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## The Maurice Clarett Story: A Justice System Failure

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## Articles

### **The Maurice Clarett Story: A Justice System Failure**

**Alan C. Milstein\***

The Maurice Clarett (“Clarett”) story is emblematic of what is wrong with the National Collegiate Athletic Association’s (“NCAA”) arbitrary and unjust enforcement process. It demonstrates how a life that held such promise was laid to waste by the NCAA’s unholy alliance with the National Football League (“NFL”)—a league that keeps young men toiling at grave risk and for no pay in a plantation system known as college football. It is also a personal story about a case that should have been won, but whose loss keeps getting me invited to symposiums like this. To quote Bob Dylan: “[T]here is no success like failure, and that failure is no success at all.”<sup>1</sup>

Maurice Clarett was born in Youngstown, Ohio, where he attended Warren G. Harding High School. Raised by his single

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1. BOB DYLAN, *Love Minus Zero/No Limit*, on BRINGING IT ALL BACK HOME (Columbia Records 1965).

mother, Clarett and his older brother faced tough times in a tough neighborhood. When his older brother ended up with a lengthy prison term, Clarett was determined to live a different life. His way out was based on his ability to do one thing remarkably well: carry an odd shaped ball at blazing speed around, and sometimes through, others trying to stop him.

While in high school, Clarett became a nationally known football player, receiving many accolades, including being named the *USA Today* Offensive Player of the Year as a senior and chosen as “Mr. Football” by the *Associated Press*.<sup>2</sup> Clarett graduated high school on December 11, 2001, two-thirds of the way through the 2001 NFL season. Subsequently, he enrolled in classes at Ohio State University in January 2002 in order to attend spring football practice.<sup>3</sup> He seemed destined for greatness.<sup>4</sup>

On August 24, 2002, Clarett became the first true-freshman tailback to start a football game for the Buckeyes since 1943.<sup>5</sup> Ohio State beat Texas Tech that day by a score of forty-five to twenty-one, and Clarett rushed for 175 yards and scored three touchdowns.<sup>6</sup> Texas Tech’s free safety Ryan Aycock commented on a particular play: “He might have been 18 but he knew what he was doing . . . That’s when you knew he’d be great. Not many guys his age have the heart to keep fighting once they’re stopped.”<sup>7</sup>

With Clarett leading the way, Ohio State achieved rousing success during the 2002-2003 college football season. Clarett rushed for an Ohio State freshman record of 1,237 yards and scored eighteen touchdowns, despite missing two games with

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2. See Craig Smith, *Ohio State back makes big splash*, SEATTLE TIMES (Sept. 12, 2002), <http://community.seattletimes.nwsourc.com/archive/?date=20020912&slug=coug12>.

3. See Billy Witz, *Battle for the Ages Ensues in NFL*, DAILY NEWS (Dec. 14, 2003), available at <http://www.highbeam.com/doc/1P2-9034215.html>.

4. See Michael A. McCann, *Justice Sotomayor and the Relationship between Leagues and Players: Insights and Implications*, 42 CONN. L. REV. 901, 910–12 (2010).

5. See *Road to the Title*, CLEVELAND PLAIN DEALER, Jan. 5, 2003, at S2, available at 2003 WLNR 524692.

6. See *id.*

7. Luke Cyphers, *Call Waiting*, ESPN INSIDER (Sept. 19, 2003, 11:35 PM), <http://insider.espn.go.com/insider/story?id=1619403>.

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injuries.<sup>8</sup> Ohio State went undefeated during the regular season—winning thirteen straight games—and awaited a date in Arizona with the vaunted Miami Hurricanes to compete for the national title.<sup>9</sup>

Just prior to the Fiesta Bowl, however, Clarett's roots resurfaced when a close friend died in a gang related shooting.<sup>10</sup> Clarett told Coach Jim Tressel ("Tressel") that he needed to attend the funeral. The school's Athletic Director, Andy Geiger ("Geiger"), assured Clarett and his mother that the University would fly him back to Youngstown after a week of practice in Arizona.<sup>11</sup> However, when it came time for the sad trip home, the Buckeyes reneged, telling Clarett that he had failed to complete the proper paperwork.<sup>12</sup> Clarett publicly expressed his outrage at a news conference, essentially labeling Geiger a liar and uttering words that, to the Buckeye faithful, was surely sacrilege: "I guess football is more important than a person's life to them."<sup>13</sup>

Ohio State defeated the University of Miami in the Fiesta Bowl and won the national championship, its first title in thirty-four years.<sup>14</sup> Though not named the game's MVP, Clarett scored the winning touchdown and made a game saving defensive play, forcing a fumble following an interception that almost sealed the win for the Hurricanes.<sup>15</sup>

Back at school for the spring semester, Clarett enrolled in Paulette Pierce's African American History course. Professor Pierce had heard the stories of Buckeye football players being

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8. See Liz Clarke, *Buckeyes put Clarett on Hold; Running Back Won't be Allowed to Practice*, WASH. POST (Sept. 3, 2003), available at <http://www.highbeam.com/doc/1P2-280646.html>.

9. See *id.*

10. See Associated Press, *Clarett angered at decision forcing him to miss funeral*, CBS SPORTS (Dec. 30, 2002) [hereinafter *Clarett Funeral Cover*], available at <http://www.freerepublic.com/focus/news/814334/posts?page=62>.

11. See *id.*

12. See William C. Rhoden, *Paying the Price While Coaches Cash In*, N.Y. TIMES (Jan. 9, 2007), <http://www.nytimes.com/2007/01/09/sports/ncaa-football/09rhoden.html>.

13. *Clarett Funeral Cover*, *supra* note 10; see also McCann, *supra* note 4, at 910.

14. See *National Champions*, MICHIGAN VS. OHIO STATE, [http://library.osu.edu/projects/OSUvsMichigan/national\\_titles.html](http://library.osu.edu/projects/OSUvsMichigan/national_titles.html) (last visited Dec. 29, 2014).

15. See Bruce Hooley, *Dot the "i" in Title*, CLEVELAND PLAIN DEALER, Jan. 4, 2003, at D1, available at 2003 WLNR 523982.

given tutors who would write papers for the players and feed them answers to exams, and she would have none of it. She told the freshman she wanted him in her office early every Monday morning to discuss his assignments and would proceed to give him an oral final exam. According to Clarett, she was the only professor at Ohio State who cared about his academics, not his touchdowns.

No one quite knows the exact source, but someone at Ohio State contacted the *New York Times* that summer and told a tale of how Maurice Clarett received special treatment in Professor Pierce's class.<sup>16</sup> On July 12, 2003, Mike Freeman, a sportswriter for the *Times* who later resigned because of discrepancies in his curriculum vitae, published a multi-column article that exposed, in his perception, outrageous academic corruption.<sup>17</sup> Always vigilant, the NCAA's enforcement arm sprung into action.

In August, Clarett was summoned to Geiger's office where, without notice, counsel, or even a parent, he was questioned for more than an hour by an NCAA enforcement officer. The subject of favorable treatment in the classroom was soon dismissed. What really interested the NCAA was how Clarett, a poor kid from Youngstown, could drive around in a new SUV. Clarett had received the vehicle on loan from a local car dealer who was friendly with Tressel, a fact Clarett would not reveal out of loyalty to his coach. When the NCAA demanded a second interview, a friend of Clarett called and asked if I could help. I showed up at Geiger's office with Clarett's mother and Hall of Famer Jim Brown, a hero in Ohio and Clarett's mentor. For most of the session, the three of us were locked out of the "proceedings" as Clarett was again drilled for more than an hour. When they finally let us in, we were not allowed to participate, resulting in Brown uttering the quintessential legal argument: "This is bullshit!"

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16. See Mike Freeman, *When Values Collide: Clarett Got Unusual Aid in Ohio State Class*, N.Y. TIMES (July 13, 2003), <http://www.nytimes.com/2003/07/13/sports/colleges-when-values-collide-clarett-got-unusual-aid-in-ohio-state-class.html>.

17. See *id.* Freeman resigned from the *New York Times* after acknowledging that he did not graduate from the University of Delaware, as he had previously claimed. See Howard Kurtz, *Puffed-up Resume Costs Sportswriter a New Job*, WASH. POST (Jan. 10, 2004), available at <http://www.highbeam.com/doc/1P2-148948.html>.

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An often-misunderstood quirk in NCAA enforcement actions is that the NCAA has no jurisdiction over and cannot sanction players.<sup>18</sup> Its authority is limited to the schools within the NCAA.<sup>19</sup> However, if the school fails to sanction the offending player, the NCAA will sanction the school.<sup>20</sup> The result is a system that leaves the player with limited appeal rights since the investigative body takes no action. For Clarett, this meant that Geiger, the man he had called a liar, was judge and jury with the added incentive to throw Clarett under the bus to save his multi-million dollar football operation. On September 9, 2003, Geiger announced at a press conference that Clarett was suspended for at least the upcoming season, and perhaps indefinitely, for not being candid with the NCAA and receiving property worth over \$20,000.00.<sup>21</sup> No report by the NCAA was ever presented to Clarett. There were no findings of fact, and there was no forum to which he could lodge an appeal. No sanctions were leveled against the University.

