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## Can I See Some ID: An Antitrust Analysis of NBA and NFL Draft Eligibility Rules

**“CAN I SEE SOME ID?”: AN ANTITRUST ANALYSIS OF NBA AND NFL  
DRAFT ELIGIBILITY RULES**

By Steve E. Cavezza\*

**I. INTRODUCTION**

LeBron James could have gone to Ohio State for one season. He could have brought in millions of dollars in revenue for The Ohio State University (OSU) Athletic Department, the National Collegiate Athletic Association (NCAA), television networks, and OSU sponsors. However, LeBron presumably would not have seen a single penny of the profits he produced. After one year as a Buckeye, having grown from an immature eighteen-year-old child to a nineteen-year-old man, equipped with one year of college education under his belt, he would have been allowed to enter the National Basketball Association (NBA) Draft. This, of course, was not the fate of LeBron James. Instead, in 2003, he went straight from high school to the NBA, where he signed a lucrative contract with the Cleveland Cavaliers at the youthful age of eighteen.<sup>1</sup> In 2005, the NBA began barring high school players from participating in its draft.<sup>2</sup> Had LeBron been born just two years later, he likely would have spent his first year after high school in a dorm room in Columbus rather than a mansion in Cleveland.

The National Football League (NFL) has a similar rule that bars players from joining its league until they are three years out of high school.<sup>3</sup> The NBA and NFL (collectively, the “leagues”) are the only major professional sports leagues that prohibit player entrance based on the time since high school graduation.<sup>4</sup> Eighteen-year-old high school graduates who wish to pursue a professional career in these leagues are barred from doing so, even though they can vote, as well as fight and die for their country.<sup>5</sup> These age restrictions are a concerted action that bars entry into the leagues, and as such,

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<sup>1</sup> Associated Press, *James signs, ready to lace up for Cavs*, DESERET NEWS (July 4, 2003), available at <http://www.highbeam.com/doc/1P2-7106755.html> (“James signed his three-year, \$12.96 million rookie contract with the Cleveland Cavaliers, who selected the 18-year-old Akron high school phenom with the No. 1 overall pick in the NBA draft.”).

<sup>2</sup> Tim Legler, *Age minimum part of new labor deal*, ESPN.COM (June 21, 2005), <http://sports.espn.go.com/espn/print?id=2091539&type=story>.

<sup>3</sup> NFL COLLECTIVE BARGAINING AGREEMENT 2006-2012 [“NFL CBA”], ART. XVI, § 2(b), available at <http://www.docstoc.com/docs/20343876/NFL-Collective-Bargaining-Agreement-2006-2012>.

<sup>4</sup> Michael A. McCann & Joseph S. Rosen, *Legality of Age Restrictions in the NBA and the NFL*, 56 CASE W. RES. L. REV. 731, 731 (2006).

<sup>5</sup> Harvey Araton, *Sports of the Times; Old Enough for the Army, Not the N.F.L.?*, N.Y. TIMES (Feb. 6, 2004), <http://query.nytimes.com/gst/fullpage.html?res=990DEEDE113BF935A35751C0A9629C8B63&n=Top/Reference/Times%>.

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each restriction constitutes a “group boycott.”<sup>6</sup> Assuming the non-statutory labor exemption<sup>7</sup> does not apply to these age-based eligibility rules, they violate antitrust laws under a rule of reason analysis.

### II. NBA AND NFL AGE-BASED DRAFT RESTRICTIONS

#### A. *The NBA Draft Eligibility Rule*

The NBA originally had no age requirement, but only a handful of high school graduates joined the league.<sup>8</sup> The NBA eventually imposed a rule in its bylaws that required a player to be four years removed from his high school graduation in order to be eligible for the draft.<sup>9</sup> This rule was challenged in 1971 by high school All-American Spencer Haywood.<sup>10</sup> After two years of college, Haywood joined the NBA’s rival at the time, the American Basketball Association (ABA).<sup>11</sup> The ABA had no rule restricting college underclassmen from entering its league.<sup>12</sup> The ABA named Haywood both its Rookie of the Year and its Most Valuable Player.<sup>13</sup> He then signed a contract with the NBA’s Seattle SuperSonics.<sup>14</sup> When the NBA threatened to invalidate the contract because Haywood was only three years removed from high school, Haywood filed an antitrust suit against the league and won.<sup>15</sup>

Shortly after the decision in *Haywood*, if a student-athlete wanted to play professional basketball in the NBA, all he needed was a high school diploma or its equivalent.<sup>16</sup> Notable stars such as Moses Malone, Darryl Dawkins, Kevin Garnett, Kobe Bryant, Tracy McGrady, Jermaine O’Neal, LeBron James, Amare Stoudemire and Dwight Howard successfully made the transition directly from high school to the NBA.<sup>17</sup>

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<sup>6</sup> See *The Denver Rockets v. All-Pro Mgmt, Inc.*, 325 F. Supp. 1049, 1060-61 (C.D. Cal. 1971) (explaining that a group boycott occurs when one group of people refuses to contract with another group of people).

<sup>7</sup> The U. S. Supreme Court constructed the non-statutory labor exemption after recognizing that, “to give effect to federal labor laws and policies and to allow meaningful collective bargaining to take place, some restraints on competition imposed through the bargaining process must be shielded from antitrust sanctions.” *Brown v. Pro Football, Inc.*, 518 U.S. 231, 237 (1996). The exemption is discussed in detail *infra* Part III(B). For a more thorough discussion of the exemption’s history, see Jonathan C. Tyras, *Players Versus Owners: Collective Bargaining and Antitrust After Brown v. Pro Football, Inc.*, 1 U. PA. J. LAB. & EMP. L. 297 (1998).

<sup>8</sup> Prior to Kevin Garnett in 1995, only four players were drafted by NBA teams straight out of high school: Moses Malone (1974), Darryl Dawkins, Bill Willoughby (1975), and Shawn Kemp (1989). *High School Players and the NBA Draft*, RIVALDS.COM, <http://ssbasketballold.rivals.com/content.asp?SID=1132&CID=356192> (last visited Dec. 15, 2010).

<sup>9</sup> *Denver Rockets*, 325 F. Supp. at 1059.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 1052.

<sup>12</sup> *Id.* at 1060.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 1054.

<sup>15</sup> *Id.*

<sup>16</sup> See Jack N.E. Pitts, Jr., *Why Wait: An Analysis of the National Football League and National Basketball Association’s Draft Eligibility Rules*, 51 HOW. L.J. 433, 435 (2008).

<sup>17</sup> *High School Players and the NBA Draft*, STUDENTSPO RTSBASKETBALL.COM, <http://ssbasketball.rivals.com/content.asp?SID=1132&CID=356192> (last visited Nov. 1, 2010).

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In 2005, however, the NBA implemented a new age rule and included it in the league's Collective Bargaining Agreement (CBA).<sup>18</sup> Article X, Section 1(b)(i) of the CBA requires that:

“[T]he player (A) is or will be at least nineteen 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 . . . 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).”<sup>19</sup>

Essentially, American players must be nineteen years old *and* must wait for one NBA season to elapse after they graduate from high school to be eligible for the draft. The current CBA runs through the 2010-11 season, and the NBA has the option to extend it for the 2011-12 season.<sup>20</sup>

### ***B. The NFL Draft Eligibility Rule***

Like the NBA, the NFL originally had no age eligibility rule barring entry into its league.<sup>21</sup> The NFL adopted its first such rule in 1925.<sup>22</sup> The league unilaterally imposed the rule,<sup>23</sup> requiring that all players be at least four years removed from the time of their high school graduation before they could be eligible for the NFL Draft.<sup>24</sup> The NFL created the rule in response to a star college running back, Harold Edward “Red” Grange (a.k.a. “The Galloping Ghost”), who left the University of Illinois during his senior year and joined the Chicago Bears.<sup>25</sup> Many people, including Grange's head coach at Illinois, condemned his decision because he had “abandoned his studies for a blatantly commercial career” and because it was “unethical for Grange to capitalize upon a reputation that he had acquired in college for direct personal gain.”<sup>26</sup>

The four-year rule remained in effect until 1990, when it was essentially reduced to three seasons.<sup>27</sup> This requirement was set forth in the NFL's Constitution and Bylaws.<sup>28</sup> It required a student-athlete to be four years out of high school, but allowed for a “Special Eligibility” application for players seeking entry into the NFL Draft after only

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<sup>18</sup> NBA 2005 COLLECTIVE BARGAINING AGREEMENT [“NBA CBA”], TIT. X, § 1, *available at* <http://www.nbpa.org/cba/2005>.

<sup>19</sup> *Id.*

<sup>20</sup> Larry Coon, *NBA Salary Cap FAQ*, CBAFAQ.COM (Jul. 8, 2010), <http://members.cox.net/lmcoon/salarycap.htm#Q5>.

<sup>21</sup> *Clarett v. Nat'l Football League*, 306 F. Supp 2d 379, 383-85 (S.D.N.Y. 2004) (reviewing the history of pro football collective bargaining) [“*Clarett I*”].

<sup>22</sup> *Id.* at 385.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Clarett v Nat'l Football League*, 369 F.3d 124, 126 (2d Cir. 2004) [“*Clarett II*”].

<sup>28</sup> *Id.* at 127.

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three seasons removed from their high school graduation.<sup>29</sup> This “Special Eligibility” application was merely a formality, as the Commissioner regularly granted such requests.<sup>30</sup>

The NFL’s CBA did not contain an age requirement until 2006.<sup>31</sup> The rule, set forth in Article XVI, Section 2(b) of the 2006 CBA, states:

“No player shall be permitted to apply for special eligibility for selection in the Draft, or otherwise be eligible for the Draft, until three NFL regular seasons have begun and ended following either his graduation from high school or graduation of the class with which he entered high school, whichever is earlier.”<sup>32</sup>

While no cases challenging this current rule have been brought, in 2004 Maurice Clarett challenged the previous rule’s three-year minimum.<sup>33</sup> Clarett was a heralded high school running back from Youngstown, Ohio.<sup>34</sup> For his success on the field as a high school senior in 2002, he was named Ohio Mr. Football, *USA Today* High School Offensive Player of the Year, and a *Parade* All-American.<sup>35</sup> The following season Clarett took the field as a member of the Ohio State (OSU) Buckeyes.<sup>36</sup> He was the first freshman in sixty years to begin the season as the starting running back for the Buckeyes.<sup>37</sup> During his freshman campaign, Clarett rushed for over 1,200 yards and scored sixteen touchdowns in just eleven games.<sup>38</sup> Led by Clarett, OSU won its first National Championship in thirty-four years.<sup>39</sup> He was named the Big Ten Freshman of the Year and voted the best running back in college football by *The Sporting News*.<sup>40</sup> At six feet tall and 230 pounds, he was taller and heavier than some of the NFL’s all-time greatest running backs.<sup>41</sup> There was little doubt that Clarett was an NFL-caliber player who would be drafted in the first round.<sup>42</sup>

Due to academic and legal troubles off the field, Clarett was ruled ineligible for his sophomore season.<sup>43</sup> At the time, Clarett was only two years removed from his high school graduation<sup>44</sup> and thus ineligible for the draft for one more year.<sup>45</sup> Clarett decided

<sup>29</sup> *Id.* at 128-29.

<sup>30</sup> NFL, *Fifty-three players granted special eligibility for 2010 NFL Draft* (Jan. 2010), <http://www.nfl.com/draft/story?id=09000d5d815d4503&template=with-video-with-comments&confirm=true>.

<sup>31</sup> NFL CBA, *supra* note 3, at ART. XVI, § 2(b).

<sup>32</sup> *Id.*

<sup>33</sup> *Clarett I*, 306 F. Supp. 2d 379, 382 (S.D.N.Y. 2004).

<sup>34</sup> Associated Press, *Timeline: The Rise and Fall of Maurice Clarett*, ESPN.COM (Sept. 18, 2006), <http://sports.espn.go.com/nfl/news/story?id=2545204>.

<sup>35</sup> *Id.*

<sup>36</sup> *Clarett I*, 306 F. Supp. 2d at 382.

<sup>37</sup> *Id.* at 387.

<sup>38</sup> Mark Schlabach, *2001 Hurricanes cream of BCS crop*, ESPN.COM (May 21, 2008), <http://sports.espn.go.com/espn/print?id=3406050&type=story>.

<sup>39</sup> *Clarett I*, 306 F. Supp. 2d at 387.

<sup>40</sup> *Id.* at 388.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

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to challenge the NFL's eligibility rule in order to gain entry into the 2004 NFL Draft.<sup>46</sup> He argued that the NFL's age rule was an illegal restraint on trade because it excluded a broad class of players from the NFL labor market, thereby constituting a "group boycott" in violation of antitrust laws.<sup>47</sup> Clarett succeeded at the district court level, where the judge held that the non-statutory labor exemption<sup>48</sup> did not apply and the rule violated antitrust laws.<sup>49</sup> The Second Circuit disagreed with the district court and articulated a broad application of the non-statutory labor exemption, shielding the rule from antitrust laws.<sup>50</sup>

### III. ANTITRUST LAWS AND SPORTS

#### A. *Antitrust Laws in the Sports World*

Professional sports leagues are unique in many ways, from the way they are organized to how they are regulated. Antitrust law in the field of sports is no exception to this uniqueness. To understand it, a basic overview of antitrust laws as applied to sports is necessary.

##### 1. *The Sherman Antitrust Act*

Antitrust claims challenging restrictions on trade or commerce arise under the Sherman Act.<sup>51</sup> Section 1 of the Sherman Act prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade."<sup>52</sup> The U.S. Supreme Court has long held that only "unreasonable" restraints are prohibited.<sup>53</sup> For a viable Section 1 claim to exist, three requirements must be met: (1) a contract, combination, or conspiracy; (2) the contract, combination or conspiracy produced a restraint of trade; and (3) the restraint affected trade or commerce among the several states.<sup>54</sup> In most settings, restraints of trade concern the product market.<sup>55</sup> This is not so for player restraints in sports, however, which typically concern the labor market.<sup>56</sup>

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<sup>46</sup> *Id.* at 389.

<sup>47</sup> *Id.* at 390.

<sup>48</sup> This exemption is discussed in detail *infra* Part III(B).

<sup>49</sup> *Id.* at 410.

<sup>50</sup> *Clarett II*, 369 F.3d at 124, 142 (2d Cir. 2004).

