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## An Unconstitutional Playbook: Why the NCAA Must Stop Monitoring Student-Athletes' Password-Protected Social Media Content

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# NOTES

## An Unconstitutional Playbook

### WHY THE NCAA MUST STOP MONITORING STUDENT-ATHLETES' PASSWORD-PROTECTED SOCIAL MEDIA CONTENT

#### INTRODUCTION

Social media use has increased exponentially in the past few years. Twitter and Facebook have controlled much of the social media market share and dominate this continuously growing landscape.<sup>1</sup> Since its launch in March 2006,<sup>2</sup> Twitter has amassed about 1 billion subscribers and is used by approximately 100 million people everyday.<sup>3</sup> The social media site is “a real-time information network that connects you to the latest stories, ideas, opinions and news about what you find interesting.”<sup>4</sup> The service is used by people for business and pleasure, and allows users to freely share their thoughts and emotions via short updates, or “Tweets.”<sup>5</sup> Users may shield their Tweets from public view by making them private and limiting visibility only to users’ approved followers.<sup>6</sup> Similarly, Facebook was founded on February 4, 2004, with the “mission . . . to give people the power to share and make the

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<sup>1</sup> *Most Popular Social Media Websites in the United States in September 2014, Based on Share of Visits*, STATISTA, <http://www.statista.com/statistics/265773/market-share-of-the-most-popular-social-media-websites-in-the-us/> (last visited May 1, 2015).

<sup>2</sup> Nicholas Carlson, *The Real History of Twitter*, BUSINESS INSIDER (Apr. 13, 2011, 1:30 PM), <http://www.businessinsider.com/how-twitter-was-founded-2011-4>.

<sup>3</sup> Craig Smith, *By The Numbers: 250+ Amazing Twitter Statistics*, DIGITAL MARKETING RAMBLINGS, <http://www.expandedramblings.com/index.php/march-2013-by-the-numbers-a-few-amazing-twitter-stats/> (last updated Jan. 3, 2015).

<sup>4</sup> *Getting Started on Social Media*, STANFORD+CONNECTS, <https://stanfordconnects.stanford.edu/get-started/social-media> (last visited Nov. 14, 2014).

<sup>5</sup> *New User FAQs*, TWITTER, <https://support.twitter.com/groups/50-welcome-to-twitter/topics/203-faqs/articles/13920-new-user-faqs> (last visited May 1, 2015).

<sup>6</sup> *Id.*

world more open and connected.”<sup>7</sup> The site currently has an estimated 864 million active users each day, even surpassing the amount on Twitter.<sup>8</sup> Facebook allows users to find and add their friends by sending and accepting “friend requests.”<sup>9</sup> Users may also alter their privacy settings to decide to whom their posts, photos, or information is visible, or even whether the general public can find the existence of their page.<sup>10</sup> As a result, it is no surprise that a prevalent group among the social media lovers using Twitter and Facebook are American high school students. However, this use of social media may not be allowed if you are one of those students lucky enough to be offered a collegiate scholarship for athletics.

In order to play football at Florida State University, prior to the 2012 season students were forced to give up all use of their Twitter accounts “in order to keep them from embarrassing the program.”<sup>11</sup> Similarly, Boise State coach Chris Petersen demanded that his football players refrain from all use of Twitter for the duration of the 2012 season.<sup>12</sup> Sweeping bans are not the only means which universities and individual teams have resorted to when it comes to restricting the social media access of their student-athletes. Athletes at schools including the University of Kentucky and the University of Louisville are subject to constant monitoring of their Facebook and Twitter accounts conducted by third parties employed by the universities.<sup>13</sup> In 2012, the athletic director of University of Oklahoma admitted that “the university required its athletes to

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<sup>7</sup> *About Facebook*, FACEBOOK, <https://www.facebook.com/facebook/info> (last visited May 1, 2015).

<sup>8</sup> Craig Smith, *By The Numbers: 170 Amazing Facebook User & Demographic Statistics*, DIGITAL MARKETING RAMBLINGS, <http://expandedramblings.com/index.php/by-the-numbers-17-amazing-facebook-stats/#.VFpm3010zc> (last updated May 1, 2015).

<sup>9</sup> *Finding Friends*, FACEBOOK, <https://www.facebook.com/help/www/336320879782850/> (last visited May 1, 2015); *Adding Friends & Friend Requests*, FACEBOOK, <https://www.facebook.com/help/www/146466588759199> (last visited May 1, 2015).

<sup>10</sup> *Basic Privacy Settings & Tools*, FACEBOOK, <https://www.facebook.com/help/www/325807937506242/> (last visited May 1, 2015).

<sup>11</sup> Kristian Dyer, *Florida State Bans Its Players From Twitter*, YAHOO! SPORTS (July 20, 2012, 6:26 PM), <http://sports.yahoo.com/blogs/dr-saturday/florida-state-bans-players-twitter-222622167--ncaaf.html>.

<sup>12</sup> Paul Steinbach, *Schools Attempting to Control Athletes' Use of Social Media*, ATHLETIC BUSINESS (Oct. 2012), <http://www.athleticbusiness.com/schools-attempting-to-control-athletes-use-of-social-media.html>.

<sup>13</sup> Mark Boxley, *University of Kentucky, Louisville Monitor Athletes' Tweets*, USA TODAY (Aug. 20, 2012, 2:46 PM), <http://usatoday30.usatoday.com/sports/college/story/2012-08-20/University-of-Kentucky-and-University-of-Louisville-student-athletes-monitored-on-Twitter/57165704/1>.

friend coaches on Facebook.”<sup>14</sup> Later in the year, it was reported that Utah State University even went as far as “forcing athletes to allow school officials access to their private accounts.”<sup>15</sup>

Once a student is forced to register his username with the school and the monitoring company installs the application, their account may be considered seized for constitutional purposes, as the student’s Fourth Amendment rights may have been violated.<sup>16</sup> Similarly, a mandatory Facebook friend request can be compared to a school demanding a search of the student’s account, and may also be a violation of the Constitution.<sup>17</sup> Students are forced to submit their account to an ongoing search by someone from whom they should have the right to remain private.

Recently, many have questioned the constitutionality of these restrictions and systems of monitoring.<sup>18</sup> Courts have weighed in on several issues relating to social media, and thus far have held that First Amendment protection does extend to speech on social media.<sup>19</sup> It can be extremely difficult, however, to determine when actions taken by universities cross the line and become an invasion of the student-athletes’ constitutionally protected rights. For example, some schools employ companies to monitor student-athletes’ social media counts.<sup>20</sup> Companies such as Varsity Monitor and UDiligence have prospered as schools across the country call on them to “keep[] an online eye on their athletes.”<sup>21</sup> These companies offer customized levels of monitoring of the student-athletes’ social media feeds to meet the requests of the university.<sup>22</sup> Their services usually involve the installation of software to the athlete’s social media accounts, which in turn allows the company to access and monitor the accounts.<sup>23</sup>

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<sup>14</sup> 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-legal-concerns.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/03/31/sports/universities-track-athletes-online-raising-legal-concerns.html?pagewanted=all&_r=0).

<sup>15</sup> Kellie Woodhouse, *University of Michigan Athletes Sign Social Media Policy in Bid to Avoid Controversy As Twitter Incidents Multiply*, ANN ARBOR NEWS (Oct. 29, 2012), <http://www.annarbor.com/news/as-twitter-incidents-multiply-michigan-athletes-sign-social-media-contract-and-try-to-avoid-controve/>.

<sup>16</sup> 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>.

<sup>17</sup> *Id.*

<sup>18</sup> See Thamel, *supra* note 14.

<sup>19</sup> See *infra* Part IV.A.

<sup>20</sup> Thamel, *supra* note 14.

<sup>21</sup> *Id.*

<sup>22</sup> Boxley, *supra* note 13.

