FREE SPEECH VERSUS FREE EDUCATION

FIRST AMENDMENT CONSIDERATIONS IN LIMITING STUDENT ATHLETES' USE OF SOCIAL MEDIA

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Imagine this: a star student-athlete attending a state university on athletic scholarship is benched by his or her coach during a game. Shortly thereafter, the student-athlete takes to the airwaves via Twitter or Facebook to call out the coach. The

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[*] Professor of Law, Texas Wesleyan School of Law. The author would like to thank the entire staff of the MISSISSIPPI SPORTS LAW REVIEW for their graciousness, attention to detail and extraordinary Symposium. Professor Penrose also wishes to thank her colleagues, Professor Joe Thai of the University of Oklahoma and Professor Brian Holland of Texas Wesleyan Law School for their pre-Symposium editorial comments and insights. Professor Penrose remains grateful to the other panel participants, Tim Epstein, Jerry Parkinson, John Wendt and Peter Young, and Steven Cox for enriching her experience and understanding of these topics. Finally, thanks to Professor Will Berry and Dean Richard Gershon for their support of the Symposium. Ole Miss showed itself to be an institution of the highest order during this wonderful event. The author's experience in Oxford far transcended southern hospitality and, for that, she remains eternally grateful.

posting might look something like this–*"Don't gett [sic] how we pose [sic] to win wit [sic] this guy coachin [sic] us, just don't want it that bad I guess."*[1]

Or, perhaps, a player frustrated by his or her role on the team might post something that looks like this–"Starting to see why people transfer you can play the minutes but not getting your talents shown because u [sic] watching someone else wit [sic] the ball the whole game shooters need to move not watch why other coaches get that do not [sic] make sense to me."[2]

Free speech, as athletes are constantly learning, can be a costly endeavor. Because of tweets like the ones quoted above, many universities are now limiting or outright banning the use of social media by their athletes. In some instances, the ban is in effect only during season. In others, the ban may be in place during the athlete's entire tenure at the school. Student athletes are given a clear choice: free speech or free education.

This article considers the First Amendment implications regarding limitations placed on student athletes' use of social media. Schools have a vested interest in controlling their athletes' public expressions, whether such expressions are found in tattoos, public interviews or tweets. Like it or not, a great deal of damage can occur in "140 words or less." And, displeased student-athletes have choices. Twitter or touchdowns. Facebook from your dorm or facetime on television hitting three-pointers. While universities are generally places that encourage robust speech and debate, there are defensible, and arguably lawful, reasons why schools should limit student-athletes' use of social media.

Part I of this article will provide examples of student athletes' indiscriminate use of social media. In other words, Part I will set forth the problem. Part II of the article will present relevant case law evaluating First Amendment application in

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[1] Tweet by Senior Idaho Men's Basketball player, Kashif Watson. At the time, Watson was the team's second leading scorer. His comments regarding his coach, Don Verlin, resulted in Watson being suspended by Coach Verlin on Senior Night for "conduct detrimental to the program."

[2] Tweet by Mississippi State Men's Basketball player, Ravern Johnson, a senior. Nina Mandell, *Renardo Sidney, Mississippi State Banned From Twitter After Outburst From Ravern Johnson*, NY DAILY NEWS, Feb. 3, 2011. Johnson's tweet resulted in Coach Rick Stansbury banning the Mississippi State basketball team from using Twitter while playing at Mississippi State. *Id.*

school and athletic settings. Part II explains the legal issues in dealing with the problem. Part III concludes briefly by explaining that current First Amendment law likely permits universities to condition participation in college athletics on their athletes' restricted use of social media. After all, universities provide objecting student athletes with an option: free speech or free education.

I. THE TWITTERVERSE: INDISCRETIONS REVEALED IN 140 WORDS OR LESS

Twitter and Facebook may be the two most popular social media outlets for college students. In fact, Facebook was created at Harvard University to initially target only those individuals with an .edu email address indicating college affiliation. Twitter, in contrast, was intended to provide brief, real-time updates about individuals to others with a common interest. Both outlets allow public and private postings though, by now, surely everyone recognizes that anything posted even privately has the potential to go viral at any moment.[3] Unfortunate examples include former Texas football player, Buck Burnette, who posted the following statement on his Facebook page during election night 2010:

> "all the hunters gather up, we have a [racial slur] in the whitehouse."[4]

Burnette allegedly received the message via text from a friend and decided to post it on his own Facebook page.[5] The result? Dismissal from the University of Texas football team.[6] Without even recognizing it as a choice, Burnett tragically chose free speech over football.

In public discussions about the incident, Coach Mack Brown admitted admonishing his players about the dangerous nature of Facebook and MySpace.[7] He was unwilling, however, to ban such

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[3] Joseph Duarte, HOUSTON CHRONICLE, Nov. 11, 2008. (noting, however, that "[w]hile Facebook has privacy features that limit who can see profile pages, many college students ignore them and provide a variety of personal information").

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

practices saying he considered social media "a public right they have as students."[8] Still, at the time, only 4 Longhorn football players had active Facebook accounts.[9] Another Big 12 football player, former Texas Tech Quarterback Graham Harrell, saw his Facebook account maxed out at 5,000 friends during his college career, with an increase in popularity following victories over Texas and Oklahoma State.[10] Even former Texas Tech Coach, Mike Leach, had a MySpace page that was being followed by then-Florida State Coach Bobby Bowden and Florida Coach Urban Meyer.

