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BLUE-COLLAR CRIMES/WHITE-COLLAR CRIMINALS: SENTENCING ELITE ATHLETES WHO COMMIT VIOLENT CRIMES

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Elite professional athletes seem to commit violent crimes with distressing frequency.[1] The names Mike Tyson, Rae Carruth, Jason Kidd, and Marty McSorley will immediately suggest to sports fans the variety and seriousness of the criminal behavior of such athletes. While there is no clear evidence that sports stars – who are predominantly young and male – break the law any more frequently than other young males,[2] there is at least a common perception that violent crime by athletes is on the rise.[3]

As sports pages increasingly come to resemble a crime blotter, critics often argue that the criminal justice system does a poor job of handling cases involving athletes. Such arguments take two forms. First, critics suggest that athlete defendants get off more easily than non-athlete defendants who commit the same sorts of crimes.[4] Second, critics suggest

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1. "Elite professional athletes" (or, elsewhere in this Article, simply "elite athletes" or "athletes"), refers to the highest-paid category of professional athletes. This category of athlete prototypically encompasses the players in the National Football League ("NFL"), Major League Baseball, the National Basketball Association ("NBA"), and the National Hockey League ("NHL"). Because virtually all violent crime committed by elite athletes – at least insofar as it has been studied by academics or reported in the press – involves male athletes, masculine pronouns are used throughout this article to refer to elite athletes.

2. *See infra* Part I.A.

3. This perception may have less to do with changes in athletes' behavior than with a breakdown in the traditionally "cozy" relationship between athletes and sportswriters, which has led to increasing media coverage of athletes' off-the-field misconduct. *When Role Models Set a Bad Example: How Can a Kid Look Up to an Athlete Who's a Lawbreaker?*, L.A. TIMES, Dec. 31, 1995, at M4 [hereinafter *Role Models*]. Additionally, society's attitude towards domestic violence – one of the most common types of violent crime committed by athletes – has grown increasingly intolerant. Thus, an incident of domestic violence that might have received little police or press attention in prior generations might now result in both a criminal conviction and national media coverage.

4. *See, e.g.*, JEFF BENEDICT & DON YAEGER, PROS AND CONS: THE CRIMINALS WHO PLAY IN THE NFL 10 (1998); Ellen E. Dabbs, *Intentional Fouls: Athletes and Violence Against Women*, 31 COLUM. J.L. & SOC. PROBS. 167, 171 (1998); Matthew McKelvey, Note, *Separating Sports and Real Life: How Professional Sports Leagues' Collective Bargaining Agreements*

that, because of their high visibility and unique status as role models, elite athletes should be treated more severely than non-athletes.[5] Both lines of criticism raise the same threshold question: Should the criminal justice system treat elite athletes differently than non-athletes?

This article considers the question in the context of one particular stage in the criminal justice process: sentencing. Given the limitations and objectives of sentencing laws, should elite athletes be sentenced differently than other violent criminals? Such athletes often possess personal characteristics that distinguish them from more typical violent offenders: wealth, social status, and highly paid employment. Indeed, violent athletes might be characterized as white-collar offenders who commit blue-collar offenses. Thus, a criminal justice system that seeks to fit sentences not only to the crime, but also the criminal, might very well treat elite athletes differently at sentencing than non-athlete counterparts.

In assessing this thesis, the article proceeds as follows. Part I provides background on the prevalence of violent crime among elite athletes and responses by the criminal justice system. Part II discusses basic principles of sentencing law, focusing on three jurisdictions that represent the diversity of American sentencing schemes. Part III considers three possible justifications for treating athletes differently, and suggests that different jurisdictions might view the appropriateness of these considerations quite differently.

I. ELITE ATHLETES AND VIOLENT CRIME

A. The Scope of the Problem

Jeff Benedict and Don Yaeger have conducted what may be the most intensive – albeit much criticized – study of criminality in any professional sports league. They reviewed state criminal history records of 509 National Football League (NFL) players, comprising more than a third of all players during the 1996-1997 season, and found that 21% (109 players) had been arrested or indicted for at least one "serious" crime.[6]

Keep Athletes Out of the Criminal Justice System, 27 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 91, 92 (2001); Note, *Out of Bounds: Professional Sports Leagues and Domestic Violence*, 109 HARV. L. REV. 1048, 1053 (1996) [hereinafter *Out of Bounds*]; Bill Brubaker, *Violence in Football Extends Off the Field*, WASH. POST, Nov. 13, 1994, at A1 (noting allegations that football players given preferential treatment by police and judges).

5. Thus, for instance, William Bennett argues that athletes should be held to a higher standard. BENEDICT & YAEGER, *supra* note 4, at 9.

6. *Id.* at x. Benedict and Yaeger define "serious crime" to include homicide, rape, kidnapping, robbery, assault, battery, domestic violence, reckless endangerment, fraud, larceny, bur-

Between them, these 109 players had at least 264 arrests, or, on average, nearly two and a half arrests each.[7] More than half of these arrests were for crimes of violence, ranging from armed robbery to domestic violence to homicide.[8] While some of these arrests occurred before the targeted player turned professional, at least seventy-seven players had been arrested after entering the NFL.[9]

Benedict and Yaeger contend that their analysis is conservative because they include only arrests in states that make arrest records public. Thus, for instance, the 264 arrests do not include a much-publicized homicide arrest that occurred in a jurisdiction that would not release the relevant records.[10] On the other hand, Benedict and Yaeger may overstate the true level of player criminality by relying on arrest records, rather than conviction records. An arrest may be made based merely on a police officer's determination that a crime probably occurred, and without any of the procedural protections afforded criminal defendants at trial. Thus, many of the cases tracked by Benedict and Yaeger resulted either in acquittal or dismissal of charges.[11] However, as Benedict and Yaeger observe, acquittal and dismissal do not necessarily indicate innocence. Dismissal, for instance, may be conditioned on a defendant's completion of a counseling program, or may reflect deference to the victim's wishes.[12] In short, while Benedict and Yaeger's twenty percent figure may not be as conservative as they suggest, there seems little reason to doubt the implication that a sizeable minority of NFL players has committed violent crime.

