“CAN I SEE SOME ID?”: THE ILLEGALITY OF AGE-BASED DRAFT ELIGIBILITY RESTRICTIONS IN THE NBA AND NFL

Steve E. Cavezza

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INTRODUCTION

LeBron James could have gone to Ohio State for one season. He could have brought in millions of dollars in revenue for the Ohio State University Athletic Department, the National Collegiate Athletic Association (NCAA), television networks, and OSU sponsors. However, LeBron would never have seen a single penny of the profits he produced. After one year as a Buckeye, having grown from an immature eighteen-year-old child to a nineteen-year-old man, equipped with one year of college education under his belt, he would have been allowed to enter the National Basketball Association (NBA) Draft. This, of course, was not the fate of LeBron James. Instead, in 2003, he went straight from high school to the NBA, where he signed a lucrative contract with the Cleveland Cavaliers at the youthful age of eighteen.1 In 2005, the NBA began barring high school players from participating in its draft. 2 Had LeBron been born just two years later, he likely would have spent his first year after high school in a dorm room in Columbus, rather than a mansion in Cleveland.

The National Football League (NFL) has a similar rule that bars players from joining its league until they are three years out of high school.3 The NBA and NFL (collectively, the “leagues”) are the only major professional sports leagues that prohibit player entrance based on the time since high school graduation.4 Eighteen-year-old high school graduates who wish to pursue a professional career in these leagues are barred from doing so, even though they can

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1 Associated Press, James signs, ready to lace up for Cavs, Deseret News (July 4, 2003), available at http://www.highbeam.com/doc/1P2-7106755.html (“James signed his three-year, $12.96 million rookie contract with the Cleveland Cavaliers, who selected the 18-year-old Akron high school phenom with the No. 1 overall pick in the NBA draft.”).
2 Tim Legler, Age minimum part of new labor deal, ESPN.com (June 21, 2005), at http://sports.espn.go.com/espn/print?id=2091539&type=story.
3 Article XVI, Section 2(b) of the NFL’s 2006 Collective Bargaining Agreement.
vote, as well as fight and die for their country. These age restrictions are a concerted action that bars entry into the leagues, and as such, each restriction constitutes a “group boycott.” Assuming the non-statutory labor exemption does not apply to these age-based eligibility rules, they violate antitrust laws under a rule of reason analysis.

I. NBA AND NFL AGE-BASED DRAFT RESTRICTIONS

A. The NBA Draft Eligibility Rule

Originally, the NBA had no age requirement, but only a handful of high school graduates joined the league. The NBA eventually imposed a rule in its bylaws that required a player to be four years removed from his high school graduation in order to be eligible for the draft. This rule would be challenged in 1971 by high school All-American Spencer Haywood. After two years of college, he joined the NBA’s rival at the time, the American Basketball Association (ABA). The ABA had no rule restricting college underclassmen from entering its league. The ABA named Haywood its Rookie of the Year, as well as the league’s Most Valuable Player. He then signed a contract with the NBA’s Seattle Supersonics. The NBA threatened

6 See Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049, 1062 (C.D. Cal. 1971) (A group boycott occurs when one group of people refuses to contract with another group of people).
8 Prior to Kevin Garnett in 1995, only four players were drafted by NBA teams straight out of high school: Reggie Harding (1962), Moses Malone (1974), Darryl Dawkins and Bill Willoughby (1975).
9 Denver Rockets, 325 F. Supp. 1049, supra note 6 at 1059.
10 Id.
11 Denver Rockets, 325 F. Supp. 1049, supra note 6 at 1052.
12 Denver Rockets, 325 F. Supp. 1049, supra note 6 at 1060.
13 Id.
to invalidate the contract because Haywood was only three years removed from high school, so Haywood filed an antitrust suit against the league.\footnote{Denver Rockets, 325 F. Supp. 1049, supra note 6 at 1054.} In 1971, the Court found in favor of Haywood.\footnote{Id.}

