Checking Up on Student-Athletes: A NCAA Regulation Requiring Criminal Background Checks

Lindsay M. Potrafke
CHECKING UP ON STUDENT-ATHLETES: A NCAA REGULATION REQUIRING CRIMINAL BACKGROUND CHECKS

INTRODUCTION

In 2003, Baylor University was struck by tragedy: one of its former athletes, Carlton Dotson, confessed to shooting and killing one of Baylor’s current basketball players, Patrick Dennehy. Both Dennehy and Dotson were transfer students at the Baptist university. Dennehy was reported missing on July 12, 2003 and was last seen on campus. Dotson, a close friend of Dennehy, was immediately noted as a person of interest after a credible source told the police that Dotson admitted to another person that he shot Dennehy. Police searched for Dotson for about a month, tracking his movements through Texas, Virginia and Maryland. Finally, on July 21, 2003, Dotson voluntarily called the Maryland authorities and spoke to agents from the Federal Bureau of Investigation, at which point he confessed to intentionally shooting and killing Dennehy while the two friends were in an open field shooting handguns at targets. Dotson later was sentenced to thirty-five years in prison for the murder.

In recent years, incidents like this have not been rare occurrences in the realm of intercollegiate athletics. For example, between 2005 and 2006, at least three University of Wisconsin football players were arrested for various...
violent crimes, including assault, domestic violence, and disorderly conduct while armed.\(^8\) Athletes at the University of Colorado at Boulder also underwent scrutiny for their violent behaviors after reports surfaced that several football players and their recruits participated in the sexual assault of young women at an on-campus party.\(^9\)

While these incidents are just a few examples of violence by student-athletes, the problem of violence among this group has grabbed the attention of many universities. Several have responded to the problem by implementing criminal background checks on athletes prior to offering a scholarship.\(^10\) Other universities are still considering implementing similar procedures as a means of curbing the recruitment of violent athletes.\(^11\) To respond to this growing area of concern, the National Collegiate Athletic Association (NCAA) should take the initiative to implement a new bylaw that requires all incoming student-athletes in Division I athletic programs to undergo a criminal background check prior to becoming a member of a Division I athletic team.

Section I of this article will describe the research that shows a correlation between athletes and violence and the incidents that exemplify the research findings. Section II will then describe the measures taken to regulate the problem of violence among athletes. Section III will focus on the NCAA’s recent regulation of student-athletes in other areas of intercollegiate athletics while Section IV will focus on the NCAA’s authority to implement a bylaw requiring criminal background checks of student-athletes. Finally, Section V will analyze the current issue and explain how the bylaw should be adopted and implemented by the NCAA.

I. ATHLETES COMMIT VIOLENT CRIMES: THE RESEARCH AND THE HIGH PROFILE INCIDENTS

Researchers have repeatedly suggested that athletes have a high tendency to commit violent crimes.\(^12\) A 2003 study suggested that the

\(^8\) Steven Elbow, *Football Player is Suspended; Hill Allegedly Wielded Bat in Fight*, CAPITAL TIMES (Madison, Wis.), Feb. 7, 2006, at B3; Mike Miller, *UW’s Stanley Charged with Sexual Assault, Battery*, CAPITAL TIMES (Madison, Wis.), Jan. 9, 2006, at 1A.


\(^10\) See [discussion infra at section II regarding the measures used by a state legislature and several universities to try to combat student-athlete violence.](http://www.ncaa.org/wps/portal/!ut/p/kcxml/04_Sj9SPykssy0xPLMnMz0vM0Y_QizKLN4g3NPUESUGYHvqRaGLGphhCjggRX4_83FR9b_0A_YLc0NCldkFACrZhxQ!/delta/base64xml/L3dJdyEvUu3QndNQSevNEIVRS82xZbfMTVL?New_WCM_Context=/wps/wcm/con)

\(^11\) See id.

\(^12\) R. Jake Locklear, *Policy Alone is Not a Deterrent to Violence*, THE NCAA NEWS (May 26, 2003), available at [http://www.ncaa.org/wps/portal/!ut/p/kcxml/04_Sj9SPykssy0xPLMnMz0vM0Y_QizKLN4g3NPUESUGYHvqRaGLGphhCjggRX4_83FR9b_0A_YLc0NCldkFACrZhxQ!/delta/base64xml/L3dJdyEvUu3QndNQSevNEIVRS82xZbfMTVL?New_WCM_Context=/wps/wcm/con](http://www.ncaa.org/wps/portal/!ut/p/kcxml/04_Sj9SPykssy0xPLMnMz0vM0Y_QizKLN4g3NPUESUGYHvqRaGLGphhCjggRX4_83FR9b_0A_YLc0NCldkFACrZhxQ!/delta/base64xml/L3dJdyEvUu3QndNQSevNEIVRS82xZbfMTVL?New_WCM_Context=/wps/wcm/con)
competitive nature of athletics leads young athletes to believe that using force to settle disagreements is an acceptable method of conflict resolution. However, the research also indicated that the levels of athlete violence were not dependent upon whether the athletes participated in contact or non-contact sports. Instead, the predominant factor was the level of the athlete’s competitiveness and his or her win-oriented attitude.

Competitiveness and win-oriented attitudes seem to intensify when an athlete is immersed in the environment of intercollegiate athletics. Fans, spectators, and even coaches encourage athletes to win at all costs and may offer positive reinforcement to the athletes when they commit fouls against the other team, especially when those fouls lead to a competitive advantage for their team. According to researchers, this type of reinforcement intensifies these athletes’ competitiveness and their desire to physically dominate others, which can translate into the use of violence in non-athletic related areas of their lives.

