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## #NCAA vs. Student Athletes: An Empirical Analysis of NCAA Social Media Policies

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# #NCAA vs. Student Athletes: An Empirical Analysis of NCAA Social Media Policies

by ELIZABETH M. HEINTZELMAN\*

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## I. Introduction

On April 11, 2016, former Ohio State University Quarterback Cardale Jones tweeted, “I’m so happy to be done with the NCAA and their rules & regulation[s]. They do any and everything to exploit (sic) college

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athletes.”<sup>1</sup> This tweet, which was composed of 128 characters, was retweeted by 3,448 people while 4,870 people labeled the tweet as a favorite.<sup>2</sup> Cardale Jones, a student athlete awaiting the NFL draft, can now freely express his opinion to the world about the NCAA with the power of social media.

Whether Facebook, Twitter, Instagram, or Pinterest, social media flourishes on college campuses. A social networking website is defined as any internet service, platform, or website that provides a user with a distinct account.<sup>3</sup> Social media terminology, such as “Facebook liking,” has become a part of everyday conversation on college campuses across the United States.<sup>4</sup> As of 2015, 62% of internet users between 18-29 use Facebook, while 32% in this age group use Twitter, and 55% use Instagram.<sup>5</sup>

Social media is an integral part of life—for faculty and students alike—on college campuses, particularly for student athletes. Student athletes hold a great amount of fame on the campuses of Division I schools, making them larger-than-life figures, often eclipsing the average students. With a school’s reputation on the line with each student’s ability to post commentary and photos on various social media platforms, many member schools under the National Collegiate Athletic Association (NCAA) have implemented special policies for student athletes regarding social media.

For example, the University of Connecticut’s Women’s Basketball program does not allow players to use Twitter from the first day of practice until the last day of the season.<sup>6</sup> One player noted, “If you can’t use

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1. Tom Fornelli, *Cardale Jones rants on Twitter about problems with NCAA*, CBS Sports (Apr. 11, 2016), <http://www.cbssports.com/college-football/news/look-cardale-jones-rants-on-twitter-about-problems-with-ncaa/>.

2. *Id.*

3. See H.R. Rep. No. 537-113 (2013); see also Patrick Stubblefield, *Evading the Tweet Bomb: Utilizing Financial Aid Agreements To Avoid First Amendment Litigation and NCAA Sanctions*, 41 J.L. & Educ. 593 (2012) (social media provides access to channels of communication that have never before been available).

4. *Lane v. Facebook, Inc.*, 696 F.3d 811, 815 (9th Cir. 2012) (Facebook is an online social network where members develop personalized web profiles to interact and share information with other members. Members can share various types of information, including “news headlines, photographs, videos, personal stores, and activity updates.”); *Bland v. Roberts*, 730 F.3d 368, 384 (4th Cir. 2013) (Liking on Facebook is a way for Facebook users to share information with each other. . . . On the most basic level, clicking on the “like” button literally causes to be published the statement that the user “likes” something, which is itself a substantive statement).

5. Maeve Duggan, *The Demographics of Social Media Users*, PEWRESEARCHCENTER (Aug. 19, 2015), <http://www.pewinternet.org/2015/08/19/the-demographics-of-social-media-users/>.

6. Tim Casey, *Is There Anything UConn Can’t do? Tweet, for one*, N.Y. TIMES (Mar. 27, 2015), [http://www.nytimes.com/2015/03/27/sports/ncaabasketball/for-uconn-women-twitter-is-off-limits-until-off-season.html?\\_r=0](http://www.nytimes.com/2015/03/27/sports/ncaabasketball/for-uconn-women-twitter-is-off-limits-until-off-season.html?_r=0).

[Twitter], then you won't be able to make a mistake."<sup>7</sup> Additionally, Dabo Swinney, the football coach from Clemson University, and Jimbo Fisher, the football coach from Florida State University, instituted a season-long ban on using Twitter for players during the season as a way to avoid distractions.<sup>8</sup> Bobby Wilder, the head football coach from Old Dominion University, went so far as to institute a year-round Twitter prohibition for all football players.<sup>9</sup>

While individual athletic programs institute these policies, the programs have received guidance from the NCAA as to whether it is advisable to have social media policies. In March 2012, an offensive tweet by a player of the University of North Carolina football program led to an investigation, which resulted in the program receiving a one year bowl ban from the NCAA.<sup>10</sup>

Is it really proper for the NCAA to punish schools for social media usage? Should schools be monitoring their student athletes' social media accounts?

This article will explore the perspective of the compliance directors from Division I schools, social media policies of university athletic departments and professional athletic organizations, and a former student athlete. Part II will discuss methodology and findings from an original six question survey that was presented to Division I athletic compliance directors, a general counsel member for the National Football League, and a former Division III student athlete. Part III will explain the relationship between the NCAA and its student athletes, as this can be argued as an employer-employee relationship based on NLRB and EEOC definitions.

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7. *Id.*

8. Kristi A. Dosh, *Clemson and Florida State Ban Football Teams from Twitter*, OUTKICKTHECOVERAGE.COM (Aug. 11, 2015), <http://www.outkickthecoverage.com/clemson-and-florida-state-ban-football-teams-from-twitter-081115>.

9. Paul Steinbach, *Schools Attempt to Control Athletes' Social Media Use*, ATHLETE BUSINESS, <http://www.athleticbusiness.com/schools-attempting-to-control-athletes-use-of-social-media.html> (last visited Feb. 20, 2016); see also Marcus Hauer, *The Constitutionality of Public University Bans of Student Athlete Speech Through Social Media*, 37 VT. L. REV. 413, 417 (2012) (Mississippi State basketball team has also banned its players from using Twitter).

10. If North Carolina more effectively monitored the social media profiles of its student athletes, the school may have discovered the relationships between the student athletes and agents and the school may not have been found to violate NCAA rules for failing to monitor the compliance of its athletic program. See Pete Thamel, *Tracking Twitter, Raising Red Flags*, N.Y. TIMES (Mar. 30, 2012), [http://www.nytimes.com/2012/03/31/sports/universities-track-athletes-online-raising-legalconcerns.html?\\_r=1](http://www.nytimes.com/2012/03/31/sports/universities-track-athletes-online-raising-legalconcerns.html?_r=1); see also Aaron Hernandez, *All Quiet on the Digital Front: The NCAA's Wide Discretion in Regulating Social Media*, 15 TEX. REV. ENT. & SPORTS L. 53, 54 (2013).

