

# PRIVATE AND PROTECTED?

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## INTRODUCTION

Imagine you are living the American teenage dream as a highly recruited high school athlete. You are an all-star with local celebrity status, replete with Facebook and Twitter accounts with thousands of fans, friends, and followers. Of course, you let

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everyone know some of your pressing thoughts of the day. Those may include things like, “Yo [sic] my pops [sic] drove by and splash [sic] some jewish [sic] lady with some mad water...”<sup>1</sup> or “So we [sic] learning about the p\*\*\*y and the teacher tells me when a girls [sic] squirts that’s not an organism [sic] (cont.)...”<sup>2</sup> Completely harmless, right? Wrong. New Jersey teen Yuri Wright found that out the hard way when his vulgar and borderline racist tweets (from his now deactivated Twitter account) led to expulsion from his private school and almost cost him a collegiate scholarship.<sup>3</sup> Luckily, for Wright, the University of Colorado overlooked his poor judgment and accepted him into the university in January of 2012.<sup>4</sup>

Wright is the exception. Most high school athletes are not as highly recruited and do not compete at the collegiate level (estimates range from 3-11% depending on the sport),<sup>5</sup> but even among them, Wright is not alone in his troubles with free speech and social networking. A small group of Ohio high school athletes aired their anger over what they believed to be a lie from their coach on Facebook. The posts ultimately escalated to talks of murdering him and raping his wife.<sup>6</sup> Eventually, the school expelled the teens.<sup>7</sup>

Unfortunately, these issues are more common than ever before. Simple Google searches return newspaper articles and sports blog posts filled with examples of athletes making poor decisions. Reporters do not have to look far to create headlines; many athletes will post borderline inappropriate content on their personal social media accounts without a second thought.

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<sup>1</sup> Glenn Davis, *Yuri Wright Expelled Via Twitter*, SPORTS GRID (Jan. 20, 2012), <http://www.sportsgrid.com/ncaa-football/yuri-wright-expelled-twitter/>.

<sup>2</sup> *Id.*

<sup>3</sup> Dave Hooker, *Yuri Wright Commits to Colorado*, ESPN.COM (Jan. 26, 2012), [http://espn.go.com/college-sports/recruiting/football/story/\\_/id/7498273/ex-don-bosco-player-yuri-wright-commits-colorado-buffaloes/](http://espn.go.com/college-sports/recruiting/football/story/_/id/7498273/ex-don-bosco-player-yuri-wright-commits-colorado-buffaloes/).

<sup>4</sup> *Id.*

<sup>5</sup> *Percentage Chance of Playing NCAA College Sports*, COLLEGE SPORTS SCHOLARSHIPS <http://www.collegesportsscholarships.com/percentage-high-school-athletes-ncaa-college.htm>.

<sup>6</sup> Kodi, *Facebook + High School Athletes = Fail*, SPORTIN-A-MIC (Dec. 9, 2011), <http://sportn-a-mic.com/2011/12/09/facebook-high-school-athletes-fail/>.

<sup>7</sup> *Id.*

Over 75% of all teens now use social media sites, including some 89% of those teens with a Facebook account.<sup>8</sup> Approximately 16% of teens aged 12-17 hold Twitter accounts,<sup>9</sup> and users of both post everything from their accomplishments to their frustrations on these services. Today's teenagers mature in the age of social media. They wrongfully believe the privacy settings on their profiles will protect their information, and that the First Amendment of the United States Constitution protects their speech from negative consequences.

This article will examine the First Amendment as it applies to high school student-athletes' use of social media. High school student-athletes should be more restricted in their First Amendment free speech rights than non-athletes in the use of social media. Specifically, this article claims that public high schools can regulate the use of social media by their student-athletes without infringing upon their Constitutional right to free speech. As discussed below, both the precedent set by universities and the legal tradition of restricting juvenile Constitutional rights, particularly in the school context, indicate the likely doctrinal direction of the Supreme Court in applying the First Amendment to this problem.

Part I of this article describes the Supreme Court's First Amendment doctrine and how it differs between high school students under the age of majority and adults. The focus of the review will be within the scholastic context. Part II will examine athletes' free speech rights in general and in the context of social media. An overview of relevant case law will show why high schools and universities have the ability to regulate their student athletes more than the average student. Part III will discuss the influx of social media mishaps with athletes and the steps some high schools have taken to regulate their athletes and conclude with the policy reasoning behind the lesser freedom of high school athletes.

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<sup>8</sup> Amanda Lenhart, Mary Madden, Aaron Smith, Kristen Purcell, Kathryn Zickuhr, Lee Rainie, *Teens, kindness and cruelty on social network sites*, PEW INTERNET (Nov. 9, 2011), <http://pewinternet.org/Reports/2011/Teens-and-social-media/Part-1.aspx>.

<sup>9</sup> *Are Teens Ditching Facebook for Twitter?*, THE WEEK (Jan. 31, 2012), <http://theweek.com/article/index/223864/are-teens-ditching-facebook-for-twitter>.

## I. GUARANTEED FREEDOM AT THE AGE OF MAJORITY, MAYBE

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.<sup>10</sup>

Schoolteachers often remind American schoolchildren about the freedoms secured for them by their ancestors, but fail to mention that many of these rights do not arise until adulthood. The First Amendment right to free speech is one of these.

A. *Safeguarding the Underage*

The Supreme Court previously established that freedom of speech is not absolute.<sup>11</sup> The Court created three categories when applying the First Amendment in freedom of speech cases involving children in schools.<sup>12</sup> *Tinker v. Des Moines Independent Community School District* held, absent a reasonable forecast of substantial disruption, the First Amendment protects student speech in schools.<sup>13</sup> The second case, *Bethel School District v. Fraser*, governs cases involving vulgar, lewd, and plainly offensive speech in school.<sup>14</sup> The final case, *Hazelwood School District v. Kuhlmeier*, discusses the key question of whether school-sponsored speech operates in a public or private forum.<sup>15</sup> The Supreme Court has not directly addressed which test applies in social media cases.