Other less recent studies of the behavior of student-athletes support the 2003 findings. A study conducted from 1997 to 1998 revealed that more than 175 athletes were arrested for criminal activity at 112 NCAA Division I-A schools. Among the most common criminal activities of these athletes were assault and sexual assault. The study further revealed that within those universities studied, seventy football players at the top twenty-five nationally ranked football colleges at that time had been charged with some type of criminal activity. A 1994 study revealed similar statistics, finding that male student-athletes made up 3.3% of the male collegiate population, but represented 19% of all sexual assault perpetrators and 35% of all domestic

1. See Smith & Stewart, supra note 12.
2. Id.
3. Id.
4. Id.
5. Id.
6. Id.
7. Id.
8. Id.
9. Id.; Wieberg, supra note 12.
10. Wieberg, supra note 12.
11. Id.
12. Id.
violence perpetrators on college campuses. Although the exact statistics since that time likely have changed, the issue of student-athlete violence remains in the forefront of intercollegiate athletics.

The issue of student-athlete violence likely remains in the forefront of intercollegiate athletics because of the many high profile incidents of athlete violence that have occurred in the past few years. For example, in December 2005, two athletes from the University of Wisconsin were arrested in unrelated incidents. Both players had previous arrest records from the spring of 2005. Booker Stanley was initially arrested during a fight at a block party in Madison and faced four misdemeanor charges. In December, Stanley was arrested again, accused of beating and choking his twenty-year-old girlfriend. Stanley was suspended from the team in both instances and was forced to miss the Capital One Bowl because of the second incident. The second athlete, Marcus Randle El, was initially arrested in the spring for disorderly conduct in connection with a fight he had with his girlfriend. Randle El was arrested again in December after being accused of punching his former teammate while arguing over gambling money. As a result of that incident, he was suspended from the team, but the appeals committee reduced his suspension, making him eligible to play in the bowl game. Just over one month after these two incidents, a third Wisconsin football player, Parrish Hill, was suspended from the team after a January 26, 2006 fight during which Hill allegedly wielded a baseball bat. Hill faced misdemeanor charges of disorderly conduct while armed.

Another high profile example of athlete violence is the case of Simpson v. University of Colorado, Boulder. Although this was a civil suit brought under Title IX rather than a criminal prosecution of the individual players, the incidents involved current and future student-athletes engaging in violent situations.

23. Locklear, supra note 12.
24. Miller, supra note 8.
25. Id.
26. Id.
27. Id.
28. Id.
30. Elbow, supra note 8.
31. Id.
32. Id.
33. Id.
sexual behavior. In that case, several female students alleged that the University of Colorado's (CU) football players and recruits sexually assaulted them while at a party. The allegations stated that the football players and their recruits sexually assaulted a non-student, a female football player, and another student who was not a party to the lawsuit. Some other less recent, but well-known examples of athletes engaging in violent activities include Randy Moss, a former Marshall University football player, who pled guilty to two felonies after kicking a white student in the head in the midst of a racially charged fight and who was arrested for domestic battery after a fight with the mother of his two children; the series of violent incidents at the University of Nebraska, which included Lawrence Phillips pulling his former girlfriend down three flights of stairs by her hair, Tyrone Williams being charged with firing a gun into an occupied car, and Riley Washington being charged with attempted murder; and finally, Kenny Brunner, the former point guard at Fresno State, who was charged with attempted murder after prosecutors said that Brunner and his accomplice, Ladale Lunnie, robbed Lunnie's junior college basketball coach at gunpoint.

Although it has been suggested that the high-profile nature of intercollegiate athletics partially explains the high number of reported violent incidents of student-athletes, the problem of violent athletes remains a concern, as is exemplified from the research and incidents described above.

II. COMBATING THE PROBLEM OF VIOLENCE BY STUDENT-ATHLETES

The concern with student-athlete violence has caused many universities to consider the question of how to control the behavior of these athletes who are some of the most high profile representatives of their universities. One state legislature and several universities have responded to the concern by taking active measures to curb student-athlete violence. While these

35. Id.
36. Id. at 1232-33.
37. Id.
38. Jarret Bell, Moss' Fieldwork Inspires Oohs, USA TODAY, Aug. 4, 1998, at 8C.
41. See Thomas N. Sweeney, Closing the Campus Gates: Keeping Criminals Away from the University, 9 SETON HALL J. SPORT L. 226, 236 (1999).
measures vary considerably, they have the same underlying purposes: to reduce the incidents of violent crime among student-athletes and to create a safer environment for the athlete and the student body of the university.

Idaho’s legislature was the first to address the problem of criminal violence among student-athletes when it adopted its state policy prohibiting any Idaho state university from recruiting any athlete with a felony conviction or a juvenile charge corresponding to a felony conviction. This policy affected Idaho University, Boise State, and Division I-AA Idaho State and prohibited them from recruiting any athlete with such a conviction, absent an exception that was authorized by the school’s president and that was reported to the state board of education.

Following Idaho’s lead in attempting to combat athlete violence, Fresno State adopted its own university-wide criminal background check policy. Under this policy, athletes with a felony conviction cannot be recruited while athletes with misdemeanor convictions are yellow-flagged. A yellow flag does not prohibit a coach from recruiting an athlete; however, it does require a coach to notify and receive authorization from the university’s athletic director before further recruiting that athlete.

Since the policy’s implementation, several athletes with felony convictions have still been recruited by Fresno State, specifically by its former basketball coach Jerry Tarkanian, who recruited these athletes without notifying the university of their backgrounds. Despite this oversight by Fresno State, the university professor who proposed the new policy has noted that even though not foolproof, the policy has potentially blocked a number of individuals who would have caused disruption from being recruited by Fresno State’s athletic department. At the very least, the policy requires the “athletic director and president to put their signatures on [questionable admissions]” and to take responsibility for the athletes that the athletic department brings in to represent its university.

The University of Oklahoma also acknowledged the problem of

43. IDAHO STATE BD. OF EDUC., supra note 42.
44. Id.
45. CAL. STATE UNIV. FRESNO, supra note 42.
46. Steve Wieberg, Background Checks Becoming Part of Recruiting Process, USA TODAY, Sept. 18, 1998, at 19C.
47. Id.
48. Wieberg, supra note 12.
49. CAL. STATE UNIV. FRESNO, supra note 42.
50. Wieberg, supra note 46.
violence among its athletes when it adopted a policy in the fall of 2004 that required all incoming student-athletes to submit to criminal background checks.\textsuperscript{51} Some schools felt that Oklahoma was a pioneer, raising the bar for all universities' recruiting procedures.\textsuperscript{52} This label surprised Oklahoma's athletic director, Joe Castiglione, who claimed he did not want his university to be a pioneer, but instead wanted the university to become more aware of the athletes being recruited to represent the school.\textsuperscript{53} He stated:

We didn't do this to set the tone or call attention to this part of the process . . . . It's due diligence, and we think it helps us create a better profile on the prospective student-athletes [we are] bringing in. We're not going to catch every single thing . . . but if we don't do this, someday someone else is going to walk in to my office and say, "Did you know about this? Did you check?"

