



The Drake Group

Realizing the Promise of College Athletics

POSITION STATEMENT

College Athlete Codes of Conduct and Issues Related to Freedom of Speech and Expression ¹

EXECUTIVE SUMMARY

The Drake Group² believes there is a need to address constitutionally protected speech and expression rights of public college and university students who participate in intercollegiate athletics. This need is highlighted by current national debates about the extent to which athletic departments should properly control athlete behavior, especially on social media and in connection with activism. Questions of control include whether requirements such as athletes standing during the national anthem, providing athletic departments with their social media passwords, and covering their body tattoos violate campus-wide Student Codes of Conduct and First Amendment rights. Dealing with such issues requires institutions and athletic directors to understand the potential conflict between athletes' rights as students and athletic department and team codes of conduct.

This Drake Group position statement provides institutions with a decision-making framework for developing athlete codes of conduct, team rules, and model practices that educates athletic directors, coaches, and athletes about important free-speech protections. Key recommendations include:

¹ Preferred citation: Sanford G. Thatcher, Donna Lopiano, Brian Porto, Gerald Gurney, Fritz Polite, B. David Ridpath, Allen Sack, and Andrew Zimbalist (2022), "The Drake Group Position Statement: College Athlete Codes of Conduct and Issues Related to Freedom of Speech and Expression," The Drake Group, November 2018, updated January 2022. <http://thedrakegroup.org>.

² The Drake Group is a national not-for-profit advocacy organization of faculty and others whose mission is to defend and achieve educational integrity and freedom in higher education by eliminating the corrosive aspects of commercialized college sports.

- 1. Although the First Amendment only applies to public institutions, public and private institutions alike should honor First Amendment rights because freedom of inquiry and ideological disagreement lie at the heart of higher education.**
- 2. Athlete codes of conduct and team rules should not conflict with institutional student codes of conduct**
- 3. All team rules should require the approval of the athletic director, the Faculty Athletic Representative (FAR), the VP of Student Life, and university-wide legal counsel to ensure protection of First Amendment rights and compliance with Title IX.**
- 4. When considering restrictions on athletes' viewpoints expressed by speech or behavior, institutions should answer these test questions: (1) does the proposed restriction prevent a significant material disruption of athletes' participation in their education? (2) is the prohibited activity directed at others (individuals or groups) causing harm or creating a hostile or chilling educational environment, and (3) are other reasonable time, place, and manner restrictions available that could satisfy both the school's interests and the athletes' interests.**
- 5. Athletic directors should identify as "red flags" and evaluate especially carefully any proposed restriction of athlete viewpoint expression that is justified by the following: (1) "protects the brand"; (2) is imposed in the name of "team uniformity"; (3) "advances team chemistry"; (4) protects a sponsor relationship; (5) "saves the athlete from making a mistake on a social media platform"; (6) "makes sure donors don't get angry or diminish their financial support"; or (7) "promotes sportsmanship." Athletic departments should consider whether athlete education programs, rather than restrictions of speech and other expression, are not the more appropriate response to such concerns.**
- 6. Athlete education programs on codes of conduct and First Amendment rights should occur annually and should cover unprotected activities described in campus Student Conduct Codes (such as threatening speech or physical assault, bullying, hazing, sexual harassment, violations of law such as drug use or confidentiality of teammate medical information).**
- 7. Institutions should establish policies that mandate the reporting of violations of institutional policy (e.g., bullying, hazing, discrimination, harassment based on protected characteristics, hate or threatening speech or physical action against any individual or group that may create an unsafe or fearful educational environment, etc.), encourage bystander responsibility, and protect whistleblowers from retaliation.**
- 8. Discipline for improper athlete conduct generally should follow the rule of gradually escalating discipline (oral warning, written warning, suspension, removal from program). For the most serious violations (sexual or physical assault, hazing, and other conduct prohibited by law) or proposed discipline that includes removal of athletic scholarships or program participation rights, investigations and adjudications should follow disciplinary processes established for all students.**

Background: The Conundrum

Historically, absolute coach control and sometimes overly strict and even abusive discipline of athletes were never questioned. The coach was a proverbial “deity” whose methods were never to be challenged. Fortunately, several generations of “helicopter parents,” new laws prohibiting sexual harassment, hazing, and bullying, and educators’ focus on professional conduct have placed athlete safety in the forefront. We are now at a more subtle and challenging intersection, amidst a national debate about athlete freedom of speech and expression in the college educational setting and the drawing of correct lines that guarantee a safe educational environment while honoring constitutional rights.

Types of Conduct Codes Governing Athletes

Sports are inherently rule-governed activities. Generally, there are five types of rules that apply to the behavior of college athletes in athletic programs: (1) rules of the game, (2) sportsmanship rules, (3) institutional student conduct codes applicable to all students, (4) athletic department codes of conduct or behavioral policies applicable to all athletes in all sports, and (5) team rules set by head coaches of sports teams applicable to athletes participating on these teams.

Rules of the Game. The rules of the game itself are most visible to the public, codified in rulebooks, changed over time as the sport evolves, and enforced by officials hired to work at each athletic event. These game rules are promulgated by the governing body of the sport itself, which for intercollegiate athletics is the NCAA, to ensure that all contests in that sport are played under a common set of regulations. These rules specify how individual players perform the athletic skills required to achieve the goals of the game, what strategies are allowable, and what penalties may be imposed if the rules are not followed.

Sportsmanlike Conduct. There is another important body of rules related to player conduct during and in close proximity to the game referred to as “sportsmanship” that may not be codified formally or even universally recognized, and that are unrelated to the execution of the skills or strategies of the game. An example with which the public is familiar today, at all levels of sports, is the traditional handshake between members of the opposing teams at the end of a sporting event. “Unsportsmanlike” conduct, on the other hand, includes behaviors contrary to these positive guides, includes such actions as harassing or swearing at an opponent or official, physically intimidating or striking an opponent or official, and throwing sports equipment. Rules prohibiting unsportsmanlike conduct are intended to foster the values of dignity, honor, respect, and self-discipline.³

³ Warren P. Fraleigh, *Right Actions in Sport: Ethics for Contestants* (Champaign, IL: Human Kinetics Publishers, 1984).

