



2006

Comment: Critique of the Veil of Fair Representation

Michael Hayes

University of Baltimore School of Law, mjhayes@ubalt.edu

Follow this and additional works at: <http://scholarworks.law.ubalt.edu/lf>



Part of the [Law Commons](#)

Recommended Citation

Hayes, Michael (2006) "Comment: Critique of the Veil of Fair Representation," *University of Baltimore Law Forum*: Vol. 37: No. 1, Article 4.

Available at: <http://scholarworks.law.ubalt.edu/lf/vol37/iss1/4>

This Article is brought to you for free and open access by ScholarWorks@University of Baltimore School of Law. It has been accepted for inclusion in University of Baltimore Law Forum by an authorized administrator of ScholarWorks@University of Baltimore School of Law. For more information, please contact snolan@ubalt.edu.

COMMENT

CRITIQUE OF THE VEIL OF FAIR REPRESENTATION¹

By: Professor Michael Hayes

Mr. Brando Simeo Starkey (“Mr. Starkey”) disapproves of age-related restrictions on eligibility to play professional sports.² “Disapproves” actually understates his position. At various points, Mr. Starkey calls such restrictions “unjust” and “irrational.”³ Until two years ago, Mr. Starkey would have been well-justified in calling such age-related restrictions most likely illegal.

In what has become known as the “Spencer Haywood case⁴,” the player of that name challenged then-existing bylaws of the National Basketball Association (“NBA”) that barred anyone from playing in the NBA until four years after he, or his high school class, graduated from high school.⁵ A federal trial judge, and then Supreme Court Justice William O. Douglas, held that Mr. Haywood was entitled to a “preliminary injunction,” permitting him to play for an NBA team, because he raised a significant question whether the NBA’s four years after high school rule violated the Sherman Antitrust Act.⁶ Mr. Haywood ultimately won on the merits, as a federal district court held that the NBA’s age-related restrictions constituted an illegal “group boycott” forbidden by the Sherman Antitrust Act.⁷ The decision opened the door not only to Mr. Haywood, but to scores of basketball players who joined NBA teams after fewer than four years of college play,⁸ and even to players who came to the NBA immediately from high school.⁹

-
1. Brando Simeo Starkey, *The Veil of Ignorance: Maurice Clarett v. NFL*, 37 U. BALT. L.F. (forthcoming Fall 2006).
 2. *Id.*
 3. *Id.*
 4. Haywood v. Nat’l Basketball Ass’n, 401 U.S. 1204 (1971).
 5. *Id.* at 1204-05.
 6. *See id.* at 1204-07.
 7. *See* Denver Rockets v. All-Pro Mgmt., Inc., 325 F. Supp. 1049, 1066-67 (C.D. Cal. 1971).
 8. Some Hall of Famers like Michael Jordan and Magic Johnson had fewer than four years of college play.
 9. Stars like Kevin Garnett, Kobe Bryant and LeBron James came to the NBA immediately after high school and less stellar players like Kwame Brown, Taj McDavid and Leon Smith did the same. *See* Mark Alesia, *Age-Old Question: for NBA Draft Picks, How Young Is too Young?*, INDIANAPOLIS STAR, June 23, 2004, at D1.

The National Football League (“NFL”) also has an age-related restriction on player eligibility -- that no person may play in the NFL until three football seasons have elapsed after he or his “high school class” has graduated from high school.¹⁰ Mr. Starkey’s article refers to this restriction as “The Rule.”¹¹ As Mr. Starkey explains, the legal validity of The Rule came into question when it was challenged by former Ohio State running back, Maurice Clarett.¹² There, a federal district court judge held that The Rule violated antitrust laws and was not covered by exemptions to those laws.¹³ As of February 2004, when the district court rendered the *Clarett* decision, it seemed that the NBA, the NFL, and presumably every other professional sports league could not legally maintain age-related restrictions on player eligibility.

Since then, the tide has turned. Later in 2004, as Mr. Starkey discusses, the United States Court of Appeals for the Second Circuit reversed the district court decision in the *Clarett* case, and upheld The Rule as lawful.¹⁴ The Second Circuit reasoned that The Rule did not violate antitrust laws because it was protected by the “nonstatutory exemption” to antitrust law.¹⁵ Under that exemption, market restrictions, like The Rule, are immune from antitrust challenge when they stem from a collective bargaining relationship between an employer or group of employers and the union that represents the employees of the employer(s).¹⁶

Since the Second Circuit’s decision, both the NFL and NBA have included age-related eligibility restrictions in the collective bargaining agreements they have negotiated with the unions representing their players. The new collective bargaining agreement negotiated between the NBA and the NBA Players’ Association in the Summer of 2005 included a section providing that, to be eligible to play in the NBA, a player must attain nineteen years of age in the calendar year in which the draft is held, and that at least one NBA season has elapsed since the player, or his high school class, graduated from high school.¹⁷ In

10. See *Clarett v. Nat’l Football League*, 306 F. Supp. 2d 379, 385-86 (S.D.N.Y. 2004), *rev’d*, 369 F.3d 124 (2d Cir. 2004).