Regardless of bans, restrictions, limitations or simple warnings, Twitter and Facebook are now as entrenched in college athletics as fight songs and boosters. For students wanting more attention than that flowing from mere participation in college sports, Twitter and Facebook provide the potential to increase your "friends" into the thousands. Simple student athletes become overnight sensations, though not without some measure of risk to the athlete and university.

Take Notre Dame's Skyler Diggins, for example. Diggins is a standout member of the Notre Dame Women's Basketball team.[11] She also has a Twitter account.[12] During the 2010-2011 season, Diggins and her Fighting Irish teammates advanced to the NCAA National Championship game.[13] As a direct result of this feat and the added exposure attendant to the team's success, Diggins' popularity took a meteoric rise.[14] Diggins' Twitter followers rose from 6,000 to over to 56,000.[15] Yes, 56,000.[16]

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[8] *Id.*

[9] *Id.* "A review by the Houston Chronicle of the 60 players listed on the Longhorns' two-deep depth chart showed only four players with active Facebook accounts." *Id.*

[10] *Id.*

[11] Jeff Eisenberg, *Notre Dame's Skylar Diggins May Be Her Sport's Next Breakout Star*, rivals.yahoo.com, April 5, 2011, available at http://rivals.yahoo.com/ncaa/basketball/blog/the_dagger/post/Notre-Dame-8217.

[12] Lynette Hatton, *How Twitter Sky-Rocketed Skylar Diggins*, www.business2community.com , April 5, 2011, available at www.busniess2community.com/sports/how-twitter-sky-rocketed-skylar-diggins-023018.

[13] *Id.*

[14] *Id.* In addition to her on-court play, Hatton credits Diggins' newfound popularity to two of her Twitter followers, Lil' Wayne and Chris Brown. *Id.* Hatton also notes that both Wayne and Brown tweeted remarks about Diggins' physical appearance, with Wayne referring to her as his "wife" and Brown noting he found her "beautiful." *Id.*

[15] Jeff Eisenberg, *supra* note 11.

But, the attention that followed reveals the distressing nature of notoriety for college athletes.[17] Shortly after their National Championship game, rumors surfaced that a nude picture posted on Twitter was Diggins.[18] Diggins' response? Tweet back the truth.[19] Diggins resorted to social media to attack the rumor circulating about her on social media.[20] And, she immediately changed her account so that her posts were thereafter private.[21]

It is apparent from this example that Diggins did nothing to bring this voyeuristic attention on herself other than perform a sport at the highest level. In her case, resort to a Twitter "rant," as one author characterized her posts, was intended to defend her name and dignity.[22] Yet, it was Diggins' voluntary participation in Twitter in the first place that encouraged public figures, such as Lil' Wayne and Chris Brown, to bring further notoriety to Diggins.[23] When a famous rapper calls you his "wife" and another speaks about your beautiful appearance, chances are you will become something of a public sensation – and not merely for reasons stemming from your athletic prowess.[24]

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[16] Hatton, *supra* note 12. Hatton explains that "[b]eing mentioned in a tweet by a celebrity is a big deal. It is name-dropping to the *nth* degree, especially in our digital age. Once the followers of Lil' Wayne and Chris Brown mentioned Diggins, she became an instant source of curiosity, just on the strength of their interest alone." *Id.*

[17] Nina Mandell, *Skylar Diggins, Notre Dame Star, Slams Rumors of Naked Picture in Twitter Rant*, NY DAILY NEWS, April 17, 2011.

[18] *Id.*

[19] *Id.* Diggins posted several tweets in response to the rumor including the following:
"Gotta clear this up. I dnt [sic] know wht [sic] pic is going around, but tht [sic] is NOT ME."
"IDK who is going around trying to deame [sic] my character, but its [sic] sad."
"I can truly say that I am hurt by this …I dnt [sic] believe how someone could attempt to ruin my name but [sic] being untrue. I am stronger than this though. I will not run away and hide. There is no reason to . . . goodnight and I will be back to continue my thoughts and tweet regularly tomorrow. . . ."
Id. Even the distressing allegations did not dissuade Diggins from participating in social media. *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] Hatton, *supra* note 12.

[24] *Id.*

Diggins' social media use stands in stark contrast to that of Will Hill, a former University of Florida football player. Hill's tweets ranged from the grotesquely inane ("Taking a shit in the airport")[25] to the overtly racist ("Its funny as hell when a ni*** pay a prostitute for sex and she give him the money back")("Ni*** I go harder than a russian")[26] to the racy and sexually explicit ("Blowing on that sour wit mommy in the passenger givin me head")("Morning America day already starting off crazy chick offered me some ass if I massage her left breast smh lmsgao")(Its 636 in the morning and I here a f**kin knock at my door I'm like who the f**k is this come to find out its my first f**k of the day sour").[27] Hill's Tweets surely do not lend added respectability to the University of Florida's athletic department. One might argue, however, that such commentary offers great perspective into the lives of college athletes. Are Hill's tweeted messages representative of college athletes or are his reported exploits aberrational? Do Hill's posts provide insight into the heralded world of college athletics or are they symptoms of a growing problem? Either way, such Tweets gain the attention, ultimately, of fans, teammates, other players, coaches, university administrators, and the NCAA.