Supporting Castiglione's position, Oklahoma has continued enforcing its criminal background check policy on incoming athletes.\textsuperscript{55}

Just several months after Oklahoma implemented its policy, Baylor University set up a task force to review its own policies regulating criminal background checks.\textsuperscript{56} After reviewing its policies, the task force recommended that the university perform criminal background checks on all athletes transferring to Baylor from other schools.\textsuperscript{57} These checks were viewed as a method of assessing the character of the incoming athletes from junior colleges or other four-year institutions.\textsuperscript{58} The task force made the decision to limit its checks to transfer athletes only after considering Texas laws, which prevent the university from accessing juvenile records.\textsuperscript{59} Recognizing that 85% of Baylor's student-athletes came from Texas and that most of those athletes would have only juvenile records at the time they entered Baylor, the task force decided to focus on the older students who would have accessible, substantive records that could be evaluated for serious

\textsuperscript{51} William Lee Adams, Athletics: A Penalty Marker, NEWSWEEK, Mar. 21, 2005, at 12.
\textsuperscript{52} Id.
\textsuperscript{54} Id.
\textsuperscript{55} See id.
\textsuperscript{56} FOGLEMAN, supra note 42.
\textsuperscript{57} Id.
\textsuperscript{58} Id.
problems before the athletes entered the university.\textsuperscript{60}

As of July 2005, Baylor had conducted approximately six background checks on transferring athletes.\textsuperscript{61} None of these checks resulted in a denial of admission or a prohibition on participating in the sport.\textsuperscript{62} However, if the school were to face serious concerns in the future about an athlete's criminal history, Baylor's athletic director Ian McGraw has noted that the school would have to assess the information at that time and then determine how to proceed.\textsuperscript{63}

In response to the new procedures implemented at Oklahoma and Baylor, other universities have considered adopting similar checks.\textsuperscript{64} The University of North Carolina, the University of Kansas, and the University of Miami (Florida) have each considered the value of implementing such checks.\textsuperscript{65} In assessing the potential value, Larry Keating, the Senior Associate Athletic Director at Kansas, determined that if the background checks did not provide the type of information that would assist the university and its coaches in making better recruiting decisions, then the university would have to question whether implementing criminal background checks on its athletes would be worthwhile.\textsuperscript{66}

Florida State University, the University of Florida and the University of South Florida already have decided that such checks are not beneficial to their recruiting process and have declined to implement any criminal background check policies.\textsuperscript{67} The largest criticism has been the inconsistency of the information that the school would be able to receive because each state's law varies as to what access nongovernmental personnel have to public records.\textsuperscript{68} One important inconsistency in the state laws is the access a state grants to the records of minors, who would make up the majority of incoming athletes.\textsuperscript{69}

\textsuperscript{60} Id.
\textsuperscript{61} Id.
\textsuperscript{62} Id.
\textsuperscript{63} Id.
\textsuperscript{65} See Adams, supra note 51; Bedore, supra note 64.
\textsuperscript{66} Bedore, supra note 64.
\textsuperscript{67} Auman, supra note 53.
\textsuperscript{68} See, e.g., 705 ILL. COMP. STAT 405/5-915 (a)-(d) (2006); OHIO ADMIN. CODE ANN. § 109:5-1-01 (Anderson 2006); OHIO REV. CODE ANN. § 2151.358 (LexisNexis 2006); WIS. STAT. ANN. § 19.31 (West 2006). See also Auman, supra note 53.
\textsuperscript{69} See, e.g., 705 ILL. COMP. STAT. 405/5-915 (a)-(d); OHIO ADMIN. CODE ANN. § 109:5-1-01; OHIO REV. CODE ANN. § 2151.358; WIS. STAT. ANN. § 19.31.
This inconsistency could easily result in a recruit in one state being penalized for a glitch on his record that would never be detected for a recruit in another state.\(^7\)

Another reason some universities have declined to adopt criminal background check procedures is because they believe that the coaches can sufficiently check an athlete’s background using other means.\(^7\) These universities note that coaches can question the parents of the athletes, their coaches, and their teachers as to whether the athlete has had any disciplinary problems, and from that questioning can get a comprehensive understanding of the student-athlete’s background and his or her fitness for its athletic program.\(^7\) However, if South Florida had used background checks to screen its incoming athletes, it would have known that one of its linebackers, Gene Coleman, was charged with six felonies, two burglaries, two larcenies, and dealing in stolen property.\(^7\) Yet, even the incident with Coleman has not swayed South Florida’s coach, who firmly believes that even athletes with a criminal past deserve a second chance and that if an athlete does something while at his university, then the university will have the responsibility to investigate the incident and deal with it accordingly.\(^7\)

### III. THE NCAA’S REGULATION OF STUDENT-ATHLETES

Instead of having universities respond to violence by student-athletes, the NCAA should encourage universities to take preemptive measures to combat the violence. Criminal background checks offer such a preemptive measure that the NCAA should consider when evaluating its role in helping decrease student-athlete violence.

The NCAA has considered its role in regulating student-athletes in other areas of intercollegiate athletics by increasing university accountability for the academic progress of its student-athletes through the implementation of a new academic policy.\(^7\)\(^5\) This academic policy requires that a university and its student-athletes work together to achieve an acceptable academic progress rate and an acceptable graduation rate.\(^7\)\(^6\) To achieve these acceptable rates, the NCAA generally requires that student-athletes achieve 40% completion of

---

70. Auman, supra note 53.
71. Id.
72. Id.
73. Id.
74. Id.
75. NAT'L COLLEGIATE ATHLETIC ASS'N, 2005-06 NCAA DIVISION I MANUAL, art. 23 (2005).
76. Id. arts. 23.01-.02.2.
a degree by the end of his or her second year, 60% completion by the end of the third year, and 80% completion by the end of the fourth year. Failure to meet these regulations results in penalties to the university. Penalties include scholarship reductions, recruiting limitations, and ineligibility for NCAA post-season competition if the university has a continuous history of academic failure by its student-athletes.

