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THREE STRIKES AND YOU’RE (NOT NECESSARILY) OUT: HOW BASEBALL’S ERRATIC APPROACH TO CONDUCT VIOLATIONS IS NOT IN THE BEST INTEREST OF THE GAME

Matthew A. Foote*

“Everyone in society should be a role model, not only for their own self-respect, but for respect from others.”

—Barry Bonds†

I. INTRODUCTION

The news is dominated by the recent indiscretions of professional athletes, to the extent that it is nearly impossible to turn on any media outlet without being exposed to such headlines. Today’s athletes, coaches and other professional sports personnel live under perpetual scrutiny, and the media spreads every misstep instantaneously around the world. The frequency of such violations and their accompanying publicity make personal conduct violations a growing and urgent concern in professional sports. National Football League (NFL) star quarterback Michael Vick was recently released from federal prison after serving a sentence of nearly two years on charges relating to dog-fighting and animal abuse.† NFL Commissioner Roger Goodell has not shied away from issuing severe penalties for personal conduct, as Chris Henry, Terry “Tank” Johnson and Adam “Pacman” Jones have all recently served significant suspensions for off-the-field indiscre-

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* Associate, Hirschler Fleischer, P.C., J.D., 2008, University of Richmond School of Law. Special thanks to Professor Robert E. Shepherd, in fond memory. Thanks also to John M. Theobald for comments and research assistance. Most of all to my girls, who make everything possible.


tions. Other sports leagues have suffered from the same affliction. In 2007, the National Basketball Association (NBA) was rocked by a scandal related to referees gambling on and fixing games. Also in 2007, National Hockey League (NHL) player Mark Bell was suspended fifteen games for a DUI accident that also cost him six months in jail.

Lately, Major League Baseball (MLB or Baseball) has had more than its share of conduct concerns. Hall-of-Fame caliber players Roger Clemens, David Ortiz, Manny Ramirez, Alex Rodriguez (A-Rod) and Sammy Sosa have recently been under the public microscope for steroid use. In 2007, Barry Bonds became the sport’s new all-time home run king. Following his record-setting season, Bonds was indicted on federal perjury and obstruction of justice charges. Bonds now faces up to 30 years in prison on the charges, which grew out of a grand jury investigation of steroids and Baseball. In fact, Bonds, Clemens, Ortiz, Ramirez, A-Rod and Sosa are not alone amidst the swirling controversy. Performance-enhancing drugs are a widespread problem in Baseball. On December 13, 2007, former United States Senator George Mitchell released a scathing report (Mitchell Report) indicating that use of performance-enhancing drugs pervades the sport. However, performance-enhancing drug use is only one of several conduct-related concerns in Baseball, and such concerns are not a new phenomenon. As the longest-established and, arguably, most-revered of America’s organized professional sports, Baseball has a long history of conduct violations by players, coaches and even owners.

8. Id.
This article will first analyze some of Baseball’s personal conduct violations and MLB’s response to these issues. Part II classifies personal conduct by separating the types of indiscretions into on-the-field and off-the-field conduct violations. Part III discusses the mechanisms by which teams and MLB attempt to regulate conduct. Parts IV, V, and VI discuss some of the most common types of conduct violations: gambling, alcohol and drug use and violence, respectively. Part VII briefly anticipates the potential impact of the Mitchell Report, and proposes solutions to Baseball’s growing personal conduct problem.

This article also discusses how Baseball’s responses to these situations—from the wide variety of punishments to the establishment and increased power of the Commissioner—illustrate its attitude toward the importance of the different types of conduct violations. The severity of Baseball’s attack on certain types of conduct indicates Baseball’s hierarchy of offenses, based on the degree to which the violations damage the integrity, or “best interests” of the game. However, Baseball’s erratic treatment of the different types of conduct violations also indicates a fragmentary and disorganized approach, rather than a systemic assault on the larger problem of appalling conduct by its employees.

II. DEFINING “CONDUCT”

Conduct violations in Baseball can be classified into two broad categories: on-the-field conduct and off-the-field conduct. On-the-field conduct includes any violations that directly affect the outcome of games. While these transgressions may not necessarily take place on the field, they directly impact the game on the field. Examples of on-the-field conduct violations discussed in this article include gambling on Baseball, fixing games, performance-enhancing drug use and on-the-field violence. As this article discusses, since these violations have a direct impact on the integrity of the game itself, they are generally met with the harshest penalties.

Conversely, off-the-field conduct violations do not generally have a direct impact on the game itself and are usually met with more leniency. Examples of such off-the-field violations discussed in this article include gambling on things other than Baseball, recreational drug and alcohol use, domestic violence and other criminal conduct away from the baseball diamond. While unrelated to the outcome of games,

11. See discussion, infra Part III(B).
Baseball still has an obligation to uniformly punish such indiscretions, as they can negatively affect Baseball’s image.

Some egregious off-the-field conduct may arguably only be harmful to the offending player and not directly to Baseball. However, Baseball is an entertainment industry marketed heavily to families. Thus, the image of the game is important and illegal or immoral conduct can tarnish that image. Perhaps this is why the Uniform Player Contract (UPC) requires each player to “pledge himself to the American public,” regarding his conduct.12 Therefore, the national pastime should be untainted and the league should punish severely any personnel that bring the pastime into disrepute. Historically, team owners, league presidents and commissioners have taken the view that severe punishments are justified to protect their product. However, the Major League Baseball Players’ Association (MLBPA) and various arbitrators have tended to protect players from any extreme punishment. Presumably, they adhere to the idea that it is the job of the legal system to punish this type of behavior and a player’s ability to earn a living should not be limited by behavior that occurs away from the workplace.

Finally, it is important to note that the line between on-the-field and off-the-field conduct violations can sometimes be blurry. For example, a player’s alcohol or recreational drug abuse can presumably affect his performance on the field.13 Thus, a player’s substance abuse off-the-field can have a direct impact on the outcome of the game. Additionally, suspensions, criminal penalties, injuries and deaths related to off-the-field violations can deprive a team of the player’s services, thus directly impacting the outcome of games.14 Nevertheless, the clear delineation between on-the-field and off-the-field conduct,

13. See discussion, infra Part V.
as described above, is necessary to determine how best to discipline such violations.

III. Regulation of Personal Conduct and Enforcement

There are two ways that conduct violations in Baseball are regulated: by teams and by the league. Players and coaches who commit conduct violations generally face termination of their contracts by their teams, suspensions and fines by MLB, or a combination of all of these.

A. Team Regulation of Conduct: Major League Baseball’s Uniform Player’s Contract

MLB teams try to regulate the conduct of their players directly through provisions of the UPC. The UPC is negotiated by the MLBPA and MLB as part of Baseball’s Collective Bargaining Agreement (CBA). The UPC endeavors to give teams the authority to terminate player contracts for violations of its provisions. UPC Section 7(b) allows teams to “terminate [the] contract upon written notice to the Player” for violation of UPC provisions.15

Teams have attempted to police personal conduct by utilizing several UPC provisions. Among these provisions, the UPC obligates players to “conform to the highest standards of personal conduct, fair play and good sportsmanship.”16 Teams have often attempted to apply this broadly-drafted provision to conduct violations omitted from the UPC. For example, many different types of offenses could almost certainly fall under the “high standards of personal conduct” clause, including drug and alcohol abuse, DUIs, gambling, domestic violence, fighting and weapons violations.

In addition, a player is required to “perform his services hereunder diligently and faithfully, to keep himself in first-class physical condition, and to obey the Club’s training rules.”17 Teams could use this provision to punish players for drug and alcohol violations, as such substance abuse clearly does not contribute to “first-class physical condition,” and is obviously not a part of “the Club’s training rules.”18

The UPC also prohibits conduct of a more benign nature. Section 5(b) of the UPC contemplates players’ participation in sports other than Baseball.19 Understandably, teams wish to protect their invest-

15. UPC, supra note 12, at 395.
16. Id. at 391.
17. Id.
18. Id. at 395.
19. Id. at 393.
ments, and as such “sports [that] may impair [the player’s] ability and skill as a baseball player” are banned under the contract. Some sports specifically banned include: “skiing, auto racing, motorcycle racing, sky diving, or in any game or exhibition of football, soccer, professional league basketball, [and] ice hockey,” but the provision also includes the catch-all “other sport involving a substantial risk of personal injury.” The Yankees terminated third baseman Aaron Boone’s contract in 2005 using this provision, after Boone tore his anterior cruciate ligament playing pick-up basketball. While Boone was not playing “professional league basketball,” as the contract expressly prohibits, he could not rationally argue that the pick-up game did not have a substantial risk of personal injury. In 2002, the San Francisco Giants unsuccessfully sought similar relief from Jeff Kent’s contract when Kent allegedly injured his wrist doing “wheelies” on his motorcycle. While these may not be examples of behavior involving criminal or immoral conduct, teams are justified in demanding and utilizing these clauses to protect their investments.

B. MLB Regulation of Personal Conduct: The Major League Agreement and the Commissioner

In 1920, Baseball appointed ex-federal judge Kennesaw Mountain Landis as its first Commissioner. Initially, Landis was reluctant to take the job and did so only on the condition that the Commissioner be given broad powers to discipline players in the “best interest of the game.” Baseball’s Commissioners have repeatedly used the “best interest of the game” clause to regulate personal conduct. As current Commissioner Bud Selig said, “the intent of the best interest clause was to protect the integrity of and ensure public confidence in the game.” The Commissioner’s independent power is allocated by Section 2 of Article II of the Major League Agreement (MLA), which lists the Commissioner’s duty to “investigate . . . any act, transaction,
or practice charged, alleged, or suspected to be detrimental to the best interests of the national game of baseball." Further, the Commissioner should "determine, after investigation, what preventive, remedial, or punitive action is appropriate . . . and [ ] take such action either against Major Leagues, Major League Clubs or individuals." Thus, the Commissioner is in the unique position of fulfilling all three roles: he investigates the matter, decides guilt or innocence and doles out punishment.