Criminal behavior has not been studied as intensely in other sports leagues. Because of the sport's intrinsically violent nature, one might

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glary, theft, property destruction, drug-related offenses, illegal use or possession of a weapon, DUI, disorderly conduct, and resisting arrest. *Id.* The study was limited to the 509 players who resided in states with public criminal history records. *Id.* This appears to be a reasonably representative sample of NFL players. *Id.* (citing opinion to this effect by statistician Alfred Blumstein).

7. *Id.* at 6.

8. *Id.* Here, this article uses "crimes of violence" also to encompass rape, kidnapping, aggravated assault, assault and battery, resisting arrest, and other crimes against persons. Benedict and Yaeger's analysis indicates that 142 arrests (out of 264) fall into one of these categories. *Id.*

9. *Id.* at 8.

10. *Id.* at 7 (discussing arrest of Oakland Raiders running back Derrick Fenner). The Benedict and Yaeger numbers also miss violent crimes that are not reported to the police or that otherwise do not result in an arrest or indictment. Accordingly, domestic violence and sexual assault – crimes that are notoriously underreported by victims and neglected by police – may be significantly underrepresented in the Benedict and Yaeger study.

11. *Id.* at 263-72.

12. *Id.* at 272.

suppose that football players are particularly prone to off-the-field violence. Reliable comparative statistics are not available. However, a survey of 252 nationally-reported criminal cases in one year involving athletes found that about fourteen percent (or forty-nine) of the athletes involved were professional football players, as compared to about seven percent (twenty-five) professional baseball players and about six percent (twenty-one) each professional basketball and hockey players.[13] While non-scientific, the survey is at least suggestive that professional athletes who play other sports besides football also break the law in significant numbers, amounting to perhaps dozens of high-profile incidents each year.[14]

Some commentators suggest that athletes, as a general proposition, are more prone to criminal violence than non-athletes. Such commentators offer a number of theories in support of this claim. First, they contend that "athletes are taught to be violent and aggressive and that it is difficult for them to 'turn it off' when they interact with people in social settings."[15] Second, they argue, "[s]tardom, by nature, dulls adherence to social norms."[16] This tendency may be reinforced by the preferential treatment accorded athletes in school,[17] which allegedly gives rise to an "I can do what I want" attitude.[18] Third, as to violence against women in particular, commentators suggest that "sports may cultivate a 'macho sub-culture' that equates masculinity with violence [and] 'denigrat[es] anything considered feminine.'"[19] Indeed, violence against women may

13. Maryann Hudson, *From Box Scores to the Police Blotter; 1995 Was a Rough Year for Athletes and the Law*, L.A. TIMES, Dec. 27, 1995, at A1.

14. Indeed, the survey also casts some doubt on the hypothesis that football players are intrinsically more prone to criminality. While professional football players were involved in twice as many incidents as any other category of professional athlete, the NFL has about twice as many players (1395) as major league baseball (750) and the NHL (630), and about three times as many players as the NBA (406). These statistics were calculated by multiplying the current number of teams per league by the corresponding league limit. *See generally, Players*, ESPN.COM, *available at* http://sports.espn.go.com/mlb/players (last visited Oct. 15, 2001); *Players*, ESPN.COM, *available at* http://sports.espn.go.com/nfl/players (last visited Oct. 15, 2001); *Players*, ESPN.COM, *available at* http://sports.espn.go.com/nba/players (last visited Oct. 15, 2001); *Players*, ESPN.COM, *available at* http://sports.espn.go.com/nhl/index (last visited Oct. 15, 2001).

15. Dabbs, *supra* note 4, at 170.

16. JEFF BENEDICT, PUBLIC HEROES, PRIVATE FELONS: ATHLETES AND CRIMES AGAINST WOMEN 215 (1997).

17. Dabbs, *supra* note 4, at 171-72.

18. Laurie Nicole Robinson, Note, *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*, 73 IND. L.J. 1313, 1317-20 (1998).

19. *Out of Bounds*, *supra* note 4, at 1050 (quoting MICHAEL A. MESSNER & DONALD F. SABO, SEX, VIOLENCE & POWER IN SPORTS: RETHINKING MASCULINITY 34 (1994)).

represent the single most common type of serious crime perpetrated by athletes.[20]

Yet, while theories suggesting inherent tendencies to violence abound, persuasive statistical evidence is in short supply. The Benedict and Yaeger study indicates that NFL players are only half as likely to be arrested as males with similar age and racial characteristics in the general population.[21] The authors suggest, however, that a more apt comparison would also take into account the education and income levels of the NFL players. They hypothesize that NFL players are more prone to commit crimes than other high-income, college-educated individuals who are not athletes.[22] Comparative data of this nature is unavailable.[23] The hypothesis may find some support, however, in one study of ten universities indicating that a disproportionate number of the men reported for sexual assault to university officials were athletes.[24]

B. Responses to the Problem

Much as commentators debate how prone athletes are to violence, commentators have been similarly divided over the adequacy of societal responses. Much criticism focuses on the policies and practices of league and team management. For instance, one study indicates that, out of 141 athletes reported to police for violence against women between 1989 and 1994, only one was disciplined by league officials.[25] Likewise, among the more than five hundred arrests studied by Benedict and Yaeger, only two resulted in the arrestee being released from his team.[26] Benedict and Yaeger, like other commentators, believe that teams should release, and leagues should ban, players who commit serious crimes.[27]

The criticism of team and league responses at least implicitly suggests some dissatisfaction with the criminal justice system's responses: If the legal system were delivering sufficient punishment and deterrence in cases involving athletes, it is difficult to see why leagues and teams should impose additional sanctions of their own. Indeed, some commen-

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20. BENEDICT & YAEGER, *supra* note 4, at 149 (finding that the most common cause of arrest among the sample of NFL players was domestic violence, surpassing even driving while intoxicated).

21. *Id.* at 275-76.

22. *Id.* at 8.

23. *Id.* at 276.

24. Brubaker, *supra* note 4, at A1.

25. Robinson, *supra* note 18, at 1330.

26. BENEDICT & YAEGER, *supra* note 4, at 15.

27. *Id.* at 256-58.

tators have explicitly argued that "police, judges, and juries are more lenient when dealing with professional athletes."[28] Supporting evidence, however, remains elusive.

