

2018

Delay of Game: Analyzing the Legality of the NBA and WNBA Eligibility Rules and Their Effects on Top Amateur Basketball Players

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Delay of Game: Analyzing the Legality of the NBA and WNBA Eligibility Rules and Their Effects on Top Amateur Basketball Players

**DELAY OF GAME:
ANALYZING THE LEGALITY OF THE NBA AND WNBA
ELIGIBILITY RULES AND THEIR EFFECTS ON TOP
AMATEUR BASKETBALL PLAYERS**

*By: Uriah Tagle**

ABSTRACT

Because of the NBA and WNBA eligibility rules, men are prevented from playing professional basketball in the United States until they are at least nineteen years old and women are prevented until they are at least twenty-two years old. Since these eligibility rules were established pursuant to collective bargaining between the leagues and their respective players unions, it is unlikely that they can be successfully challenged under antitrust law. Consequently, for the time between high school graduation and professional eligibility, men and women can either play NCAA basketball or play professionally internationally. Men can also play in the NBA G-League. Section II of this article reconciles antitrust law with the eligibility rules, while Sections III and IV analyze the effects of the rules on prospective players.

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I. INTRODUCTION

Imagine you are eighteen years old and have just graduated high school. You also happen to be the greatest eighteen-year-old actor the world has ever seen. You were a child actor in a few commercials and critically acclaimed independent movies, which you were not compensated for, and now every major studio in Hollywood is lining up to offer multi-million-dollar contracts to star in their movies. The major studios all agree you are the next big box office draw and industry insiders have begun speculating about your star on the Hollywood Walk of Fame. You are thrilled about your upcoming payday as you feel you will finally be justly compensated for your immense talent.

Just before your contract negotiations with the major movie studios are set to begin, you receive an email from the chairman of the Motion Picture Association of America (MPAA), a trade association that represents the six major movie studios.¹ The MPAA is not a multi-employer group that collectively bargains on behalf of its members, nor is it a party to a collective bargaining agreement with any actors' unions. The chairman's email outlines a newly instated rule that requires all actors employed by MPAA member studios be at least nineteen years old and one year removed from high school. The chairman explains that even though you are a talented actor, the MPAA member studios have all agreed that eighteen-year-olds are just too immature to work with. Because you do not meet the new MPAA eligibility requirements, your negotiations with the major studios will be delayed for another year. Even though some of the major studios still want to overlook any maturity concerns and offer you multi-million-dollar contracts, the MPAA's eligibility requirements prevent you from negotiating and accepting any of those contracts for at least a year.

Given that you are the best actor the world has ever seen, it might seem unjust and unfair that an arbitrary agreement between movie studios can prevent you from a multi-million-dollar payday. Federal courts would likely agree and would almost certainly strike down the agreement between the MPAA member studios that severely limited your earning potential as illegal under federal antitrust laws. Since restrictive arrangements between employers are illegal in this employment context, why are agreements which have the exact same effect legal in professional basketball?

¹ As of 2018, the MPAA member companies are: Walt Disney Studios, Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Twentieth Century Fox, Universal Studios LLC, and Warner Bros Entertainment Inc. *Our Story*, MPAA, <https://www.mpa.org/our-story/> (last visited Mar. 28, 2018).

As a result of the restrictive National Basketball Association (NBA) and Women's National Basketball Association (WNBA) eligibility rules, top eighteen-year-old men's and women's basketball players are faced with a version of the eighteen-year-old movie star's dilemma every year. In the NBA, U.S. players must be nineteen and one year removed from high school during the calendar year of the draft,² and in the WNBA, U.S. players must be twenty-two or a college graduate during the calendar year of the draft (or be about to graduate within three months after the draft).³ Since these eligibility rules were agreed to by the respective leagues and players unions as parties to collective bargaining relationships, they are protected from antitrust scrutiny by the judicially-created non-statutory labor exemption (NSLE). Because the NSLE would likely bar any potential challenges to the rules under antitrust or labor law, top amateur basketball players are left with limited options between their high school graduation and playing professional basketball.⁴

Section II of this paper will discuss: (1) federal antitrust law under the Sherman Act, (2) the creation of the NSLE, and (3) cases demonstrating that the NSLE would likely bar antitrust suits challenging sports leagues' age-based eligibility rules. Assuming the eligibility rules cannot be successfully challenged using antitrust law, Section III will explore the effects that that restrictive eligibility rules of the NBA and WNBA have on amateur basketball players.

A. *The NBA Eligibility Rules*

Before the NBA and NBA Players Association (NBPA) negotiated their first Collective Bargaining Agreement (CBA) in 1970, the NBA's eligibility rules required prospective players to be at least four years removed from high school.⁵ At the time, there were two major professional basketball leagues in the United States: the NBA and the American

² NAT'L BASKETBALL PLAYERS' ASS'N COLLECTIVE BARGAINING AGREEMENT art. X § 1(b) (2017), available at <http://3c90sm371saecdwtr32v9qof.wpengine.netdna-cdn.com/wp-content/uploads/2016/02/2017-NBA-NBPA-Collective-Bargaining-Agreement.pdf> [hereinafter NBA CBA, Article X].

³ WOMEN'S NAT'L BASKETBALL PLAYERS' ASS'N COLLECTIVE BARGAINING AGREEMENT art. XIII (2014), available at <https://wnbpa.com/wp-content/uploads/2017/07/WNBA-CBA-2014-2021Final.pdf> [hereinafter WNBA CBA, Article XIII].

⁴ See discussion *infra* Section III.

⁵ Myron Medcalf, *Roots of One-and-Done Rule Run Deep*, ESPN (June 26, 2012), http://www.espn.com/mens-college-basketball/story/_/id/8097411/roots-nba-draft-one-done-rule-run-deep-men-college-basketball.

Basketball Association (ABA).⁶ The first challenge to the NBA's eligibility rules came from a former ABA player, Spencer Haywood. Haywood had turned pro after his sophomore season at the University of Detroit and led the ABA in scoring and rebounding during the 1969-70 season with the Denver Rockets. Haywood then signed with the NBA's Seattle SuperSonics when he was only three years removed from high school, in direct violation of the NBA's eligibility rules.⁷ When the NBA declared him ineligible, Haywood brought an antitrust suit against the league that he eventually won with the court declaring the NBA's four-year eligibility rule an illegal restraint on competition.⁸ Following Haywood's successful challenge and the implementation of the NBA's first CBA, the eligibility rules were changed in 1971 to allow any player who could establish a "financial hardship" to enter the league straight from high school.⁹

Establishing a "financial hardship" with the NBA proved to be a mere formality as years passed, with Daryl Dawkins and Bill Willoughby becoming the first two to enter the league straight from high school under the new rules in 1975.¹⁰ After Haywood, Dawkins, and Willoughby set the standard, no high school player tried to enter the NBA until the true "prep-to-pro" generation began in 1995 with Farragut Career Academy's Kevin Garnett.¹¹ Garnett was selected 5th overall by the Minnesota Timberwolves directly from high school in the 1995 Draft; he immediately had success, becoming an NBA All-Star in his second season.¹² After Garnett, the

⁶ The NBA would later merge with and absorb the ABA in 1976, resulting in the Denver Nuggets, San Antonio Spurs, Indiana Pacers, and New York Nets joining the NBA. *NBA Merges with ABA*, HISTORY, <https://www.history.com/this-day-in-history/nba-merges-with-aba> (last visited Mar. 28, 2018).

⁷ Medcalf, *supra* note 5.

⁸ See *Denver Rockets v. All-Pro Mgmt., Inc.*, 325 F.Supp. 1049, 1055 (C.D. Cal. 1971); see also William C. Rhoden, *Early Entry? One and Done? Thank Spencer Haywood for the Privilege*, N.Y. TIMES (June 29, 2016), <https://www.nytimes.com/2016/06/30/sports/basketball/spencer-haywood-rule-nba-draft-underclassmen.html>.

⁹ Rhoden, *supra* note 8.

¹⁰ See Terry Pluto, *LeBron James Makes Good Points on NCAA, G-League*, CLEVELAND.COM (Mar. 1, 2018), http://www.cleveland.com/pluto/index.ssf/2018/03/lebron_james_ncaa_g_league.html?_vfz=rtw_top_pages%3D11000073723926. Moses Malone also entered professional basketball straight from high school, being selected by the ABA's Utah Stars in 1974. After the NBA-ABA merger, Malone had a 19-year NBA career, retiring after the 1994-95 season. *Moses Malone*, BASKETBALLREFERENCE, <https://www.basketball-reference.com/players/m/malonmo01.html> (last visited Mar. 28, 2018).

¹¹ Farragut Career Academy is a public 4-year high school in Chicago, Illinois. See Medcalf, *supra* note 5.

¹² *Kevin Garnett*, BASKETBALLREFERENCE, <https://www.basketball-reference.com/players/g/garneke01.html> (last visited Mar. 28, 2018).

floodgates opened with each subsequent draft featuring at least one, and often more, high schoolers making the leap directly to the NBA. Notable success stories included Kobe Bryant (1996), Jermaine O'Neal (1996), Tracy McGrady (1997), Amare Stoudemire (2002), LeBron James (2003), and Dwight Howard (2004).¹³ However, for every successful prep-to-pro player there were also many who did not adjust well to the NBA or who went undrafted entirely, losing their National Collegiate Athletic Association ("NCAA") eligibility by declaring straight from high school, including Korleone Young (1998), Kwame Brown (2001), Eddy Curry (2001), Lenny Cooke (2002 – undrafted), Sebastian Telfair (2004), and Robert Swift (2004).¹⁴ These cautionary tales of high school players who struggled in the professional ranks sparked team owners to push for a change to the eligibility rules, despite the success that many in the prep-to-pro generation had.¹⁵

During negotiations over the 2005 CBA, team owners pushed for a minimum age requirement.¹⁶ Owners argued that a change to the eligibility rules would give prospects time to mature in college, allow teams more time to evaluate those prospects, and enable teams to stop spending valuable scouting resources in high school gyms.¹⁷ The NBPA strongly opposed a change¹⁸ to the eligibility rules because a minimum age requirement limited the career earning potential of prospects,¹⁹ but it ultimately conceded the changes to the eligibility rules for other concessions in the 2005 CBA.²⁰ The rules, which first forced top high school prospects Greg Oden and Kevin Durant to attend a year of college before entering the 2007 NBA Draft, required U.S. prospects to be at least nineteen years old and one year

¹³ See JONATHAN ABRAMS, *BOYS AMONG MEN: HOW THE PRE-TO-PRO GENERATION REDEFINED THE NBA AND SPARKED A BASKETBALL REVOLUTION* (2016).

¹⁴ See Medcalf, *supra* note 5.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*; see also Tom Ziller, *How to End One-and-Done and Give the NBA a Real Minor League*, SBINATION (Mar. 2, 2015), <https://www.sbnation.com/nba/2015/3/2/8106965/nba-draft-reform-one-and-done-dleague-ncaa>.

¹⁸ However, some veteran players were in favor of the change as it opened roster spots for veteran talent that would have been otherwise occupied by eighteen-year-olds.

¹⁹ An eighteen-year-old prospect who becomes a free agent for the first time at twenty-two has potential to earn more maximum contracts over the course of their career than a nineteen-year old prospect hitting free agency for the first time at twenty-three.

²⁰ Ziller, *supra* note 17.

removed from high school during the calendar year of the draft.²¹ Additionally, the rules required international prospects to be at least nineteen.²² These eligibility rules are still in effect today.²³

The changes to the NBA eligibility rules gave rise to the “one-and-done” phenomenon, as each draft since 2007 has featured several players who played NCAA basketball for only one season, most notably: Greg Oden and Kevin Durant (2007),²⁴ Derrick Rose (2008),²⁵ John Wall (2010),²⁶ Kyrie Irving (2011),²⁷ Anthony Davis (2012),²⁸ Andrew Wiggins (2014),²⁹ Karl-Anthony Towns (2015),³⁰ and Markelle Fultz (2017).³¹ While NCAA basketball has been the most popular option for high school players, it is not the only option. Several prospects have elected to forego playing in the NCAA and have instead played professionally in a foreign country for one season after high school.³² For those players, the results of this approach have been mixed, but playing overseas gave players like Brandon Jennings

²¹ NBA CBA, Article X, *supra* note 2 (“A player shall be eligible for selection [if]... [t]he player (A) is or will be at least nineteen 19 years of age during the calendar year in which the Draft is held, and (B) with respect to a player who is not an international player (defined below), at least one (1) NBA Season has elapsed since the player’s graduation from high school (or, if the player did not graduate from high school, since the graduation of the class with which the player would have graduated had he graduated from high school.”).

²² *Id.*

²³ *Id.*

²⁴ 2007 NBA Draft Board, NBA, <http://www.nba.com/draft2007/board.html> (last visited Mar. 28, 2018).

²⁵ 2008 NBA Draft Board, NBA, <http://www.nba.com/draft2008/board.html> (last visited Mar. 28, 2018).

²⁶ 2010 NBA Draft Board, NBA, <http://www.nba.com/draft2010/> (last visited Mar. 28, 2018).

²⁷ 2011 NBA Draft Board, NBA, <http://www.nba.com/draft/2011/> (last visited Mar. 28, 2018).

²⁸ 2012 NBA Draft Board, NBA, <http://www.nba.com/draft/2012/> (last visited Mar. 28, 2018).

²⁹ 2014 NBA Draft Board, NBA, <http://www.nba.com/draft/2014/> (last visited Mar. 28, 2018).

³⁰ 2015 NBA Draft Board, NBA, <http://www.nba.com/draft/2015/> (last visited Mar. 28, 2018).

³¹ 2017 NBA Draft, NBA, [http://www.nba.com/draft/board#/#/](http://www.nba.com/draft/board#/) (last visited Mar. 28, 2018). In 2017, ten years after the new eligibility rules took effect, the one-and-done phenomenon reached its peak with ten of the first eleven picks being nineteen-year-olds who attended college for one year (the 11th player was nineteen-year-old international prospect Frank Ntilikina). *Id.*

³² See Eric Bossi, *Skipping College? Top High School Prospects Discuss Other Options*, RIVALRY (July 20, 2016), <https://basketballrecruiting.rivals.com/news/college-or-overseas-top-high-school-prospects-weigh-in>.

(2009),³³ Jeremy Tyler (2011),³⁴ Emmanuel Mudiay (2015),³⁵ and Terrance Ferguson (2017)³⁶ the chance to earn multi-million dollar salaries and gain experience as professionals before entering the NBA.³⁷

In the years since the NBA's current eligibility rules were enacted, they have drawn criticism from prospects, college coaches, commentators, fans, and most recently, NBA Commissioner Adam Silver. When asked about the age minimum during the 2017 Finals, Silver acknowledged the recent prevalence of one-and-done prospects and suggested that the league is considering a change to the eligibility rules.

I think it's one of those issues that we need to come together and study. This year the projection is that we're going to have 20 one-and-done players coming, actually being drafted this year. When we first changed the minimum age from 18 to 19, the following year in 2006 we had two one-and-done players. So my sense is, it's not working for anyone. It's not working certainly from the college coaches and athletic directors I hear from. They're not happy with the current system. And I know our teams aren't happy, either, in part because they don't necessarily think that the players that are coming into the league are getting the kind of training they would expect to see among top draft picks in the league. So we're going to come together with everyone who is interested in the community, whether it be the colleges, [and] of course our union, agents, lots of points

³³ *Brandon Jennings*, BASKETBALLREFERENCE, <https://www.basketball-reference.com/players/j/jennibr01.html> (last visited Mar. 28, 2018).

³⁴ *Jeremy Tyler*, BASKETBALLREFERENCE, <https://www.basketball-reference.com/players/t/tylerje01.html> (last visited Mar. 28, 2018).

³⁵ *Emmanuel Mudiay*, BASKETBALLREFERENCE, <https://www.basketball-reference.com/players/m/mudiaem01.html> (last visited Mar. 28, 2018).