<sup>51</sup> 15 U.S.C. § 1-7. Congress enacted the Sherman Act in 1890 as a response to anticompetitive practices of large firms forcing out smaller competitors. For a discussion of the origins of federal antitrust laws, see Gary R. Roberts, *Reconciling Federal Labor and Antitrust Policy: The Special Case of Sports Leagues Labor Market Restraints*, 75 GEO. L.J. 19 (1986).

<sup>52</sup> 15 U.S.C. § 1.

<sup>53</sup> See *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918).

<sup>54</sup> 15 U.S.C. § 1.

<sup>55</sup> *McCann & Rosen*, *supra* note 4, at 734.

<sup>56</sup> *Id.*

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### *2. The Application of the Sherman Act in Professional Sports*

In the 1922 case of *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*,<sup>57</sup> the Court ruled that major league baseball was exempt from antitrust laws.<sup>58</sup> Many courts subsequently incorrectly granted antitrust exemptions in a variety of professional sports cases,<sup>59</sup> prompting the Court to revisit the issue in 1958 in *International Boxing Club of New York, Inc. v. United States*.<sup>60</sup> In that case, the Court held that there was nothing inherently special about professional sports that deserved granting them a broad exemption from antitrust liability, yet it did not overturn its *Federal Baseball Club* holding.<sup>61</sup> Today, all professional sports leagues except Major League Baseball are subject to the antitrust laws.<sup>62</sup>

### *3. Legal Standard: Per Se, Rule of Reason, & “Quick Look”*

There are three legal standards a court may use when evaluating an alleged Section 1 violation. These standards are known as “*per se*,” “rule of reason,” and “quick look.”<sup>63</sup> If a restraint has such a “pernicious” effect on competition, it is deemed *per se* illegal without any inquiry into its justifications, effects or motive.<sup>64</sup> Essentially, *per se* illegality exists if a restraint is illegal on its face.<sup>65</sup> This typically occurs with practices such as group boycotts, price-fixing schemes, and horizontal market divisions.<sup>66</sup>

Alternatively, the “rule of reason” standard examines all the circumstances involved in the disputed practice, both justifications for and arguments against the alleged restriction.<sup>67</sup> The focus of an inquiry under the rule of reason is whether the restraint imposed is justified by a legitimate business purpose and is no more restrictive than necessary.<sup>68</sup> An agreement will be deemed unlawful if it causes an anticompetitive injury that outweighs its pro-competitive effects.<sup>69</sup> The standard attempts to ensure sufficient

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<sup>57</sup> *Fed. Baseball Club of Baltimore, Inc. v. Nat’l League of Prof’l Baseball Clubs*, 259 U.S. 200, 208-09 (1922). The Court has refused to overturn this exemption twice, despite finding its original “justification” to no longer be valid. Congress has also rejected numerous bills that would have statutorily removed this exemption.

<sup>58</sup> *Id.*

<sup>59</sup> See Donald G. Kempf, Jr., *The Misapplication of Antitrust Laws to Professional Sports Leagues*, 32 DEPAUL L. REV. 625 (1983).

<sup>60</sup> *Int’l Boxing Club of New York v. United States*, 358 U.S. 242, 245 (1955).

<sup>61</sup> *Id.*

<sup>62</sup> *Radovich v. Nat’l Football League*, 352 U.S. 445 (1957).

<sup>63</sup> *McCann & Rosen*, *supra* note 4, at 734.

<sup>64</sup> *N. Pacific Railway v. United States*, 356 U.S. 1, 5 (1957).

<sup>65</sup> *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1443 (9th Cir. 1995).

<sup>66</sup> See, e.g., *Nw. Wholesale Stationers, Inc. v. Pac. Stationary Printing Co.*, 472 U.S. 85 (1985) (holding that a group boycott is a *per se* violation of the Sherman Act); *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982) (finding fee agreements among physicians to be an example of price fixing and therefore a *per se* violation of the Sherman Act); *United States v. Topco Assoc., Inc.*, 405 U.S. 596 (1972) (finding a horizontal market division to be a *per se* violation of the Sherman Act).

<sup>67</sup> See *Tarabishi v. McAlester Regional Hospital*, 951 F.2d 1558, 1570 (10th Cir. 1991).

<sup>68</sup> *Mackey v. Nat’l Football League*, 543 F.2d 606, 620 (8th Cir. 1976).

<sup>69</sup> *Nat’l Society of Prof. Engineers v. United States*, 435 U.S. 679 (1978) (describing the evolution of the Rule of Reason and explaining the rule’s focus on the competitive significance of the restraint).



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competition within a marketplace, and courts often consider the possibility of less restrictive means to achieve the same effects.<sup>70</sup>

A third standard, somewhat of a hybrid form of scrutiny, is the “quick look” rule of reason standard. Here the *per se* and rule of reason standards are blended together. “Quick look” borrows the presumption of unreasonable practices from the *per se* standard and, like the rule of reason, it considers likely anticompetitive effects and market power; only, however, “to the degree necessary to understand a challenged restraint’s competitive consequences.”<sup>71</sup>

#### *4. The Rule of Reason - The Standard for Sports*

Courts typically regard sports leagues as functionally unique and thus better suited for either a rule of reason or “quick look” rule of reason analysis when evaluating a Section 1 claim.<sup>72</sup> Professional sports leagues are unique insofar as they act as collaborations whose teams compete individually on the field but cooperate economically off it for the prosperity of the league.<sup>73</sup> Additionally, courts generally accept that professional sports leagues need to enforce various on and off-field regulations in order to exist and function.<sup>74</sup> Some regulations, such as when and where games are to be played and what rules are to be followed during the game, are necessary to facilitate competition, even if they might otherwise be viewed as illegal restraints on trade.<sup>75</sup> For these reasons, the rule of reason analysis has become the preferred form of scrutiny used by the courts in deciding antitrust claims involving professional sports.<sup>76</sup>

The seminal case for applying the rule of reason instead of a *per se* rule in the sports-related antitrust context is *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*.<sup>77</sup> The case involved members of the NCAA bringing an antitrust challenge to the association’s plan for televising college football games.<sup>78</sup> The arrangement limited the amount of intercollegiate football games that could be televised and disallowed the sale of television rights by individual teams unless it was

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<sup>70</sup> *Tarabishi*, 951 F.2d at 1569-71.

<sup>71</sup> William E. Cohen, *Per se Illegality and Truncated Rule of Reason: The Search for a Foreshortened Antitrust Analysis*, FTC STAFF DISCUSSION DRAFT (Nov. 1997), available at <http://www.ftc.gov/opp/jointvent/persepap.htm>; see also Marc C. Anderson, *Self-Regulation and League Rules Under the Sherman Act*, 30 CAP. U.L. REV. 125, 126, 130-31 (2002) (noting how quick look rule of reason “avoids automatic condemnation of a restraint but does not require an in-depth analysis to evaluate the restraint”).

<sup>72</sup> See, e.g., Daniel E. Lazaroff, *Sports Equipment Standardization: An Antitrust Analysis*, 34 GA. L. REV. 137, 147-48 (1999).

<sup>73</sup> Cf. 7 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* P 1503.1 (2d ed. 2003); Nathaniel Grow, *There’s No “I” in “League”*: *Professional Sports Leagues and the Single Entity Defense*, 105 MICH. L. REV. 183 (2006); Peter Kreher, *Antitrust Theory, College Sports, and Interleague Rulemaking: A New Critique of the NCAA’s Amateurism Rules*, 6 VA. SPORTS & ENT. L.J. 51, 64 (2006); Gary R. Roberts, *Sports Leagues and the Sherman Act: The Use and Abuse of Section 1 to Regulate Restraints on Intraleague Rivalry*, 32 UCLA L. REV. 219, 252 (1984).

<sup>74</sup> *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 99 (1984).

<sup>75</sup> See *id.* at 101.

<sup>76</sup> See Michael Tannenbaum, *A Comprehensive Analysis of Recent Antitrust and Labor Litigation Affecting the NBA and NFL*, 3 SPORTS LAW. J. 205, 209 (1996).

<sup>77</sup> See *Bd. of Regents of Univ. of Okla.*, 468 U.S. at 85.

<sup>78</sup> *Id.*

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in accordance with the plan.<sup>79</sup> The U.S. Supreme Court held that the NCAA's actions were a restraint on trade and ruled in favor of the universities. The Court reasoned that, although the plan created horizontal price-fixing and output limitation, a rule of reason analysis was proper instead of *per se* because horizontal restraints on trade were essential if the product was to be available at all.<sup>80</sup>

Similarly, in *Smith v. Pro Football, Inc.*,<sup>81</sup> the same analysis was used in applying the rule of reason. In *Smith*, a former professional football player brought an antitrust action against the NFL based on an unlawful restraint arising out of the player draft.<sup>82</sup> In choosing to apply the rule of reason, the appellate court stated, "the courts have consistently refused to invoke the boycott *per se* rule where, given the peculiar circumstances of an industry, the need for cooperation among participants necessitated some type of concerted refusal to deal."<sup>83</sup> The court found that the NFL player draft, as it existed in 1968, had a severely anticompetitive impact on the market for players' services, and its alleged precompetitive effect upon playing field equality did not encourage economic competition.<sup>84</sup> Therefore, the draft unreasonably restrained trade in violation of Section 1 of The Sherman Act.<sup>85</sup>

### ***B. The Non-Statutory Labor Exemption in Sports***

The U.S. Supreme Court created the non-statutory labor exemption to accommodate Congressional policies favoring collective bargaining under the National Labor Relations Act and free competition in business markets.<sup>86</sup> Union-employer agreements and some aspects of the collective bargaining process have thus been accorded a non-statutory exemption from antitrust sanctions.<sup>87</sup>

In the 1976 case of *Mackey v. National Football League*,<sup>88</sup> the Eighth Circuit established a three-pronged test to determine when the non-statutory labor exemption should apply. This test, now known simply as the *Mackey* test, requires courts to consider

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<sup>79</sup> *Id.* at 92.

<sup>80</sup> *Id.* at 101-03.

<sup>81</sup> *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978).

<sup>82</sup> *Id.* at 1174.

<sup>83</sup> *Id.* at 1180.

<sup>84</sup> The NFL Draft included a "no-tampering" rule under which, as it existed in 1968, precluded teams from negotiating with eligible draftees prior to the draft. *Id.* at 1183.

<sup>85</sup> *Id.*

<sup>86</sup> Collectively, the Clayton Act of 1914, the Norris-Laguardia Act of 1932 and the National Labor Relations Act of 1935 make up the non-statutory labor exemption.

<sup>87</sup> Unions are combinations of individuals that seek to preclude an employer from negotiating with individual employees.

<sup>88</sup> *Mackey* involved a challenge to the NFL's *Rozelle* Rule, which provided that once a player's contract expired and he signed with another team, his new team had to provide compensation to the previous team. If the teams couldn't reach an agreement, the Commissioner could step in and provide compensation in the form of players and/or draft picks as he deemed "fair and equitable." The plaintiffs argued that the rule "constituted an illegal combination and conspiracy in restraint of trade, denying professional football players the right to freely contract for their services." In applying its test, the court found that the rule did not satisfy the third prong because the rule was unilaterally imposed, rather than the product of bona fide arm's-length negotiation. Therefore, the *Rozelle* Rule did not qualify for non-statutory exemption. Consequently, the court went on to find that the rule violated the Sherman Act under a rule of reason analysis. *See Mackey*, 543 F.2d at 606-08 (8th Cir. 1976).

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whether (1) the restrictions affect only parties to the collective bargaining relationship; (2) the restrictions concern a mandatory subject of collective bargaining; and (3) the restrictions are a product of *bona fide* arm's-length bargaining.<sup>89</sup> Pursuant to the National Labor Relations Act, "mandatory" subjects of collective bargaining here pertains to "wages, hours, and other working conditions of employment."<sup>90</sup>

However, in 1991 the Supreme Court in *Brown v. Pro Football, Inc.*<sup>91</sup> did not apply the *Mackey* test. In fact, the Court did not adopt any specific test for applying the exemption, refusing to draw a line between what should and should not be covered by it. The Court did state that the collective bargaining process should be protected from antitrust scrutiny.<sup>92</sup> The Court also recognized the apparent conflict between antitrust and labor law: antitrust law seeks to prohibit unreasonable restraints on trade, yet labor law will allow some anticompetitive agreements "conducive to industrial harmony."<sup>93</sup> This conflict of laws, combined with the lack of a specific test to follow, makes determining when the non-statutory labor exemption should be applied a rather speculative task.

The NFL and NBA are unionized leagues, with their players represented by the National Football League Players Association (NFLPA) and the National Basketball Players Association (NBPA), respectively.<sup>94</sup> The leagues and player associations negotiate the terms of employment and memorialize them in a collective bargaining agreement (CBA), which periodically expires and is renegotiated.<sup>95</sup> Due to the non-statutory labor exemption, most restrictions included in CBAs are likely to withstand judicial scrutiny.<sup>96</sup> In *Clarett II*, the Second Circuit held that the NFL's eligibility rule fell within the scope of the non-statutory labor exemption.<sup>97</sup> Similarly, in *Wood v. National Basketball Association*<sup>98</sup> the court all but immunized the NBA Draft from antitrust attacks where the draft rules were the result of collective bargaining.<sup>99</sup>

If an athlete barred by the age restrictions were to challenge the leagues' rules in the future, a different circuit court could very well disagree with the Second Circuit and find that the non-statutory labor exemption does not apply. This would likely be due to a decision to use the *Mackey* test and a finding of failure of either the first or second prong. The *Clarett I* trial judge found that neither prong was met in that case,<sup>100</sup> though this finding did not withstand appeal. The first prong, that the restrictions affect only the

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<sup>89</sup> *Id.* at 614.

<sup>90</sup> 29 U.S.C. § 158(d) (2010); *see also* NLRB v. Borg-Warner Corp., 356 U.S. 342 (1958).

<sup>91</sup> *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996).

<sup>92</sup> Since labor and management had attempted to come to an agreement on a mandatory subject of collective bargaining (salary), the Court was not willing to step in and create its own solution. *Id.* at 240-41.

<sup>93</sup> *Id.*

<sup>94</sup> These players' associations are trade unions for NBA and NFL athletes and operate under the guidelines of the National Labor Relations Act.

<sup>95</sup> Daniel A. Applegate, *The NBA Gets a College Education: An Antitrust and Labor Law Analysis of the NBA's Minimum Age Limit*, 56 CASE W. RES. L. REV. 825, 825-54 (2006).

