



Collectively Bargained Age/Education Requirements: A Source of Antitrust Risk for Sports Club-Owners or Labor Risk for Players Unions?

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With both the NFL and NBA collective bargaining agreements expiring in 2011,³ America's two premier winter sports leagues will soon need to renegotiate their terms and conditions of employment.⁴ In doing so, both leagues' club-owners and players associations will bargain over the rules governing player eligibility, including their age/education requirements.⁵

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3. See *NFL Lockout Looming Large*, CINCINNATI ENQUIRER, Mar. 21, 2010, at C1 (noting that the NFL Collective Bargaining Agreement expires in March 2011); Nat'l Basketball Ass'n, Collective Bargaining Agreement, Art. 39, § 1 (2005), available at <http://www.nbpa.org/sites/default/files/ARTICLEXXXIX.pdf> (noting that the NBA collective bargaining agreement, unless extended, remains in effect through June 30, 2011); Mark Heisler, *Lockout Just a Rumor: Both Sides Really Have Too Much to Lose when Contract Ends in 2011*, CHI. TRIB., Feb. 28, 2010 (noting the NBA Collective Bargaining Agreement expires on July 1, 2011).

4. See *Playing Hardball: Get Ready for an Extremely Rare Collective Bargaining Confluence in Sports*, CORPORATE COUNSEL, Apr. 7, 2010, at 7.

5. See *id.* (noting as an important issue in the NBA labor talks "[r]aising the minimum age at which players may enter league.>").

Sports leagues' age/education requirements have long been a source of contention.⁶ Until recently, most leagues imposed their age/education requirements outside the scope of collective bargaining.⁷ However, after three courts found unilaterally implemented age/education requirements to violate Section 1 of the Sherman Act,⁸ the NFL and NBA shifted their age/education requirements into the realm of collective bargaining.⁹

Whether these new, collectively bargained age/education requirements likewise violate the law is unclear.¹⁰ In the 2004 case *Clarett v. Nat'l Football League*, the Second Circuit Court of Appeals held that collectively bargained age/education requirements are exempt from antitrust scrutiny under the non-statutory labor exemption, but may be subject to review under labor law's duty of fair representation.¹¹ By contrast, in other circuits, sports leagues' collectively bargained age/education requirements may still violate Section 1 of the Sherman Act if they primarily affect parties outside the scope of the collective bargaining relationship.¹²

This article addresses both the antitrust and labor law risks of sports leagues' collectively bargained age/education requirements. Part I of this article discusses the history of the NFL age/education requirement, beginning with the NFL requirement's inception in the year 1920. Part II discusses the history of the NBA age/education requirement, which emerged many years later. Part III discusses the antitrust risk that sports club-owners assume for enforcing collectively bargained age/education requirements. Finally, Part IV analyzes the labor risk that sports unions incur when they agree with club-owners to implement an age/education requirement.

6. See *infra* notes 18-146 and accompanying text.

7. See *infra* notes 18-146 and accompanying text.

8. See *infra* notes 158-169 and accompanying text.

9. See *infra* notes 92-94 and *infra* notes 130-135 and accompanying text; see also Marc Edelman & C. Keith Harrison, *Analyzing the WNBA's Mandatory Age/Education Requirement from a Legal, Cultural and Ethical Perspective: Women, Men, and the Professional Sports Landscape*, 3 N.W. J. L. & SOC. POL'Y 1, 11-12 (2008) (noting that the WNBA has taken the same action).

10. See, *infra*, notes 147-241 and accompanying text.

11. See *Clarett v. Nat'l Football League*, 369 F.3d 124, 139 (2d. Cir. 2004) ("In seeking the best deal for the NFL players overall, the representative has the ability to advantage certain categories of players over others, *subject of course to the representative's duty of fair representation.*") (emphasis added); but see *id.* (noting in dicta that unions may "seek to preserve jobs for current players to the detriment of new employees").

12. See *infra* notes 181-192 and accompanying text.

I. HISTORY OF THE NFL AGE REQUIREMENT

A. *Origins of the NFL Age Requirement*

In the early days of American professional sports, leagues did not implement age/education requirements.¹³ Thus, it was not unusual for baseball or football players as young sixteen years old to take the field against adult competition.¹⁴

Upon the NFL's founding in 1920, however, four of the league's original club-owners agreed "not to seek the services of any undergraduate college player."¹⁵ Then, in April 1921, all ten of the original NFL club-owners agreed to "abstain from signing [college] players," and "to book no games with teams harboring players still in college."¹⁶

The original NFL clubs agreed not to sign undergraduate players in deference to college football coaches.¹⁷ At the time, the college football industry was far more powerful in the United States than the NFL.¹⁸

13. See *infra* notes 13-16 and accompanying text. The era of modern American sports leagues began in 1876 with the founding of baseball's National League. Although there were many sports associations in the United States before the National League, the National League was the first modern sports league because it was first to establish core elements of central coordination such as a formal league schedule. See Marc Edelman, *Why the 'Single Entity' Defense Can Never Apply to NFL Clubs: A Primer on Property-Rights Theory in Professional Sports*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 891, 898-99 (2008); see also MICHAEL LEEDS & PETER VON ALLMEN, *THE ECONOMICS OF SPORTS* 5 (2002).

14. See *Tenure and Age Records*, BASEBALL-ALMANAC.COM, http://www.baseball-almanac.com/recbooks/rb_ten1.shtml (describing Frank "Piggy" Ward's Major League debut for the Philadelphia Quakers at the age sixteen on June 12, 1883) (last visited Apr. 15, 2011); see also Ken Delinger, *The Evolution of Younger Athletes in Professional Sports*, L.A. TIMES, Apr. 22, 1990, at C10 ("The first professional football player was a 16-year-old high school star recruited-for \$10-by a YMCA team in western Pennsylvania as an emergency fill-in at quarterback.").

15. PRO FOOTBALL RESEARCH ASSOCIATION RESEARCH, *ASSOCIATING IN OBSCURITY 1920*, at 3, available at http://www.profootballresearchers.org/Articles/Associating_In_Obscurity.pdf (internal citations and quotations omitted) (noting this agreement was between the four clubs based in Ohio).

16. *New Professional Football Body Looks Stronger than Old; No Hopping by Players*, CANTON DAILY NEWS, May 2, 1921 (no page number available). Then, in the following January, the NFL club-owners passed a rule requiring that "each club must post a guarantee of \$1,000" that would be forfeited if the club signed a college or otherwise ineligible player. *Pro Grid Association Prohibits Playing of Undergraduate Stars*, WASH. POST, Jan. 30, 1922 (no page number available).

17. *New Professional Football Body Looks Stronger than Old; No Hopping by Players*, *supra* note 16.

18. Cf. Marc Edelman & David Rosenthal, *A Sobering Conflict: A Call for Consistency in the Message Colleges Send About Alcohol*, 20 FORDHAM INTELL. PROP.

NFL club-owners thus wanted to avoid any confrontation with college football that could lead to a public relations battle.¹⁹

B. Early Non-Compliance with the NFL Age/Education Requirement

In the NFL's early years, the punishment for violating the age/education requirement was banishment from the league.²⁰ This penalty, however, was only enforced once, in 1921, after the "original" Green Bay Packers lured several players from Notre Dame University's football roster onto their club.²¹

On several other occasions, the NFL club-owners turned a blind eye toward clubs that signed college students.²² For instance, in November 1921, the NFL's Philadelphia club signed Penn State University halfback Glenn Killinger even though Killinger's scheduled graduation date was not until January 1922.²³ No punishment was ever imposed.

Then, in late November 1925, Chicago Bears owner George Halas signed University of Illinois running back and emerging national icon Harold "Red" Grange, even though Grange's anticipated college graduation date was not until May 1926.²⁴ Again, the NFL did not impose any punishment.

C. College Football's Response to Red Grange's NFL Arrival

Grange's arrival into the NFL was a major source of pride for the startup football league, and thus the Bears were willing to pay significantly for his services.²⁵ With the help of renowned entertainment agent C.C. Pile, Grange signed an initial player contract that paid him over \$10,000 per game—more than any other player in the league.²⁶

MEDIA & ENT. L.J. 1389, 1398-1402 (2010) (discussing the early years in college football in the United States).

19. See generally *New Professional Football Body Looks Stronger than Old*, *supra* note 16 (no page number available).

20. *Pro Grid Association Prohibits Playing of Undergraduate Stars*, *supra* note 16.

21. *Pro Grid Association Prohibits Playing of Undergraduate Stars*, WASH. POST, Jan. 30, 1922 (no page number available).

22. See *infra* notes 23-24 and accompanying text.

23. See *Pro Grid Association Prohibits Playing of Undergraduate Stars*, *supra* note 16 (no page number available) (noting the Philadelphia club-owners defended their signing to the other NFL clubs by explaining that Killinger had already signed a professional baseball contract with the Jersey City Skeeters and thus was no longer eligible for college athletics).

24. Ira Berkow, *Sports of the Times: The Lure of the Pros*, N.Y. TIMES, Mar. 2, 1984, at A21.

25. See *infra* notes 26-27 and accompanying text.

26. See Westbrook Pegler, *And How Is One Red Grange to Escape the Curse of Cash*, CHI. TRIB., Nov. 20, 1925, at 27 (noting Grange's hire at a salary of "\$10,000 a

Grange was then immediately placed into the Bears starting lineup, beginning with his Thanksgiving Day debut against the Chicago Cardinals, in which he rushed for 92 yards, returned punts for 56 yards, and intercepted an important pass on defense to help preserve a 0-0 tie.²⁷ He also immediately helped improve NFL game attendance, with almost every one of his 1925 games selling out the home team's stadium.²⁸

Many leaders in college football, however, were disappointed by Grange's decision to turn professional.²⁹ Grange's decision to turn professional was taken especially hard by his former college football coach Bob Zuppke and other leaders of the Big Ten college football conference.³⁰

In the days following Grange's signing, Zuppke told the *Chicago Tribune* that he believed Grange was too "green" for professional football and that the Bears were merely trying to make "their own fortunes out of [Grange's] fact and talent."³¹ Meanwhile, University of Michigan athletic director Fielding Yost told the *Chicago Tribune* that he believed Grange should return to college and become an actor or a journalist, rather than an NFL player.³² Both of these statements seem intended to disparage the NFL football product rather than truly advise Grange on his career path.³³

In the days that followed Zuppke and Carr's criticism of Grange, Big Ten Commissioner Major John J. Griffith urged for a meeting with NFL Commissioner Joe Carr.³⁴ Aware of the NFL's unenforced

game"); *Red Arrives Today to Sign on Pro Team*, CHI. TRIB., Nov. 22, 1925, at A2 (noting that under the terms of his Grange's unique six-game services contract, the Bears agreed to pay Grange \$2,000 per contest, plus approximately 45 percent of all gate proceeds that exceeded the clubs' average game revenues of \$14,000); *see also* Irving Vaughan, *Illini Star in Bears' Lineup Thanksgiving*, CHI. TRIB., Nov. 23, 1925, at A2; *Grange Brings Surge of Life to Pro Game*, CHI. TRIB., Nov. 26, 1925, at 29 (noting that the gate for Grange's debut was anticipated at \$50,000).

27. *See Grange's Debut on Thanksgiving*, PRO FOOTBALL HALL OF FAME, <http://www.profootballhof.com/story/2005/1/1/2084/> (last visited Oct. 20, 2010).

28. *See infra* notes 30-35 and accompanying text.

29. *See infra* notes 30-35 and accompanying text.

30. *See Zuppke Rebukes Grange; Warns of Danger Ahead: Red's His Last \$100,000 Player, He Says*, CHI. TRIB., Nov. 20, 1925, at 27.

31. Westbrook Pegler, *All How Is One Red Grange to Escape the Curse of Cash*, CHI. TRIB., Nov. 19, 1925, at 21.

32. *See id.* ("Mr. Yost of Michigan has urged Grange to take up journalism or the speechless drama if he feels that he must lend his name to some public work.").

33. *See generally supra* notes 31-32 and accompanying text.

