

# REPUTATIONAL RISK AND SOCIAL MEDIA

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## INTRODUCTION

Leaders in the collegiate sports world are facing a number of challenging issues arising from the proliferation of, and easy access to, the new phenomenon of social media. Well-publicized recent examples, including the case of Marvin Austin at the University of North Carolina, have dramatized the potential ramifications that come from uses and misuses of these new means of communication.

One of the interesting and problematic aspects in assessing the impact of social media is the possibility of damage to

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individual and institutional reputations. Though it is certainly true that reputation does have important, measurable legal and economic dimensions, it is also obvious that it is not a purely legal or economic concept. This paper examines recent risk management research and suggests a pathway to a new approach to thinking about the legal context of risks arising from uses and misuses of social media.

The structure of this paper is as follows:

First, to examine the impact of new social media on the collegiate sports world, with particular reference to potential legal consequences;

Second, to discuss the traditional legal First Amendment framework and to identify, mainly by implication, several issues and limitations arising from that framework;

Third, to explore the emerging concept of Reputational Risk as a basis for reframing an understanding of the impact of social media on sports, which in turn will require some review of developments in what will be described as Modern Risk Management (MRM);

Fourth, to apply insights from MRM to a well-known recent case as a means of clarifying the value of broader MRM thinking to traditional legal approaches.

## I. SOCIAL MEDIA AND SPORTS

The term “Social Media” applies to social networking sites and instant messaging,<sup>1</sup> including web logging (blogs) and such sites as Facebook, LinkedIn, MySpace, and Twitter.<sup>2</sup> The use of social media for communication has expanded exponentially in the

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<sup>1</sup> See generally Andreas Kaplan, Michael Haenlein, *Users of the world, unite! The challenges and opportunities of Social Media*, 53 BUSINESS HORIZONS 59 (2010); Teresa Correa, Amber Willard Hinsely, et al., *Who interacts on the Web?: The intersection of users' personality and social media use*, 26 COMPUTERS IN HUMAN BEHAVIOR 247 (2010).

<sup>2</sup> See Keith Hampton, Lauren Sessions Goulet, et al., *Social networking sites and our lives | Pew Research Center's Internet & American Life Project* (2011).

last few years. Its influence has ranged from the trivial<sup>3</sup> to the highly significant; witness its role in the Arab Spring of 2011.<sup>4</sup>

Social media offers opportunities for individuals to create unique and immediate bonds with one another. It can be used to build relationships, market new products and services, convey news in real time, create crises, and even manage those crises.<sup>5</sup> In sports, Twitter in particular offers athletes and fans a unique opportunity. With Twitter an athlete can post and receive real-time information via a network of contacts. Even though the short messages (Tweets) are limited to 140 characters, additional information can be linked to the Tweets.<sup>6</sup> Communication efficiency is a central attraction because the sender does not have to compose and distribute the same email numerous times. With a single click, Twitter distributes the message to everyone that “follows” the sender.

Further, using social media presents an athlete with a high profile, stream-of-consciousness “press conference” without any scripts, restraints, or intermediary interference. In a recent article, Vacchiano and O’Keefe note, “It gives athletes the opportunity to drop mini press releases on the public, without a filter . . . There’s no PR expert telling them ‘You can’t say that.’”<sup>7</sup> There is also immediate gratification and feedback for the athlete, since thousands of fans can respond right away. Of course, there are downsides. One notable athlete stated, “I think the main point is you can’t be misquoted . . . When I write (a Tweet), I know what

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<sup>3</sup> Oliver Hartwich, *Trivial Twitter*, THE AUSTRALIAN (Oct. 29, 2010, 12:00 AM), <http://www.theaustralian.com.au/news/opinion/trivial-twitter/story-e6frg6zo-1225944886599>.

<sup>4</sup> Carol Huang, *Facebook-and-Twitter-Key-to-Arab-Spring-Uprisings*, SAUDIWAVE (June 6, 2011), <http://www.saudiwave.com/Press/facebook-and-twitter-key-to-arab-spring-uprisings.html>.

<sup>5</sup> Angela Pratt, *Integrated Impression Management: How NCAA Division I Athletics Directors Understand Public Relations*; Ph.D. Dissertation, University of Tennessee (2010), [http://trace.tennessee.edu/cgi/viewcontent.cgi?article=2018&context=utk\\_graddiss&sei-redir=1#search=%22Integrated%20Impression%20Management%3A%20How%20NCAA%20Division%20Athletics%20Directors%20Understand%20Public%20Relations%22](http://trace.tennessee.edu/cgi/viewcontent.cgi?article=2018&context=utk_graddiss&sei-redir=1#search=%22Integrated%20Impression%20Management%3A%20How%20NCAA%20Division%20Athletics%20Directors%20Understand%20Public%20Relations%22).

<sup>6</sup> Twitter, *About Twitter* (2011).

<sup>7</sup> Ralph Vacchiano & Michael O’Keefe, *Athletes Are All Aflutter over Twitter, but Don’t Believe Everything You Read*, NY DAILY NEWS (June 2, 2009), [http://articles.nydailynews.com/2009-06-06/news/17924515\\_1\\_twitter-account-spread-da-word-toast](http://articles.nydailynews.com/2009-06-06/news/17924515_1_twitter-account-spread-da-word-toast).

I meant and what it says. I mean, it can still be interpreted whichever way people read it, but it's quoted right, word for word."<sup>8</sup> Recent examples, however, have shown that 140 characters are more than enough to get athletes into trouble or to confuse fans.

For example, Elijah Fields was a defensive back for the Pittsburgh Panthers football team and, according to the official Pitt website, was "one of the finest athletes on Pitt's team regardless of position."<sup>9</sup> Due in part to apparent communication problems, however, Fields was prohibited from speaking to the media for most of the 2009 season.<sup>10</sup> Fields first caused controversy when images of Fields and his friends partying and drinking alcohol appeared on his Twitter page.<sup>11</sup> The Pitt Panthers team subsequently dismissed Fields.<sup>12</sup> Fields later expressed remorse and said that he wished he could have been part of that team, stating, "I think about it a lot, every day . . . I went through a lot. I kind of put that stuff behind me; look forward, doing the right things, moving forward. I wish like heck I could have played this year, but things didn't go as planned."<sup>13</sup>

## II. SOCIAL MEDIA RISKS: THE LEGAL PERSPECTIVE

Because of the legal and economic issues and consequences involved, most have viewed the impact of social media from a legal and economic perspective.

The fundamental legal argument regarding free speech is in the First Amendment of the U.S. Constitution, which provides that "Congress shall make no law . . . abridging freedom of speech."<sup>14</sup> The Fourteenth Amendment expanded that protection

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<sup>8</sup> *Id.*

<sup>9</sup> Player Bio: Elijah Fields, University of Pittsburgh Official Athletic Site, [http://www.pittsburghpanthers.com/sports/m-footbl/mtt/fields\\_elijah00.html](http://www.pittsburghpanthers.com/sports/m-footbl/mtt/fields_elijah00.html).

<sup>10</sup> Brian Bennett, *Pitt Dismisses Fields from Team*, ESPN COLLEGE FOOTBALL (Feb. 19, 2010, 6:52 PM), <http://sports.espn.go.com/ncf/news/story?id=4921565>.