With no ability to play collegiate football, Clarett had little choice but to attempt to gain early access into the NFL. Through channels, we had heard that if Clarett entered the draft, the Dallas Cowboys would take him in the first round. The problem was that NFL teams had conspired to agree that no player in Clarett's college class would be eligible for the draft. Interestingly enough, Michigan State law professor Robert McCormack had just recently published an Op-Ed piece in the *New York Times* declaring the NFL's age eligibility rule to be in violation of antitrust laws.<sup>22</sup> With my close friend Dan Allanoff, an antitrust expert, we drafted the Complaint using Professor McCormack's article as a guide. I wrote the NFL and asked if they wanted to discuss the matter before we filed suit.

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18. See generally Maureen A. Weston, *NCAA Sanctions: Assigning Blame Where it Belongs*, 52 B.C.L. REV. 551 (2011).

19. See generally *id.*

20. See generally *id.*

21. See Stephen A. Smith, *Hypocrisy rules in Columbus: Ohio State destroys the promising future of its star running back*, PHILA. INQUIRER (Sept. 14, 2003), available at 2003 WLNR 14784315.

22. See Robert A. McCormick, *Open Letter to Maurice Clarett: Why You May Turn Professional Now*, N.Y. TIMES (Aug. 17, 2003), <http://www.nytimes.com/2003/08/17/sports/backtalk-open-letter-to-maurice-clarett-why-you-may-turn-professional-now.html>.

On Monday, September 22, 2003, Clarett's mother and I met with the NFL's counsel to discuss Clarett's participation in the April 2004 player draft, which I argued would be held after three NFL seasons had "elapsed" since Clarett's high school graduation.<sup>23</sup> The NFL representatives responded that the rule required three years to pass after the player's class, as opposed to the player, graduated from high school. While the precise language of the rule was not a matter of public record, the league denied Clarett's request to enter the draft in order to preserve its rule. We filed suit in federal district court in Manhattan the next day. Two days later, Mike Freeman of the *Times* wrote a profile of me, titled *Clarett's Lawyer Sees Abuse of Power by Pro Football*.<sup>24</sup> He neglected to recognize that I informed him that he had been used by Ohio State to malign Clarett in his prior academic piece.

The case was assigned to Judge Shira Scheindlin, a Bill Clinton nominee. While we had not asked for immediate injunctive relief, and the Complaint had still not been formally served, I received a call from the Judge's clerk within three days of filing, summoning counsel to New York for a pretrial conference. The Judge advised that the case was ripe for summary judgment and issued an expedited schedule with our briefs due at the end of October. When the briefing was completed, and as we waited for a decision, Mike Freeman surfaced yet again, this time with a profile of Judge Scheindlin, titled *Judge in Clarett Case will Get an NFL Education*.<sup>25</sup> He quoted the Judge as saying: "I don't think I have ever watched a football game . . . maybe one half of one Super Bowl. Does that count?"<sup>26</sup> Needless to say, the case was taking on a life of its own.

Standing in the way of a successful challenge to the rule was a legal concept known as the "non-statutory labor exemption." Under *Mackey v. National Football League*, later endorsed in

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23. The first season, which had begun when Clarett started his senior year, ended on February 4, 2002, fifty-five days after Clarett's graduation; the other two seasons were played out in full.

24. Mike Freeman, *The Case for Clarett*, N.Y. TIMES (Sep. 25, 2003), <http://www.nytimes.com/2003/09/25/sports/football/25milstein.html>.

25. Mike Freeman, *Judge in Clarett Case Will Get N.F.L. Education*, N.Y. TIMES (Dec. 11, 2003), <http://www.nytimes.com/2003/12/11/sports/football-judge-in-clarett-case-will-get-nfl-education.html>.

26. *Id.* (quoting Judge Shira A. Scheindlin, U.S. Dist. Ct. for the S. Dist. of N.Y.) (internal quotation marks omitted).

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*McCourt v. California Sports, Inc.*,<sup>27</sup> this exemption for unlawful restraints would shelter an anticompetitive labor-management agreement only if each of the following elements were met: (1) the agreement is the product of bona fide arm's-length bargaining; (2) the agreement concerns a mandatory subject of collective bargaining; and (3) the restraint on trade affects only the parties to the collective bargaining relationship.<sup>28</sup>

Clarett would prevail if the rule failed to satisfy any one prong but, as the facts would demonstrate, the rule failed all three: it was not bargained for; did not concern wages, hours, or terms and conditions of employment; and primarily affected those outside the bargaining unit, like Clarett.

The NFL enjoys a monopoly over professional football. The league began operating in 1920 as the American Professional Football Association, an unincorporated association comprised of member clubs, which owned and operated professional football teams.<sup>29</sup> Presently, the NFL is comprised of thirty-two separately incorporated clubs in cities throughout the United States.<sup>30</sup> Representatives from each of the clubs form the NFL Management Committee, which performs various administrative functions such as organizing and scheduling games and promulgating rules.<sup>31</sup> The clubs appoint a commissioner who is responsible for the day-to-day operations of the NFL.<sup>32</sup>

At issue in this case was the NFL's concerted refusal to allow a player to sign with an NFL team or be eligible for the draft unless three NFL seasons had elapsed since that player's high school graduation.<sup>33</sup> The rule appeared in the Constitution and Bylaws of the NFL, a document drafted and approved only by the NFL member teams.<sup>34</sup> Section 12.1(E) of the Bylaws provided, "for college football players seeking special eligibility, at least *three NFL seasons* must have elapsed since the player was

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27. 600 F.2d 1193 (6th Cir. 1979).

28. 543 F.2d 606, 614 (8th Cir. 1976).

29. See Michael A. McCann, *American Needle v. NFL: An Opportunity to Reshape Sports Law*, 119 YALE L. J. 726, 730 (2010).

30. See *id.*

31. See *id.*

32. See *id.*

33. See *Clarett v. NFL*, 369 F.3d 124, 125 (2d Cir. 2004).

34. See *id.* at 127–28.

graduated from high school.”<sup>35</sup>

The rule had been in existence for fifty years, although it originally required the player to either complete four years of college, or have five NFL seasons elapse since his high school graduation.<sup>36</sup> The NFL announced a different version of the rule to the public in a press release dated February 16, 1990.<sup>37</sup> The NFL also issued a memorandum to Club Presidents, General Managers, and Head Coaches, which stated that “[a]pplications for special eligibility for the 1990 draft will be accepted only from college players as to whom *three full college seasons* have elapsed since their high school graduations.”<sup>38</sup> The rule as stated in the Bylaws, however, referenced “NFL seasons,” not “college seasons” and did not include the word “full.”<sup>39</sup> In 1997, Greg Aiello, director of communications for the NFL, expressed yet another version of the rule: “The rule is this: to be eligible for the NFL, a player has to have been out of high school for three years.”<sup>40</sup>

In addition, the NFL had not enforced the rule in a consistent manner. In 1964, for example, Andy Livingston, a nineteen-year-old running back, signed a contract with the Chicago Bears after only one season of junior college football.<sup>41</sup> In 1988, when there was a four-year requirement, the NFL allowed Craig “Ironhead” Heyward into the draft even though he had not yet graduated

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35. See Tom Farrey, *Clarett to use NFL rule against league*, ESPN (Dec. 13, 2003, 12:12 PM), <http://sports.espn.go.com/nfl/news/story?id=1684775> (quoting NFL BYLAW § 12.1(E)) (internal quotation marks omitted). The NFL provided a copy of this document in response to Clarett’s initial Request to Produce, see Memorandum from NFL, *available at* <http://www.sskrplaw.com/files/clarettreply.pdf> (emphasis added).

36. See *Clarett*, 369 F.3d at 126.

37. See *id.* at 126, 128.

38. *Id.* at 128 (emphasis added) (internal quotation marks omitted).

39. Another memorandum dated October 1992 and issued to Club Owners, Presidents, and General Managers indicates that the Rule was revised to reflect the change from the four-year requirement to the current requirement of “three NFL seasons” in October 1992. See *id.* at 127 n.7.

40. Plaintiff Maurice Clarett’s Memorandum of Law in Support of His Motion for Summary Judgment at 6, *Clarett v. NFL*, 306 F. Supp. 2d 379 (No. 03 Civ. 7441(SAS)), 2003 WL 26053422 [hereinafter *Clarett’s Mot. Summ. J.*] (citing Tim May, *Two Years and Out?*, COLUMBUS DISPATCH, May 4, 1997).

41. See William C. Rhoden, *In 1964, a Teenager Showed He Could Play*, N.Y. TIMES (Dec. 14, 2003), <http://www.nytimes.com/2003/12/14/sports/sports-of-the-times-in-1964-a-teenager-showed-he-could-play.html>.

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from college.<sup>42</sup> In 1989, again when there was a four-year requirement, the NFL allowed Barry Sanders into the draft after he suggested he would challenge the rule, although he was a true-junior with only three NFL seasons having elapsed since his high school graduation.<sup>43</sup> In 1991, the Arizona Cardinals selected Eric Swann as the sixth pick of the first round of the draft.<sup>44</sup> Swann had never played college football and, at the time, only two NFL seasons had elapsed since his high school graduation.<sup>45</sup>

Although the rule had been in effect since at least 1953, it was not until 1968 that the NFL recognized the National Football League Players Association (“NFLPA”) as the players’ collective bargaining representative.<sup>46</sup> 1968 was also the year of the first Collective Bargaining Agreement (“CBA”) negotiated between the NFL and its players.<sup>47</sup> Nowhere in that first agreement did the rule appear. The CBA came into effect in 2003, which had been extended three times, was negotiated in 1993, and did not expire until the 2007 season.<sup>48</sup> This agreement was comprised of 292 pages, sixty-one articles, appendices A through N, and 357 sections; but, like its predecessors, it did not contain the rule.<sup>49</sup> Moreover, in Article III, Section I, titled “Scope of Agreement,” the

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42. See New Pittsburgh Courier Editorial Staff, *Steelers take Ironhead’s son in first round*, NEW PITTSBURGH COURIER (May 4, 2011), <http://newpittsburghcourieronline.com/2011/05/04/steelers-take-ironheads-son-in-first-round/>.