The criminal justice process encompasses several distinct stages, including: (1) the decision by prosecutors to initiate proceedings; (2) plea bargaining; (3) trial, typically by a jury, if plea bargaining is unsuccessful; and (4) if the defendant is convicted, sentencing by the judge. Favoritism could potentially be shown at each stage. However, there seems little basis to conclude that prosecutors show particular lenience either in charging or plea-bargaining decisions. Indeed, if anything, commentators have been more likely to criticize prosecutors as unduly harsh. For instance, the prosecution of Minnesota Vikings quarterback Warren Moon on domestic violence charges over the objection of his wife was criticized as an effort by the prosecutor to gain greater public exposure for himself.[29] A study of 217 sexual assault complaints involving athletes from 1986 to 1995 indicated that at least fifty-four percent of the complaints resulted in formal charges being brought by prosecutors.[30] The responsiveness of police and prosecutors in these cases seems to compare favorably with sexual assault cases generally.[31]

A somewhat stronger argument can be made for pro-athlete bias on the part of juries. In the eyes of many, the O.J. Simpson verdict would supply a compelling example. In the study of reported sexual assaults by athletes from 1986 to 1995, only fifteen percent of the cases that went to trial resulted in conviction.[32] The study also found that, while fifty-four percent of rape arrests nationally result in conviction,[33] only thirty-one percent of the athletes arrested were convicted.[34] A separate survey of domestic violence cases involving athletes in 1995 found a thirty-six percent conviction rate, as compared to seventy-seven percent for the general public.[35] Of course, the relative success of athletes in front of juries may have just as much to do with their ability to hire superior defense counsel as it does with jury favoritism. Moreover, to the extent that cases against athletes are prosecuted more aggressively than cases

28. *Out of Bounds*, *supra* note 4, at 1053.
29. Robinson, *supra* note 18, at 1328-29. A jury ultimately acquitted Moon.
30. BENEDICT, *supra* note 16, at 79-81.
31. *Id.* *See also* Robinson, *supra* note 18, at 1329.
32. BENEDICT & YAEGER, *supra* note 4, at 176.
33. *Id.*
34. BENEDICT, *supra* note 16, at 80.
35. Hudson, *supra* note 13, at A1.

against non-athletes, one would expect that a larger proportion of the athlete cases would be relatively weak on the merits.[36]

In addition to prosecutors and jurors, judges also play a critical role in the criminal justice process, perhaps most importantly as sentencers in those cases in which the defendant is convicted. Are judges biased in favor of athletes? Perhaps the most cited supporting evidence comes not from a criminal, but a civil case in which baseball star Barry Bonds attempted to reduce his family support payments. The judge granted the requested relief, then requested an autograph.[37] After a public outcry, the judge later reversed his ruling and recused himself from the case.[38] Judges in criminal cases have also had to defend themselves against charges of favoritism. A Florida judge, for instance, recently faced such criticism for failing to incarcerate baseball player Darryl Strawberry after his fifth probation violation.[39]

Yet, whatever the evidence of pro-athlete bias, there is also evidence pointing in the opposite direction. For instance, in 1983, Kansas City Royals baseball players Willie Wilson, Jerry Martin, and Willie Aikens were sentenced to three months in prison for a misdemeanor drug conviction.[40] As first-time offenders, they most likely would have avoided incarceration altogether had they not been athletes, but the sentencing magistrate explained that he was holding them to a "higher standard" because they were "role models for children."[41] No statistical evidence is available to suggest whether the Royals case is more or less typical than the Barry Bonds case.

Whatever the typical practices of judges, the Royals case raises a fundamental question in sentencing athletes: *Should* athletes be treated differently? Criticisms that the criminal justice system treats athletes too leniently typically assume that the system ought to treat athletes the same as non-athletes. Yet, arguments can be, and have been, made that the particular circumstances of elite athletes warrant different treatment.

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36. Juries might be biased in favor of athletes for a number of reasons. Not only are athletes viewed as heroes by many, but, as Benedict suggests, they may benefit in sexual assault cases from "popularly held cultural images of the jock-female relationship." BENEDICT, *supra* note 16, at 79-81. "Citing the abundance of women available to popular athletes, accused sex offenders insist there is no need to resort to force. . . ." *Id.*

37. Robinson, *supra* note 18, at 1331.

38. *Id.*

39. Malcolm Balfour & George King, *Darryl's Final Straw*, N.Y. POST, May 18, 2001, at 97.

40. Robinson, *supra* note 18, at 1328.

41. *Id.*

Indeed, as will be detailed in Part III below, arguments might be made both in favor of greater lenience and in favor of greater harshness.

II. Principles of Sentencing Law

When commentators criticize judges for sentencing athletes more leniently than non-athletes, their objection is to what sentencing scholars would call "unwarranted disparity": i.e., treating similarly situated defendants in a dissimilar manner. The central difficulty in identifying unwarranted disparity lies in determining which defendants are "similarly situated," that is, which defendants are substantially the same with respect to those aspects of their offense, personal character, and background that are most pertinent to the sentencing decision. Thus, in order to determine whether disparate treatment for elite athletes is warranted or not, we must consider whether those particular offender characteristics that are categorically associated with athletes (e.g., wealth and celebrity) are pertinent to sentencing.

Judges usually have some discretion in deciding on a case-by-case basis which offender characteristics should be taken into account and how. Yet, this discretion must be exercised within certain legal parameters. In particular, sentencing law guides and constrains judicial discretion in at least three relevant ways. First, sentencing law establishes global objectives for sentencing, such as deterrence of future crime. In order to justify treating athletes differently at sentencing, such differential treatment should advance the global objectives of sentencing. Second, sentencing law requires (or at least encourages) the consideration of certain types of offender characteristics at sentencing. For instance, judges must commonly consider prior criminal history when imposing a sentence. Third, sentencing law forbids (or at least discourages) the consideration of other types of offender characteristics, such as race. Thus, our analysis must consider whether the unique characteristics associated with athletes are required, encouraged, discouraged, or forbidden as sentencing factors.

