2006

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Recommended Citation
Michael A. McCann and Joseph S. Rosen, Legality of Age Restrictions in the NBA and the NFL, 56 Cas. W. Res. L. Rev. 731 (2006)
Available at: http://scholarlycommons.law.case.edu/caselrev/vol56/iss3/17
LEGALITY OF AGE RESTRICTIONS IN THE NBA AND THE NFL

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Joseph S. Rosen‡

This Essay examines age eligibility rules in the National Football League (NFL) and the National Basketball Association (NBA), offers analysis of related antitrust and labor law issues, and shares perspective on underlying policies. It primarily reflects a synthesis of our remarks during the Case Western Reserve School of Law’s Symposium on Sports and Eligibility, held on November 11, 2005. For purposes of both clarity and illumination, we add additional commentary. We also preserve our comments from the question and answer session, as our individual viewpoints sometimes vary.

I. NFL AND NBA AGE ELIGIBILITY RULES

The NFL and the NBA are the only major sports organizations that prohibit players from entrance until a prescribed period after high school graduation. Major League Baseball, the National Hockey League, NASCAR, professional tennis, professional golf, and professional boxing have no such rules. Individuals can also partake in professional acting, theater, music, and other entertainment professions without waiting an obligatory period after high school graduation. The same is true of those who enlist in the U.S. armed forces and in various occupations that require maturity and discipline. Such an em-
ployment landscape raises inquiry as to why NFL and NBA teams, unlike so many other employers, would agree to boycott any candidate, regardless of talent or skill, until a prescribed period after high school graduation. This inquiry enjoys heightened interest when considering that NFL and NBA teams are incomparable employers, as players may not play in other leagues for similar compensation. In contemplating this inquiry, this Part first examines age eligibility in the NFL and then in the NBA.

For an amateur football player to be eligible for the NFL draft, at least three years must pass from when that player graduated high school and the NFL draft (the “NFL age eligibility rule”). The NFL age eligibility rule is premised on four core beliefs about all players who fail to satisfy it: (1) they lack the requisite mental or physical maturity to play in the NFL; (2) they are uniquely prone to injury; (3) they would damage the league product and repel fans; and (4) if eligible for the NFL draft, they would be more likely to use steroids. These four beliefs were recently rejected outright by the U.S. District Court for the Southern District of New York. Nevertheless, they remain the presumptively validating rationales for the NFL age eligibility rule.

Significantly, however, the NFL Commissioner may waive the NFL age eligibility rule at his discretion. For instance, when Larry Fitzgerald, Jr. of the University of Pittsburgh participated in the 2004 NFL draft after only two and one-half years had passed from the date of his high school graduation. Fitzgerald’s father, a well-known sports journalist, would later credit the “relationship” he and his attorney had “built over the years with commissioner Paul Tagliabue” as crucial in obtaining a waiver.

Unlike age eligibility rules for other sports leagues that reflect explicit collective bargaining between management and players’ associations, the NFL age eligibility rule has traveled a murkier road to fruition. Until the National Football League Management Council (NFLMC) and the National Football League Players’ Association (NFLPA) revised their collective bargaining agreement in March 2006, previously collectively bargained language did not include this rule. This omission contrasted with the extraordinary detail paid to a

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1 Clarett, 306 F. Supp. at 408.
2 Id. at 408-09.
3 Clarett, 369 F.3d 124 (reversing the District Court).
5 Id.
myriad of other subjects of employment. In fact, the rule only appeared empowered by a memorandum issued by the NFL Commissioner in 1990 and, arguably, the NFL Bylaws.\footnote{See infra p. 743.}

Eligibility for the NBA draft, on the other hand, requires that an amateur player of American origin be at least nineteen-years-old on December 31 of the year of the NBA draft and that at least one NBA season must have passed from when he graduated from high school, or when he would have graduated from high school, and the NBA draft (the "NBA age eligibility rule").\footnote{See NBPA, Collective Bargaining Agreement, art. X, § 1 (2005), available at http://www.nbpa.com/cba_articles/article-X.php#section1. International players, who are defined as those living outside the U.S. for at least the preceding three years and who neither completed high school nor attended college in the U.S., must be nineteen or older on December 31 of the calendar year of the draft. Id.} The NBA age eligibility rule represents a provision in the 2005 collective bargaining agreement between the NBA and the National Basketball Players' Association (NBPA).\footnote{Id. \footnote{See NBPA, Collective Bargaining Agreement, art. X, § 5(a) (1999), available at http://www.nbpa.com/downloads/CBA.pdf; see also Michael A. McCann, Illegal Defense: The Irrational Economics of Banning High School Players from the NBA Draft, 3 VA. SPORTS & ENT. L.J. 113, 134 (2004) [hereinafter McCann, Illegal Defense] (providing additional detail on previous eligibility regime).} It heightens a previous rule that had only required that a player possess either a high school diploma or its equivalent.\footnote{See Michael A. McCann, The Reckless Pursuit of Domination: A Situational Analysis of the NBA and Diminishing Player Autonomy, 7 U. PA. J. LAB. & EMP. L. (forthcoming, 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=878611 [hereinafter McCann, The Reckless Pursuit of Domination] (arguing that the NBA has a paternalistic policy of controlling players).} Much like the NFL age eligibility rule, the NBA age eligibility rule is premised on a mixture of paternalistic and economic considerations.\footnote{See generally McCann, Illegal Defense, supra note 10 (detailing the successes and failures of the twenty-nine high school players who declared for the NBA draft between 1975 and 2003); McCann, The Reckless Pursuit of Domination, supra note 11 (manuscript at 20-26) (noting that players out of high school get in trouble with the law at a lower frequency than players who attended college and are also more likely to be drafted).} The rule also furthers the NBA's de facto minor-league system (i.e., Division I college basketball) in which
players develop skills without financial compensation. Moreover, by preventing talented players from entering the NBA, the rule also enables more fringe NBA players to keep their jobs. Obviously, the rule comes at an extraordinary expense to the often-impoverished premiere high school players who would rather generate revenue for their families than the schools, coaches, shoe companies, television networks, videogame companies, and other industry actors that profit considerably from fan interest in college basketball. More controversially, the rule may also reflect a situational usurpation of player autonomy by the NBA, or underlying societal prejudice, particularly when juxtaposing the experiences of premiere young basketball players with those of other young athletes and entertainers who enjoy similar capacities to earn high incomes without having to encounter the same social rebuke and paternalistic desire for legal intervention "on their behalf." 

II. ANTITRUST LAW AND AGE ELIGIBILITY RULES IN THE NFL AND NBA

Challenges to age eligibility restrictions arise under federal antitrust laws, and specifically the Sherman Antitrust Act (the "Sherman Act"). Section 1 of the Sherman Act, which prohibits agreements that unreasonably restrain trade, supplies the primary source of litigation. There are three requirements for a viable section 1 claim: (1) a contract, combination, or conspiracy; (2) the contract, combination, or conspiracy produced a restraint of trade; and (3) the restraint affected trade or commerce among the several states.

Alleged violations of section 1 are scrutinized by one of three legal standards. "Rule of reason," in which an agreement is deemed unlawful if it causes an anticompetitive injury that outweighs pro-

14 See McCann, Illegal Defense, supra note 10, at 138-56 (illustrating the financial success of high school players in the NBA).
15 See McCann, The Reckless Pursuit of Dominion, supra note 11 (highlighting the numerous ways in which the NBA limits or usurps player autonomy, including age eligibility requirements for the NBA draft).
competitive effects, offers one standard. The rule of reason standard attempts to ensure sufficient economic competition within a marketplace and courts often consider the presence or possibility of less restrictive mechanisms that may achieve the same pro-competitive effects.

In contrast, under "per se" analysis, the defendant's practices are presumed unreasonable, and illegality follows regardless of pro-competitive effects or motive. Common practices that warrant per se treatment are group boycotts, price-fixing schemes, and horizontal market divisions. Per se analysis has become the more common standard for violations of section 1.

More recently, courts have developed a hybrid form of scrutiny—the "quick look" rule of reason, which blends rule of reason and per se analyses and preserves per se's presumption of unreasonable practices, but considers likely anticompetitive effects, market power, and efficiencies "to the degree necessary to understand a challenged restraint's competitive consequences." Some commentators regard quick look as particularly useful in sports antitrust disputes, as it may furnish a desirable balance between the interests of leagues and play-

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19 Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679 (1978) (describing the evolution of the Rule of Reason and explaining the rule's focus on the competitive significance of a restraint).

20 See generally Ernest Gellhorn & Teresa Tatham, Making Sense Out of the Rule of Reason, 35 CASE W. RES. L. REV. 155 (1985); Alan J. Meese, Price Theory, Competition, and the Rule of Reason, 2003 U. ILL. L. REV. 77 (2003). For instance, in the setting of a group boycott, courts either hold the anticompetitive effects of the agreement exceeded its procompetitive effects or the businesses could have employed less restrictive ways to obtain the same pro-competitive effects. See, e.g., Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1 (1979) (holding that a blanket licensing agreement is not a per se violation of the Sherman Act and remanding for the court of appeals to further consider the specifics of the industry); Bd. of Trade v. United States, 246 U.S. 231 (1918) (holding that an agreement that restrains trade does not necessarily violate the antitrust laws and that courts must consider various factors specific to the industry to determine whether the agreement actually suppresses competition).