43. See Time Wire Services, *Barry Sanders Admitted to NFL Draft*, L.A. TIMES (Apr. 4, 1989), [http://articles.latimes.com/1989-04-04/sports/sp-1132\\_1\\_barry-sanders](http://articles.latimes.com/1989-04-04/sports/sp-1132_1_barry-sanders).

44. See Jess Root, *Arizona Cardinals Top 10 Draft Successes: No. 3, Anquan Boldin*, SB NATION: REVENGE OF THE BIRDS (Apr. 21, 2011, 10:47 AM), <http://www.revengeofthebirds.com/2011/4/21/2125117/arizona-cardinals-top-10-draft-successes-no-7-eric-swann>.

45. See Jeff Legwold, *College Not Required to Make Grade in the NFL*, ROCKY MOUNTAIN NEWS (Sept. 24, 2004), available at <http://www.highbeam.com/doc/1G1-122568371.html>. Other NFL players never played football in college, including Michael Lewis, Antonio Gates, Clinton Hart, Gene “Big Daddy” Lipscomb, Otis Sistrunk, and Cookie Gilchrist. See *id.*

46. See Jarrett Bell, *Timeline of NFL Labor Disputes*, USA TODAY (Mar. 12, 2011, 12:36 AM), [http://usatoday30.usatoday.com/sports/football/nfl/2011-03-03-nfl-labor-disputes-timeline\\_N.htm](http://usatoday30.usatoday.com/sports/football/nfl/2011-03-03-nfl-labor-disputes-timeline_N.htm).

47. See *id.*

48. See *id.*

49. See generally Michael A. McCann & Joseph S. Rosen, *Legality of Age Restrictions in the NBA and NFL*, 56 CASE W. RES. L. REV. 731 (2006).

CBA contained an integration clause, stating: “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 this Agreement without mutual consent.”<sup>50</sup> Plainly then, the CBA between the NFL and the NFLPA did not contain, and has never contained, the rule.<sup>51</sup>

The “NFL suggested at the scheduling conference that the NFLPA had nevertheless expressly agreed to the Rule by virtue of ‘a side letter.’”<sup>52</sup> When asked “to produce this document in discovery, the NFL delivered a letter dated May 6, 1993, written by its counsel and addressed to counsel for the NFLPA.”<sup>53</sup> That letter, which attached the Bylaws containing the rule, states that “the attached documents are the presently existing provisions of the Constitution and Bylaws of the NFL referenced in Article IV, Section 2, of the Collective Bargaining Agreement.”<sup>54</sup> The referenced CBA Article was entitled “No Suit” and provides simply that “neither [the NFLPA] nor any of its members will sue [the NFL] . . . relating to the presently existing provisions of the . . . Bylaws.”<sup>55</sup> There was no reference to the rule in either the letter or the Article.

Thus, rather than demonstrating that the rule was somehow expressly bargained over, the so-called “side letter” merely provided a copy of the Bylaws as to which the NFLPA had agreed that neither it nor any of its members would bring suit. Obviously, Clarett was not a member of the NFLPA, nor was he represented by that labor organization.

At the time, the NFL was the only major sports organization that prohibited players from entering its draft until a prescribed period after high school graduation. The National Basketball

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50. *Clarett v. NFL*, 369 F.3d 124, 127 (2d Cir. 2004) (citing NFL Collective Bargaining Agreement art. III, § 1 [hereinafter NFL CBA]).

51. Probably as a result of the *Clarett* litigation, the current CBA contains the rule. See NFL CBA art. VI (Aug. 4, 2011), available at <http://nflabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf>.

52. *Clarett's Mot. Summ. J.*, *supra* note 40, at 7.

53. *Id.*

54. *Clarett*, 369 F.3d at 128 (quoting Letter from NFL, to NFLPA (May 6, 1996)) (internal quotation marks omitted).

55. *Id.* (first alteration in original) (quoting NFL CBA art. IV, § 2) (internal quotation marks omitted).

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Association, Major League Baseball, and the National Hockey League had no such restrictions.<sup>56</sup> By virtue of the rule, the NFL member teams agreed with one another not to hire players until three NFL seasons had elapsed since the players graduated from high school. Because of the NFL teams' concerted refusal to deal with this segment of the talent pool, these players were absolutely and unreasonably restricted from competing for positions in the league and were unlawfully delayed or prevented from earning a livelihood in their chosen profession.

By forcing prospective players to wait until three NFL seasons had elapsed before becoming eligible for its draft, the NFL was able to maintain a free and efficient "farm" system for developing players. College football acts, in effect, as a minor league, for which the NFL incurs no expenses. While Major League Baseball teams each spend an average of nine million dollars annually for the minor league system, the NFL teams spend virtually nothing on a player development system.<sup>57</sup> Instead, the only such costs incurred by NFL teams are for their scouts, to whom the NCAA grants easy and ready access. Under the current system, NFL teams take no financial risks of investing in players while they are in college. Indeed, if a player suffers an injury while in the NCAA, or does not develop as expected, which reduces his value or renders him unable to play professionally, the NFL teams lose nothing. The NCAA is a willing partner in this cozy arrangement as college football generates millions of dollars for the schools without their having to incur the expense of player salaries. Players who are otherwise able to compete with the best in their profession must bide their time on the farm working for nothing.

For extremely talented players, like Maurice Clarett, who were otherwise able to compete for a position at the professional level, there were no comparable options. Not only were members of this segment of the talent pool arbitrarily foreclosed from playing their trade for three seasons, they were also prevented during that time from enjoying the opportunity to reap other financial rewards attendant upon becoming a professional athlete,

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56. See McCann, *supra* note 4, at 911.

57. See ANDREW ZIMBALIST, UNPAID PROFESSIONALS: COMMERCIALISM AND CONFLICT IN BIG-TIME COLLEGE SPORTS 197 (1999).

such as endorsements, appearance income, and other business opportunities. As one respected sports economist estimated, valuing the cost of tuition and board and dividing it by the estimated number of hours dedicated to the sport, the median hourly wage for a college football athlete is just \$7.69.<sup>58</sup> Moreover, if these players suffer career-ending injury while playing at the college level, their opportunity for financial rewards in football would be forever lost.

Clarett's predicament was even more dire than that of the typical college player. He was suspended from playing college football for his entire sophomore season and perhaps beyond because of alleged NCAA violations. Moreover, Clarett had no guarantee that the suspension would not carry into his junior season. Thus, Clarett could not play either as an amateur in the NCAA or as a professional in the NFL. He was a football player without a game.

Clarett, who was six-feet tall and weighed 230 pounds, would have been about eight weeks shy of his twenty-first birthday at the start of the 2004 NFL season. When the 2000 NFL season began, five players were twenty-one years old.<sup>59</sup> During the 2001 NFL season, seven NFL players were twenty-one years old.<sup>60</sup> At the start of the 2002 NFL season, eight NFL players were twenty-years old.<sup>61</sup> Clinton Portis, the great running back with the Denver Broncos, turned twenty-one at the start of the 2002 NFL season.<sup>62</sup>

The supposed purpose of the rule was to protect players who

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58. See Patrick K. Thornton, *Sports Law* 162 (2011).

59. Players who were 21 during the 2000 NFL season include Jacoby Sheppard (birthday August 31, 1979), Jamal Lewis (birthday August 26, 1979), Dez White (birthday August 23, 1979), Kwame Cavil (birthday May 3, 1979), and Deon Grant (birthday March 14, 1979). See generally NFL.com (last visited Dec. 31, 2014); SI.com (last visited Dec. 31, 2014).

60. Specifically, Hakim Akbar, Kendrell Bell, Michael Vick, Koren Robinson, Todd Heap, Dennis Norman, and Brandon Manumaleuna. See generally NFL.com (last visited Dec. 31, 2014); SI.com (last visited Dec. 31, 2014).

61. Tonia Fonoti, Trev Faulk, Albert Haynesworth, Saleem Rasheed, Lito Sheppard, Antonio Bryant, T.J. Duckett, and Josh Robinson. See generally NFL.com (last visited Dec. 31, 2014); SI.com (last visited Dec. 31, 2014).

62. See *Clinton Portis Profile*, NFL, [www.nfl.com/players/playerpage/302215](http://www.nfl.com/players/playerpage/302215) (last visited Dec. 29, 2014).

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were not physically ready to compete against the men in the NFL.<sup>63</sup> Clarett was as tall, or taller, and weighed as much, or more, than NFL running back legends Walter Payton, Barry Sanders, and Gale Sayers when they played football.<sup>64</sup> Of the top twenty rushing leaders after the fifth week of the 2003 NFL season, Clarett weighed as much as or more than seventeen of them and was as tall or taller than fifteen of them.<sup>65</sup> “In addition, Emmitt Smith, who has rushed for more yards than any player in the history of the NFL, was 20 years old when drafted in 1990, and weighed less and was shorter than Clarett.”<sup>66</sup> If the purpose of the rule was to protect players not physically mature enough to play in the pros, it had no logical application or connection to Clarett. In addition, a rule designed to safeguard against physically immature players could have been accomplished by far better means—such as, most obviously, a rule requiring certain height, weight, and strength to play in the NFL.

