Journal of Sports & Entertainment Law
HARVARD LAW SCHOOL

HARVARD JSEL
VOLUME 1, NUMBER 1 – SPRING 2010

Hardball Free Agency—The Unintended Demise of Salary Arbitration in Major League Baseball: How the Law of Unintended Consequences Crippled the Salary Arbitration Remedy—and How to Fix It

Eldon L. Ham* & Jeffrey Malach†

TABLE OF CONTENTS

* *Eldon L. Ham has taught Sports, Law & Society at Chicago-Kent College of Law for seventeen years. He has published three sports-related books including* LARCENY & OLD LEATHER: THE MISCHIEVOUS LEGACY OF MAJOR LEAGUE BASEBALL*; is the designated sports law analyst for WSCR Sports Radio in Chicago; and is the three-term chair of the Chicago Bar Committee on Law & Literature. Mr. Ham has practiced law in Chicago since 1976, and has represented scores of athletes, agents, and sports entrepreneurs.*
† *Jeffrey Malach received his J.D. from Chicago-Kent College of Law in 2009 and his B.A. in Sports Management and Communications from the University of Michigan in 2006. At Chicago-Kent, Jeffrey was President of the Sports and Entertainment Law Society. Jeffrey is a member of the Illinois State Bar and is currently an Associate at The Law Offices of Wolf and Wolfe, Ltd.*

I. INTRODUCTION

When the 2008 Major League Baseball ("MLB") season ended, New York Yankees star outfielder Bobby Abreu became a free agent.[1] Although Abreu was an established star able to negotiate with all of the baseball clubs in MLB, his salary did not go up; it went down dramatically, symbolizing the full circle that baseball economics had traveled since free agency began in 1976. How could this have happened?

Over the course of the 2008 season, Abreu's cumulative batting average was .296, and he totaled twenty home runs, one hundred runs scored, and one hundred runs batted in.[2] That season marked his sixth consecutive year with at least one hundred runs batted in.[3] The Yankees paid Abreu $16 million in 2008, and at the close of the season he was seeking a new three-year contract for $48 million.[4] It seemed all but certain that the Yankees would offer him salary arbitration.[5] Yet, in mid-February 2009, Abreu signed a one-year deal with the Anaheim Angels for $5 million, a 68.8% reduction from his 2008 salary.[6] The Yankees' replacement for Abreu had batted .219 with only twenty-four home runs and sixty-nine runs batted in for the 2008 season.[7]

---

[1] Jorge L. Ortiz & Gerry Fraley, *Free Agent Players Face Their Own Economic Slump,* USA TODAY, Mar. 2, 2009, at 6C, *available at* http://www.usatoday.com/sports/baseball/2009-03-02-econ-package_N.htm.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] Dan Graziano, *Economy Putting Chill on Baseball's Free Agent Spending*, STAR LEDGER, Dec. 6, 2008, at 5, *available at* http://www.nj.com/sports/ledger/graziano/index.ssf/2008/12/economy_putting_chill_on_baseb.html.

[6] Ortiz & Fraley, *supra* note 1. In 2008 the Yankees paid Abreu $16 million whereas in 2009 the Angels paid Abreu $5 million, a 68.8% reduction. *See id.*

[7] Nick Swisher Stats, Bio, Photos, Highlights, http://mlb.mlb.com/team/player.jsp?player_id=430897 (last visited Mar. 9, 2010). The Yankees traded for Nick Swisher to replace Bobby Abreu in right field. *See* Jerry Crasnick, *Yankees Acquire Swisher, Send Betemit and Two Pitchers to White Sox*, ESPN, Nov. 13, 2008, http://sports.espn.go.com/mlb/news/story?id=3700869.

Salary negotiations in 2008 with another star outfielder, Adam Dunn, ended with similar results.[8] Dunn, who had just tallied five consecutive seasons with forty home runs for the Arizona Diamondbacks,[9] signed a new deal at a 38.5% salary reduction with the Washington Nationals.[10] Meanwhile the Diamondbacks' replacement for Dunn only hit twelve home runs with seventy-five runs batted in for the 2008 season.[11] Both Dunn and Abreu were forced to explore the free-agent market for one simple reason: they were not offered salary arbitration by their former teams. In each situation, *both* the player *and* his former team were left in a far worse position—the player with less money and the team with an inferior athlete. A closer examination into the salary arbitration process reveals numerous flaws that likely contributed to the Yankees' and the Diamondbacks' decisions not to offer salary arbitration to Abreu and Dunn.

Baseball is America's oldest team sport, and MLB is the oldest and most storied of America's four most prominent professional leagues. As such, it has a long history of player salaries, free agency restrictions, labor strife, and legal actions, including a landmark antitrust case holding that baseball is not a business engaged in interstate commerce.[12]

Throughout the decades, baseball embraced protectionism while displaying overt disdain for the free market, especially where player compensation was concerned, symbolized by this widely quoted observation by baseball legend and subsequent sports equipment entrepreneur Albert Spalding:

> Professional baseball is on the wane. Salaries must come down or the interest of the public must be increased in some way. If one or the other does not happen, bankruptcy stares every team in the face.[13]

Never mind that Spalding's comment was originally made in 1881 to the *Cincinnati Enquirer*,[14] for its age and longevity only prove the timeless central point, to wit: professional baseball has been concerned, if not obsessed, with the cost of labor from nearly its very beginnings. Over the years management has argued for antitrust protection, taken unbridled control over the players in the form of a player option clause (best known as the infamous reserve clause), colluded to depress salaries in the 1980s, and sustained a remarkably acrimonious relationship with the players' union

---

[8] Ortiz & Fraley, *supra* note 1.

[9] Adam Dunn Stats, Bio, Photos, Highlights, http://mlb.mlb.com/team/player.jsp?player_id=276055 (last visited Mar. 9, 2010).

[10] Ortiz & Fraley, *supra* note 1.

[11] Conor Jackson Stats, Bio, Photos, Highlights, http://mlb.mlb.com/team/player.jsp?player_id=433582 (last visited Mar. 10, 2010). The Diamondbacks moved Conor Jackson from first base to outfield to replace Adam Dunn. *See* Jorge L. Ortiz, *With No Offseason Overhaul, D'backs Keep Core in Place*, USA TODAY, Dec. 19, 2008, *available at* http://www.usatoday.com/sports/baseball/nl/diamondbacks/2008-12-18-organizational-report_N.htm.

[12] Fed. Baseball Club v. The Nat'l League, 259 U.S. 200, (1922).

[13] PAUL DICKSON, BASEBALL'S GREATEST QUOTATIONS 405 (1991).

[14] *Id.*

that produced lock-outs, strikes, and the cancelation of the 1994 World Series. The inability to work with the Players Association may even have contributed to the paucity of performance-enhancing drug testing, which in turn almost certainly contributed to an aberrant decade of home runs and baseball offense that began some time in the mid-1990s and is now largely known as baseball's steroid era.[15] Yet with all that, MLB was still forced to accept free agency, salary escalation, and drug testing—all without adopting a salary cap as other sports have done.

Why? As the game reluctantly inched toward free market labor, management demonstrated a remarkable acuity for losing labor wars and legal battles, even where the result was due to voluntary compromises, some of which underlie the Rube Goldberg machination called baseball salary arbitration. Essentially a ruse to stave off free agency and control salaries, the arbitration system, in practice, has managed to find the worst of all worlds for both players and owners. As such, it seems to have embodied the essence of the "law of unintended consequences," a rule of economics and posterity that suggests the baseball clubs have not been very good at understanding the true consequences of their economic behavior.

Now those consequences will have to be addressed by another round of collective bargaining. The impending labor negotiations for the year 2012 will focus on baseball's approach to free-market-by-committee: salary arbitration. As constituted, salary arbitration has fallen victim to its own flaws, forcing star players sometimes to accept lower salaries, and forcing teams to lose star players even when they would prefer to keep them. This article is an attempt to define the baseball arbitration system, address its numerous flaws, and suggest a number of ways the system can right itself—some being as simple as allowing, or rather forcing, the salary arbitrators to provide reasons and, thus, precedent for their rulings, and others amounting to more substantive reconsideration in view of sports economics, labor negotiations, and law. Former New York Yankees slugger Bobby Abreu, whose salary decreased despite his stellar season, is a case in point.

This article examines salary arbitration, specifically though the lens of the 2008 and 2009 off-seasons, in the context of emerging baseball salaries over the past four decades. Part II of this article addresses the creation and developments of salary arbitration in MLB. Part III discusses the process and admissible criteria of salary arbitration as defined by the collective bargaining agreement signed in 2006. Part IV discusses the historical results of salary arbitration along with its perceived benefits. Part V explores current problems with salary arbitration. Finally, Part VI suggests proposals for improving the salary arbitration process for the next collective bargaining agreement in 2012.

II. THE DEVELOPMENT OF BASEBALL SALARY ARBITRATION

Taken altogether, the evolution of baseball salary arbitration is a series of steps and missteps that has ultimately led to results that are contrary to those originally intended. The cause of such anomalies is often cited in the field of economics and

[15] *See* Baseball's Steroid Era, http://www.baseballssteroidera.com (last visited Apr. 2, 2010).

elsewhere as "the law of unintended consequences," whereby well-intentioned undertakings are met and sometimes overwhelmed by foreseeable or unforeseeable repercussions, some of which seem entirely counterintuitive.

The cornerstone of free market economics is the often-quoted "invisible hand" of economist Adam Smith, whereby individuals acting in their own self-interest in the aggregate benefit society as a whole.[16] But the effects of such unintended consequences are not always productive and often lead to surprising results. A 1936 analysis by American sociologist Robert K. Merton, one of the first to identify the unintended consequences phenomenon, identified the most pervasive contributing factors as "ignorance" and "error."[17] In the context of baseball labor negotiations, one might add short-sightedness, if not greed, to the equation. As noted herein, each respective advent of free agency, salary escalation, and salary arbitration were direct consequences of actions expressly intended by the clubs to control salaries and avoid free agency. In this regard, the consequences of salary arbitration have led to remarkably counterproductive results for *both* players and club owners, the Bobby Abreu aberration being just one of them.

