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## Running the Full-Court Press: How College Athletic Departments Unlawfully Restrict Athletes' Rights to Speak to the News Media

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*A coach’s power over athletes can extend to virtually all aspects of the student-athlete’s life, in such ways that clear boundaries are hard to delineate. This near total control is rarely questioned. It is especially emblematic of coach-athlete relationships in sport cultures that place a premium on winning over other values, such that the team culture encourages sacrificing the liberty and autonomy of the individual for the good of the team (with “good” defined as winning).<sup>1</sup>*

## I. INTRODUCTION

Across amateur and collegiate athletics, story after story has come to light—often, years belatedly—about abuse and exploitation of athletes by people in positions of power. In the collegiate ranks, disturbing reports recently surfaced that, over a two-decade career, a football team physician at Ohio State University groped and fondled dozens of players during medical examinations. University authorities were aware of the misconduct but did nothing to stop it from occurring.<sup>2</sup> The Ohio State scandal is especially unsettling given the duration of the officials’ willful blindness—but it is not isolated. Rutgers University fired its men’s basketball coach in 2013 after videos were leaked to journalists showing his temper tantrums during practice sessions where he kicked players, threw basketballs at them, and taunted them with slurs.<sup>3</sup> The University of Utah took years to remove a swimming coach whose players complained of cruel and manipulative behavior, despite evidence of a violent temper and alcohol abuse.<sup>4</sup> At the University of Nebraska, softball players say an abusive

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1. DEBORAH L. BRAKE & MARIAH BURTON NELSON, NCAA, STAYING IN BOUNDS: AN NCAA MODEL POLICY TO PREVENT INAPPROPRIATE RELATIONSHIPS BETWEEN STUDENT-ATHLETES AND ATHLETICS DEPARTMENT PERSONNEL 15 (2012) (footnote omitted).
  2. Victor Mather, *Ohio State Finds Team Doctor Sexually Abused 177 Students*, N.Y. TIMES (May 17, 2019), <https://www.nytimes.com/2019/05/17/sports/ohio-state-sexual-abuse.html> [<https://perma.unl.edu/3TUD-FJSU>].
  3. Steve Eder & Kate Zernike, *Rutgers Leaders Are Faulted on Abusive Coach*, N.Y. TIMES (Apr. 3, 2013), <https://www.nytimes.com/2013/04/04/sports/ncaabasketball/rutgers-fires-basketball-coach-after-video-surfaces.html> [<https://perma.unl.edu/JTF5-5DFL>]; Don Van Natta Jr., *Video Shows Mike Rice’s Ire*, ESPN (Apr. 2, 2013), [http://espn.go.com/espn/otl/story/\\_/id/9125796/practice-video-shows-rutgers-basketball-coach-mike-rice-berated-pushed-used-slursplayers](http://espn.go.com/espn/otl/story/_/id/9125796/practice-video-shows-rutgers-basketball-coach-mike-rice-berated-pushed-used-slursplayers) [<https://perma.unl.edu/N78S-9PAV>].
  4. Lindsay Whitehurst & Aaron Falk, *Report: Former U. Swim Coach Should Have Been Fired for Alcohol Abuse*, SALT LAKE TRIB. (July 2, 2013, 3:26 PM), <https://archive.slttrib.com/article.php?id=56542931&itype=CMSID> [<https://perma.unl.edu/LD9F-M4BC>].

coach made athletes risk their health by playing through painful injuries.<sup>5</sup> As one former Nebraska player told the *Washington Post*: “The truth is there is no one athletes can report to. Everybody that an athlete could trust or may rightfully trust, they still work for the university and answer to the university.”<sup>6</sup>

The curtain of secrecy that tightly envelops college sports makes it difficult for athletes to blow the whistle on abusive conditions without fear of suffering retaliation. The seemingly obvious recourse for a player who distrusts the internal complaint process—to take the complaint public—is foreclosed at many colleges because athletes are forbidden from speaking to the media without approval from the athletic department. Is this legal? Can a public institution enforce a categorical prohibition on speaking without running afoul of the First Amendment? Despite the widespread perception of university athletic departments, the answer almost certainly is “no.”

Courts have consistently found that the First Amendment protects the ability of public employees to speak to the news media about work-related matters without a supervisor’s approval.<sup>7</sup> First Amendment caselaw is equally clear that public universities cannot restrict or punish student speech absent extreme circumstances. Athletes are treated as occupying a nether zone, fitting comfortably neither in the category of “student” nor “employee.” But regardless of which legal status applies to student-athletes, the outcome should be the same: government agencies—including state universities—do not have plenary authority to restrain people from speaking to the press and public. Still, prohibitions on unapproved interviews are, unabashedly, enforced in college athletic programs everywhere. They appear in the handbooks of major college athletic programs from Arizona State<sup>8</sup> to West Virginia,<sup>9</sup> inhibiting athletes from sharing unguarded observations with the press and public.

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5. Ben Strauss, *Complaints Against Nebraska Softball Coach Show College Athletes’ Limited Options*, WASH. POST (Aug. 30, 2019, 12:49 PM), <https://www.washingtonpost.com/sports/2019/08/30/complaints-against-nebraska-softball-coach-show-college-athletes-limited-options/> [https://perma.unl.edu/H48A-GKQY].

6. *Id.*

7. Frank D. LoMonte, *Putting the ‘Public’ Back into Public Employment: A Roadmap for Challenging Prior Restraints That Prohibit Government Employees from Speaking to the News Media*, 68 U. KAN. L. REV. 1 (2019).

8. ARIZ. STATE UNIV., STUDENT-ATHLETE 2019–2020 HANDBOOK 46 (2019) (produced in response to a Freedom of Information Act (FOI) request, copy on file with authors) (“Student-athletes should not conduct any interviews without consent from the media relations office.”).

9. W. VA. UNIV., ATHLETICS COMMUNICATIONS MEDIA & SOCIAL MEDIA GUIDELINES 1 (produced in response to FOI request, copy on file with authors) (“NEVER AGREE TO AN INTERVIEW UNLESS IT HAS BEEN COORDINATED THROUGH ATHLETICS COMMUNICATIONS OFFICE. This helps to avoid contact with unauthorized people and keeps you safe and your team safe and compliant with NCAA legislation.”).

The issue of college athletes' rights has never been more prominent. California exploded the NCAA's long-established adherence to amateurism by enacting a 2019 statute entitling players to capitalize on their notoriety by accepting endorsement payments and hiring agents, activities which the NCAA has long treated as disqualifying.<sup>10</sup> This move led legislators across the country to propose lookalike bills.<sup>11</sup> Attorneys for college athletes secured a \$60 million settlement from video-gaming giant EA Sports after demonstrating that the manufacturer profited by designing "virtual" players based on the likenesses and skills of actual players.<sup>12</sup> More than 43,000 former college players received checks as part of a \$208.7 million settlement with the NCAA and eleven athletic conferences in a lawsuit alleging that the NCAA unlawfully restrained its member schools from fully compensating athletes for the costs of attending college.<sup>13</sup> A pair of parallel class-action antitrust cases brought on behalf of athletes is challenging both the NCAA's caps on compensation and prohibition on earning outside income through capitalizing on the value of athletes' likenesses.<sup>14</sup> The NCAA recently entered into a global \$75 million settle-

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10. CAL. EDUC. CODE §§ 67456–57 (2020) (effective Jan. 1, 2023); Colin Dwyer, *California Governor Signs Bill Allowing College Athletes to Profit from Endorsements*, NPR (Sept. 30, 2019, 11:13 AM), <https://www.npr.org/2019/09/30/765700141/california-governor-signs-bill-allowing-college-athletes-to-profit-from-endorsement> [<https://perma.unl.edu/Z38R-4ZLNJ>].
  11. See e.g., Charlotte Carroll, *Florida Rep Proposes Bill Compensating College Athletes for Names, Likeness*, SPORTS ILLUSTRATED (Sept. 30, 2019), <https://www.si.com/college/2019/10/01/florida-state-representative-proposed-legislation-pay-student-athletes> [<https://perma.unl.edu/96UZ-ZABV>]; Jamie Munks, *Illinois Legislator Introduces Bill to Let College Athletes Be Paid, Saying He Wants to Stay Competitive with California*, CHI. TRIB. (Sept. 30, 2019), <https://www.chicagotribune.com/politics/ct-illinois-college-athletes-pay-bill-20190930-yhmkshh2k5aapog55iwdh6eei-story.html> [<https://perma.unl.edu/J3H6-MKAB>]; Dan Murphy, *N.Y. Senator Proposes Bill to Pay College Athletes*, ESPN (Sept. 18, 2019), [https://www.espn.com/college-sports/story/\\_/id/27644345/ny-senator-proposes-bill-pay-college-athletes](https://www.espn.com/college-sports/story/_/id/27644345/ny-senator-proposes-bill-pay-college-athletes) [<https://perma.unl.edu/D8DA-FF7Z>].
  12. Ron Clements, *EA Sports Reaches \$60M Settlement of O'Bannon Suit with College Athletes*, SPORTING NEWS (Mar. 15, 2016), <https://www.sportingnews.com/us/other-sports/news/obannon-case-ea-sports-settlement-60-million-college-athletes-ncaa-2014/1e7g4auhk91s115zl37499w94c> [<https://perma.unl.edu/2Y83-2RVR>].
  13. Steve Berkowitz & Jori Epstein, *NCAA's \$208.7 Million in Legal Settlement Money Finally Reaching Athletes' Mailboxes*, USA TODAY (Oct. 4, 2019, 1:50 PM), <https://www.usatoday.com/story/sports/2019/10/04/ncaas-208-7-million-legal-settlement-reaching-athletes-mailboxes/3859697002/> [<https://perma.unl.edu/ACL3-FPEL>].
  14. The first of these cases, *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015), resulted in a ruling that the NCAA may not prevent member institutions from awarding athletes compensation covering the full cost of their college attendance. More recently, a U.S. district court decided in March 2019 that NCAA member colleges must be free to award "education-related benefits" to athletes above-and-beyond free tuition, and that NCAA caps on compensation are an illegal restraint on trade. *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d

ment to resolve part of a wave of 300 class-action lawsuits filed by former athletes claiming their schools' inadequate response to concussions exposed them to traumatic brain injury.<sup>15</sup> Football players at Northwestern University sounded alarms throughout college athletic departments by launching a unionization movement seeking the benefits of "employee" status that are denied to student-athletes.<sup>16</sup> In these ways, athletes and their advocates are organizing to push back against the long-established regime of rigid institutional control that critics have likened to a "plantation" system.<sup>17</sup>

This Article augments the growing body of scholarship about athletes' rights by focusing on one particular and largely overlooked right: the right to speak freely to the news media. The Article concludes that athletes' right to discuss issues of public importance—including issues about the safety and integrity of an athletic program—is protected by the First Amendment at state universities despite the fact that institutions across the country are routinely infringing upon this right. The right to speak to the media is foundational to athletes' ability to

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1058, 1062 (N.D. Cal. 2019). For a detailed discussion of both cases and their historical backdrop, see Daniel Laws, *Amateurism and the NCAA: How a Changing Market Has Turned Caps on Scholarships into an Antitrust Violation*, 51 U. RICH. L. REV. 1213, 1224–28 (2017).

15. See Craig Lyons, *\$75 Million NCAA Settlement to Fund Concussion Screening for 4 Million Former Athletes*, LANSING ST. J. (Aug. 15, 2019, 7:00 AM), <https://www.lansingstatejournal.com/story/news/2019/08/15/ncaa-concussion-settlement-athlete-medical-testing/2012186001/> [<https://perma.unl.edu/CQ4R-RHJ3>]; Ralph D. Russo, *Wave of Concussion Lawsuits to Test NCAA's Liability*, ASSOCIATED PRESS (Feb. 7, 2019), <https://apnews.com/4a4ed68e4c3a426abc4e34606ae4a399> [<https://perma.unl.edu/8FYZ-3FV3>]; Jon Solomon, *Next Wave of Concussion Lawsuits Hits Conferences, and for Penn State, Schools*, CBS SPORTS (May 18, 2016, 3:49 PM), <https://www.cbssports.com/college-football/news/next-wave-of-concussion-lawsuits-hits-conferences-and-for-penn-state-schools/> [<https://perma.unl.edu/AUK3-SR9C>].
16. Joe Nocera & Ben Strauss, *Fate of the Union: How Northwestern Football Union Nearly Came to Be*, SPORTS ILLUSTRATED (Feb. 24, 2016), <https://www.si.com/college-football/2016/02/24/northwestern-union-case-book-indentured> [<https://perma.unl.edu/FR2C-76ZD>].
17. One of the NCAA's founding architects, Walter Byers, acknowledged in his 1995 memoir that "[t]he college player cannot sell his own feet (the coach does that) nor can he sell his own name (the college will do that). This is the plantation mentality resurrected and blessed by today's campus executives." See Taylor Branch, *The Shame of College Sports*, ATLANTIC, Oct. 2011 (citing WALTER BYERS, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 390 (1997) in wide-ranging critique of economic exploitation of college athletes); see also Keli Goff, *Are College Sports a Modern-Day Plantation?*, ROOT (Oct. 16, 2013, 12:59 AM), <https://www.theroot.com/are-college-sports-a-modern-day-plantation-1790898505> [<https://perma.unl.edu/GF8S-VLEJ>] (citing interview with Taylor Branch and concluding that "in the current collegiate athletic system, players have virtually no rights").

blow the whistle on wrongdoing and safety hazards within their own teams which might otherwise go unaddressed.<sup>18</sup>

In Part II, the Article discusses instances in which universities have forbidden athletes from having unapproved communication with journalists, and why the inability to speak freely with the news media puts the safety and integrity of college athletic programs at heightened risk. Additionally, Part II describes the findings of a nationwide survey which documented how pervasively public universities have restricted athletes' ability to speak to the media despite the dubious enforceability of such blanket "gag" policies. Part III describes how the judiciary has adapted First Amendment principles to the settings of the campus and the workplace where free-speech rights at times yield to competing imperatives of institutional effectiveness and order. Part IV explains how public employees have consistently prevailed in constitutional challenges to prohibitions on interviewing that are essentially identical to those put in force by college athletic departments because the policies are overbroad and lack adequate procedural safeguards. Part V looks at how the courts have dealt with constitutional claims by athletes against their institutions. The Part concludes that, while athletes at times have reduced rights that (in the view of most courts) are outweighed by competing imperatives, there is no precedential support for completely forbidding communication with the press and public. Part VI analyzes the potential legal theories that a university might offer in defense of a blanket prohibition on unauthorized communication with the news media. Specifically, a university confronting a First Amendment challenge would likely argue that athletes have diminished free-speech protection because they are employees or because they are students, or that athletes voluntarily waive free-speech rights as part of the contractual bargain for receiving scholarships and other material benefits. The Part concludes that neither constitutional law nor contract law provides a defensible basis for enforcing a mandatory-approval regimen before athletes may speak with journalists. Finally, Part VII concludes with recommendations for reforming constitutionally dubious media policies across the college athletics world.

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18. See Rebecca L. Zeidel, *Forecasting Disruption, Forfeiting Speech: Restrictions on Student Speech in Extracurricular Activities*, 53 B.C. L. REV. 303, 339 (2012) (observing that protecting athletes' right to speak about coaches' professional conduct "may serve an important safety function in reporting egregious conduct and dangerous conditions").

## II. THE CODE OF SILENCE: ATHLETES MUZZLED BY CAMPUS SPEECH RESTRICTIONS

### A. Abuse and Exploitation Proliferate in Silence

In recent years, the public has been awakened to the severity of sexual exploitation of young athletes by coaches, often disclosed only after years or even decades of abusive behavior. At Michigan State University, ousted president, Lou Anna Simon, was charged with two felonies for lying to investigators about how long MSU administrators were aware that a medical-school faculty member, Larry Nassar, was taking advantage of his position to molest young athletes referred to his care by USA Gymnastics.<sup>19</sup> Nassar is facing a lifetime behind bars after pleading guilty to ten counts of criminal sexual conduct in two separate prosecutions.<sup>20</sup> This situation was first brought to light when the *Indianapolis Star* reported on a nationwide pattern of abuse of young gymnasts that the sport's governing body ignored.<sup>21</sup> As the gymnastics scandal was unfolding, investigative reporters in California revealed that "the sexual abuse of underage swimmers by their coaches and others in positions of power within the sport was commonplace and even accepted by top officials and coaches," and that "hundreds" of young athletes were victimized even after a top official of USA Swimming tried, in 2005, to alert his organization to the gravity of the problem.<sup>22</sup> At the college level, accusations of molestation by longtime OSU athletic department physician, Richard Strauss, became public in the years following Strauss's death by suicide, only after victims escalated their complaints beyond the athletic department.<sup>23</sup>

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19. Cheyna Roth, *Former Michigan State President Arraigned on Charges Tied to Larry Nassar Scandal*, NPR (Nov. 26, 2018, 3:31 PM), <https://www.npr.org/2018/11/26/670844943/former-michigan-state-president-arraigned-on-charges-tied-to-larry-nassar-scandal> [https://perma.unl.edu/EA54-9NEZ].
  20. Eric Levenson, *Larry Nassar Apologizes, Gets 40 to 125 Years for Decades of Sexual Abuse*, CNN (Feb. 5, 2018, 2:17 PM), <https://www.cnn.com/2018/02/05/us/larry-nassar-sentence-eaton/index.html> [https://perma.unl.edu/B8AL-GMLE]; Eric Levenson, *Larry Nassar Sentenced to up to 175 Years in Prison for Decades of Sexual Abuse*, CNN (Jan. 24, 2018, 9:29 PM), <https://www.cnn.com/2018/01/24/us/larry-nassar-sentencing/index.html> [https://perma.unl.edu/Y3N6-3HYP].
  21. Marisa Kwiatkowski et al., *A Blind Eye to Sex Abuse: How USA Gymnastics Failed to Report Cases*, INDIANAPOLIS STAR (Aug. 4, 2016, 5:11 AM), <https://www.indystar.com/story/news/investigations/2016/08/04/usa-gymnastics-sex-abuse-protected-coaches/85829732/> [https://perma.unl.edu/8VSQ-V3D9].
  22. Scott M. Reid, *100s of USA Swimmers Were Sexually Abused for Decades and the People in Charge Knew and Ignored It, Investigation Finds*, ORANGE COUNTY REG. (Feb. 16, 2018, 10:59 AM), <https://www.oregister.com/2018/02/16/investigation-usa-swimming-ignored-sexual-abuse-for-decades/> [https://perma.unl.edu/6NMM-KPB9].
  23. Merrit Kennedy, *Ohio State Doctor Sexually Abused at Least 177 Male Students, Investigation Finds*, NPR (May 17, 2019, 5:16 PM), <https://www.npr.org/2019/05/>

Common to each of these scandals were victims' initial reluctance to blow the whistle publicly and the unresponsiveness of athletic department insiders who kept suspected wrongdoing under wraps. Athletes are uniquely vulnerable to exploitation because of the cultural norms of competitive sports which emphasize conforming to rules, obeying authority figures, and stoically tolerating pain.<sup>24</sup> Almost surely, these serial abusers would have been stopped far earlier, sparing generations of victims, if athletes felt empowered to take their safety concerns to the public.