11. Starkey, *supra* note 1 (forthcoming publication).

12. See *Clarett*, *supra* note 10 at 382.

13. See *id.* at 390-97 (finding exemptions inapplicable); *id.* at 404-11 (finding The Rule violates antitrust law given no exceptions apply).

14. See *Clarett v. Nat’l Football League*, 369 F.3d 124, 125 (2d Cir. 2004).

15. *Id.* at 138-42.

16. *Id.* at 134-35.

17. See National Basketball Players Association, NBA Collective Bargaining Agreement Art. X: Player Eligibility and NBA Draft, available at http://www.nbpa.com/cba_articles/article-X.php (last visited Oct. 29, 2006).

March 2006, in negotiations to revise and extend (for six years) the collective bargaining agreement between the NFL and the NFL Players' Association the parties formally incorporated The Rule into their agreement.¹⁸ In all likelihood, the NFL and the NBA were inspired by the Second Circuit's *Clarett* decision to negotiate their eligibility restrictions into their contracts with their players' unions to make certain those restrictions were covered by the labor exemption and therefore safe from challenge under the antitrust laws.¹⁹

Mr. Starkey strongly criticizes the current state of the law, where the labor exemption makes legally valid the professional sports leagues' restrictions on player eligibility. Mr. Starkey, however, does not aim his attack at the labor *exemption*, at least not directly. This is probably wise, given that there are already dozens of law journal articles discussing whether the Second Circuit was correct in *Clarett* in ruling that the labor exemption applied to the NFL's eligibility rule.²⁰ Mr. Starkey instead contends that the labor laws, if properly interpreted and applied, should forbid an age-related eligibility restriction from ever emerging from a collective bargaining relationship between an employer and a union.

The key legal principle that Mr. Starkey employs to support his argument is a union's legal "duty of fair representation" to the employees it represents. Mr. Starkey correctly describes the legal standards on fair representation, noting the duty is breached only

-
18. See Mark Maske, *New Deal Limits Disciplinary Action*, WASH. POST, Mar. 10, 2006, at E3.
 19. See *id.* (stating union negotiator for the NFL players union describes inclusion of eligibility rule in contract as "formally clos[ing] the Maurice Clarett loophole"); see Kevin J. Cimino, Note, *The Rebirth of the NBA - Well, Almost: An Analysis of the Maurice Clarett Decision and Its Impact on the National Basketball Association*, 108 W. VA. L. REV. 831, 833 (2006) (arguing convincingly that the *Clarett* case was the reason that the NBA negotiated eligibility restrictions into the collective bargaining contract with the players union).
 20. In a LEXIS search on September 30, 2006, the author found more than thirty law review articles discussing the Second Circuit's decision in the *Clarett* case. E.g. Jason Abeln, Chris Brown & Neil Desai, Comment and Casenote, *Lingering Questions After Clarett v. NFL: A Hypothetical Consideration of Antitrust and Sports*, 73 U. CIN. L. REV. 1767 (2005); Peter Altman, Note, *Stay Out for Three Years After High School or Play in Canada - and for Good Reason: An Antitrust Look at Clarett v. National Football League*, 70 BROOK. L. REV. 569 (2004); Walter Champion, *Clarett v. NFL and the Reincarnation of the Nonstatutory Labor Exemption in Professional Sports*, 47 S. TEX. L. REV. 587 (2006); Jeffrey Hoffmeyer, *Fourth Down and an Appeal: The Nonstatutory Exemption to Antitrust Law in Clarett v. National Football League*, 13 SPORTS LAW. J. 193 (2006); Michael Scheinkman, Comment, *Running Out of Bounds: Over-Extending the Labor Antitrust Exemption in Clarett v. National Football League*, 79 ST. JOHN'S L. REV. 733 (2005).

when a union's conduct toward a represented employee is "arbitrary, discriminatory, or in bad faith" and that unions are accorded a "wide range of reasonableness" in their representative functions, especially when negotiating agreements. Even though these standards are very deferential to unions, Mr. Starkey asserts that age limits are so unfair that a union violates its fair representation duty by "agreeing" to them.

