

---

## NCAA's Name, Image, and Likeness Rules in the Wake of the NBA's G League: What it Means for Antitrust Protection

Nathaniel Hall  
*Notre Dame Law School*, [nhall7@nd.edu](mailto:nhall7@nd.edu)

Follow this and additional works at: <https://via.library.depaul.edu/jslcp>



Part of the [Entertainment, Arts, and Sports Law Commons](#)

---

### Recommended Citation

Nathaniel Hall, *NCAA's Name, Image, and Likeness Rules in the Wake of the NBA's G League: What it Means for Antitrust Protection*, 17 DePaul J. Sports L. & Contemp. Probs. (2021)  
Available at: <https://via.library.depaul.edu/jslcp/vol17/iss1/5>

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Journal of Sports Law by an authorized editor of Via Sapientiae. For more information, please contact [digitalservices@depaul.edu](mailto:digitalservices@depaul.edu).

## INTRODUCTION:

The current landscape of professional basketball has changed considerably over the last fifteen years, and nothing has been more contentious than the NBA's drafting rules. In fact, during the negotiations for the 2017-2024 NBA Collective Bargaining Agreement ("CBA"), the age restriction rule was a major discussion point for the two bargaining units.<sup>1</sup> Age eligibility restrictions have been topics collectively bargained for since 2005, where, until then, athletes only needed a high school diploma to play in the NBA.<sup>2</sup> This new rule which increased the draft eligibility floor to the age of nineteen, colloquially regarded as the "one-and-done" rule, has been the center of debate amongst sports analysts and academics since it was enacted.<sup>3</sup> Prior to 2005, the NBA had begun to see an influx of high school players forego college, favoring instead an immediate transition to professional basketball. Players such as LeBron James, Kobe Bryant, Kevin Garnett, and Dwight Howard quickly became household names with their instant success.<sup>4</sup>

Players like Kwame Brown, Sebastian Telfair, and Robert Swift, on the other hand, proved to be unproductive and had short-lived careers.<sup>5</sup> These draft "busts" were the athletes the NBA had in mind when it implemented Title X of the 2005 CBA, which required:

---

<sup>1</sup> Sam C. Ehrlich, *Clarrett's Shadow: How a 14-Year-Old Case Will Impact NBA Age Rule Bargaining*, 19 TEX. REV. ENT. & SPORTS L. 29, 31 (2009).

<sup>2</sup> Warren K. Zola, *Transitioning to the NBA: Advocating on Behalf of Student-Athletes for NBA & NCAA Rule Changes*, 3 HARV. J. SPORTS & ENT. L. 159, 171 (2011); Jack N.E. Pitts, Jr., Comment, *Why Wait?: An Antitrust Analysis of the National Football League and National Basketball Association's Draft Eligibility Rules*, 51 HOWARD L.J. 433, 435 (2008); Nitin Sharma, *Current Issues in Public Policy: An Antitrust and Public Policy Analysis of the NBA's Age/Education Policy: At Least One Road Leads to Rome*, 7 RUTGERS J.L. & PUB. POL'Y 481, 483 (2010) (discussing how the previous version of the NBA's CBA, which was implemented in 1999 "contained minimal restrictions on the eligibility of high school athletes for the NBA Draft" because "[i]n the 1999 version, the only restraint on eligibility was contained within Article X(5)(a), which granted eligibility 'to those amateur players who have either graduated from high school or who have received the equivalence of a high school diploma'").

<sup>3</sup> See generally Brian Lovell, Note, *Eighteen Years Old and Ready for Driving, Cigarettes and War, but not Basketball: Why the NBA is Committing a Foul on the Age Eligibility Rule*, 26 J. C.R. & Econ. Dev. 415 (2012); Uriah Tagle, *Delay of Game: Analyzing the Legality of the NBA and WNBA Eligibility Rules and Their Effects on Top Amateur Basketball Players*, 21 U. DENV. SPORTS & ENT. L.J. 159 (2018); Benjamin S. Weisfelner, *Reverse Slam Dunk: Making the Case That the National Basketball Association's Minimum Age Requirement Violates State Discrimination Laws*, 21 SETON HALL J. SPORTS & ENT. L. 203 (2011).

<sup>4</sup> See generally Angel Rodriguez, *Lebron James' Career Timeline*, L.A. TIMES (Jul. 1, 2018, 8:10 PM), <https://www.latimes.com/sports/nba/la-sp-lakers-lebron-timeline-20180701-story.html> (giving a brief overview of LeBron James' success beginning in the 2003 NBA Draft until his signing with the Lakers in 2018); J.M. Poulard, *Is Kobe Bryant the Most Successful Player of His Era?*, BLEACHER REPORT (May 10, 2014), <https://bleacherreport.com/articles/2058485-is-kobe-bryant-the-most-successful-player-of-his-era> (discussing the accolades of Kobe Bryant, which include a league MVP, five NBA Championships, and two NBA Finals MVPs); Cork Gaines, *How Kevin Garnett Made \$326 Million to Become the Highest-Paid Player in NBA History*, BUSINESS INSIDER (Sept. 24, 2016, 2:21 PM), <https://www.businessinsider.com/kevin-garnett-career-earnings-minnesota-timberwolves-2016-9> (discussing the success of Kevin Garnett, which not only netted him \$326 million dollars over the length of his career, but also rendered him a fifteen time all-star, and an NBA Champion); Ross Coleman, *Dwight Howard: Where Does He Rank Among the Best Centers in NBA History?*, BLEACHER REPORT (Feb. 7, 2011), <https://bleacherreport.com/articles/600663-dwight-howard-where-does-he-rank-among-the-best-centers-in-nba-history> (ranking Dwight Howards as the ninth best Center in NBA history after his seventh season in the NBA).

<sup>5</sup> See generally Mark Brown, *Kwame Brown: The Biggest Bust Ever?*, BLEACHER REPORT (Jul. 17, 2009), <https://bleacherreport.com/articles/219636-kwame-brown-the-biggest-bust-ever> (after being drafted first overall in 2002, a year before LeBron James was taken first overall out of high school, this article gives a brief overview of the downward spiral that was Kwame Brown's career); Craig Meyer, *The Curious Case of Sebastian Telfair: From NYC*

[T]he player (A) is or will be at least 19 years of age during the calendar year in which the Draft is held, and (B) with respect to a player who is not an international player ... 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>6</sup>

The language of this provision is still in effect today in what is now Article X of the 2017-2024 CBA.<sup>7</sup> However, the age eligibility restrictions cannot be effectively understood without an understanding of their legal development and their impact on the National Collegiate Athletic Association ("NCAA"). The NBA's implementation of Title X in the 2005 CBA came in the immediate aftermath of the *Clarett* decision, which was decided in 2004.<sup>8</sup> The decision of the Second Circuit Court of Appeals upheld the NFL's age/education policy because it found the policy to be shielded from antitrust scrutiny by the non-statutory labor exemption. With this decision, all professional sports leagues were put on notice to collectively bargain for eligibility rules in order to shield themselves from antitrust law.

In the wake of the 2005 CBA, highly touted high school basketball prospects dealt with these new eligibility guidelines by attending universities with prestigious basketball programs for the minimum requirement of one year before entering the NBA Draft.<sup>9</sup> Highly ranked high school players attending college for one year before declaring for the NBA Draft has also impacted how the Draft has actually played out in recent years. As noted by one commentator, "the trend in recent years has been to use those top [draft] selections to take the best young players; a lottery pick has not been used on a non-freshman since Victor Oladipo and Otto Porter were selected second and third overall respectively in 2013."<sup>10</sup> As a result of the NBA's new age restrictions, the NCAA, which governs intercollegiate athletics and defines the rules under which college basketball programs can operate, became heavily reliant on the policy as its primary mechanism

---

*Phenom to NBA Bust*, BLEACHER REPORT (Aug. 5, 2009), <https://bleacherreport.com/articles/230844-the-curious-case-of-sebastian-telfair-from-nyc-phenom-to-nba-bust> (discussing how after being selected with the thirteen overall pick in the 2004 NBA Draft, he went on to play on four teams by the sixth year of his career because of his lackluster on-court performance); Mike Thomas, *The Sad Story of NBA Bust Robert Swift*, SPORTSCASTING (Jun. 15, 2020), <https://www.sportscasting.com/the-sad-story-of-nba-bust-robert-swift/> (discussing how Swift's NBA career took a turn for the worse after being selected with the twelfth overall pick in the 2004 NBA Draft).

<sup>6</sup> Pitts, Jr., *supra* note 2, at 435.

<sup>7</sup> See Collective Bargaining Agreement Between National Basketball Association and National Basketball Players Ass'n, art. X, <https://cosmic-s3.imgix.net/3c7a0a50-8e11-11e9-875d-3d44e94ae33f-2017-NBA-NBPA-Collective-Bargaining-Agreement.pdf> (last visited Oct. 10, 2020) [hereinafter NBA CBA].

<sup>8</sup> *Clarett v. National Football League*, 369 F.3d 124 (2d Cir. 2004).

<sup>9</sup> Sharma, *supra* note 2, at 482. *But see*, Chris Broussard, *Exchange Student*, ESPN (Nov. 20, 2008), <https://www.espn.com/espnmag/story?section=magazine&id=3715746> (discussing how Brandon Jennings, one of the nation's top high school point guards, opted to play in Italy over the NCAA for a year before entering the NBA Draft); *see also* Andrew Joseph, *LaVar Ball Announces That LaMelo Will 'Definitely' Play Overseas in Australia or China*, USA TODAY SPORTS (Apr. 1, 2019), <https://ftw.usatoday.com/2019/04/lavar-lamelo-ball-college-overseas-australia-china-pro-basketball> (discussing how one of the top high school recruits in the country is opting to play professional basketball overseas rather than play in the NCAA).

<sup>10</sup> Zach Leach, *Dump and Chase: Why the NFL, NBA, and MLB Should Abandon Their Problematic Amateur Draft Age Limits and Rookie Wage Structures and Adopt the Current NHL Model*, 29 MARQ. SPORTS L. REV. 177, 200 (2018).

for revenue. For example, it is estimated that the NCAA's annual basketball tournament, "March Madness," generates more than \$800 million for the organization.<sup>11</sup>

Ultimately, the one-and-done rule left high school players with two options: either sit out a year after high school before entering the draft or spend at least one year playing, either college basketball or in an international professional league while awaiting draft eligibility.<sup>12</sup> This eligibility rule had the effect of furthering the NBA's "de facto minor-league system," in which players develop skills without being compensated by any professional organization, per the NCAA's amateurism policies.<sup>13</sup> Requiring student-athletes to play elsewhere for a year before they are eligible for generous compensation by the NBA or, for those players not entering the NBA, not allowing students to profit off their own image, when coupled with the extraordinary amount of money student-athletes generate for the NCAA and their respective university, did not come without criticism.<sup>14</sup> Such criticism was primarily premised on the paternalistic and economic considerations of the rule, where critics argue that such a rule only exists to promote "the economic interests of colleges and universities, as premier high school seniors who would otherwise jump to the NBA are now likely to play college basketball for at least one season."<sup>15</sup> For the students who will never play at the professional level, or worse, for those players who would have entered the NBA barring injury, playing collegiate basketball may be the best opportunity to develop and monetize their name, image, and likeness ("NIL"). This issue is only further complicated by the racial and economic dimensions of collegiate players, in which this rule disproportionately impacts minority student-athletes.<sup>16</sup>

In this spirit, this paper analyzes the development of the NBA's age restriction rules. Beyond simply analyzing the legal history of the one-and-done rule, this paper will place the NBA's draft requirements in conjunction with (1) the legislative developments of NIL compensation in states like Florida, California, and Colorado, and (2) legislative developments at the federal level because the NCAA went so far as to propose new uniform legislation to Congress in the summer of 2020.<sup>17</sup> In the wake of the new legislation surrounding NCAA players' ability to profit off

---

<sup>11</sup> Darren Geeter, *March Madness Makes Enough Money to Nearly Fund the Entire NCAA – Here's How*, CNBC (Mar. 22, 2:45 PM), <https://www.cnbc.com/2019/03/22/ncca-march-madness-tournament-basketball.html> (discussing how "March Madness" brings in more than 75% of the NCAA's yearly revenue).

