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Being Social: Why the NCAA Has Forced Universities to Monitor Student-Athletes' Social Media

Jamie P. Hopkins, Katie Hopkins & Bijan Whelton

Abstract

On June 21, 2011, the National Collegiate Athletic Association (NCAA) charged the University of North Carolina at Chapel Hill (UNC) with a number of NCAA legislation violations, including “not adequately and consistently monitor[ing] social networking activity that visibly illustrated potential amateurism violations within the football program[.]” While the NCAA’s bylaws regarding member institution conduct indirectly impacts social media oversight, the NCAA’s lack of a social media monitoring policy creates uncertainty as to how member institutions should deal with potential violations of a non-existing policy. Coupled with concerns about their public image, tort liability, and their student-athletes’ safety, NCAA member institutions must develop a social media monitoring policy that does not infringe on constitutional free speech rights or more specific social media privacy laws. Ultimately, monitoring publicly available social media might be the safest and the best way to protect the institutions’ interests without violating their student-athletes’ legal rights.



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Being Social: Why the NCAA Has Forced Universities to Monitor Student-Athletes' Social Media

Jamie P. Hopkins, Katie Hopkins & Bijan Whelton*

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I. INTRODUCTION 101: SOCIAL MEDIA MONITORING

On June 21, 2011, the National Collegiate Athletic Association (NCAA) charged the University of North Carolina at Chapel Hill (UNC) with a number of NCAA legislation violations pertaining to their football program, including academic fraud, preferential treatment, and impermissible benefits from prospective agents.¹ On March 12, 2012, the NCAA released its notice of UNC's infractions, stating that the infractions were partly due to conduct "[i]n February through June 2010," during which "the institution did not adequately and consistently monitor social networking activity that visibly illustrated potential amateurism violations within the football program, which delayed the institution's discovery and compounded the provision of impermissible benefits[.]"² Due to these violations, the NCAA imposed penalties on UNC and its football program, including a \$50,000 fine, a bowl game ban for the 2012 football season, and a reduction of fifteen available football scholarships over a three-year period.³

Although the NCAA reprimanded UNC for failing to monitor its student-athletes' social media activity, the NCAA has not implemented a formal social media policy for monitoring or controlling social media usage by its member organizations and their student-athletes.⁴ For example, when setting forth the UNC sanctions, the NCAA refused

[t]o impose a blanket duty on institutions to monitor social networking sites. Consistent with the duty to monitor other information outside the campus setting (beyond on-campus activities such as countable

¹ See Ben Kercheval, *North Carolina Notice of Allegations Targets John Blake, Jennifer Wiley*, NBC SPORTS (June 21, 2011, 8:16 AM), <http://collegefootballtalk.nbcsports.com/2011/06/21/north-carolina-notice-of-allegations-targets-john-blake-jennifer-wiley/> (describing the allegations against UNC for violating NCAA recruiting regulations). See also *UNC Releases Response to NCAA Notice of Allegations*, UNIV. OF NORTH CAROLINA (Sept. 19, 2011), <http://www.unc.edu/campus-updates/unc-releases-response-to-ncaa-notice-of-allegations/> (noting UNC's response to the NCAA allegations of misconduct).

² See NCAA, *University of North Carolina, Chapel Hill, Public Infractions Report*, THE CHRON. OF HIGHER EDUC. (Mar. 12, 2012), <http://chronicle.com/blogs/ticker/files/2012/03/UNC.pdf> (stating the reasons for the NCAA infractions and penalties imposed). See also University of North Carolina, *Response to NCAA Notice of Allegations*, at 9-6, http://www.unc.edu/news/ncaa/NOA%20Response%20_%20redacted.pdf.

³ *Id.* at 23–24.

⁴ *Id.* at 11–12 (analogizing social media monitoring to a school monitoring the purchase of a student's clothing, highlighting the fact that there is no social media policy in place).

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athletically related activities, financial aid, satisfactory progress, etc.), such sites should be part of the monitoring effort if the institution becomes aware of an issue that might be resolved in some part by reviewing information on a site.⁵

Thus, member institutions are left on their own to decide whether to implement a social media policy, how they will enforce this policy, and whether they will monitor their student-athletes' social media usage. Furthermore, the NCAA's lack of social media monitoring policies creates uncertainty as to how member institutions should deal with potential violations of a non-existing policy.⁶ However, the NCAA's various rules and regulations regarding recruiting and member institution conduct can directly, and indirectly, impact the use and oversight of social media.⁷

This article examines the risks and benefits associated with the collegiate monitoring of student-athletes' social media. Section I of this article sets forth the basic problems for universities in monitoring social media after the recent UNC violations. Section II examines the emergence and proliferation of social media, its budding intersection with sports, and the NCAA's current stance on social media. Section III of this article describes the arguments in favor of monitoring, the most prominent being avoidance of NCAA sanctions and protecting the school's image. In turn, Section IV examines the risks of monitoring, namely legal liability, including tort liability as well as possible constitutional considerations. Section V identifies current NCAA member institution's policies for social media monitoring, considers alternatives to monitoring, and takes a look at organizations that have successfully monitored, regulated, and supported the intersection of social media and its student-athletes. Section VI sets forth recommendations on how the NCAA, schools, and the government can handle the multi-layered issues of social media monitoring. Lastly, section VII concludes this paper with suggestions for institutions that choose to monitor their students' use of social media so that they can best avoid the potential liability associated with monitoring athletes' social media.

⁵ *Id.* at 11.

⁶ *See generally id.* at 11–12 (noting the NCAA declined to set a hardline social media policy).

⁷ *See* Dave Copeland, *NCAA Takes Pressure Off Schools to Monitor Social Media*, READWRITE (Mar. 12, 2012), http://www.readwriteweb.com/archives/ncaa_takes_pressure_off_schools_to_monitor_social.php (noting the strong ties between NCAA regulations on recruiting and Social Media). *See also* NCAA DIVISION I MANUAL (2011), *available at* <http://www.ncaapublications.com/productdownloads/D112.pdf> (setting forth the Division I rules regarding member institution compliance).

II. HISTORY OF SOCIAL MEDIA

A. *History 101: The Emergence and Proliferation of Social Media*

As technology continues to play an increasing role in the everyday lives of individuals and organizations around the globe, the emergence of social media represents a landmark development, permanently altering people's manner of communicating and sharing information.⁸ Social media's expansion was made possible through developments in web functionality, allowing users to participate and collaborate in generating content, as opposed to merely consuming content published by others.⁹ There are several different types of social media, including but not limited to: blogs, social networking sites (which will be the focus of this article), virtual social worlds, collaborative projects, content communities, and virtual gaming worlds.¹⁰

Since 2011, social media has been the most popular internet activity in the world.¹¹ Leading the way are popular sites such as Facebook, Twitter, LinkedIn, MySpace, Google+, and Tumblr.¹² Research suggests that four in five daily active internet users frequent social networks and blogs on a daily basis.¹³

With 86% of people in the United States between ages 18 and 29 using social media, social media has become the most popular online activity for this age

⁸ See Eric Savitz, *When Corporate and Consumer Communications Collide*, FORBES (Jan. 16, 2012, 7:40 PM), <http://www.forbes.com/sites/ciocentral/2012/01/16/when-corporate-and-consumer-communications-collide/> (stating social media has seen an enormous expansion and proliferation due to changing cell-phone and wireless device technology).

⁹ See Andreas M. Kaplan & Michael Haenlein, *Users of the world, unite! The challenges and opportunities of Social Media*, BUS. HORIZONS (2010), at 61, available at <http://openmediart.com/log/pics/sdarticle.pdf> (noting the growth of social media has been made possible through new websites that allow for easy networking between peers).

¹⁰ See *id.* (stating the variety of social media offerings).

¹¹ See Sarah Radwanick, *It's a Social World: Social Networking Leads as Top Online Activity Globally, Accounting for 1 in Every 5 Online Minutes*, COMSCORE (Dec. 21, 2011), http://www.comscore.com/Press_Events/Press_Releases/2011/12/Social_Networking_Leads_as_Top_Online_Activity_Globally (highlighting the widespread use of social media on the internet).

¹² See *The 15 Most Popular Social Network Sites*, EBIZMBA.COM (Oct. 2012), <http://www.ebizmba.com/articles/social-networking-websites> (listing top 15 most visited social media websites).

¹³ See *State of the Media: The Social Media Report Q3 2011*, NIELSEN (2011), <http://blog.nielsen.com/nielsenwire/social/2011/> (noting forty percent of social media users have access through their mobile cell phones) [hereinafter *Nielsen Report*].

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group.¹⁴ The use of social media by potential employers is perhaps even more relevant to universities and student-athletes. Over 80% of companies use social media to recruit employees, with 95% of those companies using LinkedIn, a popular social networking site (SNS) that provides people with opportunities for building professional networks and operates a model focused on marketing and hiring solutions.¹⁵

Social media usage is not limited to recruiting and professional networking. Among other things, its uses range from picture sharing to status updates and job searches. For example, Facebook, founded in 2004, provides an online utility network for people to communicate with others, including friends, family, and coworkers.¹⁶ Defining features of Facebook include a “Home” page (which provides a feed of news regarding “friends” and interests), a profile page (where people can share status updates, information on education employment, interests, contact information), and the availability of applications (including access to photos, groups, videos, events, games and other pages).¹⁷

In 2012, Facebook reported having more than 800 million users.¹⁸ In addition, research shows that Americans spend more time on Facebook than any other site (including Google).¹⁹ Although 18–34 year olds are the most active social networkers, older individuals have contributed to the growth in social networking.²⁰

¹⁴ See Jeff Bullas, *20 Stunning Social Media Statistics Plus Infographic*, JEFFBULLAS.COM, <http://www.jeffbullas.com/2011/09/02/20-stunning-social-media-statistics/> (last visited Oct. 10, 2012) (stating the usage rates of social media by different age groups).

¹⁵ See *id.* (stating that social media is widely used by recruiters to gain more information on potential employees). See also *Press Center—About Us*, LINKEDIN, <http://press.linkedin.com/about> (last visited Oct. 10, 2012) (describing how LinkedIn works and what it offers its members).

¹⁶ See *Key Facts*, FACEBOOK, <http://newsroom.fb.com/content/default.aspx?NewsAreaId=22> (last visited Oct. 10, 2012) (illustrating Facebook’s mission and rapid expansion).

¹⁷ See *Overview*, FACEBOOK, <http://newsroom.fb.com/content/default.aspx?NewsAreaId=21> (last visited Oct. 20, 2012) (explaining and describing the current product offerings available through Facebook).

¹⁸ See *Key Facts*, FACEBOOK, <http://newsroom.fb.com/content/default.aspx?NewsAreaId=22> (last visited Oct. 20, 2012) (stating that Facebook passed the 1 billion user mark in October 2012). See also Heather Kelly, *83 Million Facebook Accounts are Fakes and Dupes*, CNN (Aug. 2, 2012), http://articles.cnn.com/2012-08-02/tech/tech_social-media_facebook-fake-accounts_1_facebook-accounts-facebook-profiles-facebook-estimates (stating 83 million, or about 8%, of Facebook accounts are fake or duplicate accounts).

¹⁹ See *Nielsen Report*, *supra* note 13 (concluding that Facebook is the most popular social networking site on the internet).

²⁰ See *id.* (noting the rapid expansion of social media use by people over the age of 35).

Mobile social networking has also increased due to the proliferation of smart-phones and applications specifically designed to provide mobile access to SNS.²¹

MySpace is another widely popular SNS that has experienced success with its social networking platform. However, since 2008, it has ceded ground to Facebook, a development that many attribute to MySpace's lack of innovation.²² Presently, MySpace tends to draw younger users.²³ Internet giant Google recently entered the SNS arena, creating Google+, which began testing in 2011.²⁴ Google+ provides users with a profile and tools for collaboration, including a "circles" feature wherein users can share information, statuses, and pictures with particular individuals that they designate in "circles."²⁵ In 2011, Google+ experienced tremendous growth, gaining roughly one million users per day during its first month of going live.²⁶

Twitter is another popular social networking website with over 500 million registered users.²⁷ Twitter enables incredibly fast social network sharing through posts, or "tweets," of information to other users.²⁸ It has been described as a SNS, a

²¹ See *id.* (stating that 46% of social media users access social media through their mobile devices and app usage accounts for over a third of social networking time across all computers and mobile devices).

²² See Dawn C. Chmielewski & David Sarno, *How MySpace Fell Off the Pace*, L.A. TIMES (June 17, 2009), <http://articles.latimes.com/2009/jun/17/business/fi-ct-myspace17> (noting MySpace's declining revenue and market share).

²³ See Keith N. Hampton et al., *Social Networking Sites and Our Lives*, PEW INTERNET (June 16, 2011), <http://www.pewinternet.org/~media/Files/Reports/2011/PIP%20-%20Social%20networking%20sites%20and%20our%20lives.pdf> (showing that MySpace tends to now attract younger members).

²⁴ See Vic Gundotra, *Introducing the Google+ Project: Real-Life Sharing, Rethought for the Web*, GOOGLE BLOG (June 28, 2011), <http://googleblog.blogspot.com/2011/06/introducing-google-project-real-life.html#/2011/06/introducing-google-project-real-life.html> (stating that Google aims to fix social media sharing by designing a social network specifically with the internet and the human element in mind).

²⁵ See *Learn More—Google+ Overview*, GOOGLE (last visited Oct. 10, 2012), <https://www.google.com/intl/en-US+/learnmore/index.html#circles> (describing the features of Google+).

²⁶ See Hayley Tsukayama, *Google Plus Could be the Fastest-Growing Site in History*, WASH. POST (Aug. 3, 2011, 10:50 AM), http://www.washingtonpost.com/blogs/faster-forward/post/google-plus-could-be-the-fastest-growing-site-in-history/2011/08/03/gIQA9x2vrI_blog.html (stating Google+ gained 25 million users in its first month, growing at a rate of almost one million people per day).

²⁷ Marissa McNaughton, *Social Networking Stats*, THE REAL TIME REPORT (Feb. 24, 2012), <http://therealtime.com/2012/02/24/social-networking-stats-twitter-hits-500-million-pinterest-grows-in-europe-rtm-scoreboard/> (stating Twitter had over 500 million users by March of 2012).