Part IV will give a general overview of the current status of NCAA social media policies, in addition to a discussion of university and professional sports social media policies. Part V will discuss social media laws involving private employer-employee relations, as this argument is in consensus with the theory that NCAA student athletes are employees of the NCAA. Part VI will discuss state and federal policies for social media, such as the Social Networking Online Protection Act and Stored Communication Act. Part VII will discuss whether current social media policies run afoul of the First and Fourth Amendment. Part VIII will discuss NCAA and its member schools' legal liability of implementing social media policies.

Part IX will make the case that the NCAA and its members should not have any form of social media policy because of First and Fourth Amendment issues, as well as the potential liability for both the NCAA and its universities. However, a social media policy for student athletes should be used as an educational tool, not a limitation of a student's constitutional rights. This policy will reflect on the arguments presented, and explain why student athletes should be free to use social media at their leisure, without any restrictions from the NCAA or its member schools.

## II. Methodology and Findings

A six question questionnaire was created for NCAA compliance directors, a professional sports general counsel member, and a former Division III student athlete. *See Appendix A.* The questions asked were crafted specifically to find out how universities were using social media policies, if they had implemented one at all, if they were using a password monitoring software, and whether they believe social media policies should exist. Anecdotally, each interviewee was asked what made their policy unique, and their thoughts on a universal social media policy.

Based on the interviews of ten Division I universities—two in the Big Ten Conference, one in the Atlantic Coastal Conference (ACC), one independent, one in the Patriot League, two in the American Athletic Conference (AAC), one in the America East Conference, one in Colonial Athletic Association (CAA)—six of the ten (60%) have a social media policy as a part of their student athlete handbooks. None (0%) of the ten NCAA universities or colleges interviewed have password-monitoring software. Four (40%) out of ten schools interviewed have coaches monitoring the social media of their players or adding players as friends to monitor their social media activity. Two (20%) out of ten interviewed believe there should be a NCAA uniform social media policy instituted.

Research from compliance directors, in particular, helped frame the argument of this article as to whether the NCAA or its member schools should institute social media policies at all.

### III. NCAA Student Athlete Relationship or Employer-Employee Relationship?

The relationship between the NCAA and its student athletes has often been contentious and controversial. The NCAA has been recognized since the late 1980s, consisting of over 900 public and private universities.<sup>11</sup> Member schools are asked to abide by various governing rules for recruiting, admission, athletic eligibility, and financial aid standards for student athletes.<sup>12</sup> The goal of the NCAA is to maintain an “educational program which universities are proud to be a part of the association.”<sup>13</sup>

The NCAA believes it is differentiated from professional sports organizations, which do enter into an employer-employee relationship with its athletes. However, many student athletes assert that an employer-employee relationship is created when student athletes sign an official letter of intent with the NCAA and its respective universities. The NCAA is responsible for enforcing rules to govern intercollegiate sports for these universities, effectively acting as an employer of thousands of student athletes.<sup>14</sup> This argument has been validated by the latest National Labor Relations Board (NLRB) decision for the trustees of *Columbia University in the City of New York and Graduate Workers of Columbia–GWC, UAW*; the term “employee” is defined as “a person who performs services for another under a contract of hire, subject to the other’s control or right, and in return for payment.”<sup>15</sup> The NLRB held that undergraduate and graduate student teaching assistants are employees under the National Labor Relations Act.<sup>16</sup> The ruling creates an employer-employee relationship between students and universities.<sup>17</sup>

A recent NLRB ruling, *Northwestern v. NLRB*, is contradictory to previous decisions; scholarship-receiving Northwestern University football players attempted to unionize, alleging an employer-employee relationship

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11. National Collegiate Athletic Ass’n v. Tarkanian, 488 U.S. 179, 183 (1988).

12. *Id.*

13. *Id.* at 183.

14. See *Northwestern and College Athletes Players Association*, 362 N.L.R.B. 167 (2015).

15. *Id.* See also *Columbia University in the City of New York and Graduate Workers of Columbia–GWC, UAW*, 364 N.L.R.B. No. 90 (2016).

16. See *Columbia University in the City of New York and Graduate Workers of Columbia–GWC, UAW*, 364 N.L.R.B. No. 90 (2016).

17. *Id.*

between themselves and the NCAA.<sup>18</sup> Under NCAA rules, coaches are instructed to “maintain control over players so they adhere to NCAA policies, and implementing disciplinary policies if these are violated.”<sup>19</sup> By this rule, there is a reasonable argument that the NCAA is effectively “the Boss” of student athletes.

Ultimately, the NLRB refused to hold that student athletes who were receiving a scholarship to perform football-related services were subject to NCAA control, and thus, not employees, dismissing the petition.<sup>20</sup> The NLRB reasoned that allowing the Northwestern University student athletes to unionize would affect the “symbiotic relationship” between the NCAA, Big Ten Conference, and member schools.<sup>21</sup>

#### **IV. Overview of Current NCAA, University, and Professional Sport Social Media Policies**

##### **A. Current NCAA Social Media Policy**

Currently, the NCAA only monitors social media for recruiting purposes.<sup>22</sup> Social media guidelines “prohibit student athletes from posting or discussing a recruit’s campus visit on social media.” Additionally, prospective student athletes<sup>23</sup> cannot be contacted by athletic staff other than by email.<sup>24</sup>

While the NCAA asserts an inherent responsibility to regulate social media, no universal social media policy has been enacted.<sup>25</sup> The NCAA believes that social media can be used, as long as it complies with already existing guidelines of the NCAA, but these sanctioned uses are focused mainly towards recruiting efforts.<sup>26</sup> Rather, the NCAA has placed the burden of policing student athlete social media use on member schools. While schools are not required to have a social media policy, the NCAA has previously instructed its member schools to have awareness of any

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18. Northwestern and College Athletes Players Association, 362 N.L.R.B. 167 (2015).

19. *Id.*

20. *Id.*

21. *Id.*

22. Vicki Blohm, *The Future of Social Media Policy in the NCAA*, 3 HARV. J. SPORTS & ENT. L. 281, 281 (2012).

23. Rex Santus, *Social media monitoring widespread among college athletic departments, public records survey shows*, SPLC (Mar. 16, 2014), <http://www.splc.org/article/2014/03/social-media-monitoringwidespread-among-college-athletic-departments-public-records-survey-shows>.

24. 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-policiesoffenders](http://espn.go.com/espn/page2/story/_/id/7026246/examining-sports-leagues-social-media-policiesoffenders).