22 See Richard A. Epstein, Let "The Fundamental Things Apply": Necessary and Contingent Truths in Legal Scholarship, 115 HARV. L. REV. 1288, 1298 (2002) (noting "the shift from a per se rule to a rule of reason regime was not motivated by altruism, but by the inability of fixed rules to distinguish restrictive from efficiency-enhancing arrangements").

ers.24 Indeed, in applying quick look, courts may avoid automatically rejecting a league regulation of player activities, but nevertheless examine its anticompetitive effects with heightened scrutiny.25

Though courts apply per se analysis to most alleged violations of section 1, they tend to regard sports leagues as functionally unique and better suited for either rule of reason analysis or quick look rule of reason analysis.26 Smith v. Pro Football, Inc.,27 a 1978 decision from the United States Court of Appeals for the District of Columbia, illuminated reasons for this distinction.28 Smith addressed the NFL draft, and whether it comprised a group boycott, or an illegal attempt by a group of economic actors to coerce a third party into particular behavior.29 The D.C. Court of Appeals reasoned that NFL teams represent joint ventures in a "shared pursuit" (i.e., the success of the NFL), and therefore the NFL draft should not constitute a group boycott.30 For that reason, per se violations were not identified.31

To characterize the concept of "shared pursuit" perhaps more meaningfully, consider that NFL teams, like teams in other professional sports leagues, are not competitors in a traditional economic sense (e.g., Company A and Company B both making widgets, having no affiliations with each other, and joining hands to restrain trade). Instead, NFL teams ostensibly employ a draft to ensure competition, much like a salary cap or tampering rules32 ostensibly promote competition. For that reason, the NFL draft superficially appears to pro-

26 See id. at 148 (finding that courts "generally reject reliance on per se principles and almost always require plaintiffs to satisfy the full-blown rule of reason standard").
27 593 F.2d 1173 (D.C. Cir. 1978).
28 Id.; see also NCAA v. Bd. of Regents, 468 U.S. 85 (1984) (ruling that the per se rule is not applicable to the NCAA and that per se violations of antitrust laws are not well-suited for the sports setting).
30 Smith, 593 F.2d at 1178-79.
31 See also Fraser v. Major League Soccer, 284 F. 3d 47 (1st Cir. 2002). In Fraser, a court applied rule of reason analysis to a restraint on player movement in a professional soccer league, leading to a characterization of sports teams as part of a "joint venture." Id. at 59. Significantly, however, the court in part reasoned its conclusion on the fact that MLS players could play in other countries for comparable or even better employment conditions. Id. at 63. Indeed, professional soccer in the United States is considered inferior to professional soccer in Europe and South America. See Heike K. Sullivan, Comment, Fraser v. Major League Soccer: The MLS's Single-Entity Structure Is a "Sham," 73 TEMP. L. REV. 865, 901-02 (2000).
mote parity: it prevents franchises with the greatest resources from attracting the best amateur talent year-after-year.\(^3\)

The NFL draft, like the NBA draft and other professional sports drafts, however, serves an ulterior motive. By preventing amateur players from negotiating with multiple teams, it limits player salaries and employment autonomy. For that reason, some commentators contend that the NFL draft and other drafts comprise illegal monopsonies: a league controls the buying of talent, but not the selling, and it is the only source to which the players may sell their services.\(^3\)\(^4\)

Moreover, there exists substantial evidence that, if given a choice to bargain with multiple teams, premiere amateur players would be significantly animated by alternative, noneconomic preferences (e.g., geographic appeal, proximity to family and friends, playing time opportunities), as well as cognitive biases and heuristics—meaning the ostensible aim of parity through a draft may be achieved through far less restrictive means.\(^3\)\(^5\) Therefore, the NFL draft and the NBA draft arguably reflect both illegal and unnecessary mechanisms.

But assuming, arguendo, that the NFL draft and NBA draft reflect necessary shared pursuits, their corresponding rules are not insulated from legal scrutiny, particularly when they appear arbitrary and inflexible. Indeed, courts appear especially weary of blanket bans on particular demographic groups who would otherwise attract interest from teams. Such bans are thought to evidence unreasonable restraints of trade (or preclusions of access), especially in the absence of collective bargaining.\(^3\)\(^6\)

In construing their draft rules as mechanisms to preserve competition rather than as restraints of trade, sports leagues seek to avoid antitrust scrutiny of those rules. Utilization of the “nonstatutory labor exemption,” which shields collective bargaining processes from antitrust scrutiny, supplies the primary means of escaping antitrust inquiry.\(^3\)\(^7\) Sufficient collective bargaining processes arise between duly elected representatives of management and labor groups, with labor representatives thought to “harmonize and adjust the conflicting interests of employees within the bargaining unit, no matter how


\(^6\) See McCann, Illegal Defense, supra note 10, at 220 and accompanying notes.

diverse their skills, experience, age, race or economic level." The labor exemption is premised on the belief that employees are better off negotiating together than individually, particularly when negotiating wages, hours, and other working conditions. Because the labor exemption exempts collectively bargained rules from antitrust scrutiny, leagues are motivated to collectively bargain rules with their players. The same negotiating incentives exist in any relationship between distinct bargaining units, such as between car manufacturers and automobile unions, or airline companies and airline mechanics' unions.

As set forth by the U.S. Court of Appeals for the Eight Circuit in Mackey v. NFL challenging the NFL’s so-called Rozelle Rule, application of the labor exemption in lieu of antitrust laws requires that the restraint of trade: (1) primarily affects only parties to the related collective bargaining agreement; (2) reflects a mandatory subject of collective bargaining, that is, wages, hours, and other terms and conditions of employment; and (3) emerged from bona fide arms-length bargaining ("the Mackey Test"). The Mackey Test has proven especially influential in challenges to age eligibility rules. As we will discuss, the U.S. Court of Appeals for the Second Circuit interpreted the Mackey Test so as to prevent application of antitrust laws in Clarett v. NFL. Moreover, if the new NBA age eligibility rule were challenged, the NBA would likely construe Mackey as warranting the rule’s exclusion from antitrust scrutiny. Indeed, given the remarkable success of NBA players who have bypassed college, the absence of equivalent employers to NBA teams, and the inflexible nature of an arbitrary age floor, the NBA would likely lose any challenge if antitrust scrutiny were applied.

Of course, it remains a lingering and fascinating question as to why sports leagues and players’ associations are treated as legal equivalents to companies and unions in traditional collective bargaining relationships. One might query why, for instance, the law treats the Ford Motor Company, one of many automakers, roughly the same

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38 ROBERT A. GORMAN, BASIC TEXT ON LABOR LAW, UNIONIZATION AND COLLECTIVE BARGAINING 379 (1976).
41 543 F.2d 606 (8th Cir. 1976).
42 The Rozelle Rule required NFL clubs to compensate any club from which they hired away a player whose contract had expired. Id. at 609.
43 Id.
44 369 F.3d at 124 (2d Cir. 2004).
45 McCann, Illegal Defense, supra note 10, at III (B).
as the NFL or the NBA, neither of which have a rival, or why millionaire NFL and NBA players, whose careers tend to last just four or five years, are treated akin to Ford assembly line workers, who might work for forty-five years and never earn what some NFL or NBA players earn in one year. This uniform style of scrutiny may reflect appreciation for precedent, as well as genuine concern that a separate method of scrutiny for collective bargaining agreements between professional sports leagues and professional athletes could unintentionally impair the collective bargaining of other groups. Nevertheless, a matching legal treatment for two wildly different sets of actors may suggest an area for future judicial inquiry, particularly given a potential disconnect between "the legal" and "the normative" in collectively bargained age eligibility rules.

III. CHALLENGES TO NFL AND NBA AGE ELIGIBILITY RULES

Eligibility cases concerning age and the NFL and NBA drafts illuminate salient limitations on draft rulemaking. Denver Rockets v. All-Pro Management, a 1971 decision from the U.S. Federal District Court for the District of California, supplies an important initial insight into how courts contemplate age and the NBA draft. At that time, the NBA required that players be four years removed from high school in order to participate in the NBA draft. The rule had not been collectively bargained. Spencer Haywood, a nineteen-year-old basketball star from an impoverished family, challenged the rule. He characterized it as an unreasonable restraint of trade. The court agreed with Haywood, finding that the age requirement constituted a per se illegal boycott. Central to the court's decision was the inflexible nature and arbitrariness of the rule, for it failed to provide an exception for unique talent or financial circumstance. In other words, a blanket age floor to draft entry comprised illegal per se activity.

