

Professional Athletes—Held to a Higher Standard and Above the Law: A Comment on High-Profile Criminal Defendants and the Need for States to Establish High-Profile Courts

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INTRODUCTION

Within the last decade, interest in high-profile criminal cases has grown to phenomenal levels. High-profile criminal cases receive national media attention during the “investigatory and pretrial proceeding”¹ and typically involve the following types of cases: cases with sordid facts which appeal to the nation’s voyeuristic tendencies;² cases in which the nature of the crime is heinous;³ cases in which defendants are celebrities;⁴ and cases in which the victims are famous.⁵ The national media coverage that these cases receive increases the difficulty of finding impartial decisionmakers. As a result, the triers of fact may be influenced as to the guilt or innocence of the high-profile defendant.

The inequities within the criminal justice system are often noticeable in high-profile criminal cases involving celebrity defendants. Using professional athletes as an example of high-profile defendants, this Comment examines the treatment of professional athletes’ “off-the-field/court”⁶ criminal misconduct. This Comment contends that professional athletes’ celebrity status and the national media coverage that accompanies their cases cause some athletes to be singled out as sacrificial lambs while allowing other athletes to receive preferential

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1. Robert Hardaway & Douglas B. Tumminello, *Pretrial Publicity in Criminal Cases of National Notoriety*, 46 AM. U. L. REV. 39, 44 (1996). Here, media attention refers to television, radio, and newspaper coverage.

2. Tabloid-type cases include criminal cases involving the following defendants: Erik Menendez, Amy Fisher, former Olympic skater Tonya Harding, and Lorena Bobbitt.

3. Notorious cases include criminal cases involving the following defendants: Rodney King (Los Angeles police beating), Timothy McVeigh and Terry Nichols (Oklahoma City bombing), Colin Ferguson (New York subway massacre), Jeffrey Dahmer, and Theodore Kaczynski (Unabomber).

4. Celebrity defendants in a criminal proceeding include the following individuals: William Kennedy Smith, Mike Tyson, Hugh Grant, O.J. Simpson, Robert Downey, Jr., and Marv Albert.

5. A case in which the victim was a celebrity was the Bill Cosby extortion case. See *Federal Jury Gets Trial on Cosby Extortion*, FLORIDA TODAY, July 24, 1997, at 3A, available in 1997 WL 11486693 [hereinafter *Trial on Cosby*].

6. “Off-the-field/court” will hereinafter be referred to as “off-the-field.”

treatment. In context, the potential biases of participants in the criminal justice system—jury and judge—toward professional athletes impair these defendants' ability to receive equal justice under the law. Relying on evidence of the demonstrated influence of celebrity, status, and notoriety in criminal cases involving professional athletes, this Comment argues that high-profile defendants, although occasionally above the law, nevertheless frequently find themselves subject to increased scrutiny due to their status and visibility, and that as a result a special court system is necessary to protect their right to a fair trial.

In recognition of the potential biases of decisionmakers and the resulting unequal playing field, this Comment proposes that states establish "high profile" courts. These courts, for the purpose of this proposal, would be designed for the specific adjudication of high-profile cases.⁷ Where a celebrity defendant perceived that his visibility, the media, and the surrounding publicity would negatively prejudice a jury trial (or even a judge inexperienced at dealing with the media or attorney grandstanding), specially trained high-profile judges would serve as the sole triers of fact. The reason for using high-profile judges is twofold: first, the special training that such judges receive will allow for effective adjudication of high-profile cases. Second, the level of experience that these judges have will make it less likely that they will be swayed by the defendant's status or media coverage. In essence, the use of this process will help ensure that where high-profile defendants feel they cannot get a fair trial with either a jury or judge inexperienced at handling the attendant prejudicial influences, such defendants will still be able to receive impartial decisionmakers.

Focusing initially on professional athletes, Part I of this Comment discusses off-the-field criminal misconduct, such as domestic violence, sexual assault, and drug-related activities. Part I then explores some root causes that may lead athletes to engage in these criminal acts. Part II examines the effects of the media and an athlete's status on other criminal-justice-system participants, such as the police, prosecutor, judge, and jury.⁸ Part II concludes that because of media attention and notoriety within the criminal justice system, professional athletes are sometimes held to a higher standard and sometimes above the law. After assessing the effectiveness of the existing judicial remedies in the context of high-profile cases—change of venue, voir dire, special jury instructions, and sequestration of jurors, Part III asserts that states need to make a separate adjudication process more easily available to high-profile defendants. Part III concludes that, where celebrity defendants believe their notoriety and visibility might impair their right to a fair trial, those defendants should be allowed to—without any opposition from the prosecution—pull their cases from both jurors and any inadequately trained judges.

Part IV describes how these high-profile courts would work by setting forth three proposals. First, this Comment recommends criteria for selecting judicial

7. The application of the high-profile court, for purposes of this Comment, is geared toward state criminal cases (i.e., state criminal defendants, state crimes, and state courts).

8. Although Part II briefly discusses the police and prosecutors' treatment of professional athletes, this Comment's proposal is only designed to change the role of the judge and jury in high-profile cases.

candidates eligible for the high-profile courts and proposes a curriculum for a training program designed to enhance judges' skills in adjudicating such cases. Second, because defendants charged with petty offenses are not constitutionally entitled to a jury trial, this Comment proposes that states take high-profile petty-offense cases out of the hands of the jury and give them to high-profile judges to adjudicate. Part IV concludes by proposing that for more serious criminal offenses, where the Sixth Amendment would require the state to offer a jury trial, the high-profile defendant be given an opportunity to have his case heard by the high-profile judge. Finally, Part IV provides a hypothetical example of how the high-profile court would operate.

I. OFF-THE-FIELD CRIMINAL MISCONDUCT AND ATHLETES: SOME ROOT CAUSES

For many decades, professional sports have played an important role in our society. From *Monday Night Football* to the National Basketball Association ("NBA") Championship, the on-the-field action continuously fascinates and entertains spectators. For any player who makes a game-winning touchdown, basket, home run, or goal, the world is his oyster as the media and public exalt him to the level of a living god. Unfortunately, behind the pageantry and glamour of professional football, basketball, baseball, and hockey often lies an ugly reality of off-the-field criminal activity.⁹ Within the past five years, off-the-field criminal misconduct involving professional athletes¹⁰ has included domestic

9. A 1995 *Los Angeles Times* study of nationally reported police incidents, court appearances, and criminal actions involving current U.S. and Canadian professionals and college athletes revealed 252 incidents involving 345 athletes. The breakdown of incidents by sport is as follows: boxing, 18; hockey, 21; professional basketball, 21; baseball, 25; college basketball, 35; professional football, 49; and college football, 160. See Julie Cart, *Sex & Violence: Some of the Most High-Profile Incidents of 1995 Involved Assaults on Women*, L.A. TIMES, Dec. 27, 1995, at C4.

10. For purposes of this Comment, references to professional athletes means only male athletes.

violence,¹¹ possession of a concealed weapon,¹² sexual assault of women,¹³ drug possession,¹⁴ drug trafficking,¹⁵ driving under the influence of alcohol ("DUI"),¹⁶ disorderly conduct,¹⁷ tax evasion,¹⁸ and gambling.¹⁹

11. In the last few years, there have been several high-profile domestic-violence charges involving professional athletes. The list includes former St. Louis Rams running back Lawrence Phillips, who pleaded no contest to charges that he attacked a former girlfriend and dragged her down three flights of stairs. See Paul Levy, *Studies Find More Violence by Athletes*, STAR TRIB. (Minneapolis-St. Paul), Jan. 9, 1996, at 1A. Baseball player Jose Canseco pleaded no contest to domestic violence. See Richard Roeper, *Athletes' Records Are Made to Be Busted*, CHI. SUN-TIMES, Jan. 6, 1997, at A11. Leslie Shepard of the Washington Redskins pleaded guilty to a charge of battery. See *id.* Other athletes accused of domestic violence include (but are not limited to) the following individuals: Minnesota Vikings quarterback Warren Moon, Chicago Bulls forward Scottie Pippen, San Francisco Giants outfielder Barry Bonds, Colorado Rockies outfielder Dante Bichette, Florida Panthers goalie Mark Fitzpatrick, Cincinnati Bengals defensive lineman Dan Wilkinson, Denver Broncos receiver Vance Johnson, former Kansas City Chiefs receiver Tim Barnett, and former Buffalo Bills star O.J. Simpson. See Note, *Out of Bounds: Professional Sports Leagues and Domestic Violence*, 109 HARV. L. REV. 1048, 1049 n.14 (1996).

12. Allen Iverson of the Philadelphia 76ers pleaded no contest to carrying a concealed weapon. See Larry O'Dell, *Iverson Receives Probation*, HARRISBURG PATRIOT (Harrisburg, Pa.), Aug. 27, 1997, at C3.

13. In the last few years the following athletes were convicted of rape: boxers Trevor Berbick and former heavyweight champion Mike Tyson, and professional football players Mossy Cade and Gerald Perry. See Richard Demak, *Athletes and Rape*, SPORTS ILLUSTRATED, Mar. 23, 1992, at 7. Atlanta Falcon Cornelius Bennett also pleaded guilty to a sexual misconduct charge. See *Falcons' Bennett Pleads Guilty to Sex Charge* (visited Sept. 9, 1997) <http://www.cnnsi.com/football/nfl/news/1997/09/09/bennett_pleads>.

14. Isaiah Rider of the Portland Trail Blazers was found guilty of marijuana possession. See Steve Brandon, *Rider Figures to Have Less Luck than Dudley in Fighting NBA*, OREGONIAN (Portland), Oct. 12, 1997, at D5. Michael Irvin of the Dallas Cowboys pleaded no contest to charges of possession of cocaine and marijuana. See *Copping a Plea: Trapped in a Degrading Drugs-and-Sex Scandal, Dallas Cowboys Star Michael Irvin Cuts a Deal*, PEOPLE WKLY., July 29, 1996, at 51. Complying with his plea agreement, Bam Morris of the Pittsburgh Steelers pleaded guilty to felony marijuana possession in exchange for having a pending cocaine possession charge against him dropped. See *Steelers' Morris Pleads Guilty to Drug Charge*, HARRISBURG PATRIOT (Harrisburg, Pa.), June 27, 1996, at D5.

15. Former St. Louis Rams defensive back Darryl Henley was indicted for masterminding a major cocaine-selling ring. See Mike Downey, *Rams Right to Stand by Their Man*, L.A. TIMES, Aug. 10, 1994, at C1.

16. Lawrence Phillips, formerly of the St. Louis Rams, pleaded no contest to DUI. See Roeper, *supra* note 11, at A11. In 1994, Patrick Hunter of the Seattle Seahawks pleaded guilty to driving while intoxicated ("DWI"). See Leslie Holdcroft, *Hunter Sentenced to Home Detention for 2nd DWI*, NEWS TRIB. (Tacoma, Wash.), Feb. 25, 1994, at C4.

17. Lawrence Phillips also pleaded no contest to a charge of disorderly conduct. See Marjie Ducey, *Judge Fines Phillips \$50 for Disorderly Conduct*, OMAHA WORLD HERALD, June 26, 1997, at 27.

18. In 1995, Darryl Strawberry pleaded guilty to tax evasion. See Maryann Hudson, *From Box Scores to the Police Blotter*, L.A. TIMES, Dec. 27, 1995, at A1.

19. The following athletes were suspended and permanently banned from their respective sports because of gambling: former NBA player Jack Molinas, former Cincinnati Reds player Pete Rose, and former football players Art Schlichter, Paul Hornung, and Alex Karras. See Note, *supra* note 11, at 1049 n.16.

Recently, much attention has been focused on the off-the-field activities of athletes. The three most reported crimes committed by athletes are domestic violence,²⁰ sexual assault,²¹ and drug-related crimes.²² In relation to criminal activity and sports, many ask if professional athletes are more prone to commit criminal acts than the general male population.²³ There is no empirical evidence to answer this question. However, some sociologists, legal commentators, media, feminist groups, and sports psychologists suggest that the answer is "yes."²⁴ These groups believe that there is a correlation between athletes, crime, and violence.²⁵ The most commonly asserted arguments are that athletes' disregard for rules, violence against women, and drug-related activities result from a combination of factors: (1) athletes are conditioned to believe that they are entitled to behave that way; (2) athletic competition and the subculture of sports perpetuate drug use; and (3) the subculture of men's sports devalues women and encourages violence.²⁶ This Part explores these contentions in more detail.

20. Domestic violence is one of today's most serious epidemics. It has been cited as the main cause of injury to women between the ages of 15 and 44. See Cart, *supra* note 9, at C4; Bernie Sanders, *Sanders Calls for a National Summit on Sports and Violence*, GOV'T PRESS RELEASES, July 24, 1996, available in 1996 WL 11123982. Statistics suggest that over 4 million women are abused each year in the United States and approximately 4000 women die each year from the injuries sustained. On average, a woman is abused every fifteen to eighteen seconds. See William Oscar Johnson, *A National Scourge*, SPORTS ILLUSTRATED, June 27, 1994, at 92; see also Note, *supra* note 11, at 1050.

21. Sexual assault against women is another commonly reported criminal act among athletes. See Hudson, *supra* note 18, at A1. It is particularly prevalent among student-athletes at the college and university level. Surveys suggest that in comparison to the general male college population, student-athletes are accused of a higher percentage of sexual assaults. See William Nack & Lester Munson, *Sports' Dirty Secret*, SPORTS ILLUSTRATED, July 31, 1995, at 62. Other studies have revealed that out of 107 reported cases of sexual assault at 30 Division I schools (with a 3.3% population of student-athletes), 19% involved student-athletes. See Bill Brubaker, *NCAA Intensifying Efforts to Educate Athletes on Issues of Sexual Responsibility*, WASH. POST, Nov. 13, 1994, at A24. The study found that college football and basketball players were responsible for 67% of the reported sexual assaults. See *id.*

22. Drug use among athletes is the third most reported criminal act. See generally Alan C. Page, *Random Testing of Professional Athletes*, 33 WM. & MARY L. REV. 155 (1991). This Comment will specifically refer to drug-related offenses (involving, for example, cocaine, marijuana, and alcohol) such as drug possession, drug trafficking, drug use, and DUI.

