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The Veil of Fair Representation: Maurice Clarett v. The National Football League

Brando Simeo Starkey
Associate Editor, The Undefeated

ARTICLE

THE VEIL OF FAIR REPRESENTATION: *MAURICE CLARETT V. THE NATIONAL FOOTBALL LEAGUE*

By Brando Simeo Starkey

I. INTRODUCTION

He was ready. In 2004, the Ohio State Buckeyes running back, Maurice Clarett ("Clarett"), contested the National Football League's ("NFL") Special Eligibility rule ("The Rule") mandating that all potential players must wait three years after their high school class has graduated to assume eligibility for the NFL Draft.[1] Clarett was only two years removed from his high school graduation. New York federal district court struck down The Rule, concluding that it violated federal antitrust law.[2] The NFL appealed.[3] The Second Circuit Court of Appeals, however, held that The Rule was not subject to federal antitrust laws but to federal labor laws and that The Rule complied with the latter.[4] When the Supreme Court denied certiorari, Clarett's dream of playing football on Sundays was deferred for a year.[5]

In this paper, I contest that, although the Second Circuit correctly held that The Rule was subject to federal labor laws, the way in which those laws operate offends common sense. Moreover, the NFL and the National Football League Players Association ("NFLPA"), if acting in the best interest of the league, should voluntarily abrogate The Rule. First, I will discuss Clarett's brief but impressive career as an Ohio State tailback. As a dynamic freshman, he led his school to an undefeated season and its first National Championship in thirty-six years. Second, I will analyze both the district court and appellate court decisions, highlighting the nuance that led the Second Circuit to overturn the lower court's findings. Third, I will call attention to the conspicuous and fundamental flaw in the manner in which federal labor laws operate. More specifically, I will challenge the paradoxical assertion that the NFLPA "has the ability to advantage certain

1. Clarett v. NFL, 306 F. Supp. 2d 379 (S.D.N.Y. 2004), *rev'd*, 369 F.3d 124 (2d Cir. 2004).
2. *Id.* at 4006-08.
3. Clarett v. NFL, 369 F.3d 124 (2d Cir. 2004).
4. *Id.* at 135, 138.
5. *Id.* at 130.

categories of players over others" and can yet still somehow meet "the duty of fair representation."[6] Fourth, using John Rawls' Veil of Ignorance, found in *A Theory of Justice*, I will introduce a philosophical framework by which sports players' associations can meet the necessary obligation of fair representation and conform to the way in which federal labor laws *should* operate. Fifth, this paper takes a turn, emerging from legal nebulousness, delving into NFL policy matters, knocking down the reasons for which the NFL and NFLPA proffer as a basis for the continuation of The Rule. Finally, I will argue why the NFL and the NFLPA should concentrate on the ability of the individual, not age, in determining readiness.

II. TRIALS, TRIBULATIONS AND PRISON

Clarett said, "[g]rowing up in Youngstown [Ohio], you don't have the best opportunities in the world, so you make the most of what you have."[7] And so he did. Clarett, named the Offensive Player of the Year in America coming out of high school, graduated early with a 3.5 GPA and a 1220 SAT score so that he could start as a freshman in Ohio State's backfield.[8] After starting the first game of the season, a victory, he impressed his coaches and teammates not only with his physical dominance, but his mental maturity. "You can tell Maurice is mentally prepared for the college game," freshman linebacker A.J. Hawk said. Hawk added, "[h]e seems to be a lot older than an 18-year-old."[9] Indeed, Clarett keenly understood the work ethic requisite for success. Furthermore, he had an appreciation for the cultural burdens that accompany socioeconomic ascendancy, commenting, "[I]f you lived in the hard environment of Youngstown, there is just some need that pushes you to get out, to get better and then to give back."[10] It was the opinion of those around him that Clarett was a well-adjusted young man.[11]

One would be remiss in overlooking Clarett's on-the-field prowess. His best game came against Washington State, the third game of the season, in which he amassed 230 yards and scored two rushing

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6. *Id.* at 139.
7. Tim May, *His Satisfaction Never Guaranteed; Maurice Clarett Constantly Pushes Himself to Do More*, THE COLUMBUS DISPATCH, Sept. 5, 2002, at D1 [hereinafter *His Satisfaction Never Guaranteed*].
8. Tim May, *OSU Football; Clarett Gets Head Start on Career at Ohio State*, THE COLUMBUS DISPATCH, Jan. 13, 2002, at D3.
9. May, *His Satisfaction Never Guaranteed*, *supra* note 7.
10. *Id.*
11. *Id.*

touchdowns. Although he did not have an impressive statistical output during the National Championship game against the vaunted and heavily favored Miami Hurricanes, he had two big plays that were instrumental in the Buckeyes' victory.[12]

