

PANEL II: Maurice Clarett's Challenge

Moderator: Jay Moyer*
Panelists: Howard Ganz†
David Feher‡
Gary Roberts§
David Cornwell||

MR. KLEIN: Our second panel of the day deals with one of the most controversial court decisions affecting the sports world in recent history.¹ Maurice Clarett has challenged the NFL's rule barring any player from entering the draft until three years after his high school graduation.² Because Judge Scheindlin in the Southern District of New York ruled in Clarett's favor, Clarett, among others, will be eligible for this year's draft.³

This issue, however, is far from resolved.⁴ Just this week, the National Football League ("NFL") and the NFL Players Association ("NFLPA") began discussions to alter the collective bargaining agreement to include language prohibiting this type of early entry into the draft.⁵

Our moderator for this panel is Professor Jay Moyer. Professor Moyer was the National Football League's first in-house attorney.

* Professor, Fordham University School of Law

† Partner, Proskauer Rose LLP

‡ Partner, Dewey Ballantine LLP

§ Deputy Dean & Director of Sports Law Forum

|| President, DNK Cornwell

¹ *Clarett v. NFL*, 306 F. Supp. 2d 379 (S.D.N.Y. 2004) [hereinafter *Clarett I*], *rev'd in part, vacated in part, remanded by* *Clarett v. NFL*, 369 F.3d 124 (2d Cir. 2004) [hereinafter *Clarett II*].

² *Id.* at 382.

³ *Id.* at 410–11. However, Judge Scheindlin's ruling was overturned by the Second Circuit. *See Clarett II*, 369 F.3d 124. Therefore, Clarett was not, in fact, eligible for the 2004 NFL draft.

⁴ As previously noted, the decision was overturned by the Second Circuit. *See Clarett II*, 369 F.3d at 124.

⁵ The 3-year rule is not currently part of the NFL's collective bargaining agreement with the players' association. *See* Chris Harry, *Clarett, NFL Near Collision; Ohio State Star Sues for the Right to Be Drafted*, ORLANDO SENTINEL TRIB., Sept. 24, 2003, at D1.

He was subsequently named the Executive Vice President and League Counsel by then-Commissioner Peter Rozelle. Professor Moyer received his undergraduate degree at Dartmouth College and his law degree at Duke Law School. I'm pleased to introduce Professor Jay Moyer.

PROF. MOYER: Good morning.

For those of you who have been on another planet for the last year or so, Maurice Clarett, star running back as a freshman at Ohio State University and member of that year's national championship team when only two years out of high school, sued in the Southern District of New York to overturn the NFL's draft eligibility rule, which requires that players be out of high school for at least three full football seasons before they may be eligible to be drafted.⁶ However, it's a fundamental practice that no player ever comes into the NFL without being subject to a draft.⁷ That's what makes the draft eligibility rule rather critical.

On February 5, 2004, Judge Scheindlin of the Southern District issued a long opinion granting summary judgment to Clarett on the grounds that the NFL's eligibility rule violates Section 1 of the Sherman Act and is not protected by the non-statutory labor exemption from antitrust laws.⁸

I predict that you will find significant divisions of opinion on the panel here today, but I don't think you will find anyone who will say that Judge Scheindlin got it all right. The one thing she did get right in her opinion, for sure, was her observation that this case raised "serious questions arising at the intersection of labor law and antitrust law."⁹

In the next hour-plus, our purpose will be to explore the implication of this decision for the law and for the NFL, for college football and for young athletes, assuming the decision is

⁶ See *Clarett I*, 306 F. Supp. 2d at 382.

⁷ But see Mike O'Hara, *Undrafted Doesn't Mean Unwanted*, DETROIT NEWS, May 31, 2002, at 4H ("For the rookie free agents signed by the Lions after this year's draft, the evidence is all around them that the draft is not the only way to make an NFL roster. The Lions have 14 players on the 2002 roster who played for them last year and were not drafted by any NFL team . . .").

⁸ See *Clarett I*, 306 F. Supp. 2d at 393-411.

⁹ *Id.* at 382.

2005]

MAURICE CLARETT'S CHALLENGE

393

upheld on appeal,¹⁰ and to the extent possible, we will examine whether or not it will be upheld by the Second Circuit and, if it comes to that, by the United States Supreme Court.¹¹

We have a very distinguished panel today. Going from my immediate left, we have David Cornwell of Newport Beach, California, who has a long history in a number of positions in professional sports; David Feher, a partner in the firm of Dewey Ballantine in New York; Howard Ganz, a partner in the firm of Proskauer Rose; and, on my far left, Professor Gary Roberts, who after cutting his teeth at Covington & Burling in Washington, a firm that has been a major legal player over the years in sports litigation, became Professor of Law at Tulane Law School and is widely known and widely quoted. I won't belabor their bios because you can read them in your materials.

What we'll try to do is have each panelist give his views, hopefully succinctly but as completely as possible, in a space of ten minutes or so, and then we will open it up to questions and to interplay between and among the panelists.

I would like to ask Mr. Feher to begin this process. David?

MR. FEHER: Thank you, Jay.

I want to start off by saying that because this case is currently pending, and also because my partner Jeff Kessler and I are regular outside counsel to the NFL Players Association and the NBA Players Association, nothing that I say today is being said on behalf of either of those entities, but, rather, is just my personal opinion.

The other thing I want to say is—this relates more to me than to other folks—since we did represent the NFL Players Association in collective bargaining in these various matters, in terms of the facts as to what happened or did not happen, I am not going to comment on it at all because Judge Scheindlin did base her decision on various debates as to the facts and did reach certain

¹⁰ On appeal, the decision was reversed in part, vacated in part, and remanded. *See Clarett II*, 369 F.3d 124 (2d Cir. 2004).

¹¹ The United States Supreme Court denied Clarett's application for certiorari. *See Clarett v. NFL*, 2004 U.S. LEXIS 3231 (Apr. 22, 2004).

conclusions.¹² So when we discuss the case, I am going to basically speak hypothetically but not testify in any way, shape, or form on that. I don't want to go in that direction.

What Jay said, though, in terms of how this case relates to the intersection of labor laws and antitrust laws, that's the nub of the issue in—I was going to say in large part, but I think almost in its entirety. Let me just lay a little bit of a background so that we all can have a common basis for at least the premise as to what happens when the antitrust laws and the labor laws are both at play.¹³

Fundamentally, there is an inherent tension between the structure of the labor laws and the structure of the antitrust laws in that the antitrust laws are designed to ensure competition and competitive markets among the various participants¹⁴ and those antitrust laws have been in place for a long time, since the Sherman Antitrust Act¹⁵ enacted at the end of the 19th century.

But at the same time, the federal labor laws are in many ways antithetical to free competition, in the sense that when labor and management were exercising their various choices and rights in the early 20th century, there was a lot of strife in this country. Many workers believed that completely free competition among workers in the employment markets was not serving the workers especially well, and the workers fought long and hard for the right not to compete individually in the labor markets, but, rather, to collectively organize and to collectively bargain.¹⁶ The federal labor laws were enacted on the principle that workers can come

¹² See *Clarett I*, 306 F. Supp. 2d at 404–10.

¹³ *Id.*

¹⁴ See Jeffrey Paul Fuhrman, *Can Discrimination Law Affect the Imposition of a Minimum Age Requirement for Employment in the National Basketball Association?*, 3 U. PA. J. LAB. & EMP. L. 585, 592 (2001) (“There is a tension between antitrust and labor law, as the aim of antitrust law is to promote competition and discourage collective behavior, while the aim of labor law is to utilize collective activity to protect workers’ rights. A series of judicial decisions has interpreted the legislation to alleviate this tension by providing a clear governing structure for determining how to protect both labor and competition.”).

¹⁵ 15 U.S.C. §§ 1–7 (2004).

¹⁶ See generally FUNK & WAGNALLS NEW ENCYCLOPEDIA, *Trade Unions in the United States* (2004).

together and by majority decision form a union that will bargain on behalf of all of the employees in the bargaining unit and, in effect, take the place of any and all individual bargaining by the employees that would otherwise occur in the absence of a union.¹⁷

This notion of collective bargaining once a union is formed—not solely once the union is formed but as you get into the collective bargaining process and the various steps—does not permit individual decisions by employees to either accept or reject individual employment offers from employers in unionized industries.

If you are an auto worker, where the United Auto Workers represents the employees in that industry, and you try to get a job with Ford, you cannot go to Ford and say, “Look, I don’t like the wage scale that the United Auto Workers has agreed upon with you, and I want to individually bargain with Mr. Bill Ford as to how much I should be paid.”

Well, if you’re in the collective bargaining unit, under the federal labor laws, you have a collective bargaining representative and that collective bargaining representative has the exclusive authority to bargain in various areas with respect to mandatory subjects of bargaining—wages, hours, and terms and conditions of employment—as well as other areas.¹⁸ Fundamentally, the union is the exclusive bargaining representative.

That’s the backdrop as to how the labor laws are different than what applies when you have free competition.

But a different question comes up because in certain industries they may not necessarily want a union. From the entertainment-sports perspective, because of supply and demand and how the industry is structured, for the employees in industries such as the NFL and the NBA, there are advantages to having free competition. Employees in those industries have multi-employers—it’s not all just one employer—and there are many teams that are operated, and we can get into debates about single

¹⁷ *Id.*

¹⁸ See generally FUNK & WAGNALLS NEW ENCYCLOPEDIA, *Labor Relations* (2004).

entities, which do negotiate for players individually.¹⁹ You don't have the Jets negotiating for the Giants, or vice versa; each team is negotiating individually.

And, since there is competition in those markets due to the way they have been structured, the players quite often feel that they would be better served by having competitive markets rather than having a wage scale.²⁰ From time to time, whenever the union and management are in debates, there are discussions about cost certainty and all of this, but as a bottom line, the players, whom I represent, usually believe that competition is a good thing and it is better to have a system in place that ensures that the various teams in a given league compete for the services of players.

Now, as a basic predicate—and this gets into more nuanced questions from time to time—it is not always possible for the players to have a union and to agree with management that we have a collective bargaining agreement reached under labor laws, and that we're all agreed that this is a fine system that should go forward.

While everyone in a perfect world would always like to have a complete absence of disputes and no situations where an agreement is impossible, that doesn't always happen. It has happened from time to time in the NFL and the NBA where the players and the owners just could not reach agreement.²¹ And from time to time in those circumstances, the players have said, "Well, we need to have competition," and the labor laws just are not working for the players in that circumstance.

There was a long series of disputes and cases in terms of exactly—let me see if I can simplify this because this is a little bit

¹⁹ See, e.g., Barry Wilner, *When Owners Get in the Way: Jerry Jones Isn't the First—and He Won't Be the Last—Head of a Team to Venture into Areas Where He Simply Doesn't Belong*, FOOTBALL DIGEST, Feb. 2002 (discussing NFL team owners and how they sign players), available at http://www.findarticles.com/p/articles/mi_m0FCL/is_6_31/ai_81789955.

²⁰ See, e.g., NBA COLLECTIVE BARGAINING AGREEMENT art. II § 3, available at <http://www.nbpa.com/cba/articleII.html#section3> (last visited Feb. 13, 2005) (allowing players in their "individual contract negotiations" to "agree upon provisions . . . setting forth cash compensation.").

²¹ See, e.g., *Playing Hardball: Sports Labour Disputes*, at http://archives.cbc.ca/IDD-1-41-1430/sports/sports_disputes/ (last visited Feb. 13, 2005).

complicated—but whenever there is an agreement, certainly an agreement between the union and management on terms and conditions of employment, and that agreement is still in effect, there is something that is called the non-statutory labor exemption to the antitrust laws.²²

Let me just give the starkest example. We have a collective bargaining agreement in the NFL that says there is a salary cap.²³ That agreement is currently in place. If a current player in the NFL says, “I don’t like the salary cap. I want to file an antitrust suit against the salary cap that is in this agreement between the union and management,” the non-statutory labor exemption, which is something that courts have developed, dictates that he cannot file an antitrust suit.²⁴ In order to permit the labor laws to function effectively in this circumstance and in order to uphold this collective bargaining agreement, antitrust suits may not be filed to challenge what has been agreed to between management and labor.²⁵

The *Clarett* case deals not with that particular circumstance but with a different issue.²⁶ I won’t get into all of the details, but essentially Maurice Clarett isn’t a current player in the NFL; he’s a college player who wants to join the union and wants to join the NFL as a player.²⁷ And so here we’re talking about a slightly different situation from the extreme: does the exemption apply to prohibit or not prohibit Mr. Clarett from filing an antitrust suit against the rules that the NFL has put in place with respect to the college draft?²⁸

The reason why we’re having this debate, is partly because of Mr. Clarett’s status, as he is not a current NFL player.²⁹ If he were a current NFL player challenging any NFL rules in the collective bargaining agreement, it wouldn’t be an issue. But there is a

²² See Fuhrman, *supra* note 14, at 593–97.

²³ *Id.* at 592.

²⁴ *Id.* at 593–97.

²⁵ *Id.*

²⁶ See *Clarett I*, 306 F. Supp. 2d 379 (S.D.N.Y. 2004).

²⁷ See *id.* at 382.

²⁸ See *id.* at 390–97.

²⁹ See *id.* at 395–96.

factual question that Judge Scheindlin addressed: what is the status of the eligibility rules?³⁰

Undoubtedly, if you pick up the collective bargaining agreement in the NFL, there is no provision setting forth all the college eligibility rules.³¹ Rather, there are provisions that cross-reference other matters.³² The NFL argues in *Clarett* that because of various cross-references and provisions as to what the NFLPA will or will not do in terms of supporting certain suits, the eligibility rules are effectively brought within the scope, such that it should be protected by this non-statutory labor exemption.³³

And so, in terms of the backdrop, we have the intersection between the labor laws and the antitrust laws and we have other cases that have arisen dealing with fairly clear circumstances where something is in a collective bargaining agreement and someone is challenging it.

For example, there is a *Leon Wood* case³⁴ that has been cited where a player who was coming into the NBA challenged the provisions of the salary cap as it applied to people who were entering the NBA.³⁵ The Second Circuit in a clear opinion said that you cannot file an antitrust suit there.³⁶ Here we have a salary cap agreement between the union and management, and even though you are entering the NBA, it doesn't make a difference in terms of that provision being protected.³⁷

Clarett deals not with that precise question, but with someone who wants to enter the NFL and avoid application of a rule that is

³⁰ See *id.* at 385–87, 396–97.