25. Blohm, *supra* note 22, at 291.

26. *Supra* note 22, at 280.

suspicious student athlete's social media behavior on the various social media platforms.<sup>27</sup> If a social media post has a big enough magnitude, NCAA staffers may intervene, as was the case during the 2011 University of North Carolina at Chapel Hill University (UNC) football season.<sup>28</sup> UNC football player Marvin Austin was alleged to have posted an inappropriate tweet, which allegedly placed the football program and the university in a bad light.<sup>29</sup> The NCAA instituted a one-year bowl ban, due to this and other violations, and hinted that member schools should be monitoring the social media postings of their student athletes, if it is suspected that the postings may be suspicious and/or against NCAA policy.<sup>30</sup>

### B. Current NCAA Member University Social Media Policies

The NCAA's hands-off approach to social media has some universities spending between \$7,000 to \$10,000 per year to monitor student athletes' social media accounts.<sup>31</sup> School-instituted social media policies warn student athletes that participation in collegiate athletic programs is a privilege, not a right.<sup>32</sup> Some schools' mentality of because you "[w]ear our threads, we get to see what you're saying online at all times" creates an intrusive presence into unchartered territory of a student's life off the field or court.<sup>33</sup> Schools argue that student athletes can put "themselves, their teams, their coaches, the program, and the university" in a very compromising predicament by posting or tweeting disrespectful commentary.<sup>34</sup>

School social media policies for its student athletes range from no policy to very restrictive. The range lacks continuity, proving how controversial a social media policy can be. Based on interviews with collegiate athletic programs, some schools strongly believe in social media policies, while others vehemently avoid them. For example, during an interview, a Colonial Athletic Association (CAA) compliance director exclaimed that his university took great pride in not having a social media

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27. Santus, *supra* note 23.

28. Myron Medcalf, *Policing the Social Media*, ESPN (May 1, 2012), [http://espn.go.com/mens-collegebasketball/story/\\_/id/7876754/policing-social-media-craze-college-sports-ncb](http://espn.go.com/mens-collegebasketball/story/_/id/7876754/policing-social-media-craze-college-sports-ncb).

29. *Id.*

30. Thamel, *supra* note 10.

31. *Id.*

32. Santus, *supra* note 23.

33. Matt Norlander, *The new way Kentucky and Louisville are monitoring athletes' social media behavior*, CBSSPORTS.COM (Aug. 20, 2012), <http://www.cbssports.com/collegebasketball/eye-on-collegebasketball/19837845/the-new-way-kentucky-and-louisville-are-monitoring-athletes-social-media-behavior>.

34. *Id.*



policy, as they want to promote freedom of speech.<sup>35</sup> The compliance director noted that the school was not concerned with liability, but rather the school would be prohibiting a student athlete's constitutional rights by enforcing such a policy.<sup>36</sup> On the other hand, an Atlantic Coastal Conference (ACC) compliance director claimed that while their school did not have a policy currently, they were in the process of implementing one.<sup>37</sup> However, not all NCAA-affiliated universities agree with this nonchalant lack-of-policy approach. Many compliance directors believe that athletic departments should institute social media policies. For example, a compliance director in the Patriot League noted that their athletic department social media policy is very generic, limited to "stupid, illegal, and embarrassing" postings, but the policy was mindful of a student athlete's privacy.<sup>38</sup> At this athletic department, a student is considered an employee of the university, a labeling that the NCAA wants to avoid from being generally applied. As an employee of the school, these student athletes are educated on social media, but may not be limited in their privacy or free speech rights. Like this university's athletic department, the University of North Carolina at Chapel Hill has since implemented a social media policy<sup>39</sup> to protect their student athletes, as well as the "Carolina brand."<sup>40</sup>

When dealing with social media monitoring, all schools interviewed were disinterested with social media monitoring software because such software is accompanied by various liability and legal issues. University of Kentucky and University of Louisville student athletes are faced with a stricter social media policy. At these universities, players can tweet whatever they like, but if any of their tweets include an inappropriate word or phrase, the compliance department is alerted by email.<sup>41</sup> Words such as "drunk," "payoff," "suicide," "strippers," "Jello shots," "stoned," "raping," "whore," and even "Captain Morgan" are all terms which may alert

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35. Telephone Interview, Compliance Director, Northeastern University Athletics (Feb. 16, 2016).

36. *Id.*

37. Telephone Interview, Compliance Director, Syracuse University Athletics (Mar. 2, 2016).

38. Telephone Interview, Compliance Director, Boston University Athletics (Feb. 16, 2016).

39. *The University of North Carolina Athletic Department, POLICY ON STUDENT ATHLETE SOCIAL NETWORKING AND MEDIA USE, GOHEELS.COM* (Apr. 2012), [http://www.goheels.com/fls/3350/pdf/Compliance/SocialNetworkingPolicy.pdf?SPID=111196&DB\\_OEM\\_ID=3350](http://www.goheels.com/fls/3350/pdf/Compliance/SocialNetworkingPolicy.pdf?SPID=111196&DB_OEM_ID=3350) (last visited Feb. 10, 2016).

40. Carolyn Coons, *Social Media Policies of Student athletes Criticized*, THE DAILY TARHEEL (Sept. 23, 2014), <http://www.dailytarheel.com/article/2014/09/social-media-policies%20of%20studentathletes%20criticized>.

41. Norlander, *supra* note 33.

university officials.<sup>42</sup> Although, the University of Maryland's policy,<sup>43</sup> does not allow for monitoring software as such a policy would be in violation of state law, as well as the athletic department feels that such a policy would be an invasion of privacy.<sup>44</sup>

Additionally, some coaches feel the need to have additional control over their student athletes, as opposed to some coaches who do not want to be a part of the students' daily lives.<sup>45</sup> Following a UNC run-in with the NCAA over social media, its softball coach enacted a social media policy, which she claimed was similar to one between employer and employees.<sup>46</sup> The policy, which labels student athletes as employees of the university, stated that softball players could not post any photos to Facebook without permission from the coach.<sup>47</sup> In addition to the softball program, the UNC women's basketball program did not allow any inappropriate pictures or pornographic material to be posted on social media.<sup>48</sup> Also, during an interview with a former Division III student athlete, it was said that a team coach implemented a social media policy with the hope of ensuring the team was appropriately representing the university.<sup>49</sup> Student athletes on this team could not be social media friends with coaches or assistant coaches until the season was over, and they could not post photos to social media sites while wearing team-issued apparel.<sup>50</sup>

Furthermore, one of the CAA compliance directors interviewed believed that there is a "creepiness factor" when faculty requested to be friends with athletes on social media platform, due to an invasion of student athlete's privacy, which could create a tense relationship between the athlete and coaching staff.<sup>51</sup> He did say that while the university compliance department did not condone coach-student friend requesting, two of the athletic department teams did have coaches friending players.<sup>52</sup>

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42. *Id.*

43. *The University of Maryland Department of Intercollegiate Athletics, 2015-2016 Student Athlete Handbook*, UMTERPS, [http://www.umterps.com/fls/29700/pdf/StudentAthleteHandbook.pdf?DB\\_OEM\\_ID=29700](http://www.umterps.com/fls/29700/pdf/StudentAthleteHandbook.pdf?DB_OEM_ID=29700) (last visited Feb. 10, 2016).