Clarett's sophomore season, however, was an unmitigated, public calamity. It started out promising with Clarett being mentioned as a Heisman trophy frontrunner.[13] It was downhill from there. In April of 2003, Clarett's 2001 Chevrolet Monte Carlo was broken into. He filed a police report, claiming that over $6,000 worth of property was stolen.[14] After being prodded about the veracity of this claim, Clarett admitted that he had lied.[15] National Collegiate Athletic Association ("NCAA") investigations ensued.[16] A war of words between Clarett and Ohio State followed. Ultimately, Clarett's football days at Ohio State were finished.[17] With seemingly no other alternative, Clarett decided to go professional but The Rule stood in his way. The courts were his only recourse. In September of 2003, Clarett announced his intention to sue the NFL.[18]

Clarett ultimately was drafted in the NFL.[19] In April of 2005, he was drafted by the Denver Broncos.[20] Four months later, he was cut.[21] After being cut, Clarett was arrested twice.[22] His first arrest was concerning an alleged aggravated robbery of a brother and sister outside of a Columbus, Ohio nightclub.[23] His second arrest was related to a concealed weapons charge after Clarett was pulled over, again in Columbus.[24] At the time, Clarett was out on bond from his

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12 Tim May, *A Perfect Ending; Buckeyes Once Again Come Up Big When It Counts*, THE COLUMBUS DISPATCH, Jan. 4, 2003, at Sport 2.

13. Tim May, *Clarett Sees Quick Return; Ex-NFL Great Jim Brown on OSU Tailback's Team as 'Observer' in Process*, THE COLUMBUS DISPATCH, Aug. 12, 2003, at E1.

14. Rob Oller, *NCAA Eyes Clarett's Report of Theft; Electronics, Cash Stolen From Car OSU Tailback Was Driving This Spring*, THE COLUMBUS DISPATCH, July 30, 2003, at E1 [hereinafter *Report of Theft*].

15. Rob Oller, *Eligibility Questions Send Clarett to Sidelines; Running Back Admits He Inflated Prices of Items Stolen from Car*, THE COLUMBUS DISPATCH, July 31, 2003, at D1

16. Oller, *Report of Theft, supra* note 14.

17. Rob Oller, *Clarett Sues NFL to Turn Pro Next Year; Sophomore Can Preserve OSU Option if He Stays in School*, THE COLUMBUS DISPATCH, Sept. 24, 2003, at A1.

18. *Id.*

19. Bruce Cadwallader and John Frutty, *Clarett Gets at Least 3½ years; Former OSU Star Settles All Cases Against Him by Agreeing to Plea Deal*, THE COLUMBUS DISPATCH, Sept. 19, 2006, at A1 [hereinafter At Least 3 ½ years].

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

previous arrest,[25] and police noticed him driving erratically.[26] When the police finally managed to pull Clarett over, he had an open bottle of vodka, an AK-47, thirty live rounds in the magazine, three pistols, a hatchet and was wearing a Kevlar bullet-proof vest.[27] In September of 2006, Clarett pled guilty to both charges and will see freedom no sooner than three and a half years.[28]

III. THE CASE -- CLARETT V. NFL

This section discusses *Maurice Clarett v. National Football League* at both the district court and appellate levels. The differing legal conclusions will be dissected, ending with an explanation of the Second Circuit's reasoning for overturning the lower court's ruling.

A. The District Court Opinion

On September 23, 2003, Clarett filed suit against the NFL claiming antitrust injury. He was being denied the right to earn a living because of his age.[29] Both parties subsequently filed Motions for Summary Judgment. Clarett argued that The Rule violated antitrust law. The NFL claimed that Clarett "'lacked antitrust standing' and that, as a matter of law, the eligibility rules were immune from antitrust attack by virtue of the non-statutory labor exemption."[30]

The district court had three arguments that led to the conclusion that Clarett had antitrust standing. First, the district court dismissed the NFL's position that antitrust laws were not controlling with respect to The Rule because it fell within a non-statutory labor exemption to antitrust law.[31] The district court held following *Mackey v. National Football League*[32] that antitrust law was applicable.[33] Under *Mackey*, eligibility rules "are not mandatory subjects of collective bargaining," the rules "affect only 'complete strangers to the bargaining relationships," and the rules "were not shown to be the product of arm's-length negotiation."[34]

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25. Bruce Cadwallader, *$6.1 Million Bond; New Charges Won't Delay Clarett's Trial*, THE COLUMBUS DISPATCH, Aug. 11, 2006, at E1 [hereinafter $6.1 Million Bond].
26. Cadwallader, *At Least 3 ½ years*, *supra* note 19.
27. Cadwallader, *$6.1 Million Bond*, *supra* note 25.
28. Cadwallader, *At Least 3 ½ years*, *supra* note 19.
29. *Clarett*, 306 F. Supp. 2d at 382.
30. *Clarett*, 369 F.3d at 129.
31. *Id.*
32. 543 F.2d 606 (8th Cir. 1976).
33. *Clarett*, 369 F.3d at 129.
34. *Id.*

Second, the district court rejected the NFL's contention that Clarett did not show a satisfactory "antitrust injury" to have a cause of action and, even if The Rule was subject to federal antitrust law, Clarett was not injured by its presence.[35] The district court held that the "inability to compete in the market," (the market being on the NFL playing field) was enough to establish an injury for antitrust purposes.[36]

