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Herschel Walker v. National Football League: A Hypothetical Lawsuit Challenging the Propriety of the National Football League's Four-or-Five Year Rule Under the Sherman Act

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I. INTRODUCTION

Herschel Walker may well be the best collegiate football player in the country. In the recruiting battle between college football teams to acquire talented players, he was the most sought after athlete in the country,[1] with good reason. As a running back in high school, he ran for eighty-six touchdowns and 6,137 yards, forty-five of the touchdowns and 3,167 of the yards in his senior year alone.[2] While attending the University of Georgia, Herschel has continued to establish himself as a superior athlete. Competing on the Georgia track team, he achieved the status of a world class sprinter by clocking a 10.19 time in the 100 meters.[3] On the gridiron, he set an NCAA freshman rushing record of 1,616 yards,[4] finished third in the Heisman Trophy voting,[5] and was the first freshman in college football to be deemed a consensus All American in this century.[6] During his sophomore year, he again achieved All American status while racking up 1,903 yards rushing and twenty-two touchdowns.[7]

Herschel's success has not gone unnoticed.[8] Nelson Skalbania, owner of the Canadian Football League's Montreal Alouettes, offered him a contract to play in Canada. One would think that a National Football League (NFL) team would share a similar inter-

1. Phillips, *How 'Bout Them Dawgs?*, TIME, Dec. 1, 1980, at 102.

2. Kirkpatrick, *More Than Georgia's on his Mind*, SPORTS ILLUSTRATED, Aug. 31, 1981, at 38, 42.

3. Den. Post, Dec. 31, 1981, § D, at 1, col. 5.

4. Kirkpatrick, *supra* note 2, at 38.

5. *Id.*

6. *Id.* at 45.

7. During the regular season, Herschel ran for 1,819 yards and 20 touchdowns. Denver Post, Dec. 31, 1981, § D, at 1, col. 4. In the Sugar Bowl, he added 84 yards and two touchdowns. L.A. Times, Jan. 2, 1982, § III, at 16, col. 4.

8. In the 1980 election returns of Greene County, Georgia, he received three write-in votes for President of the United States. Kirkpatrick, *supra* note 2, at 42.

est[9] and select him in the NFL's annual player draft. Such is not the case. No NFL team will draft Herschel for at least two more years, the simple reason being that he is not old enough.

II. THE FOUR-OR-FIVE YEAR RULE

The National Football League has enacted a so-called "four-or-five year rule" whereby an athlete is ineligible to play for, or be drafted by, an NFL team unless one of three eligibility requirements are met. A prospective football player must have exhausted his eligibility for college football, or five years must have elapsed since the player first attended an institution of higher education, or he must have received a diploma from such an institution.[10] This rule was enacted to provide for competitive balance among the NFL member teams[11] and is still enforced today.[12]

Since Herschel is only a college sophomore, he has not met the

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9. Gil Brandt, director of player personnel for the Dallas Cowboys, stated that "[Herschel] Walker and Earl Campbell are the only two players I've ever seen who could have gone straight from high school to the pros." Phillips, *supra* note 1, at 102.

10. The NFL Constitution and By-Laws provide: "The only players eligible to be selected in any Selection Meeting shall be those players who fulfill the eligibility standards prescribed in Article XII, § 12.1 of the Constitution and By-Laws of the League." NAT'L FOOTBALL LEAGUE, CONST. AND BY-LAWS FOR THE NAT'L FOOTBALL LEAGUE art. XIV, § 14.2 (1976); and

> No person shall be eligible to play or be selected as a player unless (1) all college football eligibility of such player has expired, or (2) at least five (5) years have elapsed since the player first entered or attended a recognized junior college, college, or university, or (3) such player receives a diploma from a recognized college or university prior to September 1st of the next football season of the League. . . .

Id. art. XII, § 12.1(A).

11. During the 1960's, stronger clubs such as the Green Bay Packers drafted red shirts (college players who do not play for their college teams in a given year but who retain their eligibility to play in a future year) enabling them to stockpile future players in the circumstance where weaker clubs were not in a position to do so. As a result, the League banned the drafting of red shirted college players until they had actually completed their college careers. *Rights of Professional Athletes: Hearings on H.R. 2355 and H.R. 694 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. 51 (1975) (testimony of Pete Rozelle, Commissioner, National Football League). There may be a serious question as to whether the NFL has been successful in achieving parity within the League. *See id.* at 131 (letter from Roger E. Noll, Professor of Economics); Smith v. Pro Football, Inc., 593 F.2d 1173, 1183-84 n.46 (D.C. Cir. 1979); Quirk & El Hodiri, *The Economic Theory of a Professional Sports League*, in GOVERNMENT AND THE SPORTS BUSINESS 33, 58 (R. Noll ed. 1974).

12. Following his sophomore year in college, Clarence Reece signed a contract and played for the Canadian Football League during the 1974 season. In 1975 he signed a contract with the Houston Oilers. Commissioner Rozelle disapproved the contract on the grounds that Reece had not satisfied the NFL's eligibility requirements. Reece filed suit alleging the eligibility requirements constituted a group boycott. When assured that no NFL team had encouraged Reece to withdraw from college, the Commissioner rescinded his disapproval of the contract. L. SOBEL, PROFESSIONAL SPORTS AND THE LAW 466 n.3 (1977).

NFL's eligibility requirements and therefore may not participate in the league. Should he wish to challenge this rule he might do so in a manner similar to that chosen by Kenneth Linesman, Spencer Haywood, and Joe Kapp when they challenged restrictive policies enacted by professional sports leagues.

Kenneth Linesman wished to play in the World Hockey Association; however, he was only nineteen years old and league rules required that he be twenty years old to compete in the league.[13] He was drafted by the Birmingham Bulls and signed a contract in violation of the twenty-year-old rule. The President of the league voided the contract. In the ensuing lawsuit, the court found that the rule violated the Sherman Act[14] and thus granted a preliminary injunction allowing Linesman to participate in the league.

Spencer Haywood challenged the National Basketball Association's (NBA) four year rule when Commissioner Kennedy disapproved a contract he had signed with the Seattle Supersonics.[15] Judge Ferguson found that the rule violated the Sherman Act and granted a preliminary injunction, allowing Haywood to play for the Supersonics. The NBA responded by developing a "hardship draft."[16]

Joe Kapp signed a contract to play for the NFL Boston Patriots; however, he refused to sign a Standard Players Contract which would bind him to the National Football League's Constitution and By-Laws. Kapp played in eleven games for the Patriots before the team, pursuant to an ultimatum by Commissioner Rozelle, ordered Kapp to sign the Standard Players Contract or leave the team. Kapp won the lawsuit which followed but to his dismay, he received no offers to play for any NFL team.[17]

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13. *See* notes 72-75 *infra* and accompanying text.

14. The Sherman Act provides in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ." 15 U.S.C. § 1 (1976).

15. The four year rule provided that one could not play in the NBA until four years after graduation from high school. The Commissioner disapproved the contract because Haywood did not meet the requirements of the rule. *See* notes 76-85 *infra* and accompanying text.

16. The "hardship rule," or the "undergraduate eligibility rule," provides an exception to the four year rule. It enables an impoverished athlete to petition the Commissioner of the NBA for a hardship classification. Commissioner Kennedy has liberally granted athletes this status.

17. The reasons for Kapp's inability to receive offers from NFL teams are unclear. *See* note 114 *infra* and accompanying text.

In Herschel's challenge to the NFL's four-or-five year rule, he might announce that he has chosen to pursue a career in the League and invite the NFL teams to select him in the annual player draft. Once he was drafted he would then sign a contract in violation of the four-or-five year rule. The league could then be expected to void the contract. Herschel could then file a lawsuit alleging that the rule constitutes a restraint of trade in violation of the Sherman Act.[18] On the other hand, it is possible that league teams would not draft Herschel for fear of sanctions being imposed by the League.[19] Should this be the case, Herschel would still be in a position to file a suit against the NFL.[20]

Before proceeding further, it should be noted that a person seeking to challenge the NFL's eligibility requirements will be faced with a formidable task. It is likely that the League would contest the lawsuit in order to keep its relations with college football amicable.[21] It would also be extremely difficult for such an athlete to absorb the staggering cost of confronting an unregulated monopoly.[22] Further, despite the fact that the Clayton Act provides treble damages[23] for violation of the Sherman Act,[24] since there is no assurance that Herschel could make an NFL team, any claim for damages would be purely speculative and subject to dismissal on a motion for summary judgment.[25] Since the average antitrust suit takes from four to five years to reach the Supreme Court,[26] and since Herschel will be eligible to participate in the NFL in two years, there is also the possibility that Herschel would drop the action before the Supreme Court could have an opportunity to decide the issue. If Herschel were granted

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18. *See* note 14 *supra*.

19. The NFL provides for harsh punishment for teams who acquire players in violation of the four-or-five year rule. "If a club violates this section, it shall be subject to punishment by the Commissioner, such punishment shall provide for the loss of selection choices of the offending club in the next or in succeeding Selection Meetings *up to and including the entire Selection List*." NAT'L FOOTBALL LEAGUE CONST. AND BY-LAWS FOR THE NAT'L FOOTBALL LEAGUE art. XII, § 12.1(B) (1976) (emphasis added).

20. *See* notes 126-34 *infra* and accompanying text.

21. S. GALLNER, PRO SPORTS: THE CONTRACT GAME 27 (1974). *See also* notes 87-94 *infra* and accompanying text.

22. *Id.* at 27-28.

23. The Clayton Act provides in pertinent part: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore . . . and shall recover threefold damages by him sustained, and the cost of the suit including a reasonable attorney's fee." 15 U.S.C. § 15 (1976).

24. As defined in 15 U.S.C. § 12 (1976), the Sherman Act is included in the "antitrust laws" of 15 U.S.C. § 15 (1976).

25. S. GALLNER, *supra* note 21, at 28.

26. *Id.* at 27. In Radovich v. National Football League, 352 U.S. 445 (1957), the suit took eight years to reach the Supreme Court.

a preliminary injunction, however, the League could be expected to pursue the matter to prevent other collegiate athletes from similarly attempting to enter the League.[27]

No doubt Herschel Walker was conscious of these obstacles when he determined that it would be foolish to challenge the NFL in court following his freshman year,[28] and when he announced his decision not to play football in Canada. In rejecting the Montreal Alouette's offer, he stated, "I grew up in America, and I don't think I should have to leave this country to make a living."[29] The question now becomes whether it is proper for the NFL to force young athletes to make such a decision. Perhaps the courts may soon be forced to decide the question, since Herschel has recently stated that he is "going to think seriously about challenging the [NFL draft] rule . . . ."[30]

III. THE ANTITRUST LAWS

A. Underpinnings of the Sherman Act

The notion that each individual should be free in his trade or undertaking took root during medieval times.[31] During the period of English history marked by the breakup of the guilds and brotherhoods, the common law rule against restraints began to develop.[32] Initially, all contracts in restraint of trade were deemed to be injurious to the public as well as to the individuals who made them, and the courts found such restraints to be unlawful

27. Since college athletes will probably attempt to follow Herschel's example should he be successful in his attempt to enter the NFL, the case would fall into the "capable of repetition yet evading review" exception to the mootness doctrine. Southern Pac. Terminal Co. v. ICC, 219 U.S. 498, 515 (1911).