<sup>96</sup> Michael A. McCann, *Illegal Defense: The Irrational Economics of Banning High School Players From the NFL Draft*, 3 VA. SPORTS & ENT. L.J. 113, 196 (2004).

<sup>97</sup> *Clarett II*, 369 F.3d 124 (2d Cir. 2004).

<sup>98</sup> Leon Wood attacked the NBA Draft as "an agreement among horizontal competitors, the NBA teams, to eliminate competition for the services of college basketball players." *Wood v. Nat'l Basketball Ass'n*, 602 F. Supp. 525 (S.D.N.Y. 1984), *aff'd*, 809 F.2d 954, 959-62 (2d Cir. 1987).

<sup>99</sup> *Wood*, 809 F.2d at 963

<sup>100</sup> *Clarett I*, 306 F. Supp. 2d 379, 382 (S.D.N.Y. 2004).

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bargaining parties, might fail because underage prospects and other potential league members are affected by the agreement yet are not parties to it.<sup>101</sup> Under the second prong, certain restrictions might be invalid if not classified as a mandatory subject of the collective bargaining.

Due to confusion and a lack of clearly articulated standards from the U.S. Supreme Court, a court might find that the exemption simply does not apply for other reasons. This is a realistic possibility because, over time, the interpretations of the non-statutory labor exemption and the decisions as to how much protection from antitrust scrutiny it should provide have varied.<sup>102</sup> The holding in *Clarett II* was the opinion of but one federal court of appeals. It is possible that the next time a challenge to a professional sports leagues' age-based eligibility rules is brought, the exemption will not apply. For the remainder of this paper, it is assumed that at least one of these scenarios holds true, and that the non-statutory labor exemption does not apply to the leagues' draft restrictions.

### IV. APPLYING THE RULE OF REASON TO THE DRAFT RESTRICTIONS

#### *A. Basic Framework of a Rule of Reason Analysis*

The leagues' age eligibility rules are a concerted action barring players' entry into their respective professional sport.<sup>103</sup> Such rules would be illegal under a *pro se* analysis due to violations of antitrust laws.<sup>104</sup> However, assuming the non-statutory labor exemption does not apply, a court would analyze the restrictions under a rule of reason analysis. This requires weighing the anticompetitive effects of the restraint against its pro-competitive justifications. Doing so should lead to a finding that the leagues' age-based eligibility restrictions violate antitrust laws.

In order to establish a claim under a rule of reason analysis, a plaintiff first must show there is an agreement. There is no question that an agreement to restrain trade exists in this situation. The teams collectively agreed in their respective CBAs to implement the minimum age limits. Next, a plaintiff must make a showing of harm in the relevant market. The relevant market here is the market for professional basketball and football player services, over which the NBA and NFL have virtually limitless control. By not permitting some players to compete in the NBA and NFL, those players are largely precluded from earning a living playing professionally in their home country. Moreover, insofar as players are sellers of talent and professional teams are the buyers of that talent, age restrictions act as a purchaser's bar on an entire class of sellers, which harms competition in the absence of an comparable alternative markets.

When dealing with the NBA and NFL, there are no comparable leagues. The NBA currently has no other professional basketball league in direct competition with it.

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<sup>101</sup> It is important to note that job "applicants" can typically be constrained by collective bargaining agreements. *See, e.g., Reliance Ins. Co. v. NLRB*, 415 F.2d 954, 959-62 (2d. Cir. 1987).

<sup>102</sup> Pitts, *supra* note 16, at 440.

<sup>103</sup> *See* Jason Abeln et al., *Lingering Questions After Clarett v. NFL: A Hypothetical Consideration of Antitrust and Sports*, 73 U. CIN. L. REV. 1767, 1781-90 (2005).

<sup>104</sup> Nicholas E. Wurth, *The Legality of an Age-Requirement in the National Basketball League After the Second Circuit's Decision in Clarett v. NFL*, 3 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 103, 125 (2005).

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Even international leagues are in a different market due to lower skill levels and salaries.<sup>105</sup> Numerous attempts have been made to establish and maintain major professional football leagues in the U.S. One example was the Arena Football League, which recently folded.<sup>106</sup> Currently, the NFL is the only major professional football league in existence in the United States.<sup>107</sup> The closest competitor to the NFL is the Canadian Football League (CFL).<sup>108</sup> However, only a handful of CFL players earn more than the NFL minimum salary.<sup>109</sup> As the district court in *Clarett I* stated, “The League’s suggestion that one of the other professional football leagues in North America is a fair substitute for the NFL cannot be taken seriously.”<sup>110</sup> The NFL clearly represents an unparalleled opportunity for an aspiring football player in terms of salary, publicity, endorsement opportunities, and level of competition.<sup>111</sup> For these reasons, the NFL and NBA have no reasonably comparable employers. These leagues dominate the global market, and therefore have market power not just in the United States, but throughout the world. Such market power enhances the likelihood of anticompetitive effects.<sup>112</sup> For reasons discussed below, barring student-athletes from competition based on age harms both the labor market and the consumer market.<sup>113</sup>

### ***B. Anticompetitive Effects on the Individual***

The harm to a student-athlete excluded from the leagues based on age alone flows from a harm to competition.<sup>114</sup> Anticompetitive effects on the individual athletes are numerous and severe, and they stem directly from the leagues’ age-based eligibility restrictions. First and foremost, eighteen-year-old adults are allowed to participate in various other activities that are even more inherently dangerous than playing professional basketball or football. The most blatant example being that these men can and do fight and die for our country in wars. Also, often overlooked are other professional sports that are arguably more dangerous than football, such as hockey or boxing, that allow young athletes to compete.<sup>115</sup>

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<sup>105</sup> McCann, *supra* note 96, at 214-15.

<sup>106</sup> Tom Mix, *Economy woes threaten sports*, COLUMBUS TELEGRAM (Jan 4, 2009), [http://columbus.telegram.com/sports/article\\_077c715c-9fb0-55f0-b2c7-c59a3f79981f.html](http://columbus.telegram.com/sports/article_077c715c-9fb0-55f0-b2c7-c59a3f79981f.html) (“The Arena Football League was forced to fold and cancel the 2009 season.”).

<sup>107</sup> New professional football leagues in the United States include the United Football League (UFL), which began play in 2009, and the All American Football League (AAFL), which is set to begin play in the spring of 2011.

<sup>108</sup> The Canadian Football League was founded in 1958; it is currently located entirely in Canada, after an unsuccessful attempt to expand into the United States from 1992-1996; *see* <http://www.cfl.ca/> (last visited Dec. 3, 2009).

<sup>109</sup> *Clarett I*, 306 F. Supp. 2d 379, 383-84 (S.D.N.Y. 2004).

<sup>110</sup> *Id.* at 407.

<sup>111</sup> *Id.* at 384.

<sup>112</sup> Pitts, *supra* note 16, at 466-67.

<sup>113</sup> *Cf.*, Symposium, Panel II: *Maurice Clarett’s Challenge*, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 391, 405 (2005).

<sup>114</sup> *Clarett I*, 306 F. Supp. 2d at 401.

<sup>115</sup> Jamie Fitzpatrick, *NHL Draft Day Basics*, ABOUT.COM, [http://procehockey.about.com/cs/prospects/a/nhl\\_draft\\_basic.htm](http://procehockey.about.com/cs/prospects/a/nhl_draft_basic.htm) (last visited Dec. 16, 2010); World Pro. Boxing Fed., *Youth Rules*, <http://www.wpbf-usbc.org/frame/Youths%20Rules.htm> (last visited Dec. 16, 2010).

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Perhaps most importantly is that the leagues' restrictions deny the individual athletes the right to pursue their calling. It has long been held that antitrust law will not tolerate a contract "which unreasonably forbids anyone to practice his calling."<sup>116</sup> These age-based rules are a complete, albeit temporary, bar to entry into the market, which is the type of injury that the antitrust laws were designed to prevent.<sup>117</sup> Along with this barrier to pursue one's calling comes the inability to earn enormous financial incentives for the individual athletes and their families. The average NBA salary in 2007-08 was \$5.356 million,<sup>118</sup> while the NFL's average salary is \$1.1 million.<sup>119</sup> Players who make the jump from high school to the pros are not necessarily earning league minimum salaries, either, because their lack of experience is overshadowed by their immense potential. In the NBA, the players drafted straight from high school who are currently playing have a higher median salary than the median NBA salary as a whole.<sup>120</sup> In fact, high school players who entered the NBA make more money, and do so at a faster rate, than any other age group within the league.<sup>121</sup> Also important is that these players become unrestricted free agents sooner by making the jump directly to the NBA, which oftentimes allows them to demand even more money sooner in their second contract now that they have more experience.<sup>122</sup> By not allowing a student-athlete to join the NBA out of high school, the player is not only denied the ability to make millions of dollars right away, but he will also be locked into the nearly non-negotiable rookie salary scale for one more year.<sup>123</sup>

A recent example of a heralded high school basketball player being forced to uproot his family overseas to earn a living is Brandon Jennings. In 2008, Jennings was the top high school prospect in the nation, winning all the major high school player of the year awards and was named a McDonald's All-American.<sup>124</sup> After signing a letter of intent to play college basketball at the University of Arizona, Jennings changed his mind and decided to play professionally in Europe instead.<sup>125</sup> He became the first American

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<sup>116</sup> *Gardella v. Chandler*, 172 F.2d 402, 408 (2d Cir. 1949).

<sup>117</sup> *Clarett I*, 306 F. Supp. 2d at 382.

<sup>118</sup> S.F. Heron, *The average salaries of NBA players*, HELIUM, <http://www.helium.com/items/923616-the-average-salaries-of-nba-players> (last visited Dec. 15, 2010). The league minimum in 2009-20 was \$457,588. *Minimum Annual Salary Scale*, NBA.COM, [http://www.nba.com/news/cba\\_minimumsalary\\_050804.html](http://www.nba.com/news/cba_minimumsalary_050804.html) (last visited Dec. 15, 2010).

<sup>119</sup> *NFL Hopeful Frequently Asked Questions*, NFL PLAYERS ASSOC., <http://nflplayers.com/> (last visited Oct. 25, 2010) ("This year, the average NFL salary was \$1.1 million. Qualifying players also receive a wide variety of fringe benefits including pre-season pay, life, dental and medical insurance, severance pay, disability benefits and pension coverage.").

<sup>120</sup> McCann, *supra* note 96, at 325-26.

<sup>121</sup> *Id.* at 326.

<sup>122</sup> An unrestricted free agent is free to sign with any team, though some unrestricted free agents have options on their existing contracts that, if exercised, may impact their choices.

<sup>123</sup> In 2009-10, the NBA Rookie Scale for the first overall pick was \$4,152.9 for the first-year salary, \$4,464.4 for the second-year salary, and \$4,775.9 for the third-year option salary. *See 2009-10 NBA Rookie Scale*, HOOPSWORLD, [http://www.hoopsworld.com/Story.asp?story\\_id=9301](http://www.hoopsworld.com/Story.asp?story_id=9301) (last updated July 20, 2008).

<sup>124</sup> *Brandon Jennings*, ESPN.COM, [http://espn.go.com/mens-college-basketball/recruiting/player/\\_/id/43264/brandon-jennings](http://espn.go.com/mens-college-basketball/recruiting/player/_/id/43264/brandon-jennings) (last visited Dec. 16, 2010).

<sup>125</sup> *Brandon Jennings*, N.Y. TIMES, [http://topics.nytimes.com/top/reference/timestopics/people/j/brandon\\_jennings/index.html](http://topics.nytimes.com/top/reference/timestopics/people/j/brandon_jennings/index.html) (last updated Nov. 15, 2009).

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high school basketball player to skip college to play for a European professional team.<sup>126</sup> Jennings, his mother, and his brother all moved to Italy together. Jennings signed a three-year deal with Lottomatica Virtus Roma, which guaranteed him \$1.65 million.<sup>127</sup> While in Italy, Jennings did not produce as expected. He only played seventeen minutes per game, while averaging less than six points per game.<sup>128</sup> If anything, his time in Europe hurt his “draft stock.” After one year overseas, Jennings entered the 2009 NBA draft. He was fortunate enough to be selected tenth overall by the Milwaukee Bucks, landing a five-year, \$4.5 million deal.<sup>129</sup> The \$2.1 million Jennings made in his first year in the NBA is far more than the \$1.65 million he would have made over three years in Europe. While Jennings was able to acquire an endorsement deal with Under Armor during his time in Italy, there likely would have been many more commercial opportunities for him in the United States. If not for the arbitrary age rule that prohibited him from entering the 2008 NBA Draft, Jennings would have been able to increase his income exponentially. Jennings continues to prove his worth in the NBA, where in November 2009 he set the single game scoring record for a Milwaukee Bucks rookie with 55 points.<sup>130</sup>

Aside from off-the-field financial opportunities such as endorsements, a professional athlete can only make money based on their performance for as long as they are physically able to play at a high level. As an athlete’s skills deteriorate, typically so does their paycheck. In fact, the professional athlete’s career is much shorter than many perceive. For example, the average NBA career lasts only five years.<sup>131</sup> The average NFL career is even shorter, lasting just three-and-a-half years.<sup>132</sup> By not allowing an athlete to enter the NBA for one year, a player will lessen the likelihood that his playing career will extend beyond, or even meet, the league average. That lost year impacts their financial earning capacity, including the delayed ability to become a free agent. The NFL, by delaying entry for three years, could even eliminate the entire career of a potential player.

One example of the NFL age restriction leading to the elimination of a professional career is the tragedy of Maurice Clarett. While most people know of his successes on the football field in college and his subsequent failure in the courtroom, many people do not know the story of what happened to Clarett after he was denied entry into the NFL Draft. He had lost his college eligibility, and thus sat out for two full football seasons.<sup>133</sup> In 2005, Clarett came to the NFL pre-draft workouts out of shape.<sup>134</sup>

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<sup>126</sup> Chris Broussard, *Exchange Student*, ESPN.COM, <http://sports.espn.go.com/espnmag/story?id=3715746> (last visited Dec. 16, 2010).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Jennings* (N.Y. TIMES), *supra* note 124.