<sup>11</sup> Brian Bennett, *Pitt's Fields a Case of Wasted Talent*, BIG EAST BLOG (Feb. 17, 2010, 2:35 PM), [http://espn.go.com/blog/bigeast/post/\\_id/7984/pitts-fields-a-case-of-wasted-talent](http://espn.go.com/blog/bigeast/post/_id/7984/pitts-fields-a-case-of-wasted-talent).

<sup>12</sup> Brian Bennett, *Elijah Fields of Pittsburgh Panthers dismissed from team* (2010).

<sup>13</sup> Tony Greco, *Fields Looking to Get Back to the Field*, PANTHER DIGEST (Mar. 19, 2011), <http://pittsburgh.scout.com/2/1056967.html>.

<sup>14</sup> U.S. CONST. AMEND. I.

to the states. In regulating student speech, the seminal case is *Tinker v. Des Moines Independent Community School District*.<sup>15</sup> In the 1960s, a Des Moines high school had a policy barring students from wearing black armbands in protest of the war in Vietnam. School officials asked the students to remove the armbands. The Tinkers refused to comply with this policy, and the school suspended them. Through their father, the Tinkers sued for injunctive relief and nominal damages.

Writing for the majority, Justice Fortas stated that neither “students nor teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>16</sup>

The Court did note that there can be limits on student speech if the conduct “materially disrupts classwork or involves substantial disorder or invasion of the rights of others . . .”<sup>17</sup> But, because school authorities had no reason to anticipate a “substantial disruption of or material interference with school activities,” and no disruptions on the school premises had, in fact, occurred, the school’s actions violated the students’ First Amendment free speech rights.<sup>18</sup>

While there has been some erosion of the Court’s original holding, *Tinker* and its progeny remain good law. In *Bethel School District No. 403 v. Fraser*,<sup>19</sup> a high school student made a speech nominating a fellow student for an elective office. During the entire speech, which was before a general assembly of approximately 600 teenagers, the student deliberately described the candidate “in terms of an elaborate, graphic, and explicit sexual metaphor.”<sup>20</sup> Fraser was suspended for violation of Bethel’s “disruptive conduct rule,” which prohibited conduct “that substantially interfered with the educational process, including the use of obscene, profane language or gestures.”<sup>21</sup>

Writing for the majority, Chief Justice Warren Burger upheld the suspension and distinguished *Fraser* from *Tinker* on the grounds that *Tinker* dealt with a major issue of public policy (the

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<sup>15</sup> *Tinker v. Des Moines*, 393 U.S. 503 (1969) (1969).

<sup>16</sup> *Id.* at 506.

<sup>17</sup> *Id.* at 513.

<sup>18</sup> *Id.* at 514.

<sup>19</sup> *Bethel School District 43 v. Fraser*, 478 U.S. 675 (1986).

<sup>20</sup> *Id.* at 678.

<sup>21</sup> *Id.* at 693.

war in Viet Nam) versus simple lewdness in Fraser's speech: "Unlike the sanctions imposed on the students wearing armbands in *Tinker*, the penalties imposed in this case were unrelated to any political viewpoint."<sup>22</sup> The Court noted that, "The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior."<sup>23</sup> The Court also stated, "We have recognized that 'maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures . . .'"<sup>24</sup> Finally, the Court recognized that schools have the ultimate authority to determine what "manner of speech in the classroom or in school assembly is inappropriate" and that permitting the inappropriate speech would "undermine the school's basic educational mission."<sup>25</sup>

More recently, *Wildman v. Marshalltown School District 56*<sup>26</sup> dealt with the case of Rebecca Wildman, a sophomore basketball player who claimed that her coach promised her pre-season that he would promote Rebecca to the varsity team. After the coach failed to promote her, Wildman "became frustrated and decided to write a letter to [her] teammates," stating that her "purpose was to find out what they thought of the situation and Coach Rowles."<sup>27</sup> Her coaches met with Rebecca, and they gave her the choice to either apologizing to her teammates within twenty-four hours or face suspension. After Rebecca refused, she subsequently was not allowed back on the basketball team; she also received no invitation to the team banquet and did not receive a participation award. She argued that her letter was personal communication sent to fellow students and was protected under the First Amendment and *Tinker*.

The Eighth Circuit Court of Appeals affirmed the district court's holding granting the school district's motion for summary judgment. The court, citing *Bethel*, stated, "this right to express

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 686.

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

<sup>25</sup> *Id.* at 683.

<sup>26</sup> Wildman ex rel. Wildman v. Marshalltown School Dist., 249 F.3d 768 (8th Cir. 2001).

<sup>27</sup> *Id.*

opinions on school premises is not absolute.”<sup>28</sup> The court noted that there is a difference between being in the classroom and playing on an athletic team. Finally, the court noted that Wildman violated the handbook for student conduct, which was designed to afford her teammates “an educational environment conducive to learning . . . free from disruptions and distractions that could hurt or stray the cohesiveness of the team.”<sup>29</sup>

Most recently, in *T.V. v. Smith-Green Community School Corporation*<sup>30</sup> an Indiana high school suspended two girls for posting on Facebook explicit photos of themselves at a sleepover. The photos showed the girls in lingerie and in sexually suggestive poses with explicit comments. The girls, who were members of the volleyball team and cheerleading squad, claimed that the photos were all in fun. The high school principal claimed that the Facebook post was a violation of the student code and suspended them from extracurricular and co-curricular activities for a calendar year. The student code states, “If you act in a manner in school or out of school that brings discredit or dishonor upon yourself or your school, you may be removed from extra-curricular activities for all or part of the year.”<sup>31</sup>

The court performed a detailed examination of the *Tinker* “substantial disruption” standard. In *Smith-Green* the court noted:

Petty disagreements among players on a team—or participants in clubs for that matter—is utterly routine. This type of unremarkable dissension does not establish disruption with the work or discipline of the team or the school, much less disruption that is “substantial” or “material.”<sup>32</sup>

In *Smith-Green*, the disruption amounted to two complaints from parents and “some petty sniping among a group of 15 and 16 year olds,”<sup>33</sup> a far cry from what the Supreme Court envisioned in *Tinker*.

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<sup>28</sup> *Id.* at 771.

<sup>29</sup> *Id.*

<sup>30</sup> *T.V., ex rel. B.V. v. Smith-Green Community School Corp.*, 2011 U.S. Dist. LEXIS 88403 (2011) (2010).

<sup>31</sup> *Id.* at \*6.

<sup>32</sup> *Id.* at \*37.

<sup>33</sup> *Id.*

By contrast, in *Tatro v. University of Minnesota*,<sup>34</sup> the Minnesota Court of Appeals did find “disruptive conduct” justifying school regulation and limiting speech when a student placed a controversial post on Facebook. *Tatro* is significant because, for the first time, an appellate court used the *Tinker* “substantial disruption” standard in a collegiate, not high school, setting. *Tatro* was a mortuary science student who posted several updates on her Facebook page suggesting that she would take violent actions towards her cadaver and even her ex-boyfriend:

Who knew embalming lab was so cathartic! I still want to stab a certain someone in the throat with a trocar though.[4] Hmm . . . perhaps I will spend the evening updating my “Death List #5” and making friends with the crematory guy. I do know the code . . . .<sup>35</sup>

Someone reported *Tatro*’s comments to the University. Ultimately, *Tatro* was charged with violating the University’s student code of conduct by engaging in “threatening, harassing, or assaultive conduct . . . (and) by engaging in conduct contrary to university rules related to the mortuary-science program, anatomy-laboratory course rules, and the rules listed on the anatomy-bequest-program disclosure form.”<sup>36</sup> A panel of the Campus Committee on Student Behavior (CCSB) found *Tatro* responsible for a number of student violations and imposed sanctions. *Tatro* appealed to the provost, who confirmed the CCSB’s opinion.<sup>37</sup> *Tatro* then went to court, asking the University to dismiss all charges against her.