Institutional Student Codes of Conduct. Higher education institutions have student codes of conduct that are applicable to all students including athletes and are typically accompanied by well-defined disciplinary and due-process policies governing the filing of complaints, investigation, and adjudication intended to afford all students fair and unbiased treatment. These codes address issues of academic honesty, conduct that threatens or endangers the health and welfare of others, hazing, drug use, possession of firearms and other community safety issues, demonstrations, discrimination and sexual harassment, and other, similar conduct.

Athletic Department Codes of Conduct. Athletic departments may promulgate their own codes of conduct in addition to these institutional rules that address athletics-related issues not covered by institutional codes. These conduct codes typically address expectations of sportsmanlike behavior or behavior while representing the university such as prohibitions against the use of performance-enhancing drugs, compliance with athletic governance association rules, and similar issues.

Team Rules. Least well known to the general public are the rules that individual head coaches consider to be critical to the proper functioning of their teams—referred to as “team rules.” Examples of such rules are those that require athletes to be on-time and attend practices, team meetings, and training meals, and behavior outside of formal team activities that can potentially affect the team’s reputation (such as certain kinds of commenting on social media, dress codes while traveling to meets away from home, personal grooming such as length of hair, etc.). In this last domain of rule-governed activity the concept of team chemistry is often used as the rationale for rules that demand uniformity and exemplary behavior, valued by coaches because they recognize that drugs, drinking, discipline, and other behavioral issues are often devastating to the team’s culture, morale, and reputation.⁴

The First Amendment and Student Conduct Codes

The First Amendment of the U.S. Constitution states: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the

⁴ At Penn State, head football coach Joe Paterno had clean-cut rules not continued by his successor, Bill O’Brien, causing fear among alumni and fans of an undesirable change in values. PA Sports Blog reader “rgeorge” wrote: “If I see dreadlocks and long hair sticking out of helmets this year, I think I might be done with PSU. They have been my team forever. Their clean-cut image and plain uniforms were one of the greatest things about them. Image IS important. Just ask the Army and Marines why they have to shave every day and keep short hair. It does instill more of a sense of discipline and team spirit. Leave the pony tails and earrings to the girls. Get a shave and a haircut.” Michael Sedor, “Your Comments: Penn State’s relaxation of hair, beard length rules worries some,” PA Penn Live, February 20, 2012: http://blog.pennlive.com/pasports/2012/02/beard_hair_penn_states_relaxation_of_hair_beard_length_rules_worries_some.html

freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.” Four points need to be emphasized:

1. First Amendment rights apply to governmental action.⁵ Accordingly, public colleges and universities are subject to constitutional violations, whereas private schools are not.⁶ First Amendment free speech protections are usually explicit in Institutional Student Codes of Conduct.
2. The First Amendment does not protect all speech and behavior. Certain conduct and speech are expressly prohibited such as endorsement of illegal activity, threats of imminent harm, sexual harassment, and patently offensive sexual material that is lacking any redeeming value (i.e. “obscenity”), or disclosures of another person’s private medical or academic information.
3. The Supreme Court has determined that restrictions on First Amendment rights (other than restrictions noted above) should be narrowly tailored and imposed only if “necessary” to achieve a significant governmental interest. Accordingly, within public educational institutions, speech and behavior that materially disrupt a school’s educational mission or involve substantial disorder or the invasion of the rights of others are **not** protected.
4. Restrictions that implicate First Amendment rights must not be overbroad or vague.

Thus, whenever athletic departments and coaches in public institutions of higher education seek to restrict what athletes can do, the athletics manager must always balance the need for the restriction against athletes’ First Amendment rights and the Institutional Student Code of Conduct.

The “Balancing Act”

“Speech” has been broadly defined to include conduct that communicates. People often communicate through symbols rather than words. Acts like wearing armbands, staging boycotts or sit-in demonstrations, or burning the flag are all examples of expressive conduct.

First Amendment rights, however, are not absolute. First Amendment rights focus on the nature of the speech being restricted,⁷ the relative importance of the government’s rationale

⁵ The First Amendment prohibits certain Congressional action but is applied to the states through the Fourteenth Amendment.

⁶ State laws, however, may provide students at private schools with free speech rights. See, e.g., Section 94367 Ca. Ed. Code (“Leonard Law”).

⁷ The First Amendment generally prohibits government from proscribing speech due to the ideas expressed. “Content-based restrictions are presumptively invalid.” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). “Restraining speech on the basis of the content presumptively violate[s] the First Amendment.” *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-7 (1968). Conversely,

for restricting the speech, and the availability of alternatives that would satisfy the justification but permit the speech in a different time, place, or manner. Importantly, the ability of the government to regulate speech in a public forum must be justified—by safety concerns, as one example—and the individual's freedom of speech to express ideas must be prohibited in a reasonable manner. For example, the Supreme Court in a case concerning the burning of draft cards on a courthouse's steps stated that regulation of speech is constitutional (1) if it is within the constitutional power of the government (e.g., governmental action), (2) if it furthers an important or substantial government interest, (3) if that interest is unrelated to the suppression of viewpoint speech, and (4) if the restriction is no greater than necessary to further that interest. (*U.S. v. O'Brien*, 391 U.S. 367 [1968]). The Court upheld the restriction on willful destruction of draft cards and stated that the availability of draft cards was important to the proper functioning of the draft system.

Court decisions about First Amendment restrictions in educational settings seek to evaluate governmental interests, students' liberty, and the reasonableness of the restriction. In the Supreme Court's landmark case *Tinker v. Des Moines Independent Community School District*, (393 U.S. 503 [1969]) the Court stated that students do not shed their Constitutional rights to freedom of speech at the schoolhouse gate. The Court held that the school's justification of avoiding discomfort and unpleasantness and maintaining discipline did not justify prohibiting students from wearing black armbands in a public high school because the conduct did not cause a **substantial and material disruption** to the education process or substantially infringe on the rights of others. Accordingly, while the aforementioned five types of Codes of Conduct that govern the conduct of athletes must not violate the First Amendment, there will frequently be some degree of subjectivity involved. For example, are schools' justifications substantial, are the restrictions narrowly tailored to serve the justifications or could the restrictions be more reasonable in time, place, and manner? Compounding the subjectivity of any analysis is that, on many campuses, rules and codes of conduct are broad and vague, making it virtually impossible for athletes, who have much at stake for violating the rules or codes, to know what conduct would be deemed punishable. The combination of First Amendment standards that involve few clear lines and broad and vague codes of conduct applying to athletes makes this area especially fraught with and subject to misguided interpretation. The clear message to athletic program managers is to write such rules or codes in a manner that makes prohibited conduct clear, provides the reasons for such prohibitions, and always looks for the most reasonable alternative in time, place, and manner.