<sup>23</sup> *Id.*

This note argues that the National Collegiate Athletic Association (NCAA) must adopt a new social media policy outlawing the use of monitoring systems and mandatory friend requests, because the current system inappropriately encourages schools to engage in conduct that may violate the constitutional and legal rights of their students. Part I of this note will introduce the state of social media monitoring at universities and will discuss its impact on NCAA student-athletes. Part II details the methods that universities are using to restrict the social media privacy of their student-athletes. It will also explore the use of third-party social media monitoring systems and mandatory Facebook friend requests by coaches or other school officials, as well as the issue of universities using unconstitutional methods to secure the consent of student-athletes to have their accounts monitored in these ways. This note suggests that the duress suffered by students is what ultimately compels them to oblige, which renders the consent illegal and invalid.<sup>24</sup> Part III looks at the constitutional implications of this monitoring, and explains why the NCAA's current system allows for potential violations of both the First and Fourth Amendments by public universities. Part IV discusses the current legal atmosphere regarding this issue, and shows how federal courts have already ruled to protect constitutional rights in the social media platform. Further, it will examine the legislative actions taken by states to protect the privacy of students' social media accounts. Part V will consist of a brief discussion to show how universities risk exposing themselves to liability issues if they continue to engage in student monitoring. Part VI concludes that the NCAA should create a new bylaw to its manual that builds a social media policy for all universities and their athletes to follow, and specifically prohibits schools from stripping athletes of their privacy by demanding them to perform certain actions on their social media accounts.

## I. THE CURRENT STATE OF SOCIAL MEDIA MONITORING IN THE NCAA

### A. *The Problem*

Currently, each university is responsible for setting its own social media policies, and choosing its own methods of

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<sup>24</sup> *Schneekloth v. Bustamonte*, 412 U.S. 218, 233 (1973).

policing and enforcing these policies.<sup>25</sup> While “the NCAA does not require its member schools to monitor social media accounts of student[-]athletes[,]” it does “encourage[] schools to do so.”<sup>26</sup> Many schools, including the University of Georgia, do not even apply their social media restrictions evenly across student-athletes, but rather only to members of select teams.<sup>27</sup> This lack of uniformity allows athletic directors and coaches to take whatever measures of social media monitoring and restricting they so choose. If the school chooses a method such as installing monitoring software or demanding a Facebook friend request, it may be violating several constitutional rights,<sup>28</sup> including freedom of speech and freedom “against unreasonable searches and seizures.”<sup>29</sup> Those schools that choose to utilize a third-party monitoring company appear to be practicing a system that may be unconstitutional and has been likened to using “an online bug.”<sup>30</sup> The school may obtain the student’s consent, seemingly removing it from any constitutional liability; however, these acts of consent may have been acquired involuntarily, and perhaps even through coercion.<sup>31</sup> Because “the consent was not given voluntarily,” it may be invalid as a violation of the student’s constitutional rights under the Fourth Amendment.<sup>32</sup> Finally, the current system opens the door to an immense number of problems for the universities, including potential liability for missing a crime,<sup>33</sup> or for leaking “student athletes’ personal information.”<sup>34</sup> These methods can actually come back to hurt the schools themselves and, accordingly, they would be wise to stay away from these methods for their own protection.<sup>35</sup>

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<sup>25</sup> See Matt Dunning, *Social Media Has Schools on Defense*, BUSINESS INSURANCE (July 24, 2011, 6:00 AM), <http://www.businessinsurance.com/article/20110724/NEWS07/307249975>.

<sup>26</sup> *Id.*

<sup>27</sup> Rex Santus, *Social Media Monitoring Widespread Among College Athletic Departments, Public Records Survey Shows*, STUDENT PRESS LAW CTR. (Mar. 16, 2014, 8:00 PM), <http://www.splc.org/article/2014/03/social-media-monitoring-widespread-among-college-athletic-departments-public-records-survey-shows>.

<sup>28</sup> Shear, *supra* note 16.

<sup>29</sup> U.S. CONST. amend. IV.

<sup>30</sup> Boxley, *supra* note 13.

<sup>31</sup> See *infra* Part III.C.

<sup>32</sup> *Schneckloth v. Bustamonte*, 412 U.S. 218, 248-49 (1972).

<sup>33</sup> 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=2013-08-30T00:02:00-04:00&max-results=5>.

<sup>34</sup> Boxley, *supra* note 13.

<sup>35</sup> This note will not delve into these liability issues at length, but will briefly bring them up to show how dangerous these policies are for universities.

## B. *The Solution*

Ultimately, the ideal solution for the NCAA is to recant its encouragement of universities to engage in social media monitoring.<sup>36</sup> The NCAA is at the center of the issue, as it is allowing social media monitoring through its decisions to encourage the policy rather than penalize it. As a result, the NCAA must implement a brand new social media policy through the creation of a specific bylaw to deal with, and create penalties for, social media monitoring. The NCAA can follow the University of Michigan and create a “Social Media Agreement” that all players must sign.<sup>37</sup> This new policy should apply universally to each of the NCAA’s member institutions. Doing so will help close the door on the extreme amount of variety in the way each NCAA school and team handles its athletes with regards to social media. This policy would be very straightforward and would help educate and guide student-athletes about the best ways to use social media. The NCAA must ensure that this policy sets guidelines for the student-athletes that can help them maintain successful social media accounts on their own, free from any university supervision. In addition, one way for the NCAA to feel more comfortable about its athletes’ Twitter accounts could be to ask them to include a brief disclaimer in their account bio. This would alert the athlete’s followers that the account represents the views of the individual and is in no way associated with the university.

Most importantly, the policy must limit the monitoring power of public universities and, alternatively, prevent them from forcing athletes to accept Facebook friend requests from coaches, or turnover their username or password. One way the NCAA can do this is by outlawing the same practices that some state legislatures have already banned. For example, the state of Arkansas enacted H.B. 1902 in 2013.<sup>38</sup> The bill “prohibit[s] an institution of higher education from requiring or requesting a current or prospective employee or student from disclosing his or her username or password for a social media account.”<sup>39</sup> In addition, the NCAA must take heed of judicial decisions that are giving social media users a wide range of protection, based in the First and Fourth Amendments, and the Stored Communications

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<sup>36</sup> See, e.g., Dunning, *supra* note 25 (discussing possible risks for schools that monitor the social media accounts of its athletes).

<sup>37</sup> Woodhouse, *supra* note 15.

<sup>38</sup> H.B. 1902, 89th Gen. Assemb. (Ark. 2013).

<sup>39</sup> *Id.* (capitalization omitted).

Act. The NCAA can do so by telling its member institutions that in order to enforce any restrictions on a student's social media account, the student must first engage in conduct that would lead to "substantial disruption"<sup>40</sup> to the university. Furthermore, since the Stored Communications Act prevents individuals from using third-party applications or forcing students to friend a coach to bypass privacy settings,<sup>41</sup> the NCAA must prevent its universities from doing the same. The NCAA should announce clearly, via a new bylaw, that both of these monitoring methods are strictly prohibited, and no longer can any NCAA school or team implement these broad-sweeping requirements. The NCAA must not wait for other states or the federal government to act, but should instead be proactive and take action to increase its reputation and level of accountability.

Next, the NCAA must ensure the effectiveness of the new measures it takes, and that its member schools take them seriously. The NCAA enforces rule violations by its student-athletes by serving them with suspensions, rendering them ineligible to compete in a specified number of games.<sup>42</sup> In addition, the NCAA often penalizes the school itself for violations committed by student-athletes, taking away wins, championships, bowl eligibility, or scholarships.<sup>43</sup> Two of the major ways that the NCAA polices schools for these violations are through schools self-reporting them,<sup>44</sup> and the use of an 18-member "infractions committee."<sup>45</sup> Since it would seem unlikely that schools would expose themselves to these harsh penalties by "self-reporting" themselves for violating the new social

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<sup>40</sup> See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969) (discussing the standard necessary for school officials to prohibit a student's First Amendment right to freedom of expression or speech).

<sup>41</sup> Stored Communications Act, 18 U.S.C. §§ 2701-12 (2002); see also *infra* Part IV.B.

