1981) (quoting *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949)) (“The First Amendment protects the right of every citizen to ‘reach the minds of willing listeners and to do so there must be opportunity to win their attention.’”); see also *Phelps-Roper v. Strickland*, 539 F.3d 356, 372 (6th Cir. 2008) (explaining that a speaker is not entitled to the “best means of communication,” only to a reasonably effective one with which the government does not interfere).

vagueness if it fails to give intelligible notice of the behavior that will result in penalties.<sup>33</sup> A regulation may also be struck down as unconstitutionally vague if it delegates unfettered enforcement discretion to the executive, inviting arbitrary or discriminatory application.<sup>34</sup>

A “prior restraint” is regarded as an especially noxious and disfavored brand of government regulation, since it prevents speech from ever being heard.<sup>35</sup> However, the First Amendment forbids not merely outright prohibitions on speech, but also actions that intimidate or “chill” a speaker from refraining from speech (for instance, by raising the prospect of civil liability).<sup>36</sup> When the speaker is a student, courts have found that even harsh after-the-fact condemnation of speech by school officials can be sufficiently intimidating as to impose an impermissible chill on the speech of that student and of others who witness the reproach.<sup>37</sup>

Federal courts have fashioned doctrinal exceptions to these boilerplate constitutional principles in the settings of school and the workplace.<sup>38</sup> The exceptions represent a compromise between the interests of authority and individual liberty where the speaker stands in a special relationship with the regulator beyond the ordinary citizen/government relationship.<sup>39</sup>

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33. *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1183–84 (6th Cir. 1995); see *Serv. Emp. Int’l Union v. City of Houston*, 595 F.3d 588, 596 (5th Cir. 2010) (“Because the First Amendment needs ‘breathing space,’ government regulation must be drawn with some specificity . . . Regulation of speech must be through laws whose prohibitions are clear.” (citation omitted)).

34. See *Dambrot*, 55 F.3d at 1183–84.

35. *Weinberg v. City of Chicago*, 310 F.3d 1029, 1045 (7th Cir. 2002) (citing *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (“Prior restraints are not *per se* unconstitutional, however, prior restraints are highly disfavored and presumed invalid.”)).

36. See, e.g., *Snyder v. Phelps*, 131 S. Ct. 1207, 1220–21 (2011) (overturning award of emotional distress tort damages against protesters whose speech touched on issues of public concern); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (finding that the First Amendment precludes an award of civil damages against the publisher of an editorial cartoon about a public figure, even where the cartoon is “outrageous” and inflicts emotional harm).

37. See, e.g., *Holloman v. Harland*, 370 F.3d 1252, 1269 (11th Cir. 2004) (“Given the gross disparity in power between a teacher and a student, [reproachful] comments—particularly in front of the student’s peers—coming from an authority figure with tremendous discretionary authority, whose words carry a presumption of legitimacy, cannot help but have a tremendous chilling effect on the exercise of First Amendment rights.”). In the *Holloman* case, the Eleventh Circuit found that a teacher violated a student’s First Amendment rights by chastising him in front of his class for raising his fist as a symbol of silent protest during the daily Pledge of Allegiance recitation. *Id.* at 1268–69; see also *Smith v. Novato Unif. Sch. Dist.*, 59 Cal. Rptr. 3d 508 (Cal. Ct. App. 2007) (finding that school district impermissibly chilled student commentator’s expression by issuing sharp denunciation of his anti-immigration editorial column, signed by principal and superintendent, asserting that the speech was legally unprotected and should never have been published).

38. See Scott A. Moss, *Students and Workers and Prisoners – Oh, My! A Cautionary Note About Excessive Institutional Tailoring of First Amendment Doctrine*, 54 UCLA L. REV. 1635, 1641–43 (2007) (describing, and critiquing as exaggerated, the rationales offered for affording reduced First Amendment rights to government employees, students and prisoners).

39. *Id.*

*B. The First Amendment Goes to School (or Doesn't)*

The Supreme Court has had only a handful of occasions to pass judgment on the constitutional protection of students' on-campus speech, most frequently in the K-12 setting. The Court's broadest pronouncement on the limits of school regulatory authority came in *Tinker v. Des Moines Independent Community School District*, the landmark case recognizing the right of young antiwar protesters to wear black armbands to school despite a district-enacted ban.<sup>40</sup>

Notably, *Tinker* was a compromise ruling – a halfway point between zero First Amendment protection and the full-force protection that would apply outside of school.<sup>41</sup> The Court based its willingness to give students diminished freedoms on “the special characteristics of the school environment.”<sup>42</sup> A school may enforce a content-based restriction on speech, the Court held, if the speech “materially disrupts classwork or involves substantial disorder or invasion of the rights of others[.]”<sup>43</sup>

Since *Tinker*, the Court has recognized several categories of less-protected speech in the school setting, two of which are of potential significance in the student-athlete context. In *Hazelwood School District v. Kuhlmeier*, the Court for the first time applied the “public forum” analysis to students' expressive use of school property, and determined that First Amendment freedoms were diminished when students sought to express themselves using a “curricular” vehicle, such as a class-produced newspaper, which was operated primarily for teaching rather than expressive purposes.<sup>44</sup> In *Morse v. Frederick*, the Court created a narrow exception permitting the punishment of even non-disruptive speech occurring on school grounds or at “school sanctioned” events if the message could reasonably be understood as encouraging the use of dangerous illegal drugs.<sup>45</sup> While all of the Court's student-speech cases predate the present-day popularization of social media

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40. 393 U.S. 503 (1969).

41. *Id.* at 511; Ronald Schildge & Michael A. Stahler, *Student Speech After Morse v. Frederick: An “Unwise and Unnecessary” Convolution*, VT. B. J., Fall 2009, at 55, 55–56.

42. *Tinker*, 393 U.S. at 506.

43. *Id.* at 513.

44. 484 U.S. 260, 270 (1988).

45. 551 U.S. 393 (2007).

among teens, there is little indication that the Court is inclined to create additional First Amendment carve-outs beyond those already recognized.<sup>46</sup>

By contrast with its measured apportionment of First Amendment liberties at the K-12 level, the Court has spoken expansively of the importance of the free exchange even of challenging and unpopular ideas in the “marketplace” of a college campus.<sup>47</sup> In *Hazelwood*, the Court broadly hinted that the interests of the speaker and the institution might balance out differently at the college level.<sup>48</sup> The Court has never, however, squarely confronted the extent to which the *Tinker* line of school-speech cases applies at the college level.

In its first post-*Tinker* case involving the First Amendment rights of college students, the Court approvingly referenced *Tinker* in concluding that a public university failed to satisfy its “heavy burden” in justifying refusal to recognize a campus chapter of Students for a Democratic Society.<sup>49</sup> But in a ruling later that same term—holding that a public university acted unconstitutionally in suspending the student editor of an underground newspaper because of its offensive editorial content, which included strong profanity—the Court cited *Tinker* just once in passing.<sup>50</sup>

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46. Justices Alito and Kennedy, whose votes were decisive in the *Morse* majority, concurred in finding the student’s pro-drug speech punishable “on the understanding that the opinion does not hold that the special characteristics of the public schools necessarily justify any other speech restrictions.” *Id.* at 422 (Alito, J., concurring). The Court has declined multiple invitations since 2007 to take up circuit-level rulings concerning schools’ authority over off-campus speech. *See, e.g.,* J.S. *ex rel* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915 (3d Cir. 2011) [hereinafter *Blue Mountain*] (en banc) (holding that the school district violated a student’s free-speech rights when the district suspended the student who created, from her home over a weekend, a social media website profile in the school principal’s name and filled with crude material), *cert. denied*, 132 S. Ct. 1097 (2012); Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565 (4th Cir. 2011) (holding that a public school acted constitutionally in punishing a student who created an off-campus MySpace page cruelly ridiculing a classmate as having herpes), *cert. denied*, 132 S. Ct. 1095 (2012).

47. *See, e.g., Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967) (overturning New York’s requirement that college employees sign a loyalty oath, forswearing affiliation with the Communist Party, and declaring that a college classroom is “peculiarly the ‘marketplace of ideas’”). As the Court elaborated in *Keyishian*: “Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.” *Id.* *See also* Healy v. James, 408 U.S. 169, 180 (1972) (“[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”) (internal quotation marks and citation omitted).

48. *Hazelwood*, 484 U.S. at 273 n.7 (“We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level.”).

49. *Healy*, 408 U.S. at 184.

50. *Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667, 669–70 (1973).

Lacking unequivocal direction from the Supreme Court, lower courts at times rely on *Tinker* (and increasingly, even *Hazelwood*<sup>51</sup>) as the starting point for analyzing content-based restrictions on speech at public universities. Even in those situations, courts typically view content-based regulations with greater skepticism at the college level, in light of the maturity of the speaker and audience, and the role of colleges as laboratories for experimentation with ideas.<sup>52</sup>

Often, however, regulations on college students' speech are evaluated under the "real-world" standards that would apply outside the educational setting, without reference to student-speech jurisprudence. For example, campus "civility codes" commonly are evaluated—and invalidated—under the same vagueness and overbreadth standards that would apply to content-based regulations by a city, county or state.<sup>53</sup>

One of today's most confounding and frequently litigated First Amendment issues is when, if ever, a school may control the off-campus speech of its students on the basis that the speech can be read at, and/or cause a reaction at, school functions.<sup>54</sup> These cases almost exclusively have arisen at the K-12 level, but are at least instructive about—if not directly applicable to—the scope of college students' rights as well.

Importantly, the Supreme Court has never said schools have authority over off-campus speech equivalent to that of on-campus speech. In fact, the Court has quite strongly indicated to the contrary. In *Hazelwood*, the Court prefaced its ruling by

51. See Frank D. LoMonte, *The Key Word is Student: Hazelwood Censorship Jumps the Ivy-Covered Gates*, 11 FIRST AMEND. L. REV. 305, 307–08, 334–35 (2013) (commenting on the Sixth Circuit's 2012 decision in *Ward v. Polite*, 667 F.3d 727, to join the Seventh, Tenth and Eleventh Circuits in applying the *Hazelwood* standard to the curricular speech of college students).

52. See Derek P. Langhauser, *Free and Regulated Speech on Campus: Using Forum Analysis for Assessing Facility Use, Speech Zones, and Related Expressive Activity*, 31 J.C. & U.L. 481, 502 (2005).

53. See, e.g., *DeJohn v. Temple Univ.*, 537 F.3d 301, 317–18 (3d Cir. 2008) (concluding that a college's harassment policy was unconstitutionally overbroad, because it allowed for punishment of "offensive" or "gender-motivated" comments even if no listener felt a severe or pervasive level of harassment, and even if the comments addressed "core" political or religious expression); *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177, 1183–85 (6th Cir. 1995) (invalidating on overbreadth grounds a university's "discriminatory harassment" policy that defined punishable harassment as including "offensive" or "demeaning" speech, which the court found to encompass constitutionally protected speech); *Doe v. Univ. of Mich.*, 758 F. Supp. 852, 867 (E.D. Mich. 1989) (striking down as overbroad university's anti-harassment policy outlawing speech that "stigmatizes or victimizes" another person, because the policy swept in constitutionally protected speech).

54. See Karly Zande, *When the School Bully Attacks in the Living Room: Using Tinker to Regulate Off-Campus Student Cyberbullying*, 13 BARRY L. REV. 103, 122 (2009) (discussing various ways federal and state courts have tried to apply *Tinker* in situations where the student speech originated off-campus); see also John T. Ceglia, Comment, *The Disappearing Schoolhouse Gate: Applying Tinker in the Internet Age*, 39 PEPP. L. REV. 939, 961–64 (2012).

acknowledging the robust protect afforded to students under *Tinker*, but then went on:

*We have nonetheless recognized that the First Amendment rights of students in the public schools are not automatically coextensive with the rights of adults in other settings and must be applied in light of the special characteristics of the school environment. A school need not tolerate student speech that is inconsistent with its basic educational mission even though the government could not censor similar speech outside the school.*<sup>55</sup>

Then in *Morse*, when explaining why students are given the benefit of reduced legal protection at school events, the Court recounted its 1986 ruling in the case of a student assembly speaker, Matthew Fraser, whose sexual innuendo was deemed in that setting to be constitutionally unprotected speech.<sup>56</sup> The *Morse* Court observed: “Had Fraser delivered the same speech in a public forum outside the school context, it would have been protected.”<sup>57</sup> There is, in other words, scant legal authority addressing the level of control a public school may exercise over students’ off-campus speech on personal time, but every indication that the Court regards off-campus expression as meaningfully distinct from, and deserving of greater protection than, on-campus expression.

In the earliest generation of online-speech cases to reach the judiciary, courts readily concluded that off-campus speech—even when posted on widely viewable websites—was beyond the disciplinary authority of schools.<sup>58</sup> In those cases, courts regarded the location of the students’ speech (and the absence of proof that the speakers themselves “brought” the speech onto the campus) as an important, if not decisive, consideration.<sup>59</sup> But the Second Circuit’s 2007 decision in *Wisniewski v.*

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55. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (internal quotation marks and citations omitted) (emphasis added).

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

57. *Morse v. Frederick*, 551 U.S. 393, 405 (2007).

58. See, e.g., *Mahaffey ex rel. Mahaffey v. Aldrich*, 236 F. Supp. 2d 779, 785–86 (E.D. Mich. 2002) (finding that a high school student’s off-campus website, which was created “for laughs” and included a list of people he wished “would die,” did not constitute a “true threat”); *Killion v. Franklin Reg’l Sch. Dist.*, 136 F. Supp. 2d 446, 455–56 (W.D. Pa. 2001) (finding no school authority to punish a student for an off-campus website, links to which he emailed to some classmates, containing a sarcastic “Top Ten” list crudely ridiculing the school athletic director); *Emmett v. Kent Sch. Dist.*, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000) (rejecting school’s claim that “mock obituaries” published on student’s off-campus website were punishable as a threat of violence); *J.S. ex rel H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 859–65 (Pa. 2002) [hereinafter *J.S.*] (holding that a middle school student’s website did not constitute a “true threat” even though the site listed reasons a teacher should die, showed a picture of the teacher’s head severed from her body and joked about soliciting funds to hire a hit man).

59. See, e.g., *Mahaffey*, 236 F. Supp. 2d at 785; *Killion*, 136 F. Supp. 2d at 456; *Emmett*, 92 F. Supp. 2d at 1090; *J.S.*, *supra* note 58, at 847.

*Board of Education of the Weedsport Central School District*<sup>60</sup> signaled a mentality shift in favor of school authority.

In *Wisniewski*, eighth-grader Aaron Wisniewski was punished for a series of otherwise-harmless instant messages sent to classmates off campus, in which he used as his identifying icon a crudely drawn cartoon caricature of his math teacher being shot in the head.<sup>61</sup> Without Wisniewski's knowledge or consent, one recipient shared a message with a classmate, who showed the cartoon icon to the math teacher.<sup>62</sup> Although an investigation concluded that Wisniewski meant the cartoon as a joke and had no violent intentions, the teacher was so panicked that he took a long leave of absence and was unable to continue as Wisniewski's teacher.<sup>63</sup> The Second Circuit rejected Wisniewski's First Amendment challenge to the discipline, concluding that—although occurring entirely off campus—the speech was subject to school regulation under the *Tinker* standard because of the “reasonably foreseeable risk that the icon would come to the attention of school authorities.”<sup>64</sup>

Since *Wisniewski*, and since social-networking sites have achieved pervasive worldwide popularity so as to magnify the theoretical reach and durability of speech, courts have been significantly more inclined to indulge schools' incursions into their students' off-campus lives. The Fourth and Eighth Circuits have expressly treated off-campus speech on social media as the functional equivalent of on-campus speech, equally subject to school authority within the bounds of *Tinker*.<sup>65</sup> Those cases—in the Fourth Circuit, a classic “cyberbullying” scenario in which students cruelly defamed a classmate by name, and in the Eighth Circuit, a prolonged online “chat” that devolved into a discussion of bringing guns to school and murdering specific individuals—presented highly unsympathetic speakers engaging in speech that arguably was legally unprotected even in the adult world.<sup>66</sup> Where speech is of greater constitutional dignity—because it touches on matters of public concern, or involves ridicule of school administrators and not vulnerable children—courts have been less deferential. The *en banc* Third Circuit has expressed doubt as to whether *Tinker* is adequately protective of speech taking place on the

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60. 494 F.3d 34, 38–40 (2d Cir. 2007).