²⁸ See Daniel Nations, *What is Twitter?*, ABOUT.COM, <http://webtrends.about.com/od/socialnetworking/a/what-is-twitter.htm> (last visited Oct. 10, 2012) (explaining Twitter and "tweets" of information).

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news reporting outlet, a miniature blog, and a social marketing tool.²⁹ Users can make their own personal “tweet” messages or follow the “tweets” of companies, friends, or celebrities.³⁰ Furthermore, most colleges, sports franchises, and companies have their own Twitter pages with thousands of followers; even the NCAA has its own Twitter page.³¹ Additionally, over fifty percent of internet users follow a specific brand through the use of social media, and more than thirty percent follow a celebrity.³²

Visual social network (VSN) sites have experienced tremendous growth in the past decade. These websites, such as Tumblr and Instagram, allow users to post text, pictures, videos, links, and audio to their blog or account.³³ Tumblr enables users to share textual messages, photographs, and music from their phones, e-mails, or computers.³⁴ Since its inception in 2007, Tumblr has featured over thirty-one billion posts on roughly seventy-two million different blogs.³⁵

However, YouTube may be the most successful VSN site to date.³⁶ YouTube is accessed by 800 million unique individual users every month.³⁷ Over 100 million

²⁹ *Id.* (describing how Twitter is a multi-function and purpose social network site).

³⁰ *See About Twitter*, TWITTER, <http://twitter.com/about> (last visited Oct. 10, 2012) (describing the unique sharing and following features of Twitter’s social media interface).

³¹ *See, e.g., NCAA*, TWITTER, <http://en.twitter.com/NCAA> (last visited Oct. 22, 2012) (The NCAA’s Twitter Account); *NCAA Football*, TWITTER, <http://twitter.com/NCAAFootball> (last visited Oct. 22, 2012) (the NCAA’s Football Twitter Account).

³² *See Nielsen Report*, *supra* note 13 (demonstrating how important social media can be for a company, product, brand, or personal image as millions of people use social media to gain access to this information).

³³ *See About*, TUMBLR, <http://www.tumblr.com/about> (last visited Oct. 10, 2012) (describing the features and offerings of Tumblr). *See also About Us*, INSTAGRAM, www.instagram.com/about/us/ (last visited Oct. 10, 2012) (explaining how Instagram enables users to share photographs across a wide range of social media networks).

³⁴ *See TUMBLR*, *supra* note 33 (stating how Tumblr offers users a variety of media options for its networking products).

³⁵ *See id.* (describing Tumblr’s rapid expansion and use). *See also About Flickr*, FLICKR, <http://www.flickr.com/about/> (last visited Oct. 10, 2012) (noting that Flickr is a similar website that allows users to post and share videos and photos online with other users); *What is Pinterest?*, PINTEREST, <http://pinterest.com/about/> (last visited Oct. 10, 2012) (stating that its Social Media niche focuses on sharing items of interest with your social network).

³⁶ *See Xu Cheng, Cameron Dale & Jiangchuan Liu, Statistics and Social Network of YouTube Videos*, SIMON FRAISER U. (2008), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.150.7896&rep=rep1&type=pdf> (stating how widespread YouTube use has been since 2005). *See also About YouTube*, YOUTUBE, http://www.youtube.com/t/about_youtube (last visited Oct. 10, 2012) (explaining what YouTube is and how it functions); *Timeline*, YOUTUBE, http://www.youtube.com/t/press_timeline (last visited Oct. 10, 2012) (setting forth YouTube’s timeline and historic achievements).

people take social action on YouTube every week, including liking, sharing, or commenting on a video.³⁸ In 2011, YouTube had over one trillion videos viewed, or roughly 140 videos viewed for every person alive.³⁹

Furthermore, YouTube is used by the NCAA, its member institutions and its individual athletes for both athletic and self-promotion.⁴⁰ In 2011, University of Connecticut quarterback, Johnny McEntee, grabbed national sports headlines after posting trick shot football videos online.⁴¹ In just over a year, his videos have been viewed more than six million times on YouTube alone.⁴²

Social media's rapid development has been accelerated by evolving technologies that have made social media more readily accessible to the general public.⁴³ Social media advancements have manifested in the form of a new language, which allows for the tagging of interest areas so that the content is easily accessible and searchable.⁴⁴ Continued improvements in tagging systems and social

³⁷ *Press: Statistics*, YOUTUBE, http://www.youtube.com/t/press_statistics (last visited Oct. 10, 2012) (stating the total number of YouTube social network members and how often they utilize YouTube's video content).

³⁸ *Id.* (describing how YouTube is used daily by millions of people).

³⁹ *Id.* (noting how expansive YouTube is and how popular of a social media platform it has become in just a few years).

⁴⁰ *See generally YouTube Channel—NCAA*, YOUTUBE, <http://www.youtube.com/user/ncaa> (last visited Oct. 10, 2012) (NCAA has its own official YouTube channel and uses it to promote different sports and NCAA activities). *See also YouTube Channel—University of Texas, Austin*, YOUTUBE, <http://www.youtube.com/user/utaustintexas> (last visited Oct. 10, 2012) (the University of Texas uses this channel to promote the University and its sports programs).

⁴¹ Matt Vensel, *UConn's Johnny McEntee and his QB Trick Shots*, THE BALTIMORE SUN (Feb. 9, 2011), http://articles.baltimoresun.com/2011-02-09/sports/bal-sportsblitz-qb-trick-shot0209_1_trick-reel-basketball-arena (describing Johnny McEntee's amazing skills and trick shot video that was posted on YouTube). *See also* Matt Hinton, *UConn's Backup QB is a Jedi Master of Meaningless Accuracy*, RIVALRY (Feb. 8, 2011, 6:26 PM), http://rivals.yahoo.com/ncaa/football/blog/dr_saturday/post/Video-UConn-s-backup-QB-is-a-Jedi-master-of-meaf?urn=ncaaf-318722 (providing video and commentary on some of McEntee's trick shots).

⁴² *Johnny Mac Trick Shot Quarterback*, YOUTUBE, <http://www.youtube.com/watch?v=s0WMd0Y6hIw> (last visited Oct. 12, 2012) (providing video of McEntee's trick shots and showing 6.8 million views).

⁴³ Nan Lin, *The dynamic features of Delicious, Flickr, and YouTube*, 63 J. AM. SOC'Y FOR INFO. SCI. & TECH. 139, 141 (2012) (noting that developing technology is making social media more readily accessible).

⁴⁴ *Id.* at 148 (stating that the development of a social media language will help users more effectively use social media in the future).

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media sharing will only enable the enrichment of knowledge and dispersion of information to a wider audience.⁴⁵

While social media is widely used by young adults, not all social media use is positive.⁴⁶ Over one third of social media users have admitted to lying about their credentials and nine percent of users suggest inappropriate or provocative photographs have been posted on their social media account.⁴⁷ Furthermore, while social media is widely used and accepted by the NCAA and its member institutions, social media's rapid expansion has far outpaced the efforts of legal and regulatory authorities to keep up.⁴⁸

B. History 201: The Intersection of Social Media and Sports

The proliferation of social media and social networking has conferred large societal benefits by enabling widespread community collaboration, professional networking, and information-sharing.⁴⁹ Social networking has impacted individuals as well as corporations, foundations, organizations, sports leagues, and teams.⁵⁰ These SNS create a forum for individuals, teams, and organizations to voice their opinions, market their brands, attract fans, and find sponsors.⁵¹

With over 80% of Americans actively using SNS, social media is becoming a major force in sports marketing and development.⁵² Because sports play a major role in the American culture, a high percentage of active social media users are

⁴⁵ *Id.* (arguing continued improvements in social media will enable information dissemination to be improved upon).

⁴⁶ *See* Bullas, *supra* note 14 (stating a variety of problems associated with social media use).

⁴⁷ *Id.* (noting that many social media users lie about themselves and post inappropriate material to their social networks).

⁴⁸ *Id.* (discussing the rapid growth of social media).

⁴⁹ *See Online Business Networking and Social Networking*, BUSINESS LINK, <http://web.archive.nationalarchives.gov.uk/20120823131012/www.businesslink.gov.uk/bdotg/action/detail?itmId=1081913265&type=RESOURCES> (last visited Oct. 23, 2012) (noting the benefits of social media include information sharing and professional development).

⁵⁰ *See generally* Carla Ferrara, *Business Benefits and Risks of Social Media are Explored in New ACE USA Podcast*, BUS. WIRE (Feb. 23, 2012), <http://www.businesswire.com/news/home/20120223006849/en/Business-Benefits-Risks-Social-Media-Explored-ACE> (noting some concerns for businesses regarding social media usage).

⁵¹ *See generally USC Trojans—Official Page*, FACEBOOK, <https://www.facebook.com/USCTrojans> (last visited Oct. 12, 2012) (The University of Southern California's Official Athletics Facebook Profile, with over 150,000 Facebook followers).

⁵² *See* Hampton et al., *supra* note 23 (stating the importance of SNS in the daily lives of Americans).

likely sports fans in some regard.⁵³ Behind airports, stadiums are the second most checked into place on social network websites.⁵⁴ Sporting events are widely followed and discussed through SNS. For example, the Green Bay Packers' Superbowl victory in 2011 ranked as the second most discussed topic on Facebook.⁵⁵ Social networking enables sports teams and leagues to promote their sport, team, and players in addition to connecting with fans and sponsors.⁵⁶ Over 80% of sports fans check social media sites while watching games.⁵⁷ Additionally, social networking could also help collegiate and professional teams in attracting players, fans, sponsors, and monetary donations to their organizations.⁵⁸

However, social media is no longer just a marketing tool for sports teams and players, as the lines between sports, entertainment, education, communication, and social media have evaporated.⁵⁹ For example, many college football recruits announce their decisions via social media.⁶⁰ An even more drastic blend of social

⁵³ See Jeffrey M. Jones, *More Americans Fans of Pro Football Than Any Other Sport*, GALLUP (Apr. 20, 2001), <http://www.gallup.com/poll/1786/more-americans-fans-pro-football-than-any-other-sport.aspx> (demonstrating that most Americans are self-described sports fans, with 63% of people stating they are fans of professional football).

⁵⁴ Beverly Macy, *Social Media in Sports and Entertainment: Three Mega Trends in 2012*, HUFFINGTON POST (Nov. 29, 2011), http://www.huffingtonpost.com/beverly-macy/social-media-trends_b_1115659.html (describing trends in social media and sports).

⁵⁵ Melissa Locker, *Death, Destruction and the Packers: What Facebook Talked about in 2011*, TIME (Dec. 7, 2011), <http://newsfeed.time.com/2011/12/07/death-destruction-and-the-packers-what-facebook-talked-about-in-2011/> (stating the most frequently discussed topics on Facebook in 2011).

⁵⁶ See Irwin A. Kishner & Brooke E. Crescenti, *The Rise of Social Media What Professional Teams and Clubs Should Consider*, 27 ENT. & SPORTS LAW 24 (2010) (noting the wide range of marketing options available to sports teams through the use of social media networks). See also *SHAQ*, TWITTER, <http://twitter.com/SHAQ> (last visited Oct. 10, 2012) (Shaquille O'Neal has over 6 million twitter followers).

⁵⁷ Kelsey Cox, *The Game-Changing Effect of Social Media on Sports*, PRDAILY.COM (May 19, 2012), http://www.prdaily.com/Main/Articles/The_gamechanging_effect_of_social_media_on_sports_11684.aspx# (describing how valuable social media can be for sports teams and individual players).

⁵⁸ Steve Olenski, *Three of Four CMOs Say Social Media Impacts Sales*, FORBES (Aug. 21, 2012), <http://www.forbes.com/sites/marketshare/2012/08/21/three-of-four-cmos-say-social-media-impacts-sales/> (stating that social media is an important part of sales and marketing for businesses).

⁵⁹ Steve Olenski, *The Lines Between Social Media and Sports Continue to Blur*, FORBES (Feb. 13, 2012), <http://www.forbes.com/sites/marketshare/2012/02/13/the-lines-between-social-media-and-sports-continue-to-blur/> (noting that social media and sports are becoming very integrated) [hereinafter *Blurring Lines*].

⁶⁰ See Justin Bentaas, *Arizona Lands Top Recruit Via Twitter*, MARSREEL (Sept. 15, 2012, 8:59 PM), <http://www.themarsreel.com/arizona-lands-top-recruit-via-twitter/> (stating that a top 25 nationally ranked high school basketball player announced his college decision via twitter).

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media and sports occurred when the Philadelphia Wings of the National Lacrosse League created jerseys with each player's twitter name on the back.⁶¹

Despite the many benefits of social networking, many users do not fully understand the risks associated with their activities and the risk of legal liability that can result from actions taken online.⁶² Professional sports leagues typically support the use of social media and realize the benefits that can be had by utilizing the sites to their advantage.⁶³ Nonetheless, professional sports leagues have implemented social media policies in order to prevent harmful results from social media usage by their players.⁶⁴ The NFL, NBA, NHL, and other sports leagues have developed formal social media policies.⁶⁵ For example, the NFL's policy forbids players to use Twitter, Facebook, and other social media up to 90 minutes before kickoff and until after traditional post-game media interviews.⁶⁶ The proliferation of social media restraints and the expanding use of social media have set up an interesting dichotomy between regulation and use.

C. *History 301: The NCAA on Social Media*

Although the professional sports leagues have implemented formal social media policies, the NCAA has not followed suit.⁶⁷ Despite a lack of formal policy on the matter, the NCAA has recommended that its member schools monitor the

⁶¹ *Blurring Lines*, *supra* note 59 (noting the bond between social media, sports, and marketing are growing stronger each year as more and more people accept social media into their lives).

⁶² See Maria Burns Ortiz, *Guide to Leagues' Social Media Policies*, ESPN (Sept. 27, 2011), http://espn.go.com/espn/page2/story/_/id/7026246/examining-sports-leagues-social-media-policies-offenders (discussing a variety of violations by professional athletes of their respective sports' formal social media policies).