³⁶ *Terrance Ferguson*, BASKETBALLREFERENCE, <https://www.basketball-reference.com/players/f/fergute01.html> (last visited Mar. 28, 2018).

³⁷ See Aaron Torres, *Former Arizona Hoops Commit Says Playing Overseas was 'Best Decision of My Life'*, FOX SPORTS (Dec. 9, 2016), <http://www.foxsports.com/college-basketball/story/terrence-ferguson-2017-nba-mock-draft-playing-in-australia-stats-figures-112816>.

of view out there, and see if we can come up with a better system.³⁸

If the team owners and the NBPA can agree to change the eligibility rules, they have three viable options: (1) revert back to the pre-2005 rules and lower the age minimum to eighteen; (2) increase the age minimum to twenty or older, forcing players to spend more time developing in college or elsewhere; or (3) adopt a hybrid system which allows prospects to either enter the NBA directly from high school at eighteen *or* wait until they are twenty or older.³⁹

Until one of these changes is adopted, the only options available for eighteen-year-old prospects under the current eligibility rules are to: (1) play NCAA basketball for at least one year; (2) play professionally overseas for at least one year; or (3) play professionally in the G-League⁴⁰, the NBA's developmental league, for at least one year. Section III will explore each of these options, as well as the effects a change to the eligibility rules would have on them, in-depth.

B. The WNBA Eligibility Rules

Launched under the sponsorship of the NBA in 1996, the WNBA immediately became the most successful women's professional basketball

³⁸ Adam Silver, Comm'r, Press Conference at 2017 NBA Finals (June 1, 2017) (transcript available at http://www.asapsports.com/show_interview.php?id=130413) [hereinafter Adam Silver, Press Conference at 2017 NBA Finals]. As discussed *infra* in Section III, a recent and ongoing Federal Bureau of Investigation ("FBI") investigation regarding corruption in NCAA basketball recruiting has shined the national spotlight on the NBA's eligibility rules. The probe has uncovered evidence that coaches and officials from prominent NCAA-member schools have provided impermissible benefits to top high school recruits who might have passed on playing NCAA basketball were it not for the NBA's eligibility rules. See *Report: FBI Probe into NCAA Corruption Identifies Possible Violations by Basketball Powers*, ESPN (Feb. 25, 2018), http://www.espn.com/mens-college-basketball/story/_/id/22553502/fbi-probe-corruption-reveals-basketball-powers-broken-ncaa-rules.

³⁹ Major League Baseball uses eligibility rules like this; prospects must either sign with a team directly from high school at eighteen or wait three years until they are twenty-one (typically by playing in college). This system allows the top prospects to play professionally right away, while incentivizing other prospects to develop in college for two years and at least earn an associate's degree. See *First-Year Player Draft*, MLB.COM (Oct. 29, 2017, 2:27 PM), <http://mlb.mlb.com/mlb/draftday/rules.jsp>.

⁴⁰ Formerly named the "Developmental League" or "D-League", the name was changed to the "G-League" in 2017 following the NBA's partnership with Gatorade. See Michael Singer, *NBA Makes It Official: D-League is Now the G League*, USA TODAY (June 20, 2017, 10:48 AM), <https://www.usatoday.com/story/sports/nba/2017/06/20/nba-official-d-league-now-gatorade-league/411841001/>.

league in the United States, attracting top talent and causing the competing American Basketball League (ABL) to fold two years later in 1998.⁴¹ Although the league did not establish a player's union (the WNBPA) or a CBA until 1998, the league's inaugural draft was held in 1997.⁴² The eligibility rules applied to collegiate prospects in the 1997 draft were memorialized in the 1999 CBA and have remained unchanged and in effect since.⁴³ The rules require U.S. prospects to be at least twenty-two years old during the calendar year of the draft or to have graduated college (or be about to graduate within three months after the draft).⁴⁴ International prospects who are born and reside outside of the U.S. can enter the WNBA if they are at least twenty years old during the calendar year of the draft.⁴⁵

The WNBA's eligibility rules have not been challenged under antitrust or labor law as the vast majority of prospects graduate college before entering the league. Some twenty-two-year-old prospects have left college for the WNBA before graduating,⁴⁶ but no eighteen-year-old prospect has attempted to enter the league directly from high school. While the lack of a formal challenge may seem odd given how much more restrictive the WNBA rules are than the NBA rules, the lack of a challenge is probably best explained by the WNBA's low salaries. Compared to the NBA's alluring *average* salary of about \$6.4M per year,⁴⁷ the WNBA's *maximum* salary for veterans is only \$113,500 per year,⁴⁸ and only \$51,591 per year

⁴¹ Marc Edelman & C. Keith Harrison, *Analyzing the WNBA's Mandatory Age/Education Policy from a Legal, Cultural, and Ethical Perspective: Women, Men, and the Professional Sports Landscape*, 3 NW. J. L. & SOC. POL'Y. 1, 5-8 (2008).

⁴² *Id.* at 9.

⁴³ *Id.* at 10.

⁴⁴ WNBA CBA, Article XIII, *supra* note 3 (“[An American] player is eligible to be selected in the WNBA Draft [only] if she: (i) will be at least twenty-two (22) years old during the calendar year in which such Draft is held; (ii) has graduated from a four-year college or university, or is to graduate from such college of university, during the calendar year in which such Draft is held; or (iii) attended a four-year college or university, her original class in such college or university has already been graduated or is to graduate during the calendar year in which such Draft is held, and she either has no remaining intercollegiate eligibility by written notice to the WNBA at least ten (10) days prior to such Draft.”).

⁴⁵ *Id.*

⁴⁶ See *For 2nd Straight Year, Player Declares Early for WNBA Draft*, SPORTS ILLUSTRATED (Apr. 5, 2016), <https://www.si.com/womens-college-basketball/2016/04/05/ap-bkw-ncaa-early-draft-entrants>.

⁴⁷ *2017-18 NBA Player Contracts*, BASKETBALLREFERENCE, <https://www.basketball-reference.com/contracts/players.html> (last visited Mar. 28, 2018).

⁴⁸ See WOMEN'S NAT'L BASKETBALL PLAYERS' ASS'N COLLECTIVE BARGAINING AGREEMENT art. V § 8 (2014), available at <http://3c90sm37lsaecdwtr32v9qof.wpengine.netdna-cdn.com/wp-content/uploads/2016/02/2017-NBA-NBPA-Collective-Bargaining-Agreement.pdf>.

for rookies.⁴⁹ Without the financial incentive of entering the league early that exists in the NBA, WNBA prospects have less reason to attempt a challenge to the eligibility rules.

Unless the WNBA's restrictive eligibility rules are changed, the only available options for eighteen year old prospects are: (1) play NCAA basketball for four years or until graduation; or (2) forgo college or leave college early to play professionally for a foreign team.⁵⁰ Section III will explore both of the options available to top prospects under the current eligibility rules in more depth.

II. THE NBA AND WNBA ELIGIBILITY RULES ARE PROTECTED BY THE NON-STATUTORY LABOR EXEMPTION AND THUS CANNOT BE CHALLENGED USING FEDERAL ANTITRUST LAW

Because both the NBA and WNBA eligibility rules restrict entrance of prospective players to professional basketball, the leagues would likely violate federal antitrust law if not for the NSLE. The NSLE protects the eligibility rules in both leagues from antitrust scrutiny since the rules were created during the collective bargaining process between team owners and the respective players unions.⁵¹

This section will give background on federal antitrust law under Section 1 of the Sherman Act, detail the creation of the NSLE, and examine the application of the NSLE to eligibility rules in professional basketball and football to explain why it is unlikely that the current eligibility rules in the NBA and WNBA can be successfully challenged with antitrust law.

⁴⁹ See WOMEN'S NAT'L BASKETBALL PLAYERS' ASS'N COLLECTIVE BARGAINING AGREEMENT exhibit 5 (2014), available at

<http://3c90sm37lsaecdwtr32v9qof.wpengine.netdna-cdn.com/wp-content/uploads/2016/02/2017-NBA-NBPA-Collective-Bargaining-Agreement.pdf>.

⁵⁰ As discussed in Section III *infra*, top WNBA players can make multi-million-dollar salaries playing for international teams during the WNBA offseason.

⁵¹ It is also unlikely that prospects would be able to challenge the eligibility rules under a breach of the Duty of Fair Representation (DFR) claim. First, prospects would need to successfully argue that the NBPA and WNBPA represent prospective employees in addition to current employees under the National Labor Relations Act (NLRA). Assuming they can overcome this high bar, the prospects would then need to show that the union bargained adverse to their interests by acting arbitrarily, discriminatorily, or in bad faith when bargaining for the eligibility rules. No direct precedent exists for a successful DFR claim by a prospect who is not yet represented by a union. See Jessica L. Hendrick, *The Waiting Game: Examining Labor Law and Reasons Why the WNBA Needs to Change Its Age/Education Policy*, 27 MARQ. SPORTS L. REV. 521, 534-540 (2017); see also *Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 165 (1971) (holding that union did not have duty to bargain for benefit of retired employees).

A. Federal Antitrust Law Under the Sherman Act

Section 1 of the Sherman Antitrust Act (“the Sherman Act”) deems every “contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce,” illegal under federal antitrust law.⁵² Generally, Section 1 violations fall into two categories: (1) “per se” violations; and (2) violations of the “Rule of Reason.”⁵³

A per se violation occurs when conduct violates Section 1 (by being a contract, combination, or conspiracy in restraint of trade) and has a “pernicious effect on competition and lack of any redeeming value.”⁵⁴ Per se violations 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.”⁵⁵ Examples of restraints that have been deemed to be per se violations are horizontal price fixing and output restrictions, horizontal territorial restrictions, and some group boycotts.⁵⁶

For alleged violations of Section 1 that are not per se unreasonable, courts apply the Rule of Reason.⁵⁷ A restraint is unreasonable under the Rule of Reason if the plaintiff can show: (1) an actual agreement or conspiracy between competitors; (2) that the restraint has an adverse effect in the relevant market; and (3) that the anticompetitive effects of the restraint outweigh any procompetitive justifications offered by the defendants in support of the restraint.⁵⁸ Courts have also applied a “quick look” Rule of Reason analysis for restraints that are not per se illegal, but where “an observer with even a rudimentary understanding of economics could

⁵² 15 U.S.C. § 1 (2004).

⁵³ See WILLIAM HOLMES & MELISSA MANGIARACINA, *ANTITRUST LAW HANDBOOK* § 2:10 (2016).

⁵⁴ *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958).

⁵⁵ *Id.*

⁵⁶ See *United States v. Trenton Potteries Co.*, 273 U.S. 392, 394-98 (1927) (holding that uniform price fixing by those controlling trade or business in interstate commerce was a per se violation); *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 608 (1972) (holding that territorial sales restraints on member supermarkets of cooperative buying association was per se violation); *F.T.C. v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411, 412-13 (1990) (holding that group boycott by lawyers until compensation for representing indigent defendants was increased constituted per se violation).

⁵⁷ *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 88 (1911) (announcing the Rule of Reason and holding that Section 1 of the Sherman Act only applies to contracts which unreasonably restrain trade).

⁵⁸ See WILLIAM C. HOLMES, *INTELLECTUAL PROPERTY AND ANTITRUST LAW* § 5:7 (2017).

conclude that the arrangements in question would have an anticompetitive effect on customers and markets.”⁵⁹

When considering restraints imposed by professional sports leagues, such as the NBA and WNBA eligibility rules, courts rarely find per se violations and instead usually proceed with a Rule of Reason analysis under Section 1.⁶⁰ Thus, professional sports leagues are usually afforded the opportunity to avoid antitrust liability by offering valid procompetitive justifications for their imposed restraints.

B. Spencer Haywood’s Revolutionary Challenge to Professional Basketball’s Eligibility Rules

As noted *supra* in Section I, Spencer Haywood, a former ABA player, was the first to challenge the NBA’s eligibility rules. At the time, the NBA did not have a CBA, and its eligibility rules required players to be at least four years removed from high school.⁶¹ Haywood had turned pro after his sophomore season at the University of Detroit, and led the ABA in scoring and rebounding during the 1969-70 season with the Denver Rockets.⁶² Haywood then signed with the NBA’s Seattle SuperSonics when he was only three years removed from high school, in direct violation of the NBA’s eligibility rule.⁶³ After being advised that the NBA’s eligibility rule violated federal antitrust laws, Haywood brought an antitrust suit against the NBA, seeking summary judgment and an injunction prohibiting application of the eligibility rules.⁶⁴

⁵⁹ Even if a restraint is determined unreasonable under this “quick look” standard, defendants are still given the opportunity to present legitimate procompetitive justifications for the restraint. Plaintiffs are then given the chance to rebut by showing these legitimate procompetitive justifications can be accomplished by some significantly less restrictive alternative. *Cal. Dental Ass’n v. F.T.C.*, 526 U.S. 756, 757 (1999); *see O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 1049, 1063 (9th Cir. 2015).

⁶⁰ Spencer Haywood alleged a per se violation in his antitrust challenge to the NBA’s eligibility rules and it is likely that the Supreme Court would have applied the per se framework if it had considered his antitrust claims on the merits. Instead, the Supreme Court simply reinstated a district court injunction against the NBA. In 1984, the Supreme Court decided *Board of Regents*, and held that a per se rule should only rarely be applied to the sports industry where agreements that might be characterized as “horizontal restraints on competition are essential if the product is to be available at all.” *Nat’l Collegiate Athletic Ass’n v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 101 (1984); *see Haywood v. Nat’l Basketball Ass’n*, 401 U.S. 1204, 1205-07 (1971).

⁶¹ *Denver Rockets*, 325 F.Supp. at 1055.

⁶² The ABA had a four-year rule similar to the NBA, but found the rule imposed a hardship on Haywood and waived it. *Id.* at 1054.

⁶³ *Id.*

⁶⁴ *Id.*

The district court found for Haywood, enjoining application of the NBA's eligibility rules,⁶⁵ and granting partial summary judgment on the basis that the rules were per se illegal under Section 1 of the Sherman Act.⁶⁶ The court determined that application of the eligibility rules constituted a group boycott, conduct that was per se illegal at the time, so the Rule of Reason did not need to be applied.⁶⁷ In response to the *Haywood* decision, the NBA modified its eligibility rules, adding a rule that allowed players demonstrating "financial hardship" to enter the league.⁶⁸

If *Haywood* were decided today, a court might still find that Haywood had a viable antitrust claim on the merits. However, before the viability of the antitrust claim could be considered, the court would need to decide whether the NSLE exempted the NBA from antitrust liability. Assuming that the four-year eligibility rule was bargained for by the NBA and NBPA and had been included in a CBA (which did not exist at the time *Haywood* was decided),⁶⁹ Haywood would have to fight an uphill battle to convince a court that his claims were not barred by the NSLE.

C. Creation and Application of the Non-Statutory Labor Exemption

Before creation of the NSLE, courts were faced with the difficult task of reconciling the conflicting principles of antitrust and labor law. While the Sherman Act generally discourages cooperation between parties who would otherwise be competitors, labor law encourages this cooperation to preserve industrial peace between employers and employees. Labor law encourages cooperation regarding wages, hours, and other terms and conditions of employment, such as the NBA and WNBA eligibility rules.

⁶⁵ After the injunction was granted at the district court level, the NBA appealed to the Ninth Circuit, where the injunction was stayed. *Id.* at 1060. Haywood then applied to the Supreme Court for a stay of the Ninth Circuit order, where it was decided that the preliminary injunction of the district court should be reinstated. *Id.*; see *Haywood*, 401 U.S. at 1204.

⁶⁶ *Denver Rockets*, 325 F.Supp. at 1066-67.

⁶⁷ *Id.* ("[I]t is uncontested that the rules in question are absolute and prohibit the signing of not only college basketball players but also those who do not desire to attend college and even those who lack the mental and financial ability to do so.").

⁶⁸ As discussed in *supra* Section I, the hardship rule was not strictly enforced, allowing many players to enter the NBA directly from high school.