61. *Id.* at 36.

62. *Id.*

63. *Id.*

64. *Id.* at 38. The court went on to acknowledge, somewhat unusually, that the judges were divided over whether the school had the burden of demonstrating it was reasonably foreseeable that the speech itself would make its way onto campus, or whether the fact that it did reach campus was enough. *Id.* at 39.

65. *Kowalski v. Berkeley Cnty. Sch.*, 652 F.3d 565, 574 (4th Cir. 2011); *D.J.M. ex rel. D.M. v. Hannibal Sch. Dist.*, 647 F.3d 754 (8th Cir. 2011) [hereinafter *D.M.*].

66. *Kowalski*, 652 F.3d at 567–68; *D.M.*, *supra* note 65, at 758.

Internet outside of school time or school functions,<sup>67</sup> while the Second Circuit has equivocated.<sup>68</sup>

In one of the few fully litigated cases involving a college student's off-campus expression on a social networking site, the Minnesota Supreme Court upheld the University of Minnesota's imposition of discipline on a graduate student studying to be a funeral director, because of speech perceived as violating the standards of her intended profession (including jokes on a Facebook wall about the cadaver she was assigned to dissect).<sup>69</sup> Among the comments that the college deemed punishable were two joking references to using a dissecting tool to do violence to "a certain someone," Tatro's winking reference to a bad romantic breakup.<sup>70</sup> Declining to follow any accepted First Amendment precedent – from the "school speech" setting or otherwise – the state Supreme Court fashioned a brand-new doctrine empowering colleges to enforce restraints on students' off-campus speech that are "narrowly tailored and directly related to established professional conduct standards."<sup>71</sup> (Because of the student appellant's death,<sup>72</sup> no attempt was made to take the case to the U.S. Supreme Court, where it is doubtful in light of Justice Alito's concurrence in *Morse* that a majority exists to recognize a new "accepted professional standards" exemption to the First Amendment.)

Cases implicating students' participation in extracurricular activities present distinct analytical challenges. Courts are inclined to grant schools extra deference when students' speech takes place in the context of their participation in athletics, student government or other "optional" activities – particularly when the punishment is imposed within the confines of that activity.<sup>73</sup> In an especially harsh

67. See *Blue Mountain*, 650 F.3d 915, 929–31 (3d Cir. 2011) (en banc) (finding that, even if *Tinker* did apply to a prank posted by a middle-school student on the MySpace social networking site cruelly mocking her principal, the prank's impact on the school was limited to a few momentarily distracting student conversations, which fell short of a punishable level of disruption). The concurrence went significantly further, opining that *Tinker* was insufficiently protective and that "the First Amendment protects students engaging in off-campus speech to the same extent it protects speech by citizens in the community at large." *Id.* at 936 (Smith, J., concurring).

68. See *Doninger v. Niehoff (Doninger II)*, 642 F.3d 334, 349 (2d Cir. 2011) (concluding that, whether a student's off-campus blog is punishable under the *Tinker* standard or is subject to some greater degree of protection, it was objectively reasonable for school disciplinarians to believe *Tinker* applied, thus entitling them to qualified immunity in student's First Amendment challenge); see also *Doninger v. Niehoff (Doninger I)*, 527 F.3d 41, 50 (2d Cir. 2008) (finding it likely that *Tinker* would provide the standard for assessing the legality of the school's disciplinary action based on the precedent set forth in *Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34 (2d Cir. 2007)).

69. See *Tatro v. Univ. of Minn.*, 816 N.W.2d 509, 512–13 (Minn. 2012).

70. *Id.*

71. *Id.* at 521.

72. Seth Zweifler, *Amanda Tatro, Who Fought Free Speech Battle Against the University of Minnesota, Dead at 31*, STUDENT PRESS L. CTR. BLOG (June 26, 2012), <http://www.splc.org/wordpress/?p=3844>.

73. See Matthew J. Mitten & Timothy Davis, *Athlete Eligibility Requirements and Legal Protection of Sports Participation Opportunities*, 8 VA. SPORTS & ENT. L. J. 71, 119 (2008) (remarking on "the extraordinary freedom academic institutions have from any probing judicial scrutiny").

result, the Fifth Circuit determined that a high school cheerleader had no First Amendment recourse after she was removed from the cheerleading squad for silently taking a seat during a cheer requiring her to approvingly recite the name of the basketball player she had accused of raping her.<sup>74</sup> The court's brief, unpublished opinion characterized the student's role while performing her cheerleading assignments as "a mouthpiece through which SISD [the school district] could disseminate speech."<sup>75</sup> Likewise, the Second Circuit deferred to a principal's judgment that a student leader's blog entry – in which she used disrespectful language about school officials while urging members of the community to call and email the school to help her overturn a policy decision – reflected unfitness for her position as a class officer.<sup>76</sup> The court found especially persuasive the relative leniency of the school's disciplinary response, which was limited to disqualifying the blogger from class office, an extracurricular activity in which participation was voluntary.<sup>77</sup>

### C. *The First Amendment Goes to Work (or Doesn't)*

Public employees have the benefit of only limited First Amendment protection when speaking in their employee capacity, protection that has eroded over the last two decades. In *Pickering v. Board of Education*, the Supreme Court recognized that resolving employee-speech cases required reconciling the competing interests of the government in the efficient delivery of services, the employee in sharing the benefit of her knowledge, and the electorate in honest and effective government that is facilitated by unimpeded access to information.<sup>78</sup> In *Pickering*, the Court sided with a schoolteacher who was fired over a letter-to-the-editor of the local newspaper criticizing the district's funding priorities, remarking that school employees would have informed perspective beneficial to the public discourse.<sup>79</sup>

The Court applied a limiting gloss on *Pickering* in *Connick v. Myers*.<sup>80</sup> In *Connick*, a state prosecutor aggrieved by a pending reassignment decided to circulate a survey within the office soliciting feedback about working conditions and morale.<sup>81</sup> When her supervisor found out she had distributed the survey, he fired her.<sup>82</sup> The Supreme

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74. *Doe v. Silsbee Indep. Sch. Dist.*, 402 F. App'x 852, 853–55 (5th Cir. 2010).

75. *Id.* at 855.

76. *See Doninger v. Niehoff (Doninger I)*, 527 F.3d 41, 52 (2d Cir. 2008).

77. *See id.* at 53 (commenting, after observing relative leniency of student's punishment, "[w]e are mindful that, given the posture of this case, we have no occasion to consider whether a different, more serious consequence than disqualification from student office would raise constitutional concerns.").

78. 391 U.S. 563, 568–72 (1968) (holding a teacher's dismissal for writing a letter on issues of public importance cannot be upheld and concluding that limiting teachers' opportunities to contribute to public debate is not significantly greater than limiting a similar contribution from the general public).

79. *Id.* at 572–73.

80. 461 U.S. 138, 142 (1983).

81. *Id.* at 140–41.

82. *Id.* at 141.

Court concluded that the survey was primarily about, and was motivated by, unhappiness over internal workplace conditions rather than matters of genuine public concern, and thus was entitled only to “limited” First Amendment regard.<sup>83</sup> As a result of *Connick*, “public concern” has become a reviewing court’s threshold inquiry before the duty to balance the parties’ interests under *Pickering* even comes into play.

The Court significantly narrowed *Pickering*’s scope in *Garcetti v. Ceballos*.<sup>84</sup> In *Garcetti*, a deputy district attorney was disciplined for circulating an internal memo critical of the work of his office and the police department in preparing a search warrant.<sup>85</sup> In a 5-4 ruling, the Court held that if employees are engaged in speech “pursuant to their official duties,” that speech is entirely without First Amendment protection.<sup>86</sup> Because the prosecutor was assigned to prepare the memo as part of his work responsibilities, he was not speaking as a citizen, and there was no need to conduct a *Pickering* balancing of interests.<sup>87</sup>

Properly understood, *Garcetti* stands for the unremarkable proposition that, when speaking about a particular subject is a part of an employee’s job description, that speech is the government’s speech, in which the employee has no personal expressive interest of constitutional dimension. *Garcetti* should be analogous, if ever, only to student-athletes’ speech when they appear in uniform at official functions, such as postgame news conferences, where speaking to the news media is regarded as an expectation of team participation.

The *Garcetti* line of employee-speech cases, if faithfully applied by the lower courts, should seldom apply to off-duty speech on social-networking pages, since it is neither within the scope of an employee’s job duties to create a personal Facebook page nor likely that a reasonable reader would mistake a Facebook wall post for a government agency’s official policy statement. But lower courts have, at times, expansively applied a *Garcetti* analysis even to off-hours expression, where it is alleged that the speaker’s message would bring disrepute to the government agency and undermine the agency’s own contrary official message.<sup>88</sup>

Deciding that a government employee engaged in legally protected speech is just the first step in determining whether an actionable retaliation claim exists.

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83. *Id.* at 154.

84. 547 U.S. 410, 424 (2006).

85. *Id.* at 415.

86. *Id.* at 421.

87. *Id.* at 421–22.

88. See Helen Norton, *Constraining Public Employee Speech: Government’s Control of its Workers’ Speech to Protect its Own Expression*, 59 DUKE L.J. 1, 16 (October 2009) (“[C]ourts increasingly hold that the government may also control even its workers’ off-duty speech to protect its own expressive interests.”); see also *id.* at 18–20 nn.62–69 and accompanying text (citing a sting of circuit court rulings affirming, in reliance on the off-duty speech doctrine, the firing of law enforcement officers who engaged in racially or sexually offensive speech during their off-hours, even where nothing about the speech identified the speaker’s employment affiliation).

Assuming that the employee spoke on a matter of public concern (*Connick*)<sup>89</sup> and that the speech was beyond the scope of her job responsibilities (*Garcetti*),<sup>90</sup> the question then becomes whether the employee experienced a deprivation causally connected to her message that courts are prepared to recognize as retaliatory.

For many years, plaintiffs who experienced government reprisals for speech were thwarted in recovering under a First Amendment theory unless they could demonstrate that the retaliatory action deprived them of a benefit to which they had a vested constitutional entitlement. The “rights/privileges doctrine” sprouted from Justice Holmes’ glib pronouncement in an 1892 case, *McAuliffe v. City of New Bedford*, that a citizen “may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.”<sup>91</sup> The doctrine proved fatal to generations of claims by public employees forced to check their constitutional rights at the entryway.<sup>92</sup> When New York schoolteachers challenged a 1950s anti-Communist statute forbidding membership in anti-American groups, the Supreme Court reached back to *McAuliffe* and declared that employees “have no right to work for the State in the school system on their own terms.”<sup>93</sup> That changed with the Supreme Court’s 1967 decision in *Keyishian v. Board of Regents*—challenging, this time at a state university, the same New York anti-Communist law upheld in *Adler*.<sup>94</sup> In *Keyishian*, the Court finally renounced formalistic reliance on “rights” versus “privileges” for purposes of a constitutional claim, holding that—even if a government agency has discretion to award or withhold a benefit—it may not do so for a retaliatory purpose to deter the exercise of constitutional rights.<sup>95</sup> Subsequently, the Court famously declared that even so ephemeral a slight as the cancellation of an office birthday party could, if meant to inhibit constitutionally protected speech, give rise to a First Amendment claim.<sup>96</sup>

Outside of the public employment context, the federal courts have clearly recognized that any government response to speech may be unlawfully retaliatory if it “would chill or silence a person of ordinary firmness from future First

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89. *Connick v. Myers*, 461 U.S. 138, 146 (1983).

90. *Garcetti*, 547 U.S. at 423.

91. 29 N.E. 517, 517 (Mass. 1892).

92. See *infra* notes 93–96 and accompanying text.

93. *Adler v. Bd. of Educ. of City of N.Y.*, 342 U.S. 485, 492 (1952) (citing *United Pub. Workers v. Mitchell*, 330 U.S. 75 (1947)).

94. 385 U.S. 589 (1967).

95. *Id.* at 605–06.

96. *Rutan v. Republican Party of Ill.*, 868 F.2d 943, 954 n.4 (7th Cir. 1989), *aff’d in part and rev’d in part*, 497 U.S. 62, 75 n.8 (1990). Widely discounted as *dicta*, the “birthday party” level of materiality for a retaliation claim was borrowed directly from the Seventh Circuit opinion. See, e.g., *Pierce v. Tex. Dep’t of Criminal Justice*, 37 F.3d 1146, 1150 n.1 (5th Cir. 1994) (“We choose not to read the Supreme Court’s *dicta* literally; rather, we apply the main analysis of *Rutan* to retaliation claims and require more than a trivial act to establish constitutional harm.”).

Amendment activities.”<sup>97</sup> But courts have had more difficulty locating the proper standard when a public employee brings a retaliation claim against her employer. In some judicial circuits, public employees claiming they were punished for constitutionally protected speech have been forced to prove they suffered a materially adverse change in the terms of their employment, such as firing or demotion to a lower-paying job.<sup>98</sup> Other circuits have been more hospitable, recognizing that state action short of an adverse employment decision could “silence a person of ordinary firmness.”<sup>99</sup> At least some of the confusion resulted from decades of uncertainty over the threshold for bringing a retaliation claim under Title VII of the Civil Rights Act of 1964, the federal employment discrimination statute.<sup>100</sup> Because First Amendment retaliation claims so often coexist with statutory claims as part of Title VII litigation, courts have been perhaps understandably tempted to apply comparable standards to the two causes of action.<sup>101</sup>

While it has long been recognized that employers may not retaliate against either a victim of discrimination or just a concerned bystander who takes part in a Title VII complaint, for decades courts were divided over the standard for what constitutes actionable retaliation.<sup>102</sup> In the view of some courts, only a tangibly adverse (or “ultimate”) employment action—a change in pay or rank, or a suspension or removal from employment—could support a statutory claim of retaliation.<sup>103</sup> Others were more lenient, recognizing that a retaliation claim could lie

97. See, e.g., *Mendocino Emtl. Ctr. v. Mendocino Cnty.*, 192 F.3d 1283, 1300 (9th Cir. 1999) (applying the “ordinary firmness” standard to First Amendment suit by environmental activists who claimed police falsely arrested them in retaliation for past protest activity) (internal citation and quotation marks omitted).

98. See *Meyers v. Starke*, 420 F.3d 738, 744 (8th Cir. 2005) (quoting *Duffy v. McPhillips*, 276 F.3d 988, 991 (8th Cir. 2002)); *DeGuiseppe v. Vill. of Bellwood*, 68 F.3d 187, 191 (7th Cir. 1995); *Pierce*, 37 F.3d at 1149; Elizabeth J. Bohn, *Put on Your Coat, a Chill Wind Blows: Embracing the Expansion of the Adverse Employment Action Factor in Tenth Circuit First Amendment Retaliation Claims*, 83 DENV. U. L. REV. 867, 871–75 (2006) (categorizing courts’ approaches as either engrafting the Title VII standard onto a First Amendment retaliation claim, demanding that the plaintiff prove she suffered action “that would deter a similarly situated individual of ordinary firmness” from speaking, or requiring only that the plaintiff show a detrimental action—even a slight one—that impermissibly chilled speech).

99. Bohn, *supra* note 98 at 873–74 (citation omitted). For examples of Circuit Courts of Appeals utilizing the “person of ordinary firmness standard, see *Zelnik v. Fashion Inst. Of Tech.*, 464 F.3d 217, 225 (2d Cir. 2006) (citing *Washington v. Cnty. of Rockland*, 373 F.3d 310, 320 (2d Cir. 2004); *Naucke v. City of Park Hills*, 284 F.3d 923, 927–28 (8th Cir. 2002) (citing *Carroll v. Pfeffer*, 262 F.3d 847, 850 (8th Cir. 2001); *Suppan v. Dadonna*, 203 F.3d 228, 235 (3d Cir. 2000); *Mattox v. City of Forest Park*, 183 F.3d 515, 520 (6th Cir. 1999) (citing *Bloch v. Ribar*, 156 F.3d 673, 678 (6th Cir. 1998)).

100. 42 U.S.C. §§ 2000e to 2000e-17 (2006).

101. See Rosalie Berger Levinson, *Superimposing Title VII’s Adverse Action Requirement on First Amendment Retaliation Claims: A Chilling Prospect for Government Employee Speech*, 79 TUL. L. REV. 669, 686–87 (2005) (noting that appellate courts started using Title VII jurisprudence to block First Amendment violation claims brought by government employees).

