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COLLEGES AND UNIVERSITIES ALL AT TWITTER: CONSTITUTIONAL IMPLICATIONS OF REGULATING AND MONITORING STUDENT-ATHLETES' TWITTER USAGE

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I. INTRODUCTION

Twitter plays a positive role in sports today by allowing fans to follow their favorite teams, coaches, and athletes and to connect with them in a way that they have not been able to in the past. Twitter makes these “celebrities” more accessible to their fans through short tweets and pictures sent to hundreds of thousands of “followers” at the click of a button. Twitter is a form of social media with over 100 million active users worldwide,¹ who use 140 characters to “tweet” anything they would like to say to their followers.² Twitter is growing at a tremendous rate with users sending 340 million tweets per day,³ compared to the 2 million tweets that were sent each day in January 2009.⁴ Once a user clicks to tweet, the tweet is immediately out in the public, as Twitter works in real-time,⁵ and even if later deleted, the tweet remains accessible to the public on the Internet.

When college athletes use Twitter, they become susceptible to certain issues that do not arise for the everyday user. Through various agreements (i.e., the National Letter of Intent and the Statement of Financial Assistance),

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1. *One Hundred Million Voices*, TWITTER BLOG (Sept. 8, 2011, 9:32 AM), <http://blog.twitter.com/2011/09/one-hundred-million-voices.html>.

2. *About Twitter*, TWITTER, <http://www.twitter.com/about> (last visited Mar. 22, 2013).

3. *Twitter Turns Six*, TWITTER BLOG (Mar. 21, 2012, 10:18 AM), <http://blog.twitter.com/2012/03/twitter-turns-six.html>.

4. *200 Million Tweets Per Day*, TWITTER BLOG (June 30, 2011, 1:03 PM), <http://blog.twitter.com/2011/06/200-million-tweets-per-day.html>.

5. *About Twitter*, *supra* note 2.

the student-athletes form a contractual relationship with their university and are third-party beneficiaries of the contract between the National Collegiate Athletic Association (NCAA) and their university,⁶ which puts student-athletes under a certain degree of control from these institutions. Twitter becomes a problem when student-athletes tweet about other players, dissatisfaction with their coaches,⁷ playing time frustrations,⁸ or intimate details about their personal lives.⁹ Because thousands can see tweets in an instant, as soon as the student-athlete clicks “tweet,” these tweets often reveal potential school, conference, and NCAA violations. As a result, universities are beginning to regulate their student-athletes’ social media and Twitter accounts.¹⁰ Currently, the NCAA does not have a social media policy for regulating student-athletes, but it strongly encourages its member schools to regulate their student-athletes’ use of social media to ensure that there are no NCAA rule violations occurring that could have been prevented.¹¹

As with any regulation of college athletes, the school or university’s regulation or monitoring of Twitter involves legal implications. Depending on how the student-athletes’ Twitter accounts are regulated or monitored, the student-athletes may possibly have free speech, equal protection, or privacy claims against the school.

Part II discusses Twitter and its increasingly problematic use among college athletes, including recent allegations sent to the University of North Carolina at Chapel Hill (UNC). Part III discusses constitutional concerns associated with regulating and monitoring student-athletes’ use of Twitter and examines whether UNC’s new social media policy is constitutional. Part IV contains examples of what schools are already doing about their student-athletes using Twitter and analyzes whether these regulations meet constitutional scrutiny. Finally, Part V recommends how schools can regulate

6. MATTHEW J. MITTEN ET AL., *SPORTS LAW AND REGULATION: CASES, MATERIALS, AND PROBLEMS* 100, 111 (2d ed. 2009).

7. Brandon Marcello, *Coach at MSU Bans Twitter*, CLARION-LEDGER (Jackson, Miss.), Feb. 4, 2011, at NEWS.

8. Bob Ford, *Schools Scramble to Monitor Athletes’ Social-Media Activities After NCAA Ruling*, PHILA. INQUIRER, Jan. 29, 2012, at E01.

9. For example, UNC football player Marvin Austin tweeted pictures of a watch he bought, a designer purse, and a bill for over one hundred dollars at the Cheesecake Factory. Jon Solomon, *What to Do About Social Media? Colleges Tackle How to Monitor What Athletes Are Saying*, AL.COM (July 24, 2011), http://www.al.com/sports/index.ssf/2011/07/what_to_do_about_social_media.html.

10. See Marcello, *supra* note 7.

11. Matt Dunning, *Social Media Has Schools on Defense: NCAA Signals Need to Monitor Activity, but Liability Feared*, BUS. INS. (Jul. 24, 2011), <http://www.businessinsurance.com/article/20110724/NEWS07/307249975>.

student-athletes' Twitter usage in the future, and Part VI concludes.

II. TWITTER AND COLLEGE ATHLETICS

Twitter, like all types of social media, is a great resource when used properly and positively. For example, many college athletes use Twitter to show their personalities,¹² pump up fans for games, and thank fans for their continued support.¹³ However, even though there are positive uses for Twitter, it can have negative consequences, particularly for college athletes and their respective universities.¹⁴

Twitter becomes problematic when student-athletes do not use it positively and instead use it to make negative comments about other players or students,¹⁵ to voice concerns with their playing time¹⁶ and frustrations with their coach,¹⁷ or to get into detail about their personal lives, usually by tweeting pictures.¹⁸ Many coaches see Twitter as a distraction from the game, and student-athletes often tweet things that embarrass their school or program. For example, Ravern Johnson, a men's basketball player at Mississippi State University (MSU), used Twitter minutes after a loss to say, "Starting to see

12. Former University of Oregon running back LaMichael James used Twitter to show his personality by tweeting updates on his training and life, such as, "Just finished a long day of hard work!" and "I can honestly say I won the day now I have to sit in traffic for a hr lol." Rob Moseley, *James Is Now All Atwitter*, REG.-GUARD (Eugene, Or.), Jan. 31, 2012, at C19.

13. Northwestern University's running back Jordan Mabin used Twitter to get his team's fans excited for a game by tweeting, "Gotta love seeing purple in the stands!!!! #GoCats." Teddy Greenstein, *Make it Mandatory, in Should College Football Coaches Ban Tweeting?*, BALTIMORE SUN, Sept. 6, 2011, at 2D.

