

Three Strikes and You're (Not Necessarily) Out

How Baseball's Erratic Approach to Conduct Violations Is Not in the Best Interests of the Game

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

—Barry Bonds¹

INTRODUCTION

It is nearly impossible to turn on any media outlet without hearing about the latest professional athlete's personal conduct indiscretion. The news is dominated by such headlines. Today's athletes, coaches, and other professional sports personnel live under perpetual scrutiny, and every misstep is instantaneously spread worldwide through the media. Thus, personal conduct violations are a growing and urgent concern in professional sports. For example, National Football League ("NFL") star quarterback Michael Vick was recently released from a sentence of nearly two years in federal prison on charges related to dog fighting and animal abuse.² Commissioner Roger Goodell was left with the decision on whether to impose additional sanctions against Vick upon his return. Goodell decided to reinstate Vick but conditioned his return on Vick's cooperation and good behavior, which eventually allowed Vick to return to the field with the Philadelphia Eagles after sitting out the first two games of the 2009 season.³ Goodell has not shied away from issuing severe penalties for personal conduct, as Tank Johnson, Pacman Jones, and Chris Henry have all recently served significant suspensions for off-the-field indiscretions.⁴ Other sports have suffered from the same concerns. In 2007, the National Basketball Association ("NBA") was rocked by a scandal involving referees gambling on and fixing games.⁵ Also in 2007, National Hockey League ("NHL") player Mark Bell was suspended multiple games for a DUI accident that also cost him six months in jail.⁶

Lately, Major League Baseball ("MLB" or "Baseball") has had more than its share of conduct concerns. Hall-of-Fame-caliber players Alex "A-Rod" Rodriguez, Roger Clemens, Manny Ramirez, and Sammy Sosa have recently been under the national and public microscope for steroids. In 2007, Barry Bonds became the sport's new all-time home run king, and his record-setting season was followed by his federal indictment on perjury and obstruction of justice charges.⁷ Bonds faces up to 30 years in prison on the charges, related to a grand jury investigation of steroids and Baseball.⁸ Unfortunately, Bonds, A-Rod, Clemens, Ramirez, and Sosa are not alone amid the swirling controversy, as performance-enhancing drugs are clearly a widespread problem in Baseball. On December 13, 2007, former Senator George Mitchell released a scathing report ("Mitchell Report" or the "Report") indicating that use of performance-enhancing drugs permeates the sport.⁹ 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 organized professional sport in America, Baseball has a long history of assorted conduct violations by players, coaches, and other personnel.¹⁰

This article will first analyze some of Baseball's personal conduct violations and MLB's response to these issues. It also defines conduct by separating the various types of indiscretions into on-the-field and off-the-field conduct violations. The next section discusses the mechanisms by which teams and MLB attempt to regulate personnel conduct. Then some of the most common types of conduct violations—gambling, alcohol and drug use, and violence, respectively—will be discussed. Lastly, this article briefly speculates on the impact of the Mitchell Report and proposes solutions to Baseball's growing personal conduct problem.

This article also will discuss how Baseball's response to these situations, including various punishments and the establishment and increased power of the commissioner, illustrates 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.¹¹ However, Baseball's erratic treatment of the different types of conduct violations also indicates a piecemeal approach, rather than a systemic assault on the larger problem of appalling conduct by its employees.

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 literally 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. 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 thus 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, Baseball still has an obligation to uniformly punish such indiscretions, as they can negatively affect the image of the national pastime.

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's 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 who 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. 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, injuries and death, or criminal penalties related to off-the-field violations can deprive a team of the player’s services, thus directly impacting the outcome of games. For example, while Vick’s dog-fighting activities have nothing to do with the game of football, the Atlanta Falcons lost their star quarterback.¹⁴ Nevertheless, the clear delineation between on-the-field and off-the-field conduct, as described above, is necessary to determine how best to discipline such violations.

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 whose behavior constitutes conduct violations generally face termination of their contracts by their teams, suspensions and fines by MLB, or a combination of all of these.

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

MLB teams try to regulate players’ conduct 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 these provisions.¹⁵ Individual player contracts can obviously deviate from this standard form, especially in the case of players with histories of past conduct problems. However, the termination clause is a standard provision in most MLB contracts.

The UPC includes several provisions that have been used by teams to police personal conduct. 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 not expressly listed in 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.

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 This provision has often been used 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 less morally questionable, but equally actionable sort. Section 5(b) of the UPC contemplates players’ participation in sports other than Baseball.¹⁹ Understandably, teams wish to protect their investments so “sports [that] may impair [the player’s] ability and skill as a baseball player” are banned under the contract.²⁰ Some examples are specifically enumerated, including “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.”²¹ 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.²² While Boone was clearly 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.²³ 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 on public roads.²⁴ While these may not be examples of behavior involving criminal or immoral conduct, teams are justified in demanding and utilizing these clauses that protect their investments.

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.²⁵ 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 interests of the game.”²⁶ The “best interests of the game” clause has been widely used by Baseball’s commissioners to regulate personal conduct. As current Commissioner Bud Selig said, “the intent of the best interests clause was to protect the integrity of and ensure public confidence in the game.”²⁷ 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.”²⁸ 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.”²⁹ 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.³⁰

However, the commissioner’s power to discipline in the “best interests of the game” may be problematic. First, the nebulous standard does not allow MLB players and other personnel to clearly understand what type of behavior is intolerable. 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.³¹ In addition, it is 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.”³² When the commissioner suspends a player for conduct violations, presumably to protect the best interests of the sport, this affects the sport’s competitive balance by depriving the player’s team of his services during the suspension. As a result of the suspension, the team could miss the playoffs or fail to advance in the playoffs.³³ 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 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. Surely no fan, player, coach, or league official wants 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

TODAY’S ATHLETES, COACHES, AND OTHER PROFESSIONAL SPORTS PERSONNEL LIVE UNDER PERPETUAL SCRUTINY, AND EVERY MISSTEP IS INSTANTANEOUSLY SPREAD WORLDWIDE THROUGH THE MEDIA.

behavior.³⁴ 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.³⁵ Schott reportedly called two of her players “million-dollar niggers” and used other racial slurs about Jewish and Japanese personnel.³⁶ Surely it is often easier to invoke the broad “best interests” clause than to try to create an exhaustive list of such offensive behavior.