The most recent attention grabber is Marvin Austin who, as one outlet reported, "posted more than 2,400 tweet updates and built up a following of more than 1,800 people" before his Twitter account was cancelled.[28] Rivals.com suggests that Austin's many Tweets, describing trips home to D.C., trips to Miami, improper benefits for dining, clubbing and even a watch for his sister, are partially to blame for the NCAA's infraction allegations against his former school, the University of North Carolina.[29] Sports Illustrated further reported that at least one of Austin's trips to

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[25] Spencer Hall, *The Happy Football Life of Will Hill*, Jan. 19, 2011, available at www.everydayshouldbesaturday.com/2011/1/19/1943956/the-happy-football-life-of-will-hill.

[26] *Id*.

[27] *Id*.

[28] J.P. Giglio, blogger for newsbserver.com, July 20, 2010, available at http://blogs.newsobserver.com/accnow/austins-twitter-account-provides-clues-in-ncaa-probe-at-unc.

[29] Graham Watson, *Marvin Austin Threatens to "Spill the Beans" on UNC After McAdoo Petition Denied*, Rivals.com, July 14, 2011.

South Beach, about which Austin tweeted, became part of the NCAA's focus on North Carolina.[30] The NCAA's response to Austin's tweets, and there were many, caution institutions that "the advent of social media – and the inevitable penchant of some young athletes to post incriminating messages or pictures to their Facebook or Twitter accounts – has been a boon to investigators."[31] It may eventually decimate the North Carolina Football program.[32]

For the first time in history, the NCAA condemned a university for failure to monitor their student athletes' use of social media. Any former belief that the problem of social media was merely abstract dissipated with these far ranging allegations. Are Universities really responsible for following their athletes' social postings? In 2008 when Buck Burnett referred to the incoming President as a "n*****," NCAA spokesperson, Jennifer Kearns, indicated that "[t]he NCAA does encourage member schools to educate student-athletes [on] responsible use of social networking sites, but it is ultimately up to the individual schools to decide what policies to implement for student-athletes and students in general."[33] And, we know that Coach Mack Brown quickly condemned Burnett's posting. In fact, that single social media post cost Burnett his spot on the team.

So how did we move from a policy suggesting schools should teach their students about social media to serious infraction allegations based on "failure to monitor"? The NCAA's approach apparently changed quickly from one of education to one of supervision. It should come as little surprise that athletic departments are going to react. And, perhaps that reaction only mirrors the speed at which the Twitterverse has expanded.

Schools must ask themselves what to do in light of Burnett, Diggins, Hall, and Austin, among others. And, even more

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[30] Stewart Mandel, *Inside College Football*, SI.COM, July 19, 2010.

[31] *Id.*

[32] Ironically, although Austin was forced to shut down his Twitter account while at North Carolina, he has recently returned to the Twitterverse to threaten he will "spill the beans" against his former school. Graham Watson, *Marvin Austin Threatens to "Spill the Beans" on UNC After McAdoo Petition Denied*, rivals.yahoo.com, July 14, 2011. One of his reported tweets reads, "I'm so heated right now…justice will prevail [sic]..even if I have to spill the bean." *Id.*

[33] Joseph Duarte, HOUSTON CHRONICLE, Nov. 11, 2008.

troubling, the now watchful eyes of the NCAA will be reviewing how institutions review their student-athletes' social media postings. The most effective response might be an outright ban. It is tremendously difficult to help students age 18 to 22 fully appreciate the consequences of social media postings. Rather than risk damage to the university, team conflict, or NCAA scrutiny, many schools are understandably opting for outright bans. Do such bans infringe upon student-athletes' First Amendment rights? That becomes the question that scholars and schools must address.

In this author's opinion, the answer, though uncertain, is likely no. Students are not forced to participate in athletics. Students are not forced to accept athletic scholarships. Those who choose to do so, however, are subjected to much different, and often higher, standards than the general student population. If they would prefer to be like all other students enjoying full access to Twitter and Facebook, the choice seems clear. And, as case law demonstrates, First Amendment protections have only limited applicability on athletic fields and in locker rooms.

II. SAY IT OR PLAY IT: CAN ATHLETIC PROGRAMS LEGALLY LIMIT SOCIAL MEDIA?

College Athletes are Qualitatively Different

It is not remarkable to athletes, particularly college athletes, that coaches have immense influence over their lives outside the playing field and off the court. Athletes appreciate that they are merely a part of a larger team and that the team is generally governed by the coach and his or her rules. In line with such understanding, most universities have athletic codes of conduct that transcend the more generic Student Code governing university student behavior.

For example, the University of Minnesota in the Big Ten conference, has a Student-Athlete Code of Conduct clearly posted on its website.[34] The general "conduct policy statement" admonishes:

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[34] Gopher Academics, Student-Athlete Code of Conduct, available at http://gopheracademics.umn.edu/site/code_of_conduct.

> Student-athletes often are in the spotlight and, fair or not, their behavior is subject to scrutiny by their peers, members of the campus, local and national communities and by the media. The actions of one student-athlete may result in a generalization to all student-athletes and reflects on the individual, team, department and University, whether it be positively or negatively. . .
>
> Student-athletes who do not conform to this code may be subject to certain consequences for their actions that may include but are not limited to: a warning, dismissal from the team, reduction or withdrawal of athletically related financial aid, and dismissal from the University. In addition to all University policies, student-athletes are responsible for following the standards in the NCAA student-athlete behavior statement and the Big Ten sports-like conduct statement as well as all city, state and federal law.[35]

Required adherence to the additional conduct constraints contained in the University of Minnesota's Student-Athlete Code of Conduct demonstrates an immediate exception that student-athletes accept as members of the school's athletic teams. Agreement to adhere to such athletic codes of conduct serves as acknowledgement that student-athletes are held to a higher standard and subject to greater and at times more invasive regulations than the general student population.[36] These students are not *required* to participate in intercollegiate athletics. Rather, these student-athletes choose to do so and through this choice appreciate their "freedom" will be limited.