Another area where the NCAA has increased university accountability for its student-athletes is in recruiting regulations. Several of these regulations include: requiring member institutions to develop written policies for official recruiting visits to be approved by the president or chancellor, which must prohibit the use of alcohol, sex, and gambling in the recruiting process; allowing only coach-class airfare and standard transportation to transport athletes on official visits; and permitting only current student-athletes or students designated to give tours of the campus to host prospective student-athletes on official visits.

As the NCAA continues to impose these stricter regulations on student-athletes, it should focus particularly on further refining the recruiting standards for universities. The recruiting process is an important phase for universities because it is during that phase that universities select the student-athletes who will represent them on a local, regional and national level. In refining the recruiting standards, the NCAA should implement a uniform policy for Division I athletic programs that requires all student-athletes to submit to a criminal background check prior to entering those programs. However, at this time, the NCAA has not declared any official position on the issue.

IV. THE NCAA’S AUTHORITY TO ADOPT A CRIMINAL BACKGROUND CHECK REGULATION

Although the NCAA has not declared an official position on the use of

77. Id. art. 14.4.3.2.
78. Id. art. 23.2.
79. Id. arts. 23.2.1.2.2, 23.2.1.2.3.
80. Id. art. 13.6.1; Press Release, Division I Management Council Endorses New Rules for Recruiting Student-Athletes (July 20, 2004), available at http://www.ncaa.org/wps/portal/ut/p/kxml/04_Sj9SPyksyo0xPLMnMzv0M0Y_QjqKL4j3CQXJgFJGpqvRKq6AiYRARXwN9X4_83FSgeKQ5Kg_k7akfoh_ppOnH6BfkBsaGfuaOHqKqIAB65KII/!delta/base64xml/L3d1dyEvd0ZNMQUFzQUMvNEIVRS82XzBIHFU!?CONTENT_URL=http://www.ncaa.org/releases/divi/2004/2004072001dl.htm.
81. NAT’L COLLEGIATE ATHLETIC ASS’N, supra note 75, art. 13.5.2.3.
82. Id. art. 13.6.6.5.
83. Adams, supra note 51.
criminal background checks on student-athletes, the NCAA does have the authority to implement such a regulation and to apply it to student-athletes and member institutions. This authority stems from its position as a voluntary, unincorporated administrative agency. The relevant purposes of this administrative agency include: (1) "[t]o initiate, stimulate and improve intercollegiate athletics programs for student-athletes;" (2) "[t]o uphold the principle of institutional control of, and responsibility for, all intercollegiate sports in conformity with the constitution and bylaws of this Association;" (3) "[t]o encourage its members to adopt eligibility rules to comply with satisfactory standards of scholarship, sportsmanship and amateurism;" (4) "[t]o legislate, through bylaws or by resolutions of a Convention, upon any subject of general concern to the members related to the administration of intercollegiate athletics;" and (5) "[t]o promot[e] the opportunity for competitive equity among its member institutions." To accomplish these purposes, the NCAA can change, amend, or adopt any rules and regulations it deems necessary, subject to any limitations that Congress may impose. If Congress believes that the NCAA's regulations are inappropriate or that another method will better accomplish the same goal, Congress has the authority, pursuant to the Commerce Clause, to regulate the NCAA as interstate commerce by enacting legislation that overturns the NCAA's regulations. Individual state legislative bodies do not have the authority to regulate the NCAA or to overturn its rules and regulations.

If the NCAA chooses to implement a new rule or regulation at the Division I level, a Division I member conference would first have to submit a proposal for a change to the NCAA bylaws. The member conference would

84. See NCAA v. Miller, 10 F.3d 633 (9th Cir. 1993).
85. NAT'L COLLEGIATE ATHLETIC ASS'N, supra note 75, art. 1.2.
86. Id.
87. Id.
88. Id.
89. Miller, 10 F.3d at 635-36. See NAT'L COLLEGIATE ATHLETIC ASS'N, supra note 75, art. 2.10.
90. Miller, 10 F.3d at 635.
91. The NCAA has member institutions in each of the states, schedules competitions that require transportation over state lines, governs the nationwide recruiting of amateur athletes, and controls bids for national and regional television broadcasting of college athletics; therefore, it can be regulated by Congress under the Commerce Clause as interstate commerce. See Miller, 10 F.3d at 638 (citing Justice v. NCAA, 577 F. Supp. 356, 378 (D. Ariz. 1983); accord Hennessey v. NCAA, 564 F.2d 1136, 1150 (5th Cir. 1977)).
92. See id. at 639.
93. Memorandum from Lynn M. Holzman, Director of Membership Services, to Commissioners of Selected NCAA Division I Conferences 1 (May 8, 2006), available at http://www2.ncaa.org/portal/legislation_and_goverance/rules_and_bylaws/legislative_actions_and_is
have to submit the proposal electronically through the Legislative Services Database (LSDBi) or via email to the NCAA national office. The submission would need to identify the specific legislative provision of the current NCAA manual that it wants amended; make a clear and concise statement of what the proposal is intended to accomplish; and indicate any changes by italicizing words to be deleted from the current language and bolding any language to be added (only if submitting via email). The proposal then would go to current NCAA staff who would refine it before sending it to the appropriate cabinet or committee. The cabinet or committee members would review the proposal prior to the annual Management Council meeting where a decision on the proposal would be made.

Once the NCAA adopts a new bylaw, that bylaw will not be subject to constitutional challenges. However, student-athletes may still challenge a bylaw on other grounds. For example, a student-athlete seeking to challenge a criminal background check bylaw could do so by claiming the background check constitutes an invasion of privacy or that the background check, as applied to student-athletes, is arbitrary and capricious. Yet these claims may be difficult to win, as other NCAA regulations challenged on these grounds have withstood judicial scrutiny.