³¹ See *id.* at 385–87.

³² See *id.* See generally NFL Collective Bargaining Agreement, arts. XVI–XVII [hereinafter NFL CBA], at <http://www.nflpa.org/Members/main.asp?subPage=-CBA+Complete> (last visited Jan. 31, 2005) (discussing selection and compensation of rookies, among other such matters relating to the draft).

³³ See *Clarett I*, 306 F. Supp. 2d at 396–97.

³⁴ *Wood v. NBA*, 809 F.2d 954 (2d Cir. 1987).

³⁵ See *id.*

³⁶ See *id.* at 963 (explaining that the prohibition, in collective bargaining agreement between National Basketball Association and National Basketball Players Association, on player corporations could not be challenged on antitrust grounds).

³⁷ See *id.* at 957.

2005]

MAURICE CLARETT'S CHALLENGE

399

not word-for-word contained within the collective bargaining agreement.³⁸ So there are factual issues.³⁹

I know that history has been a bit complicated. I hope that it has at least laid the basic framework for how we got to the litigation.

I don't want to go on too long, Jay. If you want to have someone else describe what Judge Scheindlin actually decided and didn't decide, that's fine with me. If you want me to go on, I can.

PROF. MOYER: That's a good suggestion, David. For that purpose, I will turn to Professor Gary Roberts and turn him loose on this topic.

PROF. ROBERTS: All right, Jay.

Let me start off by saying that for the last twenty-one years I have taught sports law at Tulane, and I think if there is one thing I have learned, it's that the term "sports law" is almost an oxymoron. It seems that in so many instances when labor law cases or antitrust cases or contract cases, or whatever you have, come into a court of law or before an arbitrator, the judges, the arbitrators, and the jurors, because the cases involve sports, just go stark, raving nuts. They start issuing opinions that are just flat-out stupid. They don't follow the law.

The story we heard from the last panel, where the juror leaned over and gave Coach Bryant the glasses—I'm not surprised at all by that, because it's such a common phenomenon.⁴⁰ The visibility, the passions, and the interest that sports stir causes courts to do really stupid things.⁴¹

And Judge Scheindlin has continued the trend. This case was one of the most abominable decisions I have ever seen. I want to spend a little time going through it.

³⁸ See *Clarett I*, 306 F. Supp. 2d 379.

³⁹ See *id.*

⁴⁰ In the midst of the 1994 Major League Baseball strike, for example, a San Francisco judge cut Giants star Barry Bonds' monthly family support payments in half and then asked Bonds for his autograph. The judge subsequently withdrew from the case and reversed the decision. See Associated Press, *Judge Makes Bonds Pay Full Family Support*, CHI. TRIB., Sept. 3, 1994, § 3, at 2.

⁴¹ See *id.*

Let me start off by saying that I've got tenure, so I can do this. I expect never to appear in front of this judge, hopefully at least not as a defendant.

The rule in question is not one I'm particularly a fan of.⁴² In fact, if I were the czar of the NFL, I think I would probably have a different rule. But I have to tell you, I'm not an expert on the game of football. I don't know at what age most players' bodies become sufficiently developed so that they're able to successfully compete in the NFL.⁴³ I'm like most people, I'm a fan, and I have my own completely uninformed, prejudiced decisions and judgments; so I of course know the answer to everything. I know what play the coach should run and what defense he should put on the field. But the reality is I really don't. And so I'm not going to get into whether or not this is a good rule or a bad rule.

My instinct—particularly as a faculty athletic representative of a Division One institution who would like to see all the Maurice Clarett's out of our system so that he's not taking his oral exams anymore—is to have these people go and play professional ball and leave college to real college students.⁴⁴

So having said that, I'm not a big fan of this rule and I wish the NFL would loosen up with it. I also have to say that my opinion on that has absolutely nothing to do with whether or not it's an antitrust violation. And so, if you try to apply legal doctrine to this case, I think that you can go through Judge Scheindlin's opinion and point by point show that she is just flat-out wrong.⁴⁵

In fact, this opinion is sort of right out of the 1960s. Had she written this in the 1960s, I would have said, "Well okay, that's a reasonable, plausible argument." But for those of you who know

⁴² See NFL CBA, *supra* note 32, art. XII ("If four seasons have not elapsed since the player discontinued high school, he is ineligible for selection, but may apply to the Commissioner for special eligibility."); see also *Clarett I*, 306 F. Supp. 2d at 385–87.

⁴³ See *Clarett I*, 306 F. Supp. 2d at 385 (stating the NFL's position that an athlete must be three years out of high school to be eligible to play in the league).

⁴⁴ Cf. Mike Fish, *Where is the Outrage*, Feb. 3, 2003, at http://sportsillustrated.cnn.com/inside_game/mike_fish/news/2003/02/03/straight_shooting (commenting on the inherent unfairness of allowing athletes to circumvent individual universities' admissions standards).

⁴⁵ See *Clarett II*, 369 F.3d 124 (2d Cir. 2004).

antitrust law, if you can see a district judge who starts citing as authority for her decision *United States v. Topco Assocs.*,⁴⁶ *Klor's v. Broadway-Hale Department Stores*,⁴⁷ and a concurring opinion from a 1949 Second Circuit decision that was reversed by the Supreme Court,⁴⁸ you know she's in trouble. Let's go through some of the stuff that came out.

First of all, Judge Scheindlin rejected the labor exemption.⁴⁹ I want to just make a comment about David's remarks, and I appreciate David's walking through the background of the labor exemption.⁵⁰ The one thing he left out—and I know it's because he and I disagree on this one—is whether or not you have to have union agreement in order for the non-statutory labor exemption to apply.⁵¹ This was a contentious issue from the early 1970s until 1996. The two different sides disagreed quite vehemently. The cases evolved.

But in 1996, by an 8-1 vote, the United States Supreme Court ruled that the non-statutory labor exemption applies to all matters that are mandatory subjects of bargaining, whether or not the union has agreed to them—the matters don't have to be in a collective bargaining agreement in order for the non-statutory labor exemption to apply.⁵²

That was precisely the issue in the *Brown* case, which involved the NFL's \$1000-a-week salary cap on the developmental squad players.⁵³ The union had never agreed to it.⁵⁴ The League had proposed and unilaterally implemented the salary cap.⁵⁵ The union was against it.⁵⁶ Mr. Brown, who was one of the developmental

⁴⁶ 405 U.S. 596 (1972)

⁴⁷ 359 U.S. 207 (1957).

⁴⁸ See *Gardella v. Chandler*, 172 F.2d 402, 408 (2d Cir. 1949) (Hand, J., concurring).

⁴⁹ See *Clarett I*, 306 F. Supp. 2d 379, 406 (S.D.N.Y. 2004).

⁵⁰ See *supra* notes 14–39 and accompanying text.

⁵¹ See *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996) (observing that the non-statutory labor exception is neither limited by case law nor principle to apply strictly to labor management agreements or labor management consents).

⁵² See *id.* at 250–51.

⁵³ See *id.*

⁵⁴ See *id.* at 234–35.

⁵⁵ See *id.* at 234–35 (1996).

⁵⁶ See *id.* at 234.

players, brought an antitrust suit.⁵⁷ The case ultimately ended up in the Supreme Court after the District of Columbia Circuit decided 2-1 that it didn't matter whether the union had agreed to the cap or not; if it's a mandatory subject of bargaining, the remedy for members of the bargaining unit is through collective bargaining created by the labor laws and not through an antitrust court.⁵⁸ How can you be bargaining in good faith if you're out suing the guy on the other side of the bargaining table in the antitrust courts?⁵⁹ That was essentially what the Supreme Court said in 1996.⁶⁰ So it is really not relevant in *Clarett* whether or not the union had agreed to this "three years out of high school" rule or not.⁶¹

Judge Scheindlin gave three reasons why the labor exemption did not apply. Number one, she said that a provision setting entry requirements into the bargaining unit is not a mandatory subject of bargaining.⁶² I've created for purposes of trying to add a little levity to programs like this what I call my "stupidity assessment scale." It goes from one to five. One is "I disagree with it but it's not really stupid," and there are different gradations up to five, which is "this is really phenomenally stupid." This one gets a five. 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.⁶³ So that reason is just gone.

Second, she said that the exemption cannot bar someone who is not yet a member of the union from bringing a suit.⁶⁴ Well, that's just a fancy way of saying it's not a mandatory subject of bargaining; if the union could agree to a provision that sets entry requirements, then that collective bargaining agreement is going to

⁵⁷ See *id.* at 235. In May 1990, 235 developmental squad players, including Mr. Brown, brought an antitrust suit against the NFL and its member clubs. *Id.*

⁵⁸ See *Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1045 (D.C. Cir. 1995), *aff'd*, 518 U.S. 231 (1996).

⁵⁹ See *Brown*, 518 U.S. at 242.

⁶⁰ *Id.*

⁶¹ See *Clarett I*, 306 F. Supp. 2d 379, 393 (S.D.N.Y. 2004).

⁶² See *id.* at 391–95.

⁶³ See Jeff Darlington, *In the Balance*, ORLANDO SENTINEL TRIB., Feb. 10, 2004, at D1.

⁶⁴ See *Clarett I*, 306 F. Supp. 2d at 395–96.

apply to anyone who is or wants to become a member of the bargaining unit.⁶⁵ The collective bargaining agreement doesn't just apply to current members of the unit; it applies to prospective members of the unit, which is what Clarett is.⁶⁶ So essentially, this second reason is just a rewording of "it's not a mandatory subject of bargaining." So again, it's not a very legitimate point.

The third argument Judge Scheindlin made I have to say a little bit more about.⁶⁷ In the third one, she said that for a rule to be protected by the labor exemption, it must arise out of the collective bargaining process.⁶⁸ In other words, the rule has to be something that, for example, the union and management actually had discussed and management unilaterally implemented after impasse.

There is language in *Brown v. Pro Football, Inc.*, the Supreme Court's decision in 1996, from which you could make Judge Scheindlin's third argument.⁶⁹ And so I don't think this one is completely off the wall. It is quite clear that the NFL had the rule regarding eligibility requirements long before the union ever took any interest in it.⁷⁰ In fact, it had a rule "four years out of high school" before we even had a union.⁷¹ So one could argue that this rule did not arise out of collective bargaining and that the language in *Brown v. Pro Football, Inc.* means that the labor exemption shouldn't apply.⁷²

I don't think that's a good argument and I would disagree with it, but I don't think it's completely off the wall. The reason I don't agree with it here is that it puts form over substance.⁷³ The only reason the eligibility rule was not bargained over is because the

⁶⁵ See Darlington, *supra* note 63.

⁶⁶ See *id.*

⁶⁷ See *Clarett I*, 306 F. Supp. 2d at 396.

⁶⁸ See *id.*

⁶⁹ See *Brown v. Pro Football, Inc.*, 518 U.S. 231, 250 (1996).

⁷⁰ See *Clarett I*, 306 F. Supp. 2d at 385; see also Robert A. McCormick & Matthew C. McKinnon, *Professional Football's Draft Eligibility Rule: The Labor Exemption and the Antitrust Laws*, 33 EMORY L.J. 375, 377 (1984) (tracing the origin of the Rule to 1925).

⁷¹ See McCormick & McKinnon, *supra* note 70, at 377-78.

⁷² See Charles Lane, *Clarett Lines Up against NFL*, WASH. POST, Jan. 23, 2004, at D6.

⁷³ See *id.*; see also Lynn Zinser, *Court Bars Clarett from Draft for Now*, N.Y. TIMES, Apr. 20, 2004, at D1.

union didn't have any problem with it.⁷⁴ In fact, Gene Upshaw has publicly stated he doesn't have any problem with this rule—in fact, he supports it.⁷⁵

So the fact that the union and the NFL didn't argue over eligibility in collective bargaining is really meaningless.⁷⁶ All this means is that the next time we have collective bargaining, the NFL is going to have to insist that Mr. Upshaw argue with them for a little bit before they agree on eligibility requirements.⁷⁷ And if that's what the law is, it's kind of silly. But that was Judge Scheindlin's third reason for rejecting the non-statutory labor exemption.⁷⁸

So I think the non-statutory labor exemption ought to apply. The first two reasons Judge Scheindlin gave for why it did not apply were just dumb. The third one is arguable, but I disagree with it.

The next issue raised was the standing issue.⁷⁹ On this one, I disagree with the NFL. The NFL's argument was that Clarett didn't have standing because he wasn't injured by reason of that which allegedly made the rule an antitrust violation.⁸⁰ It's a somewhat technical antitrust doctrine that I don't want to particularly get into, but I think that it's wrong.

I think that the allegation ought to be—and I'm not sure it was—that what arguably made this illegal under the antitrust laws is that by excluding from the talent playing football in the National Football League a group of highly talented people, you are somehow diminishing the quality of the product on the field—you are keeping people off the field or off the court that the consumer wants to see, and that by excluding them from playing, you are

⁷⁴ Todd Jones, *Players Union against Early Entry*, COLUMBUS DISPATCH, Jan. 30, 2004, at 5F; see also Zinser, *supra* note 73.

⁷⁵ See Darlington, *supra* note 63 (quoting Gene Upshaw as saying, "We will do everything in our power to block these young players from entering the league.").

⁷⁶ See Charles Lane & Mark Maske, *Judge Rules NFL Draft Is Open to Everyone*, WASH. POST, Feb. 6, 2004, at A1.

⁷⁷ See *id.*

⁷⁸ See *Clarett I*, 306 F. Supp. 2d 379, 396 (S.D.N.Y. 2004).

⁷⁹ See *id.* at 397–98.

⁸⁰ *Id.* at 398.

2005]

MAURICE CLARETT'S CHALLENGE

405

diminishing the quality of the product—and product quality is one of those values that antitrust law is trying to promote.

And so I think Clarett could make the argument that he is in fact injured by reason of a rule that creates this adverse effect on consumer welfare. So I'm not sure I would have granted the NFL's argument on the standing issue.

But in the process of rejecting it, Judge Scheindlin didn't just make the argument I made; she went on to say some things again that were just flat-out off the wall.

For example, Judge Scheindlin says: Well, there were three older cases from back in the 1970s—*Haywood v. NBA*,⁸¹ *Boris v. United States Football League*,⁸² and *Linseman v. World Hockey Ass'n*⁸³—where courts had found a per se violation of the antitrust laws against rules that are roughly equivalent to the one we are talking about here with respect to the NBA, the USFL, and the World Hockey Association.⁸⁴ Judge Scheindlin said that because those courts ruled on the merit, presumably they must have been satisfied that the plaintiffs had standing.⁸⁵

I mean that's just silly. The defendants in those cases didn't raise the standing issue; there's nothing in the opinions that spoke to standing.⁸⁶ To use that as some kind of precedent that standing exists is, I think, just crazy.