The first of these applications of free speech for juveniles occurred when three Des Moines teenagers wore armbands in protest of the Vietnam War during the holiday season.<sup>16</sup> The school suspended the children and would only allow them to return to school if they agreed to do so without the armbands.<sup>17</sup> The *Tinker* Court stated, “[i]t can hardly be argued that either

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<sup>10</sup> THE DECLARATION OF INDEPENDENCE, para. 2.

<sup>11</sup> *Pinard v. Clatskine School Dist.* 6J, 467 F.3d 755, 765 (2006).

<sup>12</sup> *Id.*

<sup>13</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

<sup>14</sup> *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986).

<sup>15</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

<sup>16</sup> *Tinker*, *supra* note 13 at 504.

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

students or teachers shed their Constitutional rights to freedom of speech at the schoolhouse gate.”<sup>18</sup> The Court considered the students’ speech, “silent, passive expression of opinion, unaccompanied by any disorder or disturbance...” and held that the suspension violated their Constitutional rights.<sup>19</sup> The Court warned that discomfort and unpleasantness alone would not allow restriction of speech.<sup>20</sup> Whether the regulation was a First Amendment violation in public schools turned on the question of whether or not the expression of the student had a substantial interference in the classroom affecting the work or rights of other students.<sup>21</sup>

Matthew Fraser, a student at Bethel High School, delivered a sexually explicit and vulgar speech in favor of a student government candidate at a mandatory school assembly in front of students as young as 14.<sup>22</sup> Bethel High reprimanded Fraser for referring to his endorsed candidate in sexually vulgar terms and suspended him from school.<sup>23</sup> The Court decided in the case involving schools, socially appropriate behavior, fundamental values of freedom of speech, and the sensibilities of others must all be balanced.<sup>24</sup> The Court ruled the school’s regulation of vulgar and offensive terms was a highly appropriate function.<sup>25</sup>

In *Kuhlmeier*, students wished to run two articles in a school-sponsored newspaper regarding teenage pregnancy and the impact of divorce.<sup>26</sup> School officials pulled the stories when concerns of privacy and journalism standards surfaced without time to remedy the issues before print.<sup>27</sup> The Court focused on whether the newspaper was an extension of the school and a

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<sup>18</sup> *Id.* at 506.

<sup>19</sup> *Id.* at 508.

<sup>20</sup> *Id.* at 509.

<sup>21</sup> *Id.* citing *Burnside v. Byars*, 363 F.2d 744, 749 (1966).

<sup>22</sup> *Fraser*, 478 U.S. at 677.

<sup>23</sup> *Id.* at 677-79 (Fraser was suspended for three days and taken off the school’s list of commencement speakers).

<sup>24</sup> *Id.* at 681.

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

<sup>26</sup> *Kuhlmeier*, *supra* note 15 at 263 (All stories involved students at their school and their families. Identities of the involved parties were anonymous but were easily ascertained. Additionally, the writers did not contact some of the mentioned parties regarding the stories to give their side).

<sup>27</sup> *Id.* at 263-64.

private forum, which is acceptable to regulate, or a public forum, which is not acceptable to regulate.<sup>28</sup> The Court found that the school's authority to regulate speech exists even in non-traditional classroom settings as long as these settings are "designed to impart particular knowledge or skill to student participants and audiences."<sup>29</sup> Greater control exists, regardless of the activity's lesson, because the likelihood that one attributes the speaker's views to the school is high.<sup>30</sup> The Court reasoned a school should be able to disassociate itself from activity that would interfere with the goals allowing them to teach cultural values to children, prepare them for their professional future, and appropriately adjust them to their environment.<sup>31</sup> The Court stated that when editorial control is involved in an activity and there is no valid educational purpose to that activity, students' Constitutional rights will be upheld.<sup>32</sup> Subsequent cases interpreting the Supreme Court's rationale following the previous three cases allow for predictions of how the Court would rule on speech by student athletes.

In 2007, high school senior Joseph Frederick refused to take down the controversial and cryptic "BONG HiTS 4 JESUS" banner while at an event during school hours.<sup>33</sup> Frederick's principal, Deborah Morse, suspended Frederick, who later argued he was not at school because the banner hung across the street and faced the direction of the school. The Court disagreed, ruling a school-sanctioned event allowed the school to regulate student speech.<sup>34</sup> The Court reiterated that Constitutional rights of public school students are not as broad as an adult's rights.<sup>35</sup> The Court found it likely that people's perception of the banner was to promote illegal drugs in contradiction to school policies against

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<sup>28</sup> *Id.* at 266 (Public forums are free for the public to enter and in a school setting; one is traditionally created when school authorities, by policy or practice, open a facility to the public for indiscriminate use).

<sup>29</sup> *Id.* at 271.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 272 (quoting *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954)).

<sup>32</sup> *Id.* at 273.

<sup>33</sup> *Morse v. Frederick*, 551 U.S. 393, 394 (2007).

<sup>34</sup> *Id.* at 401 (The event took place across the street from the school and the same student conduct rules applied during all school programming according to school policies).

<sup>35</sup> *Id.* at 396-97.

those activities.<sup>36</sup> Additionally, the Court found school regulation of student speech proper because of the special characteristics of public school environments and events.<sup>37</sup>

The distinctions became apparent when the Ninth Circuit found in favor of a student whose school reprimanded him for distributing an underground paper against school policy requiring approval of student-written material.<sup>38</sup> The court considered the school to be censoring the students based on “undifferentiated fear of disruption.”<sup>39</sup> Agreeing with the Fifth Circuit and the Supreme Court, the Ninth Circuit held that a policy must seek to remedy a substantial disruption, just as in *Tinker* or *Hazelwood*, with the school being in no way affiliated with the publication a key factor.<sup>40</sup>

Most vulgar speech by students is rightfully prohibited when published or spoken to large crowds, but in 2000, a South Dakota District Court held profane language may be regulated regardless of how many people are exposed.<sup>41</sup> The student received and opened a letter from her mother in the principal’s office; only the secretary witnessed her uttering the word, “shit.”<sup>42</sup> The court sympathized with the student, stating that offices in schools are normally non-public fora and the school officials may have been aggressive in their choice of discipline.<sup>43</sup> Regardless of that sympathy, the court still ruled against the student’s rights, holding the school did not violate the student’s Constitutional rights because school officials may restrict even individual student speech because of their responsibility to promote civility and social norms.<sup>44</sup> The court relied mostly on the language the student used because lewd speech is subject to more restriction in the school setting.<sup>45</sup>

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<sup>36</sup> *Id.* at 403-06.

