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# 140 CHARACTERS OR LESS: MAINTAINING PRIVACY AND PUBLICITY IN THE AGE OF SOCIAL NETWORKING

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Through the advances of technology, people and information are accessible at virtually any time with the touch of a button. The effect of technology's continuous growth is widespread in the sports world. No longer do you have to wait to get home or find the nearest television to find the score of the game or the latest stats on your favorite player. A cell phone with Internet access can provide you with all of the information you could want, including a way to watch the game live. In fact, technology has gone one step further and allows you direct access to the thoughts of those directly involved with your favorite team through social networking.

Social networking sites like Twitter and Facebook allow anyone to express his or her thoughts and actions to friends and followers.<sup>1</sup> Additionally, these sites have granted public access to elite athletes and other influential people. The inclusion of celebrities to these sites is fairly new; however, the effects (both good and bad) are starting to reveal themselves. Comments made by professional athletes could be free promotional material for their teams and sport, or they could create a public relations nightmare. This fine line between good and bad publicity via social networking came to light with the 2010 free agency deals of the National Basketball Association (NBA).

Before the 2010 NBA Playoffs began, speculation regarding free agency became headline news when Chris Bosh, then starting forward for the Toronto Raptors,<sup>2</sup> took to his Twitter page and asked a simple question, "Should I stay or should I go?"<sup>3</sup> This tweet created a media firestorm and fan frenzy as people concluded that this statement meant Bosh, in the last year of his

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1. *About Twitter*, TWITTER.COM, <http://twitter.com/about> (last visited Nov. 16, 2010); *Info*, FACEBOOK.COM, <http://www.facebook.com/#!/facebook?v=info> (last visited Nov. 16, 2010).

2. *Chris Bosh Career Stats*, NBA.COM, [http://www.nba.com/playerfile/chris\\_bosh/career\\_stats.html](http://www.nba.com/playerfile/chris_bosh/career_stats.html) (last visited Nov. 16, 2010).

3. *Bosh Seeks Advice on Twitter*, ESPN.COM, May 2, 2010, <http://sports.espn.go.com/nba/news/story?id=5152854>.

contract, wanted out of Toronto.<sup>4</sup> Speculation about this decision increased when, weeks later, Bosh changed his Twitter location from “Toronto” to “Everywhere.”<sup>5</sup> Incredibly, this simple statement and location change on a social networking site started pandemonium regarding Bosh and other free agents.<sup>6</sup> In the summer of 2010, ESPN’s news program, SportsCenter, and other sports media outlets reported on Twitter postings to end or create speculation about free agency decisions.<sup>7</sup> In fact, the creation of LeBron James’s official Twitter account became headline news while the nation waited on his decision.<sup>8</sup> Twitter simply provided another avenue for the rumor mills to infer insight into the free agency decision process. Because sites like Twitter allow direct access to the thoughts of celebrities, media reports concerning information found on these sites will likely increase.

This type of twenty-four-seven access to the thoughts and actions of idolized individuals could be beneficial to the team and the league in terms of promoting team activities and charitable acts that need free publicity. At the same time, these sites can create a multitude of problems by making anything said available to the masses. Remarks made on Facebook, Twitter, and other popular social networking sites have led to the loss of jobs,<sup>9</sup> expulsion from school, dismissal from school programs,<sup>10</sup> and even capture of criminals.<sup>11</sup> As the popularity of social networking grows, employers often begin monitoring these sites to scrutinize prospective applicants and to limit the actions of current employees.<sup>12</sup> With constant access to the thoughts of others, there is a higher risk of exposure to bad publicity, especially for those organizations dependent on the public for revenue, like sports teams. This potential for bad publicity encourages the use of monitoring and other

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4. *Chris Bosh's Twitter Angering Raptors Fans, Media*, SLAMONLINE.COM, May 5, 2010, <http://www.slamonline.com/online/nba/2010/05/chris-bosh-twitter-angering-raptors-fans-media/>.

5. *Id.*

6. *Id.*

7. *Id.*

8. *LeBron Tweets, But Mum About Decision*, ESPN.COM, Jul. 6, 2010, <http://sports.espn.go.com/nba/news/story?id=5358312>.

9. *Bacsik Fired for Racially Insensitive Tweet*, ESPN.COM, Apr. 27, 2010 <http://sports.espn.go.com/dallas/mlb/news/story?id=5141002>.

10. *Idaho Player Punished for Critical Tweets*, ESPN.COM, Mar. 6, 2010, <http://sports.espn.go.com/nba/news/story?id=4971673>.

11. Kamika Dunlap, *Police Find NY Fugitive with Facebook and MySpace Info*, FINDLAW.COM, Feb. 8, 2010, [http://blogs.findlaw.com/legally\\_weird/2010/02/police-find-ny-fugitive-with-facebook-myspace-info.html](http://blogs.findlaw.com/legally_weird/2010/02/police-find-ny-fugitive-with-facebook-myspace-info.html).