<sup>12</sup> Ehrlich, *supra* note 1, at 29.

<sup>13</sup> Michael A. McCann & Joseph S. Rosen, *Legality of Age Restrictions in the NBA and the NFL*, 56 CASE W. RES. L. REV. 731, 733-34 (2006).

<sup>14</sup> See generally Steve E. Cavezza, *Can I See Some ID: An Antitrust Analysis of NBA and NFL Draft Eligibility Rules*, 9 U. DENV. SPORTS & ENT. L.J. 22, 37 (2010) (arguing that college freshmen who are drafted high in their respective draft would have been drafted near the same position the year prior had the age rule not barred them from eligibility). Cavezza argued that "[w]hile [student-athletes'] draft 'stocks' may not have dropped due to the one year they spent in college, they [were] still harmed. They were not able to earn a paycheck for that year, and their professional careers have been shortened by a year."

<sup>15</sup> McCann & Rosen, *supra* note 13, at 733.

<sup>16</sup> See Timothy Davis, *African-American Student-Athletes: Marginalizing the NCAA Regulatory Structure*, 6 MARQ. SPORTS L.J. 199, 199 (1996) (discussing that the NCAA amateurism "rules impos[e] financial restrictions [that] fail to comport with the economic and social realities that confront many student-athletes, particularly African-Americans").

<sup>17</sup> Dan Murphy, *Bipartisan Federal NIL Bill Introduced for College Sports*, ESPN (Sept. 24, 2020), [https://www.espn.com/college-sports/story/\\_/id/29961059/bipartisan-federal-nil-bill-introduced-college-sports](https://www.espn.com/college-sports/story/_/id/29961059/bipartisan-federal-nil-bill-introduced-college-sports) (discussing how the NCAA asked Congress to enact a federal law in order to avoid differences in state law with regard to NCAA NIL rules); see also Ross Dellenger, *NCAA Presents Congress With Bold Proposal for NIL*

their NIL, and the NBA's developing G League, collegiate basketball players may, for the first time, have a real opportunity to profit off their NIL in an equitable manner. However, if the NBA and NCAA cannot continue to change and adopt new, forward-thinking age restriction rules, the trend appears to indicate that student-athletes will find other avenues to monetize their brand.

Part I of this paper gives a brief antitrust analysis as those laws relate to age eligibility rules in the NBA. Part II of this paper reviews the evolution of professional sports age eligibility requirements as they relate to their respective drafts. Part III will discuss the current format of the NBA's Draft, its rookie wage scale, and the G League by assessing the proliferation of talent to different leagues outside the NCAA. Additionally, this section will analyze the new NIL legislation and discuss how that impacts the NCAA, and, by proxy, the NBA G League. Part IV will compare the eligibility rules and minor league structures in the MLB, NHL, and Europe. As this paper will show, the NBA should abandon their current age restrictions and rookie wage structures and use the G League to mimic the model set forth in the NHL or in Europe.

## I. ANTITRUST LAW AND AGE ELIGIBILITY RULES IN THE NBA

Antitrust law and labor law have long battled for a position between the promotion of competition and the protection of labor principles.<sup>18</sup> Where antitrust law seeks to prevent restraints of trade through the enforcement of the Sherman Antitrust Act (Sherman Act), federal labor law promotes the unionization of workers through the National Labor Relations Board, which consists of a process that potentially produces anticompetitive effects.<sup>19</sup> The Sherman Act has provided the mechanism by which parties can challenge the age eligibility restrictions.<sup>20</sup> Section 1 of the Sherman Act, which prohibits agreements that unreasonably restrain trade, supplies the primary source of litigation on these issues.<sup>21</sup> There are three requirements for a viable Section 1 claim: (1) a contract, combination, or conspiracy; (2) the contract, combination, or conspiracy produces a restraint of trade; and (3) the restraint affected trade or commerce

---

*Legislation*, SPORTS ILLUSTRATED (Jul. 31, 2020), <https://www.si.com/college/2020/07/31/ncaa-sends-congress-nil-legislation-proposal>.

<sup>18</sup> Pitts, Jr., *supra* note 2, at 438 (emphasizing that “this tension results from the seemingly contradictory goals of the two different areas of law”).

<sup>19</sup> *Id.* at 438.

<sup>20</sup> McCann & Rosen, *supra* note 13, at 734; James Landry & Thomas A. Baker III., *Change Or Be Changed: A Proposal for the NCAA to Combat Corruption and Unfairness by Proactively Reforming its Regulation of the Athlete Publicity Rights*, 9 NYU J. INTELL. PROP. & ENT. L. 1, 16 (2019) (discussing how “the Sherman Antitrust Act has provided the foothold for plaintiffs challenging the NCAA's amateurism restrictions on the basis that they impose unreasonable restraints on trade”). *See also* Michael A. McCann, *The NBA and the Single Entity Defense: A Better Case*, 1 HARV. J. SPORTS & ENT. L. 39, 45 (2010) (discussing how the NBA, “by collectively bargaining rules with the NBPA, [] ensures that [its] rules are exempt from section 1 of the Sherman Act”) [hereinafter *Single Entity Defense*].

<sup>21</sup> McCann & Rosen, *supra* note 13, at 734.

among the several states.<sup>22</sup> It is also important to note that in sports settings, restraints of trade are concerned with the labor market rather than a product market.<sup>23</sup>

Alleged violations of Section 1 are scrutinized by one of three legal standards. First is the “rule of reason” standard, in which “a restraint will only be upheld if it results in a net procompetitive effect *and* the benefits of that effect could not have been achieved by substantially less restrictive alternatives.”<sup>24</sup> Second is the “per se” analysis, in which the defendant’s practices are presumed unreasonable, thereby relieving the plaintiff of having to demonstrate anticompetitive effects, with illegality automatically following regardless of the procompetitive effects or motives.<sup>25</sup> And finally, there is a hybrid form of scrutiny that has been developed by the courts—the “quick look” rule of reason, which “mediates between” the rule of reason and per se analysis.<sup>26</sup> It maintains the per se analysis’s presumption of unreasonable practices while also considering any potential anticompetitive effects, market power, and efficiencies in order to better understand a restraint’s potential competitive impact.<sup>27</sup>

Some commentators have regarded the quick look analysis as particularly useful in sports antitrust disputes context, because it has the potential to oscillate between the interests of the leagues and its players.<sup>28</sup> In applying the quick look analysis, courts may avoid mechanically rejecting a league regulation or restriction, while still having the ability to examine that regulation or restriction’s anticompetitive effects with a heightened scrutiny.<sup>29</sup> Though courts apply the per se analysis to most alleged violations of Section 1, courts, at least in the sports context, prefer to require plaintiffs to satisfy the rule of reason standard because of “the unique nature of sports leagues.”<sup>30</sup>

In an effort to mitigate the tension between labor and antitrust law, Congress developed the statutory exemption and the courts developed the non-statutory exemption.<sup>31</sup> The statutory exemption came about as the result of the Congressional desire to empower unions in situations where workers were viewed as unequal to management; because of this, Congress went on to

---

<sup>22</sup> *Id.* at 734. See also Ariel Y. Bublick, *Are You Ready for Some Football: How Antitrust Laws Can Be Used to Break Up DirecTV’s Exclusive Right to Telecast NFL’s Sunday Ticket Package*, 64 FED. COMM. L.J. 223, 225-26 (2011) (discussing the “Rule of Reason” analysis in *Standard Oil*).

<sup>23</sup> McCann & Rosen, *supra* note 13, at 734. See also PAUL C. WEILER & GARY R. ROBERTS, *SPORTS AND THE LAW* 277 (3rd ed. 2004) (briefly introducing the concept of the “players’ market”).

<sup>24</sup> Joseph Citelli, *Baseball’s Antitrust Exemption and the Rule of Reason*, 3 ARIZ. ST. U. SPORTS & ENT. L.J. 56, 70-71 (2014).

<sup>25</sup> McCann & Rosen, *supra* note 13, at 735. See also Michael A. McCann, *Illegal Defense: The Law and Economics of Banning High School Players from the NBA Draft*, 1 VA. SPORTS & ENT. L.J. 295, 347 (2002) (discussing how the “per se analysis relieves the plaintiff of the burden of proving anticompetitive effects, which are presumed”) [hereinafter *Illegal Defenses*].

<sup>26</sup> Max Shulman, *The Quick Look Rule of Reason: Retreat From Binary Antitrust Analysis*, 2 SEDONA CONF. J. 89, 89 (2001).

<sup>27</sup> McCann & Rosen, *supra* note 13, at 735. See also Max Shulman, *supra* note 26, at 91-92 (emphasizing the inadequacies of the “per se” and the rule of reason analysis on their own in the sports context).

<sup>28</sup> McCann & Rosen, *supra* note 13, at 735. *But see* Max Shulman, *supra* note 26, at 91-92 (discussing how “for those horizontal restraints that have a substantial, direct adverse economic impact, the result under quick look has generally been no different from what it would have been had the *per se* rule been applied”).

<sup>29</sup> McCann & Rosen, *supra* note 13, at 735-736.

<sup>30</sup> Daniel E. Lazaroff, *Sports Equipment Standardization: An Antitrust Analysis*, 34 GA. L. REV. 137, 148 (1999).