⁶³ *Id.* (setting forth the social media policies and recent offenders for the NFL, NCAA, MLB, NHL, NBA, and MLS).

⁶⁴ See *id.* (stating professional players have been fined and suspended for insensitive, racial, and other remarks made on social media). See also Paul Dehner Jr., *Bengals Coach Marvin Lewis Bans Player Use of Twitter*, CBS SPORTS (July 27, 2012), <http://www.cbssports.com/nfl/blog/nfl-rapidreports/19671003/bengals-coach-marvin-lewis-bans-player-use-of-twitter> (stating that the NFL's Cincinnati Bengal's head coach Marvin Lewis banned the use of twitter by his players after one player tweeted the status of his knee injury to all of his followers).

⁶⁵ Ortiz, *supra* note 62 (noting the varying rules for professional sports regarding the use of social media during, before, and after games or competition).

⁶⁶ Associated Press, *League Announces Policy on Social Media For Before and After Games*, NFL (Aug. 31, 2009, 6:53 PM), <http://www.nfl.com/news/story/09000d5d8124976d/article/league-announces-policy-on-social-media-for-before-and-after-games> (stating the NFL is regulating the use of social media by its players).

⁶⁷ See Ortiz, *supra* note 62 (stating most professional leagues have implemented formal social media policies).

social media of their athletes when concerns arise.⁶⁸ Although the NCAA has said that they have not imposed a duty upon member institutions to regularly monitor such sites, they stated that, “the duty to do so may arise as part of an institution’s heightened awareness when it has or should have a reasonable suspicion of rules violations.”⁶⁹ However, the NCAA’s rules, though not specifically designed to deal with social media, do apply.⁷⁰

The NCAA restricts all electronic communication between member institutions and prospective student-athletes except for e-mails and faxes.⁷¹ This ban was originally adopted in 2005 and has since been revised but it has not been updated to specifically address social media concerns.⁷² There are some exceptions to the ban after a prospective student-athlete signs his or her letter of intent with the school.⁷³

In 2012, an exception to the electronic transmission ban was enacted specifically for Division I Men’s Basketball.⁷⁴ The new exception states

[e]lectronic correspondence (e.g., electronic mail, Instant Messenger, facsimiles, text messages) may be sent to a prospective student-athlete (or the prospective student-athlete’s parents or legal guardians), provided the correspondence is sent directly to the prospective student-athlete (or his or her parents or legal guardians) and is private between only the sender and recipient

⁶⁸ See *NCAA Notice of Allegations to University of North Carolina, Chapel Hill* (June 21, 2011), http://www.wralsportsfan.com/asset/colleges/unc/2011/06/21/9761001/1308701906-Notice_of_Allegations_2.pdf (setting forth the allegations against UNC) [hereinafter *NCAA Notice to UNC*].

⁶⁹ *Id.* (stating member institutions must take action when there is a reasonable suspicion of rule violations).

⁷⁰ See 2011–2012 NCAA DIVISION I MANUAL § 13.4 (2011), available at <http://www.ncaapublications.com/productdownloads/D112.pdf> (setting forth the recruiting rules that apply to communications between universities and recruits).

⁷¹ *Id.* at § 13.4.1.2.

⁷² *Id.* (noting the NCAA rule has been revised but not to specifically address social media concerns).

⁷³ *Id.* at § 13.4.1.2.1.

⁷⁴ 2012–2013 NCAA DIVISION I MANUAL § 13.4.1.2.1 (2012), available at <http://www.ncaapublications.com/productdownloads/D113.pdf>.

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(e.g., no use of chat rooms, message boards or posts to “walls”).⁷⁵

The NCAA released a statement describing some of its reasons behind the change in electronic communications between schools and recruits.⁷⁶ The NCAA argued that the new rules would limit the “influence of third parties on the recruiting process.”⁷⁷ However, the NCAA noted that the new rules did not allow any public social media messages about recruiting as they will “continue to be prohibited because of the rule preventing institutions from publicizing their recruiting efforts.”⁷⁸

While NCAA Division I generally still bans electronic communications between schools and recruits, NCAA Division III rules are stricter and more defined.⁷⁹ The Division I rule states:

Electronically transmitted correspondence that may be sent to a prospective student-athlete by, or on behalf of, a member of the institution’s athletics department staff is limited to electronic mail, text messages and facsimiles. An enrolled student-athlete may send electronic mail and text messages to a prospective student-athlete for recruitment purposes. All other forms of electronically transmitted correspondence (e.g., instant messaging and social networking websites) are prohibited, except as specified in this section.⁸⁰

⁷⁵ *Id.*

⁷⁶ Michelle Hosick, *Basketball Recruiting Rule Change Effective Friday*, NCAA (June 11, 2012), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2012/June/Basketball+recruiting+rule+change+effective+Friday> (setting forth the reasons behind the recruiting changes in rules).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ 2012–2013 NCAA DIVISION I MANUAL, *supra* note 74 (setting forth the Division I rule regarding electronic communications between schools and recruits).

⁸⁰ *Id.*

However, the NCAA only began to consider text messages in the same light as telephone, email, and fax correspondences since January 2012.⁸¹

In an effort to prevent NCAA sanctions and reputational damage, many schools have implemented their own social networking policies, in addition to any applicable NCAA recruiting rules.⁸² As social media continues to become more prevalent in the everyday lives of student-athletes, schools, and teams, it is crucial for educational institutions to effectively leverage the benefits of social media, while avoiding practices that could expose them to legal liability. While the NCAA has loosened its rules regarding social media communications between recruits and coaches, it still lacks a comprehensive social media policy. Although NCAA rules might limit texting or face-to-face communications, new technologies such as Facebook, Skype, and other social media networks have blurred the lines between texting, emailing, chatting, posting, and face-to-face communications.⁸³

III. THE ART OF SOCIAL MEDIA MONITORING

Benefits of monitoring include a reduced risk of NCAA fines and penalties, the possibility of enhancing the school or team's image, and reducing potential liability linked to incriminating information or torts committed on social media sites.⁸⁴ Further, monitoring can be implemented through complete bans of social media, the usage of watchdog companies, or just mindful after-the-fact monitoring from the university.⁸⁵ However, without formal NCAA rules for social media

⁸¹ Gary Brown, *Text Messaging Adopted in Div. III*, NCAA (Jan. 14, 2012), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2012/January/Text+messaging+adopted+in+Division+III> (stating the NCAA revised its recruit communication rules regarding text messaging).

⁸² Kyle Ratke, *Jimbo Fisher Bans Players from Twitter for Second Time*, USA TODAY (July 19, 2012), <http://content.usatoday.com/communities/campusrivalry/post/2012/07/jimbo-fisher-bans-players-from-twitter-for-second-time/1#.UVj6W7QTHII> (stating Florida State's head coach banned twitter after a controversial player tweet).

⁸³ Jim Ryan, *Social-Media Nuances Muddle NCAA Rules for Coach-Recruit Dealings*, THE POST (OHIO UNIV.) (Mar. 1, 2012, 2:55 AM), <http://thepost.ohio.edu/content/social-media-nuances-muddle-ncaa-rules-coach-recruit-dealings> (noting how social media has blurred the lines of NCAA recruiting rules).

⁸⁴ Jason King, *Time For Schools to Ban Twitter*, YAHOO SPORTS (Aug. 30, 2011), http://rivals.yahoo.com/ncaa/basketball/news?slug=jn-king_schools_should_ban_twitter_083011 (describing the concerns with not banning or regulating college athlete's use of social media).

⁸⁵ See Maria Burns Ortiz, *Social Media: Twitter Ruling College Sports*, ESPN (Aug. 24, 2012), http://espn.go.com/blog/playbook/trending/post/_id/7037/social-media-twitter-ruling-college-sports (stating over 50% of college football coaches have social media accounts and that certain coaches have outright banned the use of social media) [hereinafter *Ortiz Social Media*]. See also Jeff Eisenberg,

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monitoring, schools, athletes, coaches, and teams will have to make their own decisions regarding regulating the use of social media.

A. *NCAA's Heavy Hand: Enforcement and Sanctions*

The NCAA was established in order to protect student-athletes by promising to “govern competition in fair, safe, equitable and sportsmanlike manner, and to integrate intercollegiate athletics into higher education so that the educational experience of the student-athlete is paramount.”⁸⁶ The NCAA includes three distinct legislative and competitive divisions—I, II and III.⁸⁷ Each of these divisions creates rules pertaining to eligibility, seasons, recruiting, benefits, communication, and institutional control.⁸⁸ Representatives from member schools and conferences must approve changes made to NCAA legislation.⁸⁹

The NCAA does not have powers akin to that of the legislative branch because it lacks the power to draft statutes and/or regulations. However, NCAA members can and have delegated power to the NCAA to enforce their membership-created rules to anyone falling under NCAA jurisdiction.⁹⁰ Individuals that can be charged by the NCAA include student-athletes, universities, colleges, recruits, and current or former school employees.⁹¹ The NCAA cannot subpoena witnesses, use the discovery process, or charge witnesses with perjury.⁹² Nonetheless, the

Tennessee Takes More Progressive Approach to Social Media than its Peers, YAHOO SPORTS (July 19, 2012), <http://sports.yahoo.com/blogs/ncaab-the-dagger-college-basketball-blog/tennessee-takes-different-approach-social-media-peers-002335251--ncaab.html> (arguing that putting social media links up with player bios will increase transparency and increase awareness of proper social media use).

⁸⁶ *About the NCAA*, NCAA, <http://ncaa.org/wps/wcm/connect/public/ncaa/about+the+ncaa> (last visited Oct. 12, 2012) (describing the purpose and goals of the NCAA).

⁸⁷ *See History of the NCAA*, NCAA (Aug. 13, 2012), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/About+the+NCAA/History> (noting the NCAA is divided into three separate divisions, each governed by its own set of bylaws).

⁸⁸ *See About the NCAA*, *supra* note 86 (describing the NCAA's structure).

⁸⁹ *See Greg Johnson, Rules Committee Proposes Changes*, NCAA (Aug. 3, 2012), <http://www.ncaa.com/news/lacrosse-men/article/2012-08-03/rules-committee-proposes-changes> (noting that the NCAA's rule committee can propose changes to bylaws but member organizations must agree and vote on the changes).

⁹⁰ *See Enforcement: Investigations*, NCAA, <http://www.ncaa.org/wps/wcm/connect/public/ncaa/enforcement/process/investigations> (last visited Jan. 31, 2013) (describing the enforcement mechanisms and procedures of the NCAA).

⁹¹ *See id.* (discussing who can be charged and held accountable by the NCAA for bylaw violations).

⁹² *See id.* (noting that the NCAA is not a governmental organization and it does not have the same authority, nor does the NCAA have to follow the due process requirements of a state actor).

consequences of being convicted of an infraction of NCAA legislation can still be daunting for recruits, institutions, coaches and athletes.⁹³

The NCAA processes cases in four stages—(1) Investigation; (2) Charging; (3) Hearings; and (4) Penalties.⁹⁴ During the investigation process, the enforcement staff reviews information regarding a possible violation and if credible, conducts interviews both on and off campus.⁹⁵ Reports of violations could come from member institutions, media reports, anonymous tips, or other individuals.⁹⁶ Following the investigation, if there is enough “substantial evidence” of a major infraction, the NCAA proceeds to charging, when it sends the notice of the allegations to the institution.⁹⁷ If the school agrees with the findings, the case can proceed to summary disposition and be closed.⁹⁸ If no agreement is reached at this time, the case proceeds to a hearing with the Committee of Infractions.⁹⁹

Following the hearing, the Committee releases a report, assesses penalties, and applies precedent if applicable.¹⁰⁰ The institution has the ability to appeal the decision.¹⁰¹ Penalties implemented by the NCAA are contingent upon the case’s facts but may include suspending athletes or making them permanently ineligible for Division I athletic competition, suspending or firing coaches, limiting recruiting opportunities, fining institutions, reducing financial aid awards, or publically reprimanding.¹⁰² While rarely implemented, the NCAA does have the authority to impose a so called “death penalty,” which completely bans scholarships, recruiting, and participation in a particular sport by a University because of egregious

⁹³ *See id.* (stating the NCAA process can be extensive).

⁹⁴ *See id.* (noting the NCAA enforcement process has four distinct stages).

⁹⁵ *See id.* (describing the investigation process).

⁹⁶ *See Enforcement: Investigations, supra* note 90 (stating that the initial investigatory process can be commenced through a variety of different information sources).

⁹⁷ *See id.* (requiring substantial evidence for a conviction of a major NCAA infraction).

⁹⁸ *See id.* (noting the availability of summary decision procedures).

⁹⁹ *See id.* (setting forth the standard set up of an infraction case).

¹⁰⁰ *See id.* (stating the NCAA does try to apply previous cases and hearings to the current ones in order to rely on precedent in areas already examined).

¹⁰¹ *See id.* (noting the appeals process for a member institution).

¹⁰² 2011–2012 NCAA DIVISION I MANUAL, *supra* note 70.

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misconduct.¹⁰³ The “death penalty” has only been applied once to Southern Methodist University “for a pay-for-play football scandal in 1987.”¹⁰⁴

B. The Gymnastics of Avoiding NCAA Sanctions

Despite the fact that it has not enacted a formal policy, the NCAA has nonetheless encouraged institutions to monitor the social media of their student-athletes.¹⁰⁵ On June 21, 2011, the NCAA charged UNC with a number of NCAA legislation violations pertaining to their football program.¹⁰⁶ Among other allegations, the notice alleged that “In February through June 2010, the institution did not adequately and consistently monitor social networking activity that visibly illustrated potential amateurism violations within the football program, which delayed the institution’s discovery and compounded the provision of impermissible benefits[.]”¹⁰⁷

On March 12, 2012, the NCAA gave some color to its allegation that UNC did not “adequately and consistently monitor social networking activity.”¹⁰⁸ At the same time, the NCAA declined “to impose a blanket duty on institutions to monitor social networking sites.”¹⁰⁹ It proceeded to state that, “[w]hile we do not impose an absolute duty upon member institutions to regularly monitor such sites, the duty to do so may arise as part of an institution’s heightened awareness when it has or should have a reasonable suspicion of rules violations.”¹¹⁰ The NCAA has made it clear that member institutions must monitor social media to some extent in order to protect against possible NCAA sanctions. However, uncertainty still looms as NCAA member institutions have not been provided with clear rules regarding social media.

