

## Anatomy of a Baseball Law Course

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# ANATOMY OF A BASEBALL LAW COURSE

ROBERT M. JARVIS\*

## I. INTRODUCTION

This Article describes my Spring 2018 Baseball and the Law (BATL) course at Nova Southeastern University (NSU) in Fort Lauderdale, Florida. Other than an experimental version of the course several years earlier, this was my first time teaching BATL. Historically, BATL courses have been few and far between, with only roughly a dozen law schools ever having had one.<sup>1</sup> Based on anecdotal reports, most BATL courses are lecture courses, carry one credit, and are given during inter-sessions or other non-standard times.<sup>2</sup> In 2009,

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1. See Christian Nolan, *Baseball and Law: When Two of America's Pastimes Meet*, N.Y.S. B. NEWS, July/Aug. 2017, at 5, 22. As Nolan explains, the first BATL course appeared in 1991 at the University of Arkansas—Fayetteville:

The very first law school course on baseball law was taught 25 years ago at the University of Arkansas School of Law. It was the idea of Howard Brill, the recently retired Chief Justice of the Arkansas Supreme Court. Brill, who grew up a Brooklyn Dodgers fan in Vermont, said he wanted to add a new course to his teaching package at that time. He also generally believed it would be enjoyable for him and the students. At one class each semester, students are required to wear their favorite baseball cap.

"I persuaded the faculty to approve a one hour elective, to be taught as an overload, and only if 20 students register," Brill told State Bar News. "We cover one appellate decision a week, covering different substantive areas of the law." The class was a success, as he has taught the course every other year since 1991.

*Id.* at 22.

2. At the University of Virginia, for example, Professor John K. Setear teaches BATL as a "J"-term course:

More than 300 students are taking January Term courses at the Law School this week, studying subjects ranging from professional baseball to the emerging world of search engine law.

The one-credit courses began Monday and run through Friday, and offer an opportunity for students to intensively examine a subject, according to Professor John Setear, who is teaching a short course on the laws and rules governing professional baseball.

"It's pretty intense for them to meet for three hours a day," Setear said. "It's a lot of work, but it means they are able to focus on one particular thing."

Professor Alan M. Dershowitz taught a BATL course at Harvard University as an ungraded 1L seminar.<sup>3</sup>

In contrast, I was allowed to teach my BATL course in a regular semester for three credits. At my request, the course was scheduled in a single weekly three-hour block (Tuesdays, 6:00-9:00 p.m.). The course had no pre-requisites, although students had to be 2Ls or higher.

Like nearly all law schools, NSU has a generic Sports Law course.<sup>4</sup> Although I taught this course at one time, a colleague now teaches it and, like most sports law professors, baseball cases are an important part of his course.<sup>5</sup> Despite this fact, I allowed students who had taken his course to enroll in my course. As things worked out, no student in my course had taken Sports Law.

In his baseball course, students take a look at baseball's collective bargaining agreement between the players union and the team owners, read a book about the first player to legally challenge Major League Baseball's reserve clause, and talk about the quasi-legal aspects of baseball such as revenue sharing, the playoff structure and the allocation of teams to different divisions.

The January Term course grew out of a semester-long class Setear taught called "Ballots, Baseballs and Bombers," which looked at the interaction between legal and nonlegal rules in presidential elections, Major League Baseball and strategic bombing during World War II.

This week, students in the January Term class are reading a book about Curt Flood, a St. Louis Cardinals outfielder who in the 1970s sued the league to challenge its reserve clause, which allowed teams to retain ownership rights to a player even after that player's contract had expired.

Flood had been traded to the then-woeful Philadelphia Phillies, and did not want to go.

"He claimed the reserve clause was an antitrust violation," Setear said. "The case went all the way to the Supreme Court, though Flood lost. It's a case that stands for the often-stated proposition that baseball is exempt from the antitrust regulation."

Students also read the infamous 1975 Pennsylvania Law Review article "The Common Law Origins of the Infield Fly Rule," and discuss the respective roles of judges and umpires.

"I think the January Term is nice because they are one credit courses, and sometimes you want to teach something that is probably not broad enough to make into a semester-long course but is still an interesting topic," Setear said.

Rob Seal, *J-Term Courses Hit Full Stride*, U. VA. SCH. L. NEWS & MEDIA (Jan. 20, 2010), [https://content.law.virginia.edu/news/2010\\_spr/j\\_term.htm](https://content.law.virginia.edu/news/2010_spr/j_term.htm).

3. See Damilare K. Sonoiki, *Dershowitz Teaches Law of Baseball*, HARV. CRIMSON, Oct. 2, 2009, <https://www.thecrimson.com/article/2009/10/2/law-lucchino-dershowitz-class/>.

4. In 2011, the National Sports Law Institute at Marquette University reported that "84% (167 out of 198) of [law] schools . . . offer at least one sports law course." See *2011 Sports Law Internet Survey*, MARQ. U. L. SCH., <https://law.marquette.edu/national-sports-law-institute/2011-sports-law-internet-survey> (last visited May 9, 2019) (under "2011 Executive Summary").

5. For the use of baseball cases in sports law courses, see Roger I. Abrams, *Even the Best Lawyers Must Know Baseball*, in *BASEBALL IN THE CLASSROOM: ESSAYS ON TEACHING THE NATIONAL PASTIME 95* (Edward J. Rielley ed., 2006). For their use in other law school courses, see C. Paul Rogers III, "Legal Baseball" in *the Law School Curriculum—The Contracts Example*, *supra*, at 104.

My law school operates on a thirteen-week semester. As a result, I divided my course into three units: a three-week introduction; a five-week salary arbitration exercise (which counted for 50% of the final grade); and a five-week U.S. Supreme Court exercise (which counted for the other 50%). Students also could earn a half-letter grade bump for exceptional class participation.<sup>6</sup>

Each segment had a specific objective. Unit 1 helped students who knew nothing (or very little) about baseball catch up to the class's die-hard fans. At the same time, it allowed me to acquaint the class with the game's myriad legal issues.<sup>7</sup>

Unit 2 was designed to teach students about baseball's economics.<sup>8</sup> It also served to enhance their familiarity with alternative dispute resolution.<sup>9</sup> Major League Baseball (MLB) uses final-offer arbitration (FOA) to determine the

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6. As has been pointed out elsewhere, giving credit for class participation has its drawbacks. *See generally* John M. Rogers, *Class Participation: Random Calling and Anonymous Grading*, 47 J. LEGAL EDUC. 73 (1997). On balance, however, I think the advantages outweigh the disadvantages and therefore use some form of it in all my courses.

7. For a sampling of these issues, see, e.g., ED EDMONDS & FRANK G. HOUEK, *BASEBALL MEETS THE LAW: A CHRONOLOGY OF DECISIONS, STATUTES AND OTHER LEGAL EVENTS* (McFarland 2017); PATRICK K. THORNTON, *LEGAL DECISIONS THAT SHAPED MODERN BASEBALL* (McFarland 2012); JOHN H. MINAN & KEVIN COLE, *THE LITTLE WHITE BOOK OF BASEBALL LAW* (A.B.A. 2009); LEWIS S. KURLANTZICK, *LEGAL ISSUES IN PROFESSIONAL BASEBALL* (Academica Press 2005); ETTIE WARD, *COURTING THE YANKEES: LEGAL ESSAYS ON THE BRONX BOMBERS* (Carolina Acad. Press 2003); ROGER I. ABRAMS, *LEGAL BASES: BASEBALL AND THE LAW* (Temp. U. Press 1998); SPENCER W. WALLER & NEIL B. COHEN, *BASEBALL AND THE AMERICAN LEGAL MIND* (Routledge 1995). *See also* Adam J. Glazer, *Baseball Faces Formidable 2018 Lineup of Litigation*, CHI. DAILY L. BULL., Mar. 15, 2018, at 5 (describing pending or threatened litigation by players, umpires, and fans).

8. Baseball's annual revenues recently surpassed \$10 billion. *See Report: MLB Revenues Exceed \$10 Billion for the First Time*, USA TODAY, Nov. 22, 2017, <https://www.usatoday.com/story/sports/mlb/2017/11/22/mlb-revenues-exceed-10-billion/890041001/>. Despite this fact, baseball remains a tale of the "haves" and the "have-nots." The leading work on baseball's economic imbalance remains MICHAEL LEWIS, *MONEYBALL: THE ART OF WINNING AN UNFAIR GAME* (W.W. Norton & Co. 2004) (in 2011, the book was made into a movie starring Brad Pitt and Jonah Hill). For other discussions, see, e.g., FRANK P. JOZSA JR., *MAJOR LEAGUE BASEBALL ORGANIZATIONS: TEAM PERFORMANCES AND FINANCIAL CONSEQUENCES* (Lexington Books 2016); JONAH KERI, *THE EXTRA 2%: HOW WALL STREET STRATEGIES TOOK A MAJOR LEAGUE BASEBALL TEAM FROM WORST TO FIRST* (ESPN Books 2011); VINCE GENNARO, *DIAMOND DOLLARS: THE ECONOMICS OF WINNING IN BASEBALL* (Maple Street Press 2007). Given the foregoing, many small-market teams have begun passing on older free agents and focusing instead on signing their young players to long-term contracts. They also have been purposely "tanking" to improve their position in the amateur players draft. In February 2018, the MLB Players Association filed a grievance against four teams for engaging in such practice. *See* Gabe Lacques, *MLBPA Files Grievance vs. Rays, Pirates, Athletics, Marlins Over Revenue-Sharing Spending*, USA TODAY, Feb. 27, 2018, <https://www.usatoday.com/story/sports/mlb/2018/02/27/players-union-files-grievance-vs-rays-pirates-athletics-marlins-over-revenue-sharing-s/376811002/>.

9. As others have pointed out, law students benefit when their classes include an alternate dispute resolution component. *See, e.g.,* John Lande & Jean R. Sternlight, *The Potential Contribution of ADR to an Integrated Curriculum: Preparing Law Students for Real World Lawyering*, 25 OHIO ST. J. ON DISP. RESOL. 247 (2010).

salaries of younger players. In such arbitrations, each side presents the arbitrators with their best offer and the arbitrators must select one of the offers. Accordingly, there is no “splitting of the baby,” as typically occurs in other types of arbitrations.<sup>10</sup>

As will be shown below, to properly prepare a salary arbitration case, an advocate must sift through facts, analyze the strengths and weaknesses of his or her client’s position, anticipate (and be ready for) the other side’s arguments, and be able to explain to the arbitrators why their client’s figure is more reasonable in light of the available evidence.

Unit 3 placed students in a more traditional law school setting—namely, having to brief and argue a mock Supreme Court case or, in the alternative, having to hear the case as a justice and render a written decision. Here, my goal was to improve the students’ appellate advocacy skills. Because Unit 2 involved player/team issues, I built Unit 3 around stadium/fan issues.