<sup>31</sup> Pitts, Jr., *supra* note 2, at 439.

enact the Clayton Act and the Norris-LaGuardia Act in order to provide unions with certain protections.<sup>32</sup> These sections, which protected unions from federal court intervention, allowed those same unions to preclude negotiations between a single employee and an employer.<sup>33</sup> The statutory exemption, which is the result of those two legislative acts, did not protect all the issues that can present themselves with regard to eligibility restrictions.<sup>34</sup> “In an effort to close the gaps and expand the protection of the statutory exemption to union activity, the non-statutory exemption emerged in the courts.”<sup>35</sup> Effectively, the non-statutory labor exemption went beyond the scope of the enumerated exceptions laid out in the Clayton Act and the Norris-LaGuardia Act.<sup>36</sup> This non-statutory labor exemption was ultimately used as a defensive mechanism to protect collectively bargained for terms from any form of antitrust scrutiny.<sup>37</sup> However, in effect, the mechanisms created to protect players’ rights (the idea of collectively bargained for terms) also gave the respective leagues a roadmap to negotiate terms that would blatantly violate antitrust law, but still withstand judicial scrutiny.<sup>38</sup> Because the non-statutory labor exemption allowed draft eligibility requirements to be collectively bargained for by both the NBA and NBPA, they cannot violate the Sherman Act.<sup>39</sup>

## II. EVOLUTION OF PROFESSIONAL SPORTS AGE ELIGIBILITY REQUIREMENTS

In 1922, in an incredibly impactful case, the Supreme Court concluded that baseball was exempt from antitrust law altogether.<sup>40</sup> This holding served “to protect [baseball] from many challenges and allowed for labor control that may be considered unconscionable” by present-day standards.<sup>41</sup> Nevertheless, basketball, or any other professional sport for that matter, did not enjoy the same antitrust protections.<sup>42</sup> Even then, though, “courts have acknowledged the functional and economic uniqueness of industries wherein competitors share revenue and prefer a higher level of competition.”<sup>43</sup> Thirty-five years later, the NFL, in *Radovich v. National*

---

<sup>32</sup> *Id.* at 439 (discussing how “the statutory exemption’s protection is limited to certain unilateral conduct of labor unions”); Michael A. McCann, *Illegal Defense: The Law and Economics of Banning High School Players from the NBA Draft*, 1 VA. Sports & ENT. L.J. 295, 341 (2002).

<sup>33</sup> *Illegal Defense*, *supra* note 25, at 341.

<sup>34</sup> Darren W. Dummit, *Upon Further Review: Why the NFL May Not be Free After Claret, and Why Professional Sports May be Free from Antitrust Law*, 8 VAND. J. ENT. & TECH. L. 149, 154 (2005).

<sup>35</sup> Pitts, Jr., *supra* note 2, at 440.

<sup>36</sup> Abraham Spira, *Almost Three Decades Later, Is Mackey Still Viable?*, 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 805, 813 (2007).

<sup>37</sup> Leach, *supra* note 10, at 185.

<sup>38</sup> *Id.* at 185.

<sup>39</sup> *Id.*

<sup>40</sup> *See generally* Fed. Baseball Club of Balt., Inc. v. Nat’l League of Prof’l Baseball Clubs, 259 U.S. 200 (1922).

<sup>41</sup> Leach, *supra* note 10, at 184.

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

<sup>43</sup> *Id.* at 185.

*Football League*, confirmed for every professional sports organization that they did not enjoy the same antitrust exemption as baseball and the MLB.<sup>44</sup>

Nearly fifty years after *Federal Baseball*, in 1971, Spencer Haywood challenged the NBA Draft rules, which had not yet become a collective bargaining subject between the NBA and the NBPA.<sup>45</sup> In *Denver Rockets v. All-Pro Management*, Spencer Haywood brought an antitrust lawsuit, in which he argued that the NBA unilaterally imposed age restrictions that, in effect, barred him from playing in the NBA; Haywood sought an injunction prohibiting the application of the eligibility rules because they were in violation of the Sherman Act.<sup>46</sup> In response, the NBA argued that the age restriction rules “constituted a valid self-regulatory scheme.”<sup>47</sup> The court, however, was quick to point out that the NBA’s “scheme” was overly broad and arbitrary, and they determined that the eligibility rules constituted a group boycott, which was per se illegal.<sup>48</sup> Therefore, the rule of reason analysis was inapplicable.<sup>49</sup> Haywood prevailed on his claim and was allowed to play in the NBA. The post-*Denver Rockets* NBA went on to alter their eligibility rules. They went on to allow players who could demonstrate “financial hardship” enter the NBA, and eventually, the NBA simply settled on allowing all high school graduates to enter the draft straight out of high school.<sup>50</sup>

In 1976, the NFL experienced first-hand the true power of the non-statutory labor exemption. In *Mackey v. National Football League*, a group of veteran NFL players challenged a rule that had previously been unilaterally enforced by the league.<sup>51</sup> The court, when analyzing the facts of the case – which consisted of, most importantly, a rule that could have been collectively bargained but was not – laid the foundation for new antitrust review.<sup>52</sup> The crux of *Mackey* was that the court developed a three-prong test to determine if a particular term must be collectively bargained or, if not, if said term is an unreasonable restraint of trade in violation of antitrust law.<sup>53</sup> The test proceeds as follows:

First, the labor policy favoring collective bargaining may potentially be given pre-eminence over the antitrust laws where the restraint on trade primarily affects only the parties to the collective bargaining relationship. Second, federal labor policy is implicated sufficiently to prevail only where the agreement sought to be exempted concerns a mandatory subject of collective bargaining. Finally, the policy favoring collective bargaining is furthered to the degree necessary to override the antitrust laws only where the agreement sought to be exempted is the product of bona fide arm’s-length bargaining.<sup>54</sup>

---

<sup>44</sup> Radovich v. National Football League, 352 U.S. 445 (1957); Leach, *supra* note 10, at 187.

<sup>45</sup> 325 F. Supp. 1049 (C.D. Cal. 1971).

<sup>46</sup> *Id.*; Leach, *supra* note 10, at 187-88; Tagle, *supra* note 3, at 171.

<sup>47</sup> Leach, *supra* note 10, at 188.

<sup>48</sup> Leach, *supra* note 10, at 188; Tagle, *supra* note 4, at 172.

<sup>49</sup> Tagle, *supra* note 3, at 172.

<sup>50</sup> Leach, *supra* note 10, at 188; Tagle, *supra* note 3, at 172.

<sup>51</sup> 543 F.2d 606 (8th Cir. 1976).

<sup>52</sup> Leach, *supra* note 10, at 189.

<sup>53</sup> Abraham Spira, *supra* note 36, at 817.

<sup>54</sup> *Mackey*, 543 F.2d at 614.

While *Mackey* court ultimately held that a Sherman Act violation had taken place, it also gave all professional sports leagues “a step-by-step process to create [ ] valid, collectively bargained rules that could restrict the player market while withstanding antitrust challenge[s].”<sup>55</sup>

Seven years after the *Denver Rockets* case and two years after *Mackey*, James Smith attacked the structure of the NFL Draft.<sup>56</sup> Smith, a twelfth-round selection, was injured after playing one year in the NFL.<sup>57</sup> Smith sued the NFL for the difference between what he would have been able to earn had he had the opportunity to negotiate with every team in the league compared to what actually happen – his being limited to only negotiating with the one team that drafted him.<sup>58</sup> However, “[f]orgotten by football history is the fact that Smith actually won the case” and the court concluded that “the NFL draft was not exempt under the nonstatutory labor exemption.”<sup>59</sup> The court held that “[t]he draft inescapably forces each seller of football services to deal with one, and only one buyer, robbing the seller, as in any monopsonistic market, of any real bargaining power.”<sup>60</sup> Smith went on to win treble damages in the sum of the estimated difference between his actual and fair-market salary for a player of his caliber.<sup>61</sup> Ultimately, post-*Smith*, the NFL Draft would be brought into collective bargaining negotiations; this would have the effect of shielding the Draft via the labor exemption.<sup>62</sup>

In 1977, in *Linseman v. World Hockey Association*, a federal district court reaffirmed the holding in *Denver Rockets* when it held that a league-imposed rule requiring that players be twenty-years-old constituted an unreasonable restraint of trade.<sup>63</sup> The court in *Linseman* emphasized that teams cannot, as a matter of law, conspire to boycott all players under a particular age.<sup>64</sup>

Then, in 1986, in what would turn out to be a significant legal development, courts began to address the relationship between a professional sports union’s duty of fair representation and draft age requirements.<sup>65</sup> *Zimmerman v. NFL* was a “case [that] concerned the 1984 supplemental draft and its effect on a player drafted out of the USFL and the draft’s alleged violation of the Sherman Act because it allowed the drafted player to negotiate with only one

---

<sup>55</sup> Leach, *supra* note 10, at 190. See also Abraham Spira, *supra* note 36, at 819 (discussing how the Sixth Circuit in *McCourt* articulated guidelines for proper application of the *Mackey* test).

<sup>56</sup> Denise K. Bryant, *Brown v. Pro Football, Inc.: You Make the Call!*, 4 VILL. SPORTS & ENT. L.J. 87, 102 (1997).

<sup>57</sup> See William N. Wallace, *ProFootball: A Full Slate for Openers*, N.Y. TIMES, Sept. 12, 1976, at 179 (discussing the injury to James “Yazoo” Smith).

<sup>58</sup> Leach, *supra* note 10, at 188 (noting that Smith only made \$50,000 as the twelfth-round pick of the Washington Redskins in 1975).

<sup>59</sup> *Id.* at 188; Bryant, *supra* note 56, at 103.

<sup>60</sup> *Smith v. Pro Football*, 593 F.2d 1173, 1185 (D.C. Cir. 1978) (where the court agreed that the draft has an anti-competitive effect on rookie salaries and was in violation of the Sherman Act).

<sup>61</sup> *Id.* at 1191.

<sup>62</sup> Ethan Lock & J. Michael Gratz, *Legal and Statistical Analysis of the National Football League Player Draft: Chicago, New York, Detroit, It's All the Same Pick*, 2 LOY. L.A. ENT. L.J. 47, 51 (1982) (discussing how the labor exemption would “immunize[ ]” the draft from antitrust problems, and then developing further the contours of the labor exemption and its relationship with collective bargaining).

<sup>63</sup> *Linseman v. World Hockey Ass’n*, 439 F. Supp. 1315, 1315 (D. Conn. 1977).

<sup>64</sup> *Id.* at 1320.

<sup>65</sup> See *Zimmerman v. National Football League*, 632 F. Supp 398 (D.D.C. 1986).

NFL team.”<sup>66</sup> The most important element of Zimmerman’s argument was that he was not subject to the NFL’s CBA because as a player in the USFL, he was not a party to the collective bargaining relationship, and that the NFLPA “failed to consult with any USFL players before approving the supplemental draft.”<sup>67</sup> The court used the *Mackey* test to analyze this claim. Yet, the district court noted that the *Mackey* test did not apply to agreements that affect competitors or actors entirely removed from the bargaining relationship.<sup>68</sup> Even then, “the court decided that Zimmerman, and the rest of the USFL players, ‘[did] not fall into this protected group’ because both present and ‘potential future players’ are parties to the bargained relationship.”<sup>69</sup> The court in *Zimmerman* established that potential future players are members of the bargaining unit and bound by the CBAs made between their potential future union representatives, before actually being represented by the bargaining unit, and the professional sports league.<sup>70</sup>

The next case that directly impacted the rights of potential future players was *Wood v. NBA*, where Leon Wood challenged the NBA’s draft as a violation of the Sherman Act.<sup>71</sup> Wood argued both that the NBA Draft constituted an agreement among horizontal competitors in order to eliminate competition and that the CBA provisions were illegal because they directly impacted potential employees outside of the bargaining unit.<sup>72</sup> The court went on to reaffirm the holdings in *Zimmerman* that great freedom is given to professional sports unions to bargain with employers over terms that affect current and *future* players.<sup>73</sup> However, critics have argued that this exception to antitrust law is rather problematic because potential future players are held to the terms of a CBA without having a true seat at the table; while those players in their respective leagues are represented by their players’ unions, those at the college level must abide by the collectively bargained restrictions, even though they do not yet have a voice.<sup>74</sup>

Most recently, there has been *Clarett v. NFL*.<sup>75</sup> While there were other cases that touched on similar issues and brought attention to the issues of players unions and draft age restrictions, none were more impactful than *Clarett*. Maurice Clarett was a freshman running back at the Ohio State University in 2002, where he led the team to an undefeated record and a national championship.<sup>76</sup> Immediately after his freshman season, which included 1,237 rushing yards and

---

<sup>66</sup> Kevin W. Brooks, *Physically Ready to Compete: Can Players’ Unions Bar Potential Draftees Based on Their Age*, 21 SPORTS LAW. J. 89, 105 (2004).