On February 5, 2004, Judge Scheindlin issued her opinion finding in favor of Clarett.<sup>67</sup> The Judge began by stating that “Clarett’s challenge to the Rule raises serious questions arising at the intersection of labor law and antitrust law, not to mention the intersection of college football and professional football.”<sup>68</sup> In rejecting the NFL’s argument that the rule was immune from antitrust scrutiny because of the non-statutory labor exemption, the district court found that the rule did not concern a mandatory subject of bargaining under the National Labor Relations Act

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63. See Adam Millsap, *High school football players should be allowed to go pro*, TIGER (Nov. 30, 2012), <http://www.thetigernews.com/news.php?aid=8203&sid=2>.

64. See Clarett’s Mot. Summ. J., *supra* note 40, at 10.

65. See *id.* at 10 n.23 (“The top 20 rushing leaders after the 5th week of the 2003 NFL season, with their height and weight are: (1) Jamal Lewis, 5’11”, 240 lbs.; (2) Stephen Davis, 6’0”, 230 lbs.; (3) Ahman Green, 6’0”, 217 lbs.; (4) Priest Holmes, 5’9”, 213 lbs.; (5) LaDainian Tomlinson, 5’10”, 221 lbs.; (6) Clinton Portis, 5’11”, 205 lbs.; (7) Deuce McAllister, 6’1”, 221 lbs.; (8) Fred Taylor, 6’1”, 234; (9) Moe Williams, 6’1”, 205 lbs.; (10) Ricky Williams, 5’10”, 226 lbs.; (11) Tiki Barber, 5’10”, 200 lbs.; (12) William Green, 6’0”, 215 lbs.; (13) Shaun Alexander, 5’11”, 225 lbs.; (14) Anthony Thomas, 6’2”, 228 lbs.; (15) Troy Hambrick, 6’1”, 233 lbs.; (16) Garrison Hearst, 5’11”, 215 lbs.; (17) Trung Canidate, 5’11”, 215 lbs.; (18) Edgerrin James, 6’0”, 214 lbs.; (19) Amos Zereoue, 5’8”, 212 lbs.; (20) Michael Pittman, 6’0”, 218 lbs.”).

66. *Id.*

67. See Clarett v. NFL, 306 F. Supp. 2d 379, 379 (S.D.N.Y. 2004).

68. *Id.* at 382.

(“NLRA”), restrained only non-employees, and “did not clearly result from arm’s length negotiations.”<sup>69</sup> Without the shield of the labor exemption to protect the rule, the court found the rule to be “blatantly anticompetitive”<sup>70</sup> and determined that “Clarett ha[d] alleged the very type of injury—a complete bar to entry into the market for his services—that the antitrust laws are designed to prevent.”<sup>71</sup> Quoting Learned Hand, the court observed “that the antitrust laws will not tolerate a contract ‘which unreasonably forbids any one to practice his calling.’”<sup>72</sup>

In deciding whether to invoke the exemption, the district court used the three-pronged standard set forth by the Eighth Circuit in *Mackey*.<sup>73</sup> Because labor law mandates collective bargaining only over “wages, hours, and other terms and conditions of employment,” the district court reasoned, “only agreements on these subjects (and intimately related subjects) are exempt from the antitrust laws.”<sup>74</sup> Inasmuch as mandatory subjects of bargaining apply only to employees, the court reasoned that the exemption may only be used to shield agreements that affect employees who will be bound by those actions.<sup>75</sup> Clarett and similarly situated athletes were not employees within the meaning of the NLRA, nor did the NFLPA represent them in any capacity, including collective bargaining, nor were they even eligible for employment or inclusion in the collective bargaining unit.

In addressing whether the rule falls within the meaning of “wages, hours, and other terms and conditions of employment” under the NLRA, the district court observed that the rule makes no reference to wages, hours, or conditions of employment of employees or persons eligible for employment.<sup>76</sup> Instead, it renders a class of otherwise qualified persons who are not employees “*unemployable*.”<sup>77</sup> The court thus concluded that the NFL’s reliance on three Second Circuit cases, *Wood v. National*

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69. *Id.*

70. *Id.* at 408.

71. *Id.* at 382.

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

73. *Id.* at 391 (citing *Mackey v. NFL*, 543 F.2d 606, 614 (8th Cir. 1976)).

74. *Id.* at 392 (internal quotation marks omitted).

75. *Id.*

76. *Id.* at 393.

77. *Id.*

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*Basketball Ass'n*,<sup>78</sup> *National Basketball Ass'n v. Williams*,<sup>79</sup> and *Caldwell v. American Basketball Ass'n*,<sup>80</sup> was misplaced.<sup>81</sup> It observed that, in sharp contrast to this case, the practices challenged in each of those cases involved the wages, hours, or working conditions of employees.<sup>82</sup> The plaintiffs in *Wood* and *Williams* were NBA employees who were represented by the players' association, but nevertheless challenged a salary cap agreement the league had negotiated with their union.<sup>83</sup> The plaintiff in *Caldwell* was a former player challenging his discharge.<sup>84</sup>

The district court distinguished these three cases, stating:

In sum, none of the cases cited by the NFL involve job *eligibility*. The league provisions addressed in *Wood*, *Williams*, and *Caldwell* govern the terms by which those who *are drafted* are employed. The [draft eligibility rule], on the other hand, precludes players from entering the labor market altogether, and thus affects wages only in the sense that a player subject to the Rule will earn none. But the Rule itself . . . does not concern wages, hours, or conditions of employment and is therefore not covered by the non-statutory labor exemption.<sup>85</sup>

Having concluded that the rule was not a mandatory subject of bargaining, the district court could have ended its analysis. Nevertheless, the district court examined the two other *Mackey* factors and found them similarly unavailing.<sup>86</sup> First, the court found that the rule “*only* affects players, like Clarett, who are complete strangers to the bargaining relationship.”<sup>87</sup> In this regard, the court stated that “[t]he labor laws cannot be used to shield anticompetitive agreements between employers and unions that affect only those outside of the bargaining unit.”<sup>88</sup> While it is

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78. 809 F.2d 954 (2d Cir. 1987).

79. 45 F.3d 684 (2d Cir. 1994).

80. 66 F.3d 523 (2d Cir. 1995).

81. *Clarett*, 306 F. Supp. 2d at 395.

82. *Id.*

83. *Id.* at 393–94.

84. *Id.* at 394.

85. *Id.* at 395.

86. *Id.* at 396–97.

87. *Id.* at 395.

88. *Id.* (“The labor policy favoring collective bargaining may potentially

true that collective bargaining agreements apply to current employees as well as those entering the workforce, the district court stated that Clarett's situation was "very different" because he was not an employee and, indeed, was not eligible for employment.<sup>89</sup> The court observed:

That the non-statutory exemption does not apply in such a case is simply the flip side of the rule that the exemption only applies to mandatory subjects of collective bargaining, those governing wages, hours, and working conditions. Employees who are hired after the collective bargaining agreement is negotiated are nonetheless bound by its terms because they step into the shoes of the players who did engage in collective bargaining. But those who are categorically denied eligibility for employment, even temporarily, cannot be bound by the terms of employment they cannot obtain.<sup>90</sup>

This reasoning is required by longstanding Supreme Court precedent on what has evolved into the first prong of the *Mackey* standard. The agreements at issue in *United Mine Workers v. Pennington*,<sup>91</sup> *Allen Bradley Co. v. Local Union No. 3*,<sup>92</sup> and *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local Union No. 100*,<sup>93</sup> were all held not to be protected by the non-statutory labor exemption because, although they directly concerned wages, hours, or terms and conditions of employment of employees, they sought "to prescribe labor standards outside the bargaining unit."<sup>94</sup> Like the small mine operators in *Pennington*, the non-New York City manufacturers in *Allen Bradley*, and the non-union subcontractors in *Connell*, Clarett and other similarly situated athletes, who were strangers to the collective bargaining relationship, were the direct and only object of the restraint.<sup>95</sup>

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be given pre-eminence over the antitrust laws where the restraint on trade primarily affects only the parties to the collective bargaining relationship." (citing *Mackey v. NFL*, 543 F.2d 606, 614 (8th Cir. 1976)).

89. *Id.*

90. *Id.* at 395–96.

91. 381 U.S. 657, 669 (1965).

92. 325 U.S. 797, 810 (1945).

93. 421 U.S. 616, 622–23 (1975).

94. *Pennington*, 381 U.S. at 668.

