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Your Coach is Watching: Can a High School Regulate its Student-Athletes' Use of Social Media?

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YOUR COACH IS WATCHING: CAN A HIGH SCHOOL REGULATE ITS STUDENT-ATHLETES' USE OF SOCIAL MEDIA?

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I. INTRODUCTION

Imagine your high school coach sitting next to you as you socialize after school at the local coffee shop, joining you at your weekend sleepover with your teammates, or scrutinizing your intimate conversations with your best friend. Then, imagine being punished for the conduct your coach witnessed. In today's world of social media, high school coaches do just that. Not only do coaches and other school officials monitor student-athletes' social media usage, but they punish these individuals for their conduct.

High schools may not merely act pursuant to their whims and desires when implementing regulations regarding student-athletes' use of social media. Public high schools are subject to the constitutional constraints of the First Amendment's right to free speech. Pursuant to the Supreme Court's landmark decision in *Tinker v. Des Moines Independent Community School District*, students retain some of their First Amendment rights when under school control.[1] Therefore, schools must be cognizant of the restraints presented by the First Amendment, *Tinker*, and other jurisprudence when determining if they will regulate their student-athletes' social media use.[2]

This Comment will discuss whether a public high school can regulate its student-athletes' usage of social media. First, it will discuss issues that arise regarding a public high school's regulation of its student-athletes' social media

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[1] *See generally* 393 U.S. 503 (1969).

[2] *See generally id.*

use. Next, it will review the legal precedent regarding students' First Amendment right to free speech, using each case to pinpoint types of speech a school can legally regulate and punish. Finally, it will provide an overview of whether a public high school may regulate its student-athletes' speech occurring via social media without violating the First Amendment, as well as the types of speech a school may regulate when taking into account where the speech occurs.

II. HIGH SCHOOL STUDENTS' USE OF SOCIAL MEDIA

Public high schools face difficulties when attempting to regulate its students' speech occurring through social media because it often occurs outside of school. Today, social networking sites, such as Facebook, Google Plus, Twitter, and blogs, are widely available and easily accessible to high school students.[3] Currently, high schools across the nation are dealing with the conundrum of whether they can legally regulate and punish their students' social media usage and whether they will do so.[4] This dilemma extends to the schools' student-athletes.[5]

With the increased availability and use of various forms of social media, high schools have begun regulating their students' posts on these platforms.[6] Some current social media policies for high school students prohibit "malicious use, demeaning statements, threats, incriminating photo[graphs or] statements, hazing, sexual harassment, vandalism, stalking, underage drinking, [and] illegal drug use."[7] Others prohibit conduct that is "unbecoming" of a student-athlete.[8] However, the question remains as to whether these current regulations violate student-athletes' First Amendment right to free speech.[9]

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[3] *See generally* Travis Jarome, *Positive Utilization of Social Networking*, NFHS.COM, https://www.nfhs.org/media/865861/wkshp-39-innskeep-jarome.pdf (last visited Nov. 20, 2014); Paul D. Mengold, *Appropriate Use of Electronic Media by Coaches*, NFHS.COM, http://www.nfhs.org/media/868971/WS23%20and%2029%20(Mengold).pdf (last visited Nov. 20, 2014).

[4] *See generally* Lee E. Green, *Sports Law Issues in School Athletic Programs*, MSADA-MD.ORG, http://www.msada-md.org/ckfinder/userfiles/files/NIAAA%202011%20Closing%20General%20Session%20-%20Social%20Media%20Law.ppt (last visited Nov. 20, 2014); Jim Inskeep, *Positive Utilization of Social Media and Strategies for Your Athletic Department*, https://www.nfhs.org/media/865861/wkshp-39-innskeep-jarome.pdf (last visited Nov. 20, 2014); Jarome, *supra* note 7; Mengold, *supra* note 7.

[5] *See generally* Green, *supra* note 4; Inskeep, *supra* note 4; Jarome, *supra* note 3; Mengold, *supra* note 3.

[6] *See* Jarome, *supra* note 3.

[7] *Id. See generally* Green, *supra* note 4.

[8] *See* Inskeep, *supra* note 4.

[9] *See generally* Green, *supra* note 4; Jarome, *supra* note 3.

III. THE DEVELOPMENT OF FREE SPEECH IN PUBLIC HIGH SCHOOLS

Because public high schools are state actors, they must act in accordance with the First Amendment of the Constitution.[10] Jurisprudence regarding free speech in public high schools has addressed various mediums of speech, while consistently applying the fundamental principles articulated in *Tinker* to largely protect student speech. Because students continue to allege that public high schools have violated their First Amendment rights, a school's permissible regulation of its student-athletes' speech continues to be at issue.