Because he is theoretically biased only toward protecting the game—rather than any particular team, player, or league—the commissioner is entrusted with making such near-impossible decisions. 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.”³⁷ Despite the concerns mentioned above, the commissioner retains the power to unilaterally take action to protect the game. Further, the Supreme Court of the United States has upheld these broad powers, holding that it is solely in the discretion of the MLB commissioner to determine what is in the best interests of Baseball.³⁸

GAMBLING

There are two distinct types of gambling that have commonly arisen as problems in Baseball: gambling on activities other than Baseball and gambling on the game itself. The consequences for the two types of gambling are drastically different. Players and managers who gamble on things like cards, horses, and other sports suffer image problems and, if their activities are illegal, 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, corrupt the spirit of the sport. 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.³⁹ Thus, as Commissioner 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.”⁴⁰

Gambling Unrelated to Baseball

Outfielder Albert Belle admitted that, during the 1990s, he lost over \$300,000 betting on sports other than Baseball.⁴¹ Commissioner Selig decided that no action was necessary to protect the integrity of the game.⁴² While such high-stakes legal gambling tends to perpetuate the negative image of athletes as overpaid and detached from the average fan, the image ramifications are generally overlooked by the league.⁴³ 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.⁴⁴ Dykstra was criminally prosecuted, which probably contributed to Commissioner Vincent’s view that action was needed to protect the image of the game.⁴⁵ 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.”⁴⁶ Despite the message Vincent purported to send, the Dykstra and Belle cases exemplify the relatively apathetic, and inconsistent, reaction to gambling that does not relate to Baseball. 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.

Gambling on Baseball

Gambling on Baseball represents the ultimate taboo offense for game participants and often results in the sternest possible punishment. As mentioned, 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 also

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 Black Sox and Pete Rose. Both situations resulted in the ultimate punishment and brought much attention to the role and authority of Baseball’s commissioner.

THE BLACK SOX: FIXING THE WORLD SERIES

In 1919, the Chicago White Sox were overwhelming favorites in the World Series against the Cincinnati Reds, but the Reds upset Chicago, five games to three, in the best-of-nine series.⁴⁷ 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 Ed Cicotte, a 29-game winner, and the famed “Shoeless” Joe Jackson.⁴⁸ 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.⁴⁹ While “Shoeless” Joe 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.”⁵⁰ 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, under which their two leagues would be united.⁵¹ 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!”⁵² Indeed, the players remained banned for the rest of their lives, and remain ineligible for the Hall of Fame.⁵³ “Shoeless” Joe and 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.⁵⁴ Nevertheless,

since their offense was so enormous, 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. The Black Sox were banned based simply on the “best interests of the game” power.⁵⁵ 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, Ty Cobb and Tris Speaker had agreed to fix a regular-season series so the Indians could collect the third-place finisher’s share of the World Series bonus.⁵⁶ 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.⁵⁷ In those days, the commissioner did not appoint special prosecutors or ex-senators to investigate such allegations. Instead, despite evidence of their unusually heavy wagering on those games, Landis determined unilaterally that there was not enough evidence to determine that Cobb and Speaker had fixed games.⁵⁸ 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.”⁵⁹

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.”⁶⁰ 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.⁶¹ The rule provides that an MLB employee “shall be declared permanently ineligible” if he

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.⁶²

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.⁶³ 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 that is implicit to the commissioner under the “best interests of Baseball” doctrine.

PETE ROSE: BETTING ON GAMES HE MANAGED

Ironically, the anti-gambling rule partially generated by Cobb’s actions would be used against the man who, decades later, would break Cobb’s 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.⁶⁴ Rose, who at the time was being investigated by the IRS for tax evasion, agreed to accept status as “permanently ineligible” to work in Baseball.⁶⁵ Part of the deal with Commissioner A. Bartlett Giamatti was that Rose would have the right to apply for reinstatement.⁶⁶ However, Commissioners Vincent and Selig, Giamatti’s successors, have both clearly indicated that Rose should not expect reinstatement during their tenures.⁶⁷

In the years following Rose’s banishment, there was speculation that Rose’s chances for reinstatement might be improved 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 better has no duty to perform.”⁶⁸ 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 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 better has a

duty to perform, shall be declared permanently ineligible.”⁶⁹ 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, Giamatti announced in a press conference that he believed Rose had bet on Reds games, and therefore had stained and disgraced the game.⁷⁰ Apparently, Giamatti would have invoked Rule 21(d) (2) to declare Rose permanently ineligible even without Rose’s acquiescence. Rose will presumably never be reinstated, as he later admitted to betting on Reds games that he managed.⁷¹ In the interim, Rose spent 14 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.”⁷²

Indeed, even at the time of the Rose investigation, 14 years before Rose’s admission to betting on Reds games, Giamatti understood the seriousness of Rose’s transgressions. Giamatti “told sportscaster Howard Cosell, in a private phone call . . . that by banning Rose he was ‘ridding baseball of a cancer.’”⁷³ 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.

THE NATIONAL PASTIME SHOULD BE UNTAINTED, AND THE LEAGUE SHOULD PUNISH SEVERELY ANY PERSONNEL WHO BRING THE PASTIME INTO DISREPUTE.

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. By Rose’s reasoning, his bets gave him no more influence on those games than he would otherwise have 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 injuries or inside information. I never allowed my wagers to influence my baseball decisions. So in my mind, I wasn’t corrupt.”⁷⁴ Regardless, Rule 21 is clear that permanent ineligibility is the consequence for “bet[ting] any sum . . . upon any game in connection with which the better has a duty to perform.”⁷⁵ In addition, Rose’s story has changed several times since the initial investigation. The bright line of Rule 21(d)(2) makes the decision easier for the commissioner. The rule was 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.⁷⁶ Hall of Fame president Edward Stack stated that the rule change was not aimed at Pete Rose.⁷⁷ Nevertheless, the rule change does illustrate another Pete Rose–Ty Cobb irony: Cobb is in the Hall of Fame despite having allegedly fixed games (and gambled on them) on the field 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 was quelled, as Baseball spokesman Rich Levin said, “as far as we’re concerned, nothing has changed.”⁷⁸

ALCOHOL AND DRUGS

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

Baseball players have a long and checkered history of problems associated with recreational alcohol. Hall of Famer Mickey Mantle is reputed to have played drunk on numerous occasions, leaving many to wonder how improved Mantle’s already staggering statistics could have been if not for his alcohol abuse.⁷⁹ 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.”⁸⁰ Both Martin and Mantle died from their alcohol abuse, Martin in a DUI crash and Mantle from liver cancer.⁸¹ 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 1998.⁸²

In addition to Martin, numerous Baseball players and managers have had alcohol-related motor vehicle accidents. For example, in 1991 Lenny Dykstra—the same Dykstra involved in gambling scandals earlier that year—was convicted of drunk driving when he got into an accident where he injured himself and teammate Darren Daulton.⁸³ In that instance, Commissioner 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.”⁸⁴ 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.⁸⁵ Obviously, 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.”⁸⁶

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.”⁸⁷ Interestingly, however, 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 severely punishing 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.”

