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Upon Further Review: Reconsidering *Clarett* and Player Access to the NFL

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COMMENTS

UPON FURTHER REVIEW: RECONSIDERING *CLARETT* AND PLAYER ACCESS TO THE NFL

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I. INTRODUCTION

Maurice Clarett grew up in Youngstown, Ohio, where he excelled as a high school football player.[1] In 2001, he earned a scholarship to play football for the Ohio State University Buckeyes.[2] As a freshman, he made an immediate impact, leading the Buckeyes to an undefeated 2002 season, which included a Fiesta Bowl victory over the defending national champions from the University of Miami and a national championship.[3]

However, things quickly soured for Clarett. Late in the 2002 season, Clarett suffered a falling out with the Ohio State coaching staff over their refusal to pay for his transportation back home to a friend's funeral.[4] Shortly thereafter, Clarett faced accusations of academic misconduct stemming from alleged preferential treatment that he received in an introductory African-American and African studies class.[5] Then, before playing a single snap of the 2003 season, Clarett encountered legal problems stemming from his alleged falsification of a

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1. *30 for 30: Youngstown Boys* (ESPN television broadcast Dec. 14, 2013).

2. *Id.*

3. *Id.*

4. *See* William C. Rhoden, *Paying the Price While Coaches Cash In*, N.Y. TIMES, Jan. 9, 2007, https://www.nytimes.com/2007/01/09/sports/ncaafootball/09rhoden.html.

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

police report.[6] Additionally, the National Collegiate Athletic Association (NCAA) accused Clarett of receiving improper benefits, namely a new SUV, which made him vulnerable to disciplinary action from Ohio State.[7] Ultimately, those violations caused the University to dismiss Clarett from school.[8]

Following his dismissal from Ohio State, Clarett attempted to declare for the National Football League (NFL) draft.[9] However, Clarett failed to secure draft eligibility because the NFL had a rule that declared:

> No player shall be permitted to apply for special eligibility for selection in the Draft, or otherwise be eligible for the Draft, until three NFL regular seasons have begun and ended following either his graduation from high school or graduation of the class with which he entered high school, whichever is earlier.[10]

The NFL first enacted age-eligibility rules, like the three-year rule above, in 1925, after Harold "Red" Grange went to play for the Chicago Bears before he graduated from the University of Illinois.[11] For much of the rule's existence, the NFL required players to wait four football seasons after graduating high school to become eligible for the draft.[12] After nearly seventy years of strict enforcement of the "four-year rule," the NFL liberalized the age-eligibility rule in 1990 to allow more players to declare for the draft after three seasons had elapsed since graduating from high school.[13] With the change, an increasing number of players three seasons removed from their high school graduation

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6. Associated Press, *Timeline: The Rise and Fall of Maurice Clarett*, ESPN (Sept. 18, 2006), http://www.espn.com/nfl/news/story?id=2545204.

7. Alan C. Milstein, *The Maurice Clarett Story: A Justice System Failure*, 20 ROGER WILLIAMS U.L. REV. 216, 219-20 (2015).

8. *Id.* at 220; Tim Bielik, *Ohio State Football: Looking Back at Maurice Clarett a Decade After Leaving OSU*, BLEACHER REPORT (July 5, 2013), https://bleacherreport.com/articles/1694318-ohio-state-football-looking-back-at-maurice-clarett-a-decade-after-leaving-osu.

9. *Id.*

10. Collective Bargaining Agreement Between National Football League and National Football League Players Association, at art. 6, section 2(b), https://nflpaweb.blob.core.windows.net/media/Default/PDFs/Active%20Players/2011%20CBA%20Updated%20with%20Side%20Letters%20thru%201-5-15.pdf, (last visited Dec. 13, 2018) [hereinafter *2011 CBA*]. The source is referred to as the "three-year rule." Although the cited text comes from the 2011 CBA, Clarett challenged the same "three-year rule" in his suit.

11. Marc Edelman & Joseph A. Wacker, *Collectively Bargained Age/Education Requirements: A Source of Antitrust Risk for Sports Club-Owners or Labor Risk for Players Unions?*, 115 PENN ST. L. REV. 341, 344-46 (2010).

12. Clarett v. Nat'l Football League, 369 F.3d 124, 126 (2d Cir. 2004). Indeed, from 1926-1989 the NFL granted only two exemptions to the four-year rule: one to nineteen-year-old running back Andy Livingston and the other to NFL Hall of Famer Barry Sanders. Edelman & Wacker, *supra* note 11, at 346-47.

13. Edelman & Wacker, *supra* note 11, at 347-48.

entered the NFL draft and excelled in professional football upon their arrival.[14] Moreover, two players only two seasons removed from their high school graduations successfully petitioned the NFL for special draft eligibility and had highly productive NFL careers.[15] Despite these successes, the NFL refused to lower their age eligibility requirements any further.[16] This left Clarett on the outside of the NFL looking in, leading him to challenge the NFL's three-year rule as an unreasonable restraint on trade in violation of federal antitrust law.[17]

The NFL argued that the three-year rule did not violate antitrust law because the non-statutory labor exemption applied to the rule.[18] Unfortunately for Clarett, future Supreme Court Justice Sonia Sotomayor, writing for the Second Circuit, agreed with the NFL and held that the non-statutory labor exemption to federal antitrust law applied to the NFL's three-year rule.[19] The court relied on three Second Circuit cases that involved the applicability of the non-statutory labor exemption to labor policies in professional basketball to reach its holding.[20] The analysis in those decisions, and, thus, in *Clarett*, were "rooted in the observation that the relationships among the defendant sports leagues and their players were governed by collective bargaining agreements and thus were subject to the carefully structured regime established by federal labor laws."[21] Thus, the analysis in *Clarett* focused largely on the nature of the relationship between Clarett, the National Football League Players Association (NFLPA), and the NFL.[22]

Applying this framework, the Second Circuit held that the NFLPA represented Clarett, making him a party to the bargaining unit that negotiated the Collective Bargaining Agreement (CBA) and subjecting him to the CBA's terms, including the three-year rule.[23] After being denied the opportunity to pursue "the kind of high-paying, high-profile career he desire[d],"[24] Clarett

14. *Id.* at 348-49.

15. *Id.* at 349-52.

16. *Id.* at 353-54.

17. *Clarett*, 369 F.3d at 126.

18. Memorandum of the National Football League (1) in Opposition to Plaintiff's Motion for Summary Judgment and (2) in Support of the NFL's Cross-Motion for Summary Judgment (Non-Statutory Labor Exemption) at 12-23, Clarett v. Nat'l Football League, 306 F. Supp. 2d 379 (S.D.N.Y. 2003) (No. 03-CV-7441), 2003 WL 23220600 [hereinafter Memorandum of the National Football League].

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

20. *Id.* at 134.

21. *Id.* at 135.

22. *Id.* at 138-43.

23. *Id.*

24. *Id.* at 141.

petitioned the United States Supreme Court for a writ of certiorari.[25] When the Supreme Court denied his petition, Clarett's case, and his dream of playing professional football in 2004, died.[26]

This Comment reexamines the Second Circuit's decision in *Clarett*, but it does not propose a new rule for analyzing when the non-statutory labor exemption should apply. Under the Second Circuit's test, the non-statutory labor exemption applies to the three-year rule if the rule results from the collective bargaining process between the affected parties.[27] This Comment argues that, even under that test, the NFL's three-year rule should face federal antitrust scrutiny because the Second Circuit ruling misunderstood the relationship between prospective professional football players and the NFLPA by treating the NFLPA as the representative of future NFL players.

This Comment argues that the NFLPA does not represent college football players; therefore, college football players and the NFL did not bargain for the three-year rule because the bargaining unit that negotiated the NFL CBA did not include prospective players. Thus, even if one assumes that the Second Circuit applied the right test for determining the applicability of the non-statutory labor exemption in *Clarett*, the non-statutory labor exemption should still not apply and courts should subject the three-year rule to federal antitrust law.

Thus, even applying the Second Circuit's own pro-NFL test, this Comment contends that the court decided *Clarett* incorrectly. Before arriving at this conclusion, this Comment provides background information on the Sherman Act and the non-statutory labor exemption in Part II, particularly focusing on the non-statutory labor exemption's application to labor policy in professional sports. In Part III, this Comment analyzes the Second Circuit's decision in *Clarett* and how the court determined whether the non-statutory labor exemption applied. In Part IV, this Comment argues that the bargaining unit that negotiated the CBA did not include Clarett or any other college football player, which should subject the NFL's three-year rule to federal antitrust law. This result likely would lead courts to strike down the NFL's age eligibility rule as an unfair restraint on trade, opening up the professional football labor market to all college football players, regardless of the number of seasons that elapsed

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25. *See* Lynn Zinser, *PRO FOOTBALL; Clarett Turns to Supreme Court for Help*, N.Y. TIMES, Apr. 21, 2004, http://www.nytimes.com/2004/04/21/sports/pro-football-clarett-turns-to-supreme-court-for-help.html.