The advent of baseball salary arbitration was not a singular event but, rather, the product of a dynamic evolution of sports, economics, and law that may have begun as early as 1966 when teammate pitchers Don Drysdale and Sandy Koufax masterminded a joint holdout to leverage substantially more money from the Los Angeles Dodgers.[18] This was a radical move necessitated by the lack of player bargaining power mostly because of the seemingly insurmountable "reserve clause" in MLB player contracts, which enabled clubs to renew player contracts on the same terms. The owners read this to mean that they could renew player contracts each year in perpetuity, in practice never granting players the opportunity to negotiate with other teams. The reserve clause hurdle, however, appeared more daunting on the surface than it actually proved to be in practice when it was seriously challenged in 1975. Its meaning was virtually overhauled by the landmark Andy Messersmith and Dave McNally grievance arbitration,[19] but that only came about after decades of challenges from other angles.

During the early 1960s the players still largely believed that revoking the MLB antitrust exemption was the best approach to achieve free agency and the

---

[16] Rob Norton, Unintended Consequences, Library of Economics and Liberty, http://www.econlib.org/library/Enc/UnintendedConsequences.html (last visited Mar. 9, 2010).

[17] *Id.*

[18] Drysdale and Koufax were two of the best pitchers in baseball at the time. In 1965, Drysdale notched twenty-two wins with a 2.77 earned run average and Koufax was even better with twenty-six wins behind a league-leading 2.04 ERA and 382 strikeouts. *See* BURT SOLOMON, THE BASEBALL TIMELINE 647, 649 (Avon Books 2001).

[19] National and American League Professional Baseball Clubs v. Major League Players Association, 66 Lab. Arb. 101 (1975) (Seitz, Arb.) [hereinafter Messersmith and McNally Grievances].

commensurate salary increases it would likely bring.[20] But the Drysdale-Koufax holdout suggested a provocative alternative to antitrust relief: federal labor laws. Although the pitchers demanded a three-year $1 million aggregate package, a radical increase for the times, they settled for raises of just under fifty percent, bringing their annual compensation to $125,000 for Koufax and $115,000 for Drysdale.[21] The owners dodged an economic bullet, but they nevertheless recognized the impending danger of such joint bargaining possibilities.

Until 1965, just before the Drysdale-Koufax holdout, the players had nearly no power in baseball negotiations.[22] When the players elected Marvin Miller in 1966 to head the Players Association, the business of baseball would be forever changed. Miller, a former economist for the United Steelworkers of America, soon built the strongest player union in professional sports.[23] Miller's first major accomplishment was convincing the owners to enter into a collective bargaining agreement in 1968 (just after the Drysdale-Koufax holdout), called the Basic Agreement.[24] One of Miller's goals at the time was to eliminate the reserve system that baseball owners had enjoyed in one form or another since the 1870s.[25] The reserve system required players to be "bound to one club for his entire career or until that club assigned his contract to another club."[26] The owners would not budge on the issue of the reserve system, but they eventually agreed to conduct a comprehensive study on the subject.[27] Between the 1968 and 1972 labor agreements, Curt Flood, a star player for the St. Louis Cardinals who was backed by the union, challenged the reserve system by means of an antitrust attack through the judicial system.[28]

---

[20] Although widely referred to as an "exemption," this term is really a misnomer. *Federal Base Ball Club of Baltimore v. National League*, 259 U.S. 200 (1922), essentially found MLB was not a business in interstate commerce. Thus, in a practical matter baseball was exempted from antitrust, but not in the usual manner, as in, for example, the Sports Broadcasting Act of 1961, 15 U.S.C. 1291 (1961), which statutorily exempted certain sports league broadcasting from the reach of otherwise applicable antitrust laws.

[21] *See, e.g.*, JOHN HELYAR, LORDS OF THE REALM 24 (1994).

[22] ROGER I. ABRAMS, LEGAL BASES: BASEBALL AND THE LAW 74 (1998). The owners actually financed the Players Association, a violation under the National Labor Relations Act [hereinafter ABRAMS, LEGAL BASES]. *Id.*

[23] *Id.* at 71.

[24] *Id.* at 82–83. The Basic Agreement incorporated the Uniform Player's Contract. The owners could no longer unilaterally change the form of an individual player's contract. The Agreement also required that all changes be made through collective bargaining. MARVIN MILLER, A WHOLE DIFFERENT BALL GAME 97 (1991).

[25] ROGER I. ABRAMS, THE MONEY PITCH: BASEBALL FREE AGENCY AND SALARY ARBITRATION 26 (2000) [hereinafter ABRAMS, THE MONEY PITCH].

[26] *Id.*

[27] ABRAMS, LEGAL BASES, *supra* note 22, at 82–83.

[28] *Id.* at 45. Flood was traded from the St. Louis Cardinals to the Philadelphia Phillies after he requested a $30,000 raise. Flood refused to report to the Phillies and wrote to then-commissioner Bowie Kuhn, "After 12 years in the Major Leagues, I do not feel I am piece of property to be bought and sold irrespective of my wishes. I believe that any system which produces that result violates my basic rights as a citizen." *Id.* at 65.

Flood sought to reverse a 1922 landmark Supreme Court decision that granted baseball an exemption from the Sherman Anti-Trust Act. In *Federal Baseball Club v. The National League*, the Court concluded that the business of giving baseball exhibitions is purely a state affair and thus not interstate commerce for the purposes of the Sherman Act.[29] This decision was reaffirmed by the Supreme Court in 1952 with its ruling in *Toolson v. New York Yankees, Inc.*[30] Flood brought a new challenge to this court-created exemption, though he ultimately lost his battle to overturn the antitrust exemption, and the owners once again retained monopolistic power over the players. Unlike the two preceding cases, however, the Court in *Flood v. Kuhn* held that baseball *is* a form of interstate commerce.[31] Moreover, Flood's antitrust litigation set the table for some of the greatest tactical mistakes the owners ever made—ultimately agreeing to both grievance and salary arbitration for player disputes.

On the eve of Flood's trial in 1970, the owners and players agreed to a new Basic Agreement.[32] The owners granted the players a right that was already enjoyed by virtually every other industry in America by allowing them to have their grievances decided by a neutral third party.[33] This set into motion a process that would evolve into salary arbitration. Then, soon after grievance arbitration was instituted, the players struck again at the bargaining table. During the contentious 1972–1973 collective bargaining process, Marvin Miller pushed for the elimination of the reserve system, reaching an eventual compromise that became salary arbitration.[34] Miller sought to achieve through collective bargaining what Drysdale and Koufax could not accomplish via individual leverage and what Flood failed to achieve through the courts.[35] At that point, however, the owners still feared a complete abolishment of the reserve system for two reasons. First, a free market for a player's services would result in rash player mobility. Second, a bidding war between teams would drastically increase player salaries.[36] As a compromise, the owners proposed a system in which individual salary disputes between the players and owners would be submitted to a neutral third party, an arbitrator.[37] The owners thought the arbitration process would eliminate players' holding out for higher salaries and partly quash the desire for free agency.[38] Miller saw this proposal as an improvement over the reserve system, for it would finally give the players some bargaining power. It was not the ideal solution,

---

[29] 259 U.S. 200, 208 (1922).

[30] 346 U.S. 356 (1953).

[31] 407 U.S. 258, 282 (1972).

[32] ABRAMS, LEGAL BASES, *supra* note 22, at 83.

[33] *Id.* Miller believed that Flood's litigation led directly to this concession by the owners. BRAD SNYDER, A WELL-PAID SLAVE 316 (2006).

[34] Miller led the players on strike prior to the 1972 season, the first strike in baseball history. ABRAMS, LEGAL BASES, *supra* note 22, at 85.

[35] *See id.* at 87.

[36] ABRAMS, THE MONEY PITCH, *supra* note 25, at 29.

[37] *Id.*

[38] *Id.* In 1966, Don Drysdale and Sandy Koufax of the Los Angeles Dodgers joined forces and held out for higher salaries. Eventually, the parties settled and the two became the highest paid players in the game at that time. *Id.* at 28.

but it was a quantum leap in the right direction.[39] A new collective bargaining agreement was reached on February 28, 1973, containing a version of the salary-arbitration provision.[40]

Beginning in 1973, the development of baseball's salary arbitration system took a path that was virtually concurrent to the evolution of free agency. Arbitration and free agency were being forged by the same economic forces that drove the allocation of labor and capital, and so neither evolved in a vacuum wholly independent of the other. Then, while the Players Association and league owners were still addressing the equitable allocation of revenues, the groundbreaking Messersmith-McNally grievance arbitration case was set into motion when both players refused to sign new 1975 contracts. The object was to induce their respective teams to invoke the reserve clause, thus forcing the issue of free agency as a viable means to achieve market value for the players.

Messersmith challenged the reserve clause in the standard player contract by filing a grievance with an arbitrator (as did McNally on the American League side).[41] Although his case was not directly about salary arbitration, it nonetheless was a grievance dispute since Messersmith was still under contract with the Dodgers.[42] Unlike Flood, who was unable to penetrate baseball's antitrust shield, Messersmith hit the proverbial home run when a neutral arbitrator interpreted the standard player contract as only a one-year option to renew for the team.[43] This not only changed the free-agency status quo but also was a baseball epiphany that would influence all baseball labor economics, necessarily including the free-market proxy that became salary arbitration. The Messersmith ruling held that, after a club exercises its one-year right of renewal, a player is no longer under contract.[44] As players would finally be free on the open market, competitive bidding for them would increase and thus force their salary levels upward. The owners challenged the arbitrator's decision in federal court,[45] but they lost largely because of their own missteps.