At the same time that abuse and exploitation of athletes is coming to light, recent recruiting scandals have likewise underscored the need for greater oversight and scrutiny over the integrity of college sports. In September 2017, the FBI and U.S. Department of Justice announced the arrest of ten people, including four college basketball coaches, accused of a corruption scheme that included payoffs to coaches for steering athletes to certain agents and financial managers, as well as payments to athletes to enroll in colleges affiliated with the Adidas sportswear company.<sup>25</sup> As the cases went to trial, testimony implicated even more prominent basketball coaches not under indictment including legendary Louisville national championship winner, Rick Pitino, who was removed shortly after his Cardinals program was identified as a participant in the payment scheme.<sup>26</sup> The probe shone unflattering scrutiny on some of college basketball's biggest-name coaches and programs, including perennial powerhouses Kansas, Louisiana State University, and Arizona, and raised questions

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17/724343147/ohio-state-doctor-sexually-abused-at-least-177-male-students-investigation-finds [https://perma.unl.edu/2N9P-8JFF]; Michael Vasquez, *Ohio State Sports Doctor Sexually Abused at Least 177 Men*, CHRON. HIGHER EDUC. (May 19, 2019), <https://www.chronicle.com/article/Ohio-State-Sports-Doctor/246330> [https://perma.unl.edu/B3LC-EYMV].

24. See Lucas Novaes, Comment, *It's Time to Stop Punting on College Athletes' Rights: Implications of Columbia University on the Collective Bargaining Rights of College Athletes*, 66 AM. U. L. REV. 1533, 1537–38 (2017) (“[C]ollege athletes have no substantial rights as amateur athletes, are subjected to prohibitive control at the hands of their coaches, universities, and respective leagues, all the while enduring some of the most laborious work on college campuses.”).
25. Lauren Thomas, *FBI Arrests NCAA Basketball Coaches and Adidas Rep in Bribery Probe Involving Recruitment*, CNBC (Sept. 26, 2017, 3:12 PM), <https://www.cnbc.com/2017/09/26/ncaa-basketball-officials-arrested-on-fraud-and-corruption-charges.html> [https://perma.unl.edu/2YJH-BB9K].
26. Mark Schlabach, *Three Sentenced in Adidas Recruiting Scandal*, ESPN (Mar. 5, 2019), [https://www.espn.com/mens-college-basketball/story/\\_/id/26141993/three-sentenced-adidas-recruiting-scandal](https://www.espn.com/mens-college-basketball/story/_/id/26141993/three-sentenced-adidas-recruiting-scandal) [https://perma.unl.edu/6GFC-UNCL]; Philip M. Bailey & Andrew Wolfson, *Rick Pitino 'Effectively Fired,' on Unpaid Leave Amid Louisville FBI Basketball Investigation*, COURIER J. (Sept. 27, 2017, 12:15 PM), <https://www.courier-journal.com/story/sports/college/louisville/2017/09/27/rick-pitino-fired-louisville-basketball/705193001/> [https://perma.unl.edu/B8QT-54QX].

about the integrity of a sport seemingly pervaded by illicit recruiting practices.<sup>27</sup>

When they feel safe and empowered to do so, athletes can effectively advocate for social and political causes with the benefit of their public platform and following. At the University of Missouri, the threat of a walkout by the Tigers football team was a pivotal pressure point in forcing the ouster of Chancellor Tim Wolfe who had mishandled instances of racial hostility.<sup>28</sup> NFL quarterback Colin Kaepernick's silent act of kneeling to protest incidents of police brutality against unarmed black people provoked a wave of lookalike protests by college athletes and cheerleaders from coast to coast.<sup>29</sup>

Because athletes have a demonstrated interest in being heard on contemporary issues, and because it is increasingly apparent that athletes are vulnerable to mistreatment and exploitation by trusted authority figures, the legal system must protect athletes' ability to speak out about issues of public concern, including issues within the athletic program. However, university policies frequently discourage athletes from going public with their concerns.

## **B. Public University Athletic Departments Tightly Control Athletes' Speech to the News Media**

Jordan McNair, a highly sought-after athlete recruited to play offensive line for the University of Maryland Terrapins, collapsed on the

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27. See Jerry Brewer, *Punishing Kansas Might Elicit Fear, but the NCAA Will Need to Do More to Earn Respect*, WASH. POST (Sept. 27, 2019, 3:14 AM), [https://www.washingtonpost.com/sports/colleges/punishing-kansas-might-elicite-fear-but-the-ncaa-will-need-to-do-more-to-earn-respect/2019/09/26/76818374-e080-11e9-be96-6adb81821e90\\_story.html](https://www.washingtonpost.com/sports/colleges/punishing-kansas-might-elicite-fear-but-the-ncaa-will-need-to-do-more-to-earn-respect/2019/09/26/76818374-e080-11e9-be96-6adb81821e90_story.html) [https://perma.unl.edu/TL3H-ASK2]; Matt Norlander, *College Basketball Corruption Trial: Wiretaps Show Payments Wanted to Recruit Zion Williamson, Marvin Bagley III*, CBS SPORTS (Apr. 25, 2019, 7:03 PM), <https://www.cbssports.com/college-basketball/news/college-basketball-corruption-trial-wiretaps-show-payments-wanted-to-recruit-zion-williamson-marvin-bagley-iii/> [https://perma.unl.edu/9BD4-NCG3].

28. Philip Bump, *How the Missouri Football Team Just Took Down Its University President*, WASH. POST (Nov. 9, 2015, 10:07 AM), <https://www.washingtonpost.com/news/the-fix/wp/2015/11/09/missouri-football-players-and-the-untapped-political-power-of-the-college-student-athlete/> [https://perma.unl.edu/WZR9-QVJJ]; see also James Hefferan, *Picking up the Flag? The University of Missouri Football Team and Whether Intercollegiate Student-Athletes May Be Penalized for Exercising Their First Amendment Rights*, 12 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 44, 75–76 (2016) (noting that boycotting Missouri football players had their coach's support and were not punished, and that any punishment likely would have run afoul of the First Amendment whether the *Tinker* disruption standard or a more protective standard applies).

29. Susan Svrluga, *Some College Students Keep Taking the Knee, Too*, WASH. POST (Oct. 16, 2017, 7:00 AM), <https://www.washingtonpost.com/news/grade-point/wp/2017/10/16/some-college-students-keep-taking-the-knee-too/> [https://perma.unl.edu/XQX7-V79Q].

practice field on May 29, 2018, suffering symptoms of heat stroke. He died in the hospital fifteen days later at the age of nineteen.<sup>30</sup> McNair's death brought to light both tragic missteps in the team's lack of urgency in seeking lifesaving medical attention as well as deeper cultural issues pervading the football program.<sup>31</sup> An exhaustive, 192-page investigative report by a commission of outside experts determined that Maryland's coaches and athletic department fostered "a culture where problems festered because too many players feared speaking out," even when members of the coaching staff subjected them to serious physical and verbal mistreatment.<sup>32</sup>

Across college sports, coaches and athletic departments rigidly control how athletes communicate with the public in ways that would never be countenanced if applied to non-athletes. At perennial powerhouse Penn State, journalists seeking reactions to the departure of the Nittany Lions' head football coach were told that "[p]er school policy, players are prohibited from speaking to the media without permission."<sup>33</sup> Kansas State University prohibited members of its equestrian team from responding to media inquiries about the impending cancellation of the sport, relying on an athletic department policy that instructs athletes: "You don't take part in an interview unless it has been approved and scheduled by a member of the communications staff or your head coach. . . . Always speak positively about program, teammates and coaches."<sup>34</sup> Football coaches commonly tell players that they will never be granted permission to speak to the media during their first year, including those at the University of Alabama, Col-

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30. Jesse Dougherty, *Experts Say Maryland May Not Have Acted Quickly Enough to Save Football Player*, WASH. POST (Aug. 13, 2018, 6:09 PM), [https://www.washingtonpost.com/sports/colleges/experts-say-maryland-may-have-not-acted-quickly-enough-to-save-football-player/2018/08/13/261b6122-9f25-11e8-8e87-c869fe70a721\\_story.html](https://www.washingtonpost.com/sports/colleges/experts-say-maryland-may-have-not-acted-quickly-enough-to-save-football-player/2018/08/13/261b6122-9f25-11e8-8e87-c869fe70a721_story.html) [https://perma.unl.edu/C323-DL5H].

31. See Michael McCann, *How Do the Findings of Jordan McNair Investigation Impact Pending Lawsuit, Durkin's Future?*, SPORTS ILLUSTRATED (Sept. 22, 2018), <https://www.si.com/college/2018/09/22/jordan-mcnair-death-investigation-findings-maryland-dj-durkin-lawsuit> [https://perma.unl.edu/9ZJJ-ZTKE].

32. Rick Maese & Keith L. Alexander, *Report on Maryland Football Culture Cites Problems but Stops Short of 'Toxic' Label*, WASH. POST (Oct. 25, 2018, 7:42 PM), <https://www.washingtonpost.com/sports/2018/10/25/report-maryland-football-culture-cites-problems-stops-short-toxic-label/> [https://perma.unl.edu/MXR4-JT4S].

33. Chris Adamski, *Penn State Prepares for New Era, as O'Brien Leaves for NFL Position*, TRIB LIVE (Jan. 1, 2014, 2:57 PM), <https://archive.triblive.com/news/penn-state-prepares-for-new-era-as-obrien-leaves-for-nfl-position/> [https://perma.unl.edu/LE4B-8P3S].

34. Celia Llopis-Jepsen, *First Amendment Lawyers Pan K-State Athletics Policy*, TOPEKA CAP.-J. (Dec. 7, 2014, 5:10 PM), <https://www.cjonline.com/news/2014-12-07/first-amendment-lawyers-pan-k-state-athletics-policy> [https://perma.unl.edu/VZV6-TKKU].

orado State University, and the University of South Carolina.<sup>35</sup> Alabama's legendary head coach, Nick Saban, explained his rationale as preventing inexperienced players from making missteps: "I'm for protecting our players and helping them develop. . . . We eventually want that guy to be able to talk to the media and do a good job with it."<sup>36</sup>

When athletes are able to speak out, they can get results. Rutgers fired its basketball coach following incriminating media reports in 2013 and parted ways with the coach of its women's swimming team after current and former athletes and their families told journalists about abusive behavior, including pressuring athletes not to take prescribed medications (although the university ultimately cleared the coach and found no wrongdoing).<sup>37</sup> A Penn State gymnastics coach resigned after a member of the 2016 women's team told the campus newspaper that the coaching staff belittled and body-shamed athletes, pressuring them to practice through injuries and lose weight.<sup>38</sup> Grambling State football players attracted nationwide attention in 2013 after boycotting a game in protest of squalid conditions in their locker room and workout facilities and the firing of their popular head coach.<sup>39</sup> Still, it's rare for athletes—especially current athletes—to break publicly with their athletic programs.

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35. See John Del Bianco, "Next Man Up" on Defense is Running Out of Options, *BIG SPUR* (Nov. 24, 2018), <https://247sports.com/college/south-carolina/Article/South-Carolina-football-Gamecocks-defense-injuries-freshman-playing—125298830/> [<https://perma.unl.edu/EAG3-CYNC>]; Andrew Gribble, *The Plaxico Effect: Why Alabama Freshmen Don't Speak with Reporters*, *AL.COM* (Oct. 22, 2012), [https://www.al.com/alabamafootball/2012/10/the\\_plaxico\\_effect\\_why\\_alabama.html](https://www.al.com/alabamafootball/2012/10/the_plaxico_effect_why_alabama.html) [<https://perma.unl.edu/8L2E-LZPD>]; John Keilman, *Bad Grades, Low Test Scores Can Scramble Signing Day Plans*, *CHI. TRIB.* (Feb. 6, 2013), <https://www.chicago.tribune.com/sports/ct-xpm-2013-02-06-ct-met-football-vagabonds-20130206-story.html> [<https://perma.unl.edu/H7U9-H3Y4>].

36. Gribble, *supra* note 35.

37. Keith Sargeant, *Amid Bullying Allegations, Rutgers Coach Fired for 'Mike Rice Tactics'*, *NJ.COM* (Nov. 16, 2017), <https://www.nj.com/rutgersfootball/2017/11/rutgers-fires-swimming-coach-accused-of-mike-rice.html> [<https://perma.unl.edu/N7MG-JYZ3>]; Keith Sargeant, *Rutgers Settles with Swim Coach for \$725K, Paying 3 Times What It Owed*, *NJ.COM* (Dec. 14, 2018), <https://www.nj.com/sports/2018/12/rutgers-settles-with-swim-coach-for-725k-paying-three-times-what-it-owed.html> [<https://perma.unl.edu/CP7R-64TU>].

38. Nick Martin, *Former Penn State Gymnasts Detail Alleged Abuse by Coaches*, *WASH. POST* (May 31, 2016, 6:42 PM), <https://www.washingtonpost.com/news/early-lead/wp/2016/05/31/former-penn-state-gymnasts-detail-alleged-abuse-by-coaches/> [<https://perma.unl.edu/246H-BSTJ>]; Rennie Dyball, *Penn State Gymnasts Allege Emotional Abuse, Body-Shaming Against Coaches: 'They Took Everything Away from Me'*, *PEOPLE* (May 31, 2016, 2:15 PM), <https://people.com/sports/penn-state-womens-gymnastics-coaches-accused-of-emotional-abuse-body-shaming/> [<https://perma.unl.edu/57YM-539Z>].

39. Greg Bishop, *At Grambling, a Proud Football Program at Risk*, *N.Y. TIMES* (Oct. 25, 2013), <https://www.nytimes.com/2013/10/26/sports/ncaafootball/at-grambling-a-proud-football-program-at-risk.html> [<https://perma.unl.edu/LSA7-REWW>].

Researchers from the Brechner Center for Freedom of Information sent public records requests to the eighty-four largest state universities in America, representing those with undergraduate enrollment of 20,000 or greater, asking for copies of any policies, rulebooks, or agreements governing athletes' interaction with the news media.<sup>40</sup> Institutions that failed to respond within thirty days received a follow-up email directed to the designated public-records custodian. Of the eighty-four institutions, fifty-six responded with copies of, or links to, documents (66.6%), fifteen responded that no responsive documents existed (17.9%), and thirteen failed to respond at all (15.5%).<sup>41</sup> Media policies were readily findable online for two of the thirteen non-responding institutions which produced a total of fifty-eight policies to review.

Of the fifty-eight policies, fifty of them (86% of all policies examined, and 59.5% of the schools surveyed) contained some form of gatekeeping rule restricting interactions with the media. The real number is almost certainly higher because several universities that claimed to have no responsive documents stated that coaches instruct their players verbally on how to handle media requests. Essentially every one of the fifty restrictive policies identified categorically prohibited speaking to the news media without approval from a coach or athletic department staff member. Policies typically instruct athletes that, if contacted by a reporter, they must refer the reporter to the athletic department's Sports Information or Media Relations office which will decide whether to approve the interview.

The wording of the policies varies from explicitly restrictive of any unapproved interaction with the news media to less explicitly restrictive. Illustrative examples of the range of wording include:

"Do not conduct any interview not arranged by the Communications Office. . . . Do not conduct an interview over the telephone unless you are instructed to do so by the Communications Office."<sup>42</sup>

"Scholar-athletes should decline all phone interviews with the media unless it has been cleared through the media relations office. Should a scholar-athlete be contacted (phone, email, social media, in-person, etc.) by a member of the

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40. Public universities were chosen because they are subject to the First Amendment and to state open-records laws.

41. Several of the non-responses were based on statutory exceptions that allow agencies to refuse requests from nonresidents. Such statutes are codified in Alabama, Arkansas, New Hampshire, New Jersey, Tennessee, and Virginia. *Supreme Court: States Can Prohibit Non-Residents from Using Public Records Laws to Gather Information*, REPS. COMMITTEE FOR FREEDOM PRESS (Apr. 29, 2013), <https://www.rcfp.org/supreme-court-states-can-prohibit-non-residents-using-public-records/> [<https://perma.unl.edu/52JK-YQ3S>].

42. UNIV. OF ARK., 2019–2020 RAZORBACKS ACADEMIC CALENDAR & PLANNER 44 (2019), <https://arkansasrazorbacks.com/wp-content/uploads/2019/09/2019-2020-Student-Athlete-Handbook-Updated.pdf> [<https://perma.unl.edu/ZP45-WSEP>].

media, please ask that reporter to call the media relations office to coordinate the interview.”<sup>43</sup>

“Student-athletes are asked to only grant interviews when they have been pre-arranged by a member of the media relations staff.”<sup>44</sup>

While most of the responding institutions provided policies from the central Athletic Department level, a few indicated that the policies are set and enforced individually by each coach. One such institution was the University of Nebraska which, in response to a public records request, produced links to athletic department handbooks for nine sports, each of which contains a variation of the same passage instructing athletes to forward any media inquiries to the Athletic Department’s Communications office.<sup>45</sup>

Almost unanimously, university policies forbid athletes from giving journalists their personal contract information, even when journalists ask for the information to check facts or pose follow-up questions.<sup>46</sup> These and other restrictions on athletes’ communications commonly are rationalized as an attempt to manage distractions or to keep athletes from unwittingly sharing information with gambling operations or other unsavory outsiders.<sup>47</sup>

Many of the policies are contained in handbooks or manuals that are directed to the athletes themselves and phrased in second-person (“you must” or “do not”) language. But others are incorporated into the general policies of the athletic department or its communications office, making it unclear whether they are regarded as binding on ath-

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43. UNIV. OF SAN DIEGO, SCHOLAR-ATHLETE HANDBOOK: 2019–2020 49 (2019), [https://s3.amazonaws.com/usdtoreros.com/documents/2018/9/18/Handbook\\_Plan-ner\\_18\\_19.pdf](https://s3.amazonaws.com/usdtoreros.com/documents/2018/9/18/Handbook_Plan-ner_18_19.pdf) [<https://perma.unl.edu/S8T8-79DN>].

44. WASH. ST. ATHLETICS, STUDENT-ATHLETE HANDBOOK 18 (2014), <https://wsucougars.com/documents/2016/6/19/3221040.pdf> [<https://perma.unl.edu/Q794-CC9X>].

45. *See, e.g.*, UNIV. OF NEB., Nebraska Men’s Tennis: Communications Guide 2 (2018) (“Please, only do interviews that have been arranged by a member of the Communications staff. . . . If you are contacted directly by a reporter, ask that person to arrange the interview through our office.”).