26. *See* Judy Battista, *Supreme Court Rejects Appeals by Clarett*, N.Y. TIMES, Apr. 23, 2004, http://www.nytimes.com/2004/04/23/sports/pro-football-supreme-court-rejects-appeals-by-clarett.html.

27. *Clarett*, 369 F.3d at 135 (describing how Second Circuit precedent regarding the applicability of the non-statutory labor exemption in the professional sports context "was rooted in the observation that the relationships among the defendant sports leagues and their players were governed by collective bargaining agreements . . . .").

between a player's final high school season and his declaration for the NFL draft.[28] Finally, this Comment briefly contemplates a new system for regulating player access to the NFL in a post-three-year-rule world.

II. HISTORY OF THE SHERMAN ACT AND THE DEVELOPMENT OF THE NON-STATUTORY LABOR EXEMPTION

Congress passed the Sherman Antitrust Act in 1890 against a backdrop of growing antitrust and anti-monopoly sentiment that emerged in response to problems created by the nearly omnipotent trusts and monopolies that dominated business, subjugated workers, and controlled politics during the Gilded Age.[29] Congress satisfied the public desire for a solution to this problem by passing the Sherman Act.[30]

The Sherman Act prohibits the "excessive concentration of private economic power" via a variety of legal remedies.[31] Despite the public's primary concern with the expanding power of corporate monopolies, numerous courts focused on how the Sherman Act applied to labor unions, rather than corporations, which ultimately led the courts to restrict key union activities in the years after the Act's passage.[32]

Union leaders, led by Samuel Gompers, challenged interpretations of the Act that prohibited critical pro-labor activity, like unionization and strikes.[33] Pressure by labor leaders, coupled with an adverse Supreme Court decision holding that unions violated the Sherman Act,[34] led Congress to eventually pass the Clayton Antitrust Act.[35]

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28. This Comment assumes that if a court held that the non-statutory labor exemption did not apply, then that court would also hold that the NFL's three-year rule violated federal antitrust law. For a detailed explanation describing why the NFL three-year rule would violate federal antitrust law if the non-statutory labor exemption did not apply, see *Clarett*, 306 F. Supp. 2d at 397-411 *rev'd in part*, *vacated in part*, 369 F.3d 124 (2d Cir. 2004), *cert. denied*, 544 U.S. 961 (2005) (ruling that Clarett had antitrust standing and that the NFL's three-year rule unreasonably restrained trade in direct violation of the Sherman Act). The court applied the "Rule of Reason" test and found that the age-eligibility rule served as a "naked restraint of trade," that the rule lacked any "legitimate procompetitive justification," and that "less restrictive alternatives to the rule" existed. *Id.* at 406-10.

29. *See* WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT 70 (Greenwood Press ed., 1980) (1965).

30. *Id.* at 100.

31. *Id.* at 16.

32. *Id.* at 155-61.

33. *Id.* at 248.

34. *See* Loewe v. Lawlor, 208 U.S. 274 (1908); *see also* Phillip J. Closius, *The Jocks and the Justice: How Sotomayor Restrained College Athletes*, 26 MARQ. SPORTS. L. REV. 493, 497 (2016) (discussing the history of the non-statutory labor exemption).

35. *See* LETWIN, *supra* note 29, at 273-76.

The Clayton Act offered numerous concessions to unions, the most fundamental of which clarified that antitrust laws did not proscribe labor unions, codifying the common law rule "that a labor union did not, merely by existing, constitute an illegal combination in restraint of trade."[36]

A subsequent Supreme Court decision—*United States v. Hutcheson*—expanded labor's power, creating what has been known as the non-statutory labor exemption.[37] *Hutcheson* recognized the exemption as necessary to facilitate collective bargaining between employers and labor unions by exempting "the types of activities which had become familiar incidents of union procedure."[38] The non-statutory labor exemption allowed "some restraints on competition imposed through the bargaining process" to promote "meaningful collective bargaining."[39]

A. Antitrust Challenges Initiated by Employers

Despite the non-statutory labor exemption, antitrust challenges to collective bargaining agreements between labor unions and employers have arisen when such agreements are "alleged to have injured or eliminated a competitor in the employer's business or product market."[40] In *Allen Bradley Co. v. Local Union No. 3, International Brotherhood of Electrical Workers*, the Supreme Court held that the non-statutory labor exemption did not apply to an agreement between an electrical workers union and contractors that closed the New York City market to electrical equipment manufacturers that did not employ union workers.[41]

Then, in two 1965 cases, the Supreme Court again contemplated the limits of the non-statutory labor exemption.[42] In *United Mine Workers v. Pennington*, the Court found that the non-statutory labor exemption did not apply to an agreement regarding wages between a miners' union and large mining companies because the parties to the agreement meant "to impose a certain wage scale on other bargaining units," namely small coal miners that did not participate in negotiations between the miners' union and large coal

36. *Id.* at 274.

37. United States v. Hutcheson, 312 U.S. 219, 236-37 (1941).

38. *Id.*

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

40. Clarett v. Nat'l Football League, 369 F.3d 124, 131 (2d Cir. 2004).

41. Allen Bradley Co. v. Local Union No. 3, In'l Bhd. of Elec. Workers, 325 U.S. 797, 798-800, 808 (1945).

42. *See* United Mine Workers v. Pennington, 381 U.S. 657 (1965); *see also* Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co., 381 U.S. 676 (1965).

companies.[43] The Court feared that exempting this agreement from antitrust law would drive the small coal mining companies from the market because they could not afford the high wages that the large companies and union negotiated.[44]

However, in *Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co.*, the Court found that the non-statutory labor exemption applied to an agreement between a butchers' union and Chicago meat suppliers that limited when meat counters could operate.[45] Jewel Tea, one of the meat suppliers, complained that it signed the agreement because of union pressure.[46] Yet, Jewel Tea's challenge failed because it did "not allege that it ha[d] been injured by the elimination of competition among the other employers within the unit with respect to marketing hours."[47] To arrive at its decision, the Court focused on determining whether the hours restriction was "so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain that provision through bona-fide, arm's-length bargaining in pursuit of their own labor union policies" subjected the agreement to federal labor, not antitrust, law.[48]

These three cases outlined the boundaries of the non-statutory labor exemption. All three involved competing employers contending that collectively bargained for agreements did not fall under the non-statutory labor exemption.[49] However, employees also can sue employers alleging that terms in collective bargaining agreements do not fall within the non-statutory labor exemption, something that has mainly occurred in the context of professional sports.[50]

B. Antitrust Challenges Initiated by Employees

In a case that eventually weighed heavily in the *Clarett* litigation—*Mackey v. National Football League*—NFL players contended that a league rule granting the Commissioner exclusive power to compensate teams that lost a

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43. *United Mine Workers*, 381 U.S. at 665-66, 668-69. ("One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy.").

44. *Id.* at 668 (finding that the agreement at issue had as its "purpose and effect . . . to establish wages at a level that marginal producers could not pay so that they would be driven from the industry.").

45. *Amalgamated Meat Cutters & Butcher Workmen*, 381 U.S. at 679-80, 688.

46. *Id.* at 681.

47. *Id.* at 688.

48. *Id.* at 689-90.

49. *See id.* at 680; United Mine Workers v. Pennington, 381 U.S. 657, 660-61 (1965); Allen Bradley Co. v. Local Union No. 3, In'l Bhd. of Elec. Workers, 325 U.S. 797, 798 (1945).

50. *See* Phillip J. Closius, *Not at the Behest of Nonlabor Groups: A Revised Prognosis for a Maturing Sports Industry*, 24 B.C. L. REV. 341, 348 n.34 and accompanying text (1983).

player to free agency violated the Sherman Act.[51] There, the court evaluated this claim using a three-part test that combined important aspects of the *Jewel Tea* and *Pennington* decisions. The exception would apply when:

- "[T]he restraint on trade primarily affects only the parties to the collective bargaining relationship,"[52]
- "[T]he agreement sought to be exempted concerns a mandatory subject of collective bargaining,"[53] and
- "[T]he agreement sought to be exempted is the product of bona fide arm's-length bargaining."[54]

Ultimately, the exemption did not apply to the contested rule because it did not arise from "bona fide arm's-length bargaining."[55]

Twenty years after *Mackey*, the Supreme Court decided another non-statutory labor exemption case that involved professional football—*Brown v. Pro Football, Inc*.[56] In *Brown*, the plaintiff challenged a salary scale for practice team players that the NFL unilaterally imposed after negotiations between the NFL and NFLPA collapsed.[57] Although never citing *Mackey*, the Court ultimately upheld the NFL's policy, writing that the unilateral imposition of the salary scale "took place during and immediately after a collective-bargaining negotiation. It grew out of, and was directly related to, the lawful operation of the bargaining process. It involved a matter that the parties were required to negotiate collectively. And it concerned only the parties to the collective-bargaining relationship."[58]

As one commentator pointed out, the test applied by the Supreme Court in *Brown* "appears to mirror the three-part *Mackey* test."[59] Thus, the *Brown*

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51. *See* Mackey v. Nat'l Football League, 543 F.2d 606, 609 (8th Cir. 1976).