However, the Commissioner's power to discipline in the "best interests of the game" may be problematic. First, this nebulous standard makes it difficult for MLB players and other personnel to clearly understand what type of behavior is intolerable. For example, since the disciplinary power is solely in the Commissioner's discretion, one player may escape punishment while another player is disciplined for a substantially similar offense. In addition, it seems nearly impossible for one person to decide the best interests of Baseball. For example, the Commissioner is supposed to take actions "he deems appropriate to ensure competitive balance in baseball."

When the Commissioner suspends a player for conduct violations, presumably to protect the best interests of the sport, it affects the sport's competitive balance by depriving the player's team of his services during the suspension. As a result, the team with one or more of its key players suspended could miss the playoffs or fail to advance in the playoffs. This could affect the team's profitability and its winning tradition, which would affect its ability to sign free agents. In addition, the team may suffer image problems from the underlying scenario occurred in the 2007 NBA playoffs. The Suns' Amare Stoudamire and Boris Diaw were suspended for one game each for leaving the bench during an altercation. There was a clear NBA rule outlining the punishment for that specific offense. Nevertheless, the Suns complained that the rule had been inconsistently enforced. The Suns were without two key players in the next crucial playoff game. The team lost the game and the series, and many felt that NBA Commissioner David Stern cost them the series. Gene Wojciechowski, For Shame! Series Merited Better Than Early Fadeaway, ESPN, May 19, 2007, http://sports.espn.go.com/espn/columns/story?columnist=wojciechowski_gene&id=2875736&sportCat=nba.
conduct violation committed by the player. Thus, the Commissioner's decision could have far-reaching consequences to the team and the sport's competitive balance.

The Commissioner must weigh all of these competing concerns when determining whether the "best interests of the game" are better served by protecting Baseball's image at the expense of affecting the outcome of games. Presumably, no fan, player, coach or league official would want a Commissioner's decision to affect wins and losses in this manner. The other alternative—specifically listing all transgressions and their respective penalties—seems an equally impossible task, considering the wide array of human behavior. For example, Commissioner Fay Vincent used the "best interests" clause to suspend Cincinnati Reds owner Marge Schott for one year in 1993 for using racial epithets about her players, personnel and rivals in Baseball. Schott reportedly called two of her players "million-dollar niggers," and used other racial slurs about Jewish and Japanese personnel. It would appear to be easier to invoke the broad "best interests" clause than to try to create an exhaustive list of such offensive behavior.

The Commissioner is entrusted with making such near-impossible decisions because he is theoretically only motivated by a desire to protect the game, and not biased toward any particular team, player or league. Indeed, "the rationale behind granting the Commissioner the power to overrule the owners lies in a fundamental conflict of interest for the owners, whose financial incentives are not wholly attached to the success of MLB, but also to the success of their individual teams." Despite the concerns mentioned above, the Commissioner retains the power to unilaterally take action to protect the game. Further, United States Federal Courts have upheld these broad powers,

35. However, expressly listing some of the most common offenses would clarify matters. See recommendations, infra Part VII.
38. Arcella, supra note 36, at 2424. Ironically, however, current Commissioner Bud Selig has been criticized for the same potential conflict of interest. Selig was the principal owner of the Milwaukee Brewers when he took the reigns as Commissioner. Selig eventually sold his majority interest in the Brewers to his daughter. It is debatable whether this sale within the Commissioner's own family eliminated the conflict of interests. Therefore, the Commissioner's neutrality may not always be beyond question.
holding that it is solely in the discretion of the MLB Commissioner to determine what is in the best interests of Baseball.39

IV. Gambling

There are two distinct types of gambling that have commonly created problems in Baseball: gambling on activities other than Baseball and gambling on Baseball itself. The consequences for the two types of gambling are drastically different. Players and managers who gamble on cards, horses and sports other than Baseball suffer image problems. If their activities are illegal, they face possible suspensions for tarnishing Baseball’s image. On the other hand, Baseball personnel who bet on the game of Baseball, particularly when their own teams are involved, tamper with the competitive spirit of the game. Since these types of gamblers have a direct influence over the outcome of games, the integrity of the game itself is at stake. After all, the allure of the product of Baseball is the competitive nature of the games. If the games are influenced by anything other than competitive spirit on both sides of the ball, the product is diminished and the fans suffer.40 Thus, as Commissioner Fay Vincent said, disciplinary action is necessary “in order to maintain a meaningful deterrent . . . [that] will protect baseball from the kind of threat represented by individuals who cannot deal with the temptations of gambling.”41

A. Gambling Unrelated to Baseball

Outfielder Albert Belle admitted that, during the 1990s, he lost over $300,000 betting on sports other than Baseball.42 Commissioner Bud Selig decided that no action was necessary to protect the integrity of the game.43 While high-stakes legal gambling, like that of Belle, tends to perpetuate the negative image of athletes as overpaid and detached from the average fan, the image ramifications are generally over-

39. Milwaukee Am. Ass’n v. Landis, 49 F.2d 298 (N.D. Ill. 1931). See also Charles O. Finley & Co. v. Kuhn, 569 F.2d 527, 538 (7th Cir. 1978) (upholding Commissioner Bowie Kuhn’s right to determine the best interests of baseball).
40. Hence the outrage over the gambling scandal involving NBA referee Tim Donaghy, and the widespread feeling that the game itself had lost credibility. It is debatable whether corrupt referees who gamble on games they officiate are more or less reprehensible than players and coaches who throw games. See Bill Ordine, Sports, Wagering: For Better or Worse, BALTIMORE SUN, Oct. 30, 2007, at 1C, available at 2007 WLNR 21364839 (showing that by calling just a few more fouls, an official can have enormous influence over the outcome of certain types of wagers.).
42. Id. at 40.
43. Id.
looked by the league.\textsuperscript{44} On the other hand, former Philadelphia Philly Lenny Dykstra received one year of Baseball "probation" in 1991 for losing $100,000 in an illegal poker operation in Mississippi.\textsuperscript{45} Dykstra was criminally prosecuted, which likely motivated Commissioner Vincent to take action to protect the image of the game.\textsuperscript{46} In fact, Vincent said that he was "sending a message in the Dykstra case . . . and by stepping on something like that fast, we can keep the act from seriously contaminating baseball."\textsuperscript{47} Despite the message Vincent purported to send, the Dykstra and Belle cases exemplify the inconsistent reaction to non-Baseball related gambling. While a year of probation is a significant punishment, it pales in comparison to the sentences received by personnel who have crossed the line into gambling on Baseball.

\textbf{B. Gambling on Baseball}

Gambling on Baseball represents the ultimate taboo offense for game participants, and often results in the sternest possible punishment. As the next section shows, gambling by players and coaches directly involved in the game diminishes the integrity of the competition. Since the credibility of the competitive aspect of the game is shaken, the product becomes less marketable to fans. The most famous examples of such gambling in Baseball—indeed, perhaps the most famous conduct violations in the history of sports—are those of the Chicago White Sox and Pete Rose. Both situations resulted in the ultimate punishment and both also brought much attention to the role and authority of Baseball’s Commissioner.

\textit{1. The Black Sox: Fixing the World Series}

The 1919 Chicago White Sox lost to the World Series to the Cincinnati Reds, five games to three in a best of nine series, despite being

\begin{itemize}
\item \textsuperscript{44} For example, high profile athletes like the NBA’s Michael Jordan and Charles Barkley have felt the heat of intense media and fan glare for their high-stakes gambling habits, but never been officially reprimanded for their behavior. See Greg Couch, Gambling Its Credibility; Advertising Dollars From Casinos May Be Hard To Resist, But After a Referee Betting Scandal, the NBA Should Be Trying . . ., CHI. SUN-TIMES, NOV. 9, 2007, at 93, available at 2007 WLNR 22142083.
\item \textsuperscript{45} WEILER, supra note 41, at 40. Dykstra was required to check in regularly with the Commissioner’s office, and he was subject to immediate suspension for any further indiscretions. Lance Pugmire, Dykstra Faces Allegations of Steroid Use, Baseball Gambling, L.A. TIMES, April 23, 2005, available at http://www.majorwager.com/forums/mess-hall/39353-dykstra-faces-allegations-steroid-use-baseball-gambling.html.
\item \textsuperscript{46} Commissioners usually use the “best interests of the game” provision to protect Baseball’s image. MAJOR LEAGUE AGREEMENT, Art. I, § 2(b) (2005).
\item \textsuperscript{47} MARTIN J. GREENBERG & JAMES T. GRAY, 1 SPORTS LAW PRACTICE 508 (2d ed. 1998).
\end{itemize}
overwhelming favorites. An ex-major leaguer named Hal Chase, who had been in trouble several times during his playing career for allegedly throwing games, had approached several White Sox players on behalf of professional gamblers. The gamblers paid a total of $100,000 to eight players (who came to be known as the “Black Sox”) to lose the World Series intentionally. These players included star pitcher and 29-game winner Ed Cicotte and the famed “Shoeless” Joe Jackson.

Eight players admitted before a grand jury to accepting money from gamblers to intentionally lose the series; all were criminally prosecuted and suspended from Baseball. While “Shoeless” Joe Jackson maintained until his death that he never tanked a game, his acceptance of $20,000 from the gamblers sealed his fate with Baseball and led to the famed statement by a young fan outside the courtroom, who pleaded “Say it ain’t so, Joe.” Indeed, the heartbroken fans of a team who just lost the World Series suffered the ultimate indignity at the revelation that their heroes purposely lost.