23. See Hudson, *supra* note 18, at A1 (reporting that "[w]hile there is insufficient data . . . experts say[] there is no denying that . . . sports and crime are increasingly intertwined in the public's mind"); Levy, *supra* note 11, at 1A (asserting that national studies imply that male athletes are more likely to commit acts of violence against women than other men).

24. See Hudson, *supra* note 18, at A1; see also Note, *supra* note 11, at 1050; Gcoff Calkins, *Athletes and Domestic Violence*, SUN-SENTINEL (Ft. Lauderdale), Oct. 17, 1995, at 1C; Deinak, *supra* note 13; Levy, *supra* note 11, at 1A; Nack & Munson, *supra* note 21, at 68; John Romano et al., *Athletes and Rape: Is There a Link?*, ST. PETERSBURG TIMES, June 28, 1992, at 1C.

25. See *Scientist Says Sports-Violence Studies Key on College* (CNN television broadcast, Dec. 28, 1995) (transcript available in LEXIS, News Library, Script File) [hereinafter *Sports-Violence Studies*].

26. See generally Nack & Mnson, *supra* note 21 (reporting on the increased media coverage of domestic violence among male college and professional athletes).

A. Professional Athletes' Sense of Entitlement

Scholars suggest that one reason some athletes disregard the law and possess an "I can do what I want" attitude is that athletes believe they have *entitlement*.²⁷ "Entitlement" is best defined as the belief that one is entitled to have whatever one wants, whenever one wants it.²⁸ When one has a sense of entitlement, one feels that the rules and laws that apply to the rest of society do not apply to him.²⁹ Receiving special treatment tends to perpetuate athletes' sense of entitlement.³⁰

The cycle usually begins during high school or college and often occurs when the athlete receives preferential treatment in the classroom. On the academic level, some athletes are conditioned to believe that they are different from other students. Differentiation is reinforced when some student-athletes are not required to follow the same class attendance policies as the rest of the student body.³¹ Moreover, coaches request that professors give athletes special treatment.³² While other students have to earn grades, some professors simply give athletes passing grades to ensure that they will remain eligible to play sports.³³ Dexter Manley is an example of a college athlete who was allowed to pass through the educational system, even though not merited. In 1989 Manley, who played for the Washington Redskins, revealed that despite having a college degree, he was unable to read or write.³⁴

A few athletes feel that they are entitled to break the law based on the disrespect they develop for the rules and regulations set by the National

27. See *NBC Nightly News: Sports Heroes in Trouble with the Law—A Trend* (NBC television broadcast, Jan. 1, 1997) (transcript available in 1997 WL 5384963) [hereinafter *NBC Nightly News*]. John Murphy, a St. Cloud State University sociologist, asserted that rape patterns are attributable to entitlement, stating that athletes "are protected. High school and college athletes aren't held responsible for their grades, [or] their actions. Someone's always taking care of them." Demak, *supra* note 13, at 7 (quoting John Murphy).

28. See *NBC Nightly News*, *supra* note 27.

29. Cf. Demak, *supra* note 13, at 7 (reporting that "athletes come to believe 'that money, power and fame can get them out of any trouble'" (quoting St. Cloud State University sociologist John Murphy).

30. See Becky Paull, *Athletics, Ethics Don't Mix*, IDAHO STATESMAN, Oct. 10, 1995, at 1A.

31. See Stephen M. Schott, *Give Them What They Deserve: Compensating the Student-Athlete for Participation in Intercollegiate Athletics*, 3 SPORTS LAW. J. 25, 28 n.14 (1996) (contending that college administrators refuse to enforce class attendance rules so that athletes can participate in sports).

32. See, e.g., Thomas V. DiBacco, *No More Perks for Athletes*, USA TODAY, June 17, 1996, at 14A (stating that professors warn student-athletes of their academic and attendance standing more frequently than nonathletes).

33. In 1995, reports revealed that four student-athletes at the University of South Carolina were given passing grades on astronomy tests which they had actually failed. See *4 Gamecocks Implicated in Grade Scandal*, SAN DIEGO UNION-TRIB., Aug. 9, 1995, at D9; see also *Pardeeville Coach Offers Resignation*, WIS. ST. J., Feb. 7, 1996, at 4B (reporting that a Pardeeville High School coach offered his resignation after school allowed athletes to make up failing algebra grade so that they could be eligible for freshman basketball).

34. See Jim Murray, *The Toughest Thing Manley Has Ever Done*, L.A. TIMES, June 2, 1989, at C1.

Collegiate Athletic Association ("NCAA"). The NCAA has specific guidelines that prohibit student-athletes from accepting monetary compensation or contracting with sports agents during their matriculation at a university.³⁵ Because sports agents want to secure future clients, they try to woo athletes by secretly giving them money under the table.³⁶ Athletes continue to ignore the NCAA rules by accepting perks including dinner, cars, concert tickets, clothes, and jewelry.³⁷ Many in the sports industry contend that athletes resort to taking illegal compensation because they are denied all other means of financial resources.³⁸ Others believe that "by the time the recruiting process is completed an athlete becomes cynical about all rules and regulations, and assumes the attitude that all things are acceptable."³⁹ For instance, in a 1989 survey of Division I basketball players, sixty percent revealed that they perceived nothing wrong with taking illegal compensation.⁴⁰

In addition, some student-athletes feel "untouchable" because they are not held accountable for their on-campus wrongdoings. Because many student-athletes play an integral role in generating economic benefits for universities, some university officials will do whatever is necessary to protect the school's meal ticket to financial rewards. If punishing an athlete's misbehavior means forfeiting a chance to go to the NCAA Men's Basketball Championship or the

35. See NAT'L COLLEGIATE ATHLETICS ASS'N BYLAW 12.3.1 (1992) (prohibiting student-athletes from agreeing "to be represented by an agent for the purpose of marketing his or her athletics ability or reputation in that sport"); see also Ricardo J. Bascuas, *Cheaters, Not Criminals*, 105 YALE L.J. 1603, 1605-07 (1990); Scott A. Mitchell, Note, *Hit, Sacked, and Dunked by the Courts: The Need for Due Process Protection of the Student-Athlete in Intercollegiate Athletics: National Collegiate Athletic Ass'n v. Miller*, 10 F.3d 633 (9th Cir. 1993), 19 T. MARSHALL L. REV. 733, 734-35 (1994).

36. See Mitchell, *supra* note 35, at 735. In a 1989 survey, "thirty-one percent of professional football players admitted that they had accepted some form of extra compensation during college, ranging from a few hundred dollars to \$80,000." Schott, *supra* note 31, at 29 n.19. Chris Webber of the Washington Wizards is alleged to have received \$100,000 from an athletic booster while playing for the University of Michigan. See *Michigan Stars Reportedly Paid; Booster Gave to Wolverines*, COM. APPEAL (Memphis), June 1, 1997, at D4.

37. See Bascuas, *supra* note 35, at 1609-11. This violative practice is customary among college coaches, athletes, and sports agents.

38. See Schott, *supra* note 31, at 28 (stating that because the NCAA rules prohibit scholarship athletes from obtaining employment during the school year, athletes are forced to "scrounge for basic expenses which the universities do not provide"). A 1988 survey sponsored by the NCAA revealed that a vast number of athletes had less than \$25 per month for personal expenses. See *id.*

39. *Id.* at 29 n.18. Former University of Miami player Bennie Blades revealed that he accepted between \$30,000 and \$40,000 with which he purchased a new sports car. See Bascuas, *supra* note 35, at 1612. University of Tennessee wide receiver Tim McGee revealed that he accepted \$3500 from an agent so that he could pay bills. See *id.* Clemson running back Ronnie Harmon admitted that he accepted over \$54,000, \$25,000 of which he used for a down payment on a leased Mercedes. See *id.*

40. See Schott, *supra* note 31, at 29.

Cotton Bowl,⁴¹ institutions may look the other way. Worst of all, when student athletes are accused of on-campus misconduct, the college may employ various tactics to keep the star athlete out of the hands of the local police or media. Some tactics used include administering an internal hearing after which the school takes minuscule action,⁴² settling with alleged victims in return for their promise not to file criminal charges with the police,⁴³ and dissuading the alleged victims from pressing charges.⁴⁴ In sum, the athlete often receives only minor punishment for his actions and is usually allowed to continue playing on the team.

Furthermore, high-profile athletes may often develop a sense of being "entitled" to women. This inclination is based on the athletes' encounters with "groupies." Groupies—also known as the free prostitutes of sports—aggressively pursue male athletes.⁴⁵ These females are motivated by money, fringe benefits (e.g., a day of shopping with an athlete's credit card), and bragging rights.⁴⁶ For some, it is their full-time job to follow athletes from game to hotel.⁴⁷ It is also noted that within the sports industry, athletes "pass around women as if sex [were] a personal service—like finding a good barber and sharing the discovery."⁴⁸ Because these women are at the sports stars' beck and call, athletes may become accustomed to having sex with whomever they want, whenever they want.⁴⁹ Consequently, athletes often come to believe that all women are "sexually compliant"⁵⁰ and placed on earth to serve their needs.⁵¹ The end result? If the

41. Collegiate sports mean big money for colleges and universities. In 1994, the NCAA Men's Basketball Championship generated \$89 million, which was distributed to 301 Division I schools. In 1993-1994 the football bowl games generated just over \$40 million, which was distributed among the 10 Division I conferences. *See id.* at 27.

42. *See* Daniel Golden, *When College Athletes Misbehave, Often There's Only Token Punishment*, BOSTON GLOBE, Sept. 11, 1995, at 39 (asserting that cases involving student athletes are kept quiet because incidents are handled behind closed doors).

43. *See id.* In a sexual-assault incident involving a Boston University athlete, the university paid a victim to transfer to another school and did so without holding a hearing or calling in the police. *See id.*

44. Two women claimed that campus police tried to dissuade them from pursuing battery complaints they had filed against University of Miami football players. *See* Coral Gables, *Two Women Claim UM Police Give 'Canes Special Treatment*, PALM BEACH POST, Oct. 26, 1995, at 7C.

45. *See* Robert Lipsyte, *Many Create the Climate for Violence*, N.Y. TIMES, June 18, 1995, § 8, at 11 (defining groupies as "women who swarm around athletes").

46. Some contend that groupies are out to entrap young millionaires. *See* Kevin Merida, *The Off-Court Press*, WASH. POST, Mar. 10, 1998, at B1.

47. As an illustration of this point, during his rookie season Shaquille O'Neal "was in Milwaukee for a road game when he heard a knock at his hotel door. When he opened it, a woman in a trench coat was standing there. She was wearing nothing else." *Id.*

48. *Id.*

49. Former NBA star Magic Johnson revealed in 1991 that he had contracted the AIDS virus as a result of having sex with as many women as he could find. *See id.*

50. *Athletes Seen Involved in More Campus Sex Crimes*, L.A. TIMES, Nov. 13, 1994, at A16.

51. *See id.* As further evidence that some athletes feel a sense of entitlement to women, Dennis Rodman asserts in his book that sex with women is accessible at all times. "As long as I play ball, I can get any woman I want. . . . If you've got money and the status that comes with

athlete one day encounters a female who says “no”—a word that he is not accustomed to hearing—he may nevertheless feel entitled to take what he believes is his.

*B. Drug Use Among Athletes: The Result of Competition
and the Subculture of Sports*

The subculture of sports is often blamed as the root of athletes’ involvement in drug and alcohol abuse. Some sports, such as football, by nature require strength, agility, and stamina. As early as high school and college—frequently at the urging of coaches and peers—some athletes rely on drugs to enhance their on-the-field performance.⁵² In order to gain a competitive edge against opponents, athletes use drugs such as steroids and amphetamines.⁵³ In addition to using these drugs for on-the-field performance, athletes take these drugs to alleviate pain from sports-related injuries, reduce stress, and prevent fatigue.⁵⁴ Eventually, some athletes become dependent on these drugs and end up abusing them.⁵⁵ In fact, a recent survey found both a decrease in steroid use and an increase in marijuana use among college athletes,⁵⁶ suggesting that such athletes may be advancing from performance-enhancing drugs to more recreational ones. Within the professional sports culture, athletes have money, women, and free time during the off-season. Consequently, the use of substances often serves as a means of escape or passing the time.

*C. The Sports Culture: Violence and the Denigration of
Women*

Some experts assert that the athletes’ violence against women can be attributed to the “sports culture.” The sports culture can best be characterized as an all-male segregated group that prides itself on being dominant, aggressive, and in control.⁵⁷ On the field, the culture encourages athletes to hit hard, play hard, and be tough. If an athlete fails to demonstrate his on-the-field masculinity to the satisfaction of his coach or team, he runs the risk of having his manhood challenged. Teammates may refer to him as a “pussy” or “wuss,” or accuse him of “throwing like a girl.”⁵⁸

playing in the NBA, you can get anybody you want. Money is power and power is money.” DENNIS RODMAN, *BAD AS I WANNA BE* 149 (1996).

52. See Charles Feeney Knapp, *Drug Testing and the Student-Athlete*, 76 *IOWA L. REV.* 107, 107 (1990).

53. See *id.* at 111.

54. See *id.* at 112.

55. See *id.*

56. See *College Athletes Using Steroids Less, Marijuana More*, *PHYSICIAN & SPORTSMED.*, Dec. 1, 1997, at 15.

57. See Cart, *supra* note 9, at C4.

58. *Sports-Violence Studies*, *supra* note 25.

Apparently, within this culture, anything that resembles femininity is scorned.⁵⁹ For example, one high school coach painted a picture of a vagina on tackling dummies.⁶⁰ Some coaches have been known to place sanitary napkins in the lockers of players for “wimpy performance[s]”⁶¹ on the field. As a result of such tactics, some athletes may subliminally come to despise women.