A. Regulation of High School Students' Speech

In certain circumstances, public high schools may regulate the general student population's speech without violating the First Amendment. In general, courts have separated speech into three categories: (1) speech causing or creating a reasonably foreseeable risk of a substantial disruption to the school environment; (2) vulgar, lewd, obscene, or plainly offensive speech; or (3) school-sponsored speech.[11]

1. The *Tinker* Standard: Substantial Disruption

In general, a public high school may regulate a general student's speech occurring at school or off-school grounds if the speech involved is substantially disruptive to the school environment.[12] The fundamental United States Supreme Court decision regarding students' right to free speech is *Tinker v. Des Moines Independent Community School District*.[13] In this case, high school students were suspended for wearing armbands to school to show their disapproval of the Vietnam conflict after the defendants, various school officials, implemented a policy prohibiting the protest.[14] The Court found the display was not "actually or potentially disruptive" to the school environment.[15] Further, the Court went on to posit that a school must show "its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" when prohibiting student speech.[16] The Court determined that without a sufficient reason for regulating students'

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[10] *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507 (1969).

[11] Chandler v. McMinnville Sch. Dist., 978 F.2d 524, 529 (9th Cir. 1992).

[12] *See generally Tinker*, 393 U.S. 503.

[13] *Id.*

[14] *Id.* at 504.

[15] *Id.* at 505.

[16] *Id.* at 509.

speech, schools must allow students to speak freely because schools are a "'marketplace of ideas,'" a place for the dissemination of various thoughts.[17]

The Court noted that the speech involved was a "silent, passive expression of opinion."[18] This characterization distinguished the speech from cases in which the behavior caused a disruption to the school environment—an instance in which a school may regulate student speech.[19] Because students are still entitled to First Amendment rights within the school setting, the Court found the prohibition and punishment of the speech to be a violation of the students' First Amendment right to free speech.[20] Further, the Court determined the conduct did not "intrude in the school affairs or the lives of others," creating a substantial disruption; therefore, punishment of the speech was a violation of the students' First Amendment right to free speech.[21]

This landmark decision established that students are still entitled to their First Amendment free speech rights, albeit limited in some respects, while within the confines of a school.[22] However, in more modern cases involving rampant retweeting or reposting of social media messages that invade the school, the outcome may be different because of the potential for the substantial disruption to the school environment.[23] Regardless, *Tinker* provides the pivotal starting point—substantial disruption of the school environment—in analyzing public high school students' right to free speech pursuant to the First Amendment.[24]

a. Interpretation of the Tinker *Standard*

Although not all decided by the United States Supreme Court, subsequent cases have further defined the Court's substantial disruption standard in the con-

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[17] *Id.* at 511–12 (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)) (discussing the importance of sharing ideas because students are the nation's future).

[18] *Id.* at 508.

[19] *See generally supra* Part II.A.

[20] *Tinker*, 393 U.S. at 506.

[21] *Id.* at 514. The Ninth Circuit examined a similar issue regarding the use of the word "scab" on various buttons and stickers worn by students in support of striking teachers. Chandler v. McMinnville Sch. Dist., 978 F.2d 524, 526 (9th Cir. 1992) (reversing the district court's dismissal of the students' case for failure to state a claim).

[22] *See generally Tinker*, 393 U.S. 503.

[23] This type of speech would likely be examined under the substantial disruption test described in this section.

[24] *See generally Tinker*, 393 U.S. 503.

text of the school's interest in maintaining "'order and a proper educational environment.'"[25] Generally, the nature of the disruption must cause "'a specific and significant fear of disruption, not just some remote apprehension of disturbance'" to be substantial under the standard set forth in *Tinker*.[26]

i. In-School Speech

In the United States Supreme Court case *Morse v. Frederick*, the plaintiff, Joseph Frederick, a high school senior, displayed a banner at a school-sanctioned event that read "BONG HiTS 4 JESUS."[27] Based upon the student's conduct and his refusal to takedown the banner, the principal suspended him and confiscated the banner.[28] The plaintiff sued, alleging the punishment violated his First Amendment right to free speech.[29] However, the Court held that the punishment did not violate the First Amendment, characterizing the plaintiff's speech as in-school speech because it occurred at a school-sanctioned event.[30] In making its determination, the Court noted the important interest schools have in deterring illegal drug use, pointing to its immense impact on the high school environment.[31] The interest of curbing drug use coupled with the perceived potential disruption to the school environment composed the basis of the Court's decision.[32]

In *LaVine v. Blaine School District*, the Ninth Circuit concluded that a public high school's emergency expulsion of a student was not a violation of his First Amendment rights, but the placement of a letter in his student file detailing the incident was.[33] The student wrote a poem entitled *Last Words*, depicting murder and suicide.[34] He gave the poem to his English teacher to review and provide feedback.[35] The student sued alleging his punishment violated his First

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[25] Kayleigh R. Mayer, Comment, *Colleges and Universities All Atwitter: Constitutional Implications of Regulating and Monitoring Student-Athletes' Twitter Usage*, 23 MARQ. SPORTS L. REV. 455, 464 (2013) (quoting Autumn K. Leslie, Note, *Online Social Networks and Restrictions on College Athletes: Student Censorship?*, 5 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 19, 27 (2008)).

