

Unnecessary Roughness

Why Athletic Departments Need to Rethink Whether to Aggressively Respond to the Use of Social Media by Athletes

BY ERIC BENTLEY

I imagine a college football coach setting forth the following team rules before the start of a season:

1. You cannot talk to friends or family members on the phone during the season.
2. You must consent to the athletic department placing a device on your dorm room phone and cell phone that will alert the coaching staff if you use a curse word or any word that might be offensive.
3. You must bring an assistant coach with you to every party. If your assistant coach hears you say something offensive, you may be asked to immediately leave the party.
4. Any violation of the above rules could lead to dismissal from the team.





Most coaches and athletic directors would instantly recognize the above rules as unnecessarily intrusive and a serious restriction on the First Amendment rights of student-athletes at public universities. However, some university athletic departments are deciding to ban or seriously limit the use of social media by athletes without realizing that doing so could create the same First Amendment issues as the above team rules. As provided below, the better approach from a First Amendment standpoint is to (1) educate student-athletes regarding the risks and dangers associated with the use of social media; (2) place reasonable time, place, and manner restrictions on the use of social media; and (3) only discipline an athlete for a social media posting if the posting is clearly a substantial disruption to the university or falls into another category of unprotected speech below.

We live in a time when athletes can use a smart phone on a long bus ride, in a hotel room, or even in the locker room to instantly post comments, videos, or pictures online for millions to see. Understandably, a coach would not be thrilled to read on the front page of the morning newspaper that his or her players posted a nude team photo on Facebook like the Bethany College golf team did in 2011. Or discover that just weeks after members of the men's basketball team were accused of an alleged rape that one of the athletes tweeted, "I'm getting it at workouts like a dude who doesn't understand the word no from a drunk girl lol," which happened at the University of Arkansas in 2009.

It is understandable for an athletic department to want to take proactive measures to prevent a team from being subjected to unwanted media exposure and criticism over an athlete's social media posting. Some athletic departments are responding by banning the use of social media by athletes during the season, requiring athlete's to "friend" a member of the athletic department staff, or even requiring the athletes to disclose their social media account passwords. Others are requiring student-athletes to install an application on their social media accounts that sends an alert to the coaching staff when the athlete uses a vulgar word.

On the other end of the spectrum, some athletic departments have decided on a more reactive approach to disciplining athletes for the content of their social media postings. Regardless of whether athletic departments take the proactive approach of limiting or restricting the use of social media or the reactive

approach of disciplining athletes for their social media postings, athletic departments at public universities are treading on dangerous First Amendment ground.

In order for an individual to bring a valid First Amendment claim, there must be "state action¹." State action includes the actions by coaches and athletic department employees who are employed by public universities. As a result, private entities or private universities such as the NFL, MLB, NBA, University of Southern California, or Brigham Young University can enact strict social media policies that are restrictive or penalize an athlete for the content of his or her social media posting without fear of being sued by an individual under the First Amendment.

In fact, the NFL and NBA have separately developed social media policies restricting the use of Twitter at certain times before and after games. However, because the actions of coaches and athletic departments are considered "state action" for purposes of the First Amendment, an athletic department at a public university must conduct a full First Amendment analysis of any proposed actions with regard to athletes' use of social media.

Typically, the first step in analyzing a First Amendment issue is to perform a forum analysis to determine whether the speech occurred or will occur in a (1) traditional public forum; (2) designated public forum; or (3) limited/non-public forum.² This forum analysis

is necessary to determine what level of scrutiny is applied to the regulation of speech within the forum. For example, a public university would have much more difficulty justifying a regulation of speech within an open public park on campus as opposed to in a classroom.

Regulation of social media, however, presents a slightly different First Amendment analysis because courts are viewing social media postings as "off-campus speech" instead of performing the forum analysis above.³ As "off-campus speech," a court will only uphold a university's discipline of a student-athlete for the content of his or her social media activity if the university can prove the speech was (1) a material disruption to the university; or (2) falls into another category of unprotected speech.

Proving this first category of the speech being a material disruption is a difficult fact-intensive inquiry for athletic departments in relation to social media postings. For example, the 3rd Circuit in *Layschock ex rel. Layschock v. Hermitage Sch. Dist.*, 650 F.3d 205 (3d Cir. 2011) decided a case in which a school district disciplined a high school student for creating a fictitious

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social media profile on his grandmother's computer. The bogus social media profile contained fake answers to fictitious questions about the school's principal, and the school argued it was a substantial disruption to the school. The Third Circuit disagreed and explained:

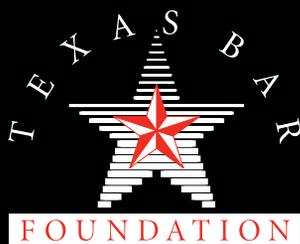
It would be an unseemly and dangerous precedent to allow the state, in the guise of school authorities, to reach into a child's home and control his/her actions there to the same extent that it can control that child when he/she participates in school sponsored activities. Allowing the District to punish Justin for conduct he engaged in while at his grandmother's house using his grandmother's computer would create just such a precedent, and we therefore conclude that the district court correctly ruled that the District's response to Justin's expressive conduct violated the First Amendment guarantee of free expression.⁴

Because there is no bright line standard for which an athletic department can prove an athlete's social media postings are substantially disruptive, an athletic department must only discipline an athlete under this theory if it can clearly articulate how the social media activity is a substantial disruption. For

example, it would be much easier to prove an athlete's Facebook posting of the team's playbook is a substantial disruption as opposed to an athlete tweeting that he or she does not like the new uniforms.