12. Laura Petrecca, *More Employers Use Tech to Track Workers*, USA TODAY, Mar. 17, 2010, available at [http://www.usatoday.com/money/workplace/2010-03-17-workplaceprivacy15\\_CV\\_N.htm](http://www.usatoday.com/money/workplace/2010-03-17-workplaceprivacy15_CV_N.htm).

safeguards by companies looking to protect their bottom line. On the other hand, these employees are entitled to certain privacy rights that must be respected by their employers in their attempts to protect their organizations.

This article will address the various legal issues that need to be considered when sports leagues and teams attempt to regulate the use of social networking sites. Part I details the history of privacy law and how this definition has expanded and been altered for the general public and celebrities in the years since its inception. Recalling the history of privacy law is important because technology and time have changed the original concept of privacy as defined by Samuel Warren and Louis Brandeis. Part II will then explain the rapid rise of social networking, its impact on society, and its claim to the right of privacy. Part III expands on the notion of privacy and social networking to illustrate its effect on employment for the public and celebrities, especially professional athletes. Lastly, Part IV will illustrate how to balance the concerns for privacy with better than adequate regulation, as well as offer a possible solution that would allow for regulation of social networking sites within the realm of relevant privacy laws.

#### I. THE HISTORY OF PRIVACY LAW AND ITS CURRENT APPLICATIONS

The basis of privacy law existed in a world before the creation of many of today's technological advances. As the media began to extinguish the balance between public and private lives in the late nineteenth century, Samuel Warren and Louis Brandeis concluded that the law must be expanded to include the right of privacy.<sup>13</sup> The ability to depict another's likeness surreptitiously with a photograph and speculative gossip made legal relief from damages challenging.<sup>14</sup> Although victims of these journalistic attacks were often granted relief, the available legal options had to be creatively tailored to fit the situation.<sup>15</sup>

In *Prince Albert v. Strange*, an episode of yellow journalism led to the public description of a series of etchings created by the royal family for their own pleasure.<sup>16</sup> The Vice-Chancellor and Lord Chancellor used a broader interpretation of existing law and reasoned that relief was possible under

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13. Samuel D. Warren & Louis D. Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193, 196 (1890). Warren's interest in protecting private lives likely stemmed from his own experiences with the press due to his marriage to the daughter of the ambassador to Great Britain. Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1348-349 (1992) (citing ALFRED LIEF, BRANDEIS: THE PERSONAL HISTORY OF AN AMERICAN IDEAL 51 (1936)).

14. Gormley, *supra* note 13, at 1353.

15. *See id.* at 1355.

16. *Prince Albert v. Strange*, 41 ENG. REP. 1171, 1171-172 (1849).

conventional common law property laws because all personal items should be protected from unwanted publication as private property.<sup>17</sup> Brandeis and Warren hypothesized that this decision illustrated the beginnings of a liberal doctrine to protect the individual: the law of privacy. “[P]rotection afforded to thoughts, sentiments, and emotions, expressed through the medium of writing or of the arts, so far as it consists in preventing publication, is merely an instance of the enforcement of the more general right of the individual to be let alone.”<sup>18</sup> Under this doctrine, no longer would there be a need to circumvent the law to find relief for those who became victims of technology and yellow journalism. Thus, the probable solution against violations of privacy would be the creation of a new area of law.

Warren and Brandeis laid out a series of points to define the law of privacy and how it should be applied in courts in an 1891 *Harvard Law Review* article entitled, *The Right to Privacy*.<sup>19</sup> First, this right would not prohibit the publication of any matter deemed public or of general interest.<sup>20</sup> The nature of privacy is to protect the person but not destroy all legitimate sources of news. Privacy law was also extended beyond the media’s intrusions to protect existing law while disallowing overarching privacy claims.<sup>21</sup> Additionally, publication by the individual, or with his consent, ends the right of privacy as a legal claim.<sup>22</sup> These provisions are the most important points created by Warren and Brandeis because they provide an end to the applicability of the doctrine and encompass its main purpose: protecting the individual. With this end clause, the right of privacy becomes solely based on consent and individual choice.

Although *The Right to Privacy* is considered by many to be the leading discussion on the law of privacy, its points were broad and left much room for interpretation. Many theorize that this broad interpretation is problematic in terms of a coherent methodology for privacy tort law.<sup>23</sup> Moreover, the law of

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17. *Id.* at 1171.

18. Warren & Brandeis, *supra* note 13, at 205.

19. *Id.* at 214–19; *see also* Gormley, *supra* note 13, at 1335. Warren and Brandeis’ article was written in December of 1890 and published the following year. *Id.* at 1336.