The Drake Group aims to provide guidance on how to evaluate rules within the five categories of rules discussed above to the extent they place restrictions on athletes' speech and behavior at public institutions, both on and off the court/field or other practice or competitive arena, and how to apply these tests related to Constitutional protections. The Drake Group's guiding principles reflect concerns for educational policy and safety. This paper does not focus on speech or activity that is strictly subject to prohibition under federal or state laws such as

restrictions on expressive speech with low intrinsic value (like using curse words not directed at any individual or group) are not subject to the same degree of scrutiny.

libel, threats of injury, harassment and discrimination of protected entities, and displays of illegal activity.

Types of Conduct at Issue Related to Athlete Speech and Expression

Activism, social media usage, and sexual/racial misconduct are areas that particularly implicate limits on freedom and expression of speech and are hot-button issues on college campuses currently for athletes and nonathlete students alike. The need for guidance related to college athletes in these areas is demonstrated by a few recent examples:

- In October of 2017, a backup quarterback at Albright College, was dismissed from the football team after kneeling during the playing of “The Star-Spangled Banner” before a game. The team had decided to kneel as a group before the game as a “show of unity” but would stand during the national anthem. The players had been told that there could be consequences if they decided to kneel during the anthem.⁸
- Prior to the opening of the 2018 football season, the Illinois State University athletic department announced a new athletes’ code of conduct prohibiting college athletes, cheerleaders, and spirit members from participating in displays of political activism while in uniform or while performing or competing in official events and activities. The designated penalty was removal from the program. Two days after the announcement, the policy was withdrawn citing concerns regarding First Amendment rights.
- In the midst of their 2015 football season, thirty University of Missouri athletes announced that they would support general student body protests by not participating in practices or games until the Missouri System president, Tim Wolfe, resigned or was fired owing to his failure to respond to a series of racist campus incidents, including the drawing with human feces of a swastika on a college dormitory’s white wall. Within seventy-two hours, the team returned to football after Wolfe resigned.⁹

Similarly, racial and sexual abuse involving athletes on college campuses has received much attention recently. For example, over the last five years, several colleges disciplined male athletes for racist, misogynistic, and/or homophobic comments using electronic media.

- In November of 2016, Harvard University canceled the remainder of the regular season and any possibility of post-season play for its men’s soccer team after the discovery of a “scouting report” then publicly accessible in a Google document in which members of the team had, at least since 2012, “rated the [members of the women’s team] on a sexual

⁸ Adam Harris, “Albright college athlete is dismissed from the team for kneeling during the national anthem,” The Chronicle of Higher Education, October 11, 2017: <https://www.chronicle.com/blogs/ticker/albright-college-athlete-dismissed-from-team-for-kneeling-during-national-anthem/120577>

⁹ Scott Gleeson, “Missouri football players to boycott until president Wolfe resigns,” USA Today Sports, November 8, 2018: <https://www.usatoday.com/story/sports/ncaaf/2015/11/07/missouri-tigers-football-players-boycott-tim-wolfe-president-resigns/75399504/>

appeal scale of 1 to 10, including explicit descriptions of their physical traits and musings about the women's preferred sexual positions."¹⁰

- In November of 2016, "Columbia University's wrestling team, had its season suspended by the university while officials investigated text messages sent by team members that included the frequent use of racist, misogynistic and homophobic terms."¹¹
- In December of 2016, Amherst College disciplined its men's cross-country team "after a number of messages came to light that administrators called racist, misogynistic, and homophobic. The messages surfaced in a report in a student publication, *The Indicator*, which reported on a series of emails and messages sent from 2013 to 2015. In some messages, female students' pictures were included with comments on their sexual history. Some women were referred to as 'meat slabs' or 'a walking STD'. Many were sent to incoming freshmen."¹²
- In December of 2016, Princeton University announced the suspension of the season for its men's swimming and diving team "after the discovery of material on its electronic mailing list [on a University-sponsored team listserv] that was 'vulgar and offensive as well as misogynistic and racist'.¹³ The Athletic Department later decided to cancel the rest of the season including participation in post-season championships.¹⁴
- In August of 2018, the University of Arizona dismissed a player from the football team "after a video surfaced over the weekend in which he twice appeared to refer to former

¹⁰ Katharine K. Seelye and Jess Bidgood, New York Times, "Harvard Men's Soccer Team Is Sidelined for Vulgar 'Scouting Report'," November 4, 2016: <https://www.nytimes.com/2016/11/05/us/harvard-mens-soccer-team-scouting-report.html>

¹¹ Seth Berkman, New York Times, "Columbia Suspends Wrestling Season Over Lewd and Racist Text Messages," November 14, 2016: <https://www.nytimes.com/2016/11/15/sports/columbia-suspends-wrestling-season-lewd-text-messages.html>

¹² USA Today, "Amherst College suspends cross-country team for sexually explicit messages," December 13, 2016: <https://www.usatoday.com/story/sports/college/2016/12/13/amherst-college-cross-country-suspended-sexually-explicit-messages/95367570/> Also see <http://athletics.amherst.edu/general/2016-17/releases/20170109jc163o>

¹³ Christopher Mele, New York Times, "Princeton Is Latest Ivy League School to Suspend Team Over Vulgar Materials," December 15, 2016: <https://www.nytimes.com/2016/12/15/sports/princeton-mens-swimming-suspended.html>

¹⁴ More details about the episode at Princeton may be found in section 3.6.4 in Sanford G. Thatcher, *A History of Princeton Swimming and Diving* (3rd edn., 2019): <https://scholarsphere.psu.edu/resources/c20ea20b-990e-4bd1-af44-87998a5245ed> The president of the University issued his own statement, saying, "I am deeply disappointed by the behavior of the men's swim team. I strongly support the decision of our athletic director, Mollie Marcoux Samaan, to suspend a team that has failed to respect the values of this University and the dignity of other students." He also "asked the athletic department to redouble its efforts to ensure that our teams conduct themselves with the character and ethics that we expect from students representing Princeton University in athletic competition."