[26] *Id.* (citations omitted); *see also Tinker*, 393 U.S. 503.

[27] 551 U.S. 393, 397 (2007).

[28] *Id.* at 396.

[29] *Id.* at 399.

[30] *Id.* at 397, 410.

[31] *Id.* at 407.

[32] *Id.* at 408.

[33] *See generally* 257 F.3d 981 (9th Cir. 2001).

[34] *Id.* at 983–84.

[35] *Id.* at 984.

Amendment right to free speech.[36] In discussing its decision, the court noted that it grants educators "substantial deference" in determining when speech is inappropriate.[37] The court found that the emergency expulsion did not violate the student's First Amendment rights because the school could reasonably predict the speech would cause a substantial disruption to the school environment based upon a consideration of the totality of the circumstances, i.e. his previous suicidal thoughts, family problems, recent break up and alleged stalking of his ex-girlfriend, and past disciplinary problems.[38] Conversely, the letter placed in his file was a violation of his First Amendment right because a permanent documentation of the incident that would potentially cause harm to him in the future was not needed, given that he was no longer a threat to himself or others.[39] Overall, the school was able to permissibly regulate the student's speech during the period in which it may have caused a substantial disruption.[40] However, as soon as that time had passed, the necessity of regulation was no longer warranted; therefore, continued regulation constituted a violation of his First Amendment right.[41]

Based upon the foregoing case law, a public high school may regulate its students' speech that causes or potentially creates a substantial disruption to the school environment. In-school speech includes speech occurring at off-ground, school-sponsored events, such as field trips and athletic events.[42] Speech characterized as promoting illicit drug use, fighting words, or threats occurring in-school may also be regulated without violating the First Amendment. Accordingly, a public high school may regulate its students' speech occurring in-school that does or is reasonably likely to create a substantial disruption.

ii. Out-of-School Speech

In *Fenton v. Stear*, the plaintiff, Jeffrey Lynn Fenton, a high school student, brought an action against the defendants, various employees of the school district, for violating his First Amendment right to free speech when the school suspended him and prohibited him from attending his senior trip.[43] The plaintiff called Defendant Stear, the plaintiff's teacher, a "prick" after school hours and

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[36] *Id.* at 986.

[37] *Id.* at 988.

[38] *Id.* at 989–90.

[39] *Id.* at 992.

[40] *Id.* at 989.

[41] *See id.* at 992.

[42] *See* Pinard v. Clatskanie Sch. Dist. 6J, 467 F.3d 755, 769 (9th Cir. 2006).

[43] 423 F. Supp. 767, 768–69 (W.D. Pa. 1976).

off school property at a shopping center several miles from the high school.[44] The plaintiff was given a three-day, in-school suspension as punishment for his actions, including a prohibition from participating in any extra-curricular activities.[45] Later, the plaintiff was suspended for an additional eleven days.[46] The court determined the plaintiff's First Amendment rights were not violated.[47] Defining fighting words as "'those which by their very utterance inflict injury or tend to incite an immediate breach of the peace,'" the court posited that fighting words—like prick—were not protected by the Constitution.[48]

The Seventh Circuit examined the application of the substantial disruption standard to out-of-school speech in *Boucher v. School Board*.[49] The plaintiff, high school student Justin Boucher, published an underground paper, *The Last*, which contained an article detailing to other students how to hack into the school's computer system.[50] The plaintiff's conduct occurred outside of school.[51] The publication required computer technicians to take precautions to protect against a potential breach incited by the article.[52] Based upon the necessity of the technicians' services, the court found that a disruption had occurred in the school and could occur in the future.[53] The court expanded the substantial disruption standard to include instances in which "school authorities 'have reason to believe' that the expression will be disruptive."[54] Because the article advocated for a disruption, the court found that the speech was not protected by the First Amendment.[55]

The Eighth Circuit examined the substantial disruption standard in *D.J.M. v. Hannibal Pubic School District*.[56] D.J.M., a high school student, was sus-

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[44] *Id.* at 769.

[45] *Id.*

[46] *Id.* at 770.

[47] *Id.* at 771.

[48] *Id.* (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)). The court also noted that lewd and obscene speech, and profane and libelous speech were not protected by the First Amendment. *Id.*

[49] *See generally* 134 F.3d 821 (7th Cir. 1998).

[50] *Id.* at 822.

[51] *Id.* at 824.

[52] *Id.* at 827.

[53] *Id.* The court also noted that, in addition to the previously published material, the article stated additional instruction would be provided at a later date. *Id.*

[54] *Id.* (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988)).

[55] *Id.* at 828–29.