The reserve language had last been amended with the Uniform Player Contract adopted in 1947, which contained two salient provisions. First, the respective owners could renew an unsigned player "on the same terms" as his expiring contract for one year.[46] The owners interpreted this renewal to mean that each time the newly renewed one-year playing contract expired, it could be renewed again, over and over,

---

[39] Murray Chass, *Baseball Notebook: Salary Arbitration and Free Agency and the Road to Riches and Ruin*, N.Y. TIMES, Jan. 7, 2001, at 85.

[40] ABRAMS, LEGAL BASES, *supra* note 22, at 87. The first player to go through baseball's salary arbitration process was Dick Woodson, a right-handed pitcher with the Minnesota Twins in 1974. Woodson wanted $30,000 while the club wanted to pay him $23,000. Woodson would prevail. ABRAMS, THE MONEY PITCH, *supra* note 25, at 143.

[41] ABRAMS, LEGAL BASES, *supra* note 22, at 118.

[42] *Id.*

[43] *Id.* at 125.

[44] *Id.*

[45] Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass'n, 532 F.2d 615 (1976).

[46] Messersmith and McNally Grievances, *supra* note 19.

because each time the "same terms" would supposedly include the renewal option, virtually expanding what looked like a one-year extension into perpetuity. Although perpetual employment agreements are dubious enough, the owners had taken their argument still further, pushing the envelope of logic and economic reason: the reserve clause also gave the clubs the right to renew not at the same compensation but at a lesser modified salary reduced by up to twenty-five percent of the prior amount.[47] The clubs may have felt this would force recalcitrant players to accept lesser pay increases for new contracts, but by 1976 these words were backfiring, again invoking the law of unintended consequences for the owners.

When Messersmith and McNally challenged this draconian logic through their 1975 grievance, Arbitrator Peter Seitz found that, although a perpetual renewal could legally be bargained for and enforced, such a possibility was duly qualified, expressly limited by the arbitrator as follows: "provided the contract expresses that intention with explicit clarity and the right of subsequent renewals does not have to be implied . . . ."[48] But not only was the right to renew merely *implied* in the first place, when it was read in conjunction with the twenty-five percent pay-cut provision, the implication was not only illogical, but also unconscionable and, therefore, unenforceable. How could there be the requisite mutuality if clubs could unilaterally force a player to accept twenty-five percent less compensation into perpetuity? Indeed, what could stop the clubs from intentionally obstructing the execution of any new agreements, knowing that by doing so, they could theoretically reduce any player salary to near zero after a few seasons?

The owners lost not because their argument was dubious—to the contrary, there was a clever charm to the perpetuity logic—but because their position was ultimately disingenuous. The perpetuity rationale was betrayed by the second clause allowing the reduction of a player's salary by twenty-five percent for each renewal, an anomaly that was eventually deemed the deciding last straw in an unconscionable synthesis of illogic and greed. In the end, therefore, the owners had only themselves to blame, harkening Shakespeare's *Julius Caesar*: the fault was not in their stars—neither the celestial nor the major league variety, as it happens—but in themselves, for it was their own oppressive language that had gone too far.

The ruling by Arbitrator Seitz was significant not only for its outcome but also for its reasoning. Almost inconceivably, however, present day baseball salary arbitration does not require arbitrators to provide reasoning behind the arbitration rulings, allowing no room for interpretation or precedent (see Parts III and VI *infra*). But since Seitz both struck down the reserve clause *and* provided the basis for doing so, the Messersmith ruling set free agency into motion, and player salaries inevitably began to escalate. Messersmith himself had earned $90,000 with the Dodgers in 1974 but was offered only modest increases even though he had won twenty games in 1971, then twenty more in 1974, followed by nineteen wins in 1975, the year he

---

[47] *Id.*

[48] *Id.*

played under the reserve system terms.[49] But in 1976 Messersmith was able to switch teams, signing with Ted Turner's Atlanta Braves for $200,000 in 1976 and $330,000 in 1977.[50] When free agency proceeded to escalate player compensation to unprecedented levels in the 1980s, the owners countered with Commissioner Ueberroth's collusion scheme.

Immediately after the Messersmith arbitration, the owners and players again faced off in collective bargaining. For the first time in baseball history the players had significant power at the bargaining table, and so in a mere ten years, Marvin Miller had reversed the roles of labor and management. However, the union feared that complete free agency, after only one year of major league service, would result in a flooding of the market and, consequently, a *reduction* in salaries,[51] at least for the foreseeable near term. Conversely, the owners sought to hold their exclusive rights to players as long as possible.[52] Thus, the two parties came together, albeit from different perspectives, agreeing that a player would be eligible for free agency after six years of major league service.[53]

Salary arbitration remained in the 1976 Basic Agreement.[54] The union, of course, was not about to give up what it had won three years earlier.[55] Explaining why the union was unwilling to relinquish arbitration, Miller stated:

> For one thing, salary arbitration covers a different group of employees. In '76, there were a lot of people who didn't have six years of major league service. It's like saying if you could have gotten higher pensions for 70-year-olds, you'd give it up for 65-year-olds. It wouldn't happen.[56]

Looking back at the 1976 negotiation then-Commissioner Bowie Kuhn publicly stated, "In a better world, we wouldn't have negotiated salary arbitration with free agency. If that simple thing had been changed, I don't think the system would be what it is."[57] Miller has insisted that the union was never willing to abandon the arbitration process despite a myth to the contrary.[58] Miller has stated:

> The difference between a ballplayer's being required to accept whatever a club offered him, as had been the case almost from the beginning of professional baseball, and the new system of salary

---

[49] Andy Messersmith Baseball Stats, http://www.baseball-almanac.com/players/player.php?p=messean01 (last visited Mar. 9, 2010).

[50] *Id.*

[51] ABRAMS, THE MONEY PITCH, *supra* note 25, at 30.

[52] *Id.*

[53] *Id.*

[54] Chass, *supra* note 39.

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.*

> arbitration was like the difference between dictatorship and democracy. Salary arbitration has been a major factor in eliminating gross inequities in the salary structures from club to club (and sometimes on the same club) and, along with the right of free agency, negotiated three years later, produced the most rapid growth of salaries ever experienced in any industry.[59]

During the 1976 bargaining negotiations, MLB lobbied for and won an express prohibition against joint player negotiations. In so doing, the owners would suppress player uprisings, but they would also deal themselves an unwitting blow. The relevant restrictive language inserted into baseball's collective bargaining agreement in 1976 included the following:

> The utilization or non-utilization of rights under this Article XVIII is an individual matter to be determined solely by each player and each club for his or its own benefit. Players shall not act in concert with other Players and Clubs shall not act in concert with other Clubs.[60]

This clause abruptly solved the Drysdale-Koufax problem, but the Players Association had astutely managed to insert the final phrasing into the last line to pose a *quid pro quo* restriction on the clubs themselves. Perhaps the owners had allowed this insertion because they were so relieved to win the primary negotiating point, or maybe they simply dismissed the possibility that two or more clubs would negotiate with one player—a seemingly unlikely eventuality that could easily have been overlooked. Ultimately, though, the clause would later become the crux of the "baseball collusion" case against Commissioner Peter Ueberroth and the clubs during the mid-1980s, whereby the clubs were deemed to have acted in concert with a "common goal" contrary to the individual bargaining efforts mandated by the collective bargaining agreement.[61]

If the owners had felt immune because of the antitrust exemption, their comfort was misplaced because a subsequent player grievance led to a pair of rulings by Arbitrators Tom Roberts (after the 1985 season) and George Nicolau (following the 1986 season) that found such overt behavior to violate the express terms of the very joint negotiation clause that the owners had themselves inserted.[62] The clubs and the Players Association then negotiated a settlement of $280 million to compensate for lost opportunities and earnings, but some estimates, which consider the increased salary costs over what the compensation might have been had the players become free agents the year before, suggest the real cost to the owners was closer to $1 billion.[63]

---

[59] MILLER, *supra* note 24, at 109.

[60] PAUL C. WEILER & GARY R. ROBERTS, SPORTS AND THE LAW 265 (3d ed. 2004). Article VIII is Articles XIX(A)(2) and XX in the 2007–2011 Basic Agreement.

[61] Murray Chass, *7 in Baseball Collusion Case Win Free Agency*, N.Y. TIMES, Jan. 23, 1988, at 11.

[62] WEILER & ROBERTS, *supra* note 60, at 265.

[63] *Id.* at 267–68.

Serving as a clear example of the "law of unintended consequences" in its own right, the legal odyssey of the baseball collusion case was exacerbated by the related, concurrent misstep that led to the Messersmith and McNally arbitration award. In other words, such collusion was originally intended to control, if not depress, player salaries, yet it ultimately became a factor in expanding those salaries when subsequent grievances exposed the collusion and unleashed free market forces. Similarly, the original player option clause intended to control players and quash free agency was found to be egregious and was defeated by the Messersmith grievance arbitration ruling. Ironically, National League player Andy Messersmith and American League player Dave McNally were both pitchers, just as Drysdale and Koufax had been, and Messersmith was even a Dodger. Although it had taken several years, the joint holdout proscription was finally inserted just after the Messersmith-McNally arbitration ruling, but, as described, it also proved to be a fatal move by the owners.

Salary arbitration was again a focal point of the 1985 collective bargaining negotiations.[64] The owners managed to increase the service time from two years to three years for arbitration eligibility.[65] However, this victory was short-lived. In response to the 1990 player strike, "the owners proposed a radical restructuring of the collective bargaining agreement."[66] Specifically regarding player compensation, the owners "proposed a pay-for-performance arrangement in which players with zero to six years of experience would be compensated on the basis of statistical formulas by position," thereby eliminating the need for salary arbitration.[67] The players, on the other hand, sought to restore the two-year period of prior major league service required for arbitration eligibility that they had given away in the 1985 Basic Agreement.[68] The parties eventually compromised and agreed to eligibility for the top seventeen percent of players with two to three years of major league service for arbitration.[69]

The owners voted to reopen negotiations in 1992, setting the stage for a particularly acrimonious player strike in 1994,[70] the one that led to the unprecedented cancellation of the 1994 World Series. The owners proposed a seven-year contract that would eliminate salary arbitration, yet would allow players with four to six years of major league service to become free agents with a right of first refusal by the player's current club.[71] Players with fewer than four years of service time would be subject to escalating minimum salaries negotiated collectively by the union.[72] The union responded by proposing to lower the eligibility for salary arbitration to two years. The owners countered by declaring an impasse and eliminating salary

---

[64] Paul D. Staudohar, *The Baseball Strike of 1994–1995*, 120 MONTHLY LAB. REV. 23 (1997) [hereinafter Staudohar, *The Baseball Strike*].