<sup>42</sup> See, e.g., *Half-Game Penalty for Johnny Manziel*, ESPN (Aug. 29, 2013, 12:41 PM), [http://espn.go.com/college-football/story/\\_id/9609389/johnny-manziel-texas-aggies-suspended-1st-half-season-opener-rice-owls](http://espn.go.com/college-football/story/_id/9609389/johnny-manziel-texas-aggies-suspended-1st-half-season-opener-rice-owls); *Kansas' Naadir Tharpe Suspended 1 Game for NCAA Violation*, USA TODAY (Oct. 29, 2013, 11:35 PM), <http://www.usatoday.com/story/sports/ncaab/big12/2013/10/29/kansas-jayhawks-naadir-tharpe-suspended-1-game/3311227/> [hereinafter *Kansas' Naadir Tharpe*]; Andy Katz, *Artis, Carter Banned 9 Games*, ESPN (Nov. 7, 2013, 8:24 PM), [http://espn.go.com/mens-college-basketball/story/\\_id/9943201/oregon-ducks-dominic-artis-ben-carter-suspended-9-games](http://espn.go.com/mens-college-basketball/story/_id/9943201/oregon-ducks-dominic-artis-ben-carter-suspended-9-games).

<sup>43</sup> See, e.g., Gary Klein, *NCAA Hands USC Two-Year Bowl Game Ban, Major Scholarship Reduction in Football*, L.A. TIMES (June 9, 2010), <http://articles.latimes.com/2010/jun/09/sports/la-sp-usc-20100610>; Lynn Zinser, *Memphis Stripped of 2008 Final Four by N.C.A.A.*, N.Y. TIMES (Aug. 20, 2009), [http://www.nytimes.com/2009/08/21/sports/ncaabasketball/21memphis.html?\\_r=0](http://www.nytimes.com/2009/08/21/sports/ncaabasketball/21memphis.html?_r=0).

<sup>44</sup> See *Kansas' Naadir Tharpe*, *supra* note 42; see also Katz, *supra* note 42.

<sup>45</sup> *New NCAA Enforcement Structure Takes Effect*, USA TODAY (Aug. 1, 2013, 3:41 PM), <http://www.usatoday.com/story/sports/college/2013/08/01/ncaa-new-enforcement-structure-takes-effect/2609185/>.



media policy, the NCAA must ensure that its “infractions committee” is prepared to handle the responsibility. The committee has been pondering the idea of adding even more members to its staff,<sup>46</sup> and with the recent explosion of social media issues, it would be a good idea for them to do so. The larger the size of the committee, the more members the NCAA can dedicate to enforcing its new social media policy, and thus the more effective it will be. Finally, because of the constitutional issues implemented, a breach of the NCAA’s new social media policy should fall under the infraction category of a “serious breach of conduct.”<sup>47</sup> By being placed in this category, schools using social media monitoring tactics will be subject to the most severe penalties, including the ability of the “infractions committee” to suspend coaches “up to one full season.”<sup>48</sup> If these recommendations are followed, the NCAA will have a strong new policy that it can implement to solve the problem of teams monitoring the social media accounts of their student-athletes. In sum, these actions will help close the door on the potential illegal monitoring and simultaneously help protect the NCAA and its member institutions from liability.

## II. HOW UNIVERSITIES ARE MONITORING STUDENTS’ SOCIAL MEDIA ACCOUNTS

### A. *Social Media Monitoring Companies and Their Clients*

Two of the companies involved in the social media monitoring business are Varsity Monitor and UDiligence.<sup>49</sup> Both of these companies use similarly designed software to monitor the activity of student-athletes on various social media sites, including Facebook and Twitter.<sup>50</sup> The software is installed in the athletes’ social media accounts, and sends “email[] alerts to coaches whenever athletes use a word that could embarrass the student, the university or tarnish their images on services such as Twitter, Facebook, YouTube and MySpace.”<sup>51</sup> The software typically “gives [the monitoring] company access to every bit of information on the account—

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> 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](http://espn.go.com/mens-college-basketball/story/_/id/7876754/policing-social-media-craze-college-sports-ncb).

<sup>50</sup> *Id.*

<sup>51</sup> Boxley, *supra* note 13.

whether or not it is password protected/private information.”<sup>52</sup> The extent of this information is great and it includes items such as the student’s “[e]mail address, phone number, birth date, posts, pictures, videos, friend lists, relationships, [and] calendar of events.”<sup>53</sup> Because of the way these programs work, some have referred to the services as “cyberstalking software.”<sup>54</sup>

Each school can customize its own list of words that will trigger these alerts being sent.<sup>55</sup> One example of this comes from the University of Louisville, which in late 2012 had over 400 trigger words, mostly “hav[ing] to do with drugs, sex, or alcohol.”<sup>56</sup> As of August 2012, the client list of UDiligence included the University of Louisville, “LSU, Ole Miss, Texas Tech, Utah State, Texas A&M, Texas, Baylor, University of Florida, New Mexico and Missouri.”<sup>57</sup> Varsity Monitor clients have included the Universities of North Carolina, Oklahoma, and Nebraska.<sup>58</sup> More schools, including Auburn, Mississippi State and South Carolina have used the services of other monitoring companies.<sup>59</sup> An exact client list is difficult to confirm because these companies no longer have client lists displayed on their websites.<sup>60</sup> Both the University of North Carolina and Utah State University no longer use these services, as their states have enacted legislation that protects the privacy of students’ social media accounts and in doing, has effectively banned them.<sup>61</sup> Further, Texas A&M’s Athletic Director recently denied using any monitoring service.<sup>62</sup>

The NCAA’s current policy leaves it to each individual school to decide what social media policy, if any, to impose and gives complete discretion to the schools to decide which of their athletic teams should be subjected to the provisions of the

<sup>52</sup> Kevin DeShazo, *Is Monitoring Student-Athletes on Social Media Illegal?*, <http://kevindeshazo.tumblr.com/post/50661117318/is-monitoring-student-athletes-on-social-media-illegal> (last visited May 1, 2015).

<sup>53</sup> *Id.*

<sup>54</sup> Bradley Shear, *Right to Privacy Will Be Protected By the Social Networking Online Protection Act*, SHEAR ON SOCIAL MEDIA LAW (Feb. 18, 2013), <http://www.shearsocialmedia.com/2013/02/right-to-privacy-will-be-protected-by.html>.

<sup>55</sup> *See* Boxley, *supra* note 13.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *See* Thamel, *supra* note 14.

<sup>59</sup> Boxley, *supra* note 13.

<sup>60</sup> Shear, *supra* note 16.

<sup>61</sup> H.B. 846, Gen. Assemb., 2013-2014 Sess. (N.C. 2013); H.B. 100, 2013 Gen. Sess. (Utah 2013).

<sup>62</sup> Jody Serrano, *Universities Might Have to Limit Monitoring, Set Social Media Policies in Stone Under Proposal*, STATESMAN (Feb. 10, 2013, 5:08 PM), <http://www.statesman.com/news/news/local-education/universities-might-have-to-limit-monitoring-set-so/nWLNgl/>.

school's policies.<sup>63</sup> For example, at the University of Kentucky, every student-athlete is required to use the service.<sup>64</sup> However, the University of Florida has chosen "to monitor only [its] football players."<sup>65</sup> This further complicates the issue and creates a wide range of disparity not only amongst each institution, but also amongst each team at the same institution.

### B. *Mandatory Facebook Friend Requests*

The other procedure used to oversee an athlete's social media activity requires that the student accept a Facebook friend request from a coach or other school official. This policy has admittedly been used by large NCAA schools such as the University of Oklahoma.<sup>66</sup> According to an NBC News report in 2012, "[s]tudent-athletes in colleges around the country also are finding out they can no longer maintain privacy in Facebook communications because schools are requiring them to 'friend' a coach or compliance officer, giving that person access to their 'friends-only' posts."<sup>67</sup> The effect of this demand is that, "if you want to play, you have to friend a coach."<sup>68</sup>

Like the installation of monitoring software, this method completely takes away the athlete's choice and right to the privacy of his password-protected content. Facebook is designed to allow users complete control and customizability over the privacy of their accounts.<sup>69</sup> Users can determine who can see their information, posts, and photos, and even limit who can find their account.<sup>70</sup> However, once athletic departments force monitoring systems onto student-athlete's accounts, or demand students to accept the friend request of a coach or administrator, athletic departments are no longer giving the athletes a choice as to the privacy controls of their accounts.