Judge Scheindlin then cited *Klor's v. Broadway-Hale Department Stores*,⁸⁷ which is a case from 1959 that the Supreme Court has done everything short of expressly overruling. She basically said: this is a group boycott, and therefore he has standing.⁸⁸ Again, I don't want to get into the details of group boycott doctrine, but there is not much left to it, and *Klor's* is not a

⁸¹ 401 U.S. 1204 (1971).

⁸² No. 83 CV 4980, 1984 U.S. Dist. LEXIS 19061 (C.D. Cal. Feb. 28, 1984).

⁸³ 439 F. Supp. 1315 (D. Conn. 1977).

⁸⁴ See *Clarett I*, 306 F. Supp. 2d at 390, 398.

⁸⁵ See, e.g., *id.* at 398 n.119.

⁸⁶ See *id.*

⁸⁷ 359 U.S. 207 (1959).

⁸⁸ See *Clarett I*, 306 F. Supp. 2d at 399 (holding that “group boycotts . . . have long been held in the forbidden category” and that Clarett's exclusion was an “injury flowing directly from the anticompetitive effect of the Rule”).

viable case to be citing for much of anything anymore—yet that’s what she relied on.⁸⁹

I could go through several of the statements she made, but I’d rather focus on the antitrust issues.

I disagree with Judge Scheindlin’s analysis under the antitrust laws for many reasons, but there are a couple mistakes she made that are just glaring.

She held that summary judgment was appropriate.⁹⁰ I am not convinced that if this case were to go to a rule of reason trial before a jury, that Clarett wouldn’t win. I think that a jury could balance the procompetitive and anticompetitive effects and ultimately conclude that the anticompetitive effects outweighed the procompetitive benefits. My guess is, having not heard all the evidence and all the experts, that if I were a juror, I would probably not find that way, but I don’t know. I’d want to hear the evidence before I reached that conclusion. But for the judge to grant summary judgment is just goofy, because in order to do it she had to make a couple of findings that are just inconsistent with antitrust law today.

First, on the finding of anticompetitive effects, instead of putting that issue to a jury, Judge Scheindlin declared that one could use the “quick look rule of reason” approach, which is certainly a doctrine that has been adopted by the Supreme Court in various cases, starting with *Board of Regents of the University of Oklahoma v. NCAA*.⁹¹ She said that the anticompetitive effects were obvious, and the reason that they were obvious is because Clarett was being denied the opportunity to pursue his profession.⁹²

Well, that’s not an obvious anticompetitive effect. There is language in the cases back in the 1950s and 1960s, when populist antitrust views were very common, that might agree. However,

⁸⁹ See *id.*

⁹⁰ See *id.* at 410–11.

⁹¹ 707 F.2d 1147 (10th Cir. 1983); see *Clarett I*, 306 F. Supp. 2d at 407–08 (providing that a “quick look” analysis is appropriate where “the great likelihood of anticompetitive effects can easily be ascertained,” and “an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect”).

⁹² See *Clarett I*, 306 F. Supp. 2d at 409–10.

since the mid-1970s, the Supreme Court has rewritten Section 1 antitrust doctrine.⁹³ The fact that an employee is somehow not allowed to ply his trade is not the kind of thing that antitrust law is interested in.⁹⁴ Antitrust law is interested in consumer welfare; it's not interested in the rights of employees.⁹⁵ That's why we have other laws, such as the labor laws.⁹⁶

So the mere fact that an employee is excluded from being able to work is not an antitrust issue.⁹⁷ For Judge Scheindlin to say that just because Clarett can't work means that there is an anticompetitive effect, and then to base summary judgment on this, is just wrong.

Her support for this theory was a quotation from a concurring opinion in a 1949 case in the Second Circuit involving the baseball antitrust exemption (which six years later the Supreme Court rejected in the *Toolson* case⁹⁸), in which Judge Hand basically said the right to work is an antitrust issue and that denying someone the right to work, in that case in the context of the baseball lifetime reserve system, was obviously anticompetitive.⁹⁹ In 1949 I might have agreed with that analysis. In 2004 it's just absolutely wrong.

But what really perturbs me is Judge Scheindlin's response to the NFL's procompetitive defense, in which she invokes an old doctrine that goes back four or five decades The NFL's procompetitive defense, which a jury should evaluate and balance against the anticompetitive effects, is that one of the reasons it has this rule is because if it doesn't, a lot of kids who would be future NFL stars if they stayed in college and developed sufficient maturity, will now come out prematurely, they will try to become professionals before they are ready, and these kids will get eaten up and spit out and will never be able to develop into the quality of

⁹³ See PAUL C. WEILER & GARY ROBERTS, *SPORTS AND THE LAW* 181–84 (3d ed. 2004).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ See *Clarett II*, 369 F.3d 124, 141 (2d Cir. 2004) (stating that any challenge to an employer's hiring criteria must "be founded on labor rather than antitrust law") (citing *Caldwell v. NBA*, 66 F.3d 523, 530 (2d Cir. 1995)).

⁹⁸ *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356 (1953).

⁹⁹ *Gardella v. Chandler*, 172 F.2d 402, 408 (2d Cir. 1949) (Hand, J., concurring).

NFL player that exists with the rule, and therefore in the long run the quality of the NFL's product will be diminished.¹⁰⁰

Now, you might think that's a silly argument; you might think that's a good argument. Like I said, I don't really know because my opinion is only informed from watching games on Sunday afternoon. But whether it's a good view or a bad view is a factual issue, and it's a factual issue that a jury has to decide.

Judge Scheindlin got rid of that issue in this case by saying it's irrelevant.¹⁰¹ The quality of the NFL's product and the efficiency with which the NFL produces its product are irrelevant because the relevant market that is being benefited by this rule if the NFL is right is the product market, whereas Maurice Clarett is claiming that the anticompetitive effects are in the labor market, and you can't use benefits in the product market if the claimed injury is in the labor market.¹⁰²

Judge Scheindlin cites *Topco*,¹⁰³ which is one of the most vilified and ridiculed cases in the history of antitrust jurisprudence—every court in the country no longer recognizes it as good law—and that's her authority for this.¹⁰⁴ It's obviously not a correct statement on her part that the product market is irrelevant if the restraint is in the labor market.

As an example, in the NCAA cases the courts are unanimous—the Supreme Court in the *Board of Regents*¹⁰⁵ case said so—that with respect to restraints on players and all these amateurism rules, if you bring an antitrust suit alleging that the NCAA's rules on the players are anticompetitive in the player labor market, these rules are nevertheless okay under the antitrust laws because the NCAA's product is defined by the amateur nature of the activity, and therefore the benefit to consumers of having amateur college football played by real students is such a

¹⁰⁰ See *Clarett I*, 306 F. Supp. 2d 379, 408–09 (S.D.N.Y. 2004).

¹⁰¹ See *id.* at 409–10.

¹⁰² See *id.* at 409.

¹⁰³ *United States v. Topco Assocs.*, 405 U.S. 596 (1972).

¹⁰⁴ See *Clarett I*, 306 F. Supp. 2d at 409.

¹⁰⁵ See *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984).

procompetitive benefit in the product market that it overwhelms any anticompetitive effects in the player labor market.¹⁰⁶

I could name dozens of cases where since the mid-1970s the courts have said that you have to balance the totality of the competitive effects.¹⁰⁷ About ten years ago in *Sullivan v. NFL*,¹⁰⁸ the First Circuit reversed another trial judge who ruled that you could only consider procompetitive effects in the market that the plaintiff claims has anticompetitive effects.¹⁰⁹ This is just not the law.

And yet, Judge Scheindlin invokes the old *Topco* case for her authority to grant summary judgment and take the procompetitive benefits issue away from the jury.¹¹⁰ That's just wrong, and I don't think there is any question about it.

Finally, she turns to the less-restrictive alternative doctrine and says: Even if all of what I said before isn't right, there is a less-restrictive alternative in this case that the NFL could have employed without barring all people who were three years out of high school, and the less-restrictive alternative is that doctors could give players medical and mental examinations to see if they were ready to play in the NFL.¹¹¹ I rest my case.

PROF. MOYER: Gary, one could only have hoped that you would have told us what you really thought.

MR. FEHER: By the way, Jay, I want my neutral description of the antitrust laws to not count against my time in responding to Gary.

PROF. MOYER: Howard Ganz, what are you views on the topic?

MR. GANZ: Although I usually agree 100 percent with Gary, I have perhaps a minor disagreement today, but I'll get there slowly.

¹⁰⁶ *Id.* at 133–34.

¹⁰⁷ *See, e.g.,* *Brown v. Pro Football*, 812 F. Supp. 237, 238 (D.D.C. 1992) (“The Rule of Reason requires the judge to balance the anti-competitive evils of a practice against its procompetitive virtues.”).

¹⁰⁸ *See, e.g.,* *Sullivan v. NFL*, 34 F.3d 1091, 1111–13 (1st Cir. 1994).

¹⁰⁹ *Id.*

¹¹⁰ *See Clarett I*, 306 F. Supp. 2d at 409.

¹¹¹ *Id.* at 410.

First, just a couple of personal observations. Discussing the *Clarett* case is for me a little bit of a “déjà vu all over again,” because when I was a junior—indeed very junior—associate at Proskauer, I had the privilege of working on the *Haywood* case.¹¹² My principal duty was to be the person who was sent to Washington to file a petition in opposition to a motion for a stay in the Supreme Court. So that was my maiden voyage other than as an amicus, and my only voyage, to the Supreme Court of the United States. And it was not a successful one because Justice Douglas stayed the operation of the Ninth Circuit’s decision in the NBA’s favor, and Mr. Haywood went on to a glorious NBA career notwithstanding his tender age.¹¹³ So *Clarett* sort of brings me back to the beginning.

I would acknowledge, Gary, that the phrase “sports law” may be an oxymoron.¹¹⁴ I hope you don’t think “sports lawyer” is an oxymoron as well, but we’ll let that go.

Like David Feher, today I am only presenting my personal opinions. I don’t care if it’s adopted by the various players’ associations, although I doubt that it will be, and I have absolutely no knowledge of the facts, so I can say whatever it is that I want to say.

First, with respect to where *Clarett* is at the moment, I think it is probably relevant to inform everybody that the NFL has made a motion to stay Judge Scheindlin’s decision.¹¹⁵ I think that argument is to be heard sometime next week by a panel that is to consist of Judge Feinberg; Judge Cabranes, who was actually on the panel in the *NBA v. Williams* case¹¹⁶ a few years ago; and Judge Pooler.

If I were to put a wager on what will happen on the stay motion, I think the court will grant a stay, because the NFL has

¹¹² *Haywood v. NBA*, 401 U.S. 1204 (1971).

¹¹³ *Id.* at 1207.

¹¹⁴ See *supra* note 39 and accompanying text.

¹¹⁵ The NFL’s first motion for a stay was denied by Judge Scheindlin. See *Clarett I*, 306 F. Supp. 2d at 411. However, the Second Circuit reversed this decision on appeal. See *Clarett II*, 369 F.3d 124 (2d Cir. 2004). This appeal was heard by Circuit Judges Sack and Sotomayor and District Judge Kaplan, sitting by designation. See *id.* at 124.

¹¹⁶ *NBA v. Williams*, 45 F.3d 684 (2d Cir. 1995).

2005]

MAURICE CLARETT'S CHALLENGE

411

proposed an expedited briefing schedule, that would enable the court to decide the merits in relatively short order. Additionally, the NFL has represented to the court that if it should affirm Judge Scheindlin's decision, the NFL would conduct a supplemental draft in which Mr. Clarett could be selected in plenty of time for him to attend training camp and/or to play next season.¹¹⁷

I agree, more seriously, with Gary's analysis of Judge Scheindlin's opinion.¹¹⁸ Maybe a little bit on the lighter side of that—and recognizing that I am one who practices in the Southern District of New York and so therefore will be somewhat more restrained than Professor Roberts from Tulane—but Judge Scheindlin's opinion is like virtually every other opinion in a "sports law" case. That is, it attempts to introduce some humor by using sports phrases or sports analogies, which 99.9 percent of the time fall flat: "the argument got close to success but failed to cross the goal line," "they did not hit a home run with this contention," etc.¹¹⁹ And for someone who has practiced in this area for some number of years, I don't think I take it personally, but it seems, in my opinion, to sort of belittle the arguments that you're making when courts and arbitrators utilize that kind of language.

Judge Scheindlin actually took this to somewhat of an extreme by her repeated citations to such august legal authorities—and I don't mean to offend anyone in the audience—as espn.com. In fact, the stay papers the NFL has filed make some issue of this because those citations suggest that the Court may have considered, and relied on, information that was outside the record.¹²⁰

Where I disagree, at least slightly with Gary—not with the result—is that I think the subject of this rule, good or bad, is a mandatory, or should be found to be a mandatory subject of

¹¹⁷ See Dan Lewis, *Clarett Clarification Causes Catastrophe?* (Apr. 20, 2004) (acknowledging that any potential harm to Clarett would be lessened by the NFL's agreement to hold a supplemental draft if the appeals court later ruled in his favor), <http://www.footballproject.com/story.php?storyid=422>.

¹¹⁸ See *supra* notes 44–111 and accompanying text.

¹¹⁹ See, e.g., *Clarett I*, 306 F. Supp. 2d at 389 ("This case has progressed rapidly, virtually rushing toward the goal line because of the imminence of the 2004 draft.").

¹²⁰ See *id.* at 386 n.33, 388 n.47.

collective bargaining, although this may not be an open-and-shut labor law issue. There are NLRB decisions, and court opinions affirming them, which hold, for example, that the administration of pre-employment drug tests to applicants for employment is not a mandatory subject of bargaining.¹²¹ And employers in virtually all industries other than professional sports would take the position, probably across the board, that they do not want and should not be required to bargain about how they treat applicants, or what the eligibility rules are, but would, instead, assert that matters like this are within a management's prerogative.