46. *See, e.g.*, COLO. ST. UNIV., COLORADO STATE RAMS STUDENT-ATHLETE HANDBOOK 2018–2019 44 (2018), [https://csurams.com/documents/2018/10/26/2018\\_19\\_Colorado\\_State\\_Student\\_Athlete\\_Handbook.pdf?id=9722](https://csurams.com/documents/2018/10/26/2018_19_Colorado_State_Student_Athlete_Handbook.pdf?id=9722) [<https://perma.unl.edu/QR5U-V7YB>] (“Student-athletes should *never* give their contact information to a media representative for any reason.”); MICH. ST. UNIV., 2019–2020 STUDENT-ATHLETE HANDBOOK AND PLANNER 43 (2019) (produced in response to FOI request, copy on file with authors) (“Please do not take or make calls to reporters from your cell phone. Once they have your number, they will have it forever, and reporters on deadline sometimes get desperate for quotes at the last minute.”).

47. The University of Georgia, for example, tells athletes not to agree to telephone interviews with unknown people unless arranged through the athletic department: “This is to avoid contact with unauthorized persons who may attempt to gain & use information for gambling purposes.” UNIV. OF GA., PRESS RELATIONS FOR THE STUDENT-ATHLETE (produced in response to FOI request, copy on file with authors).

letes and enforceable by discipline or directed to news organizations. Rutgers University's policies are typical, specifying: "All interviews must be arranged through the Athletic Communications office at least a day in advance."<sup>48</sup> It is uncertain whether the university would treat an unapproved interview as an act of misconduct by the athlete or by the journalist. However, the same document goes on to specify that acceptance of a media credential requires compliance with all university and conference rules, and that violations may be punished by expulsion from a sporting event, ineligibility for press credentials, and loss of workspace in Rutgers athletic venues, suggesting it would be the journalist who suffers the penalty.<sup>49</sup> UCLA is more direct, stating in its Athletic Department policies that "[a]ll requests to interview coaches, staff, student-athletes, or their families must be submitted through the Athletic Communications Office" and specifying the consequences to noncompliant journalists by stating that "[v]iolation[s] of this policy via direct outreach may result in denial or limitation of future access."<sup>50</sup>

The authority of athletic departments to impose punitive consequences on journalists, rather than athletes, for violating a proscription against unapproved interviews is beyond the scope of this research. As a general matter, denying a journalist access to an otherwise-available benefit or privilege based on viewpoint can be an actionable First Amendment violation.<sup>51</sup> However, it is less certain that a journalist could mount a First Amendment claim if punished for violating a policy against directly contacting athletes that is not facially based on "content" or "viewpoint."<sup>52</sup>

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48. RUTGERS UNIV., RUTGERS UNIVERSITY ATHLETIC COMMUNICATIONS, POLICIES AND PROCEDURES (2019) (produced in response to FOI request, copy on file with authors).

49. *See id.*

50. *Athletic Communications*, UCLA, <https://uclabruins.com/sports/2018/11/20/ucla-athletic-communications.aspx> [<https://perma.unl.edu/6GTS-ES6W>] (last visited Mar. 2, 2020).

51. *See Stevens v. New York Racing Ass'n*, 665 F. Supp. 164 (E.D.N.Y. 1987) (denial of media credential to shoot photographs at racetrack); *Sherrill v. Knight*, 569 F.2d 124 (D.C. Cir. 1977) (denial of White House press pass); *see also* Rob Arcamona, *Colleges Run Afoul of First Amendment in Barring Sports Journalists*, MEDIA SHIFT (Sept. 28, 2011), <http://mediashift.org/2011/09/colleges-run-afoul-of-first-amendment-in-barring-sports-journalists271/> [<https://perma.unl.edu/27R3-ZHN2>] (cataloguing instances in which college athletic programs used credentialing authority to retaliate against journalists perceived as overly critical, and opining that the First Amendment prohibits unequal treatment of journalists based on their viewpoints or their publications).

52. There appear to be no reported cases in which journalists have challenged credentialing decisions based not on their coverage but on their reporting tactics, so it is difficult to predict how a court might receive a First Amendment challenge if a news organization was deprived of access to sporting events as punishment for contacting an athlete after being instructed otherwise. For more about the

Some athletic department rules include explicit content-based prohibitions that forbid whistleblowing. At Iowa State University, for example, football players are told: “Do not take your complaints to the newspaper. The coaches’ office is the only place for these. Keep it in the family.”<sup>53</sup> Kent State University’s athlete handbook similarly provides: “Don’t take your complaints to the media. The coaches’ office is the only place for these.”<sup>54</sup> Texas Tech University produced a policy document that instructs football players: “Anything that happens with this team—anything within the program or locker room—stays with the football program and in the locker room.”<sup>55</sup> East Carolina University emphatically cautions: “If you do not have anything good to say, do not say anything at all. DO NOT COMPLAIN ABOUT THE COACHES, TEAMMATES OR THE UNIVERSITY.”<sup>56</sup>

The University of Oregon (UO), a perennial Top 25 football power in the Pac-10 conference, presents an especially vivid case study. During 2016, reporters for the *Daily Emerald* student newspaper sought to speak with members of the Ducks football team about a star player, Pharaoh Brown, who had been investigated by local police after a fight with his girlfriend at an off-campus apartment.<sup>57</sup> Reporters from the *Daily Emerald* contacted two teammates believed to have had locker-room altercations with Brown, one of whom spoke at length about their fight and one of whom cited athletic department policy in declining to comment.<sup>58</sup> The story attracted widespread media attention because of Brown’s prominence and won a prestigious national investigative reporting award.<sup>59</sup>

But the story also provoked the ire of the UO athletic department. The lead writer, Kenny Jacoby, was reprimanded and told that the

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First Amendment in the context of media credentialing, see Ryan Benjamin Witte, *It’s My News Too! Online Journalism and Discriminatory Access to the Congressional Periodical Press Gallery*, 12 *YALE J.L. & TECH.* 208 (2010).

53. IOWA ST. UNIV., MEDIA POLICIES 19 (produced in response to FOI request, copy on file with authors).

54. KENT ST. UNIV., KENT STATE UNIVERSITY ATHLETICS STUDENT-ATHLETE HANDBOOK 53 (2018) (produced in response to FOI request, copy on file with authors).

55. TEX. TECH UNIV., WORKING WITH THE MEDIA (produced in response to FOI request, copy on file with authors).

56. EAST CAROLINA UNIV., MEDIA INTERVIEW TIPS & REMINDERS (produced in response to FOI request, copy on file with authors).

57. Kenny Jacoby, Cooper Green & Jarrid Denney, *Oregon Tight End Pharaoh Brown Accused of Three Acts of Violence Since October 2014*, *DAILY EMERALD* (Nov. 16, 2016), [https://www.dailyemerald.com/archives/oregon-tight-end-pharaoh-brown-accused-of-three-acts-of/article\\_c1bcef6e-e4ea-5a53-9f68-f5400c12c6fe.html](https://www.dailyemerald.com/archives/oregon-tight-end-pharaoh-brown-accused-of-three-acts-of/article_c1bcef6e-e4ea-5a53-9f68-f5400c12c6fe.html) [https://perma.unl.edu/K9NL-XNCT].

58. *Id.*

59. Jack Pitcher, *Emerald Story Wins National Investigative Reporting Award*, *DAILY EMERALD* (Apr. 3, 2017), [https://www.dailyemerald.com/archives/emerald-story-wins-national-investigative-reporting-award/article\\_f7cc1c4d-464b-5b85-85e3-3bdd9cd73d86.html](https://www.dailyemerald.com/archives/emerald-story-wins-national-investigative-reporting-award/article_f7cc1c4d-464b-5b85-85e3-3bdd9cd73d86.html) [https://perma.unl.edu/9F6F-BELZ].

department considered penalizing the newspaper for defying the prohibition against speaking to athletes by revoking a press credential for an upcoming basketball game.<sup>60</sup> When the university was criticized for its hardball stance toward the journalists, UO's vice president and general counsel, Kevin S. Reed, undertook a study of the rights of journalists and athletes and how UO's policies compared with those of other institutions.<sup>61</sup>

In March 2017, Reed reported back to the university's president, concluding that the athletic department's prohibition on direct contact with journalists was constitutionally defensible.<sup>62</sup> The Reed Report reached its legal conclusion by distinction from the Supreme Court's *Press-Enterprise* doctrine, which states that journalists have a First Amendment right of access to courtroom proceedings if the proceedings have traditionally been open to the public and public access significantly benefits the functioning of the process.<sup>63</sup> The report surveyed the policies of eight fellow members of the Pac-10 athletic conference and found only one, the University of Arizona, where athletes were told they could speak directly with the news media without needing approval from the athletic department.<sup>64</sup>

The Reed Report's authors did not regard the pre-approval policy as constraining athletes' ability to speak to the media. "We find no evidence to support the allegation that the Athletic Department restricts student athletes' ability to address the media. Rather, the media relations professionals in the Athletic Department seem to serve the interests of student athletes by helping them manage the media's access to them."<sup>65</sup> The report acknowledged that retaliating against journalists by revoking credentials could be a constitutional violation and that multiple journalists reported experiencing threats; however, the report did not conclude that any retaliatory revocation actually took place and did not recommend a formal policy change.<sup>66</sup>

According to a document furnished by UO in response to a request under the Oregon Public Records Law, the athletic department's gatekeeping rule remains in place. The policy says nothing about ath-

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60. Austin Meek, *Emerald Dispute Results in Policy Review*, REG.-GUARD (Jan. 13, 2017, 12:01 AM), <https://www.registerguard.com/rg/sports/35172801-81/oregon-general-counsel-opens-review-into-athletic-department-media-policies.html.csp> [<https://perma.unl.edu/N8NY-9XGP>].

61. *Id.*

62. KEVIN S. REED & HAILEY CZARNECKI, U. OF OR., MEDIA ACCESS TO STUDENT ATHLETES AND RIGHTS OF FREE SPEECH (2017) [hereinafter, "REED REPORT"], <https://cpb-us-e1.wpmucdn.com/blogs.uoregon.edu/dist/9/13250/files/2017/01/Media-Access-to-Athletes-and-Free-speech-Final-For-Distribution-rev-3-17-27jyxlo.pdf> [<https://perma.unl.edu/YZC4-H2QR>].

63. *Id.* at 15 (citing *Press-Enter. Co. v. Super. Ct. of Cal.*, 478 U.S. 1, 8–9 (1986)).

64. *Id.* at 14.

65. *Id.* at 6.

66. *Id.* at 17.

letes' right of free expression and instead states that "[a]ll interviews and communications with the media should be coordinated through the Athletics Communications office. If a student-athlete is contacted directly for an interview, without their previous knowledge, they should refer the request to the Athletic Communications office."<sup>67</sup>

Notably, none of the policies obtained from college athletic departments specified any punitive consequences for speaking to the news media without approval.<sup>68</sup> However, a number of athletic department manuals, handbooks, and scholarship agreements provide generically for penalties, including loss of athletic scholarships, for defying athletic-program rules, which presumably would include the rule against unauthorized interviews.<sup>69</sup>

Whatever the consequences (real or perceived) for violating universities' prohibitions on interviewing, the restrictions appear to be producing the intended result: college athletes will not talk to journalists without approval from their coaches or athletic departments. The Brechner Center worked with AP Sports Editors, a nationwide membership organization of sports journalists across all media, on a survey of members' experiences with university interviewing policies. Of thirty-two sports editors who responded to a survey, none of them said that they are always free to speak to the college athletes they cover without needing clearance from the institution; eleven responses (34%) reported that they "sometimes" need authorization to interview college athletes; and twenty-one responses (66%) said that they "always" need authorization. Only three respondents (9%) said that when they ask for the institution's assistance in arranging an interview they are "always" able to get the access they need; twenty-one (66%) said they were "occasionally" unable to get access; and eight (25%) said they were "regularly" unable to get the interviews they

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67. UNIV. OF OR., UNIVERSITY OF OREGON STUDENT-ATHLETE HANDBOOK 2019–2020 32 (2019) (copy on file with authors) (boldface removed).

68. This is consistent with the assertion in the Reed Report that no UO athlete surveyed by the university reported experiencing any adverse consequence for having spoken to the media. *See* REED REPORT, *supra* note 62, at 13.

69. For example, in response to a public-records request, Ohio University provided a copy of its standard Intercollegiate Athletics Scholarship Agreement which specifies that, to maintain eligibility for a scholarship, the athlete must comply with all guidelines and policies established by the athletic department and coaching staff, including those in the Student-Athlete Handbook. OHIO UNIV., INTERCOLLEGIATE ATHLETICS SCHOLARSHIP AGREEMENT (copy on file with author). Texas State University similarly tells its athletes in the scholarship (Athletics Grant-in-Aid) agreement that their scholarships may be reduced or revoked if they "[f]ail to meet the athletic and academic expectations, including, but not limited to, all ethical conduct provisions, team policies, athletics support obligations, etc. as presented in team, Athletics department, institutional, Sun Belt and/or NCAA rules, policies or standards." TEX. ST. UNIV., ATHLETICS GRANT-IN-AID AGREEMENT 1 (copy on file with author).

needed. When asked whether the inability to get access to interviews with college athletes had diminished the quality of their coverage, three of the respondents (9%) said it had not; twenty-two respondents (69%) said that it “sometimes” affected their coverage; and seven respondents (22%) said that their coverage “often” was adversely affected.

Plainly, university athletic departments believe they have the authority to control athletes’ interactions with the press and public, and make no effort to disguise that they do so. The question is whether these policies are legally defensible given decades of First Amendment precedent that disfavors granting government regulators open-ended authority to decide whose speech gets to be heard.

### III. CAMPUS AND WORKPLACE SPEECH RIGHTS

#### A. The First Amendment and Prior Restraints

As a general principle, the First Amendment rigidly confines the government’s authority to enforce content-based restrictions on speech. Apart from a handful of recognized categories of constitutionally unprotected speech, including credible threats of violence and obscenity, the government may not prevent or punish speech based on the speaker’s message.<sup>70</sup> In particular, the First Amendment is understood to protect the ability to address political issues of public concern, even when the speaker’s words are highly offensive or extreme.<sup>71</sup>

The government may enforce reasonable regulations on the “time, place and manner” of speakers’ expression, so long as the regulations are drawn and applied without regard to content.<sup>72</sup> The regulation need not be the least speech-restrictive means of accomplishing the

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70. *See* *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (“Content-based regulations are presumptively invalid.” (citing *Simon v. Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991))); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975) (“[W]hen the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power.”).

71. *See* *Snyder v. Phelps*, 562 U.S. 443, 454–55 (2011) (finding that demonstrators’ anti-gay hate speech was constitutionally protected because it condemned permissive societal attitudes toward gays and lesbians, a matter of public concern); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988) (finding that “outrageous” magazine parody of conservative political figure was protected speech: “At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern.”).

72. *See* *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (holding that a government agency may enforce reasonable restrictions affecting expressive conduct, so long as the restrictions are “justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels

government's objective, but it must be "narrowly tailored to serve a significant governmental interest."<sup>73</sup> Even a content-neutral regulation may be overturned if it has the effect of closing off so many avenues for speech that a speaker has no reasonable opportunity to reach the intended audience.<sup>74</sup>

A facially content-neutral policy—like a public university's policy against granting interviews to the news media—is vulnerable to constitutional challenge on two primary grounds. First, that it is an unduly broad "prior restraint" on speech that is unjustified by any compelling governmental interest. Second, that it violates due process by conferring unbridled discretion to grant or withhold approval to speak, inviting retaliatory or viewpoint-discriminatory decisions.

A "prior restraint" that prevents speech from reaching its intended audience is considered an especially extreme form of regulation.<sup>75</sup> A regulation that restrains speech from being heard, as opposed to imposing after-the-fact consequences if the speech causes damage, is reviewed with "a 'heavy presumption' against its constitutional validity."<sup>76</sup> Because prior restraints can delay the dissemination of time-sensitive news, they threaten "immediate and irreversible injury" to the would-be speaker.<sup>77</sup> As the Supreme Court has explained:

[T]he distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable.<sup>78</sup>

When a prior restraint is challenged as unconstitutional, federal courts apply "strict scrutiny," putting the burden on the regulator to show that the restriction was narrowly tailored to address an espe-

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for communication of the information" (citing *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 79 (1984)).

73. *Id.*

74. *See Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 93 (1977) (finding that municipality's ban on yard signs did not leave real-estate sellers sufficient alternative channels to market to their intended audience because alternatives such as sound trucks or leafletting campaigns would cost more and be less effective).

75. *See Marin Scordato, Distinction Without a Difference: A Reappraisal of the Doctrine of Prior Restraint*, 68 N.C. L. REV. 1, 5 (1989) ("[P]rior restraints are so strongly disfavored that labeling a law as a prior restraint on speech is tantamount to a declaration that the law is unconstitutional.")

76. *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (quoting *Carroll v. Princess Anne*, 393 U.S. 175, 181 (1968)).

77. Jeffrey Matrullo, Comment, *People v. Bryant and Prior Restraint: The Unsettling of a Settled Area of Law*, 4 CONN. PUB. INT. L.J. 320, 326 (2005).

78. *See Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975) (citing *Speiser v. Randall*, 357 U.S. 513 (1958)).

cially compelling government objective.<sup>79</sup> Although prior restraints are often described in terms of a “licensing” system to use public property, as in the case of a permit to hold a demonstration,<sup>80</sup> the doctrine is quite a bit broader. It encompasses any system enforced by any branch of government that forbids speech or requires permission from a government official before speaking.<sup>81</sup>

As the Supreme Court’s modern understanding of the First Amendment was just taking shape, the Court decided what would prove to be a landmark freedom of the press case in *Near v. Minnesota*.<sup>82</sup> The *Near* case tested the constitutionality of a Minnesota statute enabling law enforcement agencies to enjoin the distribution of newspapers and magazines regarded as “malicious, scandalous and defamatory.”<sup>83</sup> The county attorney in Minneapolis invoked the statute to obtain an injunction against continued publication of a periodical known for its vituperative attacks on the city’s elected officials, police, and other newspapers.<sup>84</sup> The publishers conceded that they had distributed defamatory material but insisted that the First Amendment distinguishes between imposing after-the-fact liability for damaging statements (which is permissible) versus a “prior restraint” against publishing statements feared to be defamatory (which is not).<sup>85</sup> A 5–4 majority of the Supreme Court agreed.

Writing for the majority, Chief Justice Charles Evans Hughes explained that a foundational purpose of the First Amendment is to prevent government authorities from restraining citizens from exposing official misconduct: “The recognition of authority to impose previous restraint upon publication in order to protect the community against the circulation of charges of misconduct, and especially of official misconduct, necessarily would carry with it the admission of the authority of the censor against which the constitutional barrier was erected.”<sup>86</sup> Since *Near*, the Supreme Court has repeatedly struck down statutes considered to be “prior restraints.”<sup>87</sup> Perhaps most notably, the Court

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79. See, e.g., *Sindi v. El-Moslimany*, 896 F.3d 1, 11 (1st Cir. 2018); *Burk v. Augusta-Richmond Cty.*, 365 F.3d 1247, 1251 (11th Cir. 2004).

