Volume 108 | Issue 3 Article 13

April 2006

The Rebirth of the NBA - Well, Almost: An Analysis of the Maurice Clarett Decision and Its Impact on the National Basketball Association

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THE REBIRTH OF THE NBA – WELL, ALMOST: AN ANALYSIS OF THE MAURICE CLARETT DECISION AND ITS IMPACT ON THE NATIONAL BASKETBALL ASSOCIATION

I. INTRODUCTION

The days of college juniors and seniors leading their basketball team to the Final Four and then being selected as a top pick in the National Basketball Association (NBA) yearly amateur draft are all but over. In 2004, there were only two seniors taken in the first ten picks of the first round of the NBA's draft.[1] Before the summer of 2005, high school seniors were more likely to be taken in the first round of the NBA draft than college seniors.[2] This trend led sports writers to dream what the world of college basketball would be like if this was not the case. For example, in November 2003, an article in Sports Illustrated entitled *Dream Teams* read, "[a]s you can tell by the cover of this magazine (Ohio State freshman LeBron James,[3] in vintage naval captain's uniform, peering through handheld telescope), we think the scarlet-and-gray are the best college basketball team on land or sea."[4] The article goes on to imagine "[c]ollege basketball is, at this very moment, at the apex of its Golden Age . . . [t]hank goodness no player has left early, or skipped college altogether, since Moses Malone went from prep to pro in 1974."[5]

The mass exodus of sensational high school athletes and college underclassman into the NBA during the late 1990's and up until the summer of 2005 was permissible as a result of the United States Supreme Court's decision in *Haywood v. National Basketball Association*.[6] This decision held that the NBA's rule that an individual "shall not be eligible to be drafted or to be a Player [in the NBA] until four years after . . . his original high school class has

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1 Chad Ford, *Round 1 Analysis*, http://sports.espn.go.com/nba/draft2004/columns/story?columnist=ford_chad&id=1827411 (last visited Jan. 6, 2006) (on file with author).

2 *Id.*

3 In 2003, LeBron James was drafted by the Cleveland Cavaliers straight out of high school at eighteen years of age. *Player Profile*, ESPN.com, http://sports.espn.go.com/nba/players/profile?statsId=3704 (last visited Feb. 9, 2006). He is now one of the best players in the NBA and recently started for the Eastern Conference in the NBA All-Star Game in 2006. *Id.*

4 Steve Rushin, *Dream Teams*, SPORTS ILLUSTRATED, Nov. 24, 2003, at 21. The article fantasizes what college basketball would have been like had several superstars not left college early or skipped it entirely. "All of these men made the right decision. The NBA will be there, as Tracy McGrady (now in his third professional year), Kobe Bryant (in his fourth) and Kevin Garnett (in his fifth) discovered after unforgettable college careers that are now consigned to ESPN Classic. The 1998 title game, in which Duke's backcourt (Bryant, Trajan Langdon) was overwhelmed in overtime by Michigan's frontcourt (Garnett, Tractor Traylor), remains the highest-rated in history." *Id.*

5 *Id.*

6 401 U.S. 1204 (1971). The Supreme Court issued a stay on the order issued by the Ninth Circuit allowing Spencer Haywood to play in the NBA. The Ninth Circuit had ruled that NBA Bylaw 2.05, which would render Haywood ineligible to play in the NBA, violated the antitrust laws of the United States. Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049, 1057 (C.D. Cal. 1971).

been graduated . . . "[7] was a violation of antitrust law.[8] Thus, Spencer Haywood, the athlete challenging the rule, was allowed to play in the NBA.[9] The *Haywood* court did not foresee the impact its decision would have on the future of the NBA. This is evident by the court's statement, "[t]here is no evidence that the granting of the relief requested [eligibility] by cross-claimant [Haywood] will open the door to other allegedly ineligible college basketball players being recruited by NBA teams."[10] Thirty-three years later, the evidence is overwhelming. In the 2004 NBA draft, seventeen of the top twenty draft picks would have been ineligible for the draft under the NBA's rule in 1971.[11] Even though early entry by star athletes has produced some phenomenal basketball players such as LeBron James and Carmelo Anthony, basketball journalists have commented, "[f]or every LeBron James, there are five Ndudi Ebis, Dorell Wrights and J.R. Smiths–talented young athletes who need wisdom and experience but are stashed away quietly on the end of benches around the league."[12] Some have even argued that the massive influx of under–developed players has contributed to the decline of both the popularity of professional basketball and the quality of play.[13]

However, the NBA took a step in the right direction in the summer of 2005 when it collectively bargained with the National Basketball Players Association (NBPA) to put a new eligibility restriction on players entering the league.[14] This decision, endorsed by both league Commissioner David Stern and various veteran players,[15] no longer allows high school seniors to enter the NBA draft.[16] This Note suggests that the groundwork for the NBA's new eligibility requirement was laid because of Maurice Clarett's antitrust suit against the National Football League (NFL) in 2004. The NFL would have faced the same

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7 *Denver Rockets*, 325 F. Supp. at 1055 (quoting NBA Bylaw 2.05).

8 *Id.* at 1057.

9 *Id.* at 1058.

10 *Id.*

11 Ford, *supra* note 1. Nine of the top twenty first round draft picks were directly out of high school and only eight of the top twenty were juniors or seniors. *Id.*

12 Steve Kerr, *A Push for NBA Change*, Yahoo! Sports, Dec. 7, 2004, http://sports.yahoo.com/nba/news?slug=skplayerdevelop120704&prov=yhoo&type=lgns (last visited Jan. 6, 2006).

13 *Cf.* Chris Mannix, *Adults Only; David Stern Wants Teens Out of the NBA*, SPORTS ILLUSTRATED, May 2, 2005, at 15.

14 National Basketball Players Association, NBA Collective Bargaining Agreement Art. X: Player Eligibility and NBA Draft, *available at* http://www.nbpa.com/cba_articles/article-X.php [hereinafter NBA CBA].

15 Tim Povtak, *NBA Age Limits May Follow NFL Rulings Some Antitrust Experts Say The NBAPA Just Needs to Approve the Restrictions*, ORLANDO SENTINEL, Apr. 24, 2004, at D1.

16 NBA CBA, *supra* note 14.

scenario as the NBA and its influx of high school players had the Second Circuit not struck down Clarett's challenge to the NFL Player Eligibility Rule.[17]

Following a superb freshman campaign at The Ohio State University, which included leading the Buckeyes to a National Championship victory over the Miami Hurricanes in the Fiesta Bowl,[18] Clarett was suspended in September 2003 for the entire 2003–04 season.[19] After Clarett received word of his suspension, and realized that he had limited options to play competitive football, he challenged the NFL's Eligibility Rule by filing suit in the Southern District of New York hoping to enter the 2004 draft in contravention of the NFL's rule.[20] Even though, according to the NFL Bylaws, eligibility for the NFL draft requires that "at least three NFL seasons must have elapsed since the player was graduated from high school,"[21] the Southern District of New York ruled in Clarett's favor.[22] The NFL appealed, and the Second Circuit reversed, holding that the NFL's Eligibility Rule was exempt from antitrust litigation.[23] Because of the Second Circuit's decision, the NFL will continue to only allow athletes who have completed their junior, senior, or red-shirt sophomore season in college to enter the draft. The court's ruling allowed the NFL to avoid the potential jump of athletes from high school to the NFL, which was previously a trend in the NBA.

Following the *Clarett* decision, the NBA implemented a new eligibility rule requiring players entering the NBA draft to be both nineteen years old and at least one year removed from their high school graduation.[24] This Note argues that, while the one-year-removed requirement is a step in the right direction, the NBA would be better served by modeling its eligibility requirements after the NFL because such a rule would lead to better quality of play, an increase in the players' and the league's marketability, players that are mentally and physically more mature, and the promotion of a more respectable image.[25] Further, this Note points out that, because the NBA recognized the weaknesses in the NFL's defense against Clarett, the league and the NBPA specifically incorporated the

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17 *See* Clarett v. Nat'l Football League, 306 F. Supp. 2d 379 (S.D.N.Y. 2004) (Clarett I), *rev'd in part, vacated in part*, 369 F.3d 124 (2d Cir. 2004) (Clarett II), *cert. denied*, 125 S. Ct. 1728 (2005).

18 *Clarett I*, 306 F. Supp. 2d at 387. *See generally* ESPN.com, *Clarett Finds Way to Hurt 'Canes in Clutch* (Jan. 4, 2003), http://espn.go.com/ncf/bowls02/s/fiesta_clarettclucth.html.

19 *Clarett I*, 306 F. Supp. 2d at 388. *See generally* Rusty Miller, *Clarett Suspended for 2003 for 16 NCAA Violations*, (Sept. 10, 2003), *available at* http://www.usatoday.com/sports/college/football/bigten/2003-09-10-clarett-suspension_x.htm.

20 Mike Freeman, *Citing Antitrust, Clarett Sues N.F.L. To Enter Its Draft*, N.Y. TIMES, Sept. 24, 2003, at D5.

21 *Clarett II*, 369 F.3d at 127.

22 *Clarett I*, 306 F. Supp. 2d at 410-11.

23 *Clarett II*, 369 F.3d at 143.

24 NBA CBA, *supra* note 14.

25 *See infra* Part VI.

new eligibility requirement into its CBA. Because the requirement is incorporated into the new CBA, it will effectively withstand an ineligible player's challenge.[26]

Because such a challenge would be modeled after Clarett's suit against the NFL, Part II of this Note provides an overview of applicable antitrust and labor law. Part III then describes the current eligibility requirements for both the NFL and the NBA. Specifically, this Note focuses on the NFL provisions that gave rise to Clarett's case, and the NBA provisions that may be challenged in the future. Part IV gives a synopsis of the *Clarett* case and argues that the Second Circuit was correct in its ruling that the *Mackey* test does not effectively accommodate the collective bargaining process. Additionally, Part V analyzes what would happen if a basketball player who does not meet the NBA's eligibility requirements attempted to challenge that provision, and concludes that such a challenge would fail, regardless of what test the court applied. Part VI argues that instead of the NBA implementing a one-year out of high school eligibility requirement, it should have mirrored its eligibility requirement after the NFL's because it would acquire more fan interest and result in a better quality product. Finally, Part VII contains concluding remarks and recommendations concerning the policy governing both the NBA's and the NFL's eligibility requirements.

II. OVERVIEW OF APPLICABLE ANTITRUST LAW

A. *The Sherman Act*

The Sherman Act was enacted to prohibit unreasonable restraints on trade and commerce.[27] Congress passed the Act in order to "curb abuses of economic power by major industrial 'trusts' and railroad companies."[28] The Supreme Court has stated that the Act is "a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade."[29] Because of Congress's broad language, the Act has forced courts to determine its application.[30] Section One "declares illegal every contact, combination or conspiracy, in restraint of trade or commerce among the several states."[31] To establish a Section One violation, a party must establish: "(1) concerted action between the defendant and a third party, (2) restraint on trade, and (3) an effect on interstate or foreign commerce."[32] There are two ways for a

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[26] *See infra* Part V.

[27] 15 U.S.C. § 1 (2000); *see also* Mark C. Anderson, *Self-Regulation and League Rules Under the Sherman Act*, 30 CAP. U. L. REV. 125, 126-27 (2002).

[28] Anderson, *supra* note 27, at 126-27.

[29] *Id.* (quoting N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958)).

[30] *Id.* (citing JAY DRATLER, JR., LICENSING OF INTELLECTUAL PROPERTY § 5.02 (2001)).

[31] 15 U.S.C. § 1 (2000).

[32] Anderson, *supra* note 27, at 128 (citing 1 SECTION OF ANTITRUST LAW, ABA, ANTITRUST LAW DEVELOPMENTS 2 (4th ed. 1997)).

court to determine if an agreement is an unreasonable restraint on trade: the *per se* rule and the rule of reason.[33] The *per se* rule holds some agreements to be "illegal per se" because the agreements violate antitrust laws regardless of their justification.[34] Contrary to the *per se* rule, the rule of reason balances whether the challenged agreement promotes or suppresses competition by weighing all relevant circumstances to determine if the challenged practice should be prohibited.[35] If the benefits of the restriction outweigh the restraints on trade, a court will allow the restraint.[36] As is the case with most legal doctrines, the courts have carved out two categories of exemptions to Section One of the Sherman Act: the statutory and nonstatutory exemptions.[37]

B. Nonstatutory Exemption

The nonstatutory exemption excuses an enterprise from antitrust liability and can be inferred "from federal labor statutes, which set forth a national labor policy favoring free and private collective bargaining; which require good-faith bargaining over wages, hours, and working conditions . . . ."[38] The purpose of the exemption is to "prevent the courts from usurping the [National Labor Relations Board]'s function of 'determining what is or is not a 'reasonable' practice.'"[39] The exemption is supposed "to allow meaningful collective bargaining to take place" by allowing some restraints placed on competition to be free from antitrust scrutiny.[40]

The Supreme Court has never actually articulated the precise boundaries surrounding the nonstatutory exemption, but the Court tends to permit antitrust scrutiny in spite of any resulting detriment to labor policies if the detriment favors collective bargaining.[41] The first case in which the Supreme Court addressed the nonstatutory exemption was *Allen Bradley Co. v. Local No. 3, Inter-*

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33 *Id.*

34 Thomas Lombardi, *Can't We Play Too?: The Legality of Excluding Preparatory Players from the NBA*, 5 VAND. J. ENT. L. & PRAC. 32, 34 (2002). Examples of practices considered "illegal per se" are group boycotts and concerted refusals to deal. *Id.*

35 *Id.*

36 *Id.* (citing Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723 (1988)).