Perhaps some believe 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 that alcohol impacts player performance. For example, the day after a night of moderate drinking, a man’s growth hormone levels decrease by 42 percent on average as well as there being an average 25 percent decrease in testosterone.⁸⁸ This would absolutely decrease overall athletic performance.⁸⁹ Accordingly, some teams have begun taking action to deter alcohol use. In 2007, after drunken Cardinals pitcher Josh Hancock died in a car accident, the Cardinals, Yankees, and Mariners halted the practice of making beer available in the locker rooms.⁹⁰ 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.

Recreational Drug Use: Best Interests of Baseball Affected

Baseball players have an even more infamous relationship with illegal recreational drugs than with alcohol, and 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 dan-

gerous than some of the criminal alcohol conduct, discussed above, that went unpunished. 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 often has been unable to adequately punish drug-offending players. Even when teams and Baseball have attempted to discipline such transgressions, union action and lenient arbitrators have knocked the teeth out of the punishments.

For example, in 1997, Anaheim Angel Tony Phillips was arrested for buying cocaine from an undercover agent.⁹¹ The Angels tried to suspend Phillips, but arbitration precedents required conviction before a player could be suspended.⁹² Michael Eisner, the head of Disney and corporate owner of the Angels, was especially sensitive to the family appeal of the national pastime.⁹³ Eisner strongly criticized Baseball arbitration precedents.⁹⁴ 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.”⁹⁵

In 1984, Kansas City Royal Willie Wilson was suspended for the season by Commissioner Bowie Kuhn for being convicted of attempting to buy drugs.⁹⁶ The arbitrator in Wilson’s case agreed that MLB could legitimately punish players for drug use to protect the “best interests of Baseball.”⁹⁷ The arbitrator in that case articulated Baseball’s view as to why severe punishments were necessary even 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.”⁹⁸ 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, in the arbitrator’s view, drugs do not constitute quite the threat to the integrity of the sport as Baseball would argue.

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 45 days in federal prison (as well as being sentenced to five years additional probation) for crossing the Mexican border with controlled substances.⁹⁹ 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.¹⁰⁰ Despite acknowledging Baseball’s interest in protecting its image, the arbitrator reinstated the contract and reduced the suspension to 60 days.¹⁰¹ 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.¹⁰² Again, the arbitrator undermined Baseball’s claim that drugs constituted a serious threat to the integrity of the game.

In 1984, Wilson’s Kansas City teammate Vida Blue was convicted of possession of cocaine and sentenced to a prison term.¹⁰³ At the time of the incident, there was no official agreement between the MLBPA and MLB regarding drug-related incidents. Instead, Kuhn had promulgated “The Commissioner’s Rules,” which banned use, possession, or trafficking of illegal drugs and provided that in “serious cases,” discipline might include “suspension or dismissal and termination of contract guarantees.”¹⁰⁴ Kuhn suspended Blue for the remainder of the 1984 season and cited 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.¹⁰⁵ Kuhn would have imposed a lifetime ban, but refrained from doing so based on Blue’s prison term and his cooperation with federal prosecutors.¹⁰⁶

Even when Baseball is successful in severely punishing drug violators like 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, Atlanta Braves outfielder Otis Nixon was suspended for much of the season by Commissioner Vincent for testing positive for cocaine.¹⁰⁷ Despite the fact that Nixon had 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.¹⁰⁸

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.¹⁰⁹ Strawberry was only available to the Yankees because the San Francisco Giants had released him for violating the conduct clause in his contract when he failed a drug test.¹¹⁰ Strawberry fought the release by the Giants, claiming that since he had already been suspended by the commissioner, his release constituted double jeopardy.¹¹¹ The case went to arbitrator George Nicolau, and the Giants agreed to pay \$125,000 of Strawberry's next contract.¹¹² 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 the second year.¹¹³ 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 lawsuit 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.¹¹⁴

Strawberry's drug problems even reached as far as the oval office. President Clinton was so disturbed by what Strawberry's story said about Baseball's ability to police its drug offenders, he sent his presidential drug adviser to meet with George Steinbrenner and other Baseball figures about adopting tougher drug policies.¹¹⁵

The treatments of Nixon and Strawberry are just two of the many examples illustrating that, despite what team owners may preach about preserving 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

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 MLB and drugs.¹¹⁶

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 to punish some violations even when the commissioner desires such punishment. Howe's long history of drug suspensions from Baseball began in 1983, when Howe was suspended from the Dodgers for one month after failing a drug test.¹¹⁷ Later that season, Howe was suspended for the playoffs, again for a failed drug test.¹¹⁸ Howe tested positive again during the ensuing off-season, and was suspended for the entire 1984 season.¹¹⁹ Howe was suspended a total of six times for drugs before being rewarded by the Yankees with an impressive contract for the 1992 season.¹²⁰

After serving the last of these six suspensions, Howe applied for reinstatement with Baseball.¹²¹ Though Commissioner Vincent believed that Howe deserved a lifetime ban, he decided to give Howe "yet another chance" to return to Baseball.¹²² In order to prove that he was drug-free, Howe was required by the commissioner to spend a year in the minor leagues.¹²³ During this time, Howe was required to participate in regular drug testing, "possibly as often as every other day if necessary."¹²⁴ 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."¹²⁵ Vincent subsequently and frequently referred to this as Howe's "last chance agreement."¹²⁶

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.¹²⁷ Howe was sentenced to three years' probation, a fine, and community service.¹²⁸ Vincent banned Howe from Baseball for life for "violat[ing] Baseball's drug policy,"¹²⁹ saying, "there is no place for illegal drug use in Baseball."¹³⁰

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."¹³¹ 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.¹³² 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 interests to "show its membership and the public that persistent drug use ... will not be tolerated. ... Baseball's credibility is at stake."¹³³ Therefore, Howe received the first lifetime ban for drug use in the long history of Baseball.

Despite Baseball's seeming generosity, the MLBPA challenged the suspension and the issue was brought before arbitrator George Nicolau.¹³⁴ 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.¹³⁵ 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."¹³⁶ Nicolau reasoned that since "the Commissioner's medical adviser had cautioned against 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."¹³⁷ 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."¹³⁸

Adding insult to the commissioner's 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.¹³⁹ 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.¹⁴⁰ 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."¹⁴¹ 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."¹⁴² Nicolau asserted that "a penalty of this magnitude should serve as a clear warning that drug use will continue to be treated with severity."¹⁴³ Commissioner Vincent did not concur, calling it a "joke" that seven offenses were not enough, but that eight would be.¹⁴⁴

It is important to note that Howe's total suspension of 119 days for his seventh offense cost him almost \$2 million. 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 employment opportunities far beyond those that might be available to a common person with seven drug violations on his or her record. While it

GAMBLING BY PLAYERS AND COACHES DIRECTLY INVOLVED IN THE GAME DIMINISHES THE INTEGRITY OF THE COMPETITION.