20. Gormley, *supra* note 13, at 1346; Warren & Brandeis, *supra* note 13, at 214.

21. *See generally* Gormley, *supra* note 13.

22. Warren & Brandeis, *supra* note 13, at 218.

23. *See e.g.*, Gormley *supra* note 13, at 1341; Scott J. Shackelford, *Fragile Merchandise: A Comparative Analysis of the Privacy Rights for Public Figures*, SOCIAL SCIENCE RESEARCH NETWORK, Apr. 28, 2009, <http://ssrn.com/abstract=1396378> (follow “One-Click Download” hyperlink); Even the Second Restatement of Torts is not entirely clear on its interpretation of the laws governing publicity given to private life and speaks of highly offensive matters that are not a legitimate public concern. RESTATEMENT (SECOND) OF TORTS §652(D) (1977).

privacy has taken many forms in the years since Warren and Brandeis' landmark article.<sup>24</sup> Privacy law is now burdened by and responsible for ever-changing technological advances.

Technology, modern society, and the media are precisely why Warren and Brandeis' definition of privacy does not fit within the current legal structure.<sup>25</sup> Although the two authors believed any right to privacy should end with publications of facts by the individual, a literal interpretation of this rule today would be stifling. Information, to some extent, is shared daily, but facts can remain private if shared with a specific group of people and not the general public.<sup>26</sup> The United States Supreme Court's recognition of the social advancements of modern society and this principle shows a willingness to adhere to Warren and Brandeis while giving latitude to the new world order. Consequently, the modern adaptation of privacy law creates a greater expectation of privacy despite limited disclosure, and its importance remains with protecting individuals from the intrusion of the media in a social society.

Another deviation from Warren and Brandeis' theory involves the evolution of privacy for public figures and the creation of voluntary and involuntary public figures. Warren and Brandeis' reasoning rested on the point that privacy law should protect private figures whose affairs were not worthy of public interest.<sup>27</sup> Modern society, however, does not allow for such a hard line distinction between what is private and public interest. Every day there are stories of ordinary people doing heroic things that become newsworthy events.<sup>28</sup> These people, by virtue of the public interest in their

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24. Gormley, *supra* note 13, at 1340. Privacy law now includes protection under the First, Fourth, and Fourteenth Amendments of the U.S. Constitution and state constitutional laws. *Id.* For the purposes of this article, only the original privacy tort law and First Amendment privacy concerns are relevant. *Id.*

25. Lior Jacob Strahilevitz, *A Social Networks Theory of Privacy*, 72 U. CHI. L. REV. 919, 923 (2005) (citing United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 763–64, 770 (1989)).

26. See U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 763–64 (1989).

27. Shackelford, *supra* note 23, at 19.

28. For example, flight attendant Steven Slater was saluted for the inventive way he quit his job after dealing with a supposedly unruly passenger on the flight. Brett Michael Dykes, *Rogue JetBlue Flight Attendant Hailed as Working-Class Hero*, NEWS.YAHOO.COM, Aug. 10, 2010, [http://news.yahoo.com/s/yblog\\_upshot/20100810/bs\\_yblog\\_upshot/rogue-jetblue-flight-attendant-being-hailed-as-a-modern-american-working-class-hero](http://news.yahoo.com/s/yblog_upshot/20100810/bs_yblog_upshot/rogue-jetblue-flight-attendant-being-hailed-as-a-modern-american-working-class-hero). Slater's personal business quickly became subject to public fodder for the gossip pages as columnists uncovered his former problems with alcohol. See, e.g., *Cynthia Susanne, Steven Slater's Ex-Wife, On 'Today Show': I Don't Know Him to be an Alcoholic*, THEHUFFINGTONPOST.COM, Aug. 12, 2010, [http://www.huffingtonpost.com/2010/08/12/cynthia-susanne-steven-sl\\_n\\_680208.html](http://www.huffingtonpost.com/2010/08/12/cynthia-susanne-steven-sl_n_680208.html); *Steven Slater Previously Arrested for a DUI!*, PEREZHILTON.COM, Aug. 13, 2010, <http://perezhilton.com/2010-08-13-steven-slater-previously->

actions, become “involuntary” public figures because they did not seek the limelight and public attention like celebrities and politicians.<sup>29</sup> The resulting media frenzy connected to these often heartwarming stories led to the expansion of the definition of public figure to include involuntary public figures, i.e., those who are temporarily thrust into the limelight.<sup>30</sup> Although their actions and history may be newsworthy at the time, their privacy is in greater need of protection during this intrusion.