44. Telephone Interview, Compliance Director, University of Maryland Athletics (Feb. 10, 2016).

45. *Id.*

46. Coons, *supra* note 40.

47. *Id.*

48. *Id.*

49. Telephone Interview, Former Division III athlete, Trinity College (Mar. 16, 2016).

50. *Id.*

51. Telephone Interview, Compliance Director, Northeastern University Athletics (Feb. 16, 2016).

52. *Id.*

### C. Comparison to Professional Sports Organizations

Major professional sports organizations such as the NFL, MLB, UFC, NBA, and NFL rely on social media policies. Major League Baseball (MLB) has a social media policy that governs social media use by personnel, but not by players.<sup>53</sup> Also, the NBA has a policy which bans players from using cell phones during games, and bans cell phone use prior to first game interviews.<sup>54</sup> When Milwaukee Bucks player Brandon Jennings tweeted postgame, prior to the completion of postgame interviews, the NBA enforced its policy with a \$7,500 fine.<sup>55</sup> On the contrary, UFC's Dana White stated: "We focus a lot of energy on educating and training our athletes on the benefits of social media, and we warn them about the possible dangers, too. We've embraced Twitter and Facebook like no one else in sports, and it's played a big role in our success. We don't find [social media] policies necessary."<sup>56</sup>

While White's perspective on social media policies is one that the NCAA should most consider adopting, a conversation with an NFL general counsel member provided a unique perspective on the NFL's policy, and a professional athletic organization's view on the NCAA's dilemma. The general counsel member exclaimed that the League has certain restrictions, but based on the National Football League Player Association's (NFLPA) unionized workforce, a social media policy would need to be decided under the collective bargaining agreement.<sup>57</sup> The general counsel member cited an example of when the Dallas Cowboys attempted to set up their own drug testing program under the CBA, and the NFLPA blocked the club from doing so.<sup>58</sup> Because a team is unable to enforce their own policies, such as a drug test program, it is likely that a social media policy would fall under the same restrictions.<sup>59</sup>

Recently, former NFL player Rashard Mendenhall faced a social media lawsuit by his endorser, Hanesbrands.<sup>60</sup> Mendenhall used Twitter to express his views on women, Islam, and terrorism, and this was frowned upon by Hanesbrands.<sup>61</sup> Based on these tweets, Hanesbrands broke the

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53. Ortiz, *supra* note 24.

54. *Id.*

55. *Id.*

56. *Id.*

57. Telephone Interview with General Counsel, National Football League (Mar. 8, 2016).

58. *Id.*

59. *Id.*

60. Mendenhall v. Hanesbrands, LLC., 856 F.Supp. 2d 717, 722 (M.D.N.C. 2012).

61. *Id.* at 720 (tweeted "For those of you who said we want to see Bin Laden burn in hell and piss on his ashes, I ask how would God feel about your heart?" and "There is not an ignorant bone in my body. I just encourage you to # think @dkller23 We'll never know what really

contract between the NFL athlete and their brand, and Mendenhall decided to move forward with a lawsuit, following a lengthy apology for his pejorative comments.<sup>62</sup> The court ruled that a “mere disagreement with comments on Twitter” should not have led to the termination of Mendenhall’s contract. While the NFL was not directly involved in this litigation, this case is an example of how professional athlete’s social media accounts can be used to their detriment. Even though Mendenhall was victorious, his questionable statements may have been prevented with proper education about using social media. If the NCAA and its member schools had more educational policies, as opposed to social media policies that invade privacy and freedom of speech, it is likely that a player would not face a lawsuit such as Mendenhall’s.

In regards to the NCAA’s current social media policy, this NFL general counsel member believes that younger people may not have a grasp on the significance that what they post may damage their reputations.<sup>63</sup> He strongly encouraged an NCAA social media policy that would educate youth, not violate their rights.

## V. Social Media in Employer-Employee Relationships

Because social media is such an integral part of everyone’s lives, employers such as the NCAA have been forced to consider the consequences of the growing infiltration of social media issues on their place of businesses. Many employers have begun to monitor their employees’ behavior on social media platforms, as well as use social media to promote their own businesses. Today, 93% of employers will check an applicant’s social media presence before making a hire, and 73% of recruiters have hired candidates through social media websites.<sup>64</sup> Social media is used by employers for marketing to clients, customer management, crisis management, and recruitment of qualified job candidates by searching for specific qualifications.<sup>65</sup> Twitter has served as a “professional employment tool” allowing prospective job applicants to “showcase their experience and interests to employers.”<sup>66</sup>

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happened. I just have a hard time believing a plane could take a skyscraper down demolition style” on May 1, 2011).

62. *Id.* at 721.

63. Telephone Interview with General Counsel, National Football League (Mar. 8, 2016).

64. Dosh, *supra* note 8.

65. Press Release, Equal Employment Opportunity Commission, Social Media Is Part of Today’s Workplace but its Use May Raise Employment Discrimination Concerns, (Mar. 12, 2014), <http://www.eeoc.gov/eeoc/newsroom/release/3-12-14.cfm> (last visited Feb. 20, 2016) [hereinafter EEOC Press Release]

66. Dosh, *supra* note 8.

While social media has been an excellent tool for employers, improper usage due to monitoring of social media by employers may lead to discrimination on the basis of race, gender, ethnicity and religion.<sup>67</sup> Social media may reveal more information than what employers may legally be allowed to ask in a general phone or in-person interview.<sup>68</sup> Employers may find out about a prospective or current employees medical history, age, or family issues while viewing these profiles.<sup>69</sup> Once hired, an employer may be held liable for a “hostile work environment” if the employer was aware of an employee’s troubling posts due to social media monitoring.<sup>70</sup> Some employers request employee passwords to social media accounts, creating more liability for the employer for meddling in an employee’s social media.<sup>71</sup>

This reaching risk of liability has leading agencies, such as the Equal Employment Opportunity Commission (EEOC), addressing the relationship between employers, employees and social media. In *EEOC v. Simply Storage Management, LLC.*, the EEOC held that if social media is a crucial component of an ongoing case, the content from social networking sites (SNS) must be produced during discovery if relevant to a claim or defense within the case.<sup>72</sup> The EEOC reasoned that it is better for a third party or a designated employee of a company to monitor publically available social media because this monitoring will decrease an employer’s liability.<sup>73</sup> Concerning liability, the EEOC does not want to create a universal policy, due to the limits of enforceability of such a policy by their agency.<sup>74</sup>

In addition to the EEOC, the NLRB has handed down many opinions regarding social media in the workplace. The NLRB ruled in *Durham School Services L.P.* that several provisions in the employer’s “Social Media Networking Policy” were unlawful.<sup>75</sup> The Board cited the ruling in *Lafayette Park Hotel*, which stated that provisions of such a policy would be unlawful if they “reasonably tended to chill employee’s Section 7

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67. See EEOC Press Release, *supra* note 65.

