

HE TWEETED WHAT?
 A FIRST AMENDMENT ANALYSIS OF THE
 USE OF SOCIAL MEDIA BY COLLEGE
 ATHLETES AND RECOMMENDED BEST
 PRACTICES FOR ATHLETIC DEPARTMENTS

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INTRODUCTION

Think back to a simpler time in college sports when basketball players wore long socks and short shorts and Nike Air Jordan shoes were not yet considered “retro.” It was a time when, after a devastating loss in a college game, an athlete would use a landline phone to call a close friend or teammate and complain about the coaching decisions or a blown call by a referee. Later, the athlete might visit with more friends over pizza and continue to vent about the tough loss.

In the above scenario, how many friends actually heard the athlete complain about the coach or referee? Maybe five or ten close friends? And of those five or ten close friends, how likely is it that any of them would immediately divulge this conversation to the coach, referee, athletic director, school president, or anyone else who would listen? Worse yet, send each individual a transcript of the conversation? In that simpler time in college sports, the athlete likely woke up the next morning to business as usual with no repercussions—no suspension from the team for violating team rules and no early morning meeting with the athletic director to discuss the situation.

We live in a different time. It is a time when a smart phone and two fast-working thumbs are all an athlete needs to instantly post comments, videos, or pictures online for millions to see. It is a time when being the first to tweet on a subject is desirable and having videos go “viral” on YouTube can even become lucrative.¹ However, this instant access to a hungry audience of millions comes with significant risk and a potential for severe regret. Just ask the UCLA student who, shortly after the devastating tsunami in Japan, posted a three minute video on YouTube with derogatory and insensitive comments about Asians who were talking on their cell phones in the library. Within days, the video was viewed by millions, the

1. For example, consider “The Annoying Orange,” which is a compilation of short video clips posted on YouTube of a talking orange that is, well, annoying, but has raked in an estimated \$288,000 for the person who raked in the videos. See Megan O’Neill, *How Much Money Do the Top Grossing YouTube Partners Make?*, SOCIAL TIMES (Aug. 26, 2010, 1:45 PM), http://socialtimes.com/money-youtube-partners_b21335.

student and her family received death threats, and the student withdrew from UCLA.²

Some college coaches are reacting to this potential for inappropriate postings from their athletes by banning their athletes' use of social media altogether or disciplining athletes for their social media postings.³ The purpose of this article is to address whether it is legally defensible to limit or restrict the use of social media by college athletes, or to discipline athletes for their social media activity, and to suggest best practices for avoiding a valid First Amendment claim.

I. FIRST AMENDMENT CLAIMS—ENEMY OF THE STATE

It is well settled that in order for an individual to bring a valid First Amendment claim (or any other claim under the U.S. Constitution), there must be state action.⁴ This means that the actions taken by employees of public colleges and universities are subject to potential First Amendment and other constitutional claims while actions taken by employees of private colleges and universities are not. Because of the complexity of the First Amendment and the fact that a First Amendment lawsuit must be brought directly against an individual as opposed to the college or university,⁵

2. Kate Parkinson-Morgan, *Alexandra Wallace Apologizes, Announces She Will No Longer Attend UCLA*, DAILY BRUIN (Mar. 28, 2011, 12:10 AM), http://www.dailybruin.com/index.php/blog/timestamp/2011/03/alexandra_wallace_apologizes_announces_she_will_no_longer_attend_ucla.

3. See e.g., *New Mexico Coach Bans Players from Twitter*, 12 LEGAL ISSUES IN COLLEGIATE ATHLETICS 10, Aug. 2011, at 10 (reporting that the use of Twitter has been banned by coaches for the University of New Mexico's men's basketball team, Mississippi State University's men's basketball team, Villanova's men's basketball team, Boise State University's football team, University of South Carolina's football team, and Kansas State University's football team). USA Today initially reported that Urban Meyer had, within hours of taking over the Ohio State head football coaching job, banned his athletes from posting comments on Twitter. The USA Today subsequently reported that two of Meyer's football players indicated there was a misunderstanding and there was no such ban. See Erick Smith, *Ohio State Players Dispute Coach Urban Meyer Banned Twitter*, USA TODAY (Jan. 3, 2012, 5:13 PM), <http://content.usatoday.com/communities/campusrivalry/post/2012/01/ohio-state-urban-meyer-twitter-ban/1>.

4. See *Bryant v. Miss. Military Dep't.*, 519 F. Supp. 2d 622, 627 (S.D. Miss. 2007), *aff'd sub nom*, *Bryant v. Military Dep't of Miss.*, 597 F.3d 678 (5th Cir. 2010) ("A claim for violation of the First Amendment to the United States Constitution must be brought pursuant to 42 U.S.C. § 1983, which requires state action. To state a claim under § 1983, a plaintiff must allege facts showing a person acting under color of state law deprived the plaintiff of a right, privilege or immunity secured by the United States Constitution or the laws of the United States.").

5. See *Farias v. Bexar Cnty. Bd. of Tr. for Mental Health Mental Retardation Servs.*, 925 F.2d 866, 875 n.9 (5th Cir. 1991) (stating that the Eleventh

coaches and athletic directors must be well versed in complex constitutional issues to avoid valid claims. On the other hand, coaches and athletic directors at private colleges and universities have no need to study constitutional issues such as freedom of speech and expression, freedom of association, the separation of church and state, due process, or the freedom of religion.⁶

For example, consider Brandon Davies, the BYU basketball player who was suspended in the final week of BYU's 27-2 season in 2011.⁷ Davies was a key player for a BYU team that was arguably the best in school history and that was on the verge of dominating in the NCAA tournament.⁸

BYU, a private religious university, suspended Davies for a violation of a BYU honor code provision prohibiting premarital sex.⁹ Because the U.S. Constitution does not apply to private colleges or universities, BYU's actions were justified from a constitutional law standpoint—there is no First Amendment claim for free expression and free association and no First Amendment establishment clause claim for forcing Davies to adhere to the moral principles of the Mormon religion.

In fact, because BYU is a private university, it could go even further in its honor code if it so desires and state that its athletes cannot “friend” any members of the opposite sex on Facebook or that they must quote a Bible passage before every foul shot and there still would be no First Amendment implications. However, similar actions by a public college or university would have dire legal consequences under the First Amendment.

Another example of the private/public distinction under the First Amendment in the athletic context is how the NCAA, a private entity, responded to football players such as Tim Tebow who displayed

Amendment bars claims against a state brought pursuant to 42 U.S.C. § 1983); *see also* Aguilar v. Tex. Dept. of Criminal Justice, 160 F.3d 1052, 1052–53 (5th Cir. 1998) (“... a plaintiff's suit alleging a violation of federal law must be brought against individual persons in their official capacities as agents of the state, and the relief sought must be declaratory or injunctive in nature and prospective in effect.”) (*citing* Saltz v. Tenn. Dep't of Emp't Sec., 976 F.2d 966, 968 (5th Cir. 1992)).

6. *See, e.g.,* Key v. Robertson, 626 F. Supp. 2d 566 (E.D. Va. 2009) (holding there was no First Amendment claim against a private law school where the law school dean required a student to remove an image on his Facebook account of the dean scratching his nose with his middle finger).

7. *See* Ian Saleh, *Brandon Davie Suspended from BYU Basketball Team for Honor Code Violation*, WASH. POST (Mar. 4, 2011, 8:39 AM), <http://www.washingtonpost.com/wp-dyn/content/article/2011/03/04/AR2011030401742.html>.

8. *See* Pat Forde, *BYU Puts Principle Over Performance*, ESPN (Mar. 2, 2011), http://sports.espn.go.com/ncb/columns/story?columnist=forde_pat&id=6175251.