The Black Sox scandal led Baseball owners to establish the position of Commissioner and unite their two leagues under that Commissioner. Commissioner Landis said even before the trial of the Black Sox players that “there is absolutely no chance of any of them [being allowed] to come back to Organized Baseball. They will remain outlaws!” Indeed, the players remained banned for the rest of their lives and remain ineligible for the Hall of Fame. “Shoeless” Joe and

48. Arcella, supra note 36, at 2421.
50. Bukowski, supra note 26, at 109; Landis, supra note 25.
51. Weiler, supra note 41, at 36-8.
53. Weiler, supra note 41, at 38.
54. Baseball Hall of Fame, Frequently Asked Questions, http://web.baseballhalloffame.org/hofers/faq.jsp#jackson (last visited June 30, 2007). Due to his quirky nickname, his amazing talent and statistics, and what some see as his unfair banishment from baseball, “Shoeless” Joe has become a mythical figure ingrained in American culture. Indeed, Jackson’s redemption has been
the other Black Sox did not have the benefit of the player’s union and labor agreement that helped later players, like Dykstra, avoid such severe sanctions. Nevertheless, since their offense was so appalling, it is doubtful a player’s union could have helped the Black Sox remain in the game.

When Commissioner Landis banned the Black Sox, he had no explicit anti-gambling language on which to rely. Landis banned the Black Sox based simply on the “best interest of the game” power. However, the Black Sox scandal provoked Baseball into investigating gambling more closely. As a result of these investigations, another gambling scandal involving the 1919 season surfaced. According to witnesses, Detroit Tiger Ty Cobb and Cleveland Indian Tris Speaker agreed to fix a regular season series so the Indians could collect the third-place finisher’s share of the World Series bonus. Per their agreement, Cobb and Speaker would be rewarded with a piece of those earnings, and they also gambled on the games they agreed to tank. Despite witnesses’ claims of their unusually heavy wagering on those games, Commissioner Landis determined unilaterally that there was not enough evidence to determine that Cobb and Speaker had fixed games. Nevertheless, these scandals led Landis to announce a new rule: “any player, manager, or owner who bet any money on a baseball game would automatically be suspended for a year, and anyone who bet on a game involving his own team would be banned from baseball for life.”

2. Rule 21: Modern Rule Not Available to Landis

Transgressions like those of the Black Sox, Cobb and Speaker caused MLB to adopt Major League Rule 21, entitled “Misconduct.” Rule 21 lists various forms of prohibited conduct for MLB personnel, among which are provisions contemplating players intentionally not giving their best efforts to win games. The rule provides that an MLB employee “shall be declared permanently ineligible” if he

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55. WEILER, supra note 41, at 58.
56. See Bukowski, supra note 26, at 109-10 and accompanying text.
57. WEILER, supra note 41, at 38.
58. Id.
59. Id.
60. WEILER, supra note 41, at 39. (citing MLB Rule 21).
61. Id. (citing MLB Rule 21(a)).
62. Id.
shall promise or agree to lose, or attempt to lose, or to fail to give his best efforts toward the winning of any baseball game . . . or . . . shall intentionally lose or attempt to lose, or intentionally fail to give his best efforts . . . or . . . shall solicit or attempt to induce any player or person connected with a Club to lose.63

In addition, a player is duty-bound to “inform his Major League President and the Commissioner . . . immediately of such solicitation” or else also be declared permanently ineligible.64 Thus, even a player who does not agree to throw games can be permanently banned if he knows about such activity and fails to report it. Since Commissioner Landis did not have Rule 21 in his arsenal in the 1920s, he had to rely on the broad “best interests of the game” power. Rule 21 makes explicit a power which is implicit to the Commissioner under the “best interests of baseball” doctrine.

3. Pete Rose: Betting on Games He Managed

Ironically, the anti-gambling rule partially generated by Ty Cobb’s actions would be used against the man who broke Cobb’s long-standing all-time hits record. In 1989, Pete Rose admitted that his association with bookies while manager of the Cincinnati Reds violated the “best interests of baseball” rule.65 Rose agreed to accept status as “permanently ineligible” to work in Baseball.66 Part of the deal with Commissioner A. Bartlett Giamatti was that Rose would have the right to apply for reinstatement.67 However, Commissioners Fay Vincent and Bud Selig, Giamatti’s successors, have each clearly indicated that Rose should not expect reinstatement during their tenures.68

In the years following Rose’s banishment, there was speculation that Rose’s chances for reinstatement might improve if he admitted to betting on Baseball. After all, MLB Rule 21(d)(1) expressly prohibits “Betting on Ball Games,” but provides for only a one year suspension for “any player, umpire, or . . . employee, who shall bet any sum whatsoever upon any baseball game in connection with which the bettor has no duty to perform.”69 So, if Rose had bet on games in which his team was not playing, he may have only been subject to a one year suspension under Rule 21(d)(1). If Rose had come clean about such

63. Id.
64. GREENBERG & GRAY, supra note 47, at 473 (citing MLB Rule 21(a)).
65. WEILER, supra note 41, at 34.
66. Rose pled guilty to evading taxes on more than $400,000 in unreported revenue, and went to jail. Id. at 35.
67. Id.
68. Id.
69. GREENBERG & GRAY, supra note 47, at 474 (citing MLB Rule 21(d)(1)).
gambling, he may have received the benefit of some grace from the Commissioner’s office.

On the other hand, Rule 21(d)(2) provides that “any . . . employee, who shall bet any sum whatsoever upon any baseball game in connection with which the bettor has a duty to perform, shall be declared permanently ineligible.”70 Since Rose denied for years that he had bet on Baseball, Commissioner Giamatti relied on the evidence turned up by his investigation. At the time of the Rose investigation, Commissioner Giamatti announced in a press conference that he believed Rose had bet on Reds games and; therefore, had stained and disgraced the game.71 Apparently, Commissioner Giamatti would have invoked Rule 21(d)(2) to declare Rose permanently ineligible even without Rose’s acquiescence. Rose will presumably never be re-instated, as he later admitted to betting on Reds games that he managed.72 In the interim, Rose spent fourteen years denying that he bet on Baseball. He still says defiantly “I’m sure that I’m supposed to act all sorry or sad or guilty now that I’ve accepted that I’ve done something wrong. But you see, I’m just not built that way.”73

Indeed, even at the time of the Rose investigation, fourteen years before Rose’s admission to betting on Reds games, Giamatti understood the seriousness of Rose’s transgressions. Giamatti “told the sportscaster Howard Cosell, in a private phone call . . . that by banning Rose he was ‘ridding baseball of a cancer.’”74 The characterization of the previously-beloved Rose as a “cancer” demonstrates the danger to the integrity of the game that gambling on Baseball represents. The implication is clear, and the rationale for Rule 21 is obvious: conduct that inappropriately influences the outcome of games is a cancer on the game itself.

This concept is arguably even more compelling for managers, who make many decisions that can directly determine wins and losses. While admitting to betting on Reds games, Rose still rationalizes his actions by claiming to have never bet on the Reds to lose.75 By Rose’s reasoning, his bets gave him no additional motivation with regard to those games than he otherwise had with simply a healthy competitive desire to win. Rose claims “during the times I gambled as a manager, I never took an unfair advantage . . . I never bet more or less based on

70. Id. (citing MLB Rule 21(d)(2)).
71. Weiler, supra note 41, at 35.
73. Id.
74. Weiler, supra note 41, at 35.
75. Dodd, supra note 72.
injuries or inside information. I never allowed my wagers to influence my baseball decisions. So in my mind, I wasn't corrupt.”76 Regardless, Rule 21 is clear and permanent ineligibility is the consequence for “bet[ting] any sum . . . upon any game in connection with which the better has a duty to perform.”77 In addition, Rose changed his story several times since the initial investigation, and the bright line of Rule 21(d)(2) makes the decision easier for the Commissioner. The rule was presumably intended to effectively deter anyone associated with the game from endangering its integrity in such a manner, and hopefully Rose’s situation will continue to serve as an example to would-be gamblers.

It is important to note that Rose had less leverage than players, because as a manager he was not a member of the MLBPA. Therefore, unlike Dykstra, Belle and others, Rose was not eligible for arbitration for any punishment inflicted by the Commissioner. In addition, Baseball’s Hall of Fame changed its rules in 1991 to prohibit induction for anyone on Baseball’s permanently ineligible list.78 Hall of Fame president Edward Stack stated that the rule change was not aimed at Pete Rose.79 Nevertheless, the rule change does illustrate another Pete Rose-Ty Cobb irony: Cobb is in the Hall of Fame despite having allegedly fixing games (and gambled on them) as a player, while Rose is banished for betting on games, regardless of whether he actually intentionally influenced the games’ results. As mentioned, nothing is likely to change. After Rose’s admission to betting on Reds’ games, all speculation about the admission leading to grace from the Commissioner’s office were quelled, as Baseball spokesman Rich Levin said “as far as we’re concerned, nothing has changed.”80

V. ALCOHOL AND DRUGS

A. Alcohol: Not Harmful to the Best Interests of the Game?

Baseball players have a long and checkered history of problems associated with alcohol abuse. Hall of Famer Mickey Mantle is rumored to have played drunk on numerous occasions, and upon his death many wondered how improved Mantle’s staggering statistics could

76. Id.
77. GREENBERG & GRAY, supra note 47, at 474 (citing MLB Rule 21(d)(2)).
79. Id.
80. Dodd, supra note 72.
have been if not for his alcohol abuse. Since the retirements of Mantle and former Yankees player and manager Billy Martin, "baseball fans now know how often Mickey Mantle and Billy Martin of the Yankees drank until late in the night following a game, even with another game facing them the next day." Both Martin and Mantle suffered alcohol-related deaths: Martin in a DUI crash and Mantle from liver cancer. Pitcher David Wells raised eyebrows and league concern when he claimed to have been "half-drunk" when he pitched a perfect game for the New York Yankees in 1998.

In addition to Martin, numerous Baseball players and have had alcohol-related motor vehicle accidents. For example, in 1991 Dykstra was convicted of drunk driving when he got into an accident that injured both himself and teammate Darren Daulton. In that instance, MLB Commissioner Fay Vincent "decreed that Dykstra's own painful injury and the criminal fines levied on him were more than enough punishment for his dangerously illegal behavior, and thus baseball would impose no further penalties." At a 1993 spring training party, drunken Cleveland Indians player Tim Crews crashed his boat, killing himself and teammate Steve Olin, while seriously injuring another teammate, Bobby Ojeda. There was no league action taken in that case, as the offending player was killed.