52. *Id.* at 614 (citing Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616 (1975)).

53. *Id.* (citing *Amalgamated Meat Cutters & Butcher Workmen*, 381 U.S. 676; *United Mine Workers*, 381 U.S. 657).

54. *Id.* (citing Smith v. Pro-Football, 542 F. Supp. 462 (D.D.C. 1976); Phila. World Hockey Club, Inc. v. Phila. Hockey Club, Inc., 351 F. Supp. 462, 496-500 (E.D. Pa. 1972)). Note that mandatory subjects of collective bargaining include, for example, "wages, hours, and other conditions of employment." *Clarett*, 306 F. Supp. 2d at 393.

55. *See Mackey*, 543 F.2d at 615-16.

56. 518 U.S. 231 (1996).

57. Brown v. Pro Football, Inc., 518 U.S. 231, 234-35 (1996).

58. *Id.* at 250.

59. Closius, *supra* note 34, at 499-500.

> The first two sentences quoted refer to the term being a product of good faith bargaining. The final two sentences incorporate the mandatory subject of bargaining and the aspect of only affecting parties to the relationship prongs of the *Mackey* test. The *Brown* decision

decision suggested that the *Mackey* test, or at least some variant of the *Mackey* test, guided the Supreme Court when it evaluated the applicability of the non-statutory labor exemption to employee-employer agreements in professional football.[60] Therefore, one would reasonably expect that the *Mackey* test would determine the applicability of the non-statutory labor exemption in Clarett's case.

III. COMPETING TESTS FOR THE APPLICABILITY OF THE NON-STATUTORY LABOR EXEMPTION

In his challenge to the NFL's three-year rule, Maurice Clarett made numerous arguments as to why the non-statutory labor exemption should not apply to the NFL's three-year rule under the reasonable expectation that *Mackey* would apply in his case.[61] Explicitly relying on the *Mackey* test in his argument to the court, Clarett contended that the three-year rule would escape antitrust scrutiny only if: "(1) the [three-year rule] is the product of bona fide arm's length bargaining; (2) the agreement concerns a mandatory subject of collective bargaining; and (3) the restraint on trade affects only the parties to the collective bargaining relationship."[62] Though the *Mackey* test required Clarett to demonstrate only that the three-year rule failed to satisfy one of the three prongs, he contended that the rule failed on all three accounts.[63]

First, Clarett argued that the NFL three-year rule did not result from arm's-length collective bargaining because the rule did not arise from "actual bargaining but is, instead, merely the continuation of a rule unilaterally promulgated by the [NFL] some fifteen years before the NFLPA came into existence as the players' collective bargaining representative."[64] Furthermore, Clarett argued that the CBA did not contain the rule, the rule was not incorporated by reference into the CBA, and the NFL did not demonstrate that any "*actual bargaining*" occurred between the parties as required by *Mackey*.[65]

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therefore expands the duration of the exemption and appears to support *Mackey* as the test for the exemption's applicability.

Id.

60. *Id.* at 500.

61. Plaintiff Maurice Clarett's Memorandum of Law in Support of His Motion for Summary Judgment at 11-29, Clarett v. Nat'l Football League, 306 F. Supp. 2d 379 (S.D.N.Y. 2003) (No. 1:03CV07441), 2003 WL 26053422 [hereinafter Clarett's Motion for Summary Judgment].

62. *Id.* at 23.

63. *Id.*

64. *Id.* at 26.

65. *Id.* at 23-24.

Clarett then argued that the three-year rule was not a mandatory subject of collective bargaining because it did "not concern wages, hours, or other terms and conditions of employment of players currently employed by NFL teams."[66] Finally, Clarett argued that he was not a party to the collective bargaining relationship because prospective players "are complete strangers to the NFL-NFLPA collective bargaining relationship."[67]

The Second Circuit had not adopted a test for when the non-statutory labor exemption should apply, so the district court looked to the Sixth, Eighth, and Ninth Circuits—which had explicitly adopted the three-pronged *Mackey* test—for guidance when considering Clarett's argument.[68] Judge Schiendlin noted that, although the Second Circuit "acknowledged" the *Mackey* test, it "preferred to apply the simple formulation enunciated by the Supreme Court in *Local Union No. 189 v. Jewel Tea Co.*"[69] Despite the Second Circuit's preference for *Jewel Tea*'s formulation, Judge Schiendlin's ultimate analysis relied on and incorporated the three-prongs of the *Mackey* test rather than the simpler, but vaguer, *Jewel Tea* test.[70]

After Judge Schiendlin made the crucial decision to apply the *Mackey* test, Clarett's arguments proved persuasive—the court found that the non-statutory labor exemption did not cover the three-year rule for all three of the reasons that Clarett argued.[71] First, the court rejected the NFL's argument that the rule addressed a "mandatory subject of collective bargaining."[72] The court noted that the Second Circuit cases the NFL cited to support their argument involved professional sports league provisions affecting drafted players, whereas the three-year rule dealt with eligibility for the draft.[73] Second, the court found that Clarett was not a party to the collective bargaining unit because the three-year rule made Clarett ineligible for employment.[74] Rebuffing the NFL's stance, Judge Schiendlin wrote that "[t]hose who are categorically denied eligibility for

66. Clarett's Motion for Summary Judgment, *supra* note 61, at 26-27.

67. *Id.* at 29.

68. *Clarett*, 306 F. Supp. 2d at 391.

69. *Id.* at 392.

70. *Id.* at 393-97.

71. *Id.* at 391-97.

72. *Id.* at 393 ("Nowhere is there a reference to wages, hours, or conditions of employment. Indeed, the Rule makes a class of potential players *unemployable*. Wages, hours, or working conditions affect only those who are employed or eligible for employment.").

73. *Id.* at 395 ("[N]one of the cases cited by the NFL involve job *eligibility*. The league provisions addressed in *Wood, Williams*, and *Caldwell* govern the terms by which those who *are drafted* are employed. The Rule, on the other hand, precludes players from entering the labor market altogether . . . .").

74. *Id.* at 395-96.

employment, even temporarily, cannot be bound by the terms of employment they cannot obtain."[75] Finally, despite a lack of evidence from Clarett regarding the arms-length bargaining prong, Judge Schiendlin held that the three-year rule did not satisfy this requirement because the NFL did not demonstrate that the rule emerged from arms-length bargaining between the NFLPA and the NFL.[76]

After holding that the non-statutory labor exemption applied, Judge Schiendlin ruled that the three-year rule was "[a] naked restraint on competition for player services because it excludes a class of players from entering the market."[77] Thus, because the three-year rule violated federal antitrust law, Judge Schiendlin granted Clarett summary judgment and ordered him eligible for the 2004 draft.[78]

Hoping to prevent Clarett from entering the draft, the NFL swiftly appealed Judge Schiendlin's decision.[79] On appeal, Clarett's case sat in front of the Second Circuit—a circuit that adopted a decidedly lower standard for deciding when to apply the non-statutory labor exemption as compared to the approach adopted by the Eighth Circuit.[80] Moreover, whereas Judge Schiendlin adopted the *Mackey* test, the Second Circuit's preference for *Jewel Tea* led future Justice Sotomayor to reject the district court's invitation to follow *Mackey*.[81] Indeed, the court found little value in the *Mackey* court's assumption that "*Connell, Jewel Tea, Pennington*, and *Allen Bradley* dictate the appropriate boundaries of the non-statutory exemption," writing that "these decisions are of limited assistance in determining whether an athlete can challenge restraints on the market for professional sports players imposed through a collective bargaining process."[82] Instead, the court applied an analysis derived from three Second Circuit cases that dealt with plaintiffs alleging that a professional sports league placed "a restraint upon a unionized labor market characterized by a collective bargaining relationship with a multi-employer bargaining unit."[83] Thus, the

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75. *Id*. at 396.

76. *Id.* at 397 ("While Clarett offers no *evidence* on the issue of arm's-length bargaining, he certainly highlights the NFL's absence of proof.").

77. *Id.* at 398.

78. *Id.* at 410-11.

79. Associated Press, *NFL Plans to Appeal Ruling*, ESPN (Feb. 6, 2004), http://www.espn.com/nfl/news/story?id=1727856.

80. *See* Scott A. Freedman, Comment, *An End Run Around Antitrust Law: The Second Circuit's Blanket Application of the Non-Statutory Labor Exemption in Clarett v. NFL*, 45 SANTA CLARA L. REV. 155, 195-96 (2004).