⁶⁹ Rules do not need to be included in a CBA for the NSLE to apply if the union implicitly agrees to the rule. For example, in *Clarett*, the Second Circuit applied the NSLE even though the eligibility rules in question were contained in the NFL bylaws rather than the text of the CBA. The court determined that the rules were implicitly agreed to as part of the bargaining process since the players union "agreed to waive any challenge to the Constitution and Bylaws" in the CBA. *Clarett v. Nat'l Football League*, 369 F.3d 124, 142 (2d Cir. 2004) [hereinafter *Clarett II*].

Federal statutes offered courts some guidance on how to apply federal antitrust law to labor disputes. The Norris-LaGuardia Act, enacted in 1932, forbids federal courts from issuing injunctions in any case “involving or growing out of a labor dispute” except in very narrow circumstances.⁷⁰ In 1941, the Norris-LaGuardia Act was broadly interpreted by the Supreme Court.⁷¹ The Court determined that the Norris-LaGuardia Act, when read in conjunction with the Clayton Act, insulates most unilateral activities undertaken by unions (such as strikes) from antitrust scrutiny.⁷² Although this protection, often referred to as the statutory labor exemption, insulated certain unilateral activities from antitrust scrutiny, courts were required to decide whether Congress intended to exempt terms agreed to by unions and employers via collective bargaining from antitrust scrutiny and, if so, how broad that exemption should be.

The Supreme Court tackled this issue in a series of cases and attempted to establish the parameters of the NSLE⁷³ to encourage cooperative and successful bargaining between employers and their employees.⁷⁴ The NSLE protects certain agreements between employers and unions reached pursuant to the collective bargaining process from antitrust scrutiny in order to encourage agreement between the parties without the threat of antitrust liability.⁷⁵ Unfortunately, even after the Supreme Court’s series of

⁷⁰ 29 U.S.C. § 101 (1932).

⁷¹ *United States v. Hutcheson*, 312 U.S. 219, 235-36 (1941).

⁷² *Id.* at 236 (holding that the Norris-LaGuardia Act, which was enacted “to protect the rights of labor in the same manner the Congress intended when it enacted the Clayton Act,” protects “immunized trade union activities” from being “violations of any law of the United States, including the Sherman Act”). The statutory exemption also protects some unilateral actions by employers. *See Kennedy v. Long Island R. Co.*, 319 F.2d 366, 368 (2d Cir. 1963) (holding that unilateral action by group of employers in creating a strike insurance fund was protected by the labor exemption).

⁷³ *See Allen Bradley Co. v. Elec. Workers*, 325 U.S. 797 (1945) (holding that labor union’s CBAs with manufacturers and contractors which had effect of establishing monopoly on electrical equipment in New York City, violated Section 1 of Sherman Act); *Meat Cutters v. Jewel Tea*, 381 U.S. 676 (1965) (holding that agreement between butchers’ union and multi-employer bargaining group of meat markets to not sell meat at night violated Section 1 of the Sherman Act because it unreasonably restrained trade in the meat market); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965) (holding that CBA between miner’s union and large mine owners which provided that union would (1) receive higher wages, (2) not oppose mechanization of mines, and (3) not reach agreements with small owners unless they paid the same wages as large owners, violated Section 1 of the Sherman Act since it would force small owners out of business).

⁷⁴ *See Christopher Smith, A Necessary Game Changer: Resolving the Legal Quagmire Surrounding Expiration of the Nonstatutory Labor Exemption in Sports*, 14 U. PA. J. BUS. L. 1191, 1195 (2012).

⁷⁵ *See Kieran M. Corcoran, When Does the Buzzer Sound: The Nonstatutory Labor Exemption in Professional Sports*, 94 COLUM. L. REV. 1045, 1053 (1994).

decisions noted *supra*, the scope of the NSLE was still unclear, especially as applied to terms agreed to by sports leagues and player's unions via collective bargaining.⁷⁶

In 1976, the Eighth Circuit first applied the NSLE to sports, attempting to extract from the Supreme Court's decisions over the prior three decades, a clear test for applying the NSLE to terms agreed to by leagues and player's unions via collective bargaining. In *Mackey v. National Football League*, NFL players brought antitrust claims to challenge a free agency compensation rule unilaterally imposed in the league's constitution and bylaws.⁷⁷ Dubbed the "Rozelle Rule" after former NFL Commissioner Pete Rozelle, the rule provided that when a player signed with a different team in free agency, the free agent's new team and former team would attempt to reach an agreement compensating the former team for their loss.⁷⁸ If the two teams could not reach an agreement, the Commissioner had the authority to award a player or draft pick from the free agent's new team to his former team.⁷⁹ The players claimed that the "Rozelle Rule" unreasonably restrained player movement and lowered salaries because teams became hesitant to sign free agents.⁸⁰ The NFL and the team owners claimed that the NSLE should apply, and even if the NSLE did not apply, the rule was reasonable because it was implemented to maintain competitive balance and protect the investments of teams in scouting, selecting, and developing players.⁸¹

On the issue of the NSLE, the Eighth Circuit applied a three-prong test and decided that the NSLE did not exempt the "Rozelle Rule" from antitrust

⁷⁶ *Id.*

⁷⁷ *Mackey v. Nat'l Football League*, 543 F.2d 606, 610 (8th Cir. 1976).

⁷⁸ *Id.* at 610-11.

⁷⁹ *Id.* The full rule, at that time embodied in Section 12(H) of the NFL Constitution was:

Any player, whose contract with a League club has expired, shall thereupon become a free agent and shall no longer be considered a member of the team of that club following the expiration date of such contract. Whenever a player, becoming a free agent in such manner, thereafter signed a contract with a different club in the League, then, unless mutually satisfactory arrangements have been concluded between the two League clubs, the Commissioner may name and then award to the former club one or more players, from the Active, Reserve, or Selection List (including future selection choices) of the acquiring club as the Commissioner in his sole discretion deems fair and equitable; any such decision by the Commissioner shall be final and conclusive.

⁸⁰ *Mackey*, 543 F.2d at 620.

⁸¹ *Id.* at 611.

scrutiny.⁸² Based on its reading of the Supreme Court's prior holdings on the NSLE, the Eighth Circuit reasoned that the NSLE should only apply when the restraint in question: (1) affects only the parties to the collective bargaining relationship; (2) concerns a mandatory subject of collective bargaining;⁸³ and (3) is the product of "bona fide arm's-length bargaining."⁸⁴ While the Eighth Circuit determined that the "Rozelle Rule" met the first two prongs of the test because of its effect on the wages of NFL players, the rule failed the third prong in the view of the court since it was unilaterally imposed by the league and its teams.⁸⁵ The Eighth Circuit rejected the NFL's argument that the players had agreed to the "Rozelle Rule" in exchange for other benefits, since there was no evidence of such a quid pro quo, and declined to apply the NSLE to bar the player's claims.⁸⁶ Without the protection of the NSLE, the "Rozelle Rule" was deemed illegal under Section 1 of the Sherman Act.⁸⁷

D. Professional Basketball Withstands Antitrust Challenges in the Second Circuit

Although the Eighth Circuit refused to apply the NSLE in *Mackey*, professional basketball later successfully relied on the NLSE to withstand several antitrust challenges in the Second Circuit. In each of those cases, the Second Circuit rejected the framework proposed by the Eighth Circuit in *Mackey*. The Second Circuit, eschewing the balancing approach adopted by the Supreme Court that the Eighth Circuit had attempted to capture in its three-part test, instead focused primarily on whether applying the NSLE to restraints that allegedly restrained the market for the labor of NBA players would unduly interfere with the collective bargaining process and federal labor policy.

The first challenge came from Leon Wood, in response to an NBA salary cap provision that required teams that had exceeded the salary cap to sign their draft picks to one-year contracts worth \$75,000.⁸⁸ Wood was drafted

⁸² *Id.* at 616.

⁸³ Under Section 8(d) of the National Labor Relations Act ("NLRA"), mandatory subjects of bargaining include "wages, hours, and other terms and conditions of employment..." 29 U.S.C. § 158(d) (1974).

⁸⁴ *Mackey*, 543 F.2d at 614.

⁸⁵ *Id.* at 615-16.

⁸⁶ *Id.*

⁸⁷ *Id.* at 622 (applying the Rule of Reason, the Eighth Circuit rejected the NFL's procompetitive justifications of preserving competitive balance, protecting team investments in scouting and player development, and preserving fan interest by limiting player movement).

⁸⁸ *Wood v. Nat'l Basketball Ass'n*, 809 F.2d 954, 957-58 (2d Cir. 1987).

in the first round by the Philadelphia 76ers, who had exceeded the salary cap, so he was offered such a one year contract for \$75,000. Under the CBA, the offer allowed the 76ers to preserve their exclusive rights to sign Wood.⁸⁹ Believing he deserved to be paid significantly more, Wood rejected the 76ers offer and commenced an antitrust suit against the NBA, seeking a preliminary injunction to restrain enforcement of the CBA rule so that he could negotiate with teams other than the 76ers.⁹⁰ Wood contended that the salary cap provision was illegal under Section 1 of the Sherman Act because it prevented him from achieving his full market value. Moreover, he argued that, because he had not been part of the bargaining unit when the rule was adopted, the rule affected employees outside the bargaining unit.⁹¹

The Second Circuit rejected Wood's arguments and applied the NSLE to bar his antitrust claims,⁹² noting that his contentions were "at odds with, and destructive of, federal labor policy."⁹³ Rejecting the Eighth Circuit's three-prong test from *Mackey*, the Second Circuit reasoned that it was inappropriate to balance antitrust and labor concerns in cases like Wood's, where the restraints are imposed in labor markets characterized by collective bargaining.⁹⁴ The court explained that once a group of employees elects an exclusive bargaining representative, individual employees are forbidden under federal labor law from seeking a better deal for themselves which is inconsistent with the terms of a CBA.⁹⁵

⁸⁹ *Id.* at 958.

⁹⁰ *Id.*

⁹¹ Wood contended that since the salary cap provision was agreed to by the NBPA, a bargaining unit that only included current players and not prospective players, forcing prospective players to be bound by the provision was illegal. The court rejected this argument, noting that exclusive bargaining representatives like the NBPA are explicitly permitted to bargain on behalf of employees outside the bargaining unit under the NLRA. *Id.* at 959-60; *see* 29 U.S.C. § 152(3) (1978).

⁹² Wood, 809 F.2d at 963.

⁹³ *Id.* at 959. Wood's case was decided in the Second Circuit by Judge Ralph Winter, formerly a law professor at Yale, who had earlier written a law review article advocating for an expansive view of the NSLE in the context of the sports industry. The article was cited by the district court in *Clarett I.* *See* Michael S. Jacobs & Ralph K. Winter, Jr., *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L.J. 1, 24 (1971); *see also* *Clarett v. Nat'l Football League*, 306 F.Supp.2d 379, 385-86 (S.D.N.Y. 2004) [hereinafter *Clarett I.*].

⁹⁴ The three cases upon which the Eighth Circuit based its *Mackey* test (*Allen Bradley*, *Jewel Tea*, and *Pennington*) did not concern restraints occurring in labor markets characterized by collective bargaining, so the Second Circuit did not think they should be applied to Wood's case. Wood, 809 F.2d at 962-63.

⁹⁵ *Id.*; 29 U.S.C. § 159(a) ("Representatives...selected...by the majority of employees in a unit...shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining.").

The Second Circuit further noted that collective bargaining agreements in industries other than sports often disadvantage new and prospective employees compared to senior union employees.⁹⁶ Thus, the court held that Wood's antitrust claims could not proceed even though the salary cap provision limited the earning power of new players.⁹⁷ In the view of the Second Circuit, allowing Wood's antitrust claims to proceed would have caused federal labor policy to "essentially collapse unless a wholly unprincipled, judge-made exception were created for professional athletes."⁹⁸ Though the NSLE was applied to bar Wood's antitrust claims, players did score a minor victory from the Second Circuit's decision, as the court noted that in the absence of a collective bargaining relationship, the NBA's salary cap and draft provisions would be illegal under Section 1 of the Sherman Act.⁹⁹

The NSLE was next applied to shield the NBA from antitrust scrutiny in 1995. In *Williams v. National Basketball Ass'n*, the NBA sought a declaration that it was legally permitted to continue applying the salary cap, right of first refusal, and draft provisions of the expired 1988 CBA until a new agreement was reached.¹⁰⁰ The NBA players counterclaimed, asserting that continued application of the provisions of the expired 1988 CBA was illegal under Section 1 of the Sherman Act.¹⁰¹

Even though the 1988 CBA had expired, the Second Circuit followed its decision in *Wood* by applying the NSLE to shield the NBA from antitrust claims.¹⁰² The court reasoned that exposing the NBA to antitrust liability for continued application of the CBA after impasse was reached would effectively forbid multiemployer bargaining units from performing the "most routine practices of multiemployer bargaining."¹⁰³ Thus, regardless of whether a CBA is in effect, multi-employer bargaining units cannot be exposed to antitrust liability without subverting federal labor policy as long

⁹⁶ *Wood*, 809 F.2d at 960.

⁹⁷ *Id.*

⁹⁸ *Id.* at 961.

⁹⁹ *Id.* at 959.

¹⁰⁰ *Nat'l Basketball Ass'n v. Williams*, 45 F.3d 684, 686 (2d Cir. 1995).

¹⁰¹ *Id.*

¹⁰² *Id.* at 692; *See also Powell v. Nat'l Football League*, 930 F.2d 1293 (8th Cir. 1989) (holding that the NSLE applied to bar antitrust challenge to various terms and conditions of employment implemented after impasse by NFL teams).

¹⁰³ *Williams*, 45 F.3d at 689 ("Appellants' claim is that employers may not agree upon common terms and conditions of employment to be negotiated in a new CBA, bargain hard over those terms, ultimately insist upon them, and even obtain them by resorting to economic force. Appellants thus claim that the most routine practices of multiemployer bargaining...are *per se* unlawful.").

as a collective bargaining relationship exists.¹⁰⁴ Since a collective bargaining relationship still existed between the NBA and NBPA even after expiration of the 1988 CBA, the Second Circuit held that the NSLE must be applied.¹⁰⁵

The Second Circuit's application of the NSLE to shield the NBA from antitrust scrutiny in *Wood* and *Williams*¹⁰⁶ set the stage for the Supreme Court's first holding on the NSLE as it pertains to sports in *Brown v. Pro Football Inc.*

E. The Supreme Court Rules on the NSLE as Applied to Sports

Like *Mackey*, *Brown* concerned another restraint that was unilaterally imposed by the NFL.¹⁰⁷ During CBA negotiations, the NFL and NFLPA agreed to allow each team to establish a developmental squad of young players who had failed to make a regular NFL roster.¹⁰⁸ When the NFL presented the NFLPA with its plan of paying each developmental squad player a salary of \$1,000 per week, the NFLPA disagreed, and the negotiations reached impasse two months later.¹⁰⁹ At impasse, the NFL elected to unilaterally impose the \$1,000 weekly salary, prompting developmental squad players to challenge the restraint under antitrust law.¹¹⁰

Believing that the three-prong test from *Mackey* was inappropriate in a labor market case such as this, the Supreme Court held that the NSLE applied to bar the players' antitrust claims.¹¹¹ The Court noted five factors that supported its holding: (1) the restraint was imposed by a multi-employer bargaining unit after impasse; (2) the employer's conduct in imposing the terms took place during and immediately after a collective bargaining

¹⁰⁴ *Id.* at 693.

¹⁰⁵ *Id.* at 686 ("Antitrust immunity exists as long as a collective bargaining relationship exists).

¹⁰⁶ See also *Caldwell v. Am. Basketball Ass'n*, 66 F.3d 523 (2d Cir. 1995) (holding that NSLE applied to bar antitrust suit from player who claimed he was "blacklisted" by ABA and NBA, since allowing antitrust liability would subvert federal labor policy which required such claims to be submitted to the NLRB as grievances).