Unlike involuntary public figures, the right of privacy protection granted to those who voluntarily choose the limelight is limited by the First Amendment. In *New York Times Co. v. Sullivan*,<sup>31</sup> the Supreme Court held that public officials are prohibited from recovering damages for a defamatory statement related to their official conduct unless the statement is made with “actual malice.”<sup>32</sup> As the Supreme Court reasoned, criticism of public figures and their private lives should be expected due to the public nature of their employment.<sup>33</sup>

One who voluntarily places himself in the public eye, by engaging in public activities, or by assuming a prominent role in institutions or activities having general economic, cultural, social or similar public interest, or by submitting himself or his work for public judgment, cannot complain when he is given publicity that he has sought, even though it may be unfavorable to him. . . . The legitimate interest of the public in [such an] individual may extend beyond those matters which are themselves made public, and to some reasonable extent may include information as to matters that would otherwise be private.<sup>34</sup>

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arrested-for-a-duit.

29. Shackelford, *supra* note 23, at 25.

30. *Id.*

31. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964).

32. Shackelford, *supra* note 23, at 23 (citing 50 AM. JUR. 2D LIBEL & SLANDER § 33 (1995)).

33. *Id.* Specifically, the Court concluded that the First Amendment allows for a “debate on public issues [to] be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials” as a commitment to the principles of free speech. *N.Y. Times Co.*, 376 U.S. at 270–71. The advertisement at issue in *Sullivan* was made for the purposes of political protest during the Civil Rights Era and clearly fits within this structure. *Id.* at 271.

34. Shackelford, *supra* note 23, at 26 (quoting RESTATEMENT (SECOND) OF TORTS §652D cmt. e (1977)).

Because this reasoning covers those whose jobs, by their very nature, thrust the individual into the public spotlight, politicians are not the only voluntary public figures; sports figures and celebrities of any kind have to be included.<sup>35</sup> Unfortunately, public interest in celebrities has gone beyond mere criticism of job performance to an almost fanatical desire to document their every move. To leave these famous people without remedy for obvious violations of their privacy calls into debate whether information on where someone had lunch or how much they drank at a party is “newsworthy” enough to survive a tort challenge in court.<sup>36</sup>

Only legitimate newsworthy issues should be publicized, but new technology has blurred the lines between newsworthy and private material. Social networking invites people to share intimate details of their lives in a public forum. Often this information is trivial and not newsworthy, but for those already in the media’s spotlight, sharing information could derail any future privacy claim they may seek without allowing for any avenues of legal protection. If easy access to a celebrity’s thoughts and actions is available, his or her status as a public figure will add to the “newsworthy” qualities of this information, further distorting the line between public and private behavior. Unlike the general public, celebrities must learn to use social networking within established regulations to protect their privacy or else anything posted could be used against them.

## II. THE RISE OF SOCIAL NETWORKING

Social networking is not an entirely new concept. We establish social connections and relationships every day with the people we meet at work, in our neighborhoods, and in our daily interactions with others. In fact, these networks have only strengthened since the World Wide Web was introduced to the public.<sup>37</sup> One of the Internet’s main purposes is to establish and reinforce social networks because it connects people to information and allows for people across several states and countries to stay in touch with those from their past and to meet others with similar interests. Social networking sites sought to enhance this purpose.<sup>38</sup>

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35. *Id.* at 26-27.

36. *Id.* at 27.

37. The World Wide Web was released by CERN in 1991, and the phenomenon quickly took off with the public. Robert Hobbes Zakon, *Hobbes’ Internet Timeline 10*, ZAKON.ORG, <http://www.zakon.org/robert/internet/timeline/> (last visited Nov. 19, 2010).

38. Social networking sites have been described as “web-based services that allow individuals to (1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system.” Danah M. Boyd & Nicole B. Ellison, *Social Network Sites*:

Social networking sites have been increasing in popularity since the mid-1990s. The first known site directed at social networking was SixDegrees.com, launched in 1997.<sup>39</sup> This site allowed users to create a profile, add friends, and browse through the friends of their friends.<sup>40</sup> Unfortunately, SixDegrees was ahead of its time and did not achieve mass popularity;<sup>41</sup> it did, however, set the stage for others to follow. The next wave of social networking sites began in 2002 with Friendster.<sup>42</sup> Then, in the following year, the big three of social networking were made public: Facebook, LinkedIn, and Twitter.<sup>43</sup> Each of these sites started with a different purpose,<sup>44</sup> but all have the underlying goal of connecting people. Because people seek out social connections and self-promotion, these sites quickly grew in numbers and popularity. Facebook, as an example, reached 500 million users as of July 2010.<sup>45</sup>

The popularity of social networking sites often depends on how successfully these sites mirror relationships established offline and foster these relationships.<sup>46</sup> Using Facebook as an example, members can post messages to their friends along with information about themselves on their walls. These posts and the information listed on social networking sites often become an extension of each individual's identity.<sup>47</sup> Although this technique is at the core of what makes social networking sites popular, it is also responsible for the negativity associated with the movement. Because you can essentially find

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*Definition, History, and Scholarship*, 13(1) J. OF COMPUTER-MEDIATED COMM. 210, 211 (2007).