Units 2 and 3 did share one goal: to give students multiple opportunities to practice their public speaking skills.<sup>11</sup>

During the second week of the semester, I had students fill out a short questionnaire that, among other things, asked them about their previous baseball experience, knowledge of the sport, and degree of interest. At the last class of the semester, I gave them a longer survey that asked them to evaluate various aspects of the course (students also completed the law school’s standard faculty evaluation form). Once these tasks were done, I held an open forum during which I solicited additional information.<sup>12</sup>

What follows is a description of the course for those who might be thinking about teaching their own BATL course. Also included is a discussion of the results of the questionnaire, survey, forum, and faculty evaluation form. As will be seen, although there were a few hiccups, and some adjustments will be needed before I teach the course again, the students uniformly enjoyed the semester and felt it made them better lawyers.

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10. For a further look at FOA, see Benjamin A. Tulis, *Final-Offer “Baseball” Arbitration: Contexts, Mechanics & Applications*, 20 SETON HALL J. SPORTS & ENT. L. 85 (2010) (extolling the virtues of FOA and arguing that parties outside of baseball should be using it).

11. Many law students are afraid to speak in public, but public speaking is a skill all lawyers must master. See Heidi K. Brown, *Empowering Law Students to Overcome Extreme Public Speaking Anxiety: Why “Just Be It” Works and “Just Do It” Doesn’t*, 53 DUQ. L. REV. 181 (2015).

12. Because there was no final exam in the course, preserving student anonymity was not a concern.

## II. COURSE COMPONENTS

*A. Unit I*

As noted above, I began the course with a three-week introduction to baseball. For these classes, students were assigned selected portions of my casebook.<sup>13</sup> Per the course description, we touched on the

history and rules of the game; league structure, competitive integrity and balance, officiating, revenue sharing, and expansion; team ownership, broadcast and intellectual property rights; franchise relocation and bankruptcy; stadium construction, financing, operations, and spectator safety; player contracts, salaries, endorsement deals, injuries, and off-field behavior; ticket vending, memorabilia sales, and gambling; and the role of the media.<sup>14</sup>

Naturally, not every topic could be covered in depth, and many could be mentioned only in passing. In the end, I spent most of the three weeks focusing on “the trilogy,” which established baseball’s exemption from the nation’s anti-trust laws,<sup>15</sup> as well as more recent cases that have applied or rejected the

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13. See LOUIS H. SCHIFF & ROBERT M. JARVIS, *BASEBALL AND THE LAW: CASES AND MATERIALS* (Carolina Acad. Press 2016) (reviewed at Russ VerSteeg, *Book Review: Baseball and the Law: Cases and Materials*, 27 MARQ. SPORTS L. REV. 239 (2016); Ronald J. Rychlak, *Baseball and the Law: Cases and Materials – A Review*, 5 MISS. SPORTS L. REV. 273 (2016); and Ed Edmonds, *Diamond Justice—Teaching Baseball and the Law*, 95 OR. L. REV. 287 (2016)). In addition to my casebook, there is a second commercially-produced BATL casebook. See WALTER T. CHAMPION, JR., *BASEBALL AND THE LAW: CASES AND COMMENTS* (Cognella Acad. Pub. 2016). Previously, BATL professors were forced to put together their own materials, and some continue to do so. See, e.g., HOWARD W. BRILL, *BASEBALL AND THE LAW* (2018), <http://www.lulu.com/shop/howard-w-brill/baseball-and-the-law/paperback/product-23376208.html>.

14. See *Course Descriptions*, NOVA SOUTHEASTERN U., *Course Descriptions*, <https://www.law.nova.edu/current-students/course-descriptions.html> (last visited May 9, 2019) (under “Baseball and the Law”).

15. The trilogy consists of *Fed. Baseball Club of Balt., Inc. v. Nat’l League of Prof’l Baseball Clubs*, 259 U.S. 200 (1922); *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356 (1953) (per curiam); and *Flood v. Kuhn*, 407 U.S. 258 (1972). For commentary about the trilogy, see, e.g., NATHANIEL GROW, *BASEBALL ON TRIAL: THE ORIGIN OF BASEBALL’S ANTITRUST EXEMPTION* (U. Ill. Press 2014); STUART BANNER, *THE BASEBALL TRUST: A HISTORY OF BASEBALL’S ANTITRUST EXEMPTION* (Oxford U. Press 2013); BRAD SNYDER, *A WELL-PAID SLAVE: CURT FLOOD’S FIGHT FOR FREE AGENCY IN PROFESSIONAL SPORTS* (Penguin Group 2006). Justice Samuel Alito, a die-hard Philadelphia Phillies fan, also has examined the trilogy. See Samuel A. Alito Jr., *The Origin of the Baseball Antitrust Exemption: Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Players*, 34 J. SUP. CT. HIST. 183 (2009).

trilogy, such as *City of San Jose v. Office of the Commissioner of Baseball*<sup>16</sup> and *Butterworth v. National League of Professional Baseball Clubs*.<sup>17</sup>

I decided to emphasize the trilogy because MLB's anti-trust exemption is the most striking feature of baseball law. Moreover, the judiciary's refusal to extend the exemption to other sports<sup>18</sup> allows professors to explore the basis for baseball's exemption, the role of precedent, and the benefits the exemption has conferred on baseball. The Curt Flood Act of 1998,<sup>19</sup> which tacitly approves the trilogy, adds a nice legislative gloss to the subject.

Current events also influenced my choice. In 2017, both the Second Circuit, in *Wyckoff v. Office of the Commissioner of Baseball*,<sup>20</sup> and the Ninth Circuit, in *Miranda v. Selig*,<sup>21</sup> relied on the trilogy to dismiss lawsuits brought by, respectively, major league scouts and minor league players. In both cases, the plaintiffs claimed (with substantial justification) that MLB is engaged in a conspiracy to keep their salaries artificially low. In March 2018, Congress placed its imprimatur on *Miranda* by making minor leaguers ineligible for overtime.<sup>22</sup>

16. 776 F.3d 686 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 36 (2015) (exemption applied in case challenging MLB's refusal to let the Oakland Athletics move to San Jose, California).

17. 644 So.2d 1021 (Fla. 1994) (exemption does not apply to decisions involving sale and relocation of baseball franchises).

18. *See, e.g., Haywood v. Nat'l Basketball Ass'n*, 401 U.S. 1204 (1971); *Radovich v. Nat'l Football League*, 352 U.S. 445 (1957); *United States v. Int'l Boxing Club*, 348 U.S. 236 (1955); *Deesen v. Prof'l Golfers' Ass'n*, 358 F.2d 165 (9th Cir. 1966), *cert. denied*, 385 U.S. 846 (1966); *Peto v. Madison Square Garden Corp.*, 1958 Trade Cas. (CCH) ¶ 69, 106 (S.D.N.Y. 1958) (ice hockey).

19. 15 U.S.C. § 26b (2019). The statute is discussed in detail in Nathaniel Grow, *The Curiously Confounding Curt Flood Act*, 90 TUL. L. REV. 859 (2016).

20. 705 F. App'x 26 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 2621 (2018).

21. 860 F.3d 1237 (9th Cir.), *cert. denied*, 138 S. Ct. 507 (2017), *reh'g denied*, 138 S. Ct. 1045 (2018).

22. *See* Sharon Block, *Minor League Baseball Players Lose; Congress Gave the Boys of Summer a Pay Cut*, USA TODAY, Mar. 30, 2018, at 9A. As has been explained elsewhere:

As part of [the] \$1.3 trillion omnibus spending bill signed by President Donald Trump in March, section 13(a) of the Fair Labor Standards Act is amended to exempt minor league baseball players from a class of workers entitled to certain minimum wages and overtime pay under the FLSA. The amendment, known as the Save America's Pastime Act, which appears on [p]age 1967 of the 2,232 page bill, specifically exempts:

[a]ny employee employed to play baseball who is compensated pursuant to a contract that provides for a weekly salary for services performed during the league's championship season (but not on spring training or the off season) at a rate that is not less than a weekly salary equal to the minimum wage under section 6(a) for a workweek of 40 hours, irrespective of the number of hours the employee devotes to baseball related activities.

As "exempt" workers, minor league baseball players are not entitled to greater wages, even after spending more than 40 hours a week on baseball-related activities. As of last season, there were about 6,500 minor league players across all MLB systems with salaries ranging from \$1,100 per month in rookie and low-A ball to \$2,150 per month in triple-A. The Act

While the primary goal of Unit 1 was to make sure that each student knew enough about baseball to complete the course's assignments, it served two additional purposes. First, students at my law school frequently change their schedules during the first week of the semester. Although thirty-nine students registered for my BATL course, my final enrollment ended up being eighteen. Thus, it was not possible to assign students partners, or make any other organizational plans, at the first class (Tuesday, January 9, 2018).

The second advantage of having a "soft" start to the course was that it gave me an opportunity at the second class (Tuesday, January 16) to distribute a questionnaire to the students. It asked them how much they knew about baseball, whether they regularly followed the sport, and what their career plans were (and if those plans included trying to obtain a sports law position after graduation). It also let students indicate their partner preferences (they could pick or strike up to four classmates). As explained below, this information proved to be very helpful in deciding which roles individual students played in the course's exercises.

In terms of baseball IQ, the questionnaire gave students four choices: "expert," "fan," "rookie," or "no knowledge." Four students rated themselves experts, eight picked the fan designation, five felt they were rookies, and one selected no knowledge. The questionnaires further revealed that half the class planned to pursue a career in sports law, with seven students hoping to become player agents and two looking to land jobs as team executives.

The questionnaires also let me know that most of my students were either Miami Marlins or New York Yankees fans. This did not surprise me, given that NSU draws the bulk of its students from Florida and New York. Several students, however, reported that despite now living in South Florida, they still follow their childhood team (e.g., Seattle Mariners).<sup>23</sup>

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continues the MLB's discretion in setting these salaries, provided they are at least equal to the minimum wage under FLSA section 6(a) for a 40-hour workweek (about \$290 per week).

This settles a long-running dispute as to whether minor leaguers could command additional wages for hours spent honing their craft outside of official game and practice time.

Gregg E. Clifton, *New Law Exempts Minor League Baseball Players from Certain Federal Minimum Wage, Overtime Pay Laws*, LEXOLOGY: JACKSON LEWIS PC COLLEGIATE AND PROF. SPORTS L. BLOG (Apr. 17, 2018), <https://www.lexology.com/library/detail.aspx?g=dd0933d6-833d-4887-b8a5-d4693b33de51> (bold text in original deleted to improve readability). For a further discussion, see Nathaniel Grow, *The Save America's Pastime Act: Special-Intererest Legislation Epitomized*, 90 U. COLO. L. REV. (forthcoming 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3169957](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3169957).

23. As has been pointed out many times, if a youngster becomes attached to a team while growing up, it is almost impossible to get him or her to switch allegiances as an adult. See, e.g., Seth Stephens-Davidowitz, *They Hook You When You're Young*, N.Y. TIMES, Apr. 19, 2014, <https://www.nytimes.com/2014/04/20/opinion/sunday/they-hook-you-when-youre-young.html>. But see Leigh Cowart, *The A's Made Me Commit*



Lastly, students were asked to name their favorite player (past or present). Derek Jeter won easily. Again, this did not surprise me. Not only was Jeter the Yankees' star shortstop from 1995 to 2014,<sup>24</sup> when most of my students were growing up, in 2017 he became the co-owner of the Marlins.<sup>25</sup>

As will be seen, the overwhelming popularity of the Marlins and the Yankees played a large role in how I designed the Unit 2 and 3 exercises.

