

The Struggle for Labor Equality in Minor League Baseball: Exploring Unionization

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Introduction

The COVID-19 pandemic forced Major League Baseball (MLB) to cancel the 2020 Minor League Baseball (MiLB) season for the first time in history.¹ This unprecedented decision not only impacted thousands of now-unemployed minor league players.² It also presented a sober reminder of another key issue in the industry: the struggle for labor equality.

Since 1975, the median household income in the United States has risen by over 450%.³ Over that same time frame, the MLB minimum player salary has increased by nearly 3,400%.⁴ The average minimum salary for MiLB players, however, has increased only 69%.⁵ The severity of this discrepancy is one of the many reasons that the current state of Minor League Baseball is failing its players.

Professional sports have become some of America's biggest businesses.⁶ Despite the tremendous success the sports leagues have

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1. James Wagner, *Minor League Baseball Season Is Canceled for the First Time*, N.Y. TIMES (June 30, 2020), <https://www.nytimes.com/2020/06/30/sports/baseball/minor-league-baseball-season-canceled.html>.

2. *Id.*

3. In 1975, the United States' median household income was \$11,800. The median household income in February 2020 was \$66,538. *Household Money Income in 1975 & Selected Social and Economic Characteristics of Households*, U.S. CENSUS BUREAU (Mar. 1977), <https://www2.census.gov/prod2/popscan/p60-104.pdf> [<https://perma.cc/35ZA-HPSB>]; *Median Household Income in February 2020*, SEEKING ALPHA (Apr. 2, 2020, 4:09 AM), <https://seekingalpha.com/article/4335576-median-household-income-in-february-2020>.

4. The minimum MLB salary in 1975 was \$16,000 and the minimum salary in 2020 is \$563,500. *Minimum Salary*, BASEBALL REFERENCE (Feb. 15, 2020, 12:46 PM), https://www.baseball-reference.com/bullpen/Minimum_salary [<https://perma.cc/N376-E5SZ>].

5. Garrett R. Broshuis, *Touching Baseball's Untouchables: The Effects of Collective Bargaining on Minor League Baseball Players*, 4 J. HARV. SPORTS & ENT. L. 51 (2013).

6. See Steven Kutz, *NFL Took in \$13 Billion in Revenue Last Season—See How It Stacks Up Against Other Pro Sports Leagues*, MARKETWATCH (July 2, 2016, 10:53 AM), <https://www.marketwatch.com/story/the-nfl-made-13-billion-last-season-see-how-it-stacks-up-against-other-leagues-2016-07-01> [<https://perma.cc/7EKE-AWY9>].

enjoyed, constant labor struggles have permeated through the industry.⁷ To combat these issues, players in many sports, including MLB, have become represented by a union and operate under a collective bargaining agreement (CBA) between the league (i.e., MLB) and that union (i.e., MLB Players Association (MLBPA)).⁸ The result of this relationship in baseball is that nearly every aspect that governs the league's functions is stipulated as part of the agreement through negotiations between the bargaining parties. From player salaries, to uniform regulations, grievance arbitrations, travel accommodations, and more, MLB players have the right to bargain with their employers over matters deeply affecting their day-to-day lives.⁹

The same cannot be said for MiLB players. Over 6,000 players on 244 different teams are currently employed in MiLB.¹⁰ With only 1,200 players in MLB, the 6,000-plus minor league players represent the majority of all professional baseball players.¹¹ Nevertheless, these players are not granted any of the same bargaining rights that their MLB counterparts enjoy. The development of the labor relationship between MLB and the MLBPA has left minor league players with subpar living conditions and unsustainable wages. Although minor leaguers are not—and never have been—part of the MLBPA bargaining unit, the CBAs and other agreements signed between the MLBPA and MLB have affected minor league players for decades,¹² including most recently in March 2020 during negotiations in the wake of COVID-19.¹³

7. See MICHAEL SCHIAVONE, *SPORTS AND LABOR IN THE UNITED STATES* (SUNY PRESS 2015); see also Robert Pannullo, *Facilitating Change: Addressing the Underutilization of Mediation in Professional Sports*, 25 HARV. NEG. L. REV. 164 (2019).

8. *FAQs*, MAJOR LEAGUE BASEBALL PLAYERS ASS'N, <https://www.mlbplayers.com/faq> [<https://perma.cc/AC88-DJT4>] (last visited March 5, 2020) [hereinafter *MLBPA FAQs*].

9. *Id.*

10. Maury Brown, *Minor League Ballplayers Would Lose Minimum Wage Rights as Part of \$1.3 Trillion Spending Bill*, FORBES (Mar. 22, 2018, 12:13 AM), <https://www.forbes.com/sites/maurybrown/2018/03/22/minor-league-ballplayers-will-lose-minimum-wage-rights-as-part-of-1-3-trillion-spending-bill/#4a39453f37fa> [<https://perma.cc/9AW7-EUXZ>].

11. The thirty MLB teams have a twenty-five-man active roster as well as an expanded forty-man roster that includes fifteen players who play in the minor leagues but may be called up to the major league roster at any time. The calculation of 1,200 players includes members on the forty-man roster for the thirty teams. *Major League Baseball Roster History*, BASEBALL ALMANAC, http://www.baseball-almanac.com/articles/baseball_rosters.shtml [<https://perma.cc/268A-BKNQ>].

12. Broshuis, *supra* note 5, at 55.

13. On March 26, 2020, MLB agreed with the MLBPA as part of a larger agreement to retain the power to shorten the 2020 MLB Draft from forty rounds to five rounds as well as reduce the amount of signing bonuses players received. See Nick Stellini, *MLB Coronavirus Agreement Hangs Amateur Players Out to Dry*, NBC SPORTS, (Mar. 28, 2020 12:12 PM), <https://mlb.nbcsports.com/2020/03/28/mlb-coronavirus-agreement-hangs-amateur-players-out-to-dry>. As part of the deal, the MLBPA also secured a weekly \$400 stipend for minor league players through May 31. See Bill Shaikin, *MLB Agrees to Pay Minor League Players a Stipend Through May*, L.A. TIMES (Mar. 31, 2020 9:15 AM), <https://www.latimes.com/sports/dodgers/story/2020-03-31/mlb-agrees-pay-minor-league-players-stipend-through-may>.

This paper will examine the problems with the current state of Minor League Baseball and will explore unionization for players as a potential solution to those problems. Though COVID-19 has undoubtedly altered the minor leagues in the short term, this paper will primarily focus on the pre-COVID-19 structure of Minor League Baseball given the speculative nature surrounding the pandemic's long-term impact on the industry.

Part I will explore baseball's labor history. It will explain the structure of MiLB as well as how MLB's labor history has affected players at the minor league level. Part II will then examine the attempts made to change the current system of MiLB along with MLB's resistance to those efforts. It will analyze the high-profile litigation that has ensued as well as the millions of dollars spent lobbying Congress to preempt that suit. Finally, Part III will propose solutions to the current situation, particularly for the players, and will discuss the limitations to those solutions. It will examine the benefits of bargaining, the model to follow as set out in minor league hockey, and the limitations of those proposed solutions.

I. Background: Labor History in Baseball

A. Background of Minor League Baseball

1. The Structure of Minor League Baseball

To analyze the current status of MiLB, it is important to understand the structure of the minor leagues. Every major league team must have at least one affiliated team at each of the minor league levels—Triple A, Double A, Advanced A, A, Short-Season A, and Rookie.¹⁴ All major league teams currently go beyond those minimum requirements and operate with either seven or eight different minor league clubs.¹⁵ Teams typically have a total of roughly 200 players under contract.¹⁶

The majority of minor league teams are independently owned,¹⁷ meaning that the minor league team's owner is a separate entity from that of the MLB team. Under this structure, the independent minor league owners are responsible for all business aspects of the team's

14. For a list of classifications and affiliates, see *Clubs by MLB Affiliation*, MiLB.COM, <http://www.milb.com/milb/info/affiliations.jsp> [<https://perma.cc/LHY5-2YGL>] (last visited Mar. 6, 2020). Note that this article focuses on Minor League Baseball that is affiliated with Major League Baseball. Unaffiliated Minor League Baseball also exists, but, because unaffiliated Minor League Baseball is not under the MLB's scope or control, it is not addressed in this article.

15. See *id.*

16. Tom Goldman, *Fight Against Low, Low Pay in Minor League Baseball Continues Despite New Obstacles*, NAT'L PUB. RADIO (Aug. 3, 2018 5:39 PM), <https://www.npr.org/2018/08/03/635373608/fight-against-low-low-pay-in-minor-league-baseball-continues-despite-new-obsa> [<https://perma.cc/4E99-HQ8E>].

17. *The Business of MiLB*, MiLB.COM, <http://www.milb.com/milb/info/faq.jsp?mc=business#9> [<https://perma.cc/8A8T-V5MX>] (last visited Mar. 6, 2020).

finances, including promotion and ticket sales.¹⁸ Notably, however, the major league owners pay the salaries and food expenses for all players, coaches, and managers.¹⁹ The major league team also makes all of the decisions related to player development, including promotions and releases.²⁰ Though the minor league owners are required to maintain their facilities up to MLB's standards,²¹ the MLB clubs retain control over the terms and conditions of employment for the players and coaches. This financial arrangement has assisted in the growth of Minor League Baseball's business, as franchise values have appreciated at impressive rates.²² Double A teams that were worth \$500,000 thirty years ago, for example, are now worth up to \$25,000,000.²³

2. How Minor League Players Are Affected by the Major League's Structure

The structure of this ownership system bifurcates the business and baseball financial commitments in MiLB. The dynamic creates an incentive for major league clubs to suppress wages of the minor league players who are not currently contributing towards the major league club's success.²⁴ The salaries for players at all levels reflect this incentive. At the lowest levels (Rookie and Low A), players are paid \$1,100 per month.²⁵ At the highest level (Triple A), players can earn \$2,150 per month.²⁶ At all minor league levels, players are paid only during the five-month regular season; they are not paid during spring

18. Goldman, *supra* note 16.

19. *Id.*

20. *Id.*

21. See 2019 Major League Rules, Rule 58, <https://registration.mlbpa.org/pdf/MajorLeagueRules.pdf>. Failure to comply with these maintenance standards can result in a \$250,000 fine. *Id.*, Rule 58(c).

22. Benjamin Katz & Max Teller, *Minor Leagues, Major Profits*, FORBES (Aug. 6, 2008, 5:00 PM), https://www.forbes.com/2008/08/06/baseball-minors-sacramento-biz-sports-cz_mo_0806minors.html#224c023373e0 [<https://perma.cc/NND3-7T8P>]. MiLB's twenty most valuable teams are worth an average of \$37.5 million, up thirty-five percent from 2013. Ray Glier, *Minor League Baseball Is Better Business, Not Bigger Business*, USA TODAY (May 9, 2017, 11:57 AM), <https://www.usatoday.com/story/sports/mlb/2017/05/08/minor-league-baseball-better-business-not-bigger-business/101451572> [<https://perma.cc/BJU2-FQ8P>].

23. Glier, *supra* note 22.

24. *Id.*; Goldman, *supra* note 16.

25. *The Business of MiLB*, *supra* note 17.