Texas A&M teammates as monkeys...The offensive clip was discovered by Texas A&M fans and then circulated on social media before it was deleted.”¹⁵

These decisions all concerned speech behavior and they raised concerns that colleges were abandoning their traditional support for free expression as a core value of higher education, whether formally required to do so by the First Amendment or not.¹⁶ For example, at Princeton there were diametrically different views presented about the school’s responsibility. A majority of the editorial board of the Princeton student newspaper questioned the University’s right to control “private speech” and impose “collective guilt” by punishing an entire team. In their view the University should not have taken action based solely on such comments made in private contexts unless the conduct met the legal definition of a crime. Another faction of the board, however, with whom we agree, wrote a dissenting opinion arguing that while the broadest latitude of speech must be permitted in the academic setting, the University has a compelling interest in maintaining a safe educational environment. The regulation of misogynistic, racist, and otherwise threatening speech exchanged between members of the campus community is important because harmful speech chills the possibility of freedom of speech in the educational setting; thereby violating a student’s right of access to an equal education.¹⁷ This compelling interest in maintaining a safe environment is a significant factor for athletics and all extracurricular activities that are educational extensions of the classroom.¹⁸ The behavior and speech of athletes and coaches should meet the same educational standards as the behavior and speech of nonathlete students and classroom teachers.

Developing Policies and Guidelines for Athletic Code of Conduct and Team Rules

Whatever the merits of arguments about free speech and its limits on college campuses may be, significant reasons support adopting rules (in each of the five categories discussed above) that are specific and give athletes clear guidance on what is not permissible.¹⁹ Athletics

¹⁵ Dan Wolken, “Santino Marchiol dismissed by Arizona after video appears to show him using racist term,” USA Today, August 27, 2018:

<https://www.usatoday.com/story/sports/ncaaf/pac12/2018/08/27/santino-marchiol-dismissed-arizona-after-video-racist-term/1114260002/>

¹⁶ The Supreme Court, of course, recognized that no sharp dividing line exists between verbal and physical behavior under the First Amendment in deciding that burning the U.S. flag constitutes “symbolic” free speech in *Texas v. Johnson* in 1989 by a 5-4 majority.

¹⁷ For more detailed discussion on this debate, see Sanford G. Thatcher, “Codes of conduct, free speech, and intercollegiate athletics,” September 24, 2018:

<https://scholarsphere.psu.edu/downloads/4tm70mt318>

¹⁸ We agree with the latter position that the institution has an obligation to maintain a safe educational environment. But, on the question of appropriate punishment we believe that, generally, only those athletes involved should be punished unless those not involved were under an institutional honor code or other mandatory obligation to report. We also believe that athletic department disciplinary policy should ensure that punishments are consistent from team to team and should conform with models of “gradually escalating discipline.” Such models weigh whether and when the offense is intentional or repeated, what the experiences and maturity of the students involved are, and whether students took responsibility for their actions, and the seriousness of the offense.

¹⁹ This thoughtful discussion of the values in tension between protecting free speech and enforcing student codes of conduct occurred in the midst of larger nonathletic campus environments beginning

should have special rules just as there are particular rules for the classroom and other official school activities, (like student-run newspapers, forensics, and performing arts programs).²⁰ Although it is difficult to draw clear lines of demarcation between prohibited speech and speech that is subject to Constitutional freedoms, efforts must be made to do so. As the Drake Group's report on collegiate athletic sexual and other violence emphasizes, there is a slippery slope from verbal to actual physical abuse because what may seem to some harmless banter can lead to normalizing behavior that involves actual violence by making disrespect toward others seem natural and acceptable.²¹ Maintaining a safe educational environment is an institutional responsibility. This responsibility is obvious, but how to articulate all the rules that implement this responsibility and other goals of higher education is not.

We believe that it is most helpful to provide guidelines and examples from which further athletics-specific rules can be developed. In doing so, it is necessary to examine the goals and mission of the athletic department and of the school. Especially at public institutions this all must be done within the parameters of the law and constitutional protections. Private institutions—to which federal constitutional restrictions do not apply but state constitutions do apply—should also try to conform to the framework provided here. Although it is difficult to draw clear lines of demarcation between prohibited speech and speech that is subject to Constitutional freedoms, efforts must be made to do so. We recognize that the desired rules and constitutional freedoms can conflict. And we recognize that it is difficult to define all forms of prohibited speech—e.g., speech that is so 'severely offensive' or 'materially disruptive' that it prevents a reasonable student from receiving an education. Although offensive crude, misogynistic, even racist and homophobic comments directed at individuals or groups have no place in any educational setting, defining such terms is not always straightforward.²² For

to be polarized and enflamed by incidents like the disruption of Charles Murray's talk at Middlebury College and was fueled by the outrage over the march of right-wing extremists in Charlottesville in August 2017. The debate has continued apace ever since with universities such as UC-Berkeley, Florida, Michigan State, and others having to confront the challenges, including steep security costs, imposed by invitations to inflammatory speakers like Ann Coulter, Richard Spencer, and Milo Yiannopoulos.

²⁰ Just as college newspapers do, athletic teams provide valuable lessons in the values of teamwork, dedication, integrity, and perseverance. Indeed, most universities explicitly recognize that extracurricular activities such as sports programs supplement learning in the classroom with learning on the playing field. And when crises arise involving violation of norms, considerable thought must be given to an appropriate institutional or athletic department response. Is it more important, or at least as important, to educate than to punish, especially for a first offense or when institutional or athletic department rules are ambiguous? Should athletes on these teams who use racist, misogynistic, and/or homophobic speech be required to attend classes that focus on reinforcing norms of respectful behavior, taking away lessons that will serve them well later in life and, we may hope, keep them from getting into trouble in their professional careers? Should such education be in addition to the level of discipline is imposed?