¹⁰⁷ *Brown v. Pro Football Inc.*, 518 U.S. 231, 234-35 (1996)

¹⁰⁸ *Id.*

¹⁰⁹ The NFLPA objected to the NFL's plan because it did not give developmental squad players benefits and protections similar to those provided regular players, and restricted individual squad players from negotiating their own salaries. *Id.* "Impasse" is a term used to describe the point at which the parties to a collective bargaining relationship have "exhausted the prospects of concluding an agreement and further discussions would be fruitless." *Bridgeman v. Nat'l Basketball Ass'n*, 675 F.Supp. 960, 966 (D.N.J. 1987).

¹¹⁰ *Brown*, 518 U.S. at 235.

¹¹¹ *Id.* at 250.

negotiation; (3) the employer's conduct was directly related to the lawful operation of the bargaining process; (4) the restraint concerned a mandatory subject of bargaining; and (5) the restraint concerned only parties to the bargaining relationship.¹¹² While the Supreme Court's factors included the first and second prongs of the *Mackey* test, the Court declined to apply the third prong, whether the restraint was the product of "bona fide arm's-length bargaining."¹¹³ Interestingly, this means that had the *Mackey* case arisen after *Brown* was decided, the Eighth Circuit likely would have applied the NSLE and barred the players' antitrust claims regarding the "Rozelle Rule."¹¹⁴

Since the NSLE applied, the Supreme Court did not consider the merits of the antitrust claims brought by the developmental squad players. The *Brown* decision set a new standard for application of the NSLE to terms imposed pursuant to a collective bargaining relationship and scored a huge victory for sports leagues on the judiciary's biggest stage. Following the Supreme Court's decision in *Brown*, the Second Circuit decided *Clarett v. National Football League*, which granted parties to a collective bargaining relationship seemingly limitless discretion in imposing restraints on the players' services market.¹¹⁵

F. Maurice Clarett's Challenge to the NFL Eligibility Rules Gives Parties to a Collective Bargaining Relationship Seemingly Limitless Discretion in Imposing Restraints on the Players' Services Market

Clarett v. National Football League represents the current standard for application of the NSLE to CBA's negotiated by sports leagues and players unions via collective bargaining. Frustrated by the NFL's eligibility rules, which require prospective players to be at least three years removed from

¹¹² *Id.*

¹¹³ *Id.* Had the Supreme Court chosen to apply the bona fide arms-length bargaining factor, the NSLE might not have been applied since the rule was clearly not the product of good faith bargaining. Nevertheless, the NFL's unilateral implementation of the rule after impasse was a legal tactic under labor law. *See* NLRB v. Katz, 369 U.S. 736, 744 (1962).

¹¹⁴ The Court emphasized the importance of applying labor law principles in a case like *Brown* where the alleged anticompetitive impact of the restraint occurred in a labor market characterized by collective bargaining rather than in a product market or a labor market not characterized by collective bargaining. *Id.* at 738-44. Thus, had *Brown* been decided before *Mackey*, the Eighth Circuit likely would have applied labor law principles when deciding on the application of the NSLE to the "Rozelle Rule." *Brown*, 518 U.S. at 238-242.

¹¹⁵ *Clarett I*, 306 F.Supp.2d at 379-411.

high school,¹¹⁶ star Ohio State running back Maurice Clarett, who wished to enter the NFL when he was only two years removed from high school, brought an antitrust suit against the NFL in New York district court seeking to have the rules declared illegal under the Sherman Act.¹¹⁷ On the issue of the NSLE, the district court declined to follow the Second Circuit's previous decisions. Using the Eighth Circuit's three-prong test from *Mackey* instead, the district court reasoned that the NSLE applies when the restraint in question: (1) affects only the parties to the collective bargaining relationship; (2) concerns a mandatory subject of collective bargaining; and (3) is the product of "bona fide arm's-length bargaining."¹¹⁸

On the first prong, the district court determined that the NFL's eligibility rules only affected prospective players like Clarett "who are complete strangers to the bargaining relationship."¹¹⁹ Since "Clarett's eligibility was not the union's to trade away," the district court held that the eligibility rule affected parties outside the bargaining relationship and failed the first prong.¹²⁰ Second, after considering the Second Circuit's previous opinions in *Wood*, *Williams*, and *Caldwell v. American Basketball Ass'n*, the district court determined that the eligibility rules did not concern a mandatory subject of bargaining and thereby failed the second prong of the *Mackey* test.¹²¹ Unlike the Second Circuit's previous opinions which governed "the terms by which those who are *drafted* are employed," the district court held

¹¹⁶ Quoting the Bylaws, the court stated:

The Bylaws provided that a player became eligible if he exhausted his eligibility to play college football or graduated from college. A player was also eligible if he was five years removed from his first enrollment in college (or four years removed, if he never played college football), regardless of whether he had any remaining college eligibility. Finally, a player not otherwise eligible could be granted "Special Eligibility."

Such a player has been granted eligibility through special permission of the Commissioner. In order to receive consideration for the League's principal college draft in any year, any application for special eligibility must be in the Commissioner's office no later than January 6 of that year. For college football players seeking special eligibility, *at least three NFL seasons must have elapsed since the player was graduated from high school.*

Clarett I, 306 F.Supp.2d at 385-386 (citing CONSTITUTION AND BYLAWS OF THE NATIONAL FOOTBALL LEAGUE art. XII, §§ 12.1 (A)-(E) (1993)) (emphasis added).

¹¹⁷ *Id.* at 382.

¹¹⁸ *Id.* at 393-397.

¹¹⁹ *Id.* at 395.

¹²⁰ *Id.*

¹²¹ *Id.*

that the NFL's eligibility rules "preclude[d] players from entering the labor market altogether, and thus affect[ed] wages only in the sense that a player subject to the [eligibility rules] will earn none."¹²² Finally, the district court held that the eligibility rules failed the third prong of the *Mackey* test as well, since the NFL failed to meet its burden of proving that the eligibility rules "evolved from [the collective bargaining] process."¹²³

Since the eligibility rules failed the *Mackey* test, the district court found that the NSLE did not bar Clarett's suit, allowing his antitrust claims to proceed.¹²⁴ Applying the Rule of Reason, the district court rejected the NFL's offered procompetitive justifications¹²⁵ and declared the NFL's eligibility rules illegal under Section 1 of the Sherman Act.¹²⁶

¹²² *Id.*

¹²³ *Id.* at 396. The eligibility rules were not included in the text of the CBA but rather in the NFL bylaws. *Id.* The NFL argued that the rules met the third prong of the Mackey test even though the eligibility rules were not contained in the CBA because the NFLPA agreed to waive its rights to bargain over or challenge the NFL Constitution and Bylaws in the CBA. *Id.* The district court rejected this argument, reasoning that while the NFLPA waived its rights to bargain over or challenge the eligibility rules, the NFL did not meet its burden of showing that the NFLPA agreed to the rules. *Id.* On appeal, the Second Circuit accepted the NFL's argument on this point. See discussion *infra* notes 126-141.

¹²⁴ Clarett I, 306 F.Supp.2d at 397.

¹²⁵ *Id.* at 405-10. The NFL's procompetitive justifications included: (1) protecting younger/less experienced players from heightened risk of injury; (2) protecting the NFL's entertainment product from the adverse consequences associated with such injuries; (3) protecting NFL teams from the costs and liability resulting from such injuries; and (4) protecting other adolescents from over-training in the hopes of prematurely developing the traits required to play in the NFL, and the injuries/self-abuse resulting from this over-training. *Id.* at 408. The district court rejected the NFL's first and fourth justifications stating that concern for the health of younger players "has nothing to do with promoting competition." *Id.* The district rejected the NFL's second justification because it concerned the sports entertainment market rather than the player personnel market and the NFL "may not justify the anticompetitive effects of a policy by arguing that it has procompetitive effects in a different market." *Id.* (emphasis added). Finally, the district court rejected the NFL's third justification because "[t]he fact that the [NFL] and its teams will save money by excluding players does not justify that exclusion." *Id.* at 409. Even if the district court had accepted the NFL's procompetitive justifications, the court still would have granted summary judgment for Clarett because a less restrictive alternative existed: basing a player's NFL-readiness on medical examinations and tests rather than age. *Id.* at 410.

¹²⁶ *Id.* at 408. Applying the "quick look" Rule of Reason, the district court determined that the NFL's age-based eligibility rules were a naked restraint of trade that limited "competition in the player personnel market by excluding sellers." *Id.* at 406. The court rejected the NFL's argument that Clarett failed to define the relevant market, noting that the NFL had exclusive market power in the market for NFL players and the eligibility rules had anticompetitive effects. *Id.* 407-08. Thus, the court determined that Clarett had properly established the market for NFL players as the relevant market. *Id.*

The NFL immediately appealed the district court's ruling and Claret's case was heard by the Second Circuit.¹²⁷ The Second Circuit reversed the ruling of the district court, holding that the NSLE applied to protect the NFL's eligibility rules from antitrust scrutiny.¹²⁸ Declining to apply the three-prong *Mackey* test in light of the Supreme Court's *Brown* decision,¹²⁹ the Second Circuit instead applied its decisions in *Caldwell*,¹³⁰ *Williams*, and *Wood* to reject Claret's claims.¹³¹

First, the court determined that the eligibility rules concerned a mandatory subject of bargaining, since they represented a "quite literal condition for initial employment,"¹³² and had "tangible effects on the wages and working conditions of current NFL players."¹³³ Claret had argued that the eligibility rules did not concern mandatory subjects since they directly affected the wages, hours, and other terms and conditions of employment of current employees,¹³⁴ but the Second Circuit did not accept his argument.¹³⁵ Next, the court rejected Claret's argument that the eligibility rules were an impermissible bargaining subject since he was not a member of the players union when the they were negotiated.¹³⁶ Comparing Claret to a "typical worker who is confident that he or she has the skill to fill a job vacancy but does not possess the qualifications or meet the requisite criteria that have been set,"¹³⁷ the Second Circuit held that the NFL and players association had the right pursuant to their collective bargaining relationship to bar prospective employees from entry "for nearly an reason whatsoever so long as they do not violate federal [labor] laws."¹³⁸ Finally, the Second Circuit

¹²⁷ Claret II, 369 F.3d at 124.

¹²⁸ *Id.* at 125.

¹²⁹ *Id.* at 134 ("[T]he suggestion that the *Mackey* factors provide the proper guideposts in this case simply does not comport with the Supreme Court's most recent treatment of the non-statutory labor exemption in *Brown v. Pro Football, Inc.*").

¹³⁰ *Caldwell v. American Basketball Ass'n*, 66 F.3d 523, 95 (2d Cir. 1995).

¹³¹ Claret II, 369 F.3d at 138, 143.

¹³² *Id.* at 139.

¹³³ *Id.* at 140; see *Allied Chem. & Alkali Workers*, 404 U.S. at 180 (holding that benefits of retirees are not mandatory subjects of bargaining because they do not vitally affect the terms and conditions of employment of active employees).

¹³⁴ Claret II, 369 F.3d at 140; see *Petition for Writ of Certiorari at 18-20, Claret v. Nat'l Football League*, 369 F.3d 124 (2d Cir. 2004) (No. 04-910). Compare *Star Tribune*, 295 N.L.R.B. 543 (1989) (holding that drug testing for prospective employees was not a mandatory subject of bargaining); with *Johnson-Bateman Co.*, 295 N.L.R.B. 180 (1989) (holding that drug testing for current employees was a mandatory subject of bargaining).

¹³⁵ Claret II, 369 F.3d at 139.

¹³⁶ *Id.* at 140.

¹³⁷ *Id.* at 141.

¹³⁸ *Id.* A different Circuit considering this issue might accept Claret's argument and hold that parties to a CBA must have at least some rational basis for such a strict exclusionary rule on prospective employees.

held that even though the eligibility rules were contained in the NFL bylaws rather than the text of the CBA, the rules were still agreed to as part of the bargaining process, because the players union “agreed to waive any challenge to the Constitution and Bylaws” in the CBA.¹³⁹ Determining that allowing antitrust liability would “subvert principles that have been familiar to, and accepted by, the nation’s workers for all of the NLRA’s sixty years in every industry except professional sports,”¹⁴⁰ the Second Circuit reversed the district court and applied the NSLE to shield the NFL eligibility rules from antitrust scrutiny.¹⁴¹

Currently, the Second Circuit’s *Clarett* holding is the most relevant precedent for courts to consider when ruling on the application of the NSLE to shield the eligibility rules of professional sports leagues from antitrust challenges. While it is possible that another Circuit could disagree with the Second Circuit’s holding and choose to accept some of the arguments offered by *Clarett*, it is much more likely that the NSLE will continue to be applied to protect sports leagues and their eligibility rules from antitrust scrutiny.¹⁴² Thus, assuming that the NSLE bars the NBA and WNBA eligibility rules from being successfully challenged under Section 1 of the Sherman Act, top amateur basketball players are left with limited options in the time between graduating from high school and playing professional basketball.

III. ASSUMING THE ELIGIBILITY RULES CANNOT BE SUCCESSFULLY CHALLENGED WITH ANTITRUST LAW, HOW DOES THEIR APPLICATION AFFECT TOP AMATEUR BASKETBALL PLAYERS?

As discussed *supra* in Section I, the NBA and WNBA eligibility rules restrain top U.S. amateur basketball players from playing professionally. The NBA’s rule prevents men from playing professionally until they are 19 years old and one year removed from high school graduation. The WNBA’s rule prevents women from playing professionally until they are 22 years old or four years removed from high school graduation. This

¹³⁹ *Id.* at 142.

¹⁴⁰ *Id.* at 143 (quoting *Caldwell v. American Basketball Ass’n*, 66 F.3d 523, 530 (2d Cir. 1995) (internal quotations and brackets omitted)).

¹⁴¹ *Id.*

¹⁴² See Daniel A. Applegate, Student Author, Comment, *The NBA Gets A College Education: An Antitrust and Labor Analysis of the NBA’s Minimum Age Limit*, 56 CASE W. RES. L. REV. 825 (2006); but see Joseph A. Litman, Student Author, Note, *Tremendous Upside Potential: How A High-School Basketball Player Might Challenge the National Basketball Association’s Eligibility Requirements*, 88 WASH. U. L. REV. 261 (2010).

Section will explore the available options for both men and women in the period between high school and professional eligibility.

A. Men's Basketball

The NBA's eligibility rules require U.S. prospects to be at least 19 and one year removed from high school during the calendar year of the draft, and international prospects to be at least 19 during the calendar year of the draft.¹⁴³ This leaves top 18-year old prospects with three options for their gap year: (1) play NCAA basketball for at least one year; (2) play professionally for a foreign team for at least one year; or (3) play professionally in the G-League, the NBA's developmental league, for at least one year.¹⁴⁴ Outside of these options, top amateur players can only hope that the NBA and the NBPA bargain to loosen the eligibility rules, since they likely cannot be successfully challenged under federal antitrust law, as discussed *supra* in Section II. This section will explore the benefits and detriments of each available option and discuss the effects of possible changes to the eligibility rules.

1. Playing NCAA Basketball

As mentioned in *supra* Section I, playing NCAA basketball for at least one season has been by far the most popular option among top high school prospects. Since the change to the NBA's eligibility rules in the 2005 CBA, NCAA basketball has experienced a "one and done" phenomenon, with top high school prospects spending one year in college before declaring for the NBA Draft after their freshman season.¹⁴⁵ Since 2007, when Greg Oden

¹⁴³ NBA CBA, Article 10, *supra* note 2.