26. Ted Berg, *\$12,000 a Year: A Minor Leaguer Takes His Fight for Fair Pay Public*, USA TODAY SPORTS (Jan. 31, 2017, 9:18 AM), <https://ftw.usatoday.com/2017/01/minor-league-baseball-pay-fair-labor-standards-act-minimum-wage-lawsuit-kyle-johnson> [<https://perma.cc/VZM6-W7EP>].

training and cannot earn overtime wages.²⁷ Most players earn less than \$10,000 per year, which falls well below federal poverty levels.²⁸

These meager monthly earning figures do not adequately reflect the hours that the players dedicate to their professions or the working conditions that they endure. Players consistently work over fifty hours per week at the ballpark (their “office”) and routinely spend countless more hours in the batting cage, weightlifting facility, or training room to dedicate additional practice into their craft.²⁹ They work six to seven days per week, and, when they are not working, they often are traveling long hours by bus.³⁰ When not sleeping on buses, players frequently squeeze up to six players in two-bedroom apartments or live on the couches of generous host families in an effort to reduce living costs.³¹ Minor league players endure a standard of living that most Americans would cringe at the thought of while pursuing an improbable endeavor of one day being promoted to the major leagues.³² They stomach these dire working conditions and unsustainably low wages to pursue the only avenue for fulfilling their lottery ticket dream of graduating to the major leagues.³³

In an attempt to undercut the notion that minor league players are underpaid, many cite to the lofty signing bonuses some players receive upon being drafted.³⁴ The majority of players enter the minor leagues through the MLB’s Rule 4 draft, during which teams select players

27. *Id.*

28. In January 2020, the federal poverty threshold for single family households was \$12,760. See 2020 Poverty Guidelines, U.S. DEPT. OF HEALTH & HUM. SERVS. (Jan. 21, 2020), <https://aspe.hhs.gov/2020-poverty-guidelines>

29. Broshuis, *supra* note 5, at 63.

30. *Id.* at 63 n.81.

31. Garrett Broshuis, *Playing for Peanuts*, BASEBALL AM. (Mar. 31, 2010), <http://www.baseballamerica.com/today/minors/season-preview/2010/269689.html> [<https://perma.cc/4AEK-WZEH>].

32. Ian Gordon, *Minor League Baseball Players Make Poverty-Level Wages*, MOTHER JONES (July 2014), <https://www.motherjones.com/politics/2014/06/baseball-broshuis-minor-league-wage-income> [<https://perma.cc/8V33-32KT>].

33. Brandon Sneed, *This Is What It’s Like To Chase Your Pro Baseball Dreams . . . For 12 Bucks an Hour*, BLEACHER REP. (Apr. 3, 2017), <https://bleacherreport.com/articles/2700299-this-is-what-its-like-to-chase-your-pro-baseball-dreams-for-12-bucks-an-hour> [<https://perma.cc/DNJ5-ZDRR>].

34. Mitchell Hartman, *For Some Minor League Baseball Players, Wages Can Seem Like Peanuts*, MARKETPLACE (Apr. 5, 2018), <https://www.marketplace.org/2018/04/05/business/minor-league-baseball-draws-fans-and-dispute-over-pay> [<https://perma.cc/4JDM-WZH5>]; see also Ben Badler, *Data Shows Most Players Don’t Get Big Bonuses*, BASEBALL AM. (Oct. 7, 2016), <https://www.baseballamerica.com/stories/data-shows-most-players-don-t-get-big-bonuses> [<https://perma.cc/K92U-KTEP>] (Commissioner Manfred stating, “Look, I think that it’s important to realize that a lot of the information out there about what minor league players are paid and make ignores things like signing bonuses that are paid in advance, that often are large sums of money”).

from the United States, Canada, and Puerto Rico in fifty rounds.³⁵ Some players earn large signing bonuses as an incentive to sign with an MLB team instead of playing in college.³⁶ The median signing bonus for players drafted in 2016, however, was \$50,000, with over forty percent of players earning less than \$10,000 and twenty percent earning less than \$1,000.³⁷ This disparity creates a misconception that players are earning far more than their weekly incomes indicate. Even for the players who do earn the million-dollar signing bonuses, taxes, agent's fees, and clubhouse dues significantly reduce the amount on which players are able to live for the duration of their minor league careers.³⁸

Finally, in addition to the undesirable working conditions and unsustainable wages, minor league players do not have the flexibility to choose their own employer. Major League Rules mandate that all drafted players sign contracts lasting seven minor league seasons.³⁹ During this time, their employers may trade, promote, or demote the player at will.⁴⁰ The clubs also may fire the player at any time without severance pay.⁴¹ Even if the player retires, he may not decide to sign with another team, even internationally, for the duration of the seven-year contract.⁴² This dynamic creates a system in which employees are not free to choose their employer, terms of employment, or even location of employment.

Overall, the current system in Minor League Baseball restricts players' professional autonomy and flexibility while they toil with the hopes of making it to the major leagues. About ten percent of minor league players eventually graduate to the major leagues and fulfill

35. *Rule 4 Draft*, MLB.COM, <http://m.mlb.com/glossary/transactions/rule-4-draft> [<https://perma.cc/VF2L-EPHV>] (last visited Mar. 6, 2020).

36. Phil Miller, *Many MLB Draft Picks Must Decide Between Money or College*, STAR TRIB. (Jun 18, 2017), <http://www.startribune.com/many-mlb-draft-pick-must-decide-between-money-or-college/429147703> [<https://perma.cc/7H4Z-BR5H>].

37. See Badler, *supra* note 34.

38. Michael Baumann, *The Disgrace of Minor League Baseball*, RINGER (Apr. 20, 2018), <https://www.theringer.com/mlb/2018/4/20/17259846/minor-league-baseball-anti-labor-ronald-acuna-scott-kingery> [<https://perma.cc/Z7DJ-UBLP>]. Clubhouse dues are monies players pay the clubhouse managers for food before and after games. *What to Expect: Your First Year in Pro Ball*, AWM (Apr. 2, 2015), <https://athletewealth.com/whattoexpect> [<https://perma.cc/D27M-6KSC>].

39. See *The Business of MiLB*, *supra* note 17 (“According to Major League Rule 3(b), ‘All Minor League Uniform Player Contracts between either a Major or a Minor League Club and a player who has not previously signed a contract with a Major or a Minor League Club shall be for a term of seven Minor League playing seasons.’”).

40. 2019 Major League Rules, *supra* note 21, Attachment 3; see also Broshuis, *supra* note 5, at 64.

41. See Broshuis, *supra* note 5, at 64.

42. 2019 Major League Rules, *supra* note 22, Rule 14(b) (stating that “[i]f a voluntarily retired player, during the player’s retirement, shall desire to play baseball for hire, otherwise than for the Major or Minor League Club entitled to the player’s services, the player shall first obtain written consent of the player’s Club” and must also file an application with the Commissioner’s office); see also Broshuis, *supra* note 5, at 64 & n.91.

their dream.⁴³ For the remaining ninety percent, the hours that they dedicate to their profession culminate in modest seasonal salaries with no directly transferable skills to utilize for future workforce opportunities.⁴⁴ Some may question why players continue enduring these circumstances if they provide such bleak outcomes. The answer is that these circumstances provide players with a lottery-ticket dream of making it the major leagues. That rationale, however, does not justify the circumstances.

B. Major League Baseball Labor History

1. The Antitrust Exemption

Given the impact Major League Baseball has on minor league players, it is also important to understand MLB's decorated labor history to comprehend the situation that minor league players face. This history highlights the adversities major league players overcame in their pursuit for unionization. Ultimately, the history has been shaped by the federal antitrust exemption that the league holds.⁴⁵ Although professional baseball is no different than any other professional sport including football, basketball, or hockey, it is the only one with an exemption from antitrust law,⁴⁶ effectively insulating MLB from liability for engaging in anti-competitive conduct.⁴⁷

MLB's exemption has existed since 1922, when the United States Supreme Court decided *Federal Baseball Club v. National League*.⁴⁸ The suit alleged a conspiracy among the professional baseball leagues at the time and described the constant interstate travel that took place as part of league operations.⁴⁹ Nevertheless, the Supreme Court held that federal antitrust laws did not apply to baseball because those laws only governed interstate commerce and that baseball was not an interstate activity.⁵⁰ According to Justice Holmes, "The business is giving exhibitions of baseball, which are purely state affairs."⁵¹ The transportation that players endured was "mere incident," and, although the

43. Gordon, *supra* note 32.

44. Grant Brisbee, *Here's Why the Save America's Pastime Act Is a River of Molten Sewage*, SB NATION (July 30, 2016, 1:57 PM), <https://www.sbnation.com/mlb/2016/6/30/12068178/save-americas-pastime-act-minor-league-salaries1> [<https://perma.cc/6CFX-YQXY>].

45. Kevin Reichard, *Supreme Court Yet Again Declines to Strike Down MLB Antitrust Exemption*, BALLPARK DIGEST (June 12, 2018), <https://ballparkdigest.com/2018/06/12/supreme-court-yet-again-declines-to-strike-down-mlb-antitrust-exemption> [<https://perma.cc/7GAY-JZ6J>].

46. *Antitrust Labor Issues in Sports*, US LEGAL, <https://sportslaw.uslegal.com/antitrust-and-labor-law-issues-in-sports> [<https://perma.cc/32AA-CNN4>].

47. *Id.*

48. *Fed. Base Ball Club of Baltimore v. Nat'l League of Prof'l Base Ball Clubs*, 259 U.S. 200 (1922).

49. *Id.* at 207.

50. *Id.* at 209.

51. *Id.* at 208.

exhibitions had monetary implications, they “would not be called trade of commerce in the commonly accepted use of those words” because they were “not related to production.”⁵²

This antitrust exemption was challenged in the Supreme Court again in 1953 and 1972, but the Court declined to overrule *Federal Baseball Club* even though the conventional professional understanding of interstate commerce had expanded dramatically in the interim.⁵³ Ironically, in two cases from the 1950s, one involving boxing and the other football, the Court made clear that the exemption is for baseball only, not for sports generally.⁵⁴ As a result of these Supreme Court decisions, the antitrust exemption has become firmly embedded within the system of MLB.

2. Formation of the Major League Baseball Players Union

After decades of failed unionization attempts, the Major League Baseball Players Association was formed in 1966 to represent all MLB players in their quest to achieve better working conditions for the bargaining unit.⁵⁵ Beginning in 1885, major league players sought to strike a more equitable balance of power between players and owners by making unionization efforts.⁵⁶ After failed attempts in 1885, 1914, and 1946, the MLBPA finally emerged in 1966.⁵⁷ Although the first collective bargaining agreement between owners and players was not reached until 1968 after Marvin Miller became the head of the MLBPA, the bargaining history since that time has provided MLB players with an avenue through which players are able to address concerns regarding their financial security, workplace conditions, and more.⁵⁸ Within his first eight years as head of the MLBPA, Miller helped the players achieve groundbreaking goals, including league minimum salaries, an arbitration process for grievances, and unrestricted free agency for players.⁵⁹

3. Effect of Major League Unionization on Minor League Players

As demonstrated above, major league players have enjoyed great improvement in their working conditions and wages as a result of their unionization efforts. This success, however, has not translated in the same way for minor league players. While the major leaguers have enjoyed considerable gains, the interests of minor league players at

52. *Id.* at 209.

53. *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356, 357 (1953); *Flood v. Kuhn*, 407 U.S. 258, 267–76 (1972).

54. STUART BANNER, *THE BASEBALL TRUST: HISTORY OF BASEBALL'S ANTITRUST EXEMPTION* 127–40 (2013).

55. *MLBPA FAQs*, *supra* note 8.

56. Jeffrey S. Moorad, *Major League Baseball's Labor Turmoil: The Failure of the Counter-Revolution*, 4 *VILL. SPORTS & ENT. L.J.* 53, 62 (1997).

57. *Id.*

58. *MLBPA FAQs*, *supra* note 8.