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.* at 24.

[72] *Id.*

arbitration unilaterally.[73] The players' union then successfully obtained an injunction preventing the owners from unilaterally removing salary arbitration. The court held that salary arbitration was a mandatory subject of collective bargaining and thus could not be unilaterally removed.[74] The players and owners eventually settled on a new agreement in 1996 with little modification to the salary-arbitration and free-agency provisions.[75]

A new collective bargaining agreement was signed in 2002, but the focus of this agreement veered away from arbitration issues, which were largely supplanted by testing for performance-enhancing drugs and a different approach to player salary limitations by means of a luxury tax.[76] The agreement was renewed in 2006 when, in the wake of considerable public outrage over what was becoming baseball's steroid era, the parties again considered rules regarding performance-enhancing drugs and extended the drug-testing rules through the 2011 season.[77] With an effective drug testing system finally in place, it is reasonable to anticipate that salary arbitration will again be at the forefront of negotiations in 2012.

III. SALARY ARBITRATION IN ITS CURRENT FORM

A.The Process

The current collective bargaining agreement that runs through 2011 makes salary arbitration available to all players who have completed three to six years of major league service.[78] The agreement also permits certain players, known as the "Super Twos," those with more than two years but less than three years of service, to use salary arbitration if they have accumulated at least eighty-six days of service during the immediate prior season provided they rank in the top seventeen percent of players in the two-year service group.[79] Teams must tender a contract offer to the player on or before the third Friday in December.[80] The player then has until the middle of January to negotiate with his team or file for arbitration.[81]

---

[73] Silverman v. Major League Baseball Player Relations Comm., 67 F.3d 1054, 1060 (2d. Cir. 1995).

[74] *Id.* at 1062.

[75] Staudohar, *The Baseball Strike*, *supra* note 64, at 27.

[76] Paul D. Staudohar, *Baseball Negotiations: A New Agreement*, 125 MONTHLY LAB. REV. 15 (2002) [hereinafter Staudohar, *Baseball Negotiations*].

[77] *MLB Players, Owners Announce Five-Year Labor Deal*, ESPN, Oct. 25. 2006, http://sports.espn.go.com/mlb/news/story?id=2637615.

[78] 2007–2011 Basic Agreement art. VI(F)(1)(2006), *available at* http://mlbplayers.mlb.com/pa/pdf/cba_english.pdf [hereinafter MLB Basic Agreement].

[79] *Id.*

[80] Eugene Freedman, *The Salary Arbitration Primer*, BASEBALL THINK FACTORY, Dec. 15, 2003, http://www.baseballthinkfactory.org/files/primate_studies/discussion/eugene_freedman_2003_12_14_0/.

[81] *Id.*

Players with more than six years of service time are also eligible for salary arbitration,[82] but they are subject to a different set of rules:[83] "These players must be offered arbitration on or before December 7 and must accept arbitration on or before December 19."[84] Such a player is considered signed for the next year if he is offered arbitration.[85] If that player chooses to sign with another team after being offered arbitration, his former team is entitled to compensatory draft picks.[86] If the player is not offered arbitration his team may not negotiate with or sign the player until May 1.[87]

The union and the Player Relations Committee, which represents the owners, mutually select a three-member panel from a list of approximately twenty-four arbitrators provided by the American Arbitration Panel.[88] The arbitrators are seasoned in MLB salary arbitration and labor grievances. Arbitrators are paid $950 per case and are not informed of which cases they will hear ahead of time.[89] The hearings take place in the first three weeks of February.[90]

B. Admissible Criteria

The arbitration process becomes something of a trial by statistics, augmented by the player's community standing, physical or mental condition, and the overall success of the employer ballclub. Specifically, the criteria that may be introduced in an arbitration hearing under the collective bargaining agreement include:

> The quality of the Player's contribution to his Club during the past season (including but not limited to his overall performance, special qualities of leadership and public appeal);
>
> The length and consistency of his career contribution;
>
> The record of the Player's past compensation;
>
> Comparative baseball salaries;

---

[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] ABRAMS, THE MONEY PITCH, *supra* note 25, at 147. Until the labor strike of 1994 salary arbitration cases were decided by one arbitrator. Management pressed for a change to a panel of three arbitrators, believing they were less likely to produce faulty decisions. The results from the change, however, show no statistical difference. *Id.* at 155.
[89] *Id.* at 147.
[90] *Id.*

> The existence of any physical or mental defects on the part of the Player;
>
> The recent performance record of the Club including but not limited to its League standing and attendance as an indication of public acceptance.[91]

The following evidence, even though it is arguably relevant, is not admissible in an arbitration hearing:

> The financial position of the Player and the Club;
>
> Press comments, testimonials or similar material bearing on the performance of either the Player or the Club, except that recognized annual Player awards for playing excellence shall not be excluded;
>
> Offers made by either Player or Club prior to arbitration;
>
> The cost to the parties of their representatives, attorneys, etc.;
>
> Salaries in other sports or occupations.[92]

Although the collective bargaining agreement outlines criteria that arbitrators can and cannot consider, the agreement does not specify the weight an arbitrator can apply to each such criterion. Arbitrators are instructed to assign "such weight to the evidence as shall appear appropriate under the circumstances."[93]

The method of arbitration used by MLB is based on "final offer arbitration." The arbitrator must choose either the owners or the player's position and cannot compromise between the two positions.[94] Now widely referred to in business as "baseball style arbitration," the rule barring compromise draws the two offers toward the center rather than forcing a polarized pair of starting points.

C. Salary Arbitration in the National Hockey League

Currently the only other major sports league that has a salary arbitration provision in its collective bargaining agreement is the National Hockey League ("NHL"). The NHL collective bargaining agreement was signed in 2005 after a 310-day lockout by the owners. The agreement runs through the 2010–2011 season.[95] Article 12 of the

---

[91] MLB Basic Agreement, *supra* note 78, at art. VI(F)(12)(a).

[92] *Id.* at art. VI(F)(12)(b).

[93] *Id.* at art. VI(F)(12)(a).

[94] *Id.* at art. VI(F)(5).

[95] *See* Collective Bargaining Agreement Between National Hockey League and National Hockey League Players' Association (2005), *available at* http://www.nhl.com/cba/2005-CBA.pdf.

NHL agreement outlines the league's salary arbitration system.[96] Salary arbitration in the NHL has a couple key distinctions from the system used by MLB. A player is eligible for salary arbitration after four years of professional experience if between eighteen and twenty years old or after one year of professional experience if twenty-four years or older.[97] The player or the team may elect to go to salary arbitration.[98] The two parties must submit their briefs to the selected arbitrator forty-eight hours in advance of the hearing, and the arbitrator has forty-eight hours to render a decision after the hearing.[99] Furthermore, the parties may not present evidence of any contract entered into by an unrestricted free agent or any player contract not offered by one of the parties as a comparable contract.[100]

One major difference in the two arbitration systems is that in the NHL the arbitrator must issue "a brief statement of the reasons for the decision, including identification of any comparables(s) relied on."[101] Another important distinction is that the NHL allows teams to have "walk-away rights."[102] An NHL team is afforded the chance to "walk away" from an arbitration decision within forty-eight hours, and the player subsequently becomes an unrestricted free agent.[103] "Walk-away rights" are limited to cases in which the player elects to go to salary arbitration.[104] The "walk-away right" is far different than the binding arbitration system used by MLB. An important factor to consider when comparing the two arbitration systems is that the NHL has a salary cap.[105] This distinction should be kept in mind when comparing the two arbitration systems.

IV. BENEFITS OF THE FINAL OFFER ARBITRATION PROCESS

Salary arbitration in baseball is actually a sort of hybrid of two forms of final-offer arbitration.[106] The first form is "issue-by issue" arbitration, "in which the arbitrator selects one party's final proposal for each issue separately."[107] The second is "by package" arbitration, where the arbitrator must select the entire package from either party.[108] The risk is much greater for both parties in the latter form. There is only

---

[96] *Id.* at art. 12.
[97] *Id.* at art. 12.1(a).
[98] *Id.* at art. 12.2, 12.3.
[99] *Id.* at art. 12.9 (b), (n).
[100] *Id.* at art. 12.9(g)(ii)(G), (g)(iii)(B).
[101] *Id.* at art. 12.9(n)(ii)(D).
[102] *Id.* at art. 12.10.
[103] *Id.*
[104] *Id.*
[105] *Id.* at art. 50.
[106] Jonathan M. Conti, *The Effect of Salary Arbitration on Major League Baseball*, 5 SPORTS LAW. J. 221, 230, (1998).
[107] *Id.*
[108] *Id.*

one issue in salary arbitration, salary, but the arbitrator must select the entire package.[109]

The final-offer arbitration process adopted by baseball has many advantages to alternative forms of arbitration.[110] Final-offer arbitration encourages settlement between the two parties.[111] Rational parties naturally desire to avoid the extreme risk of final-offer arbitration due to the arbitrator's inability to compromise between the two offers.[112] Both sides shift their positions in order to capture the difference between the player's actual worth and what he demands or the team offers. Winning in final-offer arbitration means one's position is more reasonable or closer to the player's actual worth.[113] The commensurate risk normally narrows the gap between positions, and this is "the key that unlocks the door to settlement."[114]

In contrast, conventional arbitration can produce a chilling effect on negotiations.[115] Parties do not "bargain in good faith because they may have reason to believe a more attractive outcome may result from arbitration than negotiation."[116] Thus, the parties may adopt extreme positions and drive themselves further away from settlement.[117]

Additionally, in final-offer arbitration, parties are made aware of the midpoint between their two offers and have considerable time to meet that midpoint prior to the arbitration proceeding.[118] Arbitration hearings take place in February, giving the teams about a month to negotiate a settlement.[119] However, recently teams such as the Tampa Bay Rays have implemented a "file and go strategy."[120] The Rays do not negotiate once numbers are filed for arbitration.[121] Instead they choose to wait and let the arbitrator decide the appropriate salary.[122] This strategy essentially eliminates the advantage of being made aware of the mid-point prior to the hearing date.