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 common person would not have been coddled as Nicolau's orders allowed.

OFF-THE-FIELD DRUGS: CONCLUSION AND 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."¹⁴⁵ However, the policy stresses that it will consider equally "the welfare of both the individual and the game."¹⁴⁶ 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."¹⁴⁷

Nevertheless, MLB consistently faces stiff challenges from the MLBPA any time it attempts to institute severe punishments to drug- and alcohol-abusing players. 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."¹⁴⁸ 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.¹⁴⁹

Unfortunately, however, the above examples demonstrate that a player's ability to help the team win games will generally overcome any drug- or alcohol-related concerns about

that player. 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 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 arbitrators dislike the nature of the commissioner's ability to preclude leaguewide 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.

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

As mentioned above in the section "Defining Conduct," 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 if not for his alcohol abuse.¹⁵⁰ 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 effects 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 contribute to their teams winning 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 influenced by the player's poor performance.¹⁵¹

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 performance-enhancing drugs. The Mitchell Report produced startling revelations about the widespread use of steroids in Baseball, and could still 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 2011.¹⁵² Indeed, the Mitchell Report concluded that steroid use "has not been an isolated problem involving just a few players or a few clubs."¹⁵³ In fact, "each of the thirty clubs has had players who have been involved with performance enhancing substances at some time in their careers."¹⁵⁴ 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.¹⁵⁵

In 2002, Baseball implemented its first mandatory random drug testing of players.¹⁵⁶ 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."¹⁵⁷ All of these suspensions are without pay.¹⁵⁸ The Mitchell Report concluded that Baseball's drug-testing program has been successful in that "detectable steroid use appears to have declined."¹⁵⁹ Nevertheless, the laundry list of current and former players who have reportedly tested positive for steroids, human growth hormone ("HGH"), or other performance-enhancing drugs is growing daily, and includes Manny Ramirez, Jose Guillen, Paul Byrd, Matt Williams, Rick Ankiel, Troy Glaus, Gary Matthews Jr., Mike Cameron, Ken Caminiti, Rafael Palmeiro, Sammy Sosa, and many others.¹⁶⁰ The news about Palmeiro, a potential Hall of Famer, was particularly galling after his adamant, finger-pointing denial while testifying before Congress.¹⁶¹

In addition to these positive tests, nearly 90 major leaguers were named in the Mitchell Report, including Barry Bonds, Andy Pettitte, and seven-time Cy Young Award winner Roger Clemens.¹⁶² Alex Rodriguez, who many hoped would someday restore the integrity of the home run record from the Bonds' steroid taint, admitted in 2009 to using steroids.¹⁶³ Ac-

ording to the Mitchell Report, former MVP Caminiti once estimated that at least half of the major leaguers were using steroids.¹⁶⁴ 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."¹⁶⁵ While HGH was added to the CBA as a banned substance in 2005, this is meaningless without the ability to test for it.¹⁶⁶

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.¹⁶⁷ As mentioned above, the integrity of the game is also in jeopardy whenever anything other than natural competitive spirit influences the outcome of games.¹⁶⁸ 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."¹⁶⁹

However, even if performance-enhancing drugs were legal, the game would still be harmed. Drugs like steroids and HGH give some players a chemically created advantage over other players, and thus their use is considered cheating. The image of the game is tarnished if its stars are viewed as cheaters. Notwithstanding the cheating concern, Baseball is tarnished by the image of its biggest stars shooting up drugs into their bodies with hypodermic needles.¹⁷⁰ 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.¹⁷¹ Indeed, the Mitchell Report states that "the widespread use of these substances raises questions about the validity of records and their comparability across different eras."¹⁷²

It appears from his indictment and his inclusion in the Mitchell Report that Bonds' use of performance-enhancing drugs is now well-documented.¹⁷³ 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."¹⁷⁴ The coming prosecution, and potential subsequent league action, will illustrate the seriousness with which Baseball views performance-enhancing drugs.

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, the Report's effect will be shown when the CBA is renegotiated in 2011. However, one thing is known: Baseball will not likely be able to punish players for steroid use that occurred prior to 2002. Amazingly, performance-enhancing drugs were never specifically prohibited before the 2002–2006 Collective Bargaining Agreement.¹⁷⁵ Indeed, A-Rod admitted to steroid use during this period and received no punishment.¹⁷⁶

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.¹⁷⁷ In addition, the indictment concerns testimony Bonds gave in 2003 about his alleged steroid use from 1999–2002, before the most recent CBA.¹⁷⁸ Bonds has never tested positive for steroids in league 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 Pete Rose, Bonds is considered one of the greatest to ever play the game. However, unlike Rose, Bonds' on-field accomplishments are also tainted, as any steroid use would surely have positively affected his performance. Bonds will be a sure Hall of Famer unless the commissioner takes action preventing his induction.

Currently still a free agent and effectively retired, Bonds faces image problems for 19 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."¹⁷⁹ Thus, 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 likely convince at least one 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 is not in 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, because he serves on the board of directors of the Boston Red Sox, and because his personal law firm was used to conduct the investigation.¹⁸⁰ Secondly, since this distrust contributed to the Mitchell investigation's being stonewalled by the players and the MLBPA, its findings included no player testimony. Further, the overwhelming majority of the Mitchell Report's evidence was supplied by two sources, both of whom were former employees of major league teams.¹⁸¹ Some have argued that testimony from two disgruntled employees simply is not enough to publicly accuse such a high number of players.¹⁸² Thus, many have dismissed the Report's findings as "unsubstantiated allegations."¹⁸³ Nevertheless,

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 fact that testimony and evidence provided by only two witnesses produced nearly 90 names cannot help but fuel speculation that the actual number of steroid users was even higher. Therefore, rather than the player names provided, the real importance of the Mitchell Report will be revealed by whether or not Baseball is "shocked into action" to aggressively address drug use.¹⁸⁴ 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.