59. Broshuis, *supra* note 5, at 70–71.

times have been used as a trading chip during bargaining negotiations.⁶⁰ Since the 1976 CBA, the disparity between what major league players experience versus what minor league players endure has widened considerably.⁶¹

Before examining the divergences, it is important to note that, although the discrepancies are striking, blame cannot be placed squarely on the MLBPA. The MLBPA does not represent minor leaguers and does not owe a duty to bargain for their interests.⁶² Without the MLBPA's gratuitous efforts,⁶³ it is possible MLB could have implemented nearly any minor league policy without regard to the negative ramifications for players.⁶⁴ Nevertheless, the CBAs that the MLBPA and MLB have agreed to have had ramifications for minor league players over time.⁶⁵ In many instances, the MLBPA has received benefits for major league players at the expense of minor league players.⁶⁶ This form of trading has resulted in gains for major leaguers, but has consequently resulted in difficult losses for minor league players.⁶⁷

Although the major league union does not represent minor league players, the disparity between the conditions that each group

60. In 2007, for example, the interests of minor league players were used as a trading chip in bargaining negotiations for changes to the Rule 5 Draft. At the time, MLBPA executive director Donald Fehr conceded that the changes "will clearly have an effect [on minor leaguers]" but "[y]ou have to find compromises." For further discussion on areas in which minor leaguers have been used trading chips, see Broshuis, *supra* note 5, at 84–95. Additionally, in 2008, MLBPA Board Member Andrew Miler acknowledged instances in which minor league player interests are sacrificed: "In negotiations, everything is essentially traded dollar for dollar . . . [and] [t]here might be a possibility for us to pressure the MLB side to raise wages on the minor league side. However, we would probably be sacrificing, say, arbitration, or some sort of dollars that are being spent on us elsewhere. That is just the reality of the deal." Bill Shaikin, *Minor League Baseball Players Exploring Union as They Continue to Battle Low Wages*, L.A. TIMES (Sept. 15, 2018, 10:10 AM), <https://www.latimes.com/sports/mlb/la-sp-mlb-column-20180915-story.html> [<https://perma.cc/P4KJ-3SV7>].

61. Broshuis, *supra* note 5, at 91–92.

62. DONALD H. WOLLETT, GETTING ON BASE: UNIONISM IN BASEBALL 96 (2008) ("The unit consists exclusively of major leaguers.").

63. In December 2019, for example, the MLBPA and MLB agreed to remove marijuana from the Joint-Drug Agreement's prohibited substances list that previously warranted suspensions for testing positive for marijuana. Mike Axisa & Dayn Perry, *MLB's New Drug Program Will Test Players for Opioids; Minor Leaguers Will No Longer Be Tested for Marijuana*, CBS SPORTS, (Dec. 12, 2019), <https://www.cbssports.com/mlb/news/mlbs-new-drug-program-will-test-players-for-opioids-minor-leaguers-will-no-longer-be-tested-for-marijuana> [<https://perma.cc/JG94-RWXJ>]. Then, during COVID-19, the MLBPA Players Trust pledged \$1 million to help minor league players whose seasons were interrupted by the pandemic. Eric Stephen, *MLBPA Trust Pledges \$1 Million to Help Minor Leaguers*, SB NATION (June 18, 2020), <https://www.truebluel.com/2020/6/18/21294647/mlb-players-trust-minor-leaguers>.

64. Broshuis, *supra* note 5, at 55–56.

65. *Id.* at 72–93 (describing how the labor history in MLB has impacted minor league players).

66. *Id.* at 86–87 (citing the change in Rule 5 draft rules as a specific concession the MLBPA made in return for higher salaries for players on MLB 40-man rosters).

67. *Id.*

experiences becomes more apparent when one compares minor league working conditions to those of major league players. For example, in the years after the MLBPA formed, CBAs have required that major league players travel first class, receive first-class meals as well as an \$85 per diem for food, and receive single-person hotel rooms when traveling.⁶⁸ Minor leaguers, on the other hand, have enjoyed little progress over the same time period. Rather than travel by plane, teams travel almost exclusively by bus, with road trips sometimes lasting as long as sixteen hours.⁶⁹ As aspiring major leaguers, players receive a \$25 per diem to fuel their bodies.⁷⁰ Few restrictions exist regarding scheduling of games, so players often sleep on the busses while traveling to play the next day's game in a new city.⁷¹ Though players earn nearly \$3,000 per day upon being promoted to the major leagues, their salary returns to their return to their previous minor league salary—sometimes \$3,000 per month—upon being optioned back to the minor leagues.⁷²

Despite enduring these unpleasant working conditions, minor league players have not seen financial advancement in their wages over time. For major league players, average salaries have risen from roughly \$50,000 in 1976 to over \$4,400,000 in 2020.⁷³ Minimum salaries over that time have risen from \$16,000 to \$563,500.⁷⁴ The same story cannot be told about minor league players, whose average minimum yearly salaries have risen from \$4,375 to just \$7,375 over nearly the

68. *Id.* at 91.

69. P.J. Dragseth, *Now I Know How Casey Felt*, *BASEBALL WISE* (July 7, 1982), <http://www.baseballwise.com/club/caseythree.html> [<https://perma.cc/5B29-A99Y>].

70. Berg, *supra* note 26. Many players have noted the difficulties associated with the meager meal *per diem*:

I think the biggest one I've noticed is the meal money—especially now since there's a big movement toward eating healthy, maintaining weight or either gaining weight or losing weight," MLBPA representative Curtis Granderson said. "In the cities you're traveling to, your options are very limited. So trying to make 20 or 25 dollars stretch, on top of the fact that you're not getting a meal at the stadium at certain levels, makes it very difficult for you to do the things that the team requires you to do.

Id.

71. Broshuis, *supra* note 5, at 91–92.

72. The minimum MLB salary was \$550,000 in 2019, and there are 187 days in the MLB schedule. Accordingly, players receive roughly \$3,000 per day of Major League service. *What Is Service Time?*, *MLB.COM* (2020), <http://m.mlb.com/glossary/transactions/service-time> [<https://perma.cc/G6BL-AD96>].

73. *Average Big-League Salary is \$3 Million*, *SOUTH BEND TRIB.* (Dec. 6, 2011), https://www3.nd.edu/~lawlib/baseball_salary_arbitration/minavg salaries/Minimum-AverageSalaries.pdf [<https://perma.cc/83ET-34K8>]; Christina Gough, *Major League Baseball Average Player Salary 2003–2018*, *STATISTA* (Aug 9, 2019), <https://www.statista.com/statistics/236213/mean-salary-of-players-in-majpr-league-baseball> [<https://perma.cc/8RBR-Q83B>].

74. See *Minimum Salary*, *supra* note 4.

same period.⁷⁵ The minimum salary at the lowest level has increased from roughly \$500 per month to just \$1,100 per month.⁷⁶ Although minor league players are not expected to see the same economic gains that major league players enjoy, their increases have failed even to keep up with inflation over time, as depicted in Table 1.⁷⁷

This financial outlook paints part of the picture for life as a minor league player, but it still does not capture the entire frame of what minor league players endure. In addition to receiving inferior working conditions and wages, minor league players remain without a grievance system. A player who is suspended in MLB, for example, may appeal the decision to a panel of arbitrators.⁷⁸ On the other hand, no process is in place for minor league players to appeal a decision or settle a dispute, other than appeal it again to the commissioner's office, which makes the initial decision to discipline a player and is a representative of the owners.⁷⁹

Whether one examines the wages, working conditions, grievance procedure, or several other issues, minor league players have been left behind relative to their major league counterparts and even relative to the average working person in the country. The bargaining history in MLB has helped major league players but has left minor league players powerless in their own pursuits.

II. Conflict: Efforts to Change the Minor League System

The discrepancy between the workplace advancements that major league players have received relative to those of minor league players is significant. Frustrated with their limited bargaining power and unsustainable living situations, minor league players have attempted to initiate changes to the system. Former players have begun to shed light on their experiences, and litigation has ensued to obtain fair compensation for the services of minor league players.⁸⁰ To combat these efforts, MLB has fought the lawsuits and lobbied Congress, the efforts

75. Overall average salaries are not calculated for minor league players, so the average of the minimum salaries have been calculated by adding the minimum salaries per month for each level, dividing them by the number of levels, and multiplying by a five-month season. See Broshuis, *supra* note 5, at 93.

76. Broshuis, *supra* note 31.

77. See *infra* Appendix, Table 1: Major League, Minor League, National Median and Poverty Level Increases Since 1976.

78. An example was seen when MLB player Ryan Braun was successfully able to appeal a fifty-game suspension for allegedly taking a performance enhancing drug. See Ken Belson & Michael S. Schmidt, *Braun Wins Appeal on Positive Drug Test and Avoids Suspension*, N.Y. TIMES (Feb. 23, 2012), <https://www.nytimes.com/2012/02/24/sports/baseball/braun-wins-appeal-on-positive-drug-test-and-will-avoid-suspension.html> [<https://perma.cc/Z2DB-L767>].

79. Broshuis, *supra* note 5, at 92 (citing Art. XX.B, Minor League UPC, Major League Rules Attachment 3 (stating that “the sole exclusive forum available to Player and Club to resolve such dispute shall be arbitration by the Commissioner”)).

80. See, e.g., Sneed, *supra* note 33; see also Broshuis, *supra* note 31.

of which have resulted in potentially debilitating legislation against the players. Players' attempts to level the playing field thus far have been futile.

A. *Attempts to Change the System*

1. Rationale Behind the History of Player Inaction

Minor league players have long acknowledged that the system within which they operate is less than glamorous.⁸¹ This acknowledgment, however, has rarely translated into action for various reasons. First, minor leaguers are playing for a dream of one day advancing into the major leagues. By taking a stand against the industrial structure, players would be rebelling against the system that is the gatekeeper of their professional fate. Challenging the status quo would mean jeopardizing their chances of making it to the major leagues, a risk that players are hesitant to take.⁸²

Garrett Broshuis, a former minor league player who recently has challenged the current norm, has communicated the sentiments that players feel: "They're chasing this boyhood dream that they've been after since they were three or four years old . . . [s]o guys are reluctant to do anything that might place that dream in jeopardy."⁸³ With over 6,000 other players chasing the same dream of making it to the major leagues, individual players fear the consequences of taking a stand against the industry that controls their future.⁸⁴ This logic is a primary factor behind why players have subjected themselves to unsustainable working conditions and wages.

A second reason for this inaction on behalf of players stems from deep-rooted history. As previously explained, baseball has a storied labor history that continues to unfold.⁸⁵ As it pertains to minor league salaries, players feel "powerless" against the league in the face of the

81. According to Garrett Broshuis, a former minor league player:

Very early on in my career, I looked around and noticed things didn't seem quite right. You have the bat boy in some cases making more money per game than the first baseman is making. You're cramming six guys into a two-bedroom apartment, just to make ends meet and split the rent as many ways as possible. You have players sleeping on futons in people's basements, because a host family saves you a lot of money. Host families are great, but why are we asking people in the community to take in professional baseball players in a \$10 billion industry?

Marc Normandin, *Why Minor League Baseball Players Haven't Unionized*, SB NATION (June 5, 2018, 11:00 AM), <https://www.sbnation.com/mlb/2018/6/5/17251534/mlb-draft-minor-league-baseball-union-phpa> [<https://perma.cc/7UC3-DX99>].

82. *Id.*

83. Gordon, *supra* note 32.

84. Sneed, *supra* note 33.

85. *See supra* Part I.

“collusive MLB cartel.”⁸⁶ In principle, a cartel is conducive to collective bargaining due to less market pressure. Yet without individuals who are willing to challenge the status quo, the current system has perpetuated, continuing to determine the livelihood of minor league players.