Yet, "no one is pushing the commissioner's office to institute random alcohol tests to check for hangovers that leave players unable to play at their best . . . if anyone did . . . it would immediately be vetoed by the league authorities, whose major advertisers are beer companies." One major difference between cocaine/marijuana and alcohol is illegality, "so the true rationale for a league policy that treats a player's indulgence in alcohol or tobacco is the felt need to protect the morality—or at least the moral image of the game." Interestingly,

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82. WEILER, supra note 41, at 81.
83. Id. Martin was officially determined to be the passenger in a vehicle leaving a bar after a drinking binge by Martin and the driver. However, some have speculated that Martin was actually driving, and that this fact was covered up to for public relations reasons. See generally PETER GOLLENBOCK, WILD, HIGH AND TIGHT: THE LIFE AND DEATH OF BILLY MARTIN (1994).
84. DAVID WELLS & CHRIS KRESKI, PERFECT I'M NOT: BOOMER ON BEER, BRAWLS, BACKACHES, AND BASEBALL (2003).
85. WEILER, supra note 41, at 86.
86. Id.
87. Id. at 85.
88. Id. at 81.
89. Id. at 83. See discussion of recreational drug use, infra Part IV(B).
MLB has taken no systemic action to specifically curb the abuse of alcohol by players despite the long list of alcohol-related offenses. Baseball tends to turn a blind eye to such criminal and harmful behavior, while severelypunishing less dangerous activity like that of Rose. Baseball's response to misbehavior involving alcohol indicates that it is not the type of problem that any Commissioner has determined affects the "best interests of the game."

It might be argued that the market will deter players from engaging in activities that reduce their abilities to perform. After all, if a player consistently cannot perform up to expectations, he will not be rewarded with new contracts, regardless of the reason for his decline. There is ample evidence to show alcohol does impact player performance. For example, the day after a night of moderate drinking, a man's growth hormone levels decrease by 42% on average, and his testosterone decreases by 25% on average. This would undoubtedly have a negative overall effect on athletic performance. Perhaps this, combined with public relations concerns, has prompted some teams to take action to deter alcohol use. The 2007 drunk-driving death of Cardinals pitcher Josh Hancock prompted some teams like the Cardinals, Yankees and Mariners to halt the practice of making beer available in the locker rooms. This could signal a shift in Baseball's attitude toward alcohol abuse. Perhaps league officials have begun to recognize that substance abuse can cross the line from merely an image-related issue to one that can damage the game itself, especially regarding alcohol provided to players by MLB.

B. Recreational Drug Use: Best Interests of Baseball Affected

The relationship between Baseball players and illegal recreational drugs is even more infamous than that of Baseball players and alcohol. Accordingly, MLB's response to drug offenses has been much more severe. Curiously, the league and teams have attempted to rigorously discipline drug offenders, even though their offenses are arguably much less dangerous than some of the unpunished criminal conduct related to alcohol that was discussed above. Perhaps this reflects a societal view that drugs are a more serious problem than alcohol, even if drugs are ostensibly only harmful to the drug user. Nevertheless, despite its efforts, Baseball has often been unable to ad-

91. Id.
equately punish drug-offending players. Even when teams and Baseball have attempted to discipline such transgressions, union action and lenient arbitrators have rendered the punishments toothless.

For example, in 1997 Anaheim Angel Tony Phillips was arrested for buying cocaine from an undercover agent. The Angels tried to suspend Phillips but arbitration precedents required conviction before a player could be suspended. Michael Eisner, the head of Disney, the corporate owner of the Angels, was especially sensitive to the family-appeal of the national pastime. Eisner strongly criticized Baseball arbitration precedents. Eisner and Disney felt that "much faster and tougher action was required from baseball authorities to reassure fans that they were watching a game being played in a fully 'drug-free' zone."

In 1984, Kansas City Royal Willie Wilson was suspended for the season by Commissioner Bowie Kuhn for being convicted of attempting to buy drugs. The arbitrator in Wilson's case agreed that MLB could legitimately punish players for drug use to protect the "best interests of baseball." The arbitrator in that case purported to articulate Baseball's view regarding the necessity for severe punishments for image-related conduct offenses. The arbitrator said "because baseball players are highly skilled, well compensated, and constantly visible, they deserve and receive national attention . . . and their drug involvement . . . constitutes a serious and immediate threat to the business that is promoted as our national pastime." Nevertheless, the arbitrator reduced Wilson's suspension to one month, seemingly in contradiction with his own statements about the threat drugs represent to the best interests of the game. The reduction of the suspension from a full season to a month implies that the arbitrator did not necessarily concur with Baseball about the level of threat posed by drugs to the integrity of the game.

93. WEILER, supra note 41, at 88.
94. Id.
95. Ironically, only two months after making his irate comments about Phillips and the evil of drugs in sports, Eisner signed ABC's "Home Improvement" star, Tim Allen, to the highest-paying contract in television history at $1.25MM an episode, or about $30MM a season. No mention was made to the media of the fact that Allen had once served 28 months in prison for trafficking in cocaine. Apparently, Eisner's moral outrage applied only to Disney's baseball team, but did not extend to the rest of its corporate entities. Id.
96. Id.
97. Id.
98. Id. at 64.
99. Id.
100. Id.
101. Id.
The Commissioner's power to punish drug offenders was similarly curtailed in the case of San Diego Padre LaMarr Hoyt. In 1986, Hoyt committed three separate drug offenses: he paid a fine for being caught with marijuana and illegal prescription drugs at the Mexican border; was sentenced to probation for possession of marijuana when stopped by San Diego police; and served forty-five days in federal prison (as well as being sentenced to five years additional probation) for crossing the Mexican border with controlled substances. The Padres terminated Hoyt's contract under the code of conduct clause and Commissioner Peter Ueberroth suspended him for a year in the best interests of Baseball. Despite acknowledging Baseball's interest in protecting its image, the arbitrator reinstated the contract and reduced the suspension to sixty days. The arbitrator ruled that Baseball's policy was too inflexible and that it had contributed to Hoyt's difficulties by not providing adequate drug abuse treatment for him. Again, the arbitrator had undermined Baseball's claim that drug usage constituted a serious threat to the integrity of the game.

In 1984, Willie Wilson's Kansas City teammate Vida Blue was convicted of possession of cocaine and sentenced to a prison term. At the time of the incident, there was no official agreement between the MLBPA and MLB regarding drug-related incidents. Instead, Commissioner Kuhn had promulgated "The Commissioner's Rules," which banned use, possession or trafficking in illegal drugs and provided that in "serious cases," discipline might include "suspension or dismissal and termination of contract guarantees." Kuhn suspended Blue for the remainder of the 1984 season, citing Blue's possession conviction, his repeated in-season drug offenses, his liaison role between players and dealers for cocaine transactions and his exposure of a teenage bat boy to cocaine. Kuhn would have imposed a lifetime ban but for Blue's prison term and his cooperation with federal prosecutors.

Even when Baseball is successful in severely punishing drug violators like Vida Blue—and not curtailed by arbitrators—such offenses and their image consequences are constantly balanced against the players' ability to help the team win games. For example, in 1991,

103. Id. at 551-2.
104. Id.
105. Id.
106. Id. at 544-7 (discussing Wilson/Martin, Panel Dec. 54, Bloch 1984).
107. Id.
108. Id.
109. Id. at 548-9.
Atlanta Braves outfielder Otis Nixon was suspended for much of the season by Commissioner Vincent for testing positive for cocaine.\textsuperscript{110} Despite Nixon's multiple prior cocaine incidents, his value on the field was too much for the Braves to resist, and the team re-signed him to a three year deal.\textsuperscript{111}

In 1995, Darryl Strawberry was rewarded by the Yankees with a new contract, despite the fact that he was still serving his second suspension for drug violations.\textsuperscript{112} Strawberry was only available to the Yankees because the San Francisco Giants released him for violating the conduct clause in his contract by failing a drug test.\textsuperscript{113} Strawberry fought the release by the Giants, claiming that since he had already been suspended by the Commissioner, his release constituted double jeopardy.\textsuperscript{114} The case went to arbitrator George Nicolau and the Giants agreed to pay $125,000 of Strawberry's next contract.\textsuperscript{115} The consequence of Strawberry's many transgressions was a one year deal with the Yankees for $850,000 and a $1.8 million option for a second year.\textsuperscript{116} Strawberry's trouble with the law has continued beyond his playing career. Along with his 2001 sentence of 18 months in prison for violating his parole, his total scorecard of legal problems includes three baseball suspensions, one paternity suit . . . two arrests for domestic abuse, one arrest for assault with a deadly weapon, three cocaine arrests, four unsuccessful rehabilitation center stays, one conviction for tax-evasion, one law suit for failing to pay legal fees . . . one arrest for driving under the influence of drugs, one two-year sentence for drugs and solicitation of prostitution, and five probation violations . . . Strawberry found himself millions of dollars in debt . . . and still not through binging on drugs. [He was also] diagnosed with signs of brain damage from years of cocaine use.\textsuperscript{117}

Otis Nixon and Darryl Strawberry are just two of many examples illustrating that, despite what team owners may preach about preserv-
ing the game’s image, on-the-field ability far outweighs conduct concerns. As long as a player maintains an exceptional ability to throw, hit or catch a ball, he will likely always have a place in Baseball despite the damage he might inflict on the sport’s image through off-the-field drug use. No case is more indicative of this concept than that of Steve Howe, the poster child of ML and drugs.¹¹⁸