28. Kirkpatrick, *supra* note 2, at 41.

29. *Id.*

30. Den. Post, Dec. 31, 1981, § D, at 1, col. 5.

31. 16 J. VON KALINOWSKI, BUSINESS ORGANIZATIONS, ANTITRUST LAWS AND TRADE REGULATIONS 1-21 (Matthew Bender 1981). The notion of freedom of trade is derived from:

(1) implications of clauses in the Magna Carta relating to liberty of the individual and of trade;
(2) medieval judges favored the principle, just as they favored the principle of freedom of alienation; and
(3) a hostile feeling by medieval judges toward all arbitrary restrictions on personal liberty or property rights for which no legal justification could be shown.

Holdsworth, *Industrial Combinations and The Law in The Eighteenth Century*, 18 MINN. L. REV. 369, 371-72 (1934).

32. 16 J. VON KALINOWSKI, *supra* note 31, at 1-22 n.11.

and voidable, without regard to the surrounding circumstances.[33] This all-inclusive prohibition against restraints seriously impinged upon everyday business transactions and was eventually modified to prohibit only unreasonable restraints of trade.[34]

The English common law prohibition against unreasonable restraints found an easy foothold in America.[35] When faced with the restraints and unfair trade practices of the nineteenth century, however, the common law became outdated, and was inadequate to cope with these problems.[36] State statutes enacted in the middle and late nineteenth century were only partially successful in curbing competitive abuses which ranged across the country.[37] Given the economic condition of the times, it became clear that the Federal Government would have to intervene.[38]

B. The Sherman Act

In 1890 Congress responded by enacting the Sherman Act.[39] Read literally, this statute prohibits *every* contract, combination, or conspiracy in restraint of trade.[40] The courts, however, have been reluctant to apply the literal meaning of the Sherman Act, and as a result, two lines of cases have developed in interpreting the statute. On one hand, the Supreme Court has stated that the Sherman Act should be construed in the light of reason, and as such, it only prohibits unreasonable restraints of trade.[41] On the other hand, the Supreme Court has also stated that "certain agreements or practices which, because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused, or the business excuse for their use."[42]

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33. Standard Oil Co. v. United States, 221 U.S. 1, 54-55 (1911).

34. *Id.* at 55; 16 J. VON KALINOWSKI, *supra* note 31, at 1-23. In determining the reasonableness of the restraint, the courts weighed the interests of the contracting parties against the interests of the general public. *Id.* at 1-26.

35. Standard Oil Co. v. United States, 221 U.S. at 56-57; Hamilton, *Common Right, Due Process and Antitrust*, 7 LAW AND CONTEMP. PROB. 24, 29 (1940).

36. 16 J. VON KALINOWSKI, *supra* note 31, at 1-35.

37. *Id.* at 1-38.

38. Standard Oil Co. v. United States, 221 U.S. at 50.

39. 15 U.S.C. § 1 (1976). *See* note 14 *supra*.

40. *Id.* This appears to have been the approach applied by the courts in early cases which dealt with the Sherman Act. *See* United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897).

41. Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049, 1067 (C.D. Cal. 1971) (injunction reinstated *sub nom.* Haywood v. National Basketball Ass'n, 401 U.S. 1204 (1971)) (citing Standard Oil Co. v. United States, 221 U.S. 1 (1911)).

42. Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1957).

1. The Rule of Reason

The "rule of reason" was first announced in *Standard Oil Co. v. United States*[43] and is the standard which is usually applied where anticompetitive practices are alleged under section one of the Sherman Act.[44] Under the rule of reason, the test of legality is whether the restraint regulates and perhaps promotes competition, or whether it suppresses or destroys competition.[45] Under certain circumstances, however, the rule of reason has been replaced by a rule of *per se* illegality.

2. Per Se Illegality and Group Boycotts

The doctrine of *per se* illegality is the antitheses of the rule of reason and was given birth in *Eastern States Retail Lumber Dealers' Association v. United States*.[46] In *Eastern States*, the Court found that an agreement between retailers not to deal with wholesalers who also sold at retail was in violation of the Sherman Act. While the Court did not use the term *per se* in its opinion, it did state that the actions taken "takes the case out of those normal and usual agreements in aid of trade and commerce which may be found not to be within the act, and puts them within the prohibited class of undue and unreasonable restraints . . . ."[47]

Cases following *Eastern States* have firmly established that group boycotts[48] or concerted refusals to deal[49] are *per se* illegal

43. 221 U.S. 1 (1911). The majority opinion was written by Chief Justice White who dissented in United States v. Trans-Missouri Freight Ass'n and United States v. Joint Traffic Ass'n. *See* note 40 *supra*.

44. Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 59 (1976).

45. Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918). To determine the reasonableness of the restraint, the court ordinarily considers:

> [T]he facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint; and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, and the purpose or end sought to be attained are all relevant facts.

Id.

46. 234 U.S. 600 (1914); *see also*, Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 36 (1976).

47. Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. at 612.

48. A group boycott is a concerted attempt by a group of competitors at one level to protect themselves from competition from non-group members who seek to compete at that level. Smith v. Pro Football Inc., 593 F.2d 1173, 1178 (D.C. Cir. 1978). *See also* L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 230 (1977).

49. Technically a concerted refusal to deal is a method of enforcing or perpetrating a boycott. L. SULLIVAN, *supra* note 48, at 230-31.

under the Sherman Act. The problem, however, arises in defining the activities to which the *per se* label attaches.[50] Preliminarily it may be observed that the *per se* label is only appropriate where the conduct is manifestly anticompetitive.[51] Additionally, the Supreme Court has handed down a number of decisions which categorize the types of conduct which are deemed to be illegal *per se*.[52]

Three cases are of particular importance in the development of the *per se* approach to group boycotts. In *Fashion Originators' Guild, Inc. v. FTC*,[53] garment manufacturers formed a guild and agreed not to deal with retailers who stocked garments copied by other manufacturers from designs of the guild members. The guild argued that the restrictions were reasonable in that they prevented the immoral practice of "style piracy." The Court noted that the designs could not be patented or copyrighted and found the boycott illegal, stating: "[I]t was not error to refuse the evidence offered, for the reasonableness of the methods pursued by the combination to accomplish its unlawful objective is no more material than would be the reasonableness of the prices fixed by unlawful combination."[54]

The next decision in the development of the *per se* doctrine is *Klor's, Inc. v. Broadway-Hale Stores, Inc.*[55] In delivering the deci-

50. PRACTISING LAW INSTITUTE, TWENTY-SECOND ANNUAL ANTITRUST LAW INSTITUTE 36 (1981). "[B]oycotts are not a unitary phenomenon." St. Paul Fire and Ins. Co. v. Barry, 438 U.S. 531, 543 (1978) (quoting P. AREEDA, ANTITRUST ANALYSIS 381 (2d ed. 1974). The Supreme Court has noted that its own "decisions reflect a marked lack of uniformity in defining the term." St. Paul Fire and Ins. Co. v. Barry, 438 U.S. at 543. "[T]he simple use of labels cannot suffice. . . ." Ron Tonkin Turisino, Inc. v. Fiat Distributors, Inc., 1980-81 Trade Cas. (CCH) ¶ 63,854, at 78,529 (9th Cir. 1981).

51. Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. at 49-50. *See* notes 60-62 *infra* and accompanying text.

52. The Supreme Court has placed group boycotts into three categories:

(1) Horizontal combinations of competitors to exclude direct competitors from the market. *See, e.g.*, Associated Press v. United States, 336 U.S. 1 (1945); Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600 (1914).

(2) Vertical combinations to exclude competitors of some of the members of the combination. *See, e.g.*, United States v. General Motors Corp., 384 U.S. 127 (1966); Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959).

(3) Combinations designed to influence the trade practices of boycott victims rather than to eliminate them as competitors. *See, e.g.*, Fashion Originators' Guild of Am., Inc. v. FTC, 312 U.S. 457 (1941).

53. 312 U.S. 457 (1941).

54. *Id.* at 468.

55. 359 U.S. 207 (1959). In *Klor's*, the petitioner alleged that competing retailers conspired with leading appliance manufacturers and agreed not to sell to him, or to sell only at discriminatory prices and on unfavorable terms. The respondents countered that the matter was a purely private quarrel which did not amount to a "public wrong" proscribed by the Sherman Act.

sion Justice Black stated, "group boycotts or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category. They are not saved by allegations that they were reasonable in the specific circumstances. . . . ."[56]

The third case in the development of the *per se* application to group boycotts, and perhaps the case of highest interest is *Silver v. New York Stock Exchange*.[57] In *Silver*, the New York Stock Exchange ordered its members to remove direct telephone wire connections to Silver's office. Silver was a non-member of the Exchange and could not effectively operate as a broker-dealer without the phone connections. No hearing as to the reasons for the disconnection was provided by the Exchange. The Court felt that important business advantages were taken away from Silver by the group action of the Exchange and its members. Justice Stewart stated, "[s]uch 'concerted refusals by traders to deal with other traders . . . have long been held to be in the forbidden category. . . .' "[58] *Silver*, and the cases which followed it, have provided a very narrow exception to the *per se* rule.[59] To qualify for this exception, one must meet three requirements. First, there must be a legislative mandate for self-regulation, "or otherwise." Second, the collective action must be intended to accomplish an end consistent with the policy justifying self-regulation, be reasonably related to that goal, and be no more extensive than necessary. Third, the association must provide procedural safeguards which assure that the restraint is not arbitrary and which furnish a basis for judicial review.

There is one further consideration in determining whether the *per se* label may be properly attached to collective actions. The actions must be shown to be manifestly anticompetitive.[60] In determining whether a concerted action is anticompetitive, the relevant inquiry is "[W]hether the refusal to deal, manifested by a

56. *Id.* at 212 (citing Northern Pac. Ry. Co. v. United States, 356 U.S. 1 (1958)); Fashion Originators' Guild of Am., Inc. v. FTC, 312 U.S. 457 (1941); Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600 (1914).

57. 373 U.S. 341 (1963).

58. *Id.* at 348.

59. *See* United States Trotting Ass'n v. Chicago Downs Ass'n, 487 F. Supp. 1003 (N.D. Ill. 1980); Linesman v. World Hockey Ass'n, 439 F. Supp. 1315 (D. Conn. 1977); Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049 (C.D. Cal. 1971) (injunction reinstated *sub nom.* Haywood v. National Basketball Ass'n, 401 U.S. 1204 (1971)); Comment, *Trade Association Exclusionary Practices: An Affirmative Role for the Rule of Reason*, 66 COLUM. L. REV. 1486 (1966).

60. *See* note 51 *supra*.

combination or conspiracy is so *anticompetitive*, in purpose or effect, or both, as to be an unreasonable restraint of trade."[61] In examining the purpose or effect of a combination or conspiracy, the courts have examined the trade practices to determine whether they are arbitrary and overbroad, or whether they are reasonable and promote the legitimate needs of the conspirators.[62]

In the application of these principles to Herschel Walker's case, it can be seen that he has a rather persuasive argument that the four-or-five year rule is both arbitrary and overbroad. The rule prevents all athletes who do not meet the eligibility requirements from participating in the League without regard to whether the individual is physically capable of competing in the League or whether the player wishes to attend college.