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<sup>63</sup> See Thamel, *supra* note 14; Pete Warner, *NCAA Has Limited Stance on Student-Athletes' Use of Social Media*, BANGOR DAILY NEWS (Jan. 17, 2014, 7:05 PM), <http://bangordailynews.com/2014/01/17/sports/ncaa-has-limited-stance-on-student-athletes-use-of-social-media/>.

<sup>64</sup> See Boxley, *supra* note 13.

<sup>65</sup> See Thamel, *supra* note 14.

<sup>66</sup> *Id.*

<sup>67</sup> Bob Sullivan, *Govt. Agencies, Colleges Demand Applicants' Facebook Passwords*, NBC NEWS (Mar. 6, 2012), <http://www.nbcnews.com/technology/govt-agencies-colleges-demand-applicants-facebook-passwords-328791?franchiseSlug=technolog>.

<sup>68</sup> *Id.*

<sup>69</sup> See *Basic Privacy Settings & Tools*, FACEBOOK, <https://www.facebook.com/help/325807937506242> (last visited May 1, 2015).

<sup>70</sup> See *Privacy*, FACEBOOK, <https://www.facebook.com/help/445588775451827> (last visited May 1, 2015).

### III. HOW UNIVERSITIES' ACTIVITIES ARE UNCONSTITUTIONAL

#### A. *The First Amendment*

The case of *Tinker v. Des Moines Independent Community School District* established that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>71</sup> The Court developed the “substantial and material disruption”<sup>72</sup> test and found that a school may not prevent a student from exercising these First Amendment rights unless his or her conduct “materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school.”<sup>73</sup> *Tinker* allows student-athletes at public institutions to take the first step in contesting the NCAA’s current policy, as they can make the claim that their social media speech has First Amendment protection. *Tinker*, however, is distinguishable from the present issue as none of the contesting plaintiffs were older than the age of high school students.<sup>74</sup> Despite the dissimilar factual context, the strong First Amendment principles of *Tinker* have been expanded in recent case law and are a solid basis from which student-athletes can mount a legal challenge to university monitoring policies.

Three years after *Tinker*, the Supreme Court erased all doubt of whether First Amendment protection of students would extend to those in college.<sup>75</sup> Students at Central Connecticut State College (CCSC) “desired to form a local chapter of Students for a Democratic Society (SDS)” on campus.<sup>76</sup> When they attempted to register with the college and obtain “official recognition as a campus organization,” the school’s President denied the request.<sup>77</sup> Although the students’ application had made a showing that their viewpoint deserved a say at the college, “the Young Americans for Freedom, the Young Democrats, the Young Republicans, and the Liberal Party all enjoyed recognized status,”<sup>78</sup> the President still denied their request. While the group vowed that they would not be

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<sup>71</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

<sup>72</sup> The Court in *Tinker* does not refer to the test by this name, but later courts have commonly used this title. See, e.g., Dina Harris & Yonit Kovnator, *Courts Confirm Discipline for Off-Campus Speech Must Meet the “Tinker” Test*, MARTINDALE.COM (Sept. 21, 2011), [http://www.martindale.com/education-law/article\\_Best-Best-Krieger-LLP\\_1346822.htm](http://www.martindale.com/education-law/article_Best-Best-Krieger-LLP_1346822.htm).

<sup>73</sup> *Tinker*, 393 U.S. at 509.

<sup>74</sup> *Id.* at 504.

<sup>75</sup> *Healy v. James*, 408 U.S. 169, 180 (1972).

<sup>76</sup> *Id.* at 170.

<sup>77</sup> *Id.* at 170, 172, 174.

<sup>78</sup> *Id.* at 174.

controlled by the National SDS group, and did not share in many of their goals,<sup>79</sup> the President was concerned that the group would not be independent.<sup>80</sup> In analyzing the constitutionality of the college's decision, the Court stated, "At the outset we note that state colleges and private universities are not enclaves immune from the sweep of the First Amendment."<sup>81</sup> The Court added that, "The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,' and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom."<sup>82</sup> The case affirmed that the *Tinker* test for material disruption is the correct standard to determine the constitutionality of a school's action, even at the college level.<sup>83</sup> "[I]f there were an evidentiary basis to support the conclusion that CCSC-SDS posed a substantial threat of material disruption in violation of that command[,] the President's decision should be affirmed."<sup>84</sup> The Court ultimately remanded the case for a determination of that matter.<sup>85</sup>

Monitoring the accounts of student-athletes in order to prevent them from using certain words or phrases appears to be a clear violation of the rights afforded in *Tinker* and extended to college students in *Healy*. Bradley Shear, an attorney who specializes in the field of social media law, says that, "You cannot create a prior restraint on your students because they may do something or say something that may create embarrassment (for) your [institution.]"<sup>86</sup> In Kentucky, the American Civil Liberties Union (ACLU) has even begun to take a look at the effect of social media monitoring on students' First Amendment rights.<sup>87</sup> Regarding the matter, the ACLU stated that:

When students are forced, as a condition of receiving a scholarship, to grant government officials access to all of their social networking accounts and then are subject to punishment for engaging in lawful

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<sup>79</sup> *Id.* at 173.

<sup>80</sup> *Id.* at 175.

<sup>81</sup> *Id.* at 180.

<sup>82</sup> *Id.* at 180-81 (citation omitted).

<sup>83</sup> *Id.* at 189.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 194.

<sup>86</sup> Joe Utter & Adam Lewis, *WSU Coach Mike Leach's Ban of Twitter Raises Concerns From Legal Experts*, SEATTLE TIMES (Oct. 24, 2012, 2:15 PM), [http://seattletimes.com/html/take2/2019510389\\_taketwo24.html](http://seattletimes.com/html/take2/2019510389_taketwo24.html) (first alteration in original).

<sup>87</sup> Boxley, *supra* note 13.

speech that the university simply doesn't like, we believe public universities cross the line.<sup>88</sup>

The current way that monitoring products are used seems to give them the effect of a “disciplinary tool,”<sup>89</sup> which punishes students by restricting their rights to the freedoms of speech and expression. According to *Tinker*, prohibiting these rights is unconstitutional unless the students' conduct meets the “materially disruptive” standard. Embarrassment for the institution would not seem to rise to meet this standard and according to the Court, even “undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.”<sup>90</sup> If a star college athlete tweeted a racist remark, the argument could be made that the level of embarrassment to the institution would materially disrupt the education environment. However, even if some tweets could be materially disruptive, a blanket policy would be over-inclusive and unconstitutional because it would prohibit, on balance, much more protected speech than unprotected speech. As a result, the NCAA's lack of a uniform social media policy allows its member institutions to take away the First Amendment protection that the American judiciary has explicitly extended to students of public universities.

### B. *The Fourth Amendment and the Stored Communications Act*

By monitoring social media, universities not only risk violating the First Amendment, but risk violating the Fourth Amendment as well. The Fourth Amendment to the United States Constitution safeguards the people “against unreasonable searches and seizures” unless the government makes a showing of “probable cause.”<sup>91</sup> In addition, the Stored Communications Act “grant[s] individuals a right to privacy in their electronic communications that supplements the protections already contained within the Fourth Amendment.”<sup>92</sup> The Act gives

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<sup>88</sup> *Id.*

<sup>89</sup> David J. Leonard, *Athletic Programs' Twitter Jitters*, CHRONICLE OF HIGHER EDUCATION (Feb. 25, 2013), <http://chronicle.com/blogs/conversation/2013/02/25/athletic-programs-twitter-jitters/>.

<sup>90</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969).

<sup>91</sup> U.S. CONST. amend. IV.

<sup>92</sup> Troutman Sanders LLP, *The Stored Communications Act Can't Make Public Tweets Private*, INFORMATION INTERSECTION (Aug. 30, 2012), <http://www.informationintersection.com/2012/08/the-stored-communications-act-cant-make-public-tweets-private/>.

