

## **THE CONSTITUTIONALITY OF PUBLIC UNIVERSITY IMPOSED RESTRICTIONS ON SOCIAL MEDIA USAGE BY NCAA STUDENT-ATHLETES**

Within the National Collegiate Athletic Association (NCAA), social media has caused many problems affecting member institutions, athletic programs and student-athletes.<sup>1</sup> Athletic programs fear that social media may cause performance encumbering distractions, disclose game-day strategies, generate negative attention or expose violations of the NCAA rules of conduct. Consequently, several Division I programs have placed restrictions on student-athlete access to social media by placing bans on Facebook and Twitter.<sup>2</sup> These restrictions impede upon the free speech rights of student-athletes under the First Amendment of the U.S Constitution and raise constitutional concerns.

The operations of the NCAA and member institutions are heavily regulated regarding communications during the recruitment process.<sup>3</sup> The NCAA governs time and manner by which college coaches may contact prospective student-athletes to limit intrusion into high school athletes' lives.<sup>4</sup> Despite rigid policies, the NCAA remains silent on the regulation of social media use by student-athletes in the university setting.<sup>5</sup> Rather than regulating social media itself, the NCAA places an implied duty upon universities to monitor social media activity.<sup>6</sup> Despite the lack of clear rules, the NCAA sanctions universities that fail to "adequately and consistently" monitor social media.<sup>7</sup>

### ***Problems Caused by Social Media***

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<sup>1</sup> J. Wes Gay, *Hands Off Twitter: Are NCAA Student-Athlete Social Media Bans Unconstitutional?*, 39 Fla. St. U. L. Rev. 781 (2012).

<sup>2</sup> Walsh, *supra* note 4, at 619.

<sup>3</sup> Victor Broccoli, *Policing the Digital Wild West: NCAA Recruiting Regulations in the Age of Facebook and Twitter*, 18 Sports Law. J. 43, 49 (2011).

<sup>4</sup> *Id.* at 50.

<sup>5</sup> Vicki Blohm, *The Future of Social Media Policy in the NCAA*, 3 Harv. J. Sports & Ent. L. 281 (2012).

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

<sup>7</sup> Blohm, *supra* note 35.

In 2010, UNC Chapel Hill dismissed player Marvin Austin from the football team after Twitter revealed the receipt of improper benefits, violating NCAA ethical rules.<sup>8</sup> The incident garnered national attention and UNC was fined \$50,000 and forfeited 15 football scholarships.<sup>9</sup> Official allegations stated the university failed to, “adequately and consistently monitor social networking activity that visibly illustrated potential amateurism violations within the football program.”<sup>10</sup> As a preventative measure, UNC placed a Twitter ban on all football players.<sup>11</sup>

UNC was neither the first nor only athletic program to implement social media restrictions. The University of Missouri’s basketball program banned Twitter use during the season, reasoning (after several players were harassed by fans); the ban kept players focused on performance.<sup>12</sup> Football programs at the University of South Carolina and Boise State implemented bans after student-athletes posted offensive statements on social media.<sup>13</sup> Institutions justify such policies, stating participation in collegiate athletics is “a privilege, not a right,” therefore student-athletes face repercussions for decisions made off field.<sup>14</sup>

### ***Social Media Policy***

Historically universities have been hesitant to restrict speech, but recently institutions recognized the integrity of a program may be compromised by one player’s internet transmissions. Where athletics are primary revenue generators for universities, negative attention can jeopardize campus operations beyond the scope of athletics.<sup>15</sup> The more successful an

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<sup>8</sup> Jonathan Jones, *Marvin Austin Suspended*, The Daily Tar Heel (September 3, 2013).

<sup>9</sup> *Id.*

<sup>10</sup> NCAA Notice of Allegations to University of North Carolina, Chapel Hill (June 21, 2011).

<sup>11</sup> *Id.*

<sup>12</sup> Blohm, *supra* note 35, at 285.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 286.

<sup>15</sup> *Id.*

athletic program, the more appealing the university is to applicants; leading to larger, higher quality applicant pools, and increased revenues.<sup>16</sup>

Speculation about the legitimacy of coaches' concerns that social media exposure could compromise a team's success exist.<sup>17</sup> In NCAA history, no student-athletes have compromised a win by posting strategy onto social media, nor has a decline in performance been observed based upon social media activity. In 2012 Heisman contender Manti Teo led Notre Dame to an undefeated season during a social media scandal involving the death of his online girlfriend, an internet hoax.<sup>18</sup> While the scandal placed Notre Dame at the center of media fury, the team finished the season ranked number one and reporters described Teo's performance as "inspiring."<sup>19</sup>

### ***First Amendment Concerns***

Universities are not permitted to regulate student speech based upon the content or viewpoint expressed.<sup>20</sup> The Supreme Court holds that public schools may not regulate speech to avoid "discomfort and unpleasantness," as students are entitled to express their viewpoints void of institutional restraint.<sup>21</sup> The Supreme Court stated, "[i]t can hardly be argued that students ... shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."<sup>22</sup> High schools have traditionally been permitted to discipline students for inappropriate communications that disrupt the learning environment.<sup>23</sup> However, the Supreme Court has referred to college campuses as "marketplaces of ideas" and birthplaces of "intellectual thought,

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

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

<sup>18</sup> Ned Zedman, *The Boy Who Cried Dead Girlfriend*, Vanity Fair (June 2013).