37 Clarett v. Nat'l Football League II, 369 F.3d 124, 130 (2d Cir. 2004). Professional sports deal mostly with the nonstatutory exemption, thus a detailed discussion of the statutory exemption is outside the scope of this Note. In *Clarett*, the NFL did not rely on the statutory exemption because it does not provide any protection for "concerted action or agreements between unions and nonlabor parties." *Id.* at 130 n.11. (quoting Connell Constr. Co. v. Plumbers & Steamfitters Local No. 100, 421 U.S. 616, 622 (1975)).

38 Brown v. Pro Football, Inc. 518 U.S. 231, 236 (1996).

39 *Clarett II*, 369 F.3d at 131 (citing *Brown*, 518 U.S. at 237).

40 *Id.*

41 *Id.*

national Brotherhood of Electrical Workers.[42] In *Allen Bradley*, the Court held that the nonstatutory exemption did not apply where unions "combine with employers and with manufacturers of goods to restrain competition in, and to monopolize the marketing of, such goods."[43] Expanding on the holding in *Allen Bradley*, the Court in *United Mine Workers v. Pennington*[44] held that while "a union may make wage agreements with a multi-employer bargaining unit and may in pursuance of its own union interests seek to obtain the same terms from other employers" without incurring antitrust liability, "a union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose certain wage scale on other bargaining units."[45]

The Supreme Court discussed the nonstatutory exemption again in *Local No. 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co.*,[46] where it held that an hours restriction fell within the nonstatutory exemption,[47] but the Court did not agree as to the reason for applying the exemption.[48] Justice White felt the court should undertake a balancing approach,[49] while Justice Goldberg felt virtually all collective bargaining activity is exempt from antitrust scrutiny.[50] Finally, in *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*,[51] the Court held the nonstatutory exemption did not apply because this restraint was the "kind of direct restraint on the business market[, which] has substantial anticompetitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions."[52] Before this Note discusses how both the fed-

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42 325 U.S. 797 (1945).

43 *Id.* at 798. In *Allen Bradley*, the plaintiffs were manufacturers of electrical equipment and conducted business mostly out of New York. *Id.* The defendant was a labor union that had its jurisdiction only over New York and was thus unable to have collective bargaining agreements with other unions. *Id.* at 799.

44 381 U.S. 657 (1965).

45 *Id.* at 665.

46 381 U.S. 676 (1965).

47 *Id.* at 690.

48 Clarett v. Nat'l Football League II, 369 F.3d 124, 132 (2d Cir. 2004) (analyzing *Jewel Tea*, 381 U.S. at 676).

49 *Id.* (citing *Jewel Tea*, 381 U.S. at 690). Specifically, Justice White took the position "that the application of the nonstatutory exemption should be determined by balancing the 'interests of union members' served by the restraint against 'its relative impact on the product market.'" *Id.* (citing *Jewel Tea*, 381 U.S. at 690 n.5.).

50 Justice Goldberg found that the balancing approach was not necessary, and argued "all collective bargaining activity concerning mandatory subjects of bargaining under the [labor laws] is not subject to the antitrust laws." *Clarett*, 369 F.3d at 132 (citing *Jewel Tea*, 381 U.S. at 710 (Goldberg, J., concurring).

51 421 U.S. 616 (1975).

52 *Id.* at 625. The agreement that was the subject of litigation was a union agreement with a contractor that bound the contractor to deal only with subcontractors that employed the union's members. *Id.*

eral district court and the Second Circuit attacked the nonstatutory exemption, it is necessary to discuss how the Eighth Circuit has interpreted the exemption because its interpretation is the key discrepancy between Clarett and the NFL, and between the Southern District of New York and the Second Circuit.

C. *The Eighth Circuit's Interpretation of the Nonstatutory Exemption in* Mackey v. National Football League

In *Mackey v. National Football League*,[53] NFL players alleged that the Rozelle Rule[54] violated antitrust law because it restrained players' abilities to contract services.[55] The Rozelle Rule provided that if a player's contract expired, and that player signed with a different club, the signing club must provide compensation to the player's former team, and if the two clubs were unable to agree on mutually satisfactory arrangements, then the Commissioner would award the compensation as he deemed fair and equitable.[56]

In articulating its decision, the Eight Circuit employed a three–part test. A restraint on trade does not receive the benefit from the nonstatutory exemption unless the restraint or restriction affects the parties to the agreement, is a mandatory subject of collective bargaining, and is a product of bona fide arm's length negotiations.[57] The court in *Mackey* ruled in favor of the players and held that the Rozelle Rule violated antitrust laws because the Rule was not the product of an arm's length negotiation.[58] The court felt there was not an arm's length negotiation because the Rozelle Rule predated the collective bargaining relationship between the league and the union and was virtually unchanged since its promulgation by the clubs in 1963.[59] Therefore, because the Rozelle Rule existed before there was a collective bargaining agreement, there was no way the two parties could have had an arm's length negotiation over the rule. Also, the players union did not receive any benefit from the Rozelle Rule as a *quid pro quo* in exchange for increased pension benefits and the right of players to individually negotiate their compensation.[60] However, according to the Second Circuit, the test in *Mackey* does not conform to the Supreme Court's most recent treatment of the nonstatutory exemption.[61]

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53 543 F.2d 606 (8th Cir. 1976).

54 The Rozelle Rule was named after the NFL's former commissioner, Alvin Ray "Pete" Rozelle. *Id.* at 609.

55 *Id.*

56 *Id.* at 609 n.1.

57 *Id.*

58 *Id.* at 616.

59 *Id.*

60 *Id.*

61 Clarett v. Nat'l Football League II, 369 F.3d 124, 134 (2d Cir. 2004).

D. *The United States Supreme Court's Most Recent Treatment of the Non-statutory Exemption:* Brown v. Pro Football, Inc.

The most recent nonstatutory exemption case interpreted by the Supreme Court is *Brown v. Pro Football, Inc.*[62] In *Brown*, there was a disagreement between the NFL and the Players Association over how much money developmental players in the NFL should be paid.[63] When bargaining between the NFL Players Association and the NFL reached an impasse,[64] the owners unilaterally implemented its terms.[65] The district court allowed the case to go to a jury, which resulted in a total of $30,349,642 in damages being awarded to the players.[66] The D.C. Circuit Court of Appeals reversed, construing labor laws to "waiv[e] anti-trust liability for restraints on competition imposed through the collective-bargaining process, so long as such restraints operate primarily in a labor market characterized by collective bargaining."[67] The Supreme Court picked up on this point by explaining that Congress enacted labor statutes to prevent judicial use of antitrust law to resolve labor disputes.[68] Then, the Supreme Court briefly discussed the nonstatutory exemption noting that "to give effect to federal labor laws and policies and to allow meaningful collective bargaining to take place, some restraints on competition imposed through the bargaining process must be shielded from antitrust sanctions."[69] However, the Supreme Court explained that the "collective bargaining proceeding itself must be free of any unfair labor practice, such as an employer's failure to have bargained in good faith."[70]

The Supreme Court held that even though most cases involved only a single employer, multiemployer bargaining, as is the case in professional sports, should not be treated any differently.[71] Thus, to use antitrust law to sanction anti-competitive activities would condone behavior that the implicit labor exemption seeks to avoid.[72] Based on this legal analysis, the Supreme Court af-

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62 518 U.S. 231 (1996).

63 *Id.* at 234.

64 An impasse is a point in labor negotiations at which no agreement can be reached. BLACK'S LAW DICTIONARY 768 (8th ed. 2004).

65 *Brown*, 518 U.S. at 235.

66 *Id.; see also* Brown v. Pro Football, Inc., Civ. Action No. 90-1071 (D.D.C. Oct. 5, 1992) (judgment on the verdict), *reprinted in* J.A. 2714.

67 *Brown*, 518 U.S. at 235 (quoting Brown v. Pro Football, 50 F.3d 1041, 1056 (D.C. Cir. 1995)).

68 *Id.* at 236.

69 *Id.* at 237.

70 *Id.* at 238-39; *see also* Akron Novelty Mfg. Co., 224 N.L.R.B. 998, 1002 (1976).

71 *Brown*, 518 U.S. at 238.

72 *Id.*

firmed the Court of Appeals and held that the NFL's unilateral imposition of its terms following an impasse is exempt from antitrust scrutiny.[73]

E. Second Circuit Cases Construing the Nonstatutory Exemption

There have been three recent Second Circuit cases interpreting the exemption: *Caldwell v. American Basketball Association*,[74] *National Basketball Association v. Williams*,[75] and *Wood v. National Basketball Association*.[76] The facts of these cases are important because the district court distinguishes Clarett's case from each of these, while the Second Circuit analogizes. In *Caldwell*, the plaintiff player was suspended from the league because he denied having knowledge of a missing teammate's whereabouts.[77] Instead of pursuing internal remedies in the American Basketball Association, he litigated the suspension.[78] After trial, Caldwell received his full salary, but did not play professional basketball again because he was never told that his suspension had been lifted.[79] Caldwell again filed suit because he believed the league deprived him of his opportunity to be employed as a basketball player and he was "blackballed."[80] Caldwell based his antitrust claims on the notion that he should have the right not to have teams that might compete for his skills collectively agree whether or not he will be hired.[81] Because Caldwell's antitrust claims would "subvert fundamental principles of federal labor policy," the Second Circuit dismissed his claim because of the nonstatutory exemption.[82]

Similarly, in *Williams*, the Second Circuit held antitrust law does not remedy a claim that addressed the players' rights to negotiate over the team they will play for and the salary they will earn.[83] The court dismissed the plaintiff professional basketball players' and their union's counterclaim and granted declaratory relief to the NBA and its member teams because "antitrust laws have no application to the collective bargaining negotiations between appellants [players and union] and the NBA Teams."[84] The player's claims are not in line

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73 *Id.* at 250. The Court stated employers have four options at impasse: "(1) maintain the status quo, (2) implement their last offer, (3) lock out their workers (and either shut down or hire temporary replacements), or (4) negotiate separate interim agreements with the union." *Id.* at 245.

74 66 F.3d 523 (2d Cir. 1995).

75 45 F.3d 684 (2d Cir. 1995).

76 809 F.2d 954 (2d Cir. 1987).

77 *Caldwell*, 66 F.3d at 526.

78 *Id.*

79 *Id.*

80 *Id.*

81 *Id.* at 527.

82 *Id.* (citing Wood v. Nat'l Basketball Ass'n, 809 F.2d 954, 959 (2d. Cir. 1987)).

83 Nat'l Basketball Ass'n v. Williams, 45 F.3d 684, 685 (2d Cir. 1995).

84 *Id.*

with the "labor laws' endorsement of multiemployer collective bargaining" and thus must fail.[85] The court explained that the nature and purpose of multiemployer bargaining in the sports industry is especially important because "some terms and conditions of employment must be the same for all teams in a sports league."[86] Unlike "the industrial context in which many work rules can differ from employer to employer . . . sports leagues need many common rules[]" because there are several league rules that need to be bargained for by the league and players.[87]

Finally, in *Wood*, after a player was drafted he challenged three of the league provisions concerning the draft, the salary cap, and a limitation on player corporations.[88] The court explained, "[t]he gravamen of Wood's complaint, namely that the NBA-NBPA collective agreement is illegal because it prevents him from achieving his full free market value, is . . . at odds with, and destructive of, federal labor policy."[89] Therefore, the court rejected his antitrust claim.[90]

III. COMPARATIVE ANALYSIS OF THE NFL AND NBA COLLECTIVE BARGAINING AGREEMENTS AND PLAYER ELIGIBILITY RULES

The circumstances governing sports as a business are unique when compared to any other employment field. The club teams that make up professional sports leagues are "not completely independent economic competitors" because "they depend upon a degree of cooperation for economic survival."[91] Even though sports leagues are unique, all professional sports, with the exception of baseball,[92] are subject to antitrust laws.[93] Because the leagues must adhere to antitrust law, the presence of collective bargaining agreements is particularly important to the legal analysis surrounding sports cases and controversies.

A. *NFL's Collective Bargaining Agreement and Player Eligibility Rule*

The NFL is an "unincorporated association of thirty-two member clubs," which essentially dominates professional football in North America.[94]

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85 *Id.* at 688.

86 *Id.* at 689.

87 *Id.*

88 Wood v. Nat'l Basketball Ass'n, 809 F.2d 954, 956 (2d Cir. 1987).

89 *Id.* at 959.

90 *Id.* at 963.

91 Brown v. Pro Football, Inc., 518 U.S. 231, 248 (1996).

92 *See* Flood v. Kuhn, 407 U.S. 258 (1972).

93 Smith v. Pro Football, Inc., 593 F.2d 1173, 1177 n.11 (D.C. Cir. 1978).

94 Clarett v. Nat'l Football League I, 306 F. Supp. 2d 379, 382-83 (S.D.N.Y. 2004). The other professional football leagues in North America are the Arena Football League, the Arena Football League 2, the National Indoor Football League, and the Canadian Football League. *Id.* at 383.

Members of the National Football League Management Council (NFLMC) represent each team, and are the "exclusive collective bargaining representative of the League."[95] The approximately 1,400 players in the NFL are "exclusively represented by the National Football League Players Association (NFLPA)."[96] The NFL's first Collective Bargaining Agreement (CBA) was entered into in 1968.[97] The current CBA, which took effect in 1993, is set to expire in 2007.[98] The CBA and the league's Constitution and Bylaws include the rules by which the teams select new players.[99] The two provisions that are of importance to this Note's discussion are Article III, section 1 and Article IV, section 2.