102. For a brief discussion on the circuit split regarding retaliator actions in the workplace, see *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 60–61 (2006) [hereinafter *Burlington Northern*].

103. *Id.* at 60.

even where the change in employment conditions was more subtle, such as an assignment to less-desirable duties.<sup>104</sup>

In 2006, the Supreme Court settled the matter. In *Burlington Northern & Santa Fe Railway Co. v. White*, a female forklift operator contended that she was assigned to more strenuous and less prestigious laborer duties after lodging a claim of unlawful sex discrimination.<sup>105</sup> The Court found the claim actionable, ruled that an employee need only show a materially adverse action—not necessarily one that changes the financial conditions of employment—to prevail on a statutory retaliation claim.<sup>106</sup> Significantly, the retaliatory action need not even be strictly employment-related, so long as it is sufficiently severe that it might dissuade a reasonable employee from lodging or supporting a discrimination claim.<sup>107</sup> Few published cases since *Burlington Northern* address whether the Court’s modification of the Title VII retaliation standard necessarily also alters the threshold for bringing a First Amendment retaliation case.<sup>108</sup> But it would be counterintuitive in light of the Supreme Court’s guidance in *Rutan* to require more demanding proof of retaliation to sustain a First Amendment claim.

Mirroring the discussion on campus, one of the most actively contested issues involving employee speech today involves the extent to which employers may regulate or punish speech taking place entirely outside the workplace setting. In the public employment context where First Amendment interests are implicated, the first round of “Internet era” rulings has been decidedly mixed. Some rulings uncritically accept that, because government workers’ off-hours blogging and tweeting can damage their effectiveness at work, the *Garcetti* level of employer

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104. See, e.g., *Ray v. Henderson*, 217 F.3d 1234, 1240, 1243–44 (9th Cir. 2000) (defining adverse employment action “broadly” to include the elimination of an employee program, elimination of “the flexible start-time policy,” the “institut[ution of] lockdown procedures,” and reduced workload and pay); *Aviles v. Cornell Forge Co.*, 183 F.3d 598, 606 (7th Cir. 1999) (filing a false police report about the employee qualifies as adverse employment action); *Passer v. Am. Chem. Soc.*, 935 F.2d 322, 331 (D.C. Cir. 1991) (employer’s cancellation of symposium honoring employee may be “adverse employment action”).

105. *Burlington Northern*, *supra* note 102, at 58–59.

106. *Id.* (quoting *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006)) (finding that a retaliatory act is actionable under Title VII if “a reasonable employee would have found the challenged action materially adverse, ‘which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination’”).

107. *Id.*; see also J. Gregory Grisham & Frank L. Day, *Title VII Retaliation Claims After White: The Struggle to Define Materially Adverse Conduct in the Context of the Reasonable Employee Standard*, 10 J. ENGAGE 80, 81–83 (February 2009) (discussing range of retaliatory actions—including, in one instance, complicity in setting the complaining employee’s car on fire—that courts have, post-*White*, found capable of qualifying as materially adverse).

108. For instance, in the post-*White* case of *Worley v. City of Lilburn*, the Eleventh Circuit cited the *White* standard in the context of assessing an employee’s Title VII claim, but then reverted to the pre-*White* formulation – requiring an “important” change in a term of employment – to sustain the employee’s accompanying First Amendment retaliation claim. See *Worley*, 408 Fed. App’x. 248, 250–52 (11th Cir. 2011).

control follows them home.<sup>109</sup> Others are more protective of public employees' ability to speak unguardedly off the clock.<sup>110</sup> Even in the private workplace, the legal system is slowly adapting to the reality that the small-group watercooler conversations of earlier generations are increasingly taking place on widely viewable social networking pages.<sup>111</sup>

### III. CONTROLLING STUDENTS' SPEECH IN THE EXTRACURRICULAR SETTING

#### A. "The Dark Ages": Athlete Speech Rights Before Facebook

Colleges' interests in enforcing conformity and to preserving a favorable public image have always created friction with athletes' interests in freedom of expression. Even so, student athletes have prevailed on First Amendment claims—even when speaking within the school setting—where courts recognized their speech as societally valuable and where the speech did not cross the line into defiant behavior.

In *Pinard v. Clatskanie School District 6J*, high school basketball players in Oregon delivered a joint petition to their coach asking for his resignation, alleging a pattern of "incessant yelling, profanity and abusive coaching tactics."<sup>112</sup> When their principal learned of the petition, he called a team meeting with the athletic director, where the athletes elaborated on their grievances.<sup>113</sup> Because the coach was not immediately fired, all but one of the players elected to skip the team's next game.<sup>114</sup> The next day, players testified, the principal "permanently suspended" all of the petition-signers from the team (though the principal claimed only those who boycotted the game were suspended).<sup>115</sup> The students alleged that removal from the

109. See, e.g., *Stengle v. Office of Dispute Resolution*, 631 F. Supp. 2d 564, 576–77, 581–82 (M.D. Pa. 2009) (finding employer's actions were non-retaliatory when employee's blog raised public concern about potential bias that would conflict with her duties, and potential efficiency problems for her department).

110. See, e.g., *In re Rubino v. City of N.Y.*, 965 N.Y.S.2d 47, 48 (App. Div. 2013) (reversing, as "shocking to one's sense of fairness," the firing of a teacher who joked on Facebook about wishing unruly students would drown, in light of the teacher's clean disciplinary record and "her expression that she would never do something like this again").

111. The National Labor Relations Board, which regulates only private employers, recently has signaled that punishing workers for complaining about their workplaces on social media might constitute a sanctionably unfair labor practice, if the employee's speech can be understood as summoning fellow workers to organize to improve working conditions. See Amy L. Rosenberger, *Early Lessons from the NLRB on Social Media*, LEGAL INTELLIGENCER (May 15, 2013 12:00AM), [http://www.law.com/jsp/pa/PubArticlePA.jsp?id=1202598466318&Early\\_Lessons\\_From\\_the\\_NLRB\\_on\\_Social\\_Media](http://www.law.com/jsp/pa/PubArticlePA.jsp?id=1202598466318&Early_Lessons_From_the_NLRB_on_Social_Media) (describing NLRB findings that employers violated National Labor Relations Act by penalizing employees for using social media to engage in "concerted activities" for the purpose of "mutual aid or protection").

112. 467 F.3d 755, 760 n.5 (9th Cir. 2006).

113. *Id.* at 761.

114. *Id.* at 762.

115. *Id.*

team violated their First Amendment rights.<sup>116</sup> The Ninth Circuit agreed that, to the extent that the removal was based on having signed the petition or voiced criticism in the principal's meeting, it was unlawful.<sup>117</sup> Applying *Tinker*—and rejecting the school's invitation to instead apply the *Connick* “public concern” standard that governs employee speech—the court held that the players' speech, presented in a private setting to a small audience, could not reasonably have been expected to produce a disruption.<sup>118</sup>

*Pinard* relied on a Tenth Circuit ruling, *Seamons v. Snow*,<sup>119</sup> where an athlete's complaints about a coach's behavior were likewise held to constitute protected speech. The case involved a high school football player who complained to school authorities after teammates beat him up in the locker room.<sup>120</sup> The player said the head football coach demanded that he apologize to the team for blowing the whistle on the hazing; when he refused, he was removed from the squad.<sup>121</sup> The Tenth Circuit found the coach's behavior actionable under the *Tinker* standard, reasoning that coaches may not punish “peaceful speech” that does not create substantial disorder, materially disrupt class work, or invade the rights of others.<sup>122</sup>

Other rulings, however, place a relatively higher premium on team unity, emphasizing that athletes voluntarily surrender a degree of freedom in exchange for the privilege of playing sports. In these cases, courts are inclined to “define down” what it means to substantially disrupt school operations, so that merely interfering with team cohesion removes speech from the protection of *Tinker*.<sup>123</sup> These cases, either explicitly or implicitly, liken the student-school relationship to the employee-employer relationship so that complaints about “working conditions” within the athletic program will be viewed as mere personal gripes unworthy of constitutional recognition.<sup>124</sup>

Most prominent among these is the Sixth Circuit's ruling in *Lowery v. Euverard*, a case involving a high school football team's revolt against a coach they found unbearable to play for.<sup>125</sup> In *Lowery*, students at a Tennessee high school circulated a petition seeking the removal of their head football coach, Marty Euverard, alleging that the coach “struck a player in the helmet, threw away college recruiting letters to

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116. *Id.* at 763.

117. *Id.* at 764.

118. *Id.* at 766–70.

119. 84 F.3d 1226 (10th Cir. 1996).

120. *Id.* at 1230.

121. *Id.*

122. *Id.* at 1237–38.

123. See *Lowery v. Euverard*, 497 F.3d 584, 596 (6th Cir. 2007) (finding the school administration's response to a student petition reasonable because of the potential disruption to team unity if the coaches had not acted).

124. See *id.* at 596–97 (explicit comparison of student athletes to government employees); *Marcum v. Dahl*, 658 F.2d 731, 734–35 (10th Cir. 1981) (implicit comparison of student athletes to government employees by applying *Pickering* and government employee analysis).

125. *Lowery*, 497 F.3d at 585–86 (6th Cir. 2007).

disfavored players, humiliated and degraded players, used inappropriate language, and required a year-round conditioning program in violation of high school rules.”<sup>126</sup> When the coach learned of the petition, he summoned the players and coaching staff for a meeting, and took each player aside individually for questioning.<sup>127</sup> Four players jointly walked out of the interrogation and were kicked off the team. They claimed their removal violated the First Amendment, but the Sixth Circuit disagreed.<sup>128</sup>

The Sixth Circuit focused on the unique setting of an athletic program, where individual agendas must be subordinated to the collective goal of winning games, a goal to which the coach’s authority is crucial.<sup>129</sup> Because the petition threatened to stir locker-room disharmony and undermine the coach’s authority, the school reasonably anticipated substantial disruption to the football team, the judges held.<sup>130</sup> Analogizing the football field to the workplace, the court emphasized that students voluntarily accept limits on their freedom as part of the bargain when they seek a “job” with the team.<sup>131</sup>

Concurring in the result, Judge Ronald Lee Gilman said the school did violate the athletes’ constitutional rights, but that the right was not clearly established so as to overcome the coach’s entitlement to qualified immunity from damages.<sup>132</sup> On the merits, Judge Gilman disagreed with the majority’s relaxed application of *Tinker* in the locker-room setting: “[A] student-athlete does not, as suggested by the lead opinion, enjoy fewer First Amendment rights under *Tinker* because of his or her choice to participate in high school athletics.”<sup>133</sup>

Similarly, the Eighth Circuit found no First Amendment violation when an Iowa high school kicked a player off the basketball team for distributing a letter to her teammates that used profanity to criticize their coach.<sup>134</sup> Frustrated when the coach refused to promote her to the varsity squad, the player urged her teammates to “give [the coach] back some of the bullshit that he has given us.”<sup>135</sup> While not explicitly using the *Connick* “public concern” formulation, the court emphasized that the player’s complaints lacked any element of whistleblowing and were instead in the nature of personal grievances, which she presented in a disrespectful manner that the school reasonably believed might disrupt the basketball program.<sup>136</sup>

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126. *Id.* at 585.

127. *Id.* at 586.

128. *Id.* at 600–01.

129. *Id.* at 594–96.

130. *Id.* at 600–01.

131. *Id.* at 596–97.

132. *Id.* at 606 (Gilman, J., concurring).

133. *Id.* at 605.

134. *Wildman ex rel. Wildman v. Marshalltown Sch. Dist.*, 249 F.3d 768, 769 (8th Cir. 2001).

135. *Id.* at 769–70.

136. *Id.* at 772.

The same rationale—that comments critical of coaches will prompt disunity among players and undermine the successful pursuit of team goals – was behind the Tenth Circuit’s decision in *Marcum v. Dahl* dismissing the First Amendment claims of college basketball players who lost their athletic scholarships after criticizing their head coach both privately and in the news media.<sup>137</sup> The players in *Dahl* first voiced concerns to their athletic director about the coach’s “lifestyle” and about what they perceived as favoritism, and when the college took no action, told the press they would no longer play for the coach.<sup>138</sup> The athletic director for women’s sports told each of the complainers that their scholarships would be discontinued because of their “attitude[s] and behavior.”<sup>139</sup> Despite the undisputed cause-and-effect, the Tenth Circuit, relying in part on *Pickering*, found no First Amendment violation, as the players’ complaints were “not of general public concern” and “resulted in disharmony among the players and disrupted the effective administration of the basketball program.”<sup>140</sup>

As seen in these cases, whether students have First Amendment recourse when removed from athletic participation is an intently fact-specific determination that often turns on two factors—first, a court’s determination that an athlete’s behavior has crossed the line from defiant speech into an intent to *behave* defiantly (such as by boycotting games), and second, the relative importance that a court places on the harmonious operation of the athletic program as compared with the interests of the speaker in “rocking the boat.”

B. “Trash-Tweeting”: School Authority Follows Athletes Online

*Last week my wife and I told our 13-year-old daughter she could join Facebook. Within a few hours she had accumulated 171 friends, and I felt a little as if I had passed my child a pipe of crystal meth.*<sup>141</sup>

Then the executive editor of *The New York Times*, Bill Keller ignited a brief social-media firestorm with a 32-character grenade written on his Twitter account: “#TwitterMakesYouStupid. Discuss.”<sup>142</sup> Technophiles responded predictably: “Some people sound stupid off Twitter too. Perhaps the problem isn’t Twitter,” was one of the politer retorts.<sup>143</sup> Unrepentant, Keller took to the pages of the *Times* with a

137. 658 F.2d 731, 734 (10th Cir. 1981).

138. *Id.* at 733.

139. *Id.*

140. *Id.* at 734–35.

141. Bill Keller, *The Twitter Trap*, N.Y. TIMES, May 22, 2011 (Magazine), at 11.

142. *Id.* at 12.

143. Mike Masnick, *NY Times Editor Claims Twitter Killing Conversation, While His Tweets Spawn Conversation*, TECHDIRT (May 18, 2011, 3:39 PM), <http://www.techdirt.com/articles/20110518/11213214321/ny-times-editor-claims-twitter-killing-conversation-while-his-tweets-spawn-conversation.shtml>.

cautionary lecture about the powerful hold of social media on the American conscious and how it may be subtly changing the way people use their brains: “Twitter is not just an ambient presence. It demands attention and response. It is the enemy of contemplation.”<sup>144</sup>

Twitter may not make anyone stupid, but its frictionless immediacy invites widespread sharing of momentarily blurted thoughts. The failed joke that once fell flat on the locker-room floor instead sits memorialized on public display, where it is scrutinized and second-guessed. Because so many athletes have successfully built a social media following to interact with fans, the audience for their electronic updates can (for the highest-profile professionals) reach into the millions.<sup>145</sup> While it is rare for a college athlete to command such a following, mainstream news outlets have in recent years begun routinely quoting social-media updates as if the account holder were speaking directly, thus amplifying the impact of a gaffe.<sup>146</sup>

By way of background, Facebook is the most popular of the websites broadly regarded as “social networking” sites, enabling users to share links to online content, post observations on a personal “wall” and upload photographs.<sup>147</sup> Privacy settings on the site allow the account-holder to tailor the permissible viewership of each item shared, from publicly viewable by anyone using Facebook down to an approved list of enumerated “friends.”<sup>148</sup> Twitter is referred to as a “microblogging” site, providing a free conduit through which users may share comments, photos and links to websites in posts capped at 140 characters.<sup>149</sup> Account holders may make

144. Keller, *supra* note 141, at 12.

145. See, e.g., Alvin Anol & Marvin Pittman, *LeBron James’ Twitter Account is Rocketing Up In Numbers*, ESPN (July 7, 2010, 12:20 PM), <http://espn.go.com/espn/page2/index?id=5360881> (listing the most followed athletes on Twitter).