95. *Clarett*, 306 F. Supp. 2d at 395; *Connell Const.*, 421 U.S. at 619;

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Finally, the district court found that the non-statutory labor exemption was inapplicable because “the NFL ha[d] failed to demonstrate that the Rule evolved from arm’s-length negotiations between the NFL and the NFLPA.”<sup>96</sup> The rule, the court observed, was adopted more than thirty years before the NFLPA was even formed and more than forty years before it became the players’ exclusive bargaining agent.<sup>97</sup> Indeed, the court found that the collective bargaining agreement never mentioned the rule.<sup>98</sup> While the NFL attempted to rely on the NFLPA’s statement that it “waive[s] . . . its rights to bargain over any provision of the Constitution and Bylaws . . . [and] to resolve any dispute . . . involving the interpretation or application of the Constitution and Bylaws in accordance with the dispute resolution procedures of the CBA,” the district court read this language only to confirm that the NFLPA had merely waived its right to bargain and, consequently, that the rule itself “was never the subject of collective bargaining between the league and the union, and did not arise from the collective bargaining process.”<sup>99</sup> Because the rule did not evolve from the collective bargaining process, the NFL could not shelter its anticompetitive agreement from antitrust review.<sup>100</sup>

In short, the district court concluded the rule was not within the reach of the non-statutory labor exemption for three separate reasons, each of which was independently sufficient to foreclose the exemption’s applicability.<sup>101</sup>

The case should have ended there. The NFL Combine was only three weeks away and the Draft was three months beyond that. Judge Scheindlin called counsel back into her courtroom and asked if there was anything else to be done at her level. She also advised the NFL what it already knew: the league had a limited period of time to file an appeal before the case became moot—when Clarett entered the league. Leaving the courtroom, I overheard the NFL’s counsel telling a reporter “this is only the

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*Pennington*, 381 U.S. at 659; *Allen Bradley*, 325 U.S. at 798.

96. *Clarett*, 306 F. Supp. 2d at 396.

97. *Id.*

98. *Id.*

99. *Id.* (alterations in original) (quoting NFL CBA arts. III, IV, IX) (internal quotation marks omitted).

100. *Id.* at 397.

101. *Id.*

first period. There are two periods to play.” While I thought it was odd enough for opposing counsel to use a hockey analogy, it seemed that he had miscalculated the game clock. Why would the Second Circuit grant expedited review to keep one grown man from playing professional football if a team in the league was ready to employ him at a substantial salary?

At a hearing on at least seven other motions for expedited review, all of which seemed far more pressing than the Clarett case, the Second Circuit denied all but the NFL’s Motion, setting what seemed like a frenetic briefing schedule. Within a week, I fielded requests from virtually every professional sports league and its union as well as the NCAA, all of whom wanted to file amicus briefs on behalf of the NFL. The only friend of the court Clarett enjoyed was Representative John L. Conyers, Jr., of the Committee on the Judiciary United States House of Representatives, the Congressional committee charged with overseeing the antitrust laws of the United States.<sup>102</sup> Representative Conyers wrote:

As the Ranking Democrat on the House Judiciary Committee, amicus has an overriding interest in preserving and protecting the antitrust laws. Amicus is concerned that the non-statutory labor exemption not be extended in a manner that would undermine the integrity of the antitrust laws or intrude on Congress’ traditional purview in enacting such laws. In addition, amicus believes that Clarett, who has been foreclosed from being able to seek employment in the NFL, is precisely the type of party Congress envisioned being able to seek relief under the antitrust laws.<sup>103</sup>

At the oral argument in Foley Square, in a courtroom that prominently displayed a bust of Learned Hand, reporters filled the seats. From the beginning it seemed clear that the court, with Judge Sonia Sotomayor leading the charge, wanted to reverse. While one normally waits weeks or longer for a decision, the clerk called my cell phone within an hour of the argument stating we had lost.

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102. See Petition for Writ of Certiorari at 27, *Clarett v. NFL*, 369 F.3d 124 (2d Cir. 2004) (No. 04-910), 2004 WL 3057836 (U.S.).

103. *Id.* at 27–28 (quoting Rep. John L. Conyers, Mich.).

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In reversing the district court, the Second Circuit expressly rejected the *Mackey* standard.<sup>104</sup> The Second Circuit rejected each of the district court's conclusions and found the rule immune from antitrust challenges under the non-statutory labor exemption because it was imposed "on a labor market organized around a collective bargaining relationship."<sup>105</sup> Under the Second Circuit's curious standard, all anticompetitive agreements among employers who collectively bargain on a multi-employer basis are exempt from antitrust review if the restraint is upon a "labor" market. Indeed, under the Second Circuit's holding, it is immaterial whether the matter involves a mandatory subject of bargaining, restrains only strangers to the collective bargaining relationship, or has even been collectively bargained for at all. Rather, the mere presence of a union shelters all "labor" market restraints. This standard deviated far from the holdings of other circuits as well as the holdings of the Supreme Court. It is simply wrong.

In *Local 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co.*, a companion case to *Pennington*, the Supreme Court reached a different result.<sup>106</sup> There, a multi-employer group of grocery stores agreed with the union representing its butchers to limit the operation of meat counters to certain hours.<sup>107</sup> Jewel Tea, one of the stores that was a signatory to the agreement, challenged the hours restriction on antitrust grounds.<sup>108</sup> Justices White and Goldberg, writing collectively for six Justices, concluded that, for the non-statutory labor exemption to be available, the labor-management agreement at issue must be both a mandatory subject of bargaining and the product of "bona fide, arm's-length bargaining."<sup>109</sup> These two criteria represent the second and third elements of the *Mackey* standard. The Second Circuit, however, read *Jewel Tea* to mean that only "product" market restraints are outside the reach of the exemption, a reading wholly without justification.<sup>110</sup> Nowhere in *Jewel Tea* did

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104. *Clarett v. NFL*, 369 F.3d 124, 133 (2d Cir. 2004).

105. *Id.* at 134.

106. 381 U.S. 676 (1965).

107. *Id.* at 679–80.

108. *Id.* at 681.

109. *Id.* at 689–90.

110. *See Clarett*, 369 F.3d at 132–34.

the Supreme Court state that only restraints on the “product” market were outside the reach of the exemption or that restraints on the labor market were automatically insulated.<sup>111</sup> Indeed, under the Second Circuit’s holding, the many cases in which player restraints have been challenged in situations when the players were contemporaneously represented by a union that negotiated on their behalf with teams that bargained on a multi-employer basis must have been wrongly reasoned.<sup>112</sup> After all, under the Second Circuit’s paradigm, the antitrust laws have no applicability whatsoever and are, in effect, extinguished under such circumstances.

In *Connell*, a union demanded that a contractor do business only with subcontractors employing union members, despite the fact that the union did not represent the contractor’s employees, and the agreement sought was not a collective bargaining contract.<sup>113</sup> The contractor, who acquiesced in the demand only after the union picketed one of its sites, challenged the arrangement on antitrust grounds.<sup>114</sup> The Supreme Court again denied antitrust immunity to this “kind of direct restraint on the business market [that] has substantial anticompetitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions.”<sup>115</sup>

The Second Circuit again misapplied precedent, misreading *Connell* to mean that only “product” market restraints fall outside the non-statutory labor exemption.<sup>116</sup> *Connell* stands for nothing

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111. In *Jewel Tea*, Justice White stated that application of the nonstatutory labor exemption required balancing “the interests of union members served by the restraint against its relative impact on the product market.” 381 U.S. at 690 n.5. This formula, however, was designed to weigh the competing antitrust and labor law considerations at stake, not to establish that all labor market restraints fall automatically within the exemption, as the Second Circuit decided.

112. See, e.g., *Brown v. Pro Football, Inc.*, 518 U.S. 231, 231 (1996); *McCourt v. Cal. Sports, Inc.*, 600 F.2d 1193, 1197–98 (6th Cir. 1979); *Mackey v. NFL*, 543 F.2d 606, 614 (8th Cir. 1976); cf. generally *Boris v. U.S. Football League*, Civ. A. No. 83-4980 LEW, 1984 WL 894 (C.D. Cal. Feb. 28, 1984); *Linseman v. World Hockey Ass’n*, 439 F. Supp. 1315 (D. Conn. 1977); *Denver Rockets v. All-Pro Mgmt., Inc.*, 325 F. Supp. 1049 (C.D. Cal. 1971).

113. 421 U.S. 616, 619–20 (1975).

114. *Id.*

115. *Id.* at 625.

116. See *Clarett v. NFL*, 369 F.3d 124, 134 (2d Cir. 2004).

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of the sort. Nowhere in *Connell* did the Supreme Court limit its holding to “product” market restraints. In fact, *Connell* supports the conclusion, also present in *Allen Bradley* and *Pennington*, that it is the exclusion of strangers to the collective bargaining relationship that rendered the agreement subject to antitrust scrutiny.<sup>117</sup> *Clarett* was no different than the subcontractors in *Connell*. He was an “economic actor” barred from selling his talent in the market for player services. Moreover, as in *Connell*, the union did not represent him.<sup>118</sup>

Indeed, the Second Circuit’s effort to distinguish “product” markets from “labor” markets was illusory and flew in the face of Supreme Court precedent. So-called “product” and “labor” markets are so intertwined and interconnected that they cannot be distinguished from one another. For example, in *Connell*, the agreement in question not only restrained prospective subcontractors who could have bid upon jobs but for the restriction, but also excluded employees of those employers who were likewise foreclosed from employment opportunities.<sup>119</sup> In addition, in *Jewel Tea*, the restraint involved the store’s marketing hours.<sup>120</sup> Nevertheless, Justice White found the restriction “so intimately related to wages, hours and working conditions that the unions’ successful attempt to obtain that provision through bona fide, arm’s length bargaining” was “within the protection of national labor policy and . . . therefore exempt from the Sherman Act.”<sup>121</sup>

The Second Circuit flatly rejected the district court’s reliance on the standard announced in *Mackey*, stating that it had “never regarded the Eighth Circuit’s test in *Mackey* as defining the appropriate limits of the non-statutory exemption.”<sup>122</sup> The court

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117. *Connell Constr.*, 421 U.S. at 625; *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 668 (1965); *Allen Bradley Co. v. Local Union No. 3, Int’l Brotherhood of Electrical Workers*, 325 U.S. 797, 810 (1945).