²¹ Lopiano, D., Gurney, G., Porto, B., Polite, F., Ridpath, B.D., Sack, A., Willingham, M. & Zimbalist, A. (2020, November) The Drake Group Position Statement: Need for National Collegiate Athletic Governance Organization Rules Related to Athlete Sexual Misconduct and Other Physical Violence. Retrieved from <https://www.thedrakegroup.org/2016/09/11/institutional-integrity-issues-related-to-college-athlete-sexual-assault-and-other-forms-of-serious-violence/>

²² Many of the women's teams that the men have targeted have seen an increase in racial and ethnic diversity, not to mention diversity in sexual orientation. Harvard even has a transgender athlete who

example, the terms “crude” and “offensive” are broad and vague and accordingly subject to different interpretations. As the Supreme Court has stated: “One man’s vulgarity is another man’s lyric.” (*Cohen v. California*, 403 U.S. 15, 25 [1971]) And although the First Amendment proscribes restrictions that generally prohibit “crude” or “offensive” comments, a school may prohibit such conduct depending on the circumstances, including whether it is so severe, pervasive, and objectively offensive that other students are effectively denied equal access to an institution’s education. These questions are incredibly complex. This position paper attempts to address an additional complexity, viz., whether the activity of participating in school-sponsored athletics justifies any additional proscriptions and exactly what, where, and when the proscriptions violate the First Amendment.²³

Colleges must strive to be as clear and precise as possible in setting forth what kinds of behavior are acceptable and what kinds are not. This can be an even more challenging task during times, as now, when attitudes and norms are evolving quickly.

For athletes, the necessary guidance must come in the form of the five types of rules discussed above. The guidance must come not only from the top administration but also from the athletic department and the coaches themselves. Each has a particular responsibility to formulate policies and devise codes of conduct reflecting their own stakes in the process, with advice as needed from legal counsel.²⁴

switched from being one of the fastest swimmers on the women’s team to being one of the slower swimmers on the men’s team: <https://www.cbsnews.com/news/60-minutes-harvard-transgender-swimmer-schuyler-bailar/>

²³ For example, an ongoing issue is whether speech not occurring on campus can be curtailed when it involves the school in one capacity or another (e.g., university-owned-and-operated email and electronic communication systems). The university may justly exercise its power to monitor and control such media. Whether that authority should extend to non-university social media like Facebook, Twitter, or Instagram remains open for debate to the extent that students act as an athletics team or inappropriately use their university or team affiliation. The University of Arizona football team recently removed a player who had transferred from Texas A&M after a posted video was discovered of the player calling two former black A&M teammates “monkeys.” <https://sportsday.dallasnews.com/college-sports/texasamaggies/2018/08/27/ex-texas-am-linebackersantino-marchiol-dismissed-arizona-after-video-appears-show-saying-racist-remarks>

²⁴ Whatever short-term worries the athletic departments at Amherst, Columbia, Harvard, and Princeton may have had about the effects of their disciplinary actions on recruiting, the safe bet is that over time these institutions will be seen as the forerunners of needed cultural and moral change in intercollegiate athletics and will reap benefits from being seen as proactive on these issues. Women who see these colleges as places to pursue their sports should be especially encouraged by the actions taken. Better to be a school that confronts the problems early and boldly than to be a school like Baylor or Michigan State that buries its head in the sand, hoping for the problems never to surface, but eventually facing the prospect of being called to account after much damage has been done.

Recommendations for Athlete Codes of Conduct

1. Commitment to Principles Underlying Freedom of Speech and Expression in the Higher Education Setting. In light of the disturbing behavior previously cited, it is important for higher education athletic departments and teams to directly address issues related to freedom of speech and expression and university control of athletes through enforcement of codes of conduct. As noted above, although the First Amendment does not apply to private schools, their codes of conduct should comply with First Amendment's protections.

1.1 Safe Educational Environment. Safety is at the heart of education. Students will not feel free to question ideas, policies, laws, and actions—essential ingredients in the pursuit of truth and social justice—if they fear mistreatment. Safety not only is an issue of prevention of physical harm but also must include verbal and psychological harm—abuse, harassment, bullying, intimidation, disrespect, hate, and other forms of nonphysical assault—that should be addressed by institutional codes of conduct applicable to all students.

1.2 Freedom of Speech Not an Absolute Right. The hallmark of the First Amendment protection of free speech is the free exchange of ideas. Colleges have long been recognized as important marketplaces of ideas. However, as noted above, First Amendment rights are not absolute. Certain speech is illegal under all circumstances, including libel, true threats to commit violence, danger, or injury, incitement of imminent unlawful activity, and patently offensive sexual material that is so lacking in any redeeming value as to be legally obscene, sexual, racial, and other forms of harassment, and promotion of illegal activity. Therefore, for example, the athletic department may impose penalties on athletes who use social media to carry out or display their violations of such laws (like taking pictures of illegal drugs) and may punish a team for sexual harassment prohibited under Title IX when it uses a Facebook account to rate female athletes on their appearance or sexual orientation. Moreover, college athletes can also be punished for bullying, hazing, or harassing individuals or groups based on appearance or stereotypes even if the activities are not strictly prohibited by law.

1.3 Need for Justifications for Restricting Speech to be Identifiable. In the college athletic arena, restrictions on speech must be based on sound educational justifications or athletics' safety reasons and must be balanced against athletes' rights to express their opinions, especially if the opinions express viewpoints on societal issues and are not of low intrinsic value. There must be a direct causal relationship between the restriction and the harm sought to be prevented. Then, if the justification for restricting the speech outweighs the harm from doing so, the restriction should be further evaluated as to whether there is a less restrictive way that would satisfy the justification for the restriction while still permitting the communication of the same message. In other words, are there other time, place, and manner restrictions that could be applied in order not to completely chill or constrain the speech?

1.4 Adherence to Court Precedents. In the school arena, the Supreme Court has supported wearing black arm bands because it does not materially and substantially disrupt the educational environment. On the other hand, noise outside the classroom was prohibited because created a disturbance to the learning environment. Thus, what the degree of the disturbance and interference to the operation of the educational environment is, and whether the time, place, and manner restrictions are reasonable, are key considerations. The courts will look to impose reasonable time, place, and manner restrictions rather than to prohibit the speech outright. But no Supreme Court case has addressed freedom of speech in the context of intercollegiate athletics. And the lower courts reveal little consensus on the free speech rights of college athletes.²⁵

1.5 Balancing of Interests. Before imposing any restrictions prohibiting the ability of the athlete to express a viewpoint on a subject that has societal interest, the administrators must balance (1) justifiable reasons (such as the obligation to maintain civility and to direct criticism at ideas, laws, policies, and actions rather than at the persons or individuals expressing them or the potential for significant material disruption of the educational environment) and (2) whether other reasonable time, place, and manner restrictions could satisfy both the schools' interests and the athletes' interests.