I wrapped up Unit 1 during the first hour of the third class (Tuesday, January 23). In the second hour, I gave the students an ungraded assignment. It involved a grievance by a player who, against his team's wishes, had played in the 2020 Olympics,<sup>26</sup> got hurt, and now was being financially punished by the club. After reviewing the facts, the students, in the role of grievance arbitrators,<sup>27</sup> were given 30 minutes to prepare a reasoned award. Once time expired, I led the class in a discussion of the problem and then distributed a model award.

The grievance problem gave students a sense of my grading expectations. It also helped fill a gap that otherwise would have existed in the course. My casebook is divided into six principal chapters:

- Chapter 1 – Overview
- Chapter 2 – Commissioners
- Chapter 3 – Teams
- Chapter 4 – Stadiums
- Chapter 5 – Players
- Chapter 6 – Fans<sup>28</sup>

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*Baseball Adultery*, SB NATION (Jan. 7, 2015), [www.sbnation.com/mlb/2015/1/7/7482257/raysathletics-baseball-joe-maddon-adultery](http://www.sbnation.com/mlb/2015/1/7/7482257/raysathletics-baseball-joe-maddon-adultery).

24. See *Derek Jeter Stats*, BASEBALL REFERENCE, <https://www.baseball-reference.com/players/j/jeterde01.shtml> (last visited May 9, 2019).

25. See Tyler Kepner, *Derek Jeter Was Once the Captain. But Now He's the Apprentice*, N.Y. TIMES, Dec. 13, 2017, <https://www.nytimes.com/2017/12/13/sports/baseball/derek-jeter-marlins-trade.html>.

26. Baseball became an Olympic medal sport in 1992; before that, it had made multiple appearances as an exhibition sport. See PETER C. BJARKMAN, DIAMONDS AROUND THE GLOBE: THE ENCYCLOPEDIA OF INTERNATIONAL BASEBALL 439 (Greenwood 2005). The sport was dropped following the 2008 Olympics but is being revived for the 2020 Olympics at the request of host country Japan. See Victor Mather, *Baseball and Softball Returning to Olympics in 2020*, N.Y. TIMES, Aug. 3, 2016, <https://www.nytimes.com/2016/08/04/sports/olympics/baseball-softball-2020-tokyo-new-sports.html>.

27. While MLB uses multiple arbitrators to hear salary disputes, it relies on a single arbitrator to hear grievances. Attorney Mark L. Irvings, who became MLB's grievance arbitrator in 2017, previously served as an MLB salary arbitrator. See *Mark Irvings Hired as Baseball's Arbitrator*, USA TODAY, June 15, 2017, <https://www.usatoday.com/story/sports/mlb/2017/06/15/apnewsbreak-mark-irvings-hired-as-baseballs-arbitrator/102901622/>.

28. The book concludes with a short seventh chapter that deals with amateur baseball. I made it clear, both in the syllabus and at the first class, that I was limiting myself to professional baseball.

As is obvious, I keyed Unit 1 to Chapter 1; Unit 2 to Chapters 3 and 5; and Unit 3 to Chapters 4 and 6. Thus, only Chapter 2 was missing. By having the commissioner leave to the teams the contentious issue of players participating in international tournaments,<sup>29</sup> the grievance problem gave me a chance to discuss the unusual origins and original purpose of the commissioner's office, as well as its long slide from independent regulator to hired hand.<sup>30</sup>

### B. Unit 2

Once we finished the player grievance exercise, I distributed the instructions for Unit 2. As explained above, Unit 2 required students to participate, either as advocates or arbitrators, in a player salary arbitration case.

In real life, MLB salary arbitrations take place just before spring training and involve players who have at least three years of experience<sup>31</sup> but have not yet become free agents (which occurs after six years of playing in the majors).<sup>32</sup> In 2018, the MLB filing deadline for salary arbitration was Tuesday, January 9; the deadline for players and teams to exchange salary figures was Friday, January 12; and salary arbitrations took place from Monday, January 29 to

29. The problem with such events is that players run the risk of getting hurt. At MLB's World Baseball Classic, which started in 2006 in response to the Olympics' decision to drop baseball, see Mather, *supra* note 26, a number of stars have suffered injuries, including Yankees first baseman Mark Teixeira (2013) and Yankees shortstop Didi Gregorius (2017). See Ben Lindbergh, *The World Baseball Classic Injury Effect*, RINGER (Apr. 11, 2017), <https://www.theringer.com/2017/4/11/16042968/2017-mlb-world-baseball-classic-injury-effect-ba832903792a>.

30. This slide is detailed in works such as LARRY MOFFI, *THE CONSCIENCE OF THE GAME: BASEBALL'S COMMISSIONERS FROM LANDIS TO SELIG* (Bison Books 2006); FAY VINCENT, *THE LAST COMMISSIONER: A BASEBALL VALENTINE* (Simon & Schuster 2002); JEROME HOLTZMAN, *THE COMMISSIONERS: BASEBALL'S MIDLIFE CRISIS* (Total Sports 1998).

31. Some players, dubbed "Super Twos," are eligible for salary arbitration after two years. See *What is a Super Two?*, MAJOR LEAGUE BASEBALL, <http://m.mlb.com/glossary/transactions/super-two> (last visited May 9, 2019).

To qualify for the Super Two designation, players must rank in the top 22 percent, in terms of service time, among those who have amassed between two and three years in the Majors. Typically, this applies to players who have two years and at least 130 days of service time, although the specific cutoff date varies on a year-to-year basis.

*Id.*

32. As has been explained elsewhere:

There are two main groups of players who are eligible for salary arbitration: (1) free agents, and (2) players who have not yet accumulated the six years of service time necessary for free agency. Because it is extraordinarily rare for a team to actually plan on going to salary arbitration with one of its free agents, the process exists primarily for those players who have not yet reached free agency status. If, however, free agents do go the arbitration route, they are subject to a different set of rules.

Edward Silverman, *Dick Woodson's Revenge: The Evolution of Salary Arbitration in Major League Baseball*, 2013 PEPP. L. REV. 21, 30-31 (2013) (footnotes omitted).

Friday, February 16<sup>33</sup> in Phoenix, Arizona.<sup>34</sup> This schedule dovetailed nicely with the dates of my course, which, as explained above, began on Tuesday, January 9, 2018. Thus, by the time I handed out my salary arbitration exercise on Tuesday, January 23, MLB was just days away from its first 2018 salary arbitration hearing.

MLB salary arbitration battles receive extensive media coverage, and as the parties come to terms (as most do), the press reports the details of each new contract. Even more attention, however, is paid to those instances in which a player and his team are unable to find common ground. In 2018, there were twenty-two salary arbitration cases, the most since 1990.<sup>35</sup> Reflecting the hard-fought nature of these contests, twelve were decided in favor of the players while ten were won by the teams.<sup>36</sup>

To prepare my students for their arbitrations, I had them visit the Tulane Sports Law Society's (TSLs) web site.<sup>37</sup> Every winter since 2008, the TSLs has staged a national baseball salary arbitration competition; the 2018 competition took place from Wednesday, January 17 to Friday, January 19.<sup>38</sup> On its competitor page,<sup>39</sup> the TSLs has posted: 1) MLB's CBA; 2) a short paper describing baseball salary arbitration; 3) a video of the 2015 competition's final round (between Rutgers University and the University of Ottawa); and 4) the University of Ottawa's winning brief. These materials prompted many students to e-mail me questions, which I often answered by replying to the entire class.<sup>40</sup>

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33. See 27 *MLB Players Who Filed for Salary Arbitration*, USA TODAY, Jan. 12, 2018, <https://www.usatoday.com/story/sports/mlb/2018/01/12/27-mlb-players-who-filed-salary-arbitration/1030961001/>.

34. Pursuant to Article VI(E)(6) of MLB's collective bargaining agreement (CBA), salary arbitration hearings take place each year in a location agreed upon by the owners and the players, "with preference being given to either Los Angeles, Tampa/Orlando, or Phoenix." Collective Bargaining Agreement Between Major League Baseball and Major League Baseball Players Union art. VI(E)(6), at 20, <http://www.mlbplayers.com/pdf9/5450407.pdf> (last visited May 9, 2019). For a copy of MLB's current CBA (known as the "Basic Agreement"), see *id.*

35. See *Reds' Gennett Wins in Arbitration, Players Beat Clubs 12-10*, FOX SPORTS (Feb. 17, 2018), <https://www.foxsports.com/mlb/story/reds-gennett-wins-in-arbitration-players-beat-clubs-12-10-021718>.

36. *Id.*

37. See *Sports Law Society*, TUL. U., <https://law.tulane.edu/orgs/sports-law-society> (last visited May 9, 2019).

38. For a profile of the 2018 competition, see Craig Calcaterra, *Future Sports Lawyers Battle in Baseball Arbitration Competition*, NBC SPORTS (Jan. 22, 2018), <http://mlb.nbcsports.com/2018/01/22/future-sports-lawyers-battle-in-baseball-arbitration-competition/>.

39. See *International Baseball Arbitration Competition*, TUL. U., <https://law.tulane.edu/academics/sports/baseball-arbitration> (last visited May 9, 2019).

40. In addition to e-mail, I set up a Westlaw "TWEN" page for the course, although I ended up using it only to post updates to the syllabus.

Because I had eighteen students, I was able to divide them into three equal-sized groups. Within each group, there were four “attorneys” (two representing the player and two representing the team) and two “arbitrators.” In deciding which students would play each role, I was guided by the preferences they had expressed on the questionnaires they filled out during the second week of class. As things worked out, every student got to work with his or her preferred partner and I was able to assign nearly every student to his or her preferred role.<sup>41</sup>

The biggest challenge in creating this exercise was finding three suitable players. From the outset, I was intent on picking three actual players to make the exercise as authentic as possible. However, I could not choose any arbitration-eligible players because their cases would be resolved by Friday, February 16, and my exercise was scheduled to run through Thursday, March 1. Thus, the students would know the results prior to their oral arguments. Although I could have told the students to ignore the results, I felt this would take away from the experience.

I also needed players who had had mixed 2017 seasons, so as to give both sides an equal chance to win the arbitration. Luckily, three players on the Yankees fit my needs perfectly: first baseman Greg Bird (24-years-old and ineligible for salary arbitration until 2019); right fielder Aaron Judge (25/2020); and pitcher Luis Severino (23/2019).<sup>42</sup> I also considered Yankees left fielder Clint Frazier (23/2021),<sup>43</sup> but as there was considerable talk during the off-season that he would be traded,<sup>44</sup> I decided not to use him.<sup>45</sup>

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41. More students asked to be arbitrators rather than advocates. As such, some students had to be advocates.