“individuals . . . a civil cause of action when their electronic information is disclosed in violation of the [Act].”<sup>93</sup> As a result, these laws often work in tandem.<sup>94</sup>

Although the Fourth Amendment was created to safeguard against law enforcement officials, the “Court has never limited the Amendment’s prohibition on unreasonable searches and seizures to operations conducted by the police.”<sup>95</sup> The Court also stated that, “It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.”<sup>96</sup> A later example of the Court applying the Fourth Amendment to conduct by those other than law enforcement officers can be found when the Supreme Court specifically held that the Fourth Amendment’s protection against “unreasonable searches and seizures” does indeed apply to those “conducted by public school officials.”<sup>97</sup> The Court articulated the standard to follow in determining whether the search is constitutional, as one that “should depend simply on the reasonableness, under all the circumstances, of the search.”<sup>98</sup> To determine whether the nature of the search was reasonable, the Court has set forth a two-step process, asking “whether the officer’s action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.”<sup>99</sup>

Social media monitoring does not seem to rise to the necessary level to be considered a reasonable search under the circumstances. Schools are searching student-athletes’ accounts in an extremely broad way and it is doubtful that a court would hold that this practice is “justified at its inception.”<sup>100</sup> Maryland Senator Ronald N. Young has likened social media monitoring to the unconstitutional practices of “reading [someone’s] mail or listening to [someone’s] phone calls.”<sup>101</sup> Young believes that it is a constitutional violation for schools to demand access to their student-athlete’s accounts by having them “give up their

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *N.J. v. T.L.O.*, 469 U.S. 325, 335 (1985).

<sup>96</sup> *Camara v. Mun. Ct. of the City & Cnty. of S.F.*, 387 U.S. 523, 530 (1967).

<sup>97</sup> *N.J. v. T.L.O.*, 469 U.S. at 333.

<sup>98</sup> *Id.* at 341.

<sup>99</sup> *Terry v. Ohio*, 392 U.S. 1, 19-20 (1968).

<sup>100</sup> *Id.* at 20.

<sup>101</sup> Thamel, *supra* note 14.

password or user name.”<sup>102</sup> Further, Bradley Shear, the aforementioned social media attorney asks, “[W]ould it be acceptable for schools to require athletes to bug their off-campus apartments? Does a school have a right to know who all your friends are?”<sup>103</sup> Once a student is compelled to register his username with the school and the monitoring company installs the application, their account is being constantly searched under the Constitution. As a result, school administrators are thereby violating their privacy rights. Similarly, a mandatory Facebook friend request can be compared to demanding a search of the student’s account. Students are forced to submit their account to an ongoing search by someone from whom they should have the right to remain private.

### C. *Counterarguments and the Issue of Consent*

Several counterarguments should be examined regarding the unconstitutionality of the current system. The first argument is that, when schools request only usernames but not passwords, they are obtaining access to information that is already available to the public at large.<sup>104</sup> However, “[m]embers generally publish information they want to share to their personal profile, and the information is thereby broadcasted to the members’ online ‘friends’ (i.e., other members in their online network).”<sup>105</sup> The social media monitoring systems do away with the requirement that you must be a user to log on and view others’ information and posts. The information is not in the public domain, but rather available for other users with permission to access it (in the “online network” of the user). As a result, the monitoring company is more like an outside bug being installed on the account. The school would not otherwise have access to the athletes’ account but, similar to a hacker, the monitoring company breaks the rules and gets them in anyway. This goes back to the question of whether it is “reasonable” for the schools to do this and conduct a constant search of the student-athlete’s accounts. Perhaps if a specific athlete has done something to raise suspicions, then the school could have a case to monitor his account, but there is no basis for a school to

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<sup>102</sup> *Id.*

<sup>103</sup> Sullivan, *supra* note 67.

<sup>104</sup> See DeShazo, *supra* note 52.

<sup>105</sup> Lane v. Facebook, Inc., 696 F.3d 811, 816 (9th Cir. 2012).



claim that it needs sweeping access to monitor an entire team or athletic department of students.

A second argument is that schools already monitor student-athletes in other ways, such as drug testing. However, social media monitoring is distinguishable from drug testing because, while the content that the NCAA searches for through the process of drug testing is illegal, that is not the case with social media monitoring.<sup>106</sup> The California Supreme Court has ruled that “[t]he NCAA’s drug testing program does not violate the state constitutional right to privacy.”<sup>107</sup> However, the court found it significant that the plaintiffs did “not contend that the purpose or objectives of the NCAA are contrary to law or public policy.”<sup>108</sup> On the other hand, the issue of monitoring social media accounts could be against both law and public policy. While there is no inherent legal right to maintain a social media account, many courts have already held that social media users should be afforded a high level of constitutional protection and have explicit First and Fourth Amendment protection.<sup>109</sup> Further, because the drugs that the NCAA tests for are indeed illegal, there was no way for the plaintiffs to argue that public policy favored their right to be protected from a search. However, with millions around the world using social media as a means of free expression, public policy would not seem to favor NCAA institutions taking this right away in a sweeping manner just to guard against the chance of one or more students making a comment that harms the school’s reputation. Finally, the practice of drug testing student-athletes survived legal challenge because drugs have a direct effect on the outcome of NCAA events. “[T]he NCAA’s decision to enforce a ban on the use of drugs by means of a drug testing program is reasonably calculated to further its legitimate interest in maintaining the integrity of intercollegiate athletic competition.”<sup>110</sup> The NCAA’s decision to drug test is used directly to enforce one of its most important rules and keep illegal substances from compromising the integrity of its various sports. “[Athletic] competition should be decided on the basis of who has done the best job of perfecting and utilizing his or her natural abilities, not on the basis of who has the best

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<sup>106</sup> Thamel, *supra* note 14.

<sup>107</sup> Hill v. Nat’l Collegiate Athletic Ass’n., 865 P.2d 633, 669 (Cal. 1994).

<sup>108</sup> *Id.* at 660.

<sup>109</sup> See *infra* Part IV.

<sup>110</sup> Hill, 865 P.2d at 660.

pharmacist.”<sup>111</sup> On the other hand, there is no correlation between a student’s social media account use and his or her on-field performance or the integrity of the sport. Thus, the NCAA would not be able to make any of the same arguments that it made to defend its use of drug testing as a proper means of enforcing a rule, and not as a reasonable search.

The final, and perhaps strongest counterargument, is that schools are not in danger of committing any constitutional violation here since the student-athletes themselves are consenting to these monitoring methods. Before a school official or coach can become Facebook friends with a student-athlete, the student-athlete must accept the other party’s friend request. As a result, it would seem that the student has consented to the search of his account. If this were true, then there would be no issue of constitutionality, as “a search authorized by consent is wholly valid.”<sup>112</sup> Similarly, when a public school decides to use a third-party monitoring service to monitor the student’s account, the school may argue that there was consent from the student because he turned over his username and/or password and thus gave permission for the installation of the software. However, “[w]hen a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given.”<sup>113</sup> The Supreme Court spelled out what is required to show “that a consent was ‘voluntarily’ given,”<sup>114</sup> determining that it “is a question of fact to be determined from the totality of all the circumstances.”<sup>115</sup> The Court added that the interpretation of “voluntariness” in this sphere of the law should be the same as the conventional “definition of ‘voluntariness.’”<sup>116</sup> According to the Merriam-Webster dictionary, “voluntary” can be defined as “done or given because you want to and not because you are forced to” or “having power of free choice.”<sup>117</sup>

In the context of student-athletes “consenting” to the monitoring of their accounts, there seems to be a valid claim

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<sup>111</sup> *Id.* (alteration in original) (internal quotation marks omitted) (citing Eric D. Zemper, *Drug Testing in Athletics*, in *DRUG TESTING: ISSUES & OPTIONS* 120 (Coombs & West, eds. 1991)).

<sup>112</sup> *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973).

<sup>113</sup> *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968).

<sup>114</sup> *Schneckloth*, 412 U.S. at 222.

<sup>115</sup> *Id.* at 227.

<sup>116</sup> *Id.* at 229.