First, *Tatro* argued that her entries on Facebook were not only done off campus and outside the reach of the University, but also, “when read in context, were obviously literary expression, intended to be satirical, vent emotion, and incorporate popular culture references.”<sup>38</sup> The court did not accept her arguments, noting, that the University does apply the code to off-campus

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<sup>34</sup> *Tatro v. University of Minnesota*, 2011 WL 2672220 (Minn. Ct. App. July 11, 2011).

<sup>35</sup> *Id.* at \*1.

<sup>36</sup> *Id.* at \*2.

<sup>37</sup> *Id.* at \*2.

<sup>38</sup> *Id.* at \*5.

conduct if it “has an adverse effect on a substantial university interest and indicates potential danger or threat to the student or others.”<sup>39</sup> The court went on to note that student speech, while being afforded broad constitutional protection, are subject to limits, as seen in *Tinker* and *Fraser*,<sup>40</sup> that “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings,”<sup>41</sup> and that the rights of students must be “applied in light of the special characteristics of the school environment.”<sup>42</sup> The court noted that in a long line of cases beginning with *Tinker*, the Supreme Court has held that schools may limit or discipline student expression if school officials “reasonably conclude that it will ‘materially and substantially disrupt the work and discipline of the school’”<sup>43</sup>

Second, and perhaps more importantly, in rejecting Tatro’s argument, the author’s would like to emphasize that this was the first time an appellate court applied the *Tinker* substantial-disruption analysis to a university setting.

We discern no practical reasons for such a distinction and note that other courts have acknowledged *Tinker*’s broad applicability to public-education institutions...We observe, as the Third Circuit did in *DeJohn*, that what constitutes a substantial disruption in a primary school may look very different in a university. But these differences do not per se remove the *Tinker* line of cases from the analysis. Accordingly, we apply the *Tinker* substantial-disruption standard to determine whether the university acted within the boundaries of its authority to discipline student expression.<sup>44</sup>

The *Tatro* court’s analysis is similar to *Tinker* in that it “turns on whether the record demonstrates that Tatro’s posts “materially and substantially disrupt[ed]” the work and discipline of the university. Actual violence did not occur, but the threat was perceived as real. As the court noted, a “school need not wait for

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<sup>39</sup> *Id.* at \*4.

<sup>40</sup> *Id.* at \*7 (citing *Healy v. James*, 408 U.S. 169, 180 (1972)).

<sup>41</sup> *Id.* (citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986)).

<sup>42</sup> *Id.* (citing *Tinker v. Des Moines*, 393 U.S. 503, 506 (1969)).

<sup>43</sup> *Id.* (citing *Morse v. Frederick*, 551 U.S. 393, 403 (2007)).

<sup>44</sup> *Id.* at \*9.

actual violence to occur before taking appropriate steps to ensure the safety of its community.”<sup>45</sup>

The court also placed an emphasis on the fact that Tatro’s posts affected the reputation of and future donations to the University’s anatomy-bequest program, which is essential to the mortuary science program. Her posts reached donors and funeral directors, causing damage to the reputation of the program and leading supporters of the program to “question the professionalism of the program in general—a program that relies heavily on the faith and confidence of donors and their families to provide necessary laboratory experiences for medical and mortuary-science students.”<sup>46</sup>

Other commentators have written about the First Amendment rights of student-athletes noting, “[e]ach case will rest largely on the specific circumstances facing each school, team, and coach.”<sup>47</sup> And again following *Wildman*, there is a balancing of interests of a coach’s ability to maintain order versus the student’s free speech rights. An argument could be made that Marvin Austin’s actions at North Carolina could fall under *Tinker*’s “material disruption test.” Austin’s actions were not political speech protected under the First Amendment, and they did not constitute petty sniping as recognized in *Smith-Green*. The actions were a “material disruption” to not only the football program, but also to the University of North Carolina itself. Austin’s actions were the fundamental cause of an NCAA investigation into the University of North Carolina football program. Arguably, these actions reached the level of the material disruption to a substantial university interest as seen in *Tatro*.

In conclusion, the court’s holding in *Tatro* shows that the legal context of social media is in flux. As previously mentioned, Justice Fortas pointed out that while students do not shed their rights to freedom of speech at the gates of the schoolyard, there

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Noel Johnson, *Tinker Takes the Field: Do Student Athletes Shed Their Constitutional Rights at the Locker Room Gate?*, 21 MARQ. SPORTS. L. REV. 293, 314 (2010); See also Emily Gold Waldman, *Badmouthing Authority: Hostile Speech About School Officials and the Limits of School Restrictions*, 19 WM. & MARY BILL RTS. J. (2011); Lauren McCoy, *140 Characters Or Less: Maintaining Privacy and Publicity in the Age of Social Networking*, 21 MARQ. SPORTS L. REV. 203, 218 (2010).

may be some limitations.<sup>48</sup> The rationale that administrators will use is that the school considers the speech in question to be a substantial or material disruption to an important university interest. That rationale could potentially be a vague standard that is both difficult to enforce and defend.

This case law provides a legal foundation for considering the risks associated with free speech. The law is primarily concerned with two broad issues: 1) individual free speech and the costs imposed on individuals by properly/improperly enforced controls; and 2) the generalized legal impact on institutions found to improperly restrict free speech. While acknowledging the importance of this legal framework, the following sections introduce a different organizing structure—one that places the legal aspects within a wider Reputation Risk Management context.

### III. REPUTATION AND REPUTATIONAL RISK

This paper argues that restricting the analysis of social media's impact to legal considerations narrows the opportunity for meaningful insights and responses. Activities that fall within the bounds of legal permissibility can nevertheless exact costs in the form of reputational damage—both to individuals and institutions. Thus, this question can be raised: Is it better to look at social media impacts as primarily a legal issue with ancillary (or consequential) reputational results, or as primarily a reputational issue with elements that may be legal in nature and implication?

The Conference Board recently noted that the concept of Reputational Risk was rapidly passing more conventional financial, safety, and security risks in its recognized level of importance.<sup>49</sup> Based solely on its number of “mentions” in professional publications,<sup>50</sup> the growing interest is starkly evident. Further, surveys of top managers throughout the world

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<sup>48</sup> Tinker at 506.

<sup>49</sup> Matteo Tonello, *Reputation Risk: A Corporate Governance Perspective*, THE CONFERENCE BOARD, CORPORATE/INVESTOR SUMMIT SERIES at 5 (2007), available at <http://www.complianceweek.com/s/documents/ConfBReputation.pdf>.

<sup>50</sup> *Id.*

consistently identify Reputational Risk as one of the top five organizational risks.<sup>51</sup>

Defining the scope of reputation is not a straightforward exercise.<sup>52</sup> A significant part of the problem—from an analytical or managerial perspective—is the difficulty in monetizing or otherwise quantifying reputation. There are methods in which the economic value of reputation can be partially indicated, but there is no consensus that reputation can be considered a singularly economic concept. Equally, some of the literature builds the notion of reputation on the back of legal reasoning, which is not illogical, as the previous section of this paper indicates. Nevertheless, the general view is that reputation is not simply the result of “acting consistently in a legal manner.”