42. See *New York Yankees Salaries and Contracts*, BASEBALL REFERENCE, <https://www.baseball-reference.com/teams/NYY/new-york-yankees-salaries-and-contracts.shtml> (last visited May 9, 2019).

43. *Id.*

44. In December 2017, for example, it was widely reported that Frazier was going to the Pittsburgh Pirates in return for starting pitcher Gerrit Cole. See, e.g., Thomas Lott, *MLB Trade Rumors: Yankees Acquiring Gerrit Cole Matter of ‘When’ Not ‘If,’*, SPORTING NEWS (Dec. 22, 2017), <http://www.sporting-news.com/mlb/news/mlb-trade-rumors-new-york-yankees-gerrit-cole-clint-frazier/itb756s26v39112f981mkm5rf>. In fact, Cole ended up being traded to the Houston Astros. See Brian McTaggart, *Astros Land Gerrit Cole in Trade with Pirates*, MLB NEWS (Jan. 14, 2018), <https://www.mlb.com/news/astros-land-gerrit-cole-in-trade-with-pirates/c-264677578>.

45. The Yankees decided to hold on to Frazier and for a time it appeared he would be named the team’s fourth outfielder. However, on Saturday, February 24, 2018, he suffered a concussion while playing in an exhibition game against (ironically) the Pirates. When his symptoms persisted, he was placed on the disabled list and remained out until late April, when he began a rehabilitation assignment with the Class A Tampa Tarpons. See Mike Axisa, *DotF: Frazier Begins Rehab Assignment in Tampa’s Win*, RIVER AVE BLUES (Apr. 26, 2018), <http://riveraveblues.com/2018/04/dotf-frazier-begins-rehab-assignment-tampas-win-169818/>. Thus, not using him turned out to be the right decision, because his injury would have thrown a last-minute monkey wrench into my exercise.

Having all three players come from the Yankees saved me a lot of work, because it meant I had to become familiar with the payroll and player evaluation philosophy of only one club. It also made the exercise fairer, because each case involved a large-market team that, as explained below, was trying to pinch pennies.

As mentioned above, I distributed the salary arbitration exercise instructions at the end of class on Tuesday, January 23. On Tuesday, January 30, and Tuesday, February 6, I met with each set of advocates for 30 minutes apiece (with six sets of advocates, this took up the full three hours that otherwise would have been spent holding class). Although I regretted having to give up two classes, the fact that I had both day and evening students made any other scheduling arrangement impossible. To satisfy the ABA's time requirements, I told students that when they were not meeting with me they were to meet with their co-counsel and work on their brief and oral arguments.

During my meetings with the advocates, we discussed the player's 2017 performance and what it portended for 2018. For Bird, this meant acknowledging that he was injured for most of the season, but recognizing that he was highly productive when he was able to play.<sup>46</sup> For Judge, students had to weigh his remarkable first-half<sup>47</sup> against his anemic second-half, which was marred by an ugly fifty-five-game slump.<sup>48</sup> Lastly, for Severino, the question

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46. See Tanya Bondurant, *2017 Yankees Season Review: Greg Bird*, SB NATION: PINSTRIPE ALLEY (Nov. 3, 2017, 5:00 PM), <https://www.pinstripealley.com/2017/11/3/16603810/greg-bird-yankees-season-review-2017-ankle-injury>. Bird has been plagued with injuries throughout his short career, and between 2015 (his first year in the majors) and 2017 he was healthy only 20% of the time. See *Greg Bird Stats*, BASEBALL REFERENCE, <https://www.baseball-reference.com/players/b/birdgr01.shtml> (last visited May 9, 2019) (indicating that Bird played in only 94 games out of 486). Thus, students had to grapple with whether Bird's struggles were finally behind him or if 2018 would bring more of the same. The answer came at the end of spring training, when Bird again suffered an injury and was forced to undergo surgery. See Billy Witz, *Yankees' Greg Bird Once Again Sidelined for Surgery*, N.Y. TIMES, Mar. 26, 2018, <https://www.nytimes.com/2018/03/26/sports/greg-bird-yankees.html>. Bird finally made his 2018 debut in late May. See Billy Witz, *Greg Bird Is Rejoining the Yankees, Carrying Yet Another Bat*, N.Y. TIMES, May 26, 2018, <https://www.nytimes.com/2018/05/25/sports/greg-bird-yankees.html>.

47. Judge began the season hitting home runs so frequently that the Yankees cordoned off part of Section 104 at Yankee Stadium and named it "The Judge's Chambers." See Michael Clair & Bryan Hoch, *Aaron Judge Has His Own Section at Yankee Stadium*, CUT4 (May 23, 2017), <https://www.mlb.com/cut4/aaron-judge-has-his-own-section-at-yankee-stadium/c-231789486>. Fans lucky enough to land one of the coveted eighteen seats were given fake wigs, robes, and gavels, as well as signs reading "All Rise." *Id.* On Thursday, August 31, 2017, the section played host to long-time Yankees fan Justice Sonia Sotomayor. See Andy Lefkowitz, *Justice Sotomayor Visits 'Judge's Chambers' at Yankees Game*, A.B.A. J., Sept. 1, 2017, [http://www.abajournal.com/news/article/supreme\\_court\\_justice\\_sotomayor\\_visits\\_judges\\_chambers\\_at\\_yankees\\_game](http://www.abajournal.com/news/article/supreme_court_justice_sotomayor_visits_judges_chambers_at_yankees_game).

48. Following the end of the season, the Yankees finally admitted that Judge's second-half struggles were due to a shoulder injury. See Michael Dixon, *Aaron Judge Undergoes Successful Shoulder Surgery*, SPORTSNAUT (Nov. 21, 2017), <https://sportsnaut.com/2017/11/aaron-judge-undergoes-successful-shoulder-surgery/>. In addition to having to try to predict the effect of the surgery, students also had to take two other

was which one was the fluke: his brilliant regular season or his history-making collapse in the playoffs?<sup>49</sup>

Prior to filing for salary arbitration, MLB players and their teams conduct intensive negotiations to try to avoid arbitration.<sup>50</sup> Because of time constraints, I was unable to have my students do likewise. Instead, in their instructions the advocates were told, on a confidential basis, the range their client was looking to get or to pay. From this range, students had to select a figure to present to the arbitrators.

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off-season developments into account: the Yankees' decision to replace manager Joe Girardi, a strict disciplinarian, with Aaron Boone, a former player known for his laid-back personality, and the team's signing of Giancarlo Stanton, who won the 2017 National League Most Valuable Player award by hitting even more home runs (59) than Judge (52). As students came to realize, Girardi's departure was likely to cause the Yankees (including Judge) to play looser, see Kyle Downing, *Reactions to the Yankees' Hiring of Aaron Boone*, MLB TRADE RUMORS (Dec. 2, 2017), <https://www.mlptraderumors.com/2017/12/yankees-hire-aaron-boone-reactions.html>, while Stanton's arrival was likely to take some pressure off Judge. See Cory Fallon, *How the Yankees Giancarlo Stanton Trade Helps Aaron Judge*, FANSIDED (Dec. 11, 2017), <https://yankees-goyard.com/2017/12/11/yankees-stanton-trade-helps-judge/>.

49. See Tanya Bondurant, *2017 Yankees Season Review: Luis Severino*, SB NATION: PINSTRIPE ALLEY (Nov. 19, 2017, 11:00 AM), <https://www.pinstripealley.com/2017/11/19/16675386/luis-severino-yankees-2017-cy-young-award>. Severino was 14-6 with a 2.98 earned run average (ERA) in the regular season. In the playoffs, however, he went 1-1 with a 5.93 ERA. See *Luis Severino Stats*, BASEBALL REFERENCE, <https://www.baseball-reference.com/players/s/severlu01.shtml> (last visited May 9, 2019). In the crucial wild card elimination game against the Minnesota Twins, Severino lasted just one-third of an inning and left with an 81.00 ERA. *Id.* This ranked as one of the worst pitching performances in MLB playoff history. See also Matt Snyder, *Yankees-Twins Wild Card: Severino Posts One of Worst Starts in MLB Playoff History*, CBS SPORTS (Oct. 3, 2017), <https://www.cbssports.com/mlb/news/yankees-twins-wild-card-severino-posts-one-of-worst-starts-in-mlb-playoff-history/>. After Severino's departure, the Yankees rallied to win the game and ultimately came within one victory of the World Series. See Brett Borzelli, *The 2017 Yankees Year in Review*, MEDIUM: BASEKNOCK MLB (Dec. 31, 2017), <https://medium.com/baseknock-mlb/the-2017-yankees-year-in-review-5bb2afe5cfdc>.

50. Negotiations normally terminate when the player and the team exchange salary figures. This is known as "file and trial." See Mike Axisa, *Everything You Need to Know from MLB's Salary Arbitration Filing Deadline*, CBS SPORTS (Jan. 12, 2018), <https://www.cbssports.com/mlb/news/everything-you-need-to-know-from-mlbs-salary-arbitration-filing-deadline/>.

Most teams these days employ a "file and trial" approach, meaning if the two sides do not agree to a contract and wind up filing salary figures, the club cuts off negotiations and they go to an arbitration hearing. The "file and trial" approach is designed to put some pressure on the player to sign. No one likes to go to a hearing, after all.

*Id.* Both players and teams dislike going to arbitration because of the hard feelings the process generates. This became especially clear in 2017, when the Yankees (\$3 million) beat relief pitcher Dellin Betances (\$5 million). On a subsequent conference call, Yankees President Randy Levine berated Betances for having asked for closer money, telling reporters, "Dellin Betances is not a closer." See Billy Witz, *Yankees' Dellin Betances Loses in Arbitration, and a War of Words Begins*, N.Y. TIMES, Feb. 18, 2017, <https://www.nytimes.com/2017/02/18/sports/baseball/yankees-dellin-betances-arbitration.html>. This greatly upset Betances and immediately led to speculation that he would leave the team upon becoming a free agent in 2020. *Id.* One commentator has suggested that much of the process's acrimony could be avoided by requiring the parties to first submit to mediation. See Sam B. Smith, Note, *Show Me the Mediation!: Introducing Mediation Prior to Salary Arbitration in Major League Baseball*, 42 HOFSTRA L. REV. 1007 (2014).