Third, the district court concluded that the antitrust injury Clarett suffered, being disallowed from the NFL draft, was patent and the justifications for The Rule that the NFL proffered failed to mask its glaring anticompetitive nature.[37] The NFL argued that young players have an elevated susceptibility to both physical and mental dangers from which the NFL should protect them.[38] The Rule is designed to confront said dangers. With The Rule in place, the NFL is able to put forth a better product for public consumption than it could without The Rule.[39] No one would, after all, want to spend their money on a sporting event full of young, often injured, immature players. As cogent as this justification may be, it was not adequate as a matter of law.[40] The NFL could, furthermore, address these potential problems with other means that were not violative of antitrust law.[41] With The Rule no longer in place, there was no impediment to Clarett being eligible for the NFL draft. On February 5, 2004, the court granted Summary Judgment in favor of Clarett.[42] The district court entered an order stating Clarett was eligible[43] and allowed him to enter the NFL draft.

B. Overturned – The Second Circuit Opinion

While the district court held that The Rule was subject to and antagonistic to antitrust law, the Second Circuit came to the opposite conclusion.[44] The Second Circuit held that the "labor market for NFL players is organized around a collective bargaining relationship that is provided for and promoted by federal labor law, and that the NFL

35. *Id.*
36. *Id.* (quoting *Clarett*, 306 F. Supp. 2d at 403).
37. *Clarett*, 369 F.3d at 129.
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.* at 130.

clubs as a multi-employer bargaining unit"[45] can get together "in setting the terms and conditions of players' employment and the rules of the sport without risking antitrust liability."[46] In other words, while the district court held that antitrust law was applicable, the Second Circuit rejected that holding, concluding that the relationship between the NFL and NFLPA was subject to a non-statutory antitrust exemption and therefore governed by federal labor laws with which it complied.[47]

The district court relied on *Mackey* in its conclusion that the NFL's eligibility rule did not meet one of the non-statutory exemptions to antitrust law.[48] The *Mackey* factors, argued the Second Circuit, do not provide the "proper guideposts," when the challenge is that the eligibility rule is "an unreasonable restraint upon the market for player's services."[49] *Mackey* guidelines should have been followed had Clarett argued "that the NFL's draft eligibility rules work to the disadvantage of the NFL's competitors in the market for professional football or in some manner protect the NFL's dominance in that market."[50] In short, the *Clarett* and *Mackey* decisions dealt with two separate legal questions. The district court erroneously conflated the two issues.

The issues in *Caldwell v. American Basketball Association*, *National Basketball Association v. Williams* and *Wood v. National Basketball Association*[51] are all analogous to Clarett's contention that the NFL was engaging in behavior tantamount to a "restraint upon the labor market for players' services and thus violated the antitrust laws . . ."[52]

In all those cases, the Second Circuit held that the non-statutory labor exemption extinguished each player's claim.[53] The court's "analysis in each case was rooted in the observation that the relationships among the defendant sports leagues and their players

45. *Id.* A bargaining unit, in this instance, is an entity comprised of different teams that come together to negotiate with the NFLPA.
46. *Id.*
47. *Id.*
48. *Id.* at 120 (citing *Clarett*, 306 F. Supp. 2d at 397).
49. *Clarett*, 369 F.3d at 134.
50. *Id.*
51. *Caldwell*, 66 F.3d 523, 526-27 (2d Cir. 1995); *Williams*, 45 F.3d 684, 687 (2d Cir. 1995); *Wood*, 809 F.2d 954, 956-58 (2d Cir. 1987) (noting these cases all concern the legal issue of a plaintiff arguing against being restrained by a unionized labor market that has a collective bargaining agreement relationship with a multi-employer bargaining entity).
52. *Clarett*, 369 F.3d at 135.
53. *Claret*, 369 F.3d at 134-35.

were governed by collective bargaining agreements and thus were subject to carefully structured regimes established by federal labor laws."[54]

After holding that The Rule was subject to federal labor laws and not antitrust laws, the issue before the court was then whether it was in compliance with the former.[55] The Second Circuit held the arguments to back Clarett's antitrust cause of action "run counter to each of these basic principles of federal labor law."[56] First, because the NFL players are a union that decided to have the NFLPA as its bargaining representative, Clarett was forbidden by labor law from directly negotiating conditions of his employment with any NFL team.[57] The terms and conditions of Clarett's employment with regard to the NFL must be determined by negotiations between the NFLPA and the NFL.[58]

Second, the NFLPA, as a player's union, possesses powers analogous to that of a legislative body insofar as it may restrict and create "the rights of those whom it represents."[59] When searching for the most advantageous deal for NFL players, the representative can give preference to certain categories of players over others, which is subject to the representative's duty of fair representation.[60] This ability to advantage certain categories of players over others is vested in the players' representative whenever "a mandatory collective bargaining relationship is established and continues throughout the relationship."[61] After a collective bargaining relationship commences, federal labor law then provides the legal fulcrum through which problems are settled.[62]