<sup>130</sup> *Id.*

<sup>131</sup> Arn Tellem, *Pro and Con of Permitting Teenage Pros in the N.B.A.: THE AGENT; Proposed Age Limit is Hollow Altruism*, N.Y. TIMES May 13, 2001, at 11, available at <http://www.nytimes.com/2001/05/13/sports/pro-con-permitting-teenage-pros-nba-agent-proposed-age-limit-hollowaltruism.html?pagewanted=1>.

<sup>132</sup> *NFL Hopeful Frequently Asked Questions*, NFL PLAYERS ASSOCIATION, <http://nflplayers.com/> (last visited Oct. 25, 2010) (“The average length of an NFL career is about 3 and a half seasons. Although there are some exceptional players who have long careers that extend 10 or twelve seasons and beyond, most players only stay active for about three seasons. Players leave the game because of injury, self-induced retirement, or being cut by the team. This also means that while players may make more money than most people, they are only making it for an average of three and a half years.”).

<sup>133</sup> *Clarett I*, 306 F. Supp. 2d 379, 388 (S.D.N.Y. 2004).

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He ran a very disappointing 4.82-second forty-yard dash.<sup>135</sup> Clarett, or “Slow Mo” as he was called then, was fortunate enough to be selected with the 101<sup>st</sup> pick by the Denver Broncos.<sup>136</sup> He showed up to training camp overweight, and was soon released by the team without having played a single down in the NFL.<sup>137</sup> Due in large part to his legal challenge of the NFL’s age-eligibility rule, Clarett was over one million dollars in debt and in and out of employment.<sup>138</sup> This led to an incident in January of 2006 in which Maurice attempted to rob a couple at gunpoint outside a nightclub in downtown Columbus, Ohio.<sup>139</sup> Seven months later, after making an illegal U-turn, he led police on a high-speed chase.<sup>140</sup> The chase ended when Clarett’s vehicle ran over a police spike strip.<sup>141</sup> After being subdued, police discovered Clarett was wearing Kevlar body armor.<sup>142</sup> Inside the car were loaded guns and an open bottle of vodka.<sup>143</sup> He accepted a plea bargain and was sentenced to seven and a half years in prison, with the possibility of early release after three and a half years.<sup>144</sup> While it is possible that Maurice Clarett would have had both personal and legal issues even if his NFL rule challenge had been successful, the situation may have been completely avoided. If not for the age-based eligibility restriction, Maurice may have gone straight to the NFL, had a successful career, and would still be making millions to this day. Instead, he is blogging from a federal prison cell in Toledo.<sup>145</sup> While much of this is ultimately no one’s fault but

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<sup>134</sup> Steve Wilstein, *Williams Walks Through Door Clarett Opened*, NBC SPORTS (Feb. 28, 2004), <http://nbcsports.msnbc.com/id/4377775/> (“Out of shape and away from competition for a year, he left scouts shaking their heads when he passed up a chance to show off his talents at the NFL combine workouts last week. He’ll be lucky to be drafted in the first two or three rounds.”).

<sup>135</sup> Don Banks, *Not so fast: Clarett plummets down draft board with bad 40*, SI.COM (Feb. 26, 2005), [http://sportsillustrated.cnn.com/2005/writers/don\\_banks/02/26/clarett.combine/](http://sportsillustrated.cnn.com/2005/writers/don_banks/02/26/clarett.combine/) (“In his two cracks at the 40 on Saturday at the RCA Dome, Clarett false-started, then ran a glacier-like 4.82 [-second forty-yard dash] and followed it up with a slightly improved 4.72.”).

<sup>136</sup> Eddie Pells, *Troubled Back Looks Forward to Starting Anew*, USA TODAY, Apr. 24, 2005, available at [http://www.usatoday.com/sports/football/2005draft/2005-04-24-broncos-clarett\\_x.htm](http://www.usatoday.com/sports/football/2005draft/2005-04-24-broncos-clarett_x.htm).

<sup>137</sup> See Michael Wilbon, *The Clarett Saga is a Wake-Up Call for Us All*, WASHINGTON POST, Aug. 10, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/08/09/AR2006080902074.html>; see also Tom Friend, ABC News, *Maurice Clarett’s Last Call, Possibly, As a Free Man: NFL Running Back’s Arrest Just the Latest in Long Downward Spiral*, ABC NEWS, Aug. 9, 2006, available at <http://abcnews.go.com/Sports/story?id=2297018&page=1>.

<sup>138</sup> Jason Cole, *Rookie RB Brown keeps ego in check*, THE MIAMI HERALD, Sept. 7, 2005 (“According to two sources, Clarett is already \$1 million in debt from legal fees for his fight with the NFL and other costs.”).

<sup>139</sup> *Ex-Ohio State Star Clarett Appears in Court, Post \$50K Bond*, CBS SPORTS LINE (Jan. 2, 2006), <http://www.sportslines.com/print/collegefootball/story/913826>.

<sup>140</sup> Associated Press, *Clarett Agrees to Plea Deal, Will Serve 3 ½ Years*, ESPN.COM (Sept. 18, 2006), <http://sports.espn.go.com/espn/print?id=2593068&type=story>.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> Maurice Clarett, *The Mind of Maurice Clarett* (May 25, 2009), <http://mauriceclarett.wordpress.com/> (“I can’t hold these feelings in anymore. I want to play football again. I have a deep desire to play. I love the game. I have so much penitentiary aggression pinned up inside of me. I want to hit someone. I want to run the ball. I want to tackle someone. I want to play. I am going to play somewhere. I cannot accept how things ended. I won’t accept how they ended. I am 220, rock solid. I am moving swift, running fast, and jumping high. My mind is right and my life is in order. I am 25 but I feel like I am 18. I am still young.”)



Clarett's, it would nonetheless be a shame if a future star athlete were barred from earning a living by the leagues' age restrictions and suffered a similar fate.

Aside from the shortening of a professional athlete's career, there are other financial considerations regarding the risks players must face due to their inability to enter the leagues. The two most considerable risks are injury and the dropping of draft "stock." Some athletes are so talented at the age of eighteen that NBA coaches and scouts feel they are good enough to be selected high in the draft immediately out of high school.<sup>146</sup> In fact, prior to the current NBA rule, many players were.<sup>147</sup> Such players include stars like Moses Malone, Darryl Dawkins, Kevin Garnett, Kobe Bryant, Jermaine O'Neal, Tracy McGrady, Al Harrington, Rashard Lewis, Tyson Chandler, Amare Stoudemire, LeBron James and Dwight Howard.<sup>148</sup> It only takes one look at either the 2009 NBA Finals rosters or the 2009 NBA All-Star game rosters to realize the effect these players have on the game today. Between the two teams competing in the Finals, five players began playing professional basketball prior to when they would be allowed to under the current NBA rule.<sup>149</sup> In the All-Star game, eight of the twenty-four players fit this description, as well as three of the five players selected to the 2009-2010 All-NBA first team.<sup>150</sup>

Recent NBA Drafts also provide evidence that teams who have the top picks are still willing to draft younger players based on potential over older, more experienced players. In 2007, the top two picks were college freshmen Greg Oden<sup>151</sup> and Kevin Durant.<sup>152</sup> Oden and Durant were ranked one and two, respectively, in the 2006 high

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Those who do support me deserve and want to see me out there playing again. I play with some pretty good athletes back here. In the penitentiary you could say basketball is football. Back here everything is aggressive. Everything is intense. I know I am an asset to someone's locker room on so many levels. I've survived some of life's worst struggles. I am not a statistic. I am still here and I am still living. I didn't and won't give up. I am a winner. I am optimistic. I am inspirational. I am alive. I want to play for the love and the respect. I want to play for the underdogs. I want to play because I know how to really well. Hopefully, they'll open these gates soon and I'll be able to get out on the field again. I am healthy mentally and physically. I am rock solid. I train hard. I go hard. I'm HERE.").

<sup>146</sup> Fourteen high school seniors were drafted with a top ten pick by NBA teams from 1995-2005. Interestingly, Kobe Bryant was not one of them, as he was selected with the 13<sup>th</sup> pick in the 1996 NBA Draft.

<sup>147</sup> Forty-five high school players were drafted by NBA teams between 1962 and 2005.

<sup>148</sup> For a complete list of high school players who have entered the NBA Draft, see *High School Players and the NBA Draft*, RIVALDS.COM, <http://ssbasketballold.rivals.com/content.asp?SID=1132&CID=356192> (last visited Dec. 15, 2010).

<sup>149</sup> The Los Angeles Lakers faced the Orlando Magic in the 2009 NBA Finals; the five players on the rosters who began playing professional basketball prior to turning nineteen were, for the Magic: Hedo Turkoglu, Rashard Lewis and Dwight Howard, and for the Lakers: Andrew Bynum and Kobe Bryant. See John Saraceno, *Non-College players dominate NBL Finals rosters*, USA TODAY, June 12, 2009, available at [http://www.usatoday.com/sports/basketball/nba/2009-06-12-non-college-players\\_N.htm](http://www.usatoday.com/sports/basketball/nba/2009-06-12-non-college-players_N.htm).

<sup>150</sup> The eight 2009 NBA All-Stars who began playing professional basketball prior to turning nineteen included: LeBron James, Kevin Garnett, Dwight Howard, Kobe Bryant, Amare Stoudemire, Rashard Lewis, and international players Dirk Nowitzki and Tony Parker. That same year, LeBron James was named League MVP, and Dwight Howard was named Defensive MVP. *2009 All-Star Rosters*, NBA.COM, <http://www.nba.com/allstar2009/players/> (last visited Dec. 16, 2010).

<sup>151</sup> Greg Oden played at Ohio State for one season, leading them to a Big Ten Championship and National Runner-Up; he was drafted with the first pick in the 2007 NBA Draft by the Portland Trailblazers.

<sup>152</sup> Kevin Durant played one season at the University of Texas, where he was named the 2007 National College Player of the Year; he was selected second overall in the 2007 NBA Draft by the Seattle

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school basketball recruiting rankings.<sup>153</sup> Similarly, in the 2008 NBA Draft, four of the top five players selected were college freshmen, and the fifth was just a sophomore.<sup>154</sup> Like Oden and Durant, those four freshmen were among the top six of the 2007 high school basketball recruiting rankings.<sup>155</sup> In comparison, only five college seniors were drafted in the entire first round.<sup>156</sup> In 2010, the University of Kentucky alone had a record four freshmen selected in the first round of the NBA Draft, including the first overall pick.<sup>157</sup> Arguably, all of these college freshmen chosen high in the drafts would have been drafted at or about the same spot the year prior had the age rule not barred them from participating. While their draft “stocks” may not have dropped due to the one year they spent in college, they are still harmed. They were not able to earn a paycheck for that year, they will become free agents one year later, and their professional careers have been shortened by a year.

The popular counterargument to this is that for every success story, such as Kobe Bryant, there are multiple failures, such as Kwame Brown.<sup>158</sup> However, this argument is of little merit because there are also plenty of highly touted high school recruits who choose to attend college and never live up to the lofty expectations. “[H]igh school players [do so] so well in the NBA because they knew they would . . . ; otherwise, they would not have declared.”<sup>159</sup> The facts illustrate the truth, which is that there are far more “prep-to-pro” successes than failures. Of the forty-eight American players who entered the NBA Draft right out of high school prior to the implementation of the new rule, forty-two were drafted.<sup>160</sup> Twenty-nine of those forty-two were first-round picks.<sup>161</sup> Of the forty-four high school players drafted since 1995, only six are no longer playing in the NBA,<sup>162</sup> while six others were selected to play in the 2009 NBA All-Star Game.<sup>163</sup>

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Supersonics; after his first season in the NBA, he was named Rookie of the Year. *Kevin Durant*, NBA.COM, [http://www.nba.com/playerfile/kevin\\_durant/bio.html](http://www.nba.com/playerfile/kevin_durant/bio.html) (last visited Dec. 16, 2010).

<sup>153</sup> *The Rivals 150 2006 Prospect Ranking*, RIVALDS.COM, <http://rivals.yahoo.com/naaa/basketball/recruiting/rankings/rank-1428> (last updated June 8, 2006).

<sup>154</sup> College freshmen Derrick Rose, Michael Beasley, O.J. Mayo and Kevin Love were selected with the first, second, third, and fifth picks, respectively; sophomore Russell Westbrook was selected with the fourth pick. *Draft 2008*, NBA.COM, <http://www.nba.com/draft2008/> (last visited Oct. 28, 2010).

<sup>155</sup> *The Rivals 150 2007 Prospect Ranking*, RIVALDS.COM, <http://rivals.yahoo.com/naaa/basketball/recruiting/rankings/rank-1611> (last updated Nov. 7, 2007).

<sup>156</sup> *Draft 2008*, *supra* note 154.

<sup>157</sup> See MyNBADraft.com, *2010 Draft Results Round 1*, <http://www.mynbadraft.com/NBA-Draft-Results> (last visited Dec. 18, 2010).

<sup>158</sup> Kwame Brown was a McDonald’s High School All-American; he committed to the University of Florida, but later decided to enter the 2001 NBA Draft straight out of high school where he was the first overall pick by the Washington Wizards; he has largely failed to live up to the high expectations, averaging only seven points per game over his nine year career. *Kwame Brown Info Page*, NBA.COM, [http://www.nba.com/playerfile/kwame\\_brown/](http://www.nba.com/playerfile/kwame_brown/) (last visited Oct. 30, 2010).

<sup>159</sup> See McCann, *supra* note 96, at 162.

<sup>160</sup> It should also be noted that, while six high school seniors went undrafted, one of those six, Jackie Butler, was signed by the New York Knicks during the 2004-2005 season. *Knicks Sign Jackie Butler*, NBA.COM (Feb. 27, 2005), [http://www.nba.com/knicks/news/butler\\_050227.html](http://www.nba.com/knicks/news/butler_050227.html).

<sup>161</sup> These reflect the author’s own calculations, with information gathered in part from *Draft NY 08*, NBA.COM, [http://www.nba.com/history/draft\\_index.html](http://www.nba.com/history/draft_index.html) (last visited Dec. 3, 2010).

<sup>162</sup> *Id.*

<sup>163</sup> *2009 All Star Roster*, NBA.COM, <http://www.nba.com/allstar2009/players/> (last visited Dec. 16, 2010) (LeBron James, Kevin Garnett, Dwight Howard, Kobe Bryant, Amare Stoudemire and Rashard Lewis).