---

[109] *Id.*

[110] Brien Wassner, *Major League Baseball's Answer to Salary Disputes and the Strike*, 6 VAND. J. ENT. L. & PRAC. 5, 10 (2003).

[111] *Id.*

[112] *Id.*

[113] ABRAMS, THE MONEY PITCH, *supra* note 25, at 149.

[114] *Id.*

[115] Spencer B. Gordon, *Final Offer Arbitration in the New Era of Major League Baseball*, 6 J. AM. ARB. 153, 158 (2007).

[116] *Id.*

[117] *Id.*

[118] Wassner, *supra* note 110, at 11.

[119] ABRAMS, THE MONEY PITCH, *supra* note 25, at 147.

[120] Bill Chastain, *Aybar, Navarro Will Go to Arbitration*, MLB, Jan. 1, 20, 2009, http://mlb.mlb.com/news/article.jsp?ymd=20090120&content_id=3751465&vkey=hotstove2008&fext=.jsp.

[121] *Id.*

[122] *Id.*

The threat of final-offer arbitration can also motivate parties to settle based on interest-based incentives.[123] Players can negotiate terms outside of the scope of the arbitration salary like bonuses and multi-year contracts.[124]

Furthermore, owners normally prefer to avoid the adversarial nature of an arbitration hearing. Teams risk injuring their relationship with a player by arguing that his worth is well below what the player thinks he is worth.[125] A team might be forced to defend its proposal by "insulting a player and presenting arguments that harp on a player's physical or mental defects, or demeaning his past contributions to the club, playing record or public appeal."[126] Despite all these reasons why final-offer arbitration encourages settlement, some cases are still not settled and make it to the arbitration table. To date, 495 cases have been arbitrated between players and owners and the owners have won 285 such hearings.[127] However, a closer look at salary arbitration reveals that the players have benefited far more than the owners in the long run and that the system as a whole has flaws that affect all parties involved in the game of baseball.

V. CURRENT PROBLEMS WITH SALARY ARBITRATION

A. Failure to Assign Weight to Admissible Criteria Creates Inconsistent and Unpredictable Results

The collective bargaining agreement outlines specific criteria that may be presented at an arbitration hearing; however, the agreement does not assign specific weight to the criteria.[128] A closer look at three arbitration hearings during the 2008 offseason reveals the inconsistency and unpredictability that can arise from such a lack of guidance.

Oliver Perez, starting pitcher for the New York Mets, filed for arbitration following a season in which he had fifteen wins and ten losses with a 3.56 earned run average.[129] The Mets offered him $4.725 million, but Perez sought $6.5 million.[130] Perez had accumulated 5.034 years of major league service time.[131] Perez won his arbitration hearing and was awarded a salary of $6.5 million for the 2008 season.[132]

---

[123] Wassner, *supra* note 110, at 11.

[124] *Id.*

[125] ABRAMS, THE MONEY PITCH, *supra* note 25, at 164.

[126] Elissa M. Meth, *Final Offer Arbitration: A Model for Dispute Resolution in Domestic and International Disputes*, 10 AM. REV. INT'L ARB. 383, 390 (1999).

[127] Maury Brown, Arbitration Scorecard, http://bizofbaseball.com/index.php?option=com_content&view=article&id=719&Itemid=116 (last visited Mar. 9, 2010) [hereinafter Brown, Arbitration Scorecard].

[128] MLB Basic Agreement, *supra* note 78, at art. VI(F)(12)(a).

[129] Oliver Perez Stats, Bio, Photos, Highlights, http://mlb.mlb.com/team/player.jsp?player_id=424144 (last visited Mar. 9, 2010).

[130] Brown, Arbitration Scorecard, *supra* note 127.

[131] Maury Brown, Arbitration Figures, http://bizofbaseball.com/index.php?option=com_content&view=article&id=3400&Itemid=173 (last visited Mar. 9, 2010) [hereinafter Brown,

Chien-Ming Wang, starting pitcher for the New York Yankees, also filed for arbitration following a season in which he had nineteen wins and seven losses with a 3.70 earned run average.[133] Wang's service time was 2.159 years.[134] The Yankees offered him $4 million, but Wang sought $4.6 million.[135] Unlike Perez, Wang lost his case and was awarded the club's salary position.[136] The cases were decided by different arbitration panels.[137] The results suggest that service time may have been weighted disproportionately given that Perez was awarded a much higher salary despite winning four fewer games and having only a slightly lower earned run average.

Brien Fuentes, relief pitcher for the Colorado Rockies, also filed for arbitration in 2008 with 5.125 years of major league service time, nearly identical to that of Perez.[138] Fuentes had twenty saves and an earned run average of 3.08 in 2007, nearly a full half-run lower than Perez.[139] The Rockies offered $5.05 million and Fuentes sought $6.5 million.[140] Fuentes lost his case at arbitration and thus was awarded $1.45 million less than Perez.[141] This arbitration panel assigned significantly less weight to service time and the result was a $1 million deviation from the Perez award.

The uncertainty regarding the weight an arbitration panel will assign to the particular admissible criteria creates a highly unpredictable process evidenced by the results in the Perez, Wang, and Fuentes hearings. In response to such unpredictability, teams and players often present the panel with mountains of information and statistics hoping to catch the arbitrator's eye.[142] However, arbitrators only have twenty-four hours from the hearing to issue their opinions.[143] Roger Abrams, an established baseball arbitrator and former dean at three law schools including Northeastern University in Boston, has observed, "At times, the litigation seems to have more in common with rotisserie baseball leagues than with normal grievance arbitration."[144]

Arbitration Figures]. Note that in customary arbitration nomenclature, although the mathematical service designations give the appearance of a decimal system, they actually represent years followed by days such that the Perez shorthand notation of 5.034 means that Perez had accumulated five years and thirty-four days of service time.

[132] Brown, Arbitration Scorecard, *supra* note 127.

[133] Chien-Ming Wang Stats, Bio, Photos, Highlights, http://mlb.mlb.com/team/player.jsp?player_id=425426 (last visited Mar. 9, 2010).

[134] Brown, Arbitration Figures, *supra* note 131.

[135] Brown, Arbitration Scorecard, *supra* note 127.

[136] *Id.*

[137] *Id.*

[138] Brown, Arbitration Figures, *supra* note 131.

[139] Brian Fuentes Stats, Bio, Photos, Highlights, http://mlb.mlb.com/team/player.jsp?player_id=150118 (last visited Feb. 16, 2010).

[140] Brown, Arbitration Scorecard, *supra* note 127.

[141] *Id.*

[142] ABRAMS, THE MONEY PITCH, *supra* note 25, at 158.

[143] *Id.*

[144] *Id.* at 157.

The inconsistency and unpredictability is compounded by the fact that baseball arbitrators do not issue written opinions explaining their reasoning. Parties can only infer what evidence was given more weight before attempting to use that ruling as precedent at a later hearing, but they have no real ground on which to stand when making their subsequent presentations regarding precedential value.

By not assigning weight to the admissible criteria presented at an arbitration hearing, both teams and players engage in a much riskier and unpredictable process. The amount of discretion given to arbitrators to "assign such weight to the evidence as shall appear appropriate under the circumstances"[145] is unnecessary and fosters a system of inconsistency. Both players and owners would benefit from assigning weight to the admissible criteria presented at a salary arbitration hearing, or at least requiring further explanation in the arbitration award.

B. Comparing Players with Different Years of Service Time

The collective bargaining agreement states:

> The arbitration panel shall, except for a Player with five or more years of Major League service, give particular attention, for comparative salary purposes, to the contracts of Players with Major League service not exceeding one annual service group above the Player's annual service group. This shall not limit the ability of a Player or his representative, because of special accomplishment, to argue the equal relevance of salaries of Players without regard to service, and the arbitration panel shall give whatever weight to such argument as is deemed appropriate.[146]

At the arbitration table, a player prefers to be compared with players who have more major league service than he has completed.[147] A player with more major league service is likely to have a higher salary. The team, therefore, prefers the exact opposite.[148] The above excerpt from the collective bargaining agreement offers little to no guidance to arbitrators on this issue.[149] Arbitrators are directed to give "particular attention" to the player's service group and one service group above that group. However, the agreement does not define or give any guidance as to what "particular attention" means.

Furthermore, the agreement also allows players to argue equal relevance of salaries without regard to service because of "special accomplishment." Once again the agreement does not define this term or provide any guidance as to its meaning. Is a special accomplishment a Gold Glove award for noteworthy defense, throwing a

---

[145] MLB Basic Agreement, *supra* note 78, at art. VI(F)(12)(a).

[146] *Id.*

[147] ABRAMS, THE MONEY PITCH, *supra* note 25, at 161.

[148] *Id.*

[149] *Id.*

no-hitter, playing injured, hitting a game-winning home run, not missing any team meetings—or, for that matter, passing a steroid test?

The following table illustrates 2008 mean average salary by years of service:[150]

Years of Service	Number of Players	Average Salary
At least 3 but less than 4	76	$1,794,652
At least 4 but less than 5	62	$3,412,746
At least 5 but less than 6	59	$3,948,787

The lack of guidance given to arbitrators regarding comparing players in different service groups can lead to inconsistent results.[151] If an arbitrator were to reach up and compare a third-year player with a fourth-year player, the result might be a drastically inflated salary given that the average salary difference is over $1,600,000.[152] Without proper guidance as to the term "particular attention," a player with exactly the same "special accomplishments" could receive a lower salary, defeating the purpose of paying similar players similar salaries.