118. *Clarett*, 369 F.3d at 126; *see also Connell Constr.*, 421 U.S. at 619.

119. 421 U.S. at 618–19.

120. 381 U.S. 676, 679–80 (1965).

121. *Id.* at 689–90. *See also* BERNARD D. MELTZER, *LABOR LAW* 496 (1970) (“The impact of wage costs on supply and price results in an inextricable connection between the two markets. As a result, the general objectives of the Sherman Act . . . can be frustrated by monopoly power exerted solely in the labor market.”)

122. *Clarett*, 369 F.3d at 133.

stated,

we disagree with the Eighth Circuit's assumption in *Mackey* that the Supreme Court's decisions in *Connell*, *Jewel Tea*, *Pennington*, and *Allen Bradley* dictate the appropriate boundaries of the non-statutory exemption for cases in which the only alleged anticompetitive effect of the challenged restraint is on a labor market organized around a collective bargaining relationship.<sup>123</sup>

Thus, the Second Circuit plainly acknowledged that its decision created a split among the circuits on the critically important parameters of the exemption. Its holding directly and unabashedly contravened the decisions of the Eighth Circuit in *Mackey*,<sup>124</sup> the Sixth Circuit in *McCourt*,<sup>125</sup> and the Ninth Circuit in *Continental Maritime of San Francisco, Inc. v. Pacific Coast Metal Trades District Council*<sup>126</sup> that the antitrust laws apply fully to anticompetitive agreements affecting the labor market in the context of a multi-employer collective bargaining situation. While these courts, consistent with the district court's sound reasoning, would not allow the exemption automatically to shield plainly anticompetitive conduct that restrains the rights of prospective employees to practice their trade, the Second Circuit would invoke the exemption in every case unless it was "employers who asserted that they were being excluded from competition in the product market."<sup>127</sup>

The Second Circuit claimed to find further support for its approach in the Supreme Court's pronouncement on the reach of the non-statutory labor exemption in *Brown v. Pro Football, Inc.*, a case establishing the duration of the exemption.<sup>128</sup> As if it meant something, the Second Circuit announced that "eight Justices [had] agreed that the non-statutory exemption precludes antitrust claims against a professional sports league for unilaterally setting policy with respect to mandatory bargaining subjects after negotiations with the players union over those subjects reach

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123. *Id.* at 133–34

124. *Mackey v. NFL*, 543 F.2d 606, 623 (8th Cir. 1976).

125. 600 F.2d at 1193, 1215 (6th Cir. 1979).

126. 817 F.2d 1391, 1394–95 (9th Cir. 1987).

127. *Clarett*, 369 F.3d at 134.

128. 518 U.S. 231, 244 (1966).

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impasse.”<sup>129</sup>

But the *Clarett* case, of course, did not involve the duration of the exemption. More importantly, the plaintiff in *Brown* was an NFL employee and a member of the union.<sup>130</sup> *Clarett* was neither. He was instead a stranger to the bargaining relationship because he was excluded from the league. Moreover, the subject at issue in *Brown* was wages—an unquestionably mandatory subject of bargaining—while the subject in *Clarett*—an employment eligibility rule—was not a mandatory subject of bargaining.<sup>131</sup> The subject at issue in *Brown* was bargained over extensively, indeed exhaustively, as demonstrated by the fact that the parties reached impasse as to that issue, while in *Clarett*, no bargaining at all took place over the rule.<sup>132</sup>

In *Brown*, the Supreme Court noted that the NFL conduct at issue,

took place during and immediately after a collective-bargaining negotiation. It grew out of, and was directly related to, the lawful operation of the bargaining process. It involved a matter that the parties were required to negotiate collectively. And it concerned only the parties to the collective-bargaining relationship.<sup>133</sup>

Thus, the *Brown* decision is grounded on the very three factors relied upon by the Eighth, Sixth, and Ninth Circuits but rejected by the Second Circuit.

The Second Circuit not only misused *Brown* to extend the exemption far beyond what *Brown* or any other case would sanction, it did so in defiance of the Supreme Court’s clear instruction to the contrary. Indeed, the Second Circuit acknowledged that the Court in *Brown* had “expressed some reservations about . . . the broader holding of the court of appeals that the non-statutory exemption ‘waiv[es] antitrust liability for restraints on competition imposed through the collective-bargaining process so long as such restraints operate primarily in

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129. *Clarett*, 369 F.3d at 137.

130. *Brown*, 518 U.S. at 233–34.

131. *Id.*; see also *Clarett*, 369 F.3d at 139.

132. *Clarett*, 369 F.3d at 139; *Brown*, 518 U.S. at 233–34.

133. *Brown*, 518 U.S. at 250.

a labor market characterized by collective bargaining.”<sup>134</sup> But the Supreme Court expressed far more than “reservations” about an expansive interpretation of the non-statutory labor exemption. In *Brown*, it wrote, “we do not interpret the exemption as broadly as did the Appeals Court.”<sup>135</sup>

The Second Circuit rejected Clarett’s contention, and the district court’s finding, that the rule is not a mandatory subject of bargaining under the NLRA.<sup>136</sup> The court wrote that “the eligibility rules for the draft represent a quite literal condition for initial employment and for that reason alone might constitute a mandatory bargaining subject.”<sup>137</sup> For this proposition, the appellate court quoted Professor Gorman’s treatise *Labor Law*, which states, “[i]n accordance with the literal language of the Labor Act, the parties must bargain about the requirements or ‘conditions’ of initial employment.”<sup>138</sup> This reference, however, has nothing to do with employment eligibility, but only with the initial terms and conditions of work for employees once they are hired. “Conditions of employment” mean working conditions like hours, facilities, or uniforms, not the conditions one must meet to be hired. In addition, the Second Circuit stated, “eligibility rules constitute a mandatory bargaining subject because they have tangible effects on the wages and working conditions of current NFL players” and “affect the job security of veteran players.”<sup>139</sup> This conclusion, aside from being factually wrong,<sup>140</sup> is contrary to Supreme Court and National Labor Relations Board (“NLRB”) precedent on this issue.<sup>141</sup>

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134. *Clarett*, 369 F.3d at 138 (quoting *Brown*, 518 U.S. at 235).

135. 518 U.S. at 235.

136. *Clarett*, 369 F.3d at 142.

137. *Id.* at 139.

138. *Id.* at 140 (quoting R. GORMAN, LABOR LAW, UNIONIZATION, AND COLLECTIVE BARGAINING 504 (1976)).

139. *Id.*

140. Claret’s eligibility for the draft would have had no effect at all on a veteran player’s interest in job preservation because Claret would simply have taken the place of the last player chosen in the draft. The last player drafted is traditionally known as “Mr. Irrelevant.” See McCann, *supra* note 4, at 912.

141. See, e.g., *Allied Chem. & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co., Chem. Div.*, 404 U.S. 157 (1971); *Johnson-Bateman Co.*, 295 N.L.R.B. 180 (1989); *Star Tribune*, 295 N.L.R.B. 543 (1989).

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The NLRA protects “employees” and, only under rare circumstances that are not present here, non-employees.<sup>142</sup> Thus, the heart of that NLRA, section 7, states that “employees shall have the right of self-organization, to form, join or assist labor organizations for the purpose of collective bargaining or other mutual aid or protection.”<sup>143</sup> This language is natural, of course, because the purpose of the NLRA was to grant employees the right to form unions and to bargain collectively, rather than individually. Because the NLRA grants rights to employees, labor and management must bargain only over the “wages, hours and other terms and conditions of employment” of current employees, not applicants for employment like Clarett or retirees.<sup>144</sup>

The Supreme Court and the NLRB have long held that matters exclusively concerning job applicants or former employees do not constitute mandatory subjects of bargaining.<sup>145</sup> For example, in *Star Tribune and The Newspaper Guild of the Twin Cities*, the NLRB addressed the question of whether drug testing for employment applicants was a mandatory subject of bargaining under the NLRA.<sup>146</sup> There, the NLRB unambiguously declared that “[a]pplicants . . . are not ‘employees’ under the Act” and that, therefore, the issue was not a mandatory subject of bargaining under the NLRA.<sup>147</sup> As a consequence, the employer could unilaterally require job applicants to undergo drug screening and was not obligated to bargain with the union representing its current employees regarding that matter.<sup>148</sup>

The significance of *Star Tribune* is illuminated by its companion case, *Johnson-Bateman Co. and International Ass’n of Machinists*.<sup>149</sup> There, the NLRB held that mandatory drug testing for current employees was a mandatory subject of bargaining, and thus, the employer’s unilateral adoption of such

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142. See 29 U.S.C. § 152 (2012).

143. 29 U.S.C. § 157 (2012).

144. See 29 U.S.C. § 158(d) (2006).

145. See, e.g., *Pittsburgh Plate Glass*, 404 U.S. 157; *Johnson-Bateman*, 295 N.L.R.B. 180; *Star Tribune*, 295 N.L.R.B. 543.

146. 295 N.L.R.B. 543.

147. *Id.* at 557.

148. *Id.* See also *NLRB v. USPS*, 18 F.3d 1089, 1098 (3d Cir. 1994) (holding that an employer generally has no duty to bargain over practices that involve non-unit employees).