80. See *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992) (characterizing a Georgia county’s ordinance requiring a permit and a fee to obtain authorization for public speaking, parades, or assemblies as a prior restraint on speech).

81. See generally Michael I. Meyerson, *Rewriting Near v. Minnesota: Creating a Complete Definition of Prior Restraint*, 52 *MERCER L. REV.* 1087, 1096–132 (2001) (explaining scenarios in which courts have determined that government-imposed hurdles to speech represent “prior restraints”).

82. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931).

83. *Id.* at 701.

84. *Id.* at 703.

85. *Id.* at 730 (Butler, J., dissenting).

86. *Id.* at 721 (majority opinion).

87. See, e.g., *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (statute restricting door-to-door distribution of religious materials without state approval); *Niemotko v. Ma-*

invoked the prior-restraint standard in the landmark “Pentagon Papers” case, denying the federal government an injunction to prevent journalists from publishing a leaked classified history of the Vietnam War.<sup>88</sup>

The Court elaborated on the prior-restraint doctrine in *Nebraska Press Association v. Stuart*, where the restraint was imposed judicially rather than legislatively.<sup>89</sup> There, the Court found that a trial judge violated the First Amendment when, attempting to keep incriminating information from tainting the jury pool, he ordered news organizations not to publish anything about the suspects’ confessions. The Court explained:

[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights. . . .

A prior restraint . . . has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication ‘chills’ speech, prior restraint ‘freezes’ it at least for the time.<sup>90</sup>

Time and again, the Court has recognized that the mere existence of a “permission” system is constitutionally suspect, if only because it interferes with spontaneous speech in response to time-sensitive events. As the justices wrote in throwing out a city ordinance that required a permit to engage in door-to-door political or religious advocacy, “[i]t is offensive—not only to the values protected by the First Amendment, but to the very notion of a free society—that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so.”<sup>91</sup>

In the rare instances that a prior restraint has been found tolerable—such as, during the 1960s, prescreening motion pictures for obscenity—the Supreme Court has required rigorous procedural safeguards. In *Freedman v. Maryland*, the Court found that, to be constitutional, a state pre-approval process must put the burden on the censor to demonstrate that the speech is unprotected, strictly limit the review period, and provide for prompt judicial appeal.<sup>92</sup>

Even where a regulation restricting speech furthers an important government purpose, it still may be unconstitutional if it is so broad

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ryland, 340 U.S. 268 (1951) (park commissioner’s policy requiring permission to use park for prayer meetings); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969) (ordinance requiring permits for parades).

88. *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971).

89. *Neb. Press Ass’n v. Stuart*, 427 U.S. 539 (1976).

90. *Id.* at 559.

91. *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 165–66 (2002).

92. *Freedman v. Maryland*, 380 U.S. 51, 58–59 (1965).

that it inflicts collateral harm on benign speech.<sup>93</sup> A law may be invalidated as facially overbroad if “a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.”<sup>94</sup>

Open-ended restrictions on the content of speech also are vulnerable to challenge under the Due Process Clause. A regulation may be declared void for vagueness if it fails to give intelligible notice of the behavior that will result in penalties.<sup>95</sup> Vague regulations on speech offend the Constitution because, uncertain about whether their expression is punishable, speakers will self-censor to stay far from the indistinct line of punishability.<sup>96</sup> A regulation also may be struck down as unconstitutionally vague if it delegates unfettered enforcement discretion to the executive, inviting arbitrary or discriminatory application.<sup>97</sup> Licensing or permitting systems that lack meaningful constraints on the decision-maker’s authority are strongly disfavored because “in the area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship.”<sup>98</sup>

The Supreme Court first recognized in *Hague v. Committee for Industrial Organization*<sup>99</sup> that open-ended permitting systems offend the First Amendment because they enable the decisionmaker to ration the right to speak based on subjective, and potentially viewpoint-discriminatory, considerations. The *Hague* case challenged the decision of a New Jersey police department to deny applications from Commu-

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93. *Hays Cty. Guardian v. Supple*, 969 F.2d 111, 118 (5th Cir. 1992) (“Even a legitimate government interest cannot justify a restriction if the restriction accomplishes that goal at an inordinate cost to speech.”).

94. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008) (quoting *New York v. Ferber*, 458 U.S. 747, 769–71 (1982)).

95. *See Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) (“[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.”); *see also NAACP v. Button*, 371 U.S. 415, 435 (1963) (observing, in invalidating a Virginia statute interpreted as preventing the NAACP from soliciting civil-rights clients, that “a vague and broad statute lends itself to selective enforcement against unpopular causes”).

96. *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964).

97. *See Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) (invalidating municipal ordinance that gave police no objective standards by which to issue or deny permits for demonstrations, finding that the ordinance invited selective enforcement based on the speaker’s viewpoint).

98. *City of Lakewood v. Plain Dealer Publ’g. Co.*, 486 U.S. 750, 757 (1988) (citations omitted). As the Court explained in *City of Lakewood*, facial challenges to permitting systems on the basis of unfettered discretion will be liberally entertained, even before any adverse government action takes place, because such a system risks intimidating speakers into self-censoring out of fear of government retaliation. *See id.* at 758.

99. *Hague*, 307 U.S. 496.

nist political groups to use a municipal meeting hall, relying on an ordinance that empowered the police chief to withhold a permit “for the purpose of preventing riots, disturbances or disorderly assemblage.”<sup>100</sup> The Court struck down the permitting ordinance finding that, without objective standards to constrain the police chief’s exercise of authority, the ordinance could “be made the instrument of arbitrary suppression of free expression.”<sup>101</sup>

Similarly, in *Cox v. Louisiana*,<sup>102</sup> the Supreme Court vacated a civil-rights demonstrator’s conviction on a charge of obstructing a public sidewalk because the statute under which he was convicted gave “unfettered discretion” to municipal authorities to decide which uses of public property for expressive purposes were or were not punishable. Writing for the Court’s 7–2 majority, Justice Arthur Goldberg found that the statute, while facially neutral, had in fact been applied in a discriminatory way:

It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups either by use of a statute providing a system of broad discretionary licensing power or, as in this case, the equivalent of such a system by selective enforcement of an extremely broad prohibitory statute.<sup>103</sup>

To be constitutional, any permitting system imposed as a condition of speech must cabin the decisionmaker’s discretion with “neutral criteria to insure that the . . . licensing decision is not based on the content or viewpoint of the speech being considered.”<sup>104</sup>

While these constitutional principles strictly constrain government’s ability to interdict or punish speech in most settings, federal courts have created workarounds in the settings of school and the workplace. In those contexts, courts are somewhat more deferential to government, recognizing that the government needs latitude to effectively manage its own programs and institutions.

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100. *Id.* at 502 n.1.

101. *Id.* at 516.

102. *Cox v. Louisiana*, 379 U.S. 536 (1965).

103. *Id.* at 557–58.

104. *City of Lakewood v. Plain Dealer Publ’g. Co.*, 486 U.S. 750, 760 (1988); *see also* *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 323 (2002) (“Where the licensing official enjoys unduly broad discretion in determining whether to grant or deny a permit, there is a risk that he will favor or disfavor speech based on its content.”); Trey Hatch, *Keep on Rockin’ in the Free World: A First Amendment Analysis of Entertainment Permit Schemes*, 26 *COLUM. J.L. & ARTS* 313, 320–21 (2003) (explaining that, to be constitutional, a licensing system “must not grant unbridled discretion to decision-makers, but rather must incorporate narrow, objective, and definite standards or limits to guide their decision”).

## B. The First Amendment (Sometimes) Goes to College

### 1. Content-Based Punishment for Disruptive Speech

Students in public schools and colleges have the benefit of some constitutional protections that are enforceable against their institutions.<sup>105</sup> The First Amendment protects students' ability to express themselves free from government restraint or retaliation, while the Due Process Clause assures that they may not be deprived of the benefits of a public education arbitrarily or without adequate notice.

Although student-speech cases regularly find their way into federal court, no case has presented anything resembling a facial overbreadth challenge to a regulation prohibiting students from talking to the media. The framework developed by federal courts in the more commonplace scenario—a student disciplined for speech that a school or college deems unsuitable—offers some limited insight into how a First Amendment case by silenced athletes might fare. But, the analogy is imperfect because a preemptive restraint on an entire class of speakers will be harder to justify than after-the-fact punishment of a single speaker.

The Supreme Court has not comprehensively addressed whether college students have the full benefit of the First Amendment rights that, in the off-campus world, foreclose content-based restrictions absent extreme exceptions. While the Court has spoken expansively of the importance of the free exchange of ideas on a university campus,<sup>106</sup> the few college-speech cases to reach the Court have been decided on relatively narrow grounds, making it difficult to discern any universally applicable standards. For instance, a public university may not exclude religious-themed publications from competing for financial support on equal terms with non-religious publications.<sup>107</sup> Nor may universities withdraw student activity fee support from stu-

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105. See *NCAA v. Tarkanian*, 488 U.S. 179, 192 (1988) (holding that, for purposes of a due process claim, “[a] state university without question is a state actor”).

106. See, e.g., *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (overturning New York’s requirement that college employees sign a loyalty oath forswearing affiliation with the Communist Party and declaring that a college classroom is “peculiarly the ‘marketplace of ideas’”). As the Court elaborated in *Keyishian*: “Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.” *Id.* See also *Healy v. James*, 408 U.S. 169, 180 (1972) (“Yet, the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, ‘the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.’” (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960))).

107. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995).

dent clubs just because some dissenting students do not share the clubs' political ideology.<sup>108</sup>

First Amendment standards are more sharply defined in the realm of K-12 education. In its landmark, Vietnam-era case, *Tinker v. Des Moines Independent Community School District*, the Court rejected the notion that public school authorities may prohibit speech purely to avoid controversy or the sharp exchange of differing views.<sup>109</sup> A school may not enforce a content-based prohibition on speech, the Court held, unless the speech "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."<sup>110</sup>

Since *Tinker*, the Court has recognized several categories of less-protected speech in the school setting. Most notably, in *Hazelwood School District v. Kuhlmeier*, the Court applied "public forum" analysis to students' expressive use of school property and determined that First Amendment freedoms were diminished when students sought to express themselves using a "curricular" vehicle, such as a class-produced newspaper, which operated primarily for teaching rather than expressive purposes.<sup>111</sup>

The meaning of *Tinker's* "substantial disruption" standard has proven somewhat malleable.<sup>112</sup> Although it is clear that substantial disruption means something beyond hurt feelings and sharp differences of opinion, some especially deferential applications of *Tinker* have reconceived the concept of "disruption" to include disturbing a school extracurricular event<sup>113</sup> or causing a school to consume substantial time responding to a controversy that the student provokes.<sup>114</sup> In no event, however, should *Tinker* be a vehicle for punishing even sharply worded speech about political or social issues, or speech that merely indicates questionable judgment. Even presuming that colleges have the latitude recognized under *Tinker*, their punitive authority extends only to speech that impedes the school from functioning in an operational sense, not speech reflecting discredit on the school or its students.

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108. *Bd. of Regents v. Southworth*, 529 U.S. 217 (2000).

109. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

110. *Id.* at 513.

111. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 269–70 (1988).

112. See Perry A. Zirkel, *The Rocket's Red Glare: The Largely Errant and Deflected Flight of Tinker*, 38 J.L. & EDUC. 593, 594–95 (2009) ("[M]ajority opinion contains threads that are susceptible to unraveling its lofty students' rights reputation. Although the rule in *Tinker* generally is known as the 'substantial disruption' test for student expression, a careful examination of the decision suggests an elastic effect that is more akin to the Rorschach inkblot test.")

113. See *Doe v. Silsbee Indep. Sch. Dist.*, 402 F. App'x 852 (5th Cir. 2010) (explaining that student speech is not protected when the speech "substantially interferes" with the school's business).

114. See *Doninger v. Niehoff*, 527 F.3d 41, 50 (2d Cir. 2008).

The Court has never squarely confronted the extent to which the *Tinker* line of school-speech cases applies to claims brought by college students, and many commentators question whether a standard created for children attending K-12 school is suitable for adult-age college students.<sup>115</sup> In *Hazelwood*, the Court explicitly limited its holding to the K-12 setting—where captive audiences of minors may be exposed to speech unsuitable for their maturity—and left the door open for a more protective standard at the college level.<sup>116</sup>

Lacking unequivocal guidance from the Supreme Court, some lower courts have defaulted to the *Tinker-Hazelwood* school-speech framework as the only tool in the toolbox.<sup>117</sup> Even in those situations, courts typically view content-based regulations with greater skepticism at the college level in light of the maturity of the speaker and audience, and the role of colleges as laboratories for experimentation with ideas.<sup>118</sup> Other courts, however, evaluate restrictions on college students' speech by reference to the "real-world" First Amendment standards that apply in off-campus society. For example, campus "civility codes" commonly are evaluated—and invalidated—under the same vagueness and overbreadth standards that would apply to content-based regulations by a city, county, or state.<sup>119</sup>

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115. See, e.g., Meggen Lindsay, Comment, *Tinker Goes to College: Why High School Free-Speech Standards Should Not Apply to Post-Secondary Students*—Tatro v. University of Minnesota, 38 WM. MITCHELL L. REV. 1470, 1481 (2012) ("There is a glaring disparity in imposing the same restrictions on twenty-two-year-olds as on twelve-year-olds."); Karyl Roberts Martin, *Demoted to High School: Are College Students' Free Speech Rights the Same as Those of High School Students?*, 45 B.C. L. REV. 173, 195 (2003) (arguing that application of K-12 speech standards to postsecondary education "could have detrimental effects on the rigor of university education, where individual thought and free expression are particularly valued").
116. *Hazelwood*, 484 U.S. at 273 n.7 ("We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level.").
117. See Edward L. Carter, Kevin R. Kemper & Barbara L. Morgenstern, *Applying Hazelwood to College Speech: Forum Doctrine and Government Speech in the U.S. Courts of Appeals*, 48 S. TEX. L. REV. 157, 181 (2006) ("More than half the federal circuits that have considered the issue have applied aspects of *Hazelwood* to university- or college-student speech, despite arguments that *Hazelwood*'s restrictive standard should not be applied in the post-secondary context."); Mary-Rose Papandrea, *The Free Speech Rights of University Students*, 101 MINN. L. REV. 1801, 1828 (2017) (observing that, because Supreme Court higher-ed speech cases "leave open some important questions about the scope of a public university's authority to restrict or punish the speech of its students," lower courts have sometimes looked to the K-12 line of cases "to provide this missing guidance").
118. See Derek P. Langhauser, *Free and Regulated Speech on Campus: Using Forum Analysis for Assessing Facility Use, Speech Zones, and Related Expressive Activity*, 31 J.C. & U.L. 481, 502 (2005).
119. See, e.g., *DeJohn v. Temple Univ.*, 537 F.3d 301, 317–18 (3d Cir. 2008) (concluding that a college's harassment policy was unconstitutionally overbroad because it allowed for punishment of "offensive" or "gender-motivated" comments even if

An evolving body of caselaw at both the college and K-12 levels addresses when school disciplinary authority extends to off-campus speech on social media that provokes a reaction on campus. Federal courts are coalescing around a modified *Tinker*-based approach, under which speech becomes punishable when it threatens students or school employees<sup>120</sup> or when it is directed at the school in a way intended to cause a disturbance.<sup>121</sup> At the college level, courts have additionally recognized some heightened degree of authority to regulate off-campus speech over students enrolled in pre-professional programs whose speech indicates unfitness for their chosen profession.<sup>122</sup>

Still, even at the K-12 level, courts have not equated schools' authority over speech on personal time with speech on school grounds during the school day. In *Hazelwood*, the Court recognized that schools' authority to regulate speech diminishes outside the school setting: "A school need not tolerate student speech that is inconsistent with its 'basic educational mission' even though the government could not censor similar speech outside the school."<sup>123</sup> Similarly, in *Morse v. Frederick*, the Court acknowledged that a sexually explicit speech that could be grounds for disciplinary action when delivered to a school assembly would be beyond the school's jurisdiction if delivered "in a pub-

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no listener felt a severe or pervasive level of harassment, and even if the comments addressed "core" political or religious expression); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1183-85 (6th Cir. 1995) (invalidating on overbreadth grounds a university's "discriminatory harassment" policy that defined punishable harassment as including "offensive" or "demeaning" speech, which the court found to encompass constitutionally protected speech); *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 867 (E.D. Mich. 1989) (striking down as overbroad university's anti-harassment policy outlawing speech that "stigmatizes or victimizes" another person because the policy swept in constitutionally protected speech).

120. *See, e.g.*, *Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1069 (9th Cir. 2013) (holding, in case involving discipline of student who posted messages to MySpace threatening to emulate the Virginia Tech massacre and shoot specific people at school, that "when faced with an identifiable threat of school violence, schools may take disciplinary action in response to off-campus speech that meets the requirements of *Tinker*").
121. *See, e.g.*, *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 396 (5th Cir. 2015) (en banc) (holding that schools may rely on *Tinker* to exert punitive authority over off-campus social media speech "when a student intentionally directs at the school community speech reasonably understood by school officials to threaten, harass, and intimidate a teacher").
122. *See Tatro v. Univ. of Minn.*, 816 N.W.2d 509 (Minn. 2012) (finding that university could sanction student enrolled in mortuary-science program for making disrespectful jokes on a personal Facebook page about the cadaver she was assigned to dissect); *Keefe v. Adams*, 840 F.3d 523 (8th Cir. 2016) (applying *Tatro* to dismiss constitutional claims by community college student removed from nursing program on the grounds of unprofessional speech on social media directed at classmates).
123. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986)).

lic forum outside the school context.”<sup>124</sup> Recently, the Fifth Circuit dismissed a high-school cheerleader’s First Amendment case on the grounds of qualified immunity, finding that the school violated no “clearly established” legal standards in punishing her for sharing profane and sexually explicit messages on social media in violation of the team’s code of conduct.<sup>125</sup> But the court concluded its analysis with the admonition that “‘a broad swath of off-campus student expression’ remains fully-protected by the First Amendment.”<sup>126</sup> The off-campus, on-campus dichotomy is relevant to evaluating colleges’ authority to regulate athletes’ speech because colleges’ media-relations rules make no distinction about the timing and location of the speech, asserting the same level of control everywhere.

## 2. *Prior Restraints in School Flunk the Constitutional Test*

The *Tinker* line of cases applies when an educational institution imposes individualized disciplinary sanctions for speech that threatens to disrupt school operations. But prior restraints that categorically restrict students from being heard are viewed with significantly more skepticism and less deference, even at the K-12 level.

In K-12 schools, prior-restraint cases generally involve prohibitions against distributing written material on school grounds during school time. In those scenarios, student speakers almost invariably have prevailed in facial challenges to school policies, either because the policies are unduly broad in violation of the First Amendment or because they leave standardless discretion in the hands of school authorities.