There are, of course, cases that suggest a different result. One line of cases, on which the *Wood* decision in the Second Circuit relied, held that a hiring hall, where individuals seeking employment go to the hiring hall and then get referred out to employers, is clearly a mandatory subject of bargaining.¹²² There is an argument distinguishing hiring halls from a professional sports league draft because indeed hiring halls are common in industries where there are typically large or frequent layoffs of people—e.g., the construction industry—and where an employee is laid off, that employee can get back to work only by going to the hiring hall.¹²³ So when the union and employer are discussing how

¹²¹ See *Star Tribune v. Newspaper Guild of the Twin Cities*, 295 N.L.R.B. 543, 548 (1989) (ruling that pre-employment drug testing, in and of itself, is not a mandatory subject of bargaining under the statutory duty to bargain about employees' terms and conditions of employment).

¹²² See *Wood v. NBA*, 809 F.2d 954, 960 (2d Cir. 1987) (citing generally *Local 357, Int'l Bhd. of Teamsters*, 365 U.S. 667 (1961); *Assoc. Gen. Contractors*, 143 N.L.R.B. 409, *enforced*, 349 F.2d 449 (5th Cir. 1965), *cert. denied*, 382 U.S. 1026 (1966)). Collective agreements in a number of industries provided for the exclusive referral of workers by a hiring hall to particular employers at a specified wage. The *Wood* court held that:

[T]he choice of employer is governed by the rules of the hiring hall, not the preference of the individual worker. There is nothing that prevents such agreements from providing that the employee either work for the designated employer at the stipulated wage or not be referred at that time. Otherwise, a union might find it difficult to provide the requisite number of workers to employers. Such an arrangement is functionally indistinguishable from the college draft.

Id.

¹²³ See *id.* (explaining hiring halls).

2005]

MAURICE CLARETT'S CHALLENGE

413

the hiring hall operates, it really has an effect, or potential effect, on a current employee.¹²⁴

All that being said, and while Judge Scheindlin tried to distinguish the *Wood* case principally on the ground that Mr. Clarett had not yet been drafted, I think that is a distinction without merit, to put it mildly.¹²⁵ It can't make a difference that on the day before the NFL draft, eligibility is not a mandatory subject, but as soon as the Commissioner announces that Maurice Clarett has been selected by Team X, eligibility became a mandatory subject. That just does not seem to be a logical conclusion.

In addition, and certainly in other sports where there is an express provision in a collective bargaining agreement, Judge Scheindlin's opinion really would eradicate rules to which the bargaining parties themselves have agreed.¹²⁶ For example, there are age restrictions in the WNBA collective bargaining agreement, directly bargained across the table; the agreement between the WNBA and the Players Association says flat-out that you've got to be twenty-two years old to play in the WNBA.¹²⁷ Under Judge Scheindlin's opinion, those are pretty questionable provisions.

I think that's wrong—that when there has clearly been bargaining and the parties have agreed on issues like these, courts should not, and will not, have a problem.

And I certainly agree with Gary that the fact that there is no explicit language on an issue in a collective bargaining agreement is not determinative. 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 collective bargaining agreement.¹²⁸ A classic example: If the employer for twenty years

¹²⁴ See *id.*

¹²⁵ See *Clarett I*, 306 F. Supp. 2d at 393–94 (distinguishing *Wood*, 809 F.2d 954).

¹²⁶ See generally *id.*

¹²⁷ See *Kids in the NBA*, WASH. POST, July 11, 2001, at C16 (providing that “[t]o be drafted for a WNBA team, a player must be 22 during the calendar year of the first season or graduated from a four-year college or have played at least two seasons in another pro basketball league.”).

¹²⁸ See, e.g., *Int'l Bhd. of Elec. Workers, Local Union No. 199 v. United Tel. Co. of Fla.*, 738 F.2d 1564, 1568 (11th Cir. 1984) (holding that an arbitrator's award that appeared contrary to a collective bargaining agreement might nevertheless have been

has given Christmas turkeys to the workforce, taking away those turkeys may be a violation of the collective bargaining agreement even if that agreement says nothing about turkeys.

So too in the NFL, these rules about eligibility have existed for quite some time, there has never been any objection from the union, and they should be regarded as a matter of practice as part of the overall collective bargaining agreement.

In addition, there are social issues and business issues involved in rules like this. By social issue I really don't mean what Gary was saying about having a panel of doctors examining high school, junior high school, or elementary school athletes to see whether or not they are capable of playing a professional sport—I'm not talking about whether or not the kids can play or whether or not the kids are mature enough to act in appropriate ways either on the court, or off the court. There are plenty of examples of professional athletes in their thirties who have acted in rather childish ways—and I don't think we need to make a long list of those—so I'm not sure age is a necessary factor.¹²⁹

But there are thousands of athletes—some at college, some not—who, heartened by the ruling in *Clarett*—and I think seven or eight high school players have declared themselves eligible for the NFL draft—are going to give up the opportunity for an education to go to play a professional sport in which they are never going to succeed.¹³⁰ For every one who makes it, there are thousands who don't.¹³¹ Terminating the three season eligibility rule exacerbates the problem.¹³²

From a more parochial business side, i.e., from the League and teams' point of view—and there may be some NBA draft picks

valid if premised upon reliable evidence of the parties' intent, such as past practices, industrial efficiency, and bargaining history).

¹²⁹ *But see Easterblogg*, NEW REPUBLIC ONLINE (Feb. 6, 2004) ("Performance in team sports requires maturity, which in this context usually means the early twenties. Football is also the most complex of sports; it simply takes longer to learn."), at <http://tnr.com/easterbrook.mhtml?pid=1296>.

¹³⁰ *See, e.g., Dick Vitale, High-School Stars Way Too High on NBA* (Feb. 6, 2004), at <http://espn.go.com/dickvitale/vcolumn040206-high-schoolers.html>.

¹³¹ *See id.*

¹³² *See id.*

2005]

MAURICE CLARETT'S CHALLENGE

415

that reflect this because I think it is more important in sports like basketball where there is only a minimal number of draft choices—there obviously have been a number of players who have been very successful coming out of high school and playing in the NBA.¹³³ Putting aside his other problems, Kobe Bryant isn't a bad basketball player and neither is Kevin Garnett, but for every Bryant and Garnett there are question marks.¹³⁴

At least from a very narrow business perspective, a team takes a large risk in investing one of its very few options to select draft choices by selecting someone who is eighteen or nineteen years old.¹³⁵ They may win; they may lose.¹³⁶ From the business perspective, it would be much better if that individual had more seasoning, whether in college or in some minor league, etc.¹³⁷ That is actually one of the reasons why the NBA started the National Basketball Development League, which has had some modest amount of success in providing call-ups to the NBA.¹³⁸

I think that, Jay, concludes what I would say for the moment.

PROF. MOYER: Thank you, Howard.

Let's hear from David Cornwell.

MR. CORNWELL: Thank you, Jay.

I am going to, like Gary, take some specific shots at the Judge's opinion.

I actually think this is a fascinating case because it gives us the opportunity to get a glimpse at the impact that litigation tactics

¹³³ See *id.* ("Let's hope that some of these kids re-think and re-evaluate their futures. They can't all be the next LeBron James.").

¹³⁴ See, e.g., Keith A. Owens, *The Wags Try Kobe* (July 30, 2003) (Despite Bryant's success on the court, "he was the youngest player ever to join the NBA in 1996 at age 17. Now, at age 24, he may become one of the youngest to lose it all. . . . [He] has probably been caught up in too much of a whirlwind at far too young an age. Being a sports hero, role model and husband has got to be one hell of a load to shoulder for a 19-year-old."), at <http://www.metrotimes.com/editorial/story.asp?id=5191>.

¹³⁵ See Vitale, *supra* note 130.

¹³⁶ See *id.*

¹³⁷ See *id.*

¹³⁸ See Nat'l Basketball Dev. League, *15 Former NBDL Players on 2004–05 NBA Opening Day Rosters* (Nov. 2, 2004), at http://www.nba.com/nbdl/nbdl-nbdl_nba_openingroster_04.html.

have on the outcome of a case, as well as confirming that, in fact, there are times when judges are just flat-out wrong.¹³⁹

With respect to litigation tactics, I'm quite certain that there were good reasons the lawyers for the NFL and NFLPA decided not to issue a clarification to the collective bargaining agreement when it became clear that Maurice Clarett was going to challenge the draft eligibility rules.¹⁴⁰

The collective bargaining agreement in the NFL is also an element of a stipulated settlement agreement that came about in the resolution of a series of antitrust cases arising out of the labor dispute in the NFL in the late 1980s and early 1990s.¹⁴¹ Since the collective bargaining agreement was adopted, there have been a series of clarifications between the union and the league that, in my opinion, actually add new provisions—even though they are characterized as clarifications—and it seems to me that the parties could have clarified the eligibility rule here. Had they, I don't think that this case would have gotten much further, because in that instance it would have been a case of contract interpretation and not necessarily one that was susceptible to antitrust scrutiny.

Additionally, I think that had they issued that clarification, the NFL would have done well to move the case to the District Court in Minneapolis because Judge Doty has a long history of dealing with these parties and disputes arising out of the collective bargaining agreement.¹⁴² I have been involved in disputes with the NFL and the NFLPA relating to interpretation of the collective bargaining agreement.¹⁴³ My experience with Judge Doty is that

¹³⁹ Judge Scheindlin's ruling was overturned by the Second Circuit. *See Clarett II*, 369 F.3d 124 (2d Cir. 2004).

¹⁴⁰ *See Clarett I*, 306 F. Supp. 2d 379 (S.D.N.Y. 2004).

¹⁴¹ For a brief summary of the antitrust cases, see Steven Wayne Hays, *Labor Strife in the National Football League, Why the Reggie White Settlement Was Unfairly Settled for Those Involved and Why This Settlement Will Eventually Lead to More Problems*, 13 U. MIAMI ENT. & SPORTS L. REV. 195, 203–12 (1996).

¹⁴² Judge David S. Doty oversees the NFL's collective bargaining agreement. In 1992, Judge Doty paved the way for free agency in the NFL in overseeing a case finding the league's free agent policies to be in violation of federal antitrust laws. *See McNeil v. NFL*, 790 F. Supp. 871 (D. Minn. 1992).

¹⁴³ Mr. Cornwell served as Assistant General Counsel for the NFL earlier in his career. In 1997, he co-founded DNK Cornwell, which specializes in complex transactions in the sports and entertainment industry.

2005]

MAURICE CLARETT'S CHALLENGE

417

when the NFL and the NFLPA agree on a provision, or on the interpretation of a provision in the collective bargaining agreement, he is unlikely to agree with a third party's competing interpretation.¹⁴⁴

With respect to the Judge Scheindlin's ruling, I think that the Judge got it wrong in a number of areas.

First, I don't think this case was susceptible to summary judgment.¹⁴⁵ As we know, the standard for summary judgment is that there is no material fact relating to an issue in the case when all of the facts are construed in favor of the party opposing the motion for summary judgment.¹⁴⁶ Peter Ruocco, someone with whom Jay and I worked at the NFL, submitted a declaration in support of the NFL's position where he stated that the eligibility rule was in fact the subject of collective bargaining.¹⁴⁷ In rejecting the applicability of the non-statutory exemption, the court found that there was no evidence that the rule was addressed in collective bargaining.¹⁴⁸ That means that Judge Scheindlin specifically rejected a factual assertion by a witness in the case without any finding that the factual statement was for some reason inadmissible.¹⁴⁹ So in that regard, I think she is flat-out wrong.

A couple of observations about the non-statutory exemption.

The Judge even states in her opinion that the mandatory subjects are wages, hours, other conditions of employment, and those matters intimately related to the mandatory subjects of bargaining.¹⁵⁰ I don't know that there is any analysis, strained or otherwise, that supports the conclusion that if the draft is a subject of mandatory bargaining, eligibility for the draft wouldn't also be a

¹⁴⁴ *Id.*

¹⁴⁵ *See Clarett I*, 306 F. Supp. 2d 379 (S.D.N.Y. 2004).

¹⁴⁶ *See id.* at 389.

¹⁴⁷ Mr. Ruocco is the Senior Vice-President of Labor Relations of the NFL Management Council and was personally involved in the 1993 collective bargaining with the NFLPA. *See id.* at 383 n.4.

¹⁴⁸ *See id.* at 396.

¹⁴⁹ *See id.*

¹⁵⁰ *Id.* at 392-93.

mandatory subject under her own language of “matters intimately related” to those subjects.¹⁵¹

Howard noted the Judge’s effort—I don’t even think it qualifies as being an effort—to distinguish *Wood*.¹⁵² *Wood* stands for the proposition that in collective bargaining, a union may agree to provisions that have an impact on prospective members of the bargaining unit.¹⁵³ You cannot find any language in *Wood* that supports the distinction that someone is not a prospective member pre-draft but is post-draft.¹⁵⁴

Similarly, the court cited a case, *Caldwell v. American Basketball Ass’n*, and attempted to distinguish that by saying: “*Caldwell* addresses a mandatory subject of bargaining—namely the conditions under which an employer may terminate an employee.”¹⁵⁵ Here I think the distinction is of little difference. If an employer can terminate an employee, or if termination is insulated from an antitrust challenge, then so too is a decision whether to hire an employee. I don’t see it as a distinction that makes much of a difference.

But one thing I do credit the Judge with—and not so much the Judge, but it’s a conspiracy of events in my view—is that I think the decision holds up, to a certain degree, because of the absence of the NFLPA’s perspective and a definitive statement that the eligibility rule was, in fact, incorporated into the collective bargaining agreement.¹⁵⁶ The NFL’s interests were laid out in the case, but there are clear interests that the union would have in agreeing to an eligibility rule, two of which come to mind readily.

One is where an employer has access to less skilled, and therefore less expensive, employees, then a union has an interest in ensuring that those employees are required to meet certain qualifications, i.e., eligibility rules. So in that instance, I think the NFLPA had an interest in agreeing to the eligibility rule.

¹⁵¹ See *id.*

¹⁵² See *id.* at 393–94 (citing *Wood v. NBA*, 809 F.2d 954 (2d Cir. 1987)).

¹⁵³ See *Wood*, 809 F.2d at 960.

¹⁵⁴ See *id.*

¹⁵⁵ See *Clarett I*, 306 F. Supp. 2d at 394–95 (citing *Caldwell v. Am. Basketball Ass’n*, 66 F.3d 523, 529 (2d Cir. 1995)).

¹⁵⁶ See *supra* notes 26–39 and accompanying text.