149. 295 N.L.R.B. 180.

testing for current employees was a breach of its duty to bargain with the union in good faith over the “wages, hours, and other terms and conditions of employment” of its employees under the NLRA.<sup>150</sup> These two cases, read collectively, clearly confirm that mandatory subjects of bargaining involve the wages, hours, and terms and conditions of employment of current employees, not prospective employees.

Finally, in *Allied Chemical & Alkali Workers, Local 1 v. Pittsburgh Plate Glass Co.*, the Supreme Court established the parameters of the bargaining obligation under the NLRA.<sup>151</sup> There, the question was whether the company was obligated to bargain with its employees’ union over retirement benefits, including health insurance, for retirees.<sup>152</sup> The Supreme Court’s decision provided:

Together, [Sections 1, 8(a)(5), 8(d) and 9(a)] establish the obligation of the employer to bargain collectively, ‘with respect to wages, hours, and other terms and conditions of employment,’ with ‘the representatives of his employees’ designated or selected by the majority ‘in a unit appropriate for such purposes.’ This obligation extends only to the ‘terms and conditions of employment’ of the employer’s ‘employees’ in the ‘unit appropriate for such purposes’ that the union represents.<sup>153</sup>

In addition, the Supreme Court separately put to rest any argument that employers were obligated to bargain with the union representing their employees over persons who were not employed. The Supreme Court held:

Section 9(a) of the [NLRA] accords representative status only to the labor organization selected or designated by the majority of employees in a ‘unit appropriate’ ‘for the purposes of collective bargaining.’ . . . In this cause, in addition to holding that pensioners are not ‘employees’ within the meaning of the collective-bargaining obligations of the Act, we hold that they were not and

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150. *Id.* at 181, 188.

151. 404 U. S. 157 (1971).

152. *Id.* at 158.

153. *Id.* at 164.

could not be ‘employees’ included in the bargaining unit.<sup>154</sup>

The Second Circuit’s decision contravenes *Star Tribune*, *Johnson-Bateman*, and *Pittsburgh Plate Glass*. Those cases illuminate the bright line drawn between those persons who are employed and those who are either not yet employed or have ceased employment. The former may exercise and enjoy the rights and protections of the NLRA, while the latter may not. Mandatory subjects of bargaining do not include matters applicable only to non-employees, like *Clarett*, any more than they did to the prospective employees in *Star Tribune* or the retirees in *Pittsburgh Plate Glass*. Like all other employers in the United States, the NFL has no duty to bargain with the NFLPA regarding employment eligibility rules for prospective employees.<sup>155</sup> Such persons are not “employees” within the meaning of the NLRA and are plainly not members of the collective bargaining unit.<sup>156</sup> Therefore, the employer’s bargaining obligation does not extend to matters affecting only them and questions concerning their eligibility for employment are not, and cannot be, mandatory subjects of bargaining under the NLRA.

To be sure, there are rare circumstances where rules affecting non-employees may be deemed to “vitally affect” the terms and conditions of employment of current employees and, therefore, fall within the mandatory bargaining requirement.<sup>157</sup> At the same time, however, “[a]n indirect or incidental impact on unit employees is not sufficient to establish a matter as a mandatory subject. Rather, mandatory subjects include only those matters that materially or significantly affect unit employees’ terms and conditions of employment.”<sup>158</sup> No such vital effects were demonstrated in *Clarett*.

Of course eligibility rules, depending on their terms, may lessen a veteran player’s risk of being replaced by an entering player, but this is always true in any employment setting because

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154. *Id.* at 171–72.

155. *See* *Clarett v. NFL*, 369 F.3d 124, 141 (2d Cir. 2004).

156. *See* 29 U.S.C § 152 (2012).

157. *See, e.g.,* *United Techs. Corp.*, 274 N.L.R.B. 1069, 1070 (1985), *enforced*, 789 F.2d 121 (2d Cir. 1986).

158. *Id.*

limiting access to employment will always result in greater job security for incumbent employees. Such effect alone does not, and cannot, convert employment eligibility rules into mandatory subjects of bargaining, or the exception would wholly swallow the rule and, contrary to *Star Tribune*, render eligibility rules mandatory subjects of bargaining under all circumstances. Like eligibility rules for prospective employees, retiree benefits may also have a substantial impact on terms and conditions for current employees, but that effect, of course, did not make such benefits a mandatory subject of bargaining in *Pittsburgh Plate Glass*.<sup>159</sup> By expanding the duty to bargain to include employment eligibility rules, the Second Circuit's opinion fundamentally alters the balance of power between employers and unions and broadens the bargaining obligation beyond anything envisioned by Congress, the Supreme Court, or the NLRB.

In any event, Clarett's eligibility would have had no effect whatsoever on the jobs of veteran players or their wages, let alone a "vital effect." The number of rounds in the NFL draft is limited to seven. Roughly 214 new players were drafted in the 2004 draft.<sup>160</sup> Clarett's eligibility in that draft would have had no effect at all on a veteran player's interest in job preservation, because Clarett would simply have taken the place of the last player chosen in the draft. Put differently, regardless of whether Clarett participated in the 2004 draft, the total number of new players eligible was fixed. Thus, Clarett's participation, or lack thereof, would not affect the job security of players already in the league, only the identity of the new players entering the league.

The Second Circuit asserted that Clarett "argues that the eligibility rules are an impermissible bargaining subject because they affect players outside of the union."<sup>161</sup> Not true. Clarett had never taken this position. Quite to the contrary, Clarett argued that eligibility rules are a permissive subject of bargaining.<sup>162</sup> They are not "wages, hours, or other terms and conditions of employment" for employees and, therefore, mandatory subjects of

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159. 404 U.S. at 157.

160. See *Draft Season 2004*, NFL, <http://www.nfl.com/draft/history/fulldraft?season=2004> (last visited Dec. 30, 2014).

161. Clarett v. NFL, 369 F.3d 124, 140 (2d Cir. 2004).

162. Clarett v. NFL, 306 F. Supp. 2d 379, 390, 400 (S.D.N.Y. 2004).

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bargaining, but neither are they unlawful.<sup>163</sup> The distinction was critical. While it was true that the draft profoundly affects players entering the unit by limiting the teams with which they may negotiate, the draft eligibility rule foreclosed any employment opportunity for a class of otherwise qualified applicants. Clarett never challenged the validity of the draft mechanism as a lawful and, indeed, mandatory subject of bargaining. He sought only to be part of that mechanism.

The Second Circuit cited the hiring hall arrangement in certain industries as authority for the proposition that employment eligibility rules are mandatory subjects of bargaining.<sup>164</sup> This analogy highlights a fundamental flaw in the court's reasoning. Hiring halls exist "in certain industries—most notably maritime, longshoring and construction" where the "unions provide what is in effect a job-referral service and act as a clearinghouse between employees seeking work and employers seeking workers."<sup>165</sup>

The NFLPA does not operate a hiring hall. It does not refer players for employment to NFL teams needing a player with particular skills for short-term employment. Put differently, the particular needs of employers, employees, and unions, which make hiring halls necessary in certain industries, have no bearing on the NFL and, while such arrangements constitute mandatory subjects of bargaining in those settings, nothing in the *Clarett* case suggested that an employment eligibility rule that excludes an otherwise qualified class of prospective employees is likewise mandatory. Instead, in this setting, like the vast majority of employment settings, the reach of the union's bargaining authority is coextensive with the collective bargaining unit and did not include persons like Clarett who were neither employees, members of the union, or part of the collective bargaining unit.

Indeed, in *Pittsburgh Plate Glass*, the Supreme Court foreshadowed and rejected, this very argument advanced by the NFL and accepted by the Second Circuit.<sup>166</sup> Rejecting the hiring hall analogy, the Supreme Court wrote,

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163. *Id.*

164. *Clarett*, 369 F.3d at 140–41.

165. ARCHIBALD COX ET AL., *LABOR LAW* 1125 (13th ed. 2001).

166. 404 U.S. 157, 168 (1971).

[t]he Board enumerated ‘unfair labor practice situations where the statute has been applied to persons who have not been initially hired by an employer or whose employment has terminated. Illustrative are cases in which the Board has held that applicants for employment and registrants at hiring halls—who have never been hired in the first place—as well as persons who have quit or whose employers have gone out of business are ‘employees’ embraced by the policies of the Act.’ . . . Yet all of these cases involved people who, unlike the pensioners here, were *members of the active work force available for hire* and at least in that sense could be identified as ‘employees.’ No decision under the Act is cited, and none to our knowledge exists, in which an individual who has ceased work without expectation of further employment has been held to be an ‘employee.’<sup>167</sup>

So, too, a person not eligible for employment, like Clarett, was not an employee within the meaning of the NLRA.

The Second Circuit also noted that the NFL teams bargain with the NFLPA on a multi-employer basis, an entirely permissible arrangement under the NLRA, as support for its conclusion that Clarett’s position would undermine federal labor policy.<sup>168</sup> This fact, however, has no bearing upon the question whether an agreement among such employers and the union representing their employees is immune from antitrust scrutiny under the non-statutory labor exemption. After all, *Allen Bradley* and *Pennington* both involved circumstances in which a group of employers, bargaining on a multi-employer basis, had reached anticompetitive arrangements with the unions representing their employees, and, nevertheless, the Supreme Court reached the question of antitrust liability and found such liability.<sup>169</sup> Clarett did not challenge the multi-employer bargaining arrangement in professional football. The decision of the NFL and the NFLPA to bargain on that basis, however, should not have served to insulate

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167. *Id.* (emphasis added).