39. *Id.* at 214.

40. *Id.*

41. *Id.*

42. *Id.* at 215.

43. *Id.*; see also Don Bulmer, *The Big Three Social Networks Have Emerged as Professional Networks: LinkedIn, Facebook, and Twitter*, SOCIALMEDIATODAY.COM, Nov. 19, 2009, <http://www.socialmediatoday.com/SMC/143975>.

44. Facebook started as a social networking site for college students and quickly expanded to include high school students, corporations, and then everyone. Boyd & Ellison, *supra* note 38, at 218; see also *Info*, *supra* note 1. LinkedIn provides a resource to "summarize" your professional experience and connect with other professionals and potential clients. *About Us*, LINKEDIN, <http://press.linkedin.com/about> (last visited Nov. 19, 2010). Twitter is marketed as the "evolution of messaging" giving people the ability to share information quickly through posts of 140 characters or less. *About Twitter*, *supra* note 1.

45. Mark Zuckerberg, *500 Million Stories*, FACEBOOK.COM, July 21, 2010, <http://blog.facebook.com/blog.php?post=409753352130>.

46. James Grimmelman, *Saving Facebook*, 94 IOWA L. REV. 1137, 1154 (2009).

47. Danah Boyd, *Why Youth (Heart) Social Network Sites: The Role of Networked Publics in Teenage Social Life*, YOUTH, IDENTITY, & DIGITAL MEDIA, <http://www.mitpressjournals.org/doi/pdf/10.1162/dmal.9780262524834.119> (last visited Nov. 19, 2010) (focusing on teen usage of social networking sites; however, the same concepts could apply to any member of a social networking site).

out what people perceive to be acceptable for their social group and their identity, things can be perceived out of their intended context.<sup>48</sup> This social mirror imaging effect created through an online identity then becomes potentially damaging because people become prone to share information online that should have been limited to a private venue. With everyone on Facebook or Twitter, it means that more people can see all information placed on these sites: good or bad; and something that was intended as a joke could be taken seriously.

Privacy concerns have grown with the explosion of social networking sites as a form of mass communication. Recently, the Lockport, New York Police Department found a fugitive based on information posted on his Facebook and MySpace pages.<sup>49</sup> Christopher Crego, the fugitive, posted online details about his workplace, work schedule, his criminal history, and even taunted the police, claiming that they would “never catch [him].”<sup>50</sup> The success of finding criminals and solving crimes through the uncovering of information via social networking has led to an increased presence by law enforcement on these sites.<sup>51</sup> All activity by law enforcement on these sites, whether open or covert, is perfectly legal because each person is willingly posting information on a public forum.<sup>52</sup>

Information posted on social networking sites is not only challenging in terms of criminal liability, it can create social or employment problems. Many have lost their jobs due to what they posted online. A damaging Twitter post led to the firing of sports reporter Mike Bacsik in the spring of 2010.<sup>53</sup> Bacsik is a former major league pitcher who was working as a Dallas sports radio producer and personality when he made a racially insensitive comment via Twitter after game five of the San Antonio Spurs-Dallas Mavericks series during the 2010 NBA Playoffs.<sup>54</sup> In the game, Mavericks’ player Eduardo Najera tackled Spurs’ player Manu Ginobili and was ejected from the game.<sup>55</sup> Bacsik later commented on this ejection and tweeted, “Congrats to all the dirty [M]exicans in San Antonio.”<sup>56</sup> Once the comment was made public, Bacsik

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48. *Id.*

49. Dunlap, *supra* note 11.

50. *Id.*

51. Kamika Dunlap, *Feds Use Covert Operations on Social Network Sites*, FINDLAW.COM, Mar. 17, 2010, <http://blogs.findlaw.com/blotter/2010/03/feds-use-covert-operations-on-social-network-sites.html>.

52. *Id.*

53. *Bacsik Fired for Racially Insensitive Tweet*, *supra* note 9.

54. *Id.*

55. *Id.*

56. *Id.*

immediately expressed remorse, but this apology could not stop the storm of bad publicity for the analyst and the company, which led to his immediate suspension and subsequent firing.<sup>57</sup> What Bacsik said was a poor comment made in bad taste, and it cost him more than it necessarily would have if he had just remembered that Twitter is a public forum before posting this comment. These cautionary tales are just a few of the many instances in which social networking sites have caused more harm than good, but few people heed the warning and pay attention to what they say online. People must respect the idea of privacy and not list personal information on these sites to maintain their privacy. It helps to imagine that someone is always watching because it is likely that they are paying attention.