¹⁰³ Associated Press, *Harsher Penalties Still an Option*, NCAA (Dec. 25, 2010), <http://www.ncaa.com/news/ncaa/2010-12-25/harsher-penalties-still-option> (discussing penalty options for the NCAA).

¹⁰⁴ *Id.* (describing the use of the “death penalty” as an NCAA deterrent).

¹⁰⁵ See *NCAA Notice to UNC*, *supra* note 68 (encouraging UNC and other schools to monitor their student-athletes’ social media).

¹⁰⁶ See *id.* (noting that UNC was charged with a number of NCAA violations).

¹⁰⁷ See *id.* (stating that UNC did not adequately monitor social media activity).

¹⁰⁸ See *id.* (identifying areas where schools should pay attention with regards to social media monitoring).

¹⁰⁹ See *id.* (stating there is no formal social media monitoring policy in place).

¹¹⁰ See *id.* (noting that while schools are not required to monitor social media, they must be aware of well publicized events that occur on social media that could relate to potential NCAA infractions).

Because the NCAA and its member institutions are still uncertain about how to adequately enforce social media guidelines, especially in regards to the recruiting process, gray areas of enforcement will be prevalent. For example, under NCAA bylaw 13.10.5, “a member institution shall not publicize (or arrange for publicity of) a prospective student-athlete’s visit to the institution’s campus. Violations of this bylaw do not affect a prospective student-athlete’s eligibility and are considered institutional violations.”¹¹¹ Enforcement of this bylaw has become increasingly complicated as many student-athlete recruits actively use public social media and correspond with others regarding their recruitment process.

For example, in March 2012, Notre Dame tight end, Tyler Eifert, entered the NCAA’s crosshairs for “tweeting” in reference to the upcoming recruiting visit of his high school friend and former teammate, five star recruit, Jaylon Smith of Fort Wayne, Indiana.¹¹² The tweet read: “Big recruiting day tomorrow here at ND. Looking forward to meeting and hanging out with 5 star recruit and Fort Wayne native @JaeSmiff9ENT.”¹¹³ Although Eifert may have violated the language of bylaw 13.10.5, neither the NCAA nor Notre Dame suspended him as the effects of the tweet were “secondary” in nature and were determined to not create an unfair competitive advantage.¹¹⁴ The NCAA’s ruling in this instance seems inconsistent with the plain language of its bylaw. Though inadvertent and seemingly harmless, Eifert’s tweet was an act of publicizing a potential student-athlete’s recruitment, which the bylaw expressly prohibits. The NCAA has offered little clarification concerning the distinctions between serious and secondary offenses. Therefore, its rulings will likely vary from case to case and will not provide universities with a clear message for monitoring social media.

C. *Protecting Current Students*

The intra-scholastic scrutiny of social media can yield several beneficial results. By monitoring its students’ online activities, a school can avert threats to

¹¹¹ See 2011–2012 NCAA DIVISION I MANUAL, *supra* note 70 (setting forth the recruiting rules that apply to communications between universities and recruits).

¹¹² Brian Hamilton, *Eifert Tweet to Football Recruit Could Mean Notre Dame Violation*, CHI. TRIB. (Mar. 2, 2012), http://articles.chicagotribune.com/2012-03-02/sports/chi-eifert-tweet-to-recruit-could-mean-notre-dame-violation-20120302_1_secondary-violations-tyler-eifert-tweet (stating concern surrounding a possible NCAA recruiting violation for a tweet).

¹¹³ See *id.* (reciting the tweet that potentially violated NCAA bylaw § 13.10.5).

¹¹⁴ See *id.* (noting the NCAA deems some violations as secondary and these violations do not provide any clear advantage or serious violation of the rules).

both its property as well as the livelihood of its students.¹¹⁵ Over the years, despondent students have foreshadowed their violent actions via blogs and message boards but despite their ominous content, their messages never reached the appropriate authorities in time.¹¹⁶ In 2006, Kevin Ray Underwood of Purcell, Oklahoma, gruesomely murdered 10-year old Jamie Rose Bolan and proceeded to dismember and boil her corpse in the bathtub of his apartment.¹¹⁷ In the months preceding his gruesome crime, Underwood regularly maintained a blog entitled, “Strange Things Are Afoot at the Circle K,” a cheeky homage to the film *Bill and Ted’s Excellent Adventure*.¹¹⁸ Admittedly depressed, lonely and hopeless, Underwood wrote, “my fantasies are just getting weirder and weirder. Dangerously weird. If people knew the kinds of things I think about anymore, I’d probably be locked away. No probably about it, I know I would be.”¹¹⁹ Though Underwood is now in prison facing execution, his posts were discovered far too late.¹²⁰

In the two years leading up to the Columbine High School shootings that occurred on April 20, 1999, the shooters, Eric Harris and Dylan Klebold, kept a blog wherein they detailed their violent urges and eventual plot to kill their

¹¹⁵ See Barbara Rodriguez, *William Koberna, Kent State Student in Twitter Threat, Ordered to Avoid School*, HUFFINGTON POST (July 30, 2012, 5:35 PM), http://www.huffingtonpost.com/2012/07/30/william-koberna-kent-stat_0_n_1721261.html (stating the suspect was immediately turned over to the police and arrested because the School’s safety was the top priority). See generally Reuven Cohen, *Dept. of Homeland Security Forced to Release List of Keywords Used to Monitor Social Networking Sites*, FORBES (May 26, 2012, 8:21 AM), <http://www.forbes.com/sites/reuvencohen/2012/05/26/departement-of-homeland-security-forced-to-release-list-of-keywords-used-to-monitor-social-networking-sites/> (noting that the Federal Government uses social media monitoring to protect against violent and other types of serious threats); Jason Koebler, *FBI Wants to Monitor Social Media for “Emerging Threats,”* U.S. NEWS, Jan. 27, 2012, <http://www.usnews.com/news/articles/2012/01/27/fbi-wants-to-monitor-social-media-for-emerging-threats> (stating that the FBI wants to monitor Facebook, Twitter, and other social media accounts to protect against emerging threats).

¹¹⁶ Associated Press, *‘Bored, Lonely’ Man Charged in Horrific Crime*, MSNBC (Oct. 17, 2006, 10:21:23 AM), http://www.msnbc.msn.com/id/12344689/ns/us_news-crime_and_courts/t/bored-lonely-man-charged-horrific-crime/ (stating that Underwood detailed his gruesome murder plans online before he ever was able to execute them).

¹¹⁷ *Id.* (detailing the events surrounding the brutal 2006 murder of Jamie Rose Bolan).

¹¹⁸ Kristal Hawkins, *Murder, They Blogged*, TRUE TV, http://www.trutv.com/library/crime/criminal_mind/psychology/bloggers-who-kill/10.html (last visited Oct. 12, 2012) (discussing Underwood’s blog posts detailing his gruesome plans).

¹¹⁹ *Alleged Cannibal Blogged About Plans*, CBS NEWS (Feb. 11, 2009, 6:36 PM), http://www.cbsnews.com/2100-201_162-1501459.html (reciting Underwood’s blog posts).

¹²⁰ *Id.* (noting that nothing was ever done to prevent Underwood’s crimes, despite disturbing online posts).

classmates.¹²¹ Aside from mere expressions of angst, they included detailed instructions on how to make explosives and boasted about their growing collection of firearms.¹²² Those two years of planning would culminate in the deaths of twelve students, one teacher, and the shooters' own suicides.¹²³

With the growing visibility and accessibility of social media outlets, schools have taken more proactive measures in monitoring the activities of their students.¹²⁴ In July of 2012, Kent State student, James Koberna, was arrested and instructed to stay away from both the school and its president due to a Twitter posting, or tweet, in which Koberna stated, "I'm shooting up your school ASAP."¹²⁵ Because the school was able to quickly identify the message and take proper action, Koberna could not act on his threat.¹²⁶ While such ominous statements may often be bluffs, it is nonetheless in a school's best interest to protect itself when its safety appears to be in question.

However, some will argue that when given the power to closely monitor the SNS of their students, institutions will be overbroad in their scrutiny. In June 2012, Celia Alchemy Savage, a college student living in Northeast Georgia, was arrested and held without bond when authorities found explosives and firearms in her home.¹²⁷ Both her Facebook profile and YouTube postings were believed to have fueled the FBI's suspicions.¹²⁸ Her Facebook profile, which she made accessible to

¹²¹ *Affidavit Says Harris Made Threats on Internet*, CNN (Apr. 10, 2001), http://articles.cnn.com/2001-04-10/justice/columbine.evidence_1_columbine-student-brian-rohrbough-daniel-rohrbough?_s=PM:LAW (stating the facts surrounding the Columbine Shootings).

¹²² *See id.* (stating the police were supposed to look into Harris's threats almost a year before the Columbine shootings because some of the people threatened had turned the information over to the police).

¹²³ *See id.* (noting horrific outcome of the Columbine shootings).

¹²⁴ *See* David Bailey, *Kent State Student Charged with Threatening School on Twitter*, CHI. TRIB. (July 30, 2012), http://articles.chicagotribune.com/2012-07-30/news/sns-rt-us-usa-crime-kentstatebre86t1dq-20120730_1_graduate-student-university-police-kent-state-student (noting the school and police took proactive measures after a shooting threat was made against the school).

¹²⁵ *See* Rene Lynch, *Kent State Student Accused of Plan to 'Shoot Up' Campus*, L.A. TIMES (July 30, 2012), <http://articles.latimes.com/2012/jul/30/nation/la-na-nn-kent-state-student-arrested-alleged-twitter-threat-20120730> (reciting the tweet threatening to shoot up the school).

¹²⁶ *Id.* (noting that Koberna was quickly arrested and charged with multiple crimes, possibly preventing a school shooting).

¹²⁷ Alexis Stevens, *College Student Held Without Bond for Explosives, Drugs*, THE ATLANTA J.-CONST. (Jun. 1, 2012), <http://www.ajc.com/news/news/local/college-student-held-without-bond-for-explosives-d/nQWFD/> (setting forth the details surrounding the student's arrest).

¹²⁸ *See id.* (noting that social media tracking alerted the FBI).

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all users, contained numerous hunting photos as well as statements concerning her distaste for law enforcement.¹²⁹ The YouTube video depicts Savage detonating one of her explosives.¹³⁰ However, neither the content on her Facebook profile nor the activities depicted in her YouTube videos were per se illegal. The case has created controversy concerning the extent to which SNS scrutiny is appropriate. Savage issued no specific threat of violence nor is there any evidence of affiliation with a militia or terrorist organization.¹³¹ Savage's father contends that her daughter's arrest constitutes a violation of her right to privacy as well as her right to freedom of speech.¹³²

NCAA member institutions may also look to protect their students through social media monitoring during the admission and recruitment period. Already, an estimated 80% of college admissions officers consider social media content when evaluating student applications.¹³³ According to a Studentadvisor.com survey editor, "in at least one case an admissions counselor told us they rejected a potential student based on their [his] social networking profile."¹³⁴ Additionally, there have been examples of student-athletes losing scholarship offers because of inappropriate social media use during high school.¹³⁵ In 2012, Yuri Wright was suspended from high school and his scholarship offers to play football were pulled by multiple schools after he posted potentially racist and sexist tweets.¹³⁶ While the NCAA does not have a clear policy regarding many potential social media and recruitment issues, member institutions will continue to monitor social media to best protect their interests and their students' interests.

¹²⁹ *See id.* (stating that the student's social media webpages included references to bombs, guns, and anti-law enforcement statements).

¹³⁰ *See id.* (stating YouTube was used to demonstrate her using bombs and detonating explosives).

¹³¹ *See id.* (describing the Facebook profile's content).

¹³² *See id.*

¹³³ *80% of College Admissions Officers Use Facebook to Check Out Students*, HUFFINGTON POST (May 25, 2011, 6:35 PM), http://www.huffingtonpost.com/2011/02/28/facebook-college-admissions_n_828487.html (noting the Kaplan study findings).

¹³⁴ *Id.* (stating that some students might not be accepted due to their social media postings).

¹³⁵ Liz Klimas, *Catholic High School Football Star Expelled, Loses Scholarship Over Racist, Sexual Tweets*, THE BLAZE (Jan. 23, 2012), <http://www.theblaze.com/stories/catholic-high-school-football-star-expelled-loses-scholarship-over-racist-sexual-tweets/> (stating that sexual and racist tweets cost high school football star change to attend his preferred college).

¹³⁶ *Id.* (reciting some of the sexual and racist tweets that resulted in Wright's scholarship withdrawals).

D. *Protecting the Image—Public Perception*

One reason many institutions choose to monitor student-athletes' social media profiles is to protect the institution and the teams from reputational damage. Some schools have informal monitoring regulations and policies, while others have implemented more strict and formal policies. Following the NCAA allegations against UNC and its football program, UNC instituted a formal social media policy.¹³⁷ The policy gives guidelines to student-athletes regarding best practices for using SNS.¹³⁸ In respect to monitoring, the policy explicitly states,

[e]ach team must identify at least one coach or administrator who is responsible for having access to and regularly monitoring the content of team members' social networking sites and postings. The Department of Athletics also reserves the right to have other staff members review and/or monitor student athletes' social networking sites and postings.¹³⁹

The consequences of posting controversial content on SNS are far reaching, including: loss of jobs, expulsion from school, dismissal from school programs, as well as the capture of criminals.¹⁴⁰ In 2009, former Kansas City Chiefs running back, Larry Johnson, made derogatory comments about his coach and posted a gay slur regarding a fan in a series of tweets.¹⁴¹ Following Osama Bin Laden's death, Pittsburgh Steelers running back, Rashard Mendenhall, posted a series of controversial tweets. Mendenhall tweeted, "What kind of a man celebrates death? It's amazing how people can HATE a man they have never even heard speak.