A final reason that no action had been taken pertains to the size of the unit of players involved. When the MLBPA initially was formed, Executive Director Marvin Miller considered the idea of including the minor league players in the bargaining unit.⁸⁷ Ultimately, however, Miller decided against fighting for this inclusion given the lack of resources, decentralization of the minor leagues, and the dreamy idealism of the players: “The notion that these very young, inexperienced people were going to defy the owners, when they had stars in their eyes about making it to the Major Leagues—it’s just not going to happen.”⁸⁸ The hurdles that minor league players face in challenging the status quo is undeniable. These barriers halted players from taking action for decades, but several individuals recently have attempted to serve as a champion for change.

2. *Senne v. Office of the Commissioner of Baseball*

Although these obstacles had created inaction in the past, several minor league players have become increasingly dissatisfied with their working conditions and recently began to call for change. Garrett Broshuis, who became a labor lawyer after retiring from MiLB, has spearheaded this pursuit.⁸⁹ In February of 2014, Broshuis’s St. Louis law firm filed a lawsuit in the U.S. District Court for the Northern District of California against five defendants: Major League Baseball, then-MLB commissioner Bud Selig, the Kansas City Royals, Miami Marlins, and San Francisco Giants.⁹⁰ Initially represented in the suit were three minor league players: Aaron Senne (Marlins), Michael Liberto (Royals), and Oliver Odle (Broshuis’ former teammate in the Giants’ farm system).⁹¹ Over time, the plaintiffs amended the suit to add a minor

86. Lucas Mann, *Minor Leagues, Microscopic Paychecks*, SLATE (Mar. 30, 2014, 10:45 PM), <https://slate.com/culture/2014/03/minor-league-baseball-lawsuit-should-we-care-that-low-level-ballplayers-make-as-little-as-1100-per-month.html> [<https://perma.cc/9T75-SM8W>].

87. Lily Rothman, *Emancipation of the Minors*, SLATE (Apr. 3, 2012, 11:08 AM), <https://slate.com/culture/2012/04/minor-league-union-thousands-of-pro-baseball-players-make-just-1100-per-month-where-is-their-cesar-chavez.html> [<https://perma.cc/WNW3-PXLW>].

88. *Id.*

89. Dave Matter, *Minor Leaguer-Turned-Lawyer Targets MLB in Lawsuit*, ST. LOUIS POST DISPATCH (June 25, 2014), https://www.stltoday.com/sports/baseball/minor-leaguer-turned-lawyer-targets-mlb-in-lawsuit/article_713f4d65-e981-5565-a4a2-2e36ed1e627c.html [<https://perma.cc/A8N2-CABH>].

90. *Id.*

91. *Id.*

league player from each major league club, enabling them to name all thirty MLB organizations in the suit.⁹²

The class-action suit, *Senne v. Office of the Commissioner of Baseball*, alleges that baseball's minor league wages and labor practices violate the minimum wage and overtime rules in the Fair Labor Standards Act of 1938 (FLSA).⁹³ The suit asserts that MLB has allowed minor league salaries to "remain stuck in the 19th century."⁹⁴ According to the filed complaint, Congress passed the FLSA to protect workers from wage and labor abuses of the type that minor leaguers face.⁹⁵ The FLSA mandates a minimum wage for workers and requires overtime for most employees who work more than forty hours weekly, yet minor league players routinely work sixty to seventy hours per week and do not receive overtime wages.⁹⁶ In August 2019, the Ninth Circuit held that the players were permitted to proceed in their class action lawsuit under the FLSA and state law, overruling a part of the prior district court ruling that certified a separate California class but denied certification for Arizona and Florida.⁹⁷ Months later in January 2020, the Ninth Circuit rejected MLB's motion for an *en banc* hearing to review the August 2019 class certification.⁹⁸

If successful in their now-certified class action suit, players would receive a modest but important increase in their minimum earnings. Assuming even a fifty-hour work week for the twenty-eight-week season,⁹⁹ players would earn \$11,165 per the federal minimum wage.¹⁰⁰

92. *Id.*

93. See Complaint at 4, *Senne v. Office of the Comm'r of Baseball*, 2015 WL 1826255 (N.D. Cal. 2015) (No. 14-CV-00608-JCS) [hereinafter *Senne* Complaint]. For the ruling on appeal, see *Senne v. Kansas City Royals Baseball Corp.*, 934 F.3d 918 (9th Cir. 2019).

94. Matter, *supra* note 89.

95. The complaint quotes President Franklin D. Roosevelt as saying, prior to the FLSA's passing, "[The Act must] protect workers unable to protect themselves from excessively low wages and excessively long hours . . . [and] should reiterate the oft-repeated pledge of political parties that labor is not a mere commodity." *Senne* Complaint, *supra* note 93, at 6–7, 2015.

96. *Id.*; see also Scooby Axson, *Former Minor League Players Sue MLB Over Low Salaries*, SPORTS ILLUSTRATED WIRE (July 10, 2014), <https://www.si.com/mlb/2014/07/10/ex-minor-leaguers-sue-mlb-low-salaries> [<https://perma.cc/3LAQ-ZTHL>].

97. See generally *Senne*, 934 F.3d 918.

98. See Braden Campbell, *9th Circ. Won't Rethink Minor League Players' Class Cert. Win*, LAW360 (Jan. 3, 2020, 7:26 PM), <https://www.law360.com/articles/1231361/9th-circ-won-t-rethink-minor-league-players-class-cert-win> [<https://perma.cc/WLQ8-9D7L>].

99. The twenty-eight-week figure was calculated by adding the five-month (twenty-week) regular season with the additional two months (eight weeks) of spring training, during which time minor league players currently are not compensated. Alternate calculations have used twenty-nine-weeks as the proper number of weeks for which players should be paid. See, e.g., Sam C. Ehrlich, *Minor Leagues, Major Effects: What if Senne Wins?*, 6 MISS. SPORTS L. REV. 23, 24 (2016).

100. Based on the current federal minimum wage of \$7.25 with time and a half given past forty hours. 29 U.S.C. § 206(a)(1)(C); *Minimum Wage*, U.S. DEP'T OF LABOR, <http://www.dol.gov/whd/minimumwage.htm> [<https://perma.cc/2VMK-9CAF>].

Although this amount would still fall below the National Poverty Line of \$12,760 for a single person household,¹⁰¹ it would represent a meaningful increase for many minor leaguers who earn currently just \$3,000 to \$7,500 for an entire season.¹⁰²

B. Attempts to Oppose Change: MLB Lobbying Efforts and Current Legislation

1. Rationale for Resisting Change

In the eyes of the owners, voluntarily increasing the salaries of all minor leaguers is an unnecessary and unjustified expense.¹⁰³ Economists have pointed out a simple truism that reflects owners' sentiments about minor league salaries: "[Minor League] [B]aseball gets to keep paying its players next to nothing, because it can."¹⁰⁴ Owners understandably do not want to pay more than they have to, and baseball's labor history has thus far dictated that minor league players are not to be compensated on a wage scale like a typical nine-to-five job would.

The Commissioner of Major League Baseball, Rob Manfred, shares the views of the owners and adds that paying minor league players an hourly wage would be impractical.¹⁰⁵ According to the commissioner, calculating hours for minor league players would create a blurry line because it would be irrational to attempt to determine when a player is or is not working.¹⁰⁶

This is not a dollars and cents issue. It is the irrationality of the application of traditional workplace overtime rules to minor league baseball players. It just makes no sense. If I want to take extra [batting practice], am I working? Or am I not working? With travel, every moment you're on a bus, is that your commute that you don't get paid for, or is that working time? Where is the clock? Who is going to punch a clock to keep track of those hours? When you're eating in

101. *Poverty Guidelines*, U.S. DEP'T OF HEALTH & HUM. SERVS., <https://aspe.hhs.gov/poverty-guidelines> [<https://perma.cc/2G2B-FB9U>].

102. *Senne Complaint*, *supra* note 93.

103. Goldman, *supra* note 16.

104. Pat Garofalo, *The MLB Makes Millions on Minor Leaguers. It Refuses to Pay Minimum Wage* (Feb. 14, 2019), <https://talkpoverty.org/2019/02/14/hands-wall-border-razor-wire>.

105. Ronald Blum, *MLB Doesn't Think Minor Leaguers Should Get Overtime*, ASSOC. PRESS (July 12, 2016), <https://apnews.com/6c7f98a16ed7419eb59ba1e7e4c0ea47> [<https://perma.cc/4RKT-SZB8>].

106. *Id.* Garrett Broshuis dismisses Manfred's argument that timekeeping is a barrier to paying minor league baseball players adequately: "Not everybody works in a factory anymore," he said. "Industries of all different types have figured out a way to comply with wage and hour laws. MLB can find a way to do it. They are sophisticated businessmen." Bill Shaikin, *Minor Leaguers Could be Paid Minimum Wage—and No More*, L.A. TIMES (Mar. 23, 2019, 10:44 AM), <https://www.latimes.com/sports/mlb/la-sp-minor-league-baseball-wage-20180323-story.html> [<https://perma.cc/PLD6-UM48>].

the clubhouse, with a spread the employer provided, is that working time, or is that your lunch break?¹⁰⁷

Commissioner Manfred's comments reflect the reason for the league's opposition to the proposal in *Senne*. Forcing the league to operate under the FLSA's rigid system that was not designed for baseball would create issues that the league believes would be unreasonable.

In addition to communicating the impossibility of calculating hours for minor leaguers, Commissioner Manfred has also cautioned about the financial ramifications of increasing minor league pay. Although MLB revenues have reached annual highs of more than \$10 billion per year, Commissioner Manfred warns that if major league owners are required to pay minor league players more, it could force the major league owners to reduce the number of minor league teams that they field: "The litigation is going to run its course, but I have to tell you this is area where excessive regulation could have a really dramatic impact on the size of minor league baseball."¹⁰⁸ Undoubtedly, the resulting impact of the pending litigation would see the salaries for minor league players rise. As a result, MLB owners have proposed reducing the size of the minor leagues in the face of potentially rising MiLB salaries.¹⁰⁹ The increases, however, should not result in the drastic changes that the commissioner fears.

If MLB clubs were forced to pay their minor league players the federal minimum wage of \$7.25 for fifty hours per week (forty hours of \$7.25 per hour plus ten hours of "time and a half" overtime) during the season and spring training, the total expenditures would rise to roughly \$2 million per club.¹¹⁰ Considering minor league players currently cost major league clubs roughly \$1 million per year,¹¹¹ the costs

107. Blum, *supra* note 105.

108. Bauman, *supra* note 38. Manfred adds, "Minor league baseball would not exist were it not for the fact that we subsidize those player costs, to the tune of several hundred million dollars a year." Shaikin, *supra* note 106. MLBPA Executive Director Tony Clark responded that minor league players deserve to receive the full protection of the law just as all other workers do. *Id.* The Major League Baseball Players Association, which represents players with big league contracts on forty-man rosters, issued a statement last month saying it "believes that all workers, including athletes who are directly employed by the major and minor league clubs, are entitled to the statutory protections afforded them by all of the employment laws of the United States and the various states and municipalities, including the protections for both minimum wages and overtime work." Blum, *supra* note 105.

109. Kyle Newman, *MLB Proposal Eliminates the Minor Leagues in Colorado. But Grand Junction and Colorado Springs Are Pushing Back*, DENVER POST (Dec. 8, 2019), <https://www.denverpost.com/2019/12/08/major-league-baseball-proposal-eliminates-minor-leagues-in-colorado> [<https://perma.cc/ZR33-GJY3>].

110. Ehrlich, *supra* note 99, at 43; *see infra* Appendix Table 3: Estimated Minor League Salaries Per Club at \$7.25/hour for 50 Hours/Week.