Similar reasoning emerged in Boris v. United States Football League, in which a federal district court held that a professional football league could not unilaterally impose a rule requiring that a
player complete college before entering its draft.\textsuperscript{53} By doing so, the court concluded, the league engaged in an illegal group boycott of amateur players unable or unwilling to complete college.\textsuperscript{54} As in 

_Denver Rockets_, the inflexible nature of a uniform age requirement proved over-inclusive and unacceptably harmful to prospective players.\textsuperscript{55}

Analogous lines of reasoning have been evidenced in the litigation of age restrictions in other professional sports leagues. For instance, in 

_Linesman v. World Hockey Association_,\textsuperscript{56} a federal district court held that a league-imposed rule requiring that players be twenty-years-old constituted an unreasonable restraint of trade. The court enunciated that teams cannot, as a matter of law, conspire to boycott all players under a particular age.\textsuperscript{57}

Arguably the most crucial decision concerning age and professional sports eligibility occurred in 2004: 

_Clarett v. NFL_.\textsuperscript{58} In 

_Clarett_, Ohio State running back Maurice Clarett sought to participate in the NFL draft before the three-year anniversary of his high school graduation. Growing up in a financially hard-pressed family from nearby Youngstown, Ohio, Clarett was an extraordinary player for the Buckeyes. As a freshman, he led the team to a national championship, established player performance records,\textsuperscript{59} and was named by _The Sporting News_ as the top running back in college football.\textsuperscript{60} Clarett was so impressive that his Ohio State jersey rapidly sold-out of stores—a great benefit to his school, which received the revenue from these sales, though Clarett, as an NCAA student-athlete, received nothing.\textsuperscript{61} For reasons discussed in the question/answer portion of this Essay, Ohio State suspended Clarett for his sophomore season in 2003.\textsuperscript{62}

\textsuperscript{53} Id.
\textsuperscript{54} Id.
\textsuperscript{55} Id.
\textsuperscript{56} 439 F. Supp. 1315 (D. Conn. 1977)
\textsuperscript{57} Id. at 1320.
\textsuperscript{58} 369 F.3d 124 (2d Cir.), rev'g Clarett v. NFL, 306 F. Supp. 2d 379 (S.D.N.Y. 2004). For two excellent student pieces discussing 


\textsuperscript{59} See Austin Murphy, _Mighty Mo: Precocious Freshman Tailback Maurice Clarett Made His Presence Felt—On and Off the Field_, SPORTS ILLUSTRATED, Jan. 15, 2003, at 12; see also Bruce Lowitt, _Buckeyes Running Back in a Big Hurry_, ST. PETERSBURG TIMES, Dec. 29, 2002, at 1C (supplying additional information on Maurice Clarett's record-breaking feats).

\textsuperscript{60} See Brief for Appellees, at 9, _Clarett_, 306 F. Supp. 2d at 379 (on file with authors).

\textsuperscript{61} See Alice Thomas, _Clarett "13" Jerseys Likely To Be Popular This Fall, Stores Say_, COLUMBUS DISPATCH, Aug. 17, 2003, at D7.

\textsuperscript{62} See infra pp. 752-53. Below, Alan C. Milstein discusses suspension and disconnect be-
Seeking to enter the 2004 NFL draft before the requisite three-year anniversary, Clarett sued the NFL in September 2003, characterizing its age eligibility rule as an unreasonable restraint of trade under section 1 of the Sherman Antitrust Act. The case was heard before Judge Scheindlin of the U.S. District Court for the Southern District of New York. Clarett knew that if he was eligible for the 2004 NFL draft, he would likely be drafted in the first or second round, thus securing a signing bonus in excess of one million dollars. Clarett also found it profoundly unfair that others could profit so considerably from his talents, while he and his family remained impoverished.

Clarett argued that the NFL age eligibility rule failed the Mackey Test on each of its three prongs, and thus warranted antitrust scrutiny. First, the only people subjected to the NFL age eligibility rule were him and similarly situated athletes excluded from the bargaining unit and thus prevented from obtaining the terms and conditions of NFL employment. Indeed, the rule does not concern the rights of any NFL players or draftees; rather, it concerns only those individuals who, because of it, cannot become NFL players or draftees. For that reason, Clarett asserted, the rule should be distinguished from rules designed to promote competition, such as a salary cap or drug testing policies since they, unlike the age eligibility rule, obviously concern parties to the collective bargaining agreement. Thus, Clarett sought to characterize the rule as failing the first prong of the Mackey Test: it does not primarily affect only parties to the collective bargaining agreement.

In response, the NFL contended that in other collectively bargained settings, management and unions had established prerequisites for entry that deny certain parties. In that regard, the NFL preferred that Clarett be viewed as “no different from the typical worker who is confident that he or she has the skills to fill a job vacancy but does not possess the qualifications or meet the requisite criteria that have been set.”

On the other hand, as Clarett noted, this argument failed in various settings in which strangers to the bargaining unit were also
Nevertheless, the NFL insisted that the "shared pursuit" of NFL teams dictates the need for multi-employer bargaining with the NFLPA (NFL players' association), including in bargaining rules affecting prospective employees. In that respect, according to the NFL, age eligibility rules should be considered comparable to other rules ostensibly designed to promote successful league operations, such as the number of games, length of season, roster size, and roster composition.

Clarett's second argument was aimed at the second prong of the Mackey Test: the NFL age eligibility rule does not concern a mandatory subject of collective bargaining. More specifically, Clarett argued that unlike the NFL draft itself, which governs the method by which players enter the bargaining unit, the NFL age eligibility rule precludes certain nonemployees from applying for employment. Moreover, Clarett alleged that the rule does not "vitaly affect" the jobs of veteran players or their wages: Clarett would have simply taken the place of another draft eligible player, and, like that player, Clarett would have ultimately competed against a veteran player for a roster spot. Indeed, Clarett never challenged the legality of the NFL draft or how it governs those outside the bargaining unit who enter the NFL. Instead, he posited that a rule that precludes nonemployees from applying for employment does not concern a mandatory subject of collective bargaining.

In response, the NFL claimed that its age eligibility rule vitally affects current players' terms and employment, as Clarett would have replaced the job of a veteran player, and because his relatively lower salary would count in formulation of the league salary cap, his entrance into the NFL would reduce the wages of players in the NFLPA. Of course, the NFL's argument appeared circular: whether or not Clarett and similarly situated players were eligible for the draft, each team would still draft and sign the same number of players, who would compete for jobs presently held by veteran players. Along those lines, if Clarett and similarly situated players were eligible, they would have simply replaced other players drafted, and presumably those selected at the very end of the draft.

69 See Brief for Appellees, supra note 60, at 21 (citing Connell Constr. Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616 (1975); United Mine Workers v. Pennington, 381 U.S. 657 (1965); Allen Bradley Co. v. Local 3, IBEW, 325 U.S. 797 (1945)).
70 Id. at 21 (citing NBA v. Williams, 45 F.3d 684, 689 (2d Cir. 1995)).
71 Id. at 25-26.
72 Id. at 27; see also infra pp. 746-48 (discussing significance of Maurice Clarett replacing one player in the NFL draft).
73 Brief for Appellees, supra note 60, at 26.
Lastly, Clarett argued that the NFL's age eligibility rule was neither collectively bargained for nor the product of arms-length negotiation. Indeed, the 292-page collective bargaining agreement (CBA) between the NFLMC (NFL Management Council) and the NFLPA, which was signed in 1993 and not revised until March 2006, did not contain the rule. Instead, the rule's primary support derives from a non-collectively bargained memorandum unilaterally issued by the NFL commissioner to teams in 1990—three years before the CBA—but, tellingly, not issued to the NFLPA and only of concern to the 1990 NFL draft.

In response, the NFL argued that although its collective bargaining agreement with the NFLPA does not expressly mention the age eligibility rule, sufficient collective bargaining emerged as a result of the existence of a side letter from the NFL's counsel to a counter-part at the NFLPA in 1992. This letter asserted, without reference or apparent proof, that the age eligibility rule had been collectively bargained. The letter was attached to the 1992 NFL Bylaws, which were ultimately incorporated into the CBA (the NFL proffered this argument even though the 1992 NFL Bylaws were replaced in 2003, and the 2003 NFL Bylaws mention only the memorandum and not the letter).

In applying the three-prong Mackey Test, Judge Scheindlin agreed with Clarett's reasoning that the NFL age eligibility rule failed each of the three prongs. Consequently, the rule lost protection from the labor exemption and was subjected to antitrust scrutiny.

Employing quick look rule of reason analysis, Judge Scheindlin held, among other points adverse to the NFL, that: (1) the rule procured obvious anticompetitive effects by prohibiting access to all players who failed to satisfy the rule; (2) the NFL's pro-competitive arguments failed because the rule, which prevented access to talented players, did not promote economic competition in the labor market; and (3) assuming, arguendo, that the NFL possessed legitimate pro-competitive arguments, there existed far less restrictive alternatives to an inflexible and arbitrary rule tied to age particularly since, as the NFL's own affiant conceded, "the 'timeframe' for a player's physical

75 See Brief for Appellees, supra note 60, at 4.
76 Id. at 5.
77 Id.
78 Id. at 7-8.
and psychological maturation 'varies from individual to individual.'

Drawing on themes raised in Denver Rockets, Judge Scheindlin intimated that less restrictive alternatives could include an exception for unique talent or financial circumstance, or simply case-by-case analyses of prospective draft picks. As a result, the NFL age eligibility rule was found to comprise an illegal group boycott under section 1 of the Sherman Act. Judge Scheindlin granted summary judgment in favor of Clarett and ordered that he be allowed to participate in the 2004 NFL draft.

Clarett's victory proved fleeting, as the U.S. Court of Appeals for the Second Circuit reversed the district court. Although the three-prong Mackey Test had been regularly applied in the Second Circuit, the Court of Appeals considered it noncontrolling, and only cursorily applied it to the facts. Writing for the three-judge panel, Judge Sotomayor held that the rule warranted protection under the labor exception. Her opinion asserted that the NFL age eligibility rule comprised a mandatory bargaining subject since it pertained to initial employment; Clarett and similarly situated players would procure a tangible effect on the wages and working conditions of the current NFL players; and sufficient collective bargaining was primarily established by the NFLPA's agreement to waive any challenge to the NFL Bylaws.