1.6 Importance of Layered Institutional Policy. Athletic program codes of conduct should always supplement and not conflict with university codes of conduct. And specific sport team rules promulgated by individual coaches may supplement the athletic program codes and be more restrictive as long as they only apply to athletes. Thus, the athletic department codes or team rules should be layered. Athletic department rules imposed on all athletes should be related to athlete performance (e.g., the obligation to report violations of NCAA rules, prohibitions on the use of performance-enhancing drugs, or grooming requirements) and/or safety. Individual sport team rules can similarly be additional obligations necessary because they are directly related to athlete performance, team success or safety in that sport (e.g., speaking to reporters after the game). Although these layers of rules are important, situations will arise that do not fall squarely within the rules. Athletic administrators must examine facts and weigh circumstances in each case.

1.7 Questionable Rule Justifications. Athletic departments and coaches must not have unfettered license to promulgate rules that are unrelated to athletic performance.

²⁵ See <https://www.insidehighered.com/views/2016/02/04/do-college-athletes-have-first-amendment-right-strike-essay> (noting the different results in lower courts as to whether peaceful protests by athletes, e.g., the Tenth Circuit in *Williams v. Eaton*, 468 F. 2d 1079 (10th Cir. 1972), upheld the University of Wyoming's dismissal of players who wore armbands on the field during a game not due to potential disruption during the game, but instead to maintain complete neutrality in religion. The players wore the armbands to protest the religious beliefs of the Church of Jesus Christ of Latter-Day Saints on racial matters).

Restrictions must have a relationship to educational purpose, athletic goals, or safety concerns. Thus, much care must be taken with regard to reasons offered to justify more restrictive athletic department rules related to speech and expressive conduct.

Social Media Control. Neither athletic department codes of conduct nor an individual coach's team rules should prohibit athletes from having social media accounts on Twitter, Facebook, Instagram and other websites.²⁶ Posting on social media can be restricted to certain times that do not interfere with an educational activity, whether curricular or extracurricular, such as prohibiting texting or tweeting during a game or for a reasonable preparation time before or team meeting and media activity after the game. But athletes must not be required to provide their passwords to persons in the athletic department so that they can gain access to the accounts and scrutinize communications that are not otherwise publicly available for no valid purpose. The school would have to offer compelling reasons for such unfettered access.

Uniformity and Brand/Image Protection. Justifications for restrictions such as "developing team chemistry, unity, or cohesion," "representing or protecting the image of the institution," and "protecting the athletes' images" (saving the athletes from making stupid mistakes) are all common generic justifications used by athletic administrators and coaches that should be "red flags" demanding careful examination. A good example is whether athletic departments should require athletes to stand during the national anthem or be prohibited from taking any action during the playing of the national anthem other than standing if the reason for the activity is to express a viewpoint. Importantly, the athletic department must examine the manner of that action. Is it disruptive, peaceful, or respectful? What do those communications mean? For example, if an athlete "takes a knee" (symbolic act of respect before the grave of a fallen soldier) to respectfully express a position on social justice, it is doubtful that the athletic department's interest in uniformity would justify any requirement to stand. On the other hand, if a teammate tears the American flag during the national anthem, the activity may be so materially and substantially disruptive to the other athletes and the spectators that it can be prohibited. This example demonstrates that drawing lines and articulating principles clearly is essential but nuanced.

Exemplary Conduct. Other examples of justifications that raise red flags include "exemplary conduct while representing the institution" or "making sure donors don't get angry at the institution or athletic department and withhold their financial support." These justifications in virtually every situation would not support the chilling of viewpoint speech that is delivered in a peaceful and respectful manner. On the other hand, "crude" and offensive speech that is delivered indiscriminately and has nothing

²⁶ A number of states (including at least Arkansas, California, Delaware, Michigan, New Jersey, New México, Oregon, and Utah) have enacted "social media privacy" laws limiting the ability of colleges to require students to surrender private social-media information. Some athletic departments have required athletes to sign waivers to this law.

to do with a viewpoint might properly be restricted based on these justifications. It might also teach young adults civil, respectful behavior. For example, an athlete might be punished for using profanity to criticize a coach during practice because the outburst materially disrupts the educational environment. But that same athlete respectfully objecting to a coach who verbally or physically abuses another player would not. Another example of an improper restriction might be a prohibition against wearing buttons that state philosophical or political positions such as “Black Lives Matter” or a rainbow scarf while the team is traveling. The institution might insist that maintaining that the restriction is in the interests of uniformity in clothing, but that rationale does not relate to the educational purpose of the institution or its athletic programs. On the other hand, a rule prohibiting the wearing of a pin or a scarf during competition could be justified on safety grounds (depending on the sport).

Protection of Sponsors. Another justification for the regulation of athletes’ speech—accommodating corporate sponsors—has gained significance as college sports have become increasingly commercialized. The regulations restrict player apparel during practices and competitions and prohibit players from criticizing sponsors or supporting the sponsors’ competitors. To our knowledge, courts have not yet ruled on the constitutionality of these regulations. Still, we offer the following opinions.

- (1) Requiring an athlete to cover the logo of a competing sponsor when wearing shoes or apparel not provided under the terms of a sponsorship contract comports with the athlete’s freedom of speech. So does requiring an athlete to wear a uniform that bears a commercial logo.
- (2) An athletic department rule that prohibits “shout outs” on social media against sponsors because, for example, the athlete dislikes the sponsor’s product is likely compatible with the First Amendment.
- (3) However, if an athlete covered a logo on the uniform or refused to appear at an event to benefit a sponsor because the athlete disagreed with the sponsor’s unfair labor practices, the athlete’s expression would merit protection as viewpoint speech that does not disrupt or interfere with an educational mission.

Accordingly, we suggest that athletic departments should not prohibit or punish athletes’ expression of a viewpoint about the ethics or business practices of the sponsor.