111. Ehrlich, *supra* note 99, at 44; *see infra* Appendix Table 2: Current Estimated Minor League Salaries Per Club.

would increase by less than \$1 million per team.¹¹² For context, the team with the lowest payroll in MLB spends over \$50 million on major league player salaries, while the highest-spending team spends over \$220 million.¹¹³ In addition, the 2019 minimum major league salary was \$555,000;¹¹⁴ paying minor league players according to federal minimum wage standards would increase ownership expenses by less than two minimum salary players.¹¹⁵ Nevertheless, in the wake of COVID-19, MLB continued to exploring ways to shrink the minor leagues, as it reduced the amount of rounds for the 2020 and 20201 MLB Draft, and proposed eliminating over forty minor league teams by as soon as 2021.¹¹⁶

2. Save America's Pastime Act

Given the financial implications owners would incur as a result of the proposed structure in *Senne*, MLB lobbied Congress to pass legislation that would declare it legal for the league to pay players as it always has.¹¹⁷ The figures above indicate that roughly \$30 million more dollars would be allocated to minor league players per year if the MLB loses the litigation in *Senne*.¹¹⁸ Acknowledging this fact, MLB attempted to preempt the lawsuit by making an investment that would exempt minor league baseball players from minimum wage laws.¹¹⁹ After spending just \$330,000 in lobbying efforts in 2015 and less than \$550,000 in each of the previous five years, MLB increased its lobbying

112. See Ehrlich, *supra* note 99, at 42, 43. Note, however, that under this structure, players in Short-A and Rookie-Level would see the biggest benefit. Although players in Triple-A would make less per month, they would still make more money over the course of the full season than they currently do. *Id.* at 42–43. Additionally, some Triple-A players (and possible even some Double-A players) are on MLB forty-man rosters and would receive significantly more than the minimum salary. *Id.*

113. See generally MLB Team Payroll Tracker, SPOTRAC, <https://www.spotrac.com/mlb/payroll> [<https://perma.cc/2UUC-VR6S>].

114. Maury Brown, *Breaking Down MLB's New 2017-21 Collective Bargaining Agreement*, FORBES (Nov. 30, 2016, 11:10 PM), <https://www.forbes.com/sites/maurybrown/2016/11/30/breaking-down-mlbs-new-2017-21-collective-bargaining-agreement/#65eac23e11b9> [<https://perma.cc/6RE4-CDG8>].

115. Ehrlich, *supra* note 99, at 42–44.

116. See Vinnie Duber, *Minor League Baseball Reportedly Set to Agree to Elimination of 42 Teams*, NBC SPORTS (Apr. 21, 2020, 12:20 PM), <https://www.nbcsports.com/chicago/white-sox/minor-league-baseball-reportedly-set-agree-elimination-42-teams>.

117. *Real Sports with Bryant Gumbel Ep 256: Minor-League Pay*, HBO Go (2018) (subscription required), <https://www.hbo.com/real-sports-with-bryant-gumbel/all-episodes/july-2018> [<https://perma.cc/6ZZF-9VMF>].

118. Number calculated by multiplying \$1 million per team by thirty teams in MLB.

119. Maury Brown, *Minimum Wage Exemption Is the Culmination of a Battle over MLB and Minor League Economics*, FORBES (Mar. 26, 2018, 7:00 AM), <https://www.forbes.com/sites/maurybrown/2018/03/26/the-fragile-economics-between-mlb-the-minors-and-the-minimum-wage-exemption/#70eb00fe3c21> [<https://perma.cc/7QGK-6JXB>].

expenses by nearly \$1 million in 2016 and 2017, spending \$1.32 million in each of those years.¹²⁰

As a result of MLB's lobbying efforts, members of Congress introduced the Save America's Pastime Act (SAPA), which now exempts "any employee who has entered into contract to play baseball at the minor league level" from the FLSA.¹²¹ SAPA failed to garner much traction as a stand-alone bill when it was introduced¹²² but eventually was passed when it was included on the 1,967th page of the \$1.3 billion omnibus spending bill signed by President Trump in 2016.¹²³ Several congressmen admitted they were unable to read the entire 2,323-page bill and were initially unaware that legislation affecting minor league baseball was included.¹²⁴ Nevertheless, MLB's multimillion dollar investment in lobbying Congress successfully excluded minor league players from the FLSA and debilitated the likelihood of success under federal minimum wage laws for the upcoming *Senne* arguments.

The effect of SAPA becoming law has the potential to completely preempt *Senne* before it is even heard by the Ninth Circuit. Broshuis acknowledges the hurdles now in place due to SAPA.¹²⁵ He notes, however, that although SAPA may preempt any federal challenges, he is hopeful that individual states will ignore the federal exemption in favor of state minimum wage laws¹²⁶ and, at the very least, that backpay will be awarded for the period preceding SAPA.¹²⁷ The arguments under state law are likely to face significant hurdles as well, as MLB has continued its lobbying spending in an effort to pass similar legislation

120. *Client Profile: Major League Baseball Commissioner's Office*, OPEN SECRETS (2018), <https://www.opensecrets.org/lobby/clientsum.php?id=D000022093> [<https://perma.cc/4BC2-SAT4>].

121. Save America's Pastime Act, H.R.5580, 114th Cong. § 2 (2016).

122. Ryan Fagan, *Despicable "Save America's Pastime Act" Aims to Screw Minor Leaguers*, SPORTING NEWS (June 29, 2016), <http://www.sportingnews.com/us/mlb/news/minor-league-save-americas-pastime-act-salaries-antitrust-exemption-broshuis-congress/1j1n290g1ubed18af2tjyb1u7l> [<https://perma.cc/RU58-QU9L>].

123. Stephen Hawkins, *MLB Commish Says Federal Provision Will Mean Raise for Some*, ASSOC. PRESS (Mar. 29, 2018), <https://www.apnews.com/b6f4532c602e4176b8bee17574693e12> [<https://perma.cc/ZC9R-CY4W>].

124. Kristie Ackert, *Rep. Peter King Clarifies After Saying He Was Unaware Spending Bill Makes Minor Leaguers Exempt from Minimum Wage Laws*, N.Y. DAILY NEWS (Mar. 24, 2018, 2:04 AM), <https://www.nydailynews.com/sports/baseball/mets/peter-king-didn-minor-leaguers-hurt-spending-bill-article-1.3891867> [<https://perma.cc/L28M-EG92>]. Other representatives echoed those sentiments by communicating that "no one knows what is in this bill" because it was not provided in timely enough fashion for any representative to have read the entire bill. *The "Save America's Pastime Act" MLB's Dirty Secret*, SBNation Fanpost (Aug. 1, 2018, 3:29 PM), <https://www.gaslampball.com/2018/8/1/17640894/the-save-americas-pastime-act-mlbs-dirty-secret> [<https://perma.cc/9C9F-VX4G>].

125. *Real Sports*, *supra* note 117.

126. *Id.*

127. Telephone interview with Garrett Broshuis, Attorney, Korein Tillery (Mar. 22, 2019) [hereinafter Broshuis Interview].

to SAPA at the state level.¹²⁸ Given the efforts that MLB has taken, Broshuis fears for the next generation of players, who similarly will be left behind if these issues remain unaddressed.¹²⁹

III. Resolution: Solutions and Limitations for the Future of Minor League Baseball

Given the hurdles that minor league players now face as a result of Save America's Pastime Act, their chances of obtaining labor equality through in *Senne* are severely reduced. The unsustainable working conditions and wages that players sustain, however, remain present and must be addressed. Although MLB's quest for legislative intervention limited the opportunity for remedy under the FLSA, it does not close the door for opportunity under other labor-related solutions. One remaining avenue through which players should choose to pursue change is unionization. There are significant hurdles to minor league unionization, but there are also demonstrable benefits of accomplishing this goal. Management currently has undeniable leverage over the players, but organizing minor leaguers could benefit both parties. Collective bargaining would allow the parties to negotiate over issues rather than continue costly litigation resulting in poor public relations. Unionization efforts would not come easily, but they have proven successful in another minor league sport. It is time the players explore this option.

A. Benefits of Bargaining

Collectively bargaining for solutions rather than engaging in burdensome litigation has many benefits for both sides. In this labor context, players have an interest in seeing their workplace conditions improve and wages increase.¹³⁰ As of now, this interest is being pursued through litigation because all other efforts to address the status quo have failed.¹³¹ This paper encourages minor league players to pursue unionization efforts because of the many potential benefits.

The value of addressing the issues minor league players face is not only in the players' best interest. As the issues have surfaced, MLB has received national condemnation for its practice of exploiting workers for

128. Mitchell, Williams, Selig, Gates, & Woodyard, P.L.L.C., *Saving America's Pastime Means Not Paying Minor League Players*, JD SUPRA (Jan. 25, 2019), <https://www.jdsupra.com/legalnews/saving-america-s-pastime-means-not-45220> [<https://perma.cc/DSF2-CHS6>] (noting MLB's lobbying increase in Arizona, one of two states where teams play spring training games).

129. *Real Sports*, *supra* note 117.

130. Sneed, *supra* note 33.

131. Sheryl Ring, *The Minor-League Wage Battle Might Be on the Verge of Ending*, FANGRAPHS (Mar. 20, 2018), <https://blogs.fangraphs.com/the-minor-league-wage-battle-might-be-on-the-verge-of-ending> [<https://perma.cc/YQ2B-MRMZ>].

their labor,¹³² failing to provide adequate financial resources for meals or housing,¹³³ and neglecting to improve their ballpark facilities.¹³⁴ It also has been criticized for spending millions lobbying Congress to thwart the possibility of change.¹³⁵ Most recently during COVID-19, some major league teams' initial decision not to pay minor leaguers during the pandemic was met with such strong backlash that the organizations ultimately decided to change their minds.¹³⁶ Although the ramifications of negative public relations are not always tangible, this instance shows that there are issues MLB could avoid—as well as benefits MLB could reap—as a result minor league concerns being appropriately addressed.

Minor league players are an investment for the owners.¹³⁷ These investments, however, currently are unable to fuel their bodies with proper meals and are unable to afford living spaces that are conducive to success on the field.¹³⁸ In the offseason, players sometimes work three or four jobs to sustain themselves.¹³⁹ Affording them the opportunity to focus on training and improving would increase the quality of play at the minor league level and correspondingly would create more competition at the major league level.¹⁴⁰ It also would foster strong workplace relations between the clubs and the individuals who later will become members of their major league team.¹⁴¹

Although labor and management appear to disagree on many issues, they agree that change is overdue. In 2018, the president

132. Joel Mendelson, *Major League Wage Theft: How Baseball Owners and Congress Exploit Minor League Players*, JOBS WITH JUSTICE (Mar. 28, 2018), <http://www.jwj.org/major-league-wage-theft-how-baseball-owners-and-congress-exploit-minor-league-players> [<https://perma.cc/H7WW-QLKM>].

133. Emma Baccellieri, *The Cruel Bill Allowing MLB To Keep Screwing over Minor-Leaguers Is Now Law*, DEADSPIN (Mar. 23, 2018, 3:22 PM), <https://deadspin.com/the-gross-bill-allowing-mlb-to-keep-screwing-over-minor-1824029651> [<https://perma.cc/R76E-FDKN>].

134. Jake Russell, *MiLB Owners Balk at MLB's Request for Improved Facilities at the Lower Levels*, WASH. POST (Oct. 19, 2019, 8:04 AM) <https://www.washingtonpost.com/sports/2019/10/19/mlb-owners-balk-mlbs-request-improved-facilities-lower-levels> [<https://perma.cc/XYS3-LL7T>].

135. Bauman, *supra* note 38.

136. Martin Gallegos, *A's Resume Stipends for Minor League Players*, MLB.COM (June 5, 2020), <https://www.mlb.com/news/a-s-paying-minor-league-players>.