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Every year there are top high school prospects who are forced to either attend college or move overseas because of the draft rule. The 2009 draft was no exception, as most NBA scouts believed that University of Kentucky freshman John Wall would have been the first overall pick in that year's draft had he been allowed to enter it.<sup>164</sup> Blake Griffin of the University of Oklahoma was selected with that pick and was handsomely rewarded with a rookie salary scale contract of \$16,071,840.<sup>165</sup> If Wall had suffered a career-ending injury playing for the Wildcats during the 2009-2010 season, he would have never seen a dime of what he could have earned had he been given the opportunity to participate in the draft one year earlier. Similarly, if Wall had suffered even a minor injury, it may have cause his draft "stock" to drop. Even if Wall played all year long injury-free, as he did, his performance at the college level might not have lived up to expectations. This would have caused his draft stock to fall, decreasing his potential earnings in the NBA. As Brandon Haywood, a star basketball player at the University of North Carolina who played all four years, put it, "the longer you stay, the more they're going to criticize your game. The shorter you stay, the more they'll draft on potential."<sup>166</sup> The long history of successful players in the NBA who have made the jump directly from high school illustrates that certain athletes are willing and able to compete at the professional level. Furthermore, scouts have become proficient at identifying them. Given the risks these players face by having their careers delayed, they should be allowed to compete directly out of high school.

The leagues, as well as much of the public, are convinced that since age-based restrictions "allow" student-athletes to pursue higher education and attend college, these rules are inherently a positive thing for the athlete, the leagues, and society as a whole.<sup>167</sup> Unfortunately, this is not true. By enforcing these rules, athletes are not given a choice. Were there no such rules, a player could freely choose whether to join the leagues, or go to college. With the current rules in place, they have no such choice. The exceptional student-athlete today essentially has two options: move to a foreign country and play professionally, or go to college and play for no pay. Taking a year off is not a viable option, as these players' elite skills and physiques are likely to deteriorate, as was the case with Maurice Clarett. Playing professional football in the Canadian Football League or professional basketball overseas means less money, less publicity, and uprooting to a foreign country. Therefore, most highly skilled high school athletes choose the college route.

Since these athletes essentially have no other option, many go to college when they do not want to. Players might not meet the academic requirements of educational institutions, which can lead to cheating and NCAA rules violations. A recent example of

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<sup>164</sup> Jason King, *Behind John Wall*, YAHOO! SPORTS (Dec. 4, 2009), <http://rivals.yahoo.com/ncaa/basketball/news?slug=jn-wall120409&prov=yahoo&type=lgns> ("Most NBA analysts say he would've been the top overall selection in last year's draft had he been eligible to submit his name straight out of high school.").

<sup>165</sup> Darren Rovell, *NBA Draft: By The Numbers*, CNBC.COM (June 26, 2009), [http://www.cnbc.com/id/31566641?\\_\\_source=RSS\\*blog\\*&par=RSS](http://www.cnbc.com/id/31566641?__source=RSS*blog*&par=RSS).

<sup>166</sup> Michael Murphy, *Going Straight from High School to the Pros was Once Unheard of, but the Success of Players like Kobe Bryant and Kevin Garnett has More Teens Trying to Make the Leap*, HOUSTON CHRON. (June 24, 2001), § 2, at 17, available at [http://www.chron.com/CDA/archives/archive.mpl?id=2001\\_3314916](http://www.chron.com/CDA/archives/archive.mpl?id=2001_3314916).

<sup>167</sup> Isamu Bae, *High School Athletes Should go to College, Not the Pro Level*, SILVER CHIPS ONLINE (June 1, 2004), <http://silverchips.mbhs.edu/story/3626>.

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this is Derrick Rose.<sup>168</sup> Rose was a star basketball player at his Chicago high school.<sup>169</sup> He was barred entry into the NBA due to the current age rule, so he attended the University of Memphis.<sup>170</sup> He played just one year at Memphis, leading the Tigers to the National Championship game, before declaring for the 2008 NBA Draft where he was the first overall selection by the Chicago Bulls.<sup>171</sup> Less than a year later, an NCAA investigation revealed that Rose cheated on his SAT exam to gain entrance into Memphis.<sup>172</sup> As a result, Memphis was forced to vacate its entire 2008 season.<sup>173</sup> Had the NBA age rule not been in effect, Rose likely would have gone straight to the NBA, and this embarrassing sequence of events would have been avoided.

Similarly, players who are forced to play college ball and not earn a paycheck seek other forms of monetary gain. This too can lead to NCAA rules violations, the likelihood of which is increased considering the fact that a majority of the elite NCAA athletes come from impoverished families.<sup>174</sup> A recent example of this is Reggie Bush.<sup>175</sup> Bush led the University of Southern California football team to two National Championships.<sup>176</sup> Bush was also the recipient of college football's highest individual honor, the Heisman Trophy.<sup>177</sup> After following the NFL's age-eligibility requirement, Bush decided to forego his senior year and entered the NFL Draft where the New Orleans Saints selected him with the second overall pick.<sup>178</sup> After leaving USC, reports surfaced that Bush and his family may have been receiving substantial gifts in violation of NCAA

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<sup>168</sup> Derrick Rose was the top-rated point guard prospect in the class of 2007. See *The Rivals 150 2007 Prospect Ranking*, *supra* note 155.

<sup>169</sup> *Id.*

<sup>170</sup> *Derrick Rose*, RIVAL.COM, <http://rivals.yahoo.com/ncaa/basketball/recruiting/player-Derrick-Rose-30307> (last visited Nov. 1, 2010).

<sup>171</sup> Andy Katz, *Bulls go for Rose over Beasley in NBA draft; Mayo, Love swap places*, ESPN.COM (June 26, 2008), <http://sports.espn.go.com/nba/draft2008/news/story?id=3462594>.

<sup>172</sup> Steve Wieberg, *NCAA vacates Memphis' '07-08 season record, Final Four run*, USA TODAY, Aug. 21, 2009, available at [http://www.usatoday.com/sports/college/mensbasketball/2009-08-20-memphis-ncaa-penalties\\_N.htm](http://www.usatoday.com/sports/college/mensbasketball/2009-08-20-memphis-ncaa-penalties_N.htm).

<sup>173</sup> *Id.*

<sup>174</sup> Kwame Brown, for example, was the youngest of eight children from a poor family. Michael Wilbon, *Stern Wants Age Limit; NBA Commissioner Says He'll Work With Union*, WASH. POST, June 14, 1999, at D1. Leon Smith was in part motivated to declare for the NBA Draft because of his family's poverty. Greg Wallace, *NBA Drain a Pain*, CHATTANOOGA TIMES, Dec. 13, 2001, at D1.

<sup>175</sup> Reggie Bush was a highly recruited running back out of high school; he attended the University of Southern California; while there he played running back, wide receiver, and punt returner; Bush was named an All-American all three years while at USC.

<sup>176</sup> USC was named National Champions in 2003 and 2005; see *University of Southern California Official Athletic Site*, USCTROJANS.COM, <http://www.usctrojans.com/sports/m-footbl/archive/usc-m-footbl-archive.html>.

<sup>177</sup> Associate Press, *USC's Bush wins Heisman by monumental margin*, ESPN.COM (Dec. 11, 2005), <http://sports.espn.go.com/ncf/news/story?id=2255184>.

<sup>178</sup> On January 12, 2006, Reggie Bush elected to forgo his senior season at USC and declared himself eligible for the NFL draft. Since it was predicted that he would be the first overall pick in the 2006 NFL Draft, held by the Houston Texans, Houston was expected to obtain Reggie Bush. However, in a surprising move on the night before the draft, the Texans signed Mario Williams, a defensive end from North Carolina State. The New Orleans Saints selected Reggie Bush with their #2 pick in the draft. *Reggie Bush Online*, REGGIEBUSHONLINE.COM, <http://www.reggiebushonline.com/reggie-bush-biography.php> (last visited Oct. 20, 2010).

rules.<sup>179</sup> In June 2010, the NCAA determined that Bush and his family were indeed guilty of these violations.<sup>180</sup> If the NFL age-eligibility requirement had not been in place, Reggie Bush could have gone directly to the NFL from high school, or perhaps he could have entered the NFL Draft after one or two years of college, before any gifts were made to his family. Reggie Bush is just one example of the many student-athletes who have tried to procure financial incentives while attending college and been prohibited from entering their respective professional league due to the age restrictions.<sup>181</sup> While encouraging NCAA rules violations alone may not be a justification for striking down the leagues' age restrictions, it is yet another example of how the restrictions harm the individual athletes and college athletics.

While in college, these athletes spend an average of forty hours per week working on their game.<sup>182</sup> This leaves limited time to work on their academics. The best players, although forced to attend college, typically leave well before they graduate. In the 2009 NBA Draft, only six of the thirty first round picks were college seniors.<sup>183</sup> Perhaps even more telling, none of the first ten draft picks were seniors.<sup>184</sup> In the 2009 NFL Draft, less than half of the first round picks were college seniors.<sup>185</sup> Kevin Garnett's agent, Arn Tellem, provides clear evidence of why these athletes should choose the pros over college: "In Garnett's case, those four extra years of college could have cost him as much as \$100 million."<sup>186</sup> Given the financial incentives and risks discussed above, the "smart" thing for most star athletes to do is to join the professional leagues, not attend college. Athletes can always return to school later in life if they want to earn their degree, after they have made their millions. However, they cannot turn back the clock and return to their athletic "prime."

### *C. Anticompetitive Effects on the Market*

In *Haywood v. National Basketball Association*,<sup>187</sup> which was the seminal sports eligibility case prior to *Clarett*,<sup>188</sup> the plaintiff argued that the NBA's then four-year rule

<sup>179</sup> Associated Press, *Reggie Bush Denies Allegations He Took Money From Marketing Agents*, FOXNEWS.COM (Sept. 16, 2006), <http://www.foxnews.com/story/0,2933,214133,00.html> ("Allegations that they accepted gifts, money and other benefits worth more than \$100,000 from two marketing agents during his career at Southern California.").

<sup>180</sup> As a result of these violations, USC had to vacate its 2004 National Championship win, as well as all of its wins during the 2005 season. The school is excluded from participating in the 2010 and 2011 bowl seasons, and it lost thirty scholarships. In September 2010, Bush forfeited his 2005 Heisman Trophy. Steve Yanda, *After NCAA violations, times have changed for USC football*, WASHINGTON POST, Sept. 15, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/14/AR2010091403791.html>.

<sup>181</sup> Eamonn Brennan, *Brandon Jennings: Go east, young man*, RIVAL.COM (June 24, 2008), [http://rivals.yahoo.com/ncaa/basketball/blog/the\\_dagger/post/Brandon-Jennings-Go-east-young-man?urn=ncaab,89942](http://rivals.yahoo.com/ncaa/basketball/blog/the_dagger/post/Brandon-Jennings-Go-east-young-man?urn=ncaab,89942) ("The NBA's one-year rule is producing some truly strange new situations. In the case of O.J. Mayo, we got to see what happens when people stop being polite, are forced to go to college for one year, take a bunch of money from shady agents, leave for the NBA, don't have to face the repercussions of their actions, and start getting real.").

<sup>182</sup> Michael Wilbon, *Graduation Rates Deceive*, WASH. POST, Mar. 28, 2002, at D1.

<sup>183</sup> *Draft NY 09*, NBA.COM, <http://www.nba.com/draft2009/> (last visited Oct. 20, 2010).

<sup>184</sup> *Id.*

<sup>185</sup> *Draft 2009*, NFL.COM, <http://www.nfl.com/draft/2009> (last visited Oct. 20, 2010).

<sup>186</sup> Tellem, *supra* note 131.

<sup>187</sup> *Haywood v. Nat'l Basketball Ass'n*, 401 U.S. 1204, 1206 (1971).

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constituted a “group boycott” in violation of the Sherman Act.<sup>189</sup> The district court concluded that the rule would inflict “irreparable harm” on Haywood because he only had a limited window of time to play professional basketball.<sup>190</sup> Conversely, the NBA would not endure any substantive harm from allowing Haywood to enter the league.<sup>191</sup> The court found that the boycott victimized excluded players by not allowing them to enter the desired market and that the ban injured competition within that market since the excluded players could not sell their services.<sup>192</sup> Simply put, by imposing an arbitrary age restriction, the leagues are not allowing the *best* players to play.

Eighteen-year-old men should be allowed to compete for positions within the market. The best example of this is LeBron James.<sup>193</sup> He entered the NBA right out of high school at the age of eighteen, and he was arguably the best player in the NBA the second he stepped on the court. Players out of high school help, rather than hurt, the NBA. The NBA players who make the jump from high school are among the most popular players in the league. Not allowing them to play hurts the market of professional basketball. Professional sports leagues rely on the popularity of their players. Perhaps the best measurement of an individual player’s popularity is by analyzing jersey sales. The most popular jerseys in 2008-2009 were: (1) Kobe Bryant, (2) Kevin Garnett, and (3) LeBron James.<sup>194</sup> The three highest-selling jerseys in the entire NBA were those of players who came straight out of high school.<sup>195</sup> Perhaps even more telling is the all-time jersey sales list. Three of the top six selling NBA jerseys of all time are those of high school players: Kobe Bryant, LeBron James and Tracy McGrady.<sup>196</sup>

Players who go straight to the NBA from high school also tend to provide the league with increased publicity. Players like Kevin Garnett, Kobe Bryant, LeBron James and Sebastian Telfair have all graced the cover of Sports Illustrated while still in high school.<sup>197</sup> The interest these players create greatly boosts jersey sales and publicity. Other positive effects that are likely to follow are increased ticket sales, television ratings, and competition as a whole. While some may argue that the NBA benefits from having well-known college players drafted instead of relatively little known high school players, the truth is that the college players do not create anywhere near the buzz the high school

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<sup>188</sup> *Clarett II*, 369 F.3d 124 (2d Cir. 2004).

<sup>189</sup> *Haywood*, 401 U.S. at 1206.

<sup>190</sup> *The Denver Rockets v. All-Pro Mgmt.*, 325 F. Supp. 1049 (C.D. Cal. 1971).

<sup>191</sup> *Id.* at 1058.

<sup>192</sup> *Id.* at 1061.

<sup>193</sup> Nicknamed “King James,” LeBron was named Mr. Ohio Basketball three times in high school; at eighteen he was selected with the number one overall pick by the Cleveland Cavaliers; James signed a \$90 million Nike shoe contract before ever playing a game in the NBA; James was named NBA Rookie of the Year in 2003-2004 and NBA Most Valuable Player twice, in 2008-2009 and 2009-2010; he has been an All-Star every season since 2005.