In his 1990 book *Down and Dirty: The Life & Crimes of Oklahoma Football*, former Oklahoma University quarterback Charles Thompson recounted an incident in which a teammate walked through the dormitory hallways, naked, with condoms in his hands, knocking on the doors of his teammates, and asking them if they wanted to have sex with the girl in his room.⁶² Accordingly, fifteen players lined up to have sex with the girl.⁶³ Experts contend that the male sports culture encourages athletes to engage in these activities, not for sexual pleasure, but to prove their virility or sense of worth to other men.⁶⁴ Ultimately, the culture instills the idea that women are sexual conquests.⁶⁵

Finally, the sports culture has been blamed for encouraging off-the-field violence against women because it instills the ill-conceived notion that such behavior is acceptable. This belief can be inferred from statements made by individuals within the sports arena. For instance, Indiana University basketball coach Bobby Knight stated in an interview with Connie Chung that “[i]f a female knows that rape is inevitable, she should just sit back and enjoy it.”⁶⁶ Similarly, Bennie Blades, a safety for the Detroit Lions, made a comment during a news conference stating, “[t]hree years ago, you smacked a girl around and people maybe said she asked for it. Now whether she asked for it or not, they’re going to haul you off.”⁶⁷ While playing with the Philadelphia 76ers, Charles Barkley once said, “This is a game that, if you lose, you go home and beat your wife and kids.”⁶⁸ Penn State football coach Joe Paterno stated at a postgame

59. Within the sports culture, “things feminine have served as symbols of things to be avoided.” Nack & Munson, *supra* note 21, at 68.

60. *See id.*

61. Note, *supra* note 11, at 1050 n.22 (alteration added) (quoting MARIAH B. NELSON, *THE STRONGER WOMEN GET, THE MORE MEN LOVE FOOTBALL* 87 (1994)).

62. *See* Romano et al., *supra* note 24, at 1C. *See generally* CHARLES THOMPSON, *DOWN AND DIRTY: THE LIFE & CRIMES OF OKLAHOMA FOOTBALL* (1990).

63. *See* Romano et al., *supra* note 24, at 1C.

64. *See* Lisa Faye Kaplan, *Gang Rape: Why Are Athletes Suspect?*, Gannett News Service, May 21, 1990, available in 1990 WL 4909361. A 1985 study conducted by the Association of American Colleges revealed that next to male fraternity groups, college athletes were the most likely group on campus to commit gang rape. *See id.*

65. *See* Demak, *supra* note 13, at 7 (linking incidents involving athletes and teammates with gang rape).

66. Nack & Munson, *supra* note 21, at 68 (alteration added) (quoting Bobby Knight).

67. Note, *supra* note 11, at 1048 (alteration added) (quoting Calkins, *supra* note 24, at 1C (quoting Bennie Blades)). New York Mets manager Dallas Green revealed that when his team loses, “I just beat the hell out of [my wife] Sylvia and kick the dog and whatever else I’ve got to do to get it out.” Johnson, *supra* note 20, at 92 (alteration in original) (quoting Dallas Green).

68. Johnson, *supra* note 20, at 92 (quoting Charles Barkley).

news conference, ““I’m going home . . . and beat up my wife.””⁶⁹ Paterno defended these remarks as being ““just part of the sports culture, locker room talk, harmless, a joke that did not mean anything.””⁷⁰ Even though these sports figures might have considered their statements as just harmless jokes and locker room banter, problems occur when dissident athletes are not able to separate on-the-field culture from off-the-field reality. In sum, the accumulation of these factors conditions some athletes to believe one thing: ““that money, power and fame can get them out of any trouble.””⁷¹

II. PROFESSIONAL ATHLETES: SOMETIMES HELD TO A HIGHER STANDARD AND SOMETIMES ABOVE THE LAW

One of the goals of the American criminal justice system is to provide justice for all. The prosecutor and judge are responsible for ensuring fairness and the jury is responsible for determining guilt or innocence. Since the media play a large role in athletes’ lives, this Part first discusses the media’s relationship with professional athletes. By further examining athletes’ celebrity status and the media attention that accompanies their notoriety, this Part concludes that within the criminal justice system, some professional athletes are held to a higher standard while others are above the law.

A. The Media’s Relationship with Professional Athletes

The cliché “To whom much is given, much is expected” definitely rings true for professional athletes. Upon entering a professional sports league, the stakes become higher for athletes because the media becomes a player in the game. Athletes’ instant celebrity status, fame, and seven-figure salaries tend to attract more newspaper, radio, and television coverage than lesser-known individuals receive. Consequently, professional athletes are often subject to intense media scrutiny.⁷²

The recent barrage of media reports regarding athletes, violence, and crime leads many to believe that this is a new phenomenon. However, despite the media’s new style of reporting, it is important to note that off-the-field mischief has been present since the very early days of sports. In the past, the media shielded the public from the off-the-field activities of professional athletes. For instance, the media refrained from reporting that baseball great Ty Cobb once seriously wounded a mugger and left him for dead.⁷³ Star athletes like Mickey Mantle and Babe Ruth were known to drink and womanize,⁷⁴ but because the

69. Note, *supra* note 11, at 1048 (omission in original) (quoting Mike Capuzzo, *Unsportsmanlike Conduct*, PHILA. INQUIRER, Dec. 7, 1990, at 1C (quoting Joe Paterno)).

70. Johnson, *supra* note 20, at 92 (quoting Paterno).

71. Demak, *supra* note 13, at 7 (quoting St. Cloud State University sociologist John Murphy).

72. See Andrew K. Craig, *The Rise in Press Criticism of the Athlete and the Future of Libel Litigation Involving Athletes and the Press*, 4 SETON HALL J. SPORT L. 527, 527 (1994).

73. See Hudson, *supra* note 18, at A1.

74. See *NBC Nightly News*, *supra* note 27.

media and athletes had an unspoken pact, this information never graced the pages of the mainstream sports sections.⁷⁵ For example, when Babe Ruth contracted a venereal disease and was unable to play in a baseball game,⁷⁶ the media shielded him by telling the public that he was out sick due to a bellyache.⁷⁷ The paternalistic protection that the media gave athletes in the past may be attributed to the fact that both groups shared a common bond. Namely, professional athletes and reporters made roughly the same salary, and both the media and professional sports leagues were predominantly white.⁷⁸ As result of this comradeship, the media respectfully limited its analysis to on-the-field events such as victories, defeats, records, and performances.

In contrast, today the media have become more critical and are now quick to tear down the pedestals on which they help place professional athletes.⁷⁹ The relationship between the media and professional athletes has changed in that the groups are no longer similar. In other words, professional sports leagues are now predominantly African American, and athletes' salaries have well exceeded that of reporters'.⁸⁰ The souring of the relationship between the media and athletes may also be attributable to the emphasis on investigative reporting, which has grown since the Watergate scandal.⁸¹ Ever since this ignominy, a Pandora's box has been opened and reporters are pressured to uncover all malfeasance committed by public figures. News agencies compete to "outscoop" each other. Thus, the media's aggressive style of reporting, coupled with the expansion of television viewership,⁸² has created an appetite for the details of celebrities' personal lives.⁸³

75. See Hudson, *supra* note 18, at A1.

76. See Craig, *supra* note 72, at 527 n.2.

77. See *id.*

78. In earlier times, professional sports leagues were all white. Jackie Robinson and Jesse Owens were the first African Americans to break the color barrier in baseball and track, respectively. See S.L. Price, *What Ever Happened to the White Athlete?*, SPORTS ILLUSTRATED, Dec. 8, 1997, at 30, 33.

79. See Hudson, *supra* note 18, at A1.

80. African Americans now make up 67% of the players in the National Football League ("NFL"); 80% of the NBA; 17% of Major League Baseball; and 93% of U.S. Male Track and Field. See Price, *supra* note 78, at 33. As of 1996 the average salary of NBA players was \$1.98 million (up from \$409,000 a decade earlier), while the average salary of NFL players was \$765,000. See Dan Weil, *The Key to Avoiding Financial Woes Is Finding a Good Financial Adviser*, BUFFALO NEWS, Jan. 12, 1998, at B2. This Comment recognizes that race may play a factor in the media's current treatment of professional athletes. Nonetheless, this Comment will not explore the relationship between race and sports.

81. See Editorial, *When Role Models Set a Bad Example*, L.A. TIMES, Dec. 31, 1995, at M4.

82. Sports broadcasting and coverage have exploded within the last decade. For instance, sports-specific programming has grown to include such sports channels as ESPN, ESPN2, TNT, Home Box Office, Pay Per View, Showtime, CNN/NI, Home Team Sports, Prime, FoxSports, Madison Square Garden Network, Classic Sports Network, and WGN Sports.

83. See Hudson, *supra* note 18, at A1.

B. Celebrity Status and Media Scrutiny: The Impact on the Criminal Justice System

When professional athletes' criminal activities receive media coverage, the media saturate the public with opinion and commentary pertaining to the case.⁸⁴ This coverage may well jeopardize the defendant's right to receive an impartial decisionmaker.⁸⁵ The most prejudicial form of media coverage is pretrial publicity. Pretrial publicity influences potential jurors as to the guilt or innocence of the accused,⁸⁶ and it diminishes the chances of selecting an impartial jury.⁸⁷

It is during the preliminary stages of a criminal trial that the media unveil the most important details of the crime and are most likely to taint the minds of potential jurors.⁸⁸ Coverage during this stage typically takes the form of photographs of the victims, images of the defendant's being led away in handcuffs by the police, details pertaining to the crime, the community's response, and the media's commentary as to who is guilty and who is not.

One well-known example is the pretrial publicity surrounding the trial of former professional athlete O.J. Simpson. This case captured the attention of the

84. See Newton N. Minow & Fred H. Cate, *Who Is an Impartial Juror in an Age of Mass Media?*, 40 AM. U. L. REV. 631 (1991) (contending that in notorious cases, courts have difficulty selecting impartial juries).

85. In *Marshall v. United States*, 360 U.S. 310 (1959), the U.S. Supreme Court for the first time reversed the conviction of criminal defendants based on the effect of media publicity on the case. The Court concluded that seven jurors were prejudiced because they were exposed to evidence through media accounts rather than trial proceedings. Consequently, the Court found the defendant did not receive a fair trial. In *Irvin v. Dowd*, 366 U.S. 717 (1961), the Court reversed the defendant's conviction because 90% of potential jurors questioned in voir dire had already formed an opinion as to the defendant's guilt. In *Rideau v. Louisiana*, 373 U.S. 723 (1963), the Court again reversed the defendant's conviction, finding that the trial court improperly denied change of venue where the media, prior to trial, had broadcasted filmed confessions to an estimated 106,000 people (out of 150,000 people in the entire community). In *Sheppard v. Maxwell*, 384 U.S. 333 (1966), the Court held the defendant's right to a fair trial was impaired due to media scrutiny. Finally, in *Estes v. Texas*, 381 U.S. 532 (1965), the defendant's conviction was reversed because the media broadcasted the defendant's pretrial hearing to 100,000 viewers. See generally Alberto Bernabe-Riefkohl, *Prior Restraints on the Media and the Right to a Fair Trial: A Proposal for a New Standard*, 84 KY. L.J. 259, 276-77 (1995-1996). This Comment will not balance the media's First Amendment right to freedom of the press against the defendant's Sixth Amendment right to a fair trial. Instead, this section will focus on the effects of pretrial publicity on a high-profile defendant's ability to obtain an impartial decisionmaker.

86. See Jonathan M. Remshak, Comment, *Truth, Justice, and the Media: An Analysis of the Public Criminal Trial*, 6 SETON HALL CONST. L.J. 1083, 1084 (1996).

87. See *id.*

88. Empirical data reveal that "jurors' attitudes are affected by extreme exposure to pretrial publicity, that their verdicts are affected as well, and that the existing remedies, with some exceptions, do not deal with the problem entirely." Eileen A. Minnefor, *Looking for Fair Trials in the Information Age: The Need for More Stringent Gag Orders Against Trial Participants*, 30 U.S.F. L. REV. 95, 99 n.15 (1995) (quoting Symposium, Panel One, *What Empirical Research Tells Us, and What We Need to Know About Juries and the Quest for Impartiality*, 40 AM. U. L. REV. 547, 551 (1991)).

American public and the world.⁸⁹ As background, on June 13, 1994, Nicole Brown Simpson—ex-wife of former football hero O.J. Simpson—and her friend Ronald Goldman were found stabbed to death in front of her home in Brentwood, a suburb of Los Angeles.⁹⁰ On June 17, 1994, prosecutors filed double murder charges against Simpson and arranged for his arrest—but he did not show up. Angry police officers announced to the public that Simpson was a fugitive on the run. After the announcement, Simpson and his friend Al Cowlings were spotted driving on a Los Angeles freeway in a white Ford Bronco. All major television networks provided live coverage of the infamous slow-speed chase, as well as Simpson's eventual surrender at his Brentwood mansion.⁹¹ Upon his arrest, the media displayed Simpson's booking shots, which were reportedly darkened in at least one instance to make him look more sinister.⁹² During the determination of whether Simpson would stand trial, a merchant testified at a hearing that Simpson had bought a fifteen-inch knife approximately five weeks before his ex-wife and her friend were slashed to death.⁹³ Moreover, prior to the completion of jury selection, it was revealed that Simpson's relationship with Nicole was plagued by domestic abuse.⁹⁴ In addition, tabloid newspapers such as *The Globe* printed photographs of the crime scene and of the "blood-drenched" bodies of the victims.⁹⁵ Even more inflammatory were media broadcasts of interviews with the victims' families, in which family members openly accused Simpson of committing both murders.⁹⁶ Whether watching television or passing by the magazine aisle at the grocery store, one could not escape the highly prejudicial pretrial publicity in the Simpson case.⁹⁷

Of course, it is important to remember that, at least for Simpson, the pretrial publicity ultimately inured to his benefit, as the jury acquitted him on both murder counts. But hindsight is 20/20, and not every high-profile defendant's

89. See Bernabe-Riefkohl, *supra* note 85, at 259.

90. See Jim Newton & Shawn Hubler, *Simpson Held After Wild Chase*, L.A. TIMES, June 18, 1994, at A1.

91. See *id.*

92. *Newsweek* and *Time* used the official booking shots of Simpson. It is reported that a *Time* photographer darkened Simpson's face to make him look more sinister. *Time's Sinister O.J.*, NEWS TRIB. (Tacoma, Wash.), June 23, 1994, at A6.

93. See *O.J. Bought Knife in May, Hearing Told Blood Trail Stretched from Vehicle to Home*, ARIZ. REPUBLIC, July 1, 1994, at A1.

94. Before the completion of jury selection, author Faye Resnick released a sensational book chronicling the last few months of Nicole's life. The book alleges that Simpson and Nicole argued the evening of the murders. See *Nicole Book Halts O.J. Simpson Trial*, TORONTO STAR, Oct. 19, 1994, at A2.

95. *Paper Claims to Show Crime Site Photographs*, MILWAUKEE J. SENTINEL, Oct. 2, 1995, at 4.