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

<sup>20</sup> Eric Bentley, *He Tweeted What? A First Amendment Analysis of the Use of Social Media by College Athletes and Recommended Best Practices for Athletic Departments*, 38 J.C. & U.L. 462 (2012).

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

<sup>22</sup> *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 506 (1969).

<sup>23</sup> Epstein, *supra* note 16, at 17.

experimentation and discovery,” thus, students should be encouraged to speak freely to promote academic growth.<sup>24</sup>

For social media bans to be justified, student-athlete speech must cause a “substantial disturbance” to school operations.<sup>25</sup> The assertion that student speech can attract negative press, diverting focus away from the success of the athletic program, is reasonable. However, it is unlikely a university could establish a disruption is substantial enough to withstand a constitutional objection.<sup>26</sup> Athletic programs are public in nature, so it is unlikely one student-athlete’s transgressions would be enough to require further damage control measures. To date, a student-athlete’s social media use has never hindered university operations.<sup>27</sup>

### ***Prior Restraint***

Typically, universities are motivated to protect student-athletes’ moral, safety and health interests; but NCAA institutions are vulnerable to litigation if they impede upon speech within a social media forum regardless of content.<sup>28</sup> Prior restraint is, “governmental restriction on speech or publication before its actual expression”. This violates the First Amendment unless the speech is obscene, defamatory, or creates a clear and present danger to society.”<sup>29</sup> Though not per se unconstitutional, in *New York Times v. Sullivan*, the court held that the government bears the burden of providing sufficient justification for restraint.<sup>30</sup>

Justification for prior restraint is established by procedural safeguards ensuring regulations: 1) do not allocate overbroad discretion to the government, 2) are not content-based, 3) are narrowly tailored to serve a significant government interest, 4) offers reasonable

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

<sup>25</sup> Gay, *supra* note 7, at 801.

<sup>26</sup> *Id.* at 802.

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

<sup>28</sup> Epstein, *supra* note 16, at 11.

<sup>29</sup> *Black’s Law Dictionary* 1314 (9th ed. 2009).

<sup>30</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

alternatives for communication.<sup>31</sup> If a university's social media ban is challenged the likelihood of success is high.<sup>32</sup> The university would likely satisfy the first two requirements, with difficulty meeting the remaining regulations.<sup>33</sup>

Universities that implement bans prohibit the use of *all* social media platforms to preempt harmful communications. The ban is not narrowly tailored because it places a blanket restriction on all social media communications regardless of content. Although, the university is seeking only to prevent speech that may be deemed harmful, these measures are overbroad. Thus, student-athletes would be prohibited from all communications, even those unrelated to the university. Messages protected by the Constitution would also be prohibited.<sup>34</sup>

For a prior restraint to be sufficiently justified, the restriction must leave alternatives for communication.<sup>35</sup> Here, the university will assert that student-athletes may communicate by email or telephone.<sup>36</sup> However, social media sites provide the only method for the athlete to communicate with their fan base at large.<sup>37</sup> Given that social media provides instant mass communication, no equivalent alternative exists.<sup>38</sup>

### ***Equal Protection***

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<sup>31</sup> *S.E. Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975).

<sup>32</sup> Stubblefield, *supra* note, 2 at 589.

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

<sup>34</sup> Epstein, *supra* note 16, at 16.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 17.

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

<sup>38</sup> *Id.*

In addition to First Amendment concerns, the Equal Protection Clause may also be infringed.<sup>39</sup> The Fourteenth Amendment provides that “no state shall deny to any person ... the equal protection of the law.”<sup>40</sup> Here, social media bans are targeted towards specific student-athletes. If the regulation were challenged, the university would only succeed if a sufficiently important justification could be established.<sup>41</sup>

A public university would struggle to provide sufficient justification for banning a team from using social media, while allowing another campus group access.<sup>42</sup> The university may argue that regulation is necessary due to the high-profile nature of a student-athlete’s social media account. However, other non-athlete student leaders may be equally visible on social media and equally capable of posting harmful messages.

### ***Conclusion***

The NCAA must establish appropriate social media policies to protect student-athletes and institutions from complications caused by social media. If students are correctly monitored and adequately educated about consequences of misuse, NCAA institutions may benefit from social media in the future. Student-athletes who interact with fans through social media platforms can generate positive attention and encourage interest and growth in the institution both academically and athletically.

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<sup>39</sup> Bradley Shear, *NCAA Student-Athlete Social Media Bans May Be Unconstitutional*, Shear on Social Media Law (August 11, 2011).

<sup>40</sup> U.S. Const. amend. XIV, § 2.

<sup>41</sup> *Id.*

<sup>42</sup> Shear, *supra* note 90.