In 2017, MLB's minimum salary was \$535,000.<sup>51</sup> Bird made \$545,500;<sup>52</sup> Judge \$544,500;<sup>53</sup> and Severino \$550,975.<sup>54</sup> Working off these numbers, I gave the advocates the following ranges and explained that they had come from either the player's agent or Brian Cashman, the Yankees' general manager:

PLAYER	TEAM WANTS TO PAY	PLAYER WANTS TO GET
Greg Bird	\$750,000-\$1 million	\$1.5 million-\$2.5 million
Aaron Judge	\$1.5 million-\$3 million	\$4 million-\$8 million
Luis Severino	\$750,000-\$1.5 million	\$2 million-\$3 million

These are the numbers the advocates ultimately chose to present to the arbitrators:

PLAYER	TEAM'S PROPOSED 2018 SALARY	PLAYER'S PROPOSED 2018 SALARY
Greg Bird	\$818,250 (50% raise)	\$1.97 million (361% raise)
Aaron Judge	\$3,000,000 (551% raise)	\$8 million (1,469% raise)
Luis Severino	\$1,105,950 (201% raise)	\$3 million (544% raise)

In selecting their numbers, the advocates were told to keep three additional figures in mind: \$545,000 (MLB's 2018 minimum salary);<sup>55</sup> \$4 million (MLB's 2017 average player salary);<sup>56</sup> and \$197 million (MLB's 2018 luxury tax threshold—teams with payrolls exceeding this number are required to pay a

51. See Maury Brown, *Breaking Down MLB's New 2017-21 Collective Bargaining Agreement*, FORBES, Nov. 30, 2016, <https://www.forbes.com/sites/maurybrown/2016/11/30/breaking-down-mlbs-new-2017-21-collective-bargaining-agreement/#54d5369c11b9>.

52. See *Greg Bird Stats*, *supra* note 46.

53. See *Aaron Judge Stats*, BASEBALL REFERENCE, <https://www.baseball-reference.com/players/j/judgeaa01.shtml> (last visited May 9, 2019).

54. See *Luis Severino Stats*, *supra* note 49.

55. See Brown, *supra* note 51.

56. See Associated Press, *Average Major League Baseball Salary Tops \$4 Million*, SFGATE, Dec. 22, 2017, <https://www.sfgate.com/sports/article/Average-Major-League-Baseball-salary-tops-4-12451310.php>.

“tax” ranging from 20 cents to 50 cents on the dollar).<sup>57</sup> Going into the 2017-18 off-season, the Yankees had repeatedly stated that their main priority was to get their payroll below \$197 million, so as to “reset” their tax number.<sup>58</sup>

The most important part of any MLB salary arbitration case are the comparables, because the arbitration panel “gives the most weight to each side’s presentation of comparable baseball salaries.”<sup>59</sup> Accordingly, my students had to learn about their player and then decide which other MLB players were the most similar.

In addition to comparables, many different services publish player projections, which attempt to predict how a player will perform during the upcoming season. With the services all pointing to significant improvement by Bird,<sup>60</sup> a slight regression by Judge,<sup>61</sup> and roughly no change by Severino,<sup>62</sup> these data points became yet another factor for my students to consider.

All of the advocates’ briefs were due by Sunday, February 11, 2018.<sup>63</sup> Thus, from start to finish, the students had nineteen days to prepare their cases. In 2018, the real-life MLB advocates had seventeen days to prepare their cases.<sup>64</sup>

Each set of advocates in my exercise were required to produce a single joint brief, which was submitted to me by e-mail. When I had all of them, I e-mailed them to the entire class. In my e-mail I told the students that while they should spend most of their time on the briefs filed in their case, they also were required to read the briefs in the other two cases because they would be serving as “shadow” arbitrators in those cases.

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57. See *What Is a Competitive Balance Tax?*, MAJOR LEAGUE BASEBALL, <http://m.mlb.com/glossary/transactions/competitive-balance-tax> (last visited May 9, 2019).

58. See, e.g., Mark Polishuk, *Cashman: “We Are Getting Under The Threshold Next Year.”* MLB TRADE RUMORS (Oct. 6, 2017), <https://www.mlptraderumors.com/2017/10/cashman-we-are-getting-under-the-threshold-next-year.html>; see also Mike Axisa, *Making a Case for the Yankees to Exceed the \$197M Luxury Tax Threshold in 2018*, RIVER AVE BLUES (Jan. 18, 2018), <http://riveraveblues.com/2018/01/yankees-luxury-tax-yu-darvish-197-million-165175/>.

59. Justin Sievert, *Breaking Down the MLB Salary Arbitration Process*, SPORTING NEWS (Jan. 13, 2018), <http://www.sportingnews.com/mlb/news/mlb-salary-arbitration-process-breakdown-spring-training-2016/4jkawqkcz8i17cb4rhqjxseh>. See Silverman, *supra* note 32, at 32 (“The winning strategy in salary arbitration is to present in simple, straightforward terms the right class of comparable players, focusing on the core characteristics of the player whose case is being adjudicated.”).

60. See, e.g., Carson Cistulli, *2018 ZiPS Projections – New York Yankees*, FANGRAPHS (Jan. 5, 2018), <https://blogs.fangraphs.com/2018-zips-projections-new-york-yankees/>.

61. *Id.*

62. *Id.*

63. Throughout the course I strictly enforced all deadlines, and assessed a half-letter grade penalty for each hour any submission was late. Only one student missed a deadline during the semester.

64. See *supra* text accompanying note 33 (explaining that salary figures were exchanged on January 12, 2018 and hearings began on January 29, 2018).



Until the briefs were distributed, each side knew only what their client was seeking and the arbitrators did not know what either side wanted. On Tuesday, February 13, 2018, I met for one hour with each pair of arbitrators to go over the briefs, the amounts being requested, and the questions they planned to ask during oral argument. This was the first time since our class on Tuesday, January 23, that I was seeing the arbitrators in person. In the interim, I had kept in touch with them by e-mail and had encouraged them to meet with their co-arbitrators and learn as much as they could about the player whose case they would be hearing. While some clearly had done so, others had not. In addition, while some of the arbitrators had read the briefs, others had not. As a result, the arbitrator sessions were not as productive as I had hoped.

On Tuesday, February 20, the entire class came together for oral arguments. To make the evening more festive, I had my university's catering department deliver snacks and soft drinks to the room and I decorated the tables and walls with baseball paraphernalia. I also opened the arguments to the entire law school. Our public relations officer had the good idea to invite NSU's baseball team and, as explained below, this proved very fortuitous. To help the audience follow the arguments, I placed a summary sheet at each seat; a miniature baseball served as both a paperweight and a souvenir. I also arranged for the evening to be taped (all of our classrooms are equipped with cameras).

Each set of advocates were given fifteen minutes for their argument-in-chief and ten minutes for their rebuttal, with each team member handling one or the other. I kept time using timecards and the arbitrators were free at any point to ask questions. Compared to actual MLB salary arbitrations, in which each side is given sixty minutes for its argument-in-chief and thirty minutes for rebuttal,<sup>65</sup> this was a very abbreviated schedule. As things worked out, however, fifty minutes per round proved to be plenty of time.

At the end of each argument, I sent the two arbitrators out of the room. Once they were sequestered, I asked the audience which side it thought had won the arbitration. Since 1995, MLB salary arbitrations have been heard by three arbitrators (before that there were heard by one arbitrator).<sup>66</sup> Thus, because my panels were staffed by only two arbitrators (due to the class's size), the audience became my third, or shadow, arbitrator. (As explained below, I used this technique again during the Supreme Court exercise.)

I gave the arbitrators five minutes to confer and then brought them back into the room and had them announce their decisions (this is essentially the same procedure that MLB uses). As it happens, the arbitrators in all three cases agreed with each other and each time ruled for the Yankees. The audience

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65. See Silverman, *supra* note 32, at 32.

66. *Id.* at 27.

agreed with the arbitrators in the Bird and Judge cases but disagreed with them in the Severino case.

After the second hearing, we took a short break and enjoyed the refreshments. Following the third hearing, I asked Bryan Peters, NSU's assistant baseball coach, who was sitting in the audience with his players, to comment on the arguments. This was a spur-of-the-moment decision and worked out incredibly well, as he explained to students what baseball professionals look at when they evaluate players and try to predict their upside.<sup>67</sup>

It took twenty-four hours for the evening's videotape to be uploaded. Once I had the link, I e-mailed it to the students and told them that they should watch their performances. Had I thought of it, I also would have told them specific things to look for (such as speaking too fast, using their hands too often, and relying on their notes too much). I did, however, think to tell the arbitrators that they could use the tape to refresh their memories and, if germane, cite specific questions and answers in their awards.

MLB salary arbitrators do not write reasoned awards—they simply advise the parties which side won and the result is then leaked to the press by the winning side.<sup>68</sup> I deviated from this practice and required each arbitrator to write his or her own individual award, which had to be in line with his or her oral decision (i.e., the arbitrators could not change their minds). I gave the arbitrators just over a week to write their opinions, which had to be e-mailed to me by Thursday, March 1, 2018. Once I received all the awards, I e-mailed them to the entire class.

### C. Unit 3

Due to time constraints, I had to start Unit 3 while the arbitrators were still working on their awards. Thus, at the end of the salary arbitration oral arguments class (Tuesday, February 20), I distributed the instructions for the

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67. As Coach Peters' web page explains, "[d]uring his coaching career, Peters has developed 28 players that have signed professional contracts, including a first-round pick in 1997 when USF's Jason Dellaero was selected 15th by the Chicago White Sox." *Bryan Peters*, NOVA SOUTHEASTERN U., <https://www.nsu-sharks.com/coaches.aspx?rc=729&path=baseball> (last visited May 9, 2019).

68. The lack of reasoned awards has been heavily criticized:

The manner in which decisions are issued is one of the most criticized facets of the entire process—particularly the fact that arbitrators' decisions are not written out or formally rationalized. Without issuing written decisions there is no indication as to what kind of weight the arbitrators placed on the particular statistics presented. Without knowing the weight attached to each statistic—without any real explanation, as to how or why the arbitrators arrived at their decision—neither side is any better off the next time around, which only adds to the inherent risk and uncertainty of the process.

Silverman, *supra* note 32, at 34-35 (footnote omitted).

Supreme Court exercise. Students who had been advocates during the salary arbitration exercise now became justices, while students who had been arbitrators served as advocates.

Because of my class's size, I divided the students into two groups of nine. In each group, there were four advocates (two for each side) and five justices. In the instructions, I explained the absence of a full bench by saying that the remaining four justices had recused themselves.<sup>69</sup> I also appointed two of the students to serve as chief justice and made my picks based on how the students had conducted themselves during the salary arbitration exercise.

The class's size required two students to again be advocates (rather than switching to being justices). Fortunately, in filling out their Week 2 questionnaires, two students expressed a strong desire to be advocates, so I was able to avoid what otherwise would have been a sticky situation. The questionnaires also proved helpful in another way. As will be recalled, students were asked if there was anyone that they wanted to work with and were allowed to name up to four classmates. I used these choices to make sure that justices did not sit in the case being argued by their best friends.

Although I considered using actual cases for the exercise,<sup>70</sup> I decided to develop my own fact patterns, write my own circuit court opinions, and draft my own certiorari orders. This required much more time than I expected.<sup>71</sup> On the other hand, it allowed me to tightly control the exercise, focus on subjects that we, so far, had not examined in detail, and let me have as parties Florida's two MLB teams (the Marlins and the Tampa Bay Rays), which my students appreciated.

Case 1, entitled *Tampa Bay Rays Baseball Ltd. v. Rathstein*, involved a fan (Ann C. Rathstein) who was hit by a baseball while attending the Wednesday, April 22, 2015, Boston Red Sox-Rays game at Tropicana Field in St. Petersburg, Florida.<sup>72</sup> In a twist, however, the ball had not come from the playing field.