2005]

MAURICE CLARETT'S CHALLENGE

419

A second would be if the union accepted, as I do—I do believe that the rule is good because a substantial portion of my professional life is now spent dealing with and representing professional athletes—that it is fair to conclude that certain young men lack both the physical and psychological maturity to be successful in the NFL.¹⁵⁷ I am hard pressed to embrace an argument that says these young men have the right to fail, and that's what I think the challenge to the eligibility rule ultimately does.¹⁵⁸ But if you accept the notion that young athletes are not physically mature enough, and ultimately are therefore susceptible to more injury, then the NFLPA has an interest in restricting those individuals' access to the NFL because that would have a chilling effect on things such as benefits, injuries, and things of that nature.¹⁵⁹

One other observation, following on what Howard said: I was stunned when I read the opinion. While I am as close to Michael Wilbon as somebody can be without actually being related, I was stunned to see that Judge Scheindlin actually cited Michael Wilbon in connection with this case.¹⁶⁰ That is just simply inappropriate.¹⁶¹ I think that, in addition to being legally flawed, the decision is unprofessional as well.

PROF. MOYER: Before we go to questions, do you want to counterpoint?

MR. FEHER: I really haven't discussed at all my personal views on the decision.

¹⁵⁷ Many critics and professional scouts, for example, have expressed concerns about Maurice Claret's emotional maturity to play in the NFL. *See, e.g.,* Sean Lahman, *Clarett's Behavior Raises Questions* (Feb. 3, 2004), <http://www.footballproject.com/story.php?storyid=415>.

¹⁵⁸ *See, e.g.,* Paul Daugherty, *Clarett's Loss May Be His Gain* (Apr. 20, 2004), at http://www.enquirer.com/editions/2004/04/20/spt_sptfoot1daugherty.html.

¹⁵⁹ *See id.*

¹⁶⁰ *See Claret I*, 306 F. Supp. 2d 379, 388 n.54 (S.D.N.Y. 2004) (citing Michael Wilbon, *For Claret, It's a Bad Move*, WASH. POST, Sept. 25, 2003, at D1). In addition to writing as a columnist for the Washington Post, Mr. Wilbon co-hosts ESPN's *Pardon the Interruption* with fellow Washington Post columnist Tony Kornheiser.

¹⁶¹ *See generally* John J. Hasko, *Persuasion in the Court: Nonlegal Materials in U.S. Supreme Court Opinions*, 94 LAW LIBR. J. 427 (2002) (discussing the increasing use of non-legal materials in the High Court's decisions).

MR. GANZ: That's okay, David.

MR. FEHER: You can tell that when Howie and I negotiate, we're on opposite sides of the table. When Gary and I have a dispute, it's pretty much the same too.

I want to look at this very carefully, though, because I think it is very easy—when you sometimes have an opinion where judges get interested in sports cases and use sports clichés and all of that—to totally dismiss it and say, “Oh, it's just not right.”¹⁶² I don't like that. The judges succumb every now and then. Everyone's a fan to some degree, I guess.

But leaving that language aside, I think it's important to analyze it very carefully, in terms of what the opinion says and what it doesn't say, and also to break it out because I think Judge Scheindlin got large chunks of this right.

On the antitrust law, I will say that Gary and I just fundamentally disagree on all sorts of subjects, and we have done this for years; there's no reason to stop disagreeing now.

But let's look at it piece by piece and see what the judge found, what it's based upon, and whether or not it makes sense.

There are really two fundamental questions here. The first is whether the non-statutory labor exemption applies or doesn't apply, and then second, if it doesn't apply, what are the antitrust merits?¹⁶³

Let's start with the first part: Does the non-statutory labor exemption apply? The facts that Judge Scheindlin found are not that the union and the employer agreed on these restrictions.¹⁶⁴ Let me just go over factually what is uncontested and undisputed, and also what the judge found the effect was.

If you look at the NFL collective bargaining agreement, there is what's called a “non-suit” provision, which says that the NFLPA and its members will not file suit concerning the NFL constitution and by-laws.¹⁶⁵

¹⁶² See *supra* notes 40–41, 118–119 and accompanying text.

¹⁶³ See *Clarett I*, 306 F. Supp. 2d at 390–91.

¹⁶⁴ See *id.* at 396–97.

¹⁶⁵ See NFL CBA, *supra* note 32, art. IV, § 2.

2005]

MAURICE CLARETT'S CHALLENGE

421

In terms of how that provision applies to Mr. Clarett, one interesting thing is that Maurice Clarett, since he hasn't joined the NFL and actually hasn't been drafted yet, isn't a "member" of the NFLPA.¹⁶⁶ If the definition of the membership of the NFLPA had been drafted differently, to not only include players who have been drafted but players who are seeking to be drafted, the NFL might have had a good and interesting argument that Mr. Clarett was barred by that agreement from even prosecuting the litigation in the first instance.¹⁶⁷ But when you examine the collective bargaining agreement and see who it defines to be part of the unit, Mr. Clarett happens to be just outside that boundary.¹⁶⁸

PROF. MOYER: David, let me ask you one question. What's the scope of the NFLPA's certification?

MR. FEHER: Actually it's interesting because the NFLPA gave up its status as a collective bargaining unit, and then they held that there was never a union that was certified, subject to a letter from the NLRB saying "this is the scope of your bargaining unit."¹⁶⁹ That sometimes happens with a union election, but there wasn't a union election trigger here. There were just consent forms that were distributed among the membership after the antitrust settlement was resolved, where the various union members agreed that they wanted to re-form the union.¹⁷⁰

And so, in terms of the scope of the union itself, the scope of the bargaining unit is defined on the first page of the collective bargaining agreement.¹⁷¹ I think that's partly what got Mr. Clarett

¹⁶⁶ See *supra* notes 29–39 and accompanying text.

¹⁶⁷ *Id.*

¹⁶⁸ See NFL CBA, *supra* note 32, Preamble (stating that the agreement covers present and future employee players, specifically: "1. All professional football players employed by a member club of the National Football League; 2. All professional football players who have been previously employed by a member club of the National Football League who are seeking employment with an NFL Club; 3. All rookie players once they are selected in the current year's NFL College Draft; and 4. All undrafted rookie players once they commence negotiation with an NFL Club concerning employment as a player.").

¹⁶⁹ See, e.g., *Powell v. National Football League*, 764 F. Supp. 1351, 1358 (D. Minn. 1991).

¹⁷⁰ See Jon Saraceno, *NFL Players Prepare to Recertify as a Union*, USA TODAY, Mar. 5, 1993, at 11C.

¹⁷¹ See NFL CBA, *supra* note 32.

in the courthouse door in the first step. He has argued in all the appellate papers that he is not a member of the NFLPA.¹⁷² So that gets to the first step.

But then you get to the question of what was agreed to and what wasn't agreed to. As I said in the introduction, you can't open up the CBA and find a section that says "eligibility requirements."¹⁷³ There are just these provisions that refer to non-suits with respect to the constitution and bylaws.¹⁷⁴

And then, at the same time the CBA was agreed to, there was a letter agreement that was separately executed which simply says, "Attached hereto is the constitution and bylaws of the NFL that's referred to in this other provision."¹⁷⁵ And so that letter agreement doesn't say, "We agree to everything that's in here;" it just says, "This is what's cross-referenced in the other provision."¹⁷⁶

And then, when you open up the provision of the constitution and bylaws of 1993, which is just cross-referenced, there is a provision relating to college eligibility.¹⁷⁷ But those are the rules that were in place in 1993.¹⁷⁸

Judge Scheindlin said: Well, the reason why the NFL doesn't get any benefit out of those rules is because by the time you got to Mr. Clarett, it wasn't the same provisions, it wasn't exactly the 1993 provisions, and the rules restricting Mr. Clarett were actually just a memorandum unilaterally issued by Commissioner Tagliabue; therefore, it didn't come within whatever protection might otherwise exist if the facts were different.¹⁷⁹

Now, I'm not going to get into the facts, but I will say that I do believe that it makes a fundamental difference as to whether or not a restriction that is imposed by a multi-employer bargaining group

¹⁷² Cf. *Clarett II*, 369 F.3d 124, 140 (2d Cir. 2004) ("Clarett, however, argues that the eligibility rules are an impermissible bargaining subject because they affect players outside of the union.").

¹⁷³ See *supra* notes 29–39 and accompanying text.

¹⁷⁴ See NFL CBA, *supra* note 32, art. IV, § 2.

¹⁷⁵ See, e.g., *Clarett II*, 369 F.3d at 128.

¹⁷⁶ See *id.*

¹⁷⁷ See *Clarett I*, 306 F. Supp. 2d 379, 385, 396 n.110 (S.D.N.Y. 2004).

¹⁷⁸ See *id.* at 385–86.

¹⁷⁹ See *id.* at 386–87, 396.

2005]

MAURICE CLARETT'S CHALLENGE

423

or a group of employers is or is not agreed to by a union either directly or by incorporation by reference; there's a fundamental difference under the labor laws as to what employers can do as part of the bargaining process and what they can do unilaterally on their own.¹⁸⁰

I'll go one step further. Let's assume that Donald Trump wakes up tomorrow and decides, "I have enough money now so I'm going to resurrect my mistake with the United States Football League and I'm going to form a new league, and this league will compete against the NFL, and we'll form this new league and we'll structure it in a certain way."¹⁸¹

The NFL looks at this and says: I don't like that, and so what I am going to do is to unilaterally decide . . . I don't need to talk to Gene Upshaw or anyone else. Commissioner Tagliabue wakes up on one of his bad days and says, "I'm going to unilaterally decide, and we're going to issue a memo that says if any NFL team tries to hire any player who at any point in his life was employed by this competing league, they are forever barred from ever playing in the National Football League. We've got to put these other guys out of business because we don't want this competition." Now, that's not something that's agreed to by the union but unilaterally decided by the NFL.

MR. GANZ: This is during the term of an agreement?

MR. FEHER: Even during the term of an agreement.

MR. GANZ: Even during, okay.

MR. FEHER: During or in between. But in any event—

MR. CORNWELL: He said he didn't want to get into the details.

MR. GANZ: I'm sorry.

¹⁸⁰ See *id.* at 392–93.

¹⁸¹ See Thomas Neumann, *Three and Out*, SAN DIEGO UNION-TRIB., Mar. 16, 2003, at C1 (tracing the history of the USFL); see also Matt Winkeljohn, *Ready to Rumble*, ATLANTA J. & CONST., Feb. 2, 2002, at 1D ("The United States Football League was doing OK while playing in the spring, 1983–85. But when New Jersey Generals owner Donald Trump persuaded fellow USFL owners to switch to a fall schedule opposite the NFL in 1986, it spelled doom.").

MR. FEHER: This is a hypothetical.

But looking at this hypothetical, if one of those aggrieved players said: “This is a classic group boycott. I was previously employed in this other league. Now I want to join the NFL. This is a classic group boycott that flat-out bars me from participation in this league, not individually but because of my status, and that is a violation of the antitrust laws.”¹⁸²

Where does that stand in the spectrum of a labor dispute or something that should properly be the subject of an antitrust suit? This is a unilateral restriction imposed by somebody for anticompetitive reasons, not as part of the bargaining process, not as having anything to do with collective bargaining, but rather because of an intent to suppress competition on a particular market—and, indeed, more than one market.¹⁸³

The point I’m trying to make here is that the distinctions between the labor laws and the antitrust laws aren’t so broad and aren’t so clear-cut as Gary suggested when he said that according to the Supreme Court in *Brown*, the non-statutory labor exemption applies to labor matters even in the absence of an agreement.¹⁸⁴ It doesn’t go that far.¹⁸⁵

What *Brown* really decided, I think, when you look at the text, is that when as part of collective bargaining the bargaining stops, impasse is reached, and management unilaterally implements something, which they are permitted affirmatively to do under the labor laws in the collective bargaining process—and that unilateral implementation is not distant in time or subject matter from what was being negotiated—then in that instance, the absence of union agreement wasn’t necessary for it to be exempt from antitrust attack because implementation after impasse is a part of the labor laws; if we’re going to have the labor laws operate, and that is something that is clearly recognized under the labor laws, you

¹⁸² Cf. *Clarett I*, 306 F. Supp. 2d at 398–405.

¹⁸³ See *id.*

¹⁸⁴ See *supra* notes 51–61 and accompanying text.

¹⁸⁵ See *Brown v. Pro Football, Inc.*, 518 U.S. 231, 237–39 (1996).

2005]

MAURICE CLARETT'S CHALLENGE

425

cannot have that exercise of labor law right by management as something that's subject to antitrust attack.¹⁸⁶

That doesn't mean the antitrust laws don't apply.¹⁸⁷ In fact, the Supreme Court expressly reserved the issue as to what happens if it is much more distant in time from the bargaining or if the union were to give up its status as a collective bargaining representative.¹⁸⁸ Those are different issues.

And so, while management might wish that the *Brown* decision decided that the antitrust laws are not relevant anymore to labor markets, they clearly are because it depends upon the factual circumstances in which it arises.¹⁸⁹ The point here is that on the non-statutory labor exemption and the facts of this particular case, if one assumes the factual findings by the court that this was something never agreed to in collective bargaining and isn't really part of the collective bargaining process, I think you have a very, very good argument that the antitrust laws can and should apply to factual circumstances that are divorced from union consent, union agreement, and bargaining in any sense.¹⁹⁰

The issue that Howard raised in terms of practice is an interesting one.¹⁹¹ That isn't something that we've gotten into very much, and we can talk about it later. But I don't think that was the subject of Scheindlin's opinion and it hasn't been briefed so far.¹⁹²

Leaving aside the labor exemption, and if you get past the facts and say that because this doesn't have anything to do with collective bargaining it was something that was unilaterally implemented, therefore the antitrust law should apply—

Before that though, there is a critical point that I think everyone is in agreement with—Judge Scheindlin's observation that "Clarett's eligibility was not the union's to trade away."¹⁹³ My view is that the decision is completely incorrect. If in the NBA or

¹⁸⁶ See *id.*

¹⁸⁷ See *id.* at 250.

¹⁸⁸ See *id.*

¹⁸⁹ See *id.*

¹⁹⁰ See *Clarett I*, 306 F. Supp. 2d 379, 396–97 (S.D.N.Y. 2004).

¹⁹¹ See *supra* note 129 and accompanying text.

¹⁹² See *generally Clarett I*, 306 F. Supp. 2d 379.