68. Melanie Trottman, *Watch those Tweets: The EEOC looks at Social Media*, WALL ST. J. BLOGS (Mar. 18, 2014), <http://blogs.wsj.com/atwork/2014/03/18/watch-those-tweets-the-eec-looks-atsocial-media/>.

69. *Id.*

70. See EEOC Press Release, *supra* note 65.

71. Bradley Shear, “*Are UDiligence and Varsity Monitor Advising NCAA Schools to Violate the Stored Communications Act?*,” SHEAR ON SOCIAL MEDIA LAW (May 18, 2012), <http://www.shearsocialmedia.com/2012/05/is-varsity-monitor-and-udiligence.html>.

72. LLC, 270 F.R.D. 430, 437 (S.D. Ind. 2010).

73. *Id.*

74. Trottman, *supra* note 68.

75. See *Durham School Services L.P.*, 360 N.L.R.B. 85 (2014).

rights.”<sup>76</sup> In another NLRB decision, *Laurus Technical Institute*, the Board addressed a specific policy similar to social media; a no-gossip policy, and decided that the language in the no-gossip policy was overly broad, and severely restricted employees from complaining about any terms and conditions of their employment.<sup>77</sup> Restrictions on an employee’s speech also applied to social media and out-of-office communications, and such a policy should not prohibit all communication even positive or negative comments.<sup>78</sup> While both the NLRB and EEOC have opined about social media, both take a cautious approach to protect free speech of employees and avoid invasion of employee privacy. Both also view social media in a positive way as evidence in court cases and for recruitment purposes.

## VI. State and Federal Social Media Laws – Do They Impact NCAA Social Media Policies?

### A. State Social Media Policies

An overwhelming amount of states have begun to enact their own social media policies for employers and academic institutions. An important part of these social media policies is that an employer or academic institution cannot ask for an employee or student’s passwords for password-protected social media accounts. As of 2013, at least 11 states had enacted laws banning school verification of social media passwords.<sup>79</sup> Michigan,<sup>80</sup> Maryland,<sup>81</sup> Louisiana,<sup>82</sup> Illinois,<sup>83</sup> Delaware,<sup>84</sup> California,<sup>85</sup> and Arkansas<sup>86</sup> have enacted social media policies thus far. While these states are geographically diverse, they all have very similar policies defining social media. California defines social media as “an electronic service or account, or electronic content, including, but not limited to, videos or still photographs, blogs, video blogs, podcasts, instant and text messages, email, online services or accounts, or Internet Web site profiles

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76. Lafayette Park Hotel, 326 N.L.R.B. 824, 825 (1998).

77. See *Laurus Technical Institute and Joslyn Henderson*, 360 N.L.R.B. 133 (2014).

78. *Id.*

79. See Bradley Shear, *Social Media Monitoring Companies May Be Creating Millions of Dollars in Legal Liability for NCAA Athletic Departments*, SHEAR ON SOCIAL MEDIA LAW (Aug. 30, 2013), <http://www.shearsocialmedia.com/2013/08/nj-federal-court-non-public-facebook.html>.

80. MICH. COMP. LAWS § 37.271-37.278 (2012).

81. MD. CODE ANN. LABOR AND EMPL. § 3-712 (2013).

82. LA. STAT. ANN. § 51:1955 (2014).

83. 820 ILL. COMP. STAT. 55/10 (2014).

84. DEL. CODE ANN. tit. 14, § 8103 (2015).

85. CAL. EDUC. Code § 99121 (2013).

86. ARK. CODE ANN. §6-60-104(a)(1) (2013).

or locations.”<sup>87</sup> This broad definition of social media covers a wide spectrum of which an employer or academic institute may not meddle.

Additionally, state statutes further define the parties affected and what parties may and may not do involving social networking sites. Arkansas, for example, one of the first states with a social media policy, defines an employee at an academic institution as “an individual who provides services or labor for wages or other remuneration for an institution of higher education;” and an institution of higher education as “a public or private institution that provides postsecondary education or training to students that is academic, technical, trade-oriented, or in preparation for gaining employment in a recognized occupation.”<sup>88</sup> The statute states that students do not have to disclose usernames and passwords, add an employer to social media accounts or change privacy settings associated with social media for an employer or school.<sup>89</sup> Also, Louisiana’s statute requires that a person “shall not create a duty to search or monitor an individual’s online accounts by an employer or academic institution.”<sup>90</sup> Furthermore, Delaware’s statute requires no password disclosure, no monitoring student devices, no adding students as friends, and no enlisting third parties to monitor social media.<sup>91</sup> Each statute embodies the importance of allowing students to have an opinion and to use social media freely.

Promoting a student’s right to free speech and respecting their privacy are crucial in having a successful social media policy. While these policies are only recently enacted, they have begun to impact how universities enact their own social media policies. Specifically, New Jersey bans social media monitoring services, which have become very popular in many college athletic departments.<sup>92</sup> As more states enact statutes, the more difficulty universities will have creating their own social media policies.

## **B. Social Networking Online Protection Act (SNOA)**

The Social Networking Online Protection Act (SNOA) was the first step towards Congress directly addressing a national social media policy. In 2013, Congress introduced SNOA to “prohibit employers and certain other entities from requiring or requesting that employees and certain other

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87. CAL. EDUC. CODE § 99121 (2013).

88. ARK. CODE ANN. §6-60-104(a)(1) (2013); ARK. CODE ANN. §6-60-104(a)(2) (2013).

89. *Id.*

90. LA. STAT. ANN. § 51:1955 (2014).

91. DEL. CODE ANN. tit. 14, § 8103 (2015).

92. Bradley Shear, *New Jersey Bans NCAA Social Media Monitoring Companies*, SHEAR ON SOCIAL MEDIA LAW (Aug. 29, 2013), <http://www.shearsocialmedia.com/search?updated-max=2013-0830T00:02:00-04:00&max-results=5>.

individuals provide a user name, password, or other means for accessing a person's account on any social networking website" for employers and institutions of higher education.<sup>93</sup> Specifically, the bill focuses on the intersection of privacy and technology.<sup>94</sup> Americans today want the right to keep things private, especially when it comes to their password-protected social media accounts.<sup>95</sup> SNOPA would forbid employers or educational institutions from requesting an employee, student or potential student's username, password or any other means for accessing a private email account.<sup>96</sup> Additionally, an employer or academic institution could not discipline, threaten to expel or expel an employee or student if they refuse to give social media information.<sup>97</sup> SNOPA's prohibition on discipline protects a student from negative consequences for posting freely on social media.