> Article III, section 1 of the CBA states:
>
> This Agreement represents the complete understanding of the parties on all subjects covered herein, and there will be no change in the terms and conditions of the Agreement without mutual consent . . . . The NFLPA and the Management Council waive all rights to bargain with one another concerning any subject covered or not covered in this Agreement for the duration of this Agreement, including the provisions of the NFL Constitution and Bylaws.[100]
>
> Article IV, section 2 of the CBA states:
>
> Neither the NFLPA nor any of its members, agents acting on its behalf, nor any members of its bargaining unit will sue, or support financially or administratively any suit against, the NFL or any Club relating to the presently existing provisions of the Constitution and Bylaws of the NFL as they are currently operative and administered.[101]

Because of these two provisions, there is disagreement over whether the "NFL and the players union actually bargained over the terms of the Constitution and Bylaws (which contained the eligibility Rule at issue), or merely bargained away the NFLPA's ability to bargain over or challenge the Bylaws' pro-

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95 *Id.* at 384.

96 *Id.*

97 *Id*; *see also* Smith v. Pro Football, Inc., 420 F. Supp. 738, 741 (D.D.C. 1976), *rev'd in part by*, 593 F.2d 1173 (D.C. Cir. 1978).

98 *Clarett I*, 306 F. Supp. 2d at 384.

99 *Id.*

100 *Id.* (citing 11/20/03 Second Declaration of Peter Ruocco Ex. D, CBA). Peter Ruocco is the Senior Vice-President of Labor Relations of the NFLMC and was involved in the collective bargaining agreement. *Id.* at 384 n.4.

101 *Id.*

visions."[102] An essential element to Clarett's suit was whether actual bargaining took place regarding the eligibility rule.[103]

When the Player Eligibility Rule was first introduced, it "precluded a player from joining the NFL unless four seasons had elapsed since his high school graduation."[104] However, in 1990 the requirement was adjusted so that players who have been out of high school for three seasons may enter the draft.[105] In 1993, when the current CBA became effective, the two parties acknowledged that the various provisions of the 1993 Bylaws are comprehensive rules describing who is eligible to play in the NFL.[106] The most important rule is the "Special Eligibility" Rule, which states that a player must receive approval from the commissioner to enter the draft if "at least three NFL seasons . . . have elapsed since the player was graduated from high school."[107] Under the 2003 version of the Bylaws, the Rule now exists only as "policy and procedure" and is omitted altogether, but NFL Commissioner Paul Tagliabue issued a release that virtually states the same Rule as the 1993 Special Eligibility Rule.[108]

B. NBA's Collective Bargaining Agreement and Player Eligibility Rule

Prior to June 30, 2005 and the new NBA CBA, the NBA's player eligibility rule was simply that incoming players had to be seventeen years old.[109] *Haywood v. National Basketball Association* was the seminal case that interpreted the NBA Bylaws and governed player eligibility.[110] Prior to *Haywood*, Section 2.05 of the NBA Bylaws stated: "A person who has not completed high school or who has completed high school but has not entered college, shall not be eligible to be drafted or to be a Player [in the NBA] until four (4) years after . . . his original high school class has been graduated . . . ."[111] In 1970, Spencer Haywood signed a contract to play for the Seattle Supersonics but was ineligible to play under Section 2.05 of the NBA's Bylaws because he was not out of high

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102 *Id.* at 384-85.

103 *Id.* at 393.

104 *Id.* at 385.

105 *Id.*

106 *Id.*

107 *Id.* at 386.

108 *Id.* at 385. The only difference between the 1993 Special Eligibility Rule and the release by the Commissioner was instead of being three NFL seasons removed from high school; the player must be three college seasons removed. *Id.*

109 PAUL C. WEILER & GARY R. ROBERTS, SPORTS AND THE LAW: TEXT, CASES, PROBLEMS 76-77 (3d. ed. Supp. 2004 ed.).

110 401 U.S. 1204 (1971); *see also* Denver Rockets v. All-Pro Management Inc., 325 F. Supp. 1049 (C.D. Cal. 1971).

111 WEILER, *supra* note 109, at 76-77; *see also Denver Rockets*, 325 F. Supp. at 1055.

school for four years.[112] The district court found that Section 2.05 had the effect of excluding him from the NBA until after the 1971-72 season.[113] Because of this exclusion, Haywood was prevented "from contracting with any NBA team, even though he does not desire to, or may not be eligible to, attend college and even though he does not desire to, and is ineligible to, participate in collegiate athletics."[114] The district court further stated that Section 2.05 likely constituted a group boycott[115] and without the provision, Haywood would be permitted to play for Seattle.[116] Because a player cannot negotiate with any team until four years after his high school graduation, and even then he may only negotiate with the NBA team that has obtained his draft rights, the district court explained that the NBA "created an unreasonable restriction of the ability of a qualified basketball player to bargain freely," thus creating a group boycott.[117]

Following the district court's ruling, the NBA appealed to the Ninth Circuit, which stayed the injunction.[118] The court weighed the pros and cons of the issue prior to and following the injunction.[119] By considering the injury to the respective parties and that to the public interest, the Ninth Circuit affirmed the district court.[120] The case was then argued before the Supreme Court, which

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[112] *Denver Rockets*, 325 F. Supp. at 1054. In 1967, Haywood graduated high school, and after his graduation, he attended Trinidad Junior College during the 1967–68 season. *Id.* at 1052. He then played basketball for the United States in the 1968 Olympics. *Id.* Following the Olympics, Haywood played for the University of Detroit for the 1968-69 season. *Id.* The Denver Rockets of the American Basketball Association (ABA) signed Haywood, but because of the contract dispute with the Rockets, Haywood signed with the Seattle Supersonics of the NBA in 1970. *Id.* at 1054. This was only two and half years following his high school graduation and with full knowledge of the NBA Bylaw 2.05. *Id.* at 1056. The NBA threatened to sanction Seattle for contracting with Haywood, thus he challenged the rule. *Id.* at 1057.

[113] *Id.* at 1056. Haywood would have been eligible to play in the NBA following the 1971-72 season because the required four years would have elapsed.

[114] *Id.*

[115] *See* Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959). A group boycott is considered illegal *per se* under Section One of the Sherman Antitrust Act. *See supra* Part II.

[116] *Denver Rockets*, 325 F. Supp. at 1057.

[117] *Id.* Group boycotts are referred to as "concerted refusals to deal." *See* PHILLIP E. AREEDA, ANTITRUST LAW §2200. Under *Fashion Originators' Guild of America v. FTC*, 312 U.S. 457 (1941), and *Klor's, Inc. v. Broadway-Hale Stores Inc.*, 359 U.S. 207 (1959), a group boycott is a *per se* violation of the Sherman Act. Haywood v. Nat'l Basketball Ass'n, 401 U.S. 1204, 1205 (1971).

[118] *Haywood*, 401 U.S. at 1206.

[119] *Id.*

[120] *Id.* at 1206-07. The Court of Appeals for the Ninth Circuit specifically stated:

> We have considered the status quo existing prior to the District Court's action and the disturbance of that status resulting from the injunction; the nature and extent of injury which continuation of the injunction or its stay would cause to the respective parties; and the public interest in the institution of professional basketball and the orderly regulation of its affairs.

Id. at 1206. In order for a party to successfully petition the court for preliminary injunction:

ultimately upehld the district court's preliminary injunction.[121] The Supreme Court considered the status quo and quoted the district court when it held:

> If Haywood is unable to continue to play professional basketball for Seattle, he will suffer irreparable injury in that a substantial part of his playing career will have been dissipated, his physical condition, skills and coordination will deteriorate from lack of high-level competition, his public acceptance as a super star will diminish to the detriment of his career, his self-esteem and his pride will have been injured and a great injustice will be perpetrated on him.[122]

During the analysis of the injuries caused by the injunction, the district court found there to be "no evidence that the granting of the relief requested by cross-claimant [Haywood] will open the door to other allegedly ineligible college basketball players being recruited by NBA teams."[123] Furthermore, "[n]o monetary injury will result to the NBA by the reason of the granting of the Preliminary Injunction."[124] The court only gave this consideration of the future impact on the NBA. Because the Eligibility Rule was not bargained for, there is also no discussion of federal labor policy.

Before the CBA expired on June 30, 2005, the NBA's player eligibility criterion was located in the league's Constitution and Bylaws.[125] Article II, section 2.04 stated that in order to be eligible to enter the NBA a player must be at least be seventeen years old.[126] Section 2.05(b) stated that a person who wishes to enter the NBA must "renounce his intercollegiate basketball eligibility by written notice to the [National Basketball] Association at least forty-five (45) days prior to the annual College Draft for which the person desires to be eligible."[127] It is also important to note that the NBA Bylaws did not constitute an

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> The moving party must prove: (1) there is a substantial likelihood of success on the merits; (2) there is a substantial threat of irreparable harm; (3) the threatened injury to plaintiff outweighs the harm an injunction may cause to defendant; and (4) the granting of the injunction would not disserve the public interest.

Fla. Panthers Hockey Club, Ltd., v. Miami Sports and Exhibition Auth., 939 F. Supp. 855, 858 (S.D. Fla. 1996) (citing Teper v. Miller, 82 F.3d 989, 992-93 n.3 (11th Cir. 1996)).

121 *Haywood,* 401 U.S. at 1206-07.

122 *Id.* at 1205 (quoting Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049, 1057 (C.D. Cal. 1971)).

123 *Denver Rockets*, 325 F. Supp. at 1058.

124 *Id.*

125 WEILER, *supra* note 109, at 76-77.

126 *Id.* Scholars argued, prior to the *Clarett* decision, that it is only a matter of time before a high school underclassman, under the age of seventeen decides to challenge this provision. *See* Lombardi, *supra* note 34, at 32.

127 Section 2.05(a) of the NBA Bylaws stated:

agreement reached through a collective bargaining process, as opposed to NFL's Bylaws.[128]

However, after that version of the CBA expired on June 30, 2005, the NBA and the NBPA agreed to change the player eligibility requirements.[129] Currently, the rules governing player eligibility are no longer found in the league's Constitution and Bylaws, but are now contained in the new CBA.[130] Article X Section 1 of the CBA states that a player is eligible for selection in the NBA draft if the player "is or will be at least 19 years of age during the calendar year in which the Draft is held, and . . . at least one NBA Season has elapsed since the player's graduation from high school."[131]

C. *Comparison between the NFL and NBA Collective Bargaining Agreements*

By looking at the differences between the NFL's and NBA's collective bargaining agreements, it is apparent that the two leagues have achieved their status through different bargaining methods. The fact that the NBA did not provide for or incorporate a clause similar to Article III section 1, or Article IV section 2 of the NFL's Bylaws was primarily the reason that the court in *Haywood* does not discuss the possibility for the nonstatutory exemption.[132] These sections clearly state that the NFL and the Player's Union have negotiated with respect to the players' eligibility.[133] Because the NBA CBA did not have a clause similar to Article III, section 1 or Article IV, section 2 prior to the new CBA, the NBA allowed high school graduates and college underclassman to go unchallenged into the NBA draft. However, using the NFL's Constitution and Bylaws as the framework for potential change, the NBA changed its player eli-

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> A person who has not completed high school or who has completed high school but has not entered college, shall not be eligible to be drafted or to be a Player until four (4) years after he has been graduated or four (4) years after his original high school class has been graduated . . . . Similarly, a person who has entered college but is no longer enrolled shall not be eligible to be drafted or to be a Player until the time when he would have first become eligible had he remained in college.

WEILER, *supra* note 109, at 76-77. This language was the same as it was at the time Spencer Haywood challenged the ruling. The NBA simply added subsection (b) to do away with (a).

128 Lombardi, *supra* note 34, at n.86 (citing Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049, 1059-60 (C.D. Cal. 1971)).

129 Mannix, *supra* note 13, at 15.

130 NBA CBA, *supra* note 14.

131 *Id.*

132 These provisions had been interpreted to mean that the parties, the NFLPA and the NFLMC, have collectively bargained over all the provisions contained in the Bylaws. *See* Clarett v. Nat'l Football League II, 369 F.3d 124 (2d Cir. 2004).

133 *See supra* notes 100-01.

gibility requirement in the summer of 2005 when the CBA expired.[134] The NBA focused on the Second Circuit's decision in *Clarett v. National Football League*[135] in order to establish a method of regulating player eligibility. The NBA learned from legal issues the NFL faced in *Clarett* and made sure that in its new CBA it specifically provided for a section that governs player eligibility, not merely a reference to its Constitution and Bylaws like the NFL. This factor will be very important if the NBA's player eligibility rule is ever challenged.[136]

IV. STATEMENT OF THE CASE: *CLARETT V. NATIONAL FOOTBALL LEAGUE*

A. *Factual Background Leading to Clarett's Suit Against the NFL*

The infamous Maurice Clarett saga began in April 2003 when Clarett falsified the price of items that were allegedly stolen from a Monte Carlo, which he had borrowed during an overnight test drive.[137] Clarett told police that $800 in cash and $300 worth of clothes were taken from his vehicle along with the car stereo, totaling $10,000.[138] Because of the astronomical cost of these items, the National Collegiate Athletic Association (NCAA) investigated how Clarett, a student athlete, could have obtained such expensive items.[139] The NCAA's investigation caused Clarett to plead guilty to failing to aid a law enforcement officer because he admitted that he inflated the price of the merchandise taken from his car.[140] Next, the Ohio State University Athletic Director, Andy Geiger, suspended Clarett for the entire 2003 season because he received "special benefits" and continually misled investigators.[141] After sitting out the entire 2003 season, and not being allowed to return to the team in 2004, Clarett decided to challenge the NFL's ruling regarding player eligibility.[142] The NFL denied

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134 Kerr, *supra* note 12.