¹³⁷ *The University of North Carolina at Chapel Hill Department of Athletics Policy on Student-Athlete Social Networking and Media Use*, U.N.C. (Sept. 2011), http://grfx.cstv.com/photos/schools/unc/genrel/auto_pdf/2011-12/misc_non_event/SocialNetworkingPolicy.pdf [hereinafter *UNC Athletics Policy*] (describing University of North Carolina's social media policy).

¹³⁸ *Id.* (setting forth best practices for student-athlete usage of SNS).

¹³⁹ *Id.* (stating UNC has the right to review a student-athletes' social media sites).

¹⁴⁰ See Lauren McCoy, *140 Characters or Less: Maintaining Privacy and Publicity in the Age of Social Networking*, 21 MARQ. SPORTS L. REV. 203, 215–17 (2010) (noting the wide range of uses for social media and impact of controversial social media usage).

¹⁴¹ See Bill Williamson, *On Twitter, Kansas City Chiefs' Larry Johnson Slams Todd Haley, Uses Gay Slur*, ESPN (Oct. 27, 2009, 11:06 AM), <http://sports.espn.go.com/nfl/news/story?id=4596288> (noting the negative attention Larry Johnson received for his insensitive Twitter posts).

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We've only heard one side."¹⁴² He soon thereafter tweeted, "We'll never know what really happened. I just have a hard time believing a plane could take a skyscraper down demolition style."¹⁴³ These tweets caused Champion to terminate their endorsement contract with Mendenhall, saying that his remarks were, "inconsistent with the values of the Champion brand and with which we strongly disagreed."¹⁴⁴ Mendenhall has filed suit against Champion's parent company, claiming breach of contract and a violation of his First Amendment right to freedom of speech.¹⁴⁵ Yet, Mendenhall is unlikely to prevail because the contract included a morality clause, which stated that Champion can terminate the sponsorship if he, "commits or is arrested for any crime or becomes involved in any situation or occurrence tending to bring Mendenhall into public disrepute, contempt, scandal or ridicule, or tending to shock, insult or offend the majority of the consuming public."¹⁴⁶

Along with lost jobs and sponsorships, remarks made on public SNS can also result in reputational damage for players, thereby dramatically impacting their futures and their respective teams. Due to this fear, many professional leagues have developed formal policies on social networking. Collegiate athletes must consider their future prospects of jobs and sponsors, and the consequences for their teams or institutions when posting content on SNS. The consequences for student-athletes can be even more dramatic as they are not contractually bound and are not protected by players' unions. Mississippi State freshman basketball player, D.J. Gardner, was removed from the team for "repeated actions detrimental to the team" after tweeting profanely about being redshirted.¹⁴⁷ The instantaneous and public nature of unrestricted SNS pose unique issues, which are distinct from the issues that arose before social networking existed for student-athletes. Information is

¹⁴² *Rashard Mendenhall Doesn't Hold Back*, ESPN (May 4, 2011, 9:57 AM), <http://sports.espn.go.com/nfl/news/story?id=6471433> (describing Mendenhall's tweets and ensuing public outrage).

¹⁴³ *Id.* (reciting Mendenhall's tweets).

¹⁴⁴ *Mendenhall Sues Company that Dropped Him as Spokesperson*, PRO FOOTBALL WKLY. (July 19, 2011, 11:53 AM), <http://www.profootballweekly.com/2011/07/19/mendenhall-sues-company-that-dropped-him-as-spokes> (noting why Mendenhall's sponsor dropped him after his Tweets).

¹⁴⁵ *Id.* (describing Mendenhall's complaint).

¹⁴⁶ *Id.* (reciting the morality clause in Mendenhall's contract).

¹⁴⁷ *See* Associated Press, *D.J. Gardner Kicked Off Mississippi State*, ESPN (Aug. 26, 2011), http://espn.go.com/mens-college-basketball/story/_/id/6898335/mississippi-state-bulldogs-dismiss-freshman-dj-gardner (detailing the events behind D.J. Gardner's expulsion from the basketball team).

more quickly disseminated; there is a lasting record; and the media is quick to jump on any controversial topics.

Institutions may benefit from monitoring their athletes' SNS because they would protect their athletes as well as their own reputation. Establishing and maintaining a positive institutional reputation can have far-reaching effects. A positive image can result in more revenues from alumni and fans. Additionally, recruiting is likely to be affected by the institution's and the program's reputation. Although the NCAA has policies in place regarding contact and remarks about recruiting on social media, it is common for recruits to become Facebook friends with or twitter followers of current athletes (especially following a recruiting trip). This is another reason why schools have an interest in keeping themselves informed about athletes' social media. Postings by current student-athletes could impact a recruit's decision to attend a particular school, which in turn could potentially impact the quality and success of both the program and the institution.

E. Protecting the Pockets—Liability

In addition to NCAA infractions, a poor public perception, employment and social problems, another risk of failing to monitor athletes' SNS is a risk of liability attributed to athletes committing crimes or torts. If an athlete commits a tort through a SNS or posts about a crime they were involved with, the individual student-athlete could be held liable. Such posts would likely fall under the laws regarding written defamation (libel) as it is a common action resulting from wrongful posts on SNS.¹⁴⁸ Social media defamation cases are becoming increasingly common and are resulting in substantial monetary awards, occasionally upwards of ten million dollars.¹⁴⁹

New questions have arisen concerning the effects of social media upon the parameters of defamation law. How should a reasonable fact-finder perceive a derogatory or accusatory remark posted to a blog or message board? At which point should social media content be treated as a statement of apparent fact rather than an expression of pure opinion? Finally, should the person who posts remarks to a blog be viewed in the same light as a person engaged in the practice of "traditional" journalism?

¹⁴⁸ See 42 PA. CONS. STAT. ANN. § 8343 (2006) (setting forth the elements of defamation).

¹⁴⁹ See Ki Mae Heussner, 'Anonymous' Posters to Pay 13 Million for Defamatory Comments, ABC NEWS (Apr. 24, 2012), <http://abcnews.go.com/Business/jury-awards-13-million-texas-defamation-suit-anonymous/story?id=16194071> (stating that a jury awarded damages of 13 million dollars for online message board postings defaming the plaintiffs).

In *Obsidian Finance Group, LLC v. Cox*, Judge Marco Hernandez courted controversy in his attempt to resolve the aforementioned questions.¹⁵⁰ Plaintiff Obsidian Financial asserted that the character of Defendant Cox’s blog and message board entries constituted acts of libel.¹⁵¹ Posting to the blog called *obsidianfinancesucks.net*, the defendant alleged, among other things, that the plaintiff frequently engaged in fraudulent business practices, did so deliberately and maliciously, and threatened to kill her.¹⁵² The Circuit Court denied the plaintiff’s motion on the grounds that a reader would not likely interpret the blog postings as fact; thus, no libel could occur.¹⁵³ However, Judge Hernandez withheld judgment concerning the statements made by Cox on the *bankruptcycorruption.com* website.¹⁵⁴

In rendering his holding in *Obsidian I*, Judge Hernandez applied a three prong test, and later reapplied this test in *Obsidian II* when analyzing the *bankruptcycorruption.com* statements.¹⁵⁵ Under the first prong, the court examined the “broad context in which the statements were made, including the general tenor of the entire work, the subject of the statements, the setting and the format.”¹⁵⁶ Noting the frequency of defendant’s postings, the stream of consciousness style of her prose, and the personal attacks upon plaintiff’s counsel, the court determined that a reasonable reader would not interpret the defendant’s statements as assertions of provable fact.¹⁵⁷ Under the second prong, the court examined the context and the content of the specific statements, including the use of hyperbolic language.¹⁵⁸ Likewise, the court concluded that the defendant’s statements could not be viewed

¹⁵⁰ *Obsidian Fin. Grp. LLC v. Cox*, No. CV-11-57-HZ, 2011 WL 5999334 (D. Or. Nov. 30, 2011) [hereinafter *Obsidian I*] (setting forth the facts of the case); *Obsidian Fin. Grp., LLC v. Cox*, 812 F. Supp. 2d 1220 (D. Or. 2011) [hereinafter *Obsidian II*].

¹⁵¹ *Obsidian II*, 812 F. Supp. 2d at 1226 (describing plaintiff’s claims against defendant).

¹⁵² *Id.* at 1227 (noting the severity of the online social media postings).

¹⁵³ *Id.* at 1221 (stating the court denied plaintiff’s claims based on the *obsidianfinancesucks.net* postings because they were statements of opinion and not fact).

¹⁵⁴ *Id.* at 1238 (noting Judge Hernandez preserved some issues for further review).

¹⁵⁵ *Id.* at 1221–34 (applying a three prong test to determine defamation).

¹⁵⁶ *Id.* at 1233 (setting forth the first prong of the three prong defamation test).

¹⁵⁷ *Obsidian II*, 812 F. Supp. 2d 1220, 1234 (D. Or. 2011) (describing most of defendant’s statements as opinion based and not provable facts).

¹⁵⁸ *Id.* (examining the language and meaning of the posts).

as credible assertions of fact.¹⁵⁹ Under the third prong of the test, the court assessed whether certain statements, when taken in isolation, could be interpreted as provable assertions of fact.¹⁶⁰ The court concluded that most of the statements “lose the ability to be characterized and understood as provable assertions when the content and context of the surrounding statements are considered.”¹⁶¹

However, the court reached a different conclusion regarding one of the postings made by the defendant on the *bankruptcycorruption.com* website.¹⁶² The post asserted that the plaintiff was a thug, thief, cheat, liar, unethical, and cheated on taxes along with various other statements.¹⁶³ Applying the identical three prong test, the court noted a relative lack of context to understand the blog posting as merely an opinion.¹⁶⁴ Compared to her serial postings on the *obsidianfinancesucks.net* blog, defendant’s activity on *bankruptcycorruption.com* was relatively sparse; only two of her posts were featured.¹⁶⁵ For this reason, the court denied summary judgment for both the plaintiff and the defendant.¹⁶⁶ Moreover, Judge Hernandez refused defendant’s request for shield law protection regarding the concealment of her alleged sources.¹⁶⁷ Under the Oregon shield statute, protection attaches to certain defined mediums of communication, including but not limited to, any newspaper, magazine or other periodical, book, pamphlet, news service, wire service, news or feature syndicate, broadcast station or network, or cable television system.¹⁶⁸

¹⁵⁹ *Id.* (determining most posts failed the second prong of the libel test because they were not provable facts).

¹⁶⁰ *Id.* (applying the third prong).

¹⁶¹ *Id.* (noting most of the statements did not constitute defamation).

¹⁶² *Id.* at 1238 (stating one of defendant’s statements was unlike the others in its seriousness and provability).

¹⁶³ *Obsidian II*, 812 F. Supp. 2d 1220, 1237 (reciting defendant’s post).

¹⁶⁴ *Id.* at 1237–38 (noting that the post’s relative isolation on the website made it more likely the statements were asserted as factual accounts).

¹⁶⁵ *Id.* (noting defendant’s sparse activity and posting on the *bankruptcycorruption.com* website).

¹⁶⁶ *Id.* at 1239 (denying both plaintiff and defendant’s motion for summary judgment).

¹⁶⁷ *Id.* (stating the Oregon shield laws did not apply).

¹⁶⁸ John J. Dougherty, *Obsidian Financial Group, LLC v. Cox and Reformulating Shield Laws to Protect Digital Journalism in an Evolving Media World*, 13 N.C. J.L. & TECH. 287 (2012) (describing the scope of the Oregon shield laws).

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However, the most controversial aspect of the decision came in *Obsidian I*.¹⁶⁹ Asserting that Defendant Cox was not an actual journalist and the blog postings were not “media,” the court, in an unprecedented move, set out a seven factor test to determine the elements of actual journalism.¹⁷⁰ Among the seven factors were the requirements that one formally receive an education in journalism and that one be affiliated with a “recognized news entity.”¹⁷¹ The court determined that Defendant Cox was not a member of the “media” even though she claimed she was an “investigative blogger.”¹⁷² Therefore, a plaintiff has a lessened burden of proof in advancing claims against defendant.¹⁷³ In so ruling, the Court sent a clear message that people who post on public forums like blogs might consider themselves to be part of the “media,” but being part of the media requires more than just consistent social media postings and writings.

Recently, Twitter has fallen under the legal microscope of defamation law assessment. In early 2011, Dawn Younger-Smith, designer of the Boudoir Queen fashion line, sued rock-star/actress, Courtney Love, on a theory of libel stemming from a profanity laced tweet appearing on Love’s twitter account.¹⁷⁴ While Love’s counsel asserted that there was no proof of damage, Younger-Smith claimed that the tweet effectively ruined her career.¹⁷⁵ In designating its damage request, her counsel argued that a celebrity’s tweets be held to the same standard as any other

¹⁶⁹ *Obsidian I*, No. CV-11-57-HZ, 2011 WL 5999334, at *1 (D. Or. Nov. 30, 2011) (setting forth the court’s order and decision).

¹⁷⁰ *Id.* at *5 (setting forth the seven part test by stating that “[f]or example, there is no evidence of (1) any education in journalism; (2) any credentials or proof of any affiliation with any recognized news entity; (3) proof of adherence to journalistic standards such as editing, fact-checking, or disclosures of conflicts of interest; (4) keeping notes of conversations and interviews conducted; (5) mutual understanding or agreement of confidentiality between the defendant and his/her sources; (6) creation of an independent product rather than assembling writings and postings of others; or (7) contacting “the other side” to get both sides of a story.”).

¹⁷¹ *Id.* (noting the factors for being a member of the media).

¹⁷² *Id.* (holding defendant was not a member of the media).

¹⁷³ *Id.* at *6 (noting the Oregon shield law only applies to the media and that the case was not of significant public concern to warrant special protections).

¹⁷⁴ Kelly O’Reilly, *Courtney Love Sued by Fashion Designer over Tweets*, NBC (Jan. 6, 2011, 10:15 AM), <http://www.nbcnewyork.com/blogs/threadny/THREAD-Courtney-Love-Being-Sued-for-Tweets-113003634.html> (describing the facts surrounding the defamation twitter lawsuit against Courtney Love).