While there is no actual proof that arbitrators are engaging in the practice of looking to other service groups, due to the fact that no written opinions are required, it is inevitable that an arbitrator will know and have a sense for other player levels—judicial notice of sorts—since they are experienced with other cases and are not limited to the data presented at the actual hearing.

C. Salary Arbitration Creates an Inefficient Free Agent Market

In economic terms, baseball players are labor, in effect virtual "goods" to which owners purchase exclusive rights for a term of years. Salary arbitration creates three separate classes of this player commodity. One class encompasses players who have yet to reach arbitration eligibility. Another class includes players that are arbitration-eligible. The final class consists of free agents. In an ideal market, supply will ultimately equal demand and equilibrium will be reached.[153] The amount of goods produced will be equal to the amount of goods demanded. However, this is not the case in the baseball free-agent market, and thus the allocation of players as goods is not efficient. The free-agent market for players is limited to those who have reached six years of major league service. In 2009, twenty-three percent of players were not eligible for free agency.[154] This decrease in supply creates an inefficient market and,

---

[150] MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION, AVERAGE SALARIES IN MAJOR LEAGUE BASEBALL 1967–2009, at 4, *available at* http://hosted.ap.org/specials/interactives/_sports/baseball08/documents/bbo_average_salary2009.pdf.

[151] *See* ABRAMS, THE MONEY PITCH, *supra* note 25, at 162.

[152] MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION, *supra* note 150, at 4.

[153] Economics Basics: Demand and Supply, http://www.investopedia.com/university/economics/economics3.asp (last visited Mar. 9, 2010).

[154] *See* MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION, *supra* note 150.

as a result, salaries are artificially inflated.[155] The Messersmith decision empowered the players' union to negotiate the hybrid free agency that creates this inefficient market, and the escalating results have been astronomical.[156] The owners' desire to retain exclusive control for the first six years of a major league player's service time has led to a significant increase in player salaries.[157] The average player salary has increased from $44,676 in 1975 to $2,925,679 in 2008.[158] The owners undoubtedly would prefer lower salaries, even though the increase was largely brought on by themselves—just as their overreaching led to the Messersmith decision's elimination of the reserve clause—once again exposing the clubs to the law of unintended consequences.

The National Football League ("NFL") does not separate its players into classes of goods. In fact, a first-round draft pick may be one of the higher paid players on any given team in the NFL.[159] However, unlike in baseball, the NFL established a hard cap on a team's total salaries.[160] This tempers the free market in a more efficient way than baseball's salary arbitration structure, and the result is increased cost certainty for NFL teams. The combination of separating players into classes of goods in baseball while maintaining no limit on team spending has resulted in massive player salaries.[161] For instance, in the last decade, Alex Rodriguez signed two deals worth over $200 million each.[162]

Certainly, the significant increase in baseball salaries cannot be blamed wholly on the advent of salary arbitration. Prior to the Messersmith decision, each team had the luxury of being the only employer able to negotiate with its own player, thereby achieving the intended result of artificially lower salaries.[163] There is ample anecdotal evidence of such economic aberrations, much of it comprising some of baseball's greatest lore. When prodigious slugger Jimmy Foxx won the coveted Triple Crown in

---

[155] *See* John P. Gillard, Jr., *An Analysis of Salary Arbitration in Baseball: Could a Failure to Change the System Be Strike Three For Small-Market Franchises?*, 3 SPORTS LAW. J. 125, 133 (1996).

[156] Marvin Miller's economic background likely contributed to the creation of the inefficient market.

[157] ABRAMS, THE MONEY PITCH, *supra* note 25, at 30.

[158] MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION, *supra* note 150, at 3.

[159] *See* John Clayton, *Lions Secure QB Stafford*, ESPN, Apr. 25, 2009, http://sports.espn.go.com/nfl/draft09/news/story?id=4097641 (reporting that Matthew Stafford, the first pick in the 2009 draft, received $41.7 million guaranteed, while veteran Albert Haynesworth received $41 million guaranteed).

[160] 1993 Collective Bargaining Agreement between the NFL Management Council and the NFL Players Association, as amended Feb. 25, 1998, art. XXIV, 1(c)(i) & 4, *in* Vittorio Vella, *Swing and a Foul Tip: What Major League Baseball Needs to Do to Keep Its Small Market Franchises Alive at the Arbitration Plate*, 16 SETON HALL J. SPORTS & ENT. L. 317, 333 (2006). A hard cap is how much each team is allowed to spend on player salaries for a given year. A team may not go over a hard cap under any circumstances.

[161] *See* Chass, *supra* note 39.

[162] *See* Associated Press, *Rodriguez Finalizes $275M Deal with Yankees*, ESPN, Dec. 13, 2007, *available at* http://sports.espn.go.com/mlb/news/story?id=3153171.

[163] *See* Conti, *supra* note 106, at 236.

1933, Athletics owner Connie Mack tried to actually reduce his salary.[164] This, however, was during the Great Depression, so a better example might be Mickey Mantle's 1957 season when he batted a lofty .365, a feat that inspired Yankees owner George Weiss to offer a pay cut.[165] When superstar Ralph Kiner led the National League in home runs for the seventh consecutive year for the last place Pirates, General Manager Branch Rickey cut his salary by twenty-five percent.[166] When a stunned Kiner protested, claiming the lowly Pirates needed him, Rickey countered with one of the more enduring lines in the annals of baseball: "We would have finished last without you."[167]

It is clear that baseball revenues have increased significantly over the past twenty years, and player salaries have also increased since the demise of baseball's reserve clause. Nevertheless, the market for free agents is an inefficient one caused by salary arbitration and the absence of a cap on team salaries.

D. Super Two Eligibility Fosters a No-Win Situation for Teams, Players, and Fans

One of the many highlights of the 2008 playoffs was the success of the Tampa Bay Rays.[168] Among other things, the Rays' run to the World Series featured a surprise pitching performance from David Price.[169] Price was the Rays' first pick of the amateur draft in 2007.[170] In the 2008 playoffs, he earned his first major league win and recorded the final four outs of the American League Championship Game.[171] Yet, despite his performance—a seemingly "special accomplishment"—when the 2009 season started, the Rays left him off their twenty-five man roster and assigned him to the minor leagues.[172] This decision was not in the best interest of the team in winning games, nor was it in the best interest of the paying fans. The Rays' decision to assign him to the minor leagues was simply an attempt to delay his arbitration eligibility.[173]

---

[164] HELYAR, *supra* note 21, at 10.

[165] *Id.* at 82.

[166] DICKSON, *supra* note 13, at 358.

[167] *Id.*

[168] "The Rays were the worst team in the majors last year, had never come close to a winning season in their 10-year franchise history and spent less money in 2008 payroll than every other team but the Florida Marlins. Vegas set odds of 200 to 1 for Tampa Bay to win the World Series this year. The Rays, however, won 97 games and the pennant . . . ." Tom Verducci, *The New Reality*, SPORTS ILLUSTRATED, Oct. 27, 2008, at 46.

[169] *Id.*

[170] Jayson Stark, *Believe It or Not, Price Headed to Minors*, ESPN, Mar. 24, 2009, http://sports.espn.go.com/mlb/spring2009/columns/story?columnist=stark_jayson&id=4011780.

[171] *See id.*

[172] Associated Press, *Rays Send Lefty Price to Minors*, ESPN, Mar. 25, 2009, http://sports.espn.go.com/mlb/spring2009/news/story?id=4016400.

[173] *See* Stark, *supra* note 170.

The collective bargaining agreement provides that a player with at least two, but less than three, years of major league service shall be eligible for salary arbitration if he has accumulated at least eighty-six days of service during the immediately preceding season and he ranks in the top seventeen percent in total service in the class of players who have at least two but less than three years of major league service.[174] A major league season is defined as 172 days on the roster.[175] Players who qualify for eligibility under these criteria are deemed Super Twos. This distinction was implemented by the 1990 collective bargaining agreement. In the 1994 labor strike, the owners pushed for the elimination of the Super Two eligibility scheme, and the players refused.

From a player's perspective, gaining Super Two eligibility can result in a significant increase in pay.[176] In 2008, Ryan Howard of the Philadelphia Phillies became a Super Two by a mere five days and his salary increased $10 million as a result of salary arbitration.[177] In an effort to avoid Super Two eligibility teams have, in the past, risked costing themselves a chance for a place in the playoffs. In 2007, the Milwaukee Brewers did not bring up their star prospect Ryan Braun until May 25. From that day forward he compiled better statistics than the American League Most Valuable Player.[178] Yet, the Milwaukee Brewers missed the playoffs by a mere two games.[179] Whether Braun could have made up those two games by appearing seven weeks sooner is uncertain, but it is apparent that the Brewers were willing to take that risk. This unwillingness has created a losing situation for the game of baseball itself, not to mention the Brewers and their fans.

The Tampa Bay Rays assigned the 2008 Minor League Player of the Year, David Price, who accumulated a 1.08 earned run average in spring training and significantly contributed to the Rays' first trip to the World Series, to the minor leagues.[180] The Rays are not the only team to make similar decisions with top prospects in 2009.[181]

---

[174] MLB Basic Agreement, *supra* note 78, at art. VI(F)(1).

[175] Tim Sullivan, *Padres' Stance on Headley all about the money*, SAN DIEGO UNION TRIB., May 28, 2008, at D1, *available at* http://www3.signonsandiego.com/news/2008/may/27/headleys-prolonged-apprenticeship-portland-makes-d/.