"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 belie 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.¹⁸⁵ The hearing took place during the World Series and it was announced he would serve a 50-game suspension.¹⁸⁶ However, this was not the typical steroids case. Romero had purchased a supplement from a local General Nutrition Store ("GNC") that was supposed to be approved for use under Baseball's rules.¹⁸⁷ He personally checked the label, gave the product to his nutritionist, checked with his strength and conditioning coach, and then went for a second opinion from another nutritionist.¹⁸⁸ All sources claimed the supplement was approved. Furthermore, the MLBPA had previously released a memorandum that any supplements purchased over the counter at a GNC were approved.¹⁸⁹ However, the manufacturer of the supplement omitted a banned ingredient from the label.¹⁹⁰ Although Romero could not realistically have known, Baseball still found him negligent for not discovering the banned ingredient.¹⁹¹

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 2009.¹⁹² 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.¹⁹³ The suit by Baseball was eventually dropped.¹⁹⁴ Oddly, Baseball found it fit to look at the circumstances and facts surrounding this 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.

VIOLENCE AND OTHER CRIMINAL CONDUCT

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 inevitably 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."¹⁹⁵ By this logic, off-the-field criminal conduct should be treated no differently than on-the-field offenses.

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.¹⁹⁶ Thus, before there was a commissioner, this reasoning prevailed in Baseball. According to this argument, if a player is guilty of a crime and is punished 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 league and team may still suffer significant image problems due to the player's behavior, and other 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 multimillion-dollar contracts despite their troublesome behavior.¹⁹⁷ 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."¹⁹⁸

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, undress his weaknesses, reveal him as a loser in public."¹⁹⁹ 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, as is the base runner who barrels into and over 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 at what they do. 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, but 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, Barry Bonds once faced a domestic violence charge from his ex-wife.²⁰⁰ After the proceeding, the judge asked Bonds for an autograph.²⁰¹ 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.²⁰² 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 York Mets manager Dallas Green when he said his method for coping with losses was to "just beat the hell out of my wife."²⁰³ 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.²⁰⁴

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 was suspended for multiple games when he pled guilty to abusing his wife.²⁰⁵ Cordero's case represents a rare occasion when Baseball's commissioner utilized the "best interests of Baseball" clause for this type of offense.²⁰⁶ The Red Sox also took action against Cordero, placing him on "administrative leave" upon learning that a previous wife also had accused him of physical abuse.²⁰⁷ 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.²⁰⁸

On-the-Field Violence: Detrimental to "Best Interests"

Sanctioning players and other MLB personnel for on-the-field deviant conduct 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 John Roseboro in the head with a bat.²⁰⁹ 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.²¹⁰ 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.²¹¹ 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."²¹² Baltimore Oriole Roberto Alomar spat in umpire John Hirshbeck's face while arguing a call.²¹³ Alomar was suspended five games in the "best interests of Baseball."²¹⁴ 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 that *Sports Illus-*

trated called “ludicrous, galling, appalling—choose your adjective!”²¹⁵ It is debatable whether the best interests of Baseball were served by allowing a star player to compete in the playoffs, while consequently removing the sting from his punishment.

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 cooperating with the investigation.²¹⁶ Indeed, nearly all players refused to meet with the Mitchell investigators.²¹⁷ 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.²¹⁸

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.²¹⁹ Similarly, Baseball’s provisions addressing on-the-field gambling—Rule 21’s

AS THE MITCHELL REPORT SHOWS, BASEBALL KEPT ITS HEAD IN THE SAND ABOUT STEROID ABUSE FOR NEARLY TWO DECADES.

automatic permanent ineligibility—provides a meaningful deterrent.²²⁰ Baseball’s approach to on-the-field violence also has 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 bargained. 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 also may 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.”²²¹ 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 team also should 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 Steve Howe and Darryl Strawberry in multimillion-dollar contracts despite their multiple conduct 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 also should refuse to approve new contracts for players with, for example, three conduct violation strikes against them. 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 in 1985 that performance-enhancing drugs would

damage the integrity of the game, Baseball did not “push hard” for testing until 2002.²²² If Baseball had addressed the 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. ♦

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The author wishes to thank Professor Robert E. Shepherd, in fond memory, and John M. Theobald for his comments and research assistance.

ENDNOTES

1. Alex Long, *The Deteriorating Face of American Sports*, WALTONIAN, Sept. 12, 2007, available at <http://media.www.waltonian.com/media/storage/paper752/news/2007/09/12/Sports/The-Deteriorating-Face.Of.American.Sports-2964154.shtml>.

2. Michael Vick Released From Federal Prison in Kansas, Mar. 25, 2009, <http://www.foxnews.com/story/0,2933,510500,00.html>; Vick Sentencing Minutes, <http://assets.espn.go.com/media/pdf/071210/vicksentencing.pdf> (last visited Dec. 12, 2007); Lester Munson, *Tough Sentence Reflects Judge's Displeasure With Vick*, Dec. 11, 2007, <http://sports.espn.go.com/nfl/columns/story?i=3148826>. Vick pled guilty to similar charges in Virginia state court. *Vick Pleads Guilty to Dogfighting Charge*, Nov. 25, 2008, <http://www.nytimes.com/2008/11/26/sports/football/26vick.html>.

3. *Vick Eligible to Play in Third Week*, Sept. 4, 2009, <http://sports.espn.go.com/nfl/news/story?id=4442627>.

4. *Commissioner Won't Reduce Jones' Season-long Ban*, Nov. 7, 2007, <http://sports.espn.go.com/nfl/news/story?id=3097764>.

5. Pablo S. Torre & Caitlin Moscatello, *Life on and Off the Road*, SPORTS ILLUSTRATED, Nov. 5, 2007, available at 2007 WLNR 21384846.

6. *Leafs F Bell Cleared by Substance Abuse Doctors, Will Start 15-Game Suspension*, Oct. 2, 2007, <http://sports.espn.go.com/nhl/news/story?id=3046952>.

7. Barry M. Bloom, *Bonds Indicted on Federal Charges*, Nov. 16, 2007, http://mlb.mlb.com/news/article.jsp?ymd=20071115&content_id=2301117&vkey=news_mlb&fext=.jsp&c_id=mlb [hereinafter “Bonds Indicted”].

8. *Id.*

9. GEORGE J. MITCHELL, DLA PIPER US LLC, REPORT TO THE COMMISSIONER OF BASEBALL OF AN INDEPENDENT INVESTIGATION INTO THE ILLEGAL USE OF STEROIDS AND OTHER PERFORMANCE ENHANCING SUBSTANCES BY PLAYERS IN MAJOR

LEAGUE BASEBALL (Dec. 13, 2007), http://assets.espn.go.com/media/pdf/071213/mitchell_report.pdf [hereinafter “MITCHELL REPORT”].

10. *Articles Show “Base Ball” Was Played in 1823*, <http://static.espn.go.com/mlb/news/2001/0708/1223744.html> (last visited June 30, 2009).

11. See discussion, *infra*, “MLB Regulation of Conduct: The Major League Agreement and the Commissioner’s ‘Best Interests of the Game’ Power.”