¹⁷⁵ *Id.* (setting forth each party’s arguments).

media.¹⁷⁶ Love and Younger-Smith eventually settled the matter for \$430,000; while no formal ruling was made regarding the matter, the case nonetheless demonstrates the availability of monetary relief stemming from Twitter libel.¹⁷⁷

In March of 2012, ex-cricketer Chris Cairns prevailed in a libel action against Indian Premier League chairman, Lalit Modi, who alleged on Twitter that Cairns was involved in a match-fixing scheme.¹⁷⁸ Modi was required to pay 90,000 pounds to Cairns in damages and an additional 400,000 pounds for Cairns' legal expenses.¹⁷⁹ Such steep damages serve as a testament to the potential legal consequences that accompany rash social media usage.¹⁸⁰ Finally, in July of 2010, a British student prevailed on a defamation claim stemming from a lewd Facebook image and caption alleging that he was a pedophile.¹⁸¹ The graphic nature of the image and public accessibility of the student's profile were determinative factors in the court's decision to award 10,000 pounds in damages.¹⁸²

The treatment of social media with regards to defamation is still evolving; however, it is clear that the use of social media will not receive many of the same blanket protections that once aided journalists in traditional media sources. Additionally, large damage awards for social media defamation postings could become an issue for universities and athletes. Institutional monitoring could present a possible solution for protecting against illegal social media postings. It is possible that by implementing a monitoring policy, athletes might be more cautious about what they post, thereby preventing potentially defamatory posts. Additionally, the school could benefit from monitoring because after reading the incriminating evidence, they could take immediate action and separate the institution from the act.

¹⁷⁶ Sara Dover, *Courtney Love to Settle Twitter Defamation Case*, NBC (Mar. 4, 2011, 8:15 AM), <http://www.nbcnewyork.com/entertainment/music/Courtney-Love-to-Settle-Twitter-Defamation-Case-117394613.html> (noting an argument was made for celebrity social media statements to be held to the level of media).

¹⁷⁷ *Id.* (noting the case was settled for a substantial sum of money).

¹⁷⁸ *Ex-Cricketer Chris Cairns Wins £90,000 Libel Damages*, BBC NEWS (Mar. 26, 2012, 8:28 AM), <http://www.bbc.co.uk/news/uk-17512027> (setting forth the twitter messages instituting the lawsuit).

¹⁷⁹ *Id.* (stating plaintiff's large monetary damage and attorney fee rewards).

¹⁸⁰ *Id.* (noting the large damages of social media defamation cases).

¹⁸¹ Andy Dolan, *Student Wins Libel Damages*, DAILY MAIL NEWS (July 27, 2010, 7:31 PM), <http://www.dailymail.co.uk/news/article-1298010/Facebook-libel-Law-student-dubbed-paedophile-wins-10-000-libel-damages.html> (describing a similar social media defamation case).

¹⁸² *Id.* (setting forth the court decision and damages award).

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F. School Bullying

Schools might also consider monitoring social media because of the increase in school bullying and possible third party liability concerns. In *Kowalski v. Berkely County Schools*, a student was suspended from school for creating a MySpace webpage dedicated to ridiculing another classmate.¹⁸³ The Court upheld the school's suspension, noting that the student

used the Internet to orchestrate a targeted attack on a classmate, and did so in a manner that was sufficiently connected to the school environment, implying that the [s]chool [d]istrict has authority to discipline speech which “materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school and collid[es] with the rights of others.”¹⁸⁴

IV. ARGUMENTS AGAINST MONITORING

Risks of monitoring include the possibility of legal liability on various grounds, including tort and constitutional claims. Athletes could potentially sue institutions for reputational damage, lost financial gains linked to athletic performance, negligence, freedom of speech violations, privacy violations or on grounds of discrimination.

A. Tort Liability

If an institution chooses to monitor athletes' social media and decides to suspend an athlete or remove an athlete from a team based on postings on SNS, the institution could be faced with a charge of reputational damage or defamation. Defamation actions seek to compensate for wrongful injury to reputation.¹⁸⁵ The likely remedy for defamation is damages.¹⁸⁶ Furthermore, an athlete wrongfully or

¹⁸³ *Kowalski v. Berkeley County Schools*, 652 F.3d 565, 567 (4th Cir. 2011) (setting forth the facts of the case).

¹⁸⁴ *Id.* (holding the school could suspend a student for using social media in a way to significantly disrupt the school environment) (quoting *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 513 (1969) (setting forth the material and substantial interference test)).

¹⁸⁵ *See, e.g., Longbehn v. Schoenrock*, 727 N.W.2d 153, 160 (Minn. Ct. App. 2007) (describing why damages are awarded for defamation).

¹⁸⁶ *Kukatash Min. Corp. v. Sec. & Exch. Comm'n*, 198 F. Supp. 508, 510–11 (D.D.C 1961), *aff'd*, 309 F.2d 647 (D.C. Cir. 1962) (noting damages may be awarded for successful defamation cases).

prematurely kicked off a team could sue for lost financial gains linked to athletic performance.

In addition, institutions could be faced with claims of negligence if they decide to adopt a monitoring policy. Negligence consists of duty, breach, causation and damage.¹⁸⁷ If a school has a formal policy to monitor athletes' social media and actually enforces this policy, it could create a duty of care to act upon obtaining certain information.¹⁸⁸ For example, if a school becomes aware of widespread corruption, violence, teacher abuse, or discrimination, this knowledge could create a duty for the school to act. Therefore, by not acting on the information, the school could breach its duty of care.¹⁸⁹ Thus, if it fails to catch something that is incriminating, it could be held liable for negligence.¹⁹⁰ In contrast, if an institution has no monitoring policy, no duty would be imposed on an institution and therefore, it would not be exposed to negligence claims.

B. Constitutional Analysis

Some schools have implemented formal social networking policies, as did UNC¹⁹¹ Other colleges have taken a backseat, such as Penn State University, by consciously choosing not to monitor their athletes' profiles.¹⁹² Schools who have enacted social media policies—whether it be monitoring policies, restrictions on use or bans on use, have opened themselves up to potential litigation on constitutional grounds, namely, the First, Fourth, and the Fourteenth Amendments.

1. First Amendment

The First Amendment states, “Congress shall make no law . . . abridging the freedom of speech.”¹⁹³ In order to prevail on a First Amendment claim, a student would have to demonstrate that (1) the institution is a public actor; (2) the

¹⁸⁷ See, e.g., *U.S. Fid. & Guar. Co. v. Camp*, 831 P.2d 586, 588–89 (Mont. Sup. Ct. 1992) (explaining the elements of negligence).

¹⁸⁸ See generally RESTATEMENT (SECOND) OF TORTS § 323 (1965) (describing duty in terms of negligence actions).

¹⁸⁹ *Id.* (noting the requirements of negligence).

¹⁹⁰ *Id.*

¹⁹¹ See *UNC Athletics Policy*, *supra* note 137 (setting forth UNC Chapel Hill's social networking policy for the athletic department).

¹⁹² Matt Dunning, *Social Media Has Schools on Defense*, BUS. INS. (July 24, 2011), <http://www.businessinsurance.com/article/20110724/NEWS07/307249975> (noting certain schools have decided to not monitor their student-athletes' social media usage).

¹⁹³ U.S. CONST. amend. I (setting forth the right of freedom of speech).

restriction is on protected speech; (3) the restriction is not a content-based restriction that is narrowly tailored to serve a compelling government interest; and (4) the restriction is not part of a contract between the athlete and the institution.¹⁹⁴

The Constitution and the Amendments to the Constitution apply only to acts of the federal government.¹⁹⁵ The Fourteenth Amendment further extends these liberties to the state.¹⁹⁶ The Supreme Court has broadened the definition of public action by holding that the performance of a “public function” or a function that has been traditionally and exclusively performed by the state is a public action.¹⁹⁷ Additionally, if the government is “pervasively entwined” with the organization, the organization’s actions are public actions.¹⁹⁸ Yet, private institutions are not found to be “state actors,” and resultantly, they are not typically subject to claims regarding unconstitutional restrictions on students’ free speech.¹⁹⁹

In *Carson v. Springfield College*, although the college received federal funds, the trial court held that the college was not acting as a state actor because higher education has not been an exclusively public function.²⁰⁰ Thus, private institutions are likely to prevail on most First Amendment claims leveled by student-athletes. Likewise, the Supreme Court signaled that the NCAA is not a state actor in *NCAA v. Tarkanian*.²⁰¹ On the other hand, state universities are, without question, state actors.²⁰²

¹⁹⁴ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 570–71 (1942) (setting forth the requirements to prevail on a First Amendment claim). *See also* *Roth v. United States*, 354 U.S. 476, 483 (1957); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Kashmiri v. Regents of Univ. of Cal.*, 156 Cal. App. 4th 809, 824 (Cal. Ct. App. 2007).

¹⁹⁵ *Chaplinsky*, 315 U.S. 568, 570–71 (noting the First Amendment only directly applies to federal actors).

¹⁹⁶ U.S. CONST. amend. XIV (extending the First Amendment to State actors).

¹⁹⁷ *Marsh v. Alabama*, 326 U.S. 501, 506–07 (1946) (stating public action can constitute more than just the government).

¹⁹⁸ *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 303 (2001) (noting excessive entwinement can require heightened standards of freedom of speech protections).

¹⁹⁹ *See Carson v. Springfield Coll.*, CIV.A.05C-10-002-PLA, 2006 WL 2242732, at *1-3 (Del. Super. Aug. 4, 2006) (noting that private institutions, not found to be state actors, are not subject to free speech requirements).

²⁰⁰ *Id.* (noting federal funds alone might not be enough to make a school a state actor).

²⁰¹ *NCAA v. Tarkanian*, 488 U.S. 179, 199 (1988) (stating the NCAA is not a state actor).

²⁰² *Id.* at 192 (holding state universities to be state actors).

In *Tennessee Secondary School Athletic Association v. Brentwood Academy*, the Supreme Court held that when the school joined the athletic association, it voluntarily accepted the association's ban on recruiting.²⁰³ The Court held that "[a]n athletic league's interest in enforcing its rules may warrant curtailing the speech of its voluntary participants."²⁰⁴ However, the Court also noted that an "athletic association does not have unbounded authority to condition membership on the relinquishment of constitutional rights[.]"²⁰⁵ While it is clear that an organization like the NCAA can infringe upon First Amendment rights due to the voluntary membership in the organization, it is unclear how far this right extends.

Another consideration under First Amendment scrutiny is whether the speech is protected. Only certain speech is protected under the First Amendment.²⁰⁶ Unprotected speech under the First Amendment includes obscenity, libel, and fighting words.²⁰⁷ The Supreme Court applies different levels of scrutiny when weighing a government interest against a constitutional right.²⁰⁸ Strict scrutiny is the standard typically applied to matters contemplating infringement on the First Amendment rights.²⁰⁹ Under strict scrutiny, content-based restrictions are valid only if there is a compelling government interest and the solution is narrowly tailored to protect this interest, meaning that there is no less restrictive alternative to address the compelling government interest.²¹⁰ The Court also considers whether the means actually further the interest and if it is unnecessarily burdensome.²¹¹

It is uncertain if public universities with social media policies for athletes will pass this analysis. Possible arguments for compelling government interests include

²⁰³ *Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad.*, 551 U.S. 291, 299 (2007) (noting schools take on the rules of their athletic associations).

²⁰⁴ *Id.* (stating sports leagues may want to limit their members' free speech).

²⁰⁵ *Id.* at 300 (noting athletic institutions do not have free reign to limit free speech even if they might not be state actors).

²⁰⁶ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942); *Miller v. California*, 413 U.S. 15, 23 (1973) (stating that the protections of the First Amendment are limited).

²⁰⁷ *Chaplinsky*, 315 U.S. at 571–72; *Miller*, 413 U.S. at 23 (noting speech that is not protected).

²⁰⁸ *Miller*, 413 U.S. at 24–25 (noting the different standards used).

²⁰⁹ *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938) (describing the standard of strict scrutiny).

²¹⁰ *See Korematsu v. United States*, 323 U.S. 214, 216 (1944). *See also Grutter v. Bollinger*, 539 U.S. 306, 327 (2003) (explaining strict scrutiny).

²¹¹ *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126, (1989) (noting other strict scrutiny concerns with free speech restrictions).

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protecting the welfare of student-athletes or avoiding NCAA sanctions. Even if either of these is found to be a compelling government interest, it is unlikely that the policies will be found to be narrowly tailored to serve the government interest. Most policies are broad and limit communications that can positively impact the well-being of student-athletes and arguably, do not further the student-athlete welfare interest. NCAA member institutions will need to develop very narrowly tailored policies and consider each monitoring decision on a case by case basis.²¹²

Public institutions could thus resort to policies that ban posts on unprotected speech. Curiously, however, unprotected language is not the primary issue that schools are seeking to address. Some bad publicity could come from athletes' use of unprotected speech. Yet, bragging about perks given by the athletic department, discussion about recruits, or trash-talking coaches is not unprotected speech. But, in fact, these are precisely the kind of topics that schools are seeking to prevent from being posted by their athletes in order to avoid a bad reputation and NCAA sanctions.

The best strategy for public universities to pass constitutional muster in this regard is to include a social media policy in the student-athletes' contract, which they would sign before they begin at the university or before the season commences. Agreeing to follow certain social media guidelines or to refrain entirely from using social media is likely to be found as a valid consideration in exchange for the student-athlete's opportunity to participate in a sport at the university under contract law. In fact, the contracts signed by student-athletes often contain codes of conduct that prescribe expectations that go beyond what is expected from the general student population. Athletes willingly give up certain rights in exchange for the chance to play intercollegiate athletics but it is important for restrictions to be included in the terms of the contract.

2. *Fourth Amendment*

Institutions monitoring their athletes' social media may be subject to a privacy claim under the Fourth Amendment. The Fourth Amendment states in relevant part that, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]"²¹³ In determining whether monitoring social media is a search, courts

²¹² Eric D. Bentley, *He Tweeted What? A First Amendment Analysis of the Use of Social Media by College Athletes and Recommended Best Practices for Athletic Departments*, 38 J.C. & U.L. 451 (2012) (stating schools should be careful about regulating social media because of First Amendment concerns and should do so only on a case by case basis).