14. See generally Solomon, *supra* note 9.

15. Lehigh University's All-American receiver Ryan Spadola was suspended by the NCAA Football Championship Subdivision Championships Committee for a quarterfinal playoff game when he "retweeted" (forwarded a tweet that someone else tweeted first) a tweet using a "racial slur to describe" students from the school Lehigh had just played." Dan Stamm, *Lehigh's Leading Receiver Suspended for Tweet*, NBC 10 PHILA. (Dec. 9, 2011), <http://www.nbcphiladelphia.com/news/local/Lehigh-Tweet-Spadola-135323213.html>. Lehigh University issued a statement saying that the suspension was supposed to send the message that "this is not acceptable behavior within college athletics." *Id.* (quoting *Lehigh Statement on the Suspension of a Football Student-Athlete*, LEHIGH, http://www.lehighsports.com/sports/football/lehigh_statement_on_the_suspension_of_a_football_student-athlete.aspx (last visited Mar. 23, 2013)).

16. The running back for Elon University was "suspended for a profanity-laced tirade concerning his lack of playing time." Ford, *supra* note 8.

17. Marcello, *supra* note 7. Additionally, Chris Early, a forward for the University of Tennessee at Chattanooga, tweeted about his coach saying, "I hate this man with a passion, each and every day I have to see him I become more and more miserable." Ford, *supra* note 8.

18. UDiligence, a monitoring company, posts pictures on its website that it has found while monitoring student-athletes' social media use. See *Why Use UDiligence?*, UDILIGENCE, <http://www.udiligence.com/what-we-find.aspx> (last visited Mar. 23, 2013).

why people Transfer. You can play the minutes but not getting your talents shown because u watching someone else wit the ball the whole game.”¹⁹ After he sent this tweet, a sophomore on the team retweeted it so that more people, namely the sophomore’s own Twitter followers, could see it.²⁰ Many upset fans responded to the retweet, leading the sophomore to tweet back, “It’s a Shame how our fans turn they back on us when we need them the most.”²¹ Shortly after, the two student-athletes’ Twitter accounts were gone; a few days later, the coach banned all players from using Twitter.²² Although Johnson’s tweet about the offensive game plan may not have amounted to an NCAA violation, it put himself, his team, and his school in a bad light.

Additionally, Florida State University’s head football coach, Jimbo Fisher, announced that he was banning his team from Twitter based on a series of tweets from different players.²³ In 2011, the coach temporarily banned Twitter for his team after a loss because he was unhappy in how they responded to negative tweets.²⁴ In 2012, Tyler Hunter tweeted about being pulled over by police officers for wearing his seatbelt incorrectly.²⁵ He then tweeted rap lyrics containing the phrase “kill the cops.”²⁶ Moreover, one of Hunter’s teammates tweeted, “Child support is worse than aids” and other questionable comments.²⁷ Fisher banned Twitter because he believes it is a privilege for his players to use, thought they were not representing their school positively,²⁸ and decided it became too much of a distraction for his players.²⁹

Presently, the NCAA is not regulating student-athletes’ use of social media, including Twitter, directly³⁰ and has “decline[d] to impose a blanket duty on institutions to monitor social networking sites.”³¹ However, NCAA

19. Marcello, *supra* note 7.

20. *Id.*

21. *Id.*

22. *Id.*

23. Kristian Dyer, *Florida State Bans Its Players from Twitter*, YAHOO! SPORTS (July 20, 2012, 6:26 PM), <http://sports.yahoo.com/blogs/ncaaf-dr-saturday/florida-state-bans-players-twitter-222622167--ncaaf.html>.

24. *Id.*

25. *Id.*

26. *Id.*

27. Erin Sorensen, *College Football 2012: Florida State Players Show Why Twitter Should Be Banned*, BLEACHER REP. (July 9, 2012), <http://bleacherreport.com/articles/1252534-college-football-2012-florida-state-players-show-why-twitter-should-be-banned>.

28. Dyer, *supra* note 23.

29. Sorensen, *supra* note 27.

30. *See generally* 2011–2012 NCAA DIVISION I MANUAL (illustrating that the NCAA has no rules on social media).

31. NCAA, UNIVERSITY OF NORTH CAROLINA, CHAPEL HILL PUBLIC INFRACTIONS REPORT

spokespeople have encouraged its member schools to regulate student-athletes' Twitter usage to ensure that the student-athletes are not compromising their eligibility or violating any NCAA rules.³² The NCAA is concerned with student-athletes' Twitter use insofar as it should be "part of the [institution's] monitoring effort if the institution becomes aware of an issue that might be resolved in some part by reviewing information" on it just as the institution has the duty to monitor "other information outside the campus setting."³³ The NCAA's issue with student-athletes using Twitter is when schools, through their compliance departments, do not monitor Twitter accounts to find potential rule violations, which the schools have a duty to find, and when their monitoring of Twitter could have found potential violations sooner.³⁴

In June 2011, the NCAA sent a notice of allegations to UNC, citing nine different potential violations³⁵ including "fail[ing] to adequately monitor the conduct and administration of the football program"³⁶ between February and June 2010.³⁷ This notice proves that the NCAA does more than just simply "encourage" its member schools to monitor their student-athletes; the NCAA will potentially punish member schools for failing to monitor its student-athletes' use of social media as part of compliance and monitoring violations.

The NCAA alleged that UNC "did not adequately and consistently monitor social networking activity that visibly illustrated potential amateurism violations within the football program, which delayed the institution's discovery and compounded the provision of impermissible benefits provided in Allegation Nos. 4-a, 4-c, 4-d and 4-e."³⁸

One of the UNC football players whose Twitter account UNC failed to adequately monitor was Marvin Austin,³⁹ also known as

11 (2012), available at <http://chronicle.com/blogs/ticker/files/2012/03/UNC.pdf> [hereinafter PUBLIC INFRACTIONS REPORT].

32. Dunning, *supra* note 11.

33. PUBLIC INFRACTIONS REPORT, *supra* note 31, at 11.

34. *See id.* at 11–12.

35. *See generally* Notice of Allegations, Case No. M357, from the NCAA to the Univ. of N.C. at Chapel Hill (June 21, 2011), available at http://grfx.cstv.com/photos/schools/unc/sports/m-footbl/auto_pdf/NCAA_NOA_062111-1.pdf. These violations included academic fraud, impermissible extra benefits to football players from a former tutor, benefits from individuals that "trigger[ed] NCAA agent legislation," and a student-athlete providing misleading and false information about his involvement in and knowledge of possible NCAA violations, among others. *Id.*

36. *Id.* at 21.

37. *Id.*

38. *Id.*

39. Megan Walsh, *Twitter Banned for UNC Football*, DAILYTARHEEL.COM (Oct. 15, 2010), http://www.dailytarheel.com/index.php/article/2010/10/twitter_banned_for_unc_football.