Assuming for the moment that a union's agreement to an age limit is a breach of its duty of fair representation, that finding would not deliver the result Mr. Starkey wants – removal of such age limits in professional sports. The NFL and NBA could, and in the past have, established age-related eligibility restrictions without getting their players' unions to agree to them. Both the NFL and NBA had such restrictions in their policies before they ever bargained about them with their players' unions.²¹ If one of these employers proposed to the union that the employer be able to retain its eligibility restrictions, or even expand them, then the employer could add those restrictions as terms of employment, even if the unions never agreed to them, as long as the employer bargained to "impasse" with the union over those restrictions.²² Moreover, the United States Supreme Court has held that the labor exemption to antitrust applies to a term that an employer unilaterally implements after impasse, even if the union never agreed to it.²³ Given these legal rules, even if Mr. Starkey were absolutely correct that a union's duty of fair representation precludes it from ever agreeing to an age limit on player eligibility, the NFL, the NBA, and any other professional sports employers could still establish such limits.

At one point, Mr. Starkey seems to acknowledge that a union does not really control whether age limits will be put in place. Mr. Starkey states that the duty of fair representation requires that the NFL players' union should "at least have to challenge" an NFL proposal to impose age limits, and argues that any union that "fails to fight" against age limits is violating its duty. Significantly, Mr. Starkey fails to identify

21. See Scott R. Rosner, *Must Kobe Come Out and Play? An Analysis of the Legality of Preventing High School Athletes and College Underclassmen from Entering Professional Sports Drafts*, 8 SETON HALL J. SPORT L. 539, 550-51 (1998) (discussing the history of the NBA's eligibility rule). *Clarett*, 369 F.3d at 126 (discussing the origins of the NFL's eligibility rule).

22. See Stephen D. Buchholz, Comment, *Run, Kick, and (Im)passe: Expanding Employers' Ability to Unilaterally Impose Conditions of Employment after Impasse in Brown v. Pro Football*, 81 MINN. L. REV. 1201, 1207 & n.34 (1997) (explaining the legal rules on implementing terms after bargaining to impasse).

23. See *Brown v. Pro Football Inc.*, 518 U.S. 231, 243-48 (1996).

the means by which unions are obligated to “challenge” and “fight” such limits. Given an employer's power to establish and change employment terms over a union's most strenuous objection, the only way to stop terms from going into effect is for the workers to refuse to work under them, i.e. to go on strike. Is Mr. Starkey insisting that professional sports unions are violating their legal duties unless they go on strike and cancel games and maybe even seasons, to stop age limits? Almost all unions' by-laws require them to submit a decision to strike to their members for a vote.²⁴ It's highly probable that the hundreds of NFL players already on NFL teams, if asked by their union to give up their income and even risk being replaced in order to stop the NFL from setting an age limit on joining those teams, would overwhelmingly reject going on strike for that purpose. Does Mr. Starkey believe that a union would breach its duty of fair representation by abiding by such a majority vote?

Although these are fair questions in the face of Mr. Starkey's sweeping pronouncements on fair representation, the hypotheticals are extreme in comparison with what the NFL and NBA players' unions actually did with regard to age limits in the past year. Both unions in fact agreed to include age limits in their agreements in 2005 and 2006, respectively.²⁵ Is a union's agreement to an age limit a breach of its duty of fair representation? To support his argument that it is, Mr. Starkey relies on the concepts of “Rules of Justice” and “Veil of Ignorance” set forth by the late philosopher John Rawls' in his classic book, *A Theory of Justice*²⁶. Applying those principles, Mr. Starkey contends that no person (or organization) would establish or agree to an age limit for eligibility to play a professional sport.

As an admirer of Professor Rawls and his book, I am always interested in applications of his ideas to different situations. Mr. Starkey's proposal to apply Rawlsian principles to collective bargaining is fascinatingly provocative, and dramatic in its implications. Unfortunately, it is also inappropriate. It simply makes no sense to apply Rawlsian principles to bargaining between employers and unions. Professor Rawls himself maintained that the responsibility for setting the rules for allocation of resources rested

24. See David Westfall & Gregor Thüsing, *Strikes and Lockouts in Germany and Under Federal Legislation in the United States: A Comparative Analysis*, 22 B.C. INT'L & COMP. L. REV. 29, 60 (1999).

25. See *supra* note 10, 11.

26. JOHN RAWLS, *A THEORY OF JUSTICE*, (The Belknap Press of Harvard Univ. Press 1971).

exclusively with political institutions, i.e. governments.²⁷ As Mr. Starkey rightly points out, Rawls' question is, "To ask what rules would people behind the veil of ignorance adopt."²⁸ However, in collective bargaining, unions do not play the role of "adopting" rules. If they did, the unions probably would say, "Yes, everyone age eighteen or older should be eligible to play." They also would say "yes" to questions about whether every player should have generous health, retirement, and disability plans, and generous compensation in general, and limits on the employer's power to "cut" or otherwise terminate him. But a union cannot itself make any of those things happen. It has to persuade or pressure the employer to provide them. And in collective bargaining, an employer does not go through each item and say to the union, "Do you want A, do you want B, do you want C?" In effect, the employer asks the union, "Which of these items do you want the most, and what items are you willing to give up or trade to get those most desired items?"²⁹