Third, Clarett argues that because eligibility rules are not a mandatory subject of collective bargaining, the "scheme established by federal labor law" can be avoided in favor of antitrust law.[63] The

54. *Clarett*, 369 F.3d at 135 (noting that if there are exemptions to antitrust law, they are provided by statute. If a legal issue meets one of those statutory exemptions, antitrust law does not govern – federal labor law does).
55. *Id.* at 136-37.
56. *Id.* at 138.
57. *Id.*
58. *Id.* at 139.
59. *Id.* at 139 (quoting Trans World Airlines, Inc. v. Indep. Fed'n of Flight Attendants, 489 U.S. 426, 459 (1989)).
60. *Clarett*, 369 F.3d at 139 (citing Vaca v. Sipes, 386 U.S. 171, 177 (1967)).
61. *Clarett*, 369 F.3d at 139 (quoting *Caldwell*, 66 F.3d at 528).
62. *Clarett*, 369 F.3d at 139 (citing *Caldwell*, 66 F.3d at 529).
63. *Clarett*, 369 F.3d at 139.

district court agreed with this contention.[64] The Second Circuit rejected it, holding that eligibility rules are indeed a mandatory bargaining subject that has ramifications on the NFL players' working conditions and wages.[65] Sports leagues are configured in such a way that although certain issues might not seemingly affect wages and working conditions, upon further reflection they actually do.[66] The age at which players gain eligibility has countless ramifications on the competition of current players, salary caps, and salary pools for rookies.[67]

Additionally, Clarett argues that the eligibility rules are not permissible because they affect potential players that are not even members of the NFLPA.[68] But within the confines of a collective bargaining relationship, the NFLPA and the NFL can decide that a player is ineligible as long as it does not violate federal laws prohibiting unfair labor practices or discrimination.[69] As discussed in *Reliance Insurance v. National Labor Relations Board*, an "[Employer is usually free to] pick and choose his employees and hire those he thinks will best serve his business interests."[70] The Rule, it was held, was a lawful collective bargaining stipulation.[71]

Clarett counters by noting that The Rule predates the collective bargaining agreement and the NFLPA and the NFL never bargained over it.[72] In order to comply with federal labor law, The Rule had to have been bargained over.[73] If it was not, it does not meet the non-statutory exemptions to antitrust law.[74] The Second Circuit found this argument unpersuasive.[75] "Given that the eligibility rules are a mandatory bargaining subject … the union or the NFL could have forced the other to the bargaining table if either felt that a change was warranted."[76] National Football League Management Council's ("NFLMC") Vice President for Labor Relations, Peter Ruocco, claims

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64. *Id.*
65. *Id.*
66. *Id.* at 140.
67. *Id.* (explaining that eligibility does indeed have huge ramifications on wages and working conditions).
68. *Id.*
69. *Id.* at 141.
70. *Id.* at 141 (quoting Reliance Ins. Co. v. NLRB, 415 F.2d 1, 6 (8th Cir. 1969)).
71. *Clarett*, 369 F.3d at 141.
72. *Id.* at 142.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*

that this is what actually transpired.[77] In conclusion, the collective bargaining agreement between the NFL and NFLPA is subject to federal labor laws and not antitrust laws.[78] The Rule conforms to the former.[79]

IV. THE FEDERAL LABOR LAW QUANDARY

The tension between the district court and appellate decisions was whether or not antitrust law or federal labor law was controlling.[80] The Second Circuit overruled the lower court, holding that federal labor law was controlling, and that The Rule was in compliance.[81] Whether or not the Second Circuit solved the issue correctly in *Clarett* is not the issue with which this paper is concerned. For the purposes of this paper, it is assumed that the Second Circuit's resolution of the issue was correct. Indeed, it is conceded that the eligibility rule between the NFLPA and the NFL is governed by federal labor law not antitrust law and that federal labor law allows for a union to implement a rule that is tantamount to an age restriction.[82] The legal argument this paper attempts to make is that federal labor law allows representatives of a collective bargaining agreement to come to unjust age eligibility requirements. The Second Circuit did not get it wrong; federal labor law got it wrong. To argue this point, federal labor law needs exploration.

As previously noted, the NFLPA is allowed to entrust a person with the power to act as a representative that bargains on behalf of players' rights.[83] The representative has "powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents."[84] "Congress gave to the . . . representative the task of harmonizing and adjusting the conflicting interests of employees within the bargaining unit, no matter how diverse their skills, experience, age, race or economic level."[85] Coming to a good agreement is, obviously, a very arduous task where there are members of the union that have disparate interests.[86] Not everyone will arise

77. *Id.*
78. *Id.* at 143.
79. *Id.*
80. *Id.* at 125.
81. *Id.* at 143.
82. *Id.*
83. *Id.* at 139.
84. Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192, 202 (1944).
85. *Wood*, 809 F.2d at 960.
86. *Id.*

from the bargaining table completely satisfied; indeed total complete contentedness of all those represented is not a realistic occurrence.[87]