¹⁴⁴ A fourth approach is currently being explored by 5-star Western Kentucky recruit Mitchell Robinson. Jeff Goodman, *Mitchell Robinson leaves Western Kentucky will focus on NBA draft*, ESPN (Sept. 18, 2017), http://www.espn.com/mens-college-basketball/story/_/id/20743631/five-star-recruit-mitchell-robinson-leaves-western-kentucky-hilltoppers-focus-nba-draft. Robinson dropped out of Western Kentucky shortly after enrolling and considered transferring, but instead took the year off to focus on preparing for the 2018 NBA Draft. *Id.* Time will tell whether Robinson's gamble will pay off, with one NBA executive remarking, "[h]e's a huge red flag...and I'm not sure he's even that good." *Id.* Robinson was unable to play in the G-League during the 2017-18 season because of a rule that barred entry by players who attended a college or university during the same academic year. Tim Cato, *G-League Bars Top NCAA Prospects Due to Obscure Rule, Per Report*, SBATION (Jan. 11, 2018, 6:45 PM), <https://www.sbnation.com/2018/1/11/16880980/g-league-ncaa-prospects-mitchell-robinson-nba-rule>. The rule provides an exception for players who have exhausted their NCAA eligibility or been declared ineligible by the NCAA, but Robinson did not meet either exception due to the circumstances of his departure from Western Kentucky. *Id.*

¹⁴⁵ Medcalf, *supra* note 5.

and Kevin Durant were drafted first and second after their freshman seasons at Ohio State and Texas respectively, 25 of 33 total players selected in the Top-3 have been one-and-done players.¹⁴⁶ The one-and-done phenomenon reached its peak in the 2017 Draft, with 10 one-and-done players among the first 11 selections.¹⁴⁷ With the vast majority of top high school players since 2007 electing to play NCAA basketball during their gap year between high school and the NBA, it is by far the most utilized option available to top amateur prospects.

Playing NCAA basketball for at least one year provides several benefits for top amateur players. Players who choose NCAA basketball receive a free college education (assuming they are on scholarship)¹⁴⁸ as well as access to state-of-the-art facilities,¹⁴⁹ high-quality equipment, and expansive alumni networks.¹⁵⁰ Going to college, even for only one year, is also viewed as a good way for players to mature and develop professionally, as the rigors

¹⁴⁶ 2007 NBA Draft Board, *supra* note 24; 2008 NBA Draft Board, *supra* note 25; 2009 NBA Draft, NBA, <http://www.nba.com/draft2009/> (last visited Mar. 28, 2018); 2010 NBA Draft Board, *supra* note 26; 2011 NBA Draft Board, *supra* note 27; 2012 NBA Draft Board, *supra* note 28; 2013 NBA Draft Board, NBA, <http://www.nba.com/draft/2013/> (last visited Mar. 28, 2018); 2014 NBA Draft Board, *supra* note 29; 2015 NBA Draft Board, *supra* note 30; 2016 NBA Draft Board, NBA, <http://www.nba.com/draft/2016/> (last visited Mar. 28, 2018); 2017 NBA Draft, *supra* note 31. Further, from 2014-2017 all 12 players selected in the Top-3 of their respective drafts were one-and-done college players. Colt Kesselring, *2017 Update: NBA One-and-Done Era, Visualized*, HERO SPORTS (Feb. 20, 2017, 5:28 PM), <https://herosports.com/news/one-and-done-rule-list-college-basketball-nba-visualized>.

¹⁴⁷ 2017 NBA Draft Board, *supra* note 31. Interestingly, the only player in the Top-11 who did not attend college for a year was 19-year-old French point guard Frank Ntilikina, who was selected 8th by the New York Knicks. *Id.*

¹⁴⁸ Division I men's basketball teams have 13 scholarships to allocate and can award financial aid up to the equivalent "cost of attendance that normally is incurred by students enrolled in a comparable program at the institution." NAT'L COLLEGIATE ATHLETIC ASS'N BYLAWS [hereinafter NCAA Bylaws] art. 15.06 & 15.5.5.1 (2017), *available at* <https://www.ncaapublications.com/p-4511-2017-2018-ncaa-division-i-manual-august-version-available-august-2017.aspx>.

¹⁴⁹ Will Hobson & Steven Rich, *Colleges Spend Fortunes on Lavish Athletic Facilities*, CHI. TRIB. (Dec. 23, 2015), <http://www.chicagotribune.com/sports/college/ct-athletic-facilities-expenses-20151222-story.html>; *see also* Steve Politi, *10 College Basketball Practice Facilities that Will Blow Rutgers Fans Away*, NJ.COM (Feb. 26, 2015), http://www.nj.com/rutgersbasketball/index.ssf/2015/02/10_basketball_practice_facilities_that_will_blow_r.html.

¹⁵⁰ Top basketball programs often have several well-connected alumni working in the NBA as players, coaches, agents, advisors, and executives. Joe Boozell, *College Basketball Players in the NBA: Kentucky, Kansas Top the List*, NCAA (June 22, 2016), <http://www.ncaa.com/news/basketball-men/article/2016-06-22/college-basketball-players-nba-kentucky-kansas-top-list>.

and challenges of being truly independent for the first time cause most to mature.¹⁵¹

Further, playing NCAA basketball is the best way for top amateur players to grow their brand, secure future marketing opportunities, and become a household name before playing a single NBA game. Regular season games are televised on major networks like ESPN, CBS, and Fox Sports, as well as on conference television networks, and the annual NCAA Tournament thrusts players into a bright national spotlight.¹⁵² Additionally, since this exposure makes it easy and relatively cheap to scout NCAA players, NBA teams appear to be more inclined to spend a high draft pick on NCAA players competing against a known level of competition rather than players who spend their gap year competing internationally or in the G-League.¹⁵³ Finally, for players who are not sure if they are ready to enter the NBA after their freshman season (or any other season), a new rule provides players the

¹⁵¹ Brian Shaffer, *The NBA's Age Requirement Shoots and Misses: How the Non-Statutory Exemption Produces Inequitable Results for High School Basketball Stars*, 48 SANTA CLARA L. REV. 681, 686 (2008).

¹⁵² Patrick Hipes, *NCAA Tournament Ratings at 24-Year High Through First Weekend*, DEADLINE (Mar. 20, 2017), <http://deadline.com/2017/03/ncaa-tournament-ratings-record-2017-1202047200/>.

¹⁵³ See Jordan Ritter Conn, *Is the NBA Done Drafting International Players?*, GRANTLAND (June 28, 2012), <http://grantland.com/features/evan-fourmier-not-necessarily-surprising-dearth-foreign-prospects-2012-nba-draft/> (Pete Philo, an international scout with the Timberwolves, stated, "When you're scouting college kids, you can watch your team play one night, and then go watch North Carolina and Duke play the next night." "The comparison is right there. If you stay over in Europe too long, you're not used to the athleticism of our league. You're watching slow on slow. Anybody with any kind of quickness all of a sudden looks like he's Tony Parker").

opportunity to test their NBA draft stock without losing their NCAA eligibility, provided they do not hire an agent.¹⁵⁴

For all the benefits that playing NCAA basketball provides, the major problems with choosing this option all seem to stem from the NCAA's strict eligibility rules.¹⁵⁵ Most relevant to players being restrained from earning a multi-million dollar NBA salary, players who choose NCAA basketball cannot receive a salary or be paid in any way for their play.¹⁵⁶ While players receive scholarships which usually cover the full cost of college attendance,¹⁵⁷ they often feel exploited by this rule, since their play drives multi-million dollar revenues for their schools in the form of ticket and jersey sales, and enormous television contracts.¹⁵⁸ These revenues are not shared with the players in any way, and are instead shared between the schools, conferences, and NCAA.¹⁵⁹ Further, the NCAA's bylaws prevent

¹⁵⁴ Sam Vecenie, *NBA Draft Prospects Big Fans of Rule Giving Them More Time to Test Waters*, CBS SPORTS (May 13, 2016), <https://www.cbssports.com/college-basketball/news/nba-draft-prospects-big-fans-of-new-rule-giving-them-more-time-to-test-waters/>; see also Memorandum from Nat'l Collegiate Athletic Ass'n to Div. I Athletic Dirs., Senior Compliance Adm'rs, and Men's Basketball Head Coaches (May 23, 2017), available at https://www.ncaa.org/sites/default/files/2017DIENF_NBAEducational_Memov2_20170523.pdf. The NCAA's "no agent" rules have themselves been challenged by players under antitrust law and otherwise. See *Banks v. Nat'l Collegiate Athletic Ass'n*, 977 F.2d 1081 (7th Cir. 1992) (holding that the NCAA's no-agent rules were not illegal under antitrust law because the plaintiff failed to allege anticompetitive effects of the rules in his complaint); see also *Oliver v. Nat'l Collegiate Athletic Ass'n*, 155 Ohio Misc.2d 17 (Ohio Ct. Com. Pl. 2009), vacated pursuant to settlement (Sept. 30, 2009) (granting injunction against NCAA's rules prohibiting lawyers from being present during contract discussions with a professional team since rules were arbitrary and capricious, illogical, and violated NCAA's contractual obligation of good faith and fair dealing to plaintiff college baseball player).

¹⁵⁵ See NCAA Bylaws, *supra* note 148.

¹⁵⁶ *Id.* at art. 12.1.2.

¹⁵⁷ *Id.* at art. 15.01.06.

¹⁵⁸ See David Berri, *Exploitation is Everywhere in Men's College Basketball*, TIME (Nov. 14, 2014), <http://time.com/3586037/exploitation-is-everywhere-in-mens-college-basketball/>.

¹⁵⁹ See *Distributions*, NCAA.COM

<http://www.ncaa.org/about/resources/finances/distributions> (last visited Mar. 28, 2018); see also Will Hobson & Steven Rich, *Playing in the Red*, WASH. POST (Nov. 23, 2015), http://www.washingtonpost.com/sf/sports/wp/2015/11/23/running-up-the-bills/?utm_term=.fc3a6acbc2a8.

players from profiting off their name, image, or likeness in any way,¹⁶⁰ so players are unable to receive endorsements, sell autographs, hire agents, receive promises of future pay, or “use [their] athletics skill (directly or indirectly) for pay in any form”¹⁶¹ without losing their NCAA eligibility.

In the fall of 2017, news of an FBI investigation regarding corruption in NCAA basketball recruiting sent shockwaves through the basketball world.¹⁶² The ongoing probe has shed light on the recruiting “black market” and named NCAA coaches and players, both active and former, associated with many prominent institutions, such as the University of Louisville, the University of Arizona, and the University of Southern California.¹⁶³ The FBI investigation has thrust NCAA basketball into the national spotlight and fueled many conversations about alternatives to NCAA basketball for top high school players, the future of the current NCAA model, and changes to the NBA’s eligibility rules.¹⁶⁴

¹⁶⁰ See NCAA Bylaws, *supra* note 148, at art. 12.1.2. These rules have been under fire recently and were the subject of a very prominent antitrust suit brought by former college athletes against the NCAA. See *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 1049 (9th Cir. 2015), cert. denied, 137 S.Ct. 277 (2016); see also *Bloom v. Nat’l Collegiate Athletic Ass’n*, 93 P.3d 621 (Colo. App. 2004) (holding that plaintiff, who was an Olympic and World Cup skier before being recruited to play football at Colorado University, could not profit from his notoriety as a skier and maintain his eligibility to play football).

¹⁶¹ NCAA Bylaws, *supra* note 148, at art. 12.1.2(a).

¹⁶² See *Report: FBI Probe into NCAA Corruption Identifies Possible Violations by Basketball Powers*, *supra* note 38.

¹⁶³ *Id.*; see Daniel Rapaport, *What We Know About Each School Implicated in the FBI’s College Basketball Investigation*, SPORTS ILLUSTRATED (Nov. 17, 2017), <https://www.si.com/college-basketball/2017/09/29/what-we-know-about-each-school-fbi-investigation>.

¹⁶⁴ See Andy Staples, *The NCAA Must Change the Rules in Order to Solve College Basketball’s Existential Crisis*, SPORTS ILLUSTRATED (Feb. 23, 2018), <https://www.si.com/college-basketball/2018/02/23/fbi-probe-investigation-ncaa-recruiting-rules-andy-miller>. On the heels of the FBI investigation, Adam Silver reportedly met with the NBPA to discuss changes to the NBA’s eligibility rules. Khadrice Rollins, *Report: Adam Silver Wants to Improve NBA’s Relationship With Elite High School Players*, SPORTS ILLUSTRATED (Mar. 5, 2018), <https://www.si.com/nba/2018/03/05/adam-silver-elite-high-school-player-one-and-done-change-g-league> (“We’re not by any means rushing through this. I think this is a case where, actually, outside of the cycle of collective bargaining, we can spend more time on it with the players’ association, talking to the individual players, talking to the executive board and really trying to understand the pros and cons of potentially moving the age limit.”). Per the report, Silver is also considering enticing top high school players to play in the G-League by offering higher salaries for players on both standard G-League contracts and two-way contracts. *Id.*

Aside from the problems players face when attempting to preserve their NCAA eligibility, especially when considering the ongoing FBI investigation, choosing NCAA basketball might result in additional issues for top high school players. One-and-done players who know they are declaring for the NBA Draft after their freshman season do not really receive the benefits of a free college education. Some of these players do not attend classes since they know they will not be finishing their degree, and will sometimes disenroll from classes at the conclusion of basketball season to begin preparing for the NBA Draft.¹⁶⁵ For those that do attend class and finish at least one year of college, becoming an on-campus celebrity and one of the most famous students at the school might not be the best environment for certain players to learn to act like a professional and to mature.¹⁶⁶ Additionally, while NCAA training programs are very high-quality, some NBA teams would rather have college-aged players developing in the NBA or G-League, where the player can be under the organization's control and treat basketball like a full-time job.¹⁶⁷

Since the NBA's current eligibility rules were incorporated in the 2005 CBA, top amateur prospects have overwhelmingly decided that the benefits of playing NCAA basketball in their gap year outweigh the detriments –

¹⁶⁵ See Gary Parrish, *76ers Rookie Ben Simmons' Year at LSU Exposed in Showtime's 'One & Done'*, CBS SPORTS (Nov. 4, 2016), <https://www.cbssports.com/college-basketball/news/76ers-rookie-ben-simmons-year-at-lsu-exposed-in-showtimes-one-done/>; Adam Silver, Press Conference at 2017 NBA Finals, *supra* note 38 (Students “enroll in these universities... and they attend those universities until either they don't make the tournament, and the last game therefore of their freshman season, or to whenever they lose or win in the NCAA Tournament, that becomes their last day. So in essence it's a half-and-done, in a way”); see also Matt Norlander, *Adam Silver Changes Stance on Age-Limit Rule and That's Bad News for College Hoops*, CBS SPORTS (June 1, 2017), <https://www.cbssports.com/college-basketball/news/adam-silver-changes-stance-on-age-limit-rule-and-thats-bad-news-for-college-hoops/>.

¹⁶⁶ See generally Pete Thamel & Thayer Evans, *College Stars Run for Cover From Fans' Cameras*, N.Y. TIMES (Sept. 16, 2009), http://www.nytimes.com/2009/09/17/sports/ncaafootball/17colleges.html?_r=1&hpw.

¹⁶⁷ Adam Silver, Press Conference at 2017 NBA Finals, *supra* note 38 (“[O]ur teams aren't happy either, in part because they don't necessarily think that the players... are getting the kind of training they would expect to see among top draft picks... [I]ncreasingly the veteran players... feel that the young players are not coming in game-ready... [like] when they were coming out of college”); see Kevin O'Connor, *The Future of the NBA Could be the G-League*, THE RINGER (June 6, 2017), <https://www.theringer.com/nba/2017/6/6/16077542/nba-draft-adam-silver-age-limit-ben-simmons-51cc9cfbc034>; see also Tim MacMahon, *Cuban: D-League Better for Prospects*, ESPN (Mar. 6, 2014), https://espn.go.com/dallas/nba/story/_/id/10538276/mark-cuban-says-nba-d-league-better-option-ncaa.

especially when considering the alternatives. However, if the eligibility rules were changed, players might choose differently.

The NCAA has the most to gain if the NBA's age minimum is increased, as top players would spend more time in college, generating revenue for schools, conferences, and the NCAA itself. Television viewership might increase as well since some consumers feel that the one-and-done phenomenon has diluted the quality of NCAA basketball by encouraging constant roster turnover from year to year.¹⁶⁸ Further, an increase to the age minimum would give players a chance to earn an associate's degree during their time in college, and also likely convince some players to stay the final two years to finish a bachelor's degree.¹⁶⁹ Such an increase would cause the NBA's eligibility rules to become even more restrictive however,¹⁷⁰ and might draw an antitrust challenge, exposing the NBA to the risk that a different Circuit would disagree with the Second Circuit's reasoning in *Clarett* and refuse to apply the NSLE.