Prior-restraint cases generally arise when school administrators assert authority to review expressive materials before students can distribute them. Most courts regard mandatory pre-approval as facially unconstitutional because schools have narrower, less-restrictive means to respond to potential disruptions. For instance, in *Burch v. Barker*, involving a school’s refusal to allow students to distribute an underground newspaper, the Ninth Circuit surveyed post-*Tinker* caselaw and concluded that “a policy which subjects all non-school-sponsored communications to predistribution review for content censorship” is unconstitutional.<sup>127</sup> The ruling relied on similar conclusions from the First, Fourth, and Seventh Circuits, each finding pre-approval policies to be facially overbroad.<sup>128</sup>

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124. *Morse v. Frederick*, 551 U.S. 393, 405 (2007).

125. *Longoria v. San Benito Indep. Sch. Dist.*, 942 F.3d 258, 269 (5th Cir. 2019).

126. *Id.* at 270 (quoting *Bell*, 799 F.3d at 402 (Elrod and Jones, JJ., concurring)).

127. *Burch v. Barker*, 861 F.2d 1149, 1157 (9th Cir. 1988).

128. *See* *Riseman v. Sch. Comm. of Quincy*, 439 F.2d 148 (1st Cir. 1971); *Baughman v. Freienmuth*, 478 F.2d 1345 (4th Cir. 1973); *Nitzberg v. Parks*, 525 F.2d 378 (4th Cir. 1975); *Fujishima v. Bd. of Educ.*, 460 F.2d 1355 (7th Cir. 1972).

Even the courts that find some pre-approval regime to be permissible have found schools' procedural safeguards lacking. In cases involving school policies requiring permission to distribute printed materials on school grounds, the Second and Eighth Circuits each concluded that, while pre-approval was not categorically foreclosed by the First Amendment, the schools' policies lacked adequate constraints on the reviewers' discretion.<sup>129</sup> In both cases, the courts took pains to emphasize that the First Amendment would tolerate some degree of pre-approval only at the K-12 level and only when the distribution took place on campus.<sup>130</sup> In *Bystrom v. Fridley High School*, the Eighth Circuit caveated:

The school district asserts no authority to govern or punish what students say, write, or publish to each other or to the public at any location outside the school buildings and grounds. If school authorities were to claim such a power, quite different issues would be raised, and the burden of the authorities to justify their policy under the First Amendment would be much greater, perhaps even insurmountable. . . . Specifically, what we say in this opinion does not apply to college or other post-secondary campuses and students. Few college students are minors, and colleges are traditionally places of virtually unlimited free expression.<sup>131</sup>

None of these K-12 prior restraint cases, even the ones most tolerant of administrative pre-approval, can be read as support for a college-level restraint on speaking to the news media during all hours of the day.

At the college level, while there is no indication that anyone has ever challenged a prohibition against speaking with the news media, other types of prior restraints are regularly declared unconstitutional, most often in the context of restrictions on using campus property for expressive activity. The breadth of the prior-restraint doctrine is best

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129. See *Eisner v. Stamford Bd. of Educ.*, 440 F.2d 803 (2d Cir. 1971); *Bystrom v. Fridley High Sch.*, 822 F.2d 747 (8th Cir. 1987). By contrast, the Tenth Circuit upheld a school's policy of pre-approving expressive materials specifically because it contained procedural safeguards—including the opportunity to appeal an initial denial and substantive constraints on school authorities' discretion to censor—which the court deemed to be essential prerequisites to make a pre-approval policy constitutional. *Taylor v. Roswell Indep. Sch. Dist.*, 713 F.3d 25, 43–44 (10th Cir. 2013).

130. In *Eisner*, 440 F.2d at 808, the Second Circuit stated that a school's policy requiring an administrator to approve literature before students disseminate it was permissible because it did not carry any punitive consequences for disobedience and did not extend to off-campus expression. The court added in a footnote:

Because of such factors as the larger size of university campuses, and the tendency of students to spend a greater portion of their time there, the inhibitive effect of a similar policy statement might be greater on the campus of an institution of higher education than on the premises of a secondary school and the justifications for such a policy might be less compelling in view of the greater maturity of the students there.

See *id.* at 808 n.5.

131. *Bystrom*, 822 F.2d at 750 (citations omitted).

illustrated by the Supreme Court's decision in *Healy v. James*, which found that even a regulation that has only a secondary effect of burdening student speech can still constitute an unlawful prior restraint if its effect is to cut off the speaker from opportunities to be heard.<sup>132</sup>

Applying prior-restraint doctrine, federal courts have routinely invalidated restrictions that (1) require permits to use campus property for expressive gatherings<sup>133</sup> or to distribute literature,<sup>134</sup> (2) empower administrators to discretionarily reject guest speakers,<sup>135</sup> or (3) proscribe the use of offensive or hateful language.<sup>136</sup> These restraints typically flunk constitutional scrutiny either because they are overly broad—burdening all speech in an attempt to weed out the subset of speech that might realistically disrupt campus activities<sup>137</sup>—or because they fail to provide neutral and objective standards constraining the discretion of government decision-makers.<sup>138</sup> To be valid, permitting systems that enable college authorities to decide who is allowed to speak must have both substantive safeguards (setting boundaries that foreclose discriminatory enforcement) as well as procedural safe-

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132. *Healy v. James*, 408 U.S. 169, 184 (1972) (“It is to be remembered that the effect of the College’s denial of recognition was a form of prior restraint, denying to petitioners’ organization the range of associational activities.”). In *Healy*, the defendant college’s act of denying official recognition to a leftist student group was found to burden speech because, without college recognition, the group’s members could not use campus meeting facilities or bulletin boards. *See id.* at 176.
133. *See, e.g.*, *Univ. of Cincinnati Chapter of Young Ams. for Liberty v. Williams*, No. 1:12-CV-155, 2012 WL 2160969 (S.D. Ohio June 12, 2012); *Pro-Life Cougars v. Univ. of Houston*, 259 F. Supp. 2d 575 (S.D. Tex. 2003).
134. *See Brubaker v. Moelchert*, 405 F. Supp. 837 (W.D.N.C. 1975).
135. *See, e.g.*, *McGlone v. Bell*, 681 F.3d 718 (6th Cir. 2012); *Smith v. Univ. of Tenn.*, 300 F. Supp. 777 (E.D. Tenn. 1969); *Stacy v. Williams*, 306 F. Supp. 963 (N.D. Miss. 1969); *Snyder v. Bd. of Trs. of Univ. of Ill.*, 286 F. Supp. 927 (N.D. Ill. 1968).
136. *See supra* note 95 and accompanying text; *see also Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357, 369–70 (M.D. Pa. 2003) (applying *Tinker* and concluding that university speech code was unconstitutionally overbroad where it required students to communicate “in a manner that does not provoke, harass, intimidate, or harm another” and to refrain from “acts of intolerance”).
137. *See Doe v. Univ. of Mich.*, 721 F. Supp. 852, 856 (E.D. Mich. 1989) (finding campus speech code unconstitutionally broad because it proscribed speech “stigmatizing or victimizing” people based on membership in a protected category, which the university interpreted to permit punishment even of harmless classroom discussions).
138. *See Pro-Life Cougars*, 259 F. Supp. 2d at 583 (finding that application process to use campus property “lacks the procedural safeguards necessary to survive a constitutional challenge” because it is “devoid of any objective guidelines or articulated standards” for determining whose speech qualifies as “potentially disruptive”); *Stacy*, 306 F. Supp. at 973 (“The crux of a valid regulation must, in objective language, preclude only that speech subject to being forbidden under the doctrine of clear and present danger.”); *see also Snyder*, 286 F. Supp. at 934–36 (holding that regulation on speakers’ use of campus facilities was impermissibly vague because it enabled campus authorities to exclude speakers based on membership in organizations deemed to be “subversive” or “un-American”).

guards, including a reasonable time for responding to a request and a prompt opportunity to appeal a denial.<sup>139</sup>

### C. The First Amendment (Sometimes) Works at Work

Just as in public schools, the First Amendment applies in the public workplace, and just as in public schools, courts have fashioned exceptions allowing workplace authority figures to restrict speech that would normally be beyond the government's regulatory reach.

In *Pickering v. Board of Education*, the Supreme Court recognized that resolving employee-speech cases required reconciling the competing interests, including the government's interest in the efficient delivery of services, employees' interest in sharing the benefit of their knowledge, and the electorate's interests in honest and effective government that is facilitated by unimpeded access to information.<sup>140</sup> In *Pickering*, the Court sided with a schoolteacher who was fired over a letter-to-the-editor article he wrote for the local newspaper. The letter criticized the district's funding priorities, remarking that school employees would have an informed perspective beneficial to the public discourse.<sup>141</sup>

The Court applied a limiting gloss on *Pickering* in *Connick v. Myers*.<sup>142</sup> In *Connick*, a state prosecutor aggrieved by a pending reassignment decided to circulate a survey within the office soliciting feedback about working conditions and morale.<sup>143</sup> When her supervisor found out she had distributed the survey, he fired her.<sup>144</sup> The Supreme Court concluded that the survey was primarily motivated by dissatisfaction with workplace conditions rather than matters of genuine public concern, and thus was entitled only to "limited" First Amendment regard.<sup>145</sup> As a result of *Connick*, "public concern" has become a reviewing court's threshold inquiry before the duty to balance the parties' interests under *Pickering* even comes into play.

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139. See *Stacy*, 306 F. Supp. at 973 (explaining that, to make a permitting system constitutional, the decision-maker must "act upon a request within ample time after submission, and prompt review of his decision must be afforded"); *Snyder*, 286 F. Supp. at 936 (finding campus speaker regulation deficient because it provided no opportunity for appeal short of a constitutional lawsuit, making the censor's decision effectively final).

140. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568-72 (1968) (holding a teacher's dismissal for writing a letter on issues of public importance cannot be upheld and concluding that limiting teachers' opportunities to contribute to public debate is not significantly greater than limiting a similar contribution from the general public).

141. *Id.* at 572-73.

142. *Connick v. Myers*, 461 U.S. 138, 142 (1983).

143. *Id.* at 140-41.

144. *Id.* at 141.

145. *Id.* at 154.

The Court narrowed *Pickering*'s scope in *Garcetti v. Ceballos*.<sup>146</sup> In *Garcetti*, a deputy prosecutor was disciplined for deviating from his supervisor's orders and writing a memo questioning the validity of a search warrant that was essential to a case the district attorney's office was prosecuting.<sup>147</sup> In a 5–4 ruling, the Court found the speech to be unprotected because it was prepared “pursuant to Ceballos’ official duties.”<sup>148</sup> Because the memo was in effect the government’s own speech, not the deputy prosecutor’s speech as an individual, there was no need to conduct a *Pickering* balancing of interests.<sup>149</sup>

While initially received as a grave setback for workers’ rights,<sup>150</sup> *Garcetti*'s scope was significantly curtailed by the Supreme Court’s ruling in a subsequent workplace-speech case, *Lane v. Franks*.<sup>151</sup> In *Lane*, a former college administrator brought a First Amendment retaliation claim alleging he was fired for giving incriminating testimony implicating his superiors in a scheme to put a state politician on the college payroll in a no-work sinecure. The justices held that the speech was entitled to First Amendment protection: “Truthful testimony under oath by a public employee outside the scope of his ordinary job duties is speech as a citizen for First Amendment purposes. That is so even when the testimony relates to his public employment or concerns information learned during that employment.”<sup>152</sup>

The Court distinguished its holding from *Garcetti*, noting that “*Garcetti* said nothing about speech that simply relates to public employment or concerns information learned in the course of public employment.”<sup>153</sup> The majority framed the “critical” question as “whether the speech at issue is itself ordinarily within the scope of an employee’s duties, not whether it merely concerns those duties.”<sup>154</sup> In other words, a public employee does not lose First Amendment protection merely by speaking about work or by sharing information learned in the course of work; rather, for *Garcetti* to apply, the speech itself must be a work assignment.<sup>155</sup>

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146. *Garcetti v. Ceballos*, 547 U.S. 410, 424 (2006).

147. *Id.* at 415.

148. *Id.* at 421.

149. *Id.* at 421–22.

150. *See, e.g.*, Helen Norton, *Imaginary Threats to Government’s Expressive Interests*, 61 CASE W. RES. L. REV. 1265, 1267 (2011) (decrying “deeply disturbing” prospect that government can deprive employees of free-speech protection merely by categorizing the employee’s speech as the employer’s own).

151. *Lane v. Franks*, 573 U.S. 228 (2014).

152. *Id.* at 238.

153. *Id.* at 239.

154. *Id.* at 240.

155. *See id.* (“[T]he mere fact that a citizen’s speech concerns information acquired by virtue of his public employment does not transform that speech into employee—rather than citizen—speech.”).

Once it is established that the employee's speech falls within the bounds of the First Amendment, prevailing on a retaliation claim then requires proving a causal connection between the speech and some deprivation at the hands of the employer. Early First Amendment cases declined to recognize the loss of a government job as an actionable deprivation because employees have no vested entitlement to indefinite employment.<sup>156</sup> That changed with the Supreme Court's 1967 decision in *Keyishian v. Board of Regents*, which forbade the state of New York from insisting on an anti-Communist loyalty oath as a condition of university employment.<sup>157</sup> In *Keyishian*, the Court abandoned the distinction between the loss of an entitlement versus the loss of a discretionary privilege, holding that any deprivation meant to deter speech can support a retaliation claim.<sup>158</sup>

The *Keyishian* principle is relevant to athletes' ability to pursue First Amendment claims against their schools. Courts at times have deferred to disciplinary decisions involving athletes because there is no entitlement to participate in extracurricular activities.<sup>159</sup> But while the loss of a vested property interest may be necessary to sustain a claim for deprivation of procedural due process,<sup>160</sup> that is not a prerequisite for a First Amendment case. Any punishment or deprivation that is intended to chill speech and that would intimidate a speaker of reasonable fortitude into silence is sufficient injury to support a First Amendment claim.<sup>161</sup>

While their analyses diverge, the *Pickering*, *Connick*, *Garcetti*, and *Lane* cases share one essential trait: they involve challenges brought

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156. See *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892) (observing that a job applicant who claimed he was denied employment because of his political views "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman").

157. *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967).

158. *Id.* at 605-06.

159. See, e.g., *Johnson ex rel. S.J. v. Cache Cty. Sch. Dist.*, 323 F. Supp. 3d 1301, 1320 (D. Utah 2018) (concluding that school district has greater latitude to control cheerleaders' speech on social media because there is no constitutional entitlement to participate in cheerleading and participation can be made subject to reasonable restrictions); *Cleveland v. Blount Cty. Sch. Dist.*, No. 3:05-CV-380, 2008 WL 250403, at \*4 (E.D. Tenn. Jan. 28, 2008) (finding that students challenging decision to disband cheer squad because of "suggestive" dance routines had diminished First Amendment rights because there is no right to participate in extracurricular activities).

160. See *Bd. of Regents v. Roth*, 408 U.S. 564, 578 (1972) (finding no procedural due process claim for the loss of an opportunity to be re-hired on a one-year teaching contract without a hearing).

161. See *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 500 (4th Cir. 2005) ("[F]or purposes of a First Amendment retaliation claim . . . a plaintiff suffers adverse action if the defendant's allegedly retaliatory conduct would likely deter 'a person of ordinary firmness' from the exercise of First Amendment rights." (citations omitted)).

by individual employees disciplined by their employers for what they said or wrote. When the case instead involves a pre-enforcement challenge to categorical prohibitions on speech restraining the entire workforce, different legal standards will apply and the government's burden of justification will become nearly insurmountable. This is the analysis that will apply if athletes facially challenge regulations prohibiting unauthorized interactions with the press.

#### IV. UNTYING THE GAGS: WORKPLACE INTERVIEW BANS STRUCK DOWN

##### A. Employees Undefeated in Challenging Workplace Gags

The First Amendment has consistently been interpreted to forbid public employers from requiring employees to get supervisory approval before speaking to the news media. As far back as the 1940s, courts were striking down mandatory gatekeeping policies as unduly broad infringements on employees' free-speech rights. In one of the earliest known challenges, the New York Court of Appeals invalidated a municipal fire department rule providing that employees needed written approval from the chief before their names or images could appear in a newspaper or magazine.<sup>162</sup>

After the Supreme Court created the *Pickering* balancing test in 1968, lower courts regularly applied the test to strike down overly broad policies that unduly interfered with public employees' communications with the public and press.<sup>163</sup> For instance, the Fifth Circuit found that a Texas sheriff's department violated the First Amendment by enforcing a policy that restricted employees from making "unauthorized public statements" and forbid comments to journalists on any topic "that is or could be of a controversial nature."<sup>164</sup>

The Supreme Court did not confront a prior restraint on government employee speech until 1995, in the case of *United States v. Na-*

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162. *Kane v. Walsh*, 66 N.E.2d 53, 55 (N.Y. 1946) (finding the rule "so broad in scope and so rigid in terms as to be arbitrary and unreasonable").

163. *See Grady v. Blair*, 529 F. Supp. 370, 371 (N.D. Ill. 1981) (finding that the Chicago Fire Department's policy prohibiting unapproved interviews with the media, "whether on or off duty," about matters "pertaining to Department activities" was unconstitutionally vague and overbroad); *Steenrod v. Board of Engineers of Fire Dept.*, 87 Misc. 2d 977, 979 (N.Y. Sup. Ct. 1976) (applying *Pickering* and holding that city policy that forbade firefighters from discussing "for publication, matters concerning the department" without supervisory approval was invalid because it could "stifl[e] what may be just criticism by a public servant concerning a matter of public concern"); *see also Hall v. Mayor of Pennsauken*, 422 A.2d 797 (N.J. Super. Ct. App. Div. 1980) (holding that policy forbidding police from criticizing superior officers was invalid because it prohibited even speech related to matters of public concern that did not adversely affect the functioning of the department).

164. *Barrett v. Thomas*, 649 F.2d 1193 (5th Cir. 1981).

*tional Treasury Employees Union* (known as the “NTEU” case).<sup>165</sup> In *NTEU*, the Court applied rigorous scrutiny to invalidate an ethics statute forbidding federal employees from accepting compensation for speeches or articles. The statute was intended to deter special interests from buying influence with federal policymakers. However, the Court found that the prohibition, which applied even to the lowest-ranking ministerial employee, was not narrowly tailored to advance Congress’s anti-corruption objective. Specifically, the Court stated: “Deferring to the Government’s speculation about the pernicious effects of thousands of articles and speeches yet to be written or delivered would encroach unacceptably on the First Amendment’s protections.”<sup>166</sup>

The justices held that a rule discouraging an entire class of employees from speaking demands an especially weighty justification, beyond what *Pickering* requires to justify disciplining a single employee for speech disrupting the workplace:

[U]nlike an adverse action taken in response to actual speech, this ban chills potential speech before it happens. For these reasons, the Government’s burden is greater with respect to this statutory restriction on expression than with respect to an isolated disciplinary action. The Government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression’s ‘necessary impact on the actual operation’ of the Government.<sup>167</sup>

Under the *NTEU* test, where the government singles out expressive activity for regulation to address anticipated harms, the government must “demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.”<sup>168</sup>

Since *NTEU*, lower courts have consistently found mandatory-approval policies to be unlawfully broad. In an oft-cited case applying *NTEU*, *Harman v. City of New York*, the Second Circuit found that New York City’s health department could not lawfully require employees to refrain from answering questions from journalists and refer all media inquiries to a public-relations officer.<sup>169</sup> The court noted that a categorical restraint on employee speech implicated not just the speakers’ rights but also the public’s right to receive information about the performance of government functions.<sup>170</sup> Just the delay inherent in seeking permission, the court observed, could be tantamount to a denial: “By delaying the review process, the employer has the

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165. *United States v. Nat’l Treasury Emps. Union*, 513 U.S. 454 (1995).