As a result of the Second Circuit's holding, the NFL deemed Clarett ineligible for the 2004 NFL draft. He and a similarly situated player, Mike Williams of the University of Southern California, faced a predicament: they could not participate in the 2004 NFL draft, but they had forfeited their NCAA eligibility by signing with agents. Neither played organized football in 2004, but both were drafted in the 2005 NFL draft. Williams now plays for the Detroit Lions, while Clarett is not presently a member of an NFL team.

80 Id. at 410.
81 Id. at 404-05.
82 Id. at 410-11.
84 Id.
85 Id. at 142.
86 After the Second Circuit's holding, Clarett filed a writ of certiorari to the United States Supreme Court, but it was denied. Clarett, 125 S. Ct. 1728.
88 Mike Williams was selected in the first round, 10th overall, by the Detroit Lions while Maurice Clarett was selected in the third round, 101st overall, by the Denver Broncos. 2005 NFL Draft, available at http://www.nfl.com/draft/history/years/2005.
89 Clarett was released by the Denver Broncos in August 2005 and has not, as of this writing, joined another NFL team.
IV. QUESTIONS AND ANSWERS ABOUT LAW AND AGE ELIGIBILITY IN THE NFL AND NBA

At this point in the Essay, we turn to our statements during the Symposium, as they may vary considerably. The statements concern *Clarett* and broader issues of age eligibility in the NFL and NBA. Alan C. Milstein also participated in the discussion. Please note: Alan C. Milstein and Michael A. McCann litigated on behalf of Maurice Clarett in *Clarett* and Joseph S. Rosen represents professional athletes, though, in the opinion of his coauthor and doubtlessly the audience, moderated the debate with remarkable fairness.

*Reaction to Clarett v. NFL*

MR. MILSTEIN: When considering the Second Circuit’s opinion in *Clarett*, I found it telling how only a very weak and very short portion of it addressed the three *Mackey* factors. The court surmised that the labor exemption should apply to any case in which someone from labor alleges an antitrust violation. The court interpreted *Brown v. Pro Football* as meaning that, so long as there is a bargaining unit and a collective bargaining agreement, a court will not hear any case in which an employee challenges a rule—even if the subject is not a part of the agreement.90

MR. McCANN: Along those lines, the Second Circuit appeared to endorse a simplistic valuation of form over substance, which, as a matter of precedent, can set undesirable parameters for union-management negotiations. For one, it would seem to beget incentives for existing players to readily sacrifice the interests of prospective players. And two, it may catalyze existing employees to pursue policies that conflict with their negotiating unit’s long-term interests.

MR. MILSTEIN: And just consider what happened when the United States Football League (USFL) broke up in 1986. The NFL, in conjunction with the NFLPA, determined that players from the then-defunct USFL could only play in the NFL if they partook in an expansion draft. One of the USFL players challenged this decision because he wanted to become a free agent. But the court ruled that under the labor exemption, the NFL and NFLPA could agree that players are subject to the draft.

But let us suppose the facts were different: suppose the NFL and the NFLPA decided that they really hated the USFL. And when the USFL broke up, they decided to set a rule that bans USFL players from ever entering the NFL. That rule would so obviously comprise

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an antitrust violation and yet it cannot be challenged under the Second Circuit’s reasoning in Clarett.

MR. McCANN: With that in mind, consider just how boundless a scope of negotiating autonomy the Second Circuit provided to existing members of negotiating units and, more importantly, how that scope may prevent antitrust law from acting as both a safeguard and a deterrent. Really, why bother having antitrust protection when it can be so readily avoided?

Wages, Rights, and Clarett v. NFL

MR. ROSEN [MODERATOR]: Remember that Alan and Mike are advocates, so please, be advocates as well. And we could especially use advocates who take the NFL’s side. I will even try to be one of them.

What is the main problem with the NFL using the labor exemption as a defense in Clarett? Why was the Second Circuit wrong in agreeing with the NFL on that point? We are talking about mandatory subjects of collective bargaining and how the age eligibility rule affects wages.

MR. MILSTEIN: No, we are not. The rule does not affect wages.

MR. ROSEN: Of course it affects wages; it affects every player’s wages when you do not allow certain people into the league.

MR. MILSTEIN: Sure, the NFL claimed that the rule affects people in the draft. But it does not. Clarett would have only replaced the last person in the 2004 draft, which included 255 players selected. The same number of persons (255) would still have been drafted, with one player, the last person who would have otherwise been selected, dropping out. The same wage scale for the first round, the second round, the third round, etc., would have existed. All that happens is that if Maurice happened to have been a first-round pick, then he would have received first-round money. Nobody is excluded except the very last person in the draft. So it does not affect wages, it is not a term of employment, and it is not a condition of employment. The court totally misread the phrase “condition of employment.” Condition of employment does not mean you could be employed if you satisfy these requirements. Condition of employment considers existing employment conditions like locker room facilities, field safety, and those types of considerations. So age eligibility is not a condition of employment and Maurice and other college athletes were clearly outside of the bargaining unit. The age eligibility rule is aimed at those who are not within the labor organization.
MR. McCANN: And players not within the labor organization have no one at the bargaining table. Obviously, existing players have an interest in keeping top amateur players out of the NFL because doing so preserves existing jobs that would otherwise go to better, younger players. That consideration is especially salient for marginal veteran players who would otherwise fall out of the labor market. So we have to wonder, who is looking out for the legal interests of prospective players when both negotiating units—the NFL and the NFLPA—negotiate to their adverse interests?

MR. ROSEN: But it does affect wages. Mike Williams is a better example because he, unlike Clarett, is on an NFL roster right now. Williams was a wide receiver at the University of Southern California. He was not involved in the Clarett appeal but he waited to see what happened. Williams was a first-round draft pick in the 2005 draft, and that affected NFL wages regardless of the last pick of the draft. Yes, Williams’ inclusion moved everybody down one spot, but also, by entering the league, he affected the wages of another wide receiver on his NFL roster. When he joined the Detroit Lions, one wide receiver had to be cut and his wages were going to be affected because Mike Williams was on that roster. So the wages are affected.

MR. McCANN: But the aggregate wages are not.

MR. ROSEN: The individual wages are. It is just wages. It does not say aggregate wages. It says wages.

MR. McCANN: But typically, antitrust law has not been applied to protect the interest of one employee and that is the fact-pattern that you are describing. Courts consider the broader scope of persons and parties being affected. They look at patterns and systemic effects. And to have the Lions’ worst wide-receiver—who is probably lucky to even be on the team and he probably will not keep his job long any way—be the one person adversely affected, that would seem highly unlikely to trigger a viable antitrust claim.

MR. ROSEN: We are not talking necessarily about a team’s worst wide-receiver because we all know how the NFL works. When Mike Williams came to the Detroit Lions, who was released? Az-Zahir Hakim, who is a good wide receiver now with the New Orleans Saints and his wages were affected.

The way the NFL works, teams are going to keep that last receiver because he is going to be the guy on the practice squad or the special teams unit who is making $100,000 a year and they are going to get rid of Hakim who is making $1 million a year. Now he has gone to the Saints and is making $400,000 a year. So his wages are affected.
MR. McCANN: But in that instance, if Az-Zahir Hakim had actually been good, he would not have been cut. The Lions let go of the player whom they least wanted to keep, and his name was Az-Zahir Hakim. And at the end of the day, that is not an employee with tremendous rights under antitrust law.

MR. MILSTEIN: Az-Zahir Hakim has no rights. We are talking about a player who just wants to be in the NFL but is prevented from competing for a job. He is a clear loser under this case. Az-Zahir Hakim, on the other hand, cannot claim an antitrust violation. He is lost in the normal competition of the draft. That is not what happened with Maurice. Maurice was not allowed to compete.

Legitimacy of Eligibility Rules in the NFL and NBA

MR. MILSTEIN: Let us address the essential underlying topic: why is there an eligibility rule in the NFL and NBA and nowhere else? There is no such rule in tennis, golf, or hockey. The NFL said that the rule is to protect the players, but compared to hockey, the NFL is like a game of tennis.

MR. McCANN: And what about boxing? You can be eighteen-years-old and box professionally. You can get punched in the head repeatedly, and you can punch someone else in the head repeatedly. You are somehow mature enough to pound one another in the head, but not mature enough to catch a pass out of the backfield or dunk a basketball and cash a paycheck at the same time?

MR. MILSTEIN: As another analogy, suppose you had a kicker in high school that could kick sixty-five-yard field goals. Tell me why he cannot go from high school to the pros? Who are you protecting? What is the reason? Why only basketball and football? What do basketball and football have in common?

AUDIENCE: The NCAA is what they have in common.

MR. MILSTEIN: Right. And the entire basis of these eligibility rules is to perpetuate that system in which players, who are otherwise eligible to make money and earn a living, are forced to work for nothing. And not only work for nothing, but risk career ending injuries after which they will never earn anything and nobody will take care of them.

AUDIENCE: Are you advocating a system like baseball, where there is a minor league system for player development, because, obviously, somebody has to develop those players? Are you saying then that there should be minor leagues for basketball and football?
MR. MILSTEIN: Well, I think that is up to the NFL and the NBA. But the fact is that there are no minor leagues; the minor leagues are the NCAA.