12. BASIC AGREEMENT BETWEEN THE AMERICAN LEAGUE OF PROFESSIONAL BASEBALL CLUBS AND THE NATIONAL LEAGUE OF PROFESSIONAL BASEBALL CLUBS AND MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION, UNIFORM PLAYER’S CONTRACT, 591 PLI/Pat 385, 395 (2000) [hereinafter “UPC”].

13. See discussion, *infra*, “Alcohol and Drugs.”

14. In Vick’s absence in 2007, the Falcons went 4-12 and lost their head coach. Mark Bradley, *End Falcons’ Cursed Season*, ATLANTA J. CONST., Dec. 16, 2007, available at http://www.ajc.com/blogs/content/shared-blogs/ajc/sportscolumns/entries/2007/12/16/end_falcons_cur.html.

15. UPC, *supra* note 12.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. Tyler Kepner, *With the Yankees Behind Him, Boone Looks Forward*, PITT. POST-GAZETTE, Mar. 13, 2005, at C11, available at 2005 WLNR 3898497.

23. *Id.*

24. Kent Says He’s OK; *Sabeen Blows Fuse*, SAN DIEGO UNION-TRIB., Apr. 4, 2002, at D8, available at 2002 WLNR 13954528.

25. Kenesaw Mountain Landis Bio Page, <http://www.baseballhalloffame.org/hofers/detail.jsp?playerId=492574> (last visited June 30, 2009).

26. Sean Bukowski, *Flag on the Play: 25 to Life for the Offense of Murder*, 3 VAND. J. ENT. L. & PRAC. 106, 109–10 (2001).

27. Bud Selig, *One of Baseball’s Enduring Myths: “The All-Powerful Commissioner” Never Was an Accurate Portrayal*, SPORTING NEWS, Mar. 14, 1994, at 8.

28. MAJOR LEAGUE AGREEMENT, art. II, § 2(b), (c) (2003).

29. *Id.* at § 2(c).

30. See recommendation for a separate “Department of Investigations,” *infra*, “Conclusion—Some Suggested Solutions.”

31. Bukowski, *supra* note 26, at 112. See discussion *infra*, “Team Regulation of Conduct: The Uniform Player’s Contract” (comparing the treatment of Lenny Dykstra with that of Albert Belle); see also discussion *infra* “MLB Regulation of Conduct: The Major League Agreement and the Commissioner’s ‘Best Interests of the Game’ Power” (comparing the treatment of the Black Sox with that of Ty Cobb and Tris Speaker).

32. Bukowski, *supra* note 26, at 110.

33. This ominous 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*, May 19, 2007, http://sports.espn.go.com/espn/columns/story?columnist=wojciechowski_gene&id=2875736&sportCat=nba.

34. However, expressly listing some of the most common offenses would clarify matters. See recommendations, *infra*, “Conclusion—Some Suggested Solutions.”

35. Craig F. Arcella, *Major League Baseball’s Disempowered Commissioner: Judicial Ramifications of the 1994 Restructuring*, 97 COLUM. L. REV. 2420, 2447 (1997).

36. Marge Schott Suspended, Fined for Racial Slurs, JET, Feb. 22, 1993, available at http://findarticles.com/p/articles/mi_m1355/is_n17_v83/ai_13459219.

37. Arcella, *supra* note 35, 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 interest. Therefore, the commissioner’s neutrality may not always be beyond question.

38. *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).

39. 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 Bettor or Worse*, BALT. 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).

40. PAUL C. WEILER, LEVELING THE PLAYING FIELD: HOW THE LAW CAN MAKE SPORTS BETTER FOR FANS 61 (2000).

41. *Id.* at 58.

42. *Id.*

43. 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 have 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.

44. WEILER, *supra* note 40, at 58.

45. Commissioners usually use the “best interests of the game” provision to protect Baseball’s image. MAJOR LEAGUE AGREEMENT, art. I, § 2(b) (2005).

46. I. MARTIN J. GREENBERG & JAMES T. GRAY, SPORTS LAW PRACTICE 508 (1998).

47. Arcella, *supra* note 35, at 2421.

48. Cicotte had an added incentive to get back at Baseball, and his team, while earning an extra buck. Cicotte had a bonus provision in his contract that kicked in when he won 30 games. After earning his 29th victory, White Sox owner Charles Comiskey ordered the White Sox manager to bench Cicotte to avoid paying the bonus. WEILER, *supra* note 40, at 38. "Shoeless" Joe got his nickname because he once played a game in his stockings after disposing of some uncomfortable spikes. See "Shoeless" Joe Jackson Official Website Fast Facts, <http://www.shoelessjoejackson.com/about/facts.html> (last visited June 30, 2009). "Shoeless" Joe's 1919 World Series statistics seem to support his claim that he did not try to lose: Jackson batted .375 and committed zero errors in the field. "Shoeless" Joe Jackson Official Website Biography, <http://www.shoelessjoejackson.com/about/biography.html> (last visited June 30, 2009).

49. WEILER, *supra* note 40, at 38.

50. *Id.* Interestingly, a treasure trove of documents about the Black Sox was auctioned off in 2007. *Chicago History Museum Wins Auction of Black Sox Papers*, Dec. 14, 2007, http://archives.chicagotribune.com/2007/dec/14/local/chi-blacksox-papers_webdec14. While some hoped the auction might reveal previously unknown facts about the Black Sox—and perhaps even clear Jackson's name—no such revelations have thus far come to light.

51. Bukowski, *supra* note 26, at 109–10; Landis, *supra* note 25.

52. WEILER, *supra* note 40, at 38.

53. 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 fictionalized both on the page and on the big screen. See generally W.P. KINSELLA, *SHOELESS JOE* (1982); *FIELD OF DREAMS* (Columbia Pictures 1989).

54. WEILER, *supra* note 40, at 38.

55. See Bukowski, *supra* note 26, at 109–10 and accompanying text.

56. WEILER, *supra* note 40, at 38.

57. *Id.*

58. *Id.*

59. GREENBERG & GRAY, *supra* note 46, at 472 (citing MLB Rule 21).

60. *Id.* (citing MLB Rule 21(a)).

61. *Id.*

62. *Id.*

63. *Id.* (citing MLB Rule 21(a)).

64. WEILER, *supra* note 40, at 34.

65. Rose pled guilty to evading taxes on more than \$400,000 in unreported revenue, and went to jail. *Id.*

66. *Id.*

67. *Id.* at 35.

68. GREENBERG & GRAY, *supra* note 46, at 472 (citing MLB Rule 21(d)(1)).

69. *Id.* (citing MLB Rule 21(d)(2)).