Should Herschel Walker successfully argue that the *per se* label should be attached to the four-or-five year rule, the NFL would be in an awkward position. The League would be faced with the unenviable task of showing that the boycott qualified for the *Silver* exception to the *per se* rule. Failure to do so could lead to the downfall of the rule. On the other hand, should the League prevail in the argument that the four-or-five year rule does not constitute a group boycott, or that the rule is not manifestly anticompetitive, then the rule of reason would be the proper standard to determine the propriety of the NFL's rule.[63] Before proceeding further with this line of analysis, it will be necessary to

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61. Neeld v. National Hockey League, 594 F.2d 1297, 1298 (9th Cir. 1979) (emphasis added). Mutual Fund Investors v. Putnam Management Co., 553 F.2d 620, 626 (9th Cir. 1977), Alpha Distrib. Co. of Cal., Inc. v. Jack Daniel Distillery, 454 F.2d 442, 452 (9th Cir. 1972), *cert. denied*, 419 U.S. 842 (1974).

62. Cases which have found practices by professional sports leagues to be arbitrary and unreasonable include: Linesman v. World Hockey Ass'n, 439 F. Supp. 1315 (D. Conn. 1977) (athlete must be 20 years old to compete in the League); Blalock v. Ladies Professional Golf Ass'n, 359 F. Supp. 1260 (M.D. Ga. 1973) (probation and fine for cheating was imposed in exercise of defendants unfettered discretion, followed by a suspension without a hearing); Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049 (C.D. Cal. 1971) (injunction reinstated *sub nom.* Haywood v. National Basketball Ass'n, 401 U.S. 1204 (1971) (athlete not eligible to compete until four years after graduation from high school). Cases which have found practices by professional sports leagues to be reasonable and not anticompetitive include: Neeld v. National Hockey League, 594 F.2d 1297 (9th Cir. 1979) (prohibition preventing one-eyed hockey players from participating in the league was to promote safety and was not motivated by an anticompetitive purpose); Deesen v. Professional Golfers' Ass'n, 358 F.2d 165 (9th Cir. 1966), *cert. denied*, 385 U.S. 846 (1966) (requirement that a golfer participate in "test rounds" to demonstrate she has the skills to compete in tournaments promotes competition by facilitating participation by proficient younger players); Molinas v. National Basketball Ass'n, 190 F. Supp. 241 (S.D.N.Y. 1961) (suspension of an athlete involved in gambling on the "point spread" of his team was necessary to insure the survival of the League).

63. For a more detailed analysis of which standard should be applied, *see* notes 135-47 *infra* and accompanying text.

examine the application of antitrust law in cases dealing with professional athletes. This is due to the fact that certain aberrations have developed in this area of the law.

C. Antitrust Laws in Professional Athletics

1. The Baseball Anomaly

The first attempt to apply antitrust laws to professional sports occurred in *Federal Base Ball Club of Baltimore v. National League of Professional Base Ball Clubs*.[64] The result was somewhat surprising. The Supreme Court found that baseball was not involved in interstate commerce and as such was exempt from antitrust laws. The antitrust exemption for baseball has been upheld in a number of cases including *Toolson v. New York Yankees*[65] and *Flood v. Kuhn*.[66] This exemption, controversial as it may be, still exists today.[67]

In *Radovich v. National Football League*,[68] the NFL argued for a similar exemption, asserting that "football has just about the same aspects as baseball" and that *stare decisis* compels a similar exclusion from antitrust laws for football.[69] This contention fell upon deaf ears and the Court ruled that football was subject to antitrust laws. Other sports have also suffered a similar fate.[70]

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64. 259 U.S. 200 (1922).

65. 346 U.S. 356 (1953).

66. 407 U.S. 258 (1972).

67. For a more detailed analysis of this exemption, *see* L. SOBEL, *supra* note 12, at 1-82; Comment, *Nearly a Century in Reserve: Organized Baseball: Collective Bargaining and the Antitrust Exemption Enter the 80's*, 8 PEPPERDINE L. REV. 313 (1981).

68. 352 U.S. 445 (1957).

69. Brief for Respondent at 4-5, Radovich v. National Football League, 352 U.S. 445 (1957).

70. The following cases have expressly or impliedly held that the antitrust exemption is limited to baseball: Haywood v. National Basketball Ass'n, 401 U.S. 1204 (1971) (basketball); United States v. International Boxing Club, 348 U.S. 236 (1955) (boxing); Deesen v. Professional Golfers' Ass'n, 358 F.2d 165 (9th Cir. 1966) (golf); Washington St. Bowling Proprietors' Ass'n v. Pacific Lanes, Inc., 356 F.2d 371 (9th Cir. 1966) (bowling); National Wrestling Alliance v. Myers, 325 F.2d 768 (8th Cir. 1963) (wrestling); United States Trotting Ass'n v. Chicago Downs Ass'n, 487 F. Supp. 1008 (N.D. Ill. 1980) (horse racing); Linesman v. World Hockey Ass'n, 439 F. Supp. 1315 (D. Conn. 1977) (hockey); Drysdale v. Florida Team Tennis, Inc., 410 F. Supp. 843 (W.D. Pa. 1976) (tennis); STP Corp. v. United States Auto Club, Inc., 286 F. Supp. 146 (S.D. Ind. 1968) (auto racing).

2. The Case Law

Prior to 1971, baseball was the only sport which selected or drafted players directly out of high school.[71] Subsequent to that time the courts have determined that rules similar to the NFL's four-or-five year rule constitute group boycotts and as such are *per se* illegal. *Linesman v. World Hockey Association*[72] was one such decision. The *Linesman* case dealt with the World Hockey Association's (WHA) rule which required a person to be twenty years old before he was eligible to be drafted.[73] Kenneth Linesman, a nineteen year old amateur Canadian hockey player, was drafted by the Birmingham Bulls and entered into a $500,000 contract with the team. The President of the League declared that the contract violated the twenty-year-old rule, and was therefore null and void. Linesman brought suit contending that the eligibility requirement constituted an unreasonable restraint in violation of section one of the Sherman Act. The WHA defended the rule on the ground that if Linesman was allowed to play, the League would suffer a loss in excess of two and one half million dollars.[74] The court, in granting a preliminary injunction, stated that the twenty-year-old rule constituted a group boycott and was *per se* illegal under the Sherman Act. The court then refused to grant the *Silver* exception to the *per se* rule, stating that "it is doubtful that the WHA would be able to demonstrate that even one of these three prerequisites exists in the instant case."[75]

In *Denver Rockets v. All-Pro Management, Inc.*,[76] Spencer Haywood challenged the National Basketball League's four year rule that prevented an athlete from participating in the league until four years after he graduated from high school.[77] Spencer Haywood was drafted by the American Basketball Association's

71. Demoff, *Eligibility Requirements for Young Athletes*, LOS ANGELES LAWYER, June 1981, at 35, 37.

72. 439 F. Supp. 1315 (D. Conn. 1977).

73. The WHA's twenty-year-old rule provided: "Each member club shall make its selections from among the players who attain their 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." *Id.* at 1318 n.3.

74. It was alleged that this loss would result because the WHA had scheduled hockey games in Canada between themselves and teams from Russia, Czechoslovakia, Sweden, and Finland. Approval by the Canadian Amateur Hockey Ass'n was required for these matches. The Canadian Association had indicated that they would not sanction the contests if the twenty-year-old rule was violated.

75. Linesman v. World Hockey Ass'n, 439 F. Supp. at 1321. It is doubtful that the court's blanket statement is entirely correct because a number of decisions have stated that organizations similar to the WHA qualify for the self-regulation portion of the *Silver* exception. *See* notes 81-82 *infra*.

76. 325 F. Supp. 1049 (C.D. Cal. 1971) injunction reinstated *sub nom.* Haywood v. Nat'l Basketball Ass'n, 401 U.S. 1204 (1971)).

77. The National Basketball Association's four year rule, like the National

(ABA) Denver Rockets following his sophomore year in college. While the ABA had a four year rule similar to the one in the NBA, Haywood was eligible to be drafted under a "hardship exemption" to this rule.[78] Spencer Haywood entered the ABA with credentials as impressive as those of Herschel Walker. He was honored with All-American status in both high school and college. In the 1968 Olympics he led the United States' basketball team to a gold medal and was named the outstanding player in the games. In his first year with the Rockets he was named "Rookie of the Year" and "Most Valuable Player in the ABA."[79] Despite this success, he became disenchanted with the Rockets over a contractual dispute and began to look for another team. Eventually he signed a contract to play for the Seattle Supersonics of the

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Football League's four-or-five year rule is in two parts. Section 2.05 of the By-Laws of the NBA provides:

> *High School Graduate, etc.* 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 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. Similarly a person who has entered college but is no longer enrolled, shall not be eligible to be drafted or to be a Player until the time when he would have first become eligible had he remained enrolled in college. Any negotiations or agreements with any such person during such period shall be null and void and shall confer no rights whatsoever; nor shall a Member violating the provisions of this paragraph be permitted to acquire the rights to the services of such person at any time thereafter.

Section 6.03 provides:

> *Persons Eligible for Draft.* The following classes of persons shall be eligible for the annual draft:
>
> (a) Students in four year colleges whose classes are to be graduated during the June following the holding of the draft;
>
> (b) Students in four year colleges whose original classes have already been graduated, and who do not choose to exercise remaining collegiate basketball eligibility;
>
> (c) Students in four year colleges whose original classes have already been graduated if such students have no remaining collegiate basketball eligibility;
>
> (d) Persons who become eligible pursuant to the provisions of Section 2.05 of these By-Laws. (emphasis in original).

Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. at 1059.

78. Haywood qualified as a "hardship case" because he supported his mother and nine younger brothers and sisters. *Who Owns Haywood?*, NEWSWEEK, Feb. 15, 1971, at 79. It is interesting to note that the ABA's "hardship exemption" was a gimmick, devised to beat the NBA in signing Haywood. The ABA knew that no NBA team could sign Haywood until after his senior year of college. L. SOBEL, *supra* note 12, at 448-49, 468-69. By drafting Haywood prior to the time an NBA team could, the Rockets could also avoid a bidding war with NBA teams.

79. Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. at 1052.

NBA. The Commissioner of the NBA disapproved the contract since it had not been four years since Haywood graduated from high school. The stage was now set for the bitterly contested suit which was to follow.

Spencer Haywood filed suit alleging that the NBA's four year rule constituted a group boycott in violation of the Sherman Act. Haywood then filed a motion for partial summary judgment seeking an order declaring two sections of the NBA By-Laws to be illegal under section one of the Sherman Act.[80] Judge Ferguson granted the motion.