AUDIENCE: That is correct.

MR. ROSEN: But the NBA is trying to implement a minor-league system.

MR. MILSTEIN: The NFL is also trying, supposedly, with NFL Europe. But we are just talking about such a small number of players from the NFL who would make it from high school into college, or perhaps after their first or second year of college. I do not think you have to have a minor league in order to perpetuate a system in which players are forced to work without compensation in the NCAA. And then you have a kid who grew up poor, this kid who has no money is offered money from alumni and made to feel like a criminal if he takes it just because he wants to live like any other student. How can you possibly justify saying that he cannot earn a living when he is able to? It is just an outrage to me.

Compensating College Athletes

AUDIENCE: What are your thoughts, then, on having colleges pay for athletes?

MR. MILSTEIN: It would be an impossible situation for colleges to pay athletes. But college athletes should be able to make deals with Nike and enter similar deals if their image is sold on merchandise. Consider this for a moment: Ohio State sold more Ohio State Clarett jerseys than it sold for any other player in school history. Maurice did not get a dollar out of that. Why not?

MR. McCANN: And if Michele Wie is mature enough as a sixteen-year-old to enter into multimillion dollar endorsement deals, then why is not Maurice Clarett not mature enough at twenty or twenty-one able to do the same? What is the difference? Why do we cast suspicions on young basketball and football players who seek endorsement deals, while we praise young golfers and young tennis players, or young actors and young singers who do the same?

MR. ROSEN: The problem with paying college athletes is how you would do it. Who gets paid? Is it just the money-making teams? The football teams and the basketball teams are generally the only way that any college can make money. The revenue they generate supports other teams at those universities. So should only the football players and basketball players get paid? That arrangement would not work with Title IX. So should every college athlete, every softball
player, and every gymnast—should they all be paid? The NCAA would obviously not go for that.

MR. MILSTEIN: These programs cost a lot of money. Right now in the state of Ohio, there are two professional football teams, the Cincinnati Bengals and the Ohio State Buckeyes. Just think about that. (Laughter.) The Browns are still in the minor leagues.

MR. PETER CARFAGNA [SYMPOSIUM CHAIR]: I would like to throw another log on the fire to get ahead with the baseball panel. How is it that someone like Drew Henson can go ahead and get paid to play minor league baseball and still maintain his eligibility to play football for Michigan? Does that make your point or deny your point?

MR. MILSTEIN: The reason Drew Henson or Quincy Carter or Ricky Williams can go play baseball in the minor leagues and then come back and remain eligible for college football is because the NCAA has decided that they can. That is really the answer. Those players were able to go play one sport professionally, but retained their eligibility in another sport. What you cannot do is go get endorsement deals because the NCAA has determined that they have no idea what those endorsement deals were for. Jeremy Bloom was a skier and a football player. His endorsements were for skiing, generally, but the NCAA said they could not determine that the endorsement deals were for skiing and not for football.

Age as a Proxy

MR. MILSTEIN: There is no other field of endeavor in which age determines whether or not you can earn your living. The Olsen twins can earn millions and millions of dollars and then go to NYU and participate in the college drama program. Some violinists can get paid to play with the New York Philharmonic and then go play in the college orchestra.

MR. McCANN: Also, ask what age is. Age is a proxy. It suggests certain things about certain people. It does not tell us specific things about those persons, but it indicates our assumptions about them. For instance, ask yourself why we have an eighteen-year-old floor for voting. It is because we assume that persons under the age of eighteen are not mature enough to vote, unlike those eighteen and over. But we all know persons younger than eighteen who are more than precocious enough to place a ballot. And we all know persons who are older than eighteen who we do not want anywhere near a voting booth. But for legal, practical, and ethical reasons, we cannot engage in a person-by-person analysis of voting aptitude.
In contrast, sports teams already enjoy information pertaining to which players at which age should be drafted at which point in the draft. Teams conduct exhaustive physical and cognitive evaluations to determine whether or not a player should be drafted. For that reason, drafting really is not about age—it is about others' ability to measure talent. And think about that for a moment. Think about all those college juniors and seniors who were drafted high but ended up playing poorly in the NBA. Rafael Araujo, Trajan Langdon, Ed O'Bannon, Mateen Cleaves, Kirk Haston, Brandon Armstrong, Dahntay Jones, Marcus Haislip, Reece Gaines, Marcus Banks—this list could go on and on and on. These players were twenty-one- or twenty-two-years-old when they entered the NBA. They had played three or four years of college basketball where they had excelled. They had attracted the keen interest of NBA scouts. And yet they proceeded to flop in the NBA. Would an arbitrary age floor of nineteen- or twenty-years-old have stopped any of them from being drafted? Obviously not. Too bad the NBA could not have created a rule that protected itself from drafting these guys.

And just the opposite, actually, we have repeatedly seen high school players go straight to the NBA and excel. Not just Lebron James and Tracy McGrady and Kevin Garnett, but also guys like Amare Stoudemire, Jermaine O'Neal, Rashard Lewis, Al Harrington, Eddy Curry, Dwight Howard, Al Jefferson, J.R. Smith, Josh Smith, Sebastian Telfair—it is remarkable how many have done so well, both on and off the court. And that goes to the fact that player eligibility should not be based on age, which is a red herring; it should be about talent and others' ability to discern it. And that is why teams expend vast resources trying to figure out which players are talented, and they tend be more right when drafting younger players than older players.

MR. MILSTEIN: I think we also have to understand why the leagues have the rule, and why there is an antitrust violation. The league is setting a rule. Why would they do that? Because the individual teams, without the rule, would draft the young player. So the coaches and the scouts have already determined, based on all the criteria that they use, that this particular player is good enough to play on my team, is good enough to make a lot of money and they want to draft that player.

MR. McCANN: And that is why a proxy belies the whole system. It does not make sense to conduct exhaustive pre-draft evaluations of prospective draft picks, and then impose an arbitrary, absolute rule that may exclude the optimal group of prospective draft picks.
Clarett as a Person and Client

AUDIENCE: I have a question. Being a criminal lawyer, one of the things that I thought handicapped you in representing Clarett was that he was regarded as a snitch. What he said got a whole lot of people in trouble, including the University, which was, of course, a difficulty that you had to overcome. With my clients, I try to take them to the theater before they get on the stand. Do not say this; do not do this. Did you have that conversation with Maurice before he did some of these things? Now, we were very sympathetic about what you were talking about, his lower class background. But when he began to reveal some of the deals that he received, the coach did his part and put the whole university on some kind of disciplinary thing. Do you not think that also caused some animosity in the forum that you were representing him in?

MR. MILSTEIN: We had already lost in the Second Circuit when he disclosed information about Ohio State. One of the things that initially got him in trouble with the NCAA was that he wanted to protect his coach during the investigation; he was not as candid as perhaps he should have been when the NCAA questioned him. Maurice, at times, was his own worst enemy. He is a very intelligent young man, but he cannot take hypocrisy and does not deal with it well.

Everything started with Maurice back at the NCAA championship when a friend of Maurice’s from high school was killed. Maurice’s mother had a conversation with the coach and with the athletic director. They told her that when Maurice goes with the team out to California they would fly him back for the funeral. So the team went to California and it came time to go to the funeral but they said no. They said that they could not pay for the flight. And Maurice, publicly, before the NCAA championship game, called that outrageous. These people do not understand that there is something more important in life than football. And for an Ohio State football player getting ready to play for a national championship, saying that was sacrilegious. And after that is when the world started going downhill for Maurice. The NCAA went after him; the school went after him; and the New York Times went after him.

But that is not what the case was about. The teams wanted to draft Maurice. They wanted to pay him a lot of money to play football and there was an artificial rule that said, no, they could not do that.

MR. CARFAGNA: Why did he not bury the school when he was given the chance?

AUDIENCE: Did you advise him to do what he did?
MR. MILSTEIN: Well, I am not going to disclose attorney-client privilege, but I can say this: there are clients that you can control; there are clients that you cannot. Maurice was his own person and he was determined to go his own way. That was one of things that impressed Jim Brown so much about him. This was a young man who was very articulate and just unwilling to take the hypocrisy of the NCAA. The things that went on in Ohio State were just unbelievable. Actually, not unbelievable. You all suspect that what goes on at a school like Ohio State goes on. Everybody turns a blind eye. But if the player happens to do anything wrong, the NCAA comes down harshly. It is simply an absolutely outrageous system.

*Education, Athletics, and Social Norms*

AUDIENCE: When you look at Clarett’s situation, he was desperate. When you look at Lebron’s situation, his father was in the penitentiary. He had to make decisions for his mother. As lawyers, you have to realize that on the field, in an NFL game, people are trying to kill other players or end their career, on every play. The NFL and the NBA are not sports like golf where people hit a ball. NFL and NBA players are involved in different careers, and sometimes we do not think about how we can protect them.

A lot of times when you say a kid is ready to have this type of management, money, skills, any of those things, they are not prepared. Sometimes it might take a little bit more time to try to help develop them, to let them see that this is one potential way that he can do better, by going through some of these systems, whether they make a billion dollars or not. They may make it as a football player or they may make it as a businessman or a as lawyer.

People are just so focused on becoming a professional athlete. And we are losing all of that character that our society is supposed to be trying to nurture and develop.