<sup>37</sup> *Id.*

<sup>38</sup> *Burch v. Barker*, 861 F.2d 1149 (1988).

<sup>39</sup> *Id.* at 1154.

<sup>40</sup> *Id.* at 1159.

<sup>41</sup> *Anderson v. Milbank Sch. Dist.*, 197 F.R.D. 682, 684 (2000).

<sup>42</sup> *Id.* at 684-85. (The student’s mother informed her to take the bus home from school but by the time the student read the letter she had missed the bus).

<sup>43</sup> *Id.* at 686-87.

<sup>44</sup> *Id.* at 687-88 quoting *Tinker*, 393 U.S. at 509.

<sup>45</sup> *Id.* at 689.

The common result of *Tinker*, *Fraser*, and *Hazelwood* allows stricter regulation of students' First Amendment rights, regardless of their affiliation with a sport or activity. When involved in a school-sponsored activity, especially one where the speech is published and can be attributed to the school, the regulations allowed to further the educational experience are said to be subject to strict scrutiny but are often given broad deference. Still the question remains: Are high school athletes' rights infringed upon if their school regulates their use of social media services?

*B. "College Isn't the Place to go for Ideas."<sup>46</sup>*

College students tend to believe the Constitution guarantees rights regardless of the setting. This misconception continues because there are cases in which educational institutions regulate against the freedoms regarded in the Constitution without infringing upon personal rights. The Supreme Court, often known for using the reward method, ruled in favor of the University of California-Hastings Law School's non-discriminatory policy regarding their affiliated student organizations.<sup>47</sup> Free speech in its conventional form was not at risk in *Christian Legal Society v. Martinez*. Instead, the Christian organization wanted to use the University logo and receive the same benefits other organizations that complied with the university's non-discriminatory policy received.<sup>48</sup> The *Martinez* Court held that the university fell into a category of a governmental entity and may regulate speech in limited public forums.<sup>49</sup> The Court maintained an organization would be able to restrict their membership so long as they disassociated themselves from the university; which included losing their funding and designation as an official school organization.<sup>50</sup>

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<sup>46</sup> Helen Keller, QUOTEWORLD.ORG, <http://www quoteworld.org/quotes/7542/>.

<sup>47</sup> *Christian Legal Soc'y v. Martinez*, 130 S.Ct. 2971, 2995 (2010) (The Christian Legal Society at the law school wished to exclude people who were not Christian or who did not hold the same religious beliefs and to keep the ability to associate themselves with the law school and university).

<sup>48</sup> *Id.* at 2984.

<sup>49</sup> *Id.* at 2984 (Limited public forums are established by opening property for use or discussion of certain subjects to certain limited groups).

<sup>50</sup> *Id.* at 2986.

The Court generally favors the First Amendment and requires a governmental entity (a public university in this case) to have a compelling state interest unrelated to the suppression of ideas with an unavailability of significantly less restrictive means to serve the interest.<sup>51</sup> The Court concluded that the use of the university's name was a "right of association" and the university may regulate the standards upon which they allow that association.<sup>52</sup> Further, the Court stated that "so long as a public university does not contravene Constitutional limits, its choice to advance state law goals through the school's educational endeavors stands on firm footing."<sup>53</sup> Other organizations experienced similar scenarios when their respective universities adopted nondiscriminatory policies. Some, unlike the Christian Legal Society, chose to forgo the right of association and leave that association behind.<sup>54</sup>

The right to associate with a program or university discussed in *Martinez* is a key reason athletes in both public universities and high schools have been and will be subject to greater regulation than their non-athlete counterparts.

## II. "THERE IS NO I IN TEAM."

The American Dream is one about options. Americans are free to choose their own path in life. The freedom to choose to participate is central to the arguments in favor of regulation of speech in athletic programs. When addressing concerns of Constitutional freedoms in the context of athletic departments and athletes, the compelling state interest served by preserving the name of the university or its brand is often given preferential treatment. The organization was free to conform to the neutral non-discriminatory policy in *Martinez* and athletes are free to conform or not participate with the team.

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<sup>51</sup> *Id.* at 2985.

<sup>52</sup> *See id.*

<sup>53</sup> *Id.* at 2991.

<sup>54</sup> Todd Starnes, *Vanderbilt Tells Catholic Students to Change Name*, FOX NEWS RADIO, (Apr. 11, 2012), <http://radio.foxnews.com/toddstarnes/top-stories/vanderbilt-tells-catholic-students-to-change-name.html> (Most recently the Catholic group "Vanderbilt Catholic" chose to leave the campus so they would not have to comply with the Vanderbilt University nondiscriminatory policy).

A. *Speak Now, Play Never.*

*Williams v. Eaton* is factually similar to *Tinker*, but with a drastically different result.<sup>55</sup> University of Wyoming football players wanted to demonstrate against their opponent Brigham Young University and the majority of their student population's religious beliefs by wearing black armbands during a game.<sup>56</sup> The school dismissed the players after a dispute about the situation.<sup>57</sup> The court relied on *Tinker* and found the university would violate the establishment clause of the First Amendment had they allowed the armbands, but evaded the use of the disruption test.<sup>58</sup> The court strongly supported policies restricting hostile expressions against religious beliefs by representatives of states or their agencies, finding the football players are representatives of the university, and the university an agent of the state.<sup>59</sup>

In 2008, University of Texas lineman Buck Burnette exercised his right to free speech when he posted as his Facebook status, "all the hunters gather up, we have a \*\*\*\*er in the whitehouse [sic]."<sup>60</sup> Burnette subsequently apologized via the press stating he made a "terrible decision."<sup>61</sup> Texas football coach Mack Brown told the press he could not ban the use of social media and that, "It's a public right they have as students. We've told them they need to obviously not be putting anything their mom wouldn't want to see."<sup>62</sup> Even so, the team dismissed Burnette amongst sadness from his teammates (including quarterback Colt McCoy).<sup>63</sup> Still under the Mack Brown era,

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<sup>55</sup> *Williams v. Eaton*, 468 F.2d 1079 (1972).