34. *See* Walter Eckersall, *Intersectional Games Sought from Big Ten*, CHI. TRIB. Nov. 30, 1925, at 29.

age/education requirement, Griffith vowed to ensure that “some action will be taken to curb repetition of Grange’s action.”³⁵

D. The Griffith-Carr Meeting

While the details of Griffith’s meeting with Commissioner Carr are not publicly available, the result of the meeting was clear. Thereafter, the NFL club-owners agreed to ratify a formal bylaw forbidding any club-owner from “induc[ing] any college player to engage in professional football.”³⁶ This bylaw, which took immediate effect, also included a promise from all NFL club-owners to show “support to college authorities in maintaining the advancing interest in college football and in preserving the amateur standing of all college athletes.”³⁷

E. Enforcement of the NFL’s Age/Education Requirement (1926-1989)

With the NFL’s age/education agreement consecrated into the league bylaws, the NFL club-owners then proceeded to accomplish what they had not done previously: enforce their own requirement.³⁸

The responsibility for enforcing the NFL age/education requirement initially belonged to the individual club-owners.³⁹ However, by 1935 this responsibility had shifted to the NFL commissioner, who also became responsible for overseeing the league’s new first-year player draft.⁴⁰

Under the NFL commissioner’s oversight, the league strictly enforced its age/education requirement through the 1989 season.⁴¹

35. *Id.*

36. See ARTHUR DALEY, PRO FOOTBALL’S HALL OF FAME 180 (1963), available at <http://www.archive.org/details/profootball/shall007368mbp>; see also William Johnson, *A Legal License to Steal the Stars: Two of Basketball’s Best Undergraduates Turn Pro, Others May, and Football is in Trouble, Too, Following a Court Decision*, SPORTS ILLUSTRATED, Apr. 12, 1971, available at <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1084736/index.htm> (“It is true that the so-called four-year rule has been in effect since the days of Red Grange.”).

37. Johnson, *supra* note 36. Under this declaration, the NFL club-owners further agreed that should any club-owner attempt to sign a player that the NFL commissioner deemed ineligible, that the offending club would be fined a minimum of \$1,000, and run the risk of termination of their franchise. See *id.*

38. See *infra* notes 40-41 and accompanying text.

39. See *infra* notes 40-41 and accompanying text.

40. *Mackey v. Pro Football Inc.*, 593 F.2d 1173, 1175 (D.C. Cir. 1978) (noting that the primary purpose of the NFL draft was to promote on-the-field competitive balance among the clubs).

41. Johnson, *supra* note 36 (noting that football’s age/education requirement has been “in general quite rigidly observed even by the most avaricious and ambitious sharks.”). It is worth noting, however, that on a few occasions where an NFL

During this time, only two players received special exemptions from the age/education requirement.⁴² First, in 1964, NFL Commissioner Pete Rozelle permitted 19-year old running back Andy Livingston to sign with the Chicago Bears.⁴³ Rozelle decided to allow Livingston into the league early because he had impregnated his high school girlfriend and thereafter dropped out of school to support his baby.⁴⁴

Then, in 1989, NFL Commissioner Paul Tagliabue allowed Oklahoma State University running back Barry Sanders to join the NFL one year ahead of schedule.⁴⁵ In Sanders' case, the previous season he had won the Heisman Trophy—an award given annually to the most outstanding college football player.⁴⁶ He subsequently sent a 14-page petition to the NFL commissioner, seeking to skip his senior year of college based on his on-the-field football success, his family's limited economic resources, and Oklahoma University's NCAA sanctions that prevented him from appearing in nationally televised college football games.⁴⁷ Commissioner Tagliabue granted Sanders' petition for these reasons.

commissioner had failed to recognize a player's draft eligibility, the league commissioner has alternatively prevented negotiating with that player until he reached the appropriate age or educational status. See Tony Green, *Ex-NC State Star Seeks Way Into the NFL*, GREENSBORO NEWS & RECORD, Jan. 31 1991, at D1 (noting that the NFL's Cleveland Browns selected fullback Cookie Gilchrist directly out of high school in a mid-1950s NFL draft, however, the NFL deferred his league entry until he was appropriate age. Gilchrist thus went and played in Canada from 1954 through 1961.).

42. See *infra* notes 43-44 and accompanying text.

43. See *Bears Revamp Alignment for Cardinals*, CHI. TRIB., Aug. 27, 1964, at § 3, 6; see also Dennis Dodd, *Livingston Precedent Backs High School-To-NFL Jump*, CBS Sports.com, Feb. 10, 2004, available at <http://www.cbssports.com/nfl/story/7078177;50,173> *Watch Cards Defeat Bears 7-3*, CHI. TRIB., Aug. 29, 1964, at § 2, 2.

44. Dodd, *supra* note 43.

45. William Nack, *Barry Breaks Away: Dad Said Take the NFL Money and Run, and Barry Sanders, the Heisman Winner, Obeyed*, SPORTS ILLUSTRATED, Apr. 10, 1989, available at <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1068256/index.htm>.

46. See Steve Weiberg & Larry Weisman, *Clarett Files Suit Against NFL Draft Rule*, USA TODAY, Sept. 23, 2003, available at http://www.usatoday.com/sports/college/football/bigten/2003-09-23-clarett-suit_x.htm; see also Jeff Merron, *Best Individual College Football Seasons*, ESPN.com, Dec. 15, 2003, <http://espn.go.com/page2/s/list/collegefootball/seasons.html>.

47. Nack, *supra* note 45, at 24-25. Sanders, who had little money, drove an eight-year old Pontiac with a broken clutch, which was known to have broken down on several occasions including on his way to the Heisman Trophy award ceremony. *Id.*

F. *The NFL Changes its Age/Education Requirement (1990)*

Until 1990, Livingston and Sanders were the only NFL players to receive a formal exemption from the NFL age/education requirement.⁴⁸ However, in 1990 an astounding 40 college juniors petitioned the NFL to enter the league draft early.⁴⁹ One reason for the dramatic increase in the NFL's early-entry requests was the fear that an NFL salary cap would begin the following season.⁵⁰ Another was Barry Sanders' tremendous success as an NFL rookie in 1989—a season in which he rushed for 1,470 yards, scored 14 touchdowns, and won the league's Rookie of the Year Award.⁵¹

At first, NFL Commissioner Tagliabue indicated that he would reject all 40 of these early entry requests. However, some of the college juniors who sought to enter the NFL draft purportedly threatened to file an antitrust lawsuit against the league.⁵² In an effort to avoid an antitrust challenge to the league's age/education requirement, the NFL club-owners thus agreed to change their age/education requirement to allow college juniors to enter the draft as long as they formally surrendered their remaining college football eligibility.⁵³

G. *College Juniors and the NFL Draft*

Since the NFL reduced its age/education requirement by one year, many college juniors have declared for the league draft.⁵⁴ In 1990, 28 college juniors declared for the draft, with 18 of them selected by an NFL club.⁵⁵ One junior, University of Florida running back Emmitt

48. See *infra* notes 49-51 and accompanying text.

49. See Mal Florence & Elliot Almond, *NFL Draft May Face Challenge: Football: Top College Underclassmen are Considering Skipping Senior Seasons Because of Possible Rookie Salary Cap in 1991*, L.A. TIMES, Dec. 19, 1989, available at http://articles.latimes.com/1989-12-19/sports/sp-503_1_nfl-draft; see also Paul Domowitch, *Without College, He's Out to Tackle Football Stardom*, PHILA. DAILY NEWS, Feb. 8, 1991, at 85.

50. See Florence & Almond, *supra* note 49.

51. See M.B. Roberts, *Sanders' Humility Makes him Distinctive*, ESPN.com, <http://espn.go.com/sportscentury/features/00016456.html> (last visited Apr. 15, 2011); see also Florence & Almond, *supra* note 49.

52. See Gerald Eskenazi, *N.F.L. Has 29 Players Listed for Early Draft*, N.Y. TIMES, Feb. 5, 1991, at B9. The threat of such a suit was bona fide given that just six years earlier the United States Football League had its nearly identical age/education requirement overturned on antitrust grounds. See *Boris v. U.S. Football League*, No. Cv. 83-4980 LEW (Kx), 1984 WL 894, at *1 (C.D. Cal. Feb. 28, 1984).

53. See generally Eskenazi, *supra* note 52 (discussing the NFL owners' decision to change their age/education requirement).

54. See *infra*, notes 55-58 and accompanying text.

55. See Eskenazi, *supra* note 52.

Smith, quickly became almost as successful a running back as Barry Sanders.⁵⁶ Recently, Smith earned induction into the Pro Football Hall of Fame.⁵⁷

Last year, a record 53 juniors declared for the NFL draft.⁵⁸

H. *College Sophomores and the NFL Draft*

The 1990 changes to the NFL age/education requirement, however, did not completely end requests by players for special exemptions.⁵⁹ Instead, they have simply opened the door for even younger and less formally educated players to seek entry into the NFL.⁶⁰

1. Eric Swann (1991)

The first prospective NFL player to seek to enter the NFL draft only two years after graduating from high school was Eric Swann—a 6-foot-5 defensive end, who sought to enter the draft in 1991.⁶¹ Swann was a “B” student in high school, who suffered from what his family described as “test anxiety.”⁶² Swann had taken the Scholastic Aptitude Test (“SAT”)

56. See Gene Wojciechowski, *A Very Good Year—To Forget: Aikman was Winless, Woody During Rookie Season, but Cowboys Should be Improved*, L.A. TIMES, Jun. 22, 1991, at 1 available at http://articles.latimes.com/1990-06-22/sports/sp-237_1_troy-aikman (referring to Cowboys first-round pick Emmitt Smith as “a slower version of Barry Sanders”); see also Sam Blair, *Sam Blair’s People*, DALLAS MORNING NEWS, May 12, 1990, at 2B.

57. See Gary Myers, *Rice, Smith Get Hall Call*, N.Y. DAILY NEWS, Feb. 7, 2010, at 65 (discussing Emmitt Smith’s 2010 induction into the pro football Hall of Fame); Bob Brown, *The Pro Football Hall of Fame Class of 2004*, USA TODAY, Aug. 6, 2004 (discussing Barry Sanders’s 2004 induction into the pro football Hall of Fame).

58. See Barry Wilmer, *NFL Draft 2010 Juniors: 53 Underclassmen Eligible for NFL Draft*, THE HUFFINGTON POST, Jan. 19, 2002, http://www.huffingtonpost.com/2010/01/19/nfl-draft-2010-juniors-53_n_428189.html (last visited Apr. 15, 2011).

59. See *infra* notes 61-87 and accompanying text.

60. See *infra* notes 61-87 and accompanying text.

61. See Greg Boeck, *Player Skips School, Seeks NFL Degree*, USA TODAY, Dec. 4, 1990 at 1C; see also Paul Domowitch, *Without College, He’s Out to Tackle Football Stardom*, PHILA. DAILY NEWS, Feb. 8, 1991, at 85.

62. See *Williamson is Named as Bucs Head Coach*, SAN JOSE MERCURY, Feb. 5, 1991, at 3C; see also Boeck, *supra* note 61. (noting that Eric Swann took the SAT exam eight times but could not earn a score above 650, thus making him academically ineligible for college football); Ron Borges, *Twilight Time for Most of the Bay State Titans, the Sun Seemingly has Set on their Careers, but they Cling to a Ray of Hope*, BOSTON GLOBE, July 13, 1990, at 41 (noting that despite Swann’s low SAT score, he was a B student in high school, and he attended a high school without any SAT preparation services); Charles Chandler, *Former Prep Star Taking New Path to NFL*, CHARLOTTE OBSERVER, Aug. 16, 1990, at 1D (noting “test anxiety” as being the source of Swann’s inability to perform well on the SAT).

on eight occasions but never earned the minimum score needed to earn Division I college football eligibility for his freshman season.⁶³

With playing Division I football as a freshman not a feasible option, Swann enrolled in technical school⁶⁴ and began working odd jobs, including a job playing semi-pro football for the Bay State Titans.⁶⁵ After two years of working odd jobs, Swann petitioned NFL Commissioner Tagliabue for permission to enter the NFL draft.⁶⁶

Alongside his parents, Swann met with Commissioner Tagliabue and convinced the commissioner to add his name to the NFL draft roster despite Swann being just two years removed from his high school graduation. Swann thereafter was selected by the Phoenix Cardinals with the sixth overall pick of the 1991 draft.⁶⁷

63. See *Academics to Come Second: NFL is First Choice for Cardinals' Swann*, AKRON BEACON J., Apr. 22, 1991, at B7 (“Swann needed at least a 700 on the Scholastic Aptitude Test to play for the Wolfpack as a freshman. However, he could not reach that score in eight attempts. Swann didn’t care for the prospect of sitting out his first year of college, so he came up with two options: join the Marines or the minor leagues.”); see also Paul Domowitch, *Without College, He’s Out to Tackle Stardom*, PHILA. DAILY NEWS, Feb. 8, 1991, at 85 (“Swann, a 6-4, 315-pound defensive tackle, is one of 29 players who have applied—and been accepted—for early entry into this year’s NFL draft. A couple of things distinguish him from the other 28. One is his age. He’s only 20. The other is that he never has attended college.”); *NFL Draft Enigma: No College Ties*, S.F. CHRON., Feb. 6, 1991, at D7 (“Eric Swann has never played a down of college football. But Swann, a 20-year-old defensive lineman, has successfully petitioned the NFL to be eligible for its draft under a special exemption, and there are scouts who believe that he could be a first- or second-round selection in April.”); *No College But He’s Ready to Enter NFL Rookie Class*, SAN JOSE MERCURY NEWS, Feb. 6, 1991, at 1E.