<sup>67</sup> *Zimmerman*, 632 F. Supp. at 405; see also Brooks, *supra* note 66, at 105-106.

<sup>68</sup> *Zimmerman*, 632 F. Supp. at 405; Brooks, *supra* note 66, at 106.

<sup>69</sup> Brooks, *supra* note 66, at 106 (citing *Zimmerman*, 632 F. Supp. at 405).

<sup>70</sup> *Id.* at 106.

<sup>71</sup> 809 F.2d 954 (2d Cir. 1987); *id.* at 956-57.

<sup>72</sup> *Wood*, 809 F. 2d at 958, 960.

<sup>73</sup> Brooks, *supra* note 66, at 108.

<sup>74</sup> Leach, *supra* note 10, at 190. See also, Brooks, *supra* note 66, at 114 (citing *Clarett* 369 F.3d at 139) (“The NFLPA’s power allows it ‘to create and restrict the rights of those whom it represents,’ and the unions can, ‘for example, favor veteran players over rookies . . . and . . . seek to preserve jobs for current players to the detriment of new employees and the exclusion of outsiders”).

<sup>75</sup> 369 F.3d 124 (2d Cir. 2004).

<sup>76</sup> See SI Staff, Cover (Dec. 2, 2002), <https://vault.si.com/vault/2002/12/02/02>. Brooks, *supra* note 62, at 112.

18 touchdowns, Clarett began to have eligibility problems with the NCAA.<sup>77</sup> Clarett was eventually suspended by the Ohio State University in order to insulate the institution from an NCAA sanction because he had received improper benefits; because of this, he sought to enter the 2003 NFL Draft.

When he was barred from doing so, Clarett brought an action against the NFL, where he argued that the NFL rule prohibiting players from entering the draft until they had been out of high school for three years violated antitrust law.<sup>78</sup> The district court found for Clarett, but the NFL quickly appealed to the Second Circuit Court of Appeals. In *Clarett II*, the court held that:

[T]he labor market for NFL players is organized around a collective bargaining relationship that is provided for and promoted by federal labor law, and that the NFL clubs, as a multi-employer bargaining unit, can act jointly in setting the terms and conditions of players' employment and the rules of the sport without risking antitrust liability. For those reasons, the NFL argues that federal labor law favoring and governing the collective bargaining process precludes the application of the antitrust laws to its eligibility rules. We agree.<sup>79</sup>

In this capacity, *Clarett II* “appeared to mirror the rationale from *Wood*” in the sense that future players were obligated to abide by collectively bargained for terms even though they had no say in the collective bargaining process.<sup>80</sup>

The court focused on the fact that the terms and conditions of Clarett's, or any other potential future players', employment were negotiated by the NFLPA.<sup>81</sup> The Second Circuit reasoned that because this age eligibility rule was to deal with initial employment, the rule was a subject of mandatory bargaining.<sup>82</sup> The Second Circuit concentrated on the right of the NFLPA “to advantage certain categories of players over others.”<sup>83</sup> “The NFLPA's power allows it ‘to create and restrict the rights of those whom it represents,’ and the union can, ‘for example, favor veteran players over rookies ... and ... seek to preserve jobs for current players to the detriment of new employees and the exclusion of outsiders.’”<sup>84</sup> The Second Circuit reaffirmed that unions, premised on the duty of fair representation, can favor certain groups of members over others.<sup>85</sup>

*Clarett II*'s biggest contribution was that it rejected the three-prong *Mackey* test and provided a new framework for the non-statutory exemption that allowed professional

---

<sup>77</sup> Tim Bielik, *Ohio State Football: Looking Back at Maurice Clarett a Decade After Leaving OSU*, BLEACHER REPORT (Jul. 5, 2013), <https://bleacherreport.com/articles/1694318-ohio-state-football-looking-back-at-maurice-clarett-a-decade-after-leaving-osu>.

<sup>78</sup> Brooks, *supra* note 66, at 113.

<sup>79</sup> *Clarett*, 369 F.3d 124; *see also* Ehrlich, *supra* note 1, at 53 (emphasizing that “[t]he Second Circuit’s opinion in *Clarett* expanded the non-statutory labor exemption by including eligibility rules as mandatory subjects of bargaining, [while] also dismiss[ing] the argument raised by Clarett that collectively bargained terms that are not actually in the CBA cannot be protected by labor law favoring collective bargaining”).

<sup>80</sup> Brooks, *supra* note 66, at 114.

<sup>81</sup> *Clarett*, 369 F.3d at 138.

<sup>82</sup> *Id.* at 139.

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

<sup>84</sup> Brooks, *supra* note 66, at 114 (citing *Clarett*, 369 F.3d at 139).

<sup>85</sup> *Clarett*, 369 F.3d at 139.

organizations to avoid antitrust scrutiny in situations involving eligibility rules.<sup>86</sup> Ultimately, the *Clarett II* decision expanded the non-statutory labor exemption when it included eligibility rules as subject of mandatory bargaining.<sup>87</sup> In essence, *Clarett II* put all professional sports unions on notice that if they did not like a particular bargaining topic, they should renegotiate the term under their respective CBAs rather than seek protection under federal antitrust law.<sup>88</sup> The NFL's victory in *Clarett II* also proved to be quite the win for the NCAA because the NFL's age restriction, which forced the hands of student-athletes and required them to play in the NCAA before they could enter NFL Draft, was left intact.<sup>89</sup>

The 2005 NBA CBA clearly took notice of the Second Circuit's decision in *Clarett II* when it collectively bargained for the "one-and-done rule," which raised the age draft floor from eighteen to at least nineteen years of age, effective starting in the 2006 NBA Draft.<sup>90</sup> This was the first time the NBA worked to limit the entry of players into the NBA Draft since *Haywood*. This rule increasing the draft eligibility age to nineteen was the product of collective bargaining, and, therefore, skirted around antitrust scrutiny. Altogether, between 1995 and 2004, only thirty-six players had come straight out of high school and were selected in the NBA Draft.<sup>91</sup> However, upon notice of an impending age restriction, an additional eleven players declared for the 2005 NBA Draft straight out of high school.<sup>92</sup> Upon being drafted, there is little flexibility for incoming-rookies when it comes to negotiating their first contract. All draft picks, per the 2005 CBA, were first offered a "Required Tender" of a minimum-value contract determined by the league that served to lock in exclusive negotiating rights of the player.<sup>93</sup> Additionally, "[a]ll first-round picks [were] required to sign a two-year contract with team options for the third and fourth years."<sup>94</sup> The NBA also provided both the "Rookie Salary Scale" value and required base salary scale value, so teams and first-round selections knew immediately what their salary negotiating range could be.<sup>95</sup>

---

<sup>86</sup> Pitts, Jr., *supra* note 2, at 448-49.

<sup>87</sup> Ehrlich, *supra* note 1, at 53.

<sup>88</sup> Pitts, Jr., *supra* note 2, at 449.

<sup>89</sup> Ehrlich, *supra* note 1, at 53. Student-athletes, particularly those playing collegiate football, tried to take a different route in order get around playing under the rules of such an inequitable structure. See Sean Gregory, *Here's the Road Ahead for College Athletes After Union Setback*, TIME (Aug. 18, 2015, 9:24 PM); Northwestern University and College Athletics Players Association (CAPA), 362 N.L.R.B. 167 (2015) (declining jurisdiction in a case where a group of college athletes asked the Board to certify them as a union).

<sup>90</sup> Michael A. McCann, *The Reckless Pursuit of Dominion: A Situation Analysis of the NBA and Diminishing Player Autonomy*, 8 U. PA. J. LAB. & EMP. L. 819, 832 (2006) [hereinafter *Reckless Pursuit*].

<sup>91</sup> *Reckless Pursuit*, *supra* note 90, at 832.

<sup>92</sup> *Id.* at 832.

<sup>93</sup> Leach, *supra* note 10, at 200 (citing Collective Bargaining Agreement Between the National Basketball Association and National Basketball Players Ass'n, art. X § 1(b)(i), <http://3c9Osm371saecdwt32v9qof.wpengine.netdna-cdn.com/wpcontent/uploads/2016/02/2017-NBA-NBPA-Collective-Bargaining-Agreement.pdf> (last visited Dec. 13, 2018)).

<sup>94</sup> *Id.* at 200.

<sup>95</sup> See Collective Bargaining Agreement Between the National Basketball Association and National Basketball Players Ass'n, Exhibit B-1, B-2, <http://3c9Osm371saecdwt32v9qof.wpengine.netdna-cdn.com/wpcontent/uploads/2016/02/2017-NBA-NBPA-Collective-Bargaining-Agreement.pdf> (last visited Dec. 13, 2018).

### III. CURRENT FORMAT OF THE NBA'S DRAFT, ROOKIE WAGE SCALE, AND THE G LEAGUE

While it is readily apparent the impact the *Clarett II* decision had on the 2005 NBA-NBPA CBA, that decision also served to further complicate the relationship of the NCAA and the NBA. When the 2005 CBA increased the age floor of the NBA Draft, the interests of the NCAA and the NBA became undeniably aligned. “[T]he age rule creates a ‘symbiotic relationship between the NBA and NCAA’ as it induces ‘the best 17- and 18-year-olds to make the one-year rental agreement with college basketball’ thus ‘uplifting college basketball’s national viability.’”<sup>96</sup> Given the exuberant NBA contracts that are more common in today’s NBA, it is also easy to infer why the NBA would prefer a higher age rule. If a player’s rookie contract, which is limited in its negotiating power, subject to collective bargaining, and capped at below-market rates, covers the first couple of years of their career, as it does for first round picks under the current CBA, it would then be in the best interest of an NBA organization to ensure that those first four years cover as much of that player’s prime career output as possible.<sup>97</sup> Ultimately, this would ensure that a player’s best potential earning seasons are covered under the NBA’s rookie salary scale, which has the effect of limiting a player’s compensation significantly below that player’s open-market value; this is because the NBA organization that drafted the player would avoid having to compete for that player on the open market entirely.<sup>98</sup> Instead, that player would be locked-in to a rookie deal that caps his salary, even though his on-court performance may demand a significantly higher salary.