By establishing objectives and criteria for sentencing, the law provides a framework for determining whether elite athletes are situated similarly to non-athletes for purposes of sentencing. Sentencing law, however, varies from jurisdiction to jurisdiction, which considerably complicates the analysis. This article will focus on three sentencing systems that are representative of the national variation: the federal system, the New York state system, and the Minnesota state system. The remainder of this Part will provide background about each of these sentencing schemes.

A. Federal Sentencing

Sentencing at the federal level has undergone dramatic changes since passage of the Sentencing Reform Act of 1984 ("SRA").[42] Prior to the SRA, federal judges had virtually unlimited discretion to sentence defendants within broad ranges established by statute (e.g., zero to twenty years). These sentences were subject to parole opportunities, which generally resulted in the release of prisoners after they had served between one-third and two-thirds of their sentences. The SRA, however, abolished parole and authorized the United States Sentencing Commission to draft new Sentencing Guidelines limiting judicial discretion. The federal Guidelines require judges to consider certain specified offense and offender characteristics in prescribed ways. The various tables and formulae in the Guidelines establish a relatively narrow sentencing range for each defendant (e.g., twelve to eighteen months). Judges retain discretion in selecting a sentence within this narrow range, but generally may not impose a sentence outside the prescribed range (that is, the judge may not "depart") unless either: (1) The judge finds that there exists a mitigating or aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission;[43] or (2) the defendant renders substantial assistance to the authorities.[44]

The changes in federal sentencing law have been accompanied by a dramatic expansion in the reach of federal criminal law enforcement.[45] While crimes of violence traditionally lay within the exclusive jurisdiction of state and local law enforcement, Congress has in recent years enacted new federal criminal laws dealing with such diverse crimes as drug-induced rape, sexual abuse of children, and carjacking.[46] Additionally, federal prosecutors have grown increasingly aggressive in using existing federal gun laws to prosecute defendants involved in routine street

42. 18 U.S.C. §§ 3551-3586 (1994).

43. 18 U.S.C. § 3553(b).

44. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (1998).

45. For a more detailed discussion of this trend, see Michael M. O'Hear, *National Uniformity / Local Uniformity: Reconsidering the Use of Departures to Reduce Federal-State Sentencing Disparities*, 87 IOWA L. REV. (forthcoming 2002).

46. *See, e.g.*, Drug-Induced Rape Prevention and Punishment Act of 1996, Pub. L. No. 104-305, 110 Stat. 3807 (1996) (codified as amended at 28 U.S.C. § 994 and in scattered sections of 21 U.S.C.); Protection of Children from Sexual Predators Act of 1998, Pub. L. No. 105-314, 112 Stat. 2974 (1998) (codified as amended in scattered sections of 18 U.S.C., 28 U.S.C., and 42 U.S.C.); Anti-Car Theft Act of 1992, Pub. L. No. 102-519, 106 Stat. 3384 (1992) (codified as amended at 15 U.S.C. §§ 1901, 2021-2044, 19 U.S.C. § 1646, 42 U.S.C. § 3750, and in scattered sections of 18 U.S.C.).

crimes. Perhaps most notably, "Project Exile," which has been implemented by the United States Department of Justice in several cities, channels into federal court nearly every crime involving a gun.[47] Given such recent developments, athletes who commit crimes of violence will likely find themselves increasingly subject to federal prosecution, and hence federal sentencing laws.

B. New York

To some extent, the state sentencing laws in New York reflect the traditional sentencing model that the SRA jettisoned at the federal level. Because New York has not adopted sentencing guidelines, judges retain nearly unlimited discretion to determine sentences within broad statutory ranges.[48] To be sure, under the so-called "Rockefeller drug laws," as well as more recent statutes dealing with violent crimes, certain categories of offenses are subject to severe statutory minimum sentences.[49] Moreover, appellate courts may modify a sentence found to be "unduly harsh or severe."[50] Yet, appellate courts generally defer to trial courts,[51] leaving New York's sentencing judges with substantially greater discretion than their federal counterparts.[52]

C. Minnesota

Unlike New York, Minnesota has eliminated parole and adopted sentencing guidelines, but has done so in a manner substantially different from the federal model.[53] Where the framers of the federal Guidelines chose not to endorse any overarching penological theory,[54] the Minne-

47. John S. Baker, Jr., *State Police Powers and the Federalization of Local Crime*, 72 TEMP. L. REV. 673, 682 (1999).

48. N.Y. PENAL LAW § 70.02(3) (McKinney 2001) (establishing determinate sentencing range for Class B violent felonies as five to twenty-five years, and range for Class C violent felonies as three and one-half to fifteen years).

49. For example, sale of two ounces or more of cocaine is subject to a minimum indeterminate sentence of 15 years to life (that is, a defendant receiving the minimum sentence would not be eligible for parole for at least 15 years). N.Y. PENAL LAW §§ 220.43(1), 70.00(3)(a)(1) (McKinney 2001).

50. N.Y. CRIM. PROC. LAW § 470.15(2)(c) (McKinney 2001).

51. *See, e.g.*, People v. Morris, 713 N.Y.S.2d 107 (N.Y. App. Div. 2000); People v. McNaney, 713 N.Y.S.2d 438, 439 (N.Y. App. Div. 2000).

52. People v. Farrar, 419 N.E.2d 864, 865 (N.Y. 1981) ("[T]he sentencing decision is a matter committed to the exercise of the *court's* discretion . . . .").

53. For a thorough discussion of the history and theoretical bases of the Minnesota Guidelines, see DALE G. PARENT, STRUCTURING CRIMINAL SENTENCES: THE EVOLUTION OF MINNESOTA'S SENTENCING GUIDELINES (1988).

54. U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, policy statement (1998).

sota Guidelines explicitly adopt the "just desserts" rationale of sentencing, i.e., the theory that sentences ought to be strictly proportional to the severity of the offense.[55] Where the federal Guidelines are often criticized for their complexity (e.g., by employing forty-three distinct "offense levels"), the Minnesota Guidelines are substantially simpler (e.g., by using only ten different offense levels).[56] Finally, the Minnesota Guidelines are not mandatory for sentencing judges, but "advisory."[57] Minnesota judges may depart from the Guidelines "when substantial and compelling circumstances exist"[58] – a standard that has proven to be far more flexible in practice than the federal departure standard.[59]

III. WHY MIGHT ATHLETES BE SENTENCED DIFFERENTLY?

This Part considers three possible justifications for sentencing elite athletes differently than non-athletes who commit the same crimes.[60] In particular, this Part assesses the compatibility of such disparities with the objectives and legal requirements of the federal, New York, and Minnesota sentencing schemes.