With the introduction of SNOPA, Congress' intent is to protect a student's privacy and promote free speech. These ideals are ones that should be carried over to NCAA student athletes. Even though SNOPA has not yet been enacted, the current NCAA stance on social media is not favorable. If social media monitoring legislation ultimately follows SNOPA's intention, universities will not be able to have password monitoring software, which has become an integral part of many social media policies in university athletic departments.

### C. Stored Communication Act

Similar to SNOPA, the Stored Communication Act (SCA) has been enacted to protect freedom of speech and privacy rights of citizens. Specifically, the SCA provides that anyone who "(1) intentionally accesses without authorization a facility through which an electronic communication service is provided; or (2) intentionally exceeds an authorization to that facility; and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system shall be punished."<sup>98</sup>

Courts have recently begun to focus their attention on how the SCA applies to social media litigation. A court in *Ehling v. Monmouth-Ocean*

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93. H.R. REP. 537-113 (2013); see also Brett Barocas, *An Unconstitutional Playbook: Why the NCAA Must Stop Monitoring Student-Athletes' Password-Protected Social Media Content*, 80 BROOK. L. REV. 1029.

94. 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-banemployers-seeking-facebook-password-20120430>.

95. Maltais, *supra* note 94.

96. See H.R. REP. 537-113 (2013).

97. *Id.*

98. 18 U.S.C.A. §2701.



*Hosp. Service Corp.* opined that the “SCA covers: (1) electronic communications, (2) that were transmitted via an electronic communication service, (3) that are in electronic storage, and (4) that are not public.”<sup>99</sup> Social media networking sites provide users with multiple types of communication; some argued as public and others argued as not. The court ruled that when Facebook users make wall posts “private” or inaccessible to the general public, the wall posts are “configured to be private” under the SCA.<sup>100</sup>

The current status of the NCAA social media policy would likely violate the SCA.<sup>101</sup> Requesting access to password-protected social media accounts likely violates the SCA as requested by employers, and the SCA would likely prohibit the NCAA and member schools from hiring password monitoring software companies or requesting student athletes’ passwords.<sup>102</sup> Also, the SCA would likely be interpreted against password-monitoring software, as well as prohibiting coaches from adding student athletes as Facebook friends. To enact these social media policies would be a massive violation of the SCA, committed by the NCAA or its members. The SCA is a “huge victory” for student athletes because if universities are unable to have coaches add student athletes as friends or are prohibited from having password-monitoring software as a part of the university’s social media policy, the student athletes can act freely as youth should be allowed to act on social media.<sup>103</sup>

## VII. Current Social Media Policies’ Violation of Student Athletes First and Fourth Amendment Rights

Many critics of the NCAA’s current social media policy have argued that student athletes’ First and Fourth Amendment rights are violated by the NCAA and its member schools’ policies on social media. Bradley Shear, a leading authority on social media law, argues that “any of these social media policies giving access to a password protected electronic content was a violation of First and Fourth Amendment constitutional rights.”<sup>104</sup>

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99. *Ehling v. Monmouth-Ocean Hosp. Service Corp.*, 961 F.Supp.2d 659, 667 (D. NJ 2013).

100. *Id.* at 663.

101. *Id.* at 662.

102. Bradley Shear, *Are UDiligence and Varsity Monitor Advising NCAA Schools to Violate the Stored Communications Act?*, SHEAR ON SOCIAL MEDIA LAW (May 18, 2012), <http://www.shearsocialmedia.com/2012/05/is-varsity-monitor-and-udiligence.html>.

103. Bradley Shear, *NJ Federal Court: Password Protected Facebook Posts Covered By Stored Communications Act*, SHEAR ON SOCIAL MEDIA LAW (Aug. 30, 2013), <http://www.shear-socialmedia.com/2013/08/nj-federal-court-non-public-facebook.html>.

104. Thamel, *supra* note 10.

### A. First Amendment

The First Amendment's goal is to promote free speech, expression, and religion throughout the nation.<sup>105</sup> Congress may make no law abridging the freedom of speech.<sup>106</sup> The relationship between the First Amendment, students, and school institutions has been a point of contention since 1969. The seminal case *Tinker v. Des Moines Indep. Cmty. Sch. Dist.* was the first case to consider the First Amendment in educational settings.<sup>107</sup> This case involved a student wearing black armbands on school grounds to protest the Vietnam War.<sup>108</sup> This case established the *Tinker* Rule; the Rule held that when a student's conduct, inside or outside of class, for any reason, "materially disrupts classwork or involves substantial disorder or invasion of rights of others is not immunized by First Amendment Right to free speech."<sup>109</sup> This standard is applicable when a student intentionally addresses the school community in a threatening or intimidating manner.<sup>110</sup> However, the court ruled that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," and while schools do not possess "absolute authority" over the student body, they do have a right to monitor material or substantial interferences.<sup>111</sup>

As social media becomes an integral part of teenage and college student culture, the courts have seen more and more cases specifically dealing with students engaging in cyberbullying. A recent case, *Bell v. Itawamba County School Bd.*, in which a Mississippi high school student wrote a rap to expose sexual harassment by two instructors of his high school and posted it to social media websites.<sup>112</sup> The school proceeded to ask the student to remove this content from the internet; the school board claimed the rap "constituted threats, harassment and intimidation."<sup>113</sup> The court noted that "students now have the ability to disseminate

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105. See U.S. CONST, AMEND. I.

106. *Fisher v. King*, 232 F.3d 391, 396 (4th Cir. 2000).

107. 393 U.S. 503, 504 (1969).

108. *Id.*

109. *Id.* at 513.

110. *Id.*; see also *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (the court opined that school board acted within its authority when it disciplined a student for an "offensively lewd and indecent" speech).

111. *Tinker*, 393 U.S. at 506; See also *Doe v. Pulaski County, Special Sch. Dist.*, 306 F.3d 616, 624 (8th Cir. 2002) (A true threat is a "statement that a reasonable recipient would have interpreted as a serious expression of an intent to harm or cause injury to another."); see also Lauren E. Rosenbaum, *Your Coach Is Watching: Can a High School Regulate its Student Athletes' Use of Social Media?*, 25 MARQ. SPORTS L. REV. 329, 331 (2014).

112. 799 F.3d 379, 383 (5th Cir. 2015).

113. *Id.* at 396.

instantaneously and communicate widely from any location via the Internet,” which gives schools the opportunity to expand their reach.<sup>114</sup> The court ruled that this rap was a substantial interference, stating that “student speech is unprotected by the First Amendment and is subject to school discipline when the speech contains (1) an actual threat to kill or physically harm personnel and/or students of the school (2) which an actual threat is connected to the school environment; (3) which actual threat is communicated to the school, or its students or its personnel.”