70. WEILER, *supra* note 40, at 34–35.

71. Mike Dodd, *Recognizing "I'm 14 Years Late," Rose Admits He Bet on Baseball*, Jan. 5, 2004, http://www.usatoday.com/sports/baseball/2004-01-05-rose_x.htm.

72. *Id.*

73. WEILER, *supra* note 40, at 34–35.

74. Dodd, *supra* note 71.

75. GREENBERG & GRAY, *supra* note 46, at 472 (citing MLB Rule 21(d)(2)).

76. Murray Chass, *Board Says Rose Is Ineligible for Hall of Fame*, N.Y. TIMES, Feb. 5, 1991, available at <http://query.nytimes.com/gst/fullpage.html?res=9D0CE4DB163EF936A35751C0A967958260&sec=&spone=&pagewanted=print>.

77. *Id.*

78. Dodd, *supra* note 71.

79. See Eric Neel, *Bonds or Mantle: Who Is the Greater Disappointment?* Aug. 13, 2007, <http://sports.espn.go.com/espn/page2/story?page=neel/070809> (arguing that Mantle's use of a substance that diminished his enormous ability is more disappointing for a baseball fan than Bonds' alleged use of performance-enhancing drugs).

80. WEILER, *supra* note 40, at 81.

81. *Id.*

82. DAVID WELLS & CHRIS KRESKI, *PERFECT I'M NOT: BOOMER ON BEER, BRAWLS, BACKACHES, AND BASEBALL* (2003).

83. WEILER, *supra* note 40, at 86.

84. *Id.*

85. *Id.* at 85.

86. WEILER, *supra* note 40, at 81.

87. *Id.* at 83. See discussion of recreational drug use, *infra*, "Recreational Drug Use: Best Interests of Baseball Affected."

88. *Alcohol and Bodybuilding: Do They Mix?* <http://www.teenbodybuilding.com/bigalcohol.htm> (last visited June 30, 2009).

89. *Id.*

90. Jim Street, *Mariners Review Alcohol Policy*, May 9, 2007, http://seattle.mariners.mlb.com/news/article.jsp?ymd=20070509&content_id=1955014&vkey=news_sea&fext=.jsp&c_id=sea.

91. WEILER, *supra* note 40, at 88.

92. *Id.*

93. 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 \$1.25 million an episode, or about \$30 million 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.*

94. *Id.*

95. *Id.*

96. *Id.* at 64.

97. *Id.*

98. *Id.*

99. Major League Baseball Players Ass'n v. Comm'r of Major League Baseball, Grievance 92-7, Panel Dec. 94, 548 PLI/Pat 539, 551 (1999) (Nicola, Arb.) [hereinafter "Howe Decision"].

100. *Id.* at 551–52.

101. *Id.*

102. *Id.*

103. *Id.* at 544–47 (discussing Wilson/Martin, Panel Dec. 54, Bloch 1984).

104. *Id.*

105. *Id.*

106. *Id.* at 548–49.

107. WEILER, *supra* note 40, at 82.

108. *Id.*

109. David Lennon, *The Strawberry Signing: Strange but True, Straw's a Yankee*, NEWSDAY, June 20, 1995, at A62, available at 1995 WLNR 517081. Strawberry's other transgressions, besides drug violations, before signing his Yankees contract included the following: allegedly breaking his wife's nose in 1986; arrest for assaulting his wife with a deadly weapon in 1990; alcohol and drug rehab in 1990 and 1994; significant jail time for conviction on tax evasion in 1995; and a court order to pay over \$300,000 in delinquent spousal and child support payments. *Id.*

110. GREENBERG & GRAY, *supra* note 46, at 508. Strawberry would not have been available to the Giants if the Dodgers had not released him because of his indictment for tax evasion. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. Michael T. Flannery, *Affairs of the Heart*, 10 VILL. SPORTS & ENT. L.J. 211, 271 (2003).

115. *Drug Policy Takes a Hit*, MILWAUKEE J. SENTINEL, June 29, 1995, at 4C.

116. Similarly, Miami Dolphins running back Ricky Williams has earned the moniker of "poster child of the NFL and drugs." In 2007, Williams returned from his fourth suspension for positive drug tests. See *Reinstated Ricky Williams Rejoins Dolphins*

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Starting Monday, Nov. 16, 2007, <http://sports.espn.go.com/nfl/news/story?id=3111806> (last visited June 30, 2009).

117. WEILER, *supra* note 40, at 59.
118. *Id.*
119. *Id.*
120. *Id.*
121. Howe Decision, *supra* note 99, at 562.
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.* at 585.
127. WEILER, *supra* note 40, at 59.
128. *Id.*
129. Howe Decision, *supra* note 99, at 541–42 (citing Exhibit 4, Commissioner Vincent’s letter to Steve Howe).
130. WEILER, *supra* note 40, at 61.
131. *Id.*
132. *Id.* at 60.
133. Howe Decision, *supra* note 99, at 578.
134. See generally Howe Decision, *supra* note 99.
135. *Id.*
136. *Id.* at 581.
137. WEILER, *supra* note 40, at 61.
138. Howe Decision, *supra* note 99, at 587–88.
139. *Id.* at 585.
140. *Id.*
141. *Id.*
142. WEILER, *supra* note 40, at 61.
143. Howe Decision, *supra* note 99, at 592–93.
144. WEILER, *supra* note 40, at 61.
145. Howe Decision, *supra* note 99, at 544–47.
146. *Id.*
147. *Id.* The drug policy also provides for scaled automatic suspensions for positive tests. Random, mandatory drug testing was implemented in 2002. See discussion, *infra*, “On-the-Field Drug Violations: Performance-Enhancing Drugs.”
148. Howe Decision, *supra* note 99, at 589.
149. WEILER, *supra* note 40, at 82.
150. See Neel, *supra* note 79 and accompanying text.
151. Additionally, suspensions and criminal sanctions can deprive teams of the players’ services, also affecting the teams’ ability to win games. See Vick discussion, *supra*, “Introduction.”
152. Donald Fehr, MLBPA chief and staunch opponent of drug testing, recently resigned and left a “mixed legacy.” *Fehr Leaving Mixed Legacy*, June 23, 2009, <http://www.chicagotribune.com/sports/chi-23-fehr-jun23,0,4909260.story>. Performance-enhancing drug use spiraled out of control during Fehr’s watch, and the next CBA negotiations could bring drastic changes without his involvement.
153. MITCHELL REPORT, *supra* note 9, at SR-1.
154. *Id.*
155. Barry M. Bloom, *Selig Announces Steroid Investigation*, Mar. 30, 2006, http://mlb.mlb.com/news/article.jsp?ymd=20060330&content_id=1374385&vkey=news_mlb&fext=.jsp&c_id=mlb.
156. Drug Policy in Baseball Timeline, http://mlb.mlb.com/mlb/news/drug_policy.jsp?content=timeline (last visited June 30, 2009).
157. 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).