In Brennan v. Board of Trustees, the court held that the NCAA’s drug testing policy, as implemented by individual schools, did not violate the athletes’ privacy interests. The court noted three reasons that the policy did not violate the athletes’ privacy interests. First, student-athletes already have diminished expectations of privacy because the nature of intercollegiate athletics requires them to engage in communal undress, physical examinations, and the routine sharing of personal information with their coaches and
CHECKING UP ON STUDENT-ATHLETES

Second, student-athletes’ reasonable expectations of privacy are further diminished because the drug-testing program provides advance notice of the testing and the opportunity to consent to such testing. Finally, the court found that when the NCAA’s interest in regulating was balanced against the diminished privacy interests of the student-athletes, the NCAA has a legitimate, well-founded interest in protecting the integrity of NCAA athletics and in protecting the health and safety of its student-athletes. Thus, the court found that the regulation did not violate the student’s privacy interest.

Other student-athletes who have claimed that the NCAA bylaws are arbitrary and capricious have similarly had little success in court. For example, in Bloom v. NCAA, the appeals court upheld an NCAA bylaw regarding a student-athlete’s receipt of endorsements for modeling and other media activities, dismissing Jeremy Bloom’s claim that the rule as applied to him was arbitrary and capricious. Bloom, an athlete recruited to play football at the University of Colorado (CU), requested through CU a waiver of the NCAA bylaw restricting student-athlete endorsement and media activities because, as a professional skier, he relied upon the revenues from those activities to support his professional career. The trial court held that Bloom and CU did not demonstrate any inconsistency in the NCAA’s application of its rules and thus ruled in favor of the NCAA. The court of appeals affirmed the trial court’s decision.

In light of the courts’ deference to NCAA bylaws as evidenced in Brennan, Bloom, and other similar cases, an NCAA rule implementing a procedure for criminal background checks of all incoming Division I student-

104. Id. at 329.
105. Id.
106. Id.
107. Id. at 330.
108. Other NCAA bylaws also have withstanded judicial scrutiny when alleged to be arbitrary and capricious. See, e.g., NCAA v. Lasege, 53 S.W.3d 77 (Ky. 2001); Hall v. NCAA, 985 F. Supp. 782 (N.D. Ill. 1997).
110. Id. at 622-23.
111. Id.
112. Id. at 627-28.
113. Id.
114. See, e.g., Lasege, 53 S.W.3d 77 (finding in favor of the NCAA by recognizing that it is inappropriate for a judicial entity to substitute its decision for that of the NCAA in a student-athlete eligibility matter where the plaintiff signed contracts to play professional basketball in violation of NCAA amateurism regulations); Hall, 985 F. Supp. 782 (holding that the NCAA’s eligibility requirements were valid and that the student-athlete failed to meet them thereby making the determination that the student-athlete was ineligible not arbitrary).
V. A Proposal for an NCAA Criminal Background Check Procedure for Student-Athletes

Using its rule-making authority, the NCAA should amend its bylaws to include a requirement of criminal background checks on student-athletes. The bylaw should accomplish the following: (1) satisfy the three criteria set forth in the Brennan privacy analysis; (2) determine how the checks will be conducted; and (3) determine how any criminal history that is found should be used.

A. Satisfying the Brennan Criteria

If a student-athlete were to challenge an NCAA bylaw requiring criminal background checks, a court likely would apply the same analysis as did the court in Brennan because, similar to the drug testing policy at issue in that case, criminal background checks would require a search of student-athletes’ personal information and may possibly invade student-athletes’ rights of privacy.115 To satisfy the Brennan requirements, the NCAA must do the following: (1) establish that student-athletes have a diminished right of privacy; (2) provide student-athletes with advance notice of and require their written consent to the background checks; and (3) narrowly tailor its bylaw to address the NCAA’s specific goals.

i. Establishing student-athletes’ diminished right to privacy

To satisfy the first criterion, the checks must not be overly invasive of student-athletes’ privacy. The NCAA can satisfy the first criterion because as articulated in Brennan, student-athletes already have a diminished right to privacy given that the nature of intercollegiate athletics includes communal undress, physical examinations, the routine sharing of information, and required consent to drug testing.

ii. Providing advance notice and consent

To satisfy the second criterion of the Brennan analysis, the NCAA must adopt procedures that provide for advance notice and student-athlete consent.116 The NCAA could provide advance notice by incorporating the

115. See Brennan, 691 So. 2d at 329-30.
116. Id.
criminal background check policy into article thirteen of the NCAA Manual, which outlines the policies and procedures for proper recruiting. Including the policy in the manual would provide student-athletes with constructive notice that they will be required to undergo these checks prior to being recruited by the university's athletic program.

The NCAA also could satisfy the second criterion of the Brennan analysis by requiring student-athletes to fill out notification and consent forms prior to the university initiating a criminal background check. Requiring this acknowledgement of understanding and consent would provide student-athletes with explicit notice of the future check and its ramifications and would give them the opportunity to consent or not to consent to the procedure.

iii. Narrowly tailoring the bylaw to address specific goals

To satisfy the third criterion of the Brennan court's reasoning, the NCAA must narrowly tailor its policy to address the specific goals of the criminal background checks. The goals of such a policy should include: (1) to protect the health and safety of other student-athletes, coaches, and the student body, and (2) to maintain the integrity of intercollegiate athletics by monitoring student-athletes' behavior in order to deter future violent conduct by the athletes while they act in a representative capacity for Division I athletics and for the individual universities. The bylaw should be tailored in two specific ways: first, it should limit the checks to only violent felony and misdemeanor convictions, and second, it should require that all incoming student-athletes undergo these checks.

1. Limiting checks to violent felony and misdemeanor convictions

The NCAA should first tailor its bylaw by limiting the type of information the universities are permitted to obtain from these checks. State laws vary as to what type of information is accessible. Take for example, the laws of Wisconsin, Ohio, and Illinois.