<sup>194</sup> Ryne Nelson, *Kobe Tops NBA Jersey Sales, Again*, SLAM ONLINE (Jan. 28, 2009, 3:51 PM.), <http://www.slamonline.com/online/nba/2009/01/kobe-tops-nba-jersey-sales-again/> (Prep-to-pro players Derrick Rose and Dwight Howard were also in the top twelve).

<sup>195</sup> John Kelly, *Top Selling NBA Jerseys 2008-2009 Season*, ASSOC. CONTENT (Mar. 4, 2009), [http://www.associatedcontent.com/article/1532033/top\\_selling\\_nba\\_jerseys\\_20082009\\_season.html?cat=14](http://www.associatedcontent.com/article/1532033/top_selling_nba_jerseys_20082009_season.html?cat=14).

<sup>196</sup> Kobe Bryant’s jersey sales were second all-time behind Michael Jordan, LeBron James’ jersey was already at number four after being on sale for just five years. Darren Rovell, *NBA 10 year Jersey Sales List – Guess Who’s Number One!*, CNBC.COM (Mar. 26, 2008, 11:14 AM), <http://www.cnbc.com/id/23810523>.

<sup>197</sup> *SI Classic Covers Collection*, SICOVERS.COM, <http://www.sicovers.com/> (last visited Oct. 20, 2010).

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players do. Fans want to see what these high school kids can do in the NBA, and they will watch them play, even if just to see if they will fail. Consider the anticipation of LeBron James' first NBA game in 2003 versus that of college star Tyler Hansbrough's<sup>198</sup> in 2009. LeBron James made his home debut before a sellout crowd at Gund Arena.<sup>199</sup> In 2009, Hansbrough's Pacers had the seventh worst home attendance record and failed to sell out a single game.<sup>200</sup>

### *D. League Justifications and Pro-Competitive Benefits*

The leagues offer multiple justifications and allege several pro-competitive benefits of the age-based eligibility rules. All of these can be classified under one of the "3 P's": (1) Paternalistic, (2) Pecuniary, or (3) Product. Most of the leagues' justifications fall into the paternalism or pecuniary categories, while the pro-competitive benefits relate more to the product.

#### *1. Paternalistic Justifications*

One of the reasons offered by NBA commissioner David Stern for the necessity of the age limit is that it keeps unscrupulous agents and runners from misleading players into false hope of NBA stardom and fortune.<sup>201</sup> Marty Blake, the Director of Scouting Services for the NBA, stated that "the kids are getting bad advice in some cases. Some just can't play."<sup>202</sup> However, if greedy agents were tricking vulnerable high school athletes who did not possess NBA-caliber talent into entering the NBA, there would have been a larger number of players making the jump. Further, more high school graduates who did declare would not have been selected in the draft, and more would flop at the professional level. Research done in 2002 showed that, of high school players entering the NBA Draft, sixty-six percent were drafted in the first round, while seventeen percent were selected in the second round, and only seventeen percent were not drafted.<sup>203</sup> These statistics suggest that, contrary to David Stern and Marty Blake's beliefs, high school players entering the NBA Draft are typically not given bad advice. Furthermore, the greedy agent theory does not succeed because NBA agents simply do not make much money off rookie contracts. The standard commission an agent would earn on the player's rookie contract is, at most, a mere four percent.<sup>204</sup> Due to the NBA rookie slotting system, the agent is unable to do much negotiating. The real money for NBA

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<sup>198</sup> Tyler Hansbrough played four years at the University of North Carolina where he swept all major individual honors in men's college basketball, winning six national player of the year awards; he was drafted by the Indiana Pacers with the thirteenth pick in the 2009 NBA Draft.

<sup>199</sup> ROGER GORDON, *TALES FROM THE CLEVELAND CAVALIERS: THE ROOKIE SEASON OF LEBRON JAMES* xi (Sports Publishing LLC, 2004).

<sup>200</sup> See *2009-2010 NBA Attendance Report*, ESPN.COM, [http://sports.espn.go.com/nba/attendance?sort=home\\_avg&year=2010&seasonType=2](http://sports.espn.go.com/nba/attendance?sort=home_avg&year=2010&seasonType=2) (last visited Oct. 20, 2010).

<sup>201</sup> Desmond Conner, *Bynum Has a Test Left*, HARTFORD COURANT, May 29, 2005, at E5.

<sup>202</sup> Ethan J. Skolnick, *Ready or Not, Here they Come*, PALM BEACH POST, June 27, 1999, at 14C.

<sup>203</sup> McCann *supra* note 96, at 159.

<sup>204</sup> Bob Kravitz, *Minimum Age Requirements Don't Add Up*, INDIANAPOLIS STAR, June 22, 2001, at 1D.

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agents comes with the second contract.<sup>205</sup> Therefore, if the high school player is not good enough to excel in the NBA and earn a lucrative second contract, the agent would be wasting both time and money.

A second justification for the age rule offered by Stern is that time in college can help serve the players by advancing life skills as well as promoting the obtainment of a college degree.<sup>206</sup> This argument is not persuasive for the reasons explained in detail above, including: players not wanting to go to college, potential NCAA rules violations, lack of interest in academics, lack of ability to succeed in the classroom, lack of time to commit to studies, leaving school prior to earning a degree, and the ability to go back to college after a professional career. The rule does not promote obtainment of a college degree, but rather it promotes spending one year in college. Simply put, a player does not need a college degree to dunk a basketball.

Perhaps the most paternalistic of all the NBA's justifications for the age rule is the desire to protect the mental, emotional and physical well-being of young student-athletes.<sup>207</sup> This justification is not valid because the student-athletes who made the jump to the NBA prior to the imposition of the current rule and failed did so because of their talent level, not because of their physical frailty or emotional instability. If, on the other hand, the concern is with off-the-court issues, then this justification still falls short. No NBA player who came straight from high school has been the subject of a major negative media headline. NBA athletes who have been involved in such turmoil include Allen Iverson, who spent two seasons at Georgetown University;<sup>208</sup> Latrell Sprewell, a University of Alabama graduate;<sup>209</sup> and Ron Artest, who played three seasons at St. Johns University.<sup>210</sup>

According to a 2005 study, of the eighty-four total NBA players who had ever been arrested, forty-eight had gone to college for four years, while only four of those arrests were of players who had not gone to college at all.<sup>211</sup> In other words, over forty-one percent of NBA players went to college for four years, and over fifty-seven percent

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<sup>205</sup> Darren Heitner, *Still Want To Be An NBA Agent?*, SPORTS AGENT BLOG (July 7, 2009), <http://www.sportsagentblog.com/2009/07/07/still-want-to-be-an-nba-agent/> ("The first time [agents] will make [a substantial] commission on a team deal will be in the second contract, which will be very lucrative for those rookies who outperform the competition.").

<sup>206</sup> Marc J. Spears, *NBA Leaders: Q&A NBA*, DENVER POST, Feb. 11, 2005, at D1.

<sup>207</sup> McCann, *supra* note 96, at 178-82.

<sup>208</sup> In 1997, Iverson pleaded no contest to a gun charge after police in Richmond stopped a car in which he was a passenger and found a gun belonging to Iverson and two marijuana cigarettes; In 2002, Iverson faced fourteen felony and misdemeanor offenses for forcing his way into a West Philadelphia apartment and confronting two men, threatening them with a handgun. *Allen Iverson surrenders Tuesday*, CBS SPORTS (July 16, 2002, 1:37 AM), <http://www.cbc.ca/sports/story/2002/07/11/iverson020711.html>.

<sup>209</sup> Mike Puma, *Sprewell's Image Remains in a Chokehold*, ESPN.COM (Aug. 21, 2003), [http://espn.go.com/classic/biography/s/Sprewell\\_Latrell.html](http://espn.go.com/classic/biography/s/Sprewell_Latrell.html) ("During a Golden State Warriors practice in 1997, Sprewell snapped, choking P.J. Carlesimo before returning about 20 minutes later to continue the assault.").

<sup>210</sup> Artest ran into the stands and exchanged punches with fans; he was suspended thirty games for his actions. Nick Fortuna, *Pacers' Ron Artest Suspended 30 Games for Fight*, BLOOMBERG.COM (Nov. 21, 2004, 3:00 PM), <http://www.bloomberg.com/apps/news?pid=10000103&sid=ayGTq68qWykY&refer=us>.

<sup>211</sup> See Michael McCann, *NBA Players That Get In Trouble With the Law: Do Age and Education Level Matter?*, SPORTS LAW BLOG (July, 20, 2005), [http://sports-law.blogspot.com/2005/07/nba-players-that-get-in-trouble-with\\_20.html](http://sports-law.blogspot.com/2005/07/nba-players-that-get-in-trouble-with_20.html).



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of those players were arrested.<sup>212</sup> Meanwhile, just over eight percent did not go to college, and less than five percent of those players were arrested.<sup>213</sup> This study helps prove that players who enter the NBA out of high school are just as prepared mentally, emotionally and physically to endure the rigors that come with competing at such a high level as those players who spend four years in college.

The NFL's paternalistic justifications include preventing injuries to young players who may not be physically or mentally ready for the level of play in the NFL, protecting young adolescents trying to reach the NFL from overtraining and using performance enhancing drugs, and preventing steroid use by young athletes.<sup>214</sup> In discussing the NFL's age rule, one author explains, "The three-year rule promotes competition and future players' preparation for entry in the most physically rigorous and financially successful professional sports leagues in the United States."<sup>215</sup> The NFL certainly has a better argument here than the NBA, based solely on the physicality of the game. However, while these may be laudable intentions, much like the NBA's paternalistic justifications, they do not suffice as "pro-competitive."<sup>216</sup> They do not show that "the challenged restraint enhances competition."<sup>217</sup>

### *2. Pecuniary Justifications*

The NBA has also put forth a few financial justifications for its age restrictions. These include keeping NBA coaches and general managers from having to travel to high school gyms, keeping the costs of scouting down, and reducing the teams' risks involved in drafting young players.<sup>218</sup> As Professor Rick Karcher,<sup>219</sup> an expert in the field of sports law, put it: "Even though it's only a one year difference, it's so much better for the clubs because they don't have to spend the resources scouting high school games, and they get to see the kids in a much more competitive (division one) environment, so it eliminates a lot of the risk that's involved in scouting (and) assessing high school talent."<sup>220</sup> Similarly, Donnie Walsh, the President of Basketball Operations for the New York Knicks, believes that drafting eighteen-year-olds, rather than nineteen-year-olds, is too unpredictable, and therefore unfairly burdens NBA managers, coaches and scouts. Walsh stated, "If a general manager is going to get judged – and judged harshly – for missing the next Kobe, then he's going to have to (scout) eighth grade. In fact, he'd get fired if he weren't and missed a player."<sup>221</sup>

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<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Clarett I*, 306 F. Supp. 2d 379, 408 (S.D.N.Y. 2004).

<sup>215</sup> Cf. Peter Altman, *Stay Out for Three Years After High School or Play in Canada – And for Good Reason, an Antitrust Look at Clarett v. National Football League*, 70 BROOK. L. REV. 569, 600-04 (2004).

<sup>216</sup> *Clarett I*, 306 F. Supp. 2d at 408 ("While these may be reasonable concerns, none are reasonable justifications under the antitrust laws.").

<sup>217</sup> *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 104 (1984).

<sup>218</sup> McCann, *supra* note 96, at 224.

<sup>219</sup> Director, Florida Coastal School of Law Center for Law and Sports.

<sup>220</sup> Michael McCann, *NBA Draft Age Ban Discussion*, SPORTS LAW BLOG (June 25, 2005), <http://sports-law.blog.spot.com/2005/06/nba-draft-age-ban-discussion.html>.

<sup>221</sup> Sam Farmer, *Early Risers*, LA TIMES, June 26, 2001, § Sports, at 1.

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Much like the NBA's beliefs of evil agents and having too many unsuccessful high school players, this justification does not withstand factual scrutiny. While it is true that NBA executives are fired for misjudging talent, it happens at every level of play, whether it is with high school, college, or professional players.<sup>222</sup> Even with the current ban in place, some teams are successful while others are not, and the executives of the unsuccessful teams still get fired.<sup>223</sup> Therefore, prevention of team executives having to scout high school athletes does not stand as a valid justification. Paralleling this is the argument that the NBA teams will be able to prevent having to spend valuable scouting resources on high school players. While limiting the talent pool would surely decrease overall scouting costs, this is still a weak argument. NBA executives already spend time traveling the nation, and even the world, scouting potential draftees.<sup>224</sup> It is hard to believe that sending a scout to a handful of local high school gyms would be more costly than sending multiple scouts overseas for weeks at a time to watch hundreds of international players. Very few high school players have the talent to play at the NBA level and actually declare for the NBA Draft, while there are thousands of college and foreign players.<sup>225</sup> If NBA scouts could draft high school players, there would be less of a need to scout foreign talent. Even if banning players due to their age actually cut resources, the district court in *Clarett* correctly pointed out that a league's "desire to keep its costs down is not a legitimate pro-competitive justification."<sup>226</sup>

Furthermore, even with the current age rule in place, while NBA scouts and general managers may not be actively scouting exceptional high school players like they once did, they still follow them.<sup>227</sup> Nineteen-year-old players are drafted on potential just as much as eighteen-year-old players are. Every year there are standout college basketball players drafted who are unsuccessful in making the transition to the NBA game, including college seniors such as Michael Olowokandi,<sup>228</sup> Eric Montross<sup>229</sup> and Bryant

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<sup>222</sup> McCann, *supra* note 96, at 183.

<sup>223</sup> In November of 2009 alone, New Orleans Hornets head coach Byron Scott and New Jersey Nets head coach Lawrence Frank were fired; Scott had been named NBA Coach of the Year in 2008; Frank was the longest-tenured coach in the NBA's Eastern Conference and had the most wins for a head coach in Nets history. Marc Stein, *Nets fire Frank amid trip, 0-16 start*, ESPN.COM (Nov. 29, 2009), <http://sports.espn.go.com/nba/news/story?id=4697789>.

<sup>224</sup> Hamza Hendawi, *NBA scouts scour Europe*, CBC SPORTS (Sept. 3, 2001), <http://www.cbc.ca/sports/story/2001/09/03/eurobasketball010903.html>.

<sup>225</sup> McCann, *supra* note 96, at 115 ("[H]igh school players who enter the NBA Draft are a small, self-selected group, comprised almost entirely of exceptionally talented players.").