146. Even national-affairs reporters at respected media outlets have taken to incorporating Twitter posts into their news coverage. See, e.g., Juan Forero, *Venezuela’s Maduro Culls Power with Snowden Asylum Offer*, WASH. POST, July 29, 2013 at A7 (republishing a remark from Russian parliament member Alexi Pushkov’s Twitter account); Hiroko Tabuchi, *Ban Lifted, Japan’s Politicians Race Online*, N.Y. TIMES, July 5, 2013, at A4 (quoting an opposition-party candidate’s tweet introducing himself to the Japanese electorate). Quotes culled from Twitter have become a staple of the news media’s coverage of sporting events and of celebrity deaths as well. See, e.g., Jeff Barker, *In Leaving Behind ACC, UM Hopes It Can Finally Catch Up In Big Ten*, BALT. SUN, June 25, 2013, at 1C (quoting NBA star LeBron James’ Twitter reaction after seeing redesigned University of Maryland football uniforms: “OH GOSH! Maryland uniforms #Ewwwwww!”); *Whitney Houston Dead at 48; Celebs React on Twitter*, L.A. TIMES BLOG, (Feb. 11, 2012, 6:14 PM), <http://latimesblogs.latimes.com/gossip/2012/02/whitney-houston-dead.html> (quoting tweets from celebrities including Russell Simmons, Justin Bieber, and Michelle Branch, expressing sorrow at Houston’s death).

147. See *United States v. Fumo*, 655 F.3d 288, 331 (Nygaard, J., concurring in part and dissenting in part) (noting Facebook’s extreme popularity based on the site’s registered user base of over 500 million people).

148. *Basic Privacy Settings & Tools*, FACEBOOK HELP CTR. (2013), <https://www.facebook.com/help/325807937506242> (describing Facebook’s privacy features and explaining how to utilize them).

149. See Chris Gaylord, *A Primer on Twitter*, CHRISTIAN SCIENCE MONITOR, March 26, 2009, at 25 (explaining the vocabulary of “hashtags” and “retweets” as popularized by users of the service); Annie Cercone, *Fifth Anniversary of Social Phenomenon: Bloggers Still Composing a Story of Tweet Success, 140 Characters at a Time*, COLUMBUS DISPATCH, May 21, 2011, at 1D (reporting how Twitter grew to 200 million individual accounts over five years).

their postings publicly viewable or may “protect” their accounts by enabling only pre-approved “subscribers” to see what they write.<sup>150</sup> Significantly, Facebook and Twitter each have one-to-one messaging capability that is the functional equivalent of email, and both Facebook and its Google-backed would-be competitor, Google+, have “chat” features enabling distant accountholders to exchange real-time text messages approximating a conversation, and to archive those chats for later viewing.<sup>151</sup>

While in simpler times a coach or athletic director would never seriously contemplate demanding to eavesdrop on a player’s telephone calls, read his mail, or sit in on his lunchtime social conversations at the mall, the potentially greater reach and durability of electronic communications have changed the game.<sup>152</sup> Colleges perceive online platforms as amplifying the trouble that an intemperate (or overly candid) comment might cause, for the student and for the institution alike. Athletic programs have responded to the “Twitter generation” in three main ways:

(1) By imposing punishment, often in the form of “benching” or demotion, in response to particular remarks.<sup>153</sup> Punishment sometimes follows statements perceived as divisive to the team or defiant of authority. At other times, punishment results from speech that offends members of the audience who might think less of the athlete (or, administrators fear, of the institution). A typical policy, in force at the University of Houston, describes a set of “guidelines” for optimal online behavior—some of which track existing First Amendment law, others of which seem purely aspirational (“be proud of where you come from and where you are at”)—and then concludes with an admonition: “If a student-athlete’s social media activity is found to be inappropriate in accordance with this policy, he/she may be subject to” penalties up to and including “expulsion from his/her team and/or loss of some or all of his/her athletics financial aid.”<sup>154</sup>

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150. See *About Public and Protected Tweets*, TWITTER HELP CTR. (2013), <https://support.twitter.com/articles/14016-about-public-and-protected-tweets#>.

151. See *Sending a Message*, FACEBOOK HELP CTR. (2013), <https://www.facebook.com/help/326534794098501/>; *Send and Receive Direct Messages*, TWITTER HELP CTR. (2013), <https://support.twitter.com/groups/50-welcome-to-twitter/topics/202-take-a-tour/articles/20169555-send-and-receive-direct-messages#>; *Hangouts*, GOOGLE+ FEATURES, <http://www.google.com/+learnmore/hangouts/>; *Facebook Chat. Everywhere*, FACEBOOK (2013), <https://www.facebook.com/sitetour/chat.php>.

152. See Bentley, *supra* note 5, at 834–36 (noting that it would be instantly recognized as an unconstitutional and excessive restriction of athletes’ rights to restrict their telephone privileges, allow monitoring of their calls for bad language, or bring a coach with them to every party).

153. See, e.g., *University of Southern California Athletic Department Social Media Policy & Guidelines for Student-Athletes*, <https://saas.usc.edu/files/2012/08/USC-Student-Athlete-Social-Media-Policy-Sign-Off.pdf>; *Online Social Networking Policy*, ATHLETIC ACADEMIC SERVICES – NORTHWESTERN UNIVERSITY, <http://www.northwestern.edu/academicservices/cats-lifeskills/personal-development/online-social-networking-policy.html>.

154. Eric Bentley, *He Tweeted What? A First Amendment Analysis of the Use of Social Media by College Athletes and Recommended Best Practices for Athletic Departments*, 38 J.C. & U.L. 451, 476–78 (2012) (University of Houston policy is reprinted as an appendix).

(2) By banning or limiting social media activity.<sup>155</sup> Coaches have enacted categorical bans on Twitter, ordered athletes to abstain from social media during the playing season, and imposed temporary social-media “blackouts” in response to substandard performance.

(3) By requiring athletes to surrender their social media passwords, so that either an employee of the athletic department or a private monitoring service can follow the portions of the athlete’s online activity that are not visible to the general public.<sup>156</sup> Monitoring companies work with institutions to develop “key word lists” of terms that might—in the words of one company’s CEO, “damage the school’s brand.”<sup>157</sup> A policy that athletes at Utah State University were asked to sign is typical: “To the extent that any federal, state or local law prohibits the Athletic Department from accessing my social networking accounts, I hereby waive any and all such rights and protections.”<sup>158</sup> Having access to an account-holder’s login information conveys the ability to read “protected” postings that were shared with a limited audience (which might be two people or might be 2,000 people) of the author’s choosing. It also provides access to one-on-one personal messages archived on Facebook and Twitter, and chats archived on Facebook and Google+, comparable to being able to read a student’s emails or smartphone text messages.

Colleges are feeling heightened pressure to watch social media for warning signs that their athletes might be involved in illicit behavior. In June 2011, the NCAA served notice on the University of North Carolina-Chapel Hill that its football program was facing stiff penalties for rule violations that, in the view of NCAA enforcers, might have been detected sooner by vigilantly reading players’ Twitter accounts.<sup>159</sup> “In February through June 2010,” the letter reads, “the institution did not adequately and consistently monitor social networking activity that visibly illustrated potential amateurism violations within the football program, which delayed the institution’s discovery and compounded the provision of impermissible benefits” totaling more than \$27,000 between seven football players.<sup>160</sup> In March

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155. See Bentley, *supra* note 5, at 835–36.

156. See Bentley, *supra* note 5, at 836.

157. See John Browning, *Universities Monitoring Social Media Accounts of Student Athletes: A Recipe for Disaster*, 75 TEX. BAR J. 840, 842 (December 2012). See also Nick Glunt, *First Amendment Fumble?*, STUDENT PRESS LAW CENTER REPORT (Spring 2012), [http://www.splc.org/news/report\\_detail.asp?edition=58&id=1629](http://www.splc.org/news/report_detail.asp?edition=58&id=1629) (last viewed Aug. 12, 2013) (discussing rising utilization of Varsity Monitor and UDiligence monitoring services).

158. The policy was excerpted on the blog of a Maryland attorney who advocates in favor of athletes’ social media privacy. See Bradley Shear, *Utah Bans Student-Athlete Social Media Monitoring Firms*, SHEAR ON SOCIAL MEDIA LAW (April 9, 2013), [http://www.shearsocialmedia.com/2013\\_04\\_09\\_archive.html](http://www.shearsocialmedia.com/2013_04_09_archive.html).

159. *NCAA Details Allegations in Yearlong Football Probe*, UNC GENERAL ALUMNI ASSOCIATION (June 22, 2011), <http://alumni.unc.edu/article.aspx?sid=8300>.

160. See Glunt, *supra* note 157 (discussing rising utilization of Varsity Monitor and UDiligence monitoring services).

2013, the NCAA revoked 15 scholarships and banned the football team from postseason play for a year, quoting UNC athletes' tweets as evidence.<sup>161</sup>

### C. *Legislative Responses*

While the courts have yet to weigh in on the permissible scope of colleges' intrusion into students' social-media lives, a handful of state legislatures have filled the vacuum. Since 2011, legislatures in eight states – Arkansas, California, Delaware, Michigan, New Jersey, New Mexico, Oregon and Utah – have enacted “social media privacy” statutes limiting the ability of colleges to require current or prospective students to surrender private social-media information.<sup>162</sup> No litigation has yet emerged testing these statutes in the context of college sports. A likely point of contention will be whether students may be compelled to sign a waiver similar to the aforementioned policy at Utah State forsaking their newfound statutory protection as a condition of participating in sports.

## IV. ATHLETE SOCIAL MEDIA RESTRAINTS FLUNK FIRST AMENDMENT SCRUTINY

### A. *Athlete Social Media Bans Invite Vagueness, Overbreadth Challenge*

If a First Amendment challenge arises to colleges' social-media restrictions, the inquiry will focus on the nature of the speech being restricted and the relative importance of the government's rationale. Since so little speech is categorically beyond the scope of the First Amendment, an athlete's case typically will involve constitutionally protected expression. The question then will become whether the government has a compelling justification overriding the speaker's First Amendment rights, and whether the restriction is a “fit” well-tailored to the problem being addressed. By that yardstick, the initial generation of restrictions on college athletes' social-media activity will be difficult to justify.

The Supreme Court has shown special solicitude for speech addressing, even peripherally and with no great depth or sophistication, issues of political or social concern. The Court's decision in the *Snyder* case involving Westboro Baptist Church turned decisively on the Court's conclusion that the subjects of the church protesters' hate speech—“the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy”—were matters of public concern.<sup>163</sup> In a recent

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161. Andrew Carter, *UNC's Thorp Calls Penalties Painful*, NEWS & OBSERVER (March 13, 2012), <http://www.newsobserver.com/2012/03/12/1926741/ncaa-to-announce-findings-on-unc.html>.

162. See *Employer Access to Social Media Usernames and Passwords 2013*, NATIONAL CONFERENCE OF STATE LEGISLATURES (July 31, 2013), <http://www.ncsl.org/issues-research/telecom/employer-access-to-social-media-passwords-2013.aspx>.

163. *Snyder v. Phelps*, 131 S. Ct. 1207, 1216–17 (2011).

application of this doctrine in the school setting, the Third Circuit recognized that even in-school speech using “lewd” phrases is constitutionally protected if it can be understood as addressing an issue of social or political concern.<sup>164</sup> Speech attempting to shed light on abusive practices by coaches, for instance, would be properly regarded as addressing a matter of public concern. Because restrictions on athletes’ online speech do not typically make any allowances for speech addressing matters of public concern, they run the risk of impermissibly chilling unkind remarks about national political figures or impolitic remarks about contemporary social issues – exactly the speech for which the Court has always said the First Amendment must provide an extra modicum of “breathing space.”<sup>165</sup> Punishing athletes for the use of taboo “flagged words” invites a special risk of impermissible viewpoint discrimination. Athletes who are singled out, for instance, because they express anti-gay religious views or views insulting to particular ethnic minorities may well have a First Amendment claim if speakers expressing contrary viewpoints go unpunished.<sup>166</sup>

Banning the use of social media to protect athletes from reading unkind speech about them is a singularly unpersuasive justification. The remedy is fatally under-inclusive, because so many alternative conduits exist.<sup>167</sup> Even without a social media account, an athlete is exposed to the wrath of sports fans and commentators on talk radio, on blogs and news websites (including reader comment boards), and of course within the stadium itself. And indeed, one need not hold a Twitter account at all to read the content on Twitter that writers make publicly accessible. Unless athletic departments also are prepared to ban telephones and email, those with

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164. See *B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, No. 11-2067, 2013 WL 3970093, at \*11 (3d Cir., Aug. 5, 2013) (en banc) (applying limiting gloss to Supreme Court’s *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986), which empowered schools to punish “lewd” student speech in the captive-listener setting of a school assembly).

165. In striking down a statute that attempted to restrict civil-rights lawyers from placing advertisements seeking plaintiffs for race-discrimination test cases, Justice Brennan memorably wrote, “Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.” *NAACP v. Button*, 371 U.S. 415, 433 (1963) (citing *Cantwell v. Connecticut*, 310 U.S. 296, 311 (1940)).

166. See *Browning*, *supra* note 157, at 842 (pointing out “troubling words and phrases” for which monitoring companies have been asked to flag athletes’ accounts, including “Arab[.]” “Muslim” and “gay”).

167. See, e.g., *Brown v. Ent’mt Merchants Ass’n*, 131 S. Ct. 2729, 2740 (2011) (finding that a California statute making it a crime to sell a child a video game depicting realistic scenes of violence was “wildly underinclusive,” because it left unregulated equally graphic violence in other media accessible to children, and because the proscription could easily be subverted by having an adult purchase the game). For a thorough discussion of the importance of a “fit” between the regulation and the problem sought to be addressed, see *Pitt News v. Pappert*, 379 F.3d 96 (3d Cir. 2004). In *Pappert*, then-Judge Alito authored the opinion invalidating, as “both severely over-inclusive and under-inclusive,” a Pennsylvania statute banning ads for alcoholic beverages only in media affiliated with a college or university. While the prohibition was offered as a response to unlawful drinking by underage college students, the court found that justification lacking, both because less speech-restrictive alternatives existed (enforcing the law against underage drinking) and because the law disadvantaged one subset of news organizations while allowing ads to continue in other media equally accessible to and influential on campus audiences. *Id.* at 108–09.

ulterior agendas—sports agents, fixers, boosters—have no shortage of alternative ways to communicate with athletes<sup>168</sup> (and indeed, given the risk of public exposure, social-networking pages would be a relatively unlikely conduit for those bent on criminality). Banning social media entirely is also overbroad, in that (a) narrower remedies exist, including privacy settings that allow account-holders to refuse to accept messages from unknown or unwelcome senders, and (b) voluntarily abstaining from social media, for those athletes who are sensitive to criticism.<sup>169</sup> While the doctrine is not well-developed, the Supreme Court has recognized a First Amendment right to receive as well as to communicate information.<sup>170</sup> Ordering even an athlete who is thick-skinned and is unafraid of criticism to abstain, over his objections, from taking part in social media would implicate both the right to speak and the right to read.

“Saving the athlete from himself” is the weakest of the justifications that athletic departments and their advocates have offered for banning or regulating social media activity.<sup>171</sup> The idea underlying selectively singling out social media for prohibition – that social media is a uniquely effective way to reach a large audience—is both self-defeating and beside the point; the First Amendment is not volumetric, and a speaker’s right to freedom of expression does not diminish simply

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168. Illicit contact with athletes greatly predates the social media era. *See, e.g.*, Randall Mell, ‘*Canes Would Consider Prosecution in Agent Tampering*, SOUTH FLORIDA SUN-SENTINEL, Sept. 15, 1993, at 6C (reporting player’s admission that six members of Miami’s 1987 national champion football team took improper cash payments from sports agent); Doug Bedell, *Blount-led Sports Agency Gave Collegians Money*, DALLAS MORNING NEWS, May 23, 1991, at 1B (reporting that eight players on Southern Methodist University’s football squad violated NCAA rules by accepting loans from an SMU booster’s sports agency). Indeed, possibly the most heralded college football player of the modern era, 1982 Heisman Trophy winner Herschel Walker of the University of Georgia, was forced to forfeit his senior season of college eligibility after impulsively signing a pro football contract that he unsuccessfully tried to revoke – two decades before the debut of Facebook. *See* Mark Asher & David Remnick, *Walker Goes Pro, Signing Record Pact*, WASH. POST, Feb. 24, 1983 (reporting that Walker became ineligible to continue playing college football after hiring an agent, who negotiated what was at the time a record salary for a professional football player).