9. *Id.* To access BYU's honor code, *see* *Church Educational System Honor Code*, BYU, <http://saas.byu.edu/catalog/2011-2012ucat/GeneralInfo/HonorCode.php#HCOofficeInvolvement>.

handwritten Bible passages on their eye black.¹⁰ In response to this perceived “problem,” the NCAA came up with rules in 2011 prohibiting college football players from placing symbols or letters on their eye black.¹¹ Because the First Amendment protects even non-verbal expression, a player’s use of Bible passages on eye black would be considered expressive activity that is subject to First Amendment protection if a coach from a public college or university told the player he could not cite Bible passages on his eye black.¹² However, because the eye black rule was enacted by the NCAA as a private entity, there would not be a valid First Amendment claim against the NCAA for limiting this expressive activity.

In summary, private colleges or universities and other private entities (including the NFL, MLB, and the NBA) can enact strict social media policies or discipline an athlete for an inappropriate tweet or Facebook posting without risking a valid First Amendment claim by the athlete.¹³ However, public colleges and universities should adhere to the best practices detailed in Sections III–V below with regard to athletes’ use of social media.

II. THE SOCIAL MEDIA FORUM—A WORLD WIDE WEB OF ITS OWN

Generally, the first step in analyzing a potential First Amendment claim is to perform a forum analysis.¹⁴ A forum analysis focuses on whether the speech occurred in a (1) traditional public forum, (2) designated public

10. Joe Schad, *Eye Black Messages, Wedge Blocks Out*, ESPN (Apr. 16, 2010, 2:44 PM), <http://sports.espn.go.com/ncf/news/story?id=5092774>.

11. *Id.*

12. Expressive activity encompasses much more than just words that are spoken. See *Steadman v. Texas Rangers*, 179 F.3d 360, 367 (5th Cir. 1999):

“Speech,” as we have come to understand that word when used in our First Amendment jurisprudence, extends to many activities that are by their very nature non-verbal: an artist’s canvas, a musician’s instrumental composition, and a protester’s silent picket of an offending entity are all examples of protected, non-verbal “speech.”

See also *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991) (“ . . . nude dancing . . . is expressive conduct within the outer perimeters of the First Amendment . . .”).

13. For an example of the NFL’s and NBA’s social media policies restricting the use of Twitter, see Don Reisinger, *NFL Bans Tweeting Before, During, and After Games*, CNET NEWS (Sept. 1, 2009, 8:36 AM), http://news.cnet.com/8301-17939_109-10322904-2.html; *NBA Issues Policy on Twitter Use Before, After Games*, NBA (Sept. 30, 2009, 11:28 PM), <http://www.nba.com/2009/news/09/30/nba.twitter.rules.ap/index.html>.

14. *Arizona Life Coal. Inc. v. Stanton*, 515 F.3d 956, 968 (9th Cir. 2008).

forum, or (3) limited/nonpublic forum,¹⁵ in order to then determine the level of scrutiny that is applied to governmental regulation of speech within the forum.¹⁶ For a traditional public forum and a designated public forum, any regulation of speech must survive the highest level of First Amendment scrutiny.¹⁷ For a limited public forum or a non-public forum, a regulation of speech will be upheld so long as the regulation is reasonable and viewpoint-neutral.¹⁸ However, this forum analysis is only performed when evaluating restrictions placed on speech or expressive activity conducted or seeking to be conducted on government property.¹⁹ For example, in *Axson-Flynn*, the Tenth Circuit found that “[a university] classroom constitutes a nonpublic forum, meaning that school officials could regulate the speech that takes place there ‘in any reasonable manner.’”²⁰ Moreover, the Tenth Circuit also noted that courts should give substantial deference to a college or university’s decision to regulate classroom speech so long as its actions are related to legitimate pedagogical concerns.²¹ As a result, professors have wide latitude to restrict speech within the classroom setting as long as the restriction is reasonably based on the professor’s desire to benefit or maintain the appropriate learning environment.²²

Regulating student-athletes’ use of social media, however, presents a much different analysis under the First Amendment than the typical forum

15. See *Wright v. Incline Vill. Gen. Improvement Dist.*, 665 F.3d 1128, 1138 (9th Cir. 2011) (“Regardless of whether the [forum is] a limited public forum or a nonpublic forum, the test is the same, as several of our sister circuits have noted.”) (citing *Victory Through Jesus Sports Ministry Found. v. Lee’s Summit R-7 Sch. Dist.*, 640 F.3d 329, 334–35 (8th Cir. 2011); *Byrne v. Rutledge*, 623 F.3d 46, 54 n.8 (2d Cir. 2010); *Miller v. City of Cincinnati*, 622 F.3d 524, 535–36 (6th Cir. 2010); *Christian Legal Soc’y v. Walker*, 453 F.3d 853, 865 n.2 (7th Cir. 2006); *Goulart v. Meadows*, 345 F.3d 239, 252 n.23 (4th Cir. 2003); cf. *Galena v. Leone*, 638 F.3d 186, 197 n.8 (3d Cir. 2011) (stating that “[r]ecently the Court has used the term ‘limited public forum’ interchangeably with ‘nonpublic forum,’ thus suggesting that these categories of forums are the same[,]” and declining to distinguish between limited public fora and nonpublic fora) (citations omitted)).

16. *Byrne*, 623 F.3d at 53.

17. *Id.*

18. *Id.* (citing *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985)).

19. *Id.* (“[U]nder the prevailing constitutional framework, speech restrictions imposed on *government-owned property* are analyzed under a ‘forum-based’ approach that divides *government property* into three categories—the traditional public forum, the designated public forum, and the nonpublic forum.” (emphasis added)).

20. *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1285 (10th Cir. 2004).

21. *Id.* at 1290.

22. *Id.* at 1289 (“Few activities bear school’s ‘imprimatur’ and ‘involve pedagogical interests’ more significantly than speech that occurs within a classroom setting as part of a class curriculum.”).

analysis conducted for classroom speech or other on-campus speech. Unless a college or university or athletic department maintains its own social media site that is open to the public for social media postings, a student-athlete's use of social media will not result in a forum analysis because the social media site will not be considered government property.²³ The Third Circuit recognized the unique characteristics of social media sites when it stated,

For better or worse, wireless internet access, smart phones, tablet computers, social networking services like Facebook, and stream-of-consciousness communications via Twitter give an omnipresence to speech that makes any effort to trace First Amendment boundaries along the physical boundaries of a school campus a recipe for serious problems in our public schools.²⁴

Instead of applying a forum analysis for social media postings by college and university students, courts typically treat social media postings as "off-campus speech" and will only uphold a college or university's regulation of a student's social media activity if the college or university can prove the speech was (1) a material disruption to the school, and/or (2) falls under another category of unprotected speech.²⁵ Because student-athletes do not possess any greater First Amendment rights than other students,²⁶ courts will apply the same First Amendment scrutiny for social media postings of students to student-athletes.

23. For a detailed analysis of whether a government actor's own Facebook page opened up for public comment is a public forum, see Lyrisa Lidsky, *Public Forum 2.0*, 91 B.U. L. REV. 1975 (2011). It should be noted, however, that even if a college or university athletic department seeks to regulate the social media postings by a student-athlete on its own social media site, the best practice tips in this article should still be adhered to.

24. *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 220–21 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (2012).

25. See *Evans v. Bayer*, 684 F. Supp. 2d 1365, 1372 (S.D. Fla. 2010) ("Therefore, the Court finds that Evan's speech—her publication of the Facebook page—is off-campus speech. But, the inquiry does not end because schools can discipline off-campus speech if it is unprotected speech.").