[56] *See generally* 647 F.3d 754 (8th Cir. 2011).

pended after discussing obtaining a gun and shooting other students with a classmate over instant messenger.[57] Subsequently, the school suspended him for the remainder of the school year.[58] D.J.M. brought suit against the school district alleging the punishment violated his First Amendment rights.[59] Based upon the facts of the case, including that D.J.M. had access to a handgun and was considering shooting certain students, as well as the recent threat of school violence, the court found the student's comments constituted a true threat.[60] Therefore, D.J.M.'s speech was not protected by the First Amendment.[61] The court noted that a true threat is "'a statement that a reasonable recipient would have interpreted as a serious expression of an intent to harm or cause injury to another.'"[62] Accordingly, the court held that the school's punishment of D.J.M.'s speech was not a violation of the First Amendment.[63]

Public high schools are limited in their ability to regulate student's speech occurring outside of school. When a student's speech creates an actual or a reasonably foreseeable substantial disruption to the school environment, a public high school may regulate its students' speech. Generally, this speech takes the form of true threats and fighting words. The above case law demonstrates an extension of *Tinker* to out-of-school speech and the public high school's ability to regulate the speech.

iii. Online Speech

After the advent of the Internet, out-of-school speech has gained the ability to creep into the school environment. In an early decision regarding student speech on the Internet, the court found the out-of-school speech, a webpage created by the plaintiff, did not cause a substantial disruption and such a disruption was not reasonably foreseeable.[64] In *Beussink v. Woodland R-IV School District*, the school punished the plaintiff, Brandon Beussink, for creating a website expressing views critical of the Woodland School District, which included vulgar language.[65] The plaintiff created the website in his home and used no school

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[57] *Id.* at 756.

[58] *Id.* at 757.

[59] *Id.*

[60] *Id.* at 762–64.

[61] *Id.* at 764.

[62] *Id.* at 762 (quoting Doe v. Pulaski Cnty. Special Sch. Dist., 306 F.3d 616, 624 (8th Cir. 2002)).

[63] *Id.* at 757.

[64] Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175, 1182 (E.D. Mo. 1998).

[65] *Id.* at 1177.

resources or school time.[66] The court held that the plaintiff's "provocative and challenging speech" was the type intended to be protected by the First Amendment; thus, the school violated this right when it prohibited and punished the speech.[67]

In a state supreme court case, *J.S. v. Bethlehem Area School District*, the court discussed whether a student's punishment for creating a website with offensive and threatening comments violated the student's First Amendment right to free speech.[68] The plaintiff, J.S., created a website entitled "*Teacher Sux*," and the school subsequently suspended him.[69] In addition to a disclosure statement prohibiting school officials from viewing the site and visitors from reporting the site, the website included "derogatory, profane, offensive and threatening comments" directed at various school personnel.[70] The court listed factors to be used for determining whether speech, in the totality of the circumstances, was to be considered a true threat.[71] These factors included:

> how the recipient and other listeners reacted to the alleged threat; whether the threat was conditional; whether it was communicated directly to its victim; whether the makers of the threat had made similar statements to the victim on other occasions; and whether the victim had reason to believe that the maker of the threat had a propensity to engage in violence.[72]

In regards to the threatening nature of the speech, the court determined that the speech did not constitute a true threat because it did not show a serious intention to cause harm.[73] However, the website created a substantial disruption to the school environment.[74] Although the website was created out-of-school, because it was accessed from a school computer, the court viewed the speech as

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[66] *Id.* The school was notified of the existence of the page by a fellow student who was upset with the plaintiff. *Id.* at 1177–78.

[67] *Id.* at 1182.

[68] *See generally* 807 A.2d 847 (Pa. 2002).

[69] *Id.* at 851–52. The website contained pages eliciting that a specific teacher should be fired, chastising the teacher's physical appearance, equating the teacher to Hitler, and listing reasons why the teacher should die. *Id.* at 851.

[70] *Id.*

[71] *Id.* at 857.

[72] *Id.* at 858.

[73] Id. at 859.

[74] *Id.* at 869.

occurring in-school.[75] The court noted that an important difference between the situations presented in *Tinker* and the "complex multi-media web site [sic], accessible to fellow students, teachers, and the world."[76] Further, the speech's direct and indirect effects included the need for three substitute teachers, anxiety experienced by students and teachers, and disruption of the school's educational goals.[77] Based upon the speech's effects, the court found that a substantial disruption to the school environment had occurred; therefore, the plaintiff's punishment was constitutional.[78]

In *J.S. v. Blue Mountain School District*, the plaintiff, J.S., created a spoof Myspace profile about her middle school principal, James McGonigle, and was suspended.[79] The profile did not specifically identify McGonigle, but contained his school photograph.[80] Additionally, the profile contained crude and vulgar language.[81] However, the court found the profile could not be taken seriously based upon its outrageousness.[82] The court premised its determination partly on the "private" nature of the profile—only J.S.'s friends could access its contents.[83] The court held that the profile developed out-of-school created no substantial or reasonably foreseeable disruption to the school environment; therefore, the punishment violated J.S.'s First Amendment rights.[84]

In *Kowalski v. Berkeley County School*, the plaintiff, Kara Kowalski, brought suit against defendants alleging that they violated her First Amendment free speech rights for punishing her for creating a Myspace webpage named "Students Against Sluts [sic] Herpes," targeted at another student.[85] Because the speech constituted an "orchestrate[d] . . . targeted attack on a classmate," it created a substantial disruption to the school environment.[86] Therefore, the

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[75] *Id.* at 865.