81. *See* Clarett v. Nat'l Football League, 369 F.3d 124, 133 (2d Cir. 2004) ("We . . . have never regarded the Eighth Circuit's test in *Mackey* as defining the appropriate limits of the non-statutory exemption.").

82. *Id.* at 133-34.

83. *Id.* at 134.

existence of a collective bargaining relationship became the focal point of the analysis.[84]

The three cases on which the court relied—*Caldwell v. American Basketball Association*,[85] *National Basketball Association v. Williams*,[86] and *Wood v. National Basketball Association*[87]—all involved claims that a professional sports league "imposed a restraint upon the labor market" in violation of antitrust law.[88] The plaintiffs lost in each case because the Second Circuit found that the non-statutory labor exemption applied.[89] The court based its analysis in *Caldwell, Williams*, and *Wood* "in the observation that the relationships among the defendant sports leagues and their players were governed by collective bargaining agreements and thus were subject to the carefully structured regime established by federal labor laws."[90] Per the court's analysis, a reliance on antitrust law, rather than labor law, would risk undermining federal labor law.[91]

In addition to its heavy reliance on the Second Circuit's precedent in *Caldwell*, *Williams*, and *Wood*, the court also found support for rejecting the *Mackey* test in *Brown v. Pro Football, Inc.*[92] In *Brown*, professional football players challenged the NFL's unilaterally imposed cap on salaries for developmental players that the league created after a deadlock in negotiations between the league and the union.[93] To prevent antitrust law from commandeering labor law's role in policing the collective bargaining process, the Second Circuit read *Brown* to stand for the principle "that the non-statutory exemption precludes antitrust claims against a professional sports league for unilaterally setting policy with respect to mandatory bargaining subjects after negotiations with the players union over those subjects reach impasse."[94] The

84. *Id.*

85. 66 F.3d 523 (2d Cir. 1995).

86. 45 F.3d 684 (2d Cir. 1995).

87. 809 F.2d 954 (2d Cir. 1987).

88. *Clarett*, 369 F.3d at 134-35 ("Our decisions in *Caldwell*, *Williams*, and *Wood* all involved players' claims that the concerted action of a professional sports league imposed a restraint upon the labor market for players' services and thus violated antitrust laws.").

89. *Id.* at 135 ("In each case . . . we held that the non-statutory labor exemption defeated the players' claims.").

90. *Id.*

91. *See id.* ("[T]o permit antitrust suits against sports leagues on the ground that their concerted action imposed a restraint upon the labor market would seriously undermine many of the policies embodied by these labor laws.").

92. 518 U.S. 231 (1996).

93. Brown v. Pro Football, Inc., 518 U.S. at 234-35.

94. *Clarett*, 369 F.3d at 137 (citing *Brown*, 518 U.S. at 240-42).

Second Circuit felt that *Brown*'s holding justified using *Caldwell, Williams*, and *Wood* as "controlling authority" in *Clarett*.[95]

With its focus turned squarely to the nature of the bargaining relationship between the NFL and its players, the court found multiple reasons why the existence of a collective bargaining relationship between the NFL and the NFLPA precluded Clarett from successfully challenging the three-year rule on antitrust grounds.[96]

First, the court held that the NFLPA and NFL exclusively controlled "the terms and conditions" of Clarett's employment, including when Clarett became eligible for the draft.[97] Indeed, if Clarett attempted to individually negotiate with an NFL franchise, he would "commit an unfair labor practice" since "the NFL players have unionized and have selected the NFLPA as its exclusive bargaining representative."[98] According to the court, as Clarett's exclusive bargaining representative, the NFLPA cannot only create, but also restrict, the rights of players.[99] Thus, the NFLPA could curtail Clarett's right to enter the draft at the time he desired because the NFLPA can "favor veteran players over rookies."[100] Ultimately, because the NFLPA represented Clarett, the union, rather than Clarett personally, bore the responsibility of challenging what Clarett perceived as an unfair league policy.[101]

The court also rejected Clarett's argument that the eligibility rules were not mandatory bargaining subjects.[102] The court held that certain "arrangements" in professional sports that do not appear, at least on their face, to affect mandatory bargaining subjects like wages or working conditions, still qualify as mandatory bargaining subjects "because they have tangible effects on the wages and working conditions of current NFL players."[103] Here, the court held that,

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95. *Clarett*, 369 F.3d at 138 ("Because we find that our prior decisions in this area fully comport—in approach and result—with the Supreme Court's decision in *Brown*, we regard them as controlling authority.").

96. *Id.* at 138-43.

97. *Id.* at 138-39 ("The terms and conditions of Clarett's employment are . . . committed to the collective bargaining table and are reserved to the NFL and the players union's selected representative to negotiate.").

98. *Id.*

99. *Id.* at 139 ("The players union's representative possesses 'powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents.'" (internal citations omitted)).

100. *Id.*

101. *Id.* at 138-39.

102. *Id.* at 139 ("[W]e find that the eligibility rules are mandatory bargaining subjects.").

103. *Id.* at 140.

> Because the unusual economic imperatives of professional sports raise 'numerous problems with little or no precedent in standard industrial relations,' we have recognized that many of the arrangements in professional sports that, at first glance, might not appear to deal with wages or working conditions are indeed mandatory bargaining subjects.

when viewed as part of the NFL's overall compensation scheme, the contested age-eligibility rule was a mandatory bargaining subject because the restraint on new players entering the labor pool affected the salaries of current players due, in part, to "the complex scheme by which individual salaries in the NFL are set."[104] The court bolstered its holding that the three-year rule was a mandatory bargaining subject by reasoning that reducing competition for a limited number of roster spots increased the job security of current players, which is a mandatory bargaining subject.[105]

The court also dismissed Clarett's argument that the NFLPA could not negotiate the three-year rule because it affected non-unionized players, like Clarett, holding that unions can bargain over employment requirements for prospective employees.[106] Moreover, the court did not entertain Clarett's complaint about the arbitrariness of the three-year rule, writing that Clarett did not differ from a worker who believes that he "has the skills to fill a job vacancy but does not possess the qualifications or meet the requisite criteria that have been set."[107]

Finally, the court rejected Clarett's complaint that all the NFL franchises committed antitrust violations by agreeing to abide by the three-year rule, holding that the benefits of permitting "the NFL teams to act collectively as a multi-employer bargaining unit" served the goals of federal labor policy and did not violate antitrust law.[108] Moreover, the court feared that the threat that Clarett's challenge presented to the collective bargaining process would unacceptably disrupt federal labor law.[109]

Therefore, the court held that the non-statutory labor exemption applied because the NFLPA represented Clarett, the union could negotiate about age-related employment eligibility rules for future employees, and the court's

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Id. (internal citations omitted).

104. *Id.* at 140.

> [T]he complex scheme by which individual salaries in the NFL are set, which involves, *inter alia*, the NFL draft, salary caps, and free agency, was built around the longstanding restraint on the market for entering players imposed by the eligibility rules and the related expectations about the average career length of NFL players.

Id.

105. *Id.* ("Because the size of NFL teams is capped, the eligibility rules diminish a veteran player's risk of being replaced by either a drafted rookie or a player who enters the draft, and though not drafted, is then hired as a rookie free agent.").

106. *Id.* at 141 ("As a permissible, mandatory subject of bargaining, the conditions under which a prospective player, like Clarett, will be considered for employment as an NFL player are for the union representative and the NFL to determine.").

107. *Id.*

108. *Id.* at 141 (describing the benefits of the multi-employer bargaining unit structure).

109. *Id.* at 142-43 (describing the potential disruptions to labor law that would arise from Clarett's suit).

concern with destabilizing federal labor law militated against a pro-Clarett verdict.[110] The court reversed the district court's entry of summary judgment in favor of Clarett, making him ineligible for the 2004 NFL draft.[111] The Supreme Court denied Clarett's petition for a writ of certiorari, leaving the young running back without a place to play for the 2004 season.[112]

IV. EVEN UNDER THE SECOND CIRCUIT'S TEST THE NON-STATUTORY LABOR EXEMPTION SHOULD NOT APPLY TO THE NFL'S THREE-YEAR RULE

The Second Circuit's decision in *Clarett* faced sharp criticism for a variety of reasons.[113] Some commentators argued that the court erred by not applying the *Mackey* test,[114] while others suggested creating an entirely new test for determining when to apply the non-statutory labor exemption.[115] Others, like Clarett's attorney, Alan C. Milstein, continue to argue that the NFL age eligibility rule is not a mandatory bargaining subject.[116] Although these

110. *Id.* at 138-43.

111. *Id.* at 143.