Merriam-Webster defines reputation as “the overall quality or character as seen or judged by people in general” and derives from a range of factors, with some based on tangible economic and legal considerations (organization size and performance, acting within the law), and others on a range of psychological factors (perceived trustworthiness, honesty, reliability, consistency), on ethical or moral values (Is the organization’s behavior consistent with accepted values?), and on emotional factors (“My father used Old Spice and so do I!”).<sup>53</sup> Since reputation relies on multiple factors, it is difficult to assess or manage. This is an insight that links reputation into modern risk management’s emphasis on managing risk “interconnectivity,” something that will be discussed later.<sup>54</sup>

Defining Reputational Risk is a challenge giving rise to the broader concern of categorizing risks in general, a matter of debate for many years.<sup>55</sup> To avoid an unnecessarily long diversion, let the following summarize a fairly extensive body of research:

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<sup>51</sup> *Id.* at 6.

<sup>52</sup> *Reputation: Risk of Risks*. THE ECONOMIST INTELLIGENCE UNIT (2005), available at <http://www.acegroup.com/eu-en/assets/risk-reputation-report.pdf>.

<sup>53</sup> Beth Kewell, *Linking Risk and Reputation: A Research Agenda and Methodological Analysis*, 9 RISK MGMT. 4, 238-254 (October 2007).

<sup>54</sup> Peter Kennedy, *Enterprise Risk Management: Effective ERM Practices*, 36 STRATEGY & LEADERSHIP 3, 53-56.

<sup>55</sup> C.A. WILLIAMS, M. S. SMITH & P. C. YOUNG, RISK MANAGEMENT AND INSURANCE, 4 (8th ed. 1998).

Risk generally is defined as “variation around expectation.” This definition can be applied in highly scientific, statistical contexts but also in less fixed, more impressionistic contexts. We expect certain things to happen, but in an uncertain world the differences between what is expected and what actually happens is the essence of this definition.<sup>56</sup>

Risks tend to be categorized by “source,” meaning the environment in which the risk conditions arise (natural environment, legal environment, etc.). Moving towards an emerging “holistic” view of risk management, however, there is a greater emphasis placed on classifying risk based upon exposure to uncertain conditions (a vehicle, a financial asset, a person, a strategy).<sup>57</sup>

People frequently characterize institutions as “collections of contracts, obligations, commitments, and agreements.” As those arrangements exist to define and influence the purposes of the institution, the assumption (along with the risks that attach to these arrangements) is that they are interconnected. For a variety of reasons, this “contractarian” concept frequently links with stakeholder theory, which posits that there are multiple interests that attach in specific instances—and thus there are commonly multiple stakes in any particular risk.<sup>58</sup>

In summary, Reputational Risk is a concept that primarily gets its context from “exposure” to uncertainty—we might say it is an intangible asset that receives exposure from a range of forces. Additionally, there commonly are multiple stakes that attach to a reputation, and management of such risks involves efforts to optimize the interests that attach to the exposure.<sup>59</sup> Moving forward, the risks associated with social media (and especially those that impact on reputation) cannot undergo a purely legal or economic level of assessment and management.

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<sup>56</sup> *Id.*

<sup>57</sup> Brian W. Nocco & René M. Stulz. *Enterprise Risk Management: Theory and Practice*, 18 J. APPLIED CORP. FIN. 4, 8-20 (2006).

<sup>58</sup> Peter C. Young, *Ethics and Risk Management: Building a Framework*, RISK MGMT.: AN INT'L J. 6, 23-34 (2004).

<sup>59</sup> Michael Power, Tobias Scheytt, Kim Soin, & Kerstin Sahlin. *Reputational Risk as a Logic of Organizing in Late Modernity*, 30 ORG. STUDIES 2/3, 301-324 (2009).

## IV. MODERN RISK MANAGEMENT

The previous section has provided a general description of the concept of Reputational Risk, but it is important to note that this conceptualization has arisen primarily through the dramatic reassessment of risk management over the past 15 years. It will be useful here to briefly delineate this story in order to understand not only how risk managers look at reputational risk but also how they organize the response to and management of that risk.

*The drivers of “Modern Risk Management”*

An environment of expectations has been emerging over the past 15-20 years with respect to the practice of risk management. Evidence can be found in wide ranging sources: regulator and rating agency interests in corporate resiliency, internal and external audit requirements, citizen expectations for local government responsiveness to community safety issues, or broader global expectations for meaningful responses to climate change—just to name a few examples.

There are numerous reasons why interest has grown rapidly. At the widest societal level, writers like Ulrich Beck<sup>60</sup> have identified numerous social and technological factors driving these rising expectations. On a slightly narrower scale, many of these expectations have also emerged in response to specific events: sensational cases of corporate fraud and malfeasance, oil spills, volcanoes, terrorism, and financial crises.<sup>61</sup> The sharpened edge of modern expectations is present in the proliferation of guidelines and standards focused on risk management, with ISO 31000—The International Standards Organization’s 2009 guidance, entitled *Risk Management—Principles and Guidelines*—serving as a notable current example.<sup>62</sup>

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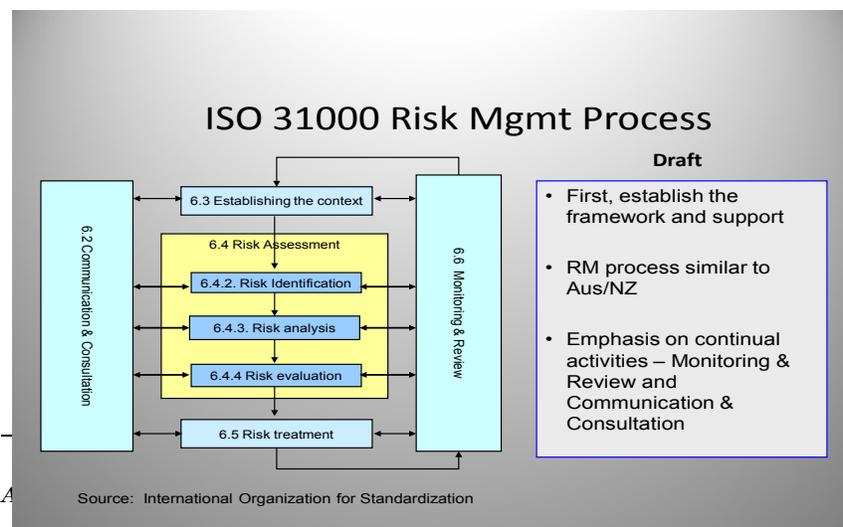
<sup>60</sup> Ulrich Beck, *RISK SOCIETY: TOWARDS A NEW MODERNITY* (Mark Ritter, trans., 1992).

<sup>61</sup> Denis Smith & Moira Fischbacher, *The Changing Nature of Risk and Risk Management: The Challenge of Borders, Uncertainty and Resilience*, 11 *RISK MGMT.* 1, 1-12 (Feb. 2009).

<sup>62</sup> ISO, *Risk Management—Principles and Guidelines*, 31000, INT’L ORG. FOR STANDARDIZATION, (2009).