Shortly after the decision in \textit{Haywood}, if a student-athlete wanted to play professional basketball in the NBA, all he needed was a high school diploma or its equivalent.\footnote{Id.} Notable stars such as Moses Malone, Darryl Dawkins, Kevin Garnett, Kobe Bryant, Tracy McGrady, Jermaine O’Neal, LeBron James, Amare Stoudemire and Dwight Howard successfully made the transition directly from high school to the NBA.\footnote{See Jack N.E. Pitts, Jr., \textit{Why Wait?: An Analysis of the National Football League and National Basketball Association’s Draft Eligibility Rules}, 51 How. L.J. 433 (2008).} In 2005 the NBA implemented a new age rule and included it in the league’s Collective Bargaining Agreement (CBA).\footnote{High School Players and the NBA Draft, http://ssbasketball.rivals.com/content.asp?SID=1132&CID=356192.} Article X, Section 1(b)(i) of the CBA requires that:

\begin{quote}
“[T]he player (A) is or will be at least nineteen years of age during the calendar year in which the Draft is held, and (B) with respect to a player who is not an international player…at least one (1) NBA Season has elapsed since the player’s graduation from high school (or, if the player did not graduate from high school, since the graduation of the class with which the player would have graduated had he graduated from high school).”\footnote{Title X of the NBA’s 2005 Collective Bargaining Agreement; http://www.nbpa.com/cba_articles/article-X.php.}
\end{quote}

Essentially, non-international players must be nineteen years old \textit{and} must wait for one NBA season to pass after they graduate from high school to be eligible for the draft. The current CBA
runs through the 2010-2011 season, and the NBA has the option to extend it for the 2011-2012 season.21

B. The NFL Draft Eligibility Rule

Like the NBA, the NFL originally had no age eligibility rule barring entry into its league.22 The NFL adopted its first such rule in 1925.23 The league unilaterally imposed the rule.24 It required that all players be at least four years removed from the time of their high school graduation before they could be eligible for the NFL Draft.25 The NFL created the rule in response to a star college running back, Harold Edward “Red” Grange (a.k.a. “The Galloping Ghost”), leaving the University of Illinois during his senior year and joining the Chicago Bears.26 Many people, including Grange’s head coach at Illinois, condemned his decision because he had “abandoned his studies for a blatantly commercial career” and because it was “unethical for Grange to capitalize upon a reputation that he had acquired in college for direct personal gain.”27

The four-year rule remained in effect until 1990, when it was essentially reduced to three seasons.28 This requirement was set forth in the NFL’s Constitution and Bylaws.29 It required a student-athlete to be four years out of high school, but allowed for a “Special Eligibility” application for players seeking entry into the NFL Draft after only three seasons removed from

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23 Id. at 385.
24 Id.
25 Id.
26 Id.
27 Id.
29 Id. at 127.
their high school graduation. This “Special Eligibility” application was merely a formality, as the Commissioner regularly granted such requests.

The NFL’s Collective Bargaining Agreement did not contain an age requirement until 2006. The rule, set forth in Article XVI, Section 2(b) of the 2006 CBA, states:

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

While no cases challenging the current rule included in the NFL’s CBA have been brought, Maurice Clarett challenged the previous rule in 2004. Clarett was a heralded high school running back from Youngstown, Ohio. For his success on the field as a high school senior in 2002, he was named Ohio Mr. Football, USA Today High School Offensive Player of the Year, and a Parade All-American. The following season Clarett took the field as a member of the Ohio State Buckeyes. He was the first freshman in sixty years to begin the season as the starting running back for the Buckeyes. During his freshman campaign, Clarett rushed for over 1,200 yards and scored sixteen touchdowns in just eleven games. Led by Clarett, OSU won its

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30 Clarett II at 128-29
32 Article XVI, Section 2(b) of the NFL’s 2006 Collective Bargaining Agreement.
33 Id.
34 Id. Clarett I.
37 Clarett I at 382.
38 Clarett I at 387.
first National Championship in thirty-four years.\footnote{Clarett I at 387.} He was named the Big Ten Freshman of the Year and voted the best running back in college football by \textit{The Sporting News}.\footnote{Clarett I at 388.} At six feet tall and 230 pounds, he was taller and heavier than some of the NFL’s all-time greatest running backs.\footnote{Id.} There was little doubt that Clarett was an NFL-caliber player who would be drafted in the first round.\footnote{Id.}