169. *See* Bentley, *supra* note 5, at 838 (predicting that courts will find social media bans, mandatory surrender of account information, and monitoring for “offensive” words to be “over-inclusive and burdening more speech than is necessary to achieve the athletic department’s interests”).

170. *See* *Brown*, 131 S. Ct. at 2736 (remarking that statute restricting sale of violent video games implicated minors’ right to receive information and ideas); *see also* *United States v. Nat’l Treasury Emps. Union*, 513 U.S. 454, 470 (1995) (finding that a ban on honoraria for government employees “imposes a significant burden on the public’s right to read and hear what the employees would otherwise have written and said”).

171. *See* Matt Maher, Note, *You’ve Got Messages: Modern Technology Recruiting Through Text-Messaging and the Intrusiveness of Facebook*, 8 TEX. REV. ENT. & SPORTS L. 125, 139 (providing that some institutions banned athletes from social media websites, such as Facebook, because the athletic programs feel as those student-athletes may not know the risks themselves); Catherine Ho, *Companies Tracking College Athletes’ Tweets, Facebook Posts Go After Local Universities*, WASH. POST (Oct. 16, 2011), [http://articles.washingtonpost.com/2011-10-16/business/35276774\\_1\\_udiligence-social-media-student-athletes](http://articles.washingtonpost.com/2011-10-16/business/35276774_1_udiligence-social-media-student-athletes) (quoting Kevin Long, founder of UDiligence, as saying that the purpose of athletic programs checking on their athletes’ social media presence is “helping the athletes protect their reputation in the long term”).

because the speaker is effective at attracting a large readership.<sup>172</sup> The proposition that a citizen could be prevented from speaking so as not to embarrass himself and damage his reputation would be a breathtakingly paternalistic view of the government's regulatory authority. An athlete is no more likely to post career-damaging material on social media than is, for instance, a law student or journalism student who posts material that is plagiarized, that displays prejudice, or that violates professional ethics, yet no university would seriously entertain a campuswide ban on social media as a means of preserving its students' career prospects.<sup>173</sup> Indeed, given the exceedingly small number of student athletes who will ever have professional sports careers in which their "brand" is of serious financial value—and that superior ability to catch touchdown passes or make tackles will still make even the most inept social-media user employable<sup>174</sup> – athletes may be *less* in need of "saving" than are non-athletes.

Athletic departments predictably will attempt to defend curbing social media use as part of legitimate "time, place and manner" restrictions. But the doctrine of "time, place and manner" is best understood as pertaining to a speaker's use of *government* property, not the use of a privately owned platform accessed on a personal electronic device.<sup>175</sup> The Supreme Court developed the concept of permissible content-neutral restrictions on the time, place and manner of speech as an adjunct of the forum doctrine, which provides for a sliding scale of First Amendment protections depending on the nature and historical use of a piece of government property. The Supreme Court typically has applied the time/place/manner to government regulation of speech on public streets, in municipal airports and in public parks—not to a prohibition governing expression

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172. See *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1067 (9th Cir. 2010) (striking down a municipal ordinance with the purpose and effect of banning all tattooing businesses from the city: "In light of the long line of cases in which the Supreme Court has invalidated total bans on a medium of communication, it cannot be true that any medium of communication may be banned based on the reasoning that it is merely a 'more effective' means of communicating a message").

173. The most infamous of collegiate "social media self-immolations" was the work of a non-athlete undergraduate at the University of California, Los Angeles, whose rant about Asian students noisily using cellphones in the library "went viral" on the YouTube video-sharing platform to the point that she became a national laughingstock and was forced to drop out of the university. See Ian Lovett, *U.C.L.A. Student's Video Rant Against Asians Fuels Firestorm*, N.Y. TIMES, Mar. 16, 2011, at A21; Kate Parkinson-Morgan, *Alexandra Wallace Apologizes, Announces She Will No Longer Attend UCLA*, DAILY BRUIN, Mar. 18, 2011, available at [http://dailybruin.com/2011/03/18/alexandra\\_wallace\\_apologizes\\_announces\\_she\\_will\\_no\\_longer\\_attend\\_ucla/](http://dailybruin.com/2011/03/18/alexandra_wallace_apologizes_announces_she_will_no_longer_attend_ucla/).

174. Manti Te'o, the former Notre Dame football star and 2012 Heisman Trophy runner-up, who gained humiliating national attention for, apparently, having been baited into an online "romance" with a woman who did not exist, signed a contract estimated to be worth \$5 million with the National Football League's San Diego Chargers despite having been the subject of perhaps the most sensational social-media controversy of all time. Lindsay H. Jones, *Manti Te'o signs contract with San Diego Chargers*, USA TODAY, May 9, 2013.

175. Alissa Ardito, *Social Media, Administrative Agencies, and the First Amendment*, 65 ADMIN. L. REV. 301, 336–37 (2013) (tracing development of time, place and manner doctrine in conjunction with Supreme Court's development of the forum doctrine).

on private property.<sup>176</sup> Although on rare occasions courts have elected to use the “time, place and manner” construct when evaluating the constitutionality of laws that apply beyond public property,<sup>177</sup> that standard arguably is insufficiently protective, since it demands nothing more than reasonableness.

Even if the doctrine were to apply, the tight control that athletic departments exercise over their athletes’ speech in all settings raises serious questions about whether an athlete has reasonable alternatives to social media that provide access to a comparable audience. And indeed, it is the unique ability of social media to inexpensively reach a geographically diffuse audience that has placed the medium in the crosshairs of regulators. For example, it is commonplace for athletic departments to require athletes to get approval from the athletic department before speaking to a news organization, and to ban media outlets from interviewing first-year players.<sup>178</sup> If a player who is concerned about abusive conditions in the athletic program is neither allowed to use social media nor to speak directly to the news media, the athlete has no reasonably available method of speaking to a national audience.<sup>179</sup> Restrictions will be more easily defensible if they apply at limited times

176. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (bandshell in public park); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (public park); *Heffron v. Int’l Soc’y for Krishna Consciousness*, 452 U.S. 640 (1981) (state fair). The earliest apparent reference to the doctrine of “time, place and manner” in Supreme Court jurisprudence occurs in *Cox v. State of New Hampshire*, 312 U.S. 569, 576 (1941), a case about a municipal permitting system for parades on public streets.

177. See, e.g., *City of Painesville Bldg. Dept. v. Dworken & Bernstein Co.*, 733 N.E.3d 1152, 1154 (Ohio 2000) (stating, in considering a First Amendment challenge to a city sign ordinance, “a narrowly drawn municipal ordinance imposing reasonable time, place, and manner restrictions on the display of temporary signs, including political yard signs posted on private property, could constitutionally be enacted”).

178. The handbook given to athletes at Pennsylvania’s East Stroudsburg University is typical: “Student-athletes are not permitted to speak to the media without prior approval from the ESU Sports Information Director, Head Coach or Director of Athletics.” Manual, East Stroudsburg University of Pennsylvania Athletics, 2013/2014 Handbook, <http://www.esuwarriors.com/custompages/General/2013-14%20Student-Athlete%20Planner.pdf?&tab=3>. See also Scott Sloan, *UK Basketball Locks Out Student Newspaper*, LEXINGTON HERALD-LEADER (Aug. 30, 2011), available at <http://www.kentucky.com/2011/08/30/1862265/uk-athletics-student-newspaper.html> (describing how the University of Kentucky’s sports-information office retaliated against the school’s student newspaper after a sportswriter “broke the university’s unwritten policy barring media from interviewing student-athletes” without approval from the athletic department).

179. Athletic departments’ ability to ration media access to athletes has been cited by analogy as a justification for similarly rationing athletes’ ability to communicate on social media. See Meg Penrose, *Outspoken: Social Media and the Modern College Athlete*, 12 J. MARSHALL REV. INTELL. PROP. L. 509, 539–40 (2013) (arguing that media-access restrictions are justified on the rationale of “protect[ing] athletes from themselves” because of “the athlete’s alleged unpreparedness to answer questions posed by reporters”). But this analogy is of limited usefulness. Athletic departments do not purport to restrict the ability of athletes to comment on non-sports-related matters that they encounter in their off-hours (for instance, giving an interview about having witnessed a fire or a plane crash), and if they did so, such a restriction almost certainly would be struck down as overbroad, just as such restrictions routinely have been invalidated in the setting of public employees. See, e.g., *Abad v. City of Marathon*, 472 F. Supp. 2d 1374 (S.D. Fla. 2007) (fire department rule requiring prior approval of contact with media was unconstitutionally applied to firefighter and union officer who wrote a newspaper column critical of understaffing and low wages); *Salerno v. O’Rourke*, 555 F. Supp. 750 (D.N.J. 1983) (regulation against jail employees giving “information” to media representatives or “any other person” without the consent of the sheriff is so over-inclusive as to be facially unconstitutional).

(perhaps during and immediately before games) and if they leave other online conduits open for uncensored use. Twitter has been singled out by athletic departments as a special concern, perhaps because its default setting is to make the writer's posts publicly accessible, while Facebook's is to make the posts accessible only to a circle of pre-approved "friends." If athletes are banned from just one social-media site, then the restriction may pass scrutiny as reasonable – though even there, the consolidation of social media and mainstream media are making it increasingly difficult for someone without a Twitter or Facebook account to be heard. For example, online newspapers increasingly are forbidding members of the public from posting comments to their websites without logging in by way of a Facebook account, hoping to discourage some of the noxious verbal abuse associated with anonymous commenting.<sup>180</sup>

To defend encroaching into athletes' online lives, colleges may argue that they need extraordinary authority because of the unique regulatory environment governing college athletics. Although the NCAA does not require member institutions to monitor social media,<sup>181</sup> colleges may "defensively" seek such authority after such cautionary experiences as the NCAA penalties levied against the University of North Carolina, which referenced the university's failure to detect misconduct that was apparent from athletes' social-media postings.<sup>182</sup> While a more sympathetic argument than "image control," this justification too is unlikely to prove adequate to override a student's constitutional interests. Participation in the NCAA is voluntary. A government cannot enter into a voluntary agreement to give its citizens fewer rights than the Constitution guarantees.<sup>183</sup> Moreover, the NCAA's public rebuke to North Carolina referred only to information publicly available on athletes' social networking sites. The NCAA has not held any college responsible for policing the non-public portions of athletes' social media sites, so pressure to comply with NCAA directives cannot legitimize otherwise impermissible incursions into privacy and free expression.

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180. See David Brauer, *Facebook Registration: Mandatory For Newspaper Commenting?*, MINNPOST, (Jan. 14, 2011), <http://www.minnpost.com/braublog/2011/01/facebook-registration-mandatory-newspaper-commenting> (reporting on MediaNews Group's move to adopt Facebook as gatekeeper for sharing comments on news websites, and predicting further expansion among media companies).

181. Ray Fittipaldo, "Social Conflicts: Twitter, Facebook and Free-Speech Rights Make Strange Bedfellows with Pro Teams and College Athletics," *The Pittsburgh Post*, May 16, 2011 at D1 ("Unlike pro sports leagues, the NCAA has no official policy for social media for student-athletes. The NCAA leaves it up to its member institutions on how they wish to deal with Twitter and Facebook problems.").

182. University of North Carolina, Chapel Hill, NCAA Public Infractions Report (Mar. 12, 2012), <http://www.ncaa.org/wps/wcm/connect/public/ncaa/pdfs/2012/university+of+north+carolina,+chapel+hill+public+infractions+report+march+12,+2012>.

183. See *generally* *Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad.*, 551 U.S. 291, 299–300 (2007) (observing that, while member schools in an athletic association may be required to accept certain limitations on recruitment tactics, the association can constitutionally enforce "only those conditions on such speech that are necessary to managing an efficient and effective state-sponsored high school athletic league").

B. *Tinker, Morse and Off-Campus Extracurricular Speech*

If analyzed under the existing framework applicable to student First Amendment rights, the bulk of colleges' first-generation responses to unwelcome speech on social media will flunk constitutional scrutiny. Even assuming that *Tinker* applies,<sup>184</sup> it does not legitimize the breadth of regulatory and punitive authority that colleges have assumed.

*Tinker* proscribes content-based restrictions on speech unless the speech portends substantial disruption of classwork or discipline.<sup>185</sup> The meaning of "substantial disruption" has proven somewhat elastic. Although it is clear that substantial disruption means something beyond hurt feelings and sharp differences of opinion, some especially deferential applications of *Tinker* have reconceived the concept of "disruption" to include disturbing a school extracurricular event,<sup>186</sup> or causing a school to consume substantial time responding to a controversy that the student provokes.<sup>187</sup> In no event, however, should *Tinker* be a vehicle for punishing even sharply worded speech about political or social issues, or speech that merely indicates questionable judgment. Even presuming that colleges have the latitude recognized under *Tinker*, their punitive authority extends only to speech that impedes the school from functioning in an operational sense, not speech reflecting discredit on the school or its students.

In the non-digital world, no First Amendment precedent is closely analogous to a rule requiring athletes to submit to monitoring of their private social-media communications. If reviewed under *Tinker*, a First Amendment challenge would likely turn not on the existence of the monitoring, but on the scope of the punitive authority to which the athlete is asked to accede. A mandatory monitoring policy will be most defensible if the scope of the college's ability to punish is limited to unlawful or "substantially disruptive" speech. Since the first generation of monitoring has not confined itself to speech unprotected under the *Tinker* standard—for instance, policing the mere use of sexual terms, or references to alcohol even by people old enough to drink<sup>188</sup>—the requirement of surrendering social-media login information will be constitutionally suspect. Moreover, as a

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184. Despite its increasing incursion into the college setting, *Hazelwood* should not be seriously entertained as the legal standard for speech that an athlete sends and receives on off-campus social media. *Hazelwood* is a creature of forum doctrine that applies when a student seeks to utilize government property to communicate, not when a student uses a privately owned website. Moreover, no reasonable reader mistakes a posting on a student's personal social-media page for speech on behalf of, or approved by, the institution. See Helen Norton, *Imaginary Threats to Government's Expressive Interests*, 61 CASE W. RES. L. REV. 1265, 1282 (2011) ("[T]he deferential *Hazelwood* rule first requires a determination that reasonable onlookers will likely misattribute the student's speech to the school.").

185. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969).

186. *Doe v. Silsbee Indep. Sch. Dist.*, 402 F. App'x 852 (5th Cir. 2010).

187. *Doninger v. Niehoff (Doninger II)*, 527 F.3d 41, 50 (2d Cir. 2008).

188. See Ho, *supra* note 171 (reporting that mentions of drinking games or brands of alcohol are among keywords red-flagged by monitoring software popular among college athletic departments).

practical matter it will be difficult for colleges to argue that they need access to the nonpublic portions of an athlete's social-media account to detect or prevent substantially disruptive speech. A disruption will itself bring the previously nonpublic speech to light—for instance, an athlete's "protected" tweet that leads readers to believe he intends to commit violence. If nothing publicly discernable happens, then by definition no substantial disruption has occurred. And once legally unprotected speech has been disseminated so as to trip the "forbidden word" sensors, it is too late for preventive action to keep it from being read. Thus, access to athletes' password information would be difficult to justify on a *Tinker* rationale.

Because *Tinker* represents a compromise struck in the context of in-school speech during the school day, it almost certainly is an inadequately protective standard for college students' speech in the very different context of off-campus expression.<sup>189</sup> First, *Tinker* originated in the unique "captive listening audience" setting of a K-12 school, where attendees are involuntarily exposed to messages (such as a classmate's apparel) from which, because of compulsory attendance laws, they may be unable to retreat.<sup>190</sup> No one is legally compelled to endure prolonged exposure to a voluntarily visited Facebook page.<sup>191</sup> Second, when a school restricts its students' off-campus communications, it is regulating not just speech directed at other students but speech directed to those entirely unconnected with the school and in no position to disrupt it. It is a drastic leap to suggest that, by virtue of being enrolled in school, a speaker must always limit her speech in off-campus public settings—even speech not meant for a student audience—to that which would be "safe" on school time.<sup>192</sup> Finally, *Tinker*'s "substantial disruption" standard requires

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189. See Steve Varel, Comment, *Limits on School Disciplinary Authority Over Online Student Speech*, 33 N. ILL. U. L. REV. 423, 463–72 (2013) (asserting that "it is unnecessary to apply *Tinker* to off-campus speech because, with the application of measures that do not suppress off-campus internet speech, the impact of off-campus internet speech on school activities can be mitigated to the point that it is largely insignificant" and advocating narrower standard under which schools may punish speech created off-campus only when its creator intentionally re-communicates the speech on school grounds or at a school function).