“@ANCHORMANAUSTIN” to the Twitter world.⁴⁰ His tweets discussed his visits to Washington D.C., which included shopping trips.⁴¹ Austin tweeted, “Jus got to DC an I’m feeln a shopn spee . . . nobody gon be fresh as ME!!!”⁴² He also tweeted pictures that indicated he was possibly receiving impermissible benefits including pictures from a trip to Miami, a watch for his sister, a designer bag, and a \$143 dining bill from The Cheesecake Factory.⁴³

The NCAA indicated that UNC failed to monitor in this situation because, although the school was informed that one of its student-athletes was planning to travel or had done so already, UNC did not further investigate that information.⁴⁴ Had UNC reviewed the student-athlete’s Twitter account, the school would have found that he had traveled to Miami, which is likely something the compliance department would have further investigated.⁴⁵ The NCAA further commented that UNC did not have “an inherent duty to monitor personal travel . . . , [but] once it became aware of the circumstances of [the student-athlete’s] travel it had a duty to investigate how the trips were paid for.”⁴⁶

In its response to the NCAA, UNC agreed with the allegations but disputed that it “did not adequately and consistently monitor social networking activity” because the allegation was unprecedented and the NCAA bylaws “are silent with respect to any alleged institutional obligation to monitor the day-to-day communications of all of its student-athletes on . . . ‘social networking’ sites.”⁴⁷ UNC asserted that it educated its students about their use of Twitter “to avoid damage to the reputation of the student-athlete and the University” and that, whenever the school was alerted of an alarming post, it asked the student-athlete to remove the post.⁴⁸

Subsequently, the UNC football program banned its players from using their Twitter accounts.⁴⁹ Additionally, UNC changed its social media and

40. See *Marvin Austin*, TWITTER, <http://www.twitter.com/ANCHORMANAUSTIN> (last visited Mar. 23, 2013).

41. Joe Giglio, *Austin’s Twitter Account Sheds Light on UNC Player*, &NEWSOBSERVER.COM (July 20, 2010, 12:00 PM), <http://blogs.newsobserver.com/acnow/austins-twitter-account-provides-clues-in-ncaa-probe-at-unc>.

42. *Id.*

43. *Id.*

44. PUBLIC INFRACTIONS REPORT, *supra* note 31, at 12.

45. *Id.*

46. *Id.*

47. Response to Notice of Allegations, Case No. M357, from Univ. of N.C. at Chapel Hill to NCAA 9-6, *available at* http://www.unc.edu/news/ncaa/NOA%20Response%20_%20redacted.pdf.

48. *Id.* at 9-7.

49. Walsh, *supra* note 39.

networking policy for all of its student-athletes in the school's student-athlete handbook.⁵⁰ The handbook now provides:

[E]ach student-athlete must remember that playing and competing for The University of North Carolina is a privilege, not a right. As a student-athlete, you represent the University and you are expected to portray yourself, your team, and the University in a positive manner at all times. Any online postings must therefore be consistent with federal and State laws, and team, Department, University, and NCAA rules, regulations and policies⁵¹

The handbook then lists several rules that the student-athletes must follow.⁵² It concludes with a section on monitoring and consequences, which states:

Each team must identify at least one coach or administrator who is responsible for having access to[] [and] regularly monitoring the content of . . . team members' social networking sites and postings ("Team Monitor"). . . .

In addition . . . , Team Monitors and/or outside vendor(s) will also evaluate postings for information that could indicate a potential violation of NCAA regulations related to amateurism, including specifically evaluating postings that identify possible improper extra benefits and/or agent-related activities. . . .

. . . Internal sanctions may include, but not be limited to, notice to remove the posting or photo, dismissal from the team, and/or reduction, cancellation, or non-renewal of athletics grant-in-aid.⁵³

UNC took a proactive step in the right direction as this policy will likely alert the NCAA that the university is at least trying to adequately and consistently monitor student-athlete social media accounts. The next step for UNC is to consider ways in which the new policy could violate a student-athlete's constitutional rights and to then modify the policy before student-athletes bring claims against the university.

50. *Id.*

51. UNIV. OF N.C. AT CHAPEL HILL, DEP'T OF ATHLETICS, POLICY ON STUDENT-ATHLETE SOCIAL NETWORKING AND MEDIA USE 1 (2012), http://www.goheels.com/fls/3350/pdf/Compliance/SocialNetworkingPolicy.pdf?SPID=111196&DB_OEM_ID=3350 [hereinafter UNC SOCIAL MEDIA POLICY].

52. *Id.* at 1–2.

53. *Id.* at 2.

III. CONSTITUTIONAL ISSUES IMPLICATED BY REGULATING AND MONITORING STUDENT-ATHLETES' USE OF TWITTER

A school's choice to implement any policy comes with consequences if the policy infringes on any student's constitutional rights. This Comment is limited to the constitutional claims that student-athletes may have against their college or university for monitoring or regulating Twitter accounts.⁵⁴ To begin, the U.S. Constitution grants students certain rights as U.S. citizens: "[s]chool officials do not possess absolute authority over their students. Students in school . . . are 'persons' under [the U.S.] Constitution."⁵⁵ However, these rights are limited based on the students' academic and athletic settings.⁵⁶

For student-athletes to have a claim against their college or university for depriving them of a constitutional right, the college or university must be a state actor and subject to regulation by the U.S. Constitution.⁵⁷ Private schools, colleges, and universities are not state actors and are not bound by the restraints of the Constitution;⁵⁸ thus, they are not discussed in this Comment. Likewise, the NCAA is not a state actor.⁵⁹ Therefore, if the NCAA decided to regulate social media and Twitter use at a national level for all student-athletes, its rules and regulations would not be subject to the Constitution and student-athletes would have no claim against the NCAA for depriving them of constitutional rights.⁶⁰ The actions by public schools and state universities and colleges, including their officials and employees, constitute state action as the schools act on behalf of the government;⁶¹ thus, student-athletes can bring actions against their public school for the deprivation of a constitutional right.

There are three basic constitutional claims that student-athletes could

54. Additionally, a student-athlete may have claims against the NCAA, but the state action doctrine and *NCAA v. Tarkanian* limit those claims and courts generally provide deference to the law of private associations. See generally *NCAA v. Tarkanian*, 488 U.S. 179 (1988). This Comment does not discuss the potential claims against the NCAA or non-constitutional claims against a college or university.

55. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969).

56. See generally *id.*

57. See *Tarkanian*, 488 U.S. at 191–92; see also *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001).

58. See *Tarkanian*, 488 U.S. at 192–95. However, private schools, colleges, and universities are subject to applicable state and federal laws and the law of private associations. See, e.g., *Bowers v. NCAA*, 9 F. Supp. 2d 460, 474 (D.N.J. 1998).