1. Steve Howe: Poster Child for MLB Drug Policy Gone Wrong

Steve Howe’s history with Baseball illustrates how conduct violations that merely tarnish Baseball’s image are treated with far more leniency than other types of violations. Howe’s case, like some of those mentioned above, also shows how powerless Baseball can be even when the Commissioner desires harsh punishment. Howe’s long history of drug suspensions from Baseball began in 1983, when Howe was suspended from the Dodgers for one month.¹¹⁹ Later that season, Howe was suspended for the playoffs for another failed drug test.¹²⁰ Howe tested positive again during the ensuing off-season, resulting in a suspension for the entire 1984 season.¹²¹ Howe was suspended a total of six times for drugs before being rewarded by the Yankees with an impressive contract for the 1992 season.¹²²

After serving the last of these six suspensions, Howe applied for reinstatement with Baseball.¹²³ Though Commissioner Fay Vincent believed that Howe deserved a lifetime ban, he decided to give Howe “yet another chance” to return to Baseball.¹²⁴ In order to prove that he was drug free, Howe was required by the Commissioner to spend a year in the minor leagues.¹²⁵ During this time, Howe was required to participate in regular drug testing, “possibly as often as every other day if necessary.”¹²⁶ The Commissioner also required that, in accordance with Howe’s rehab doctor’s advice, Howe “be immediately removed from Baseball in the event of a positive drug test.”¹²⁷

¹¹⁹. WEILER, supra note 41, at 59.
¹²⁰. Id.
¹²¹. Id.
¹²². Id. at 59-60.
¹²³. Howe Decision, supra note 102, at 562.
¹²⁴. Id.
¹²⁵. Id.
¹²⁶. Id.
¹²⁷. Id.
Commissioner Vincent subsequently and frequently referred to this as Howe's "last chance agreement."\textsuperscript{128} During the off-season prior to playing out his new contract with the Yankees, Howe was arrested on December 19, 1991 for attempting to purchase cocaine.\textsuperscript{129} Howe was sentenced to three years probation, a fine and community service.\textsuperscript{130} Commissioner Vincent banned Howe from Baseball for life for "violat[ing] Baseball's drug policy,"\textsuperscript{131} saying "there is no place for illegal drug use in Baseball."\textsuperscript{132}

Vincent argued that "any use, possession, or sale of illegal drugs would be subject to discipline that could be as stringent as permanent expulsion from the game, especially for those who, 'despite our efforts to treat and rehabilitate them,' continued to use illegal drugs."\textsuperscript{133} Vincent decided it was in the "best interests" of Baseball to "extinguish [Howe's] opportunity to play" after he had "squandered" so many opportunities to prove he could comply.\textsuperscript{134} Commissioner Vincent said there was "simply no alternative," and that Baseball had "done all that [could] be done" for Howe, because it was in Baseball's best interest to "show its membership and the public that persistent drug use . . . will not be tolerated . . . Baseball's credibility is at stake."\textsuperscript{135} Therefore, Howe got the first lifetime ban for drug use in Baseball history.

Despite Baseball's seeming generosity, the MLBPA challenged the suspension and the issue was brought before arbitrator George Nicolau.\textsuperscript{136} In November 1992, Nicolau issued a surprising decision: while he agreed that Baseball had an interest in keeping the workplace drug-free, Nicolau decided that Baseball had failed Howe by not implementing stringent testing to help Howe recover from his addiction.\textsuperscript{137} The arbitrator decided that "neither the Commissioner or [sic] his Office be held blameless. Once Baseball assumed the responsibility for testing and for aftercare . . . it was under a duty to see that those conditions and restrictions were followed."\textsuperscript{138} Nicolau reasoned that since "the Commissioner's medical adviser had cautioned against

\textsuperscript{128} Id. at 585.
\textsuperscript{129} \textit{Weiler}, supra note 41, at 60.
\textsuperscript{130} Id. at 60-1.
\textsuperscript{131} Howe Decision, supra note 102, at 541-2 (citing Exhibit 4, Commissioner Vincent's letter to Steve Howe).
\textsuperscript{132} \textit{Weiler}, supra note 41, at 61.
\textsuperscript{133} Id.
\textsuperscript{134} Id. at 61.
\textsuperscript{135} Howe Decision, supra note 102, at 578.
\textsuperscript{136} See generally Howe Decision, supra note 102.
\textsuperscript{137} Id.
\textsuperscript{138} Id. at 581.
Howe’s return unless he was tested every other day of the year,” Baseball was under an obligation to Howe to provide such testing, without which Howe would not be given a “fair shot at success.”

Nicolau even suggested that, if Howe was provided with this “strategic safeguard” of “stringent, year-round testing . . . it is not at all likely . . . that the events of December 19 would have occurred.”

Adding insult to injury, Nicolau also played a semantic game with the Commissioner. The arbitrator argued that the “last chance agreement” actually contemplated a failed urine test and that Howe had not failed such a test. Since Howe had been arrested for trying to possess cocaine but had not failed a drug test, Nicolau argued that Howe had not technically squandered his last chance. Nicolau said “some precision is required here. What [Howe] assented to . . . was his immediate removal from Baseball ‘in the event of a positive drug test.’ That circumstance has never occurred at any time since Howe’s 1990 return to the game.”

Surely Howe’s transgression violated the spirit, if not the letter, of the agreement. Nevertheless, the arbitrator sided with Howe, ordering that Howe be reinstated and subjected to drug tests every other day for the rest of his Baseball career, any failure of which would “constitute just cause for his permanent removal from the game.” Nicolau asserted that “a penalty of this magnitude should serve as a clear warning that drug use will continue to be treated with severity.” Commissioner Vincent did not concur, calling it a “joke” that seven offenses were not enough but that eight would be.

It is important to note that Howe’s total suspension of 119 days for his seventh offense cost him almost $2,000,000. Nevertheless, Howe was permitted to return to Baseball and cash in on amounts in excess of that lost income. Therefore, Howe’s ability to throw a 95 m.p.h. fastball allowed him opportunities far beyond those that would likely be available to a common person with seven drug violations on his or her record. While it can be argued that Howe’s position as a major leaguer placed him in an unusual limelight under which the common person would not normally find himself, it stands to reason that the

139. Weiler, supra note 41, at 62.
140. Howe Decision, supra note 102, at 587-8.
141. Id. at 585.
142. Id.
143. Id.
144. Weiler, supra note 41, at 63.
145. Howe Decision, supra note 102, at 593.
146. Weiler, supra note 41, at 63.
common person would not have been coddled as Nicolau’s orders allowed.

2. Off-the-Field Drugs: Conclusion & Future Impact

Baseball’s current recreational drug policy is rehabilitation-focused. It provides that “Baseball will attempt to treat and rehabilitate individuals with a drug problem.” However, the policy stresses that it will consider equally “the welfare of both the individual and the game.” In order to protect the best interests of the game, “Baseball will not hesitate to permanently remove from the game those players and personnel who, despite our efforts to treat and rehabilitate, refuse to accept responsibility for the problem and continue to use illegal drugs.”

Nevertheless, MLB faces stiff challenges from MLBPA every time it attempts to institute severe punishments for drug and alcohol abuse. As shown in the cases above, arbitrators tend to support the players. One reason for this is that MLB represents one of the only employment options for players of that skill level. As George Nicolau said in the Steve Howe decision, “the Commissioner does not stand in the isolated position of an individual employer. He can bar the employment of a player at any level of the game regardless of the opinion or wishes of any one of a great number of potential employers. That is an awesome power.”

One possible solution to the problem of too much “awesome power” in the hands of the Commissioner is to motivate teams to terminate contracts based on conduct violations. The “free market verdict” argues that

if the aim of sports drug policy is to secure a high quality of performance by players . . . the appropriate method is to have the players’ contracts permit the team to release a drug-abusing player without having to pay his expected salary. Even in the absence of an explicit contract provision targeting drug use—which clubs are most likely to negotiate with a player when they already have reason to suspect such behavior, as in Nixon’s case—the standard commitment by the player to ‘keep himself in first-class physical condition’ can and should be interpreted in this fashion.

However, the above examples demonstrate that a player’s ability to help the team win games will generally overcome any drug or alcohol-

147. Howe Decision, supra note 102, at 547.
148. Id.
149. Id. The drug policy also provides for scaled automatic suspensions for positive tests. Random, mandatory drug testing was implemented in 2002. See discussion, infra Part V(D).
150. Howe Decision, supra note 102, at 589.
151. WEILER, supra note 41, at 82.
related concerns about that player. Steve Howe's ability to throw an accurate mid-90s fastball was obviously more important than what his drug violations did to the image of the Yankees or Baseball. The same is true with Darryl Strawberry's ability to hit home runs. This creates a dilemma because only the Commissioner appears to care enough about the image of Baseball to police such conduct, but the cases of players like Howe, Hoyt, Strawberry and Wilson show that arbitrators seem to dislike the nature of the Commissioner's ability to preclude league-wide employment for the offending player. Further, the UPC is negotiated between MLB and the MLBPA. The MLBPA would surely never allow provisions giving teams too much authority to terminate contracts, especially with the wealth of arbitrators' precedents supporting the players in such circumstances.

C. Alcohol and Recreational Drugs: Hybrid of Off-the-Field and On-the-Field Violations

As mentioned in Part II, some conduct that takes place off the field can directly affect the outcome of games. While alcohol and recreational drug use are classified here as off-the-field conduct, there is an argument to be made that such transgressions qualify as a type of hybrid violation. As mentioned, many have questioned how Mantle's career may have been even more successful absent his alcohol abuse.\(^{152}\) Similarly, it is open to speculation what heights highly-talented individuals like Howe and Strawberry could have reached if not for their drug abuse. With our present-day advanced knowledge of the physiological affects of alcohol and drugs, it would be foolish to conclude categorically that such abuse does not in some way affect the outcome of games in which the abusing player performs. Without such abuse by these players, they may have been able to help to their teams win more games. This illustrates that off-the-field alcohol and drug abuse could directly affect the outcome or integrity of the game. If the abuse reduces a player's ability to perform, the integrity of the game is affected because the product is worse for the fans and the outcome of the game could be affected.\(^{153}\)

D. On-the-Field Drug Violations: Performance-Enhancing Drugs

While there are isolated episodes of recreational drug use on the field, the larger concern about on-the-field drug use relates to per-

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\(^{152}\) See Neel, supra note 81 and accompanying text.