However, the NBA’s current CBA is notably different than its previous versions in some important capacities – primarily with regard to its expansion and development of the NBA G League. The 2017 CBA between the NBA and the NBPA introduced a new concept to the NBA Standard Player Contract: two-way contracts.<sup>99</sup> Two-way contracts give players a prorated lower salary for each day they play in the G League.<sup>100</sup> But with the expansion of the G League and the introduction of two-way contracts, the NCAA and the NBA suddenly find themselves with contrasting financial and developmental interests when it comes to the development of top high-school basketball prospects.<sup>101</sup>

From an empirical perspective, the dynamics of the NBA’s draft process has changed since the implementation of the “one-and-done” rule, as the NBA has seen a decrease in the number of seasoned student-athletes selected in the draft, and an increase in younger, first- or second-year student-athletes being drafted.<sup>102</sup> This is in no small part due to this age requirement rule. Essentially, the NBA’s one-and-done rule forces the hand of every high-school basketball player in the country into attending an NCAA university for at least one year.<sup>103</sup> While there, the

---

<sup>96</sup> Ehrlich, *supra* note 1, at 57.

<sup>97</sup> NBA CBA, *supra* note 7; Ehrlich, *supra* note 1, at 55

<sup>98</sup> *Id.*

<sup>99</sup> NBA CBA, *supra* note 7, at art. 2, § 11.

<sup>100</sup> Michael McCann, *The G-League: 12 Takeaways On NBA’s New Deal*, SPORTS ILLUSTRATED (Feb. 14, 2017), <https://si.com/nba/2017/02/12/nba-gatorade-g-league-deal-adam-silver-takeaways>.

<sup>101</sup> Ehrlich, *supra* note 1, at 60.

<sup>102</sup> Zola, *supra* note 2, at 163.

<sup>103</sup> *Id.* at 172.

expectation is that student-athletes abide by the NCAA's amateurism policies and rules. But it is "the combination of money and the change in the way NBA teams evaluate talent" that forces players to turn professional as early as possible.<sup>104</sup> In fact, from 2006 to 2011, only thirty-seven seniors were taken in the first round of the draft; in a draft that is comprised of thirty first-round selections, only thirty-seven seniors were taken out of a possible 150 selections.<sup>105</sup>

Teams have moved away from selecting college seniors, and instead focus on upside and potential when it comes to evaluating younger draft prospects. In fact, this shift in focus was actually the result of the those players who successfully skipped college to go straight for the NBA.<sup>106</sup> The rationalization of organizations passing on more seasoned college players is that those players have already reached their potential, and the upside of younger players is simply far too great to pass on.<sup>107</sup> The upshot of this shift in recruiting analysis is that every year a student-athlete plays in college, his draft value potentially decreases as that student-athlete loses the ability to claim professional upside or potential.<sup>108</sup>

These shifts in scouting practices may also serve as a potential indication of the end of the NBA and NCAA being on the same side of pro-amateurism rules. As a general matter, the NCAA governs the eligibility of all college athletes.<sup>109</sup> "Because the NCAA is a non-profit with voluntary membership, its ability to impose rules and restrictions on student-athletes is virtually absolute."<sup>110</sup> Under the guise of protecting "amateurism," the NCAA and its member universities have very clearly established rules by which all student-athletes who transition from college to professional sports must follow if they are to maintain their NCAA eligibility.<sup>111</sup>

This means there exists a small set of student-athletes who will have to comply with two sets of rules—the NCAA's and the NBA's—while delaying their inevitable draft eligibility.<sup>112</sup>

---

<sup>104</sup> *Id.* at 178.

<sup>105</sup> See *Historical Drafts*, THE DRAFT REVIEW.COM, [https://www.thedraftreview.com/index.php?option=com\\_content&view=article&id=2343:2006-nba-draft&catid=15&Itemid=370](https://www.thedraftreview.com/index.php?option=com_content&view=article&id=2343:2006-nba-draft&catid=15&Itemid=370). See also Zola, *supra* note 2, at 178 (discussing how in the 2011 NBA All-Star Game, fourteen of the twenty-four players had come into the league straight out of high school, from overseas, or with only one year of NCAA experience).

<sup>106</sup> Nicholas E. Wurth, *The Legality of an Age-Requirement in the National Basketball League After the Second Circuit's Decision in Clarrett v. NFL*, 3 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 103 (2005) (arguing against lowering the minimum age requirement because it only serves to benefit a small portion of NCAA players, while potentially harming more players who are not ready to make the jump into professional basketball).

<sup>107</sup> Bill Simmons, *What the TUP is going on?*, ESPN.COM (June 27, 2005, 11:20 AM), <https://www.espn.com/espn/page2/story?page=simmons/050627&num=0> (discussing how fans, for example, "know just as much about the Mariners' prized prospect, Felix Hernandez, as about Cy Young front-runner Roy Halladay").

<sup>108</sup> Sam Vecenie, *College Seniors Don't Want Their Age Used Against Them in NBA Draft*, CBS Sports (May 14, 2016, 7:24 PM), <https://www.cbssports.com/nba/news/college-seniors-dont-want-their-age-used-against-them-in-nba-draft/> (discussing how the NBA Draft is based on potential rather than production in college).

<sup>109</sup> Zola, *supra* note 2, at 174.

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

<sup>111</sup> See *Summary of NCAA Eligibility Requirements*, NCAA.ORG.COM, [https://ncaaorg.s3.amazonaws.com/compliance/d1/2020-21D1Comp\\_SummaryofNCAAREgulations.pdf](https://ncaaorg.s3.amazonaws.com/compliance/d1/2020-21D1Comp_SummaryofNCAAREgulations.pdf).

<sup>112</sup> Zola, *supra* note 2, at 178. Note, however, that some of the NCAA players who know they will be lottery picks in the next NBA Draft do not attend class in the spring semester. See, e.g., Kyle Neubeck, *Ben Simmons Admitted He Didn't Attend Classes at LSU. Who Should He?*, LIBERTYBALLERS (Oct. 20, 2016, 2:12 PM), <https://www.libertyballers.com/2016/10/20/13347848/ben-simmons-class-attendance-lsu-one-and-done-nba>.

Practically speaking, virtually any player who hopes to play in the NBA must comply with the NCAA's rules at some point in their career, as the NBA's rules now force the hands of high school players into attending at least one year of college.<sup>113</sup> "Because of this one-year requirement, colleges and universities face an increasing number of student-athletes whose sole reason for attending school is to build their brand and pass the time before declaring for the NBA draft."<sup>114</sup> For those players that do hope to enter the NBA after their NCAA career, there are strict eligibility rules that must be adhered to in order to preserve their ability to play throughout that intermediary year. However, the NCAA has taken certain steps to mitigate the potential disastrous consequences of a player breaking one of the NCAA's eligibility rules—ineligibility. One way in which the NCAA has tried to mitigate the harshness of their rules is to allow a men's basketball player to contact the NBA in order to determine his draft status via an "evaluation period."<sup>115</sup>

This evaluation period has the effect of allowing student-athletes to "declare for the NBA Draft, evaluate their prospects, and return to college with their eligibility intact, so long as they followed [the NCAA's] rules."<sup>116</sup> "Between 2005 and 2010, 174 individuals returned to college after initially declaring their intention to enter the NBA draft. It should be noted that over 20% of those returning players (36 out of 174, or 20.7%) were drafted in subsequent years."<sup>117</sup> However, a student-athlete's ability to evaluate their specific draft prospects may not actually mean much, given the common practices of draft scouts and NBA executives. While student athletes may inquire about their draft status, their ability to declare for the draft while retaining their collegiate eligibility is an entirely different story.<sup>118</sup> This is extremely important because NBA teams, given the timing of the NCAA tournament, the NBA Playoffs, the NBA Championship, and the impending free agency season, do not have the time to comprehensively evaluate a player in the allotted timeline. Additionally, the NCAA prohibits student-athletes from signing with professional representation, who have the industry experience to help such student-athletes make educated, professional decisions.<sup>119</sup> The general amateurism rules regarding agents apply to all student-athletes and clearly state that an athlete will permanently lose his eligibility should he agree, in any capacity, to be represented by a professional agent.<sup>120</sup>

---

<sup>113</sup> See NBA CBA, *supra* note 7, at Art. X.

<sup>114</sup> Zola, *supra* note 2, at 175.

<sup>115</sup> *Id.* at 178.

<sup>116</sup> *Id.* at 179.

<sup>117</sup> *Id.* at 180; see also *Historical Drafts*, THE DRAFT REVIEW.COM, [http://thedraftreview.com/index.php?option=com\\_content&task=category&sectionid=5&id=15&Itemid=103](http://thedraftreview.com/index.php?option=com_content&task=category&sectionid=5&id=15&Itemid=103) (last visited Oct. 7, 2020).

<sup>118</sup> Matthew Stross, *The NCAA's "No-Agent" Rule: Blurring Amateurism*, 2 MISS. SPORTS L. REV. 167, 168-69 (2012) (citing *2011-2012 NCAA Division I Manual*, Bylaw 12.01.3, 61 (2011), available at [http://grfx.cstv.com/photos/schools/wast/genrel/auto\\_pdf/2011-12/misc\\_non\\_event/ncaa-d-i-manual.pdf](http://grfx.cstv.com/photos/schools/wast/genrel/auto_pdf/2011-12/misc_non_event/ncaa-d-i-manual.pdf)); see also *2013-2014 NCAA Division I Manual*, Bylaw 12.01.1, 61 (2013), available at <https://static.fordhamsports.com/custompages/compliance/forms/CoachCompliance/2013-14%20NCAA%20Manual.pdf> [hereinafter 2013 NCAA Rules].

<sup>119</sup> While a high school player cannot actually have an agent per the NCAA's amateurism rules, they can keep in contact with coaches and executives, and even attend professional training camps while in the NCAA; they may even receive a contract to leave college early. Leach, *supra* note 10, at 211.

<sup>120</sup> Zola, *supra* note 2, at 176.

No college basketball player highlighted the problems associated with these evaluation period rules more than Randolph Morris, in 2005, when he signed with an NBA team mid-season because of a loophole in the NCAA and NBA's rules. Morris, a high school All-American who nearly averaged a triple-double in his senior season, seriously considered entering the 2004 NBA Draft before committing to the University of Kentucky.<sup>121</sup> After a lackluster freshman season at Kentucky, Randolph declared himself eligible for the 2005 NBA Draft, but he did so without signing an agent.<sup>122</sup> After going undrafted, Morris returned for his sophomore season. But because of a provision in the NBA's CBA at the time, he was prohibited from re-entering the NBA Draft.<sup>123</sup> As a result, Morris had free agent status all throughout that season.<sup>124</sup> He eventually signed with the Knicks in 2007 for \$1.6 million.<sup>125</sup> This was extremely upsetting to the NCAA and clearly in violation of their goals of amateurism. As a result, in 2009, the NCAA changed their rules with regard to declaring for the NBA Draft, and college players were now required to decide whether or not they would remain in the draft before the draft was held.<sup>126</sup>

The NCAA's tradition of "amateurism" is very closely aligned with the NBA's age floor, but this tradition is more expansive and complex than its interaction with that rule. These amateur rules have led to criticism and litigation across all levels of collegiate sports, which has garnered a great deal of national attention.<sup>127</sup> When discussing the NCAA's desire to preserve their tradition of amateurism, which underlies all their rules and policies, it is impossible to not discuss *O'Bannon v. NCAA*.<sup>128</sup> This was an action brought by a group of former student-athletes challenging the NCAA's rules restricting players from receiving any portion of the revenue the NCAA and its member universities earn from "the sale of licenses to use the student-athletes' names, images, and likeness in videogames, live television telecasts, and other footage."<sup>129</sup>

In exchange for collegiate basketball players providing their schools with their athletic services and the use of their names, images, and likenesses for promotional purposes, these student-athletes receive a scholarship.<sup>130</sup> Yet, the NCAA's bylaws prohibit student-athletes from

---

<sup>121</sup> Adrian Wojnarowski, *The Problematic Prospect*, YAHOO! NEWS (Dec. 12, 2006), <https://www.yahoo.com/news/problematic-prospect-075900414--nba.html>.