<sup>56</sup> *Id.* at 1081.

<sup>57</sup> *Id.* at 1080.

<sup>58</sup> *Id.* at 1083-84.

<sup>59</sup> *Id.* at 1083.

<sup>60</sup> Will Brinson, *Texas' Buck Burnette Learns Why Racist Obama Facebook Updates are Dumb*, AOL NEWS (Nov. 6, 2008), <http://www.aolnews.com/2008/11/06/texas-c-buck-burnette-learns-why-racist-obama-facebook-updates-a/>. (A Facebook status may be updated from either the users' newsfeed page or their personal page. Facebook prompts the user to "Update Status" with "What's on your mind?" and allows the user to post text alone or pair the text with a photo, video, or even ask a question to their friends).

<sup>61</sup> David Ubben, *Texas' Orakpo Calls Dismissal of Teammate for Slurs 'Appropriate'*, ESPN.COM, (Nov. 11, 2008), <http://sports.espn.go.com/nfl/news/story?id=3694695/>.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

Texas football players continue to have active Facebook and Twitter accounts.<sup>64</sup>

If Burnette filed suit because of his dismissal, case law would still fall in favor of his coaches at Texas, as illustrated by a case which involved the much celebrated basketball school, University of Maryland (College Park Campus).<sup>65</sup> In 1979, six members of the team filed suit against multiple newspapers and publishers alleging invasion of privacy and intentional infliction of emotional distress.<sup>66</sup> In court, the players conceded they became public figures due to their membership on the team and the widespread public interest involved.<sup>67</sup> The university maintained an academic eligibility requirement for its athletes and the Maryland coach announced publicly that some of the members of the basketball team would be in trouble if their grades remained consistently low.<sup>68</sup> Three newspapers ran articles on November 1, 1977 addressing the coaches concerns, but did not identify the players who were on academic probation.<sup>69</sup> The court found the common denominator in prior decisions was the relinquishment of a right, “either directly or by acting in a manner that is inconsistent with the right or one’s intention to rely upon it.”<sup>70</sup> The court also found Maryland players were voluntary public figures under the Restatement 2d of Torts, quoting in part:

One who voluntarily places himself in the public eye by engaging in public activities, or by assuming a prominent role in institutions or activities having general economic, cultural,

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<sup>64</sup> See generally Case McCoy, TWITTER, <http://twitter.com/CaseMcCoy6/> (Notably the younger McCoy sibling and new quarterback, Case. The younger McCoy potentially learned from his brother’s generation of Longhorns and keeps most of his tweets (though “unprotected”) tame. His Twitter profile reads, “Quarterback at The University of Texas... Hunting. Fishing. Faith. Col 3:17”).

<sup>65</sup> *NCAA Basketball Tournament History*, ESPN.COM, [http://espn.go.com/mens-college-basketball/tournament/history/\\_team1/6542/](http://espn.go.com/mens-college-basketball/tournament/history/_team1/6542/) (As of 2013, the school has made 24 NCAA Basketball Tournament appearances resulting in two trips to the Final Four and one National Championship in 2002).

<sup>66</sup> *Bilney v. Evening Star Newspaper Co.*, 43 Md. App. 560, 561 (1979).

<sup>67</sup> *Id.* at 562.

<sup>68</sup> *Id.* at 562-63 (The policy stated an athlete would be allowed to be on academic probation for two consecutive semesters before being subject to dismissal from the team).

<sup>69</sup> *Id.* at 563-65.

<sup>70</sup> *Id.* at 570.

social or similar public interest, or by submitting himself or his work for public judgment, cannot complain when he is given publicity that he has sought, even though it may be unfavorable to him... *In such a case, however, the legitimate interest of the public in the individual may extend beyond those matters which are themselves made public, and to some reasonable extent may include information as to matters that would otherwise be private.*<sup>71</sup>

The public had a strong enough interest in the players' confidential grades but the *Bilney* court found some private matters remain private with a threshold of community mores, including reasonable and decent standards.<sup>72</sup>

### *B. The High School Brand*

Three major cases ruled on issues of speech in the context of high school students and courts to determine what qualifies as school sponsored speech based upon the school's endorsement or affiliation. Courts choose a test based on one of the three categories of speech found in *Tinker*, *Fraser*, and *Hazelwood*. The differences vary depending on whether the court deems the speech itself to be vulgar and lewd, disruptive to the educational setting, and/or deciphering whether the speech was non-school sponsored. Future courts should focus not only on the type of speech involved but also on the voluntary nature of the student athletes who avail themselves to further restrictions by representing the school and becoming public figures.

### *C. School Sponsored Speech.*

*Williams* illustrates that an athlete's speech is easily attributed to their school. Though involving college athletes, the *Williams* court reacted to the expression of wearing armbands *because* the government (a public university) is "neutral, and, while protecting all [religious opinions and sects], it prefers none, and it *disparages* none."<sup>73</sup> It follows that any athlete wishing to

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<sup>71</sup> *Id.* at 572 (quoting RESTATEMENT (SECOND) OF TORTS § 652D cmt. e (1977) (emphasis added).

<sup>72</sup> *Id.* at 572-73.

<sup>73</sup> *Williams*, *supra* note 56 at 1083 (quoting *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963)).

send a controversial message through an expressive form against the school's neutrality forces the athlete to choose between participating in the event and free speech.