137. Goldman, *supra* note 16.

138. Baccellieri, *supra* note 133.

139. Zack Meisel, *Many Minor Leaguers Work Second, Third or Fourth Jobs During the Offseason, So When Do They Find Time to Train?*, CLEVELAND.COM (Feb. 1, 2016), https://www.cleveland.com/tribe/index.ssf/2016/02/many_minor_leaguers_work_secon.html [<https://perma.cc/3YES-W97U>].

140. Goldman, *supra* note 16.

141. This workplace relations benefit is one of the reasons the Toronto Blue Jays decided to raise minor league salaries by fifty percent for the 2019 season. Bill Baer, *Blue Jays' Minor League Pay Raises Making a Difference*, NBC SPORTS (Aug. 22, 2019, 3:42 PM), <https://mlb.nbc.com/2019/08/22/blue-jays-minor-league-pay-raises-making-a-difference> [<https://perma.cc/4DRC-CE6G>].

president of Minor League Baseball, Pat O'Connor, acknowledged that players deserve raises, but that the FLSA may not be the most appropriate way to provide them:

We're not saying that [pay to the players] shouldn't go up. We're just saying that the formula of minimum wage and overtime is so incalculable. I would hate to think that a prospect is told, "You got to go home because you're out of hours; you can't have any extra batting practice." It's those kinds of things. It's not like factory work. It's not like work where you can punch a time clock and management can project how many hours they're going to have to pay for.¹⁴²

Although O'Connor disagrees with the manner in which the players in *Senne* currently are proposing change, he does not specifically take issue with the underlying interest in the matter. Major league teams, too, are beginning to see the benefits of addressing these workplace matters and have started to address these issues on their own.¹⁴³ In March 2019, the Toronto Blue Jays unilaterally decided to raise wages for all minor leaguers by fifty percent,¹⁴⁴ citing many of the aforementioned benefits to both the players and the club.¹⁴⁵ Although the Blue

142. Brown, *supra* note 10. MLB Commissioner Manfred communicated similar sentiments in 2016 when asked about why the league was opposed to paying players a minimum wage: "For us, it's really not about the money, so much as the burden that would be imposed. I don't think that when the wage and hour laws were passed, that people were thinking about minor league baseball players." Joe Lemire, *Minor Leaguers Are Cheap Artists, Says MLB Boss Rob Manfred*, VOCATIV (Oct. 6, 2016), <https://www.vocativ.com/365477/rob-manfred-mlb-minor-league/index.html> [<https://perma.cc/5AX2-Z6WQ>].

143. Associated Press, *Blue Jays Give Their Minor Leaguers 50% Raise; Union Hopes More MLB Teams Follow*, MARKETWATCH (Mar. 18, 2019), <https://www.marketwatch.com/story/blue-jays-give-their-minor-leaguers-50-raise-union-hopes-more-mlb-teams-follow-2019-03-18> [<https://perma.cc/B94W-VRHN>] (noting the raises the Toronto Blue Jays will be giving their minor league players beginning in 2019).

144. *Id.*

145. Toronto Blue Jays' Vice President of Baseball Operations Ben Cherington communicated that the Blue Jays raised minor league wages by fifty percent for the 2019 season for these very reasons: "We just feel like it's consistent with our values of trying to be a player-centered organization and give them every resource possible to be at their best." *Id.* The decision was popular among those in the organization. Blue Jays manager Charlie Montoyo stated, "Hopefully that gives an idea to everybody else in baseball. That's awesome I think. I'm proud to be a Blue Jay by what we just did." *Id.* Minor league players approved of the decision as well, citing the difference it will make to their teammates:

It's definitely going to help a lot of people out. . . . It takes their mind off if they have families at home. Some of them are married. It's hard to live off that especially. That puts a lot of pressure on their wives or their family back home. So that makes it a little bit easier to focus on baseball itself instead of trying to maybe skip a meal and save a little money.

Id.

Jays were the only team to implement such a change,¹⁴⁶ other clubs considered following suit.¹⁴⁷

Ultimately, an increase in mutual bargaining efforts, particularly in the midst of the Blue Jays' decision, would provide all parties involved an opportunity to explore solutions that transcend the rigid remedies litigation would provide. The Blue Jays' unilateral alteration has forced MLB to consider addressing the issue;¹⁴⁸ MLB has stated it is entering discussions with an umbrella organization of MiLB to consider changes to the current structure.¹⁴⁹ The benefits of these management-only discussions, however, are limited without union representation at the other end of the table.¹⁵⁰ The utilization of bargaining through a union would enable the parties to craft a solution that

146. John Delcos, *Toronto Blue Jays Boost Pay of Their Minor Leaguers; Major League Baseball Not Thrilled*, FORBES (Mar. 18, 2019, 8:35 PM), <https://www.forbes.com/sites/johndelcos/2019/03/18/toronto-blue-jays-boost-pay-of-their-minor-leaguers-major-league-baseball-not-thrilled/#2206f4af2a7b> [<https://perma.cc/4LLB-UQB2>].

147. The Chicago Cubs have also considered making a unilateral change to their payment of minor leaguers according to team president Theo Epstein:

It's something that people have been talking about a lot, how it would be better for all common good if we could find a way to get them a more livable wage. It's obviously a complicated issue, but it seems like a lot of steps are in the right direction. Especially with what Toronto's done, it seems like it's becoming a leaguewide conversation, which is a good thing.

Gordon Wittenmyer & Madeline Kenney, *Cubs Have Discussed Raising Minor-League Pay, as Blue Jays Did*, CHI. SUN-TIMES (Mar. 21, 2019, 10:42 PM), <https://chicago.suntimes.com/sports/cubs-discussed-raising-minor-league-pay-blue-jays> [<https://perma.cc/SQ8L-SWDE>]. The St. Louis Cardinals, however, are among the teams who plan to let MLB ultimately make any changes for them: "Ultimately we're going to have to address minor-league compensation," Cardinals president of baseball operations John Mozeliak said. "That will be something that will be done from a broader stance. I don't think we are about to change how we do things internally. If the industry starts to change in that (way), that's something we'll have to think about." Derrick Goold, *Minor Wages Become a Major Question for Cardinals and Other Clubs*, ST. LOUIS POST-DISPATCH, (Mar. 26, 2019), https://www.stltoday.com/sports/baseball/professional/minor-wages-become-a-major-question-for-cardinals-and-other-clubs/article_53a65960-8136-5909-a013-d25ecc982616.html [<https://perma.cc/5CUK-EEEJ>].

148. Jeff Passan, *Sources: MLB Eyes Higher Salaries in Minors*, ESPN (Mar. 18, 2019), http://www.espn.com/mlb/story/_/id/26298523/mlb-eyes-higher-salaries-minors [<https://perma.cc/UG65-4RU2>].

149. *Id.* ("While each Club makes its own decisions regarding minor league salaries, the Office of the Commissioner is presently in negotiations with the National Association of Professional Baseball on the terms of a new agreement between the Major Leagues and the Minor Leagues to replace the agreement that expires in September 2020. The working conditions of minor league players, including their compensation, facilities and benefits, is an important area of discussion in those negotiations.")

150. Garrett Broshuis notes that although it is a step in the right direction that MLB is taking steps to move the ball forward, their discussions are limited by the fact that they talking to MiLB president Pat O'Connell, who does not represent the players' interests. Broshuis Interview, *supra* note 127. Broshuis adds that it would be much more beneficial if the players had a seat at the table given the plethora of issues and interests. Passan, *supra* note 148. ("If [MLB] is serious about improving, there are so many different places. College baseball players receive a higher per diem than [MiLB] players do. College players don't need to pay clubhouse dues, whereas minor league players do.

increases wages for players without placing restrictive conditions on the league in the manner that overtime requirements would. For these reasons, the players should take this opportunity to push open the door to obtaining focused bargaining discussions with their employer. The league likely would not assist the players in their pursuit, but players taking the initiative to open this door could provide the league and players significant benefits.

B. Model for Success: Minor League Hockey Unionization

Although the benefits of collective bargaining have yet to be acknowledged in the Minor League Baseball context, the situation MiLB players face is not entirely unique among their peers; minor league hockey players have successfully demonstrated the benefits of unionizing. In 1967, minor league hockey players overcame similar hurdles that MiLB players face when they formed the Professional Hockey Players Association (PHPA).¹⁵¹ The PHPA and its effects on the relationships between minor league teams, major league teams, and the leagues themselves are perhaps the best examples of what collective bargaining could look like for MiLB.¹⁵²

The PHPA currently represents 1,600 players among fifty-seven minor league hockey teams in two separate levels of minor league hockey.¹⁵³ The PHPA has been the sole bargaining representative for players in the American Hockey League (AHL) since 1968 and the East Coast Hockey League (ECHL) since 1995.¹⁵⁴ Notably, the AHL and ECHL have separate and distinct collective bargaining agreements.¹⁵⁵ Though National Hockey League Players Association (NHLPA) does not partake in collective bargaining on behalf of the minor league players, the PHPA's ECHL and AHL CBAs must be congruent with many terms of the NHL-NHLPA CBA because of how frequently players move between leagues.¹⁵⁶ Given this fluidity, the PHPA and NHLPA

You look at housing, where you're making so little that six players live in a two-bedroom apartment on air mattresses. That's less than ideal.”)

151. *AHL and PHPA Ratify New Collective Bargaining Agreement*, ADMIRALS ROUNDTABLE (Oct. 9, 2015), <https://admiralsroundtable.com/2015/10/09/ahl-and-phpa-ratify-new-collective-bargaining-agreement> [https://perma.cc/ZYB6-P9J8].

152. See, e.g., Marc Normandin, *How Minor League Baseball Players Can Begin Unionizing*, SB NATION (July 12, 2018, 10:00 AM), <https://www.sbnation.com/mlb/2018/7/12/17518102/minor-league-baseball-unions-mlb-garrett-broshuis-mlbpa> [https://perma.cc/2QG9-5ZUS]; see also Shaikin, *supra* note 60.

153. *Prof'l Hockey Players' Ass'n. 50th Anniversary*, HOCKEY NEWS (Oct. 2017), <https://phpa.com/pdf/257> [hereinafter *PHPA 50th Anniversary*]. There are thirty-one AHL teams and twenty-seven ECHL teams. All thirty-one AHL teams are affiliated with an NHL team, and all twenty-seven ECHL teams are affiliated with either an NHL or AHL team. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

were able to work jointly to establish standards such as minimum salaries for two-way contracts.¹⁵⁷

Many similarities exist between the industries of hockey and baseball, yet there are stark discrepancies between the workplace conditions and compensation structures for their minor league players. Although the 2019 minimum salary for both National Hockey League (NHL) and MLB players was between \$550,000 and \$650,000,¹⁵⁸ the discrepancy between the salaries for their respective minor league players is far more significant. The minimum salary of a Triple A baseball player (the highest level in MiLB) is \$2,150 per month, paid only during the season (\$10,750 per year).¹⁵⁹ The minimum annual salary of an AHL player (the highest level in minor league hockey), on the other hand, is \$42,375 annually with an average salary of \$90,000.¹⁶⁰ As an added benefit, the AHL's *per diem* (\$74) is nearly three times what MiLB players receive.¹⁶¹ Similarly, while Single A baseball players (one of the lower levels in MiLB) earn \$1,250 per month (\$6,250 per year),¹⁶² first-year players in the ECHL (the lowest level of professional hockey associated with the NHL) earn nearly double that amount while earning a minimum of \$10,790 per season.¹⁶³ Additionally, ECHL players are provided housing in the form of furnished, utilities-paid apartments while MiLB players are not assisted with their housing needs.¹⁶⁴

Although the absence of a bargaining unit in Minor League Baseball may not be the exclusive reason for these discrepancies in pay, the incongruences in these figures should not come as a surprise given the timing of the PHPA's formation. When the PHPA was founded in 1967, it became the first legally recognized union for minor league athletes.¹⁶⁵ This formation occurred during the same year that NHL players formed their own union, the NHLPA.¹⁶⁶ The PHPA received support from their major league counterpart, the NHLPA, and has benefitted from that strong relationship in the years since.¹⁶⁷ PHPA Executive

157. *Id.*

158. The minimum NHL salary for the 2018–2019 season was \$650,000. 2012–2022 NHL-NHLPA Collective Bargaining Agreement Art. 11.12, <https://www.nhlpa.com/the-pa/cba>. The minimum MLB salary for the 2019 season is \$555,000. MLB Basic Agreement Art. VI(A)(1), https://d39ba378-ae47-4003-86d3-147e4fa6e51b.filesusr.com/ugd/b0a4c2_95883690627349e0a5203f61b93715b5.pdf.