<sup>117</sup> *Voluntary*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/voluntary> (last visited May 1, 2015).

that the consent was not “voluntarily given,” as required by the Court.<sup>118</sup> Using the Court’s “totality of all the circumstances” test,<sup>119</sup> there is a strong argument that the “traditional definition of voluntariness” is not met when student-athletes consent to the monitoring of their accounts.<sup>120</sup> As Bob Sullivan stated in a special report for NBC News, “[f]or student athletes . . . the access isn’t voluntary. No access, no sports.”<sup>121</sup> For student-athletes who have worked hard their entire lives to get to where they are in their sport, and have earned a full scholarship to college, it does not seem like they have much of a “free choice” because their other option will take away so much from them and could change their lives for the worse. Exercising the “choice” not to participate in social media monitoring would spark a long and consequential chain for the student-athletes: they would not be allowed to play sports and that would lead them to being kicked off the team and losing their scholarship. Without the scholarship, many student-athletes would not have been able to attend college and have the chance for a life-changing experience.<sup>122</sup> After working so hard to get to this point, and playing with a dream of the pros and supporting your family, how else is an 18 year-old student supposed to respond when put in this situation except to give consent? The Court held that the “possibly vulnerable subjective state of the person who consents” must be taken into account as well in testing if the consent was voluntary.<sup>123</sup> It seems like that would be a factor here as the average student-athlete, who is young and controlled in so many ways by the university, may be taken advantage of and thus be the type of person who is considered vulnerable.

The NCAA must act to prevent universities from taking advantage of their position of power over young student-athletes, and coercing student-athletes to consent to unconstitutional acts. It does appear that the consent is typically involuntary, and thus invalid, so the acts by the schools are unconstitutional.<sup>124</sup> By not creating a uniform social media policy, the NCAA is turning a blind eye and allowing

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<sup>118</sup> *Schneekloth*, 412 U.S. at 222.

<sup>119</sup> *Id.* at 223.

<sup>120</sup> *Id.* at 248.

<sup>121</sup> Sullivan, *supra* note 67.

<sup>122</sup> See Jordan Moore, *USC Athletic Director Addresses Hot-Button Topics in College Sports*, USC NEWS (June 6, 2014), <https://news.usc.edu/63826/usc-athletic-director-addresses-hot-button-topics-in-college-sports/>.

<sup>123</sup> *Schneekloth*, 412 U.S. at 229.

<sup>124</sup> See *id.* at 233.

potential constitutional violations to take place, instead of taking accountability and doing something to protect its students' rights.

#### IV. CHANGES IN THE LAW THAT REFLECT THE NEED FOR CHANGE

##### A. *The Judiciary Gives Constitutional Protection to Facebook Users*

American courts have evolved in order to properly protect the rights of their citizens from circumstances unforeseen by the founders. One of the areas in which courts have made the most adjustments relates to stretching the First Amendment to cover appropriate electronic violations of the present-day digital age. An example of this can be seen in *R.S. v. Minnewaska Area Sch. Dist.*, which involved the punishment of a student for posts she made outside of school “on her Facebook wall.”<sup>125</sup> The plaintiff initially made a comment on Facebook that she hated another student and she was given detention after someone notified the principal of the post.<sup>126</sup> Later, the plaintiff wrote another post expressing a great amount of anger that someone told the principal.<sup>127</sup> This time, she was suspended for one day and prevented from joining the rest of her class on a ski trip.<sup>128</sup> The court held that the school violated the student's First Amendment rights by punishing her for the Facebook post that she made. As the court explained:

Such statements are protected under the First Amendment and not punishable by school authorities unless they are true threats or are reasonably calculated to reach the school environment and are so egregious as to pose a serious safety risk or other substantial disruption in that environment. R.S.'s Facebook wall postings were not true threats or threats of any kind.<sup>129</sup>

The decision recognized that courts are faced with new obstacles due to the present-day popularity of speech being broadcasted electronically on the Internet by students.<sup>130</sup> Importantly, the court held that this “transition has not abrogated

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<sup>125</sup> R.S. ex rel. S.S. v. Minnewaska Area Sch. Dist. No. 2149, 894 F. Supp. 2d 1128, 1133 (D. Minn. 2012).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 1133-34.

<sup>128</sup> *Id.* at 1134.

<sup>129</sup> *Id.* at 1140 (emphasis omitted).

<sup>130</sup> *Id.* at 1139.

the clearly established general principles [of First Amendment free speech] which have governed schools for decades.”<sup>131</sup>

This case shows that even though Facebook may be a very different forum than in-person speech, First Amendment protections will still apply. A student may have just as much of a right to speak his mind on Facebook and be protected as when speaking inside the classroom. According to the court, the material disruption standard will apply in either event, and if the speech or conduct does not meet the disruptive standard, then the First Amendment prevents the school from prohibiting it.<sup>132</sup> Similarly, universities should not monitor the accounts of student-athletes in a way that would restrict their freedom of speech, unless the statement disrupts the classroom. As a result, the NCAA should enact a social media policy that reflects this notion and does not allow schools to get involved in the students’ accounts unless they have caused a disruption.

In addition to punishing her for First Amendment protected speech on Facebook, the school also made the plaintiff in *R.S.* turn over her account information so that they could search it.<sup>133</sup> “Feeling threatened” and not sure what else to do, the plaintiff complied with the demand.<sup>134</sup> The court held that “R.S.’s posting on her Facebook wall was intended to be accessible by her Facebook ‘friends,’ but not by members of the general public.”<sup>135</sup> As such, she “had a reasonable expectation of privacy to her private Facebook information.”<sup>136</sup>

Similarly, when schools use social media monitoring tactics, they are obtaining information that is not meant to be accessible to anyone except the student-athletes’ social media friends and followers. Student-athletes at public institutions are similar to the plaintiff in the *Minnewaska* case in the sense that they have First Amendment rights against state actors, and have the same expectation of privacy that universities want to transgress. Also like the plaintiff in *Minnewaska*, student-athletes may feel threatened by the fear of losing their scholarship and acquiesce to the demand because they have no other option. All of this adds up to a Fourth Amendment violation by a university and it is mainly due to the NCAA’s

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<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 1140.

<sup>133</sup> *Id.* at 1134.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 1133.

<sup>136</sup> *Id.* at 1142.

refusal to step in and set a policy to avoid the potential for these issues.

*B. The Stored Communications Act*

The Stored Communications Act (SCA or the Act) also provides protection to social media users. The Act 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” subject to a fine or imprisonment.<sup>137</sup> There are several cases that show how the Act has been used to help protect social media rights. In *Ehling v. Monmouth-Ocean Hosp. Serv. Corp.*, the plaintiff was suspended from work after her managers received word of a controversial post she made on her private Facebook wall.<sup>138</sup> The court used the Stored Communications Act to analyze the issue: “[T]he 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. Facebook wall posts that are configured to be private meet all four criteria.”<sup>139</sup> The court stated that:

Facebook allows users to select privacy settings for their Facebook walls. Access can be limited to the user’s Facebook friends, to particular groups or individuals, or to just the user. The Court finds that, when users make their Facebook wall posts inaccessible to the general public, the wall posts are ‘configured to be private’ for purposes of the SCA. The Court notes that when it comes to privacy protection, the critical inquiry is whether Facebook users took steps to limit access to the information on their Facebook walls.<sup>140</sup>

Similarly, the critical inquiry for determining whether social media monitoring systems and mandatory friend requests violate the SCA must come down to the same question. If users are making their accounts private, and the schools would not otherwise have access to them, then the school cannot use third-party applications or force students to

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<sup>137</sup> Stored Communications Act, 18 U.S.C. § 2701 (2002) (unlawful access to stored communications).

<sup>138</sup> *Ehling v. Monmouth-Ocean Hosp. Serv. Corp.*, 961 F. Supp. 2d 659, 662-63 (D.N.J. 2013).

<sup>139</sup> *Id.* at 667.