In fact, the University of Minnesota prohibits student-athletes from "[u]sing obscene gestures or profane or unduly provocative language or action toward an official, student, coach

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[35] *Id.*

[36] *Id.* For example, the Student-Athlete Code of Conduct prohibits "[t]he use of alcohol or drugs by student-athletes while involved in any team-related practices, competitions, banquets, travel or other activities is prohibited, ***regardless of age***." *Id.* (emphasis in original). Hence, student-athletes at the University of Minnesota knowingly forego the opportunity to consume alcohol during parts of their college experience in exchange for an opportunity to participate in intercollegiate athletics. The policy strikes at the very heart of one of the more common college experiences – drinking alcohol.

or spectator."[37] Failure to comply with this mandate results in possible public reprimands or suspension from playing activity.[38] While these vague definitions would ordinarily raise First Amendment concerns, athletes understand their behavior is regularly monitored and heavily regulated. Hence, the f-bomb is known to be off-limits. Not so for regular college-students. Their speech, their gestures and their desire to use profanity or unduly provocative language is a time-honored and constitutionally-protected First Amendment right.

Minnesota is hardly unique in its strict regulation of student-athletes. Other major universities, such as the University of Miami, the University of Southern California, the University of Iowa and Arizona State University, just to name a few, also enforce strict Student-Athlete codes of conduct. One common regulation appears to be a prohibition of the use of alcohol during any organized team event or activity, including on team trips or at banquets.[39] Another common regulation, and one that strikes at the heart of traditional First Amendment protections, is prohibitions on language and gestures while representing the university – so called "sportsmanlike" behavior mandates.[40] And, not surprisingly, most college athletic departments prohibit gambling on any sporting event, college or professional, regardless of the time of year or student's relation to the event, if any.[41]

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[37] *Id.*

[38] *Id.*

[39] *See e.g.,* USC Student-Athlete Code of Ethics (indicating "consumption of alcohol is not permitted on road trips or in any situation when representing USC"); Ohio University Athletics Student-Athlete Code of Conduct ("The possession or consumption of alcoholic beverages . . . on a team trip or during any team-related function is prohibited. This includes, but is not limited to, travel to and from an athletics event, before or after an athletics contest, during team gatherings and any time the team is together in an official capacity").

[40] *See e.g.,* University of Miami Student-Athlete Code of Conduct (prohibiting unsportsmanlike conduct that "in includes inappropriate behavior in language, gesture, or action, which demeans, physically intimidates, or endangers others"); Ohio University Athletics Student-Athlete Code of Conduct (warning that "[p]hysical or verbal abuse or offensive behavior will not be tolerated").

[41] *See e.g.,* USC Student-Athlete Code of Ethics (instructing that "gambling, wagering or betting in any form or any athletic activity is prohibited); Ohio University Athletics Student-Athlete Code of Conduct (explaining that "[i]n addition to obeying all federal, state and local laws, student-athletes shall not participate in any gambling activities involving intercollegiate or professional athletics").

In short, college athletes can be required to conform to the following mandate: don't drink, don't cuss, and don't gamble. These governing Student-Athlete Codes of Conduct literally prohibit college athletes, such as football and volleyball players, from entering a Final Four College Basketball Bracket despite the fact that such players have no ability to control the outcome or influence these games. Yet, the President of our county gets to participate and ESPN even publicizes his participation. Likewise, these codes of conduct would prohibit college basketball or softball players from joining their family in a professional football pool, choosing squares and throwing $5 in a pot, during the semester break or maybe even playing fantasy football. If the First Amendment were an obstacle to limiting student-athletes' use of social media, one would think that these other prohibitions, drinking, cussing and gambling, would be suspect as well.

The truth is that student-athletes forego the traditional college experience (e.g., drinking, cussing and gambling) for an enhanced opportunity to represent their university in athletic contests. The sacrifice of such freedoms is minimal and lasts, at most, four to five years. And, colleges give these students a choice– play sports under our rules or go somewhere else. Does the First Amendment really invade this choice?

Free Speech in the School Setting

> First Amendment rights, applied in light of the special circumstances of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the school house gate.[42]

Students, we are assured, do not shed their First Amendment rights at the schoolhouse gate. But, student-athletes are not simply members of the general school population, they are individuals who have voluntarily chosen to be subjected to greater responsibilities and greater regulations than many of their peers. Accordingly, when considering the regulation of student-athletes' social media usage, one must view the issue not only through the

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[42] *Tinker v. Des Moines*, 393 U.S. 503, 506 (1969).

prism of pure First Amendment law, but also considering the intersection of school law and free speech. Schools, after all, are not treated identically to free society. Schools, inherently, have more power over regulating their unique environments.

Courts Recognize the Unique Nature of the School Setting

The school environment is exceptional.[43] The United States Supreme Court has repeatedly acknowledged this uniqueness in cases where students' constitutional rights were limited.[44] In fact, the Court has grouped several school cases involving discipline and speech into a distinctive category known as "special needs" cases.[45] In special needs cases, courts traditionally show more deference to the regulating agency, school or employer, than they might in a different setting.[46] In the school context, the special needs of the school environment include the enhanced need for

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[43] *See e.g., T.L.O. v. New Jersey*, 469 U.S. 325 (1985). In his concurring opinion, Justice Powell noted:

The primary duty of school officials and teachers, as the Court states, is the education and training of young people. A State has a compelling interest in assuring that the schools meet this responsibility. Without first establishing discipline and maintaining order, teachers cannot begin to educate their students. And apart from education, the school has the obligation to protect pupils from mistreatment by other children, and also to protect teachers themselves from violence by the few students whose conduct in recent years has prompted national concern. For me, it would be at odds with history to argue that the full panoply of constitutional rules applies with the same force and effect in the schoolhouse as it does in the enforcement of criminal laws.