64. David Teel, *Fierce Area Recruiter Vacates Deacons’ Staff*, DAILY PRESS (Newport News, Va.), Aug. 5, 1989, at D3 (noting that after Swann was deemed academically ineligible for college football at North Carolina State University, he enrolled at Wake Technical Community College).

65. *Draft Dream*, PITTSBURGH POST-GAZETTE, Aug. 17, 1990, at C2 (noting that rather than playing at a lower level in college, Swann began to compete in semi-professional football for the minor league Bay State Titans); see also Glenn Sheeley, *Glenn Sheeley’s Sports Scene Dickerson Doesn’t Sign for Nothing*, ATLANTA J. & CONST., Feb. 21, 1991, at G2 (stating that according to Eric Swann’s agent Dick Bell, “If [Swann] goes in the second or third round, it’s a lot better than being back in the state fairgrounds shoveling manure and raking leaves, because that’s what he was doing.”); see also Will McDonough, *Let’s Shoot Down the Run-and-Gun Game*, BOSTON GLOBE, Nov. 10, 1990, at 37; Gil Lyons, *Seahawks Size Up Draft ‘Rocket’ Out of Reach, but Seattle Seeks Help at Receiver*, SEATTLE TIMES, Feb. 14, 1991, at E1.

66. See McDonough, *supra* note 65; see also Boeck, *supra* note 61 (noting that Swann “has petitioned the NFL to waive its junior eligibility rule and include him in the 1991 draft”); Timothy W. Smith, *Football: Notebook: Browns Won’t Be Built in a Season*, N.Y. TIMES, June 30, 1991, at 82; *Draft Dream*, *supra* note 65; Lyons, *supra* note 65.

67. See *Team-by-Team Picks*, BALTIMORE SUN, Apr. 23, 1991, at 5B.

During Eric Swann's ten-year NFL career, he earned two Pro Bowl selections and "was considered among the best defensive tackles in the NFL."⁶⁸

2. Larry Fitzgerald (2004)

After Eric Swann's early entry into the 1991 NFL draft, no other prospective NFL player petitioned the league for early entry for the next thirteen years.⁶⁹ Then, in 2004, University of Pittsburgh wide receiver Larry Fitzgerald, who had just completed his sophomore year of college, requested permission to enter the draft even though he had only played two years of college football.⁷⁰ Unlike Swann, Fitzgerald remained in good academic standing, and he was fully eligible to return on scholarship to the University of Pittsburgh.⁷¹ Fitzgerald nevertheless preferred to turn professional.⁷²

Fitzgerald believed that he was eligible for the draft because he had graduated from two different high schools—a traditional high school in 2001 and a college preparatory school in 2002.⁷³ Thus, while he was only two years removed from his second high school graduation, he was three years removed from earning his first diploma.⁷⁴

Arguing this point, Fitzgerald approached NFL Commissioner Tagliabue with counsel from his father (a long-time NFL reporter) and his family's attorney.⁷⁵ After this meeting, Commissioner Tagliabue, without public explanation, decided to allow Fitzgerald to add his name to the 2004 draft roster.⁷⁶ Fitzgerald was selected with the third overall pick of the draft and signed to a six-year, \$60 million contract.⁷⁷

68. See *Griffith Signs 3-Year Deal with Denver; Swann Retires*, ST. LOUIS POST-DISPATCH, May 2, 2001, at D2; see also *NFL Update*, DALLAS MORNING NEWS, May 2, 2001, at 13B.

69. See *infra* notes 70-74 and accompanying text.

70. See Damon Hack, *NFL Grants Eligibility to Fitzgerald, Pitt Receiver*, N.Y. TIMES, Feb. 6, 2004, at D1.

71. *Id.*

72. *Id.* ("Larry Fitzgerald has asked to be declared eligible. . . .")

73. *Id.* See also Larry Fitzgerald Sr., *A Different View of the Draft*, SPORTING NEWS, Apr. 19, 2004, at 10.

74. *Id.*; see Hack, *supra* note 70.

75. Fitzgerald, *supra* note 73; Michael A. McCann & Joseph S. Rosen, *Legality of Age Restrictions in the NBA and the NFL*, 56 CASE W. RES. L. REV. 731, 732 (2006).

76. Fitzgerald, *supra* note 73; see also Sean Jensen, *Little Brother Gets His Chance: Marcus Fitzgerald to Live Family Dream—Wear Vikings Purple*, ST. PAUL PIONEER PRESS, May 1, 2009, at D1; Mike Bires, *Fitzgerald is "Best in the World" Says Tomlin*, BEAVER COUNTY TIMES (Beaver, Pa.), Jan. 21, 2009, available at 2009 WLNR 1175002.

77. Bires, *supra* note 76; see also Sean Jensen, *Little Brother Gets His Chance: Marcus Fitzgerald to Live Family Dream—Wear Vikings Purple*, ST. PAUL PIONEER PRESS, May 1, 2009, at D1.

At the time this article was published, Fitzgerald had played six NFL seasons, appeared in one Super Bowl, and earned three Pro Bowl selections.⁷⁸

3. Maurice Clarett (2004)

Also in 2004, Ohio State University sophomore Maurice Clarett petitioned the NFL for early entry into the league's draft.⁷⁹ Commissioner Tagliabue, however, denied Clarett's petition for league entry.⁸⁰

Clarett's request to enter the NFL early caused some controversy.⁸¹ When he petitioned the NFL for early admission to the draft, Clarett had impeccable football credentials.⁸² As a college running back, Clarett had rushed for a then-record-setting 1,237 yards and 18 touchdowns in his freshman season at Ohio State University.⁸³ He also led Ohio State University to their first national football championship in 34 years, scoring the winning touchdown on the play "Red-33-Splice" in a 31-24 double overtime victory against the University of Miami.⁸⁴

However, Clarett also had upset many NCAA officials during his time at Ohio State by purportedly maintaining a relationship with several sports boosters.⁸⁵ Ohio State University had even suspended Clarett from its football team based on what athletic director Andy Geiger

78. Bires, *supra* note 76.

79. McCann & Rosen, *supra* note 75, at 740-41.

80. *See id.*

81. *See infra* notes 85-91 and accompanying text.

82. *See infra* notes 83-84 and accompanying text.

83. *See Supreme Court Nominee Wrote Opinion Barring Clarett from NFL*, COLUMBUS DISPATCH, May 27, 2009, available at 2009 WLNR 10057321; *see also Clarett's Struggle with Right and Wrong Lands Him in Jail*, L.A. TIMES, Sept. 3, 2006, at 6; Marla Ridenour, *Buckeyes Must Adjust to Losses; Offense May Have to Lead Team Next Season*, AKRON BEACON J., Jan. 5, 2006, at C1.

84. The winning touchdown play, Red-33-Splice, was provided courtesy of Ohio State Sports Information Director, Shelly Poe (certification on file with authors). *See also* Rusty Miller, *Way is Cleared for Clarett to Leave Prison*, PITTSBURGH POST-GAZETTE, Apr. 11, 2010, at D2; Ray Buck, *Fiesta Bowl Has Rich History of Tricks, Burnt Tostitos*, FT. WORTH STAR-TELEGRAM, Jan. 4, 2010, available at 2010 WLNR 113478.

85. *See infra* note 86 and accompanying text; *see also Clarett Considers Suit against NFL: Family Attorney Believes Court Could Rule Quickly*, AKRON BEACON J., Sept. 5, 2003, at C8 ("Ohio State Athletic Director Andy Geiger said Clarett was suspended because of allegations of accepting improper benefits and for misleading investigators."); Jill Riepenhoff, *Booster, Quarterback to Pay for Blunder; But OSU Protecting Contributor's Identity*, COLUMBUS DISPATCH, Dec. 23, 2004, at 01A ("Former Buckeye Maurice Clarett said that boosters gave him cash, cars and cushy jobs.").

described as Clarett's "receive[ing] special benefits worth thousands of dollars from a family friend and repeatedly [misleading] investigators."⁸⁶

With the NCAA's support, Commissioner Tagliabue decided that denying Clarett entry into the NFL would be his choice, even knowing full well that his decision would lead Clarett to test the NFL's age/education requirement under antitrust law.⁸⁷

I. *Maurice Clarett's Antitrust Challenge*

Upon learning of his rejection for the NFL draft, Maurice Clarett, as expected, sued the NFL club-owners on antitrust grounds.⁸⁸ Upon review, the U.S. District Court for the Southern District of New York ruled in Clarett's favor, striking down the NFL's age/education requirement and awarding Clarett the right to enter the NFL draft.⁸⁹

However, the NFL club-owners appealed to the United States Second Circuit Court of Appeals, which reversed and held that the NFL's age/education requirement was shielded from antitrust scrutiny by antitrust law's non-statutory labor exemption.⁹⁰ The Second Circuit Court of Appeals reached this ruling based substantially on an amicus brief filed by the NFL Players Association ("NFLPA") that indicated the NFL age/education requirement had been a product of arm's length collective bargaining.⁹¹

J. *The Current NFL Age/Education Requirement*

After the Second Circuit decision in *Clarett v. Nat'l Football League*, the NFL and NFLPA, in 2006, formally moved the league's age/education requirement into their collective bargaining agreement.⁹² The NFL age/education requirement, as it now appears in the collective bargaining agreement, states as follows:

86. Patrick Saunders, *Clarett Running on Clean Slate: Ex-RB Davis Believes Draft Pick Can Find Fast Track in NFL*, DENVER POST, Apr. 25, 2005, at D01.

87. See *Clarett Considers Suit against NFL: Family Attorney Believes Court Could Rule Quickly*, supra note 85 (providing that "NFL Commissioner Paul Tagliabue has said the league will fight any underclassman who tries to overturn the rule").

88. See Complaint, *Clarett v. Nat'l Football League*, 2003 WL 22469936 (S.D.N.Y. 2003) (No. 03 Civ. 7441).

89. See *Clarett v. Nat'l Football League*, 306 F.Supp. 2d 379, 410-11 (S.D.N.Y. 2003), rev'd by *Clarett v. Nat'l Football League*, 369 F.3d 124, 125 (2d Cir. 2004).

90. See generally *Clarett*, 369 F.3d at 125.

91. *Id.*

92. See NFL Collective Bargaining Agreement 2006-2012, Art. XVI, § 2(b), at 46, available at <http://www.docstoc.com/docs/20343876/NFL-Collective-Bargaining-Agreement-2006-2012>.