Due to academic and legal troubles off the field, Clarett was ruled ineligible for his sophomore season.\footnote{Id.} At the time, Clarett was only two years removed from his high school graduation.\footnote{Id.} Unfortunately, because of the NFL’s age eligibility rule requiring an athlete to be three seasons removed from high school, Clarett was not eligible to participate in the draft process.\footnote{Id.} Clarett decided to take on the NFL and challenge its eligibility rule to gain entry into the 2004 NFL Draft.\footnote{Id.} He argued that the NFL’s age rule was an illegal restraint on trade because the teams agreed to exclude a broad class of players from the NFL labor market, thereby constituting a “group boycott” in violation of antitrust laws.\footnote{Id.} Clarett was successful at the district court level.\footnote{Id.} The court held that the non-statutory labor exemption did not apply, and that the rule violated antitrust laws.\footnote{Clarett I.} The Second Circuit disagreed with the district court and articulated a broad application of the non-statutory labor exemption, shielding the rule from antitrust laws.\footnote{Id.}

\begin{footnotes}
\footnotetext[40]{Clarett I at 387.}
\footnotetext[41]{Clarett I at 388.}
\footnotetext[42]{Id.}
\footnotetext[43]{Id.}
\footnotetext[44]{Id.}
\footnotetext[45]{Id.}
\footnotetext[46]{Id.}
\footnotetext[47]{Id.}
\footnotetext[48]{Id.}
\footnotetext[49]{Id.}
\footnotetext[50]{Clarett I at 410.}
\footnotetext[51]{Clarett II, 369 F.3d 124 (2d Cir. 2004).}
\end{footnotes}
II. ANTITRUST LAWS AND SPORTS

A. Antitrust Laws in the Sports World

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

1. The Sherman Antitrust Act

All antitrust claims challenging restrictions on trade or commerce are brought under the Sherman Act.\(^\text{52}\) Section 1 of the Sherman Act prohibits “[e]very contract, combination…or conspiracy, in restraint of trade.”\(^\text{53}\) The Supreme Court has long held that only “unreasonable” restraints are prohibited.\(^\text{54}\) For a viable Section 1 claim to exist, three requirements must be met: (1) a contract, combination, or conspiracy; (2) the contract, combination or conspiracy produced a restraint of trade; and (3) the restraint affected trade or commerce among the several states.\(^\text{55}\) In most settings, restraints of trade concern the product market.\(^\text{56}\) This is not so for player restraints in sports, however, which typically concern the labor market.\(^\text{57}\)

2. The Application of the Sherman Act in Professional Sports

\(^{54}\) See Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).
\(^{56}\) McCann & Rosen, Legality of Age Restrictions in the NBA and the NFL, supra note 4 at 734.
\(^{57}\) Id.
In the 1922 case of Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs, major league baseball was held to be exempt from antitrust laws. Following this decision, many courts incorrectly granted antitrust exemptions with regards to a variety of professional sports cases. That is until International Boxing Club of New York, Inc. v. United States was decided in 1958. The Supreme Court held that there was nothing inherently special about professional sports that deserved granting a broad exemption from antitrust liability. Today, all professional sports leagues, with the exception of Major League Baseball, are subject to the antitrust laws.

3. Legal Standard: Per se vs. Rule of Reason

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

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58 259 U.S. 200 (1922).
59 Id. at 208-09.
62 Id.
64 McCann & Rosen, Legality of Age Restrictions in the NBA and the NFL, supra note 4 at 734.
Alternatively, the rule of reason examines all of the circumstances involved in the disputed practice, both justifications for and arguments against the alleged restriction. The focus of an inquiry under the rule of reason is whether the restraint imposed is justified by a legitimate business purpose, and is no more restrictive than necessary. This standard attempts to ensure sufficient competition within a marketplace and courts often consider the possibility of less restrictive means to achieve the same effects. Under the rule of reason standard, an agreement will be deemed unlawful if it causes an anticompetitive injury that outweighs its pro-competitive effects.

A third standard is somewhat of a hybrid form of scrutiny, and is known as “quick look” rule of reason. Under this standard, per se and rule of reason are blended together. It borrows the presumption of unreasonable practices from the per se standard and, like the rule of reason, it considers likely anticompetitive effects and market power, but only “to the degree necessary to understand a challenged restraint’s competitive consequences.”