²¹³ U.S. CONST. amend. IV (creating a right against unreasonable searches and seizures).

will look at whether the individual had a reasonable expectation of privacy.²¹⁴ If monitoring is in fact deemed to be a search, courts will then consider whether or not the search is reasonable while taking into account the character of the intrusion as well as the nature and immediacy of the governmental concern.²¹⁵

It is unlikely that a student-athlete will prevail on a Fourth Amendment claim. Although there is no significant precedent pertaining to the privacy expectations associated with social media, courts have suggested that there is no reasonable expectation of privacy when it comes to SNS.²¹⁶ Additionally, courts have indicated that students have a diminished expectation of privacy in the school setting.²¹⁷ Due to the inherently public nature of SNS and the diminished expectation of privacy in an educational setting (especially for athletes), it is likely that courts will not find a reasonable expectation of privacy. However, there are areas where courts might find an expectation of privacy, such as messaging that acts similar to email. Thus, if schools choose to monitor their athletes' social media, then they should be aware of the privacy concerns that are likely to arise from student-athletes.

3. *Fourteenth Amendment*

If schools choose to monitor the social media activity of only certain students, they could potentially face discrimination claims under the Fourteenth Amendment. The Equal Protection clause of the Fourteenth Amendment states that, “no state shall . . . deny to any person within its jurisdiction the equal protection of the

²¹⁴ See *Katz v. United States*, 389 U.S. 347, 360 (1967) (stating the importance of establishing an individual's reasonable expectation of privacy when discussing violations of the Fourth Amendment).

²¹⁵ *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652–53 (1995) (describing the reasonableness of a search).

²¹⁶ See *Dexter v. Dexter*, No. 2006-P-0051, 2007 WL 1532084 (Ohio App. 11 Dist., May 25, 2007) (noting publicly available posts on MySpace are not accorded a reasonable expectation of privacy); *Romano v. Steelcase, Inc.*, 907 N.Y.S.2d 650 (2010) (allowing discovery of plaintiff's Facebook and MySpace accounts and noting that social media is not “privileged” even if access is restricted); *Largent v. Reed*, No. 2009-1823, 2011 WL 5632688 (Pa. C.P. Franklin Co., Nov. 8, 2011) (allowing discovery of plaintiff's Facebook). *But see* *Crispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d 965 (C.D. Cal. 2010) (holding that private messaging and email were not subject to subpoena); *Pietrylo v. Hillstone Rest. Grp.*, CIV.06-5754(FSH), 2009 WL 3128420 (D.N.J. Sept. 25, 2009) (noting there is a reasonable expectation of privacy in a restaurant's employee-only social media site with restricted access); *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868 (9th Cir. 2002) (attributing a reasonable expectation of privacy where the intention was to restrict the website to a list of authorized users).

²¹⁷ *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985) (noting students give up some privacy rights at school).

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laws.”²¹⁸ Although a discrimination claim under the Fourteenth Amendment needs to be based on race/religion/sex etc., institutions will need to be prepared to prove that they were not discriminatorily monitoring some athletes based on something such as race or sex. For instance, athletes would not have a legitimate claim under this Amendment if they thought the school chose to monitor them due to their superior athletic ability.

However, institutions would be wise to take caution if they were to decide, for instance, to monitor a men’s but not a women’s team, especially in light of Title IX concerns. Additionally, schools receiving federal funding may be held liable for gender discrimination under Title IX of the Education Amendments of 1972 for peer student harassment.²¹⁹ The Supreme Court held that educational recipients of federal funds may be liable when the “recipient acts with deliberate indifference to known acts of harassment in its programs or activities[.]”²²⁰ Monitoring social media might expose the school to liability for discriminating between students.

V. CURRENT STATUS OF SOCIAL MEDIA MONITORING

While the debate over proper social media monitoring continues, a vast array of organizations are monitoring, regulating, and restricting the use of social media.²²¹ These institutions include colleges, the NCAA, professional sports leagues, employers, and the government.²²² However, when looking at academic institutions, many organizations have taken significantly different approaches to how they will deal with their stakeholders’ social media.²²³ This section of the

²¹⁸ U.S. CONST. amend. XIV (extending certain federal rights to the states).

²¹⁹ *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 641–42 (1999) (discussing federal funding and enforcement of Title IX).

²²⁰ *Id.* at 633 (noting the possibility of liability when schools do not act in conformance with the laws regarding Title IX).

²²¹ See *Who Monitors Social Media and How They Learned to Use It*, NSFA (last accessed Feb. 10, 2013), http://www.nafsa.org/_/File/_/ea_tech_report_who_monitors.pdf (setting forth the wide range of people and organizations that monitor social media).

²²² See *id.* (showing how many educational organizations monitor social media). See also *Social Media Application*, FEDBIZOPPS (last modified Jan. 20, 2012, 3:34 PM), <https://www.fbo.gov/index?s=opportunity&mode=form&id=c65777356334dab8685984fa74bfd636&tab=core&tabmode=list&> (stating that the FBI is planning on using a social media application to monitor potential threats).

²²³ See Bradley Shear, *NCAA Student-Athlete Social Media Bans May Be Unconstitutional*, SHEAR ON SOC. MEDIA LAW (Aug. 11, 2011), <http://www.shearsocialmedia.com/2011/08/ncaa-student-athlete-social-media-bans.html> (noting that schools have taken on outright bans of social media and other monitoring methods such as requiring students to install software designed to monitor social media usage). See also Matt Maher, *You’ve Got Messages: Modern Technology Recruiting through*

paper will examine how private and public academic institutions monitor social media, focusing primarily on the different policies currently employed by colleges and universities to deal with social media.

A. Existing Controls: Monitoring, Regulating, and Restricting

It is important to distinguish the abilities and the rights of private schools and public schools with regards to regulating student activity. Generally, private schools have more leeway to restrict and regulate student behavior than do their public counterparts.²²⁴ Private schools are typically not prohibited by the First Amendment from regulating free speech, and their university handbooks often have policies that restrict free speech.²²⁵ However, in 2008, Congress enacted the Higher Education Opportunity Act, stating that “an institution of higher education should facilitate the free and open exchange of ideas [and] students should not be intimidated, harassed, [or] discouraged from speaking out[.]”²²⁶ However, the Higher Education Opportunity Act did not require any higher standard of care from public schools; rather, it merely expressed Congress’ opinion on the matter.²²⁷

Many private institutions, specifically military, ideological, and religious universities or academies, implore students to relinquish an extensive amount of free speech rights.²²⁸ While these schools might not have specific policies addressing their students’ social media usage, many of their school and honor code policies, and the student handbook currently cover speech and media usage.²²⁹ For

Text-Messaging and the Intrusiveness of Facebook, 8 TEX. REV. ENT. & SPORTS L. 125, 139 (2007) (noting some colleges have enacted full social media bans).

²²⁴ Shear, *supra* note 223 (stating that Brigham Young University (BYU) bans all of its students from engaging in pre-marital sex). See also Craig B. Anderson, *Political Correctness on College Campuses: Freedom of Speech v. Doing the Politically Correct Thing*, 46 SMU L. REV. 171, 212–13 (1992) (stating the First Amendment applies to public and not private institutions).

²²⁵ See Kelly Sarabyn, *Free Speech at Private Universities*, 39 J.L. & EDUC. 145, 147 (2010) (noting that private schools are not typically prohibited from regulating free speech).

²²⁶ Higher Education Opportunity Act, 20 U.S.C. § 1011a(a)(2)(C) (2006) (noting a congressional preference for institutions of higher education to refrain from excessive regulation of speech). See also 6 CAL. EDUC. CODE § 94367 (West 2008) (requiring all private educational institutions to refrain from restricting speech that would be protected in a public school).

²²⁷ Sarabyn, *supra* note 225 (noting the Act was merely representing a congressional suggestion and was not law).

²²⁸ *Id.* (noting some military academies restrict students from speaking outside during initial training periods).

²²⁹ See *Principles of Personal Honor*, BRIGHAM YOUNG UNIV. IDAHO (2012), <http://www.byui.edu/Documents/catalog/2012-2013/University%20Standards.pdf> (setting forth required standards of conduct to be followed by all students at BYU).

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example, Brigham Young University requires students to “use clean language” and to “not communicate anything over the Internet or through texting that would be inappropriate to share in person.”²³⁰

Recently, both public and private schools have started to actively monitor and restrict social media usage rather than merely having policies in place against offensive speech or inappropriate media usage.²³¹ More specifically, the use of twitter has been banned for “Villanova University’s men’s basketball, Mississippi State men’s basketball, New Mexico men’s basketball, Miami men’s football, South Carolina men’s football, Iowa men’s football, Boise State men’s football, and Kansas men’s football.”²³² Villanova University’s basketball players appear to have been banned from using twitter only during the season.²³³ At Mississippi State, the coach banned the use of twitter after one of the team’s players criticized the team’s performance on Twitter.²³⁴ With Miami, the purported reason for the ban was to rid the team of unnecessary distractions.²³⁵ With most of these bans, it appears that the decision is being made unilaterally by the coaches and the schools rather than the student athletes, generally occurring in the aftermath of an embarrassing incident.²³⁶

However, not all twitter and social media restrictions have been made unilaterally by the schools, government, or the NCAA.²³⁷ In 2011, Florida State’s

²³⁰ *Id.* (stating the standards in which students are expected to uphold with regards to speech and media).

²³¹ See Shear, *supra* note 223 (stating that schools have begun to monitor and regulate social media usage).

²³² *Id.* (noting that a variety of NCAA sports programs have banned the use of twitter).

²³³ See Mike J., *Villanova Basketball Players Apparently Banned from Twitter*, SB NATION (Sept. 26, 2010, 6:42 PM), <http://www.vuhoops.com/2010/09/26/twitter/> (indicating the decision was only for the season and did not impact other sports teams at Villanova University).

²³⁴ See Brandon Marcello, *Rick Stansbury bans Mississippi State from Twitter after Criticism*, USA TODAY (Feb. 3, 2011), <http://content.usatoday.com/communities/campusrivalry/post/2011/02/mississippi-state-basketball-twitter-ban/1> (describing the circumstances surrounding the Coach banning the use of twitter).

²³⁵ See Associated Press, *Miami Issues Ban on Twitter*, N.Y. TIMES (Sept. 14, 2010), <http://www.nytimes.com/2010/09/15/sports/ncaafootball/15sportsbriefs-canes.html> (stating the goal of the ban was to limit distractions).

²³⁶ See David Cloninger, *Spurrier bans team from Twitter*, GAMECOCKCENTRAL (Aug. 4, 2011), <http://southcarolina.rivals.com/content.asp?CID=1247470> (describing the reasons for South Carolina’s ban as related to racial, vulgar, and sexually explicit tweets by South Carolina Football members).

²³⁷ Bob Ferrante, *Florida State Players Vote to Nix Social Media*, THE LEDGER (Oct. 10, 2011), <http://www.theledger.com/article/20111010/NEWS/111019933?Title=Florida-State-Players-Vote-to->

men's football team voted to ban the use of social media.²³⁸ However, nine months after Florida State's self-imposed twitter ban ended, Coach Jimbo Fisher reinstated the Twitter ban for the 2012 season.²³⁹

Rather than banning social media outright, some schools have begun to monitor and flag certain content as unacceptable.²⁴⁰ The University of Kentucky and the University of Louisville created lists of hundreds of words that they have "red flagged" across a variety of social media platforms, including Facebook, Twitter, YouTube, and MySpace.²⁴¹ Whenever a student uses these words, University officials receive an e-mail notice.²⁴² Some of the flagged words include: beer, keg, ice, toke, drugs, cocaine, blow, and even include hundreds of names of known sports agents.²⁴³ Kentucky and Louisville are not banning the use of these words but instead, they are monitoring when these words are used.²⁴⁴ Social backlash about monitoring words such as "Arab" and "Muslim" has caused the schools to drop these specific word flags.²⁴⁵

Another option for schools has been the use of third party monitoring software and companies. For example, Varsity Monitor, UDiligence, and Centrix Social have all been hired by large universities to help monitor and track their athletes' social media accounts.²⁴⁶ For example, UDiligence offers software that

Nix-Social-Media-&tc=ar (noting that the football team voluntarily voted to ban the use of all social media for the remainder of the 2011 football season).

²³⁸ *Id.* (stating Florida State's team voted stop using social media during the season).

²³⁹ Ratke, *supra* note 82.

²⁴⁰ Matt Norlander, *The new way Kentucky and Louisville are monitoring athletes' social media behavior*, CBS SPORTS (Aug. 20, 2012), <http://www.cbssports.com/collegebasketball/blog/eye-on-college-basketball/19837845/the-new-way-kentucky-and-louisville-are-monitoring-athletes-social-media-behavior> (stating schools have begun to monitor their athletes' social media).

²⁴¹ *Id.* (stating that the monitoring is widespread, encompassing hundreds of flagged words and is being implemented across a variety of social media platforms).

²⁴² *Id.* (noting the process and system in place for monitoring social media).

²⁴³ *Id.* (setting forth the words, phrases, genres, and people who have been flagged by the schools for monitoring and analysis).

²⁴⁴ *Id.* (noting that most athletes post anonymously and will not be monitored by the school).

²⁴⁵ See Brad Wolverton, *2 Universities Bar Athletes from Using Hundreds of Words on Twitter*, THE CHRON. HIGHER EDUC. (Aug. 20, 2012), <http://chronicle.com/blogs/players/u-of-kentucky-louisville-ban-athletes-from-using-hundreds-of-words-on-twitter/31096> (noting public backlash has caused the schools to reevaluate their initial word flag bank).