112. Battista, *supra* note 26.

113. *See, e.g.*, Closius, *supra* note 34, at 496 ("The failure to consider the relationship between the NFL and the NCAA constitutes [Clarett's] biggest deficiency."); Stephen O. Ayeni, Jr., *Intentional Grounding: How the NCAA and NFL Have Engaged in Practices That Unreasonably Restrain the Football Player Labor Market*, 41 NOVA L. REV. 265, 290-92 (2017) (arguing that the age eligibility rules did not constitute a mandatory bargaining subject). *But see, e.g.*, Ronald Terk Sia, Clarett v. National Football League*: Defining the Non-Statutory Labor Exception to Antitrust Law as it Pertains to Restraints Primarily Focused in Labor Markets and Restraints Primarily Focused in Business Markets*, 4 PIERCE L. REV. 155 (2005) (arguing that the Second Circuit decided *Clarett* correctly); Peter Altman, *Stay Out for Three Years After High School Or Play in Canada - And for Good Reason: An Antitrust Look at Clarett v. National Football League*, 70 BROOK. L. REV. 569, 572 (2005) ("[T]he NFL's three-year rule qualifies as a reasonable restraint on trade and comports with the purpose of the Sherman Antitrust Act."); Michael R. Lombardo, *Losing Collegiate Eligibility: How Mike Williams & Maurice Clarett Lost Their Chance to Perform on College Athletics' Biggest Stage*, 3 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 19, 49-52 (2005) (describing the benefits that accrue to players when forced to develop in college, rather than the NFL); Brando Simeo Starkey, *The Veil of Fair Representation: Maurice Clarett v. The National Football League*, 37 U. BALT. L.F. 17 (2006) (assuming the correctness of the Second Circuit's decision in *Clarett II* while simultaneously proposing a new ability-based framework for determining NFL eligibility).

114. *See*, e.g., Walter T. Champion, Jr., *Looking Back to Mackey v. NFL to Revive the Non-Statutory Labor Exemption in Professional Sports*, 18 SETON HALL J. SPORTS & ENT. L. 85 (2008).

115. *See, e.g.*, Eleanor M. Hynes, *Unnecessary Roughness: Clarett v. NFL Blitzes the College Draft and Exemplifies Why Antitrust Law Is Also 'A Game of Inches'*, 19 ST. JOHN'S J. LEGAL COMMENTARY 577, 635 (2005) (proposing that trial courts follow "the rule of reason approach"); Christian Dennie, *From Clarett to Mayo: The Antitrust Labor Exemption Argument Continues*, 8 TEX. REV. ENT. & SPORTS L. 63 (2007) (proposing a modified *Mackey* test for evaluating whether the non-statutory labor exemption applies).

116. Milstein, *supra* note 7. Milstein argues that the NFL's three-year rule fails to satisfy any prong of the three-part *Mackey* test. He focuses significant attention on why the age eligibility rule is not a mandatory bargaining subject, but merely mentions that the NFLPA did not represent Clarett. This Comment differs from Milstein's argument in two ways: (1) it devotes significant attention to explaining why the

arguments offer persuasive critiques of the Second Circuit's opinion in *Clarett*, this Comment adopts a different approach to explain why the non-statutory labor exemption should not apply to the NFL three-year rule.

Unlike other critiques, this Comment neither proposes a new rule for analyzing when the non-statutory labor exemption should apply, nor offers a new interpretation of what constitutes a mandatory bargaining subject. Rather, as mentioned above, this Comment argues that, even under the Second Circuit's non-statutory labor exemption test, the NFL's three-year rule should face federal antitrust scrutiny. For the exemption to apply under the Second Circuit's test, the three-year rule must result from the collective bargaining process between the affected parties.[117] The Second Circuit ruling reflected a flawed understanding of the relationship between prospective professional football players and the NFLPA because it found that the NFLPA represents future NFL players.

However, the NFLPA does not represent college football players; therefore, college football players and the NFL did not bargain for the three-year rule because prospective players are not part of the bargaining unit that negotiated the NFL CBA. Thus, even if one concedes both that the Second Circuit applied the right test for the determining the applicability of the non-statutory labor exemption in *Clarett* and that age-related draft eligibility rules are mandatory bargaining subjects, the non-statutory labor exemption should still not apply and courts should subject the three-year rule to federal antitrust law.

The remainder of Part IV explains why the non-statutory labor exemption should not apply to the NFL three-year rule. First, this Part will explain the ways that the union relationships described in *Caldwell, Williams*, and *Wood* differ from the relationship between college football players and the NFLPA, ultimately concluding that college football players do not constitute part of the bargaining unit that negotiated the NFL CBA. This Part will also consider the public policy reasons that problematize the continued acceptance of the NFL's three-year rule. Part V concludes with a proposed model for regulating player access to the NFL in the event that a court declares the NFL three-year rule an antitrust violation.

NFLPA did not represent Clarett, or any college football player, and (2) this Comment's conclusion that the NFL three-year rule should face antitrust scrutiny does not depend on a court adopting the *Mackey* test.

117. *See* Clarett v. Nat'l Football League, 369 F.3d 124, 135 (2d Cir. 2004) (describing how Second Circuit precedent regarding the applicability of the non-statutory labor exemption in the professional sports context "was rooted in the observation that relationships among the defendant sports leagues and their players were governed by collective bargaining agreements.").

A. The Relationship Between College Football Players and the NFLPA Differs from the Union Relationships in Caldwell, Williams, and Wood

The Second Circuit's *Clarett* opinion relies heavily on the court's precedent in *Caldwell, Williams*, and *Wood*.[118] Not only did the court use those cases to craft a test to determine when the non-statutory labor exemption applies, but it also held that the close fit between those cases and Clarett's made them ideal guides to determine the outcome in Clarett's suit.[119] However, even if *Caldwell, Williams*, and *Wood* delineate the proper test for the applicability of the non-statutory labor exemption, the significant differences between the players and unions in those cases and Clarett and the NFLPA in his case undermine the court's claim that the outcomes in those cases guide the outcome in Clarett's case.[120]

First, unlike the plaintiff players in *Caldwell, Williams,* and *Wood*, Clarett had not played in his sports top professional league.[121] In *Wood*, the plaintiff challenged the NBA's draft and salary cap rules *after* a team in the league drafted him.[122] In *Williams*, a class of *current* NBA players once again challenged the NBA draft and salary cap rules.[123] In *Caldwell*, a *former* player in the American Basketball Association (ABA), alleged that teams in the league conspired among themselves to get him fired from his job and permanently blacklisted by the ABA's member teams.[124] Unlike the plaintiffs in these cases, no professional team ever employed Clarett—in fact, he brought his suit precisely because the NFL three-year rule denied him that opportunity.[125]

Despite the glaring differences between *Williams*, *Caldwell*, and *Woods* and Clarett's case, the court's opinion makes no effort to explain how the NFLPA represented Clarett despite his inability to enter the NFL and earn direct

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118. *Id.* at 134-35.

119. *Id.* at 135 ("We need only retrace the path laid down by [*Caldwell, Williams*, and *Wood*] to reach the conclusion that Clarett's antitrust claims must fail.").

120. *Id.*

121. *See* Caldwell v. Am. Basketball Ass'n, 66 F.3d 523, 525-26 (2d Cir. 1995); Nat'l Basketball Ass'n v. Williams, 45 F.3d 684, 685-86 (2d Cir. 1995); Wood v. Nat'l Basketball Ass'n, 809 F.2d 954, 956-58 (2d Cir. 1987).

122. *Wood*, 809 F.2d at 956-58.

123. *Williams*, 45 F.3d at 685-86.

124. *Caldwell*, 66 F.3d at 525-26.

125. Clarett's Motion for Summary Judgment, *supra* note 61, at 2 ("Clarett moves this Court for an Order entering summary judgment in his favor, finding the [NFL three-year rule] invalid as a matter of law and allowing Clarett to compete in the marketplace of professional football.").

representation by the NFLPA.[126] In an arguably fatal flaw in the Second Circuit's analysis, the court unjustifiably assumed that the NFLPA represented prospective NFL players that remain ineligible for the NFL Draft and play in an entirely different league.[127] This unsubstantiated assumption ultimately denied Clarett the opportunity to enter the 2004 NFL Draft.[128]

Rather than reconciling the key differences in *Clarett* and existing circuit precedent, the court's application of *Caldwell, Williams*, and *Wood* to *Clarett* began by highlighting the importance of the relationship between the NFL and the NFLPA.[129] According to the court, "[b]ecause the NFL players have unionized and have selected the NFLPA as its exclusive bargaining representative," labor law prevented Clarett from negotiating independently with any NFL team.[130] Moreover, because the NFLPA represented Clarett, the union could restrict his rights, including his right to enter the NFL Draft.[131] Finally, the NFLPA could favor certain players over others, including "veteran players over rookies."[132] Yet, such reasoning does not hold up because Clarett was not a rookie, veteran, or any class of NFL player—indeed, he sued the NFL precisely because he could not join the class of players the NFLPA represented.[133] It requires serious cognitive gymnastics to imagine how a union for NFL players can represent a college football player.