The instruments of modern expectations provide a general picture of the type of risk management that is “expected.” It is holistic, integrated, comprehensive, policy-driven and systematic. The term Enterprise Risk Management (“ERM”) is often used in reference to this form of risk management, though in fact ERM is just one version of this idea. While not claiming any special naming rights, the authors introduce a slightly relaxed term and will hereafter refer to this phenomenon as Modern Risk Management (“MRM”).

MRM is reasonably well-framed and, at least among specialists in the field, fairly well-understood.<sup>63</sup> Though there are small differences among the various guidelines and standards, organizations are expected to devote attention to developing an approach to risk management that is attuned to the environmental conditions and the context of an organization’s current situation. These approaches include: 1) an understanding of the history (of the organization or situation), 2) an evaluation of the external and internal environments, including, 3) some form of stakeholder assessment, and 4) an evaluation of the organization’s goals, purposes, and intentions. Once the context has been established, MRM involves risk assessment, response to/treatment of risks, evaluation and monitoring, and effective communication to stakeholders. Figure 1 shows how ISO 31000 frames the MRM process.



Underlying this framework are several ideas that are also present in most of the current guidelines, standards, and frameworks.

Risk management exists to directly support the fulfillment of organizational (or situational) objectives, and is thus an element of the policy-setting, strategy-setting, governance dimension of management and leadership.<sup>64</sup>

While top management is the target for some clear expectations, there is a general view that the actual implementation and practice of MRM is something that is dispersed throughout the entire organization and embedded in processes and systems. “All managers are risk managers within the scope of their specific responsibilities” is a phrase often cited in support of this general notion.<sup>65</sup>

Broadly, the intention of MRM is “assessing and addressing all organizational risks,” but, as a practical matter, it is primarily concerned with the widest range of *material* risks. Materiality will differ at different levels of the organization, but the systematic risk assessment process is intended to link material risks at all levels so that the appropriate managers receive the appropriate risk information in the appropriate form at the appropriate times in order for managers to make appropriate responses.<sup>66</sup>

Adjunct to the preceding statement, but conceptually of equal importance, risk produces both positive outcomes (via opportunities) as well as negative outcomes (via hazards). Owing to this ecumenical view of risk, the purposes of risk management

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<sup>64</sup> P. Henriksen & T. Uhlenfeldt, *Contemporary Enterprise-Wide Risk Management Frameworks: A Comparative Analysis in a Strategic Perspective*, in PERSPECTIVES ON STRATEGIC RISK MGMT. (Torben Juul Andersen ed., 2006).

<sup>65</sup> Malcolm D. Griggs, *The Relationship Between Enterprise Risk Management and Operational Risk Management*, 90 RMA J. 9, 44-48 (Jun. 2008).

<sup>66</sup> Mark S. Beasley, Richard Clune, & Dana R. Hermanson, *Enterprise Risk Management: An Empirical Analysis of Factors Associated with the Extent of Implementation*, 24 J. ACCT. & PUB. POL'Y 6, 521-531 (Nov./Dec. 2005).

are not broadly focused only on eliminating or reducing risk, but on finding a proper balance of risk taking/risk mitigation.<sup>67</sup>

Finally, ISO 31000 characterizes risk as “the effect of uncertainty on objectives.” While the source of some controversy, this view suggests that risks tend to be categorized based upon their relationship to/impact on an individual or institution’s exposure to risk. In other words, the proper measure of risk is not its independent or “objective” nature, but rather its impact on an institution’s ability to achieve its goals or purposes.<sup>68</sup>

### *Reputational Risk Management and Social Media*

The emerging view of Reputational Risk Management rests upon insights cited in the previous section of this paper. Risks to reputation in the context of collegiate sports, however, bring light to a number of further issues—issues that do not correspond directly with reputational issues in different contexts.

For example, the general approach for assessing “interests” in reputation is anchored in stakeholder management. For conventional commercial firms, obvious key stakeholders (owners/shareholders, customers, key suppliers) tend to be well-understood and monitored for a range of reasons, one of which might be stakeholder perceptions of reputation. For collegiate sports, the ordering of stakeholders might take on very different forms, and the stakes may be very different from conventional circumstances.

In the case of public and private institutions like universities, the role of sports is quite distinct from a conventional business setting. Sports are not a primary purpose of such institutions, and it is not easy to simply define sports as a “product” that the institution offers to customers. The funding and financing of collegiate sports does not follow the same structures, as does the financing of a product line in a conventional business.

Sports, at its best, are a transcendent experience for participant and fan, so though it may be argued that sports are very much like a musical concert or a theatrical production, the

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<sup>67</sup> Ian Fraser & William Henry, *Embedding Risk Management: Structures and Approaches*. 22 *MANAGERIAL AUDITING* J. 4, 392-409 (2007).

<sup>68</sup> ISO, *Risk Management—Principles and Guidelines*, 31000, INT’L ORG. FOR STANDARDIZATION (2009).

widespread visibility of, and the historical depth of the relationship between, a sport and its supporters creates a distinct set of issues. As a simple illustration, visit Lincoln, Nebraska, during any home football game to witness the intensity of the “hold” sports can exert on a community.

Owing to the special properties of sports, it can be said that while there are tangible aspects of the sports experience (fans buy jerseys, hotdogs, and beer and enjoy an explicit, discrete experience—the game), the intangible elements are very significant indeed. Research shows that these intangible elements tend to place an additional weight on reputation’s importance.<sup>69</sup>

The individual aspects of team sports place an interesting structure around the link between individual and institutional behavior. In this sense, sports programs share a great deal with professional organizations like law firms and physicians’ clinics. Research has recognized that such organizations have a particularly high exposure to reputational loss.<sup>70</sup>

Other issues, perhaps not unique to sports, also warrant brief attention: 1) at the collegiate level there is an additional dimension, which is the relationship of sports programs to one another; 2) the slightly narrower issue of fan/customer loyalty is part of the reputational equation but has distinct elements; 3) the relationship between collegiate and professional sports creates an additional stake; and 4) ancillary or dependent products (institutional shoe/equipment contracts, for example) and their relationship to the sports enterprise add another stakeholder relationship.

Arguably then, Reputational Risk (and its management)—when placed in a sports context—exhibits the following key characteristics:

Reputation derives significantly from the various “interests” that attach to an individual/institution, and the nature of collegiate sports suggests that the structure and relative influence of these interests has numerous characteristics that add complexity both to assessing reputational risk and addressing it.

The multi-dimensional forces at work should probably lead to a management approach that recognizes explicitly: The notion

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<sup>69</sup> BARUCH LEV, *INTANGIBLES: MANAGEMENT, MEASUREMENT, REPORTING* (2001).

<sup>70</sup> *Id.*

that reputation is an intangible asset and is exposed to a wide range of threats and opportunities.

It is probably not in the best interest of the individual/institution to look at threats and opportunities as arising from single sources (legal, economic, physical environments). Indeed, it may be harmful to create a mindset based upon a narrow focus.

Difficulty in quantifying reputation does not mean efforts should not be made to assess the risks to reputation. Indeed, based upon modern perceptions, reputation may be the most important asset that an individual or organization can possess. Thus, while there are many ways to frame an analysis of the risks of social media to sport, one can argue that social media mainly present a risk to reputation.