<sup>226</sup> *Clarett I*, 306 F. Supp. 2d 379, 409 (S.D.N.Y. 2004); see *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1022 (10th Cir. 1998) ("cost-cutting by itself is not a valid pro-competitive justification.").

<sup>227</sup> Before the NBA instituted its age rule, scouts had to concern themselves with high school players who had enough talent to make the jump directly to the NBA; now that the rule is in place, they still have to be acutely aware of those high school players who are likely going to attend college for only one year before declaring themselves eligible for the NBA Draft.

<sup>228</sup> After his senior year, Olowokandi was drafted with the first overall pick of the 1998 NBA Draft by the Los Angeles Clippers; Olowokandi is considered by many to be one of the biggest busts in NBA history because he was selected ahead of star players such as Vince Carter, Antawn Jamison, Dirk Nowitzki, Paul Pierce, Mike Bibby, and Rashard Lewis, and because of his injuries; In 2005, Sports Illustrated ranked him third on a list of NBA draft busts. See *NBA Draft Busts*, SI.COM, [http://sportsillustrated.cnn.com/multimedia/photo\\_gallery/2005/06/24/gallery.nbabusts/content.18.html](http://sportsillustrated.cnn.com/multimedia/photo_gallery/2005/06/24/gallery.nbabusts/content.18.html) (last visited Oct. 25, 2010).

<sup>229</sup> At the University of North Carolina, Montross helped the Tarheels win the 1993 National Championship; he was named an All-American in both his junior and senior years; Montross was selected

Reeves.<sup>230</sup> The NBA teams also have pre-draft workouts, camps, and combines at their disposal. These give the teams an opportunity to watch, scout, analyze, and simply get to know potential draftees up close and in person. At the weeklong NBA Pre-Draft Combine, players undergo medical testing, skills workouts, anthropometric testing, strength and agility testing, and individual interviews.<sup>231</sup> This combine is in addition to the individual team workouts. Perhaps most importantly, the combine and workouts come at little to no costs to the teams, since the individual players, or their families, must fund the travel and related expenses.<sup>232</sup> These same points help defeat the NBA's "risk" argument. The statistics prove that no matter how much college education players have, or how old they are, there is just as good of a chance that they will not be successful NBA players, both on and off the court.<sup>233</sup> Players such as Kevin Garnett, Kobe Bryant, Amare Stoudemire, Dwight Howard and LeBron James have helped prove, beyond any doubt, that high school players can both compete and excel at the NBA level. Even if the facts proving this lack of risk were ignored, and teams believed that high school players actually did present an increased risk, there would still be NBA teams willing to take that calculated risk and draft a high school graduate, as many teams have done in the past.

Similar to the NBA's justification is the desire of the NFL to keep its scouting costs down. However, as with the NBA's argument, "cost cutting by itself is not a valid pro-competitive justification."<sup>234</sup>

### 3. *Product Justifications*

Concerns for the welfare of players and adolescents alone do not suffice as pro-competitive justifications.<sup>235</sup> In order to suffice under a rule of reason analysis, the proffered justifications must show that, when balanced, "the challenged restraint enhances competition."<sup>236</sup> Therefore, the NBA attempts to establish three additional pro-competitive justifications that relate to the "product" of professional basketball: (1) that high school graduates dilute the "product" of NBA basketball; (2) that barring these

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with the ninth overall pick in the 1994 NBA Draft; he went on to play for six different teams in less than ten years in the NBA; Montross retired having averaged less than five points per game.

<sup>230</sup> After an outstanding collegiate career at Oklahoma State University, where Reeves averaged 21.5 points per game as a senior and led OSU to the 1995 Final Four, Reeves became the Grizzlies' first-ever draft choice, selected sixth overall in the 1995 NBA Draft; weight-control problems and injuries led to his retirement.

<sup>231</sup> The NBA Draft Combine consists of medical testing and examinations, light skills workouts (shooting, ball-handling, position-specific drills), anthropometric testing (height, weight, wingspan) strength & agility testing (3/4 court sprint, bench press, vertical jump, and pro lane agility drill), and league organized player interviews.

<sup>232</sup> *NBA Draft and Agents, Key information for student-athletes to retain their eligibility*, OHIOSTATEBUCKEYES.COM, [http://www.ohiostatebuckeyes.com/fls/17300/pdf/compliance/agentnba.pdf?DB\\_OEM\\_ID=17300](http://www.ohiostatebuckeyes.com/fls/17300/pdf/compliance/agentnba.pdf?DB_OEM_ID=17300) (last visited Oct. 30, 2010).

<sup>233</sup> See McCann, *supra* note 211.

<sup>234</sup> *Clarett I*, 306 F. Supp. 2d 379, 409 (S.D.N.Y. 2004).

<sup>235</sup> *Id.* at 408. ("While these may be reasonable *concerns*, none are reasonable *justifications* under the antitrust laws.") (emphasis in the original).

<sup>236</sup> *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 104 (1984).

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student-athletes from competition promotes a positive league “brand;” and (3) that the age rule enhances college basketball.<sup>237</sup>

Under a rule of reason analysis, none of these vague pro-competitive justifications advanced by the NBA would suffice to outweigh the anticompetitive effects. Only factors that affect economic competition may be considered in determining the legality of a restrictive practice under antitrust laws.<sup>238</sup> The statistics illustrate that high school players do not “dilute” the quality of the NBA product.<sup>239</sup> If anything, they enhance it. The number of talented players in the NBA who successfully made the jump from high school is telling. The most popular teams are led by the most popular players, almost all of who did not attend a single year of college, and who would not be permitted to enter the NBA under the current rule. Ticket sales, merchandise sales and television ratings all increase due to the effect these players have on the fans. In fact, the NBA experienced notable financial growth during the time period in which the most high school players were entering the league straight out of high school.<sup>240</sup> Fans want to watch the best of the best, and not allowing the best athletes to compete harms the market.

Another product dilution argument is that, because NBA teams have limited roster space, it may hurt competition to have teams use that roster space on younger players who are currently unable to compete at the necessary level, but whose teams are hoping will develop into quality players. The argument follows that if a team lacks the talent to win games, it might not be able to attract fans and make money, which could lead to a team folding or relocating, thus harming competition.<sup>241</sup> However, teams are better off having younger potential stars on their bench rather than older aging ones. Younger players, especially those with enough talent to be drafted out of high school, will likely become stars. In fact, by their third year in the NBA, most do.<sup>242</sup> Older veterans, on the other hand, will never return to their “prime.” It is very rare that an older player gets any better as they age. An NBA player enters his “prime” at about the age of twenty-seven,<sup>243</sup> while the average age of an NBA player is just under twenty-seven years old.<sup>244</sup> Currently, the oldest player on an active NBA roster is thirty-eight, and only four players are thirty-seven years old.<sup>245</sup> Clearly, professional basketball favors the young over the old.

The argument that, by allowing younger players on a roster, teams might suffer more losses, be harmed financially, and lead to the injuring of competition as a whole is even further flawed when you consider the fact that the NBA actually promotes this. If a

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<sup>237</sup> McCann, *supra* note 96, at 116.

<sup>238</sup> National Society of Professional Engineers v. United States, 435 U.S. 679, 690 (1978).

<sup>239</sup> See McCann, *supra* note 96, at 189.

<sup>240</sup> Chad Ford, *Contract Length a Deal Breaker?*, ESPN.COM (May 20, 2005), [http://insider.espn.go.com/nba/columns/story?columnist=ford\\_chad&id=2062067&num=0](http://insider.espn.go.com/nba/columns/story?columnist=ford_chad&id=2062067&num=0).

<sup>241</sup> Applegate, *The NBA Gets a College Education: An Antitrust and Labor Law Analysis of the NBA's Minimum Age Limit*, *supra* note 96, at 846.

<sup>242</sup> McCann, *supra* note 96, at 337.

<sup>243</sup> Lacy C. Banks, *Armstrong May Be First Pick in Draft*, CHI. SUN TIMES, June 22, 1995, at 128.

<sup>244</sup> As of November 21, 2007, the average age of an NBA player was 26.89. *2006-07 Player Survey: Age*, NBA.COM, [http://www.nba.com/news/survey\\_age\\_2007.html](http://www.nba.com/news/survey_age_2007.html) (last visited Oct. 25, 2010).

<sup>245</sup> As of November 22, 2009, Lindsey Hunter, born December 3, 1970, was the oldest active player in the NBA; Grant Hill, Kurt Thomas, Shaquille O'Neal and Brent Barry were the only active NBA players who were thirty-seven years old. See *Top Ten Older Players in the NBA*, SPORTIGE.COM, <http://sportige.com/top-10-oldest-players-nba-2009-2010/> (last visited Dec. 3, 2010).

team is struggling to win games, the typical solution is to get better by drafting younger players, not by trading away young talent for older veterans. The NBA Draft Lottery is set up to allow those teams who have the worst records to have the best chance at acquiring young talent in the draft by means of having the highest picks.<sup>246</sup> Professional sports teams, particularly in the NBA, are more focused on the future and the potential of players than they are on a player's history and past accomplishments. Lastly, if a team wanted to add a veteran player, it would likely have to spend more money in free agency, or give up more in a trade, than if the team drafted a young player instead, due to the NBA's rookie salary slotting system.<sup>247</sup> For example, the Cleveland Cavaliers paid LeBron James, arguably the best player in the NBA, a total of \$12.96 million for his first three seasons in the league.<sup>248</sup> A former Cleveland teammate and current Miami teammate, Zydrunas Ilgauskas, an aging center and average NBA player, made \$11.54 million per year, almost three times as much as James.<sup>249</sup> One would be hard pressed to find an NBA team who would not take three rookie LeBrons over one Ilgauskas.

The NBA's most valid argument is that of protecting its product image, also known as "branding." The reasoning behind this alleged pro-competitive justification is this: by not allowing high school graduates to enter the NBA, and essentially forcing them to attend college, the league is promoting the athletes' obtainment of a higher education. However, as noted above, the best players simply leave college after the one year required under the rule. Even if they do not leave after one season, most star college basketball players will leave for the NBA prior to graduating.<sup>250</sup> According to the most recent graduation rates published by the NCAA, twenty-eight percent of the 312 sports teams that graduated fewer than half of their athletes were men's basketball teams.<sup>251</sup> Of those teams, twenty-three competed in the sixty-five team NCAA tournament, including two of the tournaments' four #1 seeds, the University of Connecticut (twenty-seven percent) and the University of Louisville (thirty-eight percent).<sup>252</sup>

Bob Knight, who has more all-time wins than any other Men's Division One College Basketball coach, calls the NBA's rule "the worst thing that's happened to college basketball."<sup>253</sup> Knight points out that "now you can have a kid come to school for a year and play basketball and he doesn't even have to go to class . . . he would not have to attend a single class the second semester to play through the whole second semester of

<sup>246</sup> The fourteen non-playoff teams participate in the Draft Lottery; it is weighted so that the teams with the worst records have the best chance to obtain a higher draft pick; the lottery process determines the first three picks of the draft, while the rest of the first-round draft is done in reverse order of the teams' win-loss record from the previous year.

<sup>247</sup> See 2009-2010 NBA rookie scale, *supra* note 123.

<sup>248</sup> Darren Rovell, *Matching the hype*, ESPN.COM (Apr. 16, 2004), <http://sports.espn.go.com/nba/news/story?id=1782852> ("Of course, one of the biggest beneficiaries of the LeBron economy were the Cavaliers, who thanks to the NBA's rookie salary scale are paying James a combined \$12.96 million for his first three seasons.")

<sup>249</sup> Chris Tomasson, *Ilgauskas May Retire After This Season*, FANHOUSE (Oct. 7, 2009), <http://nba.fanhouse.com/2009/10/07/ilgauskas-may-retire-after-this-season/>.

<sup>250</sup> McCann, *supra* note 96, at 329-30.

<sup>251</sup> Libby Sander, *Athletes' Graduation Rates Hit Another High, NCAA Says*, THE CHRONI. OF HIGHER EDUC. (Nov. 18, 2009), <http://chronicle.com/article/Athletes-Graduation-Rates-Hit/49202/>.

<sup>252</sup> *Id.*

<sup>253</sup> Associated Press, *Knight rips NBA's minimum-age rule*, NBC SPORTS (Feb. 19, 2007), <http://nbcsports.msnbc.com/id/17231772/>.

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basketball.”<sup>254</sup> Obviously, if the NBA really had an interest in promoting a college education, the rule would require a player to be four years out of high school, or even to have earned a college degree

### *E. The True Motivation Behind the Leagues’ Rules*

The true motivation behind the age rule is likely the use of the NCAA as a free farm system. The NBA does not have a minor league system like Major League Baseball<sup>255</sup> because the NCAA acts as the NBA’s minor league. Best of all for the NBA, this farm system comes at no cost to the league. The NBA tries to hide this under the guise of “enhancing college basketball.”<sup>256</sup> The NFL made a similar argument in *Clarett* when it argued that, by excluding the most talented college players from the NFL, it was sustaining “the NCAA’s ability to compete in the entertainment market.”<sup>257</sup> This justification did not succeed because it was simply sacrificing competition in one market, the NFL, for the sake of increased competition in another market, the NCAA.<sup>258</sup> The current NBA age restriction merely allows the league’s teams to watch a player and see how he competes at the college level and develops over his freshman season. This is to the detriment of the player who is not eligible to make a living and is essentially forced to work for nothing, all while risking injury and a drop in draft stock.

The only possible pro-competitive justification the NFL can put forth is that allowing younger athletes to enter their league would result in a dilution of the quality of play. However, like the NBA, the real reason for the age-based restriction is to continue using the NCAA as a free minor league system.<sup>259</sup> The NFL does so by using college football as an “efficient and free farm system for the NFL by preventing players from selling their services to the NFL until they have completed three college seasons.”<sup>260</sup> Age requirements in professional sports do not benefit young athletes, nor do they improve the professional sports leagues. They exist solely so that three very powerful and very profitable athletic organizations (the NBA, the NFL and the NCAA) can turn a

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<sup>254</sup> *Id.*

<sup>255</sup> See generally The Official Site of Minor League Baseball, MILB.COM, <http://web.minorleaguebaseball.com/index.jsp> (last visited Oct. 24, 2010).