An athletic department may also discipline an athlete for the content of a social media posting if the posting falls into any of the below categories of unprotected speech.

- 1. Fighting Words/True Threat** (*e.g.*, an athlete posts on Facebook that after practice, he will tie his roommate up and beat him with a three iron for sleeping with his girlfriend). The *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847 (Pa. 2002) case demonstrates how difficult it is to prove the true threat standard. In that case, the court determined it was not a true threat for a student to create a website that included a drawing of the school principal with her head cut off and blood dripping from her neck with the caption stating, "Why Should She Die?" and requesting \$20 from the readers to pay for a hit man to kill the principal. The court determined the posting was offensive, crude, and a "misguided attempt at humor or parody," but was not a serious expression of intent to inflict harm.
- 2. Defamatory Statements** (*e.g.*, an athlete falsely tweets that the athletic director embezzled money from the athletic



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department to pay for his BMW).

3. **Obscenity.** It must be more than merely vulgar speech as even the “F-word” can be protected speech. Essentially, it must depict or describe sexual conduct and must lack serious literary, artistic, political, or scientific value (*e.g.*, athlete posts a link to a hardcore pornographic website).
4. **Violation of Criminal Law** (*e.g.*, an athlete posts a picture of himself snorting a line of cocaine or stealing a car).
5. **Violation of Reasonable Team or NCAA Rules** (*e.g.*, an athlete posts a picture of herself violating the team curfew of 11 p.m., drinking a beer on the team bus, or accepting money or benefits from a booster).
6. **Harassing Speech** (*e.g.*, an athlete’s tweets are riddled with sexually-harassing content directed at another student-athlete). Note, however, that before disciplining an athlete under this category such as for a sexually-explicit posting, the athletic department should refer the matter to the university official who investigates allegations of student discrimination. Immediately disciplining an athlete when the posting may not reach the threshold standard of a violation of Title IX could present First Amendment issues and not doing anything about the matter could present issues under Title IX. It is best to turn it over to the subject matter experts who are trained to investigate allegations of discrimination.

If an athlete’s social media posting is a material disruption to the athletic department, or if the posting falls into one of the categories of unprotected speech above, the athletic department may discipline the athlete without violating the First Amendment. But what about an athletic department wanting to prevent inappropriate social media postings before they even happen?

Rather than run the risk of waiting to see if an athlete will post something damaging to the university, some athletic departments are banning social media, requiring athletes to “friend” a coach, requiring athletes to provide their social media passwords, or even installing an application to be alerted to offensive postings. The problem with these approaches from a First Amendment standpoint is that such actions would likely be viewed by a court as over-inclusive and burdening more speech than is necessary to achieve the athletic department’s interests. For example, banning social media altogether would prevent an athlete from posting a threat directed towards another student-athlete; however, it would also ban an athlete from posting harmless postings such as a response to a family member’s vacation pictures or a listing of their favorite Mexican food restaurants.

Additionally, although an athletic department requiring an athlete to “friend” an athletic department employee or to provide the athletic department their account passwords would not prohibit a harmless posting, doing so would likely be viewed as unconstitutional because it would have a chilling effect on protected speech. In other words, just as an athlete would be less likely to behave in his typical manner at a party in which his coach was by his side, an athlete would be less likely to submit

his typical social media postings knowing his coach has instant access to them. Similarly, requiring an athlete to install an application that alerts a coach if the athlete uses a vulgar word would likely be viewed as having the same chilling effect on constitutionally protected speech. For example, an athlete may be uneasy about posting on Facebook that they are running in a 5K for breast cancer for fear the word “breast” would get flagged and sent to their coach.

Not only would monitoring athletes’ social media postings in the above manner present an issue under the First Amendment, it could also have Title IX implications if the athletic department fails to take appropriate action. For example, Title IX would impose liability on a university that had knowledge of alleged sexual harassment among its student-athletes but was deliberately indifferent to it. So, a coach who was friended on Facebook by his athletes has an obligation under Title IX to ensure that any posting the coach believes could be sexual harassment is immediately investigated.

Even though it would not be advisable under the First Amendment for an athletic department to ban social media, require the athlete to “friend” a coach, provide the coach with his or her account password, or require the athlete to install monitoring software on his or her social media accounts, the athletic department still has some viable proactive options.

The best practice for an athletic department is to educate its athletes on the dangers and pitfalls of social media, place reasonable time, place, and manner restrictions on its use (*e.g.*, prohibiting social media during practice, team functions, after 10 p.m. before a game, and anytime during a game), and then only discipline an athlete if a posting is a substantial disruption to the university or falls into another category of unprotected speech.

Taking such actions would be viewed as reasonable and defensible under the First Amendment. Going beyond these actions, however, may risk being viewed as unnecessarily aggressive and in violation of student-athletes’ First Amendment rights.

NOTES

1. See *Bryant v. Miss. Military Dep’t.*, 519 F. Supp. 2d 622, 627 (S.D. Miss. 2007), *aff’d sub nom. Bryant v. Military Dep’t of Miss.*, 597 F.3d 678 (5th Cir. 2010).
2. *Arizona Life Coal. Inc. v. Stanton*, 515 F.3d 956, 968 (9th Cir. 2008); See *Wright v. Incline Vill. Gen. Improvement Dist.*, 665 F.3d 1128, 1138 (9th Cir. 2011).
3. See *Evans v. Bayer*, 684 F. Supp. 2d 1365, 1372 (S.D. Fla. 2010).
4. *Layschock ex rel. Layschock v. Hermitage Sch. Dist.*, 650 F.3d 205, 205–22 (3d Cir. 2011) *cert. denied*, 132 S. Ct. 1097 (2012).

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