4. The Rule of Reason - The Standard for Sports

Courts typically regard sports leagues as functionally unique, and therefore better suited for either a rule of reason or a quick look rule of reason analysis when evaluating a Section 1

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68 Tarabishi v. McAlester Regional Hospital, 951 F.2d 1558, 1570 (10th Cir. 1991).
70 Tarabishi v. McAlester Regional Hospital, supra note 68.
71 National Society of Professional Engineers v. United States, 435 U.S. 679 (1978) (describing the evolution of the Rule of Reason and explaining the rule’s focus on the competitive significance of the restraint).
Professional sports leagues are unique because they act as collaborations whose teams compete individually on the field but cooperate economically off of it for the prosperity of their respective league. Courts realize that professional sports leagues need to have some restraints in order for them to exist and function. Some regulations, such as when games are played, where they are played, and what rules are to be followed during the game are necessary to facilitate competition, even if they might otherwise be viewed as an illegal restraint on trade. For these reasons, the rule of reason analysis has become the preferred form of scrutiny used by the courts in deciding antitrust claims involving professional sports.

The seminal case for applying the rule of reason instead of a per se rule in antitrust cases involving sports is *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*. The case involved members of the NCAA bringing an antitrust challenge to the association’s plan for televising college football games. The arrangement limited the amount of intercollegiate football games which could be televised, and disallowed the sale of television rights by individual teams unless it was in accordance with the plan. The Supreme Court reasoned that, although the plan created horizontal price-fixing and output limitation, a per se

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76 Id. at 101.
77 See Michael Tannenbaum, Article: *A Comprehensive Analysis of Recent Anti-trust and Labor Litigation Affecting the NBA and NFL*, 3 Sports Law. J. 205, 209.
79 Id.
80 Id. at 92.
rule should not be applied.\textsuperscript{81} Instead, the rule of reason was used since horizontal restraints on trade were essential if the product was to be available at all.\textsuperscript{82}

Similarly, in \textit{Smith v. Pro Football, Inc.},\textsuperscript{83} the same analysis was used in applying the rule of reason. In \textit{Smith}, a former professional football player brought an antitrust action against the National Football League based on an unlawful restraint arising out of the player draft.\textsuperscript{84} In choosing to apply the rule of reason, the appellate court stated, “the courts have consistently refused to invoke the boycott per se rule where, given the peculiar circumstances of an industry, the need for cooperation among participants necessitated some type of concerted refusal to deal.”\textsuperscript{85} The court went on to hold that the NFL player draft, as it existed in 1968, had a severely anticompetitive impact on the market for players’ services.\textsuperscript{86}

\section*{B. The Non-Statutory Labor Exemption in Sports}

The U.S. Supreme Court created the non-statutory labor exemption to accommodate Congressional policies favoring collective bargaining under the National Labor Relations Act and favoring free competition in business markets.\textsuperscript{87} Union-employer agreements and some aspects of the collective bargaining process have thus been accorded a non-statutory exemption from antitrust sanctions.\textsuperscript{88}

\begin{footnotes}
\footnote{Id.}{Id.}
\footnote{Id.}{Id.}
\footnote{593 F.2d 1173 (D.C. Cir. 1978).}{593 F.2d 1173 (D.C. Cir. 1978).}
\footnote{Id.}{Id.}
\footnote{Id.}{Id.}
\footnote{Smith v. Pro Football, Inc., 593 F.2d 1173 at 1183; the NFL Draft included a “no-tampering” rule under which, as it existed in 1968, precluded teams from negotiating with eligible draftees prior to the draft.}{Smith v. Pro Football, Inc., 593 F.2d 1173 at 1183; the NFL Draft included a “no-tampering” rule under which, as it existed in 1968, precluded teams from negotiating with eligible draftees prior to the draft.}
\footnote{Collectively, the Clayton Act of 1914, the Norris-Laguardia Act of 1932 and the National Labor Relations Act of 1935 make up the non-statutory labor exemption.}{Collectively, the Clayton Act of 1914, the Norris-Laguardia Act of 1932 and the National Labor Relations Act of 1935 make up the non-statutory labor exemption.}
\footnote{Unions are combinations of individuals that seek to preclude an employer from negotiating with individual employees.}{Unions are combinations of individuals that seek to preclude an employer from negotiating with individual employees.}
\end{footnotes}
In the 1976 case of *Mackey v. National Football League*, the Eighth Circuit established a three-pronged test to determine when the non-statutory labor exemption should apply. This test, which has come to be known as the “Mackey test”, requires courts to consider whether: 1) the restrictions affect only parties to the collective bargaining relationship; 2) the restrictions concern a mandatory subject of collective bargaining; and 3) the restrictions are a product of bona fide arm’s-length bargaining. Further, under the National Labor Relations Act, mandatory subjects of bargaining between employers and unions pertain to “wages, hours, and other working conditions of employment.”