<sup>140</sup> *Id.* at 668.

friend a coach to bypass these privacy settings. “This decision is a huge victory for privacy because it recognizes that employers and schools may not require employees and/or students to turn over their digital user names, passwords, or password protected digital content.”<sup>141</sup>

In October 2013, a federal court extended its greatest level of protection to Facebook users yet. In *Bland v. Roberts*, the U.S. Court of Appeals for the Fourth Circuit held that even pressing the “Like” button on Facebook is considered speech protected by the First Amendment.<sup>142</sup> According to Facebook’s website, “The Like button is the quickest way for people to share content with their friends. A single click on the Like button will ‘like’ pieces of content on the web and share them on Facebook.”<sup>143</sup> In effect, the “Like” button allows a user to share a thought or expression simply by the click of a button, without typing a single word.<sup>144</sup> The court held that there is no “constitutional significance” to the difference between “a user . . . us[ing] a single mouse click to produce that message that he likes the page instead of typing the same message with several individual key strokes.”<sup>145</sup> This extension shows the ever-growing protections being afforded to social media users as courts continue to view the Constitution as protecting new rights in the digital age that comport with the intent of the Framers. Constitutional protection for social media users is growing everyday and with this case the courts have extended that protection even further than before.

### C. *State Legislative Actions*

Judicial action has not been the only type of response relating to the issue of social media as protected speech. Many states have resorted to legislative actions to protect students from being subjected to social media monitoring tactics. In 2012, California,<sup>146</sup> Delaware,<sup>147</sup> Michigan<sup>148</sup> and New Jersey<sup>149</sup>

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<sup>141</sup> Bradley Shear, *NJ Federal Court: Password Protected Facebook Posts Covered By Stored Communications Act*, SHEAR ON SOCIAL MEDIA LAW (Aug. 30, 2013), <http://www.shearsocialmedia.com/2013/08/nj-federal-court-non-public-facebook.html>.

<sup>142</sup> *Bland v. Roberts*, 730 F.3d 368, 386 (4th Cir. 2013).

<sup>143</sup> *Like Button for the Web*, FACEBOOK DEVELOPERS, <https://developers.facebook.com/docs/plugins/like-button/> (last visited May 1, 2015).

<sup>144</sup> *Like*, FACEBOOK, <https://www.facebook.com/help/like> (last visited May 1, 2015).

<sup>145</sup> *Bland*, 730 F.3d at 386.

<sup>146</sup> S.B. 1349, 2011-12 Leg., Reg. Sess. (Ca. 2012).

<sup>147</sup> H.B. 309, 146th Gen. Assemb., Reg. Sess. (Del. 2012).

<sup>148</sup> H.B. 5523, 96th Leg., Reg. Sess. (Mich. 2012).

<sup>149</sup> A.B. 2879, 215th Leg., Reg. Sess. (N.J. 2012).

enacted laws “that prohibit[] requesting or requiring a[] . . . student or applicant to disclose a user name or password for a personal social media account.”<sup>150</sup> In 2013, five other states (Arkansas,<sup>151</sup> New Mexico,<sup>152</sup> Oregon,<sup>153</sup> Utah,<sup>154</sup> and Vermont<sup>155</sup>) joined them, raising the total to nine states that have effectively outlawed the practice of requiring a student to disclose his social media username to a school for the purposes of monitoring.<sup>156</sup> Further, in 2014, four more states (Louisiana,<sup>157</sup> Maine,<sup>158</sup> Rhode Island,<sup>159</sup> and Wisconsin<sup>160</sup>) signed bills into law. The topic remains relevant, as other states have followed suit and introduced legislation of their own to protect the social media privacy rights of students.<sup>161</sup> However, the NCAA continues to fall behind and has taken no action to ensure that those students playing for universities outside of these states are also protected from social media monitoring.

California’s Act states that the Legislature intends “to protect the privacy rights of students at California’s postsecondary educational institutions.”<sup>162</sup> The bill actually points out that it was enacted because of new challenges presented by “quickly evolving technologies and social media services and Internet Web sites.”<sup>163</sup> It thus appears that the bill was created specifically to respond to the issue of social media monitoring by educational institutions. The Arkansas bill is specifically subtitled: “To prohibit an institution of higher education from requiring or requesting a current or prospective employee or student from disclosing his or her username or password for a social media account.”<sup>164</sup> This Arkansas bill specifically outlaws what many NCAA teams are doing, thus making it illegal to do so for all universities in the state of

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<sup>150</sup> *Employer Access to Social Media Usernames and Passwords*, NAT’L CONF. OF STATE LEG., <http://www.ncsl.org/research/telecommunications-and-information-technology/employer-access-to-social-media-passwords-2013.aspx> (last visited May 1, 2015).

<sup>151</sup> H.B. 1902, 89th Gen. Assemb., Reg. Sess. (Ark. 2013).

<sup>152</sup> S.B. 422, 2013 Leg., Reg. Sess. (N.M. 2013).

<sup>153</sup> S.B. 344, 77th Leg., Reg. Sess. (Or. 2013).

<sup>154</sup> H.B. 100, 2013 Leg., Gen. Sess. (Utah 2013).

<sup>155</sup> S.7, 2013-14 Leg., Reg. Sess. (Vt. 2013).

<sup>156</sup> *Employer Access to Social Media Usernames and Passwords*, *supra* note 150.

<sup>157</sup> H.B. 340, 2014 Leg., Reg. Sess. (La. 2014).

<sup>158</sup> H.B. 838, 126th Leg., 2nd Reg. Sess. (Me. 2014).

<sup>159</sup> H.B. 7124, 2014 Leg., Reg. Sess. (R.I. 2014).

<sup>160</sup> S.B. 223, 101st Leg., Reg. Sess. (Wis. 2014).

<sup>161</sup> *Id.*

<sup>162</sup> S.B. 1349, 2011-12 Leg., Reg. Sess. (Cal. 2012).

<sup>163</sup> *Id.*

<sup>164</sup> H.B. 1902, 89th Gen. Assemb., Reg. Sess. (Ark. 2013) (original in capital letters).



Arkansas.<sup>165</sup> A school in that state cannot ask a student-athlete to provide it with his Twitter username for the purpose of installing monitoring software, or for any other reason.<sup>166</sup> Altogether, these enacted state bills show that the NCAA is exposing its member institutions to liability by failing to set a social media policy preventing schools from engaging in this conduct. Instead, the NCAA continues to leave the responsibility to set school social media policies up to each individual school, which for now means that unless a student is in one of the minority states that has enacted a law, he or she may be subjected to this monitoring. The fact that more and more states have taken action over the last two years is a warning sign to the NCAA that it should take action to promote uniform protections for student-athletes' social media expression. While states have recognized that in the changing times of the digital age it is important to extend statutory protection to social media users, the NCAA refuses to adapt along with them.

*D. Social Networking Online Protection Act*<sup>167</sup>

In addition to legislation at the state level, a bill has been reintroduced by the House of Representatives that would have the same protective effect, but on a national scale.<sup>168</sup> The Social Networking Online Protection Act (SNOPA) is “designed to protect the digital privacy of . . . students . . . in the Social Media Age.”<sup>169</sup> “If SNOPA is enacted students will not have to worry about being required to provide access to their personal digital accounts in order to attend the school of their dreams or keep their scholarships.”<sup>170</sup> Specifically, the bill states that:

The institution will not—(i) require or request that a student or potential student provide the institution with a user name, password, or any other means for accessing a private email account of the student or potential student or the personal account of the student or potential student on any social networking website . . . .<sup>171</sup>

In addition, the bill prohibits institutions from enacting any type of discipline against students who refuse to comply

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<sup>165</sup> *See id.*

<sup>166</sup> *See id.* at § 1(a)(3)(C).

<sup>167</sup> Social Networking Online Protection Act, H.R. 537, 113th Cong. (2013).

<sup>168</sup> Kevin DeShazo, *Debate Heats Up Over Social Media Privacy of Student Athletes*, FIELDHOUSE MEDIA (Apr. 10, 2013), <https://fieldhousemedia.squarespace.com/blog/debate-heats-up-over-social-media-privacy-of-student-athletes>.

<sup>169</sup> Shear, *supra* note 54.