No player shall be permitted to apply for special eligibility for selection in the Draft, or otherwise be eligible for the Draft, until three NFL regular seasons have begun and ended following either his graduation from high school or graduation of the class with which he entered high school, whichever is earlier.⁹³

Since 2006, neither the NFL nor the NFLPA has expressed any public interest in changing their collectively bargained age/education requirement. Nonetheless, the NFL age/education requirement will be up for review in March 2011, when the current NFL collective bargaining agreement expires.⁹⁴

II. HISTORY OF NBA AGE/EDUCATION REQUIREMENTS

A. *The Original NBA Age/Education Requirement*

By contrast to the NFL age/education requirement, the NBA age/education requirement emerged from a less publicized series of events.⁹⁵ The original NBA age/education requirement dates back at least as far as 1969, and possibly as far as the league's inception in 1949.⁹⁶ According to the original NBA age/education requirement:

A person who has not completed high school or who has completed high school but has not entered college, shall not be eligible to be drafted or to be a Player (in the NBA) until four years after he has been graduated or four years after his original high school class has been graduated, as the case may be, nor may the future services of any such person be negotiated or contracted for, or otherwise reserved.⁹⁷

In 1970, prospective NBA player Spencer Haywood and Seattle Supersonics owner Sam Schulman challenged the NBA age/education requirement in court under Section 1 of the Sherman Act.⁹⁸ Upon

93. *Id.*

94. *See NFL Lockout Looming*, *supra* note 3, at C1.

95. *See infra* notes 96-101 and accompanying text.

96. *See* Leonard Koppett, *Legal Factors Hamper N.B.A.-A.B.A. Talks*, N.Y. TIMES, March 25, 1971, at 50; Marc Edelman, *Does the NBA Still Have Market Power? Exploring the Antitrust Implications of an Increasingly Global Market for Men's Basketball Player Labor*, 41 RUT. L. J., at *20 (forthcoming 2010) (noting the founding of the NBA on August 3, 1949).

97. *Denver Rockets v. All-Pro Management Inc.*, 325 F. Supp. 1049, 1055 (C.D. Cal. 1971) (citing By-laws of the NBA, § 2.05).

98. *See* Leonard Koppett, *Legal Factors Hamper N.B.A.-A.B.A. Talks*, N.Y. TIMES, March 25, 1971, at 50 (noting that Haywood, who had been playing in the American Basketball Association, had attempted to sign with the Seattle Supersonics; however, the

review, Hon. Judge Warren Ferguson of U.S. District Court for the Central District of California struck down the NBA age/education requirement for violating antitrust law.⁹⁹

After Judge Ferguson's ruling, the NBA club-owners changed their age/education requirement to allow prospective NBA players to petition the league for earlier entry if they faced financial hardship.¹⁰⁰ Then, in 1976, the NBA club-owners entirely abandoned their age/education requirement.¹⁰¹

B. *The NBA Without an Age/Education Requirement (1972-2005)*

After the NBA club-owners abandoned their age/education requirement, both college underclassmen and high school seniors began to declare for the NBA draft.¹⁰²

1. College Underclassmen and the NBA Draft

The first college underclassman to declare for the NBA draft was North Carolina junior Bob McAdoo, who was selected with the second overall pick of the 1972 draft by the Buffalo Braves.¹⁰³ That season, McAdoo won the Rookie of the Year Award.¹⁰⁴

Also in 1972, the Seattle Supersonics selected with their first pick Brian Taylor, a junior from Princeton University.¹⁰⁵ Taylor, who gave up his senior year of Ivy League education to play professional basketball, scored over 7,800 points during his career.¹⁰⁶

NBA Board of Governors attempted to block the signing based on the league's age/education requirement).

99. See Leonard Koppett, *Sonics Retain Haywood In Out-of-Court Compact: Seattle Submits to N.B.A. Fine of \$200,000*, N.Y. TIMES, March 27, 1971, at 21 (quoting NBA commissioner Walter Kennedy's acknowledgement of the probable need to change the league's bylaws); see also William Johnson, *A Legal License to Steal the Stars: Two of Basketball's Best Undergraduates Turn Pro, Others May, and Football is in Trouble, Too, Following a Court Decision*, SPORTS ILLUSTRATED, Apr. 12, 1971, available at <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1084736/index.htm>.

100. See Andre M. Jones, *Hold the Mayo: An Analysis of the Validity of the NBA's Stern No Preps to Pros Rule and the Application of the Nonstatutory Labor Exemption*, 26 LOY. L.A. ENT. L. REV. 475, 478 (2006).

101. McCann & Rosen, *supra* note 75, at 751.

102. See *infra* notes 103-129 and accompanying text.

103. See 1972 NBA Draft, http://en.wikipedia.org/wiki/1972_NBA_Draft (last visited Apr. 15, 2011).

104. See *NBA Rookies of the Year*, WICHITA EAGLE, Apr. 23, 2009, at D6.

105. See Ken Denlinger, *The Evolution of Younger Athletes in Professional Sports*, L.A. TIMES, Apr. 22, 1990, at 10.

106. See Brian Taylor, NBA and ABA Statistics, <http://www.basketball-reference.com/players/t/taylobr01.html> (last visited Apr. 15, 2011).

By the 1980s, many of the most successful players in the NBA had become those who left college early.¹⁰⁷ Los Angeles Lakers Hall of Fame point guard Ervin “Magic” Johnson had left Michigan State University to enter the NBA after his sophomore season.¹⁰⁸ Meanwhile, Detroit Pistons Hall of Fame guard Isaiah Thomas left the University of Indiana as a sophomore.¹⁰⁹ Even Michael Jordan, the most famous player in the history of professional basketball, left the University of North Carolina for the NBA in 1984 without a college degree.¹¹⁰

Today, most of the high-ranking NBA draft selections are still players without college degrees.¹¹¹ For example, in the 2009 NBA draft, all of the league’s first ten selections were college underclassmen, and 18 of the NBA’s top 20 selections were underclassmen.¹¹²

2. High School Seniors in the NBA Draft

High school seniors, meanwhile, first began to enter the NBA draft in 1975 when Darryl Dawkins and Bill Willoughby made their historic announcements.¹¹³ Dawkins, a 6-foot-11 center, was selected by the Philadelphia 76ers with the fifth overall pick.¹¹⁴ He proceeded to play fourteen seasons in the NBA, over which time he scored 8,733 points, grabbed 4,432 rebounds, and blocked 1,023 shots.¹¹⁵ By contrast, Willoughby, a 6-foot-8 forward, was selected with the nineteenth overall pick by the Atlanta Hawks and played eight seasons in the league, in which he averaged barely six points per game.¹¹⁶

After Dawkins and Willoughby entered the league directly from high school, no other high school senior attempted this feat until 1994,

107. See *infra* notes 108-110 and accompanying text; see also Eric Brady, *Don't Forget Early-Entry Pioneer Haywood*, USA TODAY, May 13, 2009, at C3 (discussing how Spencer Haywood opened the door for other NBA players to enter the league draft prior to completing college).

108. See Joey Johnston, *Who's Number 1?*, TAMPA TRIBUNE, Jun. 25, 2008, at 2.

109. See Francisco Alvarado, *Isiah Thomas Struggles to Reshape FIU Hoops*, MIAMI NEW TIMES, Feb. 11, 2010, available at 2010 WLNR 3229876 (“After his sophomore year, Thomas entered the 1981 NBA draft. The Detroit Pistons picked the point guard second overall.”).

110. See Linda Robertson, *Jumping to the NBA Early is a Gamble that Doesn't Pay*, MIAMI HERALD, Nov. 16, 1990, at 1D (noting that, in 1984, Michael Jordan, Charles Barkley, and Hakeem Olajuwon all left college early to enter the NBA draft).

111. See *infra* notes 112 and 127 and accompanying text.

112. See 2009 NBA Draft Results, <http://www.mynbadraft.com/2009-NBA-Draft-Results> (last visited Apr. 15, 2011).

113. See Michael McCann, *Illegal Defense: The Irrational Economics of Banning High School Players from the NBA Draft*, 3 VA. SPORTS & ENT. L.J. 113, 145-46 (2004).

114. *Id.*

115. See *id.* at 146.

116. See *id.*

when Kevin Garnett, a 6-foot-11 forward from Farragut Career Academy in Chicago, Illinois, declared for the NBA draft.¹¹⁷ Garnett had initially wanted to attend college, but he was unable to earn the minimum required score on his college entrance exams.¹¹⁸ Without qualifying for Division I college basketball, he considered joining the NBA directly from high school to be his best alternative.¹¹⁹

In hindsight, Garnett's academic struggles may have worked to his financial advantage.¹²⁰ Despite never attending college, Garnett became the Minnesota Timberwolves' first selection, and the fifth overall, in the 1994 NBA draft.¹²¹ Almost immediately upon entering the league, he emerged as both a star on the court and a model citizen away from it.¹²² By his 21st birthday, Garnett had earned a five-year, \$126 million contract extension.¹²³

Since Kevin Garnett's jump to the NBA from high school, 36 other high school seniors have declared for the NBA draft, with 30 of them making it onto a team's roster.¹²⁴ In 1996, two high school seniors were selected in the first round: Kobe Bryant (selected 13th overall) and Jermaine O'Neal (selected 17th overall).¹²⁵ By 2001, high school seniors had come to represent more than seven percent of all NBA first round selections.¹²⁶

117. See Bob Ryan, *Jennings Owes a Bow to Garnett*, BOSTON GLOBE, Dec. 8, 2009, Sports, at 1.

118. See *Bucks, Others Like Garnett*, WIS. ST. J., May 16, 1995, at 4D ("Kevin Garnett said Monday he has made himself available for the National Basketball Association draft, but he will still play college basketball if he attains the necessary entrance test score.").

119. See *id.*

120. See Ken Hornack, *From Preps to Pros: Magic's 2 Prodigies Meet Team's Prodigal Son Tonight*, DAYTONA NEWS-J., Dec. 19, 2007, at 1B; see also Jerry Trecker, *Moses' Followers*, HARTFORD COURANT, Dec. 16, 2000, at C3.

121. McCann, *supra* note 113, at 146.

122. *Id.*

123. *Id.*

124. See Michael A. McCann, *The Reckless Pursuit of Dominion: A Situational Analysis of the NBA and Diminishing Player Autonomy*, 8 U. PA. J. LAB. & EMP. L. 819, 842 (2006); Ronald Tillery, *High School Players Gone: Draft May Have More Foreign Accent*, COMMERCIAL APPEAL (Memphis, TN), Jun. 27, 2006, at D1 (chart at bottom of article).

125. See McCann, *supra* note 113, at 146; see also David Newton, *Jermaine O'Neal: He's Arrived*, STATE (Columbia, S.C.), Mar. 10, 2002, at C3 (noting that like Kevin Garnett, Jermaine O'Neal opted to turn professional after failing to earn the minimum required score on the Scholastic Aptitude Test).

126. See *id.* at 152-158 (noting that four high school seniors were selected in the first round of both the 2001 and 2003 NBA drafts); see also Ivan Carter, *Too Talented to Pass Up: High School Stars are Increasingly Tempting for NBA Teams*, KAN. CITY STAR, May 14, 2004, at D1.

It has also become increasingly common for NBA teams to use the first overall pick in the league draft on a high school player.¹²⁷ In 2001, the Washington Wizards selected Kwame Brown, a 6-foot-11 forward from Glynn Academy in Georgia, with the first overall pick.¹²⁸ Then, in 2003, the Cleveland Cavaliers selected future Hall of Famer LeBron James with the first overall pick, and in 2004, the Orlando Magic selected perennial All-Star Dwight Howard.¹²⁹

C. *The Current NBA Age/Education Requirement (2005-Present)*

After abandoning the league's original age/education requirement, NBA club-owners for many years seemed content with younger and less formally educated players entering the league.¹³⁰ In 1996, NBA Commissioner David Stern even told *New York Times* reporter Selena Roberts that he believed entering the NBA directly from high school was a "personal choice" and that "it's for [prospective players] and their parents to make the decision rather than all of us sanctimoniously and piously making these judgments."¹³¹

By the start of the 2000s, however, NBA club-owners' attitudes toward younger and less formally educated players had begun to change.¹³² Thus, in 2005, Commissioner Stern reversed course and stated that he now believed the college basketball experience made new players "more prepared on and off the court."¹³³

127. See *infra* notes 128-129 and accompanying text.

128. McCann, *supra* note 113, at 152.

129. Carter, *supra* note 126 (noting LeBron James was the first overall pick of the 2003 NBA draft); Brian Schmitz, *Youth Movement: The Magic Choose 18-Year Old Dwight Howard with the First Overall Pick; Orlando Gambles on a High Schooler's Potential Rather than Taking UConn Star Center Emeka Okafor*, ORLANDO SENTINEL, June 25, 2004, at D1 (noting Dwight Howard was the first overall pick of the 2004 NBA draft).