166. *Id.* at 475 n.21.

167. *Id.* at 468 (citations omitted).

168. *Id.* at 475 (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 624 (1994)).

169. *Harman v. City of New York*, 140 F.3d 111, 124 (2d Cir. 1998).

170. *Id.* at 119.

power to destroy the immediacy of the comment on agency affairs, and thus, in many cases, its newsworthiness.”<sup>171</sup> The justifications proffered by the city—guarding against leaks of confidential patient information, prepping employees with adequate information before speaking, and avoiding disclosure of information disruptive to agency functions—were found insufficiently compelling to justify such a broad restraint.<sup>172</sup>

Subsequently, the Third, Seventh, and Ninth Circuits have all cited *Harman* in striking down agency policies that require pre-clearance before discussing work-related matters with the press or public.<sup>173</sup> Likewise, numerous district courts have followed the *NTEU* and *Harman* rationale in finding agency prohibitions on unauthorized interviews to be unlawfully broad, restraining more speech than is necessary to accomplish the government’s legitimate interests.<sup>174</sup> In a

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171. *Id.* at 120.

172. *Id.* at 123–24.

173. *See, e.g.*, *Swartzwelder v. McNeilly*, 297 F.3d 228, 235–40 (3d Cir. 2002) (finding that a police department’s policy requiring pre-approval before officers may give expert testimony was a prior restraint and insufficiently well-tailored to accomplish the proffered objective of avoiding public confusion about the police department’s official position); *Milwaukee Police Ass’n v. Jones*, 192 F.3d 742, 750 (7th Cir. 1999) (determining that police department policy prohibiting employees from discussing the substance of formal grievance filings with any outsiders was an indefensibly broad prior restraint); *Moonin v. Tice*, 868 F.3d 853, 859 (9th Cir. 2017) (finding state highway patrol directive that forbade employees from discussing the agency’s K-9 program with anyone outside the agency to be unconstitutionally overbroad); *see also* *Liverman v. City of St. Petersburg*, 844 F.3d 400, 404–05 (4th Cir. 2016) (applying *NTEU* to invalidate police department’s prohibition against “negative comments” under which officers were disciplined for Facebook posts questioning the department’s promotion policies).

174. *See* *Lauretano v. Spada*, 339 F. Supp. 2d 391, 414–15, 420 (D. Conn. 2004) (finding that law enforcement agency violated employees’ rights by prohibiting officers from making “official comments relative to department policy” to members of the press or public without approval); *Int’l Ass’n of Firefighters Local 3233 v. Frenchtown Charter Twp.*, 246 F. Supp. 2d 734, 736, 744 (E.D. Mich. 2003) (declaring municipal ordinance requiring firefighters to refer all media inquiries to city fire chief to be unconstitutionally broad); *Kessler v. City of Providence*, 167 F. Supp. 2d 482, 483 (D.R.I. 2001) (striking down police department’s policy that officers “shall not talk for publication, be interviewed, make public speeches on police business or impart information relating to the official business of the department unless authorized by some proper authority”); *Wagner v. City of Holyoke*, 100 F. Supp. 2d 78, 89–90 (D. Mass. 2000) (striking down police department’s rule providing that only police chief or chief’s designee could release information to the media about department matters); *Providence Firefighters Local 799 v. City of Providence*, 26 F. Supp. 2d 350, 352 (D.R.I. 1998) (finding that fire chief’s order telling employees that “only the Chief of Department has the authority to discuss for publication, matters concerning the Department” was an unconstitutionally broad restraint); *Davis v. N.J. Dep’t of Law & Pub. Safety*, 742 A.2d 619, 622–23 (N.J. Super. Ct. Law Div. 1999) (invalidating regulation forbidding officers of a law enforcement agency from disclosing “any information not generally available to members of the public which such member receives or acquires in the course of

noteworthy case in the setting of college sports, the Seventh Circuit struck down a University of Illinois policy forbidding all faculty and students from communicating with prospective recruits without the athletic director's approval, finding it to be an unjustifiably broad prior restraint.<sup>175</sup>

In addition to being overbroad, policies restraining public employees from speaking to the media are also vulnerable to constitutional challenges because they fail to incorporate standards to prevent decision-makers from withholding permission to speak on impermissible grounds. Courts have repeatedly declared public employers' pre-approval policies to be unconstitutional when they lack rigorous procedural safeguards.<sup>176</sup> In one such case involving a police department's rule forbidding officers from disclosing "any information concerning the business of the department . . . unless authorized by some proper authority," a federal district judge found the rule infirm because it "sets no standards to guide the decision-making process, does not require any explanation for a denial of permission to speak, and promises no time frame for such grant or denial."<sup>177</sup>

In short, if college athletes have First Amendment rights comparable to those of public employees, there is no support for the proposition that a government agency can enforce a categorical policy requiring approval before speaking to the press.

## B. The Dubious "Employee Status" of Athletes

Whether colleges are aware of it or not, the body of precedent that forbids restricting public employees from speaking to the news media

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and by reason of official duty" without supervisory approval, and requiring employees to treat "any matters or information" pertaining to the agency as confidential).

175. See *Crue v. Aiken*, 370 F.3d 668, 680 (7th Cir. 2004) (finding that university's policy restraining students and faculty from communicating with prospective athletic recruits was an excessively broad infringement on speech not adequately justified by its purported motivation of adhering to NCAA recruiting protocols).

176. See *Swartzwelder*, 297 F.3d at 240 (finding that a policy constraining Pittsburgh police officers from providing any "opinion or advice" about any civil or criminal matter without approval was "so open-ended that it creates a danger of improper application"); *Kessler*, 167 F. Supp. 2d at 488-90 (invalidating police department's wide-ranging prohibition requiring approval before sharing any information with the public as an impermissible and overly-broad prior restraint, and also for lack of standards to limit the decision-maker's discretion); *Spain v. City of Mansfield*, 915 F. Supp. 919, 922-23 (N.D. Ohio 1996) (declaring that fire department's policy, which stated that officers "may not publicly communicate on matters concerning Mansfield Fire Department rules, duties, policies, procedures and practices without the prior written approval," was unconstitutional because it failed to provide "narrow, objective and definite standards" governing whether employees would be permitted to speak (quoting *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757 (1988))).

177. *Kessler*, 167 F. Supp. 2d at 483, 489.

is overwhelming. However, it is not certain that colleges have the same level of control over football and basketball players as they have over ordinary employees. There is little legal basis for treating athletes as employees, and in fact, colleges have fought for decades to characterize athletes as “students” rather than “employees” because employee status would be economically disadvantageous.

Universities have widely benefited from disclaiming any employer-employee relationship with their athletes, enabling them to avoid responsibility for paying workers’ compensation benefits when athletes are injured on the field<sup>178</sup> and evade claims for tortious injuries when athletes cause harm.<sup>179</sup> In *Berger v. NCAA*, the federal courts directly confronted whether college athletes qualify as “employees” for purposes of the wage-and-hour protections of the Fair Labor Standards Act (FLSA) and concluded that the answer was “no.”<sup>180</sup> The NCAA’s attorneys argued forcefully that playing intercollegiate sports was neither legally nor functionally the equivalent of “employment.”<sup>181</sup> The court relied in part on authoritative guidance from the U.S. Department of Labor, which has taken the position that extracurricular activities, specifically including sports, are not “employment” for purposes of FLSA enforcement because they are undertaken primarily for the educational benefit of the individual participant.<sup>182</sup>

In the analogous context of private-college athletics, universities have fiercely resisted classifying football players as “employees,” which would entitle them to organize and take advantage of the other worker-rights’ protections of the National Labor Relations Act (NLRA). The issue came to a head when advocates for athletes’ rights petitioned the National Labor Relations Board (NLRB) in 2014 for recognition as the bargaining representative of scholarship football play-

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178. *See Rensing v. Ind. State Univ. Bd. of Trs.*, 444 N.E.2d 1170, 1174 (Ind. 1983) (finding that athlete gravely injured during football scrimmage, which left him a quadriplegic, was not an “employee” for purposes of state benefits because his university compensation package for playing football was in the form of financial aid and not salary).

179. *See Kavanagh v. Trs. of Bos. Univ.*, 795 N.E.2d 1170, 1175 (Mass. 2003) (declining to hold university accountable for injuries caused when basketball player punched opponent during game because receipt of athletic scholarship and benefits “does not transform the relationship between the academic institution and the student into any form of employment relationship”); *Korellas v. Ohio State Univ.*, 2004-Ohio-3817, at \*2 (concluding that a driver attacked by an Ohio State athlete while making food delivery could not recover against university on a “negligent hiring” theory because athlete did not qualify as an employee).

180. *Berger v. NCAA*, 843 F.3d 285 (7th Cir. 2016).

181. *See* Brief for Appellees, *Berger v. NCAA*, 843 F.3d 285 (7th Cir. 2016) (No. 16-1558), 2016 WL 3438089.

182. *See* U.S. DEP’T OF LABOR, FIELD OPERATIONS HANDBOOK, §§ 10b03(e), 10b24(a) (2017), [https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/FOH\\_Ch10.pdf](https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/FOH_Ch10.pdf) [<https://perma.unl.edu/Y9GJ-KSJR>].

ers at Northwestern University.<sup>183</sup> The NLRA has been enforced against private universities, including for the benefit of student employees,<sup>184</sup> but the NLRB had never confronted whether athletes could be regarded as “employees.”<sup>185</sup>

In deciding whether a petitioner qualifies for NLRA protection as a statutory “employee,” the Board typically has looked to common law agency principles, focusing on whether work is performed for an employer in exchange for compensation and whether the employer has control over the details of how the work is performed.<sup>186</sup> In response to the athletes’ petition, Northwestern University forcefully argued that the athlete-college relationship is “a far cry from the employer-employee economic relationship” because the relationship is primarily an academic one for the benefit of the student.<sup>187</sup>

In March 2014, the regional general counsel for the NLRB issued an interpretation concluding that scholarship athletes in the major revenue-producing sports at the highest level of NCAA competition (Division I schools, including Northwestern University) met the statutory prerequisites to be treated as university employees.<sup>188</sup> Significantly, the fact that athletic departments tightly control interaction between athletes and the media was cited as a factor weighing in favor of “employee” status.<sup>189</sup>

The decision stunned the college sports world.<sup>190</sup> The NCAA and its member universities vehemently opposed characterizing athletes

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183. See Marc Edelman, *The Future of College Athlete Players Unions: Lessons Learned from Northwestern University and Potential Next Steps in the College Athletes’ Rights Movement*, 38 CARDOZO L. REV. 1627, 1637–38 (2017) (describing athletes’ petition to NLRB and university’s response).

184. The NLRB first asserted jurisdiction over private higher-education institutions in the case of *Cornell Univ.*, 183 N.L.R.B. 329 (1970), and subsequently has revisited the employee status of graduate-student researchers and teaching assistants many times over, shifting interpretations as the membership and ideology of the Board changes. The Board’s most recent statement of the law, in *Trs. of Columbia Univ. in the City of N.Y.*, 364 N.L.R.B. No. 90 (Aug. 23, 2016), finds that student research assistants are employees with NLRA-protected bargaining rights, overturning its previous interpretation in *Brown Univ.*, 342 N.L.R.B. 483 (2004).

185. See *Nw. Univ.*, 362 N.L.R.B. 1350, 1352 (2015) (“[T]his case involves novel and unique circumstances. The Board has never before been asked to assert jurisdiction in a case involving college football players, or college athletes of any kind.”).

186. See *id.* at 1362–63 (explaining application of common law agency test).

187. Edelman, *supra* note 183, at 1637.

188. *Nw. Univ.*, Case No. 13-RC-151359 (N.L.R.B. Mar. 26, 2014), <https://www.nlr.gov/case/13-RC-121359> [<https://perma.unl.edu/3YWC-3MU8>] (Decision and Direction of Election).

189. See Edelman, *supra* note 183, at 1638–39 (citing Region 13 counsel’s observation that “Northwestern University coaches also determined whether the football players could seek outside employment, if the players were allowed to speak with the media, and what content the players could post on the Internet”).

190. See Ned Resnikoff, *Northwestern University Fights Back Against NCAA Football Unionization*, MSNBC (Apr. 9, 2014, 3:47 PM), <http://www.msnbc.com/msnbc-col>

as employees, pointing to all of the ways the athlete-university relationship is unlike standard employment.<sup>191</sup> Turning student-athletes into employees, the NCAA insisted, “undermines the purpose of college: an education.”<sup>192</sup>

On appeal, the NLRB decided not to make a decision. The Board invoked its discretion to decline jurisdiction in cases where federal intervention would not advance the worker-rights objectives of the Act.<sup>193</sup> The Board expressed concern that a decision in favor of the Northwestern athletes could destabilize competition by producing two unequal sets of rules, one for private universities under NLRB jurisdiction and another for public universities.<sup>194</sup>

The NLRB’s scrutiny of Northwestern football unexpectedly produced some guidance favorable to athletes at private institutions, directly addressing their right to speak freely to the news media. The Board has long interpreted the NLRA to prohibit private-sector employers from enforcing blanket prohibitions on employee speech to the press and public.<sup>195</sup> The Board regards taking workplace concerns to an external audience to be a step in the “organizing” process that the

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lege-fights-ncaa-unionization [https://perma.unl.edu/SHV5-JGY9] (terming NLRB’s interpretation “a considerable upset for both Northwestern University and the NCAA” that, if upheld, “could have reverberations throughout the entire NCAA”).

191. See Dan Wolken, *NCAA President Mark Emmert Decries College Union Effort*, USA TODAY (Apr. 6, 2014, 1:02 PM), <https://www.usatoday.com/story/sports/college/2014/04/06/mark-emmert-ncaa-structure-presidents-press-conference-unionization-labor/7382025/> [https://perma.unl.edu/UD55-DSQW] (quoting NCAA president’s remarks at press conference that unionization would be “grossly inappropriate” and “would blow up everything about the collegiate model of athletics”).
192. See Tom Farrey, *Kain Colter Starts Union Movement*, ESPN (Jan. 28, 2014), [https://www.espn.com/espn/otl/story/\\_id/10363430/outside-lines-northwestern-wildcats-football-players-trying-join-labor-union](https://www.espn.com/espn/otl/story/_id/10363430/outside-lines-northwestern-wildcats-football-players-trying-join-labor-union) [https://perma.unl.edu/QVM2-AJQR] (quoting statement from NCAA Chief Legal Officer, Donald Remy, in response to *Northwestern* decision).
193. *Nw. Univ.*, 362 N.L.R.B. 1350 (2015).
194. See *id.* at 1352 (“[I]t would not promote stability in labor relations to assert jurisdiction in this case.”).
195. See *Pleasant Travel Servs., Inc.*, 2010 WL 3982203 (N.L.R.B. Sept. 28, 2010) (finding that resort hotel violated employees’ rights by enforcing regulation stating: “At no time should any employee, manager, or director of the Resort engage in communication either verbally or in writing, with a member of the news media, without prior approval and direction from either the Human Resources Director or the General Manager.”); *Crowne Plaza Hotel*, 352 N.L.R.B. 382, 385–86 (2008) (finding that an employer’s policy forbidding unauthorized employees from speaking with the media about any incident “that generates significant public interest or press inquiries” was unlawfully broad), *abrogated on other grounds by New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010).

NLRA was enacted to protect.<sup>196</sup> But until recent years, the Board had never been asked to apply that line of precedent to college sports.

In August 2015, a labor-rights lawyer filed a complaint with the NLRB alleging that Northwestern's restrictions on the speech of football players violated the NLRA. While the complaint was pending, Northwestern substantially rewrote its handbook to relax restrictive policies on athletes' speech.<sup>197</sup> The Board's associate general counsel responded to the complaint in a September 2016 Advice Memorandum taking note of the substantial revisions and identifying regulations removed from the handbook that would have been regarded as unfair labor practices.<sup>198</sup> Practices identified as unlawful included prohibiting interviews with the press without approval from a public relations officer, and directing students and employees to say only positive things to the media and avoid negative comments.<sup>199</sup> As one commentator explained, excessive gatekeeping over athletes' communications with the media violates federal labor law at NLRB-regulated universities because it gives the university veto power over speech "for the mutual aid and protection of the student-athlete and his teammates," such as exposing unsafe practice conditions.<sup>200</sup> Because Northwestern largely rewrote its past unlawful policies (for instance, by making consultation with a sports-information officer an optional service and not

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196. *See, e.g.*, Phillips 66, 2014 NLRB LEXIS 921, \*58 (Nov. 25, 2014) (finding that oil refinery violated the NLRA by enforcing overly restrictive policy stating that, if employees were contacted by the media, "no information exchange is permitted concerning [company] operations" and that it was "against company policy for anyone but an authorized company spokespersons [sic] to speak to the news media"), *rev'd on other grounds*, 369 N.L.R.B. No. 13 (Jan. 31, 2020); Portola Packaging, Inc., 361 N.L.R.B. 1316 (2012) (ordering employer to rescind unlawful provisions in employee handbook stating that employees "should not provide any information regarding the Company to the media" and that the release of any documents to the media must be approved by the company's chief financial officer), *rev'd on other grounds*, 361 N.L.R.B. 1316 (2014).

197. Advice Memorandum from Barry J. Kearney, Assoc. Gen. Counsel, Nat'l Labor Relations Bd., to Peter Sung Ohr, Reg'l Dir. of Region 13 (Sept. 22, 2016) [hereinafter Advice Memo].

198. *Id.*; *see also* Lester Munson, *Free to Tweet: Northwestern's Restrictions on Football Players Ruled Unlawful*, ESPN (Oct. 10, 2016), [https://www.espn.com/espn/otl/story/\\_id/17765516/nlr-rules-northwestern-restrictions-unlawful](https://www.espn.com/espn/otl/story/_id/17765516/nlr-rules-northwestern-restrictions-unlawful) [<https://perma.unl.edu/33LQ-QH4L>] (reporting the NLRB's decision in regards to Northwestern's unlawful restrictions).