<sup>122</sup> Andy Katz, *Knicks Sign Kentucky Center Morris to 2-Year Deal*, ESPN (Mar. 23, 2007), <https://www.espn.com/nba/news/story?id=2809958>.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* ("According to the NBA rookie contract scale, Morris' \$1.6 million deal equates to first-round money; his salary is on par with what the 26th pick received in [the 2006 NBA Draft] and what the 30th pick will sign for in 2007").

<sup>126</sup> Zola, *supra* note 2, at 181-82.

<sup>127</sup> See generally Taylor Branch, *The Shame of College Sports*, THE ATLANTIC (Oct. 2011), <https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/>; Michael Rueda, *NCAA Suffers Another Blow to Current Amateurism Model*, FORBES (May 21, 2020, 6:00 AM), <https://www.forbes.com/sites/michaelrueda/2020/05/21/ncaa-suffers-another-blow-to-current-amateurism-model/#310b91ec67b3>.

<sup>128</sup> 7 F. Supp. 3d 955, 963 (N.D. Cal. 2014).

<sup>129</sup> *Id.* at 963.

<sup>130</sup> David Watson Hughes, *O'Bannon v. NCAA: Say Goodbye to the Cinderella Story*, 22 SPORTS LAW. J. 261, 269 (2015). See also 2013 NCAA Rules, *supra* note 118, at 12.01.4 (defining a permissible grant-in-aid scholarship as "not considered to be pay or the promise of pay for athletics skill, provided it does not exceed the financial aid limitations set by the Association's membership").

receiving financial-aid based on the student's athletic ability in excess of a full-ride – a full, grant-in-aid scholarship.<sup>131</sup> The problem with these grant-in-aid scholarships is that they do not cover the *full* cost of attendance that these student-athletes encounter.<sup>132</sup> This is where the inequity of the NCAA's scholarship system typically begins to peer its head, because student-athletes argue that collegiate programs make hundreds of millions of dollars annually, usually on the backs of their prominent sports programs, while student-athletes do not even receive enough aid to live comfortably. This issue is further compounded when one takes into consideration draft age restrictions, which required these same student-athletes to play for an NCAA member institution because there is no other viable alternative.

In the *O'Bannon* case, the NCAA's main contention was that the amateur tradition of college sports contributed to its popularity and helped to promote consumer demand.<sup>133</sup> The NCAA, in order to sustain its argument that student-athletes must not be paid, relied heavily on the United States Supreme Court decision in *NCAA v. Board of Regents*.<sup>134</sup> Ultimately, the district court found that the dicta in this precedent was inapplicable to the case at hand, and ruled instead that the NCAA's practice of limiting payments to student-athletes was a violation of antitrust laws.<sup>135</sup> The court ordered that universities should be allowed to offer full cost-of-attendance scholarships, which would expand the financial aid given to student-athletes.<sup>136</sup>

However, even with mechanisms like cost-of-attendance scholarships, such aid may still not be enough to actually provide a healthy lifestyle for student-athletes. Ignoring the obvious argument that a cost-of-attendance scholarship is miniscule in light of what a player would make playing professionally, there are still instances in which collegiate players are unhappy with the state of the NCAA and their amateurism rules. In 2014, in the immediate wake of the University of Connecticut men's basketball team winning a national championship, this issue took over national news again when Shabazz Napier told reporters that he sometimes goes to bed starving because he cannot afford food.<sup>137</sup> Napier, in what is a more conservative statement, said “[w]e as students get utilized for what we do so well, and we’re definitely blessed to get a scholarship to our universities, but at the end of the day, that doesn’t cover everything. We do have hungry nights that we don’t have enough money to get food in.”<sup>138</sup>

Today, the inability of student-athletes to profit from their NIL may be changing, while also solving, in a single legislative act, the problems Napier complained of. Currently, NCAA athletes are not allowed to accept money from any outside parties in exchange for the use of their NIL, per the amateurism policies and traditions of the NCAA. States like Florida, California, and Colorado have each passed laws that will soon make it illegal for schools in those states to

---

<sup>131</sup> *Id.* at 268.

<sup>132</sup> *Id.* at 268.

<sup>133</sup> *Id.* at 270.

<sup>134</sup> *Id.* at 270; *see also* National Collegiate Athletic Ass’n v. Board of Regents of University of Oklahoma, 468 U.S. 85 (1984).

<sup>135</sup> *O'Bannon v. National Collegiate Athletic Association*, 7 F. Supp. 3d 955, 999 (N.D. Cal. 2014).

<sup>136</sup> *Id.* 3d at 982-983.

<sup>137</sup> Spraya Nadia McDonald, *National Champ U-Conn. 's Napier Says He Goes to Bed Starving*, WASH. POST (Apr. 8, 2014, 2:25 AM), <https://www.washingtonpost.com/news/morning-mix/wp/2014/04/08/national-champ-uconn-napier-says-he-goes-to-bed-starving/>.

<sup>138</sup> *Id.*

follow the current NCAA NIL rules.<sup>139</sup> In response to this state legislation, the NCAA put together a Congressional proposal that consists of a set of uniform rules that would apply to all member universities – this way, all states would have rules similar to Florida, California, and Colorado; functionally, this expansive proposal would enable *all* student-athletes to profit off their NIL.<sup>140</sup> Even then, this move could be too little, too late; at least with regard to the top high school basketball prospects in the country. The timing of this response is also rather interesting in that it comes in the immediate aftermath of top high school players opting for a six-figure salary in the G League over the NCAA and its amateurism.<sup>141</sup> Given the timing of these responses, there is an argument to be made that the NCAA may be more motivated by the potential expansion of the NBA G League, and its ability to offer high school prospects a salary, than by cries for help by its student-athletes not being able to eat enough food.

At its inception, the G League (at this point in its history, the NBA D League) was a small, eight-team regional league that functioned more as a last-ditch effort to make the NBA than a legitimate development mechanism for the NBA.<sup>142</sup> Today, the NBA parades the G League as the “official minor league” of the NBA.<sup>143</sup> G League players travel around the country playing a regular season schedule of fifty games, concluding in an annual playoff and championship.<sup>144</sup> But the G League also serves some unique functions beyond “developing” NBA talent. In its role as a “testing ground for new rules,” the NBA uses the G League as a testing ground for new rules each season.<sup>145</sup> Even then, the goal of most G League players is still to make it to the NBA and have a successful NBA career.<sup>146</sup> This is the primary goal for many of college basketball’s top players as well.

Ultimately, the G League could serve as an alternative mechanism to fill the void between the NBA and NCAA, where the age eligibility rules could actually force top, inevitably NBA-bound high school players toward the G League rather than the NCAA. “With the introduction of a true minor league system in the G League, a lower age rule would give NBA clubs control over players’ maturation processes before they enter the NBA, while simultaneously giving players hands-on training in the organization’s own development system and style.”<sup>147</sup> Unfortunately, because this void has yet to be completely filled, there has been a

---

<sup>139</sup> Dan Murphy, *Can Congress Help the NCAA Find NIL Consistency?*, ESPN (Jul. 1, 2020), [https://www.espn.com/college-sports/story/\\_/id/29392144/congress-working-multiple-legislative-options-solve-ncaa-nil-issue](https://www.espn.com/college-sports/story/_/id/29392144/congress-working-multiple-legislative-options-solve-ncaa-nil-issue).

<sup>140</sup> Glen West, *NCAA Proposes NIL Plan For College Athletes, What This Means for LSU*, SPORTS ILLUSTRATED (Apr. 29, 2020), <https://www.si.com/college/lsu/football/ncaa-proposed-nil-plan>.

<sup>141</sup> See, e.g., Des Bieler, *High School Star Hopes His Jump Straight to NBA’s G League Starts a ‘Trend’*, THE WASH. POST (Mar. 29, 2018, 8:35 PM), <https://www.washingtonpost.com/news/early-lead/wp/2018/03/29/high-school-star-hopes-his-jump-straight-to-nbas-g-league-starts-a-trend/>; Jonathan Givony & Adrian Wojnarowski, *Top High School Player Jalen Green Enters NBA/G League Pathway*, ESPN (Apr. 16, 2020), [https://www.espn.com/nba/story/\\_/id/29043828/sources-top-high-school-player-jalen-green-enter-nba-g-league-pathway](https://www.espn.com/nba/story/_/id/29043828/sources-top-high-school-player-jalen-green-enter-nba-g-league-pathway); *No. 13-Ranked Basketball Prospect Isaiah Todd Signs with G League*, ESPN (Apr. 17, 2020), [https://www.espn.com/nba/story/\\_/id/29049520/no-13-ranked-prospect-isaiah-todd-signs-g-league](https://www.espn.com/nba/story/_/id/29049520/no-13-ranked-prospect-isaiah-todd-signs-g-league).

<sup>142</sup> Ehrlich, *supra* note 1, at 56.

<sup>143</sup> NBA G LEAGUE, <https://gleague.nba.com/about/> (last visited Oct. 30, 2020).

<sup>144</sup> Dennis Hui, *Unionizing the NBA G League*, 25 SPORTS LAW. J. 113, 116 (2018).

<sup>145</sup> NBA G LEAGUE, <https://gleague.nba.com/faq/> (last visited Oct. 30, 2020).

<sup>146</sup> Hui, *supra* note 144, at 116.

<sup>147</sup> Ehrlich, *supra* note 1, at 61.

growing movement among the nation’s best high school players to seek other avenues besides the NCAA and their amateur rules.

Most recently, there are LaMelo Ball and RJ Hampton, who both played professionally in Australia before their likely lottery selection in the 2020 NBA Draft.<sup>148</sup> There have also been players who opted-out of their commitment to “blue chip” basketball programs to play in the G League and make significantly more money. Jalen Green, the projected first pick in the 2021 NBA Draft, is expected to receive a salary in the \$500,000 range while in the G league in the 2020 season.<sup>149</sup> To make matters worse for the NCAA, a top-tier player like Isaiah Todd actually decommitted from the University of Michigan to sign a deal similar to Green.<sup>150</sup> It is important to note, however, that finding alternative routes that circumvent playing in the NCAA is not a newfound concept among the country’s best high school players. Brandon Jennings, in 2008, was the country’s best high school point guard before he signed a three-year, \$1.65 million contract to play in Italy.<sup>151</sup> This was the first time a player of his caliber opted for a non-NCAA route to the NBA. Eventually, Jennings went on to be selected by the Milwaukee Bucks as a lottery selection in 2009, signaling that non-NCAA routes to the NBA do not necessarily decrease a prospect’s “draft stock.”