Some commentators close the gap in the Second Circuit's analysis and provide arguments to support the conclusion that the NFLPA represented Clarett.[134] One commentary on the *Clarett* decision basically adopts the court's stance, relying on labor law principles to deduce the NFLPA's jurisdiction over Clarett.[135] Another, more persuasive commentary by Michael Scheinkman

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126. Clarett v. Nat'l Football League, 369 F.3d 124, 138 (2d Cir. 2004) ("Because we find that our prior decisions in this area fully comport—in approach and result—with the Supreme Court's decision in Brown, we regard them as controlling authority.").

127. *Id.* at 138-39.

128. *Id.* at 138-39, 143.

129. *Id.* at 138-39.

130. *Id.* at 138.

131. *Id.* at 139.

132. *Id.*

133. *Id.* at 126; Clarett's Motion for Summary Judgment, *supra* note 61, at 2.

134. *See, e.g.*, Michael Scheinkman, *Running Out of Bounds: Over-Extending the Labor Antitrust Exemption in Clarett v. National Football League*, 79 ST. JOHN'S L. REV. 733, 757-58 (2005); Shauna Itri, *Maurice Clarett v. National Football League, Inc.: An Analysis of Clarett's Challenge to the Legality of the NFL's Draft Eligibility Rule under Antitrust Law*, 11 VILL. SPORTS & ENT. L.J. 303, 333 (2004) (arguing that the Second Circuit's holding that the NFLPA represented Clarett aligns with federal labor policy).

135. *See* Itri, *supra* note 134, at 331-33. Itri supports her proposition that "[c]ollective agreements . . . often affect employees outside of the bargaining union" by citing Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 210-217 (1964), a case that held that a company must bargain with union members about its

argued that the NFLPA represented Clarett by relying on *Wood* and a D.C. District Court case, *Zimmerman v. National Football League*.[136] Scheinkman's analysis of *Wood* focused on that case's holding that "collective bargaining agreements may be exempt from antitrust scrutiny although they may adversely affect prospective employees."[137] Scheinkman's analysis of *Zimmerman* explained that the non-statutory labor exemption applied to a supplemental draft agreed to by the NFL and NFLPA because "potential future players are parties to the collective bargaining relationship because the agreement binds all employees who subsequently enter the bargaining unit."[138]

Yet, the collective bargaining relationships that existed between the plaintiffs and unions in *Wood* and *Zimmerman* differed substantially from the relationship that existed between Clarett and the NFLPA. As mentioned above, in *Wood*, the plaintiff challenged NBA salary cap and draft rules to which the league and NBA players' union agreed before a team drafted Wood.[139] However, unlike Clarett, Wood stepped into the shoes of the professional basketball players that the NBA players' union represented when it negotiated the contested salary cap and draft rules.[140] The professional basketball players' union negotiated different employment terms for veterans and rookies, but all individuals bound by the agreement played in the NBA.[141] This differs from the NFLPA because, according to the court's analysis in *Clarett*, the NFLPA represented veterans, rookies, *and* college players, even while precluding the college players that it supposedly represents from entering the NFL.[142]

In other words, Wood entered the bargaining unit represented by the professional basketball players union before the court bound him to the union's negotiated rules.[143] By contrast, the court bound Clarett to the NFLPA and NFL's negotiated terms even though he could not join the bargaining unit—NFL players—that the NFLPA represented.[144] Thus, unlike Wood, Clarett did not merely face a lower salary that favored more senior employees in the

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decision to "contract out" labor previously performed by the union. Presumably, Itri finds support for her proposition because the union agreement affected the non-union contractor.

136. *See* Scheinkman, *supra* note 134, at 757-58.

137. *Id.* at 758.

138. *Id.*

139. Wood v. Nat'l Basketball Ass'n, 809 F.2d 954, 956-58 (2d Cir. 1987).

140. *Id*. at 958 (describing a professional basketball team drafting, negotiating with, and signing Wood).

141. *Id.* at 957-58 (describing parameters of the CBA).

142. Clarett v. Nat'l Football League, 369 F.3d 124, 138-39 (2d Cir. 2004).

143. *Wood*, 809 F.2d at 960-61 (outlining Wood's complaint regarding the amount of salary earned once he became a professional basketball player; not his ability to earn a salary).

144. *Clarett*, 369 F.3d at 138-39, 143.

bargaining unit; Clarett received no salary because the union that supposedly represented his interests excluded him, and others like him, from the bargaining unit altogether.[145]

The union relationship with the plaintiff in *Zimmerman* differs from Clarett's relationship with the NFLPA, too. Zimmerman argued that the NFL's supplemental draft violated antitrust law because it only allowed him to negotiate with one NFL team once drafted.[146] The NFLPA and the NFL negotiated and agreed to the supplemental draft,[147] but Zimmerman argued that the NFLPA did not represent him because he played in another professional football league—the United States Football League (USFL).[148] There, the court held that the bargaining unit included Zimmerman "[a]s a potential NFL player."[149]

Unlike the three-year rule that Clarett challenged, the rule Zimmerman challenged became applicable only once he became a party to the bargaining unit represented by the NFLPA—NFL football players.[150] Nothing prevented Zimmerman from joining the bargaining unit that consisted of NFL players and their union representatives, but once he joined that unit the court held him to the terms that the unit's representatives negotiated with the NFL franchises.[151] Conversely, the Second Circuit forced Clarett to abide by terms that the NFLPA negotiated even though he did not and could not play in the NFL and join the bargaining unit represented by the NFLPA.[152] In other words, the NFLPA represented Zimmerman because once he became an NFL player, or at least had the opportunity to become one after a team drafted him, he came under the purview of the negotiated terms of the CBA.[153] This differs from the situation in *Clarett*, where the court should have found that the NFLPA did not represent Clarett because he never received the opportunity to become an NFL player,

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145. *Compare Wood*, 809 F.2d at 960, *with Clarett*, 369 F.3d at 141, 143 (Wood complains because the draft and salary cap "assign him to work for a particular employer at a diminished wage," whereas Clarett cannot even enter the NFL).

146. Zimmerman v. Nat'l Football League, 632 F. Supp. 398, 401 (D.D.C. 1986) ("Zimmerman charges that the supplemental draft violates section 1 of the Sherman Act, 15 U.S.C. § 1 (1982), because it allows him to negotiate with only a single NFL team.").

147. *Id.* at 401-02.

148. *Id.* at 400, 405 ("[The supplemental draft] affected players already under contract to professional football leagues other than the NFL.").

149. *Id.* at 405-06.

150. *Id.* at 402 (discussing how Zimmerman is only subject to NFL CBA rules after the Giants, an NFL team, drafted him).

151. *Id.* at 405-06 (citing *Wood* for the proposition that the terms of a CBA apply to players who enter the bargaining unit after the parties to the agreement already agreed to the CBA's terms).

152. Clarett v. Nat'l Football League, 369 F.3d 124, 138-43 (2d Cir. 2004).

153. *Zimmerman*, 632 F. Supp. at 405-06.

and, therefore, the terms and conditions the NFLPA negotiated on behalf of NFL players should not apply to him.

B. College Football Players Did Not Constitute Part of the Bargaining Unit That Negotiated the NFL CBA

Not only does the court's opinion in *Clarett* misapply the relevant case law regarding the application of the non-statutory labor exemption in professional sports, but it also interprets the relationship between the NFLPA and Clarett in a way that directly contradicts the defined contours of the bargaining unit as explicitly outlined by the NFL Management Council (NFLMC) and the NFLPA in the CBA.[154] In the preamble to that agreement, the CBA describes the NFLPA as:

[T]he sole and exclusive bargaining representative of present and future employee players in the NFL in a bargaining unit described as follows:

- All professional football players employed by a member club of the National Football League;
- 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;
- All rookie players *once they are selected in the current year's NFL College Draft*; and
- All undrafted rookie players once they commence negotiation with an NFL Club concerning employment as a player.[155]

As clearly articulated by the NFLMC and the NFLPA in the CBA, players do not become members of the bargaining unit that negotiated the CBA until an NFL team drafts them or they begin negotiating with an NFL team about signing as a player.[156] Clarett never received that opportunity because the three-year rule prevented him from pursuing the opportunity to play in the NFL.[157] Thus,

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154. *See* Collective Bargaining Agreement Between National Football League and National Football League Players Association (1993-2000), at 1 [hereinafter *1993 CBA*]. The CBA that applied in 2004 during Clarett's case was an extension of the 1993 CBA. *See generally* Kevin G. Quinn, *Getting to the 2011-2020 National Football League Collective Bargaining Agreement*, 7 INT'L J. SPORT FIN. 141, 146 (2012).