96. See *CBS This Morning: Simpson's Attorneys Unhappy with Denise Brown's Statement* (CBS television broadcast, Nov. 25, 1994) (transcript available in 1994 WL 3531478); see also *NBC News at Sunrise: Father of Murder Victim Ron Goldman Denounces Simpson Lawyers* (NBC television broadcast, Nov. 14, 1994) (transcript available in 1994 WL 3561812).

97. During the preliminary stages of the trial, CBS conducted a survey and found that 87% of the people polled felt that the Simpson case received too much media coverage. See Bernabe-Riefkohl, *supra* note 85, at 259.

case will benefit from such publicity. For example, the publicity surrounding the trial of Susan Smith, the South Carolina woman convicted of drowning her two children after first claiming a black man had kidnapped them, may well have worked to her disadvantage.

1. Athletes Are Sometimes Held to a Higher Standard⁹⁸

Contrary to what the media report, crimes involving professional athletes are no more numerous than those involving lesser-known individuals. For instance, in 1994, a total of three million domestic-violence cases were reported in the United States. Of those incidents less than 0.01% involved athletes.⁹⁹ Athletes in some cases are held to a higher standard because the media's style of reporting creates a presumption in the public's mind that crime among athletes is more rampant than it really is. It also stereotypes athletes as being criminally deviant.¹⁰⁰ An illustration of how the media biases the public against professional athletes is the 1996 incident in which reporters vehemently accused Dallas Cowboys players Michael Irvin and Erik Williams of sexually assaulting a twenty-three-year-old woman. Despite the fact that Texas prosecutors did not charge Irvin or Williams with any wrongdoing, the media presumed they were guilty and reported its negative conclusions to the entire nation.¹⁰¹ While the press obviously has a right to zealously report information, it is troublesome that the media did not apologize nationally to Irvin or Williams with that same fervor once the alleged victim recanted her story. This incident further demonstrates that professional athletes are often targets of false or exaggerated sexual-assault claims because athletes' status and wealth encourage people to seek fame, money, and publicity.¹⁰²

When media coverage turns an athlete's criminal escapade into a high-profile case, it aggravates his prosecution. This occurs because the media focus on how the police, prosecutor, jury, or judge will handle the case. One police officer's

98. This section of the Comment expresses the views of Mr. Rapheal M. Prevot as characterized by the author. Mr. Prevot works for the NFL in the Management Council Division. Mr. Prevot formerly served as division chief for the Dade County Prosecutor's Office. Although Mr. Prevot believes that athletes are "held to a higher standard," his views and opinions are solely his and not those of the NFL.

99. See Al Levine, *1995: The Year of the Abuser*, ATLANTA CONST., Jan. 1, 1996, at B2 (stating that 120 incidents involving either collegiate or professional athletes were reported compared to 3 million total incidents).

100. Cf. Bill Maxwell, *Blacks Lose by Winning in Sports*, ST. PETERSBURG TIMES, Jan. 19, 1997, at 1D (reporting that white America "sees black male athletes as . . . violent criminals" and that these stereotypes fuel theorizing "that blacks are less intelligent and less ethical than whites").

101. In response to Irvin's lawyer's contention that Irvin was innocent, NBC's *Today Show* host Matt Lauer asked, if Irvin changed his story during his earlier drug trial, "why should we believe him now?" *Today: Royce West, Michael Irvin's Attorney, Discusses the Charges Against Michael Irvin and Erik Williams of the Dallas Cowboys* (NBC television broadcast, Jan. 6, 1997) (transcript available in 1997 WL 6083659).

102. See Romano et al., *supra* note 24, at 1C (stating that claims of alleged sexual assault directly correlate with a rise in professional athletes' salaries).

recent comment, that when an athlete's criminal actions bring media attention along with it the police will arrest him to try to look good in the eyes of the media, illustrates this point.¹⁰³

Moreover, fame, fortune, publicity, and celebrity status impose a heavy burden on athletes to conform to the public's image of "flawless human beings." Because athletes are considered to be role models for youths, they are sometimes held to a higher standard.¹⁰⁴ To convey the message to youths that there are no separate standards for athletes, the criminal justice system uses professional athletes as examples. This point is demonstrated in the 1983 criminal case involving Kansas City Royals baseball players Willie Wilson, Jerry Martin, and Willie Aiken. The players were charged with a federal misdemeanor for attempted cocaine possession. Typically a first-time offender charged with this misdemeanor drug offense would only be required to pay a fine and would not be required to go to jail.¹⁰⁵ Nevertheless, the federal magistrate adjudicating this case sentenced each player to three months in jail. The magistrate based his harsh ruling on the fact that "because [the defendants] were professional baseball players and something of role models for children, they should be held to a higher standard."¹⁰⁶

Professional athletes' celebrity status often subjects such athletes to aggressive prosecution. The 1996 domestic-violence case involving Minnesota Vikings quarterback Warren Moon is a prime example. In 1995, Moon allegedly choked his wife in front of their son Jeffrey. During the alleged incident Jeffrey called 911 to report that his mother was being beaten by his father. Shortly after the incident, Moon apologized both publicly and privately for his actions. Moon asserted in a press conference that he would seek help so that he could save his family and marriage. After things cooled down, Felicia Moon told prosecutors that she did not wish to press criminal charges against him. In spite of Mrs. Moon's request, Texas officials arrested Moon and booked him on a one-count Class A misdemeanor charge that would impose a \$4000 fine and a year in jail. Prosecutors also disregarded Mrs. Moon's request and forced her to testify.

Several factors contributed to Moon's being singled out as an example: the incident followed directly on the heels of the O.J. Simpson criminal trial (a trial that was the catalyst for heightening awareness of the domestic-violence epidemic in America),¹⁰⁷ Moon was a big-name football star, and his case was the first highly publicized case to be tried under the new Texas law.¹⁰⁸

103. See Hudson, *supra* note 18, at A1.

104. See Maryann Hudson, *Is It Fair to Expect Sports Heros [sic] to Serve as Role Models?*, L.A. TIMES, Dec. 27, 1995, at A12.

105. See . . . *And Notoriety*, WASH. POST, Nov. 26, 1983, at A20.

106. *Id.*

107. See Gordon Edes, *Link Between Sports, Gender Violence Debated*, ARIZ. REPUBLIC, June 21, 1997, at C1.

108. Texas had recently enacted a "no right to choose" law. See TEX. CRIM. P. CODE ANN. § 38.10 (West 1995). Under this new law, spouses can be compelled to testify in cases of domestic violence. See Alexandra Hardy, *Bill Would Compel Victims of Spousal Abuse to Testify*, HOUSTON POST, Feb. 26, 1995, at A1. Under the old Texas law, it was difficult for prosecutors to file charges against abusers. See *id.* As a result, the mandatory waiver was

Moon was found not guilty of the charges. After the verdict was rendered, some jurors expressed a consensus that this was a case that never should have gone to trial.¹⁰⁹ Others felt that the prosecutor used Moon's celebrity status to bolster the prosecutor's own public image.¹¹⁰ In assessing the Moon case, one question arises: Had Moon not been a celebrity, would the Texas district attorney's office still have chosen to vigorously prosecute him under the new Texas law? Domestic violence is wrong and should not be tolerated at any level; however, in Moon's case, the prosecutor's decision to try him was unwarranted. There was no evidence that spousal abuse was pervasive in the marriage. The marital relationship between Moon and his wife appeared salvageable at that stage. Therefore, the Texas prosecutors should have first determined what was actually in the best interest of the family and marriage. It was not in the best interest of the family to force the Moons' son to testify against his father, and it was not in the best interest of the marriage for the prosecutors to force Mrs. Moon to testify against her husband. The bottom line is that Moon was used as a sacrificial lamb.

A more recent example holding athletes to a higher standard involves Miami Dolphin Lamar Thomas, who was targeted by the Broward County prosecutor's office. Thomas was already on probation for an earlier domestic-violence charge.¹¹¹ In March of 1997, Metro-Dade County police responded to a 911 hang-up call at Thomas's fiancée's house. When the police arrived, Thomas's fiancée was on the bed crying, her clothes were torn, and marks were on her neck. Thomas was arrested, and the Dade County state attorney's office later declined to press any charges against Thomas for the incident.¹¹² Nevertheless, when the Broward County prosecutors learned of the alleged incident through media reports, they arrested Thomas on possible violation of probation and held him in the Broward County jail without bail.¹¹³

This case is problematic because had Thomas been a lesser-known individual, the media attention never would have alerted the Broward County prosecutors to

implemented so that spouses could not refuse to testify against their abusers. *See* TEX. CRIM. P. CODE ANN. § 38.10. Similar laws have been enacted in states such as Arizona, Colorado, Connecticut, Maryland, Michigan, and Ohio, among others. *See generally* Malinda L. Seymore, *Isn't It a Crime: Feminist Perspectives on Spousal Immunity and Spousal Violence*, 90 NW. U. L. REV. 1032, 1054 n.156 (1996) (citing statutes of 27 states that recognize an exception to the evidentiary rule which otherwise grants spouses immunity from being compelled to testify against one another).

109. Jurors in the Moon case in fact stated that the case should have never been prosecuted. *See* Tatsha Robertson, *Moon Acquitted of Abuse*, STAR TRIB. (Minneapolis-St. Paul), Feb. 23, 1996, at 1A. They also stated that they believed the case was vigorously prosecuted because of Moon's celebrity status. *See id.*

110. *See* Bob Ray Sanders, *Warren Moon Ball Still a Souvenir of Human Hero*, FORT WORTH STAR-TELEGRAM, Feb. 25, 1996, at 19 (asserting that, for the prosecutor, this was a case of ego, brought solely for the purpose of grandstanding).

111. *See* Henry Fitzgerald, Jr., *Dolphin Receiver Released*, SUN-SENTINEL (Ft. Lauderdale), May 14, 1997, at 8C.

112. *See id.*

113. *See Settlement Moves Oilers Another Step Closer to Tennessee*, SAN DIEGO UNION-TRIB., May 9, 1997, at D7.

the alleged violation. Second, the Broward County prosecutors arrested Thomas in spite of the Dade County prosecutor's finding that no crime had been committed. Third, a determination was never made as to whether the alleged probation violation ever occurred. In Florida, probation cases such as Thomas's generally require that the probation officer determine whether the probationer had violated his probation.¹¹⁴ If the probation officer concludes that the probationer did violate his probation, the officer is required to file the appropriate papers with the court. The court is then supposed to follow up with the allegations by sending the appropriate forms to the prosecutor's office. In Thomas's case, no such procedures seem to have been taken. Despite not finding Thomas in actual violation of his probation, Broward County kept him in jail without giving him a hearing. All of the circumstances surrounding this case allow for the inference that Thomas was held to a higher standard.

2. Athletes Are Sometimes Above the Law¹¹⁵

Athletes' celebrity status sometimes allows them to be above the law. Research has shown that athletes are convicted of crimes at a much lower rate than lesser-known individuals accused of the same crime.¹¹⁶ Moreover, when professional athletes engage in criminal wrongdoing, they frequently find themselves above the law: they receive minuscule punishment from their respective sports leagues and are usually allowed to continue playing.¹¹⁷ A survey conducted by *The Washington Post* on professional and college athletes who were reported to the police for violent behavior toward women illustrates this point. The survey revealed that between January 1989 and November 1994, only 1 out of 141 athletes was disciplined by his sports league.¹¹⁸

Some athletes use their notoriety and fame to receive preferential treatment from the police. For example, it is commonly reported that athletes suspected of criminal mischief initially respond to police questioning in one of two ways:

114. See FLA. STAT. ANN. § 948.06(1) (West Supp. 1998) (permitting probation officers to seek arrest of, and police officer to arrest, a probationer only when "reasonable grounds" to believe the probationer has violated his or her parole exist).

115. This section of the Comment expresses the sole views of the author, Ms. Laurie Nicole Robinson. See *supra* note *.

116. See Hudson, *supra* note 18, at A1. Northeastern University sociologists examined Boston police reports of sexual-assault cases. Although athletes were arrested at a much higher rate (79%) than lesser-known individuals accused of similar crimes (32%), the study nevertheless found that athletes were convicted at a lower rate of 30%, compared to 54% overall. See *id.*

117. The four professional sports leagues have the authority to discipline, fine, or suspend players for conduct detrimental to the game. The leagues typically discipline players for activities relating to gambling and drugs. Because this Comment relates to athletes and the criminal justice system, it will not discuss professional sports leagues' treatment of players' off-the-field misconduct.

118. See David Diamond, *Out of Bounds*, USA WEEKEND, Aug. 25, 1996, at 4. *But see id.* (reporting that in 1992, a Philadelphia Eagles player was denied reentry into the NFL after serving 33 months in prison for rape).

“‘[C]an I tell you who I am?’”¹¹⁹ or “Officer, I play for the”¹²⁰ These statements lead one to believe that athletes think they can avoid criminal sanctions because of their celebrity status.

There is also some evidence that athletes are treated leniently by the judicial system.¹²¹ In a 1994 survey studying athletes accused of violence against women, *The Washington Post* found allegations by both victims and prosecutors that athletes sometimes receive preferential treatment from judges.¹²² When NBA star Charles Barkley was accused of throwing a bar patron through a window in 1997, the judge presiding over that case delayed the misdemeanor jury trial until July 1998 to accommodate Barkley’s playing schedule.¹²³ Another well-known example demonstrating similar favoritism involved San Francisco Giants outfielder Barry Bonds. During the 1994 baseball strike, Bonds sought to have his family-support payment reduced from \$15,000 to \$7500.¹²⁴ Bonds’s case was heard by Judge George Taylor, who described himself as an “ardent baseball fan.”¹²⁵ Judge Taylor initially granted Bonds’s request to a \$7500 reduction in family support, and then asked Bonds for an autograph. But the public outcry in response to this incident was so great that Judge Taylor later reversed his judgment and recused himself from the case.¹²⁶

When an athlete is tried by a community of his peers, it is possible for him to receive special treatment from jurors,¹²⁷ largely due to the athlete’s celebrity status in the community.¹²⁸ Some jurors may find it difficult to believe that their hometown hero is capable of committing criminal acts, or simply be hesitant to punish an athlete. An illustration of this point is the case involving former Colorado Rockies player Marcus Moore. Moore was charged with raping and sexually assaulting his girlfriend.¹²⁹ The jury voted to acquit him on both charges.¹³⁰ One of the jurors stated that they decided to acquit Moore based on his “‘status as a ballplayer.’”¹³¹ “‘Everybody said he was guilty. They didn’t want

119. Michael Bamberger & Don Yaeger, *Dropping the Ball*, SPORTS ILLUSTRATED, Apr. 1, 1996, at 36, 36 (alteration added) (quoting Dallas Cowboys receiver Michael Irvin).