My question is: as you beat up on the NCAA and you look at the NAACP, look at affirmative action and all these things that are out there, are we really helping those kids as an agent or as a group of lawyers when we say, can you take care of these things? Do we prepare them? Are we preparing them before their time?

MR. CARFAGNA: Those are really provocative, really important questions. That is the point I was making. Get that education if you can. It is the old “break a leg” test and, as Arnold Palmer would say, I could have played pro right out of high school, but I went to Wake Forest. Why? Because he wanted to avoid that arrested development thing. And those were the most fun years of his life, making those
bonds with his college teammates. Golf is not a team sport, but as he would say, that is how he learned to be a businessman. That is how he learned to make even more off the course than he would make on the course. That is the point I was trying to make. Education is the thing and if you can get it paid for, you are set for life if you can never play your sport again.

MR. McCANN: I think you have identified the right aspiration. I agree that education, as a general matter, is the right ambition for all persons. But if we look at an NCAA student-athlete, we might wonder why, of the sixty-five teams that participated in the last March madness tournament, forty-two of them failed to graduate even half of their players. Or why the average Division I athlete spends between forty and fifty hours a week lifting weights, traveling, attending team meetings, playing games, and practicing, whereas most other college students can work, at most, twenty hours a week. Why is there such a discrepancy? Why are student-athletes treated so differently than students?

Moreover, why is it that when a college athlete gets in trouble with the law, he is often treated with kid gloves—yet, when his classmate gets in trouble for the same infraction, there is often a severe sanction? What kind of message is transmitted when college players consistently get in trouble and the coach looks the other way? That sends the wrong message, to all who see it.

You also described NBA basketball as being unacceptably injurious to young athletes. Let us look at that idea, and first consider that, over the last eleven years, we have seen forty-seven high school players attempt to jump to the NBA—and, remarkably, forty-two of them are or were on NBA rosters. Not only have these forty-two players out-performed the average NBA player, but there is simply no evidence that they have suffered more injuries than the average NBA player, or that they have suffered more injuries than if they had played in college instead. I understand that there is a certain appeal to that intuition, because we tend to be more protective of young persons than other persons, but it is an intuition belied by the facts.

And again, I agree with your aspiration, but if we look at the realities of the college experience for premiere student-athletes, the data suggests a vastly different environment than the one you describe.

MR. MILSTEIN: That is a good point. Sports people are treated differently. Lebron is a perfect example of a lot of things, because Lebron was someone who, at an early age, everyone knew was going to become an NBA star. Now, if he was in eighth grade and he was a superb violinist, his parents could find him a special tutor who would
do nothing but train him in the violin. But you cannot do that for young basketball players. If someone goes out and hires a professional trainer for the eighth grader, he will lose his eligibility. Why? What makes the athlete different?

AUDIENCE: But they are doing that.

MR. MILSTEIN: Yeah, but they are doing it in a system in which they are meant to feel like criminals.

AUDIENCE: Everyone is doing it. Look at soccer. Soccer has more scenarios in which they have people personally train through their coaching than any sport that I have seen in Ohio.

I coach at the Division III level at Oberlin College. I am seeing the competition. Everyone is doing things, but they are learning how to work within the laws. Some people want to pay $275 a day for three or four days or a week. Ohio State has five weeks of camp. There are all types of special training programs available. Some people are charging twenty dollars to give an hour session. And there are all sorts of deals that are set up for kids to come in and get the things that are going to make them great and enhance their performance.

MR. CARFAGNA: The bigger, faster, stronger camps. That is what we are talking about. It starts in the fifth, sixth, seventh grade.

AUDIENCE: I mean little kids. I talked with personal trainers in California and there are some people paying money for that. I do not know many kids who play football that are not on some type of performance enhancement. All of them take some kind of performance enhancement. The milkshakes, they all have them, and they do not cost much. We are talking thirty dollars a month. Cell phones are forty-five dollars a month.

MR. McCANN: But suppose athletes have to play four years of college before they can turn pro. Would they not still have similar incentives to improve their talent and body-shape in pursuing the best available college scholarships? Athletes may think, I want to play at Notre Dame or I want to play at USC, so I need to bulk up, and attract the interest of their coaches. In other words, an age floor in the NBA or NFL would not necessarily eliminate motivations to enhance body shape through objectionable means.

AUDIENCE: If you go to Purdue, if you go to Ohio State, you do not really have time for your education, unless you are just a special person. That is true. I understand that. My son is an athlete. He has been at Purdue, and is at Youngstown State right now. Politics has played a lot into that, but as a parent and a coach, and working at the Division III level, we still have to teach people the right way. And I have to tell him that he still has to get his education. Kevin O'Donnell
[Performance Consultant and Co-Founder of Speed Dynamics] will probably say the Europeans expect maturity at middle age. Some European runners and sprinters have done better after being properly trained at older ages. In America, we take a younger person and tell them that they are mature, that they are ready to go.

MR. McCANN: I actually studied arrest propensity among NBA players and controlled for age and level of education among arrested players. I found a near inverse relationship between number of years spent in college and propensity to be arrested—in other words, an entirely counterintuitive conclusion. I suspect that finding relates to the environment and situation of college basketball and the kinds of messages college basketball players hear and observe.

Just think about the recent arrest of Tony Allen of the Boston Celtics. He is alleged to have ordered a friend to shoot a restaurant patron. One might wonder about what happened to Tony Allen while he was in college. And if you look at his college record, you see that he played for three schools. And you see that he repeatedly got into trouble, and yet there was never any real sanction. And you see this pattern again and again and again in college basketball and you begin to wonder: What kind of environment do college basketball players experience? What kind of mentors do they have? Would they be better off in the pros where they have a thirty-year old mentor helping them instead of a twenty-one old mentor who can break rules and get away with it?

Legal Challenge to New NBA Age Eligibility Rule

MR. CARFAGNA: The next question pertains to the recently changed NBA rule, which Mr. McCann is an expert on. Mike, would a challenge to the new, current NBA eligibility rule be successful, in light of Clarett, and would you take that case?

MR. McCANN: I would certainly look at it.

MR. MILSTEIN: I thought you would refer it to me?

MR. McCANN: Right, I would refer it to Alan and he would hire me (Laughter).

MR. CARFAGNA: And Joe, could we restate the new rule?

MR. ROSEN: The new rule is that you have to be nineteen-years-old and one year removed from high school. Actually Mike, that is a question that I was going to pose as well. If you were going to take that case, Alan or Mike, I assume you would probably stay away from the Second Circuit?

MR. MILSTEIN: You would lose in the Second Circuit, but the ideal place to file it would be in the Sixth Circuit.
MR. McCANN: Remember, Clarett presented a hypothetical. Clarett had to argue that if we change the rule then this is how the NFL would operate—that is a conceptually hard argument for an amateur player to make. But with the NBA, we have already seen eleven years of data. We have seen that the average high school player in the NBA averages more points, grabs more rebounds, and dishes out more assists than does the average NBA player or the average player of any age group in the NBA. In other words, high school players that have matriculated directly from high school to the NBA have been the optimal group. And there is no way a court will overlook that. We have actual evidence. We are not arguing a hypothetical; we are arguing a continuation of a system that has empirically worked well.

MR. MILSTEIN: The Second Circuit would never look at it because you do not get to the antitrust issues at all unless you get past the labor exemption. So, in the Second Circuit, unfortunately, a challenge to the NBA rule would lose on the labor exemption.

MR. McCANN: But what about other circuits?

MR. MILSTEIN: I think that case is winnable in the Sixth Circuit. And, of course, the difference between the NBA and the NFL was that there was no way a court could find that the NFL rule had been collectively bargained. The Second Circuit did find that, but it was just an impossible situation to even imagine a court would conclude that this had been collectively bargained.

The NBA rule is in the collective bargaining agreement, so you are going to have that additional hurdle. The only way to win is to first argue that it is not wages, hours, or terms of employment. Second, argue that it primarily affects those outside the bargaining unit. Indeed, it is aimed at those outside of the bargaining unit.

But, again, look at the reason for these rules. One is to perpetuate the NCAA system. The second reason and, I think, the NBA’s reason, is when they had Kwame Brown, who was the number one draft pick in 2001, when they missed, it cost them a lot of money. They believe that if they get another year in which they can look at these players, that their scouts can then get more data and have a better feel for whether this guy is a sure thing or not sure thing. When you understand that reasoning, you can look back at a Kwame Brown, who signed a lucrative NBA contract right out of high school. If he had gone to college, if he had been forced to go to college and let us say he did as poorly in college in basketball as he did in the NBA, then he would not have been drafted. So he never would have had the opportunity to make the money he made out of high school. Let the NBA
team, the Washington Wizards, assume the risk and the loss, not Brown.

Ideally, our system is structured so that if the employer makes a bad decision, it is his fault. It should not be on a Kwame Brown, who excels in high school to the point that the NBA teams are willing to pick him number one in the draft. If he does not work out, he still has his money and there is nothing to keep him from going to college. That is what is so laughable about this academic argument. Consider the Olsen twins at NYU. They have made millions of dollars. There is nothing to keep them from going to college with a lot of money in their pocket. Why do you think that if you go early and get money that somehow you are foreclosed from ever enjoying the wonders of an academic environment? It is just ludicrous. There are some rich people at Case Western, rich students. They have a lot of money in their pocket and they sit in their class and they learn. You can learn with a full wallet. I promise you that.