Athletic department social media policies may have the potential to restrict a student athlete’s First Amendment rights. If the NCAA and its member schools want to have an effective social media policy, these policies need to educate young adults on the proper way to use social media, and not hinder free speech. Athletes who intend to move onto a professional career may “need Twitter latitude” and a social media presence while in college.<sup>115</sup> This advantage for student athletes to connect with a fan base on social media should be encouraged, not hindered by the NCAA. The NCAA and its member schools should be looking at social media as a positive part of a student athlete’s life, as it is an essential part of a professional athlete’s marketing and employer recruiting resource.

#### **B. Fourth Amendment**

In addition to current social media policies that limit First Amendment rights, these policies have serious Fourth Amendment implications. The Fourth Amendment is a constitutional right addressing unreasonable searches and seizures.<sup>116</sup> Courts have often addressed Fourth Amendment issues in an educational setting. When the Fourth Amendment is questioned, a claim for invasion of privacy is often cited: “. . . a claim for invasion of privacy must assert: (a) an intrusion; (b) that is highly offensive; (c) into some matter in which a person has a legitimate expectation of privacy.”<sup>117</sup> Particularly when dealing with electronic communications, the court ruled in *Katz v. United States* that an individual’s electronic conversations are protected under the Fourth Amendment.<sup>118</sup>

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114. *Id.* at 392; *Doninger v. Niehoff*, 527 F.3d 41 (2nd Cir. 2008) (School administrators “may regulate off-campus behavior insofar as the off-campus behavior creates a foreseeable risk for reaching school property and causing a substantial disruption to the work and discipline of the school.”).

115. Steinbach, *supra* note 9.

116. *See* U.S. CONST, amend. IV.

117. *Swarthout v. Mut. Serv. Life Ins. Co.*, 632 N.W.2d 741, 744 (Minn.Ct.App 2001).

118. 389 U.S. 347, 361 (1967) (ruled that police must obtain a search warrant on public pay phones).

*New Jersey v. TLO* dealt with a high school teacher discovering drug paraphernalia in a student's purse.<sup>119</sup> While a student should have the constitutional right to be free from unreasonable search and seizure,<sup>120</sup> the unreasonable search of her purse was in controversy in this case, a school's interest—the substantial interest in maintaining discipline in the classroom and on school grounds—is balanced against a student's expectation of privacy.<sup>121</sup> In determining whether a search is reasonable in schools, courts “must consider the scope of the legitimate expectation of privacy at issue, the character of the intrusion that is complained of and finally the natures and immediacy of the governmental concern at issue and the efficacy of the means employed for dealing with it.”<sup>122</sup> As the standard for a reasonable search and seizure is less strict in public schools, a school does not need a warrant as long as there is a plausible reason for search.

Social media in the educational setting was addressed in *R.S. ex rel. S.S. v. Minnewaska Area School Dist. No. 2149*.<sup>123</sup> This case focused on Facebook private messaging of a high school student regarding a school faculty member and about sexual relations with another student.<sup>124</sup> When the school discovered these comments, the school asked the student to give them her Facebook and email login information, without parental consent or a warrant.<sup>125</sup> The court delved into social media law, determining that Facebook does in fact provide both private and public communication as a part of its social media platform.<sup>126</sup> These conversations were only available privately, between the student and another person, so the student “had reasonable expectation to believe her communication was private.”<sup>127</sup> Because Facebook private messenger is similar to a private email platform, the court ruled that individuals have “an expectation to privacy when using it.”<sup>128</sup>

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119. 469 U.S. 325, 328 (1985).

120. *Id.* at 336.

121. *Id.* at 339.

122. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654-55 (1995) (“Privacy interests of schoolchildren. . . does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law. Legality of search should depend on reasonableness.”). *See also* Rosenbaum, *supra* note 111, at 342; Hauer, *supra* note 9, at 423.

123. 894 F.Supp.2d 1128 (D. Minn. 2012); *see also* Brett Barocas, *An Unconstitutional Playbook: Why the NCAA Must Stop Monitoring Student Athletes' Password-Protected Social Media Content*, 80 BROOK. L. REV. 1029, 1048 (2015).

124. *R.S. ex rel. S.S.*, 894 F.Supp.2d. at 1133.

125. *Id.*

126. *Id.* at 1142 (Facebook provides different means of communication such as posting on a user's “wall” or messages operating like email that are not open to the public).

127. *Id.*

128. *Id.* at 1147.

The Fourth Amendment and the NCAA social media policies coexist with one another when dealing with NCAA universities contracting with password-monitoring software companies. Universities deal with password monitoring in different ways. Some university compliance departments monitor student athletes through password retrieval or coaches adding players as friends.<sup>129</sup> Additionally, some universities believe that password monitoring software companies may be helpful, but may be making matters worse.<sup>130</sup> Universities such as LSU, Ole Miss, Utah State, Texas A&M, Texas, Baylor, Florida, New Mexico, and Texas Tech use companies such as UDiligence, Centrix Social and Varsity Monitor.<sup>131</sup> For example, Varsity Monitor gives a computer application to contracted every member-affiliated university that allows them to filter content on athlete's social media accounts.<sup>132</sup> While the goal of these companies is to help schools decrease incidents and liability, it actually raises liability and invades students' privacy by forcing student athletes to turn over passwords, potentially giving rise to constitutional violations.<sup>133</sup>

Schools should not have any right to invade the privacy of its student athletes unless this search into social media would be reasonable. A student athlete's private messaging and password-protected accounts should never be accessed by universities, athletic departments or the NCAA.

### VIII. NCAA and University Legal Liability Due to Social Media Policies

As long as the NCAA maintains an interest, however minimal, in the social media of student athletes, they risk liability. As a Big Ten compliance director noted, the NCAA is a "risk adverse organization," so it is contradictory to their message to universities if they get involved in the

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129. Jack Dickey, *Don't Say "Colt 45" Or "Pearl Necklace": How To Avoid Being Busted By The Facebook Cops Of College Sports*, DEADSPIN (May 24, 2012), <http://deadspin.com/5912230/dont-say-colt45-or-pearl-necklace-how-to-avoid-being-busted-by-the-facebook-cops-of-college-sports>.

130. Bradley Shear, *Are UDiligence and Varsity Monitor Advising NCAA Schools to Violate the Stored Communications Act?*, SHEAR ON SOCIAL MEDIA LAW (May 18, 2012), <http://www.shearsocialmedia.com/2012/05/is-varsity-monitor-and-udiligence.html>.