155. *1993 CBA*, *supra* note 154, at 3 (emphasis added). The current CBA uses the exact same language to describe the bargaining unit. *See 2011 CBA*, *supra* note 10, at XV.

156. *1993 CBA*, *supra* note 154.

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

even though the NFLPA did not intend to represent Clarett,[158] the Second Circuit proclaimed that the NFLPA did with virtually no support.[159]

Recent events provide further evidence that the NFLPA does not represent college players. In 2014, Northwestern football players petitioned the National Labor Relations Board for permission to unionize.[160] The NFLPA backed the Northwestern players' petition to unionize, saying, "[T]he NFLPA pledges its support to the National Collegiate Players Association (NCPA) and its pursuit of basic rights and protections for *future* NFLPA members."[161] Indeed, the NFLPA, along with the unions representing professional baseball, hockey, soccer, and basketball players, filed an amicus curiae brief that supported the proposed union.[162] If the NFLPA actually represented college players, it would not advocate for the creation of a rival union to represent college players because that would diminish the NFLPA's power as a union by diminishing the number of players that the NFLPA represents.

Additionally, the NFLPA constitution supports the conclusion that the union does not include college football players for four reasons. First, the section on membership in the NFLPA Constitution outlines detailed membership qualifications for current and former NFL players, but it never mentions potential NFL players currently in college.[163] The next section of the NFLPA constitution, which says "[t]here shall be a Player Representative and two Co-Alternate Player Representatives from each club," makes no mention of representatives from the college football ranks.[164] Moreover, the listed representatives for the NFLPA Board of Player Representatives exclusively contains current NFL players.[165] Fourth, and finally, the NFLPA Constitution

158. *1993 CBA*, *supra* note 154.

159. *Clarett*, 369 F.3d at 138-39.

160. *See* Tom Farrey, *Northwestern Wildcats Football Players Trying to Join Labor Union*, ESPN (Jan. 28, 2014), http://www.espn.com/espn/otl/story/_/id/10363430/outside-lines-northwestern-wildcats-football-players-trying-join-labor-union.

161. Mike Florio, *NFLPA Backs Efforts of College Players to Unionize*, PROFOOTBALLTALK (Jan. 28, 2014), http://profootballtalk.nbcsports.com/2014/01/28/nflpa-backs-efforts-of-college-players-to-unionize/ (emphasis added).

162. *See* Amicus Curia Brief of Major League Baseball Players' Association, National Hockey Players Union, Major League Soccer Players Union, National Football League Players Association, and National Basketball Players Association in Support of Petitioner College Athletes Players Association, Northwestern Univ. & Coll. Athletes Players Ass'n, 362 N.L.R.B. 167 (2015) (No. 13-RC-121359) [hereinafter Professional Sports Unions Amicus Brief].

163. *See* NFLPA, 2017 NFLPA CONSTITUTION art. II, at 5-9 (March 2017), *available at* https://nflpaweb.blob.core.windows.net/media/Default/PDFs/NFLPAConstitution2017.pdf.

164. *Id.* art. 3.01, at 9.

165. *See NFLPA Officers*, NFLPA, https://www.nflpa.com/about/nflpa-officers/board-of-player-reps (last visited Dec. 13, 2018).

provides for the creation of a "Former Players Board of Directors."[166] Currently, eight former NFL players serve on the Former Player's Board.[167] However, the NFLPA constitution makes no mention of representatives for college players.

Thus, no evidence exists to show that the NFLPA represents college football players or that the bargaining unit that negotiated the CBA includes college football players. Rather, all of the evidence suggests, both explicitly and implicitly, that college football players were not parties to the bargaining unit that negotiated the CBA and that the NFLPA does not represent college football players. Therefore, even under the Second Circuit's test for the application of the non-statutory labor exemption, the exemption should not apply to the NFL three-year rule.

C. Policy Considerations Support the Abolition of the NFL's Three-Year Rule

In addition to these legal justifications for finding that the non-statutory labor exemption does not apply to the NFL three-year rule, policy considerations support the abolition of the age-eligibility rule. The NFL asserts four policy rationales for the three-year rule:

> [P]rotecting younger and/or less experienced players—that is, players who are less mature physically and psychologically—from heightened risks of injury in NFL games; protecting the NFL's entertainment product from the adverse consequences associated with such injuries; protecting the NFL clubs from the costs and potential liability entailed by such injuries; and protecting from injury and self-abuse other adolescents who would over-train—and use steroids—in the misguided hope of developing prematurely the strength and speed required to play in the NFL.[168]

These rationales appear valid at first glance, but further inspection reveals the serious shortcomings of the NFL's policy justifications for the three-year rule.

First, teenagers have already played in the NFL. For instance, "in 1964, NFL Commissioner Pete Rozelle permitted 19-year old running back Andy Livingston to sign with the Chicago Bears."[169] In 2007, the Houston Texans

166. NFLPA, *supra* note 163, art. 2.11, at 7-9.

167. *See Former Player Board of Directors*, NFLPA, https://www.nflpa.com/former-players/board-directory (last visited Dec. 13, 2018).

168. Memorandum of the National Football League, *supra* note 18, at 4.

169. Edelman & Wacker, *supra* note 11, at 347.

drafted nineteen-year-old Amobi Okoye without any protest from the NFL.[170] If the NFL genuinely cared about the risks that teenagers faced playing in the NFL, then neither Livingston nor Okoye should have played in the league at nineteen. The fact that both did highlights that the NFL primarily cares about the continued enforcement of its arbitrary age-eligibility rule, not the risks that young players face upon entry into the NFL.

Additionally, NFL teams do not need league rules to prevent them from drafting physically and psychologically immature players in the NFL draft because the highly competitive nature of the league incentivizes teams to select only players that player personnel executives believe will help the team win. The elimination of the age-eligibility rules would not mandate the selection of recent high school football graduates or college freshmen, it would merely introduce that possibility. Presumably, the desire of NFL franchises to field competitive teams will serve as a check on unprepared and underdeveloped players entering the NFL.

The NFL's asserted concern about the risks of physical injury to underdeveloped players exaggerates the different risk levels between college football and the NFL. In 2017, five college football players died either in offseason training or on the field in a game.[171] In 2018, Jordan McNair, a nineteen-year-old football player at the University of Maryland, died while training for the season, causing a national uproar and, after significant delay, the firing of the team's head coach, DJ Durkin.[172] Moreover, regarding the high-profile concussion issue, recent lawsuits suggest that the NCAA faces as many, and potentially more, problems than the NFL for concussions that college football players suffer while playing.[173] In fact, players face serious concussion-related risks in high school football, "where sustaining a concussion before another has healed kills or seriously injures about 10 players a year."[174]

Non-concussion legal activity further reveals the inherent dangers and potential for significant injury-related damage that college football players face.

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170. Thayer Evans, *Fifth Down - Teenager Picked in First 10*, N.Y. TIMES, Apr. 29, 2007, https://archive.nytimes.com/query.nytimes.com/gst/fullpage-9E07E1DD133EF93AA15757C0A9619C8B63.html.

171. *See* Dennis Dodd, *Saturday Was One of the Deadliest for College Football in Decades*, CBS SPORTS (Sept. 20, 2017), https://www.cbssports.com/college-football/news/saturday-was-one-of-the-deadliest-for-college-football-in-decades/.

172. Adam Rittenberg & Tom VanHaaren, *Maryland Terrapins Football Jordan McNair Death DJ Durkin Scandal Timeline*, ESPN (Oct. 31, 2018), http://www.espn.com/college-football/story/_/id/24351869/maryland-terrapins-football-jordan-mcnair-death-dj-durkin-scandal-line.

173. *See* Rachel Axon, *Does NCAA Face More Concussion Liability Than NFL?*, USA TODAY, July 25, 2013, https://www.usatoday.com/story/sports/ncaaf/2013/07/25/ncaa-concussion-lawsuit-adrian-arrington/2588189/.

174. Alan Schwarz, *Before Reaching the N.F.L., High School and College Players Face Risk of Head Injuries*, N.Y. TIMES, Oct. 1, 2009, http://www.nytimes.com/2009/10/02/sports/football/02dementia.html.