[76] *Id.* at 864.

[77] *Id.* at 869.

[78] *Id.*

[79] 650 F.3d 915, 920 (3d Cir. 2011). The only identifying information present on the profile was a picture of the principal. *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.* at 921.

[83] *Id.* at 929.

[84] *Id.* at 920. In a similar case, the court found that punishing a student for the creation of a fake Myspace profile representing the student's principal made outside-of-school violated the First Amendment. Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 207–08 (3d Cir. 2011). The court held that although the profile contained offensive language, it did not substantially disrupt the school environment. *Id.*

[85] 652 F.3d 565, 567 (4th Cir. 2011).

[86] *Id.*

court held that the punishment, a five-day suspension accompanied by a ninety-day "social suspension,"[87] did not violate the First Amendment.[88]

Regulating students' speech occurring online creates difficulties for public high schools because of its ability to pervade the school's walls. A public high school may regulate students' Internet speech occurring outside the school environment when it pervades the school walls and becomes substantially disruptive or is reasonably foreseeable to become substantially disruptive to the school environment.[89] Speech causing or reasonably likely to cause a substantial disruption to the school environment includes true threats and attacks targeting classmates. However, if the speech contributes to the free exchange of ideas that a school is meant to promote or is too outrageous to be taken seriously, a public high school cannot regulate the speech without violating the First Amendment. Further, in some instances, a school may violate the First Amendment when it regulates speech contained on a private social media profile if the speech does not cause or create a reasonably foreseeable chance of a substantial disruption to the school environment. Courts examining the pervasiveness of Internet speech have found regulation of student speech constitutional when the speech caused a substantial disruption in-school similar to the disturbance caused when the speech itself occurs within the confines of the school.

b. Overall Development of the Tinker *Standard*

Based upon the foregoing case law, public high schools may prohibit and punish student speech that is substantially disruptive or creates a reasonably foreseeable risk of a substantial disruption to the school environment, including threats and fighting words, without running afoul of the First Amendment.[90] While a school may not regulate students' out-of-school speech as significantly as a student's in-school speech, the advent of the Internet allows for out-of-school speech to have the potential to transform into in-school speech or increased dissemination of the speech to create a substantial disruption to the

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[87] Under the social suspension, Kowalski could not attend school events if she was not a direct participant. *Id.* at 569. Additionally, she was prohibited from attending the Charm Review and participating as a cheerleader for the remainder of the school year. *Id.*

[88] *See id.* at 572.

[89] *See generally id.* When evaluating a case involving a student's website featuring fellow students' fake obituaries, the court emphasized that the speech occurred "entirely outside of the school's supervision or control," making its regulation unconstitutional. Emmett v. Kent Sch. Dist. No. 415, 92 F. Supp. 2d 1088, 1089–1090 (W.D. Wash. 2000). While not dispositive, the court further noted the posts were inspired by an in-school assignment, arguably indirectly acknowledging that speech stemming from classroom work would be protected pursuant to the First Amendment. *Id.* at 1089.

[90] *See supra* Part II.A.1.

school environment.

2. *Bethel School District v. Fraser*: The Vulgar, Lewd, and Obscene Standard

A public high school may regulate students' vulgar, lewd, obscene, and plainly offensive speech occurring at school; however, the regulation of such out-of-school speech is limited to instances in which the speech causes a substantial disruption to the educational environment.

a. Interpretation of Fraser

In the United States Supreme Court case *Bethel School District v. Fraser*, the plaintiff, Matthew Fraser, was given a three-day suspension and prohibited from being a graduation speaker after he gave a speech containing "elaborate, graphic, and explicit sexual metaphor[s]" at a school-sanctioned event.[91] The Court held that Fraser's speech was not protected under the First Amendment because the speech was not political, and the school had an interest in prohibiting "vulgar speech and lewd conduct" that it considers "wholly inconsistent with the 'fundamental values' of public school education."[92] Accordingly, a public high school may prohibit and punish students' vulgar, lewd, "obscene,"[93] and plainly offensive speech occurring in the school environment.[94]

b. Connecting Fraser to Tinker

Although the Supreme Court has not issued additional decisions following *Fraser*, federal appellate and district courts, as well as state courts, have analyzed similar issues, providing insight into the potential scope of the school's ability to regulate obscene, vulgar, lewd, or plainly offensive speech.