The NCAA also has arguably the most to lose if the NBA's age minimum is decreased to 18 and players are allowed to enter the NBA straight from high school again. It is unclear what effect this would have on the quality of NCAA basketball – on one hand, top high school players would forego college for the NBA, but on the other, fewer players would leave school early resulting in less roster turnover.¹⁷¹ Even with a few top high school players declaring for the NBA Draft each year, many more top high schoolers would still attend college, and the quality of NCAA basketball

¹⁶⁸ See Andrew Lynch, *The NBA's One-and-Done Rule has Ruined the NCAA Tournament*, FOX SPORTS (Mar. 20, 2017), <http://www.foxsports.com/college-basketball/story/ncaa-tournament-march-madness-overrated-bad-buzzer-beaters-031717>; see also Sam Drexler, *Is One and Done Ruining College Basketball?*, ODYSSEY (Mar. 28, 2016), <https://www.theodysseyonline.com/is-one-and-done-ruining-college-basketball>.

¹⁶⁹ See generally Steve Kerr, *The Case for the 20-Year-Old Age Limit in the NBA*, GRANTLAND (May 8, 2012), <http://grantland.com/features/steve-kerr-problems-age-limit-nba/>.

¹⁷⁰ See Matt Ellentuck, *Raising the NBA Draft Age Limit to 20 Would Cost New Players Millions*, SBNATION (May 12, 2016), <https://www.sbnation.com/nba/2016/5/12/11510186/nba-draft-age-limit-20-adam-silver-cost-millions>.

¹⁷¹ See David Ubben, *Can College Basketball be Saved?*, SPORTS ON EARTH (Sept. 28, 2017), <http://www.sportsonearth.com/article/256500732/how-to-repair-college-basketball-after-scandal>; Tom Ziller, *Kill the NBA Age Minimum. The G League is Ready to Replace College*, SBNATION (June 2, 2017), <https://www.sbnation.com/2017/6/2/15728454/nba-draft-age-minimum-gleague-adam-silver>.

would likely be just fine as it was pre-2005.¹⁷² The players would benefit the most under this system by regaining the freedom of choice they possessed before the current eligibility rules were enacted.

Perhaps the best solution, one that appears acceptable to the NCAA, NBA, and top high school players is to adopt a version of MLB's eligibility rules.¹⁷³ As mentioned *supra* in Section 1, MLB's eligibility rules allow players to either sign with a professional team at 18 or wait three years until they are 21, typically by playing NCAA baseball for three years. If such a system were adopted by the NBA, top high school players could enter the NBA straight from high school and players who choose college would be more likely to reap the benefits of a free college education with enough time to finish at least an associate's degree. Unfortunately, a hybrid system like this would leave players who are not ready for the NBA until after their freshman season of NCAA basketball hung out to dry.¹⁷⁴ Even though these players might be ready for the NBA after their freshman season, such a hybrid system would require them to stay in school until the end of their junior season, forcing them to sacrifice two extra years of NBA salary.

Regardless of which alternative to the NBA's current eligibility rules makes the most sense, one thing is for certain: until some change is adopted, playing NCAA basketball will continue to be the most popular option available to top high school players.

¹⁷² From 1995, when Kevin Garnett sparked the prep-to-pro generation, through 2005, when the eligibility rules were changed, 39 of the 582 players drafted were drafted directly from high school (only 6.7%). If the NBA returned the age minimum to 18, a handful of top players would forego college every year, but the vast majority would still play NCAA basketball for at least one year. See JONATHAN ABRAMS, *supra* note 13.

¹⁷³ See Matt Norlander, *College Coaches Like 'Baseball Rule' for NBA Draft, but it May Not Solve the Big Issues*, CBS SPORTS (June 19, 2017), <https://www.cbssports.com/college-basketball/news/college-coaches-like-baseball-rule-for-nba-draft-but-it-may-not-solve-the-big-issues/>.

¹⁷⁴ For example, Trae Young, who averaged twenty-eight points per game for the University of Oklahoma during the 2017-18 season and is projected to be a top-10 pick in the 2018 NBA draft, was ranked 23rd in the 2017 ESPN Top 100. *Trae Young*, ESPN, http://www.espn.com/college-sports/basketball/recruiting/player/_id/203210/trae-young (last visited Apr. 2, 2018); Jeremy Woo, *2018 NBA Mock Draft 5.0: Who Will Leave a Strong Impression in the NCAA Tournament?*, Sports Illustrated (Mar. 14, 2018), <https://www.si.com/nba/2018/03/14/nba-mock-draft-2018-march-madness-deandre-ayton-trae-young-luka-doncic>. Had Young been allowed to enter the 2017 NBA draft, it is highly unlikely he would have been drafted within the top-10.

2. Playing Professionally Internationally

Following enactment of the NBA's new eligibility rules, a handful of top high school players have elected to forego playing in the NCAA and instead spend their gap year playing professionally in a foreign country. Notable examples of players who chose this option are Brandon Jennings (drafted 10th in 2009), Jeremy Tyler (drafted 39th in 2011), Emmanuel Mudiay (drafted 7th in 2015), and Terrance Ferguson (drafted 21st in 2017).¹⁷⁵ Jennings, who was the test case for this approach in 2009, has been the most successful of this group with the 2017-18 season being the 9th of his solid career,¹⁷⁶ while Tyler, who spent two years overseas after famously foregoing his senior year of high school, played in only 104 NBA games over three seasons¹⁷⁷ before becoming a cautionary tale.¹⁷⁸ It is too soon to tell how Emmanuel Mudiay and Terrance Ferguson's NBA careers will proceed, but after Mudiay's rough rookie season,¹⁷⁹ abysmal sophomore

¹⁷⁵ In addition, a notable international experiment is ongoing in Lithuania, where LiAngelo Ball and LaMelo Ball, the younger brothers of Los Angeles Lakers point guard Lonzo Ball, signed professional contracts with Prienai-Birstonas Vytautas. Benjamin Hoffman, *LiAngelo and LaMelo Ball Are Headed to Lithuania*, N.Y. TIMES (Dec. 11, 2017), <https://www.nytimes.com/2017/12/11/sports/liangelo-lamelo-lavar-ball-lithuania.html>. LiAngelo Ball, who is eligible (and declared) for the 2018 NBA draft, intended to play NCAA basketball for the University of California Los Angeles during the 2017-18 season, but withdrew his enrollment after being suspended indefinitely following an arrest for shoplifting on the team's international trip to China. Eduardo Gonzalez, *LiAngelo Ball Declares for the NBA Draft*, L.A. TIMES (Mar. 27, 2018), <http://www.latimes.com/sports/nba/la-sp-liangelo-ball-nba-draft-20180327-story.html>; Eric Sondheimer & Ben Bolch, *LaVar Ball Says He is Withdrawing Son LiAngelo from UCLA*, L.A. TIMES (Dec. 4, 2017), <http://www.latimes.com/sports/nba/la-sp-ucla-lavar-ball-20171204-story.html>. LaMelo Ball, who is eligible for the 2020 NBA draft under the current eligibility rules, withdrew from his junior year of high school after becoming the first high school athlete to debut a signature shoe. Eric Sondheimer, *LaVar Ball to Pull Son LaMelo from Chino Hills and Train Him Personally*, L.A. TIMES (Oct. 2, 2017, 3:36 PM), <http://www.latimes.com/sports/highschool/la-sp-high-school-sports-updates-lavar-ball-to-pull-lamelo-from-chino-1506983851-htmlstory.html>; A.J. Perez, *High school Athlete LaMelo Ball Gets Signature Shoe, Sparking Eligibility Questions*, USA TODAY (Aug. 31, 2017, 5:00 PM), <https://www.usatoday.com/story/sports/2017/08/31/high-school-athlete-lamelo-ball-gets-signature-shoe-sparking-eligibility-questions/621469001/>.

¹⁷⁶ *Brandon Jennings*, *supra* note 33.

¹⁷⁷ *Jeremy Tyler*, *supra* note 34.

¹⁷⁸ See Chris Mannix, *A Sorry Semester Abroad*, SPORTS ILLUSTRATED (Mar. 29, 2010), <https://www.si.com/vault/2010/03/29/105917331/a-sorry-semester-abroad>; see also Josh Fu, *NBA Draft 2011: In Jeremy Tyler, Golden State Warriors Take a Smart Risk*, BLEACHER REPORT (July 3, 2011), <http://bleacherreport.com/articles/749047-golden-state-warriors-take-a-smart-risk-with-jeremy-tyler-acquisition>.

¹⁷⁹ Tom Ley, *There's Still Hope For Last Season's Worst NBA Rookie*, FIVETHIRTYEIGHT (Oct. 24, 2016), <https://fivethirtyeight.com/features/theres-still-hope-for-last-seasons-worst-nba-rookie/>.

campaign,¹⁸⁰ and recent trade to the New York Knicks,¹⁸¹ it is safe to assume his career might resemble Tyler's more than Jennings'. Since none of the players who have chosen the international option have been Top-5 draft selections, made NBA All-Star appearances, or signed maximum NBA contracts, top high school players are still very wary of the risks of spending their gap year overseas.¹⁸² However, those that can look past these risks have the chance to earn multi-million dollar salaries, receive endorsements, and be free of the NCAA's restrictive eligibility rules.

Freedom from the NCAA's amateurism rules is the main benefit of choosing the international option. Without needing to worry about losing their amateurism, players can receive a salary and endorsements, and can profit off their name, image, and likeness directly or indirectly. Elite high schoolers who choose the international option often make an annual salary of more than \$1M: Jennings signed with Italy's Lottomatica Virtus Roma for \$1.2 million,¹⁸³ Mudiay with China's Guangdong Dongguan Bank for

¹⁸⁰ See Daniel C. Lewis, *Emmanuel Mudiay Moved to Bench Role*, DENV. STIFFS (Feb. 22, 2017), <https://www.denverstiffs.com/2017/2/22/14701694/emmanuel-mudiay-benched-for-jameer-nelson>.

¹⁸¹ *Knicks Acquire Emmanuel Mudiay in 3-Team Trade*, NBA (Feb. 8, 2018, 9:27 PM), <http://www.nba.com/article/2018/02/08/new-york-knicks-acquire-emmanuel-mudiay-three-team-deal-official-release>. In return, the Denver Nuggets received a second-round pick from the New York Knicks and thirteen-year veteran point guard Devin Harris from the Dallas Mavericks. *Id.*; *Devin Harris*, BASKETBALLREFERENCE, <https://www.basketball-reference.com/players/h/harride01.html> (last visited Mar. 28, 2018).

¹⁸² For example, 5-star recruit Kevin Knox turned down a \$1.4M offer from a Chinese team to instead attend the University of Kentucky for the 2017-18 season. *High School Basketball Star Turns Down \$1.4 Million Offer to Play Overseas*, FOX SPORTS (Apr. 15, 2017), <http://www.foxnews.com/sports/2017/04/15/high-school-basketball-star-turns-down-14-million-offer-to-play-overseas.html>.

¹⁸³ This salary figure included endorsements. Ray Glier, *Brandon Jennings Sends Home a Warning from Europe*, N.Y. TIMES (Jan. 23, 2009), <http://www.nytimes.com/2009/01/24/sports/basketball/24recruit.html>.

\$1.2 million,¹⁸⁴ and Ferguson with Australia's Adelaide 36ers for at least \$1 million.¹⁸⁵

Playing internationally also offers players the opportunity to experience being a professional basketball player for the first time, possibly giving them a leg up on their peers who choose college. In the NBA, players are expected to treat basketball like a full-time job, without the academic distractions they would have in the NCAA, and play against fully grown and developed men, rather than nineteen to twenty-two-year-olds. By spending their gap year playing for an international team, prospects can adjust to the life of a professional basketball player and the physical challenge of playing against older, more developed players, before stepping into their first NBA locker room.¹⁸⁶

Despite the benefits of receiving remuneration for their talents before their NCAA peers, the risks of playing internationally cause most players to stay away. First, players are not afforded the national exposure of playing NCAA basketball, so endorsement opportunities might be harder to come

¹⁸⁴ Matt Norlander, *Reports: Emmanuel Mudiay Signs 1-year, \$1.2 Million Deal in China*, CBS SPORTS (July 22, 2014), <https://www.cbssports.com/collegebasketball/eye-on-college-basketball/24632524/reports-emmanuel-mudiay-signs-1-year-12-million-deal-with-chinese-team>.

¹⁸⁵ See Terrance Ferguson, *Why I'm Going Pro in Australia*, PLAYER'S TRIB. (June 30, 2016), <https://www.theplayerstribune.com/2016-6-30-terrance-ferguson-arizona-australia-basketball/>; see also Matt Ellentuck, *NBA Draft Prospect Who Skipped College to Play Overseas Want Others to do the Same*, SBNATION (June 12, 2017, 8:35 PM), <https://www.sbnation.com/nba/2017/6/12/15788188/terrance-ferguson-nba-draft-college-overseas-alabama-arizona>; Olgun Uluc, *Why More Young NBA Hopefuls May Skip College to Play in NBL Instead*, FOX SPORTS (June 30, 2016), <https://www.foxsports.com.au/basketball/why-more-young-nba-hopefuls-may-skip-college-to-play-in-nbl-instead/news-story/d8ed8d92befea7820c59670f948b4e2b>. The Australian National Basketball League ("NBL"), the league in which Ferguson played during the 2016-17 season, has launched a new program to attract top U.S. high school players during their gap year. Jonathan Givony, *How Australian Basketball is Targeting One-and-Dones*, ESPN (Mar. 1, 2018), http://www.espn.com/nba/story/_/id/22594625/how-australian-basketball-targeting-one-dones-nba-draft. The program adds an extra roster spot to each NBL team intended strictly for top high school players like Ferguson. *Id.* Top high school players filling the roster spot will reportedly be paid the Australian equivalent of \$78,000 funded directly by the NBL. *Id.*

¹⁸⁶ See Max Blau, *Brandon Jennings, Kyle Singler, and Others Talk About Playing Basketball Overseas*, GRANTLAND (Dec. 7, 2012), <http://grantland.com/the-triangle/brandon-jennings-kyle-singler-and-others-talk-about-playing-basketball-overseas/>; see also Ethan Skolnick, *NBA's 'International' Presence on the Rise as Basketball Keeps Growing Globally*, CBS SPORTS (Aug. 31, 2016), <https://www.cbssports.com/nba/news/nbas-international-presence-on-the-rise-as-basketball-continues-to-grow-globally/>.

by. Due to higher costs than domestic scouting and difficulty evaluating quality of competition,¹⁸⁷ international scouting is also much tougher for NBA teams. For some players, less scouting might be beneficial as their flaws may be exposed less than if they were playing under the NCAA's national spotlight.¹⁸⁸ For the vast majority of others, less scouting means that a poor statistical performance could completely crash their draft stock,¹⁸⁹ and that it is much easier to fall off the radar of NBA teams completely.¹⁹⁰ The risk of having their draft stock crash is the main reasons why players are wary of the international route.¹⁹¹

Further, players choosing to play internationally during their gap year are much more isolated from their friends and family than those who attend college. Players might be able to use their salary to bring a few family members overseas to live with them,¹⁹² but living in a foreign country can

¹⁸⁷ See Ritter Conn, *supra* note 153.

¹⁸⁸ See Uluc, *supra* note 185.

¹⁸⁹ This was the case with Jeremy Tyler, who experienced two poor seasons overseas before entering the NBA Draft. A star at San Diego High School, Tyler skipped his senior season to sign with Israel's Maccabi Haifa. In ten games, Tyler averaged only 2.1 points and 1.9 rebounds in 7.6 minutes per game, before quitting the team and returning to San Diego. Tyler then spent the following season with Japan's Tokyo Apache, bouncing back a bit by averaging 9.9 points and 6.4 rebounds in 15.4 minutes per game. Had Tyler stayed in high school and attended the University of Louisville, as he originally planned during his gap year, it is safe to assume he would have been drafted higher than 39th in 2011. See Brent Schrotenboer, *After Everything, Jeremy Tyler Still Bound for NBA*, SAN DIEGO UNION-TRIB. (June 21, 2011), <http://www.sandiegouniontribune.com/sports/nba/sdut-after-everything-jeremy-tyler-still-bound-nba-2011jun21-htmlstory.html>; *Tyler Quits Maccabi with 5 weeks Left*, ESPN (Mar. 20, 2010), <http://www.espn.com/nba/news/story?id=5008825>.