#### *A Case Illustration*

The potential impact of MRM thinking on the issue of reputation and sport is perhaps best shown through an example. Marvin “Anchorman” Austin was an outstanding defensive tackle for the University of North Carolina, credited with turning the football program around.<sup>71</sup> As the number one recruit in high school, just his signing with North Carolina gave the football program instant credibility.<sup>72</sup> Austin credited Associate Coach John Blake for his decision to sign with North Carolina, “He [Blake] quoted Bible verses, spoke about how to invest money and knew I’d learn a lot about life and football. We have a father-son relationship.”<sup>73</sup>

The North Carolina Tar Heels were expected to contend for the ACC’s title behind a solid defense—built around Austin and ranked among the nation’s best. Instead of entering the NFL draft early, Austin opted to return to school for his senior year.<sup>74</sup> During both his college and professional careers Austin is known for his

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<sup>71</sup> Nate Davis, Jon Saraceno, *Linked by past misdeeds, UNC trio out to rebound in the NFL* - USATODAY.com (2011).

<sup>72</sup> Christopher Lawlor, *Highly Rated Prospect Marvin Austin Picks North Carolina*, USA TODAY (Feb. 2, 2007, 2:05 AM), [http://www.usatoday.com/sports/recruiting/football/2007-02-07-austin-unc\\_x.htm](http://www.usatoday.com/sports/recruiting/football/2007-02-07-austin-unc_x.htm).

<sup>73</sup> *Id.*

<sup>74</sup> Associated Press, *North Carolina Tar Heels start practice with NCAA looking at Marvin Austin*, Greg Little (2010).

gregariousness both on the field and on the Internet. While he was in college, his Twitter account had more than 1,800 followers and 2,400 updates.<sup>75</sup> His postings, however, may have caused an investigation into the North Carolina football program by the National Collegiate Athletic Association (NCAA). Austin reportedly sent a Twitter post from a party hosted by an agent in Miami that launched an investigation about improper contacts.<sup>76</sup> On another post, he said, “Jus got to DC an [sic] I’m feeln [sic] a shopn [sic] spree ... nobody gon [sic] be fresh as ME!!!” This post hinted that Austin was receiving impermissible benefits.<sup>77</sup> According to other reports, Austin posted pictures of expensive goods from upscale store in Miami and a \$143 bill from The Cheesecake Factory in Washington.<sup>78</sup> ESPN reported that NCAA investigators were trying to determine who paid the expenses for Austin and other players who attended the agent’s party.<sup>79</sup>

The University self-reported the benefits to the NCAA.<sup>80</sup> Allegedly Todd Stewart, a financial advisor and long-time friend of Austin provided more than \$7,000 in improper benefits to Austin and other UNC players. Stewart, however, has denied those allegations.<sup>81</sup> Allegedly John Blake had ties with prominent NFL agent Gary Wichard of Pro Tect Management.<sup>82</sup> It was reported that Wichard provided more than \$5,000 in benefits to Austin and \$31,000 in benefits to John Blake.<sup>83</sup> Blake, who recruited Austin

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<sup>75</sup> J.P. Giglio, *UNC’s Austin Posted More Than 2,400 Twitter Updates*, NEWS OBSERVER (Jul. 21, 2010), <http://www.newsobserver.com/2010/07/21/590713/austin-prolific-tweeter.html>.

<sup>76</sup> *Id.*

<sup>77</sup> Ken Tysiac, *What went wrong with compliance at UNC* (2010).

<sup>78</sup> Jon Solomon, *What to do about social media? Colleges tackle how to monitor what athletes are saying* (2011).

<sup>79</sup> *Id.*

<sup>80</sup> Sporting News, *Marvin Austin Breaks Silence with Facebook Post*, SPORTING NEWS NCAAF, <http://aol.sportingnews.com/ncaa-football/feed/2010-08-unc-investigation/story/marvin-austin-breaks-silence-with-facebook-post>.

<sup>81</sup> J.P. Giglio, *Adviser Defends Role with UNC Players*, NEWS OBSERVER (JUNE 30, 2011), <http://www.newsobserver.com/2011/06/30/1310970/stewart-defends-his-role.html>.

<sup>82</sup> Charles Robinson & Bryan Fischer, *COACH-AGENT TIES PROBED* (Aug. 9, 2010), [http://rivals.yahoo.com/ncaa/football/news:\\_ylt=AIUKtvjZSROELT3maKFLe8Y5nYcB?s\\_lug=ys-agentcoach080910](http://rivals.yahoo.com/ncaa/football/news:_ylt=AIUKtvjZSROELT3maKFLe8Y5nYcB?s_lug=ys-agentcoach080910).

<sup>83</sup> J.P. Giglio, *UNC Omits Details in NCAA Report*, THE STATE, (Jun. 22, 2011) <http://www.thestate.com/2011/06/22/1870245/unc-omits-details-in-ncaa-report.html>.

to North Carolina, later resigned amid NCAA investigations into the football program.<sup>84</sup> Austin was subsequently dismissed for violations of NCAA rules on agent benefits. Greg Little, one of Austin's teammates who traveled with him to the agent's party, was ruled permanently ineligible.<sup>85</sup>

The NCAA has an enforcement staff whose duty is to work equitably to resolve infractions cases, to deter future violators, and to ensure a level playing field for all NCAA student-athletes.<sup>86</sup> When they have a "legitimate reason" to believe that there has been a violation of NCAA rules, the enforcement staff may begin an investigation.<sup>87</sup> Three events will trigger an NCAA investigation: "if information obtained indicates that an intentional violation has occurred, that a significant competitive or recruiting advantage may have been gained, or that the institution or the enforcement staff has been given false or misleading information."<sup>88</sup> Austin's "Tweets" indicating that he received impermissible benefits in violation of NCAA rules represent one factor that could have triggered an NCAA investigation.

The NCAA specifically cited the Twitter accounts of players in the Notice of Allegations (indicating a major violation of an NCAA policy) for the University's failure "to adequately monitor the conduct and administration of the football program"<sup>89</sup>and because UNC "did not adequately and consistently monitor social networking activity that visibly illustrated potential amateurism violations within the football program, which delayed the institution's discovery and compounded the provision of

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<sup>84</sup> Erin Summer, *North Carolina's Associate Head Coach John Blake Steps Down*, WRAL SPORTS (Sept. 6, 2010), <http://www.wralsportsfan.com/unc/story/8244930/>.

<sup>85</sup> David Brown, *A FLAG IS DOWN; CAROLINA ALUMNI REVIEW*, <http://www.carolinaalumnireview.com/carolinaalumnireview/20101112/?pg=18&pm=2&u1=friend#pg20>.

<sup>86</sup> *Glossary of Terms*, NAT'L COLLEGIATE ATHLETIC ASS'N, <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Issues/Recruiting/recruiting%20glossary%20of%20terms>.

<sup>87</sup> *Enforcement Process*, NAT'L COLLEGIATE ATHLETIC ASS'N, <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Issues/Enforcement/>.

<sup>88</sup> *Id.*

<sup>89</sup> *Case No. M357 Notice of Allegations*, NAT'L COLLEGIATE ATHLETIC ASS'N. at 21 (2011).

impermissible benefits . . . .”<sup>90</sup> It is believed that this is the first time that the NCAA has cited a University for failure to monitor social media.

Ironically, since the New York Giants have drafted Austin, his story may have a happy ending. Austin has said that he has matured and that “It was an extremely humbling experience to going from being one of the top players in the country to being a guy nobody wants to talk about and stuff like that . . . I just learned that hard work will pay off . . . .”<sup>91</sup> Contrast the personal impact on Austin with the institutional impact on UNC. UNC is regarded as one of the finest public universities in the country. It has not had a major NCAA violation in over 50 years. The University has a reputation for both academic and athletic excellence, and that reputation is in jeopardy; other impacts are wide-ranging.