120. The Walton County sheriff’s department reported that Washington Redskins running back Terry Allen told an officer he was a ballplayer for the Washington Redskins when an officer stopped him. See Jarrett Bell, *Redskins’ Allen Charged with DUI, Driving 133 mph*, USA TODAY, July 11, 1997, at 7C.

121. See Note, *supra* note 11, at 1053.

122. See Nack & Munson, *supra* note 21, at 69.

123. See *Judge Delays Barkley Trial*, WASH. POST, Jan. 17, 1998, at H4.

124. See *Judge Makes Bonds Pay Full Family Support*, CHI. TRIB., Sept. 3, 1994, at N2. Even though this case arose within the civil context, it is a perfect example of how an athlete’s star status allows him to receive preferential treatment from the court.

125. *Id.*

126. See *id.*

127. See Karin Winegar, *Heroes and Felons*, STAR TRIB. (Minneapolis-St. Paul), Nov. 6, 1997, at 26A.

128. See *id.*; see also Susan Weaver, *She Lets ‘Em Have It*, DES MOINES REG., May 14, 1997, at 2 (quoting Marcia Clark as saying that jurors in the O.J. Simpson criminal case were star-struck fans who did not want to send their hero to jail).

129. See Nack & Munson, *supra* note 21, at 73.

130. See *id.* at 74.

131. *Id.* (quoting a juror).

to convict him. It was baseball that did it. They didn't want to push it with a baseball player, a celebrity. They thought being traded down to the minors was punishment enough."¹³²

Reassessing the Warren Moon case from the perspective that athletes are above the law, it is possible that Moon's having been named the NFL's Man of the Year and his going to the Pro Bowl seven times strongly influenced the jurors to find him not guilty. The effect of Moon's celebrity status on the jurors can best be explained by one juror's statement that Moon "needed another chance"¹³³ and that Moon's testimony showed a "love story."¹³⁴ The evidence suggests that the prosecutors had a very strong case against Moon. Specifically, the prosecution possessed a 911 tape of Moon's son telling police that his father was "gonna hit my mommy."¹³⁵ The prosecution also had Mrs. Moon's sworn statement to police that Moon struck her with an open hand,¹³⁶ choked her to the point of passing out,¹³⁷ and pursued her in a 100-mph high-speed chase.¹³⁸ Additional evidence included photographs depicting bruises, scratches, and inflammation of the throat, neck, and shoulder,¹³⁹ and public admissions by Moon himself that he had made "a tremendous mistake."¹⁴⁰ Nonetheless, despite all of this mounting evidence, the jury acquitted him.

When an athlete is actually sentenced to jail, the system often provides him with preferential treatment while he serves his sentence.¹⁴¹ For instance, while in jail awaiting trial, it was reported that O.J. Simpson received special treatment not afforded to other inmates. He received a hot shower every day, was given unlimited visitation privileges, hot dinners, extra time out of his cell to stretch his legs, more access to the telephone, private no-contact visits with his girlfriend and children, and visitors on Christmas Day.¹⁴² Another illustration of this point involves the case of Tyrone Williams. Williams was convicted of shooting a gun into an occupied car during his college days at the University of Nebraska. He was not only placed in a low-security work-release program, but he was allowed

132. *Id.* (quoting a juror).

133. Kate Murphy, *Jury Rapidly Acquits Moon of Spousal Abuse Charges*, N.Y. TIMES, Feb. 23, 1996, at B12 (quoting a juror).

134. *Id.* (quoting a juror).

135. *Moon's Son: 'Daddy Gonna Hit My Mommy'*, ST. LOUIS POST-DISPATCH, Feb. 15, 1996, at 3D (quoting Warren Moon's son).

136. *See NFL: Heisman Winner George Too Busy to Pick Agent*, NEWS TRIB. (Tacoma, Wash.), Feb. 13, 1996, at D2.

137. *See id.*

138. *See id.*

139. *See Moon Jurors Say There's Violence in All Marriage*, GREENSBORO NEWS & REC., Feb. 23, 1996, at C3.

140. Patti Muck, *Moon Formally Charged in Beating of Wife*, HOUSTON CHRON., July 22, 1995, at 1 (quoting Warren Moon).

141. *See Ralph Frammolino, Simpson Loses a Privilege; Others in Jail Gain One*, L.A. TIMES, Dec. 29, 1994, at A1.

142. *See id.*

out of jail during the day so that he could work out in the University of Nebraska's weight room. At night he returned to the lockup.¹⁴³

Athletes also receive the benefit of having their jail term scheduled to accommodate the playing season. For example, Philadelphia Eagle James Darling was sentenced to thirty-five days in jail in 1997 for burglary and assault charges.¹⁴⁴ However, the judge arranged Darling's sentence so that Darling would be incarcerated for three days in July and then be released so that he could attend training camp and compete in the 1997 NFL season. The remaining thirty-two days were to be served after the end of the season.¹⁴⁵

In conclusion, some professional athletes are targeted for prosecution while others are able to escape major punishment; in either case, such discriminatory treatment is the result of who professional athletes are. Overall, athletes are both held to a higher standard and above the law.

III. HIGH-PROFILE DEFENDANTS: CAN THEY FIND AN IMPARTIAL DECISIONMAKER?

This Comment has already provided examples of how high-profile defendants such as professional athletes receive biased treatment—unfavorable or favorable—within the criminal justice system. When it comes to high-profile cases in general, biased treatment is not limited just to professional athletes. This Part examines whether high-profile criminal defendants in general can find an impartial decisionmaker by first looking to the arsenal of devices that trial courts typically employ to diminish the effects of media publicity. Next, this Part explores the role of the jury and judge in relation to high-profile cases. Finally, this Part concludes that it may be difficult for high-profile defendants to find impartial decisionmakers without additional procedural advantages.

A. Why Devices Employed to Diminish the Effects of Media Publicity Do Not Work in High-Profile Cases

Through its decisions, the Supreme Court has provided the media great latitude under the First Amendment to report on criminal matters.¹⁴⁶ The protection of the media's First Amendment right is based on the belief that media coverage and

143. See Kent Youngblood, *Packers Pair Focuses on Future*, WIS. ST. J., July 14, 1997, at 1D.

144. See Mike Sando, *Darling Opts for Alford Plea, Avoids Jury Trial*, SPOKESMAN REV. (Spokane, Wash.), July 9, 1997, at C1.

145. See *id.* Darling was also ordered to perform 40 hours of community service, to undergo evaluation and treatment for substance abuse and anger management, and to pay restitution to the victims. See *id.*; see also Mike Sando, *Cleaning Up His Act*, SPOKESMAN REV. (Spokane, Wash.), Jan. 14, 1998, at C1.

146. See, e.g., *Press Enter. Co. v. Supreme Court*, 464 U.S. 501 (1984); *Globe Newspaper Co. v. Supreme Court*, 457 U.S. 596 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Gannett Co. v. Depasquale*, 443 U.S. 368 (1979); *Nebraska Press v. Stuart*, 427 U.S. 539 (1976).

openness serve as a means to educate the public about the judicial process,¹⁴⁷ protect the judge from imputation of dishonesty,¹⁴⁸ help the public “perform its self-governing function,”¹⁴⁹ and “make government institutions more accountable.”¹⁵⁰ As a consequence of the Court’s protection of media rights, the high-profile defendant’s Sixth Amendment right to a fair trial may be jeopardized. To compensate for this, trial courts are empowered with an arsenal of judicial devices to minimize the prejudicial effects of media publicity.¹⁵¹ In high-profile criminal cases, the devices most commonly used include the following: change of venue,¹⁵² continuance of the trial,¹⁵³ prior restraints, voir dire,¹⁵⁴ special jury instructions,¹⁵⁵ sequestration of the jury,¹⁵⁶ and postponement.¹⁵⁷

The use of these devices was feasible during the 1960s and 1970s, when households had one television and only three main networks existed: CBS, NBC, and ABC. Today, however, times have changed. These mechanisms are no longer sufficient because the media has grown by leaps and bounds. The media’s modes of communication now include tabloid magazines,¹⁵⁸ television networks,¹⁵⁹ cable

147. See *Estes v. Texas*, 381 U.S. 532 (1965).

148. See *Richmond Newspapers*, 448 U.S. 555.

149. Bernabe-Riefkohl, *supra* note 85, at 262; *see id.* at 265.

150. *Id.* at 262.

151. See *Sheppard v. Maxwell*, 384 U.S. 333, 357-63 (1966). See generally Minow & Cate, *supra* note 84, at 646-54 (exploring the techniques judges use to find an impartial jury).

152. Change of venue is used to move the trial to another jurisdiction. See, e.g., 28 U.S.C. § 1404 (1994) (listing conditions precedent to, and procedural requirements for, obtaining change of venue from a U.S. district court). Courts grant change of venue on the belief that the defendant will not be able to find an impartial jury. See Minow & Cate, *supra* note 84, at 646-47.

153. Courts may grant a continuance of trial based on the belief that a delay in the proceedings will cause public and media attention to subside. Courts also grant continuances to cure jurors’ biases. See Minow & Cate, *supra* note 84, at 648.

154. Voir dire is a technique in which the judge and lawyers attempt to assess the effects of pretrial publicity by asking potential jurors about their knowledge of the case and whether they have already formed an opinion about the guilt or innocence of the defendant. See *id.* at 649-51.

155. Judicial instructions may include directions from the judge telling jurors to ignore such things as an individual’s status, information learned outside of court, or pretrial publicity. See *id.* at 647.

156. When trial publicity threatens juror impartiality, sequestration may be used to isolate the jury from the public during the course of the trial. See Minnefor, *supra* note 88, at 122-23.

157. Courts can order a postponement of a criminal proceeding, hoping that the public’s and media’s interest in the high-profile case will subside.

158. The main national tabloids include *The National Enquirer*, *The Sun*, *The Globe*, *The Star*, and *The National Examiner*. The first three are published by the same multimillion-dollar company and command 10 million readers per week. See Kristin Hussey, *Tabloid Heaven: Sensational Mags Call Florida Home*, PITTSBURGH POST-GAZETTE, Jan. 21, 1997, at D3.

159. The main television networks currently include, but are not limited to, CBS, NBC, ABC, FOX, PBS, WB, BET, and UPN.

news channels,¹⁶⁰ tabloid television,¹⁶¹ law-related programs,¹⁶² instantaneous information via the Internet,¹⁶³ and crime-related television shows.¹⁶⁴ With the prevalence of media coverage of high-profile cases, many trial courts rely on the techniques previously mentioned. However, these devices in today's criminal justice system are frequently insufficient. No matter what techniques are employed, it will often be impossible to impanel an impartial jury. For high-profile defendants who feel neither a jury nor a judge (at least one insensitive to the pervasive influence of media coverage) will be able to give them a fair trial, they should have a unilateral, unimpaired right to have their cases heard before a judge more attuned to how media attention and celebrity status can prejudice them.

To reduce the prejudicial effects associated with high-profile cases, courts may change the trial's venue. However, change of venue is not effective at "offsetting the prejudicial impact of the coverage."¹⁶⁵ Reliance on voir dire to diminish the prejudicial effect of pretrial publicity is similarly unrealistic. Voir dire has been criticized as an ineffective means to uncover the real biases of potential jurors,¹⁶⁶ because jurors sometimes do not give accurate or honest responses.¹⁶⁷ In high-profile cases in particular, voir dire is criticized because it rests on the notion that potential jurors know absolutely nothing about well-known defendants. Voir dire in high-profile cases is also futile because it focuses only on the extent of juror exposure to media coverage. By solely attempting to determine a juror's exposure to the media, voir dire fails to determine the actual "existence and degree of any bias . . . engendered by such exposure."¹⁶⁸ Likewise, with respect

160. For example, cable news channels include CNN, CNBC, MSNBC, and the FOX News Channel.

161. Investigative programming includes *American Journal*, *Hard Copy*, *Entertainment Tonight*, *Inside Edition*, *EXTRA*, and *Access Hollywood*.

162. Law-related programming includes *Burden of Proof*, *The People's Court*, *Judge Judy*, *Cochran & Company*, *Law & Order*, *Matlock*, and *Perry Mason*. In fact, one entire television station, Court TV, is devoted to law-related programming.

163. For example, Internet and World Wide Web search services include Yahoo!, AltaVista, Infoseek, Excite, WebCrawler, and Lycos.

164. The public's interest in criminal investigation, criminal trials, murder, and mystery may be attributable to crime-related programming. See Bernabe-Riefkohl, *supra* note 85, at 259 (arguing that the public's attention to the O.J. Simpson trial was more the result of media coverage, including live television coverage of the car chase that led to Simpson's arrest, than of the notoriety of the defendant or the disturbing nature of the crime). For example, television networks currently broadcast shows such as *Brooklyn South*, *Unsolved Mysteries*, *Diagnosis Murder*, *Homicide: Life on the Street*, *NYPD Blue*, *New York Undercover*, *JAG*, *LAPD*, *America's Most Wanted*, *COPS*, *Rescue 911*, and *Real Stories of the Highway Patrol*. Television programs that are no longer running (but still in syndication) include *Murder She Wrote* and *Miami Vice*. During 1992 and 1993 television networks aired dramatizations of the FBI's intervention at the Branch Davidian Compound in Waco, Texas, three different versions of Amy Fisher's story, and the Texas cheerleading murder case. See *id.* at 261 n.8.

165. Minnefor, *supra* note 88, at 121. Change of venue is typically most effective in cases that receive little or no media publicity. See generally Minow & Cate, *supra* note 84, at 647.

166. See Minow & Cate, *supra* note 84, at 650-51.

167. See *id.*

168. *Id.* at 633.

to special jury instructions, it is impractical to believe that jurors disregard information that may be deeply imbedded in their minds.¹⁶⁹ Finally, sequestering the jury is a device that comes too late in the process because the jurors have likely already been swayed by pretrial publicity.¹⁷⁰ Overall, these devices do not work effectively in high-profile cases.