However, in 1991, the Supreme Court in *Brown v. Pro Football, Inc.* did not apply the Mackey test. In fact, the Court did not adopt any specific test for applying the exemption, refusing to draw a line between what should and what should not be covered by it. The Court did state that the collective bargaining process should be protected from antitrust scrutiny. The Court also recognized the apparent conflict between antitrust and labor law; as antitrust law seeks to prohibit unreasonable restraints on trade, but labor law will allow some anticompetitive agreements “conducive to industrial harmony.” This conflict of laws, combined with the lack

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89 See *Mackey*, supra note 69; *Mackey* involved a challenge to the NFL’s “Rozelle Rule”, which provided that once a player’s contract expired and he signed with another team, his new team had to provide compensation to the previous team. If the teams couldn’t reach an agreement, the Commissioner could step in and provide compensation in the form of players and/or draft picks as he deemed “fair and equitable”. The plaintiffs argued that the rule “constituted an illegal combination and conspiracy in restraint of trade, denying professional football players the right to freely contract for their services.” In applying its test, the court found that the rule did not satisfy the third prong because the rule was unilaterally imposed, rather than the product of bona fide arm’s-length negotiation. Therefore, the Rozelle Rule did not qualify for non-statutory exemption. Consequently, the court went on to find that the rule violated the Sherman Act under a rule of reason analysis.

90 *Id.* at 614.


93 *Id.* at 240-241; Since labor and management had attempted to come to an agreement on a mandatory subject of collective bargaining (salary), the Court was not willing to step in and create its own solution.

94 *Id.*
of a specific test to follow, makes determining when the non-statutory labor exemption should be applied a somewhat speculative task.

The NFL and NBA are unionized leagues, with their players represented by the National Football League Players Association (NFLPA) and the National Basketball Players Association (NBPA), respectively.95 The leagues and player associations negotiate the terms of employment and memorialize them in a collective bargaining agreement (CBA), which periodically expires and is renegotiated.96 Due to the non-statutory labor exemption, restrictions that result from collective bargaining that are contained in the CBA are likely to withstand judicial scrutiny.97 In Clarett, the Second Circuit held that the NFL’s eligibility rule fell within the scope of the non-statutory labor exemption.98 Similarly, in Wood v. National Basketball Association,99 the court essentially immunized the NBA Draft from antitrust attack if the draft rules were the result of collective bargaining.100

If an athlete banned by the age restrictions were to challenge the leagues’ rules in the future, a different circuit court could very well disagree with the Second Circuit and find that the non-statutory labor exemption does not apply. This would likely be due to a failure of either the first or second prong of the Mackey Test. The first prong might fail because arguably potential
members of the leagues are not parties to the collective bargaining relationship. The second prong might not stand on the basis that the rules do not concern a mandatory subject of collective bargaining. The district court in Clarett ruled that potential players were not parties to the agreement and that the rule did not concern a mandatory subject of collective bargaining. Due to confusion and a lack of clearly articulated standards from the Supreme Court, a court might find that the exemption simply does not apply for other reasons. This is a realistic possibility because, over time, the interpretations of the non-statutory labor exemption and the decisions as to how much protection from antitrust scrutiny it should provide have varied. The holding in Clarett was the opinion of one United States federal court of appeals. There are eleven other circuits that might find differently based on the same or similar facts. It is possible that the next time a challenge of a professional sports leagues’ age-based eligibility rules is brought, the exemption will not apply. For the remainder of this paper, it is assumed that at least one of these scenarios holds true, and that the non-statutory labor exemption does not apply to the leagues’ draft restrictions.