158. *Id.*
159. MITCHELL REPORT, *supra* note 9, at SR-1.
160. See Steroids Suspensions, 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.
161. *Restoring Faith in America’s Pastime: Evaluating Major League Baseball’s Efforts to Eradicate Steroid Use: Hearing Before the H. Comm. on Gov’t Reform*, 109th Cong. 307 (2005) (testimony of Rafael Palmeiro), available at <http://ftp.resource.org/gpo.gov/hearings/109h/23038.pdf>; see also David Mayo, *Liar, Liar, Grace Under Fire*, GRAND RAPIDS PRESS, Oct. 9, 2007, at D5, available at 2007 WLNR 19846605.
162. MITCHELL REPORT, *supra* note 9, at 169.
163. *A-Rod Admits Taking PEDs During Three-Year Period*, <http://sports.espn.go.com/mlb/news/story?id=3894847> (last visited June 30, 2009) [“A-Rod”].
164. MITCHELL REPORT, *supra* note 9, at SR-2.
165. *Id.* at SR-1.
166. *Id.* at SR-13.
167. *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 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.
168. See discussion, *supra*, “Defining Types of Conduct.”
169. MITCHELL REPORT, *supra* note 9, at 4.
170. *Id.* at 171 (“McNamee injected Clemens in the buttocks four to six times with testosterone.”).
171. 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? Do 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 40s 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.
172. MITCHELL REPORT, *supra* note 9, at 4.
173. *Id.* at 113.
174. *Bonds Indicted*, *supra* note 7.
175. Drug Policy in Baseball Timeline, *supra* note 156. 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, ¶ 9 (Apr. 5, 1971) (“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 forgo disciplining players for past offenses revealed in the report. MITCHELL REPORT, *supra* note 9, at SR-33.
176. *A-Rod*, *supra* note 163.
177. 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 if hard evidence surfaces of steroid use by Bonds prior to 2002.
178. *Bonds Indicted*, *supra* note 7.
179. *Id.*
180. Howard Bryant, *Friction and Fractures Erode Faith in Mitchell’s Investigation*, Dec. 11, 2007, <http://sports.espn.go.com/mlb/news/story?id=3142651> (“neither Mitchell nor Selig anticipated the degree to which [these] relationships . . . affected the confidence level of team executives . . . who view those relationships as conflicts of interest that should have disqualified Mitchell”). Only Mitchell’s conflict of interest, not his personal credibility, has been challenged. The former judge and senator is widely respected as a knowledgeable baseball man with integrity. *Id.* Mitchell was even twice nearly nominated by President Clinton to the U.S. Supreme Court. See JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 64, 74–76 (2007).
181. The two former employees are former Mets clubhouse employee Kirk Radomski and former Yankees trainer Brian McNamee. See generally MITCHELL REPORT, *supra* note 9.
182. Bryant, *supra* note 180 (discussing tactics used by Mitchell to pressure team employees into cooperating with the investigation).
183. *Orioles Issue Statement in Response to Mitchell Report*, Dec. 16, 2007, <http://sports.espn.go.com/mlb/news/story?id=3156785>.
184. MITCHELL REPORT, *supra* note 9, at SR-9.
185. *Suspended Romero “Didn’t Cheat,”* Jan. 6, 2009, <http://sports.espn.go.com/mlb/news/story?id=3812334>.
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.*
192. J.C. Romero *Plunges Back In*, May 19, 2009, http://www.philly.com/inquirer/sports/20090519_J_C_Romero_plunges_back_in.html.
193. *Suspended Romero “Didn’t Cheat,” supra*

note 185.

194. *Id.*

195. Carrie A. Moser, *Penalties, Fouls, and Errors: Professional Athletes and Violence Against Women*, 11 *SPORTS LAW J.* 69, 81 (2004).

196. Am. League Baseball Club of New York v. Johnson, 109 Misc. 138, 179 N.Y.S. 498 (1919).

197. See Nixon, Howe, and Strawberry discussions, *supra*, "Alcohol and Drugs."

198. Howe Decision, *supra* note 99, at 554–56.

199. S.L. Price, *A Clean Start*, *SPORTS ILLUSTRATED*, Jan. 28, 2002, at 62.

200. Michael O'Hear, *Blue Collar Crimes/White Collar Criminals: Sentencing Elite Athletes Who Commit Violent Crimes*, 12 *MARQ. SPORTS L.J.* 427, 433 (2001).

201. *Id.*

202. The list of athletes 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 195, 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 10-year sentence for rape. *Tyson v. State*, 619 N.E.2d 276 (Ind. App. 2d Dist. 1993). 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 195, 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 ILLUSTRATED*, July 31, 1995, at 66. 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.*

203. William Oscar Johnson, *A National Scourge*, *SPORTS ILLUSTRATED*, June 27, 1994, at 92. Other high-profile sports personalities have expressed similarly flippant 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." *Id.*

204. Moser, *supra* note 195, at 81.

205. Paul Doyle, *Cordero Silent but Crowd Isn't*, *HARTFORD COURANT*, May 20, 1998, at C5.

206. Moser, *supra* note 195, at 82.

207. GREENBERG & GRAY, *supra* note 46, at

509, n.336.

208. *Id.*

209. WEILER, *supra* note 40, at 13–14. Marichal also had to pay \$7,500 to settle Roseboro's tort suit. *Id.*

210. *McDowell's Actions Cost Him a Donation*, *USA TODAY*, July 21, 1995, at 3C.

211. GREENBERG & GRAY, *supra* note 46, at 508.

212. WEILER, *supra* note 40, at 10–11.

213. *Id.*

214. *Id.*

215. *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, *The Rehabilitation of Latrell Sprewell*, June 21, 1999, <http://www.salon.com/news/feature/1999/06/21/sprewell/print.html>.

216. MITCHELL REPORT, *supra* note 9, at SR-7.

217. *Id.* The Mitchell Report even uncovered evidence that Gene Orza, the head of the MLBPA, notified players of upcoming drug tests. *Id.* at 282.

218. *Id.* at SR-13 n.8.

219. *Id.* at SR-2. The Mitchell Report chronicles how MLBPA objection to drug testing caused a delay in implementation of nearly 20 years. *Id.* at SR-13.

220. See discussion, *supra*, "Rule 21: Permanent Ineligibility for Fixing Games."

221. MITCHELL REPORT, *supra* note 9, at 287.

222. *Id.* at 13, 307.



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