130. See generally Selena Roberts, *Pro Basketball: Stern Questions the Outrage over Early Entry into the N.B.A.*, N.Y. TIMES, May 20, 1996, at C4 (discussing acceptance of lack of age requirement in NBA).

131. See *id.* (quoting NBA Commissioner David Stern as stating it is up to NBA prospects and their parents to decide when players should declare pro).

132. See, *infra*, notes 133-135 and accompanying text; see also Harvey Araton, *College or Pros? Answer Seems Driven by Race*, N.Y. TIMES, Jul. 26, 2005, at D1 ("But make no mistake, the N.B.A.'s 19-year-old minimum-age requirement was in part planned and promoted by Commissioner David Stern to herd future LeBrons into the madness of March, where the N.C.A.A. tournament will make television celebrities out of them, enhancing their marketing value to Stern by the time they enter the N.B.A. draft.").

133. See generally Jonathan Feigen, *Age Requirement Right Call; The Season's Draft will Provide an Added Benefit*, HOUSTON CHRON., Apr. 15, 2007, Sports, at 7 (quoting NBA Commissioner David Stern).

In 2005, the NBA club-owners implemented a new age/education requirement through the collective bargaining process.¹³⁴ That 2005 version of the NBA age/education requirement, which remains in effect today, appears in Article X, Section 1(b) of the NBA collective bargaining agreement and states as follows:

A player shall be eligible for [entry into the NBA only if] the player . . . is or will be at least 19 years of age during the calendar year in which the Draft is held [and has waited] at least one (1) NBA Season . . . since the player's graduation [or that player's class's] graduation from high school.¹³⁵

D. Effects of New NBA Age/Education Requirement

Since the NBA implemented its new, collectively-bargained age/education requirement, most high school basketball players who previously would have declared for the NBA draft have instead enrolled in college.¹³⁶ Thus, in both the 2007 and 2008 NBA drafts, the league's first two overall draft picks were players who entered the league after their freshman year of college.¹³⁷ Meanwhile, a few other players have

134. See Marc Edelman & Brian Doyle, *Antitrust and "Free Movement" Risks of Expanding Professional Sports Leagues into Europe*, 29 NW. J. INT'L L. & BUS. 403, 406 (2009); see also Nat'l Basketball Ass'n, Collective Bargaining Agreement, Art. 10, § 1(b)(i) (2005), available at <http://www.nbpa.org/sites/default/files/ARTICLE%20X.pdf>.

135. Nat'l Basketball Ass'n, Collective Bargaining Agreement, *supra* note 134. This collectively bargained age/education requirement, however, maintained a carve-out for players who maintained a residence outside of the United States and have not graduated from high school or attended college in the U.S. See Edelman & Doyle, *supra* note 134 (noting that international players are only required to have turned 19 years old by December 31 of the draft year); see also Berry Tramel, *Basketball: NBA Age Requirement: Leave the Kids Alone*, OKLAHOMAN (Oklahoma City), June 24, 2005, at 2C ("The new NBA collective bargaining agreement sets the age requirement for international players at 18, basically a year younger than U.S. hoopsters.").

136. See Jeff Jacobs, *Failure of NBA Rule is Academic: College Basketball*, HARTFORD COURANT, Jun. 6, 2009, at B1 (noting that some of these players who would have likely not attended one year of college but-for the NBA's age/education requirement include current NBA stars Kevin Durant, Greg Oden, Michael Beasley and Derrick Rose).

137. See 2007 NBA Draft Results, <http://www.mynbadraft.com/2007> (last visited Oct. 22, 2010) (indicating that in 2007, the first two overall picks were Greg Oden and Kevin Durant); 2008 NBA Draft Results, <http://www.mynbadraft.com/2008-NBA-Draft-Results> (last visited Oct. 22, 2010) (indicating that in 2008, the first two picks were Derrick Rose and Michael Beasley). Similarly, in 2009, four of the NBA's first 30 selections were players with only one year of college experience. See 2009 NBA Draft Results, *supra* note 112 (noting that the four college freshmen selected in the first round of the NBA draft were Tyreke Evans (4th overall), Demar DeRozan (9th overall), Jrue Holiday (17th overall) and BJ Mullens (24th overall)).

chosen to play a year of professional basketball after high school graduation overseas.¹³⁸ For example, 2009 NBA rookie Brandon Jennings played one year in Italy before entering the NBA draft in 2009.¹³⁹

E. Potential 2011 Changes to the NBA Age/Education Requirement

With the current NBA collective bargaining agreement set to expire on July 1, 2011, the league's collectively bargained age/education requirement will be up for review.¹⁴⁰ Some NBA officials have expressed the desire to add a second year of waiting after high school before a prospective player may enter the league draft.¹⁴¹ For instance, Commissioner Stern, despite once having supported a system of free enterprise, now purports to favor making high school graduates wait two years before entering the NBA.¹⁴²

Others, however, would prefer the NBA to revert back to its free market system for player entry.¹⁴³ For example, current NBA player Jermaine O'Neal, who entered the NBA directly from high school in 1996,¹⁴⁴ opposes an age/education requirement because he believes the

138. See Jacobs, *supra* note 136 ("David Stern has said, hey, high school grads can go to Europe or the NBA Development League if they don't want to go to college."); see Paola Boivin, *One and Done Baloney, with a Little Mayo*, USA TODAY, June 25, 2008, at 3C (noting that high school basketball superstar Brandon Jennings considered "jumping from high school to [professional basketball] in Europe because of eligibility issues and frustration with the NBA's age requirement").

139. See 2009 NBA Draft Results, *supra* note 112.

140. See Nat'l Basketball Ass'n, Collective Bargaining Agreement, Art. 39, § 1 (2005), available at <http://www.nbpa.org/sites/default/files/ARTICLEXXXIX.pdf> (noting that the NBA collective bargaining agreement, unless extended, expires after June 30, 2011).

141. See Jacobs, *supra* note 136 ("[T]here has been some talk the NBA might push the eligibility to two years out of high school.") See also Boivin, *supra* note 138 (stating that Commissioner David Stern has suggested he will push for expanding the NBA age/education requirement to a second year in the next collective bargaining agreement); Dave Krieger, *No Lack of Manure in NBA 'Farm System'*, DENVER ROCKY MOUNTAIN NEWS, May 12, 2008, at 2 ("NBA commissioner David Stern likes his age limit so much that he wants to raise it to 20. Mavericks owner Mark Cuban suggests raising it to 22."); Bob Cohn, *No Class*, WASH. TIMES, June 7, 2009, at C2 ("Commissioner David Stern reportedly wants to raise the NBA minimum age from 19 to 20.") See generally *Playing Hardball*, *supra* note 4 (noting that an important issue in the NBA labor talks was "[r]aising the minimum age at which players may enter league.>").

142. See John Rohde, *Coaches Say NBA Decision Changed Little; Sampson: Minimum Age of 20 was Preferred*, THE OKLAHOMAN, June 27, 2005, at 1B (noting that Stern claims to have conceded to a 19 years old age/education requirement as a compromise with the players' union, which balked at his initial request).

143. See *infra* notes 144-146 and accompanying text.

144. See McCann, *Illegal Defense*, *supra* note 113; see also David Newton, *Jermaine O'Neal: He's Arrived*, COLUM. STATE-RECORD (Columbia, SC), Mar. 10, 2002, at C3

requirement has racist undertones.¹⁴⁵ Meanwhile, Representative Steve Cohen (D-Tenn) has argued that the NBA age/education requirement violates prospective basketball players' liberty interests.¹⁴⁶

III. ANTITRUST STATUS OF COLLECTIVELY BARGAINED AGE/ EDUCATION REQUIREMENTS

While courts have long held that sports leagues' unilateral age/education requirements violate Section 1 of the Sherman Act, the law is less settled regarding collectively bargained age/education requirements.¹⁴⁷

A. *Elements of an Antitrust Claim*

Section 1 of the Sherman Act, in pertinent part, states that “[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce . . . is declared to be illegal.”¹⁴⁸ This section of antitrust law governs agreements to price fix, wage fix, allocate markets, and concertedly refuse to deal (group boycotts).¹⁴⁹

In determining whether a particular age/education requirement violates Section 1 of the Sherman Act, the reviewing court applies a three-part test.¹⁵⁰ First, the court determines whether the sports league's age/education requirement represents a “contract, combination . . . or

(noting that Jermaine O'Neal opted to turn professional after failing to earn the minimum required score on the Scholastic Aptitude Test).

145. See Selena Roberts, *Sports of The Times; N.B.A. 's New Age Rule Will Get Old in a Hurry*, N.Y. TIMES, Nov. 13, 2005, at 81 (“Jermaine O'Neal eloquently described the age limit last year as an unconstitutional rule directed at black athletes. Together, with the recent Mister Rogers dress code, the N.B.A. is precariously close to being perceived as a league trying to brush itself with a whitening system.”).

146. See Pete Thamel, *N.B.A. is Asked to End Age Limit*, N.Y. TIMES, June 4, 2009, at B14.

147. See *infra* notes 148-192 and accompanying text. See also Edelman & Doyle, *supra* note 134, at 424-28.

148. 15 U.S.C. §§ 1-7 (2000). See also Edelman & Harrison, *supra* note 9, at 12 (citing E. THOMAS SULLIVAN & JEFFREY L. HARRISON, UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS § 4.13, at 159-67 (3d ed. 1998)) (noting this section of antitrust law outlaws certain concerted refusals, which are otherwise known as “group boycotts”).

149. See Edelman, *Market Power*, *supra* note 96, at *3; see also Edelman & Doyle, *supra* note 134, at 412-13.

150. See Edelman, *Market Power*, *supra* note 96, at 3; see also Marc Edelman, *Are Commissioner Suspensions Really Any Different from Illegal Group Boycotts? Analyzing Whether the NFL Personal Conduct Policy Illegally Restrains Trade*, 58 CATH. U. L. REV. 631, 640 (2009).

conspiracy” that affects interstate commerce.¹⁵¹ Then, the court determines whether the age/education requirement yields sufficiently anticompetitive effects to violate antitrust law under a *prima facie* test.¹⁵² Finally, the court determines whether any affirmative defense negates the finding of a *prima facie* antitrust violation.¹⁵³

B. Are the NFL & NBA Age/Education Requirements Interstate Agreements Among Two or More Parties?

To date, every court to review a sports league’s age/education requirement has found the requirement to constitute a “contract, combination . . . or conspiracy” that affects interstate commerce.¹⁵⁴ The “contract, combination . . . or conspiracy” prong of this requirement is met because each individual sports club within a traditionally structured league is “a substantial, independently owned, and independently managed business” that collectively, through league agreements, assents to be bound by the league’s age/education requirement.¹⁵⁵ Meanwhile, the “interstate” component is met because a significant percentage of

151. See *Denver Rockets v. All-Pro Mgmt., Inc.*, 325 F. Supp. 1049, 1062 (C.D. Cal. 1971) (citing 15 U.S.C. § 1); *Blalock v. Ladies Prof’l Golfers Ass’n*, 359 F. Supp. 1260, 1263 (N.D. Ga. 1973); *McCreery Angus Farms v. Am. Angus Ass’n*, 379 F. Supp. 1008, 1017 (S.D. Ill. 1974); *Nat’l Hockey League Players Ass’n v. Plymouth Whalers*, 419 F.3d 462, 469 (6th Cir. 2005); Edelman, *Commissioner Suspensions*, *supra* note 150, at 642; Edelman, *Market Power*, *supra* note 96 at 3.

152. See Edelman, *Market Power*, *supra* note 96, at 3-4; Edelman, *supra* note 150, at 640-61 (“[A] court will . . . perform one of three sanctioned tests to determine whether the agreement produces a *prima facie* antitrust violation. On one end of the spectrum, if the agreement seems so nefarious that it is unlikely to have any redeeming value, a court will apply the *per se* test, under which it simply presumes a *prima facie* violation. On the other end of the spectrum, if an agreement seems to yield potential economic benefits, a court will apply the Rule of Reason test, under which it would fully investigate the agreement’s net economic impact. Meanwhile, in between those two scenarios, a court might also apply a so-called “quick look,” “truncated” or “abbreviated” Rule of Reason test, under which it would consider the economic effects of a particular agreement based on only a “rudimentary understanding of economics.”) (internal citations and quotations omitted).