135 369 F.3d 124 (2d Cir. 2004).

136 *See infra* Part V.

137 Rob Oller, *Eligibility Questions Send Clarett To Sidelines; Running back admits he inflated prices of items stolen from car*, THE COLUMBUS DISPATCH, July 31, 2003, at D1.

138 *Id; see also* Associated Press, *Court Provides a List of Cars Used by Clarett*, USA TODAY, Nov. 26, 2004, *available at* http://www.usatoday.com/sports/college/football/bigten/2004-11-26-clarett-cars_x.htm.

139 Associated Press, *supra* note 138.

140 *Id.*

141 Associated Press, *Maurice Clarett Timeline*, USA Today, Nov. 9, 2004, *available at* http://www.usatoday.com/sports/college/football/bigten/2004-11-09-clarett-timeline.htm.

142 *Id.* It is interesting to note that while Clarett, after being suspended from the Ohio State Buckeyes for the entire season, was forced to challenge the NFL's ruling, Larry Fitzgerald, a sophomore at the University of Pittsburgh who attended prep school for a year, was allowed to enter. Fitzgerald was arguably not eligible to enter the draft, but did not encounter any opposition from the NFL when he made his decision. Ron Borges, *Appeals Court Blocks Clarett's Bid For the Draft*, BOSTON GLOBE, Apr. 20, 2004, at D2. However, the NFL could have likely challenged Fitzgerald's draft status, but chose not to. *Id.* Maybe if Clarett had not caused all the problems he

Clarett the opportunity to be drafted in the 2004 NFL Draft, and Clarett brought suit in February 2004 alleging that the eligibility rules were "an unreasonable restraint of trade in violation"[143] of Section One of the Sherman Act[144] and Section Four of the Clayton Act.[145]

B. *The Southern District Court of New York's Initial Ruling on the Field: The NFL Violated Antitrust Law*

Based on motions for summary judgment by both Clarett and the NFL, the district court was forced to decide whether Clarett's right to seek employment in the NFL should outweigh the NFL's right "to categorically exclude a class of players that the League has decided is not yet ready to play[.]"[146] In response to Clarett's antitrust allegations, the NFL asserted three arguments in its defense: "(1) the [Eligibility] Rule is the result of a collective bargaining agreement between the NFL and the players union and is therefore immune from antitrust scrutiny; (2) Clarett has no standing under the antitrust laws to bring this suit; and (3) the Rule is reasonable."[147] In addressing the NFL's defense of immunity from antitrust scrutiny, the district court determined that the Second Circuit has not formulated a test that the district court should apply when examining the nonstatutory labor exemption, but it did note that the Sixth,

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did while at Ohio State, the NFL would not have challenged him then either? Writers have suggested that the individual to blame for this saga is the person who stole the merchandise from Clarett's vehicle. *See* David Vecsey, *Close encounters of the third-year rule* (September 26, 2004), *available at* http://sportsillustrated.cnn.com/2003/writers/david_vecsey/09/26/clarett.suit/. Vecsey facetiously argues that Clarett is *not* to blame because he is simply "living life the American way, breaking the rules until you get caught. Then suing to have them changed." *Id.* The individual to blame is "that sonofagun who broke into Maurice Clarett's car, without whom none of this would have happened . . . without whom Maurice Clarett is still happy as a clam playing college ball and cruising campus in his fully loaded 2001 Monte Carlo." *Id.* Thus, the NFL likely challenged Clarett's entrance because of his checkered past as opposed to a highly regarded athlete like Larry Fitzgerald who slipped under the Rule because he spent a year at a prep school. Borges, *supra* note 142, at D2. More evidence that suggests the NFL will only enforce the rule when it feels necessary is found in the case of Eric Swann. Dave Anderson, *Sports of The Times: For Clarett, How Early Equals How Much*, N.Y. TIMES, Sept. 26, 2003, at D3. Swann was picked with the sixth pick in the first round of the 1991 draft, but had only been out of high school for two years. *Id.* The NFL did not challenge Swann's eligibility because it was involved in other legal issues with players such as Freeman McNeil and Marvin Powell. *Id.*

143 Clarett v. Nat'l Football League II, 369 F.3d 124, 126 (2d Cir. 2004).

144 15 U.S.C. § 1 (2000) ("Declares illegal every contact, combination or conspiracy, in restraint of trade or commerce among the several states.").

145 *Id.* § 15 ("Creates a private right of action for any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws.").

146 Clarett v. Nat'l Football League I, 306 F. Supp. 2d 379, 382 (S.D.N.Y. 2004).

147 *Id.*

Eighth, and Ninth Circuits have established a three-factored test.[148] The three factors articulated by the Sixth, Eighth, and Ninth Circuits are

> First, the labor policy favoring collective bargaining may potentially be given preeminence over the antitrust laws where the restraint on trade primarily *affects only the parties to the collective bargaining relationship*. Second, federal labor policy is implicated sufficiently to prevail only where the agreement sought to be exempted *concerns a mandatory subject of collective bargaining*. Finally, the policy favoring collective bargaining is furthered to the degree necessary to override the antitrust laws only where the agreement sought to be exempted is the *product of bona fide arm's-length bargaining*.[149]

Following this analysis, the district court analyzed each prong of the test and determined that the NFL's Eligibility Rule was not immune from antitrust scrutiny.[150] The court first held that the Eligibility Rule is not "a mandatory subject of collective bargaining" because nowhere in the rule is there a reference to wages, hours, or conditions of employment.[151] Next, the court held that the Eligibility Rule governs only non-employees and the nonstatutory labor exemption cannot apply to those who are excluded from the bargaining unit.[152] The court stated that those who were "[n]ewcomers to an industry may not object to provisions of collective bargaining agreements that speak to wages, hours, or conditions of employment on the grounds that they were not present for the bargaining sessions."[153] The court further stated that the previous Second Circuit cases in *Wood*, *Williams*, and *Caldwell* held that once a player is drafted, he is bound to the terms of the collective bargaining agreement, but the district court

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148 *Id.* at 391. *See* Mackey v. Nat'l Football League, 543 F.2d 606, 614 (8th Cir. 1976); Cont'l Maritime of San Francisco, Inc. v. Pac. Coast Metal Trades Dist. Council, 817 F.2d 1391, 1393 (9th Cir. 1987); McCourt v. Cal. Sports, Inc., 600 F.2d 1193, 1197-98 (6th Cir. 1979).

149 *Clarett I*, 306 F. Supp. 2d at 391 (emphasis added). The district court noted that the Second Circuit acknowledged the test used by the Eighth Circuit in *Mackey*, but decided to apply a simple version used by the Supreme Court in *Jewel Tea*, which held that the "appropriate test is 'one that balances the conflicting policies embodied in the labor and antitrust laws, with the policies inherent in labor law serving as the first point of reference.'" *Id.* at 392 (quoting Local 210, Laborers' Int'l Union v. Labor Relations Div. Assoc. Gen. Contractors, 844 F.2d 69, 79 (2d Cir. 1988)); *see also* Local 210, 844 F.2d at 80 n.2 ("Although we believe that the agreement in the instant case could satisfy [the Eighth Circuit's *Mackey*] test, we need not adopt this particular analysis. Rather, we rely on . . . *Jewel Tea*.").

150 *Clarett I*, 306 F. Supp. 2d at 410.

151 *Id.* at 393.

152 *Id.* at 395.

153 *Id.*

felt that Clarett's situation is different because he was not yet drafted, and thus the nonstatutory exemption should not apply.[154]

Finally, the court concluded that the Eligibility Rule did not result from arm's length negotiations because the "record is sparse in establishing the evolution of the Rule."[155] The court noted that the Eligibility Rule was adopted shortly after the 1925 season, but the NFLPA was not formed until 1956, and the first collective bargaining agreement was not adopted until 1968.[156] The court goes on to say that the references to 1993 Bylaws "demonstrate that the union agreed not to bargain over or challenge the Rule," but "they in no way demonstrate that the Rule itself arose from, or was agreed to during, the process of collective bargaining."[157] Due to these factors, the district court ruled that the NFL was not immune from antitrust scrutiny. [158]

Furthermore, the district court rejected the NFL's other defenses when it held that Clarett had standing to sue because his injury flows from a policy that excludes all players in his position from selling their services to the only viable buyer.[159] The court also rejected the NFL's argument that the Eligibility Rule would survive the rule of reason analysis when it held the NFL did not show that the Eligibility Rule enhances competition.[160] Utilizing the test articulated in *Capital Imagining Associations. v. Mohawk Valley Medical Associations*,[161] the district court held that Clarett had met his burden, while the NFL failed to meet its burden.[162] To satisfy his burden of showing a prima facie violation of Section One of the Sherman Act, Clarett argued "[a]ge-based eligibility restrictions in professional sports are anticompetitive because they limit competition in the player personnel market by excluding sellers."[163] The NFL argued that Clarett "has not 'established the contours of the relevant market.'"[164] The court rejected the NFL's argument and held that "[b]ecause the Rule has the actual anticom-

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154 *Id.* at 395-96.

155 *Id.* at 396.

156 *Id.*

157 *Id.* The court emphasizes that the evidence actually showed the Rule was never the subject of collective bargaining. *Id.* The court makes this ruling despite evidence produced by the NFL, in the form of a declaration by Peter Ruocco, which stated that the eligibility rule was a subject of collective bargaining. Symposium, *Panel II: Maurice Clarett's Challenge*, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 391, 417 (2005). Therefore, the court "rejected a factual assertion by a witness in the case without any finding that the factual statement was for some reason inadmissible." *Id.*

158 *Clarett I*, 306 F. Supp. 2d at 397.

159 *Id.*

160 *Id.* at 382.

161 996 F.2d 537, 543 (2d Cir. 1993).

162 *Clarett I*, 306 F. Supp. 2d at 410.

163 *Id.* at 406.

164 *Id.* (quoting Union Carbide Corp. v. Montell N.V., 28 F. Supp. 2d 833, 840 (S.D.N.Y. 1998)).

petitive effect of excluding players . . . it is a naked restriction."[165] Since Clarett established the anticompetitive effect of the Rule, the NFL had the burden to offer a procompetive justification.[166] The NFL offered four justifications: (1) the protection of younger/less experienced players from injury;[167] (2) protecting itself from losing money as a result of the injuries;[168] (3) protecting itself from the costs of liability resulting from the injuries;[169] and (4) the protection of others from injury and potential self-abuse.[170] The court found that the league failed to offer any legitimate procompetitive justifications for the Eligibility Rule, and the court dismissed the NFL's argument.[171]

Finally, the court held that even if there had been some procompetitive justification for the Eligibility Rule, the NFL would still lose because there is an alternative that is less prejudicial to competition.[172] The district court concluded that Clarett's injury was "precisely the type of injury that antitrust laws were designed to prevent"[173] and quoted Judge Learned Hand when he said, "antitrust laws will not allow that which unreasonably forbids anyone to practice his calling."[174] The court then metaphorically held that the NFL's "Rule must be sacked."[175] However, the judges in the booth of the Second Circuit overturned the district court's "ruling on the field."

C. *The District Court's Ruling on the Field is Overturned by the Second Circuit*

Following the district court's ruling that Clarett was entitled to summary judgment, the NFL appealed to the United States Court of Appeals for the Second Circuit.[176] The Second Circuit granted the NFL's motion to stay the district court's order because of the NFL's "likelihood of success on the merits" and because if the NFL was to lose, it promised to "hold a supplemental draft

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165 *Id.*

166 *Id.*

167 *Id.*

168 *Id.*

169 *Id.*

170 *Id.* The NFL argued that if it allowed high school or young college athletes to enter the draft, it would facilitate adolescents to over-train or use steroids "in the misguided hope of developing prematurely the strength and speed required to play in the NFL." *Id.*

171 *Id.* at 409.

172 *Id.* at 410. The court used the NFL's argument against itself, by stating that the League is concerned about the physical and mental maturity of young players, but the League concedes that this maturation "varies from individual to individual." *Id.* Thus, the league could easily screen out those players that are not physically and/or mentally prepared to play in NFL. *Id.*

173 *Id.* at 406.

174 *Id.* at 382 (quoting Gardella v. Chandler, 172 F.2d 402, 408 (2d Cir. 1949)).

175 *Clarett I*, 306 F. Supp. 2d at 382.