The representative, however, has to meet the obvious standards of fair representation.[88] That is to say, if the representative is not representing all of the employees "fairly," the standards of federal labor law are not met.[89] The definition of employee includes any employee, and is not constrained to the employees of a certain employer.[90] Additionally, job applicants are "employees."[91] There is a tripartite test when evaluating claims of unfair representation in collective bargaining agreements.[92] "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith."[93]

With respect to the arbitrariness of fair representation, it occurs "only if [the union's conduct] can be fairly characterized as so far outside a 'wide range of reasonableness' that it is wholly 'irrational' or 'arbitrary.'"[94] The sort of representation that constitutes "arbitrary" is purposefully broad.[95] Indeed, "This 'wide range of reasonableness' gives the union room to make discretionary decisions and choices, even if those judgments are ultimately wrong."[96] In *Air Line Pilots Association v. O'Neill*, for example, a settlement agreement was negotiated by the union with the employer, which hindsight showed to be a terrible deal for the employees.[97] The union had negotiated a disastrous agreement for its workers. However, this was not enough to support a holding that the union's conduct was arbitrary.[98] A union's conduct can be classified as arbitrary only when it is irrational, meaning when it is without a rational basis or explanation.[99]

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87. Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953).
88. *Vaca*, 386 U.S. at 177 (1967).
89. *Id.* at 178.
90. National Labor Relations Act §§ 8(a)(1), (3), 49 Stat. 452 (codified as amended at 29 U.S.C. §§ 152(1), (3) (1988)).
91. Time-O-Matic, Inc. v. NLRB, 264 F.2d 96, 99 (7th Cir. 1959); John Hancock Mut. Life Ins. Co. v. NLRB, 191 F.2d 483, 485 (D.C. Cir. 1951).
92. *Vaca*, 386 U.S. at 177.
93. *Id.*
94. Air Line Pilots Ass'n v. O'Neill, 499 U.S. 65, 78 (1991) (quoting *Huffman*, 345 U.S. at 338).
95. *Huffman*, 345 U.S. at 338.
96. Marquez v. Screen Actors Guild, 525 U.S. 33, 45-46 (1998).
97. *O'Neill*, *supra* note 94, at 71.
98. *Id.* at 78-81.
99 *Id.* at 67.

If a union practices discrimination in its representation of employees the condition of fair representation is violated.[100] In *Steele v. Louisville & Railroad Co.*, for instance, the union and employer reached an agreement that discriminated against minority workers with respect to hiring and seniority rights.[101] Such a deal struck by the union was said to have been tainted because of its discriminatory character, failing to meet the duties of fair representation.[102]

The third prong of this tripartite system for analyzing fair representation is bad faith.[103] Courts have held that bad faith "requires a showing of fraud, deceitful action, or dishonest action."[104] Merely demonstrating that the Union did not represent an employee as vigorously as possible is insufficient to establish a violation.[105] Just merely showing bad faith is not enough for an employee to have a claim. *Ackley v. Western Conference of Teamsters* held that "to prevail on a fair representation claim, plaintiffs, in addition to establishing that a union acted unreasonably and in bad faith, must allege a causal connection between the union's wrongful conduct and the alleged injuries."[106] There are, therefore, two parts. First, it must be proved that the union acted in bad faith.[107] Second, it must be proved that whichever wrong that was initially proved caused the injuries in question.[108]

The Second Circuit, in *Clarett*, held that the NFLPA can meet the duty of fair representation despite a stipulation in the collective bargaining agreement that disallows certain members because of their age.[109] As discussed *supra*, for the purposes of this paper, it is assumed that the Second Circuit resolved whether or not the necessity of fair representation was met correctly. That is, where a sports players' union decides that it is in the union's best interest to effectively agree to an age limit, they have not broken the duty of fair representation toward persons who actually have the talent to play at the level. It, however, should.

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100. *Steele*, 323 U.S. at 194-202.
101. *Id.*
102. *Id.*
103. *Vaca*, 386 U.S. at 177.
104. Mock v. T.G. & Y. Stores Co., 971 F.2d 522, 531 (10th Cir. 1992) (quoting Motor Coach Employees v. Lockridge, 403 U.S. 274, 299 (1971).
105. *Mock*, 971 F.2d at 531.
106. *Ackley*, 958 F.2d 1463, 1472 (9th Cir. 1992).
107. *Id.*
108. *Id.*
109. *Clarett*, 369 F.3d at 139.

Federal labor law should not allow a union to exclude workers who are clearly able to perform and still meet the requirement of "fair representation." There is nothing fair about a union that favors current players over future players to such an extent that it disallows future players' entry into employment with an arbitrary rule requiring players to wait three years after graduating from high school.

V. REAL FAIRNESS

The duty of fair representation is not met only "when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith."[110] Where in *Clarett*, a union, who represents both future players and current ones promotes the interests of one over the other to the degree that the NFLPA does, the duty of fair representation should not be met.[111] I reject the notion that a union, who represents future employees as well as current ones, can agree to a collective bargaining agreement that contains an age eligibility requirement and still meet the federal labor law duty of "fair representation." In all other respects, the tripartite system of discerning whether fair representation has been met makes for good policy. However, when it comes to eligibility rules, it is conspicuously unfair. The question then becomes as follows: What should constitute fair representation with respect to age limits when a union is negotiating a collective bargaining agreement? My contention is that the union should proceed under the veil of ignorance theory.