The NCAA investigation into North Carolina’s football program has taken a dual-pronged approach: one involving improper contacts with professional sports agents and the other involving possible academic misconduct. Both approaches hurt the University’s reputation. Not only were Austin and a number of other athletes suspended, but Associate Football Coach John Blake also resigned. The head football coach, Butch Davis, was fired this summer.<sup>92</sup> The day after Butch Davis was fired, North Carolina Athletic Director Dick Baddour resigned. In the fourteen years that he was the athletic director, the Tar Heels won thirteen national championships in four sports and finished in the Top Ten fifteen times in the annual NACDA Director’s Cup competition for the best overall program<sup>93</sup>

When UNC Chancellor Holden Thorp fired Head Football Coach Butch Davis, he specifically stated that he was doing this, “[t]o restore confidence in the University of North Carolina and

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

<sup>91</sup> Mike Garafolo, *Giants Select Talented, Troubled DT Marvin Austin in Second Round of NFL Draft*, NJ (Apr. 29, 2011, 8:18 PM) [http://www.nj.com/giants/index.ssf/2011/04/giants\\_select\\_north\\_carolina\\_d.html](http://www.nj.com/giants/index.ssf/2011/04/giants_select_north_carolina_d.html).

<sup>92</sup> Ken Tysiac, *UNC Fires Coach Butch Davis*, NEWS OBSERVER (Jul. 27, 2011) <http://www.newsobserver.com/2011/07/27/1373741/unc-trustees-meeting-on-football.html>.

<sup>93</sup> UNC Athletics, *Thorp Names Search Committee for Next Athletic Director*, N.C. TAR HEELS (Aug. 8, 2011) <http://tarheelblue.cstv.com/genrel/080811aab.html>.

our football program, it's time to make a change . . . What started as a purely athletic issue has begun to chip away at this university's reputation."<sup>94</sup> Thorp noted that Davis's firing was because of the cumulative damage to UNC's reputation over the past year and not in response to any new developments in the NCAA investigation.<sup>95</sup> Thorp stated,

I have been deliberate in my approach to understanding this situation fully, and I have worked to be fair to everyone involved . . . However, I have lost confidence in our ability to come through this without harming the way people think of this institution. Our academic integrity is paramount, and we must work diligently to protect it. The only way to move forward and put this behind us is to make a change.<sup>96</sup>

Thorp's actions, however, have not met unanimous approval. The school will pay Coach Davis a buyout of up to \$2,703,500.<sup>97</sup> A number of alumni and sports boosters have either dropped their memberships in the Rams Club athletic alumni organization or have cancelled their contributions to "The Blue Zone," which was raising money for a major expansion of the football stadium.<sup>98</sup>

UNC could also lose money on their television, radio and media contracts. Reports indicate that UNC has a contract with Learfield Communications amounting to \$6.5 million annually, which rises incrementally to \$7.5 million by 2021. However, the contract also stipulates that Learfield can renegotiate the contract if UNC's football or basketball teams exclude them from championship games or if they face a reduction in the scholarships they can offer.<sup>99</sup>

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<sup>94</sup> Tysiac, *UNC fires coach Butch Davis*, *supra* note 92.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> Ken Tysiac, *Thorp Hears from Alumni over Davis*, NEWS OBSERVER (July 30, 2011), <http://www.newsobserver.com/2011/07/30/1378611/thorp-hears-from-alumni-over-davis.html>.

<sup>98</sup> Sammy Batten, *UNC Chancellor Addresses Board of Governors About Butch Davis Firing*, FAY OBSERVER (Aug. 11, 2011, 4:29 PM) <http://www.fayobserver.com/articles/2011/08/11/1114931?sac=Sports>.

<sup>99</sup> Adam Fusfeld, *NCAA Investigation to Hit North Carolina's Pocketbook*, BUS. INSIDER (Oct. 13, 2010, 8:50 AM) <http://www.businessinsider.com/heres-why-ncaas-investigation-into-unc-will-directly-affect-a-major-source-of-revenue-2010-10>.

The monetary costs that UNC faces are only a few of those involved in the NCAA investigations. For example, Ohio State, which is still in the middle of an NCAA investigation into their football program, has reportedly already spent \$800,000, including nearly \$270,000 to a Chicago public relations firm, to help manage publicity.<sup>100</sup> The school will also return \$338,811 that it received for its share of the Big Ten's payout from the Sugar Bowl<sup>101</sup> and voluntarily vacated all wins during the 2010 season including the Sugar Bowl.<sup>102</sup> Incoming student-athletes could also ask for release from their scholarships in addition to high school seniors who have made verbal commitments. The Reggie Bush and O.J. Mayo scandals may cost USC tens of millions of dollars.<sup>103</sup> And in the biggest case of the all, it is estimated that SMU has lost at least \$25 million over time from when they received "the death penalty" in 1987.<sup>104</sup> Going beyond those costs are the damage to the athletic branding of the university. Commentator David Carter, executive director of the USC Sports Business Institute, stated, "It's about protecting the university brand . . . If the brand atrophies, that is a much bigger problem than if the athletic department has a bad year or two."<sup>105</sup>

## V. AN MRM PERSPECTIVE

Perhaps the most overarching comment one can make about the North Carolina story is that it clearly demonstrates the interconnectivity of risks and interests in risks. Secondly, one might also note that dropping a "small" pebble in a pond can still produce ripples that impact a wide range of individuals and organizations. Indeed, in some ways Marvin Austin is likely to be

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<sup>100</sup> Sean Rowe, *OSU Costs of NCAA Investigation*, ABC 6 (Aug. 12, 2011, 7:03 PM) [http://www.abc6onyourside.com/shared/newsroom/top\\_stories/videos/wsyx\\_vid\\_12777.shtml?wap=0](http://www.abc6onyourside.com/shared/newsroom/top_stories/videos/wsyx_vid_12777.shtml?wap=0).

<sup>101</sup> *Id.*

<sup>102</sup> Marilyn Smith, *OSU Vacates 2010 Football Wins* (2011).

<sup>103</sup> Gary Klein, *At USC, Assessing the Financial Damage from Reggie Bush and O.J. Mayo Scandals is the Multimillion-Dollar Question*, L.A. TIMES (Jun. 21, 2011) <http://articles.latimes.com/2011/jun/21/sports/la-sp-0622-reggie-bush-usc-20110622>.

<sup>104</sup> Darren Rovell, *SMU's "Death Penalty": What Price Did It Pay?*, CNBC (Jan. 8, 2008, 9:55 AM) [http://www.cnbc.com/id/22553608/SMU\\_s\\_Death\\_Penalty\\_What\\_Price\\_Did\\_It\\_Pay](http://www.cnbc.com/id/22553608/SMU_s_Death_Penalty_What_Price_Did_It_Pay).

<sup>105</sup> Klein, *supra* note 103.

the least affected by this event—at least over the long run. He has entered the NFL, and although he will still face reputational concerns, it is well within his control to address them (through excellence in performance and other tangible efforts to restore his public standing). The effects on others and, especially on the University of North Carolina, are longer-lasting and perhaps not as easy to remedy.