Wisconsin has an open records law, which entitles all members of the public to access public records and which recognizes that denial of public access is generally not in the public's interest; thus, only under the "exceptional circumstances" exception will access to the records be denied.

117. See NAT'L COLLEGIATE ATHLETIC ASS'N, supra note 75, art. 13.
118. See Brennan, 691 So. 2d at 329-30.
119. 705 ILL. COMP. STAT. 405/5-915 (a)-(d); OHIO ADMIN. CODE ANN. § 109:5-1-01; OHIO REV. CODE ANN. § 2151.358; WIS. STAT. ANN. § 19.31.
120. Id.
One such exceptional circumstance where access to a record may be denied is where the record being requested is that of a juvenile.\textsuperscript{121} A juvenile's records may be released to the public only if the juvenile has been charged in the adult criminal system.\textsuperscript{122} A Wisconsin juvenile can be charged in the adult system if the juvenile court waives jurisdiction,\textsuperscript{123} the juvenile has previously been convicted of violating any state criminal law following a waiver, or the juvenile previously was convicted of violating a state criminal law over which the criminal court had original jurisdiction.\textsuperscript{124}

Ohio employs less stringent limitations than Wisconsin.\textsuperscript{125} Ohio permits any person to obtain information concerning another individual's criminal record if he or she includes the following items in the request: information clearly identifying the person whose record is being sought; a set of fingerprints for the person whose record is being sought; the signed consent of the individual whose records are being sought; and a fifteen dollar payment.\textsuperscript{126} Yet, even if an individual specifically follows these procedures, some records of juvenile offenders may not be available, as any record that resulted in a not guilty verdict or that occurred two years prior to the present date may have been sealed or expunged.\textsuperscript{127} One exception to the sealing or expungement option is that a record cannot be sealed or expunged if the juvenile was adjudicated as a delinquent child for committing any of the following crimes: aggravated murder, murder, rape, sexual battery, and gross sexual imposition.\textsuperscript{128}

Similar to Wisconsin and Ohio, Illinois grants all persons access to inspect, examine and reproduce conviction information unless otherwise
One restriction on this general law includes the law regarding expungement of juvenile law enforcement and court records. Under its juvenile records law, any person who has attained the age of seventeen or who has had all juvenile court proceedings terminated, whichever is later, may petition the court to expunge law enforcement records relating to incidents occurring before his or her seventeenth birthday, but only in limited circumstances. These limited circumstances include: where the juvenile was arrested and no petition for delinquency was filed; where the juvenile was charged with an offense, but found not guilty of that offense; where the juvenile was placed under supervision and the order of supervision has been successfully terminated; or where the juvenile was adjudicated for an offense that would be a Class B misdemeanor, Class C misdemeanor, or a petty or business offense if committed by any adult. Most other offenses may be expunged when the individual has attained the age of twenty-one or when five years have elapsed since all juvenile court proceedings relating to him or her have been terminated, and the person has not been convicted for any other crime since reaching the age of seventeen. The only offenses that may not be expunged are those related to first-degree murder and sex offenses because each would be a felony if committed by an adult.

Taking into consideration the diversity of the state laws and their representative provisions, the NCAA should limit its criminal background check policy to only violent felony or misdemeanor convictions. Such a limitation would serve three purposes. First, it would serve as a means of deterring future violent behavior by athletes who know they may be subject to

---

129. 20 ILL. COMP. STAT. 2635/5 (2005).

130. 705 ILL. COMP. STAT. 405/5-915 (a)-(d).

131. Id.

132. Id. A Class B misdemeanor is punishable by up to sixty days in jail and/or a $1500 fine. Examples of Class B misdemeanors include soliciting a sexual act, 720 ILL. COMP. STAT. 5/11-14.1 (2005), trespass, 720 ILL. COMP. STAT. 5/21-3, and possession of more than 2.5 grams but less than 10 grams of cannibas, 720 ILL. COMP. STAT. 550/5. A Class C misdemeanor is punishable by up to thirty days in jail and/or a $1500 fine. Examples of Class C misdemeanors include simple assault, 720 ILL. COMP. STAT. 5/12-1, and possession of not more than 2.5 grams of cannibas, 720 ILL. COMP. STAT. 550/5. Petty offenses are punishable by fines only, with the maximum fine being $1000. Examples of petty offenses include most traffic offenses, such as speeding and failure to follow traffic signals, 625 ILL. COMP. STAT. 5/11 202 (2005). Class A misdemeanors are the most severe misdemeanors and are not expungable immediately upon reaching the age of majority in Illinois. See 705 ILL. COMP. STAT. 405/5-915(a)-(d). Examples of Class A misdemeanors include aggravated assault, 720 ILL. COMP. STAT. 5/12-2, battery, 720 ILL. COMP. STAT. 5/12-3, domestic battery, 720 ILL. COMP. STAT. 5/12-3.2, reckless conduct, 720 ILL. COMP. STAT. 5/12-5, and theft of property not from a person and not exceeding $300 in value, 720 ILL. COMP. STAT. 5/16-1(b)(1).

133. 705 ILL. COMP. STAT. 405/5-915 (a)-(d).

134. Id.
the checks. In recent years, the statistics of violent crime show that juveniles have accounted for a fairly large number of violent crimes. In 2002, juveniles were involved in approximately 1300 murders in the United States, which amounted to 8% of all murders. The actual number of juvenile offenders, however, was even higher, as many of these murders involved multiple juvenile offenders. In 2003, juveniles committed one out of every eight violent crimes known to law enforcement. Statistics further revealed a tendency of those who commit crimes as juveniles to again commit crimes after reaching the age of eighteen, as 25% of offenders who committed assaults as juveniles again committed assaults after reaching the age of eighteen. Assuming these statistics accurately reflect the proportion of juvenile student-athletes who would have a criminal record at the time they entered college, an NCAA goal of detecting those potential student-athletes who have demonstrated violent tendencies is legitimate and may be a means of deterring juvenile athletes from engaging in such conduct in the future.