¹⁹⁰ Despite a solid statistical season in China, Emmanuel Mudiay, ranked 5th in the 2014 ESPN 100, dropped out of the top five and was drafted 7th by the Denver Nuggets. Likewise, Terrance Ferguson was ranked the 11th best high school player in the 2016 ESPN 100, had an above average season in Australia, and still fell to the Oklahoma City Thunder at 21. See Kurt Streeter, *Emmanuel Mudiay Is Not Scared*, ESPN (June 24, 2015), http://www.espn.com/espn/feature/story/_id/13135005/top-guard-emmanuel-mudiay-quietly-climbed-draft-charts-playing-china; see *Emmanuel Mudiay*, ESPN, http://www.espn.com/college-sports/basketball/recruiting/player/_id/117574/emmanuel-mudiay (last visited Mar. 28, 2018); Neil Johnson, *What to Make of 2017 NBA Draft Mystery Man Terrance Ferguson*, ESPN (Feb. 17, 2017), http://www.espn.com/nba/story/_id/18701018/what-make-2017-nba-draft-mystery-man-terrance-ferguson; *Terrance Ferguson*, ESPN, http://www.espn.com/college-sports/basketball/recruiting/player/_id/180838/terrance-ferguson (last visited Mar. 28, 2018).

¹⁹¹ See generally Bossi, *supra* note 32.

¹⁹² Brandon Jennings was able to bring his mother and half-brother to live with him in Italy. Glier, *supra* note 183.

often be a culture shock.¹⁹³ Additionally, eighteen-year-olds might be treated with less respect than they are used to in the locker room and forced to play a diminished role on the court.¹⁹⁴ As noted above, these challenges might help some players to prepare themselves for the NBA, but might cause others to crumble under the pressure.¹⁹⁵

Any changes to the NBA's eligibility rules would have drastic effects on the international market for high school talent. If the age minimum is increased, more players would likely choose the international route instead of the NCAA as the financial incentive would become much more attractive. Conversely, if the age minimum is decreased and the eligibility rules are returned to their pre-2005 state, the international market for top high school players would crash as they would stop choosing the international route before college completely.¹⁹⁶ The attractiveness of this option is completely based on its status as a lucrative alternative to the strict amateurism rules of the NCAA, so if players can go directly to the NBA from high school, the benefits of playing overseas will be eliminated, and the international experiment will likely end for top high school players.

3. Playing in the G-League

To be eligible to play in the G-League, the NBA's developmental league, players only need to be eighteen.¹⁹⁷ Naturally, this means that a third option for top high school players is to enter the G-League directly from high school. Under the current structure, players can sign with a G-League team directly from high school, play for a season, and then declare for the NBA Draft the following year. Playing in the G-League instead of playing in the NCAA or internationally is being explored by a top high school player, Darius Bazley, for the first time during the 2018-19 season.¹⁹⁸ When considering Bazley's choice in conjunction with the introduction of two-

¹⁹³ See Blau, *supra* note 186.

¹⁹⁴ See Glier, *supra* note 183.

¹⁹⁵ *Id.*; see also Blau, *supra* note 186.

¹⁹⁶ However, 18-year-olds who declared for the draft straight from high school and went undrafted might sign with international teams or G-League teams. While the international market might crash for the top high school players, it would not crash completely as undrafted players from high school and college would still choose the international route.

¹⁹⁷ *Frequently Asked Questions: NBA G League*, NBA, <http://gleague.nba.com/faq/> (last visited Mar. 28, 2018).

¹⁹⁸ Bazley, a five-star recruit and McDonald's All-American, was originally committed to play at Syracuse University. Jeremy Woo, *Breaking Down Darius Bazley's Decision: Syracuse's Loss Is the G League's Gain*, SPORTS ILLUSTRATED (Mar. 29, 2018), <https://www.si.com/nba/2018/03/29/breaking-down-implications-darius-bazleys-g-league-decision-syracuse>.

way contracts and the FBI investigation into NCAA basketball, it seems that the NBA's long-term goal might be to transform the G-League into a true minor league.¹⁹⁹

The 2017 NBA CBA provides for two roster slots per G-League team to be used for players on two-way contracts.²⁰⁰ These two-way contracts allow players, who meet the NBA's eligibility requirements by being at least nineteen-years-old and one year removed from high school, to spend up to forty-five days with their affiliated NBA team and the rest of the season with their G-League team.²⁰¹ Players on two-way contracts are paid \$75,000 per season during their time in the G-League²⁰² (players on normal G-League contracts are paid between \$19,000 and \$26,000 per season)²⁰³ and a six-figure rookie minimum scale salary²⁰⁴ during their time in the NBA. Two-way contracts provide an alternative to playing internationally for players who want to be paid during their gap year and are much more lucrative than typical G-League contracts. The value of these contracts still pales in comparison to multi-million-dollar international contracts however, so until G-League salaries are increased, top high school players will still choose to play in the NCAA or for a foreign team instead.

NBA teams feel that the G-League provides a better development environment for players than they would have in college or internationally,

¹⁹⁹ See O'Connor, *supra* note 167; Marc J. Spears, *Elite High School Hoops Prospects Should Stop Playing the NCAA Game and Consider the G League*, THE UNDEFEATED (Feb. 26, 2018), <https://theundefeated.com/features/elite-high-school-hoops-prospects-should-stop-playing-the-ncaa-game-and-consider-the-g-league/>.

²⁰⁰ The concept of two-way contracts was borrowed from the National Hockey League (NHL). Two-way contracts in the NHL allow players to play for both an NHL team and its minor league affiliate in the American Hockey League (AHL) in the same season. Tim Cato, *How the NBA's New 2-Way Contracts Work and Why Some Agents are Worried about Them*, SBINATION (July 18, 2017), <https://www.sbnation.com/nba/2017/7/18/15985262/nba-two-way-contract-2017-summer-league-agents-worried-about-them>; see generally BoltsGuy04, *Waivers & Entry-Level Contracts for Dummies*, SBINATION (July 17, 2017), <https://www.rawcharge.com/2017/7/17/15973228/waivers-entry-level-contracts-for-dummies-national-hockey-league-american-hockey-league>.

²⁰¹ Cato, *supra* note 200.

²⁰² *Id.*

²⁰³ Michael McCann, *The G-League: 12 Takeaways on NBA's New Deal*, SPORTS ILLUSTRATED (Feb. 14, 2017), <https://www.si.com/nba/2017/02/14/nba-gatorade-g-league-deal-adam-silver-takeaways>.

²⁰⁴ For the 2017-18 season, the minimum contract for players with zero NBA experience will pay \$815,615 per season. Players on two-way contracts will receive a prorated portion of this salary during their time on the NBA roster. *2017 CBA Minimum Annual Salary Scale*, REALGM, https://basketball.realgm.com/nba/info/minimum_scale/2017 (last visited Mar. 28, 2018).

and two-way contracts allow teams to give players who meet the NBA's eligibility requirements a brief NBA audition while maintaining control²⁰⁵ after the players are sent back to the G-League.²⁰⁶ The team-friendly nature of two-way contracts has caused many NBA agents to caution their clients about signing them.²⁰⁷ Players signed to two-way contracts are limited to signing with one NBA team, are not guaranteed a call-up to the NBA, and can be sent down to the G-League at any time, essentially leaving their fate in the hands of one organization.²⁰⁸ Conversely, for a slightly lower salary, players signed to normal G-League contracts who meet the NBA's eligibility requirements can negotiate with *any* NBA team for a spot on an NBA roster after their first call-up.²⁰⁹ Thus, while two-way contracts might appear to incentivize top high school players to sign with G-League teams straight from high school if the NBA's eligibility rules were changed, it is not a viable option until the salary is increased.

Aside from the unimpressive salaries, another reason players are wary to jump to the G-League directly from high school is the quality of competition. G-League players are only one step away from the NBA and NBA teams have great access to G-League scouting, especially for players on their affiliated teams.²¹⁰ If a player who entered the G-League straight from high school struggled against G-League competition, NBA teams would be quick to assume that player could not handle NBA competition and the player's draft stock would likely crash. Thus, players like Darius Bazley, who choose to sign with a G-League team directly from high school are betting on themselves to excel against high-quality competition in order to preserve their draft stock.

A change to the NBA's eligibility rules is essential for the role of the G-League to expand. If the age minimum is increased, more players might think about testing the G-League, but without a higher salary, most top high school players would still choose the much more lucrative international option. On the other hand, lowering the age minimum could revolutionize

²⁰⁵ Players who are signed to regular G-League contracts are free to sign with any NBA team, whereas players with two-way contracts can only sign a fully guaranteed deal with the NBA team that signed them. See Mika Honkasalo, *HoopsHype Explains: How do Two-Way Contracts Work?*, HOOPSHYPE (July 19, 2017), <http://hoopshype.com/2017/07/19/hoopshype-explains-how-do-two-way-contracts-work/>.

²⁰⁶ See *id.*; see generally O'Connor, *supra* note 167.

²⁰⁷ Cato, *supra* note 200.

²⁰⁸ See Honkasalo, *supra* note 205.

²⁰⁹ *Id.*

²¹⁰ See generally Tom Ziller, *Can the D-League Really Take Over the NCAA?*, SBNATION (Mar. 5, 2014), <https://www.sbnation.com/2014/3/5/5469282/nba-draft-age-minimum-dleague-ncaa-mark-cuban>.

the structure of professional basketball and transform the G-League into a true minor league. As was the case before the 2005 CBA, top high school players drafted in the first or second round would receive normal rookie scale contracts, which would not count against a team's salary cap if the player was sent to the G-League.²¹¹ The rest of the high school players who chose to enter the Draft could then either: (1) be drafted and signed to a two-way contract; or (2) go undrafted, sign with the G-League team of their choosing, and attempt to get signed by an NBA team.²¹² A system like this would allow players to enter the NBA straight from high school, and allow teams to use the G-League for developing younger players without giving them playing time in the NBA or having their salaries count against the salary cap.

Many of the biggest problems with the NBA's current eligibility rules would be eliminated if the NBA had a true minor league. While salaries are currently too low to adequately incentivize top amateurs to sign in the G-League, an increase to salaries or a decrease to the age minimum could establish the G-League as the true minor league the NBA needs.

4. Hope the NBPA and Owners Bargain to Loosen Eligibility Rules

For players who do not wish to play NCAA basketball, play for a foreign team, play in the G-League, or prepare and train for the draft during their gap year, the only other option is to hope that the NBA owners and NBPA can reach an agreement to loosen the eligibility rules and reduce the age minimum back to eighteen. Due to the national spotlight on NCAA basketball and the NBA's eligibility rules in the wake of the FBI investigation, changes to the eligibility rules might be coming very soon. With the introduction of two-way contracts and the establishment of more G-League affiliates, the NBA can ensure that fewer roster spots are taken away from veteran players if the age minimum is returned to eighteen, and that teams can better use their G-League affiliates for player development. Despite the reservations that many NBA teams have about scouting and drafting high school players,²¹³ the league's increased focus on expanding the G-League makes it seem that a reduction to the age minimum is more likely than an increase.²¹⁴

²¹¹ See O'Connor, *supra* note 167.

²¹² *Id.*

²¹³ See Norlander, *supra* note 173; see also Kerr, *supra* note 169.

²¹⁴ See Ziller, *supra* note 171.

B. Women's Basketball

The WNBA's eligibility rules require U.S. prospects to be at least twenty-two years old during the calendar year of the draft or to have graduated college (or be about to graduate within three months after the draft), while international prospects who are born and reside outside of the U.S. must be at least twenty years old during the calendar year of the draft.²¹⁵ The detrimental economic effects of these eligibility rules are less than the effects of the NBA rules, since the WNBA's lower revenue produces less lucrative and desirable salaries. Further, unlike the NBA rules which seem to have no legitimate procompetitive justifications, the WNBA can argue that its eligibility rules encourage players to finish their college degrees before turning pro,²¹⁶ even though it is unlikely a court would accept this justification.²¹⁷ Nonetheless, the WNBA eligibility rules are still very restrictive since they prevent adult women from entering their chosen profession.²¹⁸

Since the eligibility rules likely cannot be challenged with antitrust or labor law,²¹⁹ top eighteen-year-old prospects are left with two options after high school: (1) play NCAA basketball for four years or until graduation; or (2) forgo college or leave college early to play professionally for a foreign team. This section will explore the benefits and detriments of both options and discuss the effects of possible changes to the WNBA eligibility rules.

1. Playing NCAA Basketball for Four years or Graduating College

Since the WNBA's eligibility rules create a four-year gap between high school and playing professionally, which is substantially longer than the

²¹⁵ WNBA CBA, Article XIII, *supra* note 3.

²¹⁶ In 1998, Tennessee Volunteers star Chamique Holdsclaw considered challenging the eligibility rules after her junior season but chose to return for her senior season to set a positive example for young women. "I really want to see these young women set goals," Holdsclaw said, "and I want one of those goals to be to get that degree." Edelman & Harrison, *supra* note 41; see Elizabeth Holland, *Holdsclaw will Stay in College Basketball*, ST. LOUIS POST-DISPATCH (Mar. 30, 1988) at C6.

²¹⁷ For example, a court like the district court in *Clarett* might find this justification merely paternalistic and irrelevant to an antitrust defense; see *Clarett I*, 306 F.Supp.2d at 379-411.

²¹⁸ Since the WNBA has a monopoly on women's professional basketball in the United States, the strict eligibility rules deny women the opportunity to play professional basketball in any capacity in the U.S. See generally N. Jeremy Duru, *Hoop Dreams Deferred: The WNBA, the NBA, and the Long-Standing Gender Inequity at the Game's Highest Level*, 2015 UTAH L. REV. 559 (2015).

²¹⁹ See discussion *supra* note 51.

one-year gap which NBA prospects must fill, playing NCAA basketball is the status quo for top amateur women. The vast majority of these players graduate from college before declaring for the WNBA.²²⁰ Players who turn twenty-two during their junior year or receive medical hardship waivers²²¹ have the option of leaving college for the WNBA before graduation; however, many players presented with this option choose to finish school instead of pursuing a professional career because of the WNBA's low salaries.²²² As is the case with NBA prospects, playing NCAA basketball before declaring for the WNBA Draft has benefits and drawbacks.

Unlike the NBA's eligibility rules, the WNBA's eligibility rules push players to finish their college education before becoming professional.²²³ Since the WNBA has much lower salaries than the NBA, top amateurs have less of an incentive to turn professional and are much more likely to attend class, study, and earn a bachelor's degree to get the most out of their free college education.²²⁴ Earning a degree sets players up for a future beyond basketball, by ensuring they are prepared for a career switch if their WNBA career does not work out.²²⁵ Further, the WNBA's strict eligibility rules allow it to market its players as both scholars and athletes, who will act as positive role models for younger women.²²⁶

Playing NCAA basketball also has some of the same benefits for women as it has for men. Aside from the free college education, players are given a full four years to mature and develop before becoming professionals.²²⁷ Since women are older when they turn pro than men, WNBA prospects naturally enter the league more seasoned and mature. Playing NCAA basketball also allows players to be in the national spotlight, albeit a bit less than men. In fact, women's NCAA basketball is more popular than the

²²⁰ See Doug Feinberg, *Women's Basketball: Top Players Choose School Over WNBA*, NCAA (Apr. 2, 2017), <http://www.ncaa.com/news/basketball-women/article/2017-04-02/womens-basketball-top-players-choose-school-over-wnba>; see also Nick Forrester, *NCAA Women's Basketball Graduation Rates Tie for Highest Ever*, EXCELLE SPORTS (Nov. 15, 2016), <http://www.excellesports.com/news/ncaa-graduation-rates-women-men/>.