In reaching this decision, Judge Ferguson conducted a detailed analysis of the *Silver* exception to the *per se* rule. He noted that the "or otherwise" language in the mandate for self-regulation requirement had been extended to situations wherein the structure of the industry requires collective action.[81] Surely there could be no argument that the NBA should be entitled to develop rules which are reasonably necessary to ensure the perpetuation of the League.[82]

Under the second prong of the *Silver* test, the NBA put forth three contentions supporting the four year rule. First, the NBA suggested that the rule was financially necessary to professional basketball as a business enterprise. This argument was rejected on the grounds that *Klor's* did not provide for an exemption for such a reason. Second, the NBA argued that the rule was necessary to guarantee that a basketball player should be given an opportunity to complete four years of college before playing for a professional team. In noting that this was indeed a commendable goal, Judge Ferguson stated that "[T]his court is not in a position to say that this consideration should override the objective of fostering economic competition. . . . If such a determination is to be made, it must be made by Congress and not the courts."[83] This was also found to be more restrictive than necessary because the rules in question prohibited the signing of all college basketball players, including those who did not want to attend college, as

80. *See* note 77 *supra*.

81. Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. at 1064-65. *See also* note 59 *supra*.

82. *See* Neeld v. National Hockey League, 594 F.2d 1297 (9th Cir. 1979) (standards which promote safety); Hatley v. American Quarter Horse Ass'n, 552 F.2d 646 (5th Cir. 1977) (in some sporting enterprises a few rules are essential to survival); Deesen v. Professional Golfers' Ass'n of Am., 358 F.2d 165 (9th Cir. 1966) (golf eligibility determined by "test rounds" did not violate antitrust laws); Gunter Harz Sports, Inc. v. United States Tennis Ass'n, 511 F. Supp. 1103 (D. Neb. 1981) (need for collective action is inherent in organized sports); Molinas v. National Basketball Ass'n, 190 F. Supp. 241 (S.D.N.Y. 1961) (suspension of a basketball player for wagering on the "point spread" of his team's games).

83. Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. at 1066.

well as those who did not have the financial or mental ability to do so.

Third, the NBA contended that collegiate athletics provide a less expensive way of training athletes than the "farm team" system used in baseball. The court flatly rejected this argument, stating that even if it was true, it could not provide a basis for an antitrust exemption.

The court also considered the procedural due process requirement of *Silver*, and concluded that the NBA dismally failed to meet the requisites of this requirement.[84] In the words of Judge Ferguson:

> It is clear from the constitution and by-laws of the NBA that there is no provision for even the most rudimentary hearing before the four-year college rule is applied to exclude an individual player. Nor is there any provision whereby an individual player might petition for certain consideration of his specific case. Due to the lack of any such provisions, this court must conclude that on the basis of the undisputed facts, the NBA rules in question fall outside the *Silver* exception and are subject to the *per se* rule normally applicable to group boycotts.[85]

In summary, it would appear that the law favors Herschel Walker should he choose to challenge the NFL's four-or-five year rule. The *Haywood* case paints a rosy picture for Herschel in the outcome of a lawsuit. Under *Haywood* it appears that Herschel could receive a preliminary injunction allowing him to participate in the NFL. However, at this point some distinctions between the two cases should be delineated. First, Spencer Haywood had clearly shown that he could compete in professional athletics, something that Herschel has not yet accomplished.[86] Second, as will be seen, the NFL has set forth justifications for its rule which were not dealt with in the *Haywood* case. With this in mind, we can now turn to Herschel's challenge of the NFL's four-or-five year rule.

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84. It might be noted that the procedural due process requirement of *Silver* is not limited to a provision for a hearing. In Deesen v. Professional Golfers' Ass'n, 358 2d F.2d 165 (9th Cir. 1966), *cert. denied*, 385 U.S. 846 (1966), where a golfer had the opportunity to play in "test rounds" to prove she was qualified for tournament play, the *Silver* procedural due process requirements were met.

85. Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. at 1066 (emphasis in original).

86. For this reason it is highly unlikely that Herschel Walker would be entitled to any damages in a lawsuit challenging the four-or-five year rule. *See* notes 23-25 *supra* and accompanying text.

IV. *WALKER V. NATIONAL FOOTBALL LEAGUE*

A. Will the National Football League Defend the Four-or-Five Year Rule?

Should Herschel Walker bring suit against the NFL, one can be relatively certain that the League would defend the four-or-five year rule vehemently. Commissioner Rozelle, in reaction to the *Haywood* basketball decision, stated, "[I]t would no doubt destroy college football and basketball."[87] Rozelle also announced that despite the *Haywood* decision, the NFL would continue to enforce its rule.[88] The likelihood that the League would challenge this suit rests on more fundamental considerations. Since collegiate players largely represent the sole source of athletes for the NFL, the League must establish a working relationship with colleges for the draft to be successful.[89] Professional teams have been known to wine and dine college coaches and often provide them with tickets to their games.[90] Professional scouts often visit college campuses to speak with college coaches concerning a potential draftee's athletic abilities, coachability, motivation, and maturity.[91]

College teams are also highly supportive of the four-or-five year rule.[92] The reason for this is simple. Collegiate football programs often rely heavily upon one or two athletes for their success.[93] A rule such as the NFL's ensures that these athletes will remain in the college program.[94] Should the NFL fail to defend a lawsuit challenging the four-or-five year rule, collegiate teams could be somewhat less than receptive in dealing with professional scouts. This would severely damage the symbiotic relationship that has developed between professional and collegiate teams.

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87. Johnson, *A License to Steal the Stars*, SPORTS ILLUSTRATED, Apr. 12, 1971, at 35, 35.

88. L. SOBEL, *supra* note 12, at 465-66 (1977).

89. S. GALLNER, *supra* note 21, at 4 (1974).

90. *Id.* at 6.

91. *Id.* at 5.

92. Claude Felton, Sports Information Director for the University of Georgia stated that the University "obviously supports the NFL rule since it was designed for 'the good of the whole.'" Letter from Claude Felton to author (Oct. 1, 1981).

93. L. SOBEL, *supra* note 12, at 419.

94. On the other hand, abolition of the four-or-five year rule would appeal to those who feel that the function of a university is to educate and not to serve as a "farm system" for professional sports leagues. In response to the *Haywood* decision, one conference commissioner remarked, "We could always go back to using student athletes." Johnson, *supra* note 87, at 35.

B. The Lawsuit

1. National Football League's Defenses

a. *Joint Venture*

Should Herschel Walker file a complaint against the NFL, the league could be expected to raise any number of defenses. One such defense would be that the League is operating as a joint venture,[95] and as such does not come under the purview of the Sherman Act.[96] The National Hockey League and the National Basketball Association have successfully argued for this exemption.[97] The NFL has also argued for this exemption, but with limited success. In *Smith v. Pro Football, Inc.*,[98] the court noted that "the clubs operate basically as a joint venture. . . ."[99] but then applying the rule of reason, the court found that the NFL draft as it existed in 1968 constituted an unreasonable restraint of trade in contravention of the Sherman Act. In *North American Soccer League v. National Football League*,[100] the NFL successfully argued that the acts of the League were those of a single economic entity and as such fell outside the boundaries of the Sherman Act. The apparent inconsistency in the application of joint venture cases was explained by Judge Haight in the *North American Soccer Case*. He stated:

> If member teams of a professional sports league compete with each other in an identifiable market, § 1 of the Sherman Act applies; the legality of restraints on such competition is judged by the rule of reason. . . . Thus

95. A joint venture is a joint business undertaking of two or more parties who share the risks as well as the profits of the business. Los Angeles Coliseum Comm'n v. National Football League, 468 F. Supp. 154, 162-63 n.9 (C.D. Cal. 1979). Technically the NFL is not a joint venture because they do not share in profits and losses. *Id.* at 163 n.9; North Am. Soccer League v. National Football League, 505 F. Supp. 659 (S.D.N.Y. 1980).

96. The dominant purpose of § 1 of the Sherman Act is to maintain competition among independent business firms. If the NFL could successfully argue that their teams are not independent firms which engage in economic competition but rather joint venturers, the NFL would be beyond the reach of the Sherman Act. Los Angeles Coliseum Comm'n v. National Football League, 468 F. Supp. at 162.

97. San Francisco Seals, Ltd. v. National Hockey League, 379 F. Supp. 966, 970 (C.D. Cal. 1974); Levin v. National Basketball Ass'n, 385 F. Supp. 149, 150 (S.D.N.Y. 1974). Neither of those cases dealt with restraints imposed on the individual teams in acquiring players.

98. 593 F.2d 1173 (D.C. Cir. 1978).

99. *Id.* at 1179. The joint venture characteristics of the NFL have also been noted in Mackey v. National Football League, 543 F.2d 606, 619 (8th Cir. 1976) and North Am. Soccer League v. National Football League, 505 F. Supp. 659 (S.D.N.Y. 1980).

100. 505 F. Supp. 659 (S.D.N.Y. 1980).

> the single economic entity fails in the player contract restriction cases, where all member teams compete with each other for players, and league restraint of that competition damages the players. . . . But if joint league conduct neither implicates nor impinges upon competition between the member clubs, then the . . . league . . . may be properly regarded as a single economic entity.[101]

In the case of the four-or-five year rule, the identifiable market is that of college football players. NFL teams clearly compete amongst themselves for these players. One only need look to the fact that draft choices are frequently "traded" to find support for this statement.[102] Herschel Walker is harmed by the NFL rule, because he is unable to compete in the League. As a result, a court arguably should not grant the NFL an exemption from antitrust laws under a joint venture theory.

Should the court grant the NFL the label of joint venture, however, this would not spell the end to Herschel's action. In *Timken Roller Bearing Co. v. United States*,[103] the defendant companies defended territorial division of world markets for antifriction bearings on the ground that they operated as a joint venture. The Court rejected this characterization, stating, "[n]or do we find any support . . . for the proposition that agreements between legally separate . . . companies to suppress competition among themselves and others can be justified by labeling the project as a 'joint venture.' "[104] Since NFL teams are legally separate companies, it would appear that even if they were granted joint venture status, they could not agree amongst themselves to suppress competition for collegiate players.

b. *The Labor Exemption: Fourth and Goal*

Labor organizations have been granted a limited exemption from antitrust laws under the Clayton Act[105] and the Norris-LaGuardia Act.[106] While this statutory exemption only applies to actions unilaterally taken by labor organizations,[107] the Supreme Court has created a non-statutory exemption from antitrust laws for collective bargaining agreements between management and labor. This exemption applies even if the agreement, standing alone, would violate antitrust law.[108]

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101. *Id.* at 677.

102. In 1976, the Dallas Cowboys acquired Seattle's first-round draft choice via a trade and drafted Tony Dorsett.

103. 341 U.S. 593 (1951).

104. *Id.* at 598.

105. 15 U.S.C. § 17 (1976); 29 U.S.C. § 52 (1976).

106. 29 U.S.C. §§ 104, 105, 113 (1976).

107. United States v. Hutcheson, 312 U.S. 219 (1941).

108. Connell Constr. Co. v. Plumbers and Steamfitters, 427 U.S. 616 (1975). The non-statutory exemption is derived from a strong labor policy favoring the associa-

With the exception of *Flood v. Kuhn*[109] the labor exemption was not brought before the courts in cases involving professional sports leagues until players began to challenge the player reserve systems.[110] The NFL has had occasion to argue for a labor exemption on three separate occasions, and in none of the cases was it granted.