59. See *Tarkanian*, 488 U.S. at 182–83.

60. Again, the NCAA is subject to other federal regulations and the law of private associations; a student-athlete could bring a claim based on these grounds.

61. See *id.* at 183.

potentially bring against their respective college or university. Which claim a student-athlete could bring depends on the institution's decisions regarding the regulation of student-athletes' use of Twitter, but the potential claims include free speech, equal protection, and privacy.

A. *First Amendment Free Speech Claim*

One potential claim that a student-athlete could bring is a First Amendment free speech claim that regulating a student-athlete's use of Twitter does not allow the student-athlete to communicate his opinions or ideas freely to the public. Twitter is used to voice thoughts and ideas, and by limiting or abolishing that avenue, universities may be unconstitutionally restricting student-athletes' speech. If schools completely ban Twitter usage, they could be imposing a prior restraint as the schools would be restricting all speech made in that forum and not just a particular type of speech.⁶² A prior restraint is when the “government[] restrict[s] speech or publication before its actual expression[,]”⁶³ and such restraint is strongly presumed as constitutionally invalid.⁶⁴

A case that provides a useful analysis of First Amendment protection for students is *Tinker v. Des Moines Independent Community School District*, where a group of high school students decided to wear black armbands to protest the Vietnam War and support a truce.⁶⁵ When the principals became aware of this plan, they implemented a policy that anyone wearing an armband would be asked to take it off, and if any student did not remove the armband, the student would be suspended and could not return until it was removed.⁶⁶ The U.S. Supreme Court held that for a school to infringe upon a student's free speech right, the speech must lead school authorities “to forecast substantial disruption of or material interference with school activities.”⁶⁷ In this case, the Court found no indication that there was any disruption in the classroom and that no violent acts occurred on the school grounds;⁶⁸ thus, the school could not deny the students' form of expression in wearing the black armbands.⁶⁹

62. Patrick Stubblefield, Note, *Evading the Tweet Bomb: Utilizing Financial Aid Agreements to Avoid First Amendment Litigation and NCAA Sanctions*, 41 J.L. & EDUC. 593, 597 (2012).

63. *Id.* (quoting BLACK'S LAW DICTIONARY 1314 (9th ed. 2009)).

64. *Id.* at 597.

65. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504 (1969).

66. *Id.*

67. *Id.* at 514.

68. *Id.*

69. *Id.*

Although *Tinker* dealt with minor high school students, the Court later opined that “the First Amendment rights of speech . . . extend to the campuses of state universities”⁷⁰ because they are “not enclaves immune from the sweep of the First Amendment [, and] ‘[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.’”⁷¹ Courts generally balance the student’s right to free speech with the “preservation of order and a proper educational environment.”⁷² To prohibit student-athletes’ speech, the school needs to show that the speech “materially disrupts class work, creates substantial disorder, invades the right of others, or [that] it is reasonably foreseeable that the speech will do so.”⁷³ This disruption requires “a specific and significant fear of disruption, not just some remote apprehension of disturbance.”⁷⁴

The requirement that the speech “materially disrupts class work, creates substantial disorder, invades the right of others, or [that] it is reasonably foreseeable that the speech will do so”⁷⁵ is important. If schools ban Twitter use completely, there could be an issue because these schools are essentially limiting the student-athletes’ speech without a specific and significant fear of disruption.⁷⁶ Some players on the team may have abused Twitter with suggestive or inappropriate tweets, but many of the players probably have not. The schools that are banning Twitter based on speculation of future speech (i.e., that a student-athlete may tweet something suggesting a potential violation or something that *could* tarnish his or the school’s reputation), seem to be banning Twitter based on an apprehension of disturbance, which is not enough to ban students’ speech under *Tinker* and is likely a prior restraint.⁷⁷

Schools may be able to justify their Twitter regulation or ban based on the type of speech or the type of tweets that the student-athletes are sending. For example, a school may have more cause to reasonably predict and fear disruption if student-athletes are tweeting about those who are directly regulating their speech such as the schools or coaches because it is more likely to receive attention by causing distractions and negative effects.⁷⁸

70. *Widmar v. Vincent*, 454 U.S. 263, 268–69 (1981) (citations omitted).

71. *Healy v. James*, 408 U.S. 169, 180 (1972) (quoting *Tinker*, 393 U.S. at 506).

72. Autumn K. Leslie, Note, *Online Social Networks and Restrictions on College Athletes: Student Censorship?*, 5 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 19, 27 (2008).

73. *Id.*

74. *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 211 (3d Cir. 2001).

75. Leslie, *supra* note 72, at 27.

76. *See Saxe*, 240 F.3d at 211.

77. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969); *Saxe*, 240 F.3d at 211.

78. *See Noel Johnson*, *Tinker Takes the Field: Do Student Athletes Shed Their Constitutional*

UNC's new social media policy makes it unlikely that UNC will be subject to any First Amendment free speech claims. The social media policy states:

[T]he Department of Athletics will not tolerate disrespectful comments and behavior online, such as:

- Derogatory or defamatory language;
- Comments that create a serious danger to the safety of another person or that constitute a credible threat of serious physical or emotional injury to another person; [and]
- Comments or photos that describe or depict unlawful assault, abuse, hazing, harassment, or discrimination; selling, possessing, or using controlled substances; or any other illegal or prohibited conduct, including violating the University's Policy on Prohibited Harassment and Discrimination.⁷⁹

According to *Tinker*, school authorities can limit speech when there is a "substantial disruption of or material interference with school activities."⁸⁰ It is likely that the comments and behaviors listed in UNC's policy could qualify as a substantial disruption or material interference. Although "[s]chools may penalize students for specific Tweets or posts that are likely to lead [to] 'substantial disruption of or material interference' with the team and its activities, [they] cannot impose a prior restraint on athletes in mere anticipation of such a comment."⁸¹ However, with UNC's policy, the school punishes student-athletes only if the student-athletes specifically violate one of the broad categories of comments and behaviors listed in the policy, and UNC still allows student-athletes to tweet.⁸² Additionally, the policy may not be considered a prior restraint because certain specific language is not banned and students are not punished for the mere anticipation of tweeting—they are only punished once they specifically violate the speech rules.⁸³

Rights at the Locker Room Gate?, 21 MARQ. SPORTS. L. REV. 293, 312 (2010).

79. UNC SOCIAL MEDIA POLICY, *supra* note 51, at 1–2.

80. *Tinker*, 393 U.S. at 514.

81. Eric P. Robinson, *Intentional Grounding: Can Public Colleges Limit Athletes' Tweets?*, DIGITAL MEDIA L. PROJECT (Nov. 9, 2010), http://www.citmedialaw.org/blog/2010/intentional-grounding-can-public-colleges-limit-athletes-tweets?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+CitizenMediaLawProject+%28Citizen+Media+Law+Project%29 (quoting *Tinker*, 393 U.S. at 514).