Recognizing that this episode cannot be singularly defined as a legal matter or as a legal risk management issue may be the natural immediate reaction. Indeed, not surprisingly, the managerial response has tended to be punitive and legalistic, with an emphasis on new rules and regulations. This response is not wrong at a technical and post-event level, but it does not seem to approach the issue from the right direction. The following provides a short review of an MRM perspective on this case and demonstrates how rules and regulations should arise only in the service of a broader policy on and philosophy of risk and its management.

#### *What is our policy?*

To begin, MRM establishes that reputation is an asset that individuals and institutions possess, and that legal risks—while important in their own right—are better considered as causes of harm to reputation. From a textbook perspective, the starting point for considering a risk management response to the Marvin Austin case is to first ask how top decision makers and the University identified and understood their reputation's exposure to be at risk. Have they prioritized the importance of protecting reputation; have they understood the competing stakes that exist in defining reputation; and have they clarified their view on risk-taking with respect to reputation? Have they communicated this view/policy to internal and external stakeholders? While we concede that this point may appear slightly pedantic, it has become axiomatic in risk management that a central risk for most organizations is the absence (or lack of clarity) of policy. If an institution cannot clearly state its goals and values, how can any one person ever determine what is a good idea or a bad idea, what is excessive risk-taking, and what is acceptable risk?

This is a rather important point to reflect upon, as it would be natural to argue that no rules or policies will stop “kids from being kids.” From an analytical perspective, however, the more salient question is this: How clearly understood are the institution’s values and attitudes toward reputation? And does top management “walk the walk,” meaning are their actions consistent with their policies on reputation? Before looking at the more mechanical aspects of risk management, it is helpful to think about the stakeholder management context of the preceding paragraphs. Illustratively, consider the relationship of the athletes to the institution with respect to reputation. It can be said that the athletes have an individualized reputational exposure, as does the institution, but in the context of the North Carolina case, (as in most Reputational Risk situations) the exposures become entwined. Thus, MRM would tend to look at athletes and institutions/organizations as having a common (though differentiated) reputational exposure to risk. As a result, it would be necessary to have a discussion between athletes and the institution in the fleshing out of policy toward reputation. This point is also applicable to other stakeholders (fans or alumni, for example).

#### *Policy and goals*

The second likely step with respect to managing Reputational Risk is the examination of institutional policy relative to overall and programmatic goals. In the case of sports, one can easily imagine that programs have aspirations around the development of athletes (both psychologically and physically), of performance improvement, and of winning. MRM tends to argue for a clear examination of the relationship of Reputation Management to the attainment of these goals. To take the obvious example, it would seem that Reputation Management and a goal of “winning at all costs” would be somewhat in conflict with one another. So the MRM question would be this: what is the acceptable level of risk tolerance here? What is the point in the pursuit of competitive goals where that effort impacts reputation at an unacceptable level? MRM would not argue for one solution or another; the point would be to establish a clear basis for ongoing discussion about

the impacts of goals on values (in this case, the value of reputation).

*Policy drives practice*

Perhaps one of the rather problematic issues in MRM today derives from the difficulties in converting policies to practices. The essence of the problem is that top management may establish wide-ranging policies with respect to risk, but in large modern organizations, there are difficulties in embedding appropriate risk management practices.

Most current research reinforces the view that risk management must be consistent with an organization's culture, structure, purpose and environment, which technically means that risk management will look quite different from organization to organization. While this is seemingly true, the early evidence suggests that most implementations are driven by the view that all participants are "risk managers within the scope of their responsibilities." In other words, organizations expect all employees (or athletes) and managers (and to a certain extent, stakeholders) to be cooperatively engaged in determining how they contribute to the fulfillment of risk management policies. The point of emphasis is proactive engagement—to get those who have a stake in the Reputational Risk to identify that stake and to commit to a role in the management of that risk.

*Practices in sharper relief*

It is only at this point that MRM begins to resemble traditional technical risk management, for here the individuals have collaboratively identified the risk mitigation duties. These duties might include legal risk management and litigation management, training and education programs, public relations strategies, guidelines and specific policies, rewards, and penalties.

People in MRM often say that 80% of risk management is "getting ready to practice risk management," and the North Carolina illustration seems to emphasize the point. The missing ingredient with traditional risk management practices is the process of clarifying policy, engaging participants, and seeking agreement as to the means of managing the various stakes. The

additional distinction with MRM is the focus on the interconnectivity of risks. Thus, it is important to recognize that damage to reputation can come from a wide range of interconnected sources, but it is also important to recognize the tradeoffs that have to take place to balance goals and the various interests. To use a simplistic example, if the institution decides to put its reputation somewhat at risk to accommodate a goal of winning a conference title, then that decision should be recognized as having a multiplicity of effects on individuals and institutions. Indeed, this point is worth underlining. Risk management does not just include actions intended to prevent or reduce risks—it may also include a mechanism for clarifying the basis of risk-taking decisions and assessing the nature of the risk being taken.

#### SUMMARY DISCUSSION

While it appears that universities and their athletic departments may have the legal right to restrict certain student speech, this should be considered as only one part of a broader risk management plan.

The UNC Athletic Department recently rewrote their policy regarding social media, including Twitter. UNC spokesman Steve Kirschner said, players are “responsible for what they post, the same way as if they’d said it at a press conference.”<sup>106</sup> The Handbook specifically refers to the athlete’s words and actions in the light of the reputation of the University:

The media and fans are interested in what you have to say before and after competition, whether the Tar Heels win, lose, or draw. The Department of Athletics is aware that public perception affects the reputation of the entire University and urges you to exercise care when making statements to the media. You may be suspended by the ACC or the NCAA for making derogatory comments, especially about the officiating.

One must remember, however, that with today’s instant communication, it may take less than 24 hours for a statement you may have made to campus paper or to an Internet site covering Carolina athletics to appear as the lead story on ESPN’s

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<sup>106</sup> Giglio, *supra* note 75.

SportsCenter. UNC has given some guidance to its student-athletes:

In general, when speaking to the media, be confident, courteous, and prompt. Even if the interview is for a newspaper or radio station and is not being televised, please wear appropriate clothing. Think of every press interview as a job interview. You have the opportunity to make a positive impression on thousands of people. Interviews can be a valuable part of a student-athlete's life, and can serve as a great learning experience for you. At first, you may be nervous about speaking to the media. In fact, that is completely natural. But by the time you graduate, you will likely have become relaxed, confident, and articulate. You can then carry that confidence in public speaking into life after college.<sup>107</sup>

The MRM perspective is consistent with UNC's response at a technical level but the modern risk management view is based on establishing a clear policy, against which there is the making and implementation of many technical risk management decisions. What is unclear from the UNC case is the degree to which the specific decisions taken derived from an overall assessment of the Reputational Risk. Further, there should be an encouragement of research to better understand how progressive universities with modern risk management programs assess and address reputational risks. As new risk management practices are new, it will not be surprising to find that there has been little attention on developing and implementing reputational risk policy and with devising measures that address the multiple dimensions of the risk and the multiple interests that attach to that risk. Likewise, from a legal perspective, there are likely to be fruitful results in looking at the management of legal aspects of social media risks in a wider MRM framework as it presents greater possibilities to satisfy the wide range of stakeholders with important interests in collegiate athletics.

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<sup>107</sup> UNC Athletics, *Student Handbook*, N.C. TAR HEELS, <http://tarheelblue.cstv.com/genrel/022805aab.html>.