III. APPLYING THE RULE OF REASON TO THE DRAFT RESTRICTIONS

A. Basic Framework of a Rule of Reason Analysis

The leagues’ age eligibility rules are a concerted action to exclude that bar players’ entry into their respective professional sport. Such rules would be held illegal due to violations of

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101 It is important to note that job “applicants” can typically be constrained by collective bargaining agreements; See e.g. Reliance Insurance Companies v. NLRB, 415 F.2d 954, 959-62 (2d. Cir. 1987).
102 Clarett I.
103 Pitts, Why Wait?, supra note 17 at 435.
antitrust laws under a per se analysis.\textsuperscript{105} However, assuming the non-statutory labor exemption does not apply, a court would analyze the restrictions under a rule of reason analysis. This requires weighing the anticompetitive effects of the restraint against its pro-competitive justifications. Doing so should lead to a finding that the leagues’ eligibility restrictions based on age violate antitrust laws.

First, a plaintiff must show that there is an agreement. There is no question that an agreement to restrain trade exists in this situation. The teams collectively agreed to implement the minimum age limits, via the CBA. Next, a plaintiff would have to establish harm in the relevant market. The relevant market here is the market for NBA and NFL player services. By not permitting some players to compete, both the plaintiff and competition are harmed. Both the NBA and NFL have market power concerning professional football and basketball services. The student-athletes are the sellers of their services and abilities, the “product”, to NBA and NFL teams, the buyers. The age restrictions act as a purchaser’s bar on an entire class of sellers, which harms competition in the absence of an alternative comparable market.

When dealing with the NBA and NFL, there are no comparable leagues. The NBA currently has no other professional basketball league in direct competition with it. Even international leagues are in a different market due to inferior quality of athletes and lower salaries.\textsuperscript{106} There have been numerous attempts to establish and maintain major professional football leagues in the U.S. One example of this was the Arena Football League, which recently


\textsuperscript{106} McCann, \textit{Illegal Defense, supra} note 97 at 214-15.
folded.\textsuperscript{107} Currently, the NFL is the only professional football league in existence in the United States. The closest competitor to the NFL is the Canadian Football League (CFL).\textsuperscript{108} However, only a handful of CFL players make more than the NFL minimum salary.\textsuperscript{109} As the district court in \textit{Clarett} stated, “The League’s suggestion that one of the other professional football leagues in North America is a fair substitute for the NFL cannot be taken seriously.”\textsuperscript{110} The NFL clearly represents an unparalleled opportunity for an aspiring football player in terms of salary, publicity, endorsement opportunities, and level of competition.\textsuperscript{111} For these reasons, the NFL and NBA have no reasonably comparable employers. These leagues dominate the global market, and therefore have market power not just in the United States, but throughout the world. Such market power enhances the likelihood of anticompetitive effects.\textsuperscript{112} For reasons discussed below, barring student-athletes from competition based on age harms both the labor market and the consumer market.\textsuperscript{113}

\section*{B. Anticompetitive Effects on the Individual}

The harm to a student-athlete who is excluded from the leagues based on age alone flows from a harm to competition.\textsuperscript{114} These anticompetitive effects on the individual athletes are numerous and severe, and they stem directly from the leagues’ age-based eligibility restrictions. First and foremost, eighteen-year-old adults are allowed to participate in various other activities

\begin{thebibliography}{99}
\item[107] Tom Mix, \textit{Economy woes threaten sports}, Columbus Telegram (Jan 4. 2009), http://www.columbustelegram.com/articles/2009/01/04/sports/local/doc4960530f1db07347723911.prt (“The Arena Football League was forced to fold and cancel the 2009 season.”).
\item[108] The Canadian Football League was founded in 1958; it is currently located entirely in Canada, after an unsuccessful attempt to expand into the United States from 1992-1996; \textit{see} http://www.cfl.ca/ (last visited Dec. 3, 2009).
\item[109] \textit{Clarett} I at 383-84.
\item[110] \textit{Clarett} I at 407.
\item[111] \textit{Clarett} I at 384.
\item[112] Pitts, \textit{Why Wait?}, supra note 17 at 466-67.
\item[114] \textit{Clarett} I at 401.
\end{thebibliography}
that are even more inherently dangerous than playing professional basketball or football. The most blatant example being that these men can and do fight and die for our country in wars. Also, often overlooked are other professional sports that are inherently more dangerous than football that allow young athletes to compete, such as hockey and boxing.