Tattoos. Consider the latest iteration of athletics’ rules: prohibition of athlete tattoos that support or oppose a sponsor or convey a viewpoint and do not violate athletic governance association rules or prohibitions against hate speech. To justify restricting such body decorations or requiring athletes to cover them up, one must ask whether doing so is necessary to prevent a material and significant disruption of the educational activity.

Game Boycotts. A team announces that it will boycott the Saturday football game to protest an abusive coach and the recent death of a player during a practice session that featured punishment workouts the coach supported. Alternatively, the team announces the boycott to protest against being forced to train in an unsafe facility. In these situations, is an institutional response of dismissing boycott participants from the team and cancelling their athletic scholarships acceptable? The appropriate legal inquiry is whether dismissal is necessary to prevent a material disruption of an educational activity. In The Drake Group's view, athletes have a First Amendment right to engage in such expressive conduct. Thus, any penalty imposed for violations of regulations of the sort discussed here should result from the same disciplinary procedures that apply to all students and should balance institutional justifications against the First Amendment rights of college athletes.

1.8 Specificity of Codes. Prohibitions must be transparent and specific. Overly broad and vague rules violate due-process protections because they do not give athletes sufficient notice of what conduct is a violation and because their enforcement, therefore, is open to being arbitrary and capricious.

1.9 Review of Prohibitions by the General Counsel's Office. To ensure rules that are not overly broad or vague, hence in violation of athletes' due-process protections and do not violate athletes' constitutional rights, we recommend that the rules be subject to review by the general counsel at the university or another lawyer not under the direct purview of the athletic department.

2. Education about General Institution-Wide Mandates. Athletic departments should make a concerted effort to ensure athlete digestion of information related to their rights and obligations as students in the larger institutional community.

2.1 Annual Athlete Education Meetings. Annual athlete education meetings should include distribution and review of the general university "student code of conduct" (or other policies and procedures governing student conduct) in addition to the athletic department's Athlete Handbook and Athletes' Code of Conduct. These athletic department policies should supplement the University Student Handbook, be consistent with the University Student Handbook, and include athletic program information specific to and in addition to university policies. Regularly scheduled meetings (preferably at least monthly) should be held to discuss in smaller groups nuances of the policies. Finally, each team should discuss such policies at their meetings. .

2.2 Discussion and Emphasis about Freedom of Speech and Behavior Issues. Freedom of speech requires policies that promote peaceful, respectful, issue-oriented discussions. The university and athletic department should ensure a safe educational environment free of fear of hostility or intolerance with regard to differences in ideas and beliefs in all athletic and educational venues. The creation and nurturance of this

environment are the responsibilities of all members of the community. The following policies will help to achieve this end and protect First Amendment rights.

- Specific prohibitions of hate or harmful speech or physical action against any individual or group that may create an unsafe or fearful educational environment, including discrimination or harassment based on protected characteristics.
- Prohibition of unlawful practices such as bullying, hazing, sexual harassment, and endangering or threatening the health or physical safety of another individual.
- Affirmation that pursuit of truth/safe environment protections apply to all university venues, including its IT platform and off-campus educational activities, residences, etc.
- Processes for reporting and adjudicating violations of such policies, including penalties that may be imposed and adherence to gradually escalating discipline (warning, probation, suspension, expulsion, etc.) except in cases of serious misconduct.

3. Specific Content Recommendations for Inclusion in Athletic Department Codes of Conduct. If an athlete code of conduct is developed in addition to any university-wide student code of conduct, it should pertain and be applied evenly to athletes in all sports, and be contained in a written document that all athletes and their coaches review annually. If rules for athletes are more restrictive than those applied to nonathlete students, compelling reasons directly related to education or performance should underlie the rules for athletes and these reasons should be explained to athletes.

3.1 Causal Relation of Restrictive Policies to Their Educational, Safety, or Performance Justifications. Athletes should be informed that participation is a privilege and not a right. Nobody is entitled to participate in athletics. Accordingly, athletes may be subject to rules that other students are not and, depending on the circumstances, athletes may be suspended or expelled from athletics immediately after appropriate warning based on the severity of the violation. When these restrictions on athletes are established, they must be narrowly crafted to achieve athletics-specific educational, safety, or competitive purposes. For example, athletes may be subject to mandatory random drug testing because national athletic governance association rules that prohibit the use of performance-enhancing drugs require such testing. Wrestlers may have restrictions related to body hair necessitated by skin examinations because skin infections are a health issue in that sport. However, the rules and restrictions should be narrowly tailored so that constitutional rights are not trampled. For example, a coach should not be allowed to restrict the length of the athlete's hair, even if it is a safety issue, if the safety issue can be resolved by wearing a skull cap. The restriction must be deemed essential for educational, safety, or competitive reasons, and these reasons should be explained within the context of the policy or prohibition. Uniformity is not an acceptable reason.

3.2 Sportsmanship. Demonstration of respectful conduct toward opponents, officials, and spectators during an athletic contest is an important objective for sports conducted

in educational settings. Thus, it is recommended that athletic department codes of conduct specify that, in addition to any penalty imposed by officials (i.e., free throws, yardage, etc.) or by conference/national athletic governing organization event sponsors, any intentional game sportsmanship violation that threatens or results in physical harm to an opponent (e.g., fighting, targeting, etc.) or involves the use of obscenities or other forms of severely disrespectful speech or behavior toward opponents, officials, or spectators may also result in the finding of a violation of the institution's athletes' code of conduct and the imposition of additional athletic department or team penalties. Penalties may include an immediate suspension of the athlete from the remainder of that game as determined by the coach or additional future games as determined by the coach or athletic director after conducting a meeting with the athlete. The athletic department code of conduct should also specify that such conduct outside the game itself that creates an unsafe or hostile educational environment in practice or involving the athletes' interaction with other students (e.g., physical behavior, verbal or written communication) is prohibited. In either case, if a more serious penalty (e.g., dismissal from the team or withdrawal of a scholarship) is pursued, such penalty should only be applied in the case of serious misconduct and should be adjudicated by the institution's disciplinary process applicable to all students.²⁷

3.3 Actions Taken about Team Uniform and Use of Institutional Marks and Affiliation. Official team uniforms are issued for use during competitions and team travel. Uniforms are the property of the institution and subject to governing association rules and may not be defaced. The official marks of the university and athletic department may not be used without permission (athletes should be prohibited from using such marks on Facebook, emails, etc.). As noted above, although athletes in team uniform have a special obligation to behave respectfully, they maintain First Amendment rights, e.g., wearing a "Black Lives Matter" button on an official team travel uniform. On the other hand, it is a reasonable restriction to prohibit such a button on an athlete's uniform worn during competition because it poses a safety hazard during player-to-player contact.