In February 2018, a former Texas Christian University (TCU) football player Kolby Listenbee sued TCU, TCU Head Coach Gary Patterson, the Big 12 Conference, and others alleging "that TCU and its staff were 'malicious' and 'grossly negligent' in how they responded to him suffering a debilitating pelvic region injury."[175] Among the damages that Listenbee alleges that he suffered, he lists "'losses in value and losses in profits, including, but not limited to NFL career earnings."[176] Undoubtedly the NFL enjoys transferring this legal risk to the NCAA, but transferring that risk does not mitigate the injury risk that college football players face. In fact, it asks them to accept that risk without the salary that NFL players receive. The NFL undoubtedly cares about "protecting the NFL's entertainment product from the adverse consequences associated with" injuries like concussions; but disguising those concerns as anything more than a concern about the league's public image and bottom-line requires more than an assertion by league lawyers that the three-year rule aims to protect young football players.[177]

The NFL's argument that the three-year rule prevents players from over-training in hopes of gaining early entry to the NFL also ignores the incentives that players face to earn college scholarships and to distinguish themselves early in their college career. NFL draftees come from all levels of college football, but 77.2% of all first-round draft picks came from the so-called Power 5 conferences.[178] Therefore, earning a scholarship to those schools, something that frequently occurs before players turn eighteen, creates similar incentives for over-training that earlier access to the NFL would create. And even though players may not enter the NFL until three seasons have passed since their high school graduation, they know that their performance early in their collegiate career impacts their future attractiveness as a draft pick.[179] Thus, allowing NFL teams to draft college players before three years have passed since their high school graduation does no more to incentivize over-training and steroid abuse than the existing draft structure.

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175. *See* Michael McCann, *Kolby Listenbee Sues TCU Football: Breaking Down the Lawsuit*, SPORTS ILLUSTRATED, Feb. 1, 2018, https://www.si.com/college-football/2018/02/01/kolby-listenbee-lawsuit-tcu-gary-patterson-legal-analysis.

176. *Id.*

177. Memorandum of the National Football League, *supra* note 18, at 4.

178. Daniel Wilco, *College Football Teams and Conferences with the Most NFL Draft First-Round Picks*, NCAA (Apr. 27, 2018), https://perma.cc/A6NK-8DLF. The Power 5 Conferences are the SEC, Big 10, Big 12, Pac 12, and ACC. *Id.*

179. SI Staff, *NBA Draft: College Football Players Who Could Go One and Done to NFL*, SPORTS ILLUSTRATED, June 16, 2017, https://www.si.com/college-football/2017/06/16/one-and-done-freshmen-nfl-nba-draft (describing freshman college football players who NFL teams would likely draft if permitted to by NFL rules).

Finally, equitable principles highlight the need to allow college athletes—who receive nothing more than a scholarship despite the significant revenue they generate for their universities, coaches, and administrators—to earn their true market value once they have the talent necessary for a professional league.[180] Equating the positions of professional athletes and college football players defies logic and displays an ignorance of the realities of modern college athletics. Indeed, recent studies highlight the inequity of a system that generates substantial revenue for all parties involved in college athletics, except the players on the field.[181] Eliminating the age-eligibility requirement that prevents the most talented college players from reaping the rewards of their true market value takes a step toward creating a fairer system of compensation for revenue-generating football players.

D. A Model for Player Access to the NFL After the Abolition of the NFL's Three-Year Rule

If a future court decides an antitrust challenge to the three-year rule properly—by striking down the policy as a violation of federal antitrust law—the problem about how to properly protect the labor rights of potential NFL players would remain unresolved. A number of potential solutions exist. For instance, player representatives from each school could band together to form a union that mirrors the multi-employer bargaining unit, which the *Clarett* court approved.[182] That union could represent the interests of college football players in negotiations between the NFLPA and the NFL over issues like draft eligibility. If selecting a representative from each school seems unwieldy, selecting a representative from each conference or region could prove workable, while still effectively allowing college football players to take collective action.

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180. *See, e.g.*, Stephen A. Bergman & Trevon D. Logan, *The Effect of Recruit Quality on College Team Performance*, 17 J. SPORTS ECON. 578, 597 (2014) (estimating that a 5-star recruit generates more than $150,000 in bowl revenue for an individual school); Adam Rittenberg, *SEC Generated $596.9M in Revenue in 2016*-17, ESPN (Feb. 1, 2018), http://www.espn.com/college-sports/story/_/id/22288788/sec-generated-5969-million-revenue-2016-17. *See generally* Taylor Branch, *The Shame of College Sports*, ATLANTIC, Oct. 2011, https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/ (outlining the structure of college sports and making a case for paying college athletes).

181. *See, e.g.*, Marc Edelman, *How Antitrust Law Could Reform College Football: Section 1 of the Sherman Act and the Hope for Tangible Change*, 68 RUTGERS U.L. REV. 809, 810 (2016) (A speech that "discuss[es] how the absurdity came to pass where college football has become a multibillion dollar business, yet a majority of college football players live below the poverty line.").

182. Clarett v. Nat'l Football League, 369 F.3d 124, 136 (2d Cir. 2004) (citing Nat'l Basketball Ass'n v. Williams, 45 F.3d 684, 688-93 (2d Cir. 1995)) ("[M]ulti-employer bargaining units are a long-accepted and commonplace means of giving employers the tactical and practical advantages of collective action.").

With the overturning of the *Clarett* decision, college football players could also potentially directly negotiate with NFL teams, something that the Second Circuit precluded in *Clarett*.[183] Under such a scheme, NFL teams could purchase the rights to the current or future talents of college football players in exchange for a contractual obligation by that player that he play for that team when he enters the NFL.

This system mirrors the system that the National Hockey League (NHL) uses. In the NHL's system, NHL teams can draft the rights to high school players who then can still attend college, with the caveat that the NHL team who drafted him retains the right to the player "until 30 days after he has left college."[184] The only difference between this Comment's proposed system and the system hockey uses is that NFL teams would pay college football players salaries. Altering the system in this way makes sense given the significant amount of money that college football generates,[185] money that currently flows to everybody but the players that everyone tunes in to watch.[186] Such a system will undoubtedly encounter resistance from the entrenched powers of the NFL and NCAA,[187] but that pushback would offer the surest sign that professional football's eligibility rules require an overhaul.

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183. *Id.* at 138 ("Because the NFL players have unionized and have selected the NFLPA as its exclusive bargaining representative, labor law prohibits Clarett from negotiating directly the terms and conditions of his employment with any NFL club.").

184. *See* Steven Goldstein, *More NHL Prospects Are Electing to Play in College*, CHI. TRIB., June 24, 2015, http://www.chicagotribune.com/sports/hockey/blackhawks/ct-college-hockey-nhl-spt-0628-20150623-story.html.

185. *See* Marc Tracy & Tim Rohan, *What Made College Football More Like the Pros? $7.3 Billion, for a Start*, N.Y. TIMES, Dec. 30, 2014, https://www.nytimes.com/2014/12/31/sports/ncaafootball/what-made-college-ball-more-like-the-pros-73-billion-for-a-start.html.

186. *See* Robert Brown, *Research Note: Estimates of College Football Player Rents*, 12 J. SPORTS ECON. 200 (2010) (finding that "premium college football players contribute large rents to their schools.").

187. *See* Closius, *supra* note 34, at 496.

> *Clarett* was, in fact, wrongly decided in 2004. The result it produced is even less defensible for the current NFL and NBA. While the opinion saved college football and basketball, its legal reasoning is seriously flawed. The failure to consider the relationship between the NFL and the NCAA constitutes its biggest deficiency. The NFL eligibility rule is much more tha[n] a restraint on a class of prospective players. The restraint supports the financial structure of college football and saves each NFL team millions of dollars in developmental costs. This conspiracy inhibits entry-level competition in professional football and allows both the universities and the NFL to enjoy monopolistic profits at the expense of college football players. The predatory effect of the NFL's group boycott is even more pernicious when draft eligibility is denied to college players unquestionably ready to play in the NFL. Their ability to profit from their skills is delayed strictly to protect the financial interests of the NFL and the NCAA Division I universities.

Id. (internal citations omitted).

V. CONCLUSION

The Second Circuit's errant ruling in *Clarett* prevented Maurice Clarett, and other similarly situated players, from entering the NFL draft, foreclosing his pursuit of what the court called a "high-paying, high-profile career."[188] Not only did the foreclosure of such an opportunity prevent Clarett from capturing his full market value during the peak of his football career, but it also deprived him of the structure that a job in professional football provides. Unfortunately, devoid of this structure, Clarett, and players like him, often encounter problems that haunt them years after they play their final snap.[189] In hopes of preventing future stories like Clarett's, this Comment argued that, even under the Second Circuit's test for the applicability of the non-statutory labor exemption, the NFL's three-year rule does not qualify for protection from antitrust scrutiny because the NFLPA does not represent college players in CBA negotiations with the NFL. A court that arrived at such a conclusion would take a step toward ending the current inequitable system that suppresses the compensation of college football players.

188. *Clarett*, 369 F.3d at 141.

189. *See* Associated Press, *supra* note 6; *see also* Jill Martin, *Johnny Manziel Timeline*, CNN (May 5, 2016), http://www.cnn.com/2016/02/22/us/johnny-manziel-timeline/index.html.