A. Enhanced Culpability

Elite athletes enjoy a very high socioeconomic status. This status arguably gives rise to a higher degree of blameworthiness when they break the law. Defendants from disadvantaged backgrounds often seek, and occasionally receive, lower sentences as a result of the particular difficulties they face in life.[61] To the extent that disadvantaged backgrounds entail lower culpability, wealth and status might entail greater culpability. Elite athletes are presumed to know the law,[62] to be capable of fol-

55. MINN. STAT. ANN. § 244 app. I (West 2001). This contrasts, for instance, with rehabilitative and utilitarian approaches to sentencing.

56. *Id.* § 244 app. II.A. The ten offense levels exclude first-degree murder, which is handled separately under the Minnesota Guidelines. *Id.*

57. *Id.* § 244 app. I.

58. *Id.*

59. Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences*, 91 NW. U. L. REV. 1441, 1485 (1997).

60. This is not intended to be an exhaustive list. Other justifications may exist. The three offered here, however, reflect the chief arguments that have been advanced to date in the cases and the secondary literature.

61. *See, e.g.*, People v. Demand, 702 N.Y.S.2d 441, 445 (N.Y. App. Div. 2000) (noting sentencing judge's "careful" consideration of defendant's "unstable and troubled upbringing" in imposing sentence).

62. *Role Models*, *supra* note 3, at M4 ("[T]hese athletes know the law, almost to the letter. Their coaches and advisors drill it into them, for the team's sake, for the program and for the coach's own fortunes in keeping the best players on the field.").

lowing the law, and to possess uniquely compelling reasons for doing so.[63] Viewed in this light, crimes by such athletes seem marked by a particular willfulness that might warrant harsher sentences.

William Bennett casts the issue as a form of noblesse oblige. "[T]he expectation of standards ought to be higher for professional athletes," he contends, "because of the public nature of their profession—the high salaries, public exposure, and adulation. With all the benefits comes responsibility."[64] This responsibility may be particularly great insofar as athletes function as role models for young people:

> It's natural for boys, in particular, to look up to these big, fast, strong men. They have a larger place in a child's imagination and aspirations than the posse of heroes from other categories. They dominate the stage. They are who kids are looking at most. So what they do is critical. They have the possibility for encouraging or discouraging responsible behavior.[65]

Thus, Bennett suggests, criminal violence by athletes may be a violation of not merely the law, but also of a public trust.

Bennett's views are echoed in the Royals case, in which the athlete-defendants apparently received harsher sentences because they were "role models for children."[66] Similar themes have been sounded in other cases. For instance, when high school basketball player Dajuan Wagner was recently sentenced for assault, the judge noted that "to the young people of New Jersey and Camden he's a star," and suggested that celebrity status imposed additional responsibilities on him.[67]

To be sure, the enhanced-culpability argument is subject to numerous objections and qualifications. Many athletes, though presently rich and famous, come originally from disadvantaged backgrounds and/or belong to racial minority groups – factors that should undercut some of our assumptions relating to athletes' privileged social status. Additionally, athletes are said to be "spoiled" by society, and therefore suffer from "arrested emotional development."[68] In a similar vein, some commentators note a particular "socialization process" that may fuel sexual violence: The "elevated status of successful athletes exposes them to

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63. BENEDICT & YAEGER, *supra* note 4, at 8 ("Given that NFL players have extraordinary earning opportunities, conventional wisdom suggests that they would be less inclined to turn to crime. . . .").

64. *Id.* at 9.

65. *Id.*

66. Robinson, *supra* note 18, at 1328.

67. *Plus: Basketball; Dajuan Wagner Given Probation*, N.Y. TIMES, July 3, 2001, at D7.

68. BENEDICT & YAEGER, *supra* note 4, at 64 (quoting criminal defense lawyer Jay Ethington).

exceptional amounts of illicit behavior, particularly in the form of sexual activity."[69] Finally, as former NBA star Charles Barkley reminds us, athletes do not necessarily seek, or accept, the job of being a role model for children.[70]

The persuasiveness of the enhanced-culpability argument may thus vary considerably from case to case. But, assuming that there are cases in which the argument is relatively compelling, should sentencing courts take into account this enhanced culpability arising from the status of being an elite athlete? In the federal system, courts are required to consider "the nature and circumstances of the offense and the history and characteristics of the defendants,"[71] as well as "the need for the sentence imposed to reflect the seriousness of the offense . . . and to provide just punishment."[72] Yet, while these broad statutory mandates surely encompass personal culpability considerations, the federal Guidelines specify that that socioeconomic status is "not relevant in the determination of a sentence."[73] This injunction would apparently rule out wealth and fame as appropriate considerations, even to the extent that they bear on the defendant's culpability.[74]

Perhaps, though, a federal court may still take into account the athlete's violation of his putative responsibilities as a role model. At least one case indicates that a defendant may be sentenced at the top of a Guidelines range for committing fraud after assuming a position of "moral leadership" in the community.[75] Although this case did not involve an athlete, it does at least suggest that courts may distinguish between socioeconomic status and role model status.[76] The distinction is

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69. BENEDICT, *supra* note 16, at 26.

70. Holly M. Burch & Jennifer B. Murray, *An Essay on Athletes as Role Models, Their Involvement in Charities, and Considerations in Starting a Private Foundation*, 6 SPORTS LAW. J. 249, 257 (1999) (discussing the debate over Barkley's "I'm not a role model" commercial for Nike).

71. 18 U.S.C. § 3553(a)(1).

72. § 3553(a)(2).

73. U.S. SENTENCING GUIDELINES MANUAL § 5H1.10 (1998).

74. Although it has not rigorously defined "socioeconomic status," the Supreme Court has indicated that the factor "need not be invoked by name to be rejected," suggesting a functional analysis to determine the scope of the term. Koon v. United States, 518 U.S. 81, 110 (1996).