153. Edelman, *Market Power*, *supra* note 96, at *4; see also Edelman, *supra* note 150, at 641; Edelman & Harrison, *supra* note 9, at 42 (citing PHILLIP AREEDA & LOUIS KAPLOW, *ANTITRUST ANALYSIS: PROBLEMS, TEXT, AND CASES* 106-22 (5th ed. 1997)).

154. See *Denver Rockets*, 325 F. Supp. at 1062 (citing 15 U.S.C. § 1); *Blalock*, 359 F. Supp. at 1263; *McCreery Angus Farms*, 379 F. Supp. at 1017; *Plymouth Whalers*, 419 F.3d at 469; Edelman, *supra* note 150, at 642-44.

155. *Am. Needle v. Nat’l Football League*, 130 S.Ct. 2201, 2205 (May 24, 2010) (“The NFL teams do not possess either the unitary decisionmaking quality or the single aggregation of economic power characteristic of independent action. Each of [the teams] is a substantial, independently owned, and independently managed business. [Their] general corporate actions are guided or determined by separate corporate consciousnesses.”) (internal citations and quotations omitted).

sports league revenues come from the sale of television and radio broadcasts across state lines.¹⁵⁶

C. *Do the NFL & NBA Age/Education Requirements Violate Principles of Antitrust Law?*

Every court that has reviewed a sports league's age/education requirement additionally has found that the requirement, on its merits, produced a *prima facie* antitrust violation.¹⁵⁷

In the first antitrust challenge to a sports league's age/education requirement, *Denver Rockets v. All-Pro Management, Inc.*, the District Court for the Central District of California held that the NBA's four-year age/education requirement yielded three types of antitrust harm.¹⁵⁸

First, the victim of the boycott is injured by being excluded from the market he seeks to enter. Second, competition in the market in which the victim attempts to sell his services is injured. Third, by pooling their economic power, the individual members of the NBA have, in effect, established their own private government.¹⁵⁹

The *Denver Rockets* court then rejected each of the NBA clubs' three purported defenses: financial necessity, cost effectiveness, and the desire to promote more educated workers.¹⁶⁰ While the *Denver Rockets* court described promoting a formally educated workforce as "commendable," it explained that, pursuant to long-standing antitrust principles, even commendable goals such as promoting education cannot "override the objective of fostering economic competition."¹⁶¹

In the second challenge to an age/education requirement, *Linseman v. World Hockey Ass'n*, the U.S. District Court for the District of Connecticut overturned the World Hockey Association's requirement that all players in the World Hockey Association be at least 20 years of age.¹⁶² Consistent with the Central District of California's ruling in

156. Edelman & Harrison, *supra* note 9, at 13 (citing *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958); SULLIVAN & HARRISON, *supra* note 148, at 124-31).

157. See Edelman & Doyle, *supra* note 134, at 424. Note, however, these courts have applied different levels of review to the antitrust merits.

158. *Denver Rockets*, 325 F. Supp. at 1067 (applying both the *per se* test and the "rule of reason"). See also Edelman, *supra* note 150, at 648; Leonard Koppett, *A Job for Congress? Muddled Legal Status of Athletics May Require A Full Investigation*, N.Y. TIMES, Apr. 4, 1971, at S5.

159. *Denver Rockets*, 325 F. Supp. at 1061.

160. *Id.* at 1066. See also Edelman & Harrison, *supra* note 9, at 16.

161. *Denver Rockets*, 325 F. Supp. at 1066. See also Edelman, *supra* note 150, at 648; Edelman & Harrison, *supra* note 9, at 16.

162. *Linseman v. World Hockey Ass'n*, 439 F. Supp. 1315, 1318 (D. Conn. 1977) ("Each Member Club shall make its selections among the players who attain their

Denver Rockets,¹⁶³ the *Linseman* court concluded that the World Hockey Association rule prohibiting players of less than twenty years of age violated Section 1 of the Sherman Act by the excluding of “traders from the market . . . by means of combination or conspiracy [that] is so inconsistent with the free-market principles embodied in the Sherman Act.”¹⁶⁴

In the third antitrust challenge, *Boris v. United States Football League*, the Central District of California struck down the startup United States Football League’s age/education requirement (“USFL”),¹⁶⁵ which was identical to the age/education requirement that the NFL enforced between 1926 and 1990.¹⁶⁶ The plaintiff in that case, former University of Arizona punter Robert Boris, had challenged USFL age/education requirement after USFL Commissioner Chet Simmons refused to allow him to enter the league before completing his college education.¹⁶⁷ According to *New York Times* sports reporter Ira Berkow, “[t]he [USFL maintained this requirement because it] did not want to incur the total wrath of the colleges.”¹⁶⁸ However, according to the court, appealing the college football industry was not a sufficient reason under antitrust law to boycott young players’ services.¹⁶⁹

Meanwhile, most recently, in *Clarett v. Nat’l Football League*, the Southern District of New York held that the NFL age/education policy “must be sacked” because Clarett had “alleged the very type of injury . . . that the antitrust laws are designed to prevent.”¹⁷⁰ Although the Second

twentieth (20th) birthdays between January 1st, next preceding the conduct of the draft, and December 31st, next following the conduct of the draft both dates included.”) (citing WHA Operating Regulation § 17.2(a)).

163. *Denver Rockets*, 325 F. Supp. at 1066; see also Edelman, *supra* note 150, at 648; Edelman & Harrison, *supra* note 9, at 16.

164. *Linseman*, 439 F. Supp. at 1322 (citing *United States v. Gen. Motors Corp.*, 384 U.S. 127, 146 (1966)).

165. *Boris v. U.S. Football League*, No. Cv. 83-4980 LEW (Kx), 1984 WL 894, at *1 (C.D. Cal. Feb. 28, 1984); see also Edelman, *supra* note 150, at 648.

166. See Michael Janofsky, *U.S.F.L. Loses Antitrust Suit on Eligibility*, N.Y. TIMES, Mar. 1, 1984, at B17.

167. See *id.*; see also Edelman & Harrison, *supra* note 9, at 648 (citing *Boris*, 1984 WL 894, at *2).

168. Ira Berkow, *Sports of the Times: The Lure of the Pros*, N.Y. TIMES, Mar. 2, 1984, at A21 (noting that the same pressures that colleges exerted on NFL clubs during the “Red” Grange era appeared to still exist, even 50 years later).

169. See Edelman & Harrison, *supra* note 9, at 17.

170. *Clarett v. Nat’l Football League*, 306 F. Supp. 2d 379, 382 (S.D.N.Y. 2004); see also Edelman & Harrison, *supra* note 9, at 18 n.157 (“In applying the quick-look test, the district court held: (1) the rule created obvious anticompetitive effects by prohibiting access to all players who failed to satisfy the rule; (2) the rule did not promote economic competition in the labor market; and (3) even if the NFL possessed legitimate

Circuit Court of Appeals reversed this ruling on other grounds (specifically the non-statutory labor exemption), the Court of Appeals never overturned the district court's finding of a *prima facie* violation.¹⁷¹

D. Are the NFL and NBA Age/Education Requirements Exempted by the Non-Statutory Labor Exemption?

If a plaintiff successfully shows a *prima facie* antitrust violation under Section 1 of the Sherman Act, a court will finally allow the alleged conspirators to introduce affirmative defenses that negate the finding of antitrust liability.¹⁷² In the context of a sports league's collectively bargained age/education requirement, the most probable affirmative defense would be the non-statutory labor exemption, which shields from antitrust scrutiny any conduct that is reached through the proper workings of the collective bargaining relationship.¹⁷³

The non-statutory labor exemption arises from a public policy that "employees are better off negotiating together rather than individually, and therefore labor law (rather than antitrust law) should apply to situations where collective bargaining occurs."¹⁷⁴ Over the years, however, courts have struggled to determine the outer boundaries of the non-statutory labor exemption, often noting that "[t]he interaction of the [antitrust laws] and federal labor legislation is an area of law marked more by controversy than by clarity."¹⁷⁵

1. Second Circuit View (*Clarett v. Nat'l Football League*)

To date, there has been only one challenge to a sports league's collectively bargained age/education requirement, *Clarett v. National*

procompetitive arguments, there existed less restrictive alternatives to the NFL age/education policy.").

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

172. Edelman & Harrison, *supra* note 9, at 14; see also PHILLIP AREEDA & LOUIS KAPLOW, *ANTITRUST ANALYSIS: PROBLEMS, TEXT AND CASES* 106-22 (5th ed. 1997); MICHAEL J. COZZILLO ET. AL., *SPORTS LAW: CASES AND MATERIALS* 297-300 (2d ed. 2007); Edelman & Doyle, *supra* note 134, at 415.

173. See *Brown v. Pro Football Inc.*, 518 U.S. 231, 237 (1996); *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395 (1952); Edelman & Harrison, *supra* note 9, at 14; McCann, *supra* note 113, at 196 (all noting that as a matter of public policy, this exemption reflects the view that employees are better off negotiating together rather than individually, and thus labor law (rather than antitrust law) should apply to situations where collective bargaining occurs).

174. See Edelman & Doyle, *supra* note 134, at 416; Edelman & Harrison, *supra* note 9, at 14 (citing *United Mine Workers v. Pennington*, 381 U.S. 676, 710 (1965); McCann, *supra* note 113, at 196).

175. *Wood v. Nat'l Basketball Ass'n*, 809 F.2d 954, 959 (2d Cir. 1987).

Football League.¹⁷⁶ In that case, the U.S. District Court for the Southern District of New York held that the NFL's age/education requirement was not protected from antitrust scrutiny by the non-statutory labor exemption.¹⁷⁷ However, the U.S. Court of Appeals for the Second Circuit reversed, concluding that any collectively bargained age/education requirement falls within the bounds of antitrust law's non-statutory labor exemption.¹⁷⁸

In finding the NFL age/education requirement subject to challenge under labor law rather than antitrust law, the Second Circuit Court of Appeals explained that the non-statutory labor exemption applies most broadly to agreements that have their greatest effect on employees rather than consumers.¹⁷⁹ Thus, the court found the NFL age/education requirement to fall within the non-statutory labor exemption.¹⁸⁰

2. Potential Views of Other Circuits

Not all courts, however, would agree with the Second Circuit Court of Appeals' application of the non-statutory labor exemption. For instance, in the 1976 case *Mackey v. National Football League*,¹⁸¹ the U.S. Court of Appeals for the Eighth Circuit held that the non-statutory labor exemption applies only where an alleged restraint (1) involves mandatory subjects of bargaining, (2) primarily affects the parties involved, and (3) is reached through bona fide, arm's-length bargaining ("Mackey Test").¹⁸² The Third, Sixth, Eighth and D.C. Circuits have also applied the three-prong Mackey Test for defining the scope of antitrust law's non-statutory labor exemption.¹⁸³

If a court were to apply the three-prong *Mackey* test for the non-statutory labor exemption rather than the far broader *Clarett* test, it is possible that a sports league's collectively bargained age/education requirement would be subject to antitrust scrutiny.¹⁸⁴ While there is little

176. *Clarett v. Nat'l Football League*, 306 F. Supp. 2d 379 (S.D.N.Y. 2004).

177. *Id.*

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

179. *Id.* at 125; *see also* Edelman & Doyle, *supra* note 134, at 426.

180. *Clarett*, 369 F.3d at 125.

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

182. *Id.* at 614; *see also* Edelman & Doyle, *supra* note 134, at 416.