When a student appears in a school uniform, the public perceives the athlete as a representative of not only the team, but, in the case of a collegiate or high school athlete, also the institution. Student works in newspapers depend mostly on whether the publication appears school-sponsored (funded by the schools, overlooked by faculty, etc.) and if it is potentially reflective of or thought to represent the institution.<sup>74</sup> Because the banner *could have been* interpreted as the school endorsing the illegal use of drugs, it affected the decision in *Morse*.<sup>75</sup> A player who makes a statement during a game, while in attendance at a school sponsored event or while participating in a school-sponsored activity may be subject to stricter regulations than the average student because the student-athlete represents the institution. Further, the student-athlete reflects the teachings and values of the school as a governmental entity.

#### *D. High School Celebrity Status*

Labeling a student as a public figure is another key component affecting rulings of Constitutional violations. The student athletes in *Bilney* freely admitted that they achieved celebrity status as voluntary public figures based on their participation within the Maryland basketball program.<sup>76</sup> Buck Burnette received attention due to his association with the University of Texas and its football program and not solely because of his status update and subsequent dismissal from the football team.<sup>77</sup>

Many college students are able to achieve a celebrity status based upon their participation within a sports team. A prime example is Skylar Diggins, starting guard for the University of Notre Dame Fighting Irish women's basketball team.<sup>78</sup> In 2012, she led the Irish to the NCAA finals, scoring 20 points and

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<sup>74</sup> Compare *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), with *Burch v. Barker*, 866 F.2d 1149 (1988).

<sup>75</sup> *Morse*, 551 U.S. at 403-06.

<sup>76</sup> *Bilney*, 43 Md. App. at 569.

<sup>77</sup> *Ubben*, *supra* note 61.

<sup>78</sup> *UND Women's Basketball*, Skylar Diggins, UNIVERSITY OF NOTRE DAME, [http://www.und.com/sports/w-baskbl/mtt/diggins\\_skylar00.html](http://www.und.com/sports/w-baskbl/mtt/diggins_skylar00.html).

grabbing two rebounds in a crushing loss to Baylor University.<sup>79</sup> Through her success on the court, the attractive basketball player received attention from music stars that used social media to show their support for the star during the 2010-2011 season.<sup>80</sup> That attention, in turn, earned Diggins thousands of Twitter followers (she currently has 277,138)<sup>81</sup> and a celebrity status.<sup>82</sup>

LeBron James may be the best example of a high school athlete with celebrity status. As a high school senior, James garnered attention as a star basketball player from Akron, Ohio.<sup>83</sup> He led the St. Vincent—St. Mary's High School basketball team to three state championships, earned the honor of 2003 National High School Player of the Year, and was drafted by the Cleveland Cavaliers straight out of high school.<sup>84</sup> As a teen, James dubbed himself "The Chosen One" and was selected for the cover of Sports Illustrated ("SI"), becoming more famous than many professional athletes.<sup>85</sup> James released a book in 2009 entitled *Shooting Stars*, chronicling his journey to fame after the SI cover and how he and his friends quickly became celebrities and often took advantage of their position.<sup>86</sup> The frenzy surrounding James reflected upon his high school days and became controversial when the school reprimanded him for accepting free jerseys from a Cleveland store.<sup>87</sup> James's high school received media attention because of his abilities on the basketball court, but had James been more

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<sup>79</sup> *Griners's 26 and 13 lead Baylor to NCAA's first 40-Win Season*, ESPN.COM (Apr. 3, 2012), <http://sports.espn.go.com/ncw/recap?gameId=320940239>.

<sup>80</sup> *Lil Wayne's Crush, Skylar Diggins, Opens Up About Nude Photos*, HELLOBEAUTIFUL, (Apr. 16, 2011), <http://helloworldbeautiful.com/1784635/lil-waynes-crush-skylar-diggins-responds-to-nude-photos/>.

<sup>81</sup> Skylar Diggins, TWITTER, <http://twitter.com/skydigg4>.

<sup>82</sup> Lynette Hatton, *How Twitter Sky-Rocketed Skylar Diggins*, BUSINESS 2 COMMUNITY, (Apr. 5, 2011), <http://www.business2community.com/sports/how-twitter-sky-rocketed-skylar-diggins-023018>.

<sup>83</sup> *Prospect Profile: LeBron James, NBA*, <http://www.nba.com/draft2003/profiles/JamesLeBron.html>.

<sup>84</sup> *Id.*

<sup>85</sup> *LeBron James in High School*, SPORTS ILLUSTRATED, [http://sportsillustrated.cnn.com/multimedia/photo\\_gallery/1109/lebron.james.high.school/content.1.html](http://sportsillustrated.cnn.com/multimedia/photo_gallery/1109/lebron.james.high.school/content.1.html).

<sup>86</sup> *James Admits Pot use in Book*, ESPN.COM, (July 23, 2009), <http://sports.espn.go.com/nba/news/story?id=4350557>.

<sup>87</sup> *Id.*

inappropriate in his expression on or off the court, it surely would have reflected upon St. Vincent's—St. Mary's High School.

Most high school athletes, however, are not at the level of Diggins or James, even though their participation in sports garners them attention within their communities. Every local newspaper runs stories on local high school athletic teams and includes the names of the players. Sports play a major role in American culture. In 2012, an estimated 111.3 million people tuned in to watch Eli Manning and the New York Giants win the Super Bowl.<sup>88</sup> Even college sports have quite a draw. An estimated 20 million viewers watched top ranked University of Alabama and Louisiana State University square off in their 2011 regular season match-up.<sup>89</sup> The 2012 NCAA Basketball Tournament displayed the University of Kentucky prevailing over the University of Kansas to win their eighth National Championship, garnering 19.5 million viewers.<sup>90</sup> Professional sporting arenas host and television stations broadcast high school championships. American culture is a sports culture. Our athletes are celebrities and today's high school students are the future generation of celebrities.