26. See *Williams v. Eaton*, 468 F.2d 1079, 1079–84 (10th Cir. 1972) (applying the *Tinker* student disruption standard set forth by the Supreme Court to University of Wyoming student-athletes who were dismissed from the football team for intending to wear black arm bands to protest certain religious views); *Hysaw v. Washburn Univ. of Topeka*, 690 F. Supp. 940, 946 (D. Kan. 1987) (holding that the *Tinker* exception to protected speech could be narrowly applied to university football players who boycotted practice in response to the administration's reaction to complaints of alleged racial injustice.); *Dunham v. Pulsifer*, 312 F. Supp. 411, 417 (D. Vt. 1970) (analyzing an athletic department's grooming policy in the context of *Tinker* and stating, "it should be observed that the Constitution does not stop at the public school doors like a puppy waiting for his master, but instead it

In summary, it is much more difficult for a college or university to justify its restriction of its student-athletes who are expressing themselves in the social media setting as opposed to the classroom or other on-campus setting. As a result, it is imperative for colleges and universities to adhere to the best practice tips below before regulating student-athletes' use of social media.

III. BEST PRACTICE TIP #1: DO NOT BAN ATHLETES' USE OF SOCIAL MEDIA

A coach would never tell an athlete "don't talk to any friends or family members during the season." So why is it that a coach would tell a player he or she cannot use Twitter or Facebook during the season when that may be an athlete's primary method of communicating with certain family members and friends? From LeBron James tweeting he was "taking mental notes of everyone taking shots at [him] this summer"²⁷ to Chad Ochocinco tweeting during the middle of an NFL game that one day he was going to "jump up and start throwing hay makers,"²⁸ athletes, as well as a good portion of the U.S. population, are in love with posting random material on social media outlets.

Understandably, a coach would not be thrilled to discover his or her players did something juvenile and then instantly announced it to the whole world like the Bethany College golf team that posted a nude team photo on Facebook.²⁹ Or the University of Arkansas point guard who, just weeks after three members of the Arkansas basketball team were accused of an alleged rape, tweeted, "Im getting it at workouts like a dude who doesnt understand the word no from a drunk girl lol."³⁰ That is hardly the type of attention a coach or athletic director wants directed towards the athletic department or team. As a result, it is not surprising that a coach would want to adopt a team rule prohibiting the use of social media sites such as Facebook, Google Plus, and Twitter.

follows the student through the corridors, into the classroom, and onto the athletic field" (citing *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969)).

27. J.A. Adande, *LeBron's Summer of Wrong*, ESPN (Aug. 10, 2010, 11:11 PM), http://espn.go.com/blog/truehoop/post/_id/18887/lebrons-summer-of-wrong.

28. Chris Burke, *Chad Ochocinco Fined \$25K for Tweeting During Preseason Game*, AOL NEWS (Aug. 24, 2010, 2:25 PM), <http://www.aolnews.com/2010/08/24/chad-ochocinco-fined-25k-for-tweeting-during-preseason-game/>.

29. See *Bethany Men's Team Suspended for Nude Photo*, GOLF WEEK, (Aug. 23, 2011, 4:39 PM), <http://www.golfweek.com/news/2011/aug/23/bethany-mens-team-suspended-nude-photo/>.

30. *Twenty Tweets Heard 'Round the World*, SPORTS ILLUSTRATED, http://sportsillustrated.cnn.com/multimedia/photo_gallery/1107/tweets-heard-round-the-world/content.14.html (last visited Apr. 27, 2012).

However, because online speech is still considered speech subject to possible protection under the First Amendment, coaches must adhere to the longstanding principles of the First Amendment when attempting to discipline an athlete for his or her social media activity. For example, the court in *Beverly Hills Unified School District* held that “Supreme Court precedents apply to Plaintiff’s YouTube video” and determined that a school district violated a student’s First Amendment rights when it disciplined her for posting a YouTube video of her friends calling a classmate a “slut,” saying she is “spoiled,” and that she is the “ugliest piece of sh[*#] I’ve ever seen in my whole life.”³¹

One such longstanding First Amendment principle to be adhered to when addressing social media issues is that a college or university policy restricting speech or expressive activity must not burden substantially more speech than is necessary to achieve the college or university’s interest in enacting the policy.³²

For example, in *Justice For All*, the Fifth Circuit decided a case in which the University of Texas adopted a literature distribution policy which, in part, required students to identify themselves on the leaflets so the University could determine whether the individuals were students who were authorized by policy to distribute literature on campus.³³ A student anti-abortion group filed suit against University of Texas officials and complained that being required to reveal their identity was a violation of their First Amendment right to anonymous speech. The Fifth Circuit held that although the University of Texas had an interest in determining whether individuals distributing literature were students who were authorized by policy to be on campus, there were much less restrictive means of accomplishing this goal.³⁴ The court explained that the University of Texas could have simply required individuals to produce a student ID if asked by university officials, as opposed to requiring the individuals to divulge their names on each leaflet they distributed on campus.³⁵

Although it is understandable why a coach may want to ban the use of Twitter or Facebook by student-athletes, doing so could be viewed by a court applying the *Justice for All* reasoning as impermissibly burdening more speech than is necessary to achieve the coach’s goals. For example, while a coach’s ban on the use of Twitter and Facebook would ban a golf team from posting a nude team photo, a basketball player from posting insensitive comments about women, or a football player from posting

31. See, e.g., *J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1098, 1109 (C.D. Cal. 2010).

32. See, e.g., *Justice For All v. Faulkner*, 410 F.3d 760 (5th Cir. 2005).

33. *Id.*

34. *Id.* at 770–72.

35. *Id.*

comments on Twitter during the middle of a game, it would also ban a Facebook posting that an athlete and his roommate found a good pizza place, a posting that the athlete wants the president to be reelected, or a posting with his or her view on the war on terrorism. In a First Amendment claim by a student-athlete complaining of a ban on the use of social media, a court would likely apply the same reasoning the Fifth Circuit applied in *Justice for All* and determine the coach's ban on social media was overbroad and burdened more speech than was necessary to achieve the coach's objectives. Just as the court reasoned in *Justice for All*, a court addressing a coach's ban on social media would likely question why the coach did not attempt to enact the below recommended reasonable limitations on the athlete's use of social media instead of banning it altogether.

Instead of banning social media, athletic directors and coaches would be in a much better legal position by placing reasonable limitations on athletes' use of social media, educating athletes about the dangers associated with inappropriate or insensitive postings, and addressing the content of particular postings on a case-by-case basis.

IV. BEST PRACTICE TIP #2: PLACE REASONABLE RESTRICTIONS ON THE USE OF SOCIAL MEDIA AND THEN EDUCATE THE ATHLETES ON THE DANGERS

Although broad policies such as a ban on social media may be subject to scrutiny under the First Amendment, it is well settled that a college or university is authorized to “. . . establish reasonable time, place, and manner regulations” on expressive activity.³⁶ One such regulation could be to follow the lead of the NFL and NBA and ban the use of Twitter and other social media, but only at certain times. In 2009, Charlie Villanueva, a forward for the Milwaukee Bucks at the time, found himself in hot water with his coach by posting the following comment on Twitter during halftime of an NBA game: “In da locker room, snuck to post my twitt. We're playing the Celtics, tie ball game at da half. Coach wants more toughness. I gotta step up.”³⁷

To address situations like the posting by Villanueva, NBA rules now prohibit a player from using Twitter and other social media sites from forty-five minutes before game time until after the players have finished their responsibilities after games.³⁸ Similarly, according to NFL rules, a player is banned from using Twitter and other social media sites beginning ninety minutes before games and until all post-game interviews are completed.³⁹

36. *Widmar v. Vincent*, 454 U.S. 263, 278 (1981).