183. Edelman & Doyle, *supra* note 134, at 427 (citing *Mackey*, 543 F.2d at 614).

184. *Clarett v. Nat'l Football League*, 306 F. Supp. 2d 379 (S.D.N.Y. 2004) (noting the U.S. District Court for the Southern District of New York, applying the *Mackey Test*, had found the NFL age/education requirement to lie outside of the non-statutory labor exemption). However, this decision was reversed upon appeal, with the Second Circuit Court of Appeals noting that the Mackey Test was not applicable in that circuit. *See Clarett*, 369 F.3d at 133.

question that age/education requirements involve mandatory subjects of bargaining that are negotiated through bona fide arm's-length bargaining,¹⁸⁵ it is not clear in this context whether the second prong of the *Mackey* test is met: whether a sports league's age/education requirement "primarily affect[s] only the parties to the collective bargaining relationship."¹⁸⁶

The argument in favor of finding that age/education requirements "primarily affect only the parties to the collective bargaining relationship" emerges from case law indicating that potential workers in non-discriminatory hiring hall settings are deemed to be represented by the employees' union.¹⁸⁷ However, the alternative argument is that prospective professional athletes do not have representation at the collective bargaining table because the "existing players have an interest in keeping top amateur players out . . . [preserving] jobs that would otherwise go to better, younger players."¹⁸⁸ This view also has some legal support.¹⁸⁹ For example, in the 1971 case *Allied Chemical & Alkali Workers of America v. Local Union No. 1*, the Supreme Court held that retired employees are not adequately represented in employer-union collective bargaining agreements and thus lie outside of an employee bargaining unit.¹⁹⁰ In reaching this conclusion, the Court noted that retired employees lack mutuality of interest with current employees to the extent that retired workers "perform no services for the employer, are paid no wages, [and] are under no restrictions as to other employment or activities."¹⁹¹ This same "lack of mutuality" argument might apply as between current and prospective professional athletes.¹⁹²

IV. EVALUATING SPORTS LEAGUES' AGE/EDUCATION REQUIREMENTS UNDER LABOR LAW

One alternative to a prospective professional athlete challenging a sports league's collectively bargained age/education requirement under

185. Edelman & Doyle, *supra* note 134, at 427; *see also Clarett*, 369 F.3d at 139-41; *Mackey*, 543 F.2d at 614; Edelman & Harrison, *supra* note 9, at 23-24.

186. Edelman & Doyle, *supra* note 134, at 427 (citing *Mackey*, 543 F.2d at 614).

187. *See NLRB v. Houston Chapter, Associated Gen. Contractors of America, Inc.*, 349 F.2d 449, 452 (5th Cir. 1965).

188. Michael A. McCann & Joseph S. Rosen, *Legality of Age Restrictions in the NBA and the NFL*, 56 CASE W. RES. L. REV. 731, 747 (2006); *see also* Edelman & Doyle, *supra* note 134, at 427.

189. *See infra* notes 190-191 and accompanying text.

190. *See Allied Chem. & Alkali Workers of America v. Local Union No. 1*, 404 U.S. 157, 172-73 (1971).

191. *Id.* at 165.

192. *See supra* note 191 and accompanying text.

antitrust law is to challenge the requirement under labor law.¹⁹³ Such a challenge would focus on the union's duty to provide fair representation to all members of a bargaining unit.¹⁹⁴

A. *Elements of a Duty of Fair Representation Claim*

While no prospective professional athlete has ever challenged a collectively bargained age/education requirement under labor law, a labor law claim would require a prospective player to make two arguments: (1) that the prospective player is represented by that sport's players union; and (2) that the players union breached its duty of fair representation by approving an age/education requirement to the improper detriment of the prospective player.¹⁹⁵

B. *Do Sports Unions Represent Prospective, as well as Current, Professional Athletes?*

As a matter of law, it is not entirely settled whether a players union represents prospective league entrants.¹⁹⁶ As discussed in Section III(D)(2) of this article, the line of cases involving union representation in hiring halls such as *NLRB v. Houston Chapter, Associated General Contractors of America Inc.* seem to support the finding that a union represents even prospective employees.¹⁹⁷ However, the reasoning that underlies other cases such as *Allied Chemical* seems to point in the other direction.¹⁹⁸

C. *Is a Sports Union Allowed to Agree to an Age/Education Requirement?*

It is also not entirely settled whether a sports union's decision to approve an age/education requirement would violate a duty of fair representation to prospective league entrants.¹⁹⁹

193. See *infra* notes 194-241 and accompanying text.

194. The *Clarett* court insinuated that such a suit may have merit. See, e.g., *Clarett v. Nat'l Football League*, 369 F.3d 124, 141 (2d Cir. 2004) ("Any challenge to [collectively bargained age/education] criteria must be founded on labor rather than antitrust law." (quoting *Caldwell v. American Basketball Ass'n, Inc.*, 66 F.3d 523, 530 (2d Cir. 1995))).

195. See *infra* notes 199-241 and accompanying text.

196. See *infra* notes 197-198 and accompanying text.

197. *NLRB v. Houston Chapter, Associated Gen. Contractors of America, Inc.*, 349 F.2d 449, 452 (5th Cir. 1965).

198. See *Allied Chem. & Alkali Workers of America v. Local Union No. 1*, 404 U.S. 157, 172-73 (1971) (noting that retired employees lie outside of a collective bargaining relationship).

199. See *infra* notes 200-241 and accompanying text.

According to the National Labor Relations Act, once a union has been selected as the exclusive representative of the employees in a bargaining unit, the union owes a duty of fair representation to all members of the unit.²⁰⁰ This duty is “akin to the duty owed by other fiduciaries to their beneficiaries.”²⁰¹ It requires a union to “serve the interests of all members without [acting with] hostility or discrimination toward any, [as well as] to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.”²⁰² The duty of fair representation, however, does not require a union to make only decisions that have unanimous unit support.²⁰³

In other words, a union is awarded broad discretion to choose collective bargaining terms so long as the union does not do so in a manner that is arbitrary, in bad faith, or discriminatory.²⁰⁴

1. Is a Sports Union’s Agreement to an Age/Education Requirement Arbitrary?

Under the first prong of the duty of fair representation, courts define conduct to be arbitrary where it is “without a rational basis”²⁰⁵ or reached in a manner that is “so far outside a wide range of reasonableness that it

200. *Vaca v. Sipes*, 386 U.S. 171, 190 (1967); *see also Florey v. Air Line Pilots Ass’n Int’l*, 575 F.2d 673, 675 (8th Cir. 1978) (noting the duty of fair representation was created by the judiciary based on implication from federal statutes). This duty serves as a “bulwark” to protect “individuals stripped of traditional forms of redress by the provisions of federal labor law” from being exploited by their own union. *Vaca*, 386 U.S. at 182. Nevertheless, courts also must exercise some restraint in imposing this duty in order to protect unions from facing an endless stream of litigation. *Ackley v. Western Conference of Teamsters*, 958 F.2d 1463, 1472 (9th Cir. 1992) (If unions were made at “the siege of the courts,” they would need to constantly collect dues, which inevitably would not go toward union activities but rather to redistribution among members—a result that would likely chill employees from likely even seeking to form unions.); *see also Peterson v. Kennedy*, 771 F.2d 1244, 1255 (9th Cir. 1985) (“In the long run, the cost of recognizing such liability would be borne not by the unions but by their memberships. Not only would the direct costs of adverse judgments be passed on to the members in the form of increased dues, but, more importantly, unions would become increasingly reluctant to provide guidance to their members in collective bargaining disputes.”).

201. *Air Line Pilots Ass’n, Int’l v. O’Neill*, 499 U.S. 65, 74 (1991).

202. *Vaca*, 386 U.S. at 177 (citing *Humphrey v. Moore*, 375 U.S. 335, 342 (1964)); *see also Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 44 (1998).

203. *See Vaca*, 386 U.S. at 177; *see also Marquez*, 525 U.S. at 44.

204. *See Marquez*, 525 U.S. at 44 (citing *Vaca*, 386 U.S. at 190); *see also Air Line Pilots Ass’n, Int’l.*, 499 U.S. at 67; *Aguinaga v. United Food & Commercial Workers Int’l Union*, 993 F.2d 1463, 1470 (10th Cir. 1993) (citing *Vaca*, 386 U.S. at 190); *Warehouse Union, Local 860 v. National Labor Relations Board*, 652 F.2d 1022, 1024 (D.C. Cir. 1981); *Ruzicka v. General Motors Corp.*, 523 F.2d 306, 309 (6th Cir. 1975) (citing *Vaca*, 386 U.S. at 190).

205. *See Peterson*, 771 F.2d at 1254 (citing *Gregg v. Chauffeurs, Teamsters and Helpers Union Local 150*, 699 F.2d 1015, 1016 (9th Cir. 1983)).

is wholly irrational.”²⁰⁶ Applying this standard, courts have found it arbitrary for a union to fail to investigate an employee’s complaint,²⁰⁷ or fail to file a timely grievance on behalf of an employee.²⁰⁸ By contrast, courts have not found it arbitrary for a union to mistakenly advise a client about his rights,²⁰⁹ accept what turns out to be a bad deal,²¹⁰ or even provide incorrect advice after going through the proper investigative channels.²¹¹

For a prospective professional athlete to argue that a union’s approval of an age/education requirement is arbitrary, the athlete would need evidence indicating a problem in the union’s process of agreeing to the age/education requirement, rather than with the result of the actual requirement.²¹² For example, a prospective professional athlete would need to show either that the union blindly accepted the age/education requirement or acted indifferently in accepting the requirement.²¹³

2. Is a Sports Union’s Agreement to an Age/Education Requirement in Bad Faith?

By contrast, a court will define conduct to be in bad faith if it is either dishonest or intended to mislead workers.²¹⁴ In the context of a

206. *Marquez*, 525 U.S. at 45 (internal quotations and citations omitted); *Humphrey*, 375 U.S. at 349; *see also O’Neill*, 499 U.S. at 78; *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953); *Aguinaga*, 993 F.2d at 1470 (“A union’s actions are arbitrary only if, in light of the factual and legal landscape at the time of the union’s actions, the union’s behavior is so far outside a wide range of reasonableness as to be irrational.”) (internal quotations omitted); *Miller v. Gateway Transp. Co.*, 616 F.2d 272, 277 n.12 (7th Cir. 1980) (noting union’s obligation to avoid “capricious” conduct).

207. *See Miller*, 616 F.2d at 277 (finding that a failure to investigate the height of a truck that led to an employee’s suspension gave rise to a genuine issue of fact material to breach of the union’s duty of fair representation).

208. *Ruzicka*, 523 F.2d at 310; *see also Dutrisac v. Caterpillar Tractor Co.*, 749 F.2d 1270, 1274 (9th Cir. 1983).

209. *See Peterson*, 771 F.2d at 1253; *see also Castelli v. Douglas Aircraft Co.*, 752 F.2d 1480, 1482 (9th Cir. 1985) (A union’s representation of its members “need not be error free.”).

210. *See O’Neill*, 499 U.S. at 74-75; *see also Marquez*, 525 U.S. at 44.

211. *See, e.g., Peterson*, 771 F.2d at 1255 (finding the National Football League Players Association’s mistaken judgment to file an injury grievance rather than a non-injury grievance does not give rise to breach of the duty of fair representation).

212. *See supra* notes 205-211 and accompanying text.

213. *See supra* notes 205-211 and accompanying text.

214. *Marquez*, 525 U.S. at 47; *see also Hines v. Anchor Motor Freight Inc.*, 424 U.S. 554, 564 (1976); *Humphrey v. Moore*, 375 U.S. 335, 350 (1964); *Aguinaga v. United Food & Commercial Workers Int’l Union*, 993 F.2d 1463, 1468-70 (10th Cir. 1993); *Lewis v. Tuscan Dairy Farmers*, 25 F.3d 1138, 1142 (2d Cir. 1994); *Mock v. T.G. & Y Stores Co.*, 971 F.2d 522, 531 (10th Cir. 1992) (“Bad faith requires a showing of fraud, deceitful action or dishonest action.”).

union's duty of fair representation, bad faith conduct is most often associated with a secret agreement between the union and management or a union official's failure to disclose pertinent information to members of the bargaining unit.²¹⁵

A prospective professional athlete that seeks to challenge a union's acceptance of an age/education requirement under the "bad faith" prong would need to produce evidence that the union acted with an inappropriate intent.²¹⁶ For example, the prospective athlete would need evidence that the union officials were more interested in appeasing the NCAA or sports-club members than the wishes of their own unit.²¹⁷

3. Is a Sports Union's Agreement to an Age/Education Requirement Discriminatory?

Finally, courts define conduct as discriminatory that is either "partial" or "invidious."²¹⁸ In the 1944 case *Steele v. Louisville & Nashville Railroad Co.*, the Supreme Court found it discriminatory for a union composed of railroad firefighters to agree with their employers to exclude Black firefighters from the workplace.²¹⁹ There, the Court explained that the duty of fair representation serves to protect those within a union's minority from being discriminated against by the membership majority.²²⁰ The Court further explained that such a rule is

215. See, e.g., *Lewis*, 25 F.3d at 1142-43 (describing a secret agreement signed by union to benefit a sub-segment of its members); *Bennett v. Local Union No. 66*, 958 F.2d 1429, 1435 (7th Cir. 1992); *Ackley v. Western Conference of Teamsters*, 958 F.2d 1463, 1472 (9th Cir. 1992) (union's bad faith failure to disclose material information may lead to a claim for breach of duty of fair representation where plaintiffs can demonstrate "a causal relationship between the alleged misrepresentation and their injury."). By contrast, employees are usually unable to succeed under this prong where a union is simply found to not have been representing its members as vigorously as possible. *Mock*, 971 F.2d at 531.