Perhaps most importantly is that the leagues’ restrictions deny the individual athletes the right to pursue their calling. It has long been held that the antitrust laws will not tolerate a contract “which unreasonably forbids anyone to practice his calling.”\(^\text{115}\) These age-based rules are a complete bar to entry into the market, which is the type of injury that the antitrust laws were designed to prevent.\(^\text{116}\) Along with this barrier to pursuit of one’s calling comes the inability to earn enormous financial incentives for the individual athletes and their families. The average NBA salary is $5.356 million,\(^\text{117}\) while the NFL’s average salary is $1.1 million.\(^\text{118}\) Players who make the jump from high school to the pros are not necessarily making league minimums. In the NBA, the players drafted straight from high school who are currently playing have a higher median salary than the median NBA salary as a whole.\(^\text{119}\) In fact, high school players who entered the NBA make more money, and do so at a faster rate, than any other age group within the league.\(^\text{120}\) Also important is that, by making the jump directly to the NBA, these players gain the ability to become unrestricted free agents sooner, which allows them to

\(^{115}\) Gardella v. Chandler, 172 F.2d 402, 408 (2d Cir. 1949).

\(^{116}\) Clarett I at 382.

\(^{117}\) The NBA has the highest average salary of any major North American sports league; the NBA minimum for 2009-2010 was $457,588; see http://www.nba.com/news/cba_minimumsalary_050804.html.

\(^{118}\) NFL Players Association, NFL Hopeful Frequently Asked Questions, http://nflplayers.com/ ("This year, the average NFL salary was $1.1 million. Qualifying players also receive a wide variety of fringe benefits including pre-season pay, life, dental and medical insurance, severance pay, disability benefits and pension coverage.").

\(^{119}\) McCann, Illegal Defense, supra note 96 at 325-326.

\(^{120}\) Id. at 326.
demand even more money.\footnote{An unrestricted free agent is free to sign with any team, though some unrestricted free agents have options on their existing contracts that, if exercised, may impact their choices. \textit{See} http://www.nba.com/2009/news/features/06/24/faexplainer/index.html.} By not allowing a student-athlete to join the NBA out of high school, and making him wait a year, the player is not only denied the ability to make millions of dollars right away, but he will also be locked into the nearly non-negotiable rookie salary scale for one more year.\footnote{In 2009-2010, the NBA Rookie Scale for the first overall pick was $4,152.9 for the 1\textsuperscript{st} year salary, $4,464.4 for the 2\textsuperscript{nd} year salary, and $4,775.9 for the third year option salary; \textit{see} http://www.nbpa.com/cba_exhibits/exhibitB.php.}

Aside from off-the-field financial opportunities such as endorsements, a professional athlete can only make money based on their performance for as long as they are physically able to play at a high level. As an athlete’s skills deteriorate, typically so does their paycheck. In fact, the professional athlete’s career is much shorter than many perceive. For example, the average NBA career lasts only five years.\footnote{Arn Tellem, \textit{NBA’s Plan to Limit Youngsters No More than Hollow Altruism}, N.Y. Times, May 13, 2001, § 8, at 11.} The average career of an NFL player is even shorter, lasting just three-and-a-half years.\footnote{NFL Players Association, NFL Hopeful Frequently Asked Questions, http://nflplayers.com/ (“The average length of an NFL career is about 3 and a half seasons. Although there are some exceptional players who have long careers that extend 10 or twelve seasons and beyond, most players only stay active for about three seasons. Players leave the game because of injury, self-induced retirement, or being cut by the team. This also means that while players may make more money than most people, they are only making it for an average of three and a half years.”)} By not allowing an athlete to enter the NBA for one year, a player will lessen the likelihood that his playing career will extend beyond, or even meet, the league average. That lost year impacts their financial earning capacity, including the delayed ability to become a free agent. The NFL, by delaying entry for three years, could even eliminate the entire career of a potential player.