176 Clarett v. Nat'l Football League II, 369 F.3d 124, 124 (2d Cir. 2004).

for [Clarett] and all others similarly situated."[177] Clarett then applied to two Supreme Court Justices to lift the Second Circuit's stay order.[178] Both applications were denied, and Clarett was not eligible for the 2004 NFL draft.[179]

Before the Second Circuit, Clarett again argued that the NFL could not agree that a player will not be drafted because the NFL clubs are horizontal competitors and any such agreement would violate section 1 of the Sherman Act.[180] Contrary to the district court however, the Second Circuit stated that his argument failed because the NFL can act jointly in setting terms and conditions of employment without the risk of antitrust liability.[181] The court held that the policy behind federal labor legislation "has long been recognized that in order to accommodate the collective bargaining process, certain concerted activity among and between labor and employers must be held to go beyond the reach of the antitrust laws."[182]

The argument between Clarett and the NFL essentially came down to which Supreme Court Justice's opinion in *Jewel Tea* the Second Circuit should adopt.[183] The NFL argued that the Second Circuit should adopt Justice Goldberg's position where a balancing approach was not necessary because "all collective bargaining activity concerning mandatory subjects of bargaining under the [labor laws] is not subject to the antitrust laws."[184] Clarett argued that the court should have adopted Justice White's formulation of the exemption whereby the court would use a balancing test to determine if the Eligibility Rule should be subject to antitrust scrutiny.[185]

The district court applied Justice White's balancing test that was adopted by the Eight Circuit in *Mackey*.[186] Addressing the Justice White/*Mackey* Balancing Test, the Second Circuit stated that it did not regard the Eighth's Circuit's decision in *Mackey* as defining the "appropriate limits of

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177 *Id.* at 130. The only other college player that took advantage of the district court's ruling and decided to enter the NFL draft was University of Southern California Wide Receiver Mike Williams. Williams lost his amateur status when he hired an agent, and thus following the Second Circuit's decision he was unable to return to college and play for the 2004 National Champions. *See* Associated Press, *Williams Hires an Agent for the Second Time*, VENTURA COUNTY STAR, Oct. 13, 2004, at 9.

178 *Clarett II*, 369 F.3d at 130.

179 *Id.*

180 *Id.*

181 *Id.*

182 *Id.*; *see also* United States v. Hutcheson, 312 U.S. 219 (1941).

183 *Clarett II*, 369 F.3d at 133.

184 *Id.* at 132 (citing Local No. 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co., 381 U.S. 676, 712 (1965)).

185 *Clarett II*, 369 F.3d at 133.

186 Clarett v. Nat'l Football League I, 306 F. Supp. 2d 379, 405 (S.D.N.Y. 2004).

the nonstatutory exemption."[187] Furthermore, the Second Circuit disagreed with the Eighth Circuit's reading of the Supreme Court's rulings in *Connell*, *Jewel Tea*, *Pennington*, and *Allen Bradley*, where the Eight Circuit interpreted the "alleged anticompetitive effect of the challenged restraint" as being on a "labor market organized around a collective bargaining relationship."[188] Contrary to the Eighth Circuit, the Second Circuit felt that the Supreme Court's decisions were of "limited assistance" to see if the player challenging the league's restraints on "professional sports players imposed through a collective bargaining process."[189] These cases were of limited assistance because they involved injuries to employers who stated that "they were being excluded from competition in the *product* market."[190]

The Second Circuit does not address "whether the *Mackey* factors aptly characterize the limits of the exemption in cases in which employers use agreements with their unions to disadvantage their competitors in the product or business market,"[191] because the cases that the Second Circuit has decided are where a "plaintiff complains of a restraint upon a unionized labor market characterized by a collective bargaining relationship with a multi-employer bargaining unit."[192] Furthermore, the *Mackey* factors are not helpful because the factors do not "comport with the Supreme Court's most recent treatment of the nonstatutory labor exemption in *Brown*." [193]

The Second Circuit took notice of the Supreme Court's treatment of the nonstatutory exception in *Brown*, but could not directly apply it because the Supreme Court did not address the precise contours of the exemption.[194] Therefore, the Second Circuit applied its prior decisions in *Caldwell*, *Williams*, and *Wood* because these decisions fully comport with the Supreme Court's decision in *Brown*.[195] Therefore, the main issue the Second Circuit needed to resolve was if, under the Supreme Court's decision in *Brown* and prior Second Circuit decisions, "subjecting the NFL's eligibility rules to antitrust scrutiny would 'subvert fundamental principles of our federal labor policy.'"[196]

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187 *Clarett II*, 369 F.3d at 133. *See* Local 210, 844 F.2d at 80 (declining to follow *Mackey* in favor of balancing test articulated in *Jewel Tea*); *see also* U.S. Football League v. Nat'l Football League, 842 F.2d 1335, 1372 (2d Cir. 1988) (recognizing *Mackey* is "not consistent with our decision in *Wood v. Nat'l Basketball Ass'n*").

188 *Clarett II*, 369 F.3d at 133.

189 *Id.* at 134.

190 *Id.* (quoting Wood v. Nat'l Basketball Ass'n, 809 F.2d 954, 963 (2d Cir. 1987) (emphasis added)).

191 *Id.*

192 *Id.*

193 *Id.*

194 *Id.* at 138.

195 *Id.*

196 *Id.* (quoting Wood v. Nat'l Basketball Ass'n, 809 F.2d 954, 959 (2d Cir. 1987)).

The court began its analysis by establishing that Clarett does not have the right to negotiate directly with the NFL teams over the terms and conditions of his employment.[197] Rather, the NFL teams are permitted to engage in joint conduct with respect to the terms and conditions of players' employment without risking antitrust liability.[198] Clarett's argument that he was physically qualified to play, and antitrust laws should stop the NFL from enforcing the Eligibility Rule, contravened the principles of the collective bargaining process and federal labor policy.[199] Because the NFL players are unionized, and the NFLPA is their bargaining representative, federal law bars Clarett from negotiating directly the terms and conditions of his employment.[200] The terms and conditions of Clarett's employment are within the collective bargaining agreement, and the NFLPA may expand or restrict the rights of those whom it represents.[201] Therefore, so long as the provision Clarett challenged is a term and condition of employment, he should lose.

In order to succeed, Clarett needed to show that the Eligibility Rule did not constitute a mandatory subject of collective bargaining and was not a term and condition of employment, and thus did not fall within the protection of the nonstatutory exemption.[202] Rejecting this argument, the Second Circuit felt that the Eligibility Rule is a mandatory bargaining subject because the Eligibility Rule is unique to professional sports in that it determines a condition for initial employment and parties must bargain about the requirements or "condition[s]" of "initial employment."[203] The Second Circuit states that the Eligibility Rule is also a mandatory bargaining subject because it has "tangible effects on the wages and working conditions of current NFL players."[204] For example, the Eligibility Rule affects the job security of veteran players because younger players may take veterans roster spots on a team due to the cap on a team's size.[205]

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197 *Id.*

198 *Id.* at 139.

199 *Id.*

200 *Id.* at 138.

201 *Id.* at 138-39. For example, in seeking the best deal for the NFL players overall, the NFLPA can treat a certain category of players better than others, as long as it has a duty of fair representation. *Id. See* Vaca v. Sipes, 386 U.S. 171, 177 (1967). The NFLPA is also able to favor veteran players over rookies. *See* Ford Motor Co. v. Huffman, 345 U.S. 330, 338-39 (1953). The NFLPA can also "seek to preserve jobs for current players to the detriment of new employees and the exclusion of outsiders." *See* Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 210-15 (1964).

202 *Clarett II*, 369 F.3d at 139.

203 *Id.* at 139. *See* ROBERT A. GORMAN, LABOR LAW 504 (West ed.) (1976).

204 *Clarett II*, 369 F.3d at 140.

205 *Id.* at 140; s*ee also* Michael S. Jacobs & Ralph K. Winter, Jr., *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L. J. 1, 16 (1971).

Finally, Clarett argued that the rule is a violation of antitrust law because it affects individuals outside the union.[206] But the Second Circuit responded by stating that this is similar to union demands for hiring arrangements, and this court has held in prior case law that this was permissible.[207] The terms and conditions of a prospective player is for the NFLPA and the NFL to determine, and they can "agree that an employee will not be hired or considered for employment for nearly any reason whatsoever so long as they do not violate federal laws such as those prohibiting unfair labor practices, or discrimination."[208] The Second Circuit then went on to analogize this case to similar circumstances where an employer may set the requirements for hiring when it stated "this lawsuit reflects simply a prospective employee's disagreement with the criteria . . . that he must meet in order to be considered for employment," and the court followed the Supreme Court in declining to "fashion an antitrust exemption [so as to give] additional advantages to professional football players . . . that transport workers, coal miners, or meat packers would not enjoy."[209] Thus, Clarett's thrust toward the NFL draft was stopped dead in its tracks.[210]

D. Monday Morning Quarterback: The Second Circuit was Correct in its Holding

Following the Second Circuit's decision in *Clarett*, several scholarly articles were written about whether or not the Second Circuit was correct when it rejected the strict three prong *Mackey* test, and held all mandatory subjects of collective bargaining are exempt from antitrust law. Critics argue that the Second Circuit misconstrued the test and should have affirmed the district court's ruling by applying the *Mackey* test because "the NFL already enjoy[s] unequal bargaining power over the players union, and [the test] should serve to narrow, not enlarge the scope of the nonstatutory labor exemption."[211] Further, the Second Circuit's broad exemption "encourages players to decertify their unions in order to place their player restraint claims in the realm of antitrust laws – a result that subverts the very federal labor policies the exemption purportedly up-

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206 *Clarett II*, 369 F.3d at 140.

207 *Id.* at 140-41.

208 *Id.* at 141.

209 *Id.* at 143. (quoting Brown v. Pro Football, Inc. 518 U.S. 231, 249 (1996)).

210 Following Clarett's appeal, he sat out of college football for two years, and in 2005 he ran a sub-par 4.82 and 4.72 forty yard dash at the NFL Combine in Indianapolis. Kyle Nagel, *Clarett's Promise Now Just a Memory*, DAYTON DAILY NEWS, Jan. 12, 2006, at A1. However, the Denver Broncos took a chance on Clarett and drafted him with the 101st pick of the 2005 NFL Draft. *Id.* He was then cut by the Broncos before the regular season began, and was recently arrested for aggravated robbery. *Id.*

211 Jocelyn Sum, *Annual Review 2005: Part II: Entertainment Law and New Media: VII. Antitrust Law: A. Note:* Clarett v. National Football League, 20 BERKELEY TECH. L.J. 807, 821 (2005).

holds."[212] Also, critics argue that the Second Circuit impermissibly expanded the nonstatutory exemption because it "misinterpreted distinguishable precedent as binding" and also erred "by rejecting the test from *Mackey* while nevertheless, applying its three factors, and then misapplying those three factors to the facts presented."[213] Additionally, some argue that the *Clarett* decision "fails to afford the proper weight to federal antitrust law and policy in balancing those interests against applicable federal labor law and policy."[214]

Contrarily, other scholars persuasively argue that the Second Circuit was correct in its analysis because the more open ended standard applied by the court "wisely allows for more flexibility in nonstatutory exemption analysis. . . ."[215] Specifically, the Second Circuit's test "avoids a paramount weakness of the *Mackey* framework: namely, the Eighth Circuit's formulation making determinative the bona fide arm's length negotiations requirement."[216] Simply stated, requiring the third prong of the *Mackey* test, a *quid pro quo,* would undermine the collective bargaining process and negate the policies underlying the nonstatutory exemption because it would be "silly" to require the two sides to sit and argue about a provision to which the union does not object.[217] Therefore, the test that would comport with federal labor policy and the Supreme Court's decision in *Brown*, where the court held a unilateral imposition was exempt,[218] would not include the final element in the *Mackey* test. If the Supreme Court would apply the nonstatutory exemption to a rule that was not bargained for, then it would seem obvious that the arms length bargaining prong is not necessary to the exemption. If such a requirement were mandatory, employers would be put in the "absurd position of having to insist that the union put up a formal resistance to the employer's proposal," and unions could refuse to communicate on some issues in hopes of leaving open the idea of later bringing an antitrust claim.[219] Accordingly, the third prong in *Mackey* is superfluous, and as long as the challenged rule or restraint is a mandatory subject of collective bargaining, the nonstatutory exemption should apply.[220] To require the arms length bargain-

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212 *Id.*

213 Michael Scheinkman, Comment*: Running Out of Bounds: Over–Extending the Labor Antitrust Exemption in* Clarett v. National Football League, 79 ST. JOHN'S L. REV. 733, 740 (2005).

214 Scott A. Freedman, Comment*: An End Run Around Antitrust Law: The Second Circuit's Blanket Application of the Non-Statututory Labor Exemption in* Clarett v. NFL, 45 SANTA CLARA L. REV. 155, 156 (2004).

215 Recent Case: *Antitrust Law–Nonstatutory Labor Exemption–Second Circuit Exempts NFL Eligibility Rules from Antitrust Scrutiny.* – Clarett v. National Football League, *369 F.3d 124 (2d Cir. 2004)*, 118 HARV. L. REV. 1379, 1380 (2005).

216 *Id.*

217 *Id.* at 1382; Symposium, *supra* note 157, at 407-08.

218 Recent Case, *supra* note 215, at 1383 (arguing that the decision in *Brown* virtually renders the third prong of the *Mackey* test moot).

219 *Id.* at 1386.

220 *Id.* at 1382.

ing would be counterproductive because it is likely that the reason the union would not sit and argue with the league is because the union does not object to the restraint.[221] These practical effects run contrary to the policy of allowing meaningful bargaining to take place, therefore the aggrieved party's remedy should lie in labor law, not in antitrust.