37. *Twenty Tweets*, *supra* note 30.

38. *See Reisinger*, *supra* note 13.

39. *See id.*

As explained above, the NBA and NFL are not subject to the First Amendment, because both leagues are private entities; however, if a public college or university enacted a social media policy with time limitations similar to those of the NFL and NBA above, the policy would likely be defensible from a First Amendment standpoint because such a policy would only be placing reasonable time, place, and manner regulations on expressive activity. But what if, to borrow a line from former NBA star Allen Iverson, “we’re talking about practice” instead of a game?⁴⁰ A coach at a college or university could go even further and adopt a policy that not only prohibits the use of social media during games but also prohibits the use of social media during other team functions such as practice, pep rallies, and study hall. Thus, if an athlete sneaks a smart phone into practice and starts “tweetin’ bout practice” in violation of team rules, the athlete can, and should, be disciplined.

Additionally, it would be defensible from a First Amendment perspective to enact a policy that prohibits the other categories of “unprotected” speech listed in Section V below. For example, a disgruntled football player who did not get the starting quarterback job would not have a First Amendment right to post the team’s playbook on Facebook before the upcoming game because that would clearly be a substantial disruption to the athletic department. Likewise, as will be discussed in further detail below, an athlete does not have a First Amendment right to post a picture of himself violating criminal law, a reasonable team rule, or a college or university policy such as breaking into another institution’s athletic office and stealing the championship trophy. It should also be noted that even if a coach’s social media policy does not address the categories of “unprotected speech” listed in Section V below, an athlete could still be disciplined for such postings.⁴¹

After adopting these reasonable time, place, and manner regulations on the use of social media, a coach should also educate his or her athletes about what can go wrong with a misguided tweet or Facebook posting. Under the First Amendment, a coach is authorized to, and should, describe in detail to his or her players examples of the dangers of social media activity including potential personal liability for posting defamatory statements, lewd pictures, or copyrighted information; the possibility of being subjected to stalking or identity theft; the potential for future employers accessing an athlete’s social media activity even years after it

40. For a transcript of the infamous rant by former NBA star Allen Iverson when addressing questions from the media about his coach’s displeasure of him missing practice, see *Allen Iverson News Conference Transcript*, SPORTS ILLUSTRATED (May 10, 2002, 3:36 AM) http://sportsillustrated.cnn.com/basketball/news/2002/05/09/iverson_transcript/.

41. See *infra* note 45 (regarding due process and consistent treatment of athletes).

occurred;⁴² as well as many other dangers typically associated with online activity.⁴³

If a coach enacts a social media policy as recommended above and the coach educates his or her athletes about the dangers of online activity including the use of social media, what does the coach do when an athlete posts a picture on Facebook of the athlete smoking marijuana or a nude picture of a teammate in the locker room? In general, it would be ill-advised from a First Amendment perspective to delve into the content of an athlete's online expressive activity, but it can be accomplished with care as described below.

V. BEST PRACTICE TIP #3: EVALUATE THE CONTENT OF SOCIAL MEDIA POSTINGS ON A CASE BY CASE BASIS AND WITH EXTREME CAUTION

The general rule under the First Amendment is that a college or university is prohibited from regulating speech based on the content or viewpoint of the message or expressive activity.⁴⁴ As a result, punishing an

42. Some employers are now scouring social media sites as a way to screen job applications and the background checks some employers are purchasing from consumer reporting agencies even include a search of social media websites for the past seven years. See Alan Farnham, *Background Checks Now Include Twitter, Facebook*, ABC NEWS (June 24, 2011), <http://abcnews.go.com/Business/job-tweets-background-checks-employers-now-include-postings/story?id=13908874>.

43. The University of the Pacific posted a helpful guide for its students detailing the risks and dangers of the use of social media. See *Online Social Networking Dangers and Benefits*, UNIV. OF THE PACIFIC (last visited Jan. 25, 2012), <http://www.pacific.edu/Campus-Life/Safety-and-Conduct/Safety-and-Security/Online-Social-Networking-Dangers-and-Benefits-.html>.

44. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828, (1995) ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys."); see also *Police Dept. of Chi. v. Mosley*, 408 U.S. 92, 96, (1972). *Snyder v. Phelps*, 131 S. Ct. 1207 (2011) is illustrative of this general rule. There, a man and his church group staged a protest on public property near a military funeral held for a deceased marine. The protestors displayed signs such as "'God Hates the USA/Thank God for 9/11,' 'America is Doomed,' 'Thank God for Dead Soldiers,' 'Pope in Hell,' 'Priests Rape Boys,' 'God Hates Fags,' 'You're Going to Hell.'" *Id.* at 1213. The father of the deceased marine saw the news coverage of the protest after the funeral, suffered depression, and sued the protestors for intentional infliction of emotional distress. The jury awarded \$10 million in damages to the father of the marine, which was reduced to \$5 million by the district court, but the Fourth Circuit reversed. The Supreme Court held that the protestors could not be sued for intentional infliction of emotional distress for speech on matters of public concern uttered in a traditional public forum in conformance with local time, place, and manner regulations. The Court noted:

"[s]peech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the

athlete for the content or viewpoint of his or her postings could result in a valid First Amendment claim being brought against a coach or athletic director. However, there are some limited circumstances when it is legally defensible from a First Amendment standpoint to delve into the content of what an athlete posted online at sites such as Facebook, Google Plus, or Twitter.

The three categories below (Green Light, Yellow Light, and Red Light) illustrate examples of social media postings where, under the First Amendment, the coach or athletic director (1) may discipline an athlete (Green Light Category), (2) must exercise extreme caution before disciplining an athlete (Yellow Light Category); or (3) should not take any disciplinary action based on the content of the posting (Red Light Category).

A. Green Light Category (Unprotected Speech)—Athlete Can Be Disciplined Based on the Content of the Posting⁴⁵

There are certain categories of content of speech that have been recognized by courts as “unprotected speech.”⁴⁶ This means that even if state action (e.g., discipline rendered by a coach at a public college or

facts before us, we cannot react to that pain by punishing the speaker.

As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.”

Id. at 1220.

45. Although this article does not address the disciplinary process for student-athletes, any discipline for student-athletes must be consistently rendered to avoid discrimination or similar claims. In other words, if the Hispanic second string punter is disciplined for a Facebook posting, the White starting quarterback should also be disciplined. Additionally, although some states have held student-athletes do not possess a constitutionally protected interest in their participation in extracurricular activities that would invoke due process protections, the general principals of due process should be applied to ensure that athletes have notice of the complained of conduct and an opportunity to respond and tell their side of the story before disciplinary action is taken. *See, e.g., Nat'l Collegiate Athletic Ass'n v. Yeo*, 171 S.W.3d 863 (Tex. 2005); *Awrey v. Gilbertson*, 2011 WL 2619540 (E.D. Mich. June 30, 2011) (“The interest Plaintiff had in playing football at SVSU for the final month of the 2007 season, while undoubtedly important to him, is simply not the type of property interest the Due Process Clause was intended to protect.”).

46. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 383–84 (1992) (“... [A]reas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.)—not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content. Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government.”).

university) is taken against an individual based on the content of his or her speech, the individual will not have a valid First Amendment claim if the content falls into one of the following categories.

i. Fighting Words / True Threat

Under the fighting words / true-threat doctrine, expressive activity loses First Amendment protection “. . . where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”⁴⁷ The Eleventh Circuit expounded on this doctrine to define a true threat as follows:

A communication is a threat when in its context it would have a reasonable tendency to create apprehension that its originator will act according to its tenor. In other words, the inquiry is whether there was sufficient evidence to prove beyond a reasonable doubt that the defendant intentionally made the statement under such circumstances that a reasonable person would construe them as a serious expression of an intention to inflict bodily harm. Thus, the offending remarks must be measured by an objective standard.⁴⁸

The true threat doctrine is a much stricter standard for college and university athletic departments to prove than the materially disruptive speech standard described below in Section V(B)(ii). For example, in *J.S. v. Bethlehem*, a student created a website that included a drawing of the school principal with her head cut off and blood dripping from her neck, contained a caption stating, “Why Should She Die?” and requested twenty dollars from the readers to pay for a hit man to kill the principal.⁴⁹ The court first analyzed the postings under the true threat standard, and held, “. . . [W]e conclude that the statements made by J.S. did not constitute a true threat, in light of the totality of the circumstances present here. We believe that the web site, taken as a whole, was a sophomoric, crude, highly offensive and perhaps misguided attempt at humor or parody. However, it did not reflect a serious expression of intent to inflict harm.”⁵⁰

However, even though the court concluded the website did not constitute a true threat, the court found the website constituted materially disruptive speech. The court held that because “. . . [the] web site caused

47. See *Virginia v. Black*, 538 U.S. 343, 359, 362 (2003) (holding that Virginia’s ban on cross burning with intent to intimidate did not violate the First Amendment because such actions would constitute a true threat).

48. *United States v. Alaboud*, 347 F.3d 1293, 1296–97 (11th Cir. 2003) (internal citations, quotations, and alterations omitted).

49. *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 851 (Pa. 2002).

50. *Id.* at 859.

actual and substantial disruption of the work of the school,” the school did not violate the student’s First Amendment rights when it permanently expelled the student from school.⁵¹

If an athlete submits a Facebook posting stating that after practice, he will tie his roommate up and beat him with a golf club for sleeping with his girlfriend, the athlete could be disciplined because the posting clearly loses First Amendment protection since it would be a true threat.⁵² Additionally, such a Facebook posting would likely also be considered materially disruptive speech as explained in Section V(B)(ii) below, and as a result, the athlete could be disciplined because the athlete’s speech would not be considered protected speech.

ii. Defamatory Statements

Defamatory statements also lose First Amendment protection.⁵³ The key factor is whether the false and damaging statement is a statement of opinion that warrants First Amendment protection or a statement of fact that loses First Amendment protection.⁵⁴ For example, an athlete may have a First Amendment right to tweet on Twitter that the football coach is the worst coach for whom he has ever played (unless the college or university could prove the tweet is materially disruptive speech under Section V(B)(ii) below). However, an athlete who falsely posts on Twitter that his

51. *Id.* at 869.

52. In addition to a posting such as this possibly being a violation of state criminal law, it may be a violation of federal criminal law. *See, e.g.*, *United States v. Elonis*, Crim. Action. No. 11-13, 2011 WL 5024284 (E.D. Pa. Oct. 20, 2011) (denying a motion to dismiss an indictment by a defendant who was charged under federal law (18 U.S.C. § 875(c)) for threatening communications posted on Facebook and who claimed he had a First Amendment right to his postings). First and foremost, a coach or athletic director who has knowledge of this type of posting or other postings involving potential criminal activity should immediately report this information to law enforcement to be dealt with from a law enforcement perspective. Then, the athletic department should evaluate the potential discipline of the athlete.

53. *See New York v. Sullivan*, 376 U.S. 254 (1964).

54. *See Parsi v. Daiouleslam*, 595 F. Supp. 2d 99, 109 (D.D.C. 2009):

The First Amendment protects statements of opinions—“[h]owever pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.” To assist courts in distinguishing between facts and opinions, this circuit has set out a four-factor test: (1) the common usage or meaning of the specific language used in the statement; (2) the statement’s verifiability; (3) the full context of the statement; and (4) the broader context in which the statement appears.

citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) *and Ollman v. Evans*, 750 F.2d 970, 979 (D.C. Cir. 1984).

football coach robbed a liquor store because he is an alcoholic could be disciplined for his posting, because it would likely lose First Amendment protection since it may be a defamatory statement. It should also be noted that even if an athlete's social media posting does not satisfy the standard for defamation, the athletic department may still be able to regulate the speech if it meets the materially disruptive speech category of unprotected speech in Section V(B)(ii) below. For example, imagine a tweet by the starting quarterback which claims, "I think we lost the game tonight because the football kept clanking off my receivers' skillet-like hands.. it's not that hard, just catch the ball!" The tweet would not satisfy the defamation standard, in part, because it is the athlete's opinion, but such a posting could result in punishment to the athlete if a material disruption to the cohesiveness of the team can be proven.

iii. Obscenity

Social media postings satisfying the U.S. Supreme Court's definition of "obscenity" also lose First Amendment protection. However, before a player is forced to sit out a game because he posted curse words on his Facebook page or a link to Playboy Magazine, consider that the Supreme Court's definition of "obscenity" is actually quite narrow. In *Miller v. California*, the U.S. Supreme Court defined the standard for determining "obscenity" as:

- (a) [W]hether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest;
- (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
- (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.⁵⁵

As a result, a coach could discipline an athlete who posts a link to a hard core pornographic website or a video of sexual intercourse because the posting would likely meet the definition of "obscenity" and would lose First Amendment protection. However, it should be noted that there are many other types of social media postings that would not meet this narrow definition. For example, an athlete may post the lyrics to the athlete's favorite song on Facebook where the lyrics continuously use the "F word." Although not everyone would agree such music would have "artistic value," the Supreme Court's definition in *Miller* would categorize such lyrics as protected speech. In fact, though many individuals would consider the "F word" to be obscene, the Supreme Court determined the "F word" actually can warrant First Amendment protection in *Cohen v.*

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

California.⁵⁶ In that case, the defendant was convicted of the California offense of disturbing the peace when he walked through a courthouse corridor in the late 1960s wearing a jacket bearing the words “Fu[@#] the Draft” to protest the Vietnam War. The Supreme Court determined the conviction was not justified because the individual was engaging in protected speech.⁵⁷ Unless an athlete’s social media posting falls into this narrow category of obscenity, an athlete cannot be disciplined for the content of his or her posting. It should also be noted, however, that even if an athlete’s social media posting does not meet the criteria of “obscenity,” there could still be a chance, as explained below, that the posting would be considered unlawful harassing speech, which could warrant discipline. In fact, the college or university may actually be legally required under Title VI or Title IX to investigate and take action based on such postings.⁵⁸

iv. Posting Indicates Violation of Criminal Law

When the picture of Olympic gold medalist Michael Phelps surfaced online depicting Phelps using a bong, Phelps was forced to admit he made a mistake in judgment.⁵⁹ The picture became an instant media craze just months after Phelps brought home multiple gold medals for the U.S. during the Summer Olympics in Beijing.⁶⁰ Could an athlete at a college or university be disciplined for posting a picture of himself online using a bong? The answer is: most likely. So long as a criminal law is not unconstitutional, an individual does not have the right to violate criminal laws and seek protection under the cloak of the First Amendment. For example, if an athlete posted a picture of himself on Facebook using a bong, and it was proven that the athlete was in fact smoking marijuana in violation of criminal law, the athlete cannot claim the athlete’s “expressive activity” of smoking marijuana is protected by the First Amendment.⁶¹ Other criminal law violations, such as distributing links or pictures of child pornography or posting a picture of the athlete vandalizing the locker room,

56. *Cohen v. California*, 403 U.S. 15 (1971).