At one point, Mr. Starkey sets forth his view of how a union should go about determining appropriate age standards. However, that is not the way in which the issue is posed to the union in bargaining. Instead, age restrictions are just one of dozens of issues, all arrayed before the union at the same time. Any union knows that whenever it pushes for a particular result on one issue (e.g. eliminating age restrictions), it is reducing the likelihood of obtaining its desired result on another issue.³⁰ Even if one were to put the "veil of ignorance" over the union, so it is unaware of considerations that Rawls would deem impermissible (such as which types of players have the most political power in the union), it would not necessarily follow that abolishing age restrictions would deserve the highest priority among all the bargaining demands the union could make. It would not even necessarily comply with another Rawlsian principle that Mr. Starkey mentions-- that rules should be arranged to most benefit those who are

27. See Peter Levine, *The Legitimacy of Labor Unions*, 18 HOFSTRA LAB. & EMP. L.J. 529, 536 (2001).

28. John Kilcullen, *Rawls: The Original Position*, 1996, available at <http://www.humanities.mq.edu.au/Ockham/y64L13.html> (last visited Oct. 16, 2006).

29. See generally, National Football League Players Association Collective Bargaining Agreement, available at http://www.nflpa.org/CBA/CBA_Complete.aspx (last visited Oct. 14, 2006).

30. See Douglas H. Blair & David L. Crawford, *Labor Union Objectives and Collective Bargaining*, 99 Q. J. ECON. 547 (1984). See Eileen Silverstein, *Union Decisions on Collective Bargaining Goals: A Proposal for Interest Group Participation*, 77 MICH. L. REV. 1485 (1979). Both articles discuss how unions, in bargaining, must prioritize among issues.

the least advantaged. Are players who must defer beginning their NFL careers for one to three years really the “least advantaged” persons affected by the union’s bargaining? Are they less advantaged than players, of whom there are always dozens in the NFL, who are at risk of having their NFL careers ended forever after only a year or two of play? Are the “deferred” players less advantaged than injured players, or long-term disabled players, who are among the categories of players that the union represents? These would be difficult and important questions even if the union had the power to set all the terms for NFL players. When adding in the complication that the union does *not* have that power, and can only try to obtain from the employer the best terms it can for *all* the employees it represents, then it becomes clear how unreasonable it is to conclude that a union violates its duty of fair representation if it agrees to an age-related eligibility restriction.

Although I disagree with the means Mr. Starkey proposes for removing age limits, I agree with him that they should be abolished. I also agree that Rawls’ *Theory of Justice*³¹ supports his conclusion. Taking the issue out of the realm of collective bargaining (as I think it should be), the question becomes what kinds of rules we would adopt as members of society, if we were forced to stand behind the veil of ignorance. With regard to rules on eligibility to perform a vocation, I think a very good Rawlsian case could be made for concluding we would never, on account of a person’s age, adopt a rule barring a person from performing a vocation when he or she is perfectly competent at performing that vocation. There are many signs in Mr. Starkey’s article that it is really this type of universal, *per se* prohibition on age-related eligibility restrictions that he believes should be the law.

As explained above, labor law is *not* the appropriate source for such a prohibition on age limits. The real issue seems to be discrimination, and there are laws against age discrimination.³² Unfortunately, federal law prohibits discrimination only against *older* workers, specifically those aged forty or older.³³ However, the laws of the State of Maryland provide a possible path to the objective that Mr. Starkey seeks. Maryland’s law against age discrimination does *not* specify a

31. Rawls, *supra* note 26.

32. See MARK A. ROTHSTEIN et. al. EMPLOYMENT LAW § 2.38 (3d ed. 2004).

33. See 29 U.S.C. § 631(a) (2000) (limiting the coverage of the Age Discrimination in Employment Act to “individuals who are at least forty years of age”).

minimum age requirement,³⁴ and Maryland's law makes it illegal for an employer to "fail or refuse to hire . . . any individual . . . because of such individual's . . . age."³⁵ The age-related eligibility restrictions of the NFL (and NBA) seem vulnerable to a challenge under this Maryland law against age discrimination. Perhaps someday, a talented young football player who wants to join the Baltimore Ravens will sue to strike down The Rule as discriminatory, and thus take a major step towards abolishing age-related eligibility restrictions from professional sports.

34. See State of Maryland Commission on Human Relations, *What You Should Know About Age Discrimination*, at 1, available at <http://www.mchr.state.md.us/brochures/AgeDiscweb.pdf> (last visited Oct. 14, 2006).

35. MD. CODE ANN., Discrimination in Employment § 16(a)(1) (West 2006).