216. See *supra* notes 214-215 and accompanying text.

217. See generally *supra* notes 214-215 and accompanying text. Note, however, evidence of a union's preference to appease veteran union members at the expense of potential new members is unlikely to show bad faith, as it is unavoidable to have some level of discord, because "[c]onflict between employees represented by the same union is a recurring fact." *Humphrey*, 375 U.S. at 349-50.

218. See, *Air Line Pilots Ass'n Intern. v. O'Neill*, 499 U.S. 65, 75, 81 (1991) (describing discriminatory conduct as "invidious"; see also *Humphrey*, 375 U.S. at 342 (stating the union is required, as an agent for all employees, to treat all employees "fairly and impartially"); but cf. *Florey v. Air Line Pilots Ass'n*, 575 F.2d 673, 676 (8th Cir. 1978) (noting in the Eighth Circuit a plaintiff must show the additional element that the conduct was committed with "lack of good faith").

219. *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944) (while this case was specifically based on the Railway Labor Act, courts have since applied the same standard to other unions under the National Labor Relations Act).

220. See *Steele*, 323 U.S. at 194, 199-200.

necessary for effective collective bargaining because otherwise the voting minority “would be left with no means of protecting their interests, or . . . their right to earn a livelihood by pursuing the occupation in which they are employed.”²²¹

Nine years later in *Ford Motor Co. v. Huffman*, however, the Supreme Court limited *Steele* by clarifying that not every action taken by a union to the detriment of a subclass of employees violates the duty of fair representation.²²² Specifically in *Ford Motor Co.*, the Court held that a union may offer new employees seniority credit for their pre-employment military service without violating the duty of fair representation.²²³ According to the Court, the union’s “honest effort” to serve all parties represented by the bargaining unit is sufficient to avoid any liability.²²⁴

Given these substantial differences in both language and tone between *Steele* and *Ford Motor Co.*, lower courts have been inconsistent in determining what behaviors should be deemed discriminatory under a union’s duty of fair representation.²²⁵ The broader view of “discriminatory,” as applied by the Second and Tenth circuits, focuses on protecting those with minority voting power in a union, much like how the duty of loyalty in the corporate setting protects minority shareholders.²²⁶ For example, the Second Circuit Court of Appeals in *Jones v. Trans World Airlines, Inc.* held that for a union to avoid a lawsuit for breach of the duty of fair representation it must “provide substantive and procedural safeguards for minority members of the collective bargaining unit.”²²⁷ Similarly, the Tenth Circuit Court of

221. *Id.* at 201.

222. *See Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953).

223. *Id.* at 331.

224. *Id.* at 337-38, 340.

225. *See infra* notes 226-231 and accompanying text.

226. *Jones v. Trans World Airlines, Inc.*, 495 F.2d 790, 796 (2d Cir. 1974) (“It is clear that a union may conduct itself in a manner so arbitrary or malicious vis-à-vis an outside group that it exceeds the limit imposed by the duty of fair representation.”); *see also Miller v. Gateway Transportation Co.*, 616 F.2d 272, 277 n.11 (7th Cir. 1980) (noting that the duty of fair representation “may be breached without scienter on the part of the union,” and that “[p]atently wrongful conduct such as racial discrimination or personal hostility is not the sole measure of what is prohibited”) (internal citations and quotations omitted); Reuel E. Schiller, *The Emporium Capwell Case: Race, Labor Law, and the Crisis of Post-War Liberalism*, 25 BERKELEY J. EMP. & LAB. L. 129, 143 (2004) (“The duty of fair representation dictates that the union treat all workers fairly in the bargaining unit, even those who are not union members or who actively oppose the union.”); *see generally Air Line Pilots Ass’n Intern. v. O’Neill*, 499 U.S. 65, 75 (1991) (comparing the non-discrimination prong of the duty of fair representation to the fiduciary duty of loyalty in the corporate context).

227. *Jones*, 495 F.2d at 798.

Appeals in *Aguinaga v. United Food & Commercial Workers*²²⁸ held that it is in violation of the duty of fair representation for a union to determine worker preferences based on any classification that is irrelevant to job performance.²²⁹

By contrast, the more narrow view of the “discriminatory” prong will only find breach of the duty of fair representation where the union’s conduct harms a statutorily protected class,²³⁰ or where the discriminatory conduct occurs alongside some level of discriminatory intent.²³¹ This view seems to focus less on the explicit language used in the *Steele* case and more on that the discriminated against parties in *Steele* were Black, whereas the unhappy parties in *Ford Motor Co.* were not part of any protected class.

a. Is a Sports League Age/Education Requirement Discriminatory under the Broader View?

If a court were to apply the broader view of the discriminatory prong of the duty of fair representation, a prospective professional athlete denied entry into his sports league by a collectively bargained age/education requirement may have grounds to sue (presuming, of course, that he is deemed to be represented by the union).²³² The prospective professional athlete’s claim would focus on evidence that current professional athletes support age/education requirements only to protect their jobs from younger and less formally educated players of higher skill and ability level.²³³

Nevertheless, this challenge may prove more effective in the Tenth Circuit than in the Second Circuit.²³⁴ This is because there has recently emerged some dicta in the Second Circuit indicating that unions

228. *Aguinaga v. United Food & Commercial Workers*, 993 F.2d 1463 (10th Cir. 1993).

229. *Id.* at 1470 (applying this standard, the court proceeded to find a violation where a union, knowing full-well that the employer meat-packing plant was going to close and reopen as a non-union plant, entered into two secret side agreements releasing all rights and claims that certain plaintiff-workers would have when the plant reopened.).

230. See Matthew J. Mitten & Timothy Davis, *Athlete Eligibility Requirements and Legal Protection of Sports Participation Opportunities*, 8 VA. SPORTS & ENT. L.J. 71, 107-08 (2008).

231. See, e.g., *Florey v. Air Line Pilots Ass’n.*, 575 F.2d 673, 676 (8th Cir. 1978) (“improper union motivation is the very crux of the fair representation doctrine and is an essential element in all fair representation cases”).

232. See *infra* notes 233-235 and accompanying text.

233. McCann, *supra* note 188, at 742.

234. See *infra* note 235 and accompanying text.

sometimes may “seek to preserve jobs for current players to the detriment of new employees.”²³⁵

b. Is a Sports League Age/Education Requirement Discriminatory under a Narrow View?

If a court were to apply the more narrow view for discriminatory conduct under the duty of fair representation, a prospective league entrant would have the more difficult task of arguing that he was excluded from a sports league on the basis of his status as part of a statutorily protected class.²³⁶

Looking first at federal statutes, it would be difficult to argue that athletes excluded from a sports league by an age/education requirements are part of a protected class.²³⁷ While age discrimination is outlawed by Congress under the Age Discrimination in Employment Act of 1967, this statute “forbids discriminatory preferences for the young over the old” but does not prohibit “favoring the old over the young.”²³⁸

A prospective professional athlete may also attempt to rely on state statutes that provide protection to age discrimination against the young, as well as the old. For example, in New Jersey, an employee may not discriminate against the young in any hiring decision.²³⁹ Meanwhile, in

235. See *Clarett v. Nat'l Football League*, 369 F.3d 124, 139 (2d. Cir. 2004). Nevertheless, one may be able to argue that a plaintiff can potentially differentiate the age/education requirements in the sports context from other seniority provisions on three grounds. First, salaries and promotion in the sports marketplace are otherwise based on skill rather than seniority. Second, professional athletes typically have a far shorter careers than other unionized workers, thus making any delays in entering the workforce more detrimental. Mitten & Davis, *supra* note 230, at 105-06. Finally, unlike most other unionized workers, the professional athlete does not have the opportunity to pursue the same line of work for a non-unionized employer because “there is only one major professional league, and thus only one source of employment, for each sport in the United States.” *Id.* at 105.

236. See *supra* notes 230 - 231 and accompanying text.

237. See *infra* note 238 and accompanying text.

238. See Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (2006); see also Mitten & Davis, *supra* note 230, at 107-08 (stating that the Age Discrimination Act of 1967 protects only persons who are at least forty years old); *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 584 (2004) (noting that while the Age Discrimination Act of 1967 “forbids discriminatory preference for the young over the old,” it does not prohibit favoring the old over the young).

239. *Bergen Commercial Bank v. Sisler*, 157 N.J. 188, 199-201 (1999) (quoting New Jersey Law Against Discrimination codified at N.J.S.A. 10:5-12(a), “It shall be an unlawful employment practice, or, as the case may be, an unlawful discrimination . . . [f]or an employer, because of the . . . age . . . of any individual . . . to refuse to hire or employ or to bar or to discharge or require to retire . . . from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment. . .”).

Oregon, the courts have held that it is discriminatory for a company to refuse to hire a worker solely based on youth.²⁴⁰ However, a court might deem these state statutes preempted by federal law (a matter of first impression in the context of the discriminatory prong of a duty of fair representation claim).²⁴¹

V. CONCLUSION

While both the NFL and NBA for almost five years have maintained collectively bargained age/education requirements, the legality of collectively bargained age/education requirements remains largely unsettled.

From an antitrust perspective, whether a sports league's collectively bargained age/education requirement violates Section 1 of the Sherman Act turns on how a particular court applies the non-statutory labor exemption. Under the broader *Clarett* view, all collectively bargained age/education requirements are exempt from antitrust scrutiny under the non-statutory labor exemption. However, under the more narrow *Mackey* view, age/education requirements would not be protected by the non-statutory labor exemption if they are found not to primarily affect parties represented in the collective bargaining process.

From a labor law perspective, whether a sports union's agreement to a collectively bargained age/education requirement violates the duty of fair representation turns on whether a union is deemed to represent prospective entrants into a sports league, as well as how the court defines what is discriminatory conduct. Presuming a union is found to represent prospective league members, a prospective player seeking to challenge an age/education requirement under labor law would likely argue that they are victims of discrimination due to their lack of voting power in the players union and the ultimate result of a rule that excludes them from working despite having adequate skill. By contrast, a sports players union would likely argue that young and less educated players that seek

240. *Ogden v. Bureau of Labor*, 699 P.2d 189, 192-94 (Or. 1985) (holding that using youth as the sole reason for not considering a job applicant is discriminatory).

241. *See Altria Group, Inc. v. Good*, 129 S. Ct. 538, 543 (2008) (“[I]nquiry into the scope of a statute’s pre-emptive effect is guided by the rule that the purpose of Congress is the ultimate touchstone in every pre-emption case. Congress may indicate pre-emptive intent through a statute’s express language or through its structure and purpose. If a federal law contains an express pre-emption clause, it does not immediately end the inquiry because the question of the substance and scope of Congress’ displacement of state law still remains. Pre-emptive intent may also be inferred if the scope of the statute indicates that Congress intended federal law to occupy the legislative field, or if there is an actual conflict between state and federal law.”) (internal citations and quotations omitted).

to enter a sports league cannot argue discrimination against them by the union given they are not part of a federally protected class.

As both NFL and NBA club-owners and players prepare to negotiate their new collective bargaining agreements, both parties need to be cognizant that the law remains unsettled with respect to collectively bargained age/education requirements. In the Third, Sixth, Eighth and D.C. Circuits, sports club-owners seem to retain some antitrust risk for implementing collectively bargained age/education requirements. Meanwhile, in the Tenth Circuit (and, perhaps, to a lesser extent, the Second), players unions retain some labor law risk for agreeing to age/education requirements.