190. See, e.g., *DeFoe v. Spiva*, 625 F.3d 324, 338 (6th Cir. 2010) (Rogers, J., concurring) ("[E]xpression of racial hostility can be controlled in the public schools even though such expressions are constitutionally permitted in newspapers, public parks, and on the street. Public school students cannot simply decide not to go to school.").

191. In the "offline" world, the Supreme Court made this point in *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975), refusing to uphold an ordinance banning films depicting nudity at drive-in movie theatres where passersby, including children, might unwittingly glimpse an unwelcome breast or buttock: "[T]he screen of a drive-in theater is not 'so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it.'" (quoting *Redrup v. New York*, 386 U.S. 767, 769 (1967)). The principle applies even more strongly in the social media setting, as an unsuspecting pedestrian is unlikely to involuntarily encounter a harmful Twitter post.

192. Analogously, the Supreme Court repeatedly insists that adults' distribution of and access to literature potentially "harmful" to minors may not be abridged on the grounds that some of the material might find its way into the hands of children. See, e.g., *Butler v. Michigan*, 352 U.S. 380, 383 (1957) (observing, in striking down a statute criminalizing the sale of material containing "obscene, immoral, lewd or lascivious language," that: "The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children").

neither proof of a wrongful intent to disrupt, nor proof that disruption was a reasonable response by the listener.<sup>193</sup> Speech may be proscribed or punished as “substantially disruptive” even if uttered with the most honorable intentions (for example, had John and Mary Beth Tinker’s antiwar armbands ignited classmates into fistfights during classes). To permit the most irrational and short-tempered listener to determine what a speaker may say—not just on school time, but *anytime*—lends the ultimate sanction to the “heckler’s veto.”<sup>194</sup>

Colleges commonly argue that they need authority over what their athletes say on social media because of concern both for the welfare of the school and for that of the individual student. None of these commonly offered justifications is likely to overcome a student’s right of free expression, regardless of whether *Tinker* or something more protective than *Tinker* emerges as the proper mode of analyzing restrictions on off-campus speech.

The rationale of protecting the college from reputational injury<sup>195</sup> is unlikely to prove persuasive in a First Amendment analysis. To regard preserving a favorable image as a compelling governmental interest would open the door to a dangerous degree of censorship authority over, for example, investigative journalism that accurately depicts the shortcomings of a government agency. Indeed, government litigants seldom acknowledge that their desire to suppress speech is motivated by concern for good public relations – and on the rare occasion that “image control” has been offered up as a justification for censorship, the justification has been found wanting.

In 2002, Utica, Michigan, High School senior Katy Dean researched and wrote a news article about a local couple whose lawsuit alleged that exhaust from a school-bus garage near their home caused the husband’s lung cancer.<sup>196</sup> The superintendent claimed Dean’s article was inadequately researched and pulled it from the student newspaper.<sup>197</sup> Dean sued the district, claiming her First Amendment rights were

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193. See, e.g., *Cuff v. Valley Cent. Sch. Dist.*, 677 F.3d 109 (2d Cir. 2012) (arguing that the focus should be on the reasonableness of response, not the intent of the student); *Doninger v. Niehoff (Doninger II)*, 527 F.3d 41, 51 (2d Cir. 2008) (holding that *Tinker* does not require “actual disruption to justify a restraint on student speech”).

194. The First Amendment disfavors empowering audience members to exercise a “heckler’s veto” by causing a disturbance that forces the cancellation of the speech. See *Reno v. ACLU*, 521 U.S. 844, 880 (1997) (warning that a federal online indecency statute risked setting up a “heckler’s veto” by which any participant in an online chat could shut down the group’s discussion by declaring that his teenage child was watching).

195. See *Browning*, *supra* note 157, at 840 (quoting spokesman for University of Kentucky athletics, “the school’s primary concern is what the public can see, since this impacts the brand of the university and the athlete”). This argument has also been adopted by high schools. See *Glendale Unified School District Plans to Monitor Students on Social Media*, ABC 10 NEWS, SAN DIEGO (Aug. 27, 2013), <http://www.10news.com/news/glendale-unified-school-district-plans-to-monitor-students-on-social-media-online-082713> (“The program aims to protect students from harming themselves.”).

196. *Dean v. Utica Cmty. Sch.*, 345 F. Supp. 2d 799, 802–03 (E.D. Mich. 2004).

197. *Id.* at 803.

violated.<sup>198</sup> A U.S. district court found that the school district illegally censored her story, opining that, even in school-financed publications at K-12 schools, students “must be allowed to publish viewpoints contrary to those of state authorities without intervention or censorship by the authorities themselves.”<sup>199</sup> While the school district put forth multiple rationales for suppressing the story, all but one—the desire to project a favorable image by downplaying an unflattering news story—was found to be false.<sup>200</sup> The court determined that, even if the paper were regarded as a non-public forum and thus subject to the expansive *Hazelwood* level of school control, the result would be the same, because even *Hazelwood* does not permit withholding a factually accurate article based purely on “a difference of opinion with its content.”<sup>201</sup>

The *Dean* case is instructive for its recognition that—even in a K-12 school, and even in a publication that is (unlike social media) government property used primarily for educational purposes—state officials may not censor student viewpoints simply because they find the speech disagreeable or because the speech portrays the school in an unfavorable light. If a high school student has a constitutionally protected right to publish speech critical of her institution even in a non-forum school publication, then a college student undoubtedly must have a constitutionally protected right to challenge institutional policies when speaking on personal time. “Image protection” is consequently a legally insufficient justification to override a speaker’s First Amendment rights.

Since traditional First Amendment doctrine forbids the level of control that colleges increasingly are asserting over their athletes’ off-campus speech, colleges will have to argue for an exception that overrides generally applicable constitutional principles: Either (a) that the unique athlete/college relationship should be analyzed as an “employment” relationship with the accompanying diminution in First Amendment rights, or (b) that athletes have (explicitly or by implication) waived constitutional protection.

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198. *Id.* at 800.

199. *Id.* at 804.

200. *Id.* at 810–13. The court rejected the following arguments for censorship: privacy concerns; sexual “frank talk” and/or suitability for potential audience; fairness, balance, and opportunity to respond; expert testimony; timing; experience of journalism instructor; grammar; writing quality; research; bias and prejudice; use of pseudonyms; and accuracy. *Id.* at 810–12. Although the court implied that concerns for “discipline, courtesy or respect for authority” could justify suppression, the school district had not “reasonably related” removal of the article to those legitimate ends. *Id.* at 812–13.

201. *Id.* at 813. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (“[E]ducators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.”).

## V. THE EMPLOYEE AND CONTRACT/WAIVER RATIONALES

A. *Student-Athletes as Employees: If the Cleat Doesn't Fit. . .*

In a withering examination of the financial exploitation of college athletes for *The Atlantic*, the author Taylor Branch traced the popularization of the now-ubiquitous term, “student-athlete,” that has become the buzzword of college athletic administrators everywhere.<sup>202</sup> While perhaps seeming to represent the primacy of the classroom (“student”) above the playing field (“athlete”), the term’s origins are more ignoble. As Branch writes, the longtime executive director of the NCAA, Walter Byers, insisted on using the unwieldy phrase specifically as a defense to the workers’ compensation claims of injured athletes.<sup>203</sup> In a turning-point victory for the NCAA, the widow of a Texas A&M football player who died while competing in a game at Colorado was denied spousal benefits afforded to the survivors of employees killed on the job.<sup>204</sup> Since that time, Branch writes, NCAA member institutions have consistently succeeded in taking advantage of their students’ non-employee status to defend against liability.<sup>205</sup>

Because of the exchange of valuable consideration (free tuition, meal plan, housing) for personal services, it is superficially tempting to analogize the athlete-college relationship to the employee-employer relationship. On occasion, courts have conflated the two, as a federal district court did in dismissing the retaliation claims of a University of Kansas athlete whose speech—challenging the non-renewal of his athletic scholarship—was deemed a constitutionally unprotected private grievance, pursuant to *Connick*.<sup>206</sup> But students and athletes are materially differently situated in fact and in law—as colleges readily recognize when the distinction works to their benefit.

While it is colloquially popular for schools and colleges to admonish students that they “represent the school,” that is a colloquialism and not a matter of legal fact. Schools do not speak through their students, nor invest their students with agency to make representations of legal significance binding on the institution. As the First Circuit explained in dismissing a lawsuit attempting to hold a municipal school district responsible for decisions made by editors of a high school newspaper, students are not a school’s representatives; they are its customers:

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202. Taylor Branch, *The Shame of College Sports*, THE ATLANTIC, Oct. 2011, at 80, 88–89.

203. *Id.* at 88.

204. *Id.*

205. *Id.* at 88–89.

206. See *Richard v. Perkins*, 373 F. Supp. 2d 1211, 1217 (D. Kan. 2005) (finding that a student athlete’s First Amendment retaliation claim is governed by *Connick*, which protects speech only if it addresses matters of public concern).

“Persons do not become state actors because they are clients of government services, whether they are students, hospital patients, or prison inmates.”<sup>207</sup> Schools have, in fact, regularly benefited from this layer of separation. For instance, when a California school was accused of violating a federal privacy statute that requires schools to safeguard the confidentiality of student records, the school successfully defended itself by establishing that a student is not a “person acting for” the school.<sup>208</sup> Likewise, at the college level, courts have consistently absolved public institutions of liability for defamatory material written by students working in campus media, because the colleges are constitutionally estopped from controlling what their students write.<sup>209</sup>

Assuming responsibility for students’ off-campus behavior is an undertaking fraught with needless institutional risk. While schools and colleges have been successful in deflecting legal liability for torts committed by their students while off campus, an exception exists where the agency “undertakes” to supervise the off-campus activity but does so negligently.<sup>210</sup> Deepening the institution’s role in policing students’ off-hours behavior may invite liability where the law normally assigns none.<sup>211</sup> For example, the knowledge that an athlete was sending multiple

207. *Yeo v. Town of Lexington*, 131 F.3d 241, 253 (1st Cir. 1997).

208. *Owasso Indep. Sch. Dist. v. Falvo*, 534 U.S. 426, 433 (2002) (quoting 12 U.S.C. § 1232g(a) (2006)) (finding no liability for breach of the Family Educational Rights and Privacy Act).

209. See, e.g., *Lewis v. Saint Cloud State Univ.*, 693 N.W.2d 466, 468 (Minn. Ct. App. 2005) (declining to hold college responsible in defamation case brought by professor naming state university as defendant); *Milliner v. Turner*, 436 So. 2d 1300, 1302–03 (La. Ct. App. 1983) (holding that, because state universities are “almost completely barred” under the First Amendment from exerting control over student expression, university was not proper defendant in libel suit stemming from accusations made in student editorial column); *Mazart v. New York*, 441 N.Y.S.2d 600 (N.Y. Ct. Cl. 1981) (finding that even though college provided financial support to student newspaper, college was not liable for purportedly defamatory news article because college had no authority to control manner in which students performed journalistic work).

210. This principle is best illustrated by a string of unfortunate cases involving situations in which schools were aware of off-campus parties but ultimately held not liable for damage students caused at the parties. See, e.g., *Archbishop Coleman F. Carroll High Sch. v. Maynoldi*, 30 So. 3d 533 (Fla. Dist. Ct. App. 2010) (finding no school liability for an automobile accident involving a 17-year-old who drank at an off-campus party heavily promoted within the school, even though the principal dropped by the party to check on it); *Rhea v. Grandview Sch. Dist. No. JT 116-200*, 694 P.2d 666, 667 (Wash. Ct. App. 1985) (refusing to hold school liable for fatal accident involving student who drank at off-campus party, even though a teacher was aware of the students’ plans to buy alcohol). In the present day, schools are confronting a wave of litigation attempting to hold them responsible for acts of “cyberbullying” by students taking place off campus, and are defending themselves (almost always successfully) by demonstrating that they have neither the means nor the legal responsibility to monitor students’ social media lives. See generally Kathleen Conn, *Allegations of School District Liability for Bullying, Cyberbullying, and Teen Suicides After Sexting: Are New Legal Standards Emerging in the Courts?*, 37 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 227 (2011) (surveying cyberbullying lawsuits alleging school district liability and identifying emerging legal standards that would establish school liability in some instances for monitored, off-campus student communication that occurs via social media).

211. See Browning, *supra* note 157, at 842–83 (posing scenario of a college that fails to prevent violence after reading a student-athlete’s violent statements on social media). Browning also notes that the terms of service on most social networking sites, including Facebook, prohibit account-holders from sharing passwords with third parties. *Id.* at 842. As institutions charged with teaching optimal behavior, colleges undermine their credibility when they compel students to breach contractual agreements.

unsolicited Facebook messages propositioning a classmate for sex—knowledge that a college normally would never have, without the password to a student’s account—might trigger liability under federal sex-discrimination statutes if the college fails to act and the target of the messages claims indifference to a sexually hostile campus environment.<sup>212</sup>

Athletes do not have mobility or bargaining power analogous to that of employees. NCAA rules limit athletes to four seasons of competitive play in five calendar years, with a sixth year possible after petitioning for a discretionary waiver.<sup>213</sup> Athletes are not free to change “employers” and seamlessly continue playing if they are aggrieved by mid-career rule changes. The NCAA requires athletes in the major intercollegiate sports to sit out a year if they switch schools, to discourage teams from trying to poach each other’s players. The transferee college has discretion to block a player from moving to a rival school, which at times has been invoked for competitive reasons.<sup>214</sup> The “industry” of college sports, moreover, is hardly analogous to any traditional employment field (with the exception of professional sports leagues). A college athlete—especially one with aspirations of a professional career post-graduation—has limited ability to “do business with” an institution outside of the NCAA. The NCAA is, quite literally, the only game in town.<sup>215</sup>

Moreover, even if the *Garcetti* approach did govern the free-expression rights of athletes in the “employ” of college athletic departments, most (if not all) of what institutions seek to regulate would be beyond a public employer’s reach. While *Garcetti* was about a memo written as part of an on-the-job assignment, no athlete is “assigned” to maintain a Facebook or Twitter presence. Nor can online updates about what an athlete thinks about gay rights—or what he ate for breakfast—be regarded as speech “pursuant to employment responsibilities.”<sup>216</sup> Few college

212. See Bentley, *supra* note 5, at 838 (flagging a liability risk under the federal Title IX sex-discrimination statute if a college were “deliberately indifferent” to sexual harassment detected on students’ social media pages).

213. Charlie Armitz, *NCAA Grants Trevor Mbakwe Sixth Year After ACL Tear in November*, MINNESOTA DAILY, Mar. 26, 2012, at 1. See also Zak Brown, Note, *What’s Said in This Locker Room, Stays in This Locker Room: Restricting the Social Media Use of College Athletes and the Implication for Their Institutions*, 10 J. TELECOMM. & HIGH TECH. L. 421, 431 (2012) (discussing NCAA bylaw that limits years of eligibility).

214. See, e.g., David Whitley, *Players are Held Hostage by NCAA*, ORLANDO SENTINEL, Jan. 1, 2009, at D1 (reporting that University of Miami football coaches blocked former player Robert Marve from transferring to several schools, including all schools in the Atlantic Coast Conference and Southeastern Conference, as well as all other schools in Florida).

215. In 1984, the Supreme Court enjoined the NCAA, on antitrust grounds, from penalizing college athletic programs that negotiated broadcast-rights agreements apart from the NCAA’s global agreement, signed on behalf of its members. *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85 (1984). Quoting the district court below, the Court characterized the NCAA as a “classic cartel” with an “almost absolute control over the supply of college football which is made available to the networks, to television advertisers, and ultimately to the viewing public.” *Id.* at 96 (quoting *Bd. of Regents of Univ. of Okla. v. NCAA*, 546 F. Supp. 1276, 1295, 1300 (W.D. Okla. 1982)).

216. *Garcetti v. Ceballos*, 547 U.S. 410, 424 (2006).

athletic departments would readily accept the restrictions that the Supreme Court's employee-speech jurisprudence places on government employers' ability to restrict speech addressing matters of public concern, since at least some have punished athletes for attacking political figures or espousing unpopular views.<sup>217</sup> Around-the-clock control over opinions voiced on social media could not be sustained even under the standards that govern the employment relationship.