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69. In real life, of course, the Supreme Court needs six justices for a quorum. I therefore included in the instructions a sentence that said: "For the purposes of this assignment, 28 U.S.C. §§ 1 and 2109 do not exist."

70. I gave serious thought to having my students argue the *San Jose* case, see *supra* note 16, and *TCR Sports Broad. Holding, LLP v. WN Partner*, 59 N.Y.S.3d 672 (App. Div.), *appeal dismissed*, 88 N.E.3d 381 (N.Y. 2017), which involved a dispute between the Baltimore Orioles and the Washington Nationals and the amount of money each received from the Mid-Atlantic Sports Network (MASN), their shared regional sports network. My plan was to tell the students that certiorari had been granted in these cases, even though it had been denied in *San Jose* and *TCR* is a state arbitration case presenting no obvious federal issues.

71. It took me about fifty hours to put together Unit 3. In contrast, Unit 2 required about twenty-five hours.

72. I picked this game because several of my students had indicated on their questionnaires that they were Red Sox fans. In addition, for the "facts" to work, I needed a game that included a Rays' comeback, and in this game the Rays, after being down 5-1, rallied to win 7-5. See *Boston Red Sox at Tampa Bay Rays Box*

Instead, two teenagers were having a game of catch in the corridor behind home plate. When one of the boys missed the ball, it hit Rathstein, who at the time was racing back to her seat (and therefore not paying attention) after realizing that the Rays were in the midst of a rally. When the boys could not be located, Rathstein sued the Rays in federal court in Tampa alleging negligence. As a British national who had been visiting her brother, Rathstein premised jurisdiction on diversity.<sup>73</sup>

The students were provided with the Eleventh Circuit's opinion, which explained that even though Rathstein had suffered permanent and debilitating injuries, the district court had granted summary judgment to the Rays because of the "Baseball Rule." This venerable doctrine, which dates back to 1913,<sup>74</sup> immunizes teams from lawsuits by spectators who are hit by balls leaving the playing field, so long as the stadium provides a reasonable number of screened seats.<sup>75</sup>

In its opinion, the Eleventh Circuit reversed the district court's ruling 2-1. Because Florida's courts have never said whether, or to what extent, the Baseball Rule applies in Florida,<sup>76</sup> the dissenter urged the panel to seek the guidance of the Florida Supreme Court, as permitted by the Florida Constitution.<sup>77</sup> The majority rejected this suggestion because it considered the

*Score*, April 22, 2015, BASEBALL REFERENCE, <https://www.baseball-reference.com/boxes/TBA/TBA201504220.shtml> (last visited May 9, 2019).

73. See generally 28 U.S.C. § 1332(a)(2) (2019).

74. The baseball rule was first announced in *Crane v. Kansas City Baseball & Exhibition Co.*, 153 S.W. 1076 (Mo. Ct. App. 1913). While sitting in the bleachers at Association Park (the home of the minor league Kansas City Blues), a spectator named S.J. Crane was hit by a foul ball. *Id.* at 1077. When he sued, the trial court granted summary judgment for the defendants. *Id.* The appeals court affirmed for three reasons: (1) foul balls are a fundamental part of baseball; (2) being struck by a foul ball is a well-known risk of attending baseball games; and (3) Crane voluntarily chose to sit in an unprotected part of the stadium. *Id.* at 1078. For a further discussion, see J. Gordon Hylton, *A Foul Ball in the Courtroom: The Baseball Spectator Injury as a Case of First Impression*, 38 TULSA L. REV. 485 (2003).

75. See *Martinez v. Houston McLane Co.*, 414 S.W.3d 219 (Tex. Ct. App. 2013) (collecting cases). In *Payne v. Office of the Comm'r of Baseball*, 705 F. App'x 654 (9th Cir. 2017), a group of fans demanded that MLB mandate increased netting. Although the suit was unsuccessful, by January 2018 all thirty MLB teams had voluntarily agreed to add more netting to their stadiums. See Wallace Matthews, *All 30 Teams Will Have Extended Netting Next Season*, N.Y. TIMES, Jan. 31, 2018, <https://www.nytimes.com/2018/01/31/sports/baseball/baseball-netting.html?module=inline>; see also Wallace Matthews, *Baseball Improved Fan Safety, But in Court, It's Teams That Are Protected*, N.Y. TIMES, Mar. 28, 2018, <https://www.nytimes.com/2018/03/28/sports/baseball/extended-netting-fan-safety.html>.

76. See Louis H. Schiff & Robert M. Jarvis, *A Survey of Florida Baseball Cases*, 40 NOVA L. REV. 49, 69 n.206 (2015).

77. See FLA. CONST. art. V, § 3(b)(6) (authorizing the Florida Supreme Court to "review a question of law certified by the Supreme Court of the United States or a United States Court of Appeals which is determinative of the cause and for which there is no controlling precedent of the supreme court of Florida."). With the exception of North Carolina, all states now have such a procedure. See Michael Klotz, Comment, *Avoiding Inconsistent Interpretations: United States v. Kelly, the Fourth Circuit, and the Need for a*

Baseball Rule clearly inapplicable to injuries caused by baseballs that are not part of the game.

The packet also included the Supreme Court's order granting certiorari. In its order, the Supreme Court directed the advocates to brief two issues:

- 1) When hearing a diversity case, must a federal court seek the guidance of the state's highest court on an issue of state law, if a procedure for doing so exists?
- 2) Is the "Baseball Rule" limited to objects that leave the actual playing field?

Case 2, entitled *Miami Marlins, L.P. v. Castillo*, involved a fan named Luis Castillo (no relation to the one-time Marlins second baseman). During the Wednesday, September 28, 2016, New York Mets-Marlins game at Marlins Park in Miami, Florida,<sup>78</sup> Castillo was ejected from the stadium after unfurling a large banner that read "Fuck Trump." Under the Marlins' actual rules, banners bearing commercial or political messages are prohibited, as are banners that include profane language.<sup>79</sup>

Once again, the students received the Eleventh Circuit's opinion, which explained that after his ejection, Castillo sued the Marlins in federal court in Miami for violating his First Amendment rights. The district court, without reaching the constitutional issue, dismissed the case, but on appeal the Eleventh Circuit reversed 2-1. As the majority saw matters, because Marlins Park was built with taxpayer dollars, it was a public forum. As such, the Marlins, who operate the stadium for its owner, Miami-Dade County, had engaged in illegal censorship. The dissenter, on the other hand, concluded that Marlins Park was a private forum, and therefore Castillo had no right to stage a protest inside it.<sup>80</sup>

The Eleventh Circuit's opinion also disclosed Castillo's motivation. As an undocumented alien, he opposed Trump due to Trump's hostility towards immigrants.

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*Certification Procedure in North Carolina*, 49 WAKE FOREST L. REV. 1173, 1175 (2014). As Klotz points out, in 1945 Florida became the first state to have such a procedure, which became necessary in the wake of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). *Id.* at 1174.

78. For this fact pattern to work, I needed a game late in the 2016 presidential campaign, and this game was the Marlins' last home game of the 2016 season. See *New York Mets at Miami Marlins Box Score, September 28, 2016*, BASEBALL REFERENCE, <https://www.baseball-reference.com/boxes/MIA/MIA201609280.shtml> (last visited May 9, 2019).

79. See *Marlins Park Information Guide*, MIAMI MARLINS, <https://www.mlb.com/marlins/ballpark/information/guide> (last visited May 9, 2019) (under "Banners").

80. In the real world, courts have accepted that the sidewalks surrounding ballparks are public fora. See, e.g., *Lewis v. Colo. Rockies Baseball Club, Ltd.*, 941 P.2d 266 (Colo. 1997) (en banc). Courts have had trouble, however, deciding how to handle demonstrations inside stadiums. See, e.g., *Aubrey v. City of Cincinnati*, 65 F.3d 168 (6th Cir. 1995); *Int'l Soc'y for Krishna Consciousness, Inc. v. New Jersey Sports & Exposition Auth.*, 691 F.2d 155 (3d Cir. 1982); *Thate v. D.C. Armory Bd.*, 804 F. Supp. 373 (D.D.C. 1992).

In granting certiorari, the Supreme Court had the advocates brief two issues:

- 1) Are the interior spaces of a publicly-owned baseball stadium subject to the First Amendment?
- 2) May a privately-owned baseball team prohibit, within a publicly-owned stadium, the display of banners that, in the team's opinion, contain commercial, political, obscene, or otherwise inappropriate messages?

To help the students get ready, I sent them to the Supreme Court's web site and had them read the Court's rules<sup>81</sup> as well as its *Guide for Counsel in Cases to be Argued Before the Supreme Court of the United States*.<sup>82</sup> Once again, this caused students to e-mail me with questions.

I met with the advocates for the first time on Tuesday, February 27, 2018. Because there were only four sets of advocates, each meeting lasted forty-five minutes. The following week (Tuesday, March 6) was our spring break. I held a second meeting with the advocates on Tuesday, March 13. On Sunday, March 18, each set of advocates had to turn in its jointly-produced brief and did so by e-mailing it to me. Once I had all the briefs, I e-mailed them to the entire class. I again told the students to focus on the briefs in their case, but to read the other set of briefs because they would be serving as shadow justices.

On Tuesday, March 20, I met with both sets of justices for ninety minutes each to discuss the briefs and help them formulate questions for the oral argument. This was the first time I was seeing these students since Tuesday, February 20. During the month-long layoff, I had kept in touch with them by e-mail and told them that they should be using the time to review the Eleventh Circuit's opinion, conduct their own research, and meet with their fellow justices. Unfortunately, very few of the students heeded my advice.

Oral arguments took place on Tuesday, March 27. Once again, I invited the entire law school to attend, had the university's catering service provide food, placed summary sheets and miniature baseballs at each seat, and had the evening taped.

For the salary arbitration cases, I had allowed the students to dress as they wished, and most wore their normal school attire (one student, representing the Yankees, donned a team cap). For the Supreme Court cases, however, I procured robes for the justices and required the advocates to wear suits and ties.

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81. See SUPREME COURT OF THE UNITED STATES, RULES OF THE SUPREME COURT OF THE UNITED STATES (2017), <https://www.supremecourt.gov/filingandrules/2017RulesoftheCourt.pdf>.

82. See SUPREME COURT OF THE UNITED STATES, GUIDE FOR COUNSEL IN CASES TO BE ARGUED BEFORE THE SUPREME COURT OF THE UNITED STATES (2017), [https://www.supremecourt.gov/casehand/Guide%20for%20Counsel\\_2017.pdf](https://www.supremecourt.gov/casehand/Guide%20for%20Counsel_2017.pdf).

And, while I opened both evenings with a brief welcome, this time I finished my remarks with the Court's traditional "Oyez! Oyez! Oyez!" salutation.