### III. EMPLOYER REGULATION OF EMPLOYEE CONDUCT IN THE WAKE OF SOCIAL NETWORKING

Social networking is rapidly growing in popularity among the general public, and this idea and usage has grown exponentially in professional sports.<sup>58</sup> Sports are especially well-suited for the instant updates of social networking due to the fast paced nature of the games.<sup>59</sup> By giving fans real-time access to their favorite teams and players from anywhere, the popularity of sports increases because fans can feel more involved. This access is beneficial in terms of promoting the sport, the league, the team, and the individual players. However, constant access to the personal thoughts of anyone can be problematic because it is difficult to be constantly wary of what is said in what appears to be a private forum.<sup>60</sup> Although fans are ultimately forgiving of bad publicity, this forgiveness is limited, meaning that the league and its employees must be constantly apprehensive about the war between good and bad publicity.

In recent years, there have been several incidents involving professional athletes and Twitter. This social networking site is mainly limited to expression through posts of 140 characters or less;<sup>61</sup> however, this amount has

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57. *Id.*

58. Merritt Colaizzi, *Professional Sports are Ahead of the Game in Social Media*, SMARTBLOG.COM, Feb. 16, 2010, <http://smartblogs.com/socialmedia/2010/02/16/professional-sports-are-ahead-of-the-game-in-social-media/>.

59. *Id.*

60. There are several websites dedicated to compiling the tweets of professional athletes in a variety of sports. See e.g., ATHLETESWHOTWEET.COM, [www.athleteswhotweet.com](http://www.athleteswhotweet.com) (last visited Nov. 19, 2010); NFL Twitter Aggregator, WASHINGTONPOST.COM, available at <http://projects.washingtonpost.com/moderation/twitter/yatwittle/?page=2&page=1&page=2&page=3> (last visited Nov. 19, 2010).

61. *About Twitter*, *supra* note 1.

been proven to be more than enough to cause troubles for many athletes. Larry Johnson, a former running back for the Kansas City Chiefs, lost his job and place on the team after Twitter remarks in 2009.<sup>62</sup> Johnson used the social networking site to express frustration about head coach Todd Haley and to respond to disparaging remarks from fans.<sup>63</sup> In both situations, Johnson used gay slurs in his responses and then dared someone to stop him.<sup>64</sup> “Make me regret it. . . . U don’t stop my checks. . . . So ‘tweet’ away.”<sup>65</sup> Fans responded to this threat and implored the Chiefs to fire the running back.<sup>66</sup> Johnson was released by the team mere weeks after the incident.<sup>67</sup>

What Johnson did and the backlash from this incident is a rare occurrence, but it does illustrate the dangers associated with constant access to your favorite player. Fans often view their favorite players in an extremely favorable light, and actions like Johnson’s belittle the professional nature of the game and the respect teams and leagues have for those who fund their livelihood. Moreover, the fear of social networking posts becoming publicity nightmares is not limited to disgruntled players. Even those who are perceived to be “media darlings” can be troublemakers for their team and the league because it is impossible to monitor everything that is said online.

Many leagues are being proactive about these potential public relations nightmares by creating official policies about the use of social media. The NBA and the National Football League (NFL) both announced policies to ban the use of Twitter by players, coaches, and operations personnel during games.<sup>68</sup> The limitation of social media bans to before and after games is apt because game time is a period when employees are officially acting as representatives of a professional sports team and the league. It also follows the patterns of regulation used by employers not connected to sports. Labor law arbitrators have consistently allowed for employer regulation of their employee’s electronic communications if there is reasonable cause to believe

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62. *Johnson Uses Slurs for Haley, Reporters*, ESPN.COM, Oct. 27, 2009, <http://sports.espn.go.com/nfl/news/story?id=4596288>.

63. *Id.*

64. *Id.*

65. *Id.*

66. Peter King, *Chiefs Make Right Call on Johnson*, SI.COM, Nov. 10, 2009, [http://sportsillustrated.cnn.com/2009/writers/peter\\_king/11/10/mailbag/index.html](http://sportsillustrated.cnn.com/2009/writers/peter_king/11/10/mailbag/index.html).

67. *Id.*

68. See e.g., *League Announces Policy on Social Media for Before and After Games*, NFL.COM, <http://www.nfl.com/news/story?id=09000d5d8124976d&template=without-video-with-comments&confirm=true> (last visited Nov. 19, 2010); Marc Stein, *Source: NBA to Unveil Policy This Week*, ESPN.COM, Sept. 27, 2009, <http://sports.espn.go.com/nba/news/story?id=4508595>.

company policy has been violated.<sup>69</sup> Consequently, employers have created social networking usage bans during work hours because they can monitor what is said and prevent usage as much as possible.<sup>70</sup> This limited monitoring of social networking, however, may not be enough to protect the league from any bad publicity associated with social networking as players are free to use these sites as soon as their game time obligation is up.