#### IV. ELIGIBILITY RULES AND MINOR LEAGUE STRUCTURES IN THE MLB, NHL, AND THE PROFESSIONAL EUROPEAN MODEL

Professional baseball and the NCAA have a very different relationship than the NBA and the NCAA, due in large part to the draft eligibility rules of Major League Baseball (“MLB”). Generally, in order to be eligible for the MLB Draft, a player must be a resident of the United States or Canada and the player can never have signed a Major League or Minor League contract before.<sup>152</sup> Additionally, high school players, if they have graduated from high school and have not yet attended college or junior college, college players from four-year colleges who have either completed their junior season or are at least twenty-one-years-old, and junior college players, regardless of how many years of school they have completed, are eligible for the MLB Draft.<sup>153</sup> This means that players are forced to either commit to playing in college for at least

---

<sup>148</sup> Adam Zagoria, *LaMelo Ball Will Follow R.J. Hampton to the Australian Pro League*, FORBES (Jun 18, 2019, 6:46 AM), <https://www.forbes.com/sites/adamzagoria/2019/06/18/lamelo-ball-will-follow-r-j-hampton-to-the-australian-pro-league/#27c0a1e9154b>.

<sup>149</sup> Chris Mannix, *NBA Mailbag: How Will the G League Pathway Program Impact College Basketball?*, SPORTS ILLUSTRATED (Apr. 24, 2020), <https://www.si.com/nba/2020/04/24/nba-mailbag-g-league-college-basketball>.

<sup>150</sup> *Id.*; see, e.g., *Top Prospect Jonathan Kuminga Opts for G League Over NCAA*, NBA (Jul 16, 2020, 10:43 AM), <https://www.nba.com/article/2020/07/16/jonathan-kuminga-opts-g-league-over-college> (discussing how “[a]nother top-flight basketball recruit has opted for the NBA G League over college basketball”); Jeff Borzello, *Five-Star PG Daishen Nix Decommits From UCLA to Join G League*, ESPN (Apr. 28, 2020), [https://www.espn.com/nba/story/\\_/id/29108600/five-star-pg-daishen-nix-decommits-ucla-join-g-league](https://www.espn.com/nba/story/_/id/29108600/five-star-pg-daishen-nix-decommits-ucla-join-g-league) (discussing how one of the country’s best point guards decommitted from UCLA to join the NBA G League).

<sup>151</sup> Broussard, *supra* note 9.

<sup>152</sup> First Year Player Draft, Official Rules, MLB, <http://mlb.mlb.com/mlb/draftday/rules.jsp> (last visited Oct. 17, 2020).

<sup>153</sup> *Id.*

three years or opting to join the ranks of the extensive minor league system immediately after high school.

With regard to the MLB's minor league structure, professional baseball has had the reputation for having the most extensive farm system of any professional sports league in America.<sup>154</sup> Every MLB team is singly affiliated with minor league teams on at least six different levels of minor league play, including following levels: Rookie, Class A Short-Season, Class A, A, AA, AAA.<sup>155</sup> Because every team has at least six minor league affiliates, each MLB team is paying the salary of hundreds of players – many of whom will never see the professional field.<sup>156</sup> Professional baseball, however, also has a very strong players' union that “has continually and systematically exploited minor leaguers.”<sup>157</sup> Minor league players have no access to the open labor market, where the primary market restraints “can be classified as player mobility restrictions.”<sup>158</sup> Unlike the NBA though, the MLB continues to enjoy the last remaining traces of their exemption from antitrust laws that the federal courts granted to baseball before the Curt Flood Act of 1998.<sup>159</sup>

The Curt Flood Act, however, does not apply to minor league players and, as a result, does not protect their contracts.<sup>160</sup> Additionally, minor league players receive none of the benefits of the MLBPA, which leaves their rights in the hands of unsupervised, unchecked MLB organizational owners.<sup>161</sup> As an example, the lack of minor league protection was on full display in 2018, when the MLB lobbied the federal government to further restrict minor league wages

---

<sup>154</sup> Hui, *supra* note 144, at 126. However, in 2019, news broke that the MLB planned to cut the total number of affiliated minor league teams from 160 to 120. See David Doolittle, *Key Questions as Minor League Baseball Officially Cancels 2020 Season*, ESPN (Jun. 30, 2020), [https://www.espn.com/mlb/story/\\_/id/29390182/key-questions-minor-league-baseball-officially-cancels-2020-season](https://www.espn.com/mlb/story/_/id/29390182/key-questions-minor-league-baseball-officially-cancels-2020-season); see also Brett Taylor, *The Dire and Scary State of Minor League Baseball*, BLEACHER NATION (Jul. 2, 2020) (discussing how the pandemic has impacted the minor league, further threatening the structure and viability of the league's structure).

<sup>155</sup> Andrew Simon, *Explaining the MLB Farm System* (May 13, 2019), <https://www.mlb.com/news/the-mlb-farm-system-explained>.

<sup>156</sup> *But see*, Kevin Reichard, *RIP Minor League Baseball: 1901-2020* (Sept. 30, 2020), <https://ballparkdigest.com/2020/09/30/rip-minor-league-baseball-1901-2020/> (discussing how the MLB has eliminated 42 minor league teams, which would decrease the number of minor league teams an organization is affiliated with); Hui, *supra* note 144, at 126. A typical minor league baseball player struggles to earn a salary above the federal poverty level. See Shauna Teresa DiGiovanni, *Underpaid, Underrepresented, Unprotected: A Call for Change in the Status Quo of Minor League Baseball*, 22 SPORTS LAW. J. 243, 243-44 (2015).

<sup>157</sup> Garrett R. Broshuis, *Touching Baseball's Untouchables: The Effect of Collective Bargaining on Minor League Players*, 4 HARVARD J. OF SPORTS & ENT. L. 51, 51 (2013).

<sup>158</sup> David Williams, *Major League Baseball's Indentured Class: Why the Major League Baseball Players Association Should Include Minor League Players*, 53 U.S.F. L. REV. 515, 531 (“After a Major League Baseball team drafts an amateur player, the player is placed on the team's exclusive negotiating list.”); Joel G. Maxcy, *Rethinking Restrictions on Player Mobility in Major League Baseball*, 20 CONTEMP. ECON. POL'Y 149, 150 (2002).

<sup>159</sup> Hui, *supra* note 144, at 127.

<sup>160</sup> Edmund P. Edmonds, *The Curt Flood Act of 1998: A Congressional Response to Baseball's Antitrust Exemption*, in *Baseball and Antitrust: The Legislative History of the Curt Flood Act of 1998 Public Law No. 105-297, 112 Stat. 2824* 1, 5 (Edmund P. Edmonds & William H. Manz eds. 2001). See also Edmund R. Edmonds, *The Curt Flood Act of 1998: A Hollow Gesture After All These Years*, 9 MARQ. SPORTS L.J. 315 (1999).

<sup>161</sup> Marc Normandin, *Why Minor League Baseball Players Haven't Unionized*, SB NATION (Jun. 5, 2018, 11:00 AM), <https://www.sbnation.com/mlb/2018/6/5/17251534/mlb-draft-minor-league-baseball-union-phpa>.

more than they already were.<sup>162</sup> Even Gene Orza, a twenty-six-year labor attorney for the MLBPA, emphasized that “the Players Association doesn’t represent the minor league players, and therefore, ha[s] no obligation to help them out.”<sup>163</sup> Because of this, minor league players are easily exploitable, lack any formal means of protection, and have a low standard of living in the wake of their low salary and short season.<sup>164</sup>

The National Hockey League (“NHL”), on the other hand, has the most lenient, player-friendly draft eligibility rules of any major professional sports organization in the United States. There is no established age floor in the NHL, unlike its NBA counterpart.<sup>165</sup> Instead, any player who will be eighteen by September 15th of that calendar year through any player who will still be twenty at the end of said calendar year is available to be selected in the NHL Draft; to make matters more inclusive, any player who is twenty-one or twenty-two and had previously been drafted, but did not sign with the team that drafted them is again eligible for that year’s draft.<sup>166</sup> The pool of eligible players includes any domestic or international players, players who have been passed over in previous drafts, those who chose not to sign with the team that previously drafted them, and players participating in junior-level, high school, college, or professional hockey overseas.<sup>167</sup> For those not drafted, there is also a period of time in which they have the opportunity to sign with an NHL team as an undrafted free agent as opposed to waiting and re-entering a subsequent draft.<sup>168</sup>

Even after being selected, the NHL’s system for managing the contract status of drafted players is still incredibly flexible and friendly to both teams and players, in that the negotiation process has more room for truly determining an adequate salary in light of the players’ skill.<sup>169</sup> An NHL team has nearly a year, until the following June 1st after the draft, to retain the exclusive negotiating rights with a domestic draft pick.<sup>170</sup> While the NHL has built in certain signing procedures that allow drafted players, and their respective teams, to mitigate the risks of certain players not being ready for the NHL immediately, these same procedures cannot apply to those players who are committed to playing in the NCAA in light of the NCAA’s amateurism rules.<sup>171</sup> Because of this, the NHL and NCAA found a “loophole” to the NCAA’s rules. Any drafted player, who is, or becomes, a college student by June 1st following his initial draft selection does not need to agree to a contract with the NHL team that drafted him in order to maintain his relationship with that team; instead, the team retains the exclusive negotiating rights

---

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

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> Tyler Yaremchuk, *Now is the Time for the NHL to Change the Draft Age*, OILERSNATION (Mar. 26, 2020, 9:00 AM), <https://oilersnation.com/2020/03/26/now-is-the-time-for-the-nhl-to-change-the-draft-age/> (explaining the intricacies of the NHL Draft, and even proposing the minimum age be increased to nineteen in order to create more excitement around the draft).

<sup>166</sup> Leach, *supra* note 10, at 209-10.

<sup>167</sup> Collective Bargaining Agreement Between the National Hockey League and National Hockey League Players’ Ass’n, Art. 8, <https://www.thedraftanalyst.com/nhl-cba-rules-on-entry-draft-2013-2022/> (last visited Oct. 30, 2020).

<sup>168</sup> Leach, *supra* note 10, at 210.

<sup>169</sup> Trevor Levine, *Two Worlds Collide: Salary Arbitration for NHL Players in the Salary Cap Era*, 26 OHIO ST. J. ON DISP. RESOL. 729, 736 (2011).

<sup>170</sup> Leach, *supra* note 10, at 210.

<sup>171</sup> *Id.* at 210-211.

with that player throughout their five years of NCAA eligibility, or until August 15th following his graduation.<sup>172</sup>

Unlike the inequitable and non-unionized minor league system of the MLB, professional hockey and the NHL is home to the most established unionized minor league in any major professional sport.<sup>173</sup> In 1967, NHL players made a second attempt at forming a players' association after the players' first efforts were met with less than successful results.<sup>174</sup> Since 1967, the National Hockey League Players' Association ("NHLPA") has thrived and gone on to represent professional hockey players with much success.<sup>175</sup>

Structurally, the NHL has two premier minor leagues: the American Hockey League ("AHL") and the East Coast Hockey League ("ECHL").<sup>176</sup> The AHL, often likened to the MLB's triple-A minor league, is the top minor league of the NHL; the league itself has a "30-for-30" model, where each AHL team has an NHL affiliate.<sup>177</sup> The AHL's minimum salary was \$51,000 in 2020-21, and the average salary was over \$90,000 in 2015.<sup>178</sup> In addition to this salary, AHL players receive quality benefits, including a per diem allowance on the road, travel expenses, health insurance coverage, and arbitration for dispute resolution.<sup>179</sup> While these figures are still low compared to the NHL's minimum player salary, they are much higher than what the average minor league baseball or G League player would make.<sup>180</sup> As minor league hockey does not generate the large attendance or TV revenues of other minor leagues, the difference in salary is most likely the result of collective bargaining at the major league level.<sup>181</sup>

---

<sup>172</sup> *Id.* at 211 (discussing how even "[w]hile playing in college, the draftee may keep in contact with coaches and executives and may attend team camps, giving both sides an understanding of the player's professional-readiness and organizational fit, and may even receive and consider contract offers to leave school early, so long as an agent is not used while enrolled).