*B. High-Profile Cases Should Not Be Handled by Jurors
or Inexperienced Judges*

For the high-profile defendant facing prosecution for a nonpetty offense, the procedural safeguards enumerated above may still be insufficient to protect the jury from undue media influence, and the defendant may want to have his case heard by a judge instead. However, unless the judge himself appreciates the full impact of the defendant's celebrity status on the integrity of the judicial process, holding a bench trial may still not be enough to guarantee the high-profile defendant a fair trial. Offering such a defendant the unilateral right to a bench trial with a judge specially educated in media and public relations is one way of ensuring that those high-profile defendants whom society holds to a higher standard can still get a fair trial.

As illustrated above by the criminal trials involving Marcus Moore and Warren Moon,¹⁷¹ some cases involving professional athletes face a greater risk of partial jurors. In general, jurors who serve on high-profile cases are susceptible to enormous pressure. The media scrutiny and the actors involved may lead jurors to feel compelled to make decisions based upon public opinion. For instance, some legal analysts assert that high-profile cases make jurors more cautious in their deliberation because of fear of scrutiny, criticism, or alienation from the public and media.¹⁷² In addition, jurors serving in high-profile criminal cases may be subjected to personal danger. For example, in recent high-profile cases, some jurors have been "harassed, and even threatened because they came to an unpopular decision."¹⁷³ To further illustrate this point, when the jury went against public sentiment and decided not to sentence Terry Nichols to death, at least one juror reported that she was subjected to verbal attacks, bomb threats, and threats of physical violence.¹⁷⁴

169. In the 1997 Bill Cosby extortion trial, in which Autumn Jackson was the defendant, the judge provided the jury with 90 minutes of legal instructions. She said that it made no difference whether or not the defendant was television icon Bill Cosby's daughter. *See Trial on Cosby, supra* note 5, at 3A. In regard to high-profile cases, this Comment strongly contends that jury instructions are not sufficient to compel jurors to disregard an individual's celebrity status or pretrial publicity. Here, it was America's favorite dad, Bill Cosby, and all of the media coverage painted Jackson as guilty.

170. *See Minnefor, supra* note 88, at 123.

171. *See supra* Part II.B.2.

172. *See Remshak, supra* note 86, at 1084; Peter S. Canellos, *Bobbit Verdict: Service of Justice or Media Circus?*, BOSTON GLOBE, Jan. 22, 1994, at 6.

173. Jillian Lloyd, *Big Trials Change Juror Lives*, CHRISTIAN SCI. MONITOR, Jan. 14, 1998, at 1.

174. *See id.*

The financial gains and the notoriety of high-profile cases also tempt potential jurors and witnesses to serve their own self-interest.¹⁷⁵ Tabloid television and tabloid magazines frequently entice jurors with television interviews and lucrative book and newspaper deals for the jurors' perspectives on the proceedings.¹⁷⁶ The Simpson case alone brought into question the issue of jurors' impartiality in high-profile cases. A juror in that case stated that he received approximately \$57,000 from his book deal and interviews with tabloid television shows. Further, at the grand jury hearing, one witness testified that she saw Simpson driving near the murder scene at about the time the crime occurred. It was later revealed that she had received \$5000 from *Hard Copy* for her story.¹⁷⁷

High-profile cases are complex for jurors because jurors are oftentimes instructed to disregard the testimony of not-so-credible witnesses. When "checkbook journalism" causes witnesses to have conflicts of interest, jurors may have difficulty forgetting testimony which they have been instructed to ignore. For example, the first two witnesses in the Simpson case, who testified that Simpson had purchased a fifteen-inch knife, also revealed in court that *The National Enquirer* planned to pay them \$12,500 for their exclusive story.¹⁷⁸ The jurors were instructed by Judge Lance Ito to disregard this testimony. In such instances, if jurors are unable to purge testimony already embedded in their minds, prejudice may result. As a result, high-profile defendants, who face not only criminal prosecution but also heightened public scrutiny as a consequence of their national visibility, may feel that no jury would be able to judge them fairly, given the media's saturation of television, radio, and newspaper with the details of their alleged criminal activity. Such defendants may feel that only some sort of bench trial would adequately protect their Sixth Amendment right to a fair trial.

But beyond that, even judges can be biased when it comes to fame, celebrity, and notoriety. In such cases, judges may well be unable to adjudicate fairly without additional, specialized training (i.e., training designed to familiarize judges with ways of combating the media's influence). For example, as noted in the cases involving Charles Barkley, Barry Bonds, and the three Kansas City Royals baseball players,¹⁷⁹ judges who preside over high-profile cases may be influenced by the defendant's status, the pressure of media coverage, or public opinion.¹⁸⁰ An example is Ito's performance during the Simpson trial. Ito, a top

175. See Minnefor, *supra* note 88, at 111 n.52.

176. Book publishers, tabloid magazines, and tabloid television programs are eager to pay millions in remuneration for newsworthy information. In recognition of the problem, California passed legislation, see CAL. CIV. CODE § 1669.7 (West Supp. 1998); CAL. PENAL CODE §§ 116.5, 132.5, 1122, 1122.5 (West Supp. 1998), making it a "misdemeanor for jurors or witnesses to receive compensation (or arrange to receive compensation) for providing information relating to a criminal case within specified time periods." Recent Legislation, 108 HARV. L. REV. 1214, 1214 (1995).

177. See Henry Weinstein, *Free-Spending Tabloid Media Causing Judicial Concerns*, L.A. TIMES, July 2, 1994, at A1.

178. See *id.*

179. See *supra* Part II.B.2.

180. See Mark Jurkowitz, *A Nation of Jurors Has Arisen*, BOSTON GLOBE, Nov. 12, 1997, at A1.

official of the Los Angeles Superior Court, was selected to preside over the Simpson trial based on his level of experience. In undertaking such an arduous task, Ito, from the beginning, had to battle the media, the egos of the prosecution and defense counsel, witnesses who lacked credibility, and dissident jurors. Many proclaim that Ito lost not only the battle, but the entire war.¹⁸¹ Some feel that he lacked the ability to manage the media.¹⁸² These critics contend that Ito's courtroom turned into a media circus. Others criticize him as having become a star-struck judge,¹⁸³ while still others assert that Ito did not possess enough control to curtail the grandstanding of the prosecutors and defense lawyers.¹⁸⁴ Where a given judge is no more likely to remain uninfluenced by the media or the defendant's high profile than any jury would be, neither a jury nor a bench trial adequately protects high-profile defendants. In order to provide defendants with adequate due process in such cases, states need to afford defendants at least the option of having their cases heard before judges specially trained to deal with the impact of defendant visibility and status on the judicial process.

Because high-profile cases are complicated by the effects of media publicity, they are expensive and burdensome on taxpayers' pockets. The courts' attempts to combat the effects of pretrial publicity through voir dire can be very expensive. Costs continue to escalate as ongoing trial publicity requires the jurors to be sequestered.¹⁸⁵ When these cases continue for long periods of time, the community has to pay the extra costs. At the close of a high-profile case, taxpayers can expect to pay many thousands, or even millions, of dollars. For instance, Mike Tyson's rape trial cost Indiana taxpayers approximately \$100,000,¹⁸⁶ while O.J. Simpson's criminal trial cost Californians \$9 million.¹⁸⁷ Even worse, after taxpayers have financed millions for these high-profile criminal cases, jurors seem to either acquit, in spite of a strong presentation of evidence, or deadlock.¹⁸⁸ Therefore, inasmuch as high-profile defendants *do* elect

181. See Richard Grossman, *McVeigh Judge Avoids Ito's Mistakes*, POST-STANDARD (Syracuse, N.Y.), May 5, 1997, at A6; Editorial, *Judge Well Lest Ye Be Judged Foolishly*, YORK DAILY REC. (York County, Pa.), June 4, 1997, at 4 [hereinafter *Judge Well*].

182. See Grossman, *supra* note 181, at A6; *Judge Well*, *supra* note 181, at 4.

183. See *Judge Well*, *supra* note 181, at 4.

184. See Grossman, *supra* note 181, at A6. More recently, in the 1997 high-profile case involving British au pair Louise Woodward, the jury's guilty verdict prompted national criticism, international outrage, and contempt for the American legal system. Massachusetts Superior Court Judge Hiller Zobel, however, set aside the jury's verdict. Some speculate that public opinion and media attention prompted him to suspend the au pair's sentence. See Elizabeth Mehren, *Au Pair Freed; Conviction Cut to Manslaughter*, L.A. TIMES, Nov. 11, 1997, at A1.

185. See Minnefor, *supra* note 88, at 123 (stating sequestration is very expensive).

186. See *Taxpayers' Cost Nears \$100,000*, USA TODAY, Jan. 27, 1992, at 9C.

187. See *Dateline NBC: Bonanza; Several People Are Making Millions on the Murder of Nicole Brown and Ronald Goldman* (NBC television broadcast, Feb. 4, 1997) (transcript available in 1997 WL 7754722).

188. See Roscoe C. Howard, Jr., *The Media, Attorneys, and Fair Criminal Trials*, 4 KAN. J.L. & PUB. POL'Y, Spring 1995, at 61, 66 (referring to Los Angeles police officers charged with beating motorist Rodney King).

to take advantage of a state's high-profile court, such a court system would lower the state's litigation costs substantially.

IV. BALANCING THE SCALES OF JUSTICE: ESTABLISHING HIGH-PROFILE COURTS

The last decade has shown us that the far-reaching advancements in media technology, combined with the constitutionally mandated freedom of the press, make it increasingly difficult for the courts' arsenal of techniques to effectively ensure impartial decisionmakers. In light of this problem, this Comment suggests a solution that can help balance the scales of justice for high-profile defendants. This Comment proposes that states create courts with sole jurisdiction over all high-profile criminal cases in the state. This proposal is designed to take high-profile criminal cases out of the hands of often biased jurors, and place them in the hands of judges experienced and specially trained to handle such cases. This Part sets forth three proposals: first, it identifies the criteria for selecting judicial candidates and lays out a curriculum for a national training program designed to enhance judges' skills in adjudicating high-profile cases. Second, this Part proposes that high-profile cases involving petty offenses be adjudicated by the high-profile judge. Third, this section proposes that for more serious criminal offenses, the high-profile defendant be given an opportunity to have his case adjudicated by a high-profile judge.

A. High-Profile Judges: Selection and Training

Judge Ito's performance in the Simpson trial and other judges' actions in similar high-profile cases¹⁸⁹ teach us one important lesson: judges selected to preside over such cases should not only be neutral and experienced, but also specially trained. The foundation of the high-profile court rests on the use of "specially trained high-profile judges." This section of the Comment proposes criteria for selecting judicial candidates. Furthermore, to ensure that such judges

189. See Jean Guccione, *The Whole World's Watching*, CAL. LAW., May 1994, at 33. In 1994, Judge Joyce A. Karline, a new judge in Compton, California, was assigned to handle the high-profile case of a Korean grocer accused of killing a teenage black girl. The jury convicted the grocer and, during the sentencing phase, Judge Karline sentenced him only to probation. The community was outraged at this lenient sentence and Judge Karline was subjected to "unprecedented political backlash." *Id.* at 33. After the incident, top court officials admitted that Judge Karline did not possess the judicial experience to handle such a high-profile case. See *id.*

are unbiased and adept at adjudicating high-profile cases,¹⁹⁰ this section proposes a national training program.¹⁹¹

1. Selection of High-Profile Judges

Most state constitutions specify how judges are to be selected. In some states, judges are appointed by the governor or state legislature, while in other states, judges are elected officials. In regard to the high-profile court, this Comment suggests that high-profile judges be nominated by the state bar association and then appointed by the state legislature or governor.¹⁹²

To ensure that the best of the best high-profile judges are selected, this Comment proposes that state bar associations nominate judges because the state bar associations have knowledge pertaining to the judges' experience and past performance. The state bar association is also in a position to assess the judges' disposition rates, court backlog, appellate reversal rate, forced recusal, and the number of party and witness complaints received.¹⁹³ In selecting high-profile candidates, state bar associations must ensure that judges meet the preceding mandatory criteria in order to be considered for the high-profile court. The high-profile court should consist of judges that have a high level of competency; therefore, it is important that judges be selected based on merit.

Judges who serve on the high-profile court will be in the spotlight, placed on a "hot seat," and scrutinized by the public and the media. Therefore, once the state bar association nominates judges to serve on the court, if the state

190. The author proposes that criminal courts in the United States become subject-matter-specific. As models, the author recommends the German and French legal systems, which both have courts of specialization. Overall, these foreign systems appear to better protect litigants' rights and promote both efficiency and uniformity of the laws. *See generally* Victor Williams, *A Constitutional Charge and a Comparative Vision to Substantially Expand and Subject Matter Specialize the Federal Judiciary: A Preliminary Blueprint for Remodeling Our National Houses of Justice and Establishing a Separate System of Federal Criminal Courts*, 37 WM. & MARY L. REV. 535 (1996).

191. The concept of specially trained and skilled high-profile judges is similar to that employed by the French judicial system. In the French system, one way of ensuring judicial competence is through the "careful initial selection and training of judges." Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?*, 78 CAL. L. REV. 539, 565 (1990). Selection and training of French judges is identical to that of French prosecutors. *See id.* at 566. After completing three years of law school, French prosecutors (and thus judges) must complete 24 months of preappointment training. At this phase, prosecutors and judges spend the first seven months enrolled in classes at the National Magistrates' School in Bordeaux. Both are also required to participate in three periods of internships: "(1) thirteen months in one of the provincial courts of appeal; (2) two months with a judge or prosecutor in Paris; and (3) two months in the office selected by the candidate for his or her first post." *Id.* at 562. Moreover, after completing the preappointment training program and during their first four years of service, judges are required to complete four months of additional, specialized training. *See id.* at 566.

192. States can proceed in appointing high-profile judges according to state constitutional provisions.

193. *See* Frase, *supra* note 191, at 566.

legislature approves the nomination, the judge should be appointed for life.¹⁹⁴ Lifetime appointment is important because elected judges are often criticized for being more susceptible to the “drumbeat of public opinion,”¹⁹⁵ media scrutiny,¹⁹⁶ and various constituencies. Others feel that when it comes to unpopular verdicts, elected judges are sometimes subject to partisan politics.¹⁹⁷ In short, appointing the judges for life would allow them to “discharge their responsibilities to the criminal justice system without worrying about the electoral or other public relations consequences.”¹⁹⁸

Judges considered for the high-profile court should have a minimum of five years experience in the area of criminal law. Candidates for the high-profile court may have obtained this experience while serving as a prosecutor, criminal defense lawyer, or judge. This criterion is important because judges responsible for adjudicating high-profile criminal cases should have a solid foundation in the area of criminal law.