A. Veil of Ignorance

Under John Rawls' theory, the veil of ignorance,[112] the rules of justice are chosen in the original position, behind a "veil of ignorance," that conceals facts from the parties about themselves (gender, age, race etc.) that would likely be used as attempts to tailor the rules to engender an advantage.[113] If behind the veil of ignorance we do not know our race, for instance, then we will not desire to implement rules that favor one race over the other. In the real world we know these key facts: "that in reasoning about justice we must *disregard* some of what we know…pretend to ourselves that we don't

110. *Vaca*, 386 U.S. at 190.
111. *Clarett*, 369 F.3d at 139.
112. JOHN RAWLS, A THEORY OF JUSTICE (The Belknap Press of Harvard Univ. Press 1971).
113. John Kilcullen, *Rawls: The Original Position* (1996), http://www.humanities.mq.edu.au/Ockham/y64L13.html (last visited Nov. 15, 2006).

know it . . . To ask what rules would people behind the veil of ignorance adopt is a way of asking what rules can be justified without reference to bargaining strengths and weaknesses."[114]

The goal of the veil of ignorance is to put people in a position where they are likely to disavow their prejudices and set up rules that are the fairest possible.[115] Under the veil of ignorance, one does not know his plight in life. Indeed, he knows nothing about himself. He does not know how the rules he chooses will affect his own situation.[116] People in the original position would adopt various positions and principles, but the pertinent principle is the second principle which is as follows:

> Social and economic inequalities are to be arranged so that they are both:
>
> (a) to the greatest benefit of the least advantaged . . .
> (b) attached to offices and positions open to all under conditions of fair equality of opportunity.[117]

B. Veil of Ignorance Applied to Facts

The veil of ignorance is a philosophical theory about the world at large and needs to be adopted in the instant case. Therefore, the question is as follows: if one knew that he was a potential player and did not know his age, but that he could play in the NFL, what is the eligibility rule for which this person would advocate?

In this position, the hypothetical person would advocate for open rules. That is, he would not favor any age restriction. He does not know his age and if he felt he could play football at nineteen-years-old he surely would not want an impediment standing in his way. It is foreseeable, for example, that someone has the talent to play in the NFL at age nineteen, but if there is a rule impeding this, he would have to wait, risking injury. Indeed, there are various scenarios that could result in a detriment to a player that does not meet a predetermined age standard. The answer is clear. Under the veil of ignorance, no one would argue for an eligibility requirement.

The NFL might likely want to implement an eligibility impediment to stop young players from entering the league, but the NFLPA would at least have to challenge the NFL on that issue to meet the duty of fair

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114. *Id.*
115. *Id.*
116. Dennis C. Mueller, *Defining Citizenship*, 3 THEORETICAL INQ. L. 151, 156 (2002).
117. Kilcullen, *supra* note 113.

representation. Here, the NFLPA did not even challenge the NFL on The Rule. Any union that fails to fight for inclusive measures, with respect to the age of employees, breaks the veil of ignorance and therefore should violate the duty of fair representation.

VI. THE NFL'S ARGUMENTS

Then Washington Redskins linebacker LaVar Arrington, voiced vehement disapproval regarding Clarett's potential presence on the professional football field.[118] He said that if he saw him on the football field, he would try to take his head off.[119] His aggressive position towards Clarett was emblematic of an overreaching argument concerning young players in the NFL. They are not ready either mentally or physically, and to allow them on the football field with men is to render them susceptible to all types of peril.[120] To be an NFL player, you must be a man. A man, so the argument goes, has a certain type of body that can withstand the brutality that is professional football. Moreover, a man can deal with the turbulent, grueling nature of an NFL season, and the effects on the psyche, including the ability to deal with the media scrutiny and heightened public attention that accompanies an NFL contract. A boy cannot deal with this. In *Clarett*, the NFL stated that the first reason for The Rule was because it was in young football players' best interest to wait until they had matured before they entered the NFL.[121]

Columnist and ESPN personality Michael Wilbon agreed that Clarett was not ready for the NFL.[122] Wilbon concludes that there have only been three NFL players that could have played at an age at which The Rule forbids.[123] These three players are Herschel Walker (running back from University of Georgia), Bo Jackson (running back from Auburn University) and Marcus Dupree (running back from Oklahoma University).[124] Clarett is not ready for the NFL, he scribes, and will quickly find himself out of the league. If he were to stay in college, mature both physically and mentally, Clarett would be setting himself up in the best way possible for success at the next level. [125]

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118. Michael Wilbon, *For Clarett, It's a Bad Move*, WASH. POST, Sept. 25, 2003, at D1.
119. *Id.*
120. *Clarett*, 306 F. Supp. 2d at 408.
121. *Id.*
122. Wilbon, *supra* note 118.
123. *Id.*
124. *Id.*
125. *Id.*