Id. at 350 (Powell, J., concurring).

[44] The quintessential school case remains *TLO v. New Jersey*, 469 U.S. 325 (1985), wherein the Supreme Court reminded that the Fourth Amendment does not have the same force or effect in the public school setting. *See also Tinker v. Des Moines*, 393 U.S. 503 (1969)(explaining that some free speech limitations are acceptable in public schools); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995)(upholding school district's use of random suspicionless drug testing for student-athletes); *Bd. of Ed. Of I.S.D. No. 92 of Pottawatomie Cty v. Earls*, 536 U.S. 822 (2000)(permitting random suspicionless drug testing of all students participating in extracurricular activities, not merely student-athletes).

[45] "Special needs" cases, however, tend to involve Fourth Amendment limitations as opposed to First Amendment limitations. *See TLO v. New Jersey*, 469 U.S. 325(1985); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995); *Bd. of Ed. Of I.S.D. No. 92 of Pottawatomie Cty v. Earls*, 536 U.S. 822 (2000).

[46] This is particularly true in highly regulated industries such as railroads and the customs department. *See e.g., Skinner v. Railray Labor Executives Assn.*, 489 U.S. 602 (1989); *Treasury Employees v. Von Rabb*, 489 U.S. 656 (1989). Again, in these particular cases, the issue involved alleged infringements into the employees' Fourth Amendment right to be free from unreasonable searches and seizures.

safety, order and discipline.[47] While many of these special needs cases focusing on schools occur at the primary and secondary school level, certain limitations may still be imposed at the university level in the name of safety, order or discipline.

The most relevant "special needs" case regarding a university's attempt to limit and control athletes' behavior is *Vernonia Sch. Dist. 47J v. Acton*.[48] *Acton* upheld a public school district's program requiring that all student-athletes submit to random suspicionless drug testing.[49] Students that refused to acquiesce to the drug testing program were ineligible to participate in athletics.[50] Writing for the majority, Justice Scalia indicated that "Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere, the [constitutional scrutiny imposed] cannot disregard the schools' custodial and tutelary responsibility for children."[51] Thus, on the one hand, *Acton* simply underscores that the constitutional rights of children at school are qualitatively distinct from adults.[52]

On the other hand, *Acton* explains that students' status as athletes justifies further restrictions on their freedoms due to the

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[47] *See TLO v. New Jersey*, 469 U.S. 325(1985); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995); *Bd. of Ed. Of I.S.D. No. 92 of Pottawatomie Cty v. Earls*, 536 U.S. 822 (2000).

[48] 515 U.S. 646 (1995).

[49] *Id*. The drug testing program was explained by the Court as follows:

The student to be tested completes a specimen control form which bears an assigned number. Prescription medications that the student is taking must be identified by providing a copy of the prescription or a doctor's authorization. The student then enters an empty locker room accompanied by an adult monitor of the same sex. Each boy selected produces a sample at a urinal, remaining fully clothed with his back to the monitor, who stands approximately 12 to 15 feet behind the student. Monitors may (though do not always) watch the student while he produces the sample, and they listen for normal sounds of urination. Girls produce samples in an enclosed bathroom stall, so that they can be heard but not observed. After the sample is produced, it is given to the monitor, who checks it for temperature and tampering and then transfers it to a vial. The samples are sent to an independent laboratory, which routinely tests them for amphetamines, cocaine and marijuana. Other drugs, such as LSD, may be screened at the request of the District, but the identity of a particular student does not determine which drugs will be tested. *Id.*at 649-650.

[50] *Id.* at 650-51.

[51] *Id.* at 656.

[52] *Id.* at 654 (noting that "at common law, and still today, unemancipated minors lack some of the most fundamental rights of self-determination – including even the right of liberty in its narrow sense, i.e. the right to come and go at will").

nature of athletics–not just the unique nature of the school environment. While addressing Fourth Amendment privacy issues, Justice Scalia noted that "[b]y choosing to 'go out for the team,' [student athletes] voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally."[53] In fact, Justice Scalia notes that student-athletes must often "maintain a minimum grade point average, and comply with any 'rules of conduct, dress, training hours and related matters as may be established for each sport by the head coach and athletic director with the principal's approval.'"[54] "Somewhat like adults who choose to participate in a 'closely regulated industry,' students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy."[55] Should speech issues be handled any differently?

Justice Scalia's observations regarding student-athletes, while presented in the Fourth Amendment context, are equally useful for evaluating how courts might consider the regulation of student-athletes' speech through social media. If future courts focus, as they should, on the lessened expectations of privacy and voluntary acceptance by student-athletes of regulations not imposed on the general student population, then limits placed on free expression will not yield many successful First Amendment challenges.

Unlike students in the general population, student-athletes take on greater responsibilities and greater regulations when they agree to participate in intercollegiate athletics. Hence, reviewing courts should evaluate any speech or conduct restrictions not only through the prism of First Amendment jurisprudence but also considering the unique nature of both the school setting and student-athletes' volitional participation in a highly regulated activity.