Although not mandatory, judges considered for the high-profile court should have previous experience—be it good or bad—in adjudicating high-profile cases. Candidates for the court may have obtained this experience while adjudicating cases either in the civil or criminal context. In addition, the nature of the previous experience could have been either a national or local high-profile case. The purpose of requiring judges to have experience in high-profile cases is twofold: first, judges with such experience will have the basic skills necessary to maintain control in the courtroom and handle the presence of the media; and second, with such experience judges will be less likely to be influenced by media scrutiny, public opinion, or the defendant’s celebrity status. For instance, many high-profile cases are adjudicated in Los Angeles. To deal with these types of cases, top officials of the Los Angeles Superior Court handpick judges to preside over these cases.¹⁹⁹ As of 1994, the following four judges were recruited and groomed to serve as part of the Los Angeles high-profile team: Judge Stanley Weisberg was selected to handle the Menendez trial because of his reputation for being able to “control a case”²⁰⁰ and for his ability to control the strong and often clashing personalities of prosecutors and defense attorneys; Judge Judith L. Champagne was selected to handle the pandering case involving Heidi Fleiss—the “Madam to the Stars”;²⁰¹ Judge Paul Flynn presided over the murder trial of rapper Snoop Doggy Dog;²⁰² and Judge George W. Trammell III tried the

194. States of course may reserve the right to remove judges or discipline them in accordance with state constitutional and statutory provisions.

195. Sue Ann Wood, *Attorney Abramson as Devil's Advocate: Menendez Defender Decries Media Circus*, ST. LOUIS POST-DISPATCH, Feb. 24, 1997, at 3E.

196. See Adam H. Kurland, *Providing a Federal Criminal Defendant with a Unilateral Right to a Bench Trial: A Renewed Call to Amend Federal Rule of Criminal Procedure 23(a)*, 26 U.C. DAVIS L. REV. 309, 346 (1993).

197. See Jurkowitz, *supra* note 180, at A1.

198. Kurland, *supra* note 196, at 353.

199. See Guccione, *supra* note 189, at 33. Incidentally, Judge Ito has served as one of the top officials who handpick the judges.

200. *Id.*

201. *Id.*

202. See *id.*

Reginald Denny case.²⁰³ These four judges, in addition to Judge Ito and Judge Matsch,²⁰⁴ would qualify under this criterion.

As high-profile cases arise, top officials of the state court system should be responsible for selecting the judge that will adjudicate the case. To arrive at a selection, the state court system must assess the complexity of the case and match its level of difficulty with the experience of all eligible judges. Upon choosing a candidate, the state court system must ensure that the judge selected has no potential conflicts of interest. For example, suppose a celebrity country singer is charged with murder and his case qualifies as a high-profile case. If the country singer elects to have his case heard by a high-profile judge and the defendant happens to be the judge's favorite musician, the state would be responsible for concluding that the judge has the potential to be star-struck and biased. Thus, the state would be compelled to disallow that particular judge from hearing the case.

The state court system can also help ensure that high-profile judges themselves have not been influenced by pretrial publicity. This goal can be accomplished by interviewing judges one-on-one or forcing them to complete questionnaires. In essence, the state will have to perform its own *voir dire* to determine if the judge has already formed an opinion as to the defendant's guilt or innocence. In sum, employing this selection criteria provides an additional safeguard to ensure that judges are competent—and not star-struck and biased—decisionmakers.

2. Specialized Training

The trend toward live media coverage in the courtroom is steadily on the rise.²⁰⁵ National high-profile cases are virtually bound to receive gavel-to-gavel coverage on CNN and Court TV, in addition to print media. Consequently, the public's perception, education, and awareness of the criminal justice process is dependent upon the adjudication of high-profile cases. In other words, society's knowledge of the American criminal justice system is based on what private individuals hear, see, and read. Serving as a high-profile judge is therefore a "fishbowl" position—the defendant, victim, public, and world will all have eyes focused on the high-profile judge. As suggested earlier, more than experience is needed to adjudicate these cases. This Comment concedes that judges already

203. *See id.*

204. U.S. District Court Judge Richard P. Matsch presided over the high-profile trial of Timothy McVeigh. Although cameras were not allowed in the courtroom, Matsch was lauded for handling the intense media scrutiny, public interest, and the high-profile nature of the case. Matsch controlled the courtroom and was strict on the criminal justice participants by prohibiting lawyers on both sides from trying the case outside of the courtroom. Overall, Matsch adjudicated the McVeigh trial with even-handedness, speed, and efficiency. *See Morning Edition: Judge Matsch Profile* (NPR broadcast, June 3, 1997) (transcript available in 1997 WL 12821631).

205. *See* Robert S. Stephen, Note, *Prejudicial Publicity Surrounding a Criminal Trial: What a Trial Court Can Do to Ensure a Fair Trial in the Face of a "Media Circus"*, 26 SUFFOLK U. L. REV. 1063, 1102 (1992). Currently, "more than forty states allow live television coverage, subject to the trial court's discretion." *Id.*

participate in judicially related educational programs. However, for the particular needs of the high-profile court, enhanced specialized training is needed. This Comment proposes that all high-profile judges participate in a training program.²⁰⁶ The crux of this program is its subject-matter-specific training geared solely toward the practice of adjudicating high-profile cases.

First and foremost, high-profile judges should receive training in the area of trial procedure. In essence, this component entails participation in a series of mock trials.²⁰⁷ Similar to a program instituted at the National College of District Attorneys, mock trials can provide hypothetical scenarios likely to arise in high-profile cases. These scenarios can address issues pertaining to determining witness credibility, asking questions to extrapolate facts, and resolving conflicts in evidence. This adjudication exercise provides judges with feedback and constructive criticism from fellow judges.

Second, because media coverage of high-profile cases is inevitable, it is important that judges be able to effectively handle the presence of the media. As one of the training components, this Comment strongly recommends that high-profile judges obtain training in the area of *media management*. To manage the presence of cameras in the courtroom effectively, training should include strategies for maintaining courtroom decorum and control. In addition, because high-profile cases frequently draw prominent lawyers,²⁰⁸ training can provide judges with tactics to curtail grandstanding and control any conflicts that may arise between the prosecutor and the defense counsel. Moreover, workshops can be given on how to effectively write a high-profile case opinion. Most importantly, training can encompass methods that will enhance judges' ability to communicate with the media. This includes issuing statements to the press, answering questions for the press, and preserving the courtroom's appearance.²⁰⁹ Furthermore, in recognition of the advancement in technology, high-profile judges can also explore the usage of the Internet for displaying judicial opinions.

To ensure that high-profile judges at the state level are adept at fact finding, this Comment recommends that judges have a strong foundation in the relevant state law. To accomplish this goal, the national training school can provide

206. Tax dollars could be used to finance such training. Because high-profile judges may be limited in number, training will be cost effective and will save tax dollars in the long run. Training for these judges can take place at law schools or at convention centers.

207. The National College of District Attorneys has a special training school for the nation's best prosecutors. The emphasis of this training program's educational approach is on active participation. It is utilized through role playing and videotaped review within small groups. For purposes of this Part, this Comment will borrow some of the curriculum ideas of the National College of District Attorneys.

208. Some lawyers that may be drawn to adjudicate high-profile cases include, but are not limited to, the following: Johnnie Cochran, Alan Dershowitz, Robert Shapiro, and Roy Black.

209. As a possible idea for such training, the program can receive assistance from such media specialists as the Speaking Specialist. This company facilitates a cost-effective program designed to prepare public figures for handling the media in the 1990s. Training entails strategies for working cooperatively with the media, listening to questions, and thinking before answering questions. It also focuses on other basic skills such as not chewing gum or being defensive. See *Stepping on the Mike*, CHI. SUN-TIMES, Dec. 14, 1997, at 34.

judges with *high-quality training* in professional responsibility and state-related areas such as evidence, criminal law, and criminal procedure.

Finally, since high-profile judges will have to sentence convicted defendants, this Comment proposes that judges receive training on uniformity in sentencing in order to ensure fairness. This criterion is intended to ensure that punishment in such cases is consistent with similar criminal adjudications which are not high profile. As an illustration, if defendants found guilty of domestic violence in California would only realistically face a maximum sentence of six months in jail, the high-profile judge hearing a similar domestic-violence case in California could not sentence the high-profile defendant to two years in jail, absent distinguishing, aggravating circumstances. Overall, the specialized-training component would enable high-profile judges to minimize error by striking an appropriate balance between serving as the trier of fact and courtroom administrator. It would also enhance judges' communication, problem-solving, media-management, and public-relations skills.

B. Petty Offenses: Eliminating Defendants' Entitlement to Jury Trial

As this Comment has previously set forth, some high-profile defendants are above the law and thus held to a lesser standard by jurors and some bench-trial judges.²¹⁰ In order to balance the scales of justice, this Comment proposes that in high-profile cases the defendant's entitlement to a jury trial be eliminated in some circumstances. In implementing this proposal, the high-profile court would work in the following manner: if a defendant's case were a high-profile case and the defendant were charged with a criminal offense that imposed no more than six months in jail,²¹¹ she would have no jury trial. Instead, the high-profile judge would adjudicate the case. Giving such cases to the high-profile court assures that defendants such as Marcus Moore, Barry Bonds, and Charles Barkley have less chance to benefit from the biases of a court. In effect, because the status of the defendant would be less likely to sway the judge, the judge would be able to adjudicate the case more fairly.

With respect to eliminating the defendant's right to a jury trial, some states may question whether putting these cases directly in the hands of a judge would violate the defendant's Sixth Amendment right to a jury trial. Here, eliminating a jury trial is constitutionally feasible because the Supreme Court has firmly held

210. As this Comment has set forth, the high-profile court is designed to provide defendants whose criminal cases receive national media publicity during the investigatory and pretrial proceedings with an impartial decisionmaker.

211. The Supreme Court presumes crimes that impose no more than six months in jail to be "petty offenses." See *Blanton v. City of N. Las Vegas*, 489 U.S. 538 (1989). State legislatures have prescribed various forms of punishment for state crimes. Nevertheless, *depending* on the particular state's classification, crimes that fall under the "petty offense" category may include, but are not limited to, assault, drug use, disorderly conduct, DUI, battery, and carrying a concealed weapon.

that defendants charged with petty offenses have no Sixth Amendment right to a jury trial.²¹²

In general, the Sixth Amendment of the Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.”²¹³ Although the language in the Sixth Amendment states that it is applicable to *all criminal prosecutions*, the Supreme Court has held otherwise. For over a century the Supreme Court has held that crimes categorized as “petty” offenses do not implicate the Sixth Amendment right to jury trial.²¹⁴ This point is illustrated by the recent state enactment of DUI statutes which impose punishment on defendants without providing them with a jury trial. For example, the State of Nevada enacted a DUI statute providing that offenders are guilty for driving with a blood alcohol concentration above 0.10%.²¹⁵ In effect, defendants in violation of the Nevada DUI statute have no constitutional right to a jury trial.²¹⁶ In 1989, the Supreme Court, in *Blanton v. City of North Las Vegas*,²¹⁷ determined whether or not Nevada’s DUI statute was constitutional even though it denied first-time offenders a right to jury trial. The Court first focused on the seriousness of the offense. The Court presumed that if the legislature imposed no more than six months imprisonment for a DUI offense, then the crime was a petty offense.²¹⁸ Based on this presumption, the Court held that the defendant had no Sixth Amendment right to a jury trial.²¹⁹

The petty-offense doctrine used in *Blanton* evolved from a line of Supreme Court cases. In the 1888 case of *Callan v. Wilson*,²²⁰ the Supreme Court first established that crimes classified as petty offenses may be tried without a jury. In *Callan* the issue was whether the crime of conspiracy implicated the Sixth Amendment right to a jury trial. The Court determined that conspiracy was a “grave” offense at common law, and therefore must be tried by jury.²²¹ Thus, the Court held that conspiracy, because of the threat it posed to society, was a serious offense that entitled the accused to a jury trial.²²² In the 1930 case

212. See *Duncan v. Louisiana*, 391 U.S. 145, 159 (1968).

213. U.S. CONST. amend VI.

214. See *Callan v. Wilson*, 127 U.S. 540, 552 (1888); see also Florina A. Moldovan, Note, 20 SETON HALL L. REV. 600, 600 (1989).

215. See Moldovan, *supra* note 214, at 602-05.

216. See *id.* at 603 n.16 (quoting NEV. REV. STAT. § 484.379 (1987)):

[The Nevada DUI statute] provides for punishment by imprisonment for a minimum two days and a maximum of six months, or in the alternative, forty-eight hours of community service, and in either case, by fines between \$200 and \$1,000, ninety days revocation of unrestricted driving privileges and participation in alcohol education programs. The Nevada statute proscribes driving with a blood alcohol reading above 0.10 percent or while “under the influence of intoxicating liquor.”

See also NEV. REV. STAT. § 484.379 (1994).

217. 489 U.S. 538 (1989).

218. See *id.* at 543.

219. See *id.*

220. 127 U.S. 540 (1888).

221. See *id.* at 556.

222. See *id.* at 555-57.

District of Columbia v. Colts,²²³ the Court had to determine whether the crime of reckless driving of a motor vehicle, with its imposition of a maximum \$100 fine and a thirty-day jail sentence, entitled the defendant to a jury trial. Because it was determined that the crime was comparable to one tried before juries at common law,²²⁴ and because such driving endangered "property and individuals,"²²⁵ the Court concluded that it was a "serious" offense.²²⁶ Thus, the defendant was entitled to a jury trial.