199. Advice Memo, *supra* note 197, at 5.

200. *See* Roger M. Groves, *Memorandum from Student-Athletes to Schools: My Social Media Posts Regarding My Coaches or My Causes Are Protected Speech—How the NLRB Is Restructuring Rights of Student-Athletes in Private Institutions*, 78 LA. L. REV. 69, 120 (2017) ("[I]f a student-athlete at a private school chose to speak to the media directly about working conditions, practice times, coach interruptions of classes, dangerous practice conditions, or failure to follow concussion protocol, for example, [the NLRA] protects the student-athlete's right to do so.").

mandatory), the regional NLRB counsel recommended taking no punitive action and closing the case.<sup>201</sup>

In sum, it would be quite difficult for university administrators to take the position, after decades of arguing otherwise, that they can control athletes' speech because athletes are the legal equivalent of employees. But even if a court were to find such equivalency, policies restricting employees from having unapproved conversations about their work—whether in the public or private sector—have long been regarded as unlawful. Hence, if university lawyers seek to justify enforcing a media-gatekeeping policy that requires approval before discussing “work-related” matters with the media, they will have to look outside the employment sector for their rationale.

## V. THE CONSTITUTIONAL NETHERWORLD OF SPORTS

Schools' and colleges' interests in enforcing conformity and preserving a favorable public image have always created friction with athletes' interests in freedom of expression. Even so, student-athletes have prevailed on First Amendment claims where courts recognized their speech as societally valuable and where the speech did not cross the line into defiant behavior.

In the context of sports, courts afford some degree of heightened deference to school and college authorities, allowing them to punish speech even if the only disruption is to harmony within the locker room. The most prominent defeat for athletes came in the Sixth Circuit's *Lowery v. Euverard*, involving a high school football team's revolt against a coach many players found unbearable to play for.<sup>202</sup> In *Lowery*, students at a Tennessee high school circulated a petition seeking the removal of their head football coach, alleging that he used degrading and humiliating tactics and violated state regulations with an overly demanding conditioning program.<sup>203</sup> When the coach tried to question players about the petition, four of them walked out of the interrogation and were removed from the team.

The Sixth Circuit found no constitutional violation, emphasizing the importance of obedience to authority in the setting of scholastic sports where individuals must sacrifice some individual freedom for the collective goal of winning games.<sup>204</sup> Analogizing the football field to the workplace, the court emphasized that students voluntarily surrender some autonomy as part of the bargain when they join the team.<sup>205</sup>

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201. Advice Memo, *supra* note 197, at 5.

202. *Lowery v. Euverard*, 497 F.3d 584, 596 (6th Cir. 2007).

203. *Id.* at 585.

204. *Id.* at 594–96.

205. *Id.* at 596–97. A concurring judge agreed that damages were unwarranted, but broke with the majority's reasoning that athletes have fewer free-speech protec-

As in *Lowery*, courts have readily deferred to schools' punishment of athletes and cheerleaders where the students' speech was regarded as primarily a personal gripe about the coach<sup>206</sup> or was otherwise of minimal societal value.<sup>207</sup> Several of the cases have overtly recognized diminished constitutional protection in the context of competitive sports, noting that participation is voluntary and is not a core part of schools' educational offerings.<sup>208</sup>

Athletes' claims have fared far better when the speech takes the form of peaceful political protest or whistleblowing about improprieties within their own institutions. The Ninth and Tenth Circuits have sided with high school athletes who challenged punishment imposed for speaking out against abusive coaching techniques.<sup>209</sup> In a rare col-

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tions than rank-and-file students: "[A] student-athlete does not, as suggested by the lead opinion, enjoy fewer First Amendment rights under *Tinker* because of his or her choice to participate in high school athletics." *Id.* at 605 (Gilman, J., concurring).

206. See *Wildman ex rel. Wildman v. Marshalltown Sch. Dist.*, 249 F.3d 768, 769–70 (8th Cir. 2001) (finding no First Amendment violation when an Iowa high school disciplined a basketball player for distributing a letter to her teammates that used profanity to criticize their coach and stir up dissension against him; the letter was primarily motivated by the player's grudge over being passed over for the varsity squad); *Marcum v. Dahl*, 658 F.2d 731, 733–34 (10th Cir. 1981) (dismissing First Amendment claims of college basketball players who lost their athletic scholarships after criticizing their head coach, both privately and in the news media, on the grounds that their complaints about perceived favoritism by the coaching staff were "not of general public concern" and "resulted in disharmony among the players and disrupted the effective administration of the basketball program").
207. See *Johnson ex rel. S.J. v. Cache Cty. Sch. Dist.*, 323 F. Supp. 3d 1301, 1320 (D. Utah 2018) (applying *Lowery* and dismissing First Amendment claims by high school cheerleader removed from squad for profane speech on social media, finding that there is no entitlement to participate in cheerleading so participation can be subjected to conditions beyond those that could be enforced against rank-and-file students); *Green v. Sandy*, No. 5:10-CV-367-JMH, 2011 WL 4688639 (E.D. Ky. Oct. 3, 2011) (extending *Lowery* reasoning to the college level and finding no constitutional violation when a college soccer player was removed from the team after she and her father each wrote letters to the college administration complaining about how coaches treated her); *Cleveland v. Blount Cty. Sch. Dist.*, No. 3:05-CV-380, 2008 WL 250403, at \*4 (E.D. Tenn. Jan. 28, 2008) (applying *Lowery* to dismiss First Amendment claims by members of cheerleading team whose routines were censored as inappropriately sexually provocative for a young audience).
208. See *Stokey v. N. Canton Sch. Dist.*, No. 5:18-CV-1011, 2018 WL 2234953, at \*5 (N.D. Ohio May 15, 2018) (citing *Lowery* and finding that athletes have diminished free-speech protection because there is no constitutional entitlement to take part in extracurricular sports).
209. See *Pinard v. Clatskanie Sch. Dist.*, 6J, 467 F.3d 755, 760 n.5, 763–64 (9th Cir. 2006) (applying *Tinker* and finding that high school basketball players committed no punishable disruption by circulating a petition seeking the removal of their coach for "incessant yelling, profanity and abusive coaching tactics"); *Seamons v. Snow*, 84 F.3d 1226 (10th Cir. 1996) (ruling in favor of high school football player who was removed from the team after his coach demanded that he apologize for

lege-athlete whistleblowing case, a federal court in Kansas found in favor of college football players who boycotted a practice after complaining that black players were shortchanged on their athletic scholarships and getting no redress from their university.<sup>210</sup>

Overall, the takeaway from these cases is that the same First Amendment standards apply to athletes as to all other students, although close judgment calls will likely go in favor of school authorities in the athletic context because disobedient behavior is regarded as inherently more disruptive in a team sport.<sup>211</sup> Since none of the prior cases in the college or high-school sports context involved a categorical prior restraint, their usefulness in gauging the constitutionality of a media gatekeeping policy is limited.

One additional consideration that may weigh into assessing the legality of colleges' restrictive media policies is the parallel body of restrictions that colleges increasingly enforce on their athletes' personal use of social media. It is now commonplace for coaches or athletic departments to ban athletes from using particular social media platforms, or even all forms of social media.<sup>212</sup> The constitutionality of social media prohibitions has yet to be tested, and there is wide consensus in the legal field that the prohibitions are untenably broad.<sup>213</sup>

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reporting several teammates for beating him up in the locker room); *see also* Gonzalez *ex rel.* A.G. v. Burley High Sch., 404 F. Supp. 3d 1269 (D. Idaho 2019) (finding that sit-in by cheerleaders protesting coach's bullying and disregard for safety was protected speech and that even the loss of extracurricular participation was an actionably serious deprivation); Boyd v. Bd. of Dirs. of McGehee Sch. Dist. No. 17, 612 F. Supp. 86 (E.D. Ark. 1985) (finding that the First Amendment protected high school football players who walked out of a pep rally and refused to play in that evening's game in protest of the school's decision to deny the "homecoming queen" distinction to a black student who won the most votes).

210. Hysaw v. Washburn Univ. of Topeka, 690 F. Supp. 940, 946 (D. Kan. 1987).

211. In a thorough examination of athlete-speech cases, commentator Noel Johnson concluded that courts have drawn a line between unsuccessful challenges to the exercise of discretionary decision-making authority, which coaches must exercise to manage a team effectively, versus successful challenges to the exercise of "authority that the coach should not necessarily have," i.e., to treat players in a discriminatory or abusive manner. *See* Noel Johnson, *Tinker Takes the Field: Do Student Athletes Shed Their Constitutional Rights at the Locker Room Gate?*, 21 MARQ. SPORTS L. REV. 293, 311 (2010).

212. *See* Tehrim Umar, *Total Eclipse of the Tweet: How Social Media Restrictions on Student and Professional Athletes Affect Free Speech*, 22 JEFFREY S. MOORAD SPORTS L.J. 311, 331 (2015) (identifying major athletic programs where athletes are banned from using all social media or certain forbidden social applications).

213. *See. e.g., id.* at 343 (concluding that athletic departments' bans on using some or all social media platforms are unlikely to survive First Amendment challenge because they are not narrowly tailored and do not represent the least restrictive means of achieving the universities' legitimate objectives); Marcus Hauer, *The Constitutionality of Public University Bans of Student-Athlete Speech Through Social Media*, 37 VT. L. REV. 413, 422 (2012) (finding that broad prohibitions on college athletes' social media use will not survive analysis under *Tinker* because it is insufficient to show that an entire medium has the potential to produce some

Nevertheless, the fact that athletes may not be free to express concerns about their athletic programs—or about broader social or political issues—on Facebook, Twitter, or Instagram is a factor weighing against enforcement of prohibitions on interviewing. If athletes can neither speak to journalists without supervisory consent, nor use the alternative platform of social media, then an athlete has no unfiltered opportunity to share a message or exchange ideas with a public audience. The First Amendment disfavors restrictions on speech that cut the speaker off from all means of reaching the desired audience.<sup>214</sup>

Educational institutions may be convinced that they have a free hand to regulate their students' speech because, in contexts other than the First Amendment, courts have rebuffed constitutional claims by athletes premised on Due Process or the Fourth Amendment.<sup>215</sup> For instance, in *Vernonia School District 47J v. Acton*, the Supreme Court rejected constitutional claims brought on behalf of student-athletes challenging their Oregon school district's decision to require a signed waiver acceding to random drug testing as a condition of playing competitive sports.<sup>216</sup> While recognizing that drug tests are considered a search for Fourth Amendment purposes, the Supreme Court ruled that the drug-testing regime imposed no unreasonable intrusion on the students' privacy.<sup>217</sup> The Court observed that student-athletes already accept diminished privacy, including communal showering and locker facilities, by "going out for the team," and therefore, the intrusion of filling a urine cup in the privacy of a restroom is a rather minimal additional intrusion.<sup>218</sup> On the opposing side of the scale, the Court found two governmental interests that outweighed the sacrifice of students' privacy. First, drug use presented an imminent physical

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disruptive speech); Frank D. LoMonte, *Fouling the First Amendment: Why Colleges Can't, and Shouldn't, Control Student Athletes' Speech on Social Media*, 9 J. BUS. & TECH. L. 1, 48 (2014) (concluding that prohibitions on social media use are likely to be found unconstitutionally overbroad if challenged).

214. See *Phelps-Roper v. Strickland*, 539 F.3d 356, 373 (3d Cir. 2008) ("An alternative is not ample if the speaker is not permitted to reach the intended audience." (quoting *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1229 (9th Cir. 1990))).

215. When students challenge the loss of opportunities to play sports based on anything other than a violation of First Amendment free-speech rights, courts commonly reject their challenges on the grounds that there is no vested right to participate in extracurricular activities that entitle a student to any particular pre-deprivation process. See, e.g., *Colo. Seminary (Univ. of Denver) v. NCCA*, 570 F.2d 320, 321 (10th Cir. 1978) (interest of student athlete in participating in intercollegiate sports did not rise to level of constitutionally protected right invoking due process); *Justice v. NCAA*, 577 F. Supp. 356, 366 (D. Ariz. 1983) (participation in intercollegiate athletics is not a constitutionally protected interest).

216. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 651 (1995).

217. *Id.* at 665.

218. *Id.* at 657.

danger to safety, including the safety of innocent teammates and opponents; and second, the evidence established a crisis level of defiance of drug laws and other illicit behavior in this particular district, which in the school's judgment could be ameliorated by curbing drug use among student role models.<sup>219</sup> Because of this especially compelling factual predicate—the government was responding to a documented problem that is both illegal and physically dangerous—the *Vernonia* case cannot be interpreted as a green light for colleges to treat sports as a Constitution-free zone.

## VI. MEDIA GAG POLICIES AND ATHLETES' RIGHTS

Because athletic departments' prohibitions on unapproved interviews are prior restraints<sup>220</sup> and lack any limiting standards or procedures, they are unenforceable if athletes have either the "employee" level of constitutional protection<sup>221</sup> or the "student" level.<sup>222</sup> The prohibitions in force at universities across the country are even broader than those regularly found to be unconstitutional when applied to students or to public employees because the policies are unlimited in scope (applying even to off-hours expression) and subject matter (applying regardless of whether the athlete's planned speech relates to athletic "duties" or relates purely to personal interests).<sup>223</sup>

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219. *Id.* at 661–63.

220. *See* *McGlone v. Bell*, 681 F.3d 718, 733 (6th Cir. 2012) ("A prior restraint is any law 'forbidding certain communications when issued in advance of the time that such communications are to occur.'" (quoting *Alexander v. United States*, 509 U.S. 544, 550 (1993))).

221. At least four circuits (the Second, Fifth, Ninth, and Tenth) have struck down policies forbidding public employees from granting unauthorized interviews as facially overbroad, and no circuit has taken a contrary position. UNIV. OF FLA., BRECHNER CTR FOR FREEDOM OF INFORMATION, PROTECTING SOURCES AND WHISTLEBLOWERS: THE FIRST AMENDMENT AND PUBLIC EMPLOYEES' RIGHT TO SPEAK TO THE MEDIA 7 (2019), <http://brechner.org/wp-content/uploads/2019/10/Public-employee-gag-orders-Brechner-issue-brief-as-published-10-7-19.pdf> [<https://perma.unl.edu/3Q7B-8VQJ>].

222. As the Sixth Circuit stated in *McGlone*—striking down a Tennessee university's rule requiring outside speakers to apply for permission at least fourteen days in advance before speaking on campus property— even the existence of an advance-notice requirement itself chills speech: "Any notice period is a substantial inhibition on speech. The simple knowledge that one must inform the government of his desire to speak and must fill out appropriate forms and comply with the applicable regulations discourages citizens from speaking freely." *See* *McGlone*, 681 F.3d at 733–34 (citations omitted) (first quoting *Am.-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 605 (6th Cir. 2005); and then quoting *NAACP v. City of Richmond*, 743 F.2d 1346, 1355 (9th Cir. 1984)).

223. In concluding that athletic department gatekeeping policies do not offend the First Amendment, the University of Oregon's Reed Report, *supra* note 62, fundamentally erred in drawing on caselaw that applies to journalists' right of access to government *premises*. When a journalist seeks access to a person and not a place, courts analyze the right of access under traditional First Amendment principles

In none of the fifty mandatory gatekeeping policies obtained from universities did college athletic departments set forth any factors by which a request to talk to the media would be reviewed, or any standards that would constrain the athletic department's discretion to deny permission in a capricious, retaliatory, or viewpoint-discriminatory way. In none of the policies did athletic departments impose any deadline for deciding whether to approve an interview or provide any route by which an athlete denied permission to speak to the media could appeal. In short, the policies in place at athletic departments across the country include none of the procedural safeguards that courts have found essential to make prior restraints on speech constitutional.<sup>224</sup>

With this in mind, athletic departments will be forced to argue that the athlete-university relationship is so unique that athletes have rights inferior to those of employees or rank-and-file students. In Oregon's 2017 Reed Report, the university cited two primary justifications for filtering interview requests through the Sports Information office. The first was "time management" to keep popular athletes from being "deluged" with requests, and the second was "vetting" so "student athletes know who they are talking to."<sup>225</sup> These types of justifications are unlikely to overcome the strong presumption against prior re-

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that apply to speaker-to-listener communications. The closer analog is not the *Press-Enterprise* standard that applies when judges consider closing judicial proceedings to the public, but the standard that applies when judges deny journalists access to interviews with trial participants. In that context, courts widely agree that a gag order forbidding parties, lawyers, witnesses, and jurors from speaking to the press is properly analyzed as a prior restraint and is unconstitutional unless narrowly tailored. See *Journal Publ'g Co. v. Mechem*, 801 F.2d 1233, 1236 (10th Cir. 1986) ("A court may impose a prior restraint on the gathering of news about one of its trials only if the restraint is necessitated by a compelling governmental interest. Moreover, the court must narrowly tailor any prior restraint and must consider any reasonable alternatives to that restraint which have a lesser impact on [F]irst [A]mendment rights." (citations omitted)); *CBS, Inc. v. Young*, 522 F.2d 234, 239 (6th Cir. 1975) (finding that, although trial judge's gag order did not directly restrain journalists from publishing, it had the same practical effect because "it is apparent that significant and meaningful sources of information concerning the case are effectively removed from them and their representatives"). On no occasion have courts reviewed the ability to interview trial participants under the *Press-Enterprise* doctrine, which is unsuited to the context of interviews with individuals because it relies on "whether the place and process have historically been open to the press and general public." *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8 (1986).

224. See Nathan W. Kellum, *Permit Schemes: Under Current Jurisprudence, What Permits Are Permitted?*, 56 *DRAKE L. REV.* 381, 425 (2008) ("[A]uthoritative precedent supports the view that permit schemes should be limited in scope in all aspects and that any legitimate interest the government has pertains to public expression of such magnitude and attendance that, for the purposes of public safety and order, government regulation is deemed absolutely necessary.").

225. REED REPORT, *supra* note 62, at 9.

straints, both because athletic department policies are so broad (applying even to little-publicized sports where no “deluge” of interviews is foreseeable) and because narrower and less speech-restrictive alternatives exist (for instance, making public-relations services voluntarily available to players who request help preparing for interviews or managing their time).

If a college’s media gatekeeping policy were challenged, the college would likely argue that voluntary participation in athletics waives, either by written agreement or by implication, some constitutional liberties in exchange for the “privilege” of playing.<sup>226</sup> The waiver-by-contract argument, however, is problematic both legally and factually.

First Amendment rights are not easily waived. The Supreme Court has held that courts must “indulge every reasonable presumption against waiver’ of fundamental constitutional rights.”<sup>227</sup> An agreement will not be interpreted to waive constitutional rights unless there is clear and compelling evidence of a “voluntary, knowing, and intelligent” waiver.<sup>228</sup> A court construing waiver language will look to such factors as whether “the parties to the contract have bargaining equality and have negotiated the terms of the contract” and whether “the waiving party is advised by competent counsel and has engaged in other contract negotiations.”<sup>229</sup> This only makes sense. If First

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226. The Supreme Court has recognized that participating in extracurricular activities, particularly sports, comes with some accompanying waiver of privacy rights. *See supra* note 216 and accompanying text; *see also* *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 651 (1995) (rejecting high school athletes’ Fourth Amendment challenge to mandatory drug testing because school demonstrated that safety concerns outweighed athletes’ privacy rights, which diminish in the locker-room setting). But these were exceptional facts, accompanied by proof that less-intrusive alternatives had been tried and failed. *See* Hauer, *supra* note 213, at 424–25 (explaining that *Vernonia* was heavily influenced by severity of drug problem and ineffectiveness of solutions short of randomized drug testing). These same considerations will not come into play when evaluating the constitutionality of a college’s media gatekeeping policy. It does not follow from these Fourth Amendment cases in the K-12 context that courts will recognize a generalized waiver of constitutional rights on the part of college athletes.

227. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (quoting *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937)).

228. *Democratic Nat’l Comm. v. Republican Nat’l Comm.*, 673 F.3d 192, 205 (3d Cir. 2012); *see also* *Klein v. Livingston Cty.*, No. 10-CV-12361, 2011 WL 13217080, at \*4 (E.D. Mich. Apr. 6, 2011) (“Courts have held that validly-executed releases may waive federal statutory rights and constitutional rights only where the agreement was entered into voluntarily, knowingly, and intelligently, and without coercion, overreaching, or exploitation.”).

229. *Democratic Nat’l Comm.*, 673 F.3d at 205 (quoting *Erie Telecomms. v. Erie*, 853 F.2d 1084, 1096 (3d Cir. 1988)); *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, 599 (2012) (making the point that if colleges want immunity from claims arising out of supervising their athletes’ use of social media, the terms will have to be spelled out unambiguously in the finan-

Amendment rights could be surrendered by a throwaway boilerplate line in a handbook, public employers everywhere could evade the *Pickering* and *NTEU* body of safeguards by simply insisting on waivers as a condition of employment.<sup>230</sup>

There is no bargaining equality and no freedom to negotiate in college sports, and certainly no reason to believe that a college would entertain a “counteroffer” by an athlete who insisted on being allowed to speak freely with the media as a condition of signing with a particular athletic program. The NCAA standardizes the terms of the relationship, leaving no ability for individualized bargaining.<sup>231</sup> The NCAA caps the number of years of playing eligibility,<sup>232</sup> limits mobility to transfer between schools,<sup>233</sup> and limits the range of permissible compensation regardless of whether the athlete is a standout performer or a bench-warmer.<sup>234</sup> As one commentator has observed, “[U]niversities, through the voluntary association known as the NCAA, collectively and unilaterally define the university-athlete relationship on a ‘take it or leave it’ basis.”<sup>235</sup>

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cial aid agreement because courts will not assume that a party has agreed to waive constitutional rights).

230. See *Connick v. Myers*, 461 U.S. 138, 142 (1983) (“[A] State cannot condition public employment on a basis that infringes the employee’s constitutionally protected interest in freedom of expression.”); see also *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1063 n.3 (6th Cir. 1998) (citing *Connick* and finding that any claimed waiver of constitutionally protected privacy rights in exchange for employment as a law enforcement officer would be unenforceable and would not deprive officers of the right to challenge disclosure of confidential information about them).
231. In a 1984 ruling enjoining the NCAA from penalizing college athletic programs that negotiated broadcast agreements separate from the NCAA’s global agreement, the Supreme Court described the NCAA as a “classic cartel with an almost absolute control over the supply of college football which is made available to the networks, to television advertisers, and ultimately to the viewing public.” *NCAA v. Bd. of Regents*, 468 U.S. 85, 96 (1984) (quoting *Bd. of Regents v. NCAA*, 546 F. Supp. 1276, 1295, 1300 (W.D. Okla. 1982)).
232. See Zak Brown, Note, *What’s Said in This Locker Room, Stays in This Locker Room: Restricting the Social Media Use of Collegiate Athletes and the Implications for Their Institutions*, 10 J. ON TELECOMM. & HIGH TECH. L. 421, 431 (2012) (discussing NCAA bylaw that limits years of eligibility).
233. See, e.g., David Whitley, *Players Are Held Hostage by NCAA*, ORLANDO SENTINEL (Jan. 1, 2009), <https://www.orlandosentinel.com/news/os-xpm-2009-01-01-whitley01-story.html> [<https://perma.unl.edu/N77Z-89H3>] (reporting that University of Miami football coaches blocked former player Robert Marve from transferring to several schools, including all schools in the Atlantic Coast Conference and Southeastern Conference, as well as all other schools in Florida).
234. See David A. Grenardo, *The Continued Exploitation of the College Athlete: Confessions of a Former College Athlete Turned Law Professor*, 95 OR. L. REV. 223, 266 (2016) (“[T]he NCAA and member institutions’ capping the compensation for all college athletes at the grant-in-aid level, or the full cost of attendance, results in a significant anticompetitive effect.”).
235. Richard T. Karcher, *Big-Time College Athletes’ Status as Employees*, 33 A.B.A. J. LAB. & EMP. L. 31, 32 (2017).

Moreover, the Supreme Court has signaled disfavor for contracts that purport to impose broad waivers of First Amendment rights as a condition for receiving a government benefit. In a 2013 case involving conditions imposed on federal AIDS education grants, the Court held that applicants for the grant could not be forced to accept a broad surrender of First Amendment rights (in that case, the right to express dissent from the U.S. government's official position of condemning prostitution).<sup>236</sup>

Under the “unconstitutional conditions” doctrine, a government agency may not coerce the recipient of a government benefit to waive fundamental constitutional rights, even if the benefit is entirely discretionary.<sup>237</sup> A requirement to forfeit fundamental rights as a condition of receiving a government benefit will be held unconstitutional if the right being surrendered “has little or no relationship” to the benefit.<sup>238</sup> Requiring the applicant to sign a waiver does not validate an otherwise unconstitutional condition because “the state cannot accomplish indirectly that which it has been constitutionally prohibited from doing directly.”<sup>239</sup>

Colleges' media gatekeeping policies are not limited to the scope of the activity (participation in sports) because they make no allowance for speaking to journalists about matters other than sports. Nor are they limited to times of the year when the athletes' sports are in season, when the risk of distraction might legitimize some compromise of free-speech rights. If challenged under the doctrine of unconstitutional conditions, it is unlikely that a wholesale prohibition on unapproved interaction with the news media as a condition of receiving an athletic scholarship could be sustained.

Perhaps most significantly, not all athletes receive the package of compensation afforded to scholarship players. According to NCAA

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236. *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205 (2013).

237. Richard Epstein, *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 6–7 (1988); see also Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989) (“[G]overnment may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether.”).

238. *Lebron v. Sec'y, Fla. Dep't of Children & Families*, 710 F.3d 1202, 1217 (11th Cir. 2013) (quoting *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994)). In *Lebron*, the Eleventh Circuit ruled that requiring welfare recipients to submit to drug screening as a condition for benefits under the federally-funded Temporary Assistance for Needy Families program violated the Constitution. *Id.* at 1217–18. See also *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981) (holding that a Jehovah's Witness could not be denied unemployment benefits on the grounds of his refusal to forsake his religious objections to work in a weapons factory because, “a person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program”).

239. *Lebron*, 710 F.3d at 1217.

figures, about 46% of all athletes in the most competitive division, Division I, are non-scholarship “walk-on” players.<sup>240</sup> They sign no letter of intent committing them to enroll, and they receive no compensation beyond the intangible benefits of athletic participation.<sup>241</sup> None of the gatekeeping policies obtained from college athletic departments stated that walk-on players were free to grant requests for interviews. Self-evidently, athletic departments do not regard their ability to control the speech of athletes to be a product of the scholarship agreement.

## VII. CONCLUSION

Colleges have extraordinary control over the lives of student-athletes.<sup>242</sup> An athlete whose scholarship is revoked loses not just a potentially irreplaceable shot at a free college education, but also meals, medical care, and a place to live. It is little wonder, then, that college athletes hesitate to step over the good-conduct lines drawn by their coaches and athletic departments, even when those lines might not be constitutionally permissible.

Manifestly, athletic departments’ gatekeeping policies are bad for journalism. Sports journalists at times have literally been forced to write articles about star athletic performers with no quotes from the

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240. Joe Leccesi, *The 5 Most Commonly Asked Questions About Being a College Walk-On*, USA TODAY HIGH SCH. SPORTS (Apr. 13, 2017), <https://usatodayhss.com/2017/the-5-most-commonly-asked-questions-about-being-a-college-walk-on> [https://perma.unl.edu/N3XQ-L54C].

241. See Otis B. Grant, *African American College Football Players and the Dilemma of Exploitation, Racism and Education: A Socio-Economic Analysis of Sports Law*, 24 WHITTIER L. REV. 645, 653, 659 n.96 (2003); see also Aaron Sorenson, *Walking On 101*, NCSA, <http://www.ncsasports.org/blog/2012/10/25/walking-101/> [https://perma.unl.edu/9ZVL-WNGX] (last visited Feb. 3, 2020) (explaining that walk-on athletes cannot sign letters of intent and “oftentimes will not receive the same attention and privileges as [their] teammates”). In a case involving the “employee” status of Northwestern University football players, the National Labor Relations Board’s regional counsel took note of the legally significant differences between being a walk-on player versus being a scholarship player, including the absence of a contractually binding relationship. Nw. Univ., Case No. 13-RC-151359 (N.L.R.B. Mar. 26, 2014), <https://www.nlr.gov/case/13-RC-121359> [https://perma.unl.edu/UXY9-VLWW] (Decision and Direction of Election). Because of that distinction, the regional counsel (in a decision later vacated by the NLRB) concluded that walk-on football players did not qualify as statutory employees while scholarship players did. See *id.* at 17.

242. See Meg Penrose, *Tinkering with Success: College Athletes, Social Media and the First Amendment*, 35 PACE L. REV. 30, 43 (2014) (“[c]ollege athletes are generally the most regulated students on campus,” including restrictions on their social lives, minimum grades, mandatory tutoring sessions, and even holiday travel); Whitney D. Hermandorfer, Note, *Blown Coverage: Tackling the Law’s Failure to Protect Athlete-Whistleblowers*, 14 VA. SPORTS & ENT. L.J. 250, 250 (2015) (describing vulnerability of whistleblowers whose coaches “have absolute discretion to refuse to renew their scholarships”).

athletes because coaches will not grant permission for interviews.<sup>243</sup> But the stakes are higher than that. When athletes feel that their continued receipt of a college education (to say nothing of future professional prospects) is at risk if they are caught taking their complaints to the media, whistle-blowing is silenced.

As wave after wave of buried scandal comes to light, the lack of meaningful oversight over college sports becomes more apparent.<sup>244</sup> The role of internal whistleblowers is widely recognized as providing a salutary check on the abuse of authority in both the public and private sectors.<sup>245</sup> But employees in college athletic departments face considerable pressure to stay silent even when they witness abusive behavior, both because of an organizational culture that rewards loyalty and discourages boat-rocking, as well as because of external pressures, including the risk of backlash from devoted sports fans.<sup>246</sup> One survey of college athletic department whistleblowers found that all thirteen interviewees experienced some form of retaliation—one reported discovering her phone had been bugged by the university's counsel and another received death threats—and most of those who complained internally to supervisors felt that their complaints went ignored.<sup>247</sup> Because the incentives for employees tilt so profoundly toward silence,

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243. See, e.g., Mark Cooper, *Small-Town OSU Freshman James Washington is Making a Big Impression*, TULSA WORLD (Aug. 13, 2014), [https://www.tulsaworld.com/sports/college/osu/small-town-osu-freshman-james-washington-is-making-a-big/article\\_effcd3e2-083c-5868-b57c-fe4b8122eea2.html](https://www.tulsaworld.com/sports/college/osu/small-town-osu-freshman-james-washington-is-making-a-big/article_effcd3e2-083c-5868-b57c-fe4b8122eea2.html) [https://perma.unl.edu/9ZFD-N6YQ] (chronicling exploits of high-achieving Oklahoma State University football star who, because of athletic department policies, was not allowed to give an interview); Ross Dellenger, *LSU's Derrius Guice Runs for Murdered Father, Hard-Working Mom, Hard-Driving Coaches*, ADVOCATE (Oct. 19, 2015, 8:22 AM), [https://www.theadvocate.com/baton\\_rouge/sports/lsu/article\\_9b871504-3179-5cd7-80f8-a8a4aeb2ea96.html](https://www.theadvocate.com/baton_rouge/sports/lsu/article_9b871504-3179-5cd7-80f8-a8a4aeb2ea96.html) [https://perma.unl.edu/Y8W6-XK9C] (profiling a prodigious Louisiana State University recruit without quotes from him because LSU does not allow freshmen to speak with the media).
244. In a recent multi-part series, *USA Today* reported that college athletes are exponentially more likely than their non-athlete classmates to face charges of sexual assault, yet secrecy in the college disciplinary system enables even those accused in multiple acts of serious wrongdoing to simply transfer schools with no adverse consequences and no public awareness. Kenny Jacoby, *Predator Pipeline: NCAA Looks the Other Way as Athletes Punished for Sex Offenses Play On*, USA TODAY (Dec. 12, 2019), <https://gatehousenews.com/predatorpipeline> [https://perma.unl.edu/84UL-3FZG].
245. See Edmund Donnelly, Comment, *What Happens When Student-Athletes Are the Ones Who Blow the Whistle?: How Lowery v. Euverard Exposes a Deficiency in the First Amendment Rights of Student-Athletes*, 43 NEW ENG. L. REV. 943, 959 (2009) (describing federal and state statutory protections for whistleblowers who report wrongdoing to regulators).
246. Chris Hanna, Jeffrey Levine & Anita M. Moorman, *College Athletics Whistle-Blower Protection*, 27 J. LEGAL ASPECTS SPORT 209, 212, 218 (2017).
247. Brian K. Richardson & Joseph McGlynn, *Blowing the Whistle off the Field of Play: An Empirical Model of Whistle-Blower Experiences in the Intercollegiate Sport Industry*, 3 COMM. & SPORT 57, 70–71 (2014).

it is especially important that students feel safe in exposing dangerous or illicit behavior within their athletic programs.

Any system that requires a speaker to obtain advance permission from a government official will be viewed with deep and well-founded skepticism. This skepticism applies even in the settings of the campus and the workplace, where other First Amendment safeguards diminish. None of the justifications commonly offered by college athletic departments—most of which are image-motivated<sup>248</sup> and based on a paternalistic notion of “saving” athletes from reputational harm from their own mistakes—are sufficiently compelling justifications to override the presumption against prior restraints. It is possible to craft a constitutionally sound policy that is narrowly tailored to address the government’s legitimate interests. For instance, at the University of Texas-Austin, athletes are told not to use social media to post photos or videos taken in the dressing room or other private settings without consent and to refrain from sharing “sensitive information,” which is defined as information about injuries, game strategies, recruiting plans, or academic matters.<sup>249</sup> This type of tailoring illustrates that it is eminently possible to curb only speech disruptive to team functions without entirely forbidding unfiltered interaction with the news media.

Higher-education institutions presumably would have to concede that they have no authority to prevent rank-and-file students from speaking freely with the news media. Any attempt to enact a campus-wide prohibition against unapproved communications with journalists would be so far beyond the authority of a public university as to flunk even the most deferential judicial scrutiny. Any claim of authority over athletes’ speech, then, must necessarily flow from the “quasi-employment” relationship, as athletic departments insist that athletes “represent” their institutions in a way more akin to employee status than student status.

If that is the case, the employment setting provides some guidance as to what would and would not be a permissible interviewing constraint. In an instructive public-employment case, *Hanneman v. Breier*, the Seventh Circuit held that a police department regulation forbidding officers from sharing confidential internal matters with the public was facially constitutional.<sup>250</sup> But the court went on to find that the regulation was misapplied in disciplining three officers who

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248. See Umar, *supra* note 212, at 334 (observing, in context of colleges’ restraints on social media activity, that “institutions demand that student athletes constantly present a positive image of the schools and their programs” and that universities are willing “to censor student athletes to achieve this goal, even by perhaps unconstitutional methods”).

249. UNIV. OF TEX., TEXAS ATHLETICS STUDENT-ATHLETE CODE OF CONDUCT AND EXPECTATIONS 4 (2019) (produced in response to FOI request, copy on file with authors).

250. *Hanneman v. Breier*, 528 F.2d 750, 754 (7th Cir. 1976).

wrote to the mayor complaining about an investigation into their political activities because the investigation had already become a matter of public concern before they sent the letter.<sup>251</sup> Although the *Hanneman* case predates *NTEU* and was decided under the *Pickering* standard, it illustrates that a narrowly tailored prohibition on sharing confidential information that is not a matter of public concern (e.g., locker-room gossip about teammates) would probably pass muster in the athletic setting. That is all the authority that a public university should legitimately need to maintain orderly operations within its athletic program, giving student-athletes the “breathing space” that the First Amendment demands.<sup>252</sup>

Regardless of whether athletes occupy a legal status akin to “employee” or to “student,” there is no doctrinal support for categorically prohibiting unapproved communications with the news media. If athletic departments insist on enforcing any type of filtering policy, those policies must contain strict safeguards to make them constitutionally sound. First, they must be narrowly tailored to satisfy a compelling government interest. For instance, a gatekeeping rule might be defensible if limited to the days on which athletes are taking final exams or in the hours before a game when athletes are engrossed in preparations. Second, athletic departments must enforce clear standards against viewpoint-based gatekeeping (for example, a coach could not selectively forbid an athlete known to have strong political opinions from granting an interview about a divisive political issue) and afford athletes who are denied access to the media an avenue for timely challenging the denial.

Although it was decided under labor laws that apply only in the private sector, the NLRB’s disposition of the Northwestern University football case provides a roadmap for what a constitutionally permissible athletic department policy might look like in the public sector.<sup>253</sup> In its 2016 Advice Memorandum, the NLRB legal counsel’s office identified a number of restrictions that would constitute unfair labor practices in the private sector, including telling players that “[a]ll media request[s] for interviews with student athletes must be made through athletic communications” and instructing athletes to say only “positive” things to the press.<sup>254</sup> Northwestern brought itself into compliance with NLRB standards by replacing these restrictions with statements merely encouraging athletes to observe good interviewing

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251. *Id.* at 754.

252. *See NAACP v. Button*, 371 U.S. 415, 433 (1963) (“Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.” (citing *Cantwell v. Connecticut*, 310 U.S. 296, 311 (1940))).

253. *See supra* notes 197–201 and accompanying text.

254. Advice Memo, *supra* note 197, at 5.

practices, offering the “option” of asking the communications office for help, and affirmatively reassuring athletes: “As responsible student athletes, you may directly speak with members of the media if you choose to do so.”<sup>255</sup> This guidance makes sense in the public sector, as well. There is no reason athletes at institutions governed by the First Amendment should have *weaker* free-speech protections than those competing at private institutions.

Colleges legitimately may enforce reasonable “time, place, and manner” restrictions, such as restricting interviews during times that would distract from athletes’ academic obligations or game preparations. But a wholesale ban on unapproved interaction with the news media is unlikely to prove constitutionally permissible if challenged, doubly so without standards to ensure that interviews are not rejected because of the views the athletes intend to express.

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255. *Id.*