¹⁹³ See *id.* at 395–96.

the WNBA the union and management want to agree upon who can or cannot compete in the labor pool and who can or cannot end up being a member of the union, I think the labor law precedents are pretty clear that these issues can properly be the subject of union-management agreement, and in that instance would be protected from antitrust attack.¹⁹⁴

If you were an electricians' union and you agreed with management that no one can come into the bargaining unit unless he or she has passed a certified test by an independent third party that he or she is competent to be an electrician, and somebody says, "Well no, I should be able to compete in this labor market and management can decide whether or not I'm a good enough electrician by how many people I kill in the first year," I think that is properly a subject of bargaining and properly a subject of potential agreement between management and labor.¹⁹⁵ And if they decide that you need to have a certificate to come in, then it is protected from antitrust attack.¹⁹⁶

And if in the future Gene Upshaw and Paul Tagliabue sat down and each put their signature on a piece of paper that says "no more college eligibility unless you meet these standards," then that I think ends the matter, plain and simple, because I think it is something that can be agreed upon and can't be subject to collateral attack under the antitrust laws if there is an express agreement.¹⁹⁷

On the antitrust laws, once you get past the labor exemption, you question: "If this is something that there isn't any agreement on, should it survive antitrust attack?"¹⁹⁸

¹⁹⁴ See Darlington, *supra* note 63 (According to Gary Roberts, "If General Motors and the United Auto Workers wanted to reach an agreement that nobody can go to work until they're 24 years old, they can do that . . . Employers and unions have these entry requirements and collective-bargaining agreements all the time. It's just so foolish she would rule otherwise.").

¹⁹⁵ See *id.*

¹⁹⁶ See *id.*

¹⁹⁷ See Tony Grossi, *NFL Awaits the Storm Clouds*, PLAIN DEALER, Feb. 6, 2004, at D1 ("Even if S[c]heindlin's decision is upheld on appeal, the league could amend its collective bargaining agreement with the players union to close the door just opened.").

¹⁹⁸ See Ron Borges, *Clarett Ruled Eligible; NFL is Expected to Appeal Judge's Decision*, BOSTON GLOBE, Feb. 6, 2004, at E1.

2005]

MAURICE CLARETT'S CHALLENGE

427

First, although those cases relating to eligibility rules have been some time decided—though those were the last time those rules were challenged—the last time I looked under the antitrust laws, a lot of doctrines that arose many years ago are still good law, including per se rules on price fixing and per se rules on classic group boycotts.¹⁹⁹

It is true that the Supreme Court in contexts outside of classic group boycotts has said that it has to be careful in terms of where the per se rule is going to apply, but *FTC v. Superior Court Trial Lawyers Ass'n*²⁰⁰ is a very recent Supreme Court decision When the participants in that labor market said flat-out, “We are not going to work anymore unless we have our wages raised”—those were lawyers who were working for indigent clients who wanted to have their wages raised—the Supreme Court said that this was a classic group boycott.²⁰¹ They didn’t use those exact words, but they said that it was subject to summary condemnation without a full-blown rule of reason analysis, and I actually believe it said that it was subject to per se condemnation as a clear classic group boycott.²⁰²

The difficulty is whenever you are outside of a classic group boycott and you get into other circumstances where the facts are a little bit more mixed—What are the motivations? What are the interests? Is this a cooperative venture in other ways?—that’s a little bit different.²⁰³ But we’re not in one of those situations here because Mr. Clarett said that this is a classic group boycott in that the rules said “not just me” and it’s not just whether or not Clarett—if this was a rule that said “Maurice Clarett can’t compete in this wage market,” then you properly get into the subject of injury to a competitor versus injury to competition.²⁰⁴

But this is a rule that said “this entire class of potential participants in the labor market is excluded from competing in this

¹⁹⁹ KINTNER ET AL., FEDERAL ANTITRUST LAW §§ 11.24 (per se rules on price fixing), 48.14 (per se rules on classic group boycotts) (2004).

²⁰⁰ 493 U.S. 411 (1990).

²⁰¹ See *id.* at 431–32.

²⁰² See *id.*

²⁰³ See *id.* at 432–36.

²⁰⁴ See *Clarett I*, 306 F. Supp. 2d at 397–98.

market.”²⁰⁵ The question as to whether or not it is subject to per se or “quick-look” review is a different matter.²⁰⁶ This isn’t an individual exclusion; this is a group exclusion.²⁰⁷

I think the application of the “quick look,” or even the per se, whenever you have a naked restraint of trade—i.e. where an entire class of potential market participants is not permitted to participate in that market—that I think is something that is very easily susceptible to summary condemnation under either the per se or the “quick look.”²⁰⁸

We’ve been talking about the NCAA cases.²⁰⁹ We’ve got a case that is currently pending where the NCAA passed a rule—and I know we all like the NCAA tournament in certain ways, but once upon a time the NCAA had competitors where other tournaments were out here, and indeed an even more prominent competitor, of which Fordham was a participant, the NIT, which was a much bigger tournament in the 1950s than the NCAA was.²¹⁰ The NCAA didn’t like that and didn’t like the competition. They passed a rule that said: if you’re invited to the NCAA tournament, you are not allowed to participate in any other post-season tournament.²¹¹ That is a flat, summary, exclusionary rule, a group boycott in its classic sense.²¹²

That is currently pending.²¹³ We are in summary judgment arguments with the NCAA in terms of whether or not that is

²⁰⁵ See *id.* at 385–86.

²⁰⁶ See *id.* at 407–08.

²⁰⁷ See *id.* at 397–98.

²⁰⁸ See *id.* at 407–08.

²⁰⁹ See, e.g., *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984); see also *supra* notes 105–106 and accompanying text.

²¹⁰ See Edward N. Matisik, *NIT Sues NCAA under Sherman Anti-Trust Act* (Feb. 4, 2005), at <http://www.collegehoopsnet.com/specials/050204.htm>; see also *Second Chances . . . But the NIT Offers Little More for NCAA*, ST. LOUIS POST-DISPATCH, Mar. 15, 1990, at 6D (recounting the National Invitation Tournament’s illustrious past and its current status as a bridesmaid to the immensely popular NCAA Tournament).

²¹¹ See Melissa Isaacson, *Road to the Rockies*, CHI. TRIB., Mar. 13, 1990, § 3, at 2.

²¹² See *Metro Intercollegiate Basketball Ass’n v. NCAA*, 337 F. Supp. 2d 563 (S.D.N.Y. 2004) (denying plaintiff’s motion for summary judgment).

²¹³ See Mark Alesia, *NCAA Defends Tourney Bid Rules*, INDIANAPOLIS STAR, Apr. 16, 2004, at 1D.

subject to either “quick look” or summary condemnation.²¹⁴ And all sorts of issues—what is the relevant market, what is the effect on competition—none of that matters once you’re in a per se or “quick look.”²¹⁵ And when you get into circumstances where you have flat-out naked restraints that are completely exclusionary on their face, it gets into a different mode of analysis.²¹⁶

And so while Judge Scheindlin’s language, I think, was not the best at times, when you look at the authorities that she cited, I actually think the antitrust analysis was not bad at all and follows some relatively standard case law in this area.²¹⁷

The only other thing I want to note is that in terms of whether or not it is okay to justify a restriction in one market by procompetitive benefits in another market, there are different circumstances when you are looking at vertical integration and a chain of distribution, and you’ve got dealers that are distributing a product.²¹⁸ That is one circumstance—clearly vertical factors in a chain of distribution and a particular product—when you can look at intrabrand competition versus interbrand competition and how that should all apply in terms of the reasonableness of the restraint under the antitrust law.²¹⁹

It is a different situation when you are saying, “I am allowed to restrain competition in my input market, in terms of what I buy to

²¹⁴ See generally *id.*

²¹⁵ See *Clarett I*, 306 F. Supp. 2d 379, 407–08 (S.D.N.Y. 2004).

²¹⁶ See *id.*

²¹⁷ See *id.* at 397–411; see also Damon Hack, *Judge Orders N.F.L. to Permit Young Athletes to Enter Draft*, N.Y. TIMES, Feb. 6, 2004, at A1. Robert A. McCormick, a law professor at Michigan State University who also worked on Clarett’s behalf in the case said, “She decided correctly that this is not the sort of thing exempted from antitrust law.” *Id.*

²¹⁸ JULIAN O. VON KALINOWSKI ET AL., ANTITRUST LAWS AND TRADE REGULATIONS § 19.03 (2d ed. 2005) (discussing the history of Supreme Court decisions concerning vertical restraints on trade). In *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 57–58 (1977), the Supreme Court held that nonprice vertical restrictions should be evaluated under the rule of reason, and that such restraints may be justified if they enhance interbrand competition between the manufacturer and its competitors, even if there is some loss in intrabrand competition among the manufacturer’s distributors. See *id.* Eleven years later, the Supreme Court, in *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 719 (1988), held that absent an express agreement on price, vertical restraints are to be judged under the rule of reason. See *id.*

²¹⁹ See *id.*

create my product, in order to justify how well I can compete in my output market.” If today any employer—if GM said, “I’m going to be better able to compete in the automobile market if I”—let’s say we don’t have a union hypothetically—“if I agree with every other participant in the auto market to fix the wages of all the other employees in this wage market, and that restraint of trade is justifiable because I am going to be able to compete better in the output market”—the antitrust laws do not go so far. There are a lot more nuanced distinctions in terms of vertically integrated enterprises with intrabrand and interbrand competition, and whether or not these can serve as justifications.²²⁰ It’s completely exclusionary conduct in one market because that’s part of your input into a totally different market in which you’re competing.²²¹

I do not believe that the antitrust laws go nearly so far. And while management and the producers of these entertainment products would like it to be so far, it is not so far right now.

And so while I think it’s easy to take shots at Judge Scheindlin, other than her conclusion in terms of the NFL and NFLPA couldn’t agree on it, I actually think that a lot of the rest of it makes sense.

PROF. MOYER: I’m sure that there are at least two, and possibly three, people on the panel who would just dearly love to respond to that and would disagree with it, but I’m not going to let that happen because we have a time problem.

I will say this. I think it’s clear from the views illustrated by Gary’s approach and by David’s approach that this case does test the limits of the so-called “modern” approach to antitrust, the school that emphasizes consumer welfare as the touchstone of violation or no violation, rather than the populist view that prevailed prior to the 1970s.²²² We’re going to see, if this case keeps going and if the labor point is not the only point that gets

²²⁰ See *id.*

²²¹ See *id.*

²²² See VON KALINOWSKI ET AL., *supra* note 218, § 1.02 (In *Northern Pacific Railway Co. v. United States*, 356 U.S. 1 (1958), the Supreme Court stated that the objective of the antitrust laws “rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress.”) (quoting *Northern Pacific*, 356 U.S. at 4).

2005]

MAURICE CLARETT'S CHALLENGE

431

decided, just how viable that old school that David Feher is talking about and embracing still is.²²³

MR. FEHER: By the way, Jay, just to be fair, I am not old school.

PROF. MOYER: Old is sometimes good.

MR. FEHER: I am not old school. I think everything I have said is perfectly compatible with the Chicago School.

PROF. MOYER: Well, there are a lot of people on the Chicago School side who would disagree, and if we had another hour I would turn you guys loose and it would be fascinating.

But let's say this. In terms of the progress of this case, there will come a point at which Maurice Clarett will be eligible for the draft and will enter the NFL.²²⁴ If this case has not been decided at the Second Circuit level, much less at the Supreme Court level, can this case be kept alive, or will it become moot—will it at some point no longer be a justiciable controversy? Who has a view on that?

MR. CORNWELL: I think it will be kept alive because he is not an individual defendant protecting his individual rights; he is protecting or seeking to protect the rights of a class.²²⁵ I think David made the observation about protecting impact on competitors as opposed to impact on competition. So maybe it's not Maurice Clarett's name, but ultimately there are similarly situated individuals.²²⁶

²²³ See *Clarett II*, 369 F.3d 124, 125 n.1 (2d Cir. 2004) (electing not to express an opinion on the district court's conclusion that Clarett alleged a sufficient antitrust injury since they felt that that eligibility rules are indeed exempt from antitrust scrutiny under the non-statutory labor exemption).

²²⁴ The Court of Appeals did eventually reverse the opinion of the district court. See *id.* at 143. Previous to that decision, the court granted a stay of the district court's decision. As a result, Clarett remained ineligible for the 2004 NFL draft but will be eligible for the draft in 2005. See Warren DeLuca, *Maurice Clarett*, <http://www.houstonprofootball.com/draft/prospects/clarettm.html> (last visited Jan. 31, 2005).

²²⁵ See, e.g., *Clarett I*, 306 F. Supp. 2d 379, 382 (S.D.N.Y. 2004) (stating the issue in the case as: "Should Clarett's right to compete for a job in the NFL—the only serious pro football game in town—trump the NFL's right to categorically exclude a *class* of players that the League has decided is not yet ready to play?") (emphasis added).

²²⁶ For example, Mike Williams, a wide receiver out of U.S.C., entered the 2004 NFL draft following the district court's opinion in the *Clarett* case. This made Williams, as a

PROF. ROBERTS: Why would his lawyers continue to churn legal fees if he is already in the NFL? His lawyers represent him, they don't represent a class.

MR. FEHER: You know, Gary, I actually can speak to this from a personal challenge I got at a prior symposium. I was out at St. John's the weekend after the *Clarett* decision came down with Alan Milstein.²²⁷ We reviewed this, and I said unequivocally that if Gene Upshaw and Paul Tagliabue were to agree to it, that would be the end of the matter.²²⁸ Mr. Milstein said, "David, if you do that, I will find another plaintiff and we will have another lawsuit." At that point, I said, "Alan, you can make that argument, but I think under the labor laws you would lose."

PROF. ROBERTS: Unless he gets Judge Scheindlin, of course.

MR. FEHER: I think under the labor laws, if there is such an agreement—I mean, we'll see what the Second Circuit says, but I think that on the point as to whether the union and management can agree, that was clearly wrong.

PROF. MOYER: Speaking of the Second Circuit, we have in the Second Circuit—so far as I know, he's still alive and active and healthy—Judge Ralph Winter.²²⁹

MR. FEHER: That's correct.

PROF. MOYER: Judge Winter is a former professor of both labor law and antitrust law at the Yale Law School.²³⁰ He has been

result of NCAA rules, ineligible to return to U.S.C. After the Court of Appeals ruling to stay the district court's opinion, and their subsequent reversal of that opinion in the *Clarett* case, Williams, like Clarett, was declared ineligible for the 2004 NFL draft. Like Clarett, he will most likely participate in the draft in 2005. See Warren DeLuca, *Mike Williams*, <http://www.houstonprofootball.com/draft/prospects/williamsm.html> (last visited Jan. 31, 2005).