75. United States v. Gunderson, 211 F.3d 1088, 1089 (8th Cir. 2000).

76. The Supreme Court has indicated that "socioeconomic status" is not an infinitely elastic term. *Koon*, 518 U.S. at 110 (holding that job loss and socioeconomic status are "not the semantic or practical equivalents of each other").

Some additional support for the enhanced-culpability argument may be found in government corruption cases, in which courts have found it appropriate to consider loss of public confidence in government as a sentencing factor. *See, e.g.*, United States v. Schweitzer, 5 F.3d

perhaps most compelling where an athlete-defendant affirmatively holds himself out as a role model.[77] In such cases, the enhanced-culpability argument will least likely seem a proxy for sentencing based on forbidden socioeconomic considerations.[78]

The enhanced-culpability argument would appear somewhat easier to make in New York. To be sure, New York emphasizes "societal protection, rehabilitation, and deterrence" as the purposes of penal sanctions.[79] These utilitarian objectives do not necessarily square well with moralistic arguments about relative blameworthiness.[80] Yet, there is no indication that the New York courts are rigorous in their utilitarianism. Indeed, a New York court must provide "careful consideration of *all* facts available at the time of sentencing,"[81] including "the nature and circumstances of *both* the defendant and the crime."[82] Relevant considerations include such diverse factors bearing on culpability as: the defendant's having been a victim of domestic abuse;[83] childhood deprivation;[84] lack of desire for personal gain;[85] perjury during trial testimony;[86] violation of the victim's trust;[87] lack of remorse;[88] and the heinousness of the offense.[89] While no published case has expressly ruled on the matter, there seems little reason to doubt that a New York court could properly consider personal characteristics such as wealth, fame, and role model status at sentencing.

Finally, Minnesota expressly endorses a "just desserts" theory of sentencing,[90] in contrast to New York's more utilitarian approach. Accordingly, the enhanced-culpability argument cannot be rejected on the basis

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44, 48 (3d Cir. 1993). If loss in confidence in one social institution (government) may be considered, then perhaps so, too, may be a loss of confidence in another (professional sports).

77. Think, for instance, of Michael Jordan's "I want to be like Mike" commercials as a prototype.

78. Viewed in this light, Charles Barkley's "I am not a role model" commercials may have been a savvy disclaimer of role model status in order to reduce sentencing exposure.

79. *Farrar*, 419 N.E.2d at 865 (N.Y. 1981). *See also* N.Y. PENAL LAW § 1.05(6) (McKinney 2001).

80. People v. Stewart, 394 N.Y.S.2d 690, 691 (N.Y. App. Div. 1977) (rejecting trial court's sentence as retributive and inconsistent with the purposes of reformation and rehabilitation).

81. *Farrar*, 419 N.E.2d at 865 (emphasis added).

82. People v. Peters, 714 N.Y.S.2d 818, 820-21 (N.Y. App. Div. 2000) (emphasis added).

83. People v. Johnson, 613 N.Y.S.2d 160, 160 (N.Y. App. Div. 1994).

84. People v. Thompson, 633 N.E.2d 1074, 1078 (N.Y. 1994).

85. *Peters*, 714 N.Y.S.2d at 821.

86. *Id.*

87. People v. Smith, 710 N.Y.S.2d 648, 652 (N.Y. App. Div. 2000).

88. *Id.*

89. People v. Motter, 653 N.Y.S.2d 378, 385 (N.Y. App. Div. 1997).

90. MINN. STAT. ANN. § 244 app. I.

of overarching penal policy objectives. However, Minnesota, like the federal system, discourages the use of a wide range of personal characteristics at sentencing. Thus, the Sentencing Guidelines Commission has indicated that "sentencing should be neutral with respect to offenders' . . . income levels."[91] Departures from presumptive Guidelines ranges on the basis of "employment factors" and "social factors" are expressly barred.[92] Though the Minnesota Guidelines do not use the term "socio-economic status," sentencing based on wealth and celebrity would appear to be inconsistent with the Guidelines. No cases suggest the contrary. Like the federal Guidelines, though, the Minnesota Guidelines may leave open the possibility of taking into account the betrayal of role model responsibilities.

B. Enhanced Deterrence Value

Even if athlete criminals are not more blameworthy than others, there may still be compelling reasons to sentence them more harshly. In particular, the social prominence of elite athletes may lend enhanced deterrent value to severe sentences. The argument might take one of two forms. First, the extensive media coverage in athlete cases provides a particularly visible public forum for the state to reinforce legal norms. A long sentence for a famous athlete may more effectively convey the message of punishment risks to other prospective offenders than would a comparable sentence for a less well-known defendant. Both sentences would result in the same incarceration costs, but the one would likely have a greater deterrent effect than the other. In a similar vein, it has been suggested that the prosecution of Warren Moon under a new domestic violence law in Texas may have been partially motivated by a desire to publicize the law to other prospective abusers.[93]

Second, to the extent that athletes are role models, society might reasonably place a premium on athletes' compliance with the law. Thus, Congressman Bernie Sanders, in calling for a national "summit" on violence by athletes, has argued: "Sports leaders, as role models, are often emulated both on and off the field. . . . As role models, these sports leaders can send a strong message that rough and tumble, hard-nosed competition stops when players leave the field. . . ."[94] For the same rea-

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91. *Id.* § 244 app. II.D., cmt. II.D.101.

92. § 244 app. II.D.1.c-d.

93. Robinson, *supra* note 18, at 1328-29.

94. Press Release, Rep. Bernie Sanders, Sanders Calls for a National Summit on Sports and Violence (July 24, 1996), *available at* 1996 WL 11123982.

son, another commentator has suggested that disciplinary action by leagues against "athlete-abusers" might have "a disproportionately positive impact" on the overall incidence of domestic violence .[95] Similarly, to the extent that harsh sentences against athletes would more effectively encourage athletes as a class to comply with the law, such sentences might have a "disproportionately positive impact." Again, the implication is that the deterrent effects of scarce penal resources might be maximized by focusing those resources on elite athletes.