82. See UNC SOCIAL MEDIA POLICY, *supra* note 51, at 1–2.

83. *See id.*

B. Fourteenth Amendment Equal Protection Claim

Another way that universities can infringe on student-athletes' constitutional rights is by treating them differently than others who are similar. The Constitution requires that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."⁸⁴ Thus, public universities, as state actors, need to be conscious of the potential for equal protection claims if they are treating those that are similarly situated differently.⁸⁵

With respect to an equal protection claim, the school is subject to various levels of scrutiny depending upon whom the school is allegedly discriminating against.⁸⁶ Strict scrutiny is the highest level and is triggered only if the discrimination is based on a suspect class such as race.⁸⁷ To defend against an equal protection claim involving a suspect class, the school needs to prove that its rule or policy furthers a "compelling government interest," and there is no presumption that the policy is constitutional.⁸⁸

If the discrimination is gender-related, the school needs to show a substantial relationship between the ends and the means in order to justify its policy.⁸⁹ This intermediate scrutiny is greater than if the discrimination is just between students and not related to gender but is less than if a policy discriminates against a suspect class.⁹⁰ To defend against this claim, schools will have to show a substantial relationship between their Twitter policy and the ends they are trying to achieve. However, if the school's policy is not for just one race or gender, but instead applies to all athletes or students, then the rational basis test applies.⁹¹

The rational basis test is most likely the standard that courts will use to address an equal protection claim in this situation. To defend itself, the school simply needs to show a rational relationship between its Twitter policy and the

84. U.S. CONST. amend. XIV, § 1.

85. See *Equity in Athletics, Inc. v. Dep't of Educ.*, 639 F.3d 91, 108 (4th Cir. 2011) (stating that to survive a motion to dismiss on an equal protection claim, a plaintiff needs to demonstrate that "he was treated differently from others who were similarly situated . . .").

86. See Norman T. Deutsch, *Nguyen v. INS and the Application of Intermediate Scrutiny to Gender Classifications: Theory, Practice, and Reality*, 30 PEPP. L. REV. 185, 186 (2003).

87. *Id.* at 192.

88. Jennifer L. Greenblatt, *Putting the Government to the (Heightened, Intermediate, or Strict) Scrutiny Test: Disparate Application Shows Not All Rights and Powers Are Created Equal*, 10 FLA. COASTAL L. REV. 421, 434 (2009) (citations omitted).

89. See Deutsch, *supra* note 86, at 191.

90. See *id.*

91. See *Christian Heritage Acad. v. Okla. Secondary Sch. Activities Ass'n*, 483 F.3d 1025, 1032 (10th Cir. 2007).

ends it is trying to achieve.⁹²

Typical ends or goals that schools aim to achieve include amateurism,⁹³ academic integrity,⁹⁴ and the health, safety, and morals of the student-athletes.⁹⁵ Additionally, many coaches see Twitter as a distraction or disruption taking away from the athlete's focus on the game, and therefore, a school could seek to prevent disruption on campus, in the classroom, and during athletics.⁹⁶ Although regulating Twitter does not directly accomplish the above goals, doing so prevents athletes from communicating with agents via Twitter, which may violate amateurism rules, and keeps athletes from tweeting negative things about players, coaches, and other teams, which may disrupt the classroom, campus, or athletics. In regulating Twitter use for student-athletes, schools are likely able to prove a rational basis because rules under this standard hold a strong presumption of validity.⁹⁷ However, the school will not pass the rational basis test if its ends and means are "so attenuated as to render the distinction arbitrary or irrational."⁹⁸

If schools are going to regulate or monitor Twitter use for athletes of one sport, they should do the same for the other sports as well by creating one policy for all athletic teams. The schools that regulate and monitor Twitter usage for only the men's football or men's basketball teams need to be careful because the schools are treating athletes of one sport differently from athletes in another sport; therefore, the schools would have to show a substantial relationship between regulating Twitter for one team and not the other and explain the ends they are trying to achieve. This could be possible, but to be safe, it would be best for schools to create a single policy for all student-athletes. By creating a policy for all student-athletes, the rational basis test would apply, and the schools' policies would carry a strong presumption of validity. Schools will likely be able to show a rational basis in that they are

92. See Deutsch, *supra* note 86, at 189.

93. See generally Tyler C. Haslam, Comment, *Leveling the Playing Field: Using Rational Basis with a Bite as Means of Overcoming the NCAA's Violation of Equal Protection*, 37 OHIO N.U. L. REV. 283 (2011).

94. See Matthew J. Mitten & Timothy Davis, *Athlete Eligibility Requirements and Legal Protection of Sports Participation Opportunities*, 8 VA. SPORTS & ENT. L.J. 71, 118 (2008).

95. Stubblefield, *supra* note 62, at 598 (citing Timothy Liam Epstein, *Student-Athlete.O: Regulation of Student-Athlete's Social Media Use: A Guide to Avoiding NCAA Sanctions and Related Litigation*, 1 MISS. SPORTS L. REV. 1, 26 (2011)).

96. See, e.g., Darren Rovell, *Coaches Ban of Twitter Proves College Sports Isn't About Education*, CNBC (Aug. 8, 2011), http://www.cnbc.com/id/44058540/Coaches_Ban_Of_Twitter_Proves_College_Sports_Isn_t_About_Education; Sorensen, *supra* note 27.

97. See Deutsch, *supra* note 86, at 189.

98. Christian Heritage Acad. v. Okla. Secondary Sch. Activities Ass'n, 483 F.3d 1025, 1033 (10th Cir. 2007) (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985)).

trying to prevent disruptions and distractions by eliminating the distraction and not allowing student-athletes to tweet negative things about others and trying to protect amateurism by not allowing student-athletes to tweet to agents or reveal rule violations.

However, even if schools create a social media policy that applies to all student-athletes, these schools still may be subject to equal protection claims. Student-athletes are still students; therefore, if only the student-athletes are subject to regulations and penalties for using Twitter and the rest of the student body is not, then the schools may not be treating those similarly situated alike. Student-athletes may argue that they are students and are being treated differently than other students who are not athletes. Again, the rational basis test would apply in this situation, and schools could argue that the athletes are subject to higher regulations due to the nature of participating in college athletics and that the policy helps to protect amateurism by not letting student-athletes tweet to agents or tweet personal details suggesting rule violations.