<sup>170</sup> *Id.*

<sup>171</sup> H.R. 537 § 3(A)(i).

with a request to provide coaches or school administrators access to their social media account.<sup>172</sup> This part of the Act deals with the coercion factor mentioned previously in this Note,<sup>173</sup> and shows that it is a real issue. Unlike the NCAA's current system, the Act allows students to say no to social media monitoring without any fear that they will face consequences from the school, such as being dismissed from the team or expelled from the university.<sup>174</sup>

However, the bill does not seem to be a pressing focus of the government, and while it has been introduced, there has been no official action on it since it was "referred to [a Congressional] Committee" in February 2013.<sup>175</sup> Although the government has not acted on it, the bill may still be enacted at any time, and the NCAA would be smart to be proactive. Clearly both the federal and state governments are concerned about social media monitoring of students and believe that in the digital age it is time to make some adjustments. The NCAA should not continue to fall behind while courts and legislators attempt to take action.

## V. THE ISSUE OF LEGAL LIABILITY FOR UNIVERSITIES

Through the use of monitoring systems, universities are actually leaving themselves vulnerable to lawsuits and increasing their likelihood of liability. One of the ways that schools expose themselves to liability is by failing to prevent a crime that they have been alerted to on social media. In 2010, University of Virginia student Yeardeley Love was killed from a beating by the hands of her ex-boyfriend George Huguely.<sup>176</sup> At the time of the beating, Huguely was a member of the university's men's lacrosse team and Love of the women's team.<sup>177</sup> In 2012, Huguely was convicted of second-degree

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<sup>172</sup> *Id.* at § 3(A)(ii) .

<sup>173</sup> *See supra* Part III.C.

<sup>174</sup> *See* H.R. 537 § 3(A)(ii).

<sup>175</sup> *H.R. 537: Social Networking Online Protection Act*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/113/hr537> (last visited May 1, 2015).

<sup>176</sup> Sarah Netter & Emily Friedman, *University of Virginia Lacrosse Player Yeardeley Love Severely Beaten, Court Docs Say*, ABC NEWS (May 4, 2010), <http://abcnews.go.com/GMA/TheLaw/yeardeley-love-george-huguely-volatile-relationship-death/story?id=10547956>.

<sup>177</sup> *See* Mary Pat Flaherty, *George Huguely V Sentenced to 23 Years for Yeardeley Love Murder*, WASH. POST (Aug. 30, 2012), [http://articles.washingtonpost.com/2012-08-30/local/35491592\\_1\\_university-of-virginia-lacrosse-lexie-love-yeardeley-love](http://articles.washingtonpost.com/2012-08-30/local/35491592_1_university-of-virginia-lacrosse-lexie-love-yeardeley-love).

murder for the act.<sup>178</sup> Bradley Shear, a social media attorney, proposes an interesting and seemingly realistic question that monitoring schools and the NCAA ought to consider: “What if the University of Virginia had been monitoring accounts in the Yearley Love case and missed signals that something was going to happen?”<sup>179</sup> He then asks, “[w]hat about the liability the school might have?”<sup>180</sup> This is just one example of a crime involving an NCAA athlete and it certainly seems like a real threat to NCAA schools. If the student-athlete were being monitored and showed any warning signs, such as threats or potential for violence, the family of the victim may file a lawsuit for the failure to prevent a crime.

Another strong example of the potential liability posed to universities through Internet monitoring and awareness is the Penn State scandal. During the investigations into former coach Jerry Sandusky’s child sex abuse, it was revealed that the school may have been aware of what Sandusky was doing.<sup>181</sup> If this turns out to be true, it could leave Penn State liable for “tens of millions of dollars” in damages.<sup>182</sup> In the aftermath of this news, one could fairly ask: “[W]hy would any university want to create more opportunities for lawsuits by monitoring and archiving the digital content of their student-athletes or employees?”<sup>183</sup> Regardless of the complicated ethical issues, an attorney’s concern is to limit his or her client’s legal liability. Similarly, if a school found out about a violation or crime taking place because of its social media monitoring, it would seem to follow that they have a duty to report this and a liability that would not have been there if not for the monitoring system. “Once you take on that kind of policing activity, it creates an obligation[.]”<sup>184</sup> As a result, the NCAA must come up with a new social media policy that does not leave its member institutions open to the potential for “tens or hundreds of millions of dollars in legal liability.”<sup>185</sup>

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<sup>178</sup> Mary Pat Flaherty et al., *George Huguely Guilty of Second-Degree Murder*, WASH. POST (Feb. 22, 2012), [http://www.washingtonpost.com/local/crime/george-huguely-guilty-of-second-degree-murder/2012/02/21/gIQA1ss4TR\\_story.html](http://www.washingtonpost.com/local/crime/george-huguely-guilty-of-second-degree-murder/2012/02/21/gIQA1ss4TR_story.html).

<sup>179</sup> Sullivan, *supra* note 67.

<sup>180</sup> *Id.*

<sup>181</sup> Susan Candiotti, *Disturbing E-Mails Could Spell More Trouble for Penn State Officials*, CNN (July 2, 2012), <http://www.cnn.com/2012/06/30/justice/penn-state-emails/>.

<sup>182</sup> Bradley Shear, *Penn State Sandusky Emails Prove NCAA Schools Should Not Social Media Monitor Their Student-Athletes*, SHEAR ON SOCIAL MEDIA LAW (June 30, 2012), <http://www.shearsocialmedia.com/2012/06/penn-state-sandusky-emails-prove.html>.

<sup>183</sup> *Id.*

<sup>184</sup> Dunning, *supra* note 25.

<sup>185</sup> Shear, *supra* note 182.

Another way that schools could be exposing themselves to major liability is by a potential “breach in security” that inadvertently leaks the personal information of the student-athletes to the public.<sup>186</sup> Further, a university could expose itself to liability for taking action against a student-athlete “for a post that he or she did not author or that was taken out of context.”<sup>187</sup> In that case, the student could have recourse for “reputational damage or lost future financial benefits linked to their athletic talents.”<sup>188</sup> Finally, schools are putting themselves at risk just by choosing to monitor their athletes or specific teams.<sup>189</sup> By monitoring only some of its students (either athletes, or even only certain teams), the school risks facing “accus[at]ions] of discrimination.”<sup>190</sup> In sum, “[social media monitoring] opens up such a huge Pandora’s box,” and the NCAA may have created more of a problem than a solution with its decision to encourage schools to engage in this conduct.<sup>191</sup> “They’re essentially assuming a duty of care that they can’t enforce.”<sup>192</sup>

## CONCLUSION

Currently, universities that participate in NCAA sports receive encouragement from the NCAA “to monitor the social media accounts of [their] student-athletes.”<sup>193</sup> However, due to recent state statutes and court decisions that extend privacy protection to social media users, this practice appears to be illegal. The use of third-party monitoring services, or mandating that students “Facebook friend” a coach, forces students to give up their right to privacy and subjects them to an unconstitutional search. Both of these acts provide schools with a way to break through the privacy granted to social media users in the Stored Communications Act. In addition, the argument that students have consented to these searches seems likely to fail because under an analysis of case law, this consent appears to have been illegally obtained. Further, schools even expose themselves to liability of their own through monitoring, because it risks facing lawsuits for creating a duty,

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<sup>186</sup> Boxley, *supra* note 13.

<sup>187</sup> Dunning, *supra* note 25.

<sup>188</sup> *Id.*

<sup>189</sup> *See id.*

<sup>190</sup> *Id.*

<sup>191</sup> *See id.*

<sup>192</sup> *Id.*

<sup>193</sup> Dunning, *supra* note 25.

and then failing to prevent a crime of which it should have been aware. For example, if the monitoring leads to the discovery of a tweet that threatens imminent danger, the school itself could become vulnerable for failing to act. Overall, there are many problems with social media monitoring and it is time for the NCAA to act. The best solution would be for the NCAA to construct a social media policy outlawing any monitoring practices by its member schools, apply it uniformly to every team and every school, and enforce it as a “serious breach of conduct”<sup>194</sup> through its “infractions committee.” This policy would follow the path of both state legislatures and the United States judicial system in outlawing the practice of social media monitoring. In the end, the NCAA, its member institutions, and its student-athletes would all be best served by putting a stop to the practice of social media monitoring.

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<sup>194</sup> *New NCAA Enforcement Structure Takes Effect*, *supra* note 45.

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