\(^{153}\) Additionally, suspensions and criminal sanctions can deprive teams of the players' services, also affecting the teams' ability to win games. See Vick discussion, supra Part II.
formance-enhancing drugs. The Mitchell Report produced startling revelations about the wide spread use of steroids in Baseball and could instigate dramatic changes in MLB’s approach to drug use in the game, particularly when the CBA is renegotiated after the current CBA expires in 2011.154 Indeed, the Mitchell Report concluded that it “has not been an isolated problem involving just a few players or a few clubs.”155 In fact, “each of the thirty clubs has had players who have been involved with performance enhancing substances at some time in their careers.”156 The impetus for the Mitchell investigation was “speculation . . . originally fueled by the testimony of players before a federal grand jury investigating” alleged performance-enhancing drugs supplied to players by a San Francisco company named BALCO.157 It is believed that New York Yankee Jason Giambi admitted to steroid use while testifying before that grand jury.158 A recent book entitled Game of Shadows alleges that MLB stars Barry Bonds, Giambi, Gary Sheffield and others have long used steroids.159

In 2002, Baseball implemented its first mandatory random drug-testing of players.160 The league tests for performance-enhancing drugs as well as recreational drugs, and as of 2005 the policy provides for “a 50-game suspension for a first positive test, a 100-game suspension for a second positive test, and a permanent suspension for a third positive test.”161 All of these suspensions are without pay.162 The Mitchell Report concluded that Baseball’s drug testing program has been successful in that “detectable steroid use appears to have declined.”163 Nevertheless, the laundry list of current and former play-

155. MITCHELL REPORT, supra note 9, at SR-1.
156. Id.
159. MARK FAINARU-WADA & LANCE WILLIAMS, GAME OF SHADOWS 142-3 (Gotham Books 2006).
161. See MAJOR LEAGUE BASEBALL’S JOINT DRUG PREVENTION AND TREATMENT PROGRAM, § 6(E)(2006); MAJOR LEAGUE BASEBALL’S JOINT DRUG PREVENTION AND TREATMENT PROGRAM, § 6(E) (2005).
162. Id.
163. MITCHELL REPORT, supra note 9, at SR-1.
ers who have reportedly tested positive for steroids, human growth hormone (HGH) or other performance-enhancing drugs is growing daily. The list includes Rick Ankiel, Paul Byrd, Mike Cameron, Ken Caminiti, Troy Glaus, Jose Guillen, Gary Matthews, Jr., Rafael Palmeiro, Sammy Sosa, Manny Ramirez, Matt Williams and many others.164 The news about Palmeiro, a potential Hall of Famer, was particularly appalling after his adamant, finger-pointing denial while testifying before Congress.165

In addition to these positive tests, nearly ninety major leaguers were named in the Mitchell Report, including Bonds, Andy Pettitte and seven-time Cy Young Award-winner Roger Clemens.166 A-Rod, who many hoped would someday restore the integrity of the home run record from the Bonds’ steroid taint, admitted in 2009 to using steroids.167 According to the Mitchell Report, former MVP Caminiti once estimated that at least half of major leaguers were using steroids.168 Part of the ongoing problem is that players have shrewdly switched from steroids to HGH. The Mitchell Report recognized that “the use of human growth hormone has risen because, unlike steroids, it is not detectable through urine testing.”169 While HGH was added to the CBA as a banned substance in 2005, this is meaningless without the ability to test for HGH.170

For obvious reasons, this type of conduct transgression negatively impacts both the image and the integrity of the game. First, like other criminal activity discussed here, steroid use damages the image of the game because it is illegal.171 As mentioned above, the integrity of the

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164. See Steroids Suspensions, BASEBALL ALMANAC, http://www.baseball-almanac.com/legendary/steroids_baseball.shtml (last visited June 30, 2009); see also Rick Morrissey, Truth Be Known, Roping Honest MLB Doper Tough, CHI. TRIB., Nov. 11, 2007, available at 2007 WLNR 22293296. HGH has become a drug of choice because, thus far, it is undetectable by testing. MITCHELL REPORT, supra note 9, at SR-2.


166. Id. at 169.


168. MITCHELL REPORT, supra note 9, at SR-2.

169. Id. at SR-1.

170. Id. at SR-13.

171. Id. at SR-10.

Anabolic steroids are ... controlled substances under the federal Controlled Substances Act ... it is illegal to use or possess steroids or steroid precursors without a valid physician’s prescription. Violations ... carry penalties similar to those applicable to the illegal use or possession of narcotics. Human growth hormone is a prescription medication. It is illegal to issue a prescription for human growth hormone except for
game is also in jeopardy whenever anything other than natural competitive spirit influences the outcome of games. The Mitchell Report also mentioned concerns about steroid use that are analogous to concerns raised about players' associations with gamblers. The Report concluded that because of the illegality involved, players "can place themselves in a position of vulnerability to drug dealers who might use their access and knowledge of violations of law to their own advantage, through threats intended to affect the outcome of baseball games or otherwise."

Additionally, performance-enhancing drugs like steroids and HGH give some players a chemically-created advantage over other players. Thus, their use is considered cheating. The image of the game is tarnished if its stars are viewed as cheaters. However, even if performance-enhancing drugs were legal, the game would still be harmed. Notwithstanding the cheating concern, Baseball is tarnished by the image of its biggest stars injecting drugs into their bodies with hypodermic needles. Further, the appeal of sport is the competition to discover which athlete's natural athletic ability and hard work will prevail. The current era of Baseball has come to be known as the "Steroid Era," and there have been cries for records and statistics from this era to be marked with asterisks. Indeed, the Mitchell Report states that "the widespread use of these substances raises ques-

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very limited purposes. Human growth hormone never has been approved . . . to improve athletic performance. Issuing a prescription for human growth hormone for any of these unauthorized purposes is a violation of federal law.

_id._

172. See discussion, _supra_ Part II.
174. _Id._ at 171 ("McNamee injected Clemens in the buttocks four to six times with testosterone.").
175. The complexity of this issue can be illustrated by examining the case of Barry Bonds. Assuming for the moment that Bonds used steroids, the question then becomes: how many of Bonds' home runs were accomplished through the use of steroids? Could steroids help Bonds make solid contact with the baseball? Did steroids even benefit Bonds at all, considering that the Mitchell Report implies that a great number of pitchers used performance-enhancing drugs as well? If the pitchers and Bonds were both on steroids, then that essentially puts Bonds in the same position as Henry Aaron—assuming that neither Aaron nor the pitchers used performance-enhancing drugs. Perhaps Bonds would not even still be playing in his forties without the help of steroids, so none of Bonds' home runs should be counted after the age at which he would have retired without steroids. Of course, that age would be pure conjecture. The only clear aspect of the asterisk issue appears to be that it is nearly impossible to quantify how much steroids may have contributed to Bonds' success. Confusion is further muddled by the fact that Bonds has never actually tested positive for steroids, despite his affiliation with steroid-provider BALCO, his indictment and his inclusion in the Mitchell Report.
tions about the validity of records and their comparability across different eras."\textsuperscript{176}

Bonds’ use of performance-enhancing drugs is now well-documented in his indictment and his inclusion in the Mitchell Report.\textsuperscript{177} In fact, the indictment stated that “during the criminal investigation, evidence was obtained, including positive tests for the presence of anabolic steroids and other performance-enhancing substances, for Bonds.”\textsuperscript{178} Baseball’s reaction to the Bonds prosecution will illustrate the seriousness with which Baseball views performance-enhancing drugs, particularly with regard to his Hall of Fame eligibility and the handling of Bonds in the record books.\textsuperscript{179}

1. Conclusions to Draw From the Mitchell Report

It may still be too early to draw conclusions about the long term effects that the Mitchell Report may have on Baseball. As mentioned, renegotiation of the CBA in 2011 will reveal the measure of the Report’s effect. However, one thing is known: Baseball will not likely be able to punish players for steroid use that occurred prior to 2002. Amazingly, prior to the 2002-2006 CBA, performance-enhancing drugs were never specifically prohibited.\textsuperscript{180} Indeed, A-Rod admitted to steroid use during this period and received no punishment.\textsuperscript{181}

Therefore, even if Bonds used steroids while breaking the single-season home run record in 2001, Baseball would be hard-pressed to justify an asterisk next to Bonds’ name in the record books for that record.\textsuperscript{182} In addition, the indictment concerns testimony Bonds gave in 2003 about his alleged steroid use from 1999-2002, before the most recent CBA.\textsuperscript{183} Bonds has never tested positive for steroids in league

\textsuperscript{176} Mitchell Report, supra note 9, at 4.
\textsuperscript{177} Id. at 113.
\textsuperscript{178} Bonds Indicted, supra note 7.
\textsuperscript{179} See supra note 175.
\textsuperscript{180} Drug Policy in Baseball Timeline, supra note 160. The illegal use of prescription drugs has been prohibited in Baseball since 1971. See Notice No. 12, Memorandum from Major League Baseball Office of the Commissioner to Administrative Officials of Major and Minor League Ball Clubs Re: Drug Education and Prevention Program, Apr. 5, 1971, § 9 (“Baseball must insist its personnel comply with the federal and state drug laws. It is your obligation to be familiar with these drug laws.”). However, punishing players named in the Mitchell Report for offenses prior to 2002 would require proof of illegality, and no players named have been punished. Additionally, the Mitchell Report recommended that the Commissioner forego disciplining players for past offenses revealed in the report. Mitchell Report, supra note 9, at SR-33.
\textsuperscript{181} A-Rod, supra note 167.
\textsuperscript{182} In 2007, Bonds broke the all-time home run record. Since he has never tested positive for steroids, those calling for an asterisk next to his name will be disappointed even hard evidence surfaces of steroid use by Bonds prior to 2002.
\textsuperscript{183} Bonds Indicted, supra note 7.
testing. Therefore, Baseball may be forced to punish Bonds by using the “best interests of the game” clause rather than any specific drug provisions. Considering Bonds’ stature in the game, this will be a landmark decision for Commissioner Selig or his successors. Like Rose, Bonds is clearly one of the greatest to ever play the game. However, unlike Rose, Bonds’ on-field accomplishments are also tainted, as any steroid use would have boosted his performance. Bonds will be a sure Hall of Famer unless the Commissioner takes action preventing his induction.