57. *Id.* at 26.

58. *See infra* Section V(B)(i).

59. Associated Press, *Phelps: Photo With Marijuana Pipe Real*, ESPN (Feb. 2, 2009, 7:40 AM), <http://sports.espn.go.com/oly/swimming/news/story?id=3876804>.

60. *Id.*

61. *See supra* note 45 (regarding providing the athlete with notice of the alleged inappropriate posting and an opportunity to respond). For example, even low budget editing software would allow an individual to edit a picture so it looks like his or her friend is using a bong when they are, in fact, drinking a soda. Obviously, disciplining an athlete before they have an opportunity to explain the photo was doctored would not be appropriate or advisable.

would lose First Amendment protection and the athlete could be disciplined for the posting.⁶²

v. Posting Indicates Violation of Reasonable Team or
NCAA Rules

In *Healy v. James*, the Supreme Court recognized a University's right under the First Amendment to exclude activities that violate reasonable campus rules or substantially interfere with the opportunity of other students to obtain an education.⁶³ After a tough loss to Pittsburgh during the 2011 football season, University of Louisville football coach Charlie Strong expressed his displeasure with his athletes staying up late playing the video game *Call of Duty: Modern Warfare 3* ("MW3").⁶⁴ Coach Strong apparently became aware of some of his players' obsession with MW3 after reading tweets from his players, such as his sophomore strong safety who tweeted, "Call of Duty at Midnight."⁶⁵ A coach can, and should, set reasonable team rules such as a curfew on road trips requiring all athletes to be in their assigned hotel rooms by 10:00 p.m. with lights out by 11:00 p.m. Then, if an athlete submits a social media posting demonstrating they are in violation of a team rule, such as posting a picture of ten of the athletes in a hotel room at midnight playing MW3, the coach could discipline the athletes for the posting without running afoul of the First Amendment. Likewise, the coach could also discipline an athlete for postings that indicate violation of other reasonable team rules, including skipping class or study hall.

Additionally, an athlete does not possess a First Amendment right to submit a social media posting that demonstrates a violation of NCAA policies. Consider the following tweet from a University of North Carolina defensive tackle: "I live in club LIV so I get the tenant rate, bottles comin like it's a giveaway."⁶⁶ This tweet and others reportedly resulted in attention being drawn to the athlete, who was later suspended for his senior season for violating NCAA rules regarding receiving improper extra benefits.⁶⁷ Finally, an athlete could also be disciplined for a social media

62. Again, any time an athlete is suspected of having committed a violation of criminal law, the coach or individual with knowledge of the potential criminal violation should immediately contact law enforcement authorities.

63. See *Healy v. James*, 408 U.S. 169, 188 (1972).

64. Erick Smith, *Louisville's Charlie Strong Chides Team for Playing 'Call of Duty' Before Loss*, USA TODAY (Nov. 15, 2011, 3:02 PM), <http://content.usatoday.com/communities/campusrivalry/post/2011/11/louisville-charlie-strong-call-of-duty-loss-to-pittsburgh/1>.

65. *Id.*

66. *Twenty Tweets*, *supra* note 30.

67. *Id.*

posting indicating a violation of reasonable college or university policies, such as a posting of the athlete cheating on an exam.

B. Yellow Light Category (Possibly Unprotected Speech)—An Athlete Can Be Disciplined Based on The Content of the Posting But Only After a Detailed Review of Multiple Factors

i. Harassing Speech

There are times when an athlete can, and should, be disciplined for a social media posting that indicates the athlete may be harassing another student on the basis of a protected category such as sex or race.⁶⁸ However, a coach is placed in a difficult position to balance the First Amendment rights of his or her player who posted something allegedly harassing with the rights under Title IX or other federal anti-discrimination statutes (such as Title VI) of the student who was allegedly harassed. For example, if a coach reacted too quickly and disciplined a male athlete for one sexual proposition posted on a female athlete's Facebook "wall," it is possible the coach's actions would be considered a violation of the male athlete's First Amendment rights, because (1) the content of the posting would not fall under one of the above categories of unprotected speech, and (2) the posting would not be severe or pervasive enough to rise to the level of creating a sexually hostile learning environment under Title IX.⁶⁹ However, if a coach receives a complaint from a female athlete who complained of a sexual proposition posted on her Facebook "wall" by a male athlete, and the coach does not facilitate an investigation to see if there are additional postings and conduct, the coach could be seen as violating the female athlete's rights under Title IX.⁷⁰ Before issuing discipline for a posting that is allegedly harassing, the coach should refer the matter to the college or university official who investigates allegations

68. *See supra* note 45 (regarding providing the athlete with notice of the alleged inappropriate posting and an opportunity to respond).

69. *See, e.g., Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 652 (1999):

Damages are not available for simple acts of teasing and name-calling among school children, however, even where these comments target differences in gender. Rather, in the context of student-on-student harassment, damages are available only where the behavior is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect.

70. *See, e.g., Pederson v. La. State Univ.*, 213 F.3d 858, 882 (5th Cir. 2000) ("Where the school has control over the harasser but acts with deliberate indifference to the harassment or otherwise fails to remedy it, liability will lie under Title IX.") (*citing* *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999)). *See also* *Bryant v. Indep. Sch. Dist. No. I-38 of Garvin Cnty., Okla.*, 334 F.3d 928, 934 (10th Cir. 2003) (applying the Title IX deliberate indifference standard for a Title VI claim by a student alleging racial harassment by other students).

of student discrimination. If the investigation concludes that the student engaged in severe or pervasive conduct through social media postings to harass another student on the basis of a protected category, the athlete can be disciplined for the social media postings. Because harassing speech is fact intensive based on the particular circumstances surrounding the speech, this category of potentially unprotected speech must be evaluated on a case by case basis and with extreme caution before any disciplinary action is taken against an athlete.⁷¹

ii. Materially Disruptive Speech

Although an athlete may be disciplined for a social media posting that is proven to be materially disruptive to the college or university, athletic department, or team, any discipline based on this standard must be initiated only after a detailed review of all factors.

Tinker v. Des Moines Independent Community School District is a landmark Supreme Court case addressing the materially disruptive category of speech.⁷² In that case, two high school students wore black armbands to school to protest the Vietnam War and would not remove the armbands even after being asked by school officials to do so.⁷³ After receiving a suspension for their actions, the students filed a lawsuit claiming the school violated their First Amendment rights.⁷⁴ The Supreme Court determined the students possessed a First Amendment right to wear the armbands, wearing the armbands was not a substantial disruption to the school's activities, and in one of the Court's most often quoted opinions regarding First Amendment school cases, stated, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."⁷⁵ However, the Court carved out this materially disruptive category of speech by noting that a school can discipline students for expressive activity "by a showing that the students' activities would materially and substantially disrupt the work and discipline of the school."⁷⁶ Although *Tinker* and other subsequent Supreme Court cases allowing students to be disciplined for materially disruptive speech

71. *See, e.g., DeJohn v. Temple*, 537 F.3d 301, 305, 314 (3d Cir. 2008) (holding that it was a violation of a student's First Amendment rights for the university to enforce a policy that broadly prohibited "all forms of sexual harassment" including conduct of a "gender-motivated nature" when a student claimed the policy had a chilling effect on his willingness to express his opinions in class concerning women in the military.").

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

73. *Id.*

74. *Id.*

75. *Id.* at 506.

76. *Id.* at 513.

were high school cases,⁷⁷ as opposed to college or university cases, the *Tinker* standard has also been applied in the college and university setting, including social media postings at a college or university.