Second, limiting the checks to violent convictions and misdemeanors would help create uniformity among the universities because all universities would be required to check for the same information. Although some states have more stringent requirements for juvenile records, many states have enacted laws that express the intent to transfer more juveniles into the adult criminal system. As such, over 250,000 juveniles are transferred to the adult criminal court system annually. Because of the large number of juvenile offender transfers, even those universities in jurisdictions that impose the stringent restrictions on juvenile records would have access to severe violent convictions committed by a juvenile if the crime was adjudicated in the adult court system. Thus, even the states with stringent juvenile records

---

136. Id. at 66.
137. Id.
138. Id. at 146.
139. Id. at 71.
140. Id. at 110-16. Some states have not imposed any age requirement for these transfer restrictions while other states have required that a juvenile be anywhere between thirteen and fifteen years old before they can be transferred into the adult criminal system. Id. at 114.
142. Trying Youths as Adults: Collateral Consequences, CAMPAIGN4YOUTHJUSTICE.ORG, available at http://www.campaign4youthjustice.org/files/Facts/TryingYouthsasAdultsCollateralConsequences.pdf (noting that once juveniles are transferred to adult court, their records become public) (last visited Nov. 3, 2006). Currently, thirty-three states prohibit the sealing or expungement
CHECKING UP ON STUDENT-ATHLETES

2006]  

laws could benefit from the use of criminal background checks.

Finally, this limitation would tailor the checks to search for only convictions that are highly relevant to the individual's position as a student-athlete at a Division I institution. Violent convictions are related to athletic competition because athletes tend to have physical contact, or the ability to have physical contact, with one another in the midst of highly stressful, competitive environments, and this tends to intensify violent behaviors both on and off the playing field. Being aware of an athlete's tendency to react in a violent manner is necessary to protect the health and safety of coaches and other student-athletes who are likely to be on the receiving end of an athlete's violent outburst. By making this limitation, the check is more narrowly tailored to serve the goal of preventing athlete violence, as it focuses only on those violent convictions; thus, it is more likely to withstand judicial scrutiny.

To further tailor the requirement, the NCAA should list specific offenses that it would deem violent offenses. Such an explicit recitation of violent offenses will put potential student-athletes on notice of what information a university is likely to discover when it runs a criminal background check. It also will help ensure that universities apply the policy consistently, rather than arbitrarily, as universities will not have the discretion to decide which offenses do and do not qualify as violent offenses. Some offenses that the NCAA may include are robbery, sexual assault, assault, battery, and murder, to name a few. Although making these limitations may result in background checks not always turning up something detrimental or negative, it would help put to rest rumors or alleviate suspicions surrounding the student-athlete, and it will put the universities in a better position to fully evaluate the student-athlete's character and fitness.

2. Requiring all incoming student-athletes to undergo checks

A second means of tailoring the bylaw to satisfy the NCAA's goals is focusing on who will be subject to the criminal background checks. Again, Baylor University has limited its checks to transfer students, while Oklahoma has required that all incoming student-athletes undergo these checks. The NCAA should follow Oklahoma's example by requiring all entering freshman of any adult conviction records; seventeen states allow only some offenses to be sealed or expunged, such as first-time offenses; and forty states allow individuals to seal or expunge some or all arrest records that did not result in a conviction. Id.

143. See Smith & Stewart, supra note 12.

144. Andy Gardiner, Colleges Weigh Background Checks for Athletes, USA TODAY, July 15, 2005, at 14C.

145. Adams, supra note 51; FOGLEMAN, supra note 42.
and all transfer students consent to the criminal background checks. Requiring checks on all incoming athletes would help reduce potential challenges regarding the regulation’s arbitrary and capricious application since restricting the scope to only transfer athletes would subject transfer athletes to a regulation that other student-athletes would not be required to undergo. In addition, limiting checks to only transfer students would not further the NCAA goal of minimizing student-athlete violence at universities because only a small percentage of student-athletes would be checked, meaning that many athletes’ criminal pasts would fly under the radar.

B. Determining How the Checks will be Conducted

The next aspect of criminal background checks that the NCAA must consider is how the checks for violent felony convictions will be conducted. The NCAA would not be permitted to force a student-athlete to request his or her own criminal record and then have him or her turn it over to the university. Such a request would be overly-invasive of a student-athlete’s privacy because it would give universities access to information, such as sealed or expunged records, that they otherwise would not be permitted to access.

Instead, the NCAA should require that universities have third-party agencies conduct the checks. This type of check is consistent with the type of check proposed by the National Collegiate Directors of Athletics, which believes that criminal background checks for athletes are the wave of the future. The association has worked with the risk and security management company GlobalOptions to establish a system that would allow universities to research the criminal histories of prospective student-athletes. This type of system likely would require the university to provide information such as the student-athletes’ names, social security numbers, and previous addresses, which would be requested from the student-athletes. This information would then be run through a computer database. The university should then request that the third-party agency remove any conviction from the record

146. See KANSAS BUREAU OF INVESTIGATION, CRIMINAL HISTORY RECORD CHECK FOR NON-CRIMINAL JUSTICE PURPOSES 2 (May 2002), available at http://www.kshousingcorp.org/display/Section8/Program%20Requirements/KBI_Criminal_Records_C heck_Fact_Sheet.pdf
147. Id.
148. Gardiner, supra note 144.
149. Id.
150. Id.
151. Id.
report that did not qualify as a violent criminal conviction and that the agency send the modified report to the university’s athletic department. The athletic director should review the report and then forward it to the coach of the program for which the student-athlete would be recruited. No other individual, except the university president and an independent expert evaluating the record, should have access to the results of the check. Limiting the individuals who receive this information would substantially limit the degree to which a student-athlete’s privacy is invaded.

C. Determining What to Do When Checks Reveal a Violent Criminal History

If the checks reveal that the prospective student-athlete has a criminal history, the athletic director and coach should first give the student-athlete the opportunity to explain or rebut any charges found. This procedural requirement would give both the athlete and the university the chance to evaluate the charges found and to make sure that the information on which the university makes its decision is the correct factual information. Such a requirement will help ensure that the procedures provide for fairness, consistency, and due process.