Each side was given twenty minutes for its case-in-chief and ten minutes for rebuttal (the equivalent to what real advocates get at the Supreme Court<sup>83</sup>); both advocates had to speak; and I again served as timekeeper. After each case concluded, I had the audience vote on who it thought won the round. Unlike the salary arbitration exercise, I did not send the justices out of the room before the vote, given that in real life the Court knows (by watching the news) how legal commentators and the public are expecting the decision to come out. By a large margin, the audience voted for Rathstein. It was evenly split, however, with respect to Castillo.

We took a break between the two cases, which again gave everyone a chance to recharge their batteries. After the second case, I had Judge Louis H. Schiff<sup>84</sup> critique the students (I had told the students ahead of time that Judge Schiff would be sitting in on their arguments). He did a wonderful job and made sure to give specific examples of what he liked and what he disliked (and why). The next day, I sent the students the link to the videotape and encouraged the justices to use it as the arbitrators had (i.e., to refresh their memories and, if appropriate, cite it in their opinions).

I again met with each set of justices on Tuesday, April 3, 2018. These were the best two meetings of the semester. Having read the briefs and heard the oral arguments, the students were fully engaged and both 90-minute sessions were filled with spirited discussion. In addition to citing precedents and debating policy choices, the students corrected and challenged each other as necessary. I could not have been more pleased.

The final class of the semester took place on Tuesday, April 10, 2018. Prior to it, each justice was required to prepare and e-mail me a written opinion and was prohibited from conferring with the other justices while writing it.<sup>85</sup>

In class, each justice took a turn at the lectern to summarize his or her opinion. In this way, the students and I learned the outcome of the two cases. Both times, by unanimous votes, the justices reversed the Eleventh Circuit's opinion.

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83. See *supra* note 81 under Rule 28(3) ("Unless the Court directs otherwise, each side is allowed one-half hour for argument.").

84. As explained *supra* note 13, Judge Schiff is my baseball law casebook co-author. He also is an experienced jurist, having served on the bench since 1997. See *Louis H. Schiff*, BALLOTPEdia, [https://ballotpedia.org/Louis\\_H.\\_Schiff](https://ballotpedia.org/Louis_H._Schiff) (last visited May 9, 2019).

85. Students were told to assume that their fellow justices agreed with them and, as a result, they were writing the opinion for a unanimous court.

Once the last justice finished, I explained how I would have voted.<sup>86</sup> I then left the room so that the students could fill out both my end-of-semester survey and the law school's faculty evaluation form. Upon returning, I held an open forum with the students, which, as explained below, proved to be quite eye-opening. Later that night, I e-mailed the justices' opinions to the class.

On Wednesday, April 18, 2018, I again e-mailed the students to let them know that I had left an envelope for each of them with my administrative assistant. Inside the envelope was a scoresheet indicating how the student had done on each of the course's various assignments, along with extensive comments about their work.

### III. REFLECTIONS ON THE COURSE

During the forum at the last class, I told the students that while I generally was satisfied with how the course had turned out, I saw areas that needed improvement. First, I should have spent the introductory three weeks on player compensation and stadium operations. Once the salary arbitration and Supreme Court exercises started, there was no time to teach the students the underlying issues. While this approach would have meant that the students would not have learned about certain subjects (such as the trilogy), the trade-off would have been worth it.

Second, the fact that all of the salary arbitrators voted for the team's number made me realize I should have made the player ranges narrower. On the other hand, it was interesting to see how the player advocates really believed that their clients were entitled to very large salary increases. Of course, MLB notoriously shortchanges its young players through a variety of means, including, most notably, service time manipulation (to delay the start of their six-year march to free agency).<sup>87</sup>

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86. In *Rathstein*, I would have remanded the case to the Eleventh Circuit so that it could seek the guidance of the Florida Supreme Court. As for *Castillo*, I would have affirmed the Eleventh Circuit on the ground that as a publicly-built stadium, Castillo had a right to air his views. Regarding Castillo's use of an obscenity, I would have overlooked it on the basis of *Cohen v. California*, 403 U.S. 15 (1971), which overturned Cohen's criminal conviction for wearing a jacket in a courthouse that had written on the back "Fuck the Draft." In addition, I felt the Marlins' banner policy was too vague to be enforceable and also gave the team too much discretion.

87. See Patrick Kessock, Note, *Out of Service: Does Service Time Manipulation Violate Major League Baseball's Collective Bargaining Agreement?*, 57 B.C. L. REV. 1367 (2016); see also Adam Felder, *How MLB Keeps Its Players' Salaries Down*, ATLANTIC, Dec. 10, 2015, <https://www.theatlantic.com/business/archive/2015/12/mlb-salaries-labor-contract-negotiations/419889/>. In real life, Bird (to \$582,000 or 6.7%), Judge (to \$622,300 or 14.3%), and Severino (to \$604,975 or 9.8%) ended up getting only very modest raises from the Yankees in 2018. See Mike Axisa, *Yankees Sign Aaron Judge, Luis Severino, Three Others to One-Year Pre-Arbitration Deals*, RIVER AVE BLUES (Mar. 13, 2018), <http://riveraveblues.com/2018/03/yankees-sign-aaron-judge-luis-severino-three-others-one-year-pre-arbitration-deals-167276/>. Throughout the



Third, although I tried to make the Supreme Court exercise as balanced as possible, the fact that both sets of justices ruled unanimously tells me that I needed to do a better job crafting my fact patterns. Perhaps, however, some of the potential arguments I included simply were too difficult for the students to find.<sup>88</sup>

Fourth, I did not realize until it was too late that by having the salary arbitrators become Supreme Court advocates, they had to simultaneously write their awards and begin preparing their briefs. (This occurred during the period between February 20 and March 1, 2018.) I do not know how I could have set the schedule up differently, but clearly this was not ideal. Moreover, it gave an unfair advantage to the two students who served as advocates in both exercises, in that they already were finished with Unit 2 and could jump right into Unit 3.

Fifth, I should have capped the size of the class. As it happened, eighteen students proved to be a very workable number, but if I had ended up with all

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course, I regularly e-mailed my students news articles like this one. Doing so gave the course an “in the moment” vibe and also let me keep in touch with the class in a low-key way.

88. Students in the *Rathstein* exercise, for example, were particularly stymied by the certified question issue. During oral argument, one student said that there were only eight states that had such a procedure, and this figure, which went unchallenged by the other side, got picked up by several of the justices. Not knowing how the student came up with the number eight, which was remarkably wrong, see *supra* note 77, I decided to do some investigating. It turns out that the student thought that a certified question was a form of advisory opinion, and then turned to Wikipedia, which reports, “Eight states have provisions in their constitutions permitting or requiring their supreme courts to give advisory opinions to the governor or legislature.” See *Advisory Opinion*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Advisory\\_opinion](https://en.wikipedia.org/wiki/Advisory_opinion) (last visited May 9, 2019) (under “United States—State Courts”). What made my student’s conclusion particularly galling is the fact that in the very next paragraph, Wikipedia adds:

Advisory opinions should not be confused with certified questions by one court to another, which are permissible. U.S. federal courts, when confronted with real cases or controversies in which the federal court’s decision will turn in whole or in part on a question of state law (e.g. diversity cases under the *Erie* doctrine or issues in which federal law incorporates state law by reference, such as exemptions in bankruptcy), occasionally ask the highest court of the relevant state to give an authoritative answer to the state-law question, which the federal court will then apply to its resolution of the federal case (see e.g. *Pullman* abstention). Because the state court in such circumstances is giving an opinion that affects an actual case, it is not considered to be issuing an advisory opinion.

*Id.* I doubt this particular story will shock any law professor, for it reflects what we know about today’s law students: they want fast answers and have poor reading comprehension skills. See, e.g., James B. Levy, *Teaching the Digital Caveman: Rethinking the Use of Classroom Technology in Law School*, 19 CHAP. L. REV. 241, 295 (2016) (“[S]tudents who read screens may be less likely to finish the material and even if they do, they may be less likely to re-read it.”); Mark Yates, *Text is Still a Noun: Preserving Linear Text-Based Literacy in an e-Literate World*, 18 LEG. WRITING 119, 130 (2012) (“Internet-adapted minds may have an especially hard time in law school because, although they are used to view[ing] large volumes of information, they are not accustomed to internalizing and synthesizing it into larger ideas.”); Aliza B. Kaplan & Kathleen Darvil, *Think [and Practice] Like a Lawyer: Legal Research for the New Millennials*, 8 LEGAL COMM. & RHETORIC: JALWD 153, 164 (2011) (“Today’s Millennials want fast answers and expect that they can just ‘plug in a couple of words with a connector or within quotation marks’ and they will get everything they need.”) (footnote omitted).

thirty-nine of the students who registered for the course at one time or another, I would have been in serious trouble.

I could have handled a bigger class if I had had a co-teacher. Indeed, even with only eighteen students, I would have benefitted from having a co-teacher. Having a co-teacher would have meant that all students would have been meeting with at least one of us every week. My hope that students, on their own, would use non-class weeks to meet with their co-counsel, co-arbitrator, or co-justices was not realized and resulted in students having too much down time.<sup>89</sup> On the other hand, during the forum, and again in their surveys, a number of students said that the non-class weeks had allowed them to concentrate on their other courses, thereby making it possible to devote more time to my course when an assignment was due.

Sixth, waiting until after the course was over to give the students formal feedback was a mistake. My thinking was that if I gave students feedback as we went along, the net effect would be that they would not work as hard on the Supreme Court exercise if they were unhappy with their salary arbitration grade. While I still believe this is an accurate assessment of how students think—and one student admitted as much during the forum—the class clearly wanted feedback during the semester.<sup>90</sup>

The most eye-opening moment during the forum came when students told me that they wished I had spent time teaching them how to write a brief and do an oral argument. I had assumed that every law student who makes it to their second or third year knows how to do these things, but as I later learned while speaking with one of my colleagues, our first-year curriculum no longer includes a moot court component, and instead focuses more on the daily tasks that the typical lawyer performs. As a strictly upper-class teacher for the past twenty years, I was not aware of this change.<sup>91</sup>

I was equally shocked when my students recommended that I change the name of the course from “Baseball and the Law” to “Baseball Litigation” (or something similar) to make it clear that it involved heavy doses of courtroom advocacy. When I pointed out that the syllabus explained the foregoing in

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89. I now realize that I should have required students to turn in signed statements indicating when, where, and for how long they and their classmate(s) met, what they discussed, and what follow-up steps they agreed to take. *Cf.* FED. R. CIV. P. 26(f) (requiring counsel to hold a settlement conference as soon as practicable after a case begins).

90. As has been pointed out elsewhere, there is still much we do not know about student feedback. *See* Daniel Schwarcz & Dion Farganis, *The Impact of Individualized Feedback on Law Student Performance*, 67 J. LEGAL EDUC. 139 (2017).

91. In this respect, my law school appears to be different from the majority of law schools. *See* Carol Goforth, *Transactional Skills Training Across the Curriculum*, 66 J. LEGAL EDUC. 904, 910 (2017) (reporting that “in 2014-15 . . . 139 used appellate brief writing assignments.”).

detail, the students admitted they had not read the syllabus before enrolling in the course. When I also pointed out that I had gone over the syllabus in detail during the first class, the students pleaded collective amnesia.