For example, in *Tatro v. University of Minnesota*, a student in the University's mortuary-science program was found to have lost First Amendment protection for the following posting on her Facebook page:

Who knew embalming lab was so cathartic! I still want to stab a certain someone [who the student later indicated was her ex-boyfriend] in the throat with a trocar though. Hmm...perhaps I will spend the evening updating my 'Death List # 5' and making friends with the crematory guy. I do know the code...⁷⁸

The University of Minnesota disciplined the student for the Facebook posting and the student filed a lawsuit against the university claiming her First Amendment rights were violated.⁷⁹ The *Tatro* court declined to analyze the case under the true threat doctrine, but instead analyzed the case under the substantially disruptive doctrine set forth in *Tinker*. The court held that “[b]ecause Tatro's Facebook posts materially and substantially disrupted the work and discipline of the university, we conclude that the university did not violate Tatro's First Amendment rights by responding with appropriate disciplinary sanctions.”⁸⁰

77. See also *Morse v. Frederick*, 551 U.S. 393 (2007) (holding that a principal's action of suspending a high school student for unfurling a banner during a school activity of watching the Olympic Torch Relay, which stated, “BONG HiTS 4 JESUS” was justified under the First Amendment because the banner promoted illegal drug use in violation of school policy); see also *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

78. See *Tatro v. Univ. of Minn.*, 800 N.W.2d 811, 814 (Minn. Ct. App. 2011), affirmed by the Minnesota Supreme Court in *Tatro v. Univ. of Minnesota*, 2012 WL 2328002 (Minn. June 20, 2012) regarding the sanctions imposed by the university without separately addressing Tatro's threatening speech.

79. *Id.* at 815.

80. *Id.* at 822. See also *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 615 n.22 (5th Cir. 2004) (“Refusing to differentiate between student speech taking place on-campus and speech taking place off-campus, a number of courts have applied the test in *Tinker* when analyzing off-campus speech brought onto the school campus.”) (*citing* *Boucher v. Sch. Bd. of Sch. Dist. of Greenfield*, 134 F.3d 821, 827–28 (7th Cir.1998) (student disciplined for an article printed in an underground newspaper that was distributed on school campus); *Sullivan v. Houston Indep. Sch. Dist.*, 475 F.2d 1071, 1075–77 (5th Cir.1973) (student punished for authoring article printed in underground newspaper distributed off-campus, but near school grounds); *LaVine v. Blaine Sch. Dist.*, 257 F.3d at 989 (9th Cir. 2001) (analyzing student poem composed off-campus and brought onto campus by the composing student under *Tinker*); *Killion v. Franklin Reg'l Sch. Dist.*, 136 F. Supp. 2d 446, 455 (W.D. Pa. 2001) (student disciplined for composing degrading top-ten list distributed via e-mail to school friends, who then brought it onto campus; author had been disciplined before for bringing top-ten

Although athletic departments have the ability to discipline an athlete based on expressive activity that is substantially disruptive to the institution's athletic department or team, it becomes even more fact intensive and difficult to rely on this theory as it relates to social media postings as opposed to other expressive activity. For example, a college or university student-athlete who continues to stand up and interrupt the athletic director who is speaking at an awards banquet could be disciplined because the student-athlete would clearly be engaging in materially disruptive speech. However, what about a student-athlete who, after the awards banquet, returns to his apartment, posts a picture of the athletic director on Facebook, and draws fake horns on the picture? It would become fact intensive as to whether the student-athlete's off-campus social media activity was materially disruptive to the college or university, athletic department, or team.

The Third Circuit in *Layshock* recognized the difficulty in relying on the substantially disruptive theory in relation to social media postings.⁸¹ In that case, the court analyzed the discipline of a high school student who created a fictitious social media profile on his grandmother's computer with fake answers to fake questions about the school's principal.⁸² The Third Circuit stated,

It would be an unseemly and dangerous precedent to allow the state, in the guise of school authorities, to reach into a child's home and control his/her actions there to the same extent that it can control that child when he/she participates in school sponsored activities. Allowing the District to punish Justin for conduct he engaged in while at his grandmother's house using his grandmother's computer would create just such a precedent, and we therefore conclude that the district court correctly ruled that the District's response to Justin's expressive conduct violated the First Amendment guarantee of free expression.⁸³

Likewise, the *Doninger* court recognized this difficulty in regulating off-campus social media activity when it stated, "[i]f courts and legal scholars cannot discern the contours of First Amendment protections for student internet speech, then it is certainly unreasonable to expect school

lists onto campus); *Emmett v. Kent Sch. Dist.*, No. 415, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000) (applying *Tinker* to mock obituary website constructed off-campus); *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998) (student disciplined for article posted on personal internet site); *Bystrom v. Fridley High Sch.*, 686 F. Supp. 1387, 1392 (D. Minn. 1987) (student disciplined for writing article that appeared in an underground newspaper distributed on school campus)).

81. See *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 205–22 (3d Cir. 2011) *cert. denied*, 132 S. Ct. 1097 (2012).

82. *Id.*

83. *Id.* at 260.

administrators, such as Defendants, to predict where the line between on- and off-campus speech will be drawn in this new digital era.”⁸⁴

Courts have yet to apply the Supreme Court’s *Garcetti* standard for speech from a public employee that automatically loses First Amendment protection to that of a student or student-athlete’s speech. In *Garcetti*, the Supreme Court held that a public employee who is speaking as an employee pursuant to his or her official job duties does not have First Amendment protection, but if the public employee is speaking as a citizen on a matter of public concern, the employee may enjoy First Amendment protection.⁸⁵ For example, consider the chief financial officer for Texas A&M’s athletic department who was found to have posted the following comment about the Texas A&M president on a Texas A&M fan message board: “Guy is a putz...hopelessly underqualified puppet.”⁸⁶ Under the *Garcetti* standard, it would be difficult for the Texas A&M employee to prove he was speaking as a citizen on a matter of public concern rather than as a public employee, and as such, Texas A&M could likely fire him based on the content of his posting without risking a valid First Amendment claim.⁸⁷

It is conceivable for a court to apply the *Garcetti* standard on public employee speech to student and student-athlete speech by determining that a student or student-athlete does not have a First Amendment right when speaking pursuant to the individual’s duties as a student or student-athlete. For example, consider a student-athlete who shouts at the offensive coordinator during football practice or tweets after practice that the coach’s play calling is brutal and he could not coordinate his own way out of a phone booth. If a court were to apply a *Garcetti* type standard, the court would conclude the student-athlete’s speech was not protected speech because he was speaking as an athlete pursuant to his duties as an athlete rather than as a citizen on a matter of public concern. In other words, there would be no need to analyze the content of the speech because the speech would automatically lose First Amendment protection simply because the student-athlete was speaking in his role as a student-athlete.

However, courts have yet to apply the *Garcetti* standard to student or student-athletes. Unless a *Garcetti* standard is applied to student or student-athlete speech, courts will likely continue to apply the materially

84. *Doninger v. Niehoff*, 594 F. Supp. 2d 211, 224 (D. Conn. 2009).

85. *Garcetti v. Ceballos*, 547 U.S. 410, 411 (2006).

86. Robert Cessna, *A&M Athletics CFO Jeff Toole Calls Loftin Names Online*, THE EAGLE (Nov. 30, 2011, 12:07 AM), <http://www.theeagle.com/am/A-amp-M-official-calls-Loftin-names-online--6809601>.

87. *See Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689, 694 (5th Cir. 2007) (holding that a high school athletic director who was fired after submitting a memo that was critical of the financial decisions of the principal was speaking as a public employee, and as such, was not entitled to First Amendment protection).

disruptive standard set forth in *Tinker* to the above scenario, which is actually more difficult for a college or university to prove. For example, in the above scenario, it would be much easier to only prove the student-athlete was speaking in his role as a student-athlete as opposed to proving how the student-athlete's speech was a substantial disruption to the college or university, athletic department, or team.