In *Killion v. Franklin Regional School District*, the plaintiff, Zachariah Paul, a high school student and track team member, composed a list of characteristics of his athletic director, Robert Bozzuto, at his home, which contained inaccurate information, including the size of Bozzuto's genitals.[95] After another student brought the list into school, Paul was suspended for ten days.[96] Paul

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[91] 478 U.S. 675, 677–78 (1986).

[92] *Id.* at 685–86.

[93] *Id.* at 678. The high school prohibited obscene language in a rule providing, "[c]onduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures." *Id.* (internal citations omitted).

[94] *Id.* at 685.

[95] 136 F. Supp. 2d 446, 448 (W.D. Pa. 2001).

[96] *Id.* at 449.

sued, alleging his punishment violated his First Amendment right to free speech.[97] In addition to holding that Paul's punishment violated the First Amendment because his speech did not cause substantial disruption, the court found that the speech, although lewd, vulgar, and profane, occurred out-of-school; thus, removing it from the auspices of speech that the school may regulate pursuant to the First Amendment.[98] Additionally, even though he was a member of the track team, he was punished as though he was a general student because he was not acting within the scope of his position as an athlete.[99]

In *T.V. v. Smith-Green Community School Corp.*, two female high school volleyball players received six-game suspensions after posting risqué pictures on one of the student's Myspace and Facebook accounts.[100] The photographs at issue included the girls posing with phallic-shaped lollipops, as well as in sexually suggestive poses.[101] The court found that the photographs were meant to be humorous and the school officials' disapproval of the pictures solidified the belief they were intended to be funny.[102] Further, the court determined that the photographs did not create a reasonably foreseeable likelihood of a substantial disruption to the school environment.[103] Ultimately, the court held that the photos were protected by the First Amendment; therefore, the school's punishment was unconstitutional.[104]

The foregoing case law demonstrates a public high school's ability to regulate its students' speech without violating the First Amendment when that speech is vulgar, obscene, lewd, or plainly offensive and occurs in school. However, to regulate such speech occurring out-of-school, the speech must cause or create a reasonably foreseeable likelihood of a substantial disruption to the school environment.

3. *Hazelwood School District v. Kuhlmeier*: School-Sponsored Publications

Although regulation of student-athletes' speech occurring through a school-sponsored medium may not be as common as regulation of the speech causing

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[97] *Id.* at 450.

[98] *Id.* at 456.

[99] *See generally id.*

[100] 807 F. Supp. 2d 767, 771–72 (N.D. Ind. 2011).

[101] *Id.* at 772.

[102] *Id.* at 776.

[103] *Id.* at 779 (noting the photographs did not fall under the purview of obscenity or child pornography).

[104] *Id.* at 781.

a substantial disruption and lewd, vulgar, obscene, or plainly offensive speech, *Hazelwood School District v. Kuhlmeier* represents the United States Supreme Court's third major area of speech that a public high school may regulate.[105]

A public high school may regulate speech when the medium used to distribute the speech is a school-sponsored publication.[106] In *Kuhlmeier*, student-staff members of the school newspaper alleged that the removal of articles from the newspaper violated their First Amendment right to free speech.[107] The articles discussed the school's students' experiences with teen pregnancy and the impact divorce had on students.[108] The Court determined that the school had the ability to reasonably regulate what was published in the school newspaper and that the regulation served a valid educational purpose; thus, the removal of the articles did not violate the students' right to free speech.[109]

B. Application of Student Speech Regulation Standards to Student-Athletes

A student-athlete may be held to a higher standard of conduct than other students based upon the student-athlete's participation in interscholastic sports. The United States Supreme Court noted in dicta that student-athletes are entitled to a decreased level of privacy expectations because "[b]y choosing to 'go out for the team,' they voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally."[110] Earlier in its opinion, the Court compared the Fourth Amendment rights of public high school students to their First Amendment rights stating that the rights "are different in public schools than elsewhere."[111] Therefore, based upon its discussion, the Court, if presented with an issue involving student-athletes' right to free speech, would likely find that student-athletes' expectation of free speech is lessened by voluntarily participating in interscholastic athletics.[112] Though the Supreme Court has not directly addressed the issue of the impact of a public high school's regulation of its student-athletes' speech upon the student-athletes' First Amendment right to free speech, lower federal and state courts have analyzed this issue and provided helpful guidance.

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[105] *See generally* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

[106] *See id.* at 276.

[107] *Id.* at 262.

[108] *Id.* at 263.

[109] *Id.* at 270, 273.

[110] Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 657 (1995).

[111] *Id.* at 656.

[112] *Id.* at 657.