Moreover, there is an argument that even if the Second Circuit was wrong in its application of the nonstatutory exemption, and the court should have held the rule was not exempt under *Mackey*, the Second Circuit could have reached its result in favor of the NFL through other means. By employing the rule of reason analysis or a "functional, 'hybrid' antitrust–labor law" analysis, the court should have held that "the pro-competitive effects of the three–year rule outweigh the potentially negative effects" due to the "unique aspects of major professional sports in the United States, and the expansive reading of the labor exemption as utilized by many sports associations . . . ."[222] The justifications for the eligibility requirement are to allow the NFL "to preserve jobs of current union members and maintain the high level of skill in the incoming talent pool,"[223] and "by fostering the skills of incoming rookies, the NFL permissibly secures the highest level of on field competition and promotes a longer period of amateur player development."[224] Even if the NFL would not win this argument before the court, the district court was surely wrong in granting summary judgment in favor of Clarett, and should have ordered the case to trial.[225]

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[221] Symposium, *supra* note 157, at 403-04. Also, labor law acknowledges that by the practice of the parties over time, a course of conduct can emerge and become binding on the parties to a CBA. *Id.* at 412 (quoting Int'l Bd. of Elec. Workers, Local Union No. 199 v. United Tel. Co. of Fla., 738 F.2d 1564, 1568 (11th Cir. 1984)). To support this argument further, in *Clarett I*, the district court actually heard evidence that supported the assertion that the eligibility requirement was bargained for because a declaration by Peter Ruocco actually said that the eligibility rule was in fact a subject of collective bargaining. Symposium, *supra* note 157, at 417. Thus, there is an argument that the judge incorrectly granted the motion for summary judgment when she decided a factual issue. *Id.*

[222] Peter Altman, Note*: Stay Out for Three Years After High School or Play in Canada – And for Good Reason: An Antitrust Look at* Clarett v. National Football League, 70 BROOK. L. REV. 569, 572 (2004). Other scholars argue that even if the rule of reason analysis was applied, the League (NFL or NBA) should argue that the rule of reason would allow an age-based Eligibility Rule because an age-limitation allows teams to spend more time evaluating the talent of potential draftees; thus, clubs are not wasting valuable money on raw and underdeveloped talent and can field a more exciting team, which would lead to more ticket sales and revenue. Justin Mann Ganderson, *With The First Pick In The 2004 NFL Draft, The San Diego Chargers Select . . .?: A Rule of Reason Analysis Of What the National Football League Should Have Argued In Regards To A Challenge Of Its Special Draft Eligibility Rules Under Section 1 of The Sherman Act*, 12 U. MIAMI BUS. L. REV. 1, 25 (2004).

[223] Altman, *supra* note 222, at 603.

[224] *Id.* at 603-04.

[225] Symposium, *supra* note 157, 407-08. Professor Roberts from Tulane University stated that for a judge to grant summary judgment on the rule of reason analysis as it applied to the eligibility rule is "goofy." *Id.* Surely, reasonable minds could differ as to whether or not the eligibility requirement is reasonable given the violent nature of professional football.

V. A CHALLENGE TO NBA'S ELIGIBILITY REQUIREMENT

The confusion over what antitrust test should apply when a player challenges a league's eligibility requirements, and whether the eligibility requirement is a mandatory subject of collective bargaining is evident by both the circuit split between the Eighth and Second Circuits and the various arguments proposed by academics on both sides. However, when the NBA included its eligibility requirement into its 2005 CBA, the conflict over what nonstatutory exemption test to apply will likely not be determined in the near future. Because of the different tests applied, the precise scope of the nonstatutory exemption would be an excellent question for the Supreme Court to decide.[226] Ideally, it would be nice for the issue to arise before the Court under the context of a sports eligibility requirement. The NBA's pre-2005 eligibility requirement could have been an excellent case because it would have posed the same questions as *Clarett*.

The controversy sparked by *Clarett* was whether to apply the *Mackey* test and its strict three prong test or simply hold all mandatory subjects of collective bargaining exempt from antitrust sanctions.[227] In *Clarett*, had the court gone through a strict *Mackey* analysis, it likely would have held that the NFL did not meet the arm's length bargaining prong of the test because the rule was merely referenced in the NFL's Bylaws. However, the NBA would be in a much better legal position than that of the NFL with regards to the third prong of the *Mackey* test because the eligibility requirement was a hot topic at the bargaining table prior to the NBA CBA being signed in the summer of 2005,[228] and because the eligibility requirement is actually contained in the CBA itself.[229] Therefore, the NBA will have no difficulty satisfying the bona fide arm's length bargaining third prong of the *Mackey* test.[230] Thus, because the NBA satisfied the "bona-fide arm's length" bargaining prong of the *Mackey* test when it included its eligibility requirement into its CBA, the differences between the Second and Eighth Circuit's tests will likely not affect the outcome of the case. Consequently, the league would satisfy both the Second and Eighth Circuit tests.

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226 Recent Case, *supra* note 215, at 1386.

227 *See supra* notes 146-225 and accompanying text.

228 Potvak, *supra* note 15.

229 NBA CBA, *supra* note 14. The NBA's eligibility rule is not merely referenced as was the case in the NFL. *See supra* notes 129-31 and accompanying text.

230 Also, even those who disagree with the Second Circuit's decision in *Clarett* will concede that potential future NBA players are parties to the collective bargaining agreement, consequently the first prong of the *Mackey* test is satisfied as well. Zimmerman v. Nat'l Football League, 632 F. Supp. 398, 405 (D.D.C. 1986); Jason Ablen, Chris Brown, & Neil Desai, Comment and Casenote: *Lingering Questions after* Clarett v. NFL*: A Hypothetical Consideration of Antitrust and Sports*, 73 U. CIN. L. REV. 1767, 1773 (2005); Scheinkman, *supra* note 213, at 758; Nicholas E. Wurth, Article*: The Legality of an Age-Requirement in the National Basketball League After the Second Circuit's Decision in Clarett v. NFL*, 3 DEPAUL J. SPORTS L. CONTEMP. PROBS. 103, 126 (2005).

But, if an exceptional high school basketball player is either ineligible to play at the college level for one year or simply does not think he should wait that extra year, and wishes to enter the NBA draft immediately out of high school, and decides to challenge the NBA's eligibility requirement, the case's resolution may be based on whether or not the eligibility requirement is a mandatory subject of collective bargaining. Should it side with the Second Circuit, the NBA's eligibility requirement would undoubtedly pass its test because the facts are virtually the same as in *Clarett*. But if a jurisdiction adopts the same analysis as the district court in *Clarett* and several other scholars,[231] the NBA may not prove that the eligibility rule was a mandatory subject of collective bargaining. The debate over the second prong of the *Mackey* test, and whether or not the eligibility requirement is a mandatory subject of collective bargaining is present in both the Second and Eighth Circuit tests. The argument that an eligibility requirement is not a mandatory subject of collective bargaining,[232] is essentially that it is not a condition of employment because conditions of employment are limited to those conditions under which one has to perform his job.[233] Second, the eligibility requirement is not intimately related to wages or working conditions because any such relation is simply an "underlying assumption" and there is no effect on veteran player job security.[234] However, this Note agrees with the Second Circuit when it states that the second prong is satisfied because the eligibility requirement is an entry requirement and such a requirement is intimately related to wages, hours, and other conditions of employment similar to the conditions under which an employer may terminate an employee.[235] While there are cases that suggest pre-employment drug tests are not mandatory subjects of collective bargaining,[236] the Second Circuit has held that hiring halls (where individuals seeking employment are referred to employers) are mandatory subjects of bargaining.[237] As discussed in more detail below, the veteran players' and league officials' reaction to the effects of the eligibility requirement show that it plays a vital role in the league's product and veterans'

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231 *See supra* notes 211-14.

232 Scheinkman, *supra* note 213, at 759; John R. Gerba, Comment: *Instant Replay: A Review of the Case of Maurice Clarett, The Application of the Non-Statutory Labor Exemption, and its Protection of the NFL Draft Eligibility Rule*, 73 FORDHAM L. REV. 2383, 2414 (2005).

233 Gerba, *supra* note 232, at 2418.

234 *Id.* at 2420-23.

235 Caldwell v. American Basketball Ass'n, 66 F.3d 523, 529 (2d Cir. 1995); Symposium, *supra* note 157, at 418.

236 Symposium, *supra* note 157, at 412 (citing Star Tribune v. Newspaper Guild of the Twin Cities, 29 N.L.R.B. 543, 548 (1989)).

237 *Id.* at 398 (citing Wood v. Nat'l Basketball Ass'n., 809 F.2d 954, 960 (2d Cir. 1987)). Professor Roberts actually states, "I don't think there is anybody on this panel–in fact, I have not talked to anybody who is a labor lawyer–who would agree that entry requirements are not a mandatory subject of bargaining." *Id.* at 402.

salaries, thereby making the requirement intimately related to wages and other conditions of employment.[238]

VI. THE NBA'S NEW ELIGIBILITY REQUIREMENT IS ONLY A STEP IN THE RIGHT DIRECTION

While the NBA's new eligibility requirement will work to help the league produce a better quality product and attract more viewers by not allowing high school players to enter the draft, it falls short of effectively ensuring these results. Alternatively, the NBA's new rule should have been mirrored after the NFL's eligibility requirements. Currently, it seems as though the NFL can do no wrong, every aspect of the NFL keeps soaring: popularity, ratings, gate receipts, and licensing.[239] College football has also increased in popularity.[240] 2005 saw the only two undefeated teams go head-to-head for the national championship when the University of Texas beat the University of Southern California.[241] Because of the excellent 2005 college football season, fans are anxiously awaiting the arrival of superstars Matt Leinhart, Reggie Bush, and Vince Young, all of whom are likely to be top picks in the 2006 NFL Draft.[242]

Contrary to the NFL and college football, the NBA is struggling.[243] The NBA's image has not been the same since the early 1990's, when Michael Jordan won championships for the Chicago Bulls and professional basketball was going to be "The Game of the New Century."[244] Recently, fans and analysts have begun to comment on the depreciation of the quality of the games in the NBA.[245] While there could be many causes to the NBA's struggle (such as the expansion of the league resulting in the dilution of talent or implantation of the zone defense),[246] a glaring cause is the increase of young underdeveloped teen-

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238 *See infra* Part VI.B.

239 Abeln, et al., *supra* note 230, at 1769; Gregg Easterbrook, *Tuesday Morning Quarterback*, NFL.COM, http://www.nfl.com/features/tmq/091305 (last visited Feb. 3, 2006).

240 *Pro Grid Still King, Online Survey Finds*, N. Y. POST, Dec. 28, 2005, at 64 (showing that in an online survey that college football is America's third favorite sport, behind professional football and baseball).

241 Bill Plaschke, *Trojans Discover the Enemy Within, and an Era Ends Quietly*, L.A. TIMES, Jan. 5, 2006, at S1.

242 Sam Farmer, *Now It's Pick 'Em at the Top; Young's entry changes NFL draft picture, and Bush is anything but a sure thing to go No. 1*, L.A. TIMES, Jan. 10, 2006, at SD1.

243 *See* Jack McCallum, *The Top Five: NBA's Sinking Popularity Should Prompt Image Makeover*, SI.COM, http://sportsillustrated.cnn.com/2004/writers/jack_mccallum/12/09/top.five (last visited Feb. 6, 2006).

244 *Id.*; Easterbrook, *supra* note 239.

245 Kerr, *supra* note 12; Mannix, *supra* note 13, at 15; Rick Horrow, *NBA at Finals Time: Sustaining Three Business Goals*, CBS.SPORTSLINE.COM, http://cbs.sportsline.com/general/story/6408583 (last visited Feb. 6, 2006).

246 *Interview of Michael McCann with Aran Smith*, http://nbadraft.net/McCanninterview.asp (last visited Feb. 6, 2006).

agers sitting on the bench during early stages in their career.[247] Many of these players were sensational athletes in high school, drafted on raw talent, but were never heard of by the average basketball fan. The poor quality of play and number of players that the average fan cannot identify has caused the NBA's fans to take their money elsewhere.[248] In an effort to prevent this trend from continuing, and to improve the quality of play, Commissioner David Stern wanted to impose a twenty-year-old eligibility requirement once the collective bargaining agreement expired in 2005, but the union was able to negotiate a younger limit, which only requires players entering the draft to be nineteen years old and one year out of high school.[249] The next two subsections focus on the NBA's implementation of the new requirement from two different perspectives: first the players', then the fans' and league's.

A. *From the Players' Perspective*

This new eligibility requirement affects two types of players: those currently in the league and those players potentially entering the league. With the exception of some of the current NBA players who themselves entered the league straight out of high school, several players supported the new eligibility requirement, citing issues of immaturity[250] and the deterioration of the quality of play as the reason.[251] Veterans say, "the league has become like watching a high school game–all dunks and turnovers."[252] An obvious reason to support the eligibility requirements from the perspective of veteran players is that the requirement may preserve their jobs from talented newcomers.[253] The younger players are forcing the older players out of the league, not because the younger players are better, but simply because the younger players are cheaper.[254]

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247 Easterbrook, *supra* note 239.

248 Mannix, *supra* note 13, at 15; Easterbrook, *supra* note 239.

249 Mark Murphy, *Basketball NBA Preview 2005-06*, THE BOSTON HERALD, Nov. 2, 2005, at 080.

250 *See* Marty Burns, *Age Before Beauty: Players Young and Old Set to Give NBA Age Limit*, SPORTS ILLUSTRATED, http://sportsillustrated.cnn.com/2005/writers/marty_burns/03/04/age.limit/index.html (last visited Jan. 10, 2006).