Like the enhanced-culpability argument, the enhanced-deterrence argument is subject to various objections and qualifications. For instance, because many elite athletes belong to minority groups, enhanced sentences against athletes may be perceived as racially discriminatory. Perceptions of discrimination undercut the legal system's legitimacy, especially in minority communities, thereby potentially undermining the goal of greater compliance with the law. Additionally, given the compelling professional and financial incentives that athletes already have to avoid legal entanglements – especially those that might result in incarceration and loss of playing time – it is far from certain that the imposition of enhanced penalties would achieve any significant additional deterrent effects among athletes generally.

Assuming some enhanced deterrence, however, could this consideration properly be considered at sentencing? Federal courts are required by statute to consider deterrence in imposing a sentence.[96] Yet, like the enhanced-culpability argument, the enhanced-deterrence argument is limited by the federal Guidelines' injunction against consideration of socioeconomic status. To the extent that heavy publicity in a case is a necessary incident of the wealth and celebrity of the defendant, sentencing on the basis of that publicity would appear inappropriate. However, insofar as role-model status may be distinguished from socioeconomic status – as suggested above – federal courts may be able to consider the social benefits of heightened incentives for athletes to obey the law.

New York law likewise authorizes sentencing courts to consider deterrence.[97] Though the courts have not addressed the issue in any published decisions, no apparent doctrinal obstacles would prevent a New York court from sentencing on the basis of the enhanced-deterrence arguments.

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95. *Out of Bounds*, *supra* note 4, at 1052-53.

96. 18 U.S.C. § 3553(a)(2)(B).

97. N.Y. PENAL LAW § 1.05(6).

Minnesota offers a striking contrast. The Minnesota Guidelines do not endorse general deterrence as an appropriate purpose of sentencing. Rather, sentences must be based "proportional to the severity of the offense of conviction and the extent of the offender's criminal history."[98] The Guidelines require sentencing courts to focus on the offender's personal culpability, rather than the effect of the sentence on future crime in society at large.[99] Moreover, even if deterrence were an appropriate consideration, the Minnesota Guidelines, as noted above, mandate neutrality with respect to "employment, social or economic status,"[100] and at least one court has suggested that "publicity regarding the case because of the defendant's public status is . . . an improper factor."[101] In short, the enhanced-deterrence argument does not appear to be an appropriate consideration in Minnesota.

C. *Employment Consequences*

Thus far, we have considered possible justifications for treating elite athletes more harshly at sentencing. Yet, arguments might also be advanced that such athletes should be treated less harshly. In particular, such arguments might focus on the extraordinary employment and financial consequences that athletes may suffer as a result of conviction and incarceration. Unlike most violent criminals, elite athletes possess highly lucrative employment, as well as the potential for endorsements and other off-the-field money-making opportunities. Thus, an athlete's entanglement in the criminal justice system may prove far more costly than a non-athlete's.

The argument for a corresponding reduction in sentence takes two forms. First, the athlete may argue that, by virtue of his prosecution and conviction alone, he has already "suffered enough." His ability to obtain endorsement deals has been compromised, and he may be subject to league or team discipline, perhaps even expulsion.[102] Given the penalties he has suffered outside the criminal justice system, he is perhaps

98. MINN. STAT. ANN. § 244 app. I.

99. *Cf.* State v. Staten, 390 N.W.2d 914, 916 (Minn. Ct. App. 1986) (noting that downward departures may only be granted based on factors that mitigate the defendant's culpability); State v. Guerin, No. C3-00-1860, 2001 WL 169978, at *1 (Minn. Ct. App. Feb. 20, 2001) (same).

100. *Staten*, 390 N.W.2d at 916.

101. *Guerin*, 2001 WL 169978, at *2.

102. Though not common, there are at least a few notable instances of a player being expelled from a team or league as a result of a criminal conviction, such as football player Bam Morris's release from the Pittsburgh Steelers following a felony drug conviction. BENEDICT & YAEGER, *supra* note 4, at 67.

entitled to more lenient treatment within the system.[103] Second, the athlete's opportunity costs from time in prison may be quite high. Even losing a single season – which could result from a relatively modest sentence of a few months – may cause millions of dollars in losses. The marginal day or week or month that an athlete faces in prison may be worth far more than the same time period for a non-athlete. Thus, an athlete might argue that – in order to equalize the actual weight of the punishment – he must receive less time in prison than a non-athlete convicted of the same crime.

Once again, we should note that the argument is subject to numerous objections and qualifications. As to the "already punished enough" prong, many athletes do not suffer appreciably from having a rap sheet. Indeed, athletes like Dennis Rodman, Charles Barkley, and Michael Irvin may benefit from their colorful "bad boy" images.[104] Moreover, as Benedict and Yaeger have documented, league and team discipline for off-the-field violence is rare.[105] As to the higher-opportunity-costs prong, lost income in any amount may actually mean far more to low- and middle-income defendants than millionaire athletes. As an economist might put it, the marginal dollar is valued more by a poor person than a rich person, so that, for instance, the poor person's loss of $10,000 in income may be felt more harshly than the athlete's loss of $10 million in income.[106] Also, the opportunity costs may be substantially mitigated

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103. Quarterback Brian Griese's recent sentence to probation for drunk driving may reflect this sort of consideration. The sentencing judge noted the relative strictness of the NFL's substance abuse program. *Plus: Pro Football; Griese Put on Probation*, N.Y. TIMES, March 29, 2001, at D7. In a similar vein, baseball player Marcus Moore of the Colorado Rockies was acquitted of rape and sexual assault because the jury, according to one member, thought Moore had received "punishment enough" by being sent down to the minors. Robinson, *supra* note 18, at 1331-32.

104. Benedict and Yaeger, for instance, suggest that Irvin used his prosecution on drug charges as a platform to convey a "cool" image to "his public." BENEDICT & YAEGER, *supra* note 4, at 64-66.

105. *Id.* at 5, 15.

106. For the same reason, some critics argue that league fines have little deterrent effect on players. One NFL player put it this way:

> I don't think fines have all that much impact on very many players, even the lower-paid players. . . . You can always make more money, and money is kind of an abstract thing to some guys because at our age, some of us have made so much we don't even know what that money means. There are guys who are fined $10,000, and it is only a tenth of what they are making that week.