²⁴⁶ See Jim Cooke, *Don't Say "Colt 45" Or "Pearl Necklace": How To Avoid Being Busted By The Facebook Cops Of College Sports*, DEAD SPIN (May 24, 2012), <http://deadspin.com/5912230/>

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tracks Facebook and Twitter for “flagged words.”²⁴⁷ UDiligence has been hired and used by Texas Tech, Texas A&M, Louisville, Ole Miss, and others.²⁴⁸ Varsity Monitor, partnering with Villanova University, Nebraska, and other universities, offers similar software and options for schools to monitor student-athletes’ social media.²⁴⁹ While Varsity Monitor claims to have a quickly expanding client base, there is also a concern from many schools that this is being discussed publicly.²⁵⁰ Therefore, in the summer of 2012, both Varsity Monitor and UDiligence removed their client lists from their websites.²⁵¹

In addition to educational organizations, private employers there are increasingly monitoring their employees’ social media.²⁵² One growing industry is the use of private companies to monitor social media.²⁵³ While many of these social

(discussing how many colleges and universities are relying on third party companies to monitor and track their student athletes’ social media).

²⁴⁷ See Luke Meredith & Michael Marot, *Software Helps Schools Monitor Athletes’ Postings*, YAHOO! SPORTS (June 5, 2010), <http://sports.yahoo.com/top/news?slug=txcolleges> (describing how social media software works).

²⁴⁸ See Melissa Knowles, *Are Universities Cyberstalking Student-Athletes on Social Media?*, YAHOO! NEWS (Aug. 21, 2012), <http://news.yahoo.com/blogs/trending-now/universities-cyberstalking-student-athletes-social-media-173121047.html> (listing schools that are currently using Centrix Social and UDiligence software).

²⁴⁹ See Myron Medcalf, *Policing the Social Media Craze*, ESPN (May 1, 2012, 3:53 PM), http://espn.go.com/mens-college-basketball/story/_/id/7876754/policing-social-media-craze-college-sports-ncb (describing how Varsity Monitor works with schools to help monitor and police social media).

²⁵⁰ *Id.* (stating very few schools allow Varsity Monitor to discuss their business relationship publicly).

²⁵¹ See Bradley Shear, *Are UDiligence and Varsity Monitor advising NCAA Schools to Violate the Stored Communications Act?*, SHEAR ON SOC. MEDIA LAW (May 18, 2012), <http://www.shearsocialmedia.com/2012/05/is-varsity-monitor-and-udiligence.html> (noting that there might be some concern by universities as to the legality and popularity of this monitoring, causing these companies to remove their client lists from the public domain).

²⁵² See Caron Beesley, *Email, Phone and Social Media Monitoring in the Workplace—Know Your Rights as an Employer*, U.S. SMALL BUS. ADMIN. (June 27, 2012), <http://www.sba.gov/community/blogs/email-phone-and-social-media-monitoring-workplace-%E2%80%93-know-your-rights-employer> (stating that by 2016 up to 60% of employers are expected to monitor their employees’ social media).

²⁵³ See *Great Customers*, Radian6.com, <http://www.radian6.com/about-us/customers/> (last visited Oct. 24, 2012) (stating that they provide some type of social monitoring for companies like Commerce Bank, KLM, Pepsi, American Red Cross, Sallie Mae, Intuit, Kodak, 3M, Burger King, UPS, DELL, and more). See generally *Gartner Says Monitoring Employee Behavior in Digital Environments is Rising*, GARTNER (May 29, 2012), <http://www.gartner.com/it/page.jsp?id=2028215> (stating that businesses want to monitor their employees more but there are ethical and legal issues holding further monitoring back).

media monitoring companies promote their services as a way to maximize a business' impact through social media, they can also be used to monitor anything negative being discussed about a company or monitor individual users.²⁵⁴

Some professional sports leagues, such as the NFL, have established specific rules to deal with the use of social media by its members.²⁵⁵ For example, the NFL allows players to use social media, such as Twitter, but does not allow players to use social media during games.²⁵⁶ The NFL went further with officials, banning the use of social media completely.²⁵⁷ Furthermore, the NFL has hired private companies to monitor social media usage, especially during the Super Bowl.²⁵⁸ While the NFL has fined players for violating the in-game tweet restrictions, it has not yet fined a player for offensive or inappropriate tweets outside of the in-game policy.²⁵⁹

Currently, universities, colleges, and professional sports teams use a variety of tactics to monitor, regulate, and police social media. These polices include voluntary abandonment of social media, flagging unacceptable words, complete school imposed bans, "time, place and manner" bans, active and passive monitoring, and operating without a specific social media policy. As there has been some negative publicity for word flagging and third party monitoring, it is uncertain which one of these policies will have the most traction moving forward.

²⁵⁴ See, e.g., TRACKUR, <http://www.trackur.com> (last visited Oct. 24, 2012) (offering monitoring for employees and social media in general); TRUECARE, <http://www.truecare.com> (last visited Oct. 24, 2012) (a social media monitoring tool designed to protect kids from bullying and predators).

²⁵⁵ See Associated Press, *supra* note 66 (stating the NFL has put in place specific rules to determine when using social media during the year is appropriate).

²⁵⁶ *Id.* (noting that players may use social media but not during games).

²⁵⁷ *Id.* (setting forth the leagues restrictions on social media usage).

²⁵⁸ See Mike Flacy, *NFL Using "Social Media Command Center" to Manage Super Bowl Chatter*, DIGITAL TRENDS (Feb. 4, 2012), <http://www.digitaltrends.com/social-media/nfl-using-social-media-command-center-to-manage-super-bowl-chatter/> (stating that the NFL hired a private firm to monitor the use of social media during the Super Bowl).

²⁵⁹ See Will Brinson, *NFL Won't Fine Packers Players for Profane Tweets on Monday*, CBS SPORTS (Sept. 26, 2012), <http://www.cbssports.com/nfl/blog/eye-on-football/20377063/nfl-wont-fine-packers-players-for-profane-tweets-on-monday> (noting the NFL did not fine players for cursing and criticizing the league following a controversial game ending call).

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B. Federal and State Law Changes

On April 27, 2012, Rep. Eliot Engel introduced and proposed H.R. 5050: Social Network Online Protection Act (SNOPA).²⁶⁰ SNOPA seeks to “prohibit employers and certain other entities from requiring or requesting that employees and certain other individuals provide a user name, password, or other means for accessing a personal account on any social networking website.”²⁶¹ SNOPA would extend this prohibition to institutions of higher learning.²⁶² According to statements made by Rep. Engel and SNOPA’s co-sponsor, Rep. Jan Schakowsky, the bill was designed to primarily protect privacy interests.²⁶³

While it is unclear if SNOPA will gain any federal support, some states have already started passing similar legislation. Maryland passed a similar bill, by a vote of 46-0, which would prohibit colleges from demanding access to students’ social media accounts.²⁶⁴ In 2012, California and Delaware enacted similar legislation, banning schools and employers from requiring applicants, students, and employees to provide their social media passwords and usernames.²⁶⁵ Illinois passed similar legislation in HB 3782; however, the ban only applies to employers and not to educational institutions.²⁶⁶ While these laws demonstrate a legislative movement to restrict schools from monitoring their students’ social media networks, the bills do not typically restrict a majority of the aforementioned monitoring systems which are used by the NCAA member institutions.

²⁶⁰ H.R. 5050, 112th Cong., 2d Sess. (Md. 2011-2012) (proposing a law that would ban schools and employers from requiring students and applicants to turn over their social media access).

²⁶¹ *Id.* (describing the prohibition).

²⁶² *Id.* (noting SNOPA expanded the prohibition to schools and facilities of higher learning).

²⁶³ Michelle Maltais, *SNOPA Bill Seeks to Keep Employers Out of Private Social Networks*, L.A. TIMES (Apr. 30, 2012), <http://articles.latimes.com/2012/apr/30/business/la-fi-tn-federal-bill-bans-employers-seeking-facebook-password-20120430> (stating the bills primary objective is to protect individual privacy rights).

²⁶⁴ S.B. 433, Reg. Sess. (Md. 2012), *available at* <http://mgaleg.maryland.gov/2012rs/bills/sb/sb0433t.pdf> (enacting similar legislation to SNOPA in Maryland).

²⁶⁵ *See Governor Brown Signs Laws to Protect Privacy for Social Media Users*, GOV.CA.GOV (Sept. 27, 2012), <http://gov.ca.gov/news.php?id=17759> (noting California enacted legislation designed at protecting social media privacy); H.B. 309, 146th Gen. Assemb. (Del. 2012), *available at* <http://legis.delaware.gov/LIS/lis146.nsf/vwLegislation/HB+309?Opendocument> (enacting similar legislation to SNOPA in Delaware).

²⁶⁶ H.B. 3782, 97th Gen. Assemb. (Ill. 2012), *available at* <http://www.ilga.gov/legislation/BillStatus.asp?DocNum=3782&GAID=11&DocTypeID=HB&SessionID=84> (setting forth Illinois statute protecting social media privacy).

VI. RECOMMENDATIONS

Social media and sports have become increasingly intertwined, creating both an opportunity and risk for the NCAA and its member institutions. However, the NCAA has been unable to harmonize its rules with the current state of social media and sports. As social media has dramatically impacted recruiting, the rules dealing with recruiting have remained stagnant.²⁶⁷ Therefore, the member institutions are forced to create their own rules and policies on how they should monitor their student-athletes' social media.

Without clear NCAA rules, member institutions must decide for themselves if they will monitor their student-athletes' social media or if they will take a more hands off approach. Currently, the trend is to monitor social media because the benefits of monitoring, including preempting violent behavior, protecting student-athletes, managing the institution's public image, and preventing NCAA infractions, outweigh the concerns about free speech, privacy rights, and recruiting. Institutions might be able to limit some liability by including their monitoring policy in their athletes' financial aid and other contracts.²⁶⁸ Therefore, as schools continue to monitor social media, they should be sure to protect themselves by informing their students of their best practices, restricting their monitoring to publically available information, and specifically tailoring their monitoring to the schools' interests.

While member institutions have a difficult decision to make, the NCAA could alleviate many of these problems by instituting a formal and clear social media policy. Further deregulation of the use of social media would ease the current burden on schools to monitor the social media usage of their student-athletes. The NCAA has an incentive to require its member institutions to monitor social media usage in order to prevent recruiting violations and to protect its public image. In addition to the lack of NCAA rules specifically addressing social media concerns, current rules allow for loopholes and inconsistencies with regards to recruiting

²⁶⁷ Mitch Sherman, *Keeping up with Twitter*, ESPN (Mar. 16, 2012), http://espn.go.com/college-sports/recruiting/football/story/_/id/7695901/twitter-confusing-issue-recruiting (arguing Twitter has changed recruiting but that out-of-date NCAA rules still regulate much of the activity with confusing and inconsistent results).

²⁶⁸ Patrick Stubblefield, *Evading the Tweet Bomb: Utilizing Financial Aid Agreements to Avoid First Amendment Litigation and NCAA Sanctions*, 41 J.L. & EDUC. 593, 601 (2012) (concluding schools should use contracts with financial aid and scholarships to limit liability and enforce social media restrictions).

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through social media.²⁶⁹ Furthermore, the NCAA will benefit from developing a clear social media policy designed to fit within the confines of federal and state law because it could help prevent member institutions from violating the legal rights of their student-athletes. Clearer NCAA social media rules or further deregulation of recruiting communications could lessen the member institutions' need for monitoring social media.²⁷⁰ However, until the NCAA develops a clear policy, member institutions will continue to use a variety of methods to oversee and regulate the use of their student-athletes' social media, increasing the likelihood of negative legal consequences.

Lastly, state and the federal governments need to recognize the growing concerns with social media, sports, and monitoring. While the government should not involve itself in controlling student-athletes' social media usage, it can help protect student-athletes from being forced to surrender their social media and free speech rights. The laws passed in Maryland, California, and the proposed federal legislation would go a long way to protecting student-athletes from having to disclose their social media passwords.

VII. CONCLUSION

While there are concerns that the NCAA and its member institutions should not be in the business of monitoring social media, the risks associated with violent behavior and recruiting violations may force their hands.²⁷¹ Currently, benefits of monitoring tend to outweigh legal risks, especially since the NCAA does not have a formal policy in place at this time. However, as institutions move forward, they need to remember that the NCAA rules are in place to protect the student-athletes, and therefore, any monitoring should be enforced with that goal in mind.

²⁶⁹ Dave Hooker, *Social media is way to beat the system*, ESPN (Aug. 17, 2011, 4:23 PM), http://espn.go.com/college-sports/recruiting/football/story/_/id/6871086/social-media-allows-loopholes-ncaa-rules (arguing that the current social media landscape allows member institutions to use social media to get around NCAA recruiting rules).

²⁷⁰ Chris Smith, *NCAA Deregulation of Recruiting Texts Is Step in Right Direction, But There Is Plenty More To Be Done*, FORBES (June 18, 2012, 2:22 PM), <http://www.forbes.com/sites/chris-smith/2012/06/18/ncaa-deregulation-of-recruiting-texts-is-step-in-right-direction-but-there-is-plenty-more-to-be-done/> (noting the NCAA and its member institutions' primary concern should be the welfare of its student-athletes).

²⁷¹ Victor Broccoli, *Policing the Digital Wild West: NCAA Recruiting Regulations in the Age of Facebook and Twitter*, 18 SPORTS LAW. J. 43, 65–66 (2011) (stating the NCAA and Universities cannot continue to monitor and regulate the entirety of social media but must instead get out of the business of regulating social media and become less intrusive).

Institutions that choose to monitor their athletes' social media usage should take precautions to avoid the risks and liability associated with monitoring while protecting their interests. While streamlined NCAA rules could aid member institutions in making their monitoring decisions,²⁷² member institutions will need to develop their own monitoring policies for the time being. Member institutions can balance the risks and benefits associated with monitoring which also do not violate their student-athletes' legal rights. Ultimately, monitoring publicly available social media might be the safest and the best way to protect the institutions' interests without violating their student-athletes' legal rights. As state and federal governments become increasingly proactive in their efforts to regulate social media monitoring practices, the NCAA and its member institutions will need to modify their approach in order to be less intrusive.

²⁷² Vicki Blohm, *The Future of Social Media Policy in the NCAA*, 3 HARV. J. SPORTS & ENT. L. 277, 295 (2012) (arguing the NCAA needs to streamline its rules and take the majority of decisions out of school hands regarding social media regulations).

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