251 Murphy, *supra* note 249.

252 *Id.*

253 Tom Oates, *Big Loss For Clarett Is Big Gain For Many*, WISCONSIN STATE JOURNAL, Apr. 23, 2004, at A1.

254 Ray Melick, *What's Good For the NFL Should Be the Same for The NBA*, SCRIPPS HOWARD NEWS SERVICE, April 22, 2004, *available at* http://www.caller2.com/shns/story.cfm?pk=BKN-MELICK-04-22-04&cat=BC. One may argue that even if the draft only included college juniors and seniors, then the veterans' jobs would still be in jeopardy. This is not the case however, because the high school players and college underclassmen are being drafted on pure potential, with full knowledge that they will not contribute substantially during their first few years in the league. This leaves teams with a difficult choice after the rookies' initial contracts expire: sign the unproven player to a long term deal or let him go and watch him succeed for another team, as was

In the past, the NBPA has fought hard against an age-limit clause in the collective bargaining agreement.[255] The reason that some players are opposed to this age-limit is that they do not believe that the NBA should restrict an individual's right to earn a living.[256] Many of the original high-school draftees have been in the league for many years now and have become very influential. Players such as Kevin Garnett and Tracy McGrady do not support an age limitation because they came straight into the league from high school and have been successful.[257] Also, some older players may understand that many of the high school kids come from poor neighborhoods, and the potential to earn even the league minimum outweighs the NBA's interest. Furthermore, some NBA players may not want to expose the high school athletes to the NCAA because of its strict rules and regulations.[258]

The other class of players affected by the eligibility requirement is the class of potential players entering the draft. Scholar Michael McCann argues the most notable academic position against changing the player eligibility requirement for the NBA.[259] McCann's argument is predicated on the irrational economics of banning high school players from the NBA.[260] In his article, McCann argues that a ban on "premiere high school players from the NBA Draft would be irrational, both for those players and for the NBA, since those players are self-selected and almost always exceptionally talented, and since the NBA's economic system provides incentives for them to seek entrance into the NBA as soon as possible."[261] His article explores "how high school players who enter the NBA Draft are a small, self-selected group, comprised almost entirely of exceptionally talented players. [And] Simply put, for every Korleone Young,

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the case of Jermaine O'Neal. Roscoe Nance, *From High School to the NBA, the Leap Can be Too Great*, USA TODAY, Feb. 25, 2005, at 1A. Conversely, general managers and owners would be less patient with an older college player because their "ceiling" would be lower, thereby preserving the veterans' jobs.

255 Mike Fish, *NBA considers plugging flood of teen-agers with new eligibility rule*, SPORTS ILLUSTRATED, June 18, 2004, *available at* http://sportsillustrated.cnn.com/2004/writers/mike_fish/06/18/nba.age.limit/.

256 *Id.* Players such as Dikembe Mutumbo and Alonzo Mourning have supported the age-limitation but Union Spokesperson Dan Wasserman has stated, "The vast majority of guys have always been against an age limitation simply on the grounds you shouldn't restrict someone's right to make a living." *Id.*

257 Michael A. McCann, *Illegal Defense: The Irrational Economics of Banning High School Players from the NBA Draft*, 3 VA. SPORTS & ENT. L. J. 113, 146-47 (2004).

258 Phil Taylor, *Damned If You Do*, SPORTS ILLUSTRATED, Feb. 25, 1991, at 54.

259 McCann is a highly respected author in the field of Sports and Antitrust law. After publishing his article relating to the irrational economics of banning high players from the NBA Draft, he became a member of Maurice Clarett's Legal Team against the NFL. Mark Alesia, *Age-Old Question; For NBA Draft Picks, How Young is Too Young?*, THE INDIANAPOLIS STAR, June 23, 2004, at 1D.

260 McCann, *supra* note 257, at 113.

261 *Id.*

there are two or three Kevin Garnetts."[262] His argument is essentially that the earlier the players arrive into the NBA, and the longer they stay, the better off for the NBA and its fans.[263] To support his argument, McCann compares the per year salary of the average individual who enters the NBA immediately following high school to the average NBA player who attends college and is drafted after college.[264] He suggests that the player who enters the NBA following high school will earn more over his lifetime than the individual who first enters college because ideally a younger athlete will usually work longer.[265]

There is no way to dispute the argument that if players stay in the league until the normal retirement age, they will make more money quicker by entering the draft earlier.[266] The NBA's salary structure is designed for veteran players to earn more money over longer careers.[267] Therefore, McCann is correct in that respect. If a dynamic high school athlete were willing to forgo his college career and possibly struggle for a few seasons in the NBA while making millions of dollars before likely blossoming as a huge star, then it may be in *his* best interest to enter the league as soon as possible. This argument, however, overlooks the "value" of the college experience.[268] McCann argues "[w]hatever 'value' college may provide these players can, of course, be gained later in their lives, after they have made their millions."[269] This position completely ignores the fact that life as a college freshman at a "big time" basketball university is drastically different than a rookie season on a sub-par NBA team.[270] Therefore, while it is true that a young athlete would be a millionaire before many recent college graduates, one should not be so quick to shoot down the other aspects

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262 *Id.* at 115.

263 *Id.*

264 *Id.*

265 *Id.*

266 One critic of McCann's theory actually says, "[i]f an NBA team hypothetically wished to draft a 10-year old with the hopes of securing the next great basketball talent, there is no doubt that if the phenom lives up to his potential he will earn more money than another person his age that waits until he graduates high school before he is drafted." Wurth, *supra* note 230, at 133. This Note does not agree with another statement made by Wurth. In his article, Wurth states, "[t]he risk that a young player may ruin his life by forgoing college and declaring for the draft far outweighs the chance that a relative few young stars may make $50 million in their career when they otherwise may have made $70 million." *Id.* at 134. In this respect, this Note agrees with McCann when he states, "even if we consider [Koreleone] Young a 'failure,' bear in mind that at age 19, he earned $289,750 to play in the NBA, and over the past three seasons, has earned between $50,000 and $100,000 per year to live abroad and play . . . basketball . . . for eight months of the year." McCann, *supra* note 257, at 180. Thus, the risk of "ruining" a young players life is not substantial enough for that to be the single reason to have a higher eligibility requirement.

267 McCann, *supra* note 257, at 117-29 (discussion of the NBA rookie salary scale).

268 *Cf. Id.* at 175.

269 *Id.*

270 *See generally* Rick Reilly, *Missing Persons*, SPORTS ILLUSTRATED, Apr. 1, 2002, at 80.

that the college experience may provide.[271] Additionally, some of the players who fail after being drafted from high school may have lost their only chance at a high priced college education.[272]

Furthermore, McCann's statement that "for every Korleone Young, there are two or three Kevin Garnetts"[273] is arguably contradictory to the data in his article. McCann categorizes all twenty-two high school athletes who were drafted in the NBA from 1975-2001 as either a "superstar," "star," "serviceable," "fringe," "minor leaguer," or a "bust."[274] Of the twenty-two players, only four are given the grade "superstar," like Garnett, while seven players are given either a "minor leaguer" grade as Korleone Young, or even worse, a "bust."[275] Accordingly, if a player knows the road ahead of him and wishes to forgo the "value" of college basketball, then economically, it would make much more sense for him to make his millions. This Note does not agree, however, that it is in the best interests of the fans and the league itself.

B. From the Fans' and the League's Perspective

Entering the NBA may be economically advantageous for the high school athletes, but it is economically detrimental to both the NBA and its veteran players, and is not in the league's or the fans' best interest.[276] Because of this the league should have implemented a stricter eligibility requirement. A rule similar to the that of the NFL would have lead to better quality of play and a more exciting product, increased both the league's and the players' marketability, ensured players were mentally and physically more mature, and promoted a more respectable image. In McCann's article, he states that the NBA is better served by not prohibiting high school players from entering the NBA because "most high school players who have elected to declare for the NBA draft have done well, if not spectacularly."[277] To rebut the argument that the NBA is suffering from a drop in popularity, McCann states that "according to Commissioner David Stern, television ratings, attendance, merchandise sales, and gate receipts [in 2003–04] are all up from the 2002–03 season."[278] However, other numbers show that such a generalization is difficult to establish. For example, in 2003 other reports show that "the NBA's shift to a cable deal with

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271 "The mere fact that it is possible . . . that a player will earn more entering the league out of high school does not mean that the player necessarily should do so or that the league should refrain from allowing them to do so." Wurth, *supra* note 230, at 133; *see also infra* Part VI.B.

272 See McCann, *supra* note 257, at 156, for examples of two unsuccessful draftees.

273 *Id.* at 115.

274 *Id.* at 145.

275 *Id.* at 145-60.

276 *See* Melick, *supra* note 254.

277 McCann, *supra* note 257, at 178.

278 *Interview of Michael McCann with Aran Smith*, *supra* note 246.

ESPN/ABC replacing NBC as TNT's partner has resulted in a one-third decline in viewership to 3.5 million fans a night for the playoffs compared with 5.2 million [in 2002]."[279] Also, the ratings for Game One of the 2005 NBA Championship showed that just less than nine percent of the homes in the nation's largest television markets watched the game, down almost twenty five percent from the previous year.[280] While those numbers are subject to change depending on the teams involved in the games, the numbers that worry the NBA the most are the fact that merchandise sales were down forty–two percent for the 2004–05 season.[281]

As the system existed before the new eligibility requirement, the exceptional basketball players from high school entered the NBA, and the good/average high school players became college players. The quality and excitement of both games suffered.[282] The NBA has an obligation to market an exciting product, and by allowing younger players with raw, underdeveloped talent to enter the NBA, the league is in effect lowering its current skill level.[283] Presently, the NBA benches are not as deep as they have been in the past.[284] The benches are now filled with younger players that teams draft in hopes of developing as future superstars,[285] and these younger players have been publicly blamed for the decrease in the league's shooting percentage.[286] Playing competitive college basketball is where these young athletes learn essential basketball skills, not on the bench during the beginning of their NBA careers.[287] Normally, an NBA rookie does not receive much playing time during the season and is usually forced to develop during practice, but because practices are "short

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279 Rudy Martzke, *No Slowing Declining Ratings for NHL, NBA*, USA TODAY, June 4, 2003, at 2C.

280 Chris Isidore, *Star-Free Finals are Hurting the NBA*, CNN Money, http://money.cnn.com/2005/06/10/commentary/column_sportsbiz/sportsbiz/ (last visited Feb. 7, 2006).

281 *Id.*

282 In 2004, the ratings of the NCAA men's championship game of Connecticut versus Georgia Tech was the all-time low since the tournament went to prime time games in 1973. Rudy Martzke, *CBS Says NCAA a 'Success' Despite Ratings Dive for Final*, USA TODAY, Apr. 7, 2004, at 2C. Interesting to note however, even though this was lowest rated game in the NCAA's history, it was still more than Game One of 2005 NBA finals. *See* Isidore, *supra* note 280.

283 Kerr, *supra* note 12.

284 *Id.*

285 For example, in 2003 the Detroit Pistons selected Darko Milicic with the second pick in the draft. Milicic was only eighteen years old when drafted and only played 5.8 minutes per game during the first two years of his career. *Player Profile*, YAHOO SPORTS, http://sports.yahoo.com/nba/players/3705 (last visited Feb. 7, 2006). A look of the rest of the high school basketball players, with the exception of LeBron James and Amare Stoudamire, shows that they perform mediocre at best during their first two seasons in the league. *See* McCann, *supra* note 257, at 184.

286 Oates, *supra* note 253.

287 Kerr, *supra* note 12.

and relatively easy"[288] the players try to improve their skills by playing "2-on-2 with other substitutes."[289]

The owners and general managers take chances on players that are unproven, all in hopes of finding the next Kobe Bryant, Tracy McGrady, or Kevin Garnett.[290] This has caused teams to increase their scouting, and it occasionally proves to be ineffective.[291] While there is no way to ensure that requiring basketball players to be in college for three years before becoming eligible for the NBA means that all picks would prove efficient, some analysts feel the more time the athlete spends in college the more time the NBA scouts can evaluate their talent.[292] Also, in the cases where the player drafted out of high school is a bust, it costs the team several millions of dollars.[293] More time in college would allow the teams a better chance to evaluate potential players.[294]

Furthermore, it is evident that the NBA has taken steps in the past in attempt to keep its product exciting. Over the years, the league has introduced several changes to the game such as implementing the shot clock, changing its policy on defense, and instructing its referees to call games tighter.[295] These changes have been all in an attempt to increase scoring.[296] While it is hard to argue that the art of the mid-range jump shot has been lost, it is obvious that despite the NBA's efforts to increase scoring, the average number of points scored in an NBA game has drastically decreased throughout the years.[297] The three teams with the highest scoring averages in NBA history averaged nearly 125 points per game.[298] In the 2004-05 season, the Phoenix Suns were the highest scoring team in the NBA, but only averaged 110.4 points per game.[299] In the past eight years, the 2004-05 Suns were the only team in the NBA to average

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288 *Id.*

289 *Id.*

290 Mannix, *supra* note 13.

291 *See* Greg Sandoval, *High School Starts Rushing to the NBA*, WASH. POST, May 5, 2004, at D01 (stating "travel and labor costs have risen as NBA scouts are obliged to canvass the country for the top high school talent").

292 Chris Lawlor, *NBA Give Last Call to High Schoolers*, USA TODAY, June 29, 2005, at 9C (ESPN Analyst Jay Bilas stated, "I don't think they went far enough, meaning they should have made it 20 (years old) for business reasons. . . . Draft picks are valuable commodities and the more information you have on prospects, the better decision you're going to make.").

293 Ganderson, *supra* note 222, at 25.

294 *See Id.* at 3.