²²⁷ Alan Milstein, of the New Jersey law firm Sherman, Silverstein, Kohl, Rose & Podolsky, was Maurice Clarett's attorney.

²²⁸ Gene Upshaw has been Executive Director of the NFLPA since June 1983. *Gene Upshaw Biography*, at http://www.manheimtouchdownclub.com/upshaw_bio.html (last visited Feb. 15, 2005). Paul Tagliabue has been the NFL Commissioner since 1989. *Paul Tagliabue*, at <http://www.sportsecyclopedia.com/nfl/comish/tagliabue.html> (last updated Aug. 26, 2002).

²²⁹ See Yale Law School Faculty, *Ralph K. Winter*, at <http://www.law.yale.edu/outside/html/faculty/rkw2/profile.htm> (last visited Feb. 14, 2005).

²³⁰ See *id.*

2005]

MAURICE CLARETT'S CHALLENGE

433

on the Second Circuit Court of Appeals since 1982.²³¹ My personal opinion is that if you could pick a single jurist in this country who knows the most about the question of the overlap and interrelationship between labor and antitrust, it would be Judge Winter. He authored the *Wood* opinion that has been referred to, and several other very important opinions.²³² I would suspect, without knowing of course, that if and when this case gets to a merits appeal in the Second Circuit, he will be on the panel.²³³ If he is on the panel, I would expect that he would write the opinion, and frankly I hope he does because I would tend to accept whatever Judge Winter might have to say in this circumstance.

PROF. ROBERTS: And you know what he'll say too, don't you, Jay?

PROF. MOYER: No, I'm not one hundred percent certain anymore, but I am reasonably certain.

MR. FEHER: One thing I will note is that the Second Circuit does have random assignments, and so we will see.

PROF. ROBERTS: Jay, can I just ask a question? I have to ask David a question as to whether or not the NFL could adopt a rule excluding the class of convicted sports gamblers from playing in the NFL, or is that a per se illegal rule?

MR. FEHER: A class of convicted sports gamblers?

PROF. ROBERTS: Yes, all people who have been convicted of sports gambling and steroid use, let's put it that way.

MR. FEHER: I actually think that the current collective bargaining agreement largely addresses the subject.²³⁴

PROF. ROBERTS: Forget the agreement. There's no union. You said under the antitrust laws if you exclude a class of people it's per se illegal.

MR. FEHER: No, I didn't.

²³¹ *See id.*

²³² *See Wood v. NBA*, 809 F.2d 954 (2d Cir. 1987).

²³³ Judges Sack, Sotomayor, and Kaplan actually sat on the panel in the Second Circuit decision. Judge Winter was not present. Judge Sotomayor delivered the opinion of the court. *See Clarett II*, 369 F.3d 124, 125 (2d Cir. 2004).

²³⁴ *See NFL CBA*, *supra* note 32, App. C, ¶ 15; *id.* art. XLIV, § 6.

PROF. ROBERTS: Or you can use “quick look.”

MR. FEHER: No, I didn’t say any class. It’s going to depend upon the circumstances of the rule and what it’s directed to.

PROF. ROBERTS: That’s not what you said.

MR. FEHER: But even under the per se rule, when you have a classic group boycott, you don’t just say, “You’re excluded.” If you passed a rule that said you’re excluding two-year-olds from participating in the NFL, that, I would not argue, is something which would be struck down under the antitrust law.

PROF. ROBERTS: Why? What’s the difference between twenty-two and two?

MR. FEHER: We could have a discussion about all of the group boycott cases that have occurred over the last twenty years, and you know as well as I do, Gary, that even the Supreme Court has said that the definition of classic group boycotts that are subject to per se condemnation and those that are subject to rule of reason is a matter that has created much confusion in the courts over the years.²³⁵ And you can do this. You can argue by throwing something out—“Well, where does this stand in the spectrum?”

What I’m saying is there are certain things that are white, there are certain things that are black, even in application of the per se rule. I think in this instance and also from a functional matter—and the Supreme Court recently said this—that we can have these tag lines, but ultimately what you look at is whether or not the court views it as an appropriate case for summary condemnation. That is fundamentally the question.

You can call it per se, you can call it “quick look.” The Supreme Court has said that in some ways the labels don’t matter so much as whether or not it’s appropriate for summary condemnation.²³⁶ What I am saying here is that there are many categories in the NFL or in other sports where, if the owners tried to do something, it is more appropriate for it to be subject to

²³⁵ See, e.g., *NW Wholesale Stationary, Inc. v. Pac. Stationary & Printing Co.*, 472 U.S. 284, 293–94 (1985).

²³⁶ See *Cal. Dental Assoc. v. FTC*, 526 U.S. 756, 779–81 (1999).

2005]

MAURICE CLARETT'S CHALLENGE

435

summary condemnation in terms of its clear restriction on the labor market and not having any justification.²³⁷

In terms of the application of the “quick look” to this particular case, I think there is a more than solid basis for saying—assuming the antitrust laws apply—that you can do this on a summary basis because the competitive effects of it are evident from the text of the rule itself and from the literal impact of the rule upon the market participants.²³⁸

You don’t have to say, “Well, will these people be able to participate through these other means?” You can look at the rule and say, “These people are going to be excluded from the market.” And if you look at excluding from the market a group of people who would otherwise be competing in the market and the anticompetitive effects it is going to have on the market, I think clearly it is going to have an effect on competition that you can read just from the terms of the rule itself. How comfortable is the court in saying summary condemnation is fine?

The Supreme Court did summary condemnation of the NCAA broadcast rules in *Board of Regents*.²³⁹ Clearly it did not think that a full-blown rule of reason was necessary.²⁴⁰ And you could say, “What if hypothetically it was somewhat different?” and you’d get out of that zone of comfort.

But I think that Judge Scheindlin was comfortable. Whether every judge would be comfortable we could argue a long time.

PROF. MOYER: Gentlemen, I think we’re getting a little—

PROF. ROBERTS: I’m sorry I asked the question, but I have to say I couldn’t disagree more.

PROF. MOYER: In any case, I think it’s about time we hear from the audience. Anyone who has any questions, please so indicate. Yes, sir?

²³⁷ See generally *Brown v. Pro Football Inc.*, 518 U.S. 231 (1996) (analyzing the question of summary condemnation in terms justifiable restrictions on the labor market).

²³⁸ See *supra* notes 90–109 and accompanying text.

²³⁹ See *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984).

²⁴⁰ See *id.*

QUESTION: Not a question, just a comment. I believe there is a case which is essentially Professor Roberts' hypothetical, gambling under the antitrust laws' gambling restrictions, which was *Molinas v. NBA*,²⁴¹ where the court found that this did not violate the antitrust laws.²⁴²

PROF. MOYER: That was in the good old days when judges could take a look at a fact situation and say, "Well, that's reasonable," and say so and make that the ground of decision.²⁴³

PROF. ROBERTS: Of course, they could also say "that's not reasonable" and cut the ground for decision, too.²⁴⁴

PROF. MOYER: That's true, too.

PROF. ROBERTS: That's the problem with it.

QUESTIONER: I agree with David that everything should violate the antitrust laws.

VOICE: That's Chris Meyer from Weil Gotshal.

VOICE: Unless the union agrees.

PROF. MOYER: In the back?

QUESTION: Three of the panelists raised policy issues related to age, like physical and psychological maturity, as to when athletes are ready to be professionals, when they should be able to forgo their childhood, their education, etc.²⁴⁵ I have a comment and a question.

The question basically is what ever happened to free market choices and the choice of the individual?

It was raised that the NBA teams take a huge risk in signing these young players.²⁴⁶ The point is if a player wants to pursue that type of employment—I mean, Maurice Claret can choose to be a grocery bagger or to wipe windows on a skyscraper.²⁴⁷ If he

²⁴¹ 190 F. Supp. 241 (S.D.N.Y. 1961).

²⁴² See *id.* at 243.

²⁴³ *Id.* at 244.

²⁴⁴ *Id.*

²⁴⁵ See *supra* text accompanying notes 100–102 (Roberts), 129–138 (Ganz), 157–159 (Cornwell).

²⁴⁶ See Chris Haft, *Draft is High Risk*, CINCINNATI ENQUIRER, June 2, 1999, at D1.

²⁴⁷ *Cf. id.*

2005]

MAURICE CLARETT'S CHALLENGE

437

wants to try his hand at being a professional football player and there are teams out there that understand the risk that he is young and possibly immature, they can hire psychological experts and doctors to help them with that decision.²⁴⁸ If the teams are willing to take that risk, I don't see why the NFL should be able to bar them from doing so.²⁴⁹

I think another overall comment is that—kind of like what Gary Roberts was saying, with the Judge making kind of ridiculous rulings because these things are in the context of sports—I think that our reverence for sports creates some type of concept that the professional sports leagues, like the NFL or the NBA, are government entities that can make these rules on behalf of citizens' rights.²⁵⁰

Anyway, back to the age limitation, I wanted to hear some of the opinions of panelists who support the concept that maybe NFL players should be twenty-one or WNBA players should be twenty-two, when you have other sports leagues—which some of you actually represent—that consistently hire sixteen-year-olds. For example, Major League Soccer just signed a fourteen-year old.²⁵¹ The basic reason why they do that is so they can snag these guys into long-term contracts in order to sell them as commodities to a European club and make millions of dollars.²⁵²

So where is the consistency between signing fourteen-year-old players and not being able to sign a twenty-one-year-old?

PROF. ROBERTS: Is that a legal question? That doesn't really go to the legal issues of whether or not there is an antitrust violation. That is just sort of your own "is this fair for Maurice?" comment.

²⁴⁸ *Cf. id.*

²⁴⁹ *Cf. id.*

²⁵⁰ See, e.g., *What Should Baseball Do About Drugs?*, at http://www.legalaffairs.org/webexclusive/debateclub_MLB1204.msp (Professors Gary Roberts and Paul Finkelman debate over steroid policy in Major League Baseball and allude to the power of the institution to set up laws restricting its use) (Dec. 13–16, 2004).

²⁵¹ See Joe Burris, *Child's Play: More and More, Pro Arena is Becoming a Teen Scene*, BOSTON GLOBE, June 27, 2004, at C17 (discussing teenage soccer sensation Freddy Adu of D.C. United).

²⁵² See *U.S. Soccer Scores Coup with Adu*, SUNDAY MAIL, Nov. 23, 2003, at 70.

QUESTIONER: Well, you raised the age issue. I believe three of you raised the age issue as a policy issue.

PROF. ROBERTS: I didn't.

MR. FEHER: What I actually think is interesting is that the union and management can consider and debate all sorts of policy arguments that have nothing to do with competition.²⁵³ You know, Upshaw and Tagliabue just think it's good from a public relations point of view not to have eighteen-year-olds in the NFL, and they can decide with very wide discretion that they think it's not a good idea for the NFL and they're going to agree to it in collective bargaining using all of these various safety policy issues.²⁵⁴

But the Supreme Court has been clear that in antitrust analysis, you need to look at issues relating to competition; you can't justify a restraint on the basis of public policy matters unrelated to competition.²⁵⁵

And so, even if you think this is stupid and there ought to be a law, your remedy is to make a new law; it is not that the antitrust laws are repealed. Absent some other agreement, the antitrust laws say you compete on the merits.²⁵⁶ The Supreme Court has called it this country's "charter of economic liberty."²⁵⁷ I believe that, and that's what we need to keep in mind when we look at these decisions.

MR. CORNWELL: That essentially begs the question, though. If it's part of a collective bargaining agreement, then that begs the question as to whether it's good policy. I understand your

²⁵³ For some of the policy arguments raised by the panelists, see *supra* text accompanying notes 100–102 (Roberts), 129–138 (Ganz), 157–159 (Cornwell).

²⁵⁴ See Fuhrman, *supra* note 14, at 589.

²⁵⁵ See, e.g., *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220 (1993) ("By its terms, the Robinson-Patman Act condemns price discrimination only to the extent that it threatens to injure competition. The availability of statutory defenses . . . confirms that Congress did not intend to outlaw price differences that result from or further the forces of competition.").

²⁵⁶ See, e.g., *id.* at 223 ("As a general rule, the exclusionary effect of prices above a relevant measure of cost either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price-cutting.").

²⁵⁷ *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958).

2005]

MAURICE CLARETT'S CHALLENGE

439

perspective, but I disagree with it because I think you are largely the opponent of my position, which is that these kids have the right to fail. I don't think that's a compelling argument.

The overwhelming evidence, in the NFL at least, is that a substantial number of players who meet the eligibility requirements don't last.²⁵⁸ We are likely to now find, if the Judge's ruling is to stand, that a substantial number of them who don't meet the eligibility requirement are also likely to fail.²⁵⁹

I don't think it's a compelling argument to suggest that these young men have the right to fail, especially when you think about what goes on with "student" athletes at major football programs. They don't spend a whole lot of time on the student part.²⁶⁰

My view is that playing in the NFL should be a head start on the rest of your life, it should not be the end of it. If you come in as a middle-rounder, and last "one and done," one contract, the likelihood is that you are going to have difficulty finding gainful employment.²⁶¹

Now, I'm not quite sure what that young man won in being able to win that argument. I think it's a compelling policy reason to impose the eligibility requirement.

PROF. ROBERTS: And there are all kinds of examples in our society where people have minimum requirements. I know I was madder than hell I had to spend three years in law school. I had a law firm that was ready to hire me after my first year, but by God the California people wouldn't let me practice law until I got three years out of college and got a law degree.

I mean, in every profession there are minimum requirements. You can question what they should be. But the notion that any minimum requirement is somehow fundamentally unfair I just

²⁵⁸ See Pat Kirwan, *Roll the Dice* (June 19, 2002), at http://sportsillustrated.cnn.com/inside_game/pat_kirwan/news/2002/06/19/rookies_looking_back.

²⁵⁹ *Id.*

²⁶⁰ See Steve Ganczaruk, *Student Athletes Gravitate Toward Similar Degrees*, at <http://cronkitezine.asu.edu/spring2004/athletes.html> (last visited Jan. 31, 2005) (documenting how college football players tend to have easier majors and lower graduation rates).

²⁶¹ See Michael Voss, *Life after Football No Picnic* (May 16, 2004), at <http://www.realfooty.theage.com.au/realfooty/articles/2004/05/15/1084570997324.html>.

don't accept. The question is whether or not this is an appropriate minimum requirement in this case.