### III. SOCIAL MEDIA AND THE DEATH OF PRIVACY

Those born in the mid-eighties may recall the days of AIM (America Online's instant messaging chat service) and how quickly MySpace followed in the realm of social interaction online.<sup>91</sup> When that generation received a college email account it

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<sup>88</sup> Lisa de Morales, *Super Bowl XLVI: Biggest TV Audience Ever*, THE WASHINGTON POST, (Feb. 6, 2012), [http://www.washingtonpost.com/blogs/tv-column/post/super-bowl-xlvi-no-tv-ratings-record/2012/02/06/gIQAVAD6tQ\\_blog.html/](http://www.washingtonpost.com/blogs/tv-column/post/super-bowl-xlvi-no-tv-ratings-record/2012/02/06/gIQAVAD6tQ_blog.html/).

<sup>89</sup> Patrick Hipes, *CBS Scores: 20 Million Watch LSU-Alabama*, DEADLINE (Nov. 7, 2011), <http://www.deadline.com/2011/11/cbs-scores-with-lsu-alabama-ratings/>.

<sup>90</sup> Jen Harper, *TV Ratings: Kentucky Wildcats win 2012 NCAA Tournament*, ZAP2IT, (Apr. 3, 2012), <http://blog.zap2it.com/frominsidethebox/2012/04/tv-ratings-kentucky-wildcats-win-2012-ncaa-tournament-and-ratings-voice-dancing-with-the-stars-down.html/>. (During the 10 PM hour the viewership peaked at 19.5 million viewers, but at the 9 PM hour the tournament viewership was only at 16.04 million viewers).

<sup>91</sup> Brandon De Hoyos, A "Quantum" Leap for AIM, ABOUT.COM, [http://im.about.com/od/imbasics/a/imhistory\\_3.htm/](http://im.about.com/od/imbasics/a/imhistory_3.htm/) (American Online Instant Messenger began in 1997 and was the first of its kind, allowing people to instant message their contacts via the computer); *A Place for Friends*, A History of MySpace

gave them access to a Facebook account, MySpace practically became obsolete. Facebook became *the* social network for college students and quickly expanded to anyone with an email address. Soon, children born in the 1990's were able to create accounts while in high school or even middle school.<sup>92</sup> Twitter requires no prerequisites and is quickly expanding to the younger generation that follows their favorite celebrities and use the 140-character limit to express their teenage thoughts. Easily accessible by phone, computer, or other technology from anywhere with an Internet connection, social media is easy to use. Unfortunately, with this ease of use comes the potential for careless regard for the consequences of posting.

#### A. *Free Speech Pre-Social Media Era*

As shown above, the First Amendment regulates the average high school student within the context of his or her educational institution more strictly than it does an adult. Athletes have even less leeway to speak their mind than average high school students if they wish to continue to participate in their sport. As noted above, Yuri Wright's high school expelled him after his vulgar and borderline racist tweets gained press attention.<sup>93</sup> Less public uses of free speech allow high schools to reprimand their athletes instead, with courts finding no Constitutional violations by schools or coaches for team dismissals.

In *Lowery v. Euverard*, four members of the Jefferson County varsity football team were dissatisfied with their coaches' alleged humiliation tactics and use of verbal and sometimes physical abuse.<sup>94</sup> After talking to his teammates, one player created a

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RANDOM HISTORY (Aug. 14, 2008), [http://www.randomhistory.com/2008/08/14\\_myspace.html/](http://www.randomhistory.com/2008/08/14_myspace.html/) (One of the more popular social networking sites, Myspace.com was created in 2003 and allowed users to have an internet space to do whatever they pleased with. MySpace was incredibly popular with music artists (which were most of the first users) and was once the most visited Internet website).

<sup>92</sup> *Timeline*, FACEBOOK, <http://newsroom.fb.com/Timeline/>, (Founded by Harvard University student Mark Zuckerberg in 2004, Facebook was open to only Harvard students and then extended to other universities. In 2005, the requirement of a .edu email address dissolved and high school students quickly joined along with adults. Facebook membership was at 845 million in December 2011).

<sup>93</sup> Davis, *supra* note 1.

<sup>94</sup> *Lowery v. Euverard*, 497 F.3d 584, 585 (2007).

petition with the heading, "I hate Coach Euvard [sic] and I don't want to play for him."<sup>95</sup> The players wanted support from their teammates and to turn the petition in to their principal.<sup>96</sup> The petition gained 18 signatures before Coach Euvard learned of it and called an all-coaches meeting to discuss the situation.<sup>97</sup> During practice, coaches took the players individually into Coach Euvard's office for questioning in the presence of an assistant coach.<sup>98</sup> The three players who started the petition refused to speak to the coach individually. They were told they were free to leave, and the players took their belongings and left the facility.<sup>99</sup>

Analyzing this case under *Tinker*, the Sixth Circuit found it to be "well-established that students do not have a general Constitutional right to participate in extracurricular athletics."<sup>100</sup> The court stated that student athletes are subject to more restrictions than the rest of the student body.<sup>101</sup> The rest of their opinion centered on being "not primarily about Plaintiffs' rights to express their opinions but rather their alleged right to belong to the Jefferson County football team on their own terms."<sup>102</sup> The court eventually investigated whether the threat of disruption was well founded, noting that *Tinker* did not require disruption or even certainty of disruption before regulation.<sup>103</sup> Testimony from a player and coach confirming that a team disruption would occur (if coaches did not stop the students' actions) allowed the court to find that a substantial disruption was foreseeable and officials were within their right to regulate and give an ultimatum to students.<sup>104</sup> The court found the voluntary nature of athletics important and based their theory upon two prior decisions.<sup>105</sup>

In the first case, *Lowery*, the court based their decision on the Supreme Court's decision in *Vernonia School District v. Acton*.<sup>106</sup>

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

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

<sup>97</sup> *Id.* at 586.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 589.

<sup>101</sup> *Id.* at 605.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 591.

<sup>104</sup> *Id.* at 593.

<sup>105</sup> *Id.* at 597.