Wilbon endorses The Rule stating that the NFL will be overrun with overly ambitious nineteen-year olds, destroying the high quality product that makes it undisputedly the most popular sport in America.[126] The NFL agreed, making this their second argument in buttressing the need for The Rule.[127] The Rule, the NFL maintained, safeguards the NFL from the potential disastrous byproduct associated with young players entering a league for which they are not physically or emotionally ready.[128]

The NFL's final argument[129] in support of The Rule was the league's desire to curb steroid use by young men hoping to one day become an NFL player. The Rule was "protecting from injury and self-abuse other adolescents who would over train— and use steroids—in the misguided hope of developing prematurely the strength and speed required to play in the NFL."[130] It is an interesting argument, but one that essentially asks potentially qualified workers to give up millions of dollars so that high school adolescent boys are not tempted to engage in illegal and unethical behavior.

The position that the NFL wants to discourage young men from taking steroids to enter the league is an honorable one. Steroid use among amateur athletes is of national concern. The NFL, however, is undeniably hypocritical on this issue. Eventually drafted in the first round of the 2005 NFL draft, Luis Castillo tested positive for a steroid at a pre-draft workout.[131] If the NFL's desire was truly to send a message that steroid use has no place in the NFL and, additionally, instill in amateur football players that steroids should not be taken under any circumstances, the NFL could have taken punitive measures against Castillo. But, they did not. Taking the NFL at their word, they let an opportunity to convey their altruistic intentions regarding amateur athletes and steroids slip by. He was drafted in the second round.

Young players, quite simply are not ready, is the most deployed argument in support of The Rule from a policy standpoint. While it is true that most of the players The Rule excludes are likely not ready to

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126. *Id.*
127. *Id.*
128. *Clarett*, 306 F. Supp. 2d at 408.
129. *Id.* The third argument is excluded but it pertains to the NFL's desire to protect teams from the costs of young players that might potentially get injured because they were not physically ready to play.
130. *Id.*
131. Mark Maske, *NFL Keeps Ephedra on Prohibited List*, WASH. POST, Apr. 15, 2005, at D5.

make meaningful contributions to an NFL team, the NFL already has a natural and easy remedy to this potential disaster. They do not need to draft such players. A novel concept it seems to many of the NFL's decision makers, but it is unequivocally a perfect panacea. On draft day, had Clarett been eligible, any team viewing him as obviously too young would have had the option to pass on him. In order for young players to ruin the league, they first have to be *in* the league. The NFL conveniently overlooks their responsibility and posture insomuch as they are in a position to bottleneck the potential problem by not drafting players they conclude are not ready.

One likely retort is that teams might be so tantalized by the talent of a nineteen-year-old sensation reminiscent of John Elway[132] that teams may draft him anyway, despite the fact that he is not mature enough to make a valuable contribution. Other teams might likewise be enamored with other prodigies. The fear, then, is that these players will not materialize and teams will be hurt by poor draft day decisions. If this happens, on a large scale, then naturally the NFL suffers. No one, after all, would want to watch the NFL if it were rife with young players that should actually be playing on Saturdays.[133] With the decreased interest, the NFL would be a less prosperous league. The NFL, therefore, would be smart to restrict the flow of players whose mere presence would attenuate the quality of the league.

The peculiarity of this position, of course, is that teams currently get enamored by the talent of a twenty-two-year old sensation reminiscent of John Elway who is not mature enough to handle the NFL game. Joey Harrington, Akili Smith and Kyle Boller[134] have analogous career trajectories because they were drafted early on full of promise. They all were unmitigated calamities. The NFL's response to these underperforming players was not to place a policy roadblock that impeded them in competing. The fear that teams have regarding players The Rule excludes are the same fears they have with the players The Rule includes. The solution is not to increase the age at which players become eligible, but to be more accurate in scouting college talent and predicting how that talent will project at the next level. The NFL's argument is essentially a save-ourselves-from-

132. John Elway is often esteemed as one of the best quarterbacks in NFL history. He was the number one draft pick in the 1983 NFL draft.

133. College football is traditionally played on Saturdays.

134. All three of these quarterbacks were drafted early in the first round of the NFL draft. None of them materialized.

ourselves position. The best way these teams can save themselves is to be smart in evaluating the talent and character of draft prospects.

There are obvious strands of paternalism that are interwoven with the arguments given in support of The Rule. One might argue that these athletes should not be allowed to play until they reach a certain level of objective maturity. Coming out too early will ruin their careers. It is an undoubtedly a logical argument that, for most players, rings true. But should this be the NFL's decision to make? Is it a smart decision to allow the NFL to make a blanket rule that affects all players?

No, the NFL should not stand in the way of individual choice, no matter how much they believe their opinion is right. People should be allowed to choose their own path in life. If they fail, if they did not do everything possible to succeed, the fault lies with them. In my opinion, America is very reticent to adopt a paternalistic orientation towards people's vocation. Indeed, setting race and class aside, America generally has egalitarian principles regarding employment. The NFL should align itself with this traditional American principle as opposed to adopting a policy that excludes even those players that are capable.