159. Ehrlich, *supra* note 99, at 42.

160. Brian MacPherson, *Minor League Hockey Players Benefit from NHL Relationship*, PROVIDENCE J. (Feb. 21, 2015), <https://www.providencejournal.com/article/20150221/news/150229777> [<https://perma.cc/5Z4M-3JBN>].

161. Normandin, *supra* note 152.

162. Ehrlich, *supra* note 99, at 42.

163. MacPherson, *supra* note 160.

164. *Id.*

165. *AHL and PHPA Ratify New Collective Bargaining Agreement*, *supra* note 151.

166. MacPherson, *supra* note 160.

167. *Id.*

Director Larry Landon believes MiLB players would benefit greatly from similar support.¹⁶⁸

Ultimately, using minor league hockey players as a model to follow would serve Minor League Baseball players well in their pursuit for labor equality.¹⁶⁹ The system of Minor League Baseball is distinct from that of hockey, but there is undeniable untapped value in exploring this system's model for success. MiLB players can learn from the advancements that their hockey counterparts have enjoyed. The most important lesson that players can take from this example is that unionization is possible at the minor league level. By educating themselves of the labor structure in hockey, MiLB players should be inspired by the prospects of such possibilities.

C. *Limitations of Unionization*

1. Fear of Being Blackballed by MLB

The benefit of change to the current system is clear for minor league players. Nevertheless, significant obstacles limit their probability of success in organizing. A primary issue that the players face in this pursuit questions who the pioneer for the players will be and who will follow.¹⁷⁰ Although Broshuis and other former players have challenged the current operations, having a highly touted minor league player vocalize his displeasure or take action would help immensely.¹⁷¹ The problem with this ideal, as Broshuis acknowledges, is that it ignores the fear that players face:

Fear is the predominant issue for players. When I was talking to players [about organizing], it's not that they didn't recognize the benefits of a union, but they were scared. They looked at me as if I might as well have been asking them to jump off of a cliff with me. They are so fearful of those owners, and what they might think about it, and how the owners might judge that decision to act collectively.¹⁷²

168. "I wish Major League Baseball players would see it and say, 'You know what, these guys need an office. They need employees, they need to show that they're organized so players believe in it,' and maybe put a stipend in, each player each year." Normandin, *supra* note 152.

169. Notably, players in the NBA's G-League (the NBA's minor league) voted to form a union with the support of the NBPA in July 2020. See Jenna West, *G League Players Form Union with Assistance from NBPA*, SPORTS ILLUSTRATED (July 21, 2020), <https://www.si.com/nba/2020/07/21/g-league-players-form-union> [https://perma.cc/V3RE-5KML]. For additional reading on the implications of the potential G League Players' Union, see Marc Edelman, *Forming an NBA G League Players' Union Is a Win for Both Players and Owners*, FORBES (July 22, 2020 7:40 AM), <https://www.forbes.com/sites/marcedelman/2020/07/22/forming-an-nba-g-league-players-union-is-a-win-for-both-players-and-owners/#720b165858f4> [https://perma.cc/4GLT-66R3].

170. Rothman, *supra* note 87.

171. *Id.*

172. Normandin, *supra* note 81.

Because most minor leaguers are fungible, they fear speaking up would give the team an excuse to replace them.¹⁷³ With over 6,000 minor league players for less than 1,200 major league spots and only ten percent of minor leaguers eventually reaching the majors, players know that the margin for error is slim.¹⁷⁴

Although players fear the ramifications of organizing, there is no dispute that minor league players are permitted to unionize if they can organize themselves accordingly. Major League Baseball has argued that minor leaguers are apprentices and that they accordingly are exempt from the FLSA.¹⁷⁵ It has not, however, taken a position against the possibility of minor league players unionizing. The primary limitation is not that players are forbidden from organizing; it is that the structure of baseball has created a system in which players are afraid of taking the step to try.¹⁷⁶ Players understandably fear the repercussions of spearheading an organizing effort in an industry in which the rules against retaliation by the employer are virtually unenforceable.¹⁷⁷ Combining this fear with the already statistically unlikely chances of

173. Normandin, *supra* note 152. Players also become blinded by the chance at stardom that playing in the minor leagues provides. As former minor league player Jeremy Wolf notes, “I got to wear a Mets uniform. Players who are playing are blinded by that sort of thing. No one’s going to strike, no one’s going to scream union, no one’s going to do anything to make themselves stand out.” Garofalo, *supra* note 104.

174. Gordon, *supra* note 32.

175. When addressing the current state of MiLB, Manfred noted that MiLB is “more like apprenticeship programs or artistic pursuits where there are explicit exceptions to the wage and hour requirements.” Interview with Robert Manfred, Commissioner, ASAP SPORTS (Oct. 5, 2016), http://www.asapsports.com/show_interview.php?id=123987 [<https://perma.cc/L8EB-J6ZZ>]. This argument is facially meritorious, but it ultimately is a red herring emphasized by the employers that ignores baseball’s specific structural restrictions. Artists operate in a free market system in which they may rise to the top of their industries in a variety of ways in which minor league players may not. For example, artists may seek an employer of their choice and may bargain for higher wages against other organizations. MiLB players, on the other hand, operate within a “cartel” of sorts that has the ability to collude on salaries. Players are only permitted to sign with the team that selects them in the draft and are unable to explore the market for their services for seven years, per the standard MLB CBA. Even signing bonuses for highly touted players are artificially capped because the draft creates limits on whom the players can use to negotiate against one another. While there are strong arguments against paying minor league players a free-market wage, comparing this industry to the entertainment industry is weak. Broshuis Interview, *supra* note 127.

176. Broshuis Interview, *supra* note 127.

177. An example of this lack of discrimination policing recently was seen within the sports industry in 2018. Ultimate Fighting Championship fighter Leslie Smith filed NLRB sections 8(a)(1) and 8(a)(3) claims against UFC alleging that her contract to fight was not renewed in retaliation for her union organizing efforts and participation in section 7 protected concerted activities, but the NLRB dismissed the charges and noted its hesitation to interfere with employer business decisions. Jackson Lewis P.C., *NLRB Avoids Question of Whether UFC Fighters Are Union Eligible Employees . . . For Now!!!!*, JD SUPRA (Oct. 26, 2018), <https://www.jdsupra.com/legalnews/nlr-avoids-question-of-whether-ufc-78383> [<https://perma.cc/AF6B-3PL5>] (“[T]he NLRB’s proper role is not to second guess a business decision not to continue an agreement in the absence of union animus.”).

graduating to the major leagues creates the most burdensome limitations for the potential organizing efforts.¹⁷⁸

Finally, it is also possible the owners would not oppose organization efforts as much as players believe. When the PHPA formed, there was no backlash by the owners.¹⁷⁹ At the time, the players sought improvements in their group insurance and pension funds.¹⁸⁰ Over the course of time, the PHPA was able to demonstrate that it can provide value not only for its own membership group, but also to management. In 2017, NHL Deputy Commissioner Bill Daly stated, “I think the PHPA plays a very stabilizing role in our sport. They take care of their business quietly, they always seem to get things done, and they always seem to keep their players happy while trying to reach the NHL, and that’s been a real benefit to us.”¹⁸¹ The relationship between labor and management in professional hockey suggests a possibility that MiLB players may not face as much opposition to potential unionization efforts as they believe.

2. Lack of Support from MLBPA or Other Outside Unions

Another limitation that players face pertains to the likelihood that they would receive support from their major league counterparts. While the PHPA received, and continues to receive, support from the NHLPA and NHL, MiLB players have yet to receive similar support that would assist in their pursuits.¹⁸² The MLBPA has expressed empathy and support for minor leaguers in their plight,¹⁸³ but ultimately recognizes that the union’s obligation is to its own rank and file: the major leaguers. Additionally, although nearly every MLB player has

178. For this reason, it would be particularly beneficial if a top minor league prospect, or a group of top prospects, spearheaded the effort. They are particularly valued by their employers and, in many cases, represent significant investments that teams made, so it is less likely they would face repercussions for leading organizing efforts. Broshuis Interview, *supra* note 127.

179. *PHPA 50th Anniversary*, *supra* note 153.

180. *Id.*

181. Brian Burke, former NHL General Manager and Agent, echoes Daly’s sentiments:

The PHPA’s reputation is excellent. They’re viewed as a professional group that does a good job on behalf of their players. Their first line of attack is always a solution. Minor league players need an advocate more than anyone. My view is that players are far better off with the PHPA leading and protecting them than they would be otherwise.

Id.

182. Normandin, *supra* note 81.

183. MLBPA Executive Director Tony Clark expressed support for minor league players after the Save America’s Pastime Act was passed: “We stand shoulder to shoulder with the minor league players and the labor community in opposing this legislation.” Shaikin, *supra* note 106.

spent time in the minor leagues,¹⁸⁴ none has taken a stand to change the system within which they once toiled.¹⁸⁵

Though neither the MLBPA nor the MLB players have taken action on behalf of the minor leaguers thus far, the PHPA shows that doing so could benefit to MLBPA.¹⁸⁶ Mark Chipman, chair of True North Sports and Entertainment, which owns the NHL's Winnipeg Jets, noted the value of the PHPA for the NHLPA:

You have to appreciate the interaction with players as they move between leagues and from one CBA to the next. The PHPA helps establish the culture of being a professional hockey player. They're highly respected because they represent players on so many teams over a broad area. Having an informed Membership is key¹⁸⁷

Chipman's statement reflects a sentiment that creating union consciousness and solidarity provides value for players as they graduate to the NHL and become members of the NHLPA. In the MLB, the upcoming collective bargaining agreement ends in December 2021.¹⁸⁸ Creating a unified membership group at the minor league level would provide the MLBPA with a more informed group of players as the minor league players matriculate into the MLBPA. Despite these benefits, the current players and MLBPA have mostly provided support from the sidelines.

Given these hurdles, it is possible the players might consider the prospects of an outside union to lead their charge. Utilizing an outside union, as proposed by labor lawyer Don Wollett, would provide an answer to many of the aforementioned obstacles that players face and could help organize the players and represent their interests.¹⁸⁹ Although this avenue is intriguing, it is similarly possible that the low wages involved for minor league players would create little incentive for an outside union to invest time and effort into organizing the players.¹⁹⁰

3. Bargaining Unit Size and Nature

The size and nature of any potential bargaining unit in MiLB present additional hurdles the players must overcome in their pursuit for union representation. For instance, larger bargaining units

184. Of all drafted players since 1965, only twenty-one have gone directly to the major leagues. Only one player, Mike Leake, has done so since 2000. *Straight to the Major Leagues*, BASEBALL ALMANAC (2020), <http://www.baseball-almanac.com/feats/feats9.shtml> [https://perma.cc/HTR8-RFEZ].