As an example, Chad Ochocinco used Twitter to complain about a fine he received from the NFL due to another Twitter post made during a pre-season game.<sup>71</sup> “I’ve been fined by the league a substantial amount of money for tweeting, 1st time [T]witter hasn’t made me money but cost me money.”<sup>72</sup> This complaint, albeit harmless, exemplifies the dangers of social networking created by professional athletes. Even after being fined, Ochocinco did not hesitate to return to the social forum to voice his opinions. Further regulation of social networking sites by individual teams and sports leagues could combat this problem, but how far can these regulations go before they cross the line and become privacy violations?

#### IV. BALANCING PRIVACY AND REGULATIONS OF EMPLOYEE USAGE OF SOCIAL NETWORKING

Recent focus on social networking led to major publicity concerns for teams and leagues even after the implementation of usage policies. LeBron James’s decision regarding whether to stay in Cleveland was complicated by media speculation, and his use of Twitter during this time provided more media fodder.<sup>73</sup> With only one message posted on the site that announced his presence on Twitter, the media hypothesized that James’s presence on Twitter could give clues to his free agency decision or be the venue where he announced his decision.<sup>74</sup> Twitter’s added presence as a viable source of information for media speculation will likely get worse because it has been proven effective. Thus, this form of free publicity needs to be more closely

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69. Ariana R. Levinson, *What Hath the Twenty First Century Wrought? Issues in the Workplace Arising from New Technologies and How Arbitrators are Dealing with Them*, 11 *TRANSACTIONS: THE TENN. J. OF BUS. L.* 9, 33 (2010).

70. *Id.* at 11.

71. *Chad Ochocinco Fined \$25k*, ESPN.COM, Aug. 25, 2010, <http://sports.espn.go.com/nfl/trainingcamp10/news/story?id=5493157>.

72. *Id.*

73. See e.g., *LeBron Shows Up at Camp*, ESPN.COM, Jul. 6, 2010, [http://espn.go.com/blog/chicagobulls/post/\\_id/1210/lebron-shows-up-at-camp](http://espn.go.com/blog/chicagobulls/post/_id/1210/lebron-shows-up-at-camp); *LeBron Tweets, but Mum About Decision*, *supra* note 8.

74. *Id.* Both articles noted that other free agents Dwyane Wade and Chris Bosh were also active Twitter users, enhancing speculation that all three would soon be on the same team.

monitored to maximize its effectiveness and achieve the correct balance between privacy and regulation.

A lot of the difficulties associated with league social networking policies concern the limitations of privacy law. An employee's private life is beyond the reach of an employer. Furthermore, there is a general expectation of privacy in an employee's off-duty behavior.<sup>75</sup> These limitations may be apt for the general public, but athletes are celebrities with a lowered expectation of privacy due to public interest in their welfare and activities. As Warren and Brandeis theorized in their pivotal article on privacy, publication should not be prohibited for matters deemed public or of general interest, and the right to privacy ends with publication by the individual. Both of these viewpoints limit the expectation of privacy for athletes using social networking sites; and as a result, increased monitoring and regulation of social networking usage by the league could be possible.

There are several reasons that add strength to the argument for increased regulation of social networking sites and usage by professional sports leagues. First, there is clearly established law that gives the league commissioner the authority to punish athletes for their off-duty conduct because these actions can negatively impact the league as a whole.<sup>76</sup> Adding to the current policies would show that the commissioner's action is neither arbitrary nor capricious and is made with the intentions of protecting and promoting the league in a beneficial manner.<sup>77</sup> Next, the current conduct codes in place for various leagues would allow for added regulation. The NBA tied their social networking policies to their conduct policies specifically to remind athletes and other personnel that they should be wary of what is said online.<sup>78</sup> This policy has currently been used for punishing negative comments directed towards officiating, teams, or the league as a whole.<sup>79</sup> But, it could be extended to any detrimental conduct made public via a social networking site.

An extension of current policies does not mean that use of these sites should be banned. There are ways to regulate, without completely destroying, a player's individual autonomy. The University of North Carolina (UNC), for

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75. Levinson, *supra* note 69, at 40–41.

76. Janine Young Kim & Matthew J. Parlow, *Off-Court Misbehavior: Sports Leagues and Private Punishment*, 99 J. CRIM. LAW & CRIMINOLOGY 573, 575, 579 (2009) (illustrating various cases that grant the Commissioner ample authority in his ability to punish an athlete for conduct outside of the best interests of the sport).