MR. ROSEN: I want to make one point concerning the NBA. The reason the NBA is a little different is that the assumption is that with this one-year change, everybody is going to go to college now for one year. That is not exactly true. I guarantee you in the next year or two, you will see, whether it is the Sonny Vaccaros of the world or some startup enterprise, you will see some league or some touring company come out. That company will take the O.J. Mayos and Lebron James's of the world and pay them a certain amount of money, get them a shoe contract, tour across Europe and the United States; there will be some new basketball league out there that will take advantage of this. So, I do not know what we are doing about the NBA, but the NBA is not actually making these guys go to college.

The Matt Leinart Case, Money, and “Loyalty”

AUDIENCE: Rather than your example of the person coming in as a freshman or a child prodigy, I am more concerned with the person who avails himself of the system up to his junior year, and then contemplates turning pro before his senior year. And say this player is a key player on his team, and say his team can only compete for a championship next year with him on it. Should he not consider the interests of his university and those of his fellow students or players?

MR. CARFAGNA: Are you referring to the Matt Leinart case? He decided to stay at USC and gave up sixty to sixty-five million dollars.

MR. MILSTEIN: So you think it should be an obligation on the part of these kids who perhaps come from poor environments and whose families have no money? They should stay an extra year in
college so that their college team has a chance to win the championship?

AUDIENCE: And benefiting the university that is backing the player.

MR. McCANN: The financial benefits, certainly.

MR. MILSTEIN: For the university.

MR. CARFAGNA: It is what Leinart did, right?

MR. McCANN: And that was his choice. He made his decision and had the opportunity to make a decision. What Maurice would argue is that you should be able to decide, look, I have a very limited window of time in my life when I can earn money as a result of my athletic talents and I can rectify, arguably, centuries of poverty in my family and I do not want to risk that by staying another year in school and blowing out my knee or not playing well, particularly when I have an opportunity to go to the pros right now. Why should I take that risk? Would you, particularly if you came from a poor family?

And the loyalty factor is a characteristic that some players may value a lot, while others do not. Just like all of us, right? We all work at jobs. All of us have different values and allegiances. All of us have different opportunities to change jobs. Should we be legally foreclosed from changing positions simply because of loyalty or because of the expectation of others that we be loyal? We likely weigh loyalty but, in the absence of an employment contract, we have the right to change jobs or pursue other interests. And remember, a college player is not under a contract because he is not earning anything. He is just a student who happens to play sports, or at least that is what he is supposed to be—not a revenue generator for a college football program, and not an entertainer for students, fans, alumni, and media.

MR. MILSTEIN: Plus, Clarett did bring Ohio State a national championship. He brought the school one national championship. He ran down the field when Sean Taylor intercepted the ball, knocked the ball out of Taylor’s hands, got the ball back for Ohio State, and that let them come back and win the championship. That should have been enough.

Viability of Other Professional Leagues as Employers

AUDIENCE: What is preventing these players from going to international basketball leagues or the Canadian Football League (CFL) or the Arena Football League?

MR. MILSTEIN: Money. That was one of the arguments that the NFL made: we are not a monopoly, because look at the CFL. Come
on. An athlete makes $200,000 a year in the CFL and that is somehow on a par with the NFL?

AUDIENCE: It is simply an avenue to get there, to the NFL. Much like the international prospects have stopped coming to U.S. colleges to play basketball.

MR. MILSTEIN: But why should you not be able to go right to the NFL?

MR. McCANN: And why should you risk an injury? Look at it this way: say you are at the top of your class here at the Case School of Law, and you have offers from a number of Cleveland law firms that would pay you in excess of $100,000 a year. What if there was a rule that, before you can accept one of those positions, you first have to go to Bulgaria to practice law for a year, during which time you will be paid $800? You are still practicing law and you are still earning an income, right? How would you feel about that? And how would you feel if you knew that you would likely be able to practice law for only four or five years, which is about the average career length of a professional football player and a professional basketball player? Or that, like a football or basketball player, you may suffer a devastating injury any time you practice law? Spending one of those years in Bulgaria making $800 now sounds even worse, does it not? It is the proportionality of playing in the minors or abroad that strikes many as completely unfair, particularly when you consider career length and potential for injury. The NFL and NBA are incomparable.

MR. ROSEN: The problem is that the NFL is the only legitimate football league in the world. The argument is a little different with the NBA because you have the overseas leagues. You are still making a lot less money overseas, though; even the best players are making a lot less money overseas than they are in the NBA.

The reason is money. As I mentioned earlier, these leagues or traveling teams pop up because at this point that is the only avenue they have. They cannot play in the NBA when they are eighteen, so they have to play in Bulgaria. Bulgaria is a bad example, because they do not pay that much, unlike Spain or Italy. So they might go over there and play.

MR. McCANN: But are we helping the person by forcing him to do that? We have an eighteen-year-old, whose family would probably prefer that he stay in the United States, and now he has to go to another country, where he probably does not know anyone and may not speak the language. I do not see how that is in his best interests or in the best interests of his family. I certainly see how professional leagues would like to see them develop without being paid NBA sala-
ries, just like what happens when they develop by playing college basketball, but I do not see how he is better off by being shipped overseas.

_Necessity of Age Eligibility “System” for NBA and NFL_

AUDIENCE: I think it is obvious the panel does not like the status quo of the NFL. What system would you recommend? I know there is the perception that part of this is to protect, not necessarily Lebron James or Maurice Clarett, but those kids who think that they have the talent but do not get drafted and then do not have an education to fall back on. Or, as you said, those kids who are a product of maturity and they get into a professional game, at whatever age they might be, when they are mature and then become a train wreck, like a Jennifer Capriati. What system would you implement to try and protect that group of players?

MR. MILSTEIN: We do not have to develop a separate system. You do not need a system that is going to help the kid who comes out of high school or first or second year of college that you do not need for the kid that goes through four years. Whatever you think happens, or potentially happens, is no more likely to happen to the high school kid who jumps to the NBA than it is for the guy who spends three years in college. The statistics just do not bear that out. Mike has done that research. The high school athlete to the NBA is more successful, by and large, than the athlete who is gone through two, three, or four years of college.

MR. McCANN: Take a look at Latrell Sprewell. He choked his coach at age twenty-eight and he played four years of college basketball. Ron Artest played two years of college basketball and Ruben Patterson played four years of college basketball.

AUDIENCE: There will always be thugs. It does not matter if they have four years of college or one day of college, or whatever, there are people who have gone through college, gone through good programs like Michigan, and then they rob banks because they could not make it in professional sports. They have a problem, whether they lived in the inner city or a suburban environment. Some people have a criminal aspect to their character and it does not matter how much or how little education they have; if they cannot make it one way they will try to do it illegally another way.

_Deference to Collective Bargaining and Clarett’s Choice_

AUDIENCE: I have one general and one specific question. Generally, given that the players in the NFL have voted to be represented
exclusively by a union and given that the union spends their days and
ights thinking about what is best for players, do you think that the
union and the group representing the management are well situated to
determine whether there ought to be an age eligibility rule? Specifi-
cally, do you think Clarett would have been better off coming into the
NFL the year before he did and, if so, what happened?

MR. MILSTEIN: There is no question about that, if he had not lost
in the Second Circuit and gone the year before.

AUDIENCE: Well, what was it about the year out that undid him,
because he said he was in better shape and he felt like he was more
mature and he crashed and burned this year.

MR. MILSTEIN: He did crash and burn.

MR. McCANN: He also went through the combine and did not
perform well. That is what it came down to.

MR. MILSTEIN: I think, if he had been drafted that first year, my
personal view is, he would have been a star. I still think Maurice is a
tremendous talent and has a chance to make it in the NFL. And I hope
he does.

As for your other question, of course the labor organization and
the league can decide the age eligibility rule. But the labor exemption
does not make it exempt from antitrust law. It is an antitrust violation.
Suppose the labor organization decided that they did not want
anybody to endorse Nike products. They cannot do that. They are a
labor organization. They have got the league. They probably have a
pretty good reason for deciding that but they are not allowed to. The
antitrust laws are supposed to be a fairly strong measure to promote
competition.

AUDIENCE: But there is interplay between the two bodies of law;
do you just disagree that this ought to be recognized as something that
is covered by a labor exemption?

MR. MILSTEIN: Age eligibility should not be covered by the la-
bor exemption because it primarily affects workers outside of the bar-
gaining unit. It is an exemption to the antitrust laws and is supposed
to be narrowly construed.

AUDIENCE: In the example of the NBA, you talked about
Kwame Brown and how the draft did not work. Is it not in the players’
and management’s interest for their draft to work as well as it
can? It is designed to have the poorer teams draft higher. So the play-
ers’ union and management must believe that a higher age eligibility
rule will make for a better draft. And the NBA does not want poor
teams making mistakes because that would be bad for the league and
the players. Do you think that the people who spend the most time
dealing with the players' and management's interest ought to be able to make this kind of rule?

MR. MILSTEIN: They should not be able to make a rule that stifles competition even if they think it is in their best interest to do so.

AUDIENCE: How about a minimum salary? If you are in a league for four years, you have to make four hundred thousand dollars. There are probably players that have been in the league for a number of years.

MR. MILSTEIN: They can do that. That only affects players in the league. It affects wages and is bargained for. So it meets that narrow exemption.