With respect to UNC, although each team is able to choose a “Team Monitor,” UNC is likely protected from an equal protection claim because its new policy is applicable to all student-athletes.⁹⁹ The policy is not limited to men’s football or men’s basketball and applies to men’s and women’s sports alike.¹⁰⁰ Therefore, an equal protection claim brought by any student-athlete will be judged with the rational basis test. As such, UNC will only need to show a rational relationship between its new policy (the means) and what the school is trying to achieve (the ends). There are numerous reasons the school could use to justify its policy: to protect the health, safety, and morals of the players; to maintain the school’s reputation; and to permit other students to use the student-athletes as role models. Because the rational basis test is used and there is a strong presumption that the policy is valid, UNC will likely prevail if a student-athlete brings an equal protection claim as the policy seems to protect player safety, the role model image of the student-athletes, and the school’s reputation and hopes to prevent disruption, distraction, and potential amateurism violations,¹⁰¹ all of which are valid ends.

C. Fourth Amendment Privacy Claim

Regardless of who must abide by the school’s social media or Twitter policy, the schools may be subject to privacy claims as the Fourth Amendment of the U.S. Constitution protects individuals from unreasonable searches and

99. UNC SOCIAL MEDIA POLICY, *supra* note 51.

100. *See id.*

101. *See id.*

seizures by the government.¹⁰² This protection extends to student-athletes “when the government acts as the administrator of an athletic program in a state school or university.”¹⁰³ To determine whether a government search of a student-athlete is reasonable, and therefore constitutional, the court “balance[s] individual student athletes’ privacy expectations against [the university’s] governmental interests”¹⁰⁴

For example, in *University of Colorado v. Derdeyn*, the Supreme Court of Colorado considered whether the school’s random, suspicionless drug testing policy was constitutional.¹⁰⁵ Colorado argued that student-athletes have a diminished expectation of privacy and that there were “compelling governmental interests served by the program” that made its policy reasonable.¹⁰⁶ The court balanced the degree of intrusion on the student-athletes’ reasonable expectation of privacy with the government’s interests in the program to determine the program’s reasonableness.¹⁰⁷ In addressing these two components, the court noted that “it cannot be said that university students, simply because they are university students, are entitled to less protection than other persons under the Fourth Amendment.”¹⁰⁸

Moreover, the school argued that even if its drug testing program is unreasonable, the student-athletes voluntarily consented to the program so there can be no violation of their constitutional rights.¹⁰⁹ A warrantless search can be reasonable “if the individual has voluntarily consented to it,”¹¹⁰ which means that the consent was given “intelligently and freely . . . without any duress, coercion or subtle promises or threats.”¹¹¹ It is up to the government, in this case the university, to prove that the individual consented voluntarily to the search.¹¹² In *Derdeyn*, the student-athletes had to sign consent forms submitting to drug testing before they were able to play sports or receive an athletic scholarship.¹¹³ The court held that the student-athletes’ consent was

102. U.S. CONST. amend. IV.

103. *Univ. of Colo. v. Derdeyn*, 863 P.2d 929, 936 (Colo. 1993) (citations omitted).

104. *Id.*

105. *Id.* at 930.

106. *Id.* at 936.

107. *Id.* at 937.

108. *Id.* at 938. This is different from high school students, who do have a diminished expectation of privacy as minors. *See, e.g., Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 657 (1995); *New Jersey v. T.L.O.*, 469 U.S. 325, 338–39 (1985).

109. *Derdeyn*, 863 P.2d at 946.

110. *Id.* (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973)).

111. *Id.* (quoting *People v. Carlson*, 677 P.2d 310, 318 (Colo. 1984)).

112. *Id.*

113. *Id.* at 949.

not voluntary because the student-athletes had no choice in consenting if they wanted to participate in sports, and it found that the school's drug testing program was unconstitutional.¹¹⁴

The success of student-athletes' privacy claims is based on what schools will be allowed to legally monitor in the future, which depends on (1) what student-athletes have a reasonable expectation of privacy in (i.e., their social media accounts, personal e-mails, text messages) and (2) the government interest met by the intrusion.¹¹⁵ Alternatively, if a university can show that its student-athletes voluntarily consented to have their Twitter accounts monitored, then the university searching such social media will be found reasonable.¹¹⁶

Privacy claims by student-athletes could provide an issue for UNC. If a student-athlete brings a privacy claim against UNC, a court will balance the student-athlete's privacy expectations against UNC's governmental interests,¹¹⁷ taking into account the fact that the student-athletes are not necessarily subject to less Fourth Amendment protection just because they are student-athletes.¹¹⁸ By having team monitors regularly monitor the student-athletes' Twitter accounts, UNC is performing a warrantless search, which is generally prohibited by the U.S. Constitution but can be considered reasonable if the student-athletes voluntarily consent to the search without duress or coercion.¹¹⁹

In looking at *Derdeyn*, where the court found that student-athletes' signed consent forms subjecting them to drug testing as a prerequisite to play was not voluntarily signed by the student-athletes, UNC's policy may not be voluntary either. The policy requires team monitors to "*hav[e] access to, [to] regularly monitor[] the content of, and/or [to] receiv[e] reports about team members' social networking sites and postings.*"¹²⁰ Thus, it seems that student-athletes are required to provide team monitors with their Twitter (and other social networking websites) usernames so that they can be monitored.¹²¹ Moreover, if student-athletes' Twitter accounts are private, UNC's policy also seems to imply that the student-athletes will need to accept follower requests from the team monitor so that he or she can actually monitor the content of the student-

114. *See id.* at 949–50.

115. *See* U.S. CONST. amend. IV; *Derdeyn.*, 863 P.2d at 939.

116. *See Derdeyn*, 863 P.2d at 946.

117. *See id.* at 936.

118. *See id.* at 938.

119. *Id.* at 946.

120. UNC SOCIAL MEDIA POLICY, *supra* note 51, at 2 (emphasis added).

121. *See id.*

athlete's tweets.¹²² It is questionable whether this would be done purely voluntarily or if it would be done under coercion with a threat to bar athletic eligibility.

However, the ultimate decision may fall on whether student-athletes have a reasonable expectation of privacy in their social media accounts and tweets. If student-athletes do not have a reasonable expectation of privacy in their tweets, it will not matter whether they voluntarily consent to the search of such social media.¹²³ Additionally, UNC may be able to argue that its governmental intrusion is small when taking into account other situations. For example, if drug tests can be found constitutional,¹²⁴ which are far more intrusive than monitoring social media accounts, then the policy may be reasonable and, therefore, constitutional.