²²¹ Players with injuries or illnesses which cost them a season of competition can be granted medical hardship waivers that provide an extra year of eligibility to make up for the season that was lost. NCAA Bylaws, *supra* note 148, at art. 12.8.4.

²²² See Feinberg, *supra* note 220; see Edelman & Harrison, *supra* note 41.

²²³ See Edelman & Harrison, *supra* note 41, at 24.

²²⁴ *Id.* at 24, 25.

²²⁵ *Id.* at 25.

²²⁶ *Id.*

²²⁷ *Id.* at 26.

WNBA,²²⁸ therefore, players have a better chance to grow their profile in college before entering the professional ranks. Finally, like men, women who choose to play NCAA basketball are afforded the opportunity to stay closer to family and friends than if they chose to play overseas.

The drawbacks of playing NCAA basketball are much the same for women as they are for men. As a result of the NCAA's restrictive amateurism rules, players cannot receive a salary, profit off their name, image, or likeness, sell autographs, hire agents, receive a promise of future pay, or "use [their] athletics skill (directly or indirectly) for pay in any form" without losing their NCAA eligibility.²²⁹ Since WNBA salaries pale in comparison to NBA salaries,²³⁰ and women's college basketball typically generates substantially less revenue than men's college basketball,²³¹ these amateurism rules have less of a detrimental economic effect on women than men.²³² With that said, the WNBA's eligibility rules force women to be subjected to the NCAA's amateurism rules three years longer than men, substantially limiting their earning capacity.

Another drawback of playing NCAA basketball is that players who get injured or have academic problems might not be able to make it through the four years of college required to play in the WNBA. The four-year eligibility rule pushes top high school players towards playing NCAA basketball, where players must then excel for four years to increase their chances of being drafted to the WNBA.²³³ As a result, players who experience devastating injuries in college or struggle with the rigors of

²²⁸ Lyndsey D'Arcangelo, *Why Aren't Women's Basketball Fans Following Their Players To The Pros?*, DEADSPIN (May 10, 2017), <https://deadspin.com/why-arent-womens-basketball-fans-following-their-player-1795024988>.

²²⁹ NCAA Bylaws *supra* note 148, at art. 12.1.2(a).

²³⁰ See David Berri, *Basketball's Growing Gender Wage Gap: The Evidence the WNBA is Underpaying Players*, FORBES (Sept. 20, 2017), <https://www.forbes.com/sites/davidberri/2017/09/20/there-is-a-growing-gender-wage-gap-in-professional-basketball/#41edeb6036e0>.

²³¹ See Jason McIntyre, *Women's College Basketball Loses \$14 Million a Year, Says Mark Emmert*, THE BIG LEAD (Apr. 20, 2016), <http://thebiglead.com/2016/04/20/womens-college-basketball-loses-14-million-a-year-says-mark-emmert/>.

²³² Men generate more revenue for their colleges and forfeit multi-million-dollar NBA salaries, whereas women generate less revenue and forfeit substantially lower WNBA salaries. See Berri, *supra* note 230.

²³³ 0.9% of women who play NCAA basketball make it to the WNBA. *Estimated Probability of Competing in Professional Athletics*, NCAA, <http://www.ncaa.org/about/resources/research/estimated-probability-competing-professional-athletics> (last visited Mar. 28, 2018).

being a student-athlete²³⁴ and cannot make it through four years at the NCAA level are prevented from playing professionally, even if they otherwise have the basketball talent.²³⁵

Despite the drawbacks of playing NCAA basketball, the WNBA's four-year eligibility rules push the vast majority of high school players towards attending college. Until WNBA salaries are increased to a level where top high school players are incentivized to enter the professional ranks at eighteen, it is unlikely that the eligibility rules will be challenged under antitrust law. Such a challenge might cause the WNBA to loosen its eligibility rules and allow younger players to enter the league. Regardless of any changes to the eligibility rules, the lack of a lucrative WNBA salary to entice players into leaving college early means the vast majority of amateurs would continue to stay in college for four years to complete their degrees. Thus, WNBA salaries must be increased before any changes to the WNBA eligibility rules will make a meaningful difference in the NCAA.

2. Playing Professionally Internationally

For top amateurs who do not want to play NCAA basketball for four years, the other option is to sign with a foreign team in Europe or Asia directly from high school or after playing a few years of NCAA basketball. Unlike men's basketball where earning potential is highest in the NBA, elite women can often earn double their WNBA salaries playing for international teams.²³⁶ As a result, many players supplement their WNBA salaries by playing for international teams during the WNBA's offseason.²³⁷ Given the quality of talent competing for roster spots on international teams and the inherent difficulties for these teams of scouting U.S. high school players, there has yet to be a notable test case of a top high school player forgoing

²³⁴ A 2011 NCAA survey estimated that women's basketball players spent an average of 37.6 hours per week on athletic activities in 2010. See Peter Jacobs, *Here's the Insane Amount of Time Student-Athletes Spend on Practice*, BUSINESS INSIDER (Jan. 27, 2015), <http://www.businessinsider.com/college-student-athletes-spend-40-hours-a-week-practicing-2015-1>.

²³⁵ See Edelman & Harrison, *supra* note 41, at 26-27.

²³⁶ Barbara Barker, *For WNBA players, the Real Money is Overseas*, NEWSDAY (Nov. 19, 2016), <http://www.newsday.com/sports/columnists/barbara-barker/wnba-players-are-underpaid-shouldn-t-have-to-play-overseas-1.12639553>; see Seth Berkman, *Overseas, Lost in Transition*, N.Y. TIMES (Nov. 10, 2014), <https://www.nytimes.com/2014/11/11/sports/basketball/transition-game-wnba-players-battle-the-blues-in-first-season-abroad.html?mcubz=3>.

²³⁷ Berkman, *supra* note 236.

college to sign with an international team.²³⁸ Nevertheless, for players who wish to earn a salary for playing basketball in the four years following high school graduation, signing with a professional international team is the only option.

The benefits of playing internationally all stem from the lucrative salaries. International teams are often financed by local governments, private sponsors, or funds shared with profitable soccer club partners and are not subject to the WNBA's salary restrictions, allowing them to offer much higher salaries.²³⁹ For example, star player Diana Taurasi famously skipped playing in the 2015 WNBA season with the Phoenix Mercury at the request of her Russian team UMMC Ekaterinburg which paid her \$1.5 million per year.²⁴⁰ Lucrative salaries like this have caused 89 of the WNBA's 144 players (almost 62%) to play for foreign teams in the offseason.²⁴¹

Given the high volume of established WNBA players as well as four-year college graduates competing internationally, it stands to reason that it would be very difficult for an eighteen-year-old American to find a roster spot on a foreign team. Even if a high school player could find an international team willing to sign them, it would still make more sense for most players to play NCAA basketball on scholarship and take advantage of a free

²³⁸ However, in 2009, Rutgers star Epiphanny Prince skipped her senior season to sign with Spartak Moscow in Russia, and later Botas Spor in Turkey. Prince was drafted 4th overall in the 2010 WNBA Draft by the Chicago Sky. Prince completed her 8th WNBA season in 2017. Past attempts by Schuye LaRue (who left the University of Virginia after her sophomore season) and Britany Miller (who left Florida State after her sophomore season to play in the Czech Republic) were unsuccessful, as both flamed out of the WNBA very quickly. See Greg Bishop, *Rutgers Basketball Star to Turn Pro in Europe*, N.Y. TIMES (June 16, 2009),

<http://www.nytimes.com/2009/06/17/sports/ncaabasketball/17ncaa.html?mcubz=3>; see Greg Bishop, *Ex-Rutgers Guard Seeks Overseas Path to W.N.B.A.*, N.Y. TIMES (Dec. 1, 2009), <http://www.nytimes.com/2009/12/02/sports/ncaabasketball/02prince.html?mcubz=3>; see *Epiphanny Prince*, BASKETBALLREFERENCE, <https://www.basketball-reference.com/wnba/players/p/princep01w.html> (last visited Mar. 28, 2018).

²³⁹ Berkman, *supra* note 236; see Ceyda Mumcu, *Overseas Opportunities Could be a Boon for WNBA Players*, SPORTS BUSINESS DAILY (Aug. 31, 2015), <http://www.sportsbusinessdaily.com/Journal/Issues/2015/08/31/Opinion/Ceyda-Mumcu.aspx>.

²⁴⁰ Barker, *supra* note 236.

²⁴¹ Current as of April 2018. Each of the twelve WNBA teams has twelve roster spots, meaning the league employs 144 players. *WNBA Players Playing Overseas*, WNBA, <http://www.wnba.com/wnba-players-playing-overseas/> (last visited April 1, 2018).

college education before attempting to play professionally overseas.²⁴² Further, players who sign with international teams are isolated from their families and are often the only Americans or English-speakers on their teams.²⁴³ While high school players might be attracted to lucrative international salaries and relatively short seasons,²⁴⁴ the difficulties of finding a roster spot as an eighteen-year-old are likely the reason why a test case for this approach does not yet exist.

Any changes to the WNBA's eligibility rules would likely have no effect on the international player market. The WNBA's eligibility rules currently restrict players from earning a salary in the U.S. for four years after high school graduation and players still have not started signing with international teams directly from high school. If having to play four years without getting paid is not enough to incentivize players to attempt playing professionally for a foreign team after high school, reducing the age minimum would have no effect on the international market and high school players would continue to choose college knowing they can sign with an international team after completing their degree. If anything, a reduction to the WNBA's age minimum would cause the average age of U.S. players playing for international teams to decrease, as players would reach the WNBA at a younger age and thus have an earlier opportunity to earn roster spots on top international teams.

IV. CONCLUSION

A. *Current State and Future of Men's Basketball*

Under the NBA's current eligibility rules, there are three options available for top high school players during their gap year: (1) play NCAA basketball; (2) play professionally for a foreign team; or (3) play professionally in the G-League. As discussed *supra*, since the current eligibility rules were enacted, the vast majority of players have chosen to play NCAA basketball, giving rise to the one-and-done phenomenon. However, as Adam Silver noted when reflecting on ten years of the current eligibility rules during his interview at the 2017 NBA Finals, the current system does not seem to be

²⁴² If a player is talented enough to play professionally for an international team after high school, they would certainly be talented enough to find an international team after college. However, if a high school player chose to go to college with an international offer on the table, they'd be running the risk that they get injured or struggle academically, possibly spoiling a professional career entirely.

²⁴³ Berkman, *supra* note 236.

²⁴⁴ See Hendrick, *supra* note 51, at 541.

working for anyone involved, and, in the wake of the FBI investigation into NCAA basketball, a change to the eligibility rules appears inevitable.²⁴⁵

Unless team owners are able to strong-arm players during negotiations (which seems unlikely given victories the NBPA has scored in recent negotiations),²⁴⁶ it seems unlikely that the eligibility rules will become more restrictive through an increase to the age minimum. However, if an increase were to happen at the expense of prospective players, the NCAA and international teams would be the biggest beneficiaries as top prospects would be forced to find longer-lasting alternatives to the NBA.

Given the NBA's recent efforts to expand the G-League with the introduction of two-way contracts which allow teams to maintain control of younger prospects without keeping them on an NBA roster, it seems much more likely that the age minimum will be reduced to eighteen and the eligibility rules are returned to their pre-2005 state. For the age minimum to be reduced, the NBA must first take steps to establish the G-League as a true minor league. Depending on how two-way contracts are received, the NBA could give each team more two-way roster slots. Under this system, top prospects currently planning to leave college after their freshman season could get drafted into the NBA straight from high school, while other eighteen-year-olds would have the options of attending college, getting drafted and signed to a two-way contract, or signing with a G-League team directly from high school and declaring for the Draft the following year.

While such a change might discourage some top high school players from playing NCAA basketball, plenty of players would continue to attend college and the NCAA's on-court product might actually improve with more roster continuity from season to season. In fact, as was the case pre-2005, players who chose to attend college would be more likely to stay in school long enough to finish a degree before declaring for the NBA. Returning the age minimum to eighteen would have its most detrimental effect on the international market, as top prospects would no longer have an incentive to play overseas, and the experiment of top high school players turning pro overseas would likely end. Nonetheless, under such a system,

²⁴⁵ Adam Silver, Press Conference at 2017 NBA Finals, *supra* note 38.

²⁴⁶ See Jeff Zillgitt, *Chris Paul Trade, Phil Jackson Saga Reinforce Power of NBA Players*, USA TODAY (June 28, 2017), <https://www.usatoday.com/story/sports/nba/2017/06/28/chris-paul-trade-phil-jackson-saga-reinforce-power-nba-players/437496001/#>; see also David Aldridge, *Young Players, Rising Stars Could Benefit Most from New CBA Deal*, NBA.COM (Dec. 19, 2016), http://www.nba.com/article/2016/12/19/morning-tip-who-benefits-most-new-cba-players-owners-tv-revenue#.

players who cannot make it to the NBA and who do not want to fight for a roster spot in the G-League would still sign with international teams, as is the case currently.²⁴⁷

Regardless, until some change is made to the NBA eligibility rules, top high school players are left with the three options noted above. Until there are more international success stories, successful examples of players like Darius Bazley entering the G-League directly from high school, or G-League salaries are increased, the vast majority of players will continue to choose to play NCAA basketball during their gap year, and the one-and-done phenomenon will continue.

B. Current State and Future of Women's Basketball

Under the current version of the WNBA's eligibility rules, the only options available for top amateurs after high school are to either play NCAA basketball for four years or until graduation or play professionally with an international team. Even though these rules are very restrictive, in the sense that they prevent adult women from playing professional basketball in the United States until four years after their high school graduation, there likely will not be a challenge to the eligibility rules under either antitrust or labor law until playing in the WNBA becomes more desirable. Transforming the WNBA into a more desirable destination starts with increasing average salaries.

The WNBA needs to find a way to generate more revenue so that they can afford to pay higher salaries to its players. While it is hard to imagine a future where the WNBA drives as much revenue as the NBA, the league should at least be able to afford to pay its players as much as top international leagues are offering. When players can make a lucrative payday by playing in the WNBA, it is more likely that top eighteen to twenty-one-year-olds will attempt to enter the league early and challenge the restrictive eligibility rules, as was the case with Spencer Haywood and Maurice Clarett. As discussed *supra* in Section II, an antitrust or labor law challenge to the WNBA's eligibility rules may not be successful in court, but the pressure of a lawsuit might cause the league to be more willing to make concessions and loosen the eligibility rules during the collective bargaining process.

²⁴⁷ *Ex US Colleges Players Overseas by Team*, US BASKET, <http://www.usbasket.com/ncaa1/Ex-NCAA-D1-Basketball-Players.asp> (last visited Mar. 28, 2018).

If the eligibility rules were loosened, it is unclear how much the WNBA's age minimum would be decreased. It seems unrealistic for the WNBA to eliminate their age minimum entirely, especially since they do not have a history of allowing eighteen-year-olds into the league. Further, such a change would diminish the importance of attending college to prepare for a career after basketball, something that is very important when there are only 144 roster spots available in the twelve-team WNBA. Perhaps the WNBA should reduce the age minimum for U.S. players to twenty, so that it mirrors the rule for international prospects. This change would provide an early out for college players who feel they are ready to play professionally, while still encouraging players to go to college and get an education. Two years is enough time to earn an associate's degree for top players, and the vast majority of other players would still play NCAA basketball for four years, even with higher WNBA salaries.

Regardless of which change to the WNBA's eligibility rules would work best, the future of women's professional basketball in the U.S. depends on higher WNBA salaries. If salaries remain stagnant, it is highly unlikely that the eligibility rules will be formally challenged, and more players might follow Diana Taurasi's example and skip the WNBA season entirely to earn a much higher salary with an international team. Exactly how the WNBA can increase revenue and interest in the league remains to be seen, but until then, top amateurs will continue to play NCAA basketball for four years before turning pro.