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[53] *Id.* at 658.
[54] *Id.*
[55] *Id.*

The First Amendment Goes to High-School

As set forth above, students' constitutional rights at school may, in fact, be limited due to the unique nature of the school environment. However, the most formidable right remaining in a student's arsenal continues to be the First Amendment rights of free speech and free expression. *Tinker v. Des Moines* held that schools may limit a student's speech only where there is a reasonable belief that the speech will generate substantial disruption of or material interference with school activities.[56] The silent arm bands protesting the Vietnam War used by plaintiffs in *Tinker* failed to meet this threshold.[57] Seventeen years later, in *Bethel School District No. 403 v. Fraser*,[58] the Supreme Court revisited and expanded the *Tinker* rule.

Bethel High School enacted a policy which prohibited "conduct which materially and substantially interferes with the education process" including "profane language or gestures."[59] Pursuant to this policy, Bethel disciplined a student, Matthew Fraser, for giving a speech containing "elaborate, graphic, and explicit sexual metaphor."[60] Fraser's First Amendment challenge failed. The Supreme Court found it "a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse."[61] Comparing Fraser's speech, which was not obscene or unlawful in the legal sense, to the Manual of Parliamentary Practice used by the House of Representatives where "indecent" language is prohibited, the Court queried, "[c]an it be that what is proscribed in the halls of Congress is beyond the reach of school officials to regulate"?[62] This content-based regulation of speech was permitted due, in large

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[56] 393 U.S. 503, 513-514 (1969).

[57] *Id.*

[58] 478 U.S. 675 (1986).

[59] *Id.* at 678.

[60] *Id.* 677-678.

[61] *Id.* at 683.

[62] *Id.* at 681-682. Thomas Jefferson's Manual of Parliamentary Practice prohibited the use of "impertinent" speech during debate and indecent language. *Id.* "The Rules of Debate applicable in the Senate likewise provide that a Senator may be called to order for imputing improper motives to another Senator or for referring offensively to any state." *Id.*

part, to the unique nature of the school setting.[63] Following *Fraser*, free speech that is permissible *outside* the schoolhouse gate might be proscribed inside the schoolhouse grounds.

A mere two years later, the Supreme Court affirmed editorial censorship of students' speech when it upheld a high school's right to delete two student authored stories, one discussing students' experience with their teen pregnancies and one discussing divorce, from a school newspaper because the content was deemed inappropriate for the high school audience.[64] *Hazelwood* distinguished its holding from *Tinker*:

> The question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech.
>
> The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.
>
> Educators are entitled to exercise greater control over this second form of student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school. Hence, a school may, in its capacity as publisher of a school newspaper or producer of a school play, "disassociate itself," *Fraser,* 478 U. S. 685, not only from speech that would "substantially interfere with [its] work . . . or impinge upon

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[63] *Id.* at 683-685.

[64] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

> the rights of other students," *Tinker,* 393 U.S. at 393 U. S. 509, but also from speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences. A school must be able to set high standards for the student speech that is disseminated under its auspices—standards that may be higher than those demanded by some newspaper publishers or theatrical producers in the "real" world—and may refuse to disseminate student speech that does not meet those standards. In addition, a school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics, which might range from the existence of Santa Claus in an elementary school setting to the particulars of teenage sexual activity in a high school setting. A school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with "the shared values of a civilized social order," *Fraser, supra,* at 478 U. S. 683, or to associate the school with any position other than neutrality on matters of political controversy. Otherwise, the schools would be unduly constrained from fulfilling their role as a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. *Brown v. Board of Education,* 347 U. S. 483, 347 U. S. 493 (1954).
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> Accordingly, we conclude that the standard articulated in *Tinker* for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression. Instead, we hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities, so long as their actions are reasonably related to legitimate pedagogical concerns.
>
> This standard is consistent with our oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school

> officials, and not of federal judges. *See, e.g., Board of Education of Hendrick Hudson Central School Dist. v. Rowley,* 458 U. S. 176, 458 U. S. 208 (1982); *Wood v. Strickland,* 420 U. S. 308, 420 U. S. 326 (1975); *Epperson v. Arkansas,* 393 U. S. 97, 393 U. S. 104 (1968). It is only when the decision to censor a school-sponsored publication, theatrical production, or other vehicle of student expression has no valid educational purpose that the First Amendment is so "directly and sharply implicate[d]," *ibid.,* as to require judicial intervention to protect students' constitutional rights.[65]

In this regard, *Hazelwood* provides schools with power to edit, ban or otherwise censor school-sponsored speech. Can the same be said about students' use of social media? If a school is sponsoring, directly or indirectly, the student's ability to post information on school-related social media sites, can the school enact policies that delimit the content posted? While this is not the precise issue at hand, the quoted language of *Hazelwood* reminds that school-sponsored speech has clear boundaries.

In 2007, the United States Supreme Court again affirmed a school's ability to discipline students who use inappropriately provocative language aimed at school grounds.[66] An Alaska senior, Joseph Frederick, was suspended from high school for 10 days after he refused to take down a 14-foot banner that read "BONG HITS 4 JESUS."[67] Frederick's high school had a policy that prohibited speech advocating drug use to minors.[68] The school principal, Deborah Morse, considered the banner to be advocating illegal drug and Frederick's refusal to take the banner down a violation of school policy.[69] Chief Justice Roberts, writing for the Court, agreed with Morse.[70] Accordingly, high schools have latitude to "restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use."[71] Schools have a vested interest in securing lawful conduct from its

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[65] *Id.* at 271-274.
[66] *Morse v. Frederick*, 551 U.S. 393 (2007).
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.*

students. The regulation of school speech serving broader safety and legal goals appears to be appropriate, at least in high school.