Currently a free agent and effectively retired, Bonds faces image problems for nineteen alleged occasions of lying under oath and “unlawfully, willfully, and knowingly . . . corruptly endeavor[ing] to influence, obstruct and impede the due administration of justice, by knowingly giving Grand Jury testimony that was intentionally evasive, false and misleading.” At the very least, Bonds’ conduct will probably cost him significant dollars as teams and sponsors have steered clear. Nevertheless, as teams have shown with repeat offenders like Howe and Strawberry, on-the-field ability generally trumps image problems. Although Bonds’ days of hitting home runs are likely over, he could try to convince a team to overlook his tarnished image and the media circus he brings and take a chance that he could still produce. That is assuming, of course, that Bonds does not go to prison.

Additionally, the Mitchell Report was met with some skepticism and generated criticism from players, MLBPA officials and the media. First, some questioned Senator Mitchell’s neutrality because: he was hired by the Commissioner to investigate; he serves on the board of directors of the Boston Red Sox; the law firm where he was a senior partner was used to conduct the investigation; and notable Red Sox players like Ortiz and Ramirez, who subsequently were linked to steroid use, were omitted from the Mitchell Report. Secondly, since this distrust contributed to the Mitchell investigation being stonewalled by the players and the MLBPA, its findings included no player

184. Id.
testimony. Further, the overwhelming majority of the Mitchell Report’s evidence was supplied by only two sources, both of whom were former employees of major league teams. Some have argued that testimony from two disgruntled employees simply is not enough to publicly accuse such a high number of players. Thus, many have dismissed the Report’s findings as “unsubstantiated allegations.” Nevertheless, the fact that testimony and evidence provided by only two witnesses produced nearly ninety names cannot help but fuel speculation that the actual number of steroid users was even higher. Therefore, the real importance of the Mitchell Report is not the list of players included, but will be determined by whether or not Baseball is “shocked into action” to aggressively address drug use. Indeed, MLB’s reaction to the Mitchell Report will show how important it considers the problem of on-the-field drug use. As of yet, there has been no significant action by Baseball in response to the Report

2. “Zero Tolerance” to What Effect?: The Case of J. C. Romero

As with other types of conduct violations, Baseball’s response to performance-enhancing drug violations can contradict common sense. In 2008, Phillies pitcher J. C. Romero tested positive for a banned substance days before he was due to pitch in Game 5 of the World Series. The hearing took place during the World Series and it was announced he would serve a fifty game suspension. However, this was not the typical steroids case. Romero had purchased a supplement from a local General Nutrition Store (GNC) he believed was approved for use under Baseball’s rules. He personally checked the label, obtained opinions from two different nutritionists and his strength and conditioning coach. All sources claimed the supplement was approved. Furthermore, Romero relied on an MLBPA memorandum stating that any supplements purchased over the counter at a GNC were approved. However, the manufacturer of the supple-

186. The two former employees are former Mets clubhouse employee Kirk Radomski, and former Yankees trainer Brian McNamee. See generally Mitchell Report, supra note 9.
187. Bryant, supra note 182 (discussing tactics used by Mitchell to pressure team employees into cooperating with the investigation).
191. Id.
192. Id.
193. Id.
194. Id.
ment omitted a banned ingredient from the label. Although Romero could not realistically have known, Baseball still found him negligent for not discovering the banned ingredient.

This zero tolerance policy seems ridiculous in Romero's case. "If I made a mistake, it was to put all my trust in my superiors, the people I thought knew what they were doing," Romero stated in May 2009. Romero was misled by the manufacturers of the supplement who misrepresented the contents of their product. While strict penalties will presumably deter drug use, cases like Romero's demonstrate the need for fact-specific inquiries and punishments tailored to specific circumstances.

A 2006 incident involving Romero further exemplifies how erratic the process can be. Romero tested positive for high levels of hormones as a result of a fertility supplement his wife and he were taking. Baseball eventually cleared Romero. Oddly, Baseball found it fit to look at the circumstances and facts surrounding that violation but not the later violation involving the GNC supplement. These examples illustrate the need for consistent but common sense based governance of conduct violations in Baseball.

VI. VIOLENCE AND OTHER CRIMINAL CONDUCT

A. Off-the-Field Violence: Apparently Not Detrimental to "Best Interests"

Teams and leagues face a dilemma in punishing off-the-field criminal conduct for a number of reasons. On the one hand, teams and leagues clearly can suffer image problems when off-the-field player conduct ends up on television and in the newspaper. From this standpoint, teams and leagues are equally justified in punishing off-the-field and on-the-field conduct. After all, "the rationale for disciplining players who are violent during a game or contest is that they sully the image of the game, undermine its integrity, and pose a risk to others . . . [off-the-field violations] have precisely the same effects on the game." By this logic, off-the-field criminal conduct should be treated no differently than on-the-field offenses.

195. Id.
196. Id.
198. Gammons, supra note 190.
199. Id.
On the other hand, the role of the legal system is to adjudicate and punish such crimes. Further punishing the offender in the workplace could constitute a form of double jeopardy to the player. In addition, perhaps it is inappropriate for Baseball to attempt to play a role in shaping the morals of society. Some would argue that teams and leagues should only be responsible for punishing behavior directly related to the game. Indeed, in one early case, a New York court ruled that the league could only discipline a player in the performance of his duties, limiting Baseball’s authority to the power to regulate the actual playing of the game on the field. Thus, before there was a commissioner, this reasoning prevailed in Baseball. According to this argument, if a player is punished for his crime by the legal system, he has paid his debt to society and should not be punished further. If the player is found not guilty, it does not seem appropriate for Baseball to discipline him. However, the player’s employer may still suffer significant image problems due to the player’s behavior, and ordinary employers can generally discipline or fire employees for criminal behavior.

There is also the issue of disparate treatment between athletes who commit criminal offenses and average citizens who commit similar offenses. On the one hand, athletes live under a microscope and the average citizen may not have his or her DUI splashed across the newspaper’s front page and television. On the other hand, professional athletes almost invariably benefit from more leniency and are generally able to return to their sports and earn new multi-million dollar contracts despite their troublesome behavior. Additionally, Baseball may not have the authority to limit a player’s right to earn a living, especially regarding lengthy suspensions. After all, “the Commissioner is not an employer who has decided for himself that he will no longer retain an employee who is then free to go elsewhere in the same industry. The ... imposition of ... the Commissioner ... can effectively prevent a player’s employment by any one at any level of his chosen profession.”

Some argue that the very thing that fuels athletes’ competitive fire on the field also makes them more prone to certain types of personal conduct transgressions. S.L. Price says “all great athletes carry the seed of cruelty; it’s their job and their passion to beat the other guy,

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202. See Nixon, Howe, and Strawberry discussions, supra Part V.
203. Howe Decision, supra note 102, at 554-6.
undress his weaknesses, reveal him as a loser in public." While such violent cruelty is reviled in most aspects of life, it is celebrated on the athletic field. Indeed, some of the behavior for which players are revered on the field would constitute criminal offenses if performed on the street. The pitcher who hurls a 98 m.p.h. projectile at or near another man's head is cheered by fans, as is the base runner who barrels into the catcher on his way to home plate. These actions would constitute assault and battery outside the scope of the game. Obviously, most professional athletes have spent many years cultivating their competitive spirit and striving to be the absolute best. Thus, it may not be surprising that some of this "cruelty" would spill off the field into the athletes' personal lives.

Not only does the on-the-field behavior of players spread to their personal lives, awe and reverence for the players appear in inappropriate off-the-field ways. Even athletes who run into trouble for their violent acts often receive preferential treatment. For example, after a proceeding concerning Barry Bonds’ family support payments, the judge asked Bonds for an autograph. No league action was taken against Bonds for this allegation. This is indicative of the lax attitude that Baseball has regarding violence against women by players. Despite its marketing as family entertainment, Baseball’s treatment of players and coaches who abuse women reveals its attitude toward such offenses. For example, no league action was taken against New

205. Id.
206. Several baseball players and managers besides Bonds have been linked to domestic violence but not punished by Baseball, including Jose Conseco, Strawberry and Dallas Green. See Moser, supra note 200, at 69. The list of athletes in other sports who have gotten in trouble for acts of violence against women is staggering. For example, NBA star Jason Kidd was arrested in 2001 for hitting his wife Joumanna. Joumanna called 911 and reported that Kidd had “popped [her] right in the mouth.” When officers arrived at the home, she said “Don’t worry about me. This is minor compared with what I normally go through.” Moser, supra note 200, at 73. Kidd had previously been arrested for a drunken assault on a woman, and cited for a hit and run motor vehicle accident. Kidd suffered no punishment from the NBA. Another notorious example is Mike Tyson, who served 6 years of a ten year sentence for rape. Previously, Tyson had been charged with battery against a woman in a nightclub, accused of beating his first wife, and faced at least five civil suits for abuse of women. Moser, supra note 200, at 76. Tyson said “I like to hurt women when I make love to them... I like to hear them scream with pain, to see them bleed... it gives me pleasure.” William Nack, Sports’ Dirty Secret, SPORTS ILLUSTR., July 31, 1995, at 66, available at 1995 WLNR 4360987. Tyson’s first fight after prison earned him $40 million, and he has earned over $100 million in the ring since the rape sentence. See Thom Jones, Like Mike, DETAILS MAG., Nov. 2002, at 122. Rather than being a pariah in society, like many convicted rapists, Tyson has flourished because of his athletic ability. In one of the most extreme examples of such offenses, NFL player Rae Carruth was convicted of murdering a woman pregnant with his baby. Bukowski, supra note 26, at 110-11. Carruth’s contract was terminated, but no further league action was necessary as Carruth currently serves a life sentence in prison. Id.
York Mets manager Dallas Green when he said his method for coping with losses was to “just beat the hell out of my wife.” Clearly, off-the-field violence is considered not nearly as harmful to the game as some other offenses. This attitude defies logic. Some argue that

players who use their physical prowess and celebrity status to commit crimes against vulnerable members of society damage the reputation of the game. It is a logical inference that a person who is violent at home will eventually be violent at work, posing a risk to other players or even fans. Whether a player chokes his coach at practice or his wife after practice, that player poses a real and true risk.