*B. Waiving Fundamental Rights: An Offer Students Can't Refuse?*

Some college attorneys maintain that athletes may legitimately be required to waive any claim that social media monitoring violates their privacy or free-expression rights, as part of the Financial Aid Agreement that sets forth the terms of athletic scholarships.<sup>218</sup> But to the extent that colleges are relying on contract theory to legitimize plenary control over their athletes' social-media lives, the theory is flawed both as a matter of constitutional law and as a matter of basic contractual formalities.

From the standpoint of contract law, the most obvious defect is that, in many well-publicized cases, social media bans have been imposed in midseason by fiat of a coach, not as part of a signed agreement.<sup>219</sup> These midseason edicts represent a unilateral change in the terms of the relationship, not part of a bargained-for exchange. Further, while the initial choice of a college is a freely bargained marketplace transaction, renewing the contractual relationship in subsequent years is not. A student-athlete is under infirmities that significantly limit his mobility, and thus his ability to walk away from an onerous contract term.<sup>220</sup> Among these is the simple matter of timing. Most institutions require substantial advance notice before accepting a transfer student; an athlete who is unpleasantly surprised by an

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217. See, e.g., Cindy Boren, *Player Kicked Off Team at North Alabama For Slur About Obama*, WASHINGTONPOST.COM, (Dec. 18, 2012, 9:19 AM), <http://www.washingtonpost.com/blogs/early-lead/wp/2012/12/18/north-alabama-player-kicked-off-team-for-racial-slur-about-obama/>.

218. See, e.g., Stubblefield, *supra* note 6, at 598–600 (recommending a broad contractual waiver entitling coaches “to restrict or ban the use of social media websites at any time”).

219. At Florida State University, for example, football players were told to stay off Twitter amid a three-game losing streak during the 2011 season. Ben Kercheval, *Twitter Ban in Effect for FSU After Loss to Wake*, NBCSPORTS.COM (Oct. 10, 2011, 4:30 PM), <http://collegefootballtalk.nbcsports.com/2011/10/10/twitter-ban-reportedly-in-effect-for-fsu-after-loss-to-wake>. The University of North Carolina women's basketball coach told her team to stop using Twitter during a spell of poor play during January 2012 because it was distracting them. Michael Lananna, *Sylvia Hatchell Bans UNC Women's Basketball Team's Twitter Use*, DAILY TAR HEEL (Jan. 27, 2012, 12:07 AM), [http://www.dailytarheel.com/article/2012/01/sylvia\\_hatchell\\_bans\\_womens\\_teams\\_twitter\\_use](http://www.dailytarheel.com/article/2012/01/sylvia_hatchell_bans_womens_teams_twitter_use).

220. See Eamonn Brennan, *Want to Understand Transfer Rules? Give Up*, ESPN (Aug. 28, 2013, 4:35 PM), [http://espn.go.com/blog/collegebasketballnation/post/\\_id/87697/trying-to-understand-transfer-rules-give-up](http://espn.go.com/blog/collegebasketballnation/post/_id/87697/trying-to-understand-transfer-rules-give-up) (outlining the “dizzying” set of rules and bureaucratic processes that govern transfers in college athletics); NAT'L COLLEGIATE ATHLETIC ASS'N, TRANSFER 101: BASIC INFORMATION YOU NEED TO KNOW ABOUT TRANSFERRING TO AN NCAA COLLEGE (2012–13 ed. 2012), available at <http://www.ncaapublications.com/productdownloads/TGONLINE2012.pdf>.

unexpected term in the Financial Aid Agreement likely will be unable to seamlessly change colleges without interrupting his educational and playing career. For an athlete in his second, third or fourth years of college, the Financial Aid Agreement is a classic contract of adhesion, a take-it-or-leave-it proposition to which the only alternative may be quitting college altogether. And while contracts of adhesion typically are enforceable even when the parties stand in starkly uneven bargaining positions,<sup>221</sup> an exceptionally broad waiver of First Amendment rights might trigger judicial scrutiny under the doctrine of unconscionability.<sup>222</sup>

Perhaps more to the point, not all athletes receive scholarships, meals and housing. A substantial number of athletes “walk on” to their college teams. They sign no “letter of intent” committing them to enroll, and they receive no compensation beyond the intangible benefits of athletic participation.<sup>223</sup> It is highly unlikely that a coach would accede to two differing levels of control over players, one for those receiving financial benefits and another for walk-ons. Since a coach will assert the same level of control over non-scholarship as well as scholarship athletes, an athletic department’s authority over players’ speech cannot be based on the scholarship contract.

Requiring a student to sign away constitutional rights in exchange for the opportunity to play sports risks running afoul of the “unconstitutional conditions” doctrine. As Professor Epstein has explained the doctrine, “even if a state has absolute discretion to grant or deny a privilege or benefit, it cannot grant the privilege subject to conditions that improperly ‘coerce,’ ‘pressure,’ or ‘induce’ the waiver of constitutional rights.”<sup>224</sup> A requirement to waive constitutional rights as a condition of receiving a government benefit will be held unconstitutional if the

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221. See Shelley Smith, *Reforming the Law of Adhesion Contracts: A Judicial Response to the Subprime Mortgage Crisis*, 14 LEWIS & CLARK L. REV. 1035, 1082 (2010) (“[T]wo of the defining characteristics of adhesion contracts — the inequality of bargaining power between the parties and the inability of the non-drafting party to bargain over the contract’s terms — are not prerequisites to contract formation.”).

222. See *id.* at 1091 (defining “an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party” as an essential element of the unconscionability doctrine (quoting *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965))).

223. See Otis B. Grant, *African American College Football Players and the Dilemma of Exploitation, Racism, and Education: A Socio-Economic Analysis of Sports Law*, 24 WHITTIER L. REV. 645, 653, 659 n.96 (2003); see also Kerry Brown, *Walking On 101*, NCSA ATHLETIC RECRUITING BLOG (Oct. 25, 2012, 9:25 AM), <http://www.ncsasports.org/blog/2012/10/25/walking-101/> (explaining that walk-on athletes cannot sign letters of intent and “oftentimes will not receive the same attention and privileges as [their] teammates”).

224. Richard Epstein, *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 6–7 (1988).

right “has little or no relationship” to the withheld benefit.<sup>225</sup> Interposing the artifice of a contract so as to make the government coercion appear voluntary does not legitimize the exaction, because “the state cannot accomplish indirectly that which it has been constitutionally prohibited from doing directly.”<sup>226</sup> Significantly, a citizen may challenge a coercive condition as unconstitutional even when the condition is tied to a purely discretionary benefit.<sup>227</sup> Consequently, that a college student has no vested constitutional right in participating in sports or any other extracurricular activity would not be fatal to a legal challenge.

In the past term, the Supreme Court reinvigorated the seldom-invoked unconstitutional conditions doctrine in the case of *Agency for Int’l Development v. Alliance for Open Society International, Inc.*<sup>228</sup> There, a coalition of nongovernmental organizations receiving USAID funding for anti-AIDS programming in Africa challenged a federal requirement that grant recipients enact a statement explicitly opposing the practice of prostitution.<sup>229</sup> The organizations were concerned that staking out such a position risked alienating government officials in host countries and making it more difficult to work supportively with prostitutes in combating HIV.<sup>230</sup> Relying on the doctrine of unconstitutional conditions, the Supreme Court held that the requirement represented an unlawful coercive use of government funding to compel a grant recipient to alter its constitutionally protected message “outside the scope of the federally funded program.”<sup>231</sup>

The determination whether a condition is unconstitutional thus turns on the pivotal question of whether the condition is “within the scope” of the government benefit on which it is contingent. While a tightly drawn restriction on social media use during the performance of or preparation for an athletic competition might well survive scrutiny, a broader proscription will be constitutionally suspect. The “scope” of a college athletic program does not extend to all off-hours expressive activity. The student/school setting is perhaps uniquely well suited to a challenge under the theory of unconstitutional conditions, because the doctrine is understood

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225. *Lebron v. Sec’y, Fla. Dep’t of Children & Families*, 710 F.3d 1202 (11th Cir. 2013) (quoting *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994)). In *Lebron*, the Eleventh Circuit ruled that Florida regulators violated the Constitution by requiring welfare recipients to submit to drug screening as a condition for benefits under the federally funded Temporary Assistance for Needy Families program. *Id.* at 1217–18. See also *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 716 (1981) (holding that a Jehovah’s Witness could not be denied unemployment benefits on the grounds of his refusal to forsake his religious objections to working in a weapons factory because, “a person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program”).

226. *Lebron*, 710 F.3d at 1217.

227. See Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989) (arguing that the “government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether”).

228. 133 S. Ct. 2321 (2013).

229. *Id.* at 2324 (citing 22 U.S.C. § 7631(f) (2006)).

230. *Id.* at 2326.

231. *Id.* at 2230–32 (quoting *Rust v. Sullivan*, 500 U.S. 173, 197 (1991)).

as protecting not just the individual who is subject to the coercive bargain but the larger society as a whole. Understood in this way, the refusal to recognize the validity of a purported waiver of rights gives effect to the Constitution as not just a grant of affirmative individual rights but as a check on overreaching by government.<sup>232</sup> With the possible exception of prison, there is no setting where the power differential between individual and government is more pronounced than at school, and courts should look especially critically at contracts imposed on relatively unsophisticated counterparties purporting to widen that power differential. A broad waiver of the First Amendment right to engage in “inappropriate” speech unrelated to athletics, or of the Fourth Amendment privacy interest in social media login information<sup>233</sup> enabling an athletic department to read even private one-to-one messages, is thus vulnerable to challenge as an unconstitutional condition.

Regardless of whether an express written waiver exists, schools may argue that voluntary participation in the activity itself operates as an implicit acceptance of the coach’s and athletic department’s conditions.<sup>234</sup> The “implied waiver” argument superficially finds some support in the Supreme Court’s jurisprudence addressing the Fourth Amendment rights of K-12 students ordered to submit to drug testing as a condition of taking part in extracurricular activities. On examination, however, the situations are not materially analogous.<sup>235</sup>

In *Vernonia School District 47J v. Acton*, the families of student-athletes at an Oregon high school challenged the school district’s decision to require a signed waiver acceding to random drug testing as a condition of playing interscholastic sports.<sup>236</sup> While recognizing that a drug test qualifies as a “search” for Fourth Amendment purposes, the Supreme Court ruled 6-3 that the drug-testing regime imposed no unreasonable intrusion on the students’ privacy.<sup>237</sup> The Court observed

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232. Philip Hamburger, *Unconstitutional Conditions: The Irrelevance of Consent*, 98 VA. L. REV. 479, 513 (May 2012) (“Constitutional rights . . . are not private rights, which the rights holders can barter away or otherwise relinquish as they please. On the contrary, they are legal limits legislated by the people, and this has implications for the significance of consent.”).

233. See, e.g., *R.S. ex rel. S.S. v. Minnewaska Area Sch. Dist. No. 2149*, 894 F. Supp. 2d 1128, 1140 (D. Minn. 2012). Although a court likely would not recognize a legitimate expectation of privacy where postings were shared with hundreds of Facebook or Twitter followers, Fourth Amendment jurisprudence strongly supports an alternative argument that government actors may not engage in suspicionless searches of private messages. See, e.g., *id.* (finding an actionable invasion of privacy where a principal learned that two middle school classmates had engaged in an out-of-school, sex-related conversation, forced one of the students to log into Facebook, and then examined the student’s private messages).

234. This “implied waiver” argument can be seen as underlying courts’ willingness to compromise the First Amendment rights of government employees and students generally. See Moss, *supra* note 38, at 1643–48 (2007) (explaining waiver rationale but finding it unpersuasive in the school setting, where the speaker’s choices are limited by practical realities, including the necessity of changing residences to enroll in a different school district).

235. See *infra* notes 239–241 and accompanying text.

236. 515 U.S. 646, 651 (1995).

237. *Id.* at 665.

that student-athletes already accept diminished privacy, including communal showering and locker facilities.<sup>238</sup> “By choosing to ‘go out for the team,’” the majority stated, the athletes “voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally,” including minimum grade-point standards, mandatory insurance coverage, and a preseason physical.<sup>239</sup> On the opposing side of the scale, the Court found two legitimate government interests that outweighed the sacrifice of students’ privacy: first, that drug use presented an imminent physical danger to safety, including the safety of innocent teammates and opponents, and second, that the evidence established a “crisis” level of defiance of drug laws and other illicit behavior in this particular district, which in the school’s judgment could be ameliorated by curbing drug use among student “role models.”<sup>240</sup>

The Court then expanded on *Vernonia* in *Board of Education of Independent School District No. 92 v. Earls*, finding no Fourth Amendment violation in a more expansive drug-testing regimen applying to all students taking part in extracurriculars, not just athletes.<sup>241</sup> The school’s factual case in *Earls* was significant weaker – there was no evidence of a “crisis” level of drug abuse, and little indication that students posed a danger to others while using drugs during choir or glee club – yet a 5-4 majority found the policy “minimally intrusive” and justified by the school’s health and safety concerns.<sup>242</sup> Notably, the relatively mild consequences of a positive drug test were pivotal to the majority’s conclusion. For a first offense, the school imposed no punishment beyond a parental conference and a mandatory follow-up test; a student would be suspended from participation only after failing a second test, and dismissed from the activity only after failing a third time.<sup>243</sup>

*Vernonia* and *Earls*, to the extent that they apply in the college setting at all, do not logically lead to the conclusion that students taking part in sports implicitly waive all constitutional rights. The Court’s reasoning was a straightforward application of the balancing-of-interests that always applies to Fourth Amendment challenges.<sup>244</sup> Colleges defending the punishment of “offensive” or “inappropriate” speech—or defending a categorical prohibition on social media—would be asking for a deviation from the Supreme Court’s established First Amendment jurisprudence, not an application of it. In the First Amendment context, unlike in

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238. *Id.* at 657.

239. *Id.*

240. *Id.* at 661–63.

241. 536 U.S. 822, 825 (2002).

242. *Id.* at 834, 838.

243. *Id.* at 833–34.

244. *See, e.g.,* *South Dakota v. Opperman*, 428 U.S. 364, 377–78 (1976) (Powell, J., concurring) (holding that reasonableness of a police “inventory search” of impounded automobile “requires a weighing of the governmental and societal interests advanced to justify such intrusions against the constitutionally protected interest of the individual citizen in the privacy of his effects”).

Fourth Amendment cases, courts are limited in their ability to assign differing values to individual speakers' constitutional interests.<sup>245</sup> There is no First Amendment equivalent to the "reasonable expectation of privacy" that is at the heart of every Fourth Amendment assessment.<sup>246</sup> (If there were, that factor assuredly would cut against a government demand for access to the nonpublic portions of password-protected social media accounts.) More to the point, drug testing is limited to detecting unlawful activity that poses a physical danger to the student and to others. Colleges' asserted control over social media is not limited to unlawful or physically dangerous behavior. The ability to prevent and punish dangerous criminal behavior in no way suggests by extension the ability to also prevent and punish non-dangerous lawful behavior.

### C. *High School Athletics: A Special Case*

While the public and policymakers are focused on the higher-profile setting of college athletics, at least some K-12 schools are asserting control over their student athletes' online speech comparable to those seen at the college level.<sup>247</sup> The high school setting presents a range of unique issues not present at the college level that may actually make it harder to defend the legality of broad content-based restrictions on athletes' speech.

Depriving a student of participation in athletics at the high school level raises constitutional questions not present in college. Every state constitution entitles students to the benefits of a public education.<sup>248</sup> In at least one state, California, the

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245. In recent years, the Supreme Court has emphasized that it does not weigh the relative merits of individual speakers' messages when deciding whether their speech falls within the bounds of the First Amendment. *See, e.g., United States v. Alvarez*, 132 S. Ct. 2537, 2551 (2012) (stating, in finding that First Amendment protects speech of politician who falsely claimed to have won military honors, "The Nation well knows that one of the costs of the First Amendment is that it protects the speech we detest as well as the speech we embrace. Though few might find respondent's statements anything but contemptible, his right to make those statements is protected by the Constitution's guarantee of freedom of speech and expression."). *But see Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (balancing interest of freedom of speech with society's countervailing interest in teaching students the boundaries of socially appropriate behavior protecting minors from exposure to vulgar and offensive spoken language); *Morse v. Frederick*, 551 U.S. 393, 408 (2007) (tempering freedom of speech with special characteristics of school environment and governmental interest in stopping student drug abuse).