In *Smith v. Pro Football, Inc.*,[111] a suit was filed against the League alleging that the 1968 draft constituted a group boycott in violation of the antitrust laws. Smith argued that because he could only bargain with the team that drafted him, he was unable to negotiate a contract reflecting the true value of his services or one that would adequately protect him from loss of earnings in the event of injury.[112] The NFL's argument for a collective bargaining exemption failed because the pact was not signed by the players' union until after the 1968 draft.[113]

In *Kapp v. National Football League*,[114] the NFL's labor exemption argument was again tackled on a technicality. Kapp signed a contract to play for the Boston Patriots on October 6, 1970 and played the last eleven games of the season. This contract was not the NFL Standard Players Contract which provided, in part, that the player agreed to abide by the NFL Constitution and By-Laws. When Kapp refused to sign the Standard Players Contract, he was told to leave the team. During the suit, the NFL

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tion of employees in order to eliminate competition over wages and working conditions. *Id.* at 622. Some commentators have argued that the labor exemption, combined with collective bargaining agreement between players associations and professional sports leagues, make it highly unlikely an antitrust suit against the League will prevail. *See* Jacobs and Winter, Jr., *Anti-trust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L.J. 1 (1971).

109. 407 U.S. 258 (1972). In a dissenting opinion, Justice Marshall stated that the limits to the antitrust violations to which labor and management can agree should be explored.

110. Reserve systems typically provided that, after a player had fulfilled his contract, he became a free agent who could sign with another team if the other team paid compensation to his former team. *See* McCourt v. California Sports, Inc., 1979-1 Trade Cas. (CCH) ¶ 62,649 (6th Cir. 1979); Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976).

111. 420 F. Supp. 738 (D.D.C. 1976), *aff'd in part, rev'd in part*, 593 F.2d 1173 (D.C. Cir. 1978).

112. Smith suffered a serious neck injury in the final game of the 1968 season, and his career as a football player was terminated.

113. On appeal, the NFL did not appeal the lower court's ruling that the League did not qualify for the labor exemption. Smith v. Pro Football, Inc., 593 F.2d at 1177 n.11.

114. 390 F. Supp. 73 (N.D. Cal. 1974), *aff'd on other grounds*, 586 F.2d 644 (9th Cir. 1978).

argued for a labor exemption, stating that the Collective Bargaining Agreement between the League and the players' union, that required all players to sign the Standard Players Contract, had been accepted by Kapp through the Players Association. While the bargaining agreement was signed June 17, 1971, it was retroactive to February 1, 1970. The League contended that Kapp's October 6, agreement was included in this period. The court refused to allow an exemption because Kapp was informed that he was required to sign the Standard Players Contract pursuant to the League's *Constitution and By-Laws*. The court found that the League could not now assert that the Collective Bargaining Agreement retroactively justified the ouster of Kapp.

The third case in which the NFL argued for the labor exemption was *Mackey v. National Football League*,[115] a suit which challenged the validity of the so-called Rozelle Rule.[116] In refusing to grant an exemption, the court set forth a three-part test to qualify for a labor exemption. First, the restraint of trade must affect only the parties to the collective bargaining relationship. Second, the agreement sought to be exempted must involve a mandatory subject of collective bargaining.[117] Third, the agreement sought to be exempted must be the product of bona fide arm's-length bargaining. The court found the first test was readily met since the Rozelle Rule affected only the parties to the agreements sought to be exempted. The court also found that the agreement was a mandatory subject of collective bargaining in that the Rozelle Rule restricted players' salaries. The labor exemption was disallowed for failure to meet the bargaining requirement. The circuit court affirmed the district court finding that "the parties' collective bargaining history reflected nothing which could be legitimately characterized as bargaining over the Rozelle Rule."[118]

In analyzing the case law which deals with the NFL's claim to a

115. 543 F.2d 606 (8th Cir. 1976).

116. The Rozelle or "Ransom" Rule provided that when a free agent left his former team and signed with another team, the former team was entitled to compensation. Rozelle, at his discretion, could award the former club one or more players from the acquiring club.

117. To constitute a mandatory subject of collective bargaining, the agreement must involve wages, hours, and other terms and conditions of employment. Not all jurisdictions would agree with this requirement. *See* Larry V. Muko, Inc. v. Southwestern Pa. Bldg. & Constr. Trades Council, 1978-2 Trade Cas. (CCH) ¶ 62,184 (3d Cir. 1978) (labor exemption granted where there was no collective bargaining agreement).

118. Mackey v. National Football League, 843 F.2d at 615. Lack of bargaining was found because the Players' Association was in a relatively weak bargaining position vis-a-vis the clubs. Consequently, the Rozelle Rule, which did not benefit the players, had gone unchallenged by the players from the time it was unilaterally promulgated by the League in 1963.

labor exemption, it is rather clear that the courts have not favored granting the League exemption from the antitrust laws. They have found that the exemption does not apply where there are mere technical deficiencies in the requirements for a nonstatutory exemption. In summary, should the League argue for a labor exemption in a case challenging the four-or-five year rule, a court would carefully scrutinize this claim to determine its validity.

In applying the *Mackey* test for a labor exemption to this case, one need only examine the first requirement to see that the claim is in serious trouble. Herschel Walker is not a party to the collective bargaining relationship. He is a collegiate football player whose interests are not represented at the bargaining table. This is especially significant in light of the *Connell Construction Co. v. Plumbers and Steamfitters*[119] decision, wherein a local union made agreements with several contractors that nonunion subcontractors would be ineligible to compete for a portion of the available work. Connell, a general contractor, signed an agreement, under protest, with Local 100 not to employ nonunion subcontractors. Connell then brought suit under sections one and two of the Sherman Act seeking a declaration that the agreement was invalid. The Court rejected Local 100's argument for the nonstatutory exemption. Justice Stewart, speaking for the majority, stated "[t]here can be no argument in this case, whatever its force in other contexts, that a restraint of this magnitude might be entitled to an antitrust exemption if it were included in a lawful bargaining agreement. . . . In this case, Local 100 had no interest in representing Connell's employees."[120] Such is the case here. The NFL Players Association has no interest in representing collegiate football players.[121]

119. 421 U.S. 616 (1975).

120. *Id.* at 625-26. *Cf.* Allan Bradley v. Local Union No. 3, 325 U.S. 797 (1974), where local contractors agreed to purchase equipment from manufacturers who had a closed shop agreement with the union. The Court did not find immunity from antitrust laws reasoning: "If business groups, by combining with labor unions can fix prices and divide up markets it was little more than a futile gesture for Congress to prohibit price fixing by business groups themselves." *Id.* at 809-10. *Cf.* United States v. Woman's Sportsware Ass'n, 336 U.S. 460 (1949) ("benefits to organized labor cannot be utilized as a cat's paw to pull the employers chestnuts out of the fire." *Id.* at 464); United Mine Workers v. Pennington, 381 U.S. 657 (1965) (an agreement which results from union-employer bargaining is not exempt from the Sherman Act simply because the negotiations covered any compulsory subject of bargaining).

121. This is especially significant in this case because an incoming collegiate

The NFL's claim for a labor exemption would be damaged even further when one notes that the four-or-five year rule is not included in the Collective Bargaining Agreement between the Players Association and the NFL.[122] The NFL could attempt to avoid this technicality by waiting for Herschel to sign a Standard Players Contract with the provision that the player agrees to abide by the NFL Constitution and By-Laws and then declare the contract void.[123] The validity of such a practice seems to have been questioned in the *Kapp* Case. While the *Kapp* court did not grant a labor exemption due to a technicality, it did give some insight into how the labor exemption should be treated in this context. It asked the question posed by Justice Marshall in his dissenting opinion in the *Flood* case as to what "are the limits to the antitrust violations to which labor and management can agree?"[124] The *Kapp* court then answered its question:

> [The] exemption does not and should not go so far as to permit immunized combinations to enforce employer-employee agreements which, being unreasonable restrictions on an employee's right to freely seek and choose his employment, have been held illegal on grounds of *public policy* long before and entirely apart from antitrust laws.[125]

It does not seem likely that the NFL would be able to score with its argument for a labor exemption. It has created a system which unreasonably restrains a collegiate football player's right to freely seek and choose his employment. In so doing, the NFL has

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football player would be competing with the members of the Players Association for positions on a football team. *See also* note 122 *supra*.

122. In light of the *Connell* decision, it is doubtful whether the four-or-five year rule would be enforceable even if it were included in a collective bargaining agreement. It would also be difficult to prove such an agreement actually was "bargained for" due to the mutual interests of the Players Association and the NFL in preventing undergraduates from entering the League. Members of the Players Association would agree to the rule to protect their jobs. The NFL, on the other hand, would want to do nothing to damage their cozy relationship with college teams. *See* notes 89-94 *supra* and accompanying text.

123. The Collective Bargaining Agreement requires every player to sign the Standard Players Contract. NAT'L FOOTBALL LEAGUE PLAYERS ASS'N AND NAT'L FOOTBALL LEAGUE MANAGEMENT COUNCIL, COLLECTIVE BARGAINING AGREEMENT art. XII, § 1 (1977). The Collective Bargaining Agreement also provides that provisions of the NFL Constitution and By-Laws, which are not superseded by the agreement, remain in full force and effect. *Id.* art. I, § 2. Because § 14 of the Standard Players Contract provides that the player agrees to abide by the rules and procedures of the League, when a player signs the contract he is bound by the NFL Constitution and By-Laws. This would include the four-or-five year rule because it is not a subject of the Collective Bargaining Agreement. Commissioner Rozelle may dispose of contracts between a player and a club executed in violation of or contrary to the NFL Constitution and By-Laws. NAT'L FOOTBALL LEAGUE CONST. AND BY-LAWS FOR THE NAT'L FOOTBALL LEAGUE art. viii § 8.14(a) (1976).

124. Kapp v. National Football League, 390 F. Supp. 73, 86 (N.D. Cal. 1974), *aff'd on other grounds*, 586 F.2d 644 (9th Cir. 1978).

125. *Id.* at 86.

also failed to meet the requirements for the exemption from antitrust laws.

2. Standing to Sue Under the Sherman Act

Before a concerted refusal to deal may be condemned as illegal under the Sherman Act, two threshold elements must be present. First, there must be some impact on "trade or commerce among the several states."[126] Second, there must be sufficient agreement to constitute a "contract, combination, . . . or conspiracy."[127] The issue of whether the NFL is involved in trade or commerce was settled in *Radovich v. National Football League*,[128] where the Supreme Court found that the League conducted business on a multistate basis and conducted interstate transmission of games on radio and television. Currently the NFL has twenty eight teams operating in major cities throughout the United States. The existence of a contract or conspiracy is equally easy to show. The member teams of the League have subscribed to the NFL Constitution and By-Laws. In so doing they have agreed not to deal with football players who do not meet the eligibility requirements of the four-or-five year rule.