Having a policy in place is a good start for UNC. However, UNC may want to change parts of the policy, especially those requiring student-athletes to provide the team monitors with access to private social media accounts (even if the student-athlete has a private account), to make sure that the school does not see lawsuits from student-athletes while still being aware of student-athletes' Twitter use. Being aware of student-athletes' tweets will help preclude a NCAA investigation and limit future penalties for universities and their teams.

IV. TWITTER REGULATIONS AROUND THE COUNTRY: ARE THEY CONSTITUTIONAL?

Although UNC changed its social media policy for its student-athletes following an NCAA investigation to provide for more monitoring of social media accounts,¹²⁵ policies and procedures by other schools vary throughout the country.¹²⁶ Some schools have hired software companies to help monitor their student-athletes' Twitter accounts.¹²⁷ Other schools have banned Twitter altogether,¹²⁸ set in-house rules regarding the use of Twitter,¹²⁹ or taken a

122. *See id.*

123. *See Derdeyn*, 863 P.2d at 936.

124. *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 679 (1989).

125. *See generally* UNC SOCIAL MEDIA POLICY, *supra* note 51.

126. *See, e.g.*, Ryan Burnett, *Keeping Social Media Social; Colleges Find Need to Monitor Athletes' Posts*, SPOKESMAN REV. (Spokane, Wash.), Mar. 10, 2011, at B3; Ray Fittipaldo, *Social Conflicts Twitter, Facebook and Free-Speech Rights Make Strange Bedfellows with Pro Teams and College Athletics*, PITTSBURGH POST-GAZETTE, May 16, 2011, at D1; Stephen Gross, *Just Set Boundaries, in Should College Football Coaches Ban Tweeting?*, BALT. SUN, Sept. 6, 2011, at 2D; Catherine Ho, *Keeping Tabs on College Athletes*, WASH. POST, Oct. 17, 2011, at A16.

127. Solomon, *supra* note 9.

128. Gross, *supra* note 126 (noting that banning football athletes from using Twitter has

hands-off approach with no rules or bans.¹³⁰ In addition, some schools decided to regulate social media use for the entire athletic department, but some, like the University of Washington, let the individual head coaches set their own policies.¹³¹

Regardless of rules and regulations, schools are likely monitoring their student-athletes' Twitter accounts in some way. One way is through a third-party company, such as UDiligence or Varsity Monitor.¹³² UDiligence has "athletes install an app[lication] on their Twitter accounts[,] . . . and when something harmful is said the system automatically notifies the athlete and either a head coach or media director."¹³³ In addition to the tweets, UDiligence also searches the student-athletes' profiles, captions under posted pictures, and comment areas to locate anything troubling or impermissible.¹³⁴ Similarly, Varsity Monitor "provides monitoring services that help verify that policies are being followed."¹³⁵ This service monitors and analyzes various social media accounts for "inappropriate, illegal, or unethical content" using manual and automated methods of monitoring and alerts coaches and school administration if something is found.¹³⁶ Varsity Monitor also takes the extra step and attempts to locate any fake or imposter user accounts in addition to just monitoring pure compliance-related issues, and it educates student-athletes and coaches on "social media best practices" and how to create a social media policy.¹³⁷

However, are these rules, regulations, and monitoring choices by college and universities constitutional?

occurred at South Carolina, Boise State, and Kansas).

129. Ho, *supra* note 126. The University of Maryland set ground rules for student-athletes using social media sites that encourage students "to think twice before using slurs about race, religion or sexual orientation, to follow NCAA rules, and to monitor comments for offensive language." *Id.*

130. See Fittipaldo, *supra* note 126. The University of Pittsburgh's athletic director chose to not impose a social media policy at the university but instead decided "to educate the athletes and trust them to make good decisions." *Id.*

131. See Burnett, *supra* note 126.

132. Ford, *supra* note 8. These programs does not have access to the student-athletes' private messages or direct messages on Twitter and Facebook; rather, it screens student-athletes' public posts for certain buzz words and other potential problems. *Id.*

133. Burnett, *supra* note 126 (quoting the CEO of UDiligence, Kevin Long).

134. *Why Use UDiligence?*, *supra* note 18.

135. *Learn How Varsity Monitor Keeps You in the Game*, VARSITY MONITOR, <http://www.varsitymonitor.com> (last visited Mar. 23, 2013).

136. *Solutions*, VARSITY MONITOR, <http://www.varsitymonitor.com/solutions.php> (last visited Mar. 23, 2013).

137. *Id.*

A. Allowing Student-Athletes to Use Twitter as They Wish

This option is the most basic: by allowing student-athletes to use Twitter whenever, wherever, and however they would like to, student-athletes will have no constitutional claim against the college or university as their rights will not be infringed upon. But, even if a school chooses to do nothing by not creating any rules or banning student-athletes from Twitter, it is still in the school's best interest to find a way to monitor its student-athletes. Schools that want to do nothing about student-athletes' Twitter usage are likely choosing this option to save on time and money. Therefore, the monitoring options for these schools are limited and will likely involve manual monitoring from coaches or staff members.

B. Allowing Twitter Usage Subject to Rules and Guidelines

A less controlling way to regulate student-athletes' Twitter use is to impose in-house rules regarding Twitter use, which allow student-athletes to tweet while making sure the tweets are appropriate.¹³⁸ For example, Alabama football players are not allowed to tweet anything related to their team, and Georgia football players are "encouraged not to tweet when out on the town."¹³⁹ Kentucky tells its players that they can tweet, but before clicking tweet, they should pretend they are in an interview and begin each tweet with "Dear General Manager."¹⁴⁰ Using in-house rules puts student-athletes on notice that there are rules to follow regarding Twitter usage, which are just like any other team rule and can have penalties.

These guidelines can be included in the financial aid agreement, school policies, or team handbooks. Because the wording of and what is included in the financial aid agreement is decided by each school,¹⁴¹ it would be easy for the school to unambiguously lay out a Twitter policy that the student-athletes would need to agree to before signing and playing for the team.¹⁴² Rules could include limitations such as no tweeting on game days or within a time frame before and after the game; no tweeting if alcohol is involved; and no tweeting about coaches, staff, players, officials, or fans. Conversely, the rules could urge the sending of positive tweets like thanking fans for support or

138. See Marcello, *supra* note 7.

139. Solomon, *supra* note 9.

140. *Id.*

141. Stubblefield, *supra* note 62, at 599 (citing Kevin Stangel, *Protecting Universities' Economic Interests: Holding Student-Athletes and Coaches Accountable for Willful Violations of NCAA Rules*, 11 MARQ. SPORTS L. REV. 137, 144 (2000)).

142. *Id.* at 599.

getting fans excited for an upcoming game.