168. *Clarett*, 369 F.3d at 143.

169. *Allen Bradley Co. v. Local Union No. 3, Int’l Brotherhood of Electrical Workers*, 325 U.S. 797, 798 (1945); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 668 (1935).

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their anticompetitive conduct unless the other factors warranting such immunity were present. Not one of the factors supporting immunity were present.

Despite the fact that the rule appeared nowhere in the CBA, the Second Circuit concluded that the draft eligibility rule was “well known to the union, and a copy of the Constitution and Bylaws was presented to the union during negotiations.”<sup>170</sup> Thus, the court reasoned, “the union or the NFL could have forced the other to the bargaining table if either felt that a change was warranted.”<sup>171</sup> First, this conclusion flowed only from the Second Circuit’s erroneous holding that employment eligibility rules were mandatory subjects of bargaining and that management was obligated to bargain with the union representing its employees regarding the qualifications of the persons it seeks to employ.<sup>172</sup> They are not mandatory subjects of bargaining, and management is not so obligated. Moreover, even if such eligibility rules were mandatory subjects of bargaining, the court’s holding that the conduct of the NFL and the NFLPA amounted to the level of arm’s-length collective bargaining necessary to shelter an anticompetitive agreement conflicted with the decisions of every Circuit that had considered the issue.<sup>173</sup>

The correct standard is clear: there must be substantial evidence that “the parties bargained extensively over the [Rule] and that the [NFLPA] representatives concluded that it was in the best interest of the membership to agree to the [Rule] based on the concessions received from the NFL.”<sup>174</sup> In *McCourt*, as in *Zimmerman v. National Football League*,<sup>175</sup> the courts applied the exemption because actual bargaining had taken place over the restraint at issue.<sup>176</sup> In *Robertson v. National Basketball League*, as in *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey*

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170. *Clarett*, 369 F.3d at 142.

171. *Id.*

172. *Id.*

173. See, e.g., *McCourt v. Cal. Sports, Inc.*, 600 F.2d 1193, 1203 (6th Cir. 1979); *Mackey v. NFL*, 543 F.2d 606, 623 (8th Cir. 1976); *Zimmerman v. NFL*, 632 F. Supp. 398, 406 (D.D.C. 1986); *Robertson v. NBA*, 389 F. Supp. 867, 895 (S.D.N.Y. 1975); *Phila. World Hockey Club, Inc. v. Phila Hockey Club, Inc.*, 351 F. Supp. 462, 499 (E.D. Penn. 1972).

174. See *McCourt*, 600 F.2d at 1203; *Zimmerman*, 632 F. Supp. at 406.

175. 632 F. Supp. at 406.

176. 600 F.2d at 1203.

*Club, Inc.*,<sup>177</sup> the courts withheld the exemption based upon the absence of “[s]erious, intensive, arms-length collective bargaining.”<sup>178</sup> In *Zimmerman*, the court focused on the details of the exchanges between the parties, and, in *McCourt*, the court concluded that the union had “bargained . . . vigorously,” against the restraint at issue.<sup>179</sup>

In *Mackey*, on the other hand, no such bargaining took place.<sup>180</sup> The restraint under scrutiny, the so-called “Rozelle Rule,” had been incorporated by reference into the collective bargaining contract between the NFL and the NFLPA, and the NFL argued that this incorporation immunized the restraint from antitrust scrutiny.<sup>181</sup> The Eighth Circuit disagreed, however, finding that the rule was not the product of “bona fide arm’s length bargaining.”<sup>182</sup> The court reviewed the bargaining history and affirmed the district court’s finding that the union had received no quid pro quo for the rule’s inclusion in the collective bargaining contract.<sup>183</sup>

At bottom, the naked restraint in *Clarett* fell squarely within the view of bargaining set forth in *Mackey* and its progeny. Indeed, there was no bargaining whatsoever over the rule, while in those cases the bargaining was merely inadequate.<sup>184</sup> For this reason, the district court properly observed that the record “is peculiarly sparse in establishing the evolution of the rule. Indeed, what the record omits speaks louder than what it contains.”<sup>185</sup> The court thus determined that the rule was not the product of arm’s-length collective bargaining.<sup>186</sup> On the same record, the Second Circuit held this evidence sufficient under *Jewel Tea* to

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177. 351 F. Supp. at 499.

178. 389 F. Supp. at 895 (quoting *Phila. World Hockey Club*, 351 F. Supp. at 499).

179. *McCourt*, 600 F.2d at 1203–04; *Zimmerman*, 632 F. Supp. at 401–03.

180. *Mackey v. NFL*, 543 F.2d 606, 623 (8th Cir. 1976).

181. *Id.*

182. *Id.* at 616.

183. *Id.* at 623. The court further held that “[t]he union’s acceptance of the status quo by the continuance of the Rozelle Rule in the initial collective bargaining agreements . . . [could not] serve to immunize the Rozelle Rule from the scrutiny of the Sherman Act.” *Id.* at 616.

184. *Clarett v. NFL*, 369 F.3d 124, 128–29 (2d Cir. 2004) (discussing the history of the rule created by the Commissioner pursuant to his authority).

185. *Clarett v. NFL*, 306 F. Supp. 2d 379, 396 (S.D.N.Y. 2004).

186. *Id.*

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invoke the exemption, virtually eliminating any requirement that the challenged agreement be the product of bona fide arm's-length bargaining.<sup>187</sup> By eliminating actual bargaining as a requirement for invocation of the exemption, the Second Circuit again parted ways and created a split in the circuits as to the role of actual bargaining in the invocation of the exemption.

The Second Circuit's decision as to the reach of the non-statutory labor exemption was breathtaking. It permitted any and all anticompetitive agreements among employers restraining trade in the market for labor, so long as their employees are represented by a union with which they collectively bargain on a multi-employer basis.<sup>188</sup> Indeed, under the Second Circuit's analysis, it would be immaterial whether or not the agreement involved a mandatory subject of bargaining, primarily affected only strangers to the collective bargaining arrangement, or was unilaterally imposed by the employers and not the product of arm's-length collective bargaining. The mere presence of a union, coupled with a multi-employer bargaining arrangement, would shelter any anticompetitive arrangements regarding labor. Nothing in any area of U.S. law suggests that policies underlying labor law warrant such a sweeping repeal of the antitrust laws.

As the above analysis of the Second Court's decision suggests, age eligibility rules in professional sports can still be challenged after *Clarett*, particularly the absurd "one and done" rule in basketball. Such a challenge, however, is best to be filed in a circuit where *Mackey*, a case brought by that great tight end from my beloved Baltimore Colts, still roams the field.<sup>189</sup>

For *Clarett*, the Second Circuit decision meant that he would sit out a second season without playing football, a lifetime for an athlete. He spent that year lamenting his fate and drinking heavily. When he showed up for the NFL Combine in February 2005, he was noticeably out of shape and out of sorts. In April, the Denver Broncos reluctantly selected him in the third round of the NFL Draft.<sup>190</sup> His preseason camp was a disaster, and he was cut

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187. *Clarett*, 369 F.3d at 133–34.

188. *Id.*

189. For an excellent analysis of a prospective NBA player challenging the NBA's eligibility rule in a post-*Clarett* world, see McCann, *supra* note 4, at 914–19.

190. *Draft Season 2004*, *supra* note 160.

from the roster without ever playing a down in the NFL.<sup>191</sup>

After that, Clarett continued to descend. By the fall of 2006, after two run-ins with the law, he hit rock bottom. Sentenced to seven-and-a-half years in an Ohio state prison, Clarett ended up in the place he had sworn he would avoid.<sup>192</sup> It was a place from which football should have provided an escape and would have if the NCAA had not provided Geiger with the opportunity to ban Clarett from college football.

Fortunately, Clarett was granted early release from prison after three-and-a-half years.<sup>193</sup> He is trying to get his life back together and to make sense of his past. In a recent documentary on Clarett, Judge Scheindlin commented on the life that could have been but was wasted.<sup>194</sup> “The justice system failed Maurice Clarett,” she said, a remarkable admission by a sitting district judge about an appellate court which reversed her.<sup>195</sup>

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191. See Joe Drape, *Gamble on Clarett Reveals Perils of Potential*, N.Y. TIMES (Aug. 31, 2005), [http://www.nytimes.com/2005/08/31/sports/football/31clarett.html?\\_r=0](http://www.nytimes.com/2005/08/31/sports/football/31clarett.html?_r=0).

192. See Bruce Cadwallader, *Clarett seeks early release from prison*, COLUMBUS DISPATCH (Feb. 10, 2010, 5:19 AM), [http://www.dispatch.com/content/stories/sports/2010/02/10/clarett.ART\\_ART\\_02-10-10\\_C6\\_N5GI4JI.html](http://www.dispatch.com/content/stories/sports/2010/02/10/clarett.ART_ART_02-10-10_C6_N5GI4JI.html).

193. See Shalise Manza Young, *Timely warning for NFL rookies*, BOS. GLOBE (June 28, 2013), available at <http://www.highbeam.com/doc/1P2-34833056.html>.

194. Transcript: *Youngstown Boys* (ESPN television broadcast Dec. 15, 2013) (on file with author).

195. *Id.*