VII. THE RULE HURTS THE NFL

The NFL has already reached dominance in America. The next step is to market the league around the world. It is, however, an arduous task. The biggest obstacle the NFL has in selling its product to international consumers is that the NFL does not have star power. That is, without popular players to sell in foreign markets, the NFL will not have great success internationally. To be sure the NFL does have great players, the NFL just does not sell them to the extent that other leagues do. The NBA, for instance, is able to market its game around the world because they have actively sold their most prominent players. The NFL, conversely, sells teams.[135] The NBA, during the 1992 Olympics in Barcelona, advanced the popularity of basketball greatly with The Dream Team.[136] Admittedly, American football is not an Olympic sport, so the NFL does not have that wonderful

135. The saying is that the NFL sells the jerseys and the NBA sells the players. The saying stems from the diverging marketing strategies between the two leagues. The NBA sells the fans their stars, and the NFL its teams.

136. Jack McCallum, *USA Inc. The High-flying Americans Are Also Scoring Big in the Marketing Game*, SPORTS ILLUSTRATED, July 1992 at 124. The Dream Team was the name given to the 1992 USA Men's Olympic team.

opportunity to sell its game in a global competition. The point, however, is that showcasing your players to the world is a requisite to expanding the game into foreign countries.

The NFL has already begun the process of garnering more revenue internationally. The creation of NFL Europe was a big step in augmenting the popularity of the league in Europe. The NFL Europe is a developmental league for NFL teams. Teams send players to the league to gain experience. The NFL also played its first regular season game out of the country in 2005.[137] That contest, featuring the San Francisco 49ers and the Arizona Cardinals set the league's record for attendance at 103,467 in Mexico City's Azteca Stadium.[138] But, as ESPN's Len Pasquerelli notes, "the NFL still isn't as global a professional sports entity as, say, the NBA, and might never be."[139]

Here is where The Rule comes in. People are fascinated with young athletes with impressive talent. It is compelling to see a nineteen-year-old kid compete against thirty-year-old men and excel. Few things in sports are as instinctively captivating. It is the Lebron James effect.[140] Young players are so hyped up that, before their first game, they are already marketable stars. Indeed, they are so marketable that people want to tune in just to see what the hype is about. With these, essentially ready made stars, the NFL increases its ability to sell its product overseas. The NFL is a few stars away from making a significant splash into the global market.

The argument is not that, with The Rule abrogated, offshore markets will suddenly and miraculously open up. The argument is that, with a few of young prodigy-esque players, it will be easier to sell the game abroad. It is not the panacea to the problem, but having young stars in the NFL will help in advancing the game into other countries. It will also increase the NFL's popularity here, but the NFL's more imperative task in expanding is global. With a slight marketing shift, a shift that attempts to sell its players more, the NFL will make better headway into the global market.

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137. Len Pasquarelli, *Hali Among Many African Born Players Drafted*, Espn.com, May 5, 2006, *available at* http://pwxy.espn.go.com/nfl/columns/story?columnist=pasquarelli_len&id=2434221 (last visited Nov. 14, 2006).

138. *Id.*

139. *Id.*

140. Lebron James is a guard for the Cleveland Cavaliers. He was drafted straight from high school and became an instant fan attraction, in large part due to his young age.

In addition to helping the NFL in a pecuniary capacity, gaining popularity in foreign countries also helps in procuring talent from other countries, increasing the league's talent pool. Also, it gives countries a player to root for which feeds back in to increasing the league's popularity around the world. Currently, the overwhelming majority of players come from America. The league does have players coming from a wide range of countries, particularly those in Africa and the American Samoa.[141] To be sure, there have been recent strides in the ethnic diversification of NFL players, but with increased popularity abroad, those strides can be dwarfed.

VIII. CONCLUSION

The duty of fair representation mandated by federal labor laws with regards to age eligibility does not operate in any fashion consistent with the word fair. A union arguing on behalf of employees should have to advocate against an eligibility requirement if it wants to meet the requirement of fair representation. It cannot, as here, acquiesce. Such a union stance would violate the theoretical principles of the veil of ignorance – a theory adopted[142] to arrive at a true sense of fairness and justice. Moreover, the NFL proffers flawed policy arguments in favor of The Rule. Indeed, each and every reason the NFL gives for maintaining The Rule is fundamentally flawed. Finally, the NFL does itself a disservice by not abating their age restriction. Without The Rule, the NFL will place itself in a better position to garner international popularity, a paramount concern for the league.

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141. *See* Pasquarelli, *supra* note 137.

142. The "Veil of Ignorance" has been used countless times in legal literature to make various arguments from fairness in the health care industry to duties of professionalism. *See* Russell Korobkin, *Determining Health Care Rights from Behind a Veil of Ignorance,* 1998 U. ILL. L. REV. 801 (1998); Susan R. Martyn, *Professionalism: Behind a Veil of Ignorance,* 24 U. TOL. L. REV. 189 (1992).