<sup>106</sup> *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).

In *Acton*, the Court focused on a school's ability to drug test, holding that because of their status, student athletes are subject to more restrictions.<sup>107</sup> The Court declared that athletes possess a lesser expectation of privacy by voluntarily subjecting themselves to an activity that differentiates them from their fellow students.<sup>108</sup> The Court compared student athletes to an adult who participates in a closely regulated industry and would have the expectation of "intrusions of normal rights and privileges, including privacy."<sup>109</sup> The Court even considered the athletes' "role model" effect in their decision, finding the leadership aspect as a reason high school athletes are subject to stricter regulations.<sup>110</sup>

*Lowery* also relied heavily on the decision in *Pinard v. Clatskine*, where eight members of a public high school basketball team sued their coach, principal, athletic director, and superintendent after they created a petition and then refused to go to an away game.<sup>111</sup> The court decided the petition was not disruptive to a school activity and did not interfere with the rights of other students; however, the players' game boycott did disrupt a school activity and was properly punishable.<sup>112</sup>

The outcome of recent decisions proves that student athletes' freedom of expression, though peaceful (through petitions or boycotting), may cost them their spot on the team if it is considered a substantial disruption to the school activity or the goals of the team as determined by the coaches, principals, athletic directors, and district officials. The voluntary nature of athletic teams allows officials to advance certain goals they believe to be in the best interest of the team, affecting the ability of the student athlete to speak freely without consequence.

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<sup>107</sup> *Id.* at 657.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Pinard*, 467 F.3d at 759-64.

<sup>112</sup> *Id.* at 768-69.

### B. Consequences, Consequences

“I never looked at the consequences of missing a big shot... when you think about the consequences you always think of a negative result.”<sup>113</sup>

--Michael Jordan

Many high school students do not think ahead enough to realize the picture they post or the tweet they make hastily could come back to haunt them. In December 2011, two high school athletes became upset with their coach after he allegedly promised the team new apparel.<sup>114</sup> The displeased students posted on Facebook stating, “he ended the year on a lie,” and “I hate him.”<sup>115</sup> The venting continued and escalated into threats about murdering their coach, breaking into his home, raping his wife, and declaring “they would have to make up a new charge for what I’d do to him.”<sup>116</sup> The school reprimanded the students first by suspension, but later expelled the students and the state charged them as juveniles for aggravated menacing.<sup>117</sup>

High school basketball player Rodney Purvis has 25,354 followers on Twitter.<sup>118</sup> He even has a Twitter handle operated by “Rodney Purvis fans.”<sup>119</sup> The North Carolina State University signee tweets mundane everyday topics and has been incredibly responsible with his account, especially in comparison to his high school counterparts.<sup>120</sup> Many schools are creating policies regarding inappropriate use of social media sites but have acknowledged they are difficult to police because of how quickly

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<sup>113</sup> Michael Jordan, THINKEXIST, [http://www.thinkexist.com/quotation/i\\_never\\_looked\\_at\\_the\\_consequences\\_of\\_missing\\_a/151915.html](http://www.thinkexist.com/quotation/i_never_looked_at_the_consequences_of_missing_a/151915.html).

<sup>114</sup> Annie Zelm, *Students Threaten on Facebook to Kill Coach, Rape His Wife*, SANDUSKY REGISTER, (Dec. 5, 2011), <http://www.sanduskyregister.com/article/1096166/>.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> Rodney Purvis, TWITTER, [http://twitter.com/rpurvis\\_5](http://twitter.com/rpurvis_5).

<sup>119</sup> Rodney Purvis Fans, TWITTER, [http://twitter.com/r\\_purvis5fans/](http://twitter.com/r_purvis5fans/) (The 107 followers are significantly less than his actual handle but the norm is that usually only celebrities have Twitter fan handles).

<sup>120</sup> Tim Stevens, *Consequences Uncertain as Athletes Tweet*, NEWS OBSERVER, (Mar. 9, 2011), <http://www.newsobserver.com/2011/03/09/1039236/when-high-school-athletes-tweet.html/>.

they are being updated.<sup>121</sup> A Maryland football coach noted that with 85% of his players on either Facebook or Twitter, his social media policy “restricts posts that contain foul language, disparage the school or disrespect family members.”<sup>122</sup> His goal is to teach the student athletes about the consequences of poor judgment. Notably, as of March 1, 2012, none of his players have violated his policy.<sup>123</sup> Another Maryland high school football coach has a zero-tolerance policy regarding the Internet and postings anywhere about the football program, members of the program, or the school.<sup>124</sup> Sparked by a player’s Facebook post about not receiving an award at a banquet dinner, the coach now gives the athletes one chance and the players are aware of the policy up front.<sup>125</sup> Another coach, though allowing the use of social media in his program, recognizes “young players don’t always realize the ramifications of their actions.”<sup>126</sup>

Duke Law professor Paul H. Haagen agrees that policing social media and applying restrictions will withstand Constitutional challenges.<sup>127</sup> Proponents of relaxed social media policies and less regulation of free speech of minors question the reasoning of the coaches and schools who implement them. The answer lies in the policies of the social media.

Most users believe setting their Twitter accounts to “protected” will do just that for their information.<sup>128</sup> Many Facebook users think the “private” setting protects information

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<sup>121</sup> *Id.*

<sup>122</sup> Sam Spiegelman, *Maryland High School Coaches Cracking Down on Twitter*, CAPITAL NEWS SERVICE, (Mar. 1, 2012), <http://cnsmaryland.org/2012/03/01/maryland-high-school-coaches-cracking-down-on-twitter/>.

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

<sup>124</sup> *Id.*

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

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

<sup>127</sup> Stevens, *supra* note 120.