[176] *Id.*

[177] *Id.*

[178] Braun hit thirty-four home runs, had ninety-seven runs batted in, and hit .324 in 113 games in 2007. Ryan Braun Stats, Bio, Photos, Highlights, http://milwaukee.brewers.mlb.com/team/player.jsp?player_id=460075 (last visited Mar. 9, 2010). American League MVP, Alex Rodriguez, hit thirty-five home runs, had 111 runs batted in, and hit .325 in the last four months of the 2007 season. Alex Rodriguez Stats, Bio, Photos, Highlights, http://mlb.mlb.com/team/player.jsp?player_id=121347 (last visited Mar. 9, 2010).

[179] Regular Season Standings, http://mlb.mlb.com/mlb/standings/index.jsp?ymd=20071001 (last visited Mar. 9, 2010).

[180] Stark, *supra* note 170.

[181] Matt Wieters, the number two ranked prospect behind David Price was also assigned to the minor leagues by the Baltimore Orioles despite batting .335 with twenty-seven home runs and ninety-one runs batted in for the 2007 minor league season. *See* Associated Press, *Orioles' Wieters to Minors*, WASH. TIMES, Mar. 23, 2009, *available at* http://www.washingtontimes.com/news/2009/mar/30/orioles-wieters-is-off-to-minors-but-not-for-long.

By doing so, the Rays and other teams are essentially withholding certain better players in an effort to save a significant amount of money in the long term. Fans, therefore, pay full price for tickets to see an inferior, manipulated product on the field, and teams are hurting their own chances of winning by keeping a qualified major league player in the minors.[182]

Moreover, the Super Two eligibility scheme has a negative impact on the Rays' David Price himself, both in his potential earnings and in his development as a player. If Price does not reach Super Two eligibility, then he has to play another season at his original major league salary before reaching arbitration eligibility. He must play for earnings that are arguably well below his market value for a full year when he risks a career ending injury. Furthermore, in the minor leagues Price is forced to pitch to inferior talent. Price himself stated, "If I'm getting innings, I would love to get them in the big leagues. If I'm going to work on stuff, I'd love to work on it up there and get real reactions to hitters."[183]

During the 2008 season the agent for Francisco Liriano, pitcher for the Minnesota Twins, asked the players' union to investigate why his client had not been called up to the major leagues despite his excellent performance in the minor leagues.[184] The investigation was eventually dropped but will likely be revisited if the current structure remains in place.

E. Salary Arbitration Unfairly Favors Players During Economic Recessions

In the aftermath of a severe economic recession in 2008, the 2009 baseball offseason exposed a particular flaw in the salary arbitration process as utilized by MLB: evidence of a team's financial condition is inadmissible at the salary arbitration table.[185] The economic climate entering the 2009 offseason was unusually weak, if not at post-Depression lows. Employers across America cut jobs and salaries, and fourteen teams across baseball lowered their salaries from their 2008 payrolls.[186] The Arizona Diamondbacks and Toronto Blue Jays laid off dozens of front office employees in an attempt to reduce costs.[187] Ticket sales and advertising revenues were significantly lower than in past years. The free agency class of 2009 felt the effects of the depressed market; however, the arbitration class saw an increase of 143% in salary.[188] Thus, teams could not offer players, like Bobby Abreu, salary arbitration simply because of the likely economic result.[189]

---

[182] Stark, *supra* note 170.

[183] *Id.*

[184] Associated Press, *Agent Wants Player's Union to Investigate Twins' Call-up Snub of Liriano,* ESPN, July 18, 2008, *http*://sports.espn.go.com/mlb/news/story?id=3494330.

[185] MLB Basic Agreement, *supra* note 78, at art. VI(F)(12)(b).

[186] Bob Nightengale, *Incredible Shrinking Payroll: 14 of 30 MLB Teams Cut Back*, USA TODAY, Apr. 6, 2009, at 1C, *available at* http://www.usatoday.com/sports/baseball/2009-04-05-Salaries_N.htm.

[187] Graziano, *supra* note 5.

[188] Maury Brown, *Detailed Report: 2009 MLB Salary Arbitration by Club, Position, and More*, BIZ OF BASEBALL, Feb. 24, 2009, http://bizofbaseball.com/index.php?option=com_content&

Under the collective bargaining agreement, a team has a small window at the conclusion of the season to offer salary arbitration to its players not under contract but who have six or more years of major league service time.[190] If the club offers a player salary arbitration and he signs with another team, then that team is given compensatory draft picks.[191] However, if no other team signs him, the club risks going to arbitration. In 2002, Greg Maddux of the Atlanta Braves surprised his team by accepting its offer for salary arbitration, a bold move that forced Atlanta's hand. The likely result in arbitration would have put Atlanta over its team budget, so the Braves traded their star pitcher Kevin Millwood as a result.[192]

The economic climate entering the 2009 offseason lowered the operating budgets of fourteen major league teams, including the New York Yankees.[193] If the Yankees had offered salary arbitration to Bobby Abreu, the likely award would have been a salary similar to the one he received in 2008, which was $16 million.[194] The Yankees, however, correctly concluded that the real market for Abreu was far less due to unavoidable factors like the economic climate and the likely financial condition of other major league teams, and so the team released him.[195] The overall economic conditions of America and baseball would not have been relevant in arbitration, but they were the most compelling factors behind Abreu's decline in market value at that time.

Arbitrators use contracts and salaries made in completely different economic climates as comparables. However, using comparable salaries is only realistic for comparable economic times. A salary negotiated in the winter of 2006 is likely to be drastically different than one negotiated in the winter of 2009, even if the players are virtually identical. It is therefore no coincidence that the arbitration class of 2009 saw an increase in pay while teams across baseball were cutting their payrolls. Artificial forces were interfering with supply and demand. Normally, when a team is negotiating with a free agent, it determines his current market value based on what the club is willing to pay balanced against what other teams are willing to pay. The salary arbitration process completely ignores this market analysis,[196] and therefore the realities of the market itself. Instead, the process not only focuses on what players were paid in the past, it does so in a virtual economic vacuum.

These flaws in the arbitration process create an especially difficult situation for teams in times of economic distress. The Yankees had to let Bobby Abreu walk away

---

view=article&id=2982:detailed-report-2009-mlb-salary-arbitration-by-club-position-and-more&catid=66:free-agnecy-and-trades&Itemid=153.

189 Graziano, *supra* note 5.

190 Freedman, *supra* note 80.

191 *Id.*

192 Tom Verducci, *Deadly Deal*, SPORTS ILLUSTRATED, Apr. 29, 2003, http://sportsillustrated.cnn.com/inside_game/tom_verducci/news/2003/04/29/insider.

193 Nightengale, *supra* note 186.

194 *See* Ortiz & Fraley, *supra* note 1.

195 Graziano, *supra* note 5.

196 *See* Gillard, *supra* note 155, at 134.

without receiving compensation, and they replaced him with far inferior talent. This was a losing proposition for the Yankees, their fans, and Abreu.

Perhaps even more remarkably, the backward looking dynamic of salary arbitration does not help teams in periods of economic growth either. If a team exercises its option of offering salary arbitration, the player still has the advantage of knowing that, at worst, he may receive an arbitration salary greater than or equal to his current salary, and can use that as leverage in the open market.

F. Salary Arbitration Ignores the Business Models of Small-Market Franchises

The highest opening-day payroll for the 2009 season belonged to the New York Yankees at $201.4 million.[197] On the opposite end of the spectrum, the lowest payroll belonged to the Florida Marlins at $36.8 million.[198] Clearly the Marlins pay their players much less than the New York Yankees; the Marlins' entire 2009 payroll is only about ten percent more than the 2009 salary of Yankees star Alex Rodriguez.[199] Baseball is the only major professional team sport without a salary cap,[200] a fact that has contributed to tremendous disparities in payrolls between teams.[201] A large-market team is usually willing to pay more for a player's services than a small-market team due to the revenue-producing potential in that market,[202] through lucrative television contracts and enhanced gate revenues.

Because of the adverse economic climate, the need for a salary cap, although not on the official agenda, was at the forefront of the owners meetings during the 2009 offseason.[203] Mark Attanasio, owner of the Milwaukee Brewers, believed a salary cap would make it easier for teams to control their payrolls. Attanasio stated, "Obviously, by definition, if you have a salary cap you have some cost certainty because there are very clear parameters . . . ."[204] But the flaws in salary arbitration contribute to a team's lack of cost certainty, exacerbating the related economic challenges in operating a major league franchise.

Despite the vast differences in payrolls and revenue among teams, when a player from a small-market club files for arbitration his salary will largely be determined by comparable salaries paid to players by all teams.[205] As a result, if a Marlins player were to file for arbitration, the team might be forced to pay Yankee-type money for that player. The Yankees committed $423.5 million to multi-year deals for just three new free agents in the 2009 offseason.[206] Exacerbating the problem still further is

---

[197] Nightengale, *supra* note 186.

[198] *See* MLB Salaries, CBSSports.com, http://www.cbssports.com/mlb/salaries.

[199] *See id.*

[200] *See* Associated Press, *Some Baseball Owners Call for Salary Cap*, ESPN, Jan. 14, 2009, http://sports.espn.go.com/espn/wire?section=mlb&id=3833674.

[201] *See id.*

[202] Gillard, *supra* note 155, at 134.

[203] Associated Press, *supra* note 200.

[204] *Id.*

[205] *See* Gillard, *supra* note 155, at 134.

[206] Nightengale, *supra* note 186.

that salaries determined through genuine free agency can be used as a valid comparison in an arbitration hearing.[207] But all circumstances are not comparable; for example, a given team might be willing to pay a premium for a player if that player fulfills a much-needed position on that particular club's roster.[208] Yet the rationale for this free agent salary is ignored and the final number is used in salary arbitration as a comparable without appropriate qualification:[209] "[A]n employer's ability to pay, which is a customary consideration in setting workers' salaries in most businesses, lies outside the foul lines of baseball salary arbitration."[210] Thus, a small market team's business model and overall economic reality are completely ignored in the arbitration process.