1. Sample Cases

In *Seamons v. Snow*, the Tenth Circuit analyzed whether the plaintiff's dismissal from the high school's football team for refusing to apologize for reporting to school officials and the police that his teammates assaulted him violated his First Amendment right to free speech.[113] The court found that the dismissal was a violation of the plaintiff's First Amendment right because a student-athlete may not be punished for the truthful reporting of illegal or egregious behavior of his teammates to school officials or the appropriate authorities.[114]

In *Wildman v. Marshalltown School District*, the Eighth Circuit was charged with determining whether a student-athlete's First Amendment right to free speech was violated after she was removed from her high school basketball team for circulating a letter calling for action against the team's coach.[115] The student-athlete alleged that conditioning her ability to continue participating in interscholastic basketball on her giving a public apology to the team and coach, and her subsequent dismissal violated her First Amendment right to free speech.[116] The court determined that the dismissal did not violate the student-athlete's First Amendment right because the letter displayed insubordination and disrespect, and the school and coach had an interest in maintaining an atmosphere free of disruption and one of sportsmanship.[117]

The Ninth Circuit examined whether suspending student-athletes from the school's basketball team as punishment for complaining about their coach and refusing to board a game bus constituted a violation of their right to freedom of speech.[118] In response to their coach's verbally abusive and intimidating behavior, the student-athletes signed a petition calling for the coach's resignation and refused to board a bus for a game.[119] The students sued, alleging that their suspension from the basketball team as a punishment for their conduct violated their First Amendment right to free speech.[120] The court held that suspending

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[113] 206 F.3d 1021, 1023 (10th Cir. 2000).

[114] *See id.* at 1030–31.

[115] 249 F.3d 768, 769–70 (8th Cir. 2001).

[116] *Id.* at 769.

[117] *Id.* at 771–72. The court also noted that the punishment did not interfere with the student's education. *Id.* at 772.

[118] Pinard v. Clatskanie Sch. Dist. 6J, 467 F.3d 755, 759 (9th Cir. 2006).

[119] *Id.* at 760–762.

[120] *Id.* at 759.

the student-athletes for signing the petition was a violation of free speech because the speech was "pure speech," akin to that protected in *Tinker*.[121] However, the court found the student-athletes' refusal to board the bus materially disrupted the school environment, as extracurricular activities—including sports—are "a bona fide school activity."[122] Therefore, punishment for this conduct was not a violation of the student-athletes' right to free speech.[123]

In *Lowery v. Euverard*, the plaintiffs, after signing a petition to remove their football coach, were dismissed from the football team.[124] The plaintiffs brought suit, alleging that their dismissal violated their First Amendment right to free speech.[125] In its decision, the court noted that "[r]estrictions that would be inappropriate for the student body at large may be appropriate in the context of voluntary athletic programs."[126] In holding that the student-athletes' punishment did not violate the First Amendment, the court noted that schools have a duty to prevent substantial disruptions.[127]

2. Summary of Student-Athlete Cases

By voluntarily participating in interscholastic sports, student-athletes submit themselves to more rigorous regulation of their speech than the general student population. In addition to regulating speech pursuant to the substantial disruption standard and vulgar, lewd, obscene, and plainly offensive speech, a public high school may regulate student-athletes' speech when it is insubordinate or unsportsmanlike. However, a school may not prohibit a student-athletes' speech regarding allegations of illegal, abusive, intimidating, or egregious conduct by other student-athletes, coaches, or other associated personnel when the allegation is made in good faith. Further, interscholastic athletic events are considered to occur in-school for the purpose of analyzing student-athletes' speech. Therefore, public high schools have greater latitude when regulating a student-athlete's speech than the speech of general students.[128]

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[121] *Id.* at 764.

[122] *Id.* at 769–770.

[123] *Id.* at 770.

[124] 497 F.3d 584, 585–86 (6th Cir. 2007).

[125] *Id.* at 586.

[126] *Id.* at 597.

[127] *Id.* at 596.

[128] *Doninger v. Niehoff* provides a useful discussion pertaining to the increased regulation of students holding certain positions in the school community. *See generally* 642 F.3d 334 (2d Cir. 2011). The plaintiff signed and agreed to the school district's written policies regarding students and student officers' conduct, binding her to comply with the restrictions. *Id.* at 339. The plaintiff wrote a blog post during her tenure as junior class secretary chastising the school administration and inciting students

Additionally, student-athletes' punishments for violations of a public high school's regulations of student or student-athlete speech may include restricted access to participate in interscholastic sports beyond the effect of the education-based punishment,[129] whereas punishment of a student in the general population may only affect areas of that student's education. Based upon the preceding case law, student-athletes may be regulated to the same or greater extent as the general student population without the public high school violating the student-athletes' right to free speech.

IV. APPLICATION TO REGULATION OF STUDENT-ATHLETES' USE OF SOCIAL MEDIA

A public high school's ability to regulate student-athletes' social media usage, while subject to some limitations, is more expansive than the ability to regulate the usage of the general student population.