For an individual to have standing to bring an action for violation of the antitrust laws, he must show that he was injured by the anticompetitive actions of the conspirators. The courts have developed a number of "standing tests" which are not unlike the notion of "proximate cause" in tort law. Generally, the tests may be grouped in two broad categories. The more restrictive test focuses on the "directness of the injury." The more liberal and more widely accepted test, focuses upon whether the plaintiff is within the "target area" of the defendant's violation.[129] The "direct injury" test was first introduced in *Loeb v. Eastman Kodak Co.*[130] The "directness" requirement precludes standing where injuries are regarded as "remote," "incidental," or "consequential" results of the defendant's antitrust violations.[131] Herschel

126. 15 U.S.C. § 1 (1976). *See* note 14 *supra*.
127. *Id.*
128. 352 U.S. 445 (1957).
129. Illinois Brick Co. v. Illinois, 431 U.S. 720, 760 (1977) (Brennan, J., dissenting).
130. 183 F. 704 (3d Cir. 1910).
131. Productive Inventions, Inc. v. Trico Products Corp., 224 F.2d 678 (2d Cir. 1955), *cert. denied*, 350 U.S. 936 (1956); Loeb v. Eastman Kodak Co., 133 F. 704 (3d Cir. 1910); Data Digests, Inc. v. Standard & Poor's Corp., 43 F.R.D. 386 (S.D.N.Y.

Walker is directly injured by the NFL's primary boycott because he is excluded from the market he wishes to enter.[132] Since Herschel Walker is directly injured by the four-or-five year rule, he has standing to bring an antitrust action under the Sherman Act.

Under the less demanding "target area" test, a plaintiff must show that he suffered "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."[133] Restated, the test requires the plaintiff to show that he was within the area "which it could be reasonably foreseen would be affected" by the conspiracy.[134] Since the NFL's four-or-five year rule is directed toward collegiate athletes who have not fulfilled the eligibility requirements and since Herschel is one such athlete, it may reasonably be foreseen that Herschel will be affected by the NFL's conspiracy. Consequently Herschel Walker has standing to sue under the "target area" test.

3. Rule of Reason or *Per Se*?

Having determined that the Sherman Act would apply to Walker's action, the focus now shifts to whether to apply the rule of reason or a *per se* approach. The typical approach to a group boycott which is arguably motivated by anticompetitive desires, or where no provision for a hearing is made in challenging the regulation, is to apply the *per se* label unless the *Silver* exception is applicable.[135] This approach has been applied in a number of decisions dealing with player restrictions imposed by professional sports leagues.[136]

1967); Schwartz v. Broadcast Music, Inc., 130 F. Supp. 322 (S.D.N.Y. 1959); Snow Crest Beverages, Inc. v. Recipe Foods, Inc., 147 F. Supp. 907 (D. Mass. 1956).

132. Linesman v. World Hockey Ass'n, 439 F. Supp. at 1321; Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. at 1061. Two other harms result from the four-or-five year rule. First, competition in the market in which Herschel attempts to sell his services is injured. Second, by pooling their economic power, the individual members of the NFL have, in effect, established their own private government. *Id.*

133. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977).

134. Mulveny v. Samuel Goldwyn Productions, 433 F.2d 1073, 1076 (9th Cir. 1970), *cert. denied*, 402 U.S. 923 (1970); Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d 190, 220 (9th Cir.), *cert. denied*, 379 U.S. 880 (1964).

135. Cooney v. American Horse Shows Ass'n, 495 F. Supp. 424, 430 n.3 (S.D.N.Y. 1980); Linesman v. World Hockey Ass'n, 439 F. Supp. 1315 (D. Conn. 1977); Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049 (C.D. Cal. 1971).

136. Linesman v. World Hockey Ass'n, 439 F. Supp. 1315 (D. Conn. 1977); Bowman v. National Football League, 402 F. Supp. 754 (D. Minn. 1975) (while "*per se*" did not appear in the opinion, it is evident that this approach was used because Judge Devitt cited only cases which were decided under the *per se* doctrine); Robertson v. National Basketball Ass'n, 389 F. Supp. 867 (S.D.N.Y. 1975); Blalock v. Ladies Professional Golf Ass'n, 359 F. Supp. 1260 (N.D. Ga. 1973) (distinguished from Deesen v. Professional Golfers' Ass'n, 358 F.2d 165 (9th Cir. 1966) because Deesen was not totally excluded from the market and the Association provided a "test

The courts, however, appear to be split as to whether to apply a *Silver* type *per se* analysis or a rule of reason analysis to collective restraints imposed by organized sports leagues. It appears that the NFL has been reasonably successful in avoiding application of a *per se* standard to its collective actions.[137] These lawsuits, however, have involved athletes who are currently playing, or have been playing in the League. In *Bowman v. National Football League*,[138] a case which did not involve players in the NFL, the League passed a resolution preventing players from the defunct World Football League from signing contracts with NFL teams until the end of the season. The court enjoined the boycott, finding it illegal *per se*.[139] Further, in the *Haywood* and *Linesman* cases, which involved rules similar to the NFL's, courts found these restrictions to be illegal *per se*. In light of this, it appears that the courts would apply a *Silver* analysis to a lawsuit challenging the four-or-five year rule.

On the other hand, liberal application of the *per se* rule has been heavily criticized by a number of authorities, and perhaps with good reason. Julian O. von Kalinowski is among those who have roundly criticized the courts expansion of the *per se* doctrine. He argues, "[w]e have entered an era of rigid antitrust policy where 'absolutes' have become king and the rule of reason exiled into a philosophy of the past."[140] In the area of group boycotts, courts are dangerously close to completing the circle and returning to the *per se* standard of medieval times. Then, as now, an all-inclusive prohibition against restraints seriously impinges upon everyday business transactions. Mr. von Kalinowski argues that there is a need to return to the standard of reason and consider "the facts peculiar to the business to which the restraint is applied."[141] Indeed, it may well be time to heed Cardozo's warn-

round" to determine Deesen's qualifications to compete in the League); Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049 (C.D. Cal. 1971).

137. *See* Smith v. Pro Football, Inc., 593 F.2d 1173 (D.C. Cir. 1978); Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976); Kapp v. National Football League, 390 F. Supp. 73 (N.D. Cal. 1974), *aff'd on other grounds*, 586 F.2d 644 (9th Cir. 1978).

138. 402 F. Supp. 754 (D. Minn. 1975).

139. *Id.*

140. von Kalinowski, *The Per Se Doctrine—An Emerging Philosophy of Antitrust Law*, 11 U.C.L.A. L. REV. 569, 591 (1964).

141. *Id.* (quoting Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918)). The *per se* concept does have a place in such a philosophy if limited to practices which have the purpose and effect of stifling competition. *Id.*

ing to beware "the tyranny of tags and tickets."[142]

Proponents of the idea that the *per se* test should not be applied to sports leagues are quick to point out that the player draft does not fall within the traditional mold of the group boycott.[143] They argue that member teams of the League are not competitors in the economic sense. It is further argued that the NFL teams do not combine to protect themselves from non-group members who seek to compete with the NFL clubs. This reasoning was accepted by the court in *Smith v. Pro Football, Inc.*[144] In light of this, there is a highly persuasive argument that the rule of reason should be applied to the NFL's eligibility requirement. Commentators who argue for a rule of reason analysis for cases such as Walker's cite the approach suggested by Justice Brennan in his concurring opinion in *White Motor Co. v. United States*.[145] Justice Brennan proposed a three-part test to determine the reasonableness of the challenged restraints. First, are they reasonably related to the needs which brought them into being? Second, is the restraint so justified more restrictive than necessary, or excessively anticompetitive when viewed in light of the extenuating circumstances? Third, are less restrictive alternatives available?[146] One commentator has argued that Brennan's approach was in fact applied in the *Haywood* case.[147] Due to the factors which indicate that the *per se* analysis may not be appropriate in dealing with the organized sports, both approaches should be analyzed. The distinction between the two tests is largely academic as these divergent paths will lead in most cases to the same destination.[148]

142. Cardozo, *Mr. Justice Holmes*, 44 HARV. L. REV. 682, 688 (1931). Given President Reagan's favorable disposition towards "big business," one can foresee a shift away from emphasis on the *per se* rule.

143. *See* note 48 *supra*.

144. 593 F.2d 1173 (D.D.C. 1978) (applying the rule of reason, however, the court found that the draft, as it existed in 1968, constituted an unreasonable restraint of trade).

145. 372 U.S. 253 (1963). While *White Motor* dealt with territorial restrictions imposed by manufacturers, application of the Brennan approach to competitive abuses throughout organized sports was suggested in Rivkin, *Sports Leagues and Antitrust Laws*, in GOVERNMENT AND THE SPORTS BUSINESS 387, 410 (R. Noll ed. 1974).

146. White Motor Co. v. United States, 372 U.S. at 270-71. This is essentially the same test as the second requirement of *Silver*. *See* note 59 *supra* and accompanying text.

147. Rivkin, *supra* note 145, at 387, 401. If one carefully scrutinizes the *Haywood* case, however, it is evident that Judge Ferguson applied a *Silver* analysis. *See* notes 76-85 *supra* and accompanying text.

148. Smith v. Pro Football Inc., 593 F.2d 1173, 1179 n.22 (D.C. Cir. 1978).

4. The *Silver* Analysis

a. *The Self Regulation Requirement*

Under the *Silver* test, for the four-or-five year rule to qualify for an exemption from a *per se* standard, the League must first show that there is a legislative mandate for self-regulation, *or otherwise*. There is no legislative mandate for self-regulation in regard to the NFL. As such they will have to qualify for the "or otherwise" requirement. This has readily been granted to professional sports leagues as the structure of the industry requires collective action.[149] In *Kapp*, the League was quick to point out that the need for self-regulation has been noted by Congress[150] and the Department of Justice.[151] One can be relatively certain that the NFL has been granted the right to self-regulation.

The League must now show that the collective action is intended to accomplish an end consistent with the policy justifying self-regulation: it is reasonably related to that goal, and is no more restrictive than necessary. This League has asserted a number of policies justifying enforcement of the four-or-five year rule.[152]

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149. *See* notes 59 and 82 *supra* and accompanying text.

150. Congressional action includes: 15 U.S.C. §§ 1291-94 (exempting joint arrangements for club television rights from antitrust laws); sponsorship of a bill by Senator John F. Kennedy in 1958 which would have granted antitrust exemption for all professional sports leagues, because as the Senator stated, the leagues are so unique that they cannot be treated in the same manner as other businesses; 15 U.S.C. § 1291 (authorizing the merger of the American Football League with the National Football League). Kapp v. National Football League, 390 F. Supp. at 79 n.3.

151. In 1961, the Department of Justice acknowledged that professional league teams must have some joint agreements to assure continued functioning of the leagues. In 1971, the Department made a similar acknowledgement. Kapp v. National Football League, 390 F. Supp. at 80 n.4.