Occasionally, however, MLB and its teams will take appropriate action against a player whose violent acts are adequately severe and public. Boston Red Sox player Wil Cordero pled guilty to abusing his wife and was suspended for multiple games. Cordero’s case represents a rare occasion when Baseball’s commissioner utilized the “best interests of baseball” clause for this type of offense. The Red Sox also took action against Cordero, placing him on “administrative leave” upon learning that a previous wife had also accused him of physical abuse. Considering Baseball’s general lack of action for such offenses, however, it is clear MLB does not consider off-the-field violence detrimental to the best interests of Baseball. Indeed, the MLBPA fought Cordero’s suspension and successfully forced the Red Sox to play or trade him.

B. On-the-Field Violence: Detrimental to “Best Interests”

Sanctioning players and other MLB personnel for on-the-field violence seems relatively clear. There appears to be little argument that such offenses violate the rules of the game, thus threatening the integrity and tarnishing the image of the game. For example, in 1965 Juan Marichal was suspended eight games and fined for hitting catcher

207. William Oscar Johnson, A National Scourge, SPORTS ILLUS.T., June 27, 1994, at 92, available at 1994 WLNR 4114658. Other high-profile sports personalities have expressed similarly flip-pant remarks with impunity. Penn State football coach Joe Paterno said “I’m going to go home and beat my wife,” and NBA star Charles Barkley said “this is a game that, if you lose, you go home and beat your wife and kids.”

208. Id.


210. Moser, supra note 200, at 82.

211. GREENBERG & GRAY, supra note 47, at 511, n. 336.

212. Id.
John Roseboro in the head with a bat.\textsuperscript{213} In 1995, New York Yankee Jack McDowell made an obscene gesture to fans at Yankee stadium, earning a fine from the Yankees and an order from the league to donate a “substantial amount” of game tickets to charity.\textsuperscript{214} Pitcher Rob Dibble was suspended in 1991 for throwing a ball into the stands, and in 1992 for charging into a fight on the field.\textsuperscript{215} Nobody argued in any of these cases that Baseball exceeded its authority in punishing the players in order to protect the image and integrity of the game.

Nevertheless, players do whatever they can to avoid punishment, even when the punishment seems justified. For example, the end of the 1996 season provided what Hall of Famer Joe Morgan called “the most despicable act by a baseball player, ever.”\textsuperscript{216} Baltimore Oriole Roberto Alomar spat in umpire John Hirshbeck’s face while arguing a call.\textsuperscript{217} Alomar was suspended five games in the “best interests of baseball.”\textsuperscript{218} The suspension would have made Alomar unavailable for the first round of the playoffs. Despite general consensus that the act was worthy of suspension, Alomar and the MLBPA appealed the suspension. This allowed Alomar to delay the suspension until the beginning of the next season, a result which Sports Illustrated called “ludicrous, galling, appalling—choose your adjective!”\textsuperscript{219} It is debatable whether removing the sting from star player’s punishment by allowing him to compete in the playoffs served the best interests of Baseball.

VII. Conclusion — Some Suggested Solutions

While the Mitchell Report only addresses steroid use, the process of the investigation and its recommendations are instructive on the more general issue of conduct violations. For example, the resistance by the MLBPA to the Mitchell Report demonstrates that any plan aimed at disciplining players will be extremely difficult to implement. The Mitchell Report laments that the MLBPA was “largely uncooperative,” in that it rejected requests for documents and interviews with witnesses and MLBPA officers, and discouraged players from cooper-

\textsuperscript{213} \textsc{Weiler, supra note 41, at 14. }Marichal also had to pay $7,500 to settle Roseboro’s tort suit. \textit{id.}

\textsuperscript{214} \textsc{McDowell’s Actions Cost Him a Donation, }USA Today, July 21, 1995, at 3C.

\textsuperscript{215} \textsc{Greenberg & Gray, supra note 47, at 508}

\textsuperscript{216} \textsc{Weiler, supra note 41, at 10-1.}

\textsuperscript{217} \textit{id.}

\textsuperscript{218} \textit{id.}

\textsuperscript{219} \textit{id.} Luckily, Baseball has not suffered through an on-the-field incident like Mike Tyson’s famous biting of Evander Holyfield’s ear, or like Latrell Sprewell of the NBA attempting to choke his coach to death. See Julian Rubinstein, \textit{The Rehabilitation of Latrell Sprewell, }Salon.com, June 21, 1999, http://WWW.SALON.COM/NEWS/FEATURE/1999/06/21/SPREWELL/PRINT.HTML
ating with the investigation.\textsuperscript{220} Indeed, nearly all players refused to meet with the Mitchell investigators.\textsuperscript{221} While it is surprising that the MLBPA does not see the importance of drug testing to protect its members, its cooperation is necessary since federal law generally requires that discipline plans be collectively bargained.\textsuperscript{222}

Nevertheless, aggressive action is required to stem the increase in conduct violations in Baseball. Baseball has eventually adopted appropriately stiff penalties for on-the-field conduct violations. As the Mitchell Report concludes, the harsh penalty for performance-enhancing drug use has helped curb the number of positive tests.\textsuperscript{223} Similarly, Baseball's provisions addressing on-the-field gambling—Rule 21's automatic permanent ineligibility—provides a meaningful deterrent.\textsuperscript{224} Baseball's approach to on-the-field violence has also been largely appropriate, although the loophole allowing players to manipulate the appeals system is regrettable.

However, the penalties for off-the-field conduct violations should be similarly systemized and less reliant on the discretion of the Commissioner. MLB must take a hard line with the MLBPA in demanding the adoption of automatic penalties for some of the more common violations discussed here. Many of these transgressions are presently at the Commissioner's discretion. As mentioned, punishing players in the "best interests of baseball" produces disparate results and invites dramatically-reduced punishments from player-friendly arbitrators. Obviously, it would be impossible to expressly list all transgressions and their punishments in the CBA and the UPC. However, specifically listing the most common offenses, and their punishments, would make application of the rules and enforcement more clear.

Logically, these penalties should generally be less severe than for on-the-field conduct. The Commissioner should retain the power to discipline in the best interests of baseball, for those offenses that are not expressly listed or that present extenuating circumstances. However, if gambling, drug and alcohol offenses and criminal violence all had expressly-listed automatic penalties, there would be fewer issues for the discretion of the Commissioner. There would be fewer appeals and fewer opportunities for arbitrators to cut the legs out from under the Commissioner because those penalties would be collectively bar-

\textsuperscript{220} Mitchell Report, supra note 9, at SR-7.
\textsuperscript{221} Id. The Mitchell Report even uncovered evidence that Gene Orza, the head of MLBPA, notified players of upcoming drug tests. Id. at 282.
\textsuperscript{222} Id. at n. 8.
\textsuperscript{223} Id. at SR-2. The Mitchell Report chronicles how MLBPA objection to drug testing caused a delay in implementation of nearly twenty years. Id. at SR-13.
\textsuperscript{224} See discussion, supra Part IV(B)(2).
gained. While it will undoubtedly be difficult to get the MLBPA to agree, players would presumably appreciate that uniform, standard penalties would minimize the need for discretion by the Commissioner in the “best interests of baseball.” The scandal generated by the Mitchell Report may also limit the MLBPA’s ability, from a public relations standpoint, to object to a new disciplinary program.

One recommendation made by the Mitchell Report provides a potentially viable framework for Baseball to counteract the growing concern of conduct violations. First, the Mitchell Report recommends that Baseball form a “Department of Investigations.”225 While the Mitchell Report does not suggest the structure of this Department in great detail, it would be helpful if it were made up of former players and coaches, as well as MLB employees. Thus, investigations and disciplinary decisions—when discretion is needed—can be made with the utmost possible impartiality. The Department of Investigations should also include a full-time steroid czar, with expertise in the science of drug-testing and abuse. This would help Baseball stay ahead in the technological race between the production of performance-enhancing drugs and the ability to detect them, as well as prevent situations like the J. C. Romero incident. It is also important that the Department of Investigations be given the authority to investigate possible conduct violations that have not resulted in criminal investigations but nevertheless may tarnish the image of the game.

Lastly, Baseball should attempt to minimize the market forces that keep highly-talented, but troubled, players like Howe and Strawberry in multi-million dollar contracts despite their multiple violations. MLB should discipline teams that fail to enforce conduct clauses. Baseball could do this by fining teams, taking away draft picks, or even more extreme, forcing them to forfeit games as college teams are made to do when they have players who break eligibility rules. Baseball should also refuse to approve new contracts for players with a certain number of conduct violations. League penalties that make it uncomfortable to keep or sign such players will create an additional deterrent for the deviant behavior.

As the Mitchell Report shows, Baseball kept its head in the sand about steroid abuse for nearly two decades. Despite the fact that Commissioner Ueberroth warned that performance-enhancing drugs would damage the integrity of the game in 1985, Baseball did not “push hard” for testing until 2002.226 If Baseball had addressed the

225. Mitchell Report, supra note 9, at 287.
226. Id. at 307.
drug problem sooner, there would not have been a need for the Mitchell Report. On a larger scale, if Baseball were to implement a uniform, systemic program for violations, inappropriate player conduct could be better enforced and prevented.