In addition to the course's name, I now realize that I need to rewrite the course description.<sup>92</sup> Like most of our law school's course descriptions, the BATL course description is intentionally vague so that it does not have to be changed every time the course is offered. However, my course ended up being so different from the course description that it failed to give the students fair notice.

During the forum I also raised the possibility of making the two exercises worth 67% of the final grade (instead of 100%) and adding a short final exam worth 33%. Every student thought this was a "terrible" idea.

The end-of-semester survey provided several additional pieces of information. It asked students various questions and had them answer using a scale of 1 (strongly disagree) to 5 (strongly agree). Students reported that the course was fun (4.94);<sup>93</sup> that it had made them more knowledgeable baseball fans (4.81); and that they had spent more time talking about this course to their friends and family than any other course (4.31). They also indicated that they would recommend the course to other students (4.94).

Turning to more substantive matters, students thought the syllabus was "clear and informative" (4.94);<sup>94</sup> the workload was reasonable (4.50);<sup>95</sup> and the grievance arbitration exercise was useful (4.75). They felt well-prepared for the salary arbitration and Supreme Court exercises (4.69); enjoyed working with their co-counsel, co-arbitrator, and/or co-justices (4.06); found the comments by Coach Peters (4.56) and Judge Schiff (4.69) helpful; valued being able to see the written work of other students (4.69); learned a lot by watching the videotapes of their oral arguments (5.00); and appreciated me staying in touch with them through regular e-mails (4.88).

One aspect of the course that scored relatively low was the casebook (3.81). I suspect this is because after the third week of the course, we stopped using it (although I made frequent reference to it during my many Unit 2 and Unit 3 meetings), and students in all courses resent having to shell out money for a

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92. See *supra* text accompanying note 14.

93. As research has shown, law students learn better when they are having fun. See, e.g., Olympia Duhart, *The 'F' Word: The Top Five Complaints (and Solutions) About Formative Assessment*, 67 J. LEGAL EDUC. 531, 539-41 (2018).

94. In light of their comments at the forum, I assume this means that when students had a question during the semester, the syllabus provided a ready answer.

95. By a very slight margin (3.19), students reported that my course required more work than the typical three-credit course. Personally, I think my course took much more work, but because they were having fun, the students did not realize how much time they were putting in.

book that is not used throughout the semester. In the future, I will need to rethink how I approach this issue. It may be that rather than having the students buy the entire casebook, I should have worked with the publisher to put together a course pack.<sup>96</sup>

When asked whether they preferred the salary arbitration exercise or the Supreme Court exercise, eight students voted for the former while seven students chose the latter (one student liked both and two students expressed no opinion). Students who picked the salary arbitration exercise indicated that it had taken them out of their comfort zone and they appreciated the challenge. Conversely, students who favored the Supreme Court exercise said they liked it precisely because it let them stay in their comfort zone.

The survey also posed several open-ended questions. Not surprisingly, most students skipped these questions. One student, however, said that rather than two long exercises, there should have been multiple short exercises. The student went on to explain that he or she likes simulations because they provide “hands-on” experience.

Another student suggested that rather than offering the course in a three-hour block, I should have taught it in two 90-minute blocks. According to this student, sitting through three hours was difficult, especially during Unit 1. Of course, if I had followed this recommendation, it would have been impossible to keep all of the students on the same schedule. In addition, one of the arbitration hearings would have had to stop in the middle and wait until the next class to finish.

I told the students that I intended to grade the course using a “B” curve, which is typical for upper-class electives at my law school.<sup>97</sup> In fact, the class average came out to a 2.96. No student received an “A,” as the highest grade

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96. For years now, law professors have been spilling much ink about casebooks and whether they are still valuable. For a recent canvassing of the issues, see Stephen M. Johnson, *The Course Source: The Casebook Evolved*, 44 CAP. U. L. REV. 591 (2016).

97. Like most law schools, my law school does not have a required (or even a suggested) curve for upper-class courses. I have always thought this to be odd, because it: 1) devalues the importance of such courses, and 2) makes it very difficult for students to overcome a poor first year. For a further discussion of these points, see Nicholas L. Georgakopoulos, *Relative Rank: A Remedy for Subjective Absolute Grades*, 29 CONN. L. REV. 445 (1996). Interestingly, despite the fact that BATL was an elective, my students were as concerned about their grades as in any other course I have ever taught, including first-year courses (e.g., Contracts), required courses (e.g., Professional Responsibility), and bar courses (e.g., Florida Constitutional Law). Indeed, they regularly queried me about their grades, both in-person and by e-mail. More than anything, I believe this reflects the fact that ten years after the Great Recession, post-graduation jobs are still hard to come by for many law students. See *Employment Outcomes as of April 2018 (Class of 2017 Graduates)*, A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO THE B., [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/2017\\_law\\_graduate\\_employment\\_data.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2017_law_graduate_employment_data.authcheckdam.pdf) (last visited May 9, 2019) (reporting that only two-thirds of the Class of 2017 had secured long-term jobs that required law degrees ten months after graduation).

was an “A-.” Of the top four grades, two went to men and two went to women, even though the class was 72% male and 28% female. The top two students also earned class participation bumps.

As noted at the outset of this Article, I asked the students in their Week 2 questionnaires about their baseball IQ. Interestingly, the group that did the best grade-wise were the “rookies,” who averaged a “B+.” The “experts,” on the other hand, averaged a “B.” Although I have no way to prove it, I believe the explanation for this is that the rookies, feeling at a disadvantage, worked harder than the experts, who mistakenly felt more sure of themselves.

Five weeks after submitting my grades, I received my faculty evaluation forms. As expected, they were in line with the survey results.<sup>98</sup>

#### IV. CONCLUSION

As noted at the outset of this Article, BATL courses have not been received with open arms by law schools. Part of the reason for this is that law schools prefer bar courses.<sup>99</sup> But a bigger part of the reason is that there is an assumption that a BATL course is simply fluff, and therefore not worthy of a law student’s, or a law professor’s, time.<sup>100</sup> After teaching my Spring 2018 BATL course, I

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98. My law school’s faculty evaluation form uses a 1-5 scale, with five being the highest. The students gave me a 4.89.

99. See Robert Kuehn, *Whither Clinical Courses and Bar Passage*, BEST PRACTICES FOR LEGAL EDUC. (Jan. 18, 2016), <https://bestpracticeslegaled.albanylawblogs.org/2016/01/18/whither-clinical-courses-and-bar-passage-by-prof-robert-kuehn/>; see also Denise Riebe, *A Bar Review for Law Schools: Getting Students on Board to Pass Their Bar Exams*, 45 BRANDEIS L.J. 269, 308 (2007) (“Students should take most bar-tested courses during law school.”); Christian C. Day, *Law Schools Can Solve the “Bar Pass Problem”—“Do the Work!”*, 40 CAL. W. L. REV. 321, 343 (2004) (“Law schools should encourage students to take ‘bar courses’[.]”). As has been shown repeatedly, however, there is no empirical support for the idea that taking more bar courses will improve a student’s chances of passing the bar exam. See, e.g., Scott Johns, *A Statistical Exploration: Analyzing the Relationship (If Any) Between Externship Participation and Bar Exam Scores*, 42 OKLA. CITY U. L. REV. 281 (2018); Douglas Rush & Hisako Matsuo, *Does Law School Curriculum Affect Bar Examination Passage? An Empirical Analysis of Factors Related to Bar Examination Passage During the Years 2001 Through 2006 at a Midwestern Law School*, 57 J. LEGAL EDUC. 224 (2007); Phillips Cutright et al., *Course Selection, Student Characteristics and Bar Examination Performance: The Indiana University Law School Experience*, 27 J. LEGAL EDUC. 127 (1975).

100. In his May 2014 commencement address at the College of William & Mary, for example, Justice Antonin Scalia harshly criticized “Law &” courses:

Scalia said prestigious law schools around the country are not adequately preparing law students because they are letting them take questionable electives in place of more important traditional courses. He attacked schools that let their second- and third-year law students “study whatever strikes his or her fancy—so long as there is a professor who has the same fancy.”

He complained that some of those electives “have a distinct non-legal flavor,” such as a Harvard course called “The Philosophical Reinvention of Christianity,” and the University of Chicago’s “Contemporary Virtue Ethics.”

can unequivocally say that this assumption could not be more off base. Not only was my course demanding and rigorous, it gave students an opportunity to improve on seven of the ten lawyering skills that the venerable MacCrate Report<sup>101</sup> has identified as fundamental:

- Problem-solving (Skill 1);
- Legal analysis and reasoning (Skill 2);
- Legal research (Skill 3);
- Factual investigation (Skill 4);
- Oral and written communication (Skill 5);
- Understanding of the procedures of litigation and alternative dispute resolution (Skill 8); and
- Organization and management of legal work (Skill 9).<sup>102</sup>

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“This elimination of a core curriculum, and the accompanying proliferation of narrow (not to say silly) elective courses has not come without its costs,” he said . . . .

This is not the first time Scalia has criticized law school education or law school electives. At the University of New Hampshire Law School in 2013, he told students to “take the bread and butter” classes.

“Do not take, ‘law and women,’ do not take ‘law and poverty,’ do not take ‘law and anything.’”

Corey Adwar, *Antonin Scalia Criticizes Law Schools*, BUS. INSIDER (May 19, 2014), <http://www.businessinsider.com/antonin-scalia-criticizes-law-schools-2014-5>. One law professor has offered an even sterner rebuke:

Legal classes that require students to develop and sharpen their legal-analysis and critical-reading skills, or hard courses, are being overshadowed by softer, easier courses that tend to focus on glossy topics, such as sports and entertainment law, or on modish political and cultural issues. These “law and” courses, such as “Law and Wildlife,” often offer more “and” than “law.” Students are enticed to enroll in such courses partly because the course grade often is based on less stressful grading techniques, such as term papers or “take home” final examinations, and because the grades in these courses are typically higher than those in the difficult courses. Not only do these easier courses fail to prepare law students for the current requirements and demands of law practice, but the proliferation of such courses encourages professors to soften the required core-curriculum courses as well. Such tactics become necessary to guarantee course enrollments that are substantial enough to impress the dean when faculty raises are at stake.

James Etienne Viator, *Legal Education’s Perfect Storm: Law Students’ Poor Writing and Legal Analysis Skills Collide with Dismal Employment Prospects, Creating the Urgent Need to Reconfigure the First-Year Curriculum*, 61 CATH. U. L. REV. 735, 743 (2012) (footnotes omitted).

101. See A.B.A. SEC. OF LEGAL EDUC. & ADMISSIONS TO THE B., LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992).

102. *Id.* at 138-40. The three MacCrate skills that my course did not touch on were Counseling (Skill 6), Negotiation (Skill 7), and Recognizing and Resolving Ethical Dilemmas (Skill 10). *Id.* With just some minor tweaks to Units 2 and 3, however, it would be easy to add these elements to future versions of the course.

In my view, that adds up to a home run.