<sup>173</sup> In 2020, the NBA's G League formed a union, which will temporarily be named the Basketball Players Union (BPA). See Cassandra Negley, *G League Players Form Union with Assist from NBPA*, YAHOO!SPORTS (Jul. 21, 2020), <https://sports.yahoo.com/g-league-players-form-union-with-assist-from-nbpa-173909367.html>; Dennis Hui, *supra* note 144, at 130. However, there has been a recent push for the MLB's minor league to unionize. See, e.g., David Williams, Comment, *Major League Baseball's Indentured Class: Why the Major League Baseball Players Association Should Include Minor League Players*, 53 U.S.F. L. Rev. 515 (2019); Brad Doolittle, *Advocacy Group Formed for Minor League Baseball Players*, ESPN (Mar. 20, 2020), [https://www.espn.com/mlb/story/\\_/id/28931445/advocacy-group-formed-minor-league-baseball-players](https://www.espn.com/mlb/story/_/id/28931445/advocacy-group-formed-minor-league-baseball-players).

<sup>174</sup> Liz Mullen, *The Making of a Union: NHLPA Celebrates a Milestone of its Own, As Players' Union Turns 60*, SPORTS BUSINESS JOURNAL ISSUES (Jan. 23, 2017).

<sup>175</sup> What We Do NHLPA, <https://www.nhlpa.com/the-pa/what-we-do> (last visited May 18, 2021).

<sup>176</sup> NHL TEAM AFFILIATES, <https://records.nhl.com/franchises/team-affiliates> (last visited Oct. 30, 2020).

<sup>177</sup> Gary R. Blockus, *AHL is One Step Away From NHL*, THE MORNING CALL (Sep. 29, 2014) (analogizing the AHL to baseball's Triple-A league).

<sup>178</sup> PROFESSIONAL HOCKEY PLAYERS' ASSOCIATION, AHL-PHPA CBA (2019), <https://www.phpa.com/site/agreements#Maximum%20Salary>; Brian MacPherson, *Minor League Hockey Players Benefit From NHL Relationship*, PROVIDENCE JOURNAL (Feb. 21, 2015, 11:15 PM), <https://www.providencejournal.com/article/20150221/news/150229777>.

<sup>179</sup> Hui, *supra* note 144, at 130.

<sup>180</sup> PROFESSIONAL HOCKEY PLAYERS' ASSOCIATION, AHL-PHPA CBA (2019), <https://www.phpa.com/site/agreements#Maximum%20Salary> (the NHL's minimum salary for the 2019-20 season being \$50,000 and the minimum salary for 2023-24 season being \$52,725).

<sup>181</sup> Hui, *supra* note 144, at 130-31.

On a completely different side of the professional league spectrum, professional basketball in Europe presents a completely different structure than any professional organization in the U.S. European teams often have varying sets of rules and eligibility requirements. For example, some European leagues place certain restrictions on the number of foreign players they allow on their roster.<sup>182</sup> On the other hand, some leagues outside of Europe have a similar structure to the NBA, where there is a set number of teams and they compete to win an annual championship.<sup>183</sup> Other European basketball leagues tend to take a tiered approach, in which teams compete in certain leagues only after they have met certain performance expectations in smaller national leagues.<sup>184</sup> For example, teams' qualifications for the EuroLeague (the premier basketball league in Europe) is based on their success in their domestic leagues and other competitions around Europe.<sup>185</sup>

European basketball allows teams to sign players as teens, develop them, and bring them up in that specific league.<sup>186</sup> Take Luka Dončić as a case study of European basketball development. At just sixteen-years-old, Dončić had become the youngest player to step on the floor with Real Madrid, Spain's premier professional team.<sup>187</sup> Dončić came to the club at the age of thirteen, when he uprooted his life in Slovenia to live with the organization and train with their professional staff.<sup>188</sup> At thirteen, Dončić had signed a deal with Real Madrid that lasted through 2022; that deal, however, was always looking towards his future in the NBA with multiple NBA escape clauses.<sup>189</sup> Since then, he was drafted as the third overall pick in the 2018 NBA Draft, and in his second season in the NBA averaged nearly 29 points per game.<sup>190</sup>

While it is easy to attribute Dončić's success to anything other than the European development model, European players are clearly taking the NBA by storm.<sup>191</sup> Today, 108 international players from thirty-eight countries were on "opening-night rosters for the 2019-20

---

<sup>182</sup> Allison Slusher, *A Much Needed Travel Call: Using the G League as the NBA's Key to International Expansion*, 8 MISS. SPORTS L. REV. 69, 77 (2019) ("Italy's Lega Basket Serie A is one such league as it requires a team's roster to have five Italian players at all times. The remaining slots can either be filled by five players from outside the European Union or three players from outside the European Union and four players from the European Union").

<sup>183</sup> *Id.* at 77 (discussing how the NBL, Australia's professional basketball league is similar in structure to the NBA).

<sup>184</sup> *Id.* at 76.

<sup>185</sup> *Id.* at 76.

<sup>186</sup> Grant Hughes, *How Europe Changed the NBA Game Forever*, BLEACHER REPORT (Sep. 6, 2013), <https://bleacherreport.com/articles/1764154-how-europe-changed-the-nba-game-forever>.

<sup>187</sup> David Pick, *All Hail Luka Dončić, Europe's 16-Year-Old Hoops Prince*, BLEACHER REPORT (Nov. 13, 2015), <https://bleacherreport.com/articles/2588799-all-hail-luca-doncic-europes-16-year-old-hoops-prince>. At the age of 14, Ricky Rubio was the youngest player to have ever played professional basketball in Spain. See Pete Thamel, *Ricky Rubio at 19: The Prodigy Is Coming of Age*, THE NEW YORK TIMES (Aug. 28, 2010), <https://www.nytimes.com/2010/08/29/sports/basketball/29rubio.html> (discussing the accolades of Ricky Rubio and his draft prospects before the turning 20).

<sup>188</sup> Pick, *supra* note 187.

<sup>189</sup> *Id.*

<sup>190</sup> NBA ADVANCED STATS, <https://stats.nba.com/player/1629029/> (last visited Oct. 9, 2020).

<sup>191</sup> James Benge, *Giannis Antetokounmpo Leads Charge as Europeans Take NBA By Storm*, EVENINGSTANDARD (Jan. 16, 2019, 2:56 PM), <https://www.standard.co.uk/sport/giannis-antetokounmpo-leads-charge-as-europeans-take-nba-by-storm-a4040741.html>.

season.”<sup>192</sup> Among those players, four won 2018-19 Kia NBA Performance Awards: Giannis Antetokounmpo won the NBA Most Valuable Player, Doncic won Rookie of the Year, Pascal Siakam won NBA Most Improved Player, and Rudy Gobert won NBA Defensive Player of the Year.<sup>193</sup> It is easy to see then that European player success in the NBA is in large part due to the structure and development of European players. These players’ professional, structured development began at a younger age while overseas compared to their American counterparts, who often played on unstructured and unregulated AAU teams until they went to an NCAA member institution.

## V. CONCLUSION

While the present infrastructure of the NBA Draft make it unlikely, if not completely impossible to adopt a model similar to those seen in Europe, the NBA and its G League could very easily adopt eligibility rules and a draft structure similar to that of the NHL with great success. Even with the European model’s success, it would be too difficult to completely reshape the way professional basketball is formatted. The MLB model, on the other hand, has proven to be incredibly problematic in its treatment of minor league players, and given its sheer size, the NBA and the G League would likely opt for a more financially viable minor league structure.

The NHL, on the other hand, has had prospered with their sports entry model, even without the viewership and endorsement deals of the NBA and its affiliates. The NBA could more easily adopt the structure of the NHL’s eligibility requirements and the flexibility that comes with those rules. In applying this format to current and future players, the NBA would be ensuring NBA organizations actually get NBA-ready talent when they want, as opposed to forcing teams to abide by a blanket prohibition on players under the age of nineteen. It may be easy and more financially viable for the NBA to simply allow a player to develop elsewhere for a year before entering the NBA—saving the NBA millions in development costs and allowing organizations to avoid any unnecessary risk. However, given the growing fanbase of the G League and the newer NIL rules that are sprouting up around the country, now, more than ever, the NBA is primed to take a step in the right direction towards implanting a true minor league.

The NHL Draft model would simply be the mechanism by which high school basketball players would have the best chance to truly assess their professional outlooks without losing NCAA eligibility. This model would allow players to either: (1) enter the NBA Draft immediately, and play in the G League to develop their talent in a system more akin to that of an actual minor league; (2) enter the NBA Draft immediately and then opt to play in the NCAA as their means of development, and in doing so student-athletes could potentially increase their marketability and brand with the new NIL rules at the collegiate level; (3) a player could not be drafted and sign with an NBA franchise, in which case the NBA organization can opt to send that

---

<sup>192</sup> See Press Release, NBA, NBA Rosters Feature 108 International Players in 2019-20 (Oct. 22, 2019), <https://www.nba.com/article/2019/10/22/nba-rosters-feature-108-international-players-2019-20> (The most-represented countries among the 108 international players on opening-night rosters were Canada (16 players), Australia (nine players), France (eight players), Croatia (seven players) and Serbia (six players)).

<sup>193</sup> *Id.*

player to the G League on a two-way contract; or (4) the high school player could simply choose to play in the NCAA, not because he has to, but because he wants to. In so doing, that player can still earn money and opt to enter the NBA Draft later on when they are more developed. This structure would give players more routes to enter the NBA while also potentially increasing the talent pool in a given draft because players were allowed to select their means of development as opposed to being forced into a “one-size-fits-all” developmental scheme.

These different routes may be in direct conflict with the interests of the NCAA, given their reliance on the one-and-done rule for an influx of talent. However, it may also provide college basketball fans something they haven’t had since the early 2000s: players who want to be in college. The NCAA with its new NIL rules may actually attract players who are genuinely interested in contributing to a collegiate team and developing their brand along the way. The NCAA would avoid players like Ben Simmons, who clearly went to college to meet the age floor of the NBA and stopped attending class the moment his NCAA Tournament chances disappeared.<sup>194</sup> This would mean fans of college basketball can enjoy basketball in its purest form rather than renting top high school players for a year before they entered the NBA.

---

<sup>194</sup> Andrew Joseph, *Simmons Silences Troll by Pointing Out He Skipped LSU Classes*, USA TODAY (Oct. 20, 2016, 4:15 PM), <https://www.usatoday.com/story/sports/ftw/2016/10/20/ben-simmons-won-a-twitter-argument-by-pointing-out-he-didnt-go-to-class-at-lsu/92475142/>.