In the 1937 case *District of Columbia v. Clawans*,²²⁷ the Court had to determine whether or not the crime of selling secondhand property without a license, with its imposition of a ninety-day maximum jail sentence, entitled the defendant to a jury trial. In developing an objective standard to determine this issue, the *Clawans* Court assessed the severity of the penalty,²²⁸ the length of possible imprisonment authorized by the statute,²²⁹ and the evolving societal view of the particular crime.²³⁰ Because the crime had no common-law implications and only carried a maximum ninety-day jail term, the Court determined that the crime was a petty offense and that the defendant was not entitled to a jury trial.²³¹

In *Duncan v. Louisiana*,²³² the Court examined whether the offense of simple battery, with its imposition of a maximum fine of \$300 and prison term of two years, constituted a serious offense.²³³ In making its determination, the *Duncan* Court supplemented the objective criteria in *Clawans* by focusing on the "federal statutory definition of petty offenses, and the practices of the states."²³⁴ The Court took notice that many states imposed no more than one year in jail for battery and that the federal system imposed no more than a \$500 fine and six months in jail.²³⁵ Because the statute in *Duncan* exceeded both federal and national maximum jail sentences, the Court concluded that the statutory offense was serious.²³⁶

223. 282 U.S. 63 (1930).

224. *See id.* at 72-73 (finding that the reckless driving of horses was tried by jury at common law).

225. *Id.* at 73.

226. *Id.*

227. 300 U.S. 617 (1937).

228. *See id.* at 625.

229. *See* Peter J. Schmidt, *Mr. Lewis Goes to Washington (and Gets His Constitutional Rights Stepped On): A Criticism of the Supreme Court Decision in Lewis v. United States*, 47 DEPAUL L. REV. 191, 193-94 (1997). In *Baldwin v. New York*, 399 U.S. 66 (1970), the Court emphasized that the maximum authorized penalty of the statute is the most important criterion in determining whether the offense is petty or serious.

230. *See Clawans*, 300 U.S. at 627. The Court also proposed an assessment of those maximum penalties that states and Congress had imposed without providing for a jury trial. *See id.* at 628.

231. *See id.* at 630.

232. 391 U.S. 145 (1968).

233. *See* Colleen P. Murphy, *The Narrowing of the Entitlement to Criminal Jury Trial*, 1997 WIS. L. REV. 133, 142.

234. *Id.* at 143.

235. *See Duncan*, 391 U.S. at 161.

236. *See id.* at 162.

More recently, in *Lewis v. United States*,²³⁷ the Court held that defendants may be denied a jury trial for multiple petty offenses. In *Lewis*, the defendant was charged with two counts of obstructing the mail.²³⁸ Because (by statute) each count could only bring a maximum of six months incarceration, the Court upheld the denial of Lewis's request for a jury trial.²³⁹ Thus, if a defendant is charged with numerous petty offenses, the penalties for which may add up to several years in jail, he still has no right to jury trial.²⁴⁰ Based on a reading of these cases, if states impose no more than six months in jail for certain crimes, the defendant will not be entitled to a jury trial. Therefore, those cases involving petty crimes can be adjudicated solely by the high-profile judge.

*C. Serious Offenses: Providing the High-Profile
Defendant with a Unilateral Right to Have His Case
Heard by a High-Profile Judge*

As set forth in this Comment, because of pretrial publicity and gavel-to-gavel coverage, high-profile defendants are sometimes held to a higher standard in the criminal justice system. The Supreme Court has established that defendants charged with a serious offense—murder, manslaughter, or crimes warranting the death penalty, among others—are entitled to a jury trial.²⁴¹ In addition to this right, this Comment strongly recommends that high-profile defendants be given a unilateral right to have their cases tried by a high-profile judge. In supporting this part of the proposal, this Comment recognizes that high-profile defendants who are “above the law” are provided with an advantage—because such a defendant's celebrity status will inure to his benefit more easily if his case is tried to a jury (rather than a judge), an above-the-law defendant will be able to take advantage of the jury in a way a held-to-a-higher-standard defendant cannot. Of course, as a matter of strategy, an above-the-law high-profile defendant will not exercise this unilateral right, because such a defendant will prefer to have his case heard before a jury, the more advantageous factfinder. (As a result, because entitlement to a jury trial is mandated for serious offenses, the only viable way to reduce some of the inequity that such above-the-law defendants receive would be to eliminate the defendants' right to jury trial in all petty offense cases.) But at the other end of the spectrum, those high-profile defendants who are held to a higher standard (like Lorena Bobbitt, Erik and Lyle Menendez, and Timothy McVeigh) may well prefer the high-profile court, particularly if they perceive that their visibility, the media, and the surrounding publicity would negatively

237. 518 U.S. 322, 330 (1996).

238. *See id.* at 324; *see also* 18 U.S.C. § 1701 (1994) (“Whoever knowingly and willfully obstructs or retards the passage of the mail, or any carrier or conveyance carrying the mail, shall be fined under this title or imprisoned not more than six months or both.”).

239. *See Lewis*, 518 U.S. at 330.

240. *See Murphy*, *supra* note 233, at 157-69.

241. Although this Comment does not contend that jury trial be eliminated in high-profile cases, it does argue that, in cases where high-profile defendants opt in favor of a jury trial, high-profile judges should be assigned to preside over those cases.

prejudice their case. For them, the special court could compensate for (or at least minimize) the effect of such prejudice.

State criminal codes prescribe various procedures through which a defendant may waive a jury trial and request a bench trial. Some states, however, require the prosecutor's consent before the defendant may obtain a bench trial.²⁴² In contrast, states such as Iowa,²⁴³ Louisiana,²⁴⁴ Montana,²⁴⁵ Connecticut,²⁴⁶ Illinois,²⁴⁷ Maryland,²⁴⁸ Ohio,²⁴⁹ and New Hampshire²⁵⁰ provide defendants with a right to a bench trial without requiring the prosecutor's consent. Understandably, eliminating the prosecutor's consent in high-profile cases will likely meet with criticism. Such criticism will especially come from those who argue that the "prosecution represents the public, and the public should have a say as to whether the right to a jury trial should be waived."²⁵¹ In response, one could argue that the public and the government have a right to a fair trial, and unless proven otherwise, the public has no interest in selecting the mode of factfinding.²⁵² The high-profile court can provide the public, the government, and the defendant with a better chance of obtaining a fair trial.

Another argument against eliminating the prosecutor's veto power is based on the notion of the adversarial system that provides parties with tactical interests.²⁵³ However, this argument is relevant only in low-profile cases where the prosecution and the defense are on equal playing ground. However, in high-profile cases prosecutors often have a greater advantage over defendants because of the effects of pretrial publicity. Because of pretrial publicity, it is easier for the prosecutor to find potential jurors likely to convict than it is for defense counsel to find potential jurors likely to acquit. Also, high-profile cases tend to reverse the roles of the defense and the prosecution because the excessive publicity tends to inure to the prosecutor's benefit. As a result, instead of the prosecution having to prove the defendant's guilt, the defense ends up, as a practical matter, forced to prove the defendant's innocence.²⁵⁴ The prosecutor's job is to pursue justice, and in doing so he should recognize the unfairness in the current adjudication of high-profile cases. If the prosecutor is able to choose jurors who have already determined the guilt of the defendant based on pretrial publicity, then he is not able to carry out his job as a "servant of the law." The

242. This Comment recommends that those states requiring the prosecutor's consent before a defendant be given a bench trial amend their statutory framework to allow the defendant a unilateral right of access to the special judge.

243. See IOWA CODE ANN. § 813.2 (West 1994).

244. See LA. CONST. art. I, § 17; LA. CODE CRIM. PROC. ANN. art. 780 (West 1981 & Supp. 1998).

245. See MONT. CODE ANN. § 46-16-110 (1997).

246. See CONN. GEN. STAT. ANN. § 54-82(a) (West 1994).

247. See 725 ILL. COMP. STAT. ANN. § 5/115-1 (West 1992).

248. See MD. CODE ANN., CTS. & JUD. PROC. § 8-305 (1995).

249. See OHIO REV. CODE ANN. § 2945.05 (Anderson 1996); OHIO R. CRIM. P. 23(A).

250. See N.H. REV. STAT. ANN. § 606:7 (1986).

251. Kurland, *supra* note 196, at 349.

252. See *id.*

253. See *id.* at 332 n.79.

254. See Wood, *supra* note 195, at 3E.

prosecutor should allow the defendant in a high-profile case to have his case decided by a neutral factfinder so that the defendant can obtain a fair trial. If the prosecutor has a legitimate case against the defendant, then it should not matter if the adjudication is before a judge or before a jury.

D. The High-Profile Court: Applicable to All High-Profile Criminal Cases

The purpose of the high-profile court is to provide all criminal defendants—athletes and nonathletes—with equal justice under the law. This Comment requires that, by definition, a defendant's criminal case must be high-profile²⁵⁵ in order for it to fall within this special court's jurisdiction.²⁵⁶ In other words, a defendant's status alone will not qualify the case for the high-profile system. For illustrative purposes, suppose that the State of California had established a high-profile court as envisioned in this Comment at the time of the Nicole Brown Simpson and Ronald Goldman murders. Further assume that the trial was to be held in Brentwood, a predominantly white community where Simpson would have been more concerned about the partiality of his jury pool. Presented with those facts and that defendant, the proposed high-profile court would work in the manner explained below.

First, because a murder charge is a "serious offense," Simpson would be (and of course was) entitled to a jury trial under the Sixth Amendment. Simpson would then have two choices. Here, Simpson could choose to have a trial by jury. Alternatively, if he felt no jury would be impartial, Simpson might decide to waive his right to trial by jury, and have his case tried by the high-profile judge.²⁵⁷ If he were to decide to have his case heard before the California high-profile judge, a decision much more realistically likely had Simpson been prosecuted in Brentwood instead of Los Angeles, top officials from California's state court system would assess the complexity of the case and select a high-profile judge whose training would correspond with the level of the case's difficulty.²⁵⁸ The state court would conduct its own form of voir dire to ensure that candidate judges would not be biased and would not be affected by pretrial publicity. Once the state court had assessed all of these factors, the high-profile judge would be selected.

255. A case will qualify as high-profile based on the amount of national media attention it receives.

256. The jurisdiction of the high-profile court could also include civil cases. There are some recent civil cases that would theoretically fall under the court's jurisdiction. For example, in April of 1996, talk-show hostess Oprah Winfrey aired a show on "mad cow disease," an episode alleged to have caused a loss of millions of dollars to the Texas cattlemen's industry. See Sue Anne Pressley, *Testing a New Brand of Libel Law*, WASH. POST, Jan. 17, 1998, at A1. Due to Winfrey's status and the resultant media coverage surrounding the libel suit later brought by the cattlemen against her, use of the high-profile court would have been appropriate here. It is, however, beyond the scope of this Comment to discuss the use of such courts in the civil context.

257. See *supra* Part IV.A for a general definition.

258. For example, if California had a total of five high-profile judges, the California state court system would select the most appropriate judge out of those five.

Next, the California high-profile judge would try the case. All regular trial procedures would be applicable in the court.²⁵⁹ In other words, the prosecution would first present its case-in-chief and the defense would then present Simpson's case. To effectively carry out her duties, the high-profile judge could ask questions she deemed necessary to bring out the facts. She would be responsible for determining the sufficiency, probative effect and weight of the evidence, and the credibility of witnesses.²⁶⁰ Finally, she could be responsible for resolving conflicting evidence. At the end of the presentation of evidence, the judge would render her decision. If the judge had sufficient evidence on the record to support a conviction beyond a reasonable doubt, the verdict would stand on appeal and the California Supreme Court would not reverse the judgment. If Simpson were convicted, the California high-profile judge would then be responsible for imposing a uniform sentence.²⁶¹

CONCLUSION

This Comment focuses on the criminal justice system's treatment of professional athletes specifically, and high-profile defendants generally. It illustrates the manner in which intense media scrutiny can surround the lives of athletes, celebrities, and other high-visibility defendants. It also demonstrates how celebrity and notoriety frequently cause them to be treated differently from lesser-known individuals. With respect to professional athletes, this Comment concludes that when it comes to equal justice under the law, society may hold some of these defendants to a higher standard while allowing other high-profile defendants to operate above the law. Although the initial focus of this Comment is on athletes, it is important to recognize that the problems within our legal system reach beyond the lives of these superstars—they affect all defendants whose cases rise to the level of "high profile." It is unfair for a high-profile defendant's life, liberty, and opportunity to obtain fair treatment to be predicated on the media's agenda of selling newspapers, expanding circulation, or conquering Nielson ratings. States must recognize that for some cases, ones that may be too complicated and media-saturated for jurors and inexperienced judges to adjudicate, it may be necessary to provide the defendant the option of specially trained judges in order to protect the defendant's right to due process.

The media will continue to do its job at all costs; therefore, one viable solution to the problem is for each state to establish a high-profile court. In effect, by establishing these courts and giving the high-profile defendant the option of having a special judge serve as the trier of fact, the criminal justice system will be able to address some of the problems created by the defendant's high, often national, visibility. To the extent a defendant chooses to run this procedural

259. The discussion in this section uses the general provisions of Colorado state law governing bench trials. *See* COLO. REV. STAT. ANN. §§ 16-6 to 16-7, 16-9, 16-11 to 16-13 (West 1998).

260. *See* *Vigil v. Lamm*, 544 P.2d 631, 632-33 (Colo. 1976).

261. In recognition of some state constitutional amendments that protect victims' rights during the sentencing phase, high-profile judges would allow victims to make statements before sentencing.

gauntlet, there will be a lesser chance that the court will waste its time battling the media. There will also no longer exist a need for procedures such as voir dire, change of venue, or special jury instructions. Moreover, as with any bench trial, the use of high-profile judges guarantees that the decisionmaker will be more adept at determining witness credibility and separating truth from falsity, and that cases will no longer run the risk of ending in a hung jury. Similarly, if a defendant chooses this option, there will no longer be a need for sequestration of jurors, a safeguard which, once obviated, can save states money.²⁶² Finally, if a high-profile defendant chooses this court system, the high-profile judge will be much more likely to take only the merits into account, without undue prejudice, delay, or distractions.

In sum, because the public's only source of knowledge of the criminal justice system is often through the media, allowing trained judges to adjudicate high-profile cases will help restore the public's faith in the criminal justice system. Most importantly, high-profile defendants can better guarantee that they will finally be judged by impartial decisionmakers.

262. In a 1995 experiment, the New York state legislature authorized its criminal trial courts to eliminate sequestration. By the end of the experiment, the state had saved \$1.85 million. See Margaret Ramirez, *Study: Eliminate Jury Sequestration*, NEWSDAY, Mar. 5, 1997, at A26.