While these high school cases address the First Amendment's applicability in the public high school setting, colleges have not hesitated to use either the *Tinker* or *Hazlewood* rule in dealing with speech issues on campus. The First Amendment may apply in college, but as recent cases demonstrate, its application is not unlimited.

The First Amendment Goes to College

> In the context of the "special characteristics of the school environment," the power of the government to prohibit "lawless action" is not limited to acts of a criminal nature. Also prohibitable are actions which "materially and substantially disrupt the work and discipline of the school." *Tinker v. Des Moines Independent School District,* 393 U.S. at 393 U. S. 513. [First Amendment] activities need not be tolerated where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education.[72]

Universities are often regarded as exemplary models of the "marketplace of ideas."[73] Accordingly, courts must be cautious in resolving the "delicate issues" relating to university speech by taking into full consideration the competing, and often conflicting, interests of students, faculty, and school administrators to operate in "an environment free from disruptive interference with the educational process."[74]

Free speech, even at the university level, must be cabined to respect the unique nature of the educational environment.[75] For instance, universities can enact student codes of conduct prohibiting disruptions and limit other speech to certain time, place and manner restrictions.[76] But, content-based prohibitions

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[72] Healy v. James, 408 U.S. 169, 189 (1972).

[73] *Id.* at 181.

[74] *Id.* at 171.

[75] *See generally id. See also* Tinker v. Des Moines, 393 U.S. 503 (1969).

[76] Papish v. Bd. of Curators of the Univ. of Missouri, 410 U.S. 667, 670-671 (1973)(overturning school's expulsion of journalism student for publishing "indecent speech" "because the state University's action here cannot be justified as a

on unpopular speech or unpopular student-organizations will not survive First Amendment challenges.[77] In 2010, the United States Supreme Court provided additional guidance for universities in *Christian Legal Soc. v. Martinez*.[78]

The University of California-Hastings Law School passed a general "all-comers" requirement for student organizations seeking university recognition.[79] The all-comers policy was instituted to ensure that Hastings' non-discrimination policy was followed by all student organizations.[80] The Christian Legal Society ("CLS") sought dispensation from the policy because adherence to this approach would require the CLS to accept individuals who "do not share the organization's core beliefs about religion and sexual orientation."[81] The Court, Justice Ginsburg writing for the majority, held that Hastings' content-neutral all-comers policy did not offend the First Amendment rights of any student organization, including the CLS.[82] Those student organizations unwilling to follow Hastings' non-discrimination policy could choose to forgo all the benefits that attend official school recognition, including funding, access to school facilities and use of the school logo.[83] In other words, student organizations have a choice: accept the school's nondiscrimination policy or forgo official student recognition.

Martinez is instructive. Universities that adopt content-neutral policies regarding expression may impose certain requirements on students seeking official school recognition. Rather than simply prohibit the speech or association, students are given a choice. In *Martinez*, the CLS must choose between accepting the school's open membership policy in order to secure official school recognition or the organization can adhere to its

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nondiscriminatory application of reasonable rules governing conduct" or a reasonable time, place and manner restriction.).

[77] *See generally id. See also,* Healy v. James, 408 U.S. 169 (1972).

[78] 130 S.Ct. 2971 (2010).

[79] *Id*.

[80] *Id*.

[81] *Id*. The National CLS charter requires school chapters to adopt bylaws adhering to the tenets of the organization, including the professed belief that sex outside of marriage is wrong. Further, CLS prevents homosexuals and those holding religious beliefs distinct from those expressed in the CLS "Statement of Faith." *Id.*

[82] *Id*.

[83] *Id*.

tenets and operate outside the school setting. The "right of association" as that "right" is expressed through official school recognition is conditioned on acceptance of the school's non-discrimination policy. Likewise, student-athletes that desire to participate in intercollegiate athletics representing their school can choose to play for the team (i.e. receiving official school recognition) or they can opt for unregulated use of social media.

Martinez provides university athletic departments with assurances that college students can be forced into choosing between unlimited First Amendment rights and official school recognition, such as playing for the university's intercollegiate teams. Provided the regulations issued remain content-neutral, they should survive First Amendment review. *Martinez* reminds that the university setting is unique and that university students can be required to choose between conforming to content-neutral regulations furthering the university's policies, be they non-discrimination or non-distraction from athletic endeavors, or choose to forgo official university recognition. Students have a choice. And, unfettered rights to speech or association are certainly one of the possible choices.