3.4 Participation in Ceremonial Rituals and Customs. The athletic department may establish a guideline that all team members are expected to respectfully participate in ceremonial rituals and customs such as the national anthem, school songs, post-game acknowledgments, etc., when in uniform or appearing as the representative of a team. However, it should be made clear that no athlete will be punished for peaceful and

²⁷ Note that current NCAA rules mandate this use of general student disciplinary processes in the case of "serious misconduct." Although students receiving athletics aid generally have the right to appeal to the Office of Student Financial Aid if it is reduced or not renewed, if the reason for such nonrenewal is "serious misconduct" the determination of "serious misconduct" requires use of the university's regular student disciplinary authority (see 15.3.4.2 (c) and 15.3.4.2.4 on page 204-205 of the 2017-18 NCAA Division I Manual).

respectful protests, e.g., protests that do not threaten or cause harm to others or injury to property. If the form of the protest causes material and substantial disruption to the team, then restrictions as to when such protests may take place may be reasonable. Athletes who wish to engage in such expressions should be encouraged to consult with coaches or athletic department administrators to help determine appropriate ways to fulfill athletics responsibilities and their freedom to express opinions at the same time.

3.5 Obligation to Report Violations of University Policy. Athletic department employees should be held responsible for reporting violations of institutional policy (e.g., bullying, hazing, discrimination, harassment based on protected characteristics, hate or harmful speech or physical action against any individual or group that may create an unsafe or fearful educational environment, etc.) with whistleblower protection from retaliation afforded to such reporters. The athletic department should also adopt a college athlete “bystander” reporting expectation with a confidential reporting process and whistleblower protection. This extension of reporting responsibility to students epitomizes the belief that all members of the community are responsible for ensuring the safety of everyone within the community.

3.6 Social Media Responsibilities and Use of Institutional Email. Coaches may not prohibit the use of social media except to prohibit athletes’ use of such media during specific time periods involving preparation for and during practice, competition, etc. Posted content on social media or in emails must conform to university policy with regard to prohibitions of hate speech or harmful speech or expressions directed against an individual that threaten that person’s safety, as well as libel, bullying, hazing, discrimination or harassment based on protected characteristics. In addition, athletes are prohibited from posting information related to the health, medical status, academic grades, or discipline of teammates. The university may be a nonprofit organization that is prohibited from using its resources for political purposes or private gain, and if so, athletes should be informed of such limitations of university email or Internet use.

4. Recommendations Related to Sport-Specific Team Rules

4.1 Athletic Director Approval of Team Rules. Because intercollegiate athletics is primarily offered through sex-separate teams (some teams like swimming or track and field may have male and female athletes combined under a single coach), there is a high probability of unintentional discrimination on the basis of sex if rules are enforced on a men’s team and not on a women’s team or vice versa. For example, A legal cause of action could arise if a football player uttering an obscenity to an official was suspended for a game but a female basketball player was dismissed from the team for the same reason. Thus, all “conduct” rules should be promulgated via a department-wide policy rather than through different rules for different sports, and all team rules

should require approval of the athletic director to prevent unintentional sex discrimination.

4.2 Penalties for Violation of Team Rules. Penalties for violation of team rules may involve suspension from practice or play, but may not include physical punishment, removal from the team, or team service that is intended to embarrass or humiliate. More serious punishments for repeated violations are permitted following athlete counseling, the coach's meeting with the athletic director, and approval of the athletic director. Those judged by the coach to be in violation of team rules should have the right to appeal to the athletic director.

4.3 Removal from Team. No action should be taken to remove an athlete from a team without an investigation and hearing process, the approval of the athletic director, and the opportunity for the athlete to appeal to the regular institutional student disciplinary authority.

4.4 Bystander Responsibility. Penalties should be imposed on bystanders who witness or otherwise have knowledge of athletes who violate the codes of conduct although the bystander penalty normally should not be as severe as the penalty imposed on the original transgressor.

Postscript

The events that prompted The Drake Group to prepare and issue this position paper were such as to compel its focus to be on conduct involving speech that had the potential to be materially and significantly disruptive to the pursuance of education in a safe and nondiscriminatory environment. The examples cited and recommendations made involved speech relating to domains of political and social relevance where the First Amendment potentially offers the greatest protection.

Within the last couple of years, and especially following the passage of laws in many states providing college athletes the right to benefit from the licensing of their names, images, and likenesses (NILs), reinforced by the Supreme Court's decision in June 2021 in *National Collegiate Athletic Association v Alston et al.*, has brought to the fore a range of issues involving predominantly commercial speech. These have to do with (1) the interests colleges have in reducing or eliminating conflict between their athletes' NIL licensing and institutional ties the colleges have with commercial sponsors, (2) efforts to forbid licensing deals with companies considered to be engaged in businesses involving vices like gambling, consumption of alcohol or tobacco, and pornography, and (3) concerns about the undermining of "institutional values". Some state laws impose restrictions on athletes' freedom to negotiate NIL deals on one or more of these grounds, and some colleges themselves have made up their own rules to control or limit what their athletes can do. The NCAA, following the crippling of its regulatory authority by the Supreme Court, has decided to pass along responsibility for creating and enforcing regulations in this space to state legislatures, conferences, and colleges themselves.

Whether rules restricting athletes' ability to enter into NIL deals will pass muster in court challenges remains to be seen, but there is good reason to believe that most, if not all, will fail serious First Amendment scrutiny. In their excellent article titled "Putting the First Amendment in Play: Name, Image, and Likeness Policies and Athlete Freedom of Speech" in *The Columbia Journal of Law & the Arts* (45: 47-94 [2021]), Sam C. Ehrlich and Neal C. Ternes conclude that "the nature of these restrictions as overbroad prior restraints of free speech creates significant doubt as to the constitutionality of many of these restrictions under the First Amendment."

<https://journals.library.columbia.edu/index.php/lawandarts/article/view/8954>