152. The NFL appears to defend the rule as if it were their moral obligation to the college players. Perhaps the real reason for the rule lies in the fact that the rule serves the financial interests of both the colleges and the NFL. It serves the colleges because, by granting athletic scholarships, they can protect their supply of cheap labor. The NFL is served because the rule allows for the preservation of the draft system. *See Who Owns Haywood?*, note 78 *supra* at 79. The draft system allows the NFL to artificially suppress salaries paid to NFL players. Smith v. Pro Football, Inc., 593 F.2d at 1185-86; L. SOBEL, *supra* note 12, at 259. *See also* notes 89-94 *supra* and accompanying text.

b. *The Policies Justifying the Rule*

1) A Congressional Mandate

First, the League asserts, "Congressional Committees have frequently insisted that the NFL do nothing to interfere with the college game. Congress has even enacted laws preventing the NFL from competing with college football game telecasts. The NFL would prefer that it not be compelled to do so."[153] The statute the League makes reference to is a provision included in Title 28 United States Code, Chapter 32. This provision provides that professional football games may not be broadcast on Friday evenings or on Saturdays if the telecasting station is located within seventy-five miles of an intercollegiate or interscholastic football contest.[154] One purpose of the bill is to prevent impairment of college football gate receipts through network telecasts at times when college games are normally played.[155] A corollary purpose for the bill is to provide greater protection for in-person attendance at college football games.[156] It seems difficult to justify an antitrust exemption based on this statute since it only deals with telecasting of football games. This inconsistency becomes more obvious when one realizes that Chapter 32 also includes a provision that antitrust laws remained unaffected by this Chapter "except the agreements to which section 1291 shall apply."[157]

It is also likely that the impact upon the college game would be minimal should the four-or-five year rule be abolished. Since the NBA's four year rule was abolished ten years ago, relatively few basketball players have opted to turn professional before completing their collegiate careers.[158] Because college athletes may still be growing physically,[159] and the extensive training required to compete in professional football, it is likely that even fewer players will jump to the NFL before completing their college eligibility.[160] If the NFL has enacted the four-or-five year rule to pro-

153. Letter from Hamilton Carothers of Covington and Burling, to author (Sept. 25, 1981) (hereinafter cited as Covington and Burling).

154. 15 U.S.C. § 1293 (1976).

155. H.R. REP. NO. 1178, 87th Cong., 1st Sess. 2 (1961); S. REP. NO. 1087, 87th Cong., 1st Sess. 1, *reprinted in* [1961] U.S. CODE CONG. & AD. NEWS 3042, 3042.

156. H.R. REP. NO. 1178, 87th Cong., 1st Sess. 4 (1961); S. REP. NO. 1087, 87th Cong., 1st Sess. 3, *reprinted in* [1961] U.S. CODE CONG. & AD. NEWS, 3042, 3043-44.

157. 15 U.S.C. § 1294 (1976) (section 1291 removed the League's package sales of television rights of its members from antitrust laws).

158. The number of college players involved in the NBA's hardship draft in the decade following its enactment has averaged less than eight players per year. Kirkpatrick, *supra* note 2, at 36.

159. According to Dr. Clarence Shields, team physician for the Los Angeles Rams, an athlete reaches the peak of his physical capabilities at 22 years of age. Letter from Dr. Clarence L. Shields to author (Nov. 5, 1981).

160. Demoff, *supra* note 71, at 41.

mote the legislative policies underlying Title 15, United States Code, section 1293, the rule does not reasonably relate to these goals. The reason is that the impact of college football programs would be insignificant if the rule is abolished.

2) College Athletic Programs as Farm Systems

The League also argues, "[p]rofessional football has no minor league structure. Players who do not make NFL squads have little opportunity to develop and sharpen their skills. Only an occasional college player would be successful in making the leap. The overwhelming majority would lose both ways."[161] In *Haywood* and *Linesman*, the courts soundly rejected the notion that colleges could be substituted as a "farm system" or as a training ground to develop and sharpen the skills of a league's prospective players. The rule is also more restrictive than necessary. It provides a total bar to college players who have sufficiently developed and sharpened their skills to compete in the NFL.[162]

3) An Opportunity for an Education

The NFL's next contention is:

> What the League has sought to avoid is a policy whereunder its clubs engage in efforts to induce college players to abandon both their education and their college careers for little more than a shot at making an NFL squad. . . . The educational opportunities offered by college football scholarships should not be dismissed lightly. Professional football rarely makes possible more than a temporary career.[163]

Encouraging a college football player to complete his college education is indeed a commendable goal. The simple truth, however, is that typically the NFL football player does not take advantage of this opportunity. Less than one-half of all NFL players have undergraduate degrees and only seven of the twenty-eight first-round draft choices in 1979 have graduated from college as of 1980.[164]

Further, there may be some question as to whether the role of collegiate institutions is to provide an education for athletes or to

161. Covington & Burling, *supra* note 153.
162. Gil Brandt, the highly respected director of player personnel for the Dallas Cowboys, believes Herschel is capable of competing in the NFL. *See* note 9 *supra*. Dr. Clarence Shields, team physician for the Los Angeles Rams, shares this opinion. Letter from Dr. Clarence L. Shields to author (Nov. 5, 1981).
163. Covington & Burling, *supra* note 153.
164. Demoff, *supra* note 71, at 40.

prepare them for their professional careers. The recent decision in *Hall v. University of Minnesota*[165] addressed this issue. In *Hall*, Mark Hall, a formidable basketball player, was enrolled in a non-baccalaureate degree program at the University of Minnesota. The program terminated when Hall accumulated ninety credits. Unless he was granted admission into a "degree program" his eligibility to play on the school's basketball team also terminated. The University refused to grant Hall admission into the program. Without an opportunity to play during the winter quarter of 1982, Hall would be a sixth round choice in the National Basketball Association's draft. However, if he were allowed to play during this time, he would be selected in the second round. Hall brought suit to restore his athletic eligibility to preserve his chances for a "no cut" professional basketball contract. Judge Lord found that the school had deprived Hall of due process and granted him a preliminary injunction ordering the University to admit him into a degree-granting program. In so doing, Judge Lord made a number of observations concerning the role of a university in the development of an athlete. He felt that Mark Hall "[w]as a highly recruited basketball player out of high school who was recruited to come to the University of Minnesota to become a basketball player *and not a scholar*."[166] The court also accepted Hall's statement that his underlying desire to be enrolled in a degree program was to enhance his chances of becoming a professional basketball player. Finally, Judge Lord stated:

> The exceptionally talented student athlete is led to perceive the basketball, football, and other athletic programs as farm teams and proving grounds for professional sports leagues. It may well be true that a good academic program for the athlete is made virtually impossible by the demands of their sport at the college level. If this situation causes harm to the University, it is because they fostered it. . . .[167]

If the role of collegiate athletic programs is indeed that of preparing student athletes for their professional careers, when an athlete has developed the skills necessary to compete at a professional level, he should be given the opportunity to do so. By mandating that an athlete remain at the college level unnecessarily exposes him to an injury that may extinguish his chances in pursuing a professional career.

The *Haywood* court also dealt with the college education argument. The court felt that it was not in a position to rule that such a consideration should override the objective of fostering economic competition embodied in the antitrust laws, and deferred

165. 530 F. Supp. 104 (D. Minn. 1982).

166. *Id.* at 106. (emphasis added).

167. *Id.* at 109.

the matter to the legislature.[168] The four-or-five year rule here, as in *Haywood*, is overly broad. The rule operates as a complete bar to college players who wish to compete in the NFL. It excludes even those players who do not want to go to college as well as those are are mentally or financially unable to do so. Less restrictive means are available and are actually provided by NFL teams. NFL teams actively encourage their players to continue their college educations. The Miami Dolphins provide several scholarships each year, and often agree to give their players additional benefits if they complete their degree.[169] The New England Patriots have been known to pay for graduate education.[170] A note of caution should be given to an athlete who elects to forego his college education "for a shot at making an NFL squad." He should get his future team to agree to provide a "college fund in escrow clause" in his contract to ensure he will receive an education in the event he is unable to continue playing football. This would alleviate the possibility of him losing his opportunity to obtain an education should he fail to "make it" in pro football.

4) Abolition of the Rule Will Not Benefit the Athlete

The NFL puts forth one more argument in support of the rule preventing college players from signing with an NFL team until he meets the eligibility requirements. "Few college players would be advantaged by such efforts. Only an extraordinary college football player could anticipate greater total professional career earnings by such a process. College career performances are the major determinant of initial contract rewards of the professional player."[171] One of the criticisms of the NBA "hardship" draft closely aligns with this argument. While the hardship draft may help a superstar gain more rapid entry into the pros, it may also hurt him as a player.[172] This is essentially what transpired when

168. *See* note 83 *supra* and accompanying text.

169. The Miami Dolphins even provided a scholarship for Bob Griese's brother. *Inquiry Into Professional Sports: Hearings Before the House Select Comm. on Professional Sports*, 94 Cong., 2d Sess. 78 (1976) (testimony of Joseph Robbie).

170. *Id.* at 102 (testimony of William H. Sullivan) (it might be noted that this player had not yet received his undergraduate degree).

171. Covington & Burling, *supra* note 153.

172. S. GALLNER, *supra* note 21, at 25. In the decade since the NBA's "hardship draft" was enacted, considerably less than one-half of the players who left college as undergraduates have had NBA careers of two or more seasons. Kirkpatrick, *Hello America We Came Back*, SPORTS ILLUSTRATED, Dec. 1, 1980, at 34, 36.

David Brent signed a $1 million contract with an ABA team after his sophomore year in college. The team later collapsed, and when no other team wanted his services, his contract was worthless.[173] Further, an athlete who has an extra year of experience under his belt may be in a better bargaining position than if he elects to enter the hardship draft. Consider the case of Howard Porter, a Villanova All-American. He was offered a $350,000 contract prior to his senior year, but was offered a $1.5 million contract after his senior year.[174] Despite this problem, the NBA hardship draft continues. On the other hand, a number of athletes have performed quite admirably after being selected in the NBA's hardship draft. Following his sophomore year, when Isiah Thomas led Indiana to a National Championship, he was selected by the Detroit Pistons in the hardship draft. In his rookie year he was chosen to play on the NBA All Star Team. Magic Johnson has also established himself as one of the premier players in the NBA. Other players who have distinguished themselves after being selected in the hardship draft include Cliff Robertson, Phil Chenier, and Bob McAdoo. Should the athlete elect to remain in college he obviously runs the risk of becoming seriously injured, losing any opportunity he might have to experience the thrill of competing in the NFL.[175] In deciding whether to turn pro, the athlete must balance the drawbacks of the hardship draft against the possibility of injury should he remain in college. Since we operate in a free enterprise system, the choice of turning pro or remaining in college should be that of the athlete.

The problem of compensation for the athlete has not posed any problems in the National Basketball Association and there is no reason to assume it would present difficulties in the NFL. The collective bargaining agreement between the Players Association and the NFL provides for minimum salaries for players in the League.[176] This could serve as a starting point for negotiations. Of course it is also unlikely that any player who possesses only those skills deserving of the minimum salary provided in the Bargaining Agreement would jump to the NFL before completing his collegiate eligibility. Such a player would remain in college to further develop his skills. If a team is still unsure about the capabilities of a football player, it is free to agree with the athlete that he

173. S. GALLNER, *supra* note 21, at 25.

174. *Id.* The duration of these contracts is not known.

175. In 1977, Tom Perry, a linebacker for the University of Colorado, was seriously injured and forced to abandon his football career. It was felt that he would have been selected in the first round of the upcoming draft.