Lessened Constitutional Scrutiny For College Athletes

College athletes *choose* to participate in a university-structured program

> where grade and conduct regulations are heightened. They are far from "free" to do as they choose like their classmates who opt out of, or are otherwise unsuited for, college athletics. Such participation is a privilege, not a right. And, this privilege is heavily regulated by every major university, every national conference and the NCAA. Thus, college athletes' claims of free speech should be subjected to a much lower level of constitutional scrutiny, one on par with military members, when asserting First Amendment challenges.[84]

This author asserts that college athletes are analogous to members of our military in the sense that both voluntarily choose to enter a program that is heavily regulated, demands strict

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[84] Goldman v. Weinberger, 475 U.S. 503 (1986).

discipline and the team/unit concept necessarily prevails over individual desires.[85] The Supreme Court has held that the First Amendment rights of service members are not the same as ordinary civilians.[86] Justice Rehnquist, writing for the Court, reminded that the Supreme Court's "review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society."[87]

An air force psychologist, Simcha Goldman, desired to wear his yarmulke while on duty.[88] His desire, born out of his faith as an Orthodox Jew and an ordained rabbi, met with strong resistance and was disallowed.[89] He sued relying on the First Amendment right to practice his religious beliefs.[90] The Supreme Court, however, denied his challenge noting that the military requires conformity of conduct in matters of dress and discipline.[91]

The essence of the *Goldman* decision is akin to participating in college athletics:

> The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission, the military must foster instinctive obedience, unity, commitment and *esprit de corps*. The essence of military service "is the subordination of the desires and interests of the individual to the needs of the service. . . . The considered professional judgment of the Air Force is that the traditional outfitting of personnel in the standardized uniforms encourages the subordination of personal preferences and identities in favor of the overall group mission. Uniforms encourage a sense of hierarchical unity by tending to eliminate outward individual distinctions except for those of rank. The Air Force considers them as vital during peacetime as during war, because its personnel must be ready to provide an effective defense on a

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[85] *See, e.g., id.*
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Id.*

> moment's notice; the necessary habits of discipline and unity must be developed in advance of trouble.[92]

In many ways, college athletes and military members operate in similar environments– environments requiring strict adherence to conformity to achieve a united goal. The individual must remain subservient to the greater team to enable full potential development. Accordingly, courts should provide less constitutional scrutiny to decisions made by college athletic departments regarding student-athletes use of social media. Much like the military's ability to truncate debate or stifle protests within military units, athletic departments need discretion to delimit controversial social media postings by their student-athletes. *Goldman* provides the perfect template for evaluating the issue.

Because the analogies between student-athletes and military personnel are far more numerous than their distinctions, including uniforms, strict curfews, minimum control over their schedules and conduct, team and unit formats, courts should adhere to the limited First Amendment approach for both. The vast student-conduct codes prohibiting obscene gestures and inappropriate language can be compared to the limits placed on military members' right of free speech. Just as coaches do not want student-athletes "tagging" their whereabouts to "friends" on Facebook, military personnel are not always permitted to share their whereabouts with friends and family members. True, one of these prohibitions stems from national security issues, but there remain more similarities between these two classes than differences.

From this author's perspective, *Goldman* reminds that where discipline and cohesiveness is required to fulfill the organization's purpose, free speech may appropriately be limited. Further, *Goldman* should be evaluated with other school law cases that remind us of two clear impediments objecting college athletes must clear: first, the *Vernonia* decision underscoring the communal nature of an athletics team and the many rights and freedoms sacrificed in going out for such team; and, second, *Tinker*'s limits on behavior that poses substantial risk of

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[92] *Id.*

disruption. In merging these three cases together, the answer about student-athlete's controlled use of social media becomes clear: football or Facebook is a choice, not a First Amendment right.

III. FACEBOOK STATUS UPDATE: ATHLETES CAN BE BARRED FROM SOCIAL MEDIA

When Mississippi State Men's Basketball Coach, Rick Stansbury, opted to ban his players from using social media, many non-athletes were surprised and offended. What about the student-athletes' rights to free speech? Those rights were sacrificed many months before when the players agreed to the student athlete code of conduct that prohibits use of foul, vulgar, offensive and disrespectful language – and, requires a minimum grade point average. In addition, there is to be no drinking, no cussing, and no gambling. Not your ordinary college experience.

As this article explains, athletes are not like traditional students. They are subject to greater regulations than ordinary students. They lack the freedom of movement and expression enjoyed by their fans and fellow students. Athletes, like military personnel, are different. The law appropriately recognizes and permits these distinctions. And as unfortunate as it may be, social media may be one such limitation.

There are three reasons that athletic departments should feel confident in regulating or banning their student-athletes' use of social media. First, the constitutional rights of those in school are not identical to, and inferior to, those in mainstream society. Second, the rights of athletes have regularly been limited and more heavily regulated than their fellow classmates. The Supreme Court has recognized that student-athletes have less privacy than other students due to the rules imposed upon, and accepted by, them. Finally, athletes, like military personnel, require adherence to uniform guidelines to ensure that the good of the team prevails over the desires of the individual. While sports are not interchangeable with the more sobering impact of war, sports do involve weekly battles and require absolute teamwork and cohesiveness. Team chemistry requires suppression of individual goals so that a higher accomplishment can jointly be achieved.

Student-athletes have a choice. They can opt to savor the college experience at the fullest level by retaining their right to drink, cuss and gamble . . . and report about these excursions on Facebook and Twitter. Or, they can agree to forego such experience and accept limitations on their behavior in exchange for a college athletic career, oftentimes including a free education.

The question is really quite academic. Touchdowns or Twitter? Courts should hold student-athletes to this choice and allow them the freedom to express but one thing: their decision to play football or play on Facebook. The First Amendment has long lain dormant on the basketball court and football field. Just consider the student-athlete code of conduct limitations facing nearly all NCAA participants. If social media is a First Amendment right, then so too is the right to use vulgar language and resort to obscene gestures.

Courts should place student-athletes in the same category as military personnel. And, then, for those wanting to enjoy the best of both worlds–free expression and free education–the sideline is always available. Put to the choice, nearly all athletes would prefer to play their sport rather than post their Facebook updates. Just ask Buck Burnett.