<sup>256</sup> Chris Mannix, *Age Before Beauty: Union Stance Against NBA Age Limit Misses Benefits of Time, Maturity*, SI.COM (Dec. 1, 2004), [http://sportsillustrated.cnn.com/2004/writers/chris\\_mannix/12/01/age.limit/index.html](http://sportsillustrated.cnn.com/2004/writers/chris_mannix/12/01/age.limit/index.html) (arguing that an NBA age limit would make the college game better because college fans would be exposed to top prospects, and these top prospects would have the chance to develop their talent against a lower level of competition).

<sup>257</sup> *Clarett I*, 306 F. Supp. 2d 379, 409 (S.D.N.Y. 2004).

<sup>258</sup> *Id.* at 408-09 (“the League may not justify the anticompetitive effects of a policy by arguing that it has precompetitive effects in a different market) (original emphasis); see also *United States v. Topco Assoc., Inc.*, 405 U.S. 596, 610 (1972).

<sup>259</sup> Darrel Trimble, *NFL’s arguments against Clarett is weak*, ESPN.COM (Sept. 25, 2003), <http://insider.espn.go.com/insider/story?id=1623318> (suggesting that Clarett was more than ready for the NFL, pointing out that the rule has nothing to do with age and everything to do with college experience).

<sup>260</sup> Complaint ¶ 17, *Clarett I*, 306 F. Supp. 2d 379 (S.D.N.Y. 2004) (No. 03-CV-7441), available at <http://news.findlaw.com/hdocs/docs/nfl/claretnfl92303cmp.pdf>.

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profit, and do so at the expense of the athletes, the very individuals the NCAA was established to protect.<sup>261</sup>

### *F. The NBA vs. the NFL*

While many of the leagues' arguments are the same or very similar, the major difference between the NBA's and the NFL's is that the NFL has more paternalistic justifications due to a higher risk of serious bodily injury. A plaintiff seeking to challenge the age-based eligibility rules of the leagues would thus likely have a much better chance succeeding against the NBA than the NFL. While the three-year rule imposed by the NFL may cause more irreparable harm, the difference is that we have seen many high school athletes make the jump from high school directly to the NBA and have long, successful careers. From Moses Malone to Dwight Howard, there is a long history of student-athletes who have proven that they can compete at a high level in the NBA. However, this has not been the case in the NFL. For example, when Clarett presented his antitrust case for entry into the NFL, he was arguing a hypothetical. On the other hand, when Haywood challenged the NBA's four-year rule, he was considered a "Super Star."<sup>262</sup> Not only had he played on the U.S. Olympic Basketball Team, leading it to a gold medal while being named the outstanding player in the Olympic basketball games, but he also received Rookie of the Year and Most Valuable Player honors after his one season in the ABA.<sup>263</sup> This made Haywood a much more sympathetic plaintiff and provided additional justification for finding the NBA's four-year rule in place at the time to be in violation of antitrust laws. While it is unlikely that a basketball player competing in a professional league other than the NBA will bring such a suit, the difference between Haywood's and Clarett's situations is analogous to the difference between eighteen-year-old athletes succeeding in the NBA as opposed to in the NFL. Simply put, if a high school graduate were to bring an antitrust claim against the NBA, and the non-statutory labor exemption did not apply, a court would be more likely to find success than if a similar suit were brought against the NFL, such as *Clarett*.<sup>264</sup>

However, some newfound potential for a claim against the NFL has arisen from the success of Amobi Okoye.<sup>265</sup> Okoye entered the 2007 NFL Draft and was selected tenth overall by the Houston Texans.<sup>266</sup> At the time, he was only nineteen years old.<sup>267</sup> He made the transition to the NFL successfully. In just the first month of his rookie season, Okoye became the youngest player to ever be named Defensive Rookie of the Month.<sup>268</sup> Admittedly, Okoye did play four years at and graduate from the University of Louisville

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<sup>261</sup> Greg Bianchi, *Age Requirement in Professional Sport*, THE SPORT JOURNAL, <http://www.thesportjournal.org/article/age-requirement-professional-sport> (last visited Oct. 29, 2010).

<sup>262</sup> *The Denver Rockets v. All-Pro Mgmt.*, 325 F. Supp. 1049, 1052 (C.D. Cal. 1971).

<sup>263</sup> *Id.*

<sup>264</sup> See *Clarett II*, 369 F.3d 124, 124 (2d Cir. 2004).

<sup>265</sup> Okoye tested into ninth grade at twelve years old; at the age of fifteen, he enrolled at the University of Louisville, even though he had been accepted to Harvard University.

<sup>266</sup> Len Pasquarelli, *No. 1 pick Okoye agrees on deal with Texans*, ESPN.COM (July 27, 2007), <http://sports.espn.go.com/nfl/news/story?id=2951088>.

<sup>267</sup> *Id.*

<sup>268</sup> Jim Corbett, *Nineteen-year-old Okoye ready to be NFL's youngest player*, USA TODAY, Feb. 24, 2007, available at [http://www.usatoday.com/sports/football/draft/2007-02-24-amobi-okoye\\_x.htm](http://www.usatoday.com/sports/football/draft/2007-02-24-amobi-okoye_x.htm).

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prior to being drafted, which is why he was eligible at just nineteen.<sup>269</sup> However, he shows that age is just one of many factors that can determine a player's readiness for the NFL. As one of the NFL's own affiants in *Clarett* conceded, "The timeframe for a player's physical and psychological maturation varies from individual to individual."<sup>270</sup> Surely, Okoye is not the only nineteen-year-old on the planet with such a timeframe.

### *G. A Less Restrictive Alternative*

Less restrictive alternatives to the current rule that are less harmful to competition do exist. Both leagues should allow players to enter the draft when they are adults, at the age of eighteen. The best available alternative is simply making a case-by-case determination of each athlete who wishes to enter the leagues. Teams do not want to waste money on players who will not cut it in their respective league, no matter what their age upon entry. Potential draft picks already undergo extensive physical and medical examinations, mental evaluations, and interviews to determine if, and when, a player should be drafted.<sup>271</sup> Teams employ scouts, doctors and psychologists to test these athletes and determine whether they will be able to compete at the professional level. These pre-draft processes should suffice to allow a team to make a determination on whether to draft a certain player, based on the individual team's determination of mental and physical readiness, and what amount of risk they are willing to tolerate. As Michael McCann,<sup>272</sup> an expert on the subject explained, "It does not make sense to conduct exhaustive pre-draft evaluations of prospective draft picks, and then impose an arbitrary, absolute rule that may exclude the optimal group of prospective draft picks."<sup>273</sup> The existence of a less restrictive alternative helps prove that there are no pro-competitive justifications for the draft rules, and therefore that they violate antitrust laws.<sup>274</sup>

### *H. The Future of the Leagues' Collective Bargaining Agreements*

Changes to the collective bargaining agreements of both the NFL and NBA are likely coming, as both are set to expire soon. In May 2008, NFL owners exercised their opt-out option, effectively shortening the term of the current CBA by two years. Therefore, the NFL's CBA will expire after the 2010 season, rather than 2012. The owners and the player's union have until March 2011 to agree on a new collective bargaining agreement. If no agreement is reached, the players will be locked out, and the NFL will suffer its first work stoppage since 1987. Similarly, the NBA's current CBA

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<sup>269</sup> Pasquarelli, *supra* note 266.

<sup>270</sup> *Clarett I*, 306 F. Supp. 2d at 410.

<sup>271</sup> Potential NFL draftees must complete the Wonderlic Exam, a twelve minute test which includes fifty common knowledge questions; during the NFL Combine players are put through a series of drills, tests and interviews with more than 600 NFL personnel including head coaches, general managers and scouts.

<sup>272</sup> Michael McCann is a nationally recognized expert in the fields of sports law and antitrust. He is an Associate Professor at Vermont Law School, is a Legal Analyst for Sports Illustrated, and was on Maurice Clarett's legal team.

<sup>273</sup> McCann & Rosen, *supra* note 4, at 751.

<sup>274</sup> The antitrust laws do not tolerate a policy that restrains trade – even if there is some pro-competitive benefit – when a policy that results in less prejudice to competition would be equally effective. *See Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc.*, 996 F.2d 537, 541 (2d Cir.1993).



will expire on July 1, 2011. The NBA has only locked out its players once, during the 1998-99 season, which reduced the number of regular season games to fifty.

Numerous issues need to be worked out between the owners and players of the NBA and NFL in order to reach acceptable collective bargaining agreements and avoid league lockouts. The main issue of any collective bargaining agreement is usually the same: money. NFL team owners are unsatisfied with the league's current revenue-sharing policy, under which the league gets forty percent of "total" revenue, while the players receive sixty percent.<sup>275</sup> The owners would like to decrease the amount the players receive to roughly forty-eight percent. The players are reluctant because the NFL has recently been experiencing its most profitable years ever. Meanwhile, the players want to force teams to "open their books." While the NFLPA knows what the total league revenue is, since that is what is used to calculate the salary cap, it is unknown how much of that revenue is expenditure and how much is operating profit.<sup>276</sup> Therefore, the NFLPA does not know what its share should actually be, and it must trust that the revenue is what the owners say it is. Other issues include the rookie pay scale, reimbursement for money earned before player misconduct that prevents them from playing, benefits for retired players, and increasing the number of regular season games. However, due to the recent overwhelming success of the NFL, it is highly unlikely that there will be a work stoppage.

The NBA's CBA negotiations, like the NFL's, will focus on revenue sharing. The league owners want to reduce the player salary costs by \$750-\$800 million, or nearly thirty-five percent.<sup>277</sup> Other major points of contention include imposing a "hard" salary cap, eliminating guaranteed contracts, reducing the maximum length and value of contracts, and getting rid of cap exceptions. The leagues' current age rules could change, or even be eliminated, during these negotiations. NBA commissioner David Stern would like to see the age rule increased from one year to two, or even three. On the other side of the table, Executive Director of the National Basketball Players Association, Billy Hunter, would like to see the age rule eliminated. According to Hunter, during the 2005 CBA negotiations, all of the material terms were agreed to, except the age rule. Stern was steadfast that the rule be included, and that there would be no deal without it. Hunter believes it was personal with Stern, in that Stern had made his desire for this rule public and levied so hard for it that he had to "save face" by making sure it was included. Today, Hunter claims that the owners "don't really care" about the age rule, and that the owners "want to be able to draft high school players." During the upcoming CBA negotiations, Hunter and the NBPA will push for a rule similar to that of professional

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<sup>275</sup> Jaime Aron, *NFL commissioner hopes a new collective bargaining agreement can be reached by Super Bowl*, NEWSER (Dec. 15, 2010), <http://www.newser.com/article/d9k4o6t00/nfl-commissioner-hopes-a-new-collective-bargaining-agreement-can-be-reached-by-super-bowl.html>; Jonathan Weiler, *In Coming NFL Labor War, Remember That Players Bear All the Risk*, HUFFINGTON POST, Oct. 26, 2010, available at [http://www.huffingtonpost.com/jonathan-weiler/in-coming-nfl-labor-war-r\\_b\\_772847.html](http://www.huffingtonpost.com/jonathan-weiler/in-coming-nfl-labor-war-r_b_772847.html).

<sup>276</sup> Weiler, *supra* note 275.

<sup>277</sup> Jeff Zillgitt, *NBA commish David Stern: League wants to reduce player salaries*, USA TODAY, [http://www.usatoday.com/sports/basketball/nba/2010-10-21-david-stern-player-salary-costs\\_N.htm](http://www.usatoday.com/sports/basketball/nba/2010-10-21-david-stern-player-salary-costs_N.htm) (last updated Oct. 22, 2010).

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baseball.<sup>278</sup> According to Hunter, NCAA representatives also want a similar rule implemented in basketball.<sup>279</sup>

If the owners want to avoid a strike, and if the NBPA pushes hard enough, the NBA's age rule could disappear as soon as July, 2011. However, unlike the NFL, the possibility of a work stoppage for the NBA is very likely.<sup>280</sup> The NBA wants a sustainable business model, which it currently lacks. While league revenue is good, expenses are an issue, and the biggest expense is players' salaries.

### V. CONCLUSION

Age-based draft eligibility rules in the NBA and NFL deprive high school players of the freedom to choose when, where, and for how much they will play their respective sports at the professional level. This unfair and anticompetitive behavior lacks sufficient justification. If high school players are not ready for the NBA, for example, then why does the NBA need a rule that prevents teams from drafting them? A player will get drafted and paid if he is good enough. The eligibility of a player should not be based on age or the amount of time passed since his high school graduation. Rather, eligibility should be based on a multitude of factors, including talent and the ability of others to identify that talent. The leagues have illegally barred entry of a certain class of players without offering proper justification for doing so. If not for this unlawful exclusion, individual teams would be able to compete for these young players, and the players would be able to compete for jobs. Age-based eligibility rules are clearly a concerted action that prevent entry into the leagues. The harms to the individual athletes and the anticompetitive effects on the market far outweigh the leagues' justifications and alleged pro-competitive benefits. Thus, assuming the non-statutory labor exemption does not apply, the leagues' age-based draft restrictions violate antitrust laws under a rule of reason analysis.

None of the other major professional sports leagues in the U.S., such as those governing baseball, tennis, hockey, golf and boxing, prohibit these young athletes from competing directly out of high school. Basketball and football should follow suit. As Dick Vitale, the famous college basketball announcer put it, "Would you deny someone like Tiger Woods, Alex Rodriguez or Venus and Serena Williams the chance to turn pro and earn a living before turning twenty? No, because we live in America, and the right to do what you desire is one of the great gifts we have in this country. It's all about freedom, man!"<sup>281</sup>

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<sup>278</sup> Major League Baseball's First-Year Player Draft allows team to select high school players if they graduated and have not yet attended college, four-year college players who have completed at least their junior season or are 21 years old, and junior college players. The Club retains rights to the selected player until the player enters or returns to a four-year college on a full-time basis.

<sup>279</sup> Sports Law Association Annual Conference, William "Billy" Hunter, May 22, 2010.

<sup>280</sup> Associated Press, *Billy Hunter: Lockout 'Highly Probable,'* ESPN.COM (Nov. 23, 2010), <http://sports.espn.go.com/nba/news/story?id=5840275>.

<sup>281</sup> Dick Vitale, *Don't Keep Best High Schoolers Out of NBA*, ESPN.COM (Apr. 26, 2005), [http://sports.espn.go.com/dickvitale/vcolumn050425\\_ageplan.html](http://sports.espn.go.com/dickvitale/vcolumn050425_ageplan.html).