176. The minimum salary for a rookie in the NFL is now $22,000 per year. NAT'L FOOTBALL LEAGUE PLAYERS ASSOCIATION AND NAT'L FOOTBALL LEAGUE MANAGEMENT COUNCIL, COLLECTIVE BARGAINING AGREEMENT art. XXII, § 2 (1977).

will be paid according to his performance during the course of the season.

5) The Rule Promotes Safety

There are other arguments that the NFL will likely consider raising. One concerns the safety considerations of an undergraduate who has not yet fully matured physically,[177] in competing with older, more seasoned veterans. National Football League players take their lives into their own hands each time they step onto the football field. From 1969 to 1974 NFL players suffered an estimated 5,110 injuries.[178] A 1974 survey of NFL team trainers revealed an estimated record of 1,638 injuries, or twelve injuries for every ten players.[179] Judge Matsch gave a rather accurate description of pro football when he stated, "like coal mining and railroading, professional football is hazardous to the health and welfare of those who are employed as players."[180] Given the level of physical violence in the League, the NFL has a rather powerful argument that the four-or-five year rule is a virtual necessity to prevent physical injury to young collegiate football players.

Case law would support a league's argument that it is legitimately concerned for the welfare of players. In *Neeld v. National Hockey League*,[181] the National Hockey League (NHL) promulgated a rule preventing one-eyed hockey players from participating in the League.[182] Neeld, who only had one eye, brought suit alleging violation of section one of the Sherman Act. He argued that a "safety mask," which had especially been designed for him, would adequately protect him from further injury. The court found that the rule was not designed to have any anticompetitive effect;[183] rather it was implemented for the primary purpose of promoting health and safety. The League also had a legitimate

177. *See* note 159 *supra*.

178. R. HORROW, SPORTS VIOLENCE 7 (1980).

179. *Id.* at 7-8.

180. Hackbart v. Cincinnati Bengals, Inc., 435 F. Supp. 352, 357 (D. Colo. 1977), *rev'd on other grounds*, 601 F.2d 516 (10th Cir. 1979), *cert. denied*, 444 U.S. 931 (1980) (evidence not limited to defendant's liability).

181. 594 F.2d 1297 (9th Cir. 1979).

182. The rule provides: "A player with only one eye, or one of whose eyes has a vision of only three-sixtieths (3-60ths) or under, shall not be eligible to play for a Member Club." *Id.* at 1298 n.1.

183. *See also* Deesen v. Professional Golfers' Ass'n, 358 F.2d 165 (9th Cir. 1966), *cert. denied*, 358 U.S. 846 (1966).

concern to protect itself from being sued for personal injuries to Neeld, or to others, if he was permitted to play.

Herschel Walker, however, can distinguish the *Neeld* case. Neeld had an obvious physical defect which would cause legitimate concern for his safety and well-being. The NHL developed a definite standard which reflects a collegiate player's ability to compete in professional hockey. As a result, the *Neeld* case is not applicable.

For further support for the assertion that the NFL's four-or-five year rule may not be justified for player safety reasons, one only need return to the *Linesman* case. Hockey is equally as violent a sport as football. In the National Hockey League's 1973-74 season, 8,000 stitches were required to mend players returning from the battleground.[184] The court, in striking down the WHA's twenty-year-old rule, allowed a young man of nineteen years to participate in the League. At this age, most college players are freshmen or at best sophomores. If youngsters of this age are allowed to compete in professional hockey, there is no good reason to prevent college players from participation in professional football.[185]

6) The Rule does not Bar an Athlete from Participating in Professional Football

The last argument the NFL might put forth in defense of the four-or-five year rule would be that an athlete is not barred from participating in professional football by the rule. The player has other options available to him. He might compete in semi-pro football,[186] or in the Canadian Football League, until he meets the NFL's eligibility requirements. Case law has determined that both of these alternatives are unsatisfactory. In *Linesman*, the WHA argued that Linesman was not harmed by the League's twenty-year-old rule since he was currently playing for the Kingston Canadians in an amateur league.[187] The court rejected this argument on three grounds. First, since the career of a professional athlete is very short, the loss of even one year of playing time is very detrimental. Competing for the amateur team was

184. R. HORROW, *supra* note 178, at 5.

185. Many "teenagers" have distinguished themselves while competing in the professional ranks. Bobby Orr, Gordon Roberts, Darryl Dawkins, and Moses Malone are some of the more notable examples.

186. Football players who have opted for the "sandlot" route have returned to the NFL and experienced successful careers. After Johnny Unitas was rejected by the Pittsburgh Steelers, he played semi-pro football for the Bloomfield Rams for six dollars a game. The following year he returned to the NFL and became one of the greatest quarterbacks in the history of the League.

187. In Canada, amateur hockey players are paid and enter into contracts to play for amateur teams.

not seen as reducing the impact of the injury. Second, by playing in a less competitive league the skills of the athlete are likely to deteriorate. Third, by playing in the WHA, Linesman may achieve "superstar status" which would bring him financial and emotional awards not available if he were to compete for the Kingston team. In *Smith v. Pro Football, Inc.*,[188] the court found that the alternative of playing in Canada was not satisfactory for two reasons. First, opportunities for American players in Canada are limited due to a hiring preference for Canadian players. Second, the opportunities are significantly less rewarding as they provide lower salaries, fewer promotional opportunities, and less "glamor." This final argument, like its predecessors, is not likely to be found as a persuasive reason supporting the League's four-or-five year rule.

c. *The Due Process Requirement*

Silver also requires that the NFL provide sufficient procedural due process to ensure that the restraint is not arbitrary and furnishes a basis for judicial review. In response to this requirement, the NFL states that "[t]he League's rules are not entirely rigid. Where special circumstances are established, the League has been prepared to consider exceptions."[189] In all due fairness to the League, it appears that it has done so on at least one occasion in the past.[190] If one were to read the NFL's Constitution and By-Laws, one would find no guarantee for even the most rudimentary hearing before the four-or-five year rule is applied. In fact, one would find a clause giving the Commissioner "the power, *without a hearing*, to disapprove contracts between a player and a club, if such a contract has been executed in violation of or contrary to the NFL Constitution and By-Laws of the League. . . ."[191] The lack of a provision for a hearing was found to constitute a *per se* violation of the Sherman Act in the *Haywood* case.[192] Especially in light of the fact that the NFL expressly provides that no hearing is required, there is no reason to assume this case would

188. 593 F.2d at 1185 n.48.
189. Covington & Burling, *supra* note 153.
190. *See* note 12 *supra*.
191. NAT'L FOOTBALL LEAGUE, CONST. AND BY-LAWS FOR THE NAT'L FOOTBALL LEAGUE art.VIII § 8.14(A) (emphasis added).
192. *See also* Washington St. Bowling Proprietor's Ass'n v. Pacific Lanes, 356 F.2d 371 (9th Cir. 1966), *cert. denied*, 384 U.S. 963 (1966); Cooney v. American Horse Shows Ass'n, 495 F. Supp. 424, 430 n.3 (S.D.N.Y. 1980).

be decided differently. Given the lack of a right to a hearing, or procedures such as were applied in *Deesen v. Professional Golfer's Ass'n*,[193] there can be no assurance that the four-or-five year rule is not arbitrary. For the same reasons, there is no adequate basis for judicial review.

5. Rule of Reason Analysis

Under the rule of reason, the NFL would be required to show that challenged restraints reasonably relate to the needs which brought them into being; that they are no more restrictive than necessary; and that less restrictive alternatives are not available. Since these are essentially the requirements under the second part of the *Silver* test, a brief summary of the analysis will suffice. The four-or-five year rule does not reasonably relate to any need which brought it into existence. The rule does not facilitate a legislative policy to provide for greater in-person attendance at college football games. Colleges should not be used as a substitute for a farm system. Encouraging a college education will not override the objective of fostering economic competition embodied in the antitrust laws. The NFL is not in a position to determine whether it would be advantageous for a player to complete his college career before turning professional. The four-or-five year rule is also more restrictive than necessary. The rule prevents players who have talent sufficient to compete in the League from participating. It also bars every player from competing in the NFL regardless of whether he wants a college education, or is mentally or financially capable of attending college. Nor has the League developed definite standards to determine whether a college player may safely compete in the League. Less restrictive alternatives are available. The League teams could provide scholarships for those players who wished to attend school during the off season or at night. The League could also provide a "hardship draft" or provide for a right to a hearing to determine whether there are legitimate reasons as to why a player would be entitled to a waiver of the rule. Finally, it is manifestly unreasonable for the League to concertedly refuse to deal with college players in the absence of any procedural due process right.

V. Conclusion

The National Football League has enacted a rule which effectively denies a college football player the opportunity to participate in the League unless he has completed his collegiate football

193. *See* note 82 *supra*.

career. There can be little argument that professional sports leagues are entitled to develop rules which are *reasonably necessary* to ensure that the League continues to operate effectively. However, when these rules are no longer within the realm of reason and become arbitrary and overbroad, it is proper for a court to strike them down for violating the Sherman Act. In an action challenging the NFL's four-or-five year rule, a court should carefully scrutinize the rule to determine whether it is reasonable or is arbitrary and overbroad.

Traditionally, two methods have been followed by courts to determine the reasonableness of collective actions. In cases dealing with group boycotts which are arguably motivated by anticompetitive desires, or where no provision for a hearing is made in challenging the regulation, courts have found the rule to be illegal *per se* unless the *Silver* exception is applicable. Current procedures followed by the NFL do not include a provision for a hearing for collegiate athletes who wish to enter the League. The four-or-five year rule does not qualify for a *Silver* exception because the rule does not reasonably relate to the needs which brought it into existence and it is more restrictive than necessary.

There is, however, a rather powerful argument that the four-or-five year rule should be subject to a rule of reason analysis. Professional sports leagues do not fall within the traditional mold of group boycotts to which the *per se* label attaches. The fact that these leagues may enact rules which are reasonably necessary for the league to function smoothly also lends credence to this argument. In cases dealing with rules similar to the NFL's rule, however, courts have not found this reasoning to be persuasive finding the rules to be illegal *per se*. In light of this, it appears that Herschel Walker may receive a preliminary injunction allowing him to compete in the NFL.

There are any number of actions the NFL might follow with regard to Walker. It might choose to do nothing and hope that Walker elects to pursue the elusive Heisman Trophy or a career in the Canadian Football League. Should Walker bring an action challenging the rule, the League may elect to waive the rule, an action it has taken in the past. Such an action would allow the League to perpetuate the rule, at least in form, but it would render the rule meaningless should this conduct be followed each time it is challenged. The final and preferable alternative would be for the NFL to enact a "hardship draft" similar to the one pro-

vided by the National Basketball Association or to develop standards which help to determine the physical capability of a young athlete to compete in the League. The latter alternative would allow the League to capitalize on its most persuasive argument supporting the rule, that being the concern for the safety of the athlete in participating in the League. It would also enable the league to qualify for the due process requirement under *Silver*. If the NFL were to enact either a "hardship draft" or standards which reasonably determined the physical capabilities of a college player to compete in the NFL, the four-or-five year rule should survive an antitrust challenge under a rule of reason or a *Silver* analysis.

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