VI. PROPOSALS FOR CHANGING THE SALARY ARBITRATION SYSTEM

A. Refine the Admissible Criteria

The current salary arbitration system is an economic and logical aberration. One modification that could curb many of the aforementioned arbitration problems would be to refine the admissible criteria allowed under the collective bargaining agreement. Especially in light of the 2009 offseason, a team's financial position should be admissible in arbitration. If the Yankees were to offer evidence of a planned reduction in payroll as a result of the recession, they might have been able to offer Bobby Abreu salary arbitration and be awarded either a modified lesser salary or at least receive compensatory draft picks if Abreu were to sign with another team. Moreover the overall arbitration class would better represent the true market for player services in a given year. Allowing the team financial position to be considered would additionally benefit the small-market teams. The Marlins would be able to present evidence that its payroll is significantly less than that of the Yankees, and thus Yankee player salaries should not be used as a comparable without appropriate explanation or qualification. Otherwise, all player salaries would sooner or later reach Yankee levels, even though the Yankees would be the only team theoretically able to pay that much for its own finite roster. Under this proposed change, if a team did not present evidence of its financial condition, the arbitrator panel would not be permitted to consider it in its decision.

Another approach would be to mirror the NHL and utilize only other arbitrated salaries as admissible comparables, or at least to qualify the admissible salaries accordingly. After all, salaries negotiated in free agency can be multi-year contracts loaded with bonus and incentive clauses. Furthermore, teams are often willing to pay

---

[207] ABRAMS, THE MONEY PITCH, *supra* note 25, at 161.

[208] Gillard, *supra* note 155, at 133–34. For example the New York Mets signed star relief pitcher Francisco Rodriguez to a $37 million contract in the 2009 offseason largely because of their bullpen problems in 2008. *See* Associated Press, *K-Rod, Mets Finalize Deal*, ESPN, Dec. 10, 2008, http://sports.espn.go.com/mlb/news/story?id=3760925.

[209] Gillard, *supra* note 155, at 146.

[210] ABRAMS, THE MONEY PITCH, *supra* note 25, at 64.

a player more in free agency if that player fills a specific need that is unique to that team. Arbitrated salaries are set forth by standard player contracts for one year with no such clauses. Therefore, only comparing arbitrated salaries is not inappropriate and may provide a better apples-to-apples comparison.

Finally, the admissible criteria should be assigned weight. This will take away the unnecessary amount of discretion given to arbitrators and result in a more consistent and predictable process. As it is currently constructed, salary arbitration is a high-risk roll of the dice. The procedure is arbitrary at best, and in practice it is often unfair to teams, players, and fans alike.

B. Eliminate Super Two Eligibility

The Super Two eligibility scheme should be eliminated from the collective bargaining agreement. The eligibility for salary arbitration should either be returned to three years of service time or be replaced with a rookie scale similar to that used in the National Basketball Association ("NBA"). The NBA has an escalating wage scale for its rookies that was negotiated collectively by the union.[211] In 1994, MLB owners attempted to institute a similar salary scale; however, their proposal was coupled with the elimination of salary arbitration.[212] The owners would be better served to offer a hybrid of both rookie scale and salary arbitration to the players. One solution is a rookie scale for four years with arbitration still available for free agents after they complete their fourth year of service time, similar to the current system used by the NHL. This would prevent teams from keeping top draft picks like David Price stashed away in the minor leagues for the purpose of avoiding salary arbitration eligibility. Although no solution is entirely free from flaws or potential abuse, this approach offers a viable compromise without eliminating salary arbitration entirely.

C. Issue Written Opinions

Unlike the NHL, MLB's current collective bargaining agreement does not require salary arbitrators to issue written opinions that explain their choices.[213] The arbitrator simply fills in the chosen position on a blank standard player contract within twenty-four hours of the conclusion of the arbitration hearing.[214] After all, these decisions, much like judicial decisions, affect not only the player at issue but also future players who will engage in salary arbitration.[215] Future player representatives and teams will use arbitration decisions as comparables and try to draw analogies to them. However, they may only be analogizing to a stark number and not to the reasoning behind that

---

[211] *See* 2009–2010 Rookie Salary Scale, http://www.hoopsworld.com/Story.asp?story_id=9301 (last visited Mar. 9, 2010).

[212] Staudohar, *The Baseball Strike*, *supra* note 64, at 24.

[213] MLB Basic Agreement, *supra* note 78, at art. VI(F)(5).

[214] *Id.*

[215] ABRAMS, THE MONEY PITCH, *supra* note 25, at 152.

number. Salary arbitration would be vastly improved if arbitrators' decisions were required to be accompanied by written opinions.

Written judicial opinions serve three primary functions, and all are relevant to a written salary arbitration hearing in MLB. The first is to discipline judges in the decision-making process.[216] The act of writing helps to ensure that judges properly reason through the issues put before them. Translating thought into concrete text leads the writer to reconsider the content of his thought once he has put it on paper.[217] Baseball arbitrators are presented with an overwhelming amount of statistics in a three-hour hearing.[218] It is nearly impossible to analyze all the data in the allotted period of time.[219] Additionally, the collective bargaining agreement does not specify the weight the arbitrator should apply to the evidence presented. A written opinion will ensure that the arbitrator is thorough in his or her decision-making, and he or she will better reason through the evidence presented and the weight he or she chooses to assign to such evidence. The end result will be more fair and reasoned for the benefit of the parties, while also improving the overall process.

Every victory or loss in salary arbitration has precedential value because the system focuses on comparables as the measure of a player's value.[220] However, in a system of law with no written opinions, parties are limited in what they can argue.[221] Perhaps most importantly, arbitrators themselves are left in the dark as to the reasoning behind apparently similar cases decided in the past, which is contrary to the second primary function of a written judicial opinion: facilitating the system of precedent.[222] Teams and players can be more refined in their arguments and arbitrators will have the ability to support their decisions with careful elaborations. A written opinion will provide proper guidance for future salary arbitrations by providing parties a window into the criteria considered in past arbitration decisions and the weight assigned to such criteria.

A baseball arbitrator's guidelines or source of law are derived from the collective bargaining agreement. It outlines the admissible and inadmissible criteria on which an arbitrator can base his or her decision. However, the absence of a written opinion brings into question whether they actually stayed within these guidelines. This leads to the third function of a written opinion, which is to legitimize a ruling by providing the public with some assurance that the given decision is not arbitrary.[223] A written judicial opinion provides a window into the court's decision-making process and allows inspection as to whether a court in a given case has acted in accordance with the law rather than pursuant to some other illegitimate standard.[224] But baseball

---

[216] Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 GEO. L J. 1283, 1317 (2008).

[217] *Id.* at 1321.

[218] ABRAMS, THE MONEY PITCH, *supra* note 25, at 157.

[219] *Id.*

[220] *Id.* at 152.

[221] Oldfather, *supra* note 216, at 1328.

[222] *Id.* at 1317.

[223] *Id.*

[224] *Id.* at 1335.

salary arbitration as presently conducted leaves the parties and future parties in the dark and left to guess whether the arbitrator has stayed within the letter of the law outlined by the collective bargaining agreement. If an arbitrator is a fan of a particular team and chooses that team's position instead of a player's position, it would go unchecked and the parties would never know. Furthermore, there is nothing to stop an arbitrator from simply flipping a coin to reach his or her decision. Although there is little to no specific evidence to suggest that arbitrators have been prejudiced or have otherwise improperly strayed beyond their guidelines, requiring written opinions will better ensure that this is never the case. This, of course, begs the real point: without detailed written opinions there can be no such evidence of impropriety, and with no explanations to rely upon at all, how can there be genuine accountability?

VII. CONCLUSION

Salary arbitration in MLB has remained largely unchanged since its introduction in 1973.[225] First presented as a compromise to avoid eliminating the baseball reserve concept,[226] salary arbitration has become a contentious issue between players and owners that is inherently arbitrary and unfair in practice and has little hope of resolving itself. The owners have negotiated the eligibility rules of salary arbitration and have tried and failed to remove arbitration from baseball altogether through collective bargaining sessions in 1985 and 1994.[227] The issue has taken a back seat in recent labor negotiations due to performance-enhancing drugs and the introduction of the luxury tax.[228] But with the contentious drug issues largely resolved, the owners have an opportune chance at forthcoming bargaining negotiations to properly address the issue of salary arbitration. If they do, the owners should focus on improving the system instead of trying to eliminate it from baseball altogether. Specifically, the teams should focus their efforts on refining the admissible criteria, eliminating the Super Two eligibility scheme, and requiring written arbitration opinions. The result will be a more predictable and consistent process that benefits the teams, the players, the fans—and the game of baseball.

The players are not likely to roll over and concede the owners' demands, of course, so it is vital that the owners approach bargaining sessions with a true strategy of negotiation instead of acting unilaterally if negotiations reach an impasse like they did in 1994 (from which the economic and public relations fallout has still not fully settled). The salary cap is currently the topic of conversation heading into new rounds of labor negotiations.[229] The owners desire to achieve cost certainty through the implementation of a salary cap is likely to be met with strong opposition from the players. Refining the salary arbitration system, if presented correctly, could be seen as

---

[225] *See* Chass, *supra* note 39.

[226] *Id.*

[227] Staudohar, *The Baseball Strike*, *supra* note 64, at 23, 24.

[228] Staudohar, *Baseball Negotiations*, *supra* note 76, at 18.

[229] Associated Press, *supra* note 200.

a compromise between the owners and the players, and the result would be a major benefit to the game of baseball.

The salary arbitration system was itself a compromise, but it has devolved into an arbitrary ritual that undermines both fairness and public confidence. Baseball's history of labor disputes has been acrimonious at best, leading both sides to dig into rigid, polarized positions that often invoke the law of unintended consequences. In the wake of a steroid era that tarnished the sanctity of baseball's record books, the owners have themselves to blame.

The fault, in the end, lies not in the proverbial stars, be they celestial bodies or able- bodied players, but in the owners themselves, suggesting that the celebrated political cartoon *Pogo* trumps even Shakespeare: "We have met the enemy, and the enemy is us."