Regarding the general student population, a public high school's ability to regulate student speech is limited to speech satisfying the substantial disruption standard; speech that is vulgar, lewd, obscene, or plainly offensive; or speech occurring in a school-sponsored publication. Overall, unless the speech invades the school environment causing a substantial disruption, regulation of social media speech may be even more limited than speech occurring via more traditional means. Schools may regulate out-of-school speech when that speech causes a substantial disruption to the school environment or such a disruption is reasonably foreseeable to occur. Schools may regulate in-school speech when it causes, or would foreseeably cause, a substantial disruption to the school environment or is vulgar, obscene, plainly offensive, or lewd.[130] Overall, schools and athletic departments must balance the need to maintain the school's educational environment against the free speech rights of student-athletes.[131]

Regarding out-of-school speech, a public high school may regulate its student-athletes' social media usage if the posts involved constitute speech that actually causes or creates a reasonably foreseeable, substantial disruption to the school environment, including on the playing field. Although this regulation

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to take action. *Id.* at 339–41. The court found that the plaintiff's punishment did not violate the First Amendment. *Id.* at 351.

[129] "Education-based" punishments are those originating in the general school environment, such as a student being suspended or expelled from the educational institution.

[130] *See generally* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969); Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986); Morse v. Frederick, 551 U.S. 393 (2007); LaVine v. Blaine Sch. Dist., 257 F.3d 981 (9th Cir. 2001); *Doninger*, 642 F.3d 334; Killion v. Franklin Reg'l. Sch. Dist., 136 F. Supp. 2d 446 (W.D. Pa. 2001).

[131] *See generally* Mayer, *supra* note 25.

may be stricter than that of the general student population, as shown in the preceding case law, the actual regulation and punishment of student-athletes' speech using social media may prove more difficult in reality than it would theoretically seem. Courts narrowly construe what conduct is considered to be substantially disruptive, making it more difficult for a public high school to limit the student-athletes' speech.[132] Additionally, without a Supreme Court decision regarding the scope of the public high school's ability to regulate its students', and by extension student-athletes', speech occurring via social media creates further impediments to the high school's determination of how to regulate this speech within the confines of the First Amendment.

However, public high schools have considerably greater latitude when regulating its student-athletes' speech occurring via social media in-school. Schools may prohibit and punish student-athletes' speech if it creates or could foreseeably create a substantial disruption in the school environment; is lewd, obscene, vulgar, or plainly offensive; is unsportsmanlike; or is insubordinate.[133] Further, because the school environment extends past the boundaries of the physical structure to the playing field, a school may regulate its student-athletes' use of social media at interscholastic athletic events to the same extent it does within the physical school building.[134] Based upon the extension of scope of in-school speech to the athletic event itself, it is possible that a public high school may even regulate its student-athletes' speech via social media during the team's transportation to and from the event.[135]

Subject to the above guidelines, a public high school may regulate its student-athletes' speech that occurs via their use of social media platforms.

V. CONCLUSION

Student-athletes' use of social media is a phenomena that is not likely to disappear from the purview of schools in the near future. Therefore, the issue of public high schools' regulation of its student-athletes' social media use must be addressed. Because public schools are state actors subject to the First Amendment, they must ensure their instituted policies do not infringe upon the student-athletes' right to free speech.

The seemingly broad ability of schools to regulate their student-athletes'

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[132] *See generally* T.V. v. Smith-Green Cmty. Sch. Corp., 807 F. Supp. 2d 767 (N.D. Ind. 2011).

[133] However, it should be noted that it is unclear whether insubordinate or unsportsmanlike speech may be regulated when it occurs outside of school. *See generally* Wildman v. Marshalltown Sch. Dist., 249 F.3d 768 (8th Cir. 2001).

[134] *See generally Tinker* , 393 U.S. 503 ; Lowery v. Euverard, 497 F.3d 584 (6th Cir. 2007).

[135] *See generally Tinker*, 393 U.S. 503; *Lowery*, 497 F.3d 584.

social media use is deceptive. Based upon the case law involving students' use of social media, most speech is protected pursuant to the First Amendment. As a result, public high schools are limited in the circumstances when they may regulate student-athletes' social media use. High school athletic departments should focus on educating students about the dangers of social media as a part of the school's social media policy. Additionally, the school may prohibit student-athletes from posting material that is substantially disruptive to the school environment; vulgar, lewd, obscene, or plainly offensive; insubordinate; or unsportsmanlike. The school must also be aware of the instances in which a school's regulation of social media use is impacted by whether the speech occurs in-school or out-of-school.

Without a United States Supreme Court decision, the determination of the scope of the public high school's ability to constitutionally regulate its student-athletes' social media usage is a delicate balancing act. While the bounds of the school's ability to prohibit and punish its student-athletes' social media use remain unclear, there is no doubt that a public high school may regulate its student-athletes' social media use in a limited capacity.

Overall, a public high school has the difficult task of balancing its interests in maintaining a school environment consistent with its educational purpose with the First Amendment free speech rights of its student-athletes. Schools should formulate a social media policy for their student-athletes that clearly dictates the unacceptable uses of social media platforms both in-school and out-of-school. Ultimately, the issue of student-athletes' use of social media is here to stay; therefore, public high schools should address this problem as quickly as practicable.