295 Pete Alfano, *NBA's Anemic Effort; Low Scoring Trend Has Hurt the Game*, MILWAUKEE JOURNAL SENTINEL, June 13, 2004, at 01C.

296 *Id.*

297 *Id.*

298 *NBA Regular Season Team Records*, *at* http://www.basketball.com/nba/records/NBAteamRegScore.shtml (last visited Feb. 7, 2006).

299 *NBA Sortable Stats*, *at* http://sports.yahoo.com/nba/stats/byteam? cat1=Total&cat2=team&sort=232&conference=NBA&year=season_2004 (last visited March 25, 2006).

more than 110 points per game.[300] Because some athletes did not play college basketball and entered the NBA directly from high school, their talent was unrefined and underdeveloped.[301] By agreeing to an eligibility requirement similar to that of the NFL, and forcing the physically talented high school athletes with raw basketball skills to develop those skills in college for more than one year, the NBA would increase its skill level, which would likely lead to more points per game and a better product for the fans.[302]

Another aspect of this argument is that professional sports are "win now" businesses.[303] And contrary to the NBA, NFL first round draft picks (with the exception of quarterbacks in some cases) usually make immediate impacts at the professional level.[304] Given the "win now" attitude in the NBA, it is difficult to say that coaches need to win immediately, but general managers admit that they are drafting underdeveloped players based on raw potential.[305] These two philosophies simply do not compliment one another.[306]

Besides the depreciation in the quality of skill at the NBA level, another reason the NBA should adopt an eligibility requirement like the NFL is because fans recognize star power.[307] Star power is what attracts viewers and fans to watch games and spend their money.[308] Star power is built when players are exposed to the average fan and begin to build a fan base because they become recognizable.[309] With the exception of LeBron James and Amare Stoudemire, most of the other outstanding high schoolers took several years to develop.[310] As a result, these players are spending their younger years on the bench, and while it is true that they are making millions of dollars, they are not contributing substantially to their team. The NBA would be better served from a marketing standpoint to have its fans recognize its players. With more teams, and the

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300 *Single Season Team Stats*, *at* http://www.basketballreference.com/leaders/teamseason-search.htm (last visited March 25, 2006).

301 Kerr, *supra* note 12; Mannix, *supra* note 13 ("The result is too many fundamentally challenged might-have beens rotting on NBA benches and otherwise bogging down the game.").

302 Kerr, *supra* note 12.

303 *See* Mark Maske and Leonard Shapiro, *The Formula for Success; Stability at Coach, Smart Spending, Luck are Essential to Building a Winner*, WASH. POST, Dec. 15, 2004, at D01; Associated Press, *Cavaliers Fire Silas in Midst of Playoff Push*, WASH. POST, March 22, 2005, at D05.

304 *See generally* Joe Menzer, *A Cold Draft: Panthers' Picks From 2005 Draft Show Little Sign Before Being Able to Contribute*, WINSTON-SALEM JOURNAL, Oct. 9, 2005, at C12.

305 Nance, *supra* note 254, at 1A.

306 K.C. Johnson, *Cartwright Faces "Dilemma"; Winning While Developing Kids a Difficult Task*, CHICAGO TRIBUNE, Dec. 6, 2002, at N3.

307 Isidore, *supra* note 280.

308 *Id.*

309 *See generally* SHERRI L. BURR & WILLIAM D. HENSLEE, ENTERTAINMENT LAW: CASES AND MATERIALS ON FILM, TELEVISION, AND, MUSIC 644 (Thomson West 2004) (explaining the importance of star power in the entertainment industry).

310 *See* McCann, *supra* note 257, at 225; Nance, *supra* note 254, at 1A.

growth of foreign and high school players, the *average* NBA fan does not know the majority of players in the league.[311] Based on the principle of "mere exposure" developed by Psychologist Robert Zajonc in 1968, several studies have shown that "the mere repeated exposure to an object suffices to increase one's liking for it."[312] Therefore, by giving the average fan more time to become familiar with a player during his college years, that player (and the NBA) would develop more of a fan base.[313] Because of the "mere exposure" concept, the publicity that players would have on television, in the newspapers, and magazines would increase the fans' liking of those players and consequently, the teams and the league for which they play. In addition to the "mere exposure" concept, the players, teams, and the league would also gain the support of players' college's alumni.[314] While in college, students and alumni follow their players to the professional level. This gives athletes who go to college for three or four years much more of an initial fan base.[315] For these reasons, an eligibility requirement like the NFL's, would give the NBA and the media the opportunity to use college basketball as a tool to expose players to the average fan, and thus allow players to develop public recognition before entering the NBA, consequently improving both the league's and players' marketability.

In addition to these two reasons, the NBA's eligibility requirement is only a step in the right direction because the NBA has a responsibility to ensure that its players are mentally and physically able to handle life in the league. Another point made in McCann's article is that by excluding high school players and college underclassman from the NBA draft, the NBA would be acting blatantly paternalistic.[316] But the NBA is a business, and it must look out for its business interests, and that includes ensuring that its incoming rookies are prepared, both mentally and physically. Not only are these eighteen and nineteen

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311 Ryan Clark, *Americans Brace for Foreign Invasion*, WASH. POST, June 21, 2003, at D01 (discussing "the draft of anonymity," with the average fan able to name only the players all but guaranteed to be the first three picks).

312 ZIVA KUNDA, SOCIAL COGNITION: MAKING SENSE OF PEOPLE 283 (MIT Press 2001) (citing Robert Zajonc, *Attitudinal Effects of Mere Exposure*, 9 JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY MONOGRAPHS, 9, 1-27 (1968)).

313 This Note would hate to play the role of a "homer," but this theory is demonstrated by what transpired with the West Virginia University men's basketball team in the 2005 NCAA Tournament, especially junior power forward Kevin Pittsnogle. "[A]fter the NCAA tournament . . . people knew me." Dan Wetzel, *What's in a Name?*, YAHOO! SPORTS, https://sports.yahoo.com /ncaab/news?slug=dw-rt_05_day4_wal&prov =yhoo&type=lgns (last visited Feb. 9, 2006). The exposure and popularity of the NCAA tournament is an excellent opportunity for players to advertise their skills, in order to develop that important star power.

314 *See* CNN Morning News, http://transcripts.cnn.com/TRANSCRIPTS/0601/07/smn.01.html (last visited Feb. 9, 2006).

315 For example, the University of Texas and Vince Young have about 400,000 alumni. *Texas' Title Has Registers Bleeding Orange, at* http://www.sportspageweekly.com/article/articles/72/1/Texas%92-title-has-registers-bleeding-orange.

316 McCann, *supra* note 257, at 178.

year old athletes expected to compete against future hall of fame players at a young age on the court, but also they are expected to act like adults off the court, when in fact they are far from being adults. Kwame Brown is an excellent example of a young high school player who was faced with difficulties on and off the court.[317] Brown was selected with the number one pick of the 2002 draft by Michael Jordan and the Washington Wizards.[318] His raw potential was undeniable, he was six foot eleven inches, lightning quick, and was well built.[319] But he was only nineteen years old, and had no idea what life was like in the NBA.[320] There are stories of Brown eating Popeye's fried chicken for breakfast, lunch, and dinner because he did not know how to shop for groceries.[321]

As discussed above, older players in the NBA have cited incidents of immaturity by younger players, on and off the court, as their reason for hoping to see an age limitation.[322] These NBA players are faced with challenging decisions and situations at a young age.[323] The young athletes are given enormous amounts of money, scrutinized by the media, exposed to tremendous amounts of pressure, but are expected to act like adults. Very rarely will high school players be expected to deal with these types of experiences. Therefore, the NFL's eligibility requirement is designed to help college players become exposed to tremendous amounts of pressure, play in front of large audiences, and also assist in the transition from high school to college. And although college players are faced with similar problems, they enjoy more resources to help them adjust to this type of environment and prepare them for life on their own.[324] It may be downright paternalistic, but when given the opportunity to have its future players groomed for life as a professional basketball player, the NBA should have fought for a stricter eligibility requirement.[325] The NBA has a legitimate inter-

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317 Sally Jenkins, *Growing Pains*, WASH. POST, Apr. 21, 2002, at W20.

318 *Id.*

319 *Id.*

320 *Id.*

321 *Id.*

322 Povtak, *supra* note 15.

323 Bill Frakes, *What Would You Do*?, SPORTS ILLUSTRATED, Jan. 31, 2005, at 56.

324 *See, e.g.*, National Collegiate Athletic Association, www.ncaa.org (last visited Feb. 9, 2006). *See also* West Virginia University Athletics Student Services, http://www.wvu.edu/~sports/services/ (last visited Feb. 9, 2006).

325 One can argue that the NBA's developmental league allows players to be groomed before entering the league and earn money. The developmental league allows players drafted immediately out of high school to play for a minor league team. This system would be very similar to what is in place in Major League Baseball. In baseball, it is common for high school athletes to be drafted straight out of high school and play several seasons in the minor leagues. The National Basketball Development League would likely expand from the current number of teams, six, to approximately fifteen, then each NBDL team would serve as a farm club for two NBA teams. Kerr, *supra* note 12; *see also* Official Site of the National Basketball Developmental League, http://www.nba.com/nbdl/ (last visited Feb. 9, 2006). This may not be as successful as Major League Baseball has been because the scenario in basketball is extremely different. As opposed to

est in making sure these young players are more mature when they come into the league.

Finally, another reason the league wanted an eligibility requirement is because the NBA has an interest in looking out for the best interests of its league: not only by offering an exciting product, but also by promoting a respectable image.[326] Commissioner Stern voiced his opinion on an eligibility requirement because he does not want to be a part of a league that is sending its scouts (or even worse–agents) to tenth and eleventh grade high school games.[327] However, because of the extensive scouting that needs to be done, one year in college will not supply NBA scouts with the information needed to make such an important decision. Therefore, Stern's concern may be addressed slightly, but scouts and agents will still be at high school games. An eligibility requirement similar to the NFL's would allow scouts (and agents) enough time to evaluate a player while in college and not in high school.

VII. CONCLUSION

One can only imagine what professional basketball would have been like for the past thirty-five years had the Supreme Court not allowed Spencer Haywood to enter the NBA in 1971.[328] Now one can only imagine what the NFL would have become had the Second Circuit allowed Maurice Clarett to play professional football in 2004. Whatever the results may have been, the NFL is currently enjoying enormous success.[329] This success has proven to benefit the league, its players, and the fans. Following the 2004–05 NBA season, the NBA realized that it needed to improve its product in order to share similar success to that of the NFL. In an effort to do so, the NBA changed its eligibility requirement to no longer allow high school players to enter the draft. Even though the NBA did increase its eligibility requirement, it was not enough

college baseball, there is vast media attention and popularity that accompanies college basketball, and if young players were required to play in the developmental league before reaching the star status of the NBA, it would be foreseeable that athletes would opt for college because of the extensive media exposure as compared to a developmental league forum. College basketball players are seen on national television, while NBDL players play on small stages such as Huntsville, Alabama and Asheville, North Carolina. *See* McCann, *supra* note 257, at 189. "CBS will pay the NCAA an average of $564 million per year (or $6 billion total) to broadcast 'March Madness,' the NCAA's marquee college basketball tournament." *Id.* at 189-90.

326 Chris Tomasson, *Stern Keeps Eyes Fixed on Future of the NBA*, ROCKY MOUNTAIN NEWS, Feb. 11, 2005, at 7C. According to Sports Illustrated columnist Jack McCallum, at a gathering of seventy-five high school basketball players, he asked the question "How many of you like the NBA better than you like college basketball?" According to McCallum, one individual raised his hand. The reasons given were "NBA players don't try as hard as the college players, NBA game is too slow and boring, I don't like the players all that much anymore." This is not the type of image Commissioner Stern wishes to portray. McCallum, *supra* note 243.

327 Alesia, *supra* note 259, at 1D.

328 *See supra* notes 1-11 and accompanying text.

329 *See supra* note 239.

to make a significant difference in the league's product. The NBA has a substantial interest in promoting an exciting high-quality product. Therefore, while the NBA's new eligibility requirement that prohibits high school players from entering the NBA draft is a step in the right direction, the NBA should have implemented an eligibility requirement similar to that of the NFL. A one-year out of high school requirement will simply not make a meaningful difference.[330] The reasons the NBA should have mirrored its eligibility requirement after the NFL's rule are because such a rule would lead to better quality of play, an increase in the players' and the league's marketability, players that are mentally and physically more mature, and the promotion of a more respectable image.

Because of this change, it may only be a matter of time before a high school player is declared ineligible to play college basketball and, instead of playing in the NBDL, attempts to sue the NBA for entrance into the league's draft. Even though courts have articulated different tests to interpret applicable antitrust law, a high school athlete who attempts to challenge the NBA's eligibility requirement, would likely lose the suit because the NBA learned from *Clarett* and included its eligibility requirement into its CBA and would thus pass both the Second and Eighth Circuit's tests. The only real issue for the court to determine is whether or not an eligibility requirement is a mandatory subject of collective bargaining. Thus, if a district court agrees with the district court in *Clarett* and several other academics who felt the Second Circuit was incorrect, and finds for the high school player, the Supreme Court may have to resolve such an issue. If such a case does reach the Supreme Court, the Court would likely rule that federal labor policy demands the nonstatutory exemption apply,[331] and the Court could shed some light on the various questions regarding the nonstatutory exemption as it applies to sports eligibility requirements.

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330 Stephen Cannella, *Cleaning House*, SPORTS ILLUSTRATED, July 11, 2005, at 28.

331 *See supra* Part V.

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