131. Norlander, *supra* note 33.

132. See Shear, *supra* note 130. Varsity Monitor does not collect or request passwords from student athletes; instead, it requires student athletes to add Varsity Monitor as a Facebook friend or a Twitter followers. Elizabeth Etherton, *Seen But Not Heard: Constitutional Questions Surrounding Social Media Policies Affecting Student Athletes*, 11 WILLAMETTE SPORTS L.J. 41, 47 (2014).

133. *Id.*

personal social networking accounts of student athletes.<sup>134</sup> While the NCAA has argued that they want to monitor social media, they also want to punish universities for not “adequately and consistently” monitoring what players are doing off the field.<sup>135</sup> Universities are placed in an uncomfortable position, as they risk failure to monitor social media and potential legal liability issues from student athletes.<sup>136</sup>

Additionally, a school could be sued by a player for negligence, dereliction of duty, and even disciplined for singling out student athletes on social media, as opposed to the entire student population.<sup>137</sup> For example, the compliance director at a Patriot League program noted that their program did not password monitor their student athletes because they do not want to deal with criminal liability.<sup>138</sup> Due to the usage of password-monitoring software, schools could be fined for violating Fourth Amendment rights, and many schools would not want to take on this level of liability.<sup>139</sup>

Liability may also endanger universities in situation such as the Jerry Sandusky/Penn State scandal. The NCAA and its member schools may want to avoid being held liable for such transgressions as committed by Sandusky, which may be exposed due to the monitoring of emails.<sup>140</sup> Additionally, following the death of Yeardeley Love, a University of Virginia women’s lacrosse player, at the hands of her boyfriend, who was a member of the men’s lacrosse team, Love’s family sued the school for negligence.<sup>141</sup> The suit was later dropped, but Love’s family would have had a very plausible argument for negligence if the school’s athletic department had been monitoring Love’s killer’s social media accounts for suspicious activity prior to her death.<sup>142</sup>

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134. Telephone Interview, Compliance Director, University of Maryland Athletics (Feb. 10, 2016).

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

136. Dunning, *supra* note 135.

137. *Id.*

138. Telephone Interview, Compliance Director, Boston University Athletics (Feb. 16, 2016).

139. Bradley Shear, *Social Media Monitoring Companies May Be Creating Millions of Dollars in Legal Liability for NCAA Athletic Departments*, SHEAR ON SOCIAL MEDIA LAW (Aug. 30, 2013), <http://www.shearsocialmedia.com/2013/08/nj-federal-court-non-public-facebook.html>.

140. Shear, *supra* note 139.

141. See Santus, *supra* note 23; Brett Barocas, *An Unconstitutional Playbook: Why the NCAA Must Stop Monitoring Student Athletes’ Password-Protected Social Media Content*, 80 BROOK. L. REV. 1029, 1054 (2015).

142. *Id.*

However, in the case of *Kowalski v. Berkeley Country Schools*, a high school student was engaging in cyber bullying of a fellow classmate outside of the school.<sup>143</sup> There is a limit to the scope of a school's interest in what occurs off-premises, but schools take great interest in the personal well-being of the student population inside and outside of the building, even if liability may be present.<sup>144</sup> The court argued that if the conduct "materially and substantially interfere[ed] with the requirements of appropriate discipline in the operation of the school and collides with the rights of others," the school was permitted to interfere.<sup>145</sup> If the NCAA was faced with a situation as in *Kowalski*, where the well-being of a student is in question because of off-premises cyber-bullying, it may be permissible for the school to interfere.

A university athletic department must seek responsibility to protect student athletes from themselves and educate them on cyber-bullying, even if potential liability is present.<sup>146</sup>

### **IX. A Solution: Educate Student Athletes, Do Not Violate Constitutional Rights**

When students begin college, they are afforded an opportunity to embrace freedom of speech and expression. While it is important to educate students, is it really necessary to have social media policies that limit their rights? A universal NCAA social media policy would be a mistake. The liability assumed by the NCAA would far outweigh any positive benefit of a social media policy. Singling out student athletes' social media accounts would be unfair, since the entire student body should be viewed equally. The NCAA promotes a student experience,<sup>147</sup> one that is supposed to include teamwork, fun, winning championships, and coming together as a family. Limiting social media would take away from the experience that the NCAA intends to build for its student athletes. Student athletes should be guaranteed the ability to voice an opinion on whatever issues they want as every other non-student athlete is guaranteed.

However, pursuant to *Tinker*, if a NCAA member school was faced with a material or substantial interference of some kind by a student, it may be advisable for the school or the NCAA to intervene. A legitimate disruption, as defined in *Tinker*, is a disruption that "might reasonably

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143. 652 F.3d 565, 567-68 (4th Cir. 2011).

144. *Id.* at 473.

145. *Id.*

146. *See* Norlander, *supra* note 33.

147. Telephone Interview, Compliance Director, Syracuse University Athletics (Mar. 2, 2016).

[lead] school authorities to forecast substantial disruption of or material inference with school activities,” should never be neglected.<sup>148</sup>

If the NCAA is concerned about liability if its relationship with student athletes is labeled as “employer-employee,” binding student athletes to restrictive social media policies may be the ultimate liability. The NCAA does not want the world to see the organization as “the Boss” of student athletes. But meddling in student athletes’ social media accounts would just be an invasion of privacy and limitation of free speech.

As each university has its own core values, Division I athletic departments are particularly under the microscope. Any school—Division I programs especially—should be incredibly careful about how they want to approach social media education. These programs pride themselves on national media exposure, and any social media snafu could lead to poor headlines appearing on social media and news stations. While the NCAA is “fond of saying that student athletes will be turning in pro in something other than sports,” universities and the NCAA need to recognize that social media gives all NCAA athletes the opportunity to connect with fans, express their opinions, and connect with future employers.<sup>149</sup>

In conclusion, if an athletic department has a social media policy, the policy should be used to educate students about the harms of cyber-bullying, and over-sharing. A social media policy should not ask for an athlete’s passwords, tell a student athlete what and what not to tweet or post or invade privacy in any way. According to a few compliance directors, if there were to be a universal social media policy, it would need to be more of a recommendation to schools.<sup>150</sup> All programs, Division I, II & III should promote education of cyber-bullying and social media safety as their sole social media policy.

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

149. Steinbach, *supra* note 9.

150. Telephone Interview, Compliance Director, Northeastern University Athletics (Feb. 16, 2016).



### **Appendix A: Questionnaire**

Does school/league have a social media policy?

If yes, why & what makes the policy unique?

Does the University use password monitoring software?

Do coaches monitor student athlete's social media activity  
or have to friend players on social media?

Do you believe that the NCAA should have a social media  
policy? Why or why not?