185. Broshuis, *supra* note 5, at 54–55.

186. The NBPA's recent assistance toward the G League player unionization efforts provide further support for the inference that the MLBPA's assistance could benefit MiLB unionization efforts. See West, *supra* note 169.

187. PHPA 50th Anniversary, *supra* note 153.

188. MLB Basic Agreement, *supra* note 158.

189. Normandin, *supra* note 81.

190. Broshuis, *supra* note 5, at 99.

can provide benefits to members in the form of heightened bargaining power due to a greater disruptive capacity, lower administrative overhead costs per member, and more wage compression between different skill and productivity levels.¹⁹¹ At the same time, however, a larger bargaining unit can also be more difficult to organize, can ultimately lead to a bargaining agreement of a more restrictive scope, and can be less democratic in that each worker has less of a voice among the crowd.¹⁹² With over 6,000 minor league players in over 250 different cities across the country,¹⁹³ significant thought must be given to the structure of any proposed unit, especially considering members of each level may have different bargaining interests.¹⁹⁴

The size of the bargaining unit is an issue that must be considered, but it is not one that is unique within the sports industry.¹⁹⁵ Garrett Broshuis acknowledges these hurdles when organizing minor league players, but he also sees the PHPA as a potential model to follow.¹⁹⁶ Given the range of interests of players at the bottom and top of the minor leagues, it is likely the most rational unit size would be to divide

191. Professor Aditi Bagchi, Fordham Law School, Labor Law Lecture (Mar. 6, 2019).

192. *Id.*

193. See Delpy & Costello, *supra* note 10.

194. For example, players at the highest level (Triple-A) may have different interests than players in Rookie ball do. While players in Triple-A may desire more long-term protections or benefits for their families, younger players at the Rookie level may place a higher premium on larger up-front wages to help their worse living conditions. An additional consideration pertains to NLRB certification. Of course, the NLRB is granted much discretion in determining the appropriate bargaining unit. See *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491–92 (1947). The test for appropriateness “is whether the employees comprising the unit share a ‘community of interest.’” *Friendly Ice Cream Corp. v. NLRB*, 705 F.2d 570, 575 (1st Cir. 1983).

195. ROBERT C. BERRY, WILLIAM B. GOULD & PAUL D. STAUDOHAR, *LABOR RELATIONS IN PROFESSIONAL SPORTS* 220 (1986) (stating that establishing the appropriate bargaining unit is always difficult in the sports industry).

196. Broshuis Interview, *supra* note 127. Note, however, that Broshuis has considered other ideas for the unit size as well:

What is an appropriate bargaining unit, that’s an important question, and one that can be debated quite a bit. Sure, you could try to bite off the entire system all at once, but you could make it smaller, too. You could go by Major League organization, you could go by minor league, too, where maybe you’re focused on just the International League or just the Eastern League. If it’s a bit smaller, it becomes more manageable then.

Normandin, *supra* note 152. Yet Broshuis notes that there may not just be one correct answer on the matter:

There would be legal challenges, as this is often a hotly contested issue. “What is an appropriate bargaining unit?” The act itself, the [NLRA] uses “an” not “the.” It sort of implies that there’s not just one correct bargaining unit, that there could be several different possibilities as long as you have a sufficient level of cohesiveness within the unit that you’re choosing.

Id.

at each level of the minor leagues.¹⁹⁷ Creating a separate bargaining unit for players in Triple-A, Double-A, Single-A, and Rookie levels would provide an opportunity for each unit to represent the unique interests of the players in their specific unit.

Although this solution is plausible given the range of player interests at each level, the inherent structure of Minor League Baseball creates additional complications for the nature of each bargaining unit. First, although major league owners pay the minor league player salaries, it is possible the minor league owners would be considered joint employers because they are responsible for maintaining adequate facilities.¹⁹⁸ If this structure is determined to be a joint employment relationship, it would add an additional layer of negotiations, as minor league players would be forced to bargain with both MLB and MiLB. Ultimately, it is likely that the MLB owners would be considered the sole employer because they control the minor league player terms of employment, but the uncertainty does pose potential complications.

An additional complication relates to the transient nature of the potential bargaining units created. In the industry of Minor League Baseball, much like other sectors in which employees intend not to be members of the union indefinitely,¹⁹⁹ players aspire to graduate to the major leagues as soon as possible. Because each player has this ultimate goal in mind, he inherently would desire to be a member of a minor league union for the shortest time period possible. To complicate matters further, creating a system with different units for each level theoretically would result in players entering and exiting multiple bargaining units in a matter of days given how frequently players are promoted and demoted from one level to another.²⁰⁰ Ultimately, although the structure of baseball creates hurdles that must be considered before

197. *Id.*

198. For further reading on the impact of joint employment on collective bargaining, see Celine McNicholas & Marni von Wilpert, *The Joint Employer Standard and the National Labor Relations Board*, ECON. POL'Y INST. (May 31, 2017), <https://www.epi.org/publication/the-joint-employer-standard-and-the-national-labor-relations-board-what-is-at-stake-for-workers> [<https://perma.cc/NMS8-877V>].

199. The labor situation for medical residents, for example, parallels that of MiLB players in this sense given medical residents' aspirations to become full time doctors. For further discussion on labor issues for medical residents, see generally Angel M. Aton & Heidi S. Connelly, *The Debate over the Unionization and Collective Bargaining of Private Physicians*, 18 HOFSTRA LAB. & EMP. L.J. 658 (2001) (noting the interests medical residents have compared to those of full-time physicians regarding potential bargaining goals).

200. PHPA Executive Director Larry Landon notes that the similar structure in minor league hockey actually helped the unionization efforts, as they started efforts at the highest league then moved down to the lower levels: "We were Triple-A, then we went to Double-A, and everyone said, 'What the hell are you doing that for?' Well, because the Double-A players become Triple-A players. And the Triple-A players are going to reach the National Hockey League. You got to start somewhere." Normandin, *supra* note 152.

any bargaining efforts begin, these efforts are not unique to baseball and can be overcome.²⁰¹

4. Impact of COVID-19

Finally, the COVID-19 pandemic has created significant uncertainty for the future of Minor League Baseball. Though some restrictions—like cancelling the 2020 Minor League Baseball season—are certainly anomalous short-term hurdles,²⁰² other restrictions—like the proposed elimination of over forty minor league teams—have the potential to permanently shake the industry.²⁰³ The simple math of reducing teams creates fewer opportunities for players to make a minor league roster. Combining this reduction in opportunity with hurdles like the fear of being blackballed creates a perfect storm against minor league unionization. It is possible players who may have previously considered taking a stand will now yearn so deeply for any chance to play that they will not dare risk their precious opportunity. At the same time, a smaller minor league system may reduce the impact of the aforementioned hurdles related to bargaining unit size.²⁰⁴ Though the ripple effects from the pandemic are still unfolding and remain speculative at this point, the fallout from COVID-19 has the potential to drastically alter the effort for labor equality.

Conclusion

The current situation in Minor League Baseball begs for change. Players have endured dire working conditions and unsustainably low wages in an effort to pursue their lottery ticket dreams of graduating to Major League Baseball.²⁰⁵ The system within which minor league players currently toil has been impacted by major league operations and has seen player wages increases at a fraction of the rate that even the United States poverty line has risen.²⁰⁶ After decades of futilely operating within the system, players turned to the courts in *Senne v. Office of the Commissioner of Baseball* to call for change.²⁰⁷ Rather than risk an overhaul to the system through a loss in court, Major League Baseball spent millions lobbying congress for the passage of Save America's Pastime Act.²⁰⁸ This bill delivered a potentially debilitating blow to the players' chances of facilitating change through their suit.

The story must not end there though. The commissioner of Major League Baseball and president of Minor League Baseball concede that

201. BERRY, GOULD & STAUDOCHAR, *supra* note 195.

202. *See* Wagner, *supra* note 1.

203. *See* Duber, *supra* note 116.

204. *See supra* Part III.C.iii

205. Sneed, *supra* note 33.

206. *See supra* Part I.

207. *Senne* Complaint, *supra* note 93.

208. *Client Profile: Major League Baseball*, *supra* note 120.

change is overdue.²⁰⁹ Teams have begun making unilateral changes to minor league wages.²¹⁰ Adhering to strict FLSA or state law minimum wage requirements that were not designed for the industry of baseball may not be the answer. The journey that has taken the parties to this point, however, indicates that some form of change is not only possible, but also necessary.

Players have waged a lawsuit to fight for proper compensation, but they have yet to make an effort to unionize. It is time they consider doing so. By organizing MiLB, players would gain an opportunity to collectively bargain over matters that must be addressed in a manner that would fit the interests of both parties. There are limitations to this pursuit, as players fear the repercussions associated with stepping out of line, while the league has little reason to engage in such bargaining efforts given their clear power imbalance over the players. Nevertheless, change must be made. The solutions are not clear, but they are necessary. The only question left is whether the players will take the next step.

209. Brown, *supra* note 10.

210. See *supra* Part III.A.

Appendix:

Table 1: Major League, Minor League, National Median and Poverty Level Increases Since 1976

	MLB Minimum Yearly Salary	MLB Average Yearly Salary	MiLB Average Yearly Minimum	National Median Household Income	Poverty Level for an Individual
1976	\$16,000	\$51,501	\$4,375	\$11,800	\$2,884 ¹
2020	\$563,500	\$4,430,000	\$7,375 ²	\$66,538	\$12,488
Percent Increase	3,421%	8,502%	69%	464%	333%

1. That amount was \$12,488 in 2017. Historical Poverty Tables: *People and Families—1959 to 2017 Table 1*, U.S. CENSUS BUREAU (AUG. 27, 2019), [HTTPS://WWW.CENSUS.GOV/DATA/TABLES/TIME-SERIES/DEMO/INCOME-POVERTY/HISTORICAL-POVERTY-PEOPLE.HTML](https://www.census.gov/data/tables/time-series/demo/income-poverty/historical-poverty-people.html) [[HTTPS://PERMA.CC/DRW9-T4XB](https://perma.cc/DRW9-T4XB)].

2. Note that this figure represents the 2019 MiLB Average Salary, as the 2020 MiLB season was cancelled due to the COVID-19 pandemic.

Table 2: Current Estimated Minor League Salaries Per Club

	Players	Per Month	Months	Yearly Pay	
				Per Player	Per Club
AAA	25	\$2,150	5	\$10,750	\$268,750
AA	25	\$1,500	5	\$7,500	\$187,500
High-A	25	\$1,250	5	\$6,250	\$156,250
Low-A	30	\$1,250	5	\$6,250	\$187,500
Short-A	35	\$1,100	3	\$3,300	\$115,500
Rookie-1	35	\$1,100	3	\$3,300	\$115,500
Rookie-2	35	\$1,100	3	\$3,300	\$115,500
Total	210				\$1,146,500

**Table 3: Estimated Minor League Salaries Per
Club at \$7.25/hour for 50 Hours/Week**

	Players	Per Week	Per Month	Months ³	Yearly Pay	
					Per Player	Per Club
AAA	25	\$398.75	\$1,595	7	\$11,165	\$279,125
AA	25	\$398.75	\$1,595	7	\$11,165	\$279,125
High-A	25	\$398.75	\$1,595	7	\$11,165	\$279,125
Low-A	30	\$398.75	\$1,595	7	\$11,165	\$334,950
Short-A	35	\$398.75	\$1,595	5	\$7,975	\$279,125
Rookie-1	35	\$398.75	\$1,595	5	\$7,975	\$279,125
Rookie-2	35	\$398.75	\$1,595	5	\$7,975	\$279,125
Total	210					\$2,009,700

3. Note that this calculation includes compensating players during Spring Training.