C. Completely Banning Twitter

The most stringent option is to ban student-athletes' use of Twitter completely. A ban could be a season-long ban or even a ban for the whole time the athlete is a student-athlete and enrolled at the school. Boise State and New Mexico State football players, like MSU basketball players, are banned completely from using Twitter during the season.¹⁴³ By not allowing student-athletes to use Twitter during their sport seasons and allowing them to tweet during the off-season, schools are still providing the student-athletes with the chance to use Twitter and connect with fans when their focus is not solely on sports.

Schools may have legal benefits for banning Twitter instead of setting rules. An in-season ban is more beneficial than a permanent ban because the student-athletes, like UNC student-athletes, would still be able to tweet (albeit only during the off-season), possibly precluding a free speech claim. Moreover, the schools would likely escape an equal protection claim because they would not be treating male athletes differently from female athletes. Further, there would likely be at least a rational basis for banning Twitter usage for student-athletes as opposed to general students because student-athletes represent their schools publicly, which can lead to direct effects upon the respective school's reputation, and schools have an interest in protecting the health, safety, and morals of their student-athletes. Additionally, there may not be many privacy implications with a Twitter ban because student-athletes would not need to turn over any account information and the schools would not need to install monitoring devices on student-athletes' accounts. However, student-athletes may try to find ways to get around this by having a private or personal account where only friends have access, by making up a unique Twitter name, or by not using their real names on the account at all. Therefore, schools still need to use a monitoring technique to ensure their student-athletes are actually not tweeting.

V. RECOMMENDATIONS FOR COLLEGES AND UNIVERSITIES

With the NCAA's notice and investigation of UNC, it is clear that the NCAA, although not directly regulating Twitter use nationally, is looking for colleges and universities to take control of their own student-athletes. Each option varies in the amount of time and effort that coaches and other staff will need to put in and also in how much money it will cost the school to

143. Fittipaldo, *supra* note 126.

implement the policy. Regardless of which option schools choose, the schools will still need to be proactive and monitor the student-athletes at least when they have notice that a violation may be occurring and the tweets may provide information about the violation.

In addition to monitoring student-athletes' Twitter accounts, public colleges and universities should embrace Twitter by allowing student-athletes to use it to interact with fans while still protecting themselves from legal action by student-athletes. Allowing students to roam free using Twitter is too lenient of a policy, but not allowing them to use Twitter at all with a complete ban is too strict. First, colleges and universities should allow students to use Twitter but should also educate the student-athletes on using Twitter appropriately and how to tweet positively.¹⁴⁴

Second, schools should set in place rules that apply for all student-athletes instead of just one particular team. By setting a school-wide athletic policy, the school will likely avoid being subject to equal protection claims brought by student-athletes as the athletic department would be treating all student-athletes alike. Additionally, student-athletes are under more restrictions than non-student-athletes, and other non-student-athletes do not need to abide by the same team, league, and NCAA policies as the student-athletes. The school can incorporate its athletic department policy and rules into forms, particularly the financial aid agreement, that the student-athletes are required to sign and abide by, forming the contractual relationship between the student-athlete and the school or team. One rule that should be considered is a game-day ban on Twitter. The athletes would not be distracted before a game by thinking they need to tweet fans, and it allows for a cool-down period following games in case the athlete is upset about a referee's call, playing time, or other dissatisfactions. Setting rules and imposing a game-day ban would likely not implicate free speech claims as student-athletes can still speak freely, but one avenue of speech is restricted for a day or short period.

Finally, schools need to use their compliance staff to monitor and investigate Twitter accounts when there is notice of a possible violation without invading student-athletes' privacy. One way to monitor student-athletes could be through a third-party company, but the use of the company may be too expensive.¹⁴⁵ UDiligence and Varsity Monitor maintain

144. For example, the National Collegiate Scouting Association put together the "Top 20 Best Practices for Student-Athletes Living in a Social World," which could be a starting point. *Top 20 Best Practices for Student-Athletes Living in a Social World*, NCSASPORTS.ORG, http://issuu.com/sarahhindner/docs/top20_bestpractices_socialworld_ebook?mode=window&backgroundColor=%23222222 (last visited Mar. 23, 2013).

145. "[P]ublished reports place [Varsity Monitor] at approximately \$1,000 to \$1,500 per team per year for Division I schools." Ford, *supra* note 8.

that the student-athletes voluntarily install the monitoring applications on their Twitter accounts; therefore, it is not a violation of their privacy because the student-athletes' consent (by voluntarily installing the application) acts as a waiver of a potential privacy claim.¹⁴⁶ However, it is highly questionable whether the student-athletes voluntarily install the monitoring applications on their Twitter accounts. Based on the court's decision in *Derdeyn*, it seems that if a school makes it a condition of the student-athletes' athletic participation that the program be installed or account information be turned over to the athletic department, then the student-athletes are likely not complying purely voluntarily but rather under coercion, which may lead to a privacy violation.¹⁴⁷ However, because of the contractual relationship between student-athletes and their respective schools (based on the National Letter of Intent, financial aid agreement, and other university publications), student-athletes "promise to comply with the rules and regulations of their particular institution, athletic conference, and the athletic association."¹⁴⁸ If the athletic department requires the student-athlete to provide social media accounts and usernames, then that signed contract may serve as a waiver of the student-athlete's claim.

VI. CONCLUSION

Student-athletes represent more than just themselves: they represent their coaches, their team, their school, their conference, and even the NCAA. Thus, student-athletes have more rules and regulations to abide by and a positive reputation to maintain. Because Twitter is becoming more popular each day, particularly with college students, it is important for student-athletes to understand the implications of their tweets. Student-athletes need to think twice about tweeting because they are more likely to face penalties than the average Twitter user or student.

It is clear that schools need to monitor their student-athletes' use of Twitter in some way; these schools have several options for doing so, but the legal implications of each vary. Schools should educate students on how to properly use Twitter then set rules for when tweets can be sent and what information should and should not be tweeted. This recommendation should not violate student-athletes' constitutional rights and should reduce the fear that student-athletes' tweets could lead to NCAA sanctions. It is critical for

146. Tim Epstein, *The Legal Ramifications of Addressing Student-Athletes' Social Media Use*, DRI TODAY (Oct. 27, 2011, 4:06 PM), <http://dritoday.org/post/The-Legal-Ramifications-of-Addressing-Student-Athletes28099-Social-Media-Use.aspx>.

147. See *Univ. of Colo. v. Derdeyn*, 863 P.2d 929, 947 (Colo. 1993).

148. See MITTEN ET AL., *supra* note 6, at 112.

schools and compliance departments to search Twitter accounts as a part of their regular investigations. Technology is changing, and compliance departments need to learn to embrace it and incorporate it into their NCAA-mandated duties.