Because there is no black and white standard by which to prove an athlete's actions are substantially disruptive, an athletic director or coach must only discipline an athlete under this substantially disruptive theory if he or she can easily articulate how the social media posting was or is a substantial disruption to the college or university, athletic department, or team.

C. Red Light Category (Protected Speech)—Do Not Discipline the Athlete

Unless an athlete's social media posting clearly falls into one of the categories of unprotected speech in the "green light category"⁸⁸ or "yellow light category"⁸⁹ above, a coach or athletic director should not discipline the athlete based on the content of the posting. Doing so would likely be viewed by a court as content or viewpoint discrimination in violation of the athlete's First Amendment rights. Unfortunately for athletic directors and coaches, an instance could arise in which no disciplinary action can be taken against an athlete who posts a controversial or offensive social media posting. For example, North Carolina State University decided it could not discipline a basketball player who tweeted that he would rather not have a gay player in the locker room.⁹⁰ Although the tweet was clearly offensive, this tweet would likely not fall under any of the categories of unprotected speech provided above, and as such, the University correctly concluded that it should not discipline the athlete based on the content of the athlete's tweet. In order to avoid a successful First Amendment claim, athletic directors and coaches must take this same approach and recognize there may be some misguided and offensive social media postings for which an athlete cannot be disciplined.

VI. CONCLUSION

In these high-tech times, a student-athlete could instantly submit a harmful or offensive social media posting for millions to see and the athlete may have First Amendment protection against disciplinary action by a

88. See *supra* Section V(A).

89. See *supra* Section V(B).

90. Viviana Bonilla Lopez, *Student Tweets Causing Controversy for Universities*, USA TODAY (Sept. 18, 2011), <http://www.usatodayeducate.com/staging/index.php/ccp/student-tweets-causing-controversy-for-universities>.

coach or athletic director at a state college or university. Although it is not advisable for a coach or athletic director to completely ban athletes' use of social media, a coach or athletic director could restrict the use of social media during team functions as well as enforce other reasonable team rules and then educate the athletes regarding the potential dangers involved with social media postings. Finally, although a coach or athletic director should, as a general rule, never discipline an athlete based on the content of his or her social media posting, there are certain instances in which doing so would be authorized if the posting falls into a category of unprotected speech (e.g., fighting words/true threat, defamatory statements, obscenity, violation of criminal law, violation of reasonable team or NCAA rules, harassing speech, or materially disruptive speech).

APPENDIX A: UNIVERSITY OF HOUSTON ATHLETICS
SOCIAL MEDIA POLICY⁹¹

Participation in intercollegiate athletics at the University of Houston ("University" or "Houston") is a privilege, not a right. While the Houston Department of Athletics does not prohibit student-athletes from participating in social media avenues such as Twitter, Facebook, Google +, LinkedIn or Blogs, all postings and writings must be in compliance with the guidelines set forth by your student-athlete and university handbooks, applicable Texas and federal law, as well as NCAA, conference, and university bylaws, policies, rules, and regulations.

Facebook, Twitter and other social media sites have dramatically increased in popularity over the years. As such, fans, media, faculty, future employers and NCAA officials may have the information you post about yourself to social media avenues sent directly to them. Protect yourself, your team and your university by adhering to the guidelines below. The University of Houston student code of conduct can, in some circumstances, extend to online activity, and civil and criminal laws can also apply to online activity; as a result, the responsibility for your social media postings falls squarely on you.

The University of Houston reserves the right to take action against currently enrolled student-athletes that engage in online and social media behaviors that violate applicable laws, policies, rules, and regulations. This

⁹¹ Special thanks to General Counsel Dona Cornell, Vice President for Intercollegiate Athletics Mack Rhoades, Associate Athletics Director David Reiter, and Associate Athletics Director and Senior Women's Administrator DeJuena Chizer at the University of Houston for their efforts in formulating this policy.

action may include education, counseling, suspension and/or expulsion from the team and reduction, cancellation or nonrenewal of athletics aid.

Houston Athletics and/or third parties under contract with the University reserve the right to regularly monitor student-athletes' public profiles and the materials posted on those accounts to ensure compliance with this policy.

When participating in social media activity, please adhere to the following guidelines:

1. Make sure your social media activity is in compliance with applicable Texas and federal law, as well as NCAA, conference, and university bylaws, policies, rules, and regulations.
2. Consider setting your security settings so that only your friends can view your profile/Twitter feed(s). If you do not know how to do this, please contact the Athletics Communications Office and they will be happy to assist you. Do not give out your passwords to anyone. Make sure to change your passwords regularly.
3. You should not post your email, home address, local address, telephone numbers, social security number, birthdate, banking information or other personal information as it could lead to unwanted behavior such as stalking or identity theft. For additional tips to avoid cybercrimes, see <https://www.ncjrs.gov/internetsafety/>.
4. Be aware of who you add as "friends" or "followers" to your social media venues. Many people may not have your best interests at heart and may look to take advantage of you or seek unwanted interaction.
5. Use common sense. Respect differences, appreciate the diversity of opinions and speak or conduct yourself in a professional manner at all times. For example, you should refrain from posting items that are physically threatening, defamatory (e.g., false statements that are damaging to a person's reputation), obscene (as commonly defined by applicable federal and Texas law), in violation of copyright law, unlawfully harassing or discriminatory, or items that are materially disruptive to the University, the Department of Athletics, or your team.
6. Monitor what others post about you and remove posts from your

social media page as you determine necessary.

7. Make sure that your online activities do not interfere with your responsibilities as a member of your team. In this regard, do not engage in social media activity four hours before your upcoming athletics event or during competition or other official athletic department or team events. Additionally, do not engage in social media activity between the hours of midnight and 5 a.m. of the night before your team's athletic event/competition. Give yourself a break from social media, get some rest, and get ready for your team's event/competition.
8. Do not post any information that is proprietary to the Athletic Department, which is not public information such as tentative or future schedules, team playbooks or strategies, or information that is sensitive or personal in nature, such as travel plans and itineraries.
9. Behave on social media as you would in front of a crowd of strangers – be proud of where you come from and where you are at. Do not let anyone have a reason to dilute that pride by sully your name through social media comments.
10. Remember, a great deal of damage can be done in just 140 characters, so think before you Tweet. If you have any doubts about the appropriateness of a social media comment, do not share it!
11. Try to conduct yourself as if you were doing a live interview with a media organization. There is no such thing as privacy on your social media pages. The speed with which a negative comment can spread in social media can be staggering. The best advice is to imagine that ESPN is sitting in your room and double-checking your comments before you decide to hit the SHARE or TWEET button. Once you post your comment, it may last in cyberspace forever, including being accessible to professional sports organizations or your future employer.

If a student-athlete's social media activity is found to be inappropriate in accordance with this policy, he/she may be subject to the following penalties:

1. A written warning
2. A meeting with the Director of Athletics and Head Coach
3. Penalties as determined by the athletics department, including but not limited to, possible suspension from his/her athletics team, expulsion from his/her team and/or loss of some or all of his/her athletics financial aid.

Student-Athlete Acknowledgement and Agreement

By my signature below, I acknowledge that I have read and understand the University of Houston Department of Intercollegiate Athletics Social Media Policy. I understand that if I fail to adhere to this policy, I may be subject to disciplinary action up to and including suspension and/or expulsion from my team and loss of some or all of my athletics financial aid.

Student-Athlete Name

Team

Date