BENEDICT, *supra* note 16, at 223-24.

by scheduling incarceration to occur during off-seasons, as has been done in a number of instances.[107]

In the federal system, neither the Guidelines nor any statute expressly addresses whether employment consequences may be considered at sentencing. The Supreme Court, however, took up the issue in its landmark decision in *Koon v. United States*.[108] *Koon* arose from the federal prosecution of the police officers involved in the Rodney King beating. After they were convicted on civil rights charges, the sentencing court chose to depart downward from the prescribed Guidelines sentencing range based on several considerations, including the job loss that the police officers would suffer as a result of their convictions.[109] On appeal, the Supreme Court considered the propriety of this decision.[110] First, the Court rejected the argument that employment consequences are a "forbidden factor" because they are too closely related to socioeconomic status.[111] But, second, the Court held that the factor nonetheless should not have been used as a basis for departure.[112] Specifically, the Court found that employment consequences did not take the case outside the "heartland" of typical civil rights violations.[113] By their nature, civil rights cases usually involve public officials, and, the Court held, "[i]t is to be expected that a government official would be subject to career-related consequences" after being found guilty of a civil rights violation.[114]

Koon leaves many important questions unanswered, but is at least suggestive of how employment consequences ought to be handled in the federal system. Thus, we know that employment consequences are potentially distinguishable from socioeconomic status.[115] Because employ-

107. The case of baseball pitcher Bobby Chouinard supplies one well-publicized example. Woody Paige, *Abusive Athletes Not Above Law*, DENVER POST, Dec. 6, 2000, at D1. Football players Randy Moss and James Darling provide additional examples. Daniel Golden, *When College Athletes Misbehave, Often There's Only Token Punishment*, BOSTON GLOBE, Sept. 11, 1995, at 39; Robinson, *supra* note 18, at 1332.

108. 518 U.S. 81 (1996).

109. *Id.* at 85-89.

110. *Id.* at 91.

111. *Id.* at 110.

112. *Id.* at 111.

113. *Koon*, 518 U.S. at 110.

114. *Id.* at 110-11.

115. *Koon* did not consider the higher-opportunity-cost version of the employment-consequences argument. Because this turns on income level, it may fall within the forbidden "socioeconomic status" zone. Put differently, a federal court may be able to distinguish between defendants based on job or career consequences, but not based on the economic costs of such consequences. Thus, the loss of a $50,000 per year civil service job should be treated the same at sentencing as the loss of a $5 million per year position in the NBA.

ment consequences do not appear otherwise to be a forbidden factor, they can probably be considered when a sentence is selected within a prescribed Guidelines range. Matters become more complex when the issue is departure from the Guidelines range. While departure was not permitted in *Koon*, the Court limited its holding to the particular circumstances of that case.[116] Specifically, the Court relied on (1) the nature of the offense of conviction, and (2) its belief that government officials would typically suffer employment consequences for committing offenses of that nature. Violent crimes by athletes may be distinguishable. While most civil rights violations may involve public officials, most assault cases do not involve athletes. Athletes differ from typical offenders insofar as they stand to suffer professional discipline, lose lucrative endorsement deals, and miss practice and playing time that may be critical to their careers. To the extent that these distinctions remove elite athletes from the "heartland" of typical violent criminals, they may warrant downward departure in the federal system.

Like the enhanced-culpability and enhanced-deterrence arguments, the employment-consequences argument would appear perfectly consistent with the highly discretionary New York system.

Minnesota would be less amenable to the argument. The Minnesota Guidelines expressly preclude departure based on "employment factors, including . . . impact of sentence on profession or occupation."[117] Of course, this injunction only pertains to departures, and might be read to permit consideration of employment factors when selecting a sentence within a Guidelines range. Cases and Commission commentary suggest, however, that sentencing should generally be neutral with respect to employment and income.[118]

IV. CONCLUSION

There is no simple answer to the question of whether elite athletes should be sentenced differently. Colorable arguments support both higher and lower sentences. The strength of these arguments may vary considerably from case to case. Moreover, these arguments cannot be considered without regard to the sentencing jurisdiction. Sentencing laws differ from state to state, and from federal to state systems, even at the most fundamental level of overarching penal objectives.

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116. *Id.* at 110 ("[T]he factor, *as it exists in these circumstances*, cannot take the suit out of the heartland. . . .") (emphasis added).

117. MINN. STAT. ANN. § 244 app. II.D.1.c.

118. *Staten*, 390 N.W.2d at 916; MINN. STAT. ANN. § 244 app. II.D, cmt II.D.101.

To the extent that a jurisdiction recognizes heightened culpability as an appropriate sentencing factor, elite athletes could be differentiated from non-athletes because they possess extraordinary advantages in life, and because they are widely viewed as role models. Criminal behavior by elite athletes accordingly seems less excusable and more socially pernicious. Yet, insofar as these considerations are closely tied to athletes' unique socioeconomic status, they may nonetheless provide an inappropriate basis for treating athletes differently in jurisdictions that classify socioeconomic status as a forbidden factor, such as Minnesota and the federal system.

Similar issues arise with respect to the enhanced-deterrence argument. In jurisdictions that do recognize general deterrence as an appropriate consideration, heavy publicity in athlete cases, as well as athletes' role model status, may arguably cause harsh sentences for athletes to have particularly great social benefits. Yet, in at least some jurisdictions, these considerations may run afoul of the prohibition against taking socioeconomic status into account.

Lastly, employment consequences may also serve to differentiate athletes, either under the theory that the athlete "has already been punished enough" by his prosecution and conviction, or by reference to the extraordinary career and financial consequences that might result from incarceration. Yet, this consideration, too, may be constrained by the prohibition on socioeconomic factors. Here, Minnesota and the federal system may diverge somewhat in the extent to which employment consequences may be distinguished from socioeconomic considerations.

In short, our review of three jurisdictions suggests three different ways of dealing with the question of whether athletes should be sentenced differently. Commentators are quick to suggest that the criminal justice system treats star athletes too leniently. These criticisms, though, start from largely unexamined assumptions about the appropriate yardstick for the treatment of athletes: Should we treat them the same as non-athletes who have committed the same crimes? Should we seek to make an example of them? Should all violent criminals be incarcerated for substantial periods of time? Sentencing law supplies standards by which the performance of the system may be measured. Despite the important variations, uncertainties, and complexity in the law, criticisms of the criminal justice system that neglect this legal framework ring hollow.