<sup>128</sup> *About Public and Protected Tweets*, TWITTER, <http://support.twitter.com/articles/14016/> (When a user accesses their settings, they are able to choose between protected and unprotected Tweets. Public Tweets are the default setting on Twitter but when a user chooses to protect their Tweets “manual approval of each and every person who may view that account’s Tweets” is a requirement. Tweets of that user then become visible to approved followers and will not appear in Twitter or Google searches).

and content.<sup>129</sup> It is simple to breach the safeguards. An unprotected or public follower may simply copy and paste content and “retweet” citing to the protected originator, allowing anyone to access the information.<sup>130</sup> When using a search engine such as Google, the tweets of the unprotected person, as well as the Twitter handle of the originator may appear. A photo that is tweeted may be downloaded onto a computer and some devices allow screen shots to be taken and published elsewhere. Even Twitter notes, “If you at one time had public Tweets, those Tweets will always be public and searchable, even after you protect them.”<sup>131</sup>

Facebook privacy settings are misleading because the privacy setting’s options are always changing. Facebook currently allows customization of who may see certain pictures, status updates, and even the ability of people to search and find a Facebook page. Most users, however, have not read the terms that apply to the use of Facebook. A notable term under the “Sharing Your Content and Information” section states, “When you publish content or information using the Public setting, it means that you are allowing everyone, including people off Facebook to access and use that information, and to associate it with you (i.e., your name and profile picture).”<sup>132</sup> Users often miss the public setting but a Facebook “friend” may also simply download or copy and paste a photograph or quote allowing the world to see something intended to be private.

Many websites have popped up solely to use the lax terms of social media to expose athletes, celebrities, or normal people who experienced a lapse in judgment. BadJocks.com uses the tagline “Where Cops Meets SportsCenter” and posts about athletes of all

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<sup>129</sup> *Information we receive about you*, FACEBOOK, <http://www.facebook.com/about/privacy/your-info#everyoneinfo/> (Facebook allows many different ways to manage settings by allowing a lot of information to be available to either the public, friends, or custom (to exclude even certain friends), however, Facebook notes that if another option is not selected the information will most likely be available to even those without a Facebook account. Some information will always be “everyone information” and includes the users name, profile picture, network, usernames, and user ids).

<sup>130</sup> TWITTER, *supra* note 128. (If a user is a public user, all of their tweets will be searchable on Twitter or even Google).

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

<sup>132</sup> *Terms and Conditions*, FACEBOOK, <http://www.facebook.com/legal/terms>.

ages and their mishaps.<sup>133</sup> TheDirty.com (originally Dirty Scottsdale) began posting photos of Arizona State University college students and locals, allowing users to write vulgar and distasteful captions.<sup>134</sup> The creator, “Nik Ritchie” adds tag lines to add controversy to the already offensive posts.<sup>135</sup> The now-nationwide site even has an “athletes” section. Upon submission, a party agrees to grant the company use of the information and photographs. The website shields them from liability by labeling themselves a “gossip and satire website,” even going so far as to warn that the posts may contain inaccurate or erroneous information.<sup>136</sup> The frequently asked questions (FAQs) section of the website features the legal arguments as to why they are able to get away with posting the salacious stories, answering the question of whether they need parental consent of minors, “NO. But law and morality are two different things.”<sup>137</sup>

In the digital age, it takes the click of a mouse for information to be posted and re-posted without the consent of the originator. The methods to remove photographs or information once it becomes available can be costly and lengthy. Even if successful, removing the information does not bar damage. As Shania Purvis warned her son, “I reminded him that people who don’t know him will judge him by what he writes. And it’s public.”<sup>138</sup>

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<sup>133</sup> *Strange/Funny Sports New & Videos*, BADJOCKS, <http://badjocks.com/> (The author, a graduate of Ball State University, began the website in February 2000 when he saw a void after hearing about many athletes acting erratically. The author answers many questions about his policy behind why athletes are able to avail themselves to websites such as his in his Frequently Asked Questions section).

<sup>134</sup> Kashmir Hill, *The Dirty Business: How Gossipmonger Nik Richie of TheDirty.com Stays Afloat*, FORBES (Nov. 11, 2010), <http://www.forbes.com/sites/kashmirhill/2010/11/11/the-dirty-business-how-gossipmonger-nik-richie-of-thedirty-com-stays-afloat/>.

<sup>135</sup> *Id.* (The nickname derives from celebrity blogger Perez Hilton, who based his nickname off Hilton Hotel heiress Paris Hilton. The reality blogger then chose to base his name off the lesser-known daughter of Lionel Riche, and best friend to Paris Hilton, Nicole Richie. His true name, Hooman Karamaian has been publicized after many legal disputes and his marriage to lower tier celebrity Shane Lamas).

<sup>136</sup> THE DIRTY, <http://thedirty.com/>.

<sup>137</sup> *Contact Us*, THE DIRTY, <http://thedirty.com/contact-us/>.

<sup>138</sup> Stevens, *supra* note 120.

## CONCLUSION

The purpose of schools and programs within them is to teach each new generation both academic curriculum and what is acceptable behavior within society. The old adage “think before you speak,”<sup>139</sup> resonates strongly today as we impart knowledge of the importance of thinking before you tweet or post. Courts have and will continue to rule in favor of reasonable restrictions within athletic programs. Being an athlete in 2012 may allow some students to attend college, play professional sports, or as the NCAA reminds us, “go pro in something other than sports.”<sup>140</sup> Regardless of where a high school athlete finds a career, they are leaders within their communities and schools and other students follow their example.

In an age where the public knows athletes for more than their efforts on the field, the goal of our role models should be to show the new generation a group of leaders prepared to lead by example on and off the playing field. As high school basketball player Marcus Walker stated, “I just write what comes in my head, most of the time I don’t think about what I tweet. I just tweet.”<sup>141</sup> Walker is likely not alone in his mindset of doing before thinking. Rules may infringe upon rights; however, some rules are there for the benefit of those who are unable to appreciate the consequences of their immediate actions.

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<sup>139</sup> *Ecclesiastes* 5:2.

<sup>140</sup> NCAA Public Service Announcement: Basketball  
<http://www.youtube.com/watch?v=G40g9RTxurw>.

<sup>141</sup> Stevens, *supra* note 120.