AUDIENCE: It does keep some players out of the league, because a team may not think you are worth four hundred-thousand but we cannot hire you for less than that.

MR. MILSTEIN: But it fits the three criteria. It is not the same as keeping somebody out of the league.

MR. ROSEN: There is no group boycott against any particular group of individuals with a minimum salary rule, because it is a rule designed to govern the entire league. In contrast, an age eligibility rule or an age floor prohibits an entire group from eligibility.

MR. MILSTEIN: And just suppose Clarett entered the league before the Second Circuit reversed, and the NFL and the union were upset about it. And they decide that they need to prevent schools like Ohio State from alienating players like Maurice. So, for the next five years they say that teams cannot draft players from Ohio State, because that is what is best for our league. It is good for the league. It is bargained for. Can they do it? You obviously think they can.

AUDIENCE: I doubt that the union would agree to that.

MR. MILSTEIN: But suppose they did. Can they do it?

AUDIENCE: I would suppose they could.

Prospect of Congressionally Mandated Age Floor

MR. CARFAGNA: You know we have an expert, a good friend of mine, who has been a Teamsters lawyer for many, many years, Gary Boncella, it would be interesting to get his input. I just asked him if he would be kind enough to share his thoughts with us.

MR. GARY BONCELLA: The government legislates and protects people of minor age whether it is protecting dangerous machinery, not being able to drive a truck, or not getting a commercial vehicle license in a nonworking area. They are protected from pornography and they are unable to make medical decisions. You are arguing that there are going to be subjective judgments. If somebody is able to go
into the NBA or NFL, they should be able to, by whatever criteria the organization uses.

We have apprentice programs in the various trades that set minimum requirements. What if Senator McCain, who is seeking to enforce the banning of steroids in Major League Baseball, says there are sixteen-year-olds who want to play basketball, and we think that is too young. Let us have hearings. Let us set the minimum age at eighteen or nineteen to play dangerous sports. That would put it on par with other trades, other crafts, not as glamorous as football and baseball and basketball, but would that be something that you would accept?

Second, why can you not have a program, as the building trades do, that set minimum age requirements to learn how to be a mason, a carpenter, or a sheet-metalworker and have that as accepted collective bargaining agreement? That is accepted in collective bargaining and it is not challenged.

MR. McCANN: First of all, I would find it ironic if Congress were to say that you have to be nineteen-years-old to play a dangerous sport and yet you can be eighteen-years-old and sent off to war. There is a glaring hypocrisy to that.

MR. BONCELLA: Pick an age. Congress sets the age. Your argument is that the age does not matter, so if a person at age fifteen has the ability of a Lebron James to play basketball, he should be able to do it without regulation from anyone.

MR. McCANN: I would argue that age is a proxy. I would not say it is irrelevant, and some teams clearly value it more than others.

MR. BONCELLA: But I am saying, if Congress then said, through its legislative power and ability to regulate interstate commerce, that eighteen is the minimum age.

MR. MILSTEIN: Well, here is the difference, as Mr. Rosen says. If Congress establishes that as a rule, then that is the rule. What happens in the NFL is that a group of teams have combined to keep individual teams from hiring these players who are otherwise eligible. So you have an antitrust violation. You have a conspiracy. You have an agreement. You do not have that in the congressional setting. If you had a congressional hearing that said you had to be eighteen to play in a dangerous sport, and if they listed the sports in the NFL and the NHL, Congress could do that. There would be hearings on it and it may or may not pass.

MR. ROSEN: There might be an age discrimination suit.
MR. BONCELLA: What about the apprentice program, in which you have to be eighteen to get into the apprentice program for sheet-metal working or carpentry? Why is that not the same?

MR. MILSTEIN: Again, the difference is what Congress does.

MR. BONCELLA: Take it out of the congressional situation. Instead, the carpenter's union and the employer's association have a collective bargaining agreement that allows for an apprentice program that sets a minimum age of eighteen. Why is that different from what the NFL and the NBA have done with their players?

MR. MILSTEIN: I assume the apprentice program is designed to make sure that those who come to the labor are adequately trained. That is not the purpose of the age restriction in the NBA or the NFL. Lebron is the perfect example for all of this. He is the best guy in the NBA and he was when he walked in. He is eighteen. How in the world should Lebron have been forced to go through three or four years of college? Is there any question that if Lebron was on the Ohio State basketball team that it would be beneficial to Ohio State or that it would be beneficial to the NCAA? It might even be beneficial to the NBA, because you would have a much stronger NCAA. But it is unfair to Lebron. He is capable; he is physically able to be in the league. In fact, he is one of the best players in the league.

MR. BONCELLA: So you do not want any age restriction, and it should be determined solely on a case-by-case basis, regardless of good faith bargaining between the players' association and the league?

MR. MILSTEIN: That is correct: I am opposed to any age restriction. And the main difference is that no one is drafted unless he is capable and ready to be in the league. No one makes the squad unless he is good enough to be on the squad. No one gets a starting position unless he is ready to start. And if he is ready, why should he be prevented?

AUDIENCE: So you are arguing that maybe the NBA should have let Lebron play at sixteen?

MR. MILSTEIN: I wanted that case. Lebron would have been the number one pick in the draft after his junior year in high school. There is no question about that. Why could he not play in the NBA. What was preventing him from doing it? Because he would lose the opportunity to go through twelfth grade? Is that your argument? Believe me, you can go through twelfth grade with two million dollars in your pocket. You can do that.
Paternalism

MR. CARFAGNA: How much of this is paternalistic thinking? There are rules that prohibit drinking, for example, until a certain age. Do you not think the NCAA, the NBA, and the NFL are protecting these young egotistical kids from being in situations they are not ready for: the fame, money, jobs, etc. And is that not a fair and proper thing? The labor pool knows itself better than anybody else. We think that is best for the kids.

MR. MCCANN: If the labor pool knew itself better than everyone else, then it would not argue for that, because we have seen a near inverse correlation between how many years you spend in college and propensity to be arrested in the NBA.

As to the comment on drinking, remember that rules that tie age to drinking are premised on public safety. And there is a qualitative difference between worrying about whether someone is going to drink and drive and whether that person is going to cash a paycheck and dribble a basketball. And remember that policies promoting public safety are far different than those for regulating behavior, particularly when the latter appear animated by a desire to preserve jobs for fringe NBA veterans and a desire to enable the NCAA and NBA to profit from unpaid college basketball players.

MR. MILSTEIN: That was the NFL’s major argument. We are doing this for Clarett. Our age eligibility rule is for him. Does anybody really believe that—that the purpose of the eligibility rules is to protect these kids? They are all about money and power. That is it.

Economic Value of College Education for Professional Players

AUDIENCE: How much money did Matt Leinart’s agent lose when Leinart chose not to sign the sixty-five million dollar contract that he would have signed for being the first pick in the 2005 NFL draft? How much money does the agent for Leinart lose as a result?

MR. ROSEN: With someone like Leinart, 2 percent or maybe even less.

AUDIENCE: But the fact is, the statistics show that a football player with a college degree will earn significantly more than a football player without a college degree. So maybe it is just deferred in terms of what the agent has lost.

MR. ROSEN: I find the deferral very interesting, especially as I represent baseball players. Age eligibility works differently in baseball than in the NFL and NBA. An amateur baseball player may enter the MLB draft straight out of high school, but if he declines that op-
portunity, or if he does not sign a professional contract after being drafted, certain restrictions arise. For instance, if he attends a four-year school then he would have to have to attend for at least three years or until he is twenty-one-years-old. For every contract that I have negotiated, I make sure that part of that contract provides for the client’s education at the end of his baseball career. It does not generally work that way in basketball and football, but, as Alan and Mike said, you are free to go back to school whenever you want.

And in baseball contracts, teams are very, very willing to give those scholarships. Why do you think that is the case? It is because players seldom use them. And I make sure I negotiate that in. And baseball teams are willing to give that up because they argue that the scholarship money should come off the signing bonus. That is an argument we have very often, but it works a little differently in that situation. But the end result is that you are always free to go back to school. Deferring education now does not mean that you are getting rid of it entirely.

AUDIENCE: No, but it might, because they are giving up eligibility, and then they have to pay for it. And given the socioeconomics of the athlete, they would be far less likely to go back and pay for their own college education.

MR. ROSEN: That is true, but remember that, for instance, the NBA employs a rookie scale. Every new contract a player signs in the NBA is at least two years guaranteed with two team options. They are not making five bucks an hour. They are making millions and millions of dollars. So they are going to be able to pay for it, if they want to. The NFL is a little different because there are no guaranteed contracts, but in the NBA there generally are. If these players want to go back to school, then they can go back to school. That is the end result and by deferring it, I do not think you are getting around that.

Closing Arguments

MR. MILSTEIN: This is an issue that has to get to the United States Supreme Court. There is a clear conflict in the circuits, between the Sixth Circuit and the Second Circuit. I am as convinced about this issue as I have been about any issue that I have ever litigated: the eligibility rule of the NFL violates the antitrust laws.

MR. McCANN: If you look at all of the data, all of the available information, all of the past precedent, and all of the economic and sociopsychological applications, one thing is remarkably clear: it does not make sense to ban players out of high school from going to the NBA. There is a good chance the same is true of players seeking the
NFL. And the bottom line is that these rules are based on perpetuating a system in which there is a free minor league system for the pros to develop players.