246. "The touchstone of Fourth Amendment analysis is whether a person has a 'constitutionally protected reasonable expectation of privacy.'" *California v. Ciraolo*, 476 U.S. 207, 211 (1986) (Harlan, J., concurring) (quoting *Katz v. United States*, 389 U.S. 347, 360 (1967)).

247. *See, e.g., Mark Demsky, Students Railing Against Social Media Contract Implemented by School District*, FOX40.COM (Aug. 2, 2013), <http://fox40.com/2013/08/02/school-district-forcing-student-athletes-to-sign-social-media-contract/> (last viewed Aug. 3, 2013) (describing how Northern California school district, in a purported effort to address online bullying, enacted a mandatory "contract" for athletics and other after-school activities requiring students to refrain from any "inappropriate" speech on social media).

248. Emily Bloomenthal, *Inadequate Discipline: Challenging Zero Tolerance Policies as Violating State Constitution Education Clauses*, 35 N.Y.U. REV. L. & SOC. CHANGE 303, 329 (2011); Patricia M. Harris, Note, *Student Fees in Public Schools: Defining the Scope of Education*, 72 IOWA L. REV. 1401, 1402 (1987).

right to a free public education is understood to encompass extracurricular as well as classroom activities, because extracurricular activities are viewed as an essential element of the learning experience.<sup>249</sup> Once a public benefit is constitutionally guaranteed without condition, a state may not condition receipt of the benefit on waiving fundamental rights (particularly where, as in the case of California, the rights of students to speak freely both on and off campus are the subject of a battery of statutory protections buttressing federal First Amendment protections).<sup>250</sup> Since no one is constitutionally guaranteed a free *college* education, there is no comparable constitutional interest at stake.<sup>251</sup>

Excluding a student from extracurricular activities in high school also carries the consequence of diminished college opportunity. While extracurricular activities at college are (for all but the tiny fraction of professional-prospect athletes) merely a rewarding diversion, for high school students they are an increasingly essential part of the college-preparation track. To deny a student the opportunity for what may be the difference-making credential between college acceptance and rejection is a decision of momentous gravity.

## VI. CHALLENGING SCHOOL REGULATORY OR PUNITIVE ACTIONS

### A. *Practical Impediments Discourage Constitutional Challenges to College Disciplinary Decisions*

That a college athlete has yet to litigate a constitutional case about freedom of expression on social media speaks to the inherent difficulties for any student—especially an athlete—in taking a college to court and obtaining meaningful relief. The clock is a student plaintiff's enemy. Requests for injunctive relief are likely to be pronounced moot, even at the appellate level, as soon as the athlete graduates or expends his eligibility so as no longer to be aggrieved by the constraint he is

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249. See *Hartzell v. Connell*, 35 P.2d 35, 42 (Cal. 1984) (“It can no longer be denied that extracurricular activities constitute an integral component of public education. Such activities are generally recognized as a fundamental ingredient of the educational process.”) (internal quotes omitted). Courts in several other states, however, have taken narrower views of what falls within the bundle of benefits constituting a free public education. See, e.g., *Paulson v. Minidoka Cnty. Sch. Dist. No. 331*, 463 P.2d 935, 938 (Idaho 1970); *Hamer v. Bd. of Educ.*, 265 N.E.2d 616, 621 (Ill. 1970). The Supreme Court found no fundamental constitutional right to any particular level of education even at the K-12 level. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 18 (1973).

250. See CAL. EDUC. CODE § 48907 (guaranteeing students in K-12 schools the right of free expression except where speech is unlawful or presents a clear and present danger of inciting unlawful or substantially disruptive behavior); CAL. EDUC. CODE § 48950 (prohibiting K-12 schools from disciplining students for speech that would be protected by the First Amendment if uttered off campus).

251. See, e.g., *Colorado Seminary v. NCAA*, 570 F.2d 320, 321 (10th Cir. 1978) (finding that intercollegiate hockey players had no constitutionally protected property interest in continued athletic participation that could support a due process challenge to the NCAA's decision to suspend them).

challenging.<sup>252</sup> And the clock presents practical as well as legal disincentives – even a complete victory restoring the ability to play college football is unlikely to be of much value to a 28-year-old.

The intimidating power differential between student and institution presents a powerful psychological barrier. An athlete who is suspended from participation but remains part of the program, or has hopes of returning, will understandably hesitate to take the coach and athletic director to court. Even if an athlete wrongfully banned from the team could obtain timely injunctive relief, the adversarial proceeding could poison the player/coach relationship.

*B. Deprivation of Athletic Participation and “Material Adversity”*

It would be especially difficult to litigate a case if the state-imposed sanction is something short of a complete loss of educational opportunity—for instance, a benching or a suspension for several games. Courts understandably will defer to the internal team tactical decisions of coaches in the same way that they defer to the in-class curricular decisions of teachers and professors, hesitant to wade into refereeing who deserves playing time at which position.

Demonstrating an actionably serious deprivation may pose difficulty for an athlete who suffers no concrete loss of financial benefits. Even if an athlete were able to demonstrate that the loss of playing time diminished his appeal to professional leagues, the likelihood of a professional athletic career is so remote that courts will hesitate to recognize a cognizable injury. In one recent example (having nothing to do with freedom of expression), a state appellate court rejected an array of tort and contract claims lodged by former University of North Carolina football star Michael McAdoo, who sought recompense from the university because of his removal from the team resulting from an academic scandal.<sup>253</sup> The court found no compensable injury because McAdoo lost only playing time, not his scholarship, housing and other tangible benefits; the court dismissed as “conjectural” the suggestion that, with the benefit of a full senior season, McAdoo would have signed a more lucrative deal than the free-agent contract he landed with the Baltimore Ravens of the National Football League.<sup>254</sup>

Consistent with the Supreme Court’s guidance in *Rutan* and in *Burlington Northern*, an athlete punished for the content of speech should be able to mount a First Amendment retaliation claim even if deprived of a benefit that is intangible, if

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252. See *Lane v. Simon*, 495 F.3d 1182, 1187 (10th Cir. 2007) (dismissing, as moot, the First Amendment claims of student newspaper editors who sought to enjoin their university from future acts of censorship because, while the appeal was pending, the editors graduated and thus were no longer in a position to benefit from injunctive relief).

253. *McAdoo v. Univ. of N.C.*, 736 S.E.2d 811, 814 (N.C. Ct. App. 2013).

254. See *id.* at 823 (“Although any specific level of injury to Plaintiff’s career prospects and earning potential is too ‘conjectural’ and ‘hypothetical’ to estimate, it is clear that the actions of [the university] did not prevent Plaintiff from pursuing a professional football career.”).

it is sufficiently valuable. Losing the ability to play a sport for a sustained period is an injury that, while not quantifiable in dollars, would deter a person of ordinary firmness from engaging in the same type of speech again, and would send a chilling message to others on the team as well.<sup>255</sup> As a matter of public policy, if it can be shown that a government official acted with the intent to punish or deter constitutionally protected speech, and that the action in fact was likely to succeed, the official's choice of weapon should be of little significance.<sup>256</sup> The suggestion in cases such as *Lowery* that a deprivation is not actionable because there is no constitutional right to play sports ignores fifty years of Supreme Court guidance, beginning with *Keyishian*, that even the loss of a discretionary "privilege" can constitute unlawful retaliation.<sup>257</sup>

## VII. RESOLVING – AND PREVENTING – CONSTITUTIONAL CLASHES

To summarize, an athlete attending a state institution should have considerable First Amendment protection against content-based punishment for off-campus speech on personal time, or against broad-based restrictions that place entire methods of communication off-limits. State institutions will have, at the very most, the ability to regulate and punish speech that presents the imminent risk of substantially disrupting their operations or breaking the law.<sup>258</sup> A contract purporting to broadly surrender constitutional rights and accept punishment for otherwise legally protected speech would be viewed with justified skepticism, since participation in state programs cannot be conditioned on a waiver of constitutional rights unrelated to the program's functions. Prohibitions against specific types of speech should be governed by the scrutiny accompanying content-based restrictions, which in the "real world" outside of campus rarely are upheld without the compelling justification that appears lacking in the athletic setting. Prohibitions on the use of particular types of social media should be analyzed both for overbreadth (because they restrict the harmless use of the medium) and for underinclusiveness (because they leave equally harmful channels of communication

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255. See *T.V. v. Smith-Greene*, 807 F.Supp.2d 767, 780 (N.D. Ind. 2011) (holding, in the case of high school volleyball players removed from their team because of sexual humor in a video shot at an off-campus slumber party, that being denied the chance to play high school sports was a sufficiently severe punishment to trigger First Amendment scrutiny: "a student cannot be punished with a ban from extracurricular activities for non-disruptive speech").

256. See Levinson, *supra* note 101, at 674–75 (criticizing some courts' reluctance to recognize a retaliation claim short of proof of a "material change" in pay or benefits, because "such decisions send a dangerous message to government employers that they may penalize those who exercise their First Amendment rights provided their retaliatory conduct falls short of a 'material change' in the terms or conditions of employment").

257. See, e.g., *Speiser v. Randall*, 357 U.S. 513, 518 (1958) (stating that a denial of a tax exemption is a deprivation of freedom of speech even though specific tax exemption is a privilege).

258. See *Healy v. James*, 408 U.S. 169, 188 (1972) (recognizing that if there were an evidential basis to support the conclusion that student group posed a threat of disruption, then limitation on this freedom of speech on a state-supported institution would be justified); *supra* notes 183–84 and accompanying text.

unregulated, so as to make the prohibition ineffective). The more distant the expression is from the actual performance of team responsibilities, the less authority a school will be able to assert over it. Even if the punishment for “inappropriate” speech is only a suspension from team participation, the materiality of the loss should be addressed as a matter of damages and should not entirely foreclose recovery on a First Amendment retaliation claim.

Colleges do not need boundless authority over their athletes’ off-campus speech to protect their legitimate institutional interests, because narrower and less speech-restrictive alternatives exist. For example, intellectual-property law already provides legal recourse for colleges where the unauthorized use of trademarked logos or images might suggest official sponsorship of a student’s purely personal speech.<sup>259</sup> A college could consequently order an athlete to cease displaying a trademarked logo, mascot or other mark accompanying a social media account in a way that implies the student is speaking as a representative of the school.<sup>260</sup> A reasonable “time, place and manner” prohibition comparable to those in the professional football and basketball leagues that restricts athletes from posting to social media during and immediately before games would likely be upheld, as it is narrowly tailored to minimize distractions.<sup>261</sup> Additionally, college administrators—like any member of the public—may freely view the publicly available portions of athletes’ social media presences. While they rarely may impose punishment for “pure speech,” they remain free within their jurisdiction to punish the underlying illicit behavior they discover through social media (*e.g.*, tweets evidencing that the athlete accepts money from sports agents).

Marketplace responses already provide ample incentive for students to maintain a “clean” social media profile. As illustrated by the declining NFL valuation of Marvin Austin, the University of North Carolina footballer who dropped from a

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259. Federal law provides a cause of action for the “dilution” of a “famous” mark, such as by falsely associating it with an unsavory product in a way that diminishes its value. *See* 15 U.S.C. § 1125(c)(1) (2006). Social-networking sites have themselves developed policies for deactivating infringing accounts upon receipt of a verified infringement claim from the owner of a mark. *See, e.g.*, Facebook Copyright Policy, <http://www.facebook.com/legal/copyright.php> (last viewed Aug. 12, 2013).

260. The University of Maryland is among those specifically instructing athletes not to use the university’s “wordmarks, logs or images” without applying to the college for permission. *See Social Media Guidelines for Student-Athletes*, Maryland Athletics, available at <http://www.washingtonpost.com/r/2010-2019/WashingtonPost/2011/10/13/CapitalBusiness/Graphics/Student%20Athlete%20Social%20Media%20Guidelines.pdf>.

261. For example, the University of Houston, for instructs athletes not to use social media four hours before athletic department events or between midnight and 5 a.m. on the night before a competition. Bentley, *supra* note 154, at 477.

likely first-round draft pick to a second-round draftee after a suspension cost him his senior season,<sup>262</sup> intemperate speech on social media can limit a student's employment prospects. Private employers are free to exact penalties that government regulators are not. Teaching students about mindful social media use enhances their employability. Kicking students out of extracurricular activities, in the name of "punishing to teach," limits their employability.

### VIII. CONCLUSION

In April 2013, Rutgers University fired its head basketball coach, Mike Rice, Jr., after the sports network ESPN aired videos taken at practice sessions exposing how Rice mistreated athletes, including shoving, kicking, cursing and throwing basketballs at them.<sup>263</sup> Although the abuse was reported to have dated back to the 2010-11 season, it took more than two years—and a fired Rutgers staffer's decision to leak the films—to bring Rice's behavior to light.<sup>264</sup> Why would students accept such cruelty and unprofessionalism from a "responsible adult" who is supposed to be looking out for their welfare? One explanation lies in the culture of control that athletic departments have cultivated—erecting barriers that limit athletes' ability to have uncensored contact with the outside world, and enforcing a "my way or the highway" climate in which every player knows his future can be inalterably damaged if he is marked as a troublemaker. Banning or monitoring athletes' use of social media cuts off one more "lifeline" by which mistreated players like those at Rutgers might reach out for help.<sup>265</sup> Just the existence of monitoring sends the unmistakable message that people with life-or-death control over an athlete's educational and professional future are standing by to punish any step over the party line.

The notion that educational institutions must necessarily "punish to teach" reflects a failure of pedagogical creativity and, in the end analysis, a failure of trust

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262. See Mike Garafolo, *Giants' Hakeem Nicks Says Draftee Marvin Austin is a 'Great Kid'* STAR-LEDGER (May 5, 2011), [http://www.nj.com/giants/index.ssf/2011/05/giants\\_hakeem\\_nicks\\_says\\_draft.html](http://www.nj.com/giants/index.ssf/2011/05/giants_hakeem_nicks_says_draft.html) (describing how questions about Austin's character "caused a player with first-round talent to drop to the second day of the draft").

263. *Rutgers Fires Coach Mike Rice*, ESPN (Apr. 3, 2013), [http://espn.go.com/new-york/mens-college-basketball/story/\\_/id/9128825/Rutgers-scarlet-knights-fire-coach-mike-rice-wake-video-scandal](http://espn.go.com/new-york/mens-college-basketball/story/_/id/9128825/Rutgers-scarlet-knights-fire-coach-mike-rice-wake-video-scandal).

264. Don Van Natta, Jr., *Video Shows Mike Rice's Ire*, ESPN (Apr. 3, 2013), [http://espn.go.com/espn/otl/story/\\_/id/9125796/practice-video-shows-rutgers-basketball-coach-mike-rice-berated-pushed-used-slurs-players](http://espn.go.com/espn/otl/story/_/id/9125796/practice-video-shows-rutgers-basketball-coach-mike-rice-berated-pushed-used-slurs-players).

265. See *Seamons v. Snow*, 84 F.3d 1226, 1237 (10th Cir. 1996); Rebecca L. Zeidel, Note, *Forecasting Disruption, Forfeiting Speech: Restrictions on Student Speech in Extracurricular Activities*, 53 B.C. L. REV. 303, 339 (2012) (making the point that legal protection for speech critical of coaches' professional conduct "may serve an important safety function in reporting egregious conduct and dangerous conditions").

in the ability of speakers and audiences to parse that which is meaningful from that which is momentarily diverting—a trust exemplified by Justice Fortas' rousing words in *Tinker*:

*Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk . . . and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.<sup>266</sup>*

Outside of the school and workplace settings, it is increasingly well-accepted that the “price” of free speech—that people will be exposed to unwelcome ideas, at times presented in harsh or unsophisticated terms—is a price that a democratic society must gladly incur. None of the consequences that colleges' speech restrictions seek to avoid—that the college or its athletes might suffer reputational harm, that an athlete might be disqualified from competition, that a coach might feel his authority threatened, that locker-room dissent might result in losing a game—is of any great moment when weighed against the compromise of fundamental freedoms. Even if our legal system has sometimes lost sight when the speaker is a student of the paramount importance of the individual voice over the convenience and comfort of government regulators, our educational system should not.

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266. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. at 508–09 (1969).