If the information is found to be correct, the athletic director and an independent “expert” (possibly a faculty athletic representative or the university president) should meet to determine whether the individual should be included as a member of its athletic program. The coach should avoid being involved in the decision-making process to avoid a conflict of interest that may arise when the coach’s primary goal of signing a potential superstar athlete conflicts with the university’s goal of student health and safety. In making this determination, the athletic director and the expert should consider how long ago the conviction occurred, how many convictions the student-athlete has had, what his or her character references revealed, his or her potential for recidivism, his or her academic record and any other necessary information.

They should also be aware that if the university accepts the athlete with a violent criminal history, it will assume a duty of care and may be liable for negligent recruiting152 to a third party on campus who is injured by the

152. Although "negligent recruiting" has not become an official cause of action, many commentators have suggested this potential theory of liability as a counterpart to "negligent hiring," which makes employers liable for hiring employees who engaged in unlawful conduct that the employer should have or could have known about. See Christopher M. Parent, Personal Fouls: How Sexual Assault by Football Players is Exposing Universities to Title IX Liability, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 617, 646 (2003). To sustain a claim for negligent recruiting,
athlete. As such, the university should use all the information obtained as part of a comprehensive risk analysis, rather than as a sole indicator of fitness, and should act reasonably in implementing the checks, excluding those who pose a serious risk to other students, athletes, and coaches. Although, as noted by Oklahoma’s athletic director, the checks will not always turn up negative information, they will help find the available information and will allow the university to take preemptive measures to avoid future incidents of violence. Even if the checks do not reveal every criminal incident on a student-athlete’s record, conducting the check may convey to future athletes that the NCAA takes criminal behavior seriously and will not tolerate those athletes who engage in such behavior and tarnish the integrity of intercollegiate athletics. As such, the checks may deter future violence by student-athletes.

Using a comprehensive risk analysis will also help the university ensure that some athletes who have made mistakes in the past, but who have shown an ability to rehabilitate, are not precluded from getting the opportunity to play at the collegiate level. Even more importantly, the comprehensive analysis will allow the university to take into account all the athlete’s information so as to prevent the checks from having a disparate impact on minorities since minority student-athletes are more likely to have criminal pasts than non-minority student-athletes. If through this comprehensive analysis, they decide that the individual is “fit” to compete in athletics at this particular institution, the coach should be required to have his decision approved in writing by the athletic director and the university president.

If the decision to offer the athlete a place on the team at the university

as for any tort of negligence, a plaintiff would have to show: (1) a duty of care was owed; (2) a breach of that duty of care; (3) causation; and (4) damages. Restatement (Second) Torts § 281 (1965).

153. Restatement (Second) Torts § 324 (1965). If an individual or entity undertakes a service to protect another’s safety, then it may be liable for failing to exercise reasonable care to render that service. Id.

154. Linda A. Sharp, J.D. & Holly K. Sheilley, Ph.D., Athletic Departments Must Use Caution in Conducting Criminal Background Checks on Prospective Student-Athletes, LEGAL ISSUES IN COLLEGIATE ATHLETICS, 4-5 (May 2006).

155. Although this regulation may have a disparate impact on minorities, two cases have found that the disparate impact theory is not a sufficient theory to rely upon for challenging NCAA regulations and that the discrimination must be intentional to hold the NCAA liable. See Pryor v. NCAA, 288 F.3d 548 (3d Cir. 2002); Cureton v. NCAA, 198 F.3d 107 (3d Cir. 1999).

156. See U.S. DEP’T OF JUSTICE, CRIMINAL OFFENDERS STATISTICS (Sept. 6, 2006), http://www.ojp.usdoj.gov/bjs/crimoff.htm (noting that African Americans have an 18.6% chance of serving a prison term in their lifetime, Hispanics have a 10% chance, and whites have a 3.4% chance). In 2002, minorities made up more than 60% of the population in local jails; this statistic has not changed since 1996. Id.
is approved, the athletic director and coach should each be required to inform
the student-athlete of the preemptive measures the school will take to deter
future violence. Such measures should include the following: assigning
individual mentors to student-athletes, requiring attendance at stress
management and conflict resolution workshops and seminars, and enforcing
other NCAA and university policies regarding criminal behavior by students
that may cause a student-athlete to miss future games or to forfeit his or her
scholarship. Although these same measures should be taken to educate all
student-athletes, the coach should take active measures to ensure that these
particular athletes are meeting the requirements. One such active measure
should be to include reasonable monitoring of the student-athlete’s behaviors
on and off the field to determine if there is any indication of or tendency
towards violent behavior.

Finally, the NCAA should require that the individual universities
absorb the costs of these background checks. Harvey Shiller, the chairman of
GlobalOptions, estimates that the background checks would cost less than
$100 per athlete.\footnote{157} Although the actual cost may vary depending upon the
extent to which the university utilizes independent companies and experts,
absorbing such a cost would be beneficial to the university, especially where
the university intends to invest tens of thousands of dollars in scholarship
awards to student-athletes over the course of four or five years. In addition,
these checks could save universities money in the future because they will be
less likely to have to defend themselves against tort liability claims.

CONCLUSION

The NCAA should use its rulemaking authority to implement a
recruiting bylaw that requires all incoming student-athletes to consent to
criminal background checks. Weighing the advantages of the criminal
background check against the potential invasion of the student-athlete’s
privacy, the criminal background check procedures offer a great deal of
protection to the university, to other athletes, and to the student body of the
university. Although the background checks alone are not a foolproof
procedure for preventing future violence, such checks are the first steps
towards making universities accept responsibility for their athletes and making
student-athletes accept responsibility for their own actions.

However, the criminal background check is just the starting block for
universities to begin taking responsibility for the athletes they recruit. It
should not be used in and of itself as a means of deterring violence. Rather,

\footnote{157} Gardiner, \textit{supra} note 144.
the checks should be used as one part of a comprehensive plan, which includes ensuring that athletes have mentors and valuable educational training. As part of this comprehensive plan, the criminal background checks will be a useful tool for universities and will serve the very important functions of helping to protect the health and safety of others and of helping to maintain the integrity of intercollegiate athletics.

Lindsay M. Potrafke