77. *Id.*

78. Stein, *supra* note 68.

79. *Id.* The NBA used this conduct-related social networking policy to fine Mark Cuban, owner of the Dallas Mavericks, after he went on Twitter to complain about the officiating during a Dallas Mavericks game in March 2009. *Id.*

instance, instituted a new social networking policy that allowed for monitoring of all social networking posts by student-athletes.<sup>80</sup> As a university, UNC may have more latitude in terms of creating such a policy because monitoring will help prevent National Collegiate Athletic Association (NCAA) violations and other compliance issues.<sup>81</sup> This policy of increased monitoring, on the other hand, has an underlying effect that would be beneficial to professional sports leagues: it makes athletes aware of the public nature of social networking and the possible consequence when they post without considering the audience. One UNC player has already determined that the use of social networking is not worth the risk and deleted his page.<sup>82</sup> Although the effectiveness of this policy remains to be seen, it could finally make social networking users with celebrity status in their community aware of its dangers.

Athletes quickly learn about the lengths the media will go to create a story, and if athletes are made aware that social networking provides another place for a source, they can learn to be more careful about what is said online. Right now, athletes and other celebrities are using social networking sites just like anyone else. Their focus is on their immediate network of friends and their belief is that this is a private forum to express ideas and have conversations. However, the public nature of these sites allows anyone with Internet access to discover all they wish to know about their favorite player. Making the athlete aware of this through a more in-depth policy is easily the best way to limit the problems associated with social networking.

Additionally, highlighting the safeguards available through a more cohesive policy does not limit the athlete; instead, it further protects his private interests. If one chooses to use social networking only as a platform to connect with friends, then any information given can be made private and only visible to a certain group. Using these safeguards also protects the athlete's privacy and First Amendment privileges. One of the main problems with social networking sites is the lack of a cohesive First Amendment argument available to athletes because they voluntarily posted this information along with accepting the demands of celebrity.<sup>83</sup> Conversely, use of these

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80. *UNC Tweaks Twitter, Facebook Policies*, RALEIGH NEWS & OBSERVER, Aug. 30, 2010, available at <http://www.newsobserver.com/2010/08/30/655873/unc-tweaks-twitter-facebook-policies.html#ixzz0yBINzfOL>.

81. UNC's policy towards social networking changed after an investigation into whether defensive lineman Marvin Austin had improper contact with an agent. *Id.* Austin posted receipt of expensive gifts for himself and his family on Twitter before his page was deleted. *Id.*

82. *Is Henson the First Casualty of UNC's New Social Networking Policy?*, RALEIGH NEWS & OBSERVER, Aug. 31, 2010, available at <http://blogs.newsobserver.com/accnow/is-henson-the-first-casualty-of-uncs-new-social-networking-policy>.

83. See Shackelford, *supra* note 23, at 26.

protections takes away the free publicity factor of social networking. A lot of athletes use these sites to promote their businesses, charity events, or anything else in need of publicity. Total privacy would derail that mission and remove the benefits associated with social networking, making added knowledge about the hazards of social networking the better option available to athletes and other celebrities.

All league mandated social networking policies could benefit from increased regulation about the manner of usage, not just a time restriction. By monitoring the public remarks made by those who do not wish to use the privacy filters, the league can better control the type of publicity associated with these sites. Knowledge of league presences and available safeguards will warn the athlete of the potential danger. The biggest problem with social networking is that few are truly cognizant of its reaches, and focusing on social networking usage during games will do little to curb this effect. The majority of publicity scandals created via social networking have happened away from the game and during an athlete's private time. These media frenzies are not good for the team, the league, and especially the athlete because it may cost the athlete a job or create unnecessary financial or criminal responsibilities. Simply banning use of these sites will not solve any problems; instead, athletes, like everyone else, need to learn how to use these sites in a professional manner that protects their privacy and maintains the reputation of the organizations they represent.

#### CONCLUSION

Technological advances have changed how we do business and how we communicate with others. Social networking allows for more up-to-the-minute communication, free publicity, and a means to express ideas to others. However, its mimicry of traditional social functions causes many to ignore the public nature of these forums. Bad information can circulate just as fast as any good publicity, especially when the poster is already a public figure. To stem the tide, professional sports leagues have established policies to regulate social networking. Unfortunately, these policies have to toe the line between regulation and privacy and often end up lacking in effectiveness. Increased regulation may appear to reduce the athlete's privacy expectation. Instead, it does the opposite. If more athletes were aware of the public nature of these sites and that anyone can see what they post, then athletes and others may be more cautious about use of these sites. Often it takes the presence of an overseer to highlight the dangers and to persuade others to implement available safeguards. Social networking is only going to grow in usage, but it can be a beneficial tool if used effectively, making the use of safeguards

valuable to all involved.