PROF. MOYER: The policy question is what the question recognizes, and I think it's fair to say that all of us up here would say whatever the policy is, if the NFL Players' Association and the NFL Management Council agree on it, that's the policy, and judges should stay the hell out of it.

QUESTION: Just a further comment. I think the reason why the age requirement and the eligibility requirement are as high as they are in the sports arena is because these are public figures and people want to idolize them. But there are a lot of collective bargaining units that have age requirements.²⁶² The construction workers' union and the electrical workers' unions, for example, have a lot of service requirements before you become a member of those unions.²⁶³ So sports are not unique in that respect. It is consistent with a lot of other collective bargaining unions.

MR. CORNWELL: Well, it is unique to a certain extent, because the compelling factor that makes us want to relax the eligibility rules is money, and not particularly being especially skilled.²⁶⁴ Now, if you are a child prodigy and you are ready to go to a law firm, maybe that's a great argument. But here, it's not that he is particularly skilled, it's just the draw of the money.²⁶⁵

QUESTIONER: But an age requirement exists in many collective bargaining units.

MR. FEHER: One thing I want to note is that I think it's a little bit more of a "hot button" issue here because of some of the failures that have occurred in the NCAA, in the sense that in other industries quite often if you don't satisfy one age requirement in a particular industry, you can go out and get another job in a related area or do something else and make a living. These kids, as we all

²⁶² See, e.g., *Information Sheet for the Apprenticeship Training Program*, at <http://www.sheetmetallocal25.org/training/Apprentice%20App%20Instructions.pdf> (last visited Feb. 22, 2005) ("Applicants must be at least 17 (seventeen) years of age and in good physical shape.").

²⁶³ See *id.*

²⁶⁴ See John Gehring, *Educators Troubled by NFL-Draft Ruling*, EDUC. WK., Feb. 18, 2004, at 3, available at <http://www.usafootball.com/features/edWeek.html>.

²⁶⁵ *Id.*

2005]

MAURICE CLARETT'S CHALLENGE

441

know from our idolatry of sports, are pursuing a dream, where a lot of them believe that sports is the way to get up and out in America, even though when you look at the numbers, the odds are incredibly long and hard.²⁶⁶

If Maurice Clarett doesn't go into the NFL—his problem was that back at Ohio State he was producing millions of dollars for that university and he was getting nothing, other than an “education.”²⁶⁷ But I think we've seen in the press what some of the examinations being provided to the University of Georgia basketball players were like: How many halves are there in a basketball game?²⁶⁸ How many points do you get for a three-point shot?²⁶⁹ I'm not joking about that.

QUESTION: You have Georgetown, you have Virginia Tech, and they all have great—

PROF. ROBERTS: David, you better be careful. You might get sued for defamation here.

MR. FEHER: I am only stating things that I think are a matter of public record.

And in terms of saying that there are issues in the NCAA, I think you only need to look at Ken Starr, for example, who was saying that he watches professional basketball a lot more than college basketball because—I mean, Ken's a conservative guy when it comes to markets generally, and he has terrible problems when it comes to the NCAA, and a lot of people do. I think part of the reason why it's a “hot button” issue is because a lot of these kids, if they don't turn pro, are left in another market where they're subject to market abuse.

PROF. MOYER: Can we have one or two more questions, please?

²⁶⁶ See Kirwan, *supra* note 258.

²⁶⁷ See Dan Le Batard, *Clarett's Only Mistake—Not Taking More*, MIAMI HERALD, Nov. 21, 2004, at 7D, available at http://www.miami.com/mld/miamiherald/sports/columnists/dan_le_batard/10237228.htm?1c.

²⁶⁸ See Steve Hummer, *Old Dogs, New Principles*, ATLANTA J. CONST., Mar. 5, 2004, at 1D (providing details of an extremely easy exam given to University of Georgia basketball players).

²⁶⁹ *Id.*

QUESTION: You say they are subject to market abuse because the odds are long. You could say that about actors, models, artists, and many other entrepreneurs. Ninety-eight percent of the SAG membership doesn't work in any given year.²⁷⁰ So why is that relevant?

MR. FEHER: People in that market operate in the market and you earn whatever you're entitled to in a competitive market. The difference is if you're a student athlete in the NCAA, you can produce millions of dollars in earnings, but not for you.

So, in effect, the NCAA has operated in various ways as a cartel, where they have passed rules that are commercially driven. Some of the rules are educationally driven, but they have passed a lot of rules that are commercially driven that, in effect, deprive student-athletes of the money they produce, in exchange for very little or nothing.²⁷¹

QUESTIONER: I'm thinking of the athlete who wants to come out.

PROF. MOYER: We are getting way far afield now from our topic.

Who has a question on this topic?

QUESTION: I don't know nearly as much about the labor exemption as any one of you, but my understanding of it is that the reason we have a criterion—like whether it's a mandatory subject of collective bargaining, whether it was arm's-length or not—is because when the non-statutory labor exemption was crafted, it was a compromise.²⁷² Courts did not want a total exemption because they recognized the possibility that there could be cases

²⁷⁰ See generally U.S. Dep't of Labor, OCCUPATIONAL OUTLOOK HANDBOOK, *Actors, Producers, and Directors* (discussing the difficult employment prospects SAG members and other actors face), available at <http://stats.bls.gov/oco/pdf/ocos093.pdf> (last visited Jan. 31, 2005).

²⁷¹ See Nathan Chaisson, *Athletes Should Be Paid to Play*, COLLEGIATE TIMES, at <http://www.siu.edu/ALESTLE/library/SPRING2001/mar20/paidtoplay.html> (last visited Feb. 21, 2005).

²⁷² See Lacie Kaiser, *The Flight from Single-Entity Structured Sport Leagues*, 2 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 1, 22 (2004).

where labor combined with management to be exclusionary, to do things that might violate antitrust law.²⁷³

I wonder if that's a possibility here. I'm thinking about the New England Patriots. They have been very adroit at getting rid of older players and getting younger players to replace them.²⁷⁴ I wonder if Lawyer Malloy and Ty Law and those guys, if they go to their union and they discuss Maurice Clarett, where are these guys going to come down?²⁷⁵ Wouldn't it be in their interest to keep the Maurice Clarett out of the NFL? Isn't it possible that it's in the interest of the NFL Players' Association as well as the NFL to join together and exclude these younger players?

MR. GANZ: Sure, it may be, but it is certainly not unusual for a typical bargaining agreement to disadvantage prospective and recently hired employees.²⁷⁶ They are put on probation, their salaries are lower, etc.,—even in professional sports.²⁷⁷ In the NBA, for example, there is a rookie scale: If you are drafted in the twenty-third pick in the first round, you get X dollars this year, $X+$ in year two, and $X++$ in year three, period.²⁷⁸ Whether you're LeBron James or anybody else, you can't make as much money as a team might be willing to pay you.²⁷⁹ That was something that was supported very enthusiastically by the union and veteran players because it allowed more money to go to the veteran players.²⁸⁰ That's what unions do. They protect the current, the living, in preference to the unborn.

MR. CORNWELL: The language from the decision even notes that. It says: “Newcomers in the industrial context routinely find

²⁷³ *Id.*

²⁷⁴ See Ian Logue, *Pats Start Preparing for Eagles*, at http://www.patsfans.com/stories/display_story.php?story_id=2460 (Aug. 11, 2004).

²⁷⁵ Law and Milloy played together for the New England Patriots from 1996–2002 and are members of the NFLPA. See *Lawyer Milloy*, at <http://www.nfl.com/players-playerpage/3965> (last visited Jan. 31, 2005); *Ty Law*, at <http://www.nfl.com/players-playerpage/3820> (last visited Jan. 31, 2005).

²⁷⁶ See, e.g., NBA Collective Bargaining Agreement, art. VIII [hereinafter NBA CBA], available at <http://www.nbpa.com/cba/cba.html> (last visited Jan. 31, 2005).

²⁷⁷ See *id.*

²⁷⁸ See *id.*

²⁷⁹ See *id.*

²⁸⁰ *Id.*

themselves disadvantaged vis-à-vis those already hired. . . . that is [] a commonplace consequence of collective agreements.”²⁸¹ But then it continues: “Clarett’s eligibility was not the union’s to trade away.”²⁸²

Judge Scheindlin gives but then completely departs from the rationale that supports that non-members are routinely disadvantaged by a collective bargaining agreement.²⁸³ In essence, the language and the rationale she cites do not support the conclusion that she reaches.²⁸⁴

Also along the lines of your observation, the union and the NFL agreed to give teams relief under the salary cap with respect to minimum salaries to ensure that older, veteran players would still be employable, as opposed to a team just going to the younger player for whom a lower minimum salary applied.²⁸⁵ So even in that instance they took steps to protect the interests of the older players.²⁸⁶

PROF. MOYER: In other words, it happens routinely.

There is one more question over here, please.

QUESTION: I just want to be clear about certain things that I thought I heard from everyone. Is Clarett being excluded solely on the basis of his age or the number of years that he has been out of high school?

PROF. MOYER: The latter.²⁸⁷

QUESTIONER: If so, that doesn’t relate to any building up of him as a person or an individual. It’s just a time period exclusion, it seems to me, as I hear it from you guys. Can these other unions, like the steelworkers’ union or the electricians’ unions, just arbitrarily say, “Hey, guys, we only want people in our union who

²⁸¹ *Clarett I*, 306 F. Supp. 2d 379, 395 (S.D.N.Y. 2004) (quoting *Wood v. NBA*, 809 F.2d 954, 960 (2d Cir. 1987)).

²⁸² *Id.*

²⁸³ *Id.* at 395–96.

²⁸⁴ *See id.*

²⁸⁵ *See NFL CBA*, *supra* note 32, art. XVII, § 2.

²⁸⁶ *Id.*, art. XXXVIII, § 6.

²⁸⁷ *Clarett I*, 306 F. Supp. 2d at 385.

2005]

MAURICE CLARETT'S CHALLENGE

445

are twenty-five to forty-five?" Has an exclusion based solely on age like this ever been challenged before this decision and upheld?

PROF. MOYER: Anybody up here know the answer to that?

MR. GANZ: Well, there are age discrimination laws that would obviously apply to unions that restrict their membership.²⁸⁸ Many states, New York included, have age discrimination laws that apply starting at age eighteen.²⁸⁹ So that's a separate question.

I have never seen a case like that, but theoretically a union could unilaterally adopt a requirement for membership in the union. If it didn't violate some age discrimination law or anything like that, it would be perfectly fine.

PROF. ROBERTS: The typical union is not going to have an interest in making those age distinctions. Sports are unique because the players need to reach a certain level of physical maturity before they are likely to be successful—so age becomes a relevant issue.²⁹⁰ It's not a relevant issue in most bargaining units, at least at some point. I mean, obviously the Army won't take you until you are seventeen.²⁹¹ There are probably other situations.

QUESTIONER: What you just described makes age the key issue. Is the physical ability why age might be irrelevant in some of these other unions but relevant in sports? Because this guy is obviously great.²⁹² I mean, he did great things.²⁹³

PROF. ROBERTS: I was obviously a great lawyer after my first year of law school, but they wouldn't let me practice. I mean the point is you sometimes—

²⁸⁸ See, e.g., N.Y. LAB. LAW §§ 130–45 (McKinney 2004).

²⁸⁹ See *id.* §§ 132–38.

²⁹⁰ See *Easterblogg*, *supra* note 129 (arguing that “[p]erformance in team sports requires maturity, which in this context usually means the early twenties”).

²⁹¹ See *Enlist in the US Army*, at <http://www.army.com/enlist> (last visited Jan. 31, 2005) (providing that people must be between the ages of 17–34 to enlist).

²⁹² For example, during the 2002 season when his team, the Ohio State Buckeyes, won the National Championship, Claret was the team's leading rusher with over 1200 yards and 16 rushing touchdowns. See Ohio State Clubhouse, *Team Statistics*, at <http://sports.espn.go.com/nfl/teamstats?teamId=194&year=2002> (last visited Jan. 31, 2005).

²⁹³ *Id.*

QUESTION: But that wasn't based solely on age. You had to go two more years and then pass the bar.

PROF. ROBERTS: But when you're talking about playing sports, age and physical maturity are relevant.²⁹⁴ And yes, there may be an occasional exception, just like there's an occasional exception of somebody who could practice law before they get their law degree.²⁹⁵ But we have to set minimum entry requirements into various professions.²⁹⁶

The question is: Is this an appropriate restriction? Sure, there are always going to be exceptions to any rule that you adopt. But can you adopt a general rule even though it might unfairly impact a tiny number of people? To me that's not an antitrust question.

MR. FEHER: In some ways I think the press hasn't focused on what I think is the more radical conclusion of this decision, which is that the union and management can't agree on it.²⁹⁷ In some ways, people have been treating *Clarett* as being either the end of the world or the best thing.

It involves some terribly important antitrust and labor law issues.²⁹⁸ But so long as unions and management have the capacity to work it out, in most cases they will and it won't be such a big deal. But the real difficult problem here, I think, is Judge Scheindlin's finding that you cannot do it.²⁹⁹

I'm not saying that the current appeal isn't important, because it is terribly important, in part because of these antitrust and labor law issues. But so long as there is a determination that the union and management can work these things out, I think in most cases it will happen.

PROF. ROBERTS: David, would you at least agree that if in fact the NFL proposed to the union that they're going to have a three-year-out-of-high-school rule and they bargain to impasse and

²⁹⁴ See Easterblogg, *supra* note 129.

²⁹⁵ See *Rules of the Court of Appeals for Admission of Attorneys and Counselors at Law*, at <http://www.courts.state.ny.us/ctapps/520rules.htm> (last visited Feb. 9, 2005).

²⁹⁶ See, e.g., *id.*

²⁹⁷ See generally *Clarett I*, 306 F. Supp. 2d 379 (S.D.N.Y. 2004).

²⁹⁸ See generally *id.*

²⁹⁹ *Id.* at 410.

2005]

MAURICE CLARETT'S CHALLENGE

447

the NFL unilaterally implements it, that the *Brown*³⁰⁰ decision would protect that as well, even though the union hasn't agreed to it?

MR. FEHER: I agree it would be a different factual circumstance than what we've got here.

MR. CORNWELL: The answer is yes.

MR. ROBERTS: I know you don't like the *Brown* decision.

PROF. MOYER: Gentlemen, on that inconclusive yet interesting note, we thank the audience for your attention and the panel for its input.

³⁰⁰ 518 U.S. 231 (1996).