One example of the NFL age restriction leading to the elimination of a professional career is the tragedy of Maurice Clarett. While most people know of his successes on the football field in college and his subsequent failure in the courtroom, many people do not know
the story of what happened to Clarett after he was denied entry into the NFL Draft. He had lost his college eligibility, and thus sat out for two full football seasons.\textsuperscript{125} In 2005, Clarett came to the NFL pre-draft workouts out of shape.\textsuperscript{126} He ran a very disappointing 4.82 forty-yard dash.\textsuperscript{127} Clarett, or “Slow Mo” as he was now being referred to, was fortunate enough to be selected with the 101\textsuperscript{st} pick by the Denver Broncos.\textsuperscript{128} He showed up to training camp overweight, and was soon released by the team without having played a single down in the NFL.\textsuperscript{129} Due in large part to his legal challenge of the NFL’s age-eligibility rule, Clarett was over one-million dollars in debt, and was now out of a job.\textsuperscript{130} This led to an incident in January of 2006, where Maurice attempted to rob a couple at gunpoint outside of a nightclub in downtown Columbus, Ohio.\textsuperscript{131} Seven months later, after making an illegal U-turn, he led police on a high-speed chase.\textsuperscript{132} The chase ended when Clarett’s vehicle ran over a police spike strip.\textsuperscript{133} After being subdued, police discovered that Clarett was wearing Kevlar body armor.\textsuperscript{134} Inside the car were loaded guns and an open bottle of vodka.\textsuperscript{135} He accepted a plea bargain, and was sentenced to seven and a half

\textsuperscript{125} Clarett I at 388.

\textsuperscript{126} Steve Wilstein, Williams walks through door Clarett opened, NBC Sports, Feb. 28, 2004, http://nbcspors.msnbc.com/id/4377775/ (“Out of shape and away from competition for a year, he left scouts shaking their heads when he passed up a chance to show off his talents at the NFL combine workouts last week. He’ll be lucky to be drafted in the first two or three rounds.”).

\textsuperscript{127} Don Banks, Not so fast: Clarett plummets down draft board with bad 40, SL.com, Feb. 26, 2005, http://sportsillustrated.cn/2005/writers/don_banks/02/26/clarett combine/ (“In his two cracks at the 40 on Saturday at the RCA Dome, Clarett false-started, then ran a glacier-like 4.82 and followed it up with a slightly improved 4.72.”).


\textsuperscript{130} Jason Cole, Rookie RB Brown keeps ego in check, The Miami Herald, Sept. 7, 2005 (“According to two sources, Clarett is already $1 million in debt from legal fees for his fight with the NFL and other costs.”).


\textsuperscript{133} Id.

\textsuperscript{134} Id.

\textsuperscript{135} Id.
years in prison, with the possibility of early release after three and a half years.\textsuperscript{136} While it is possible that Maurice Clarett would have had both personal and legal issues even if his NFL rule challenge had been successful, the situation could have been completely avoided. If not for the age-based eligibility restriction, Maurice may have gone straight to the NFL, had a successful career, and would still be making millions to this day. Instead, he is blogging from a federal prison cell in Toledo.\textsuperscript{137} It would be a shame if a future star athlete were barred from earning a living by the leagues’ age restrictions and suffered a similar fate.

Aside from the shortening of a professional athlete’s career, there are other financial considerations involving the risks players must face due to their inability to enter the leagues. The two most considerable risks are that of injury, and the dropping of draft “stock”. Some athletes are so talented at the age of eighteen that NBA coaches and scouts feel they are good enough to be selected high in the draft immediately out of high school.\textsuperscript{138} In fact, prior to the current NBA rule, many players were.\textsuperscript{139} Such players include stars like Moses Malone, Darryl Dawkins, Kevin Garnett, Kobe Bryant, Jermaine O’Neal, Tracy McGrady, Al Harrington,

\textsuperscript{136} Id.
\textsuperscript{137} Maurice Clarett, \textit{The Mind of Maurice Clarett}, May 25, 2009, http://mauriceclarett.wordpress.com/ (“I can’t hold these feelings in anymore. I want to play football again. I have a deep desire to play. I love the game. I have so much penitentiary aggression pinned up inside of me. I want to hit someone. I want to run the ball. I want to tackle someone. I want to play. I am going to play somewhere. I cannot accept how things ended. I won’t accept how they ended. I am 220, rock solid. I am moving swift, running fast, and jumping high. My mind is right and my life is in order. I am 25 but I feel like I am 18. I am still young. Those who do support me deserve and want to see me out there playing again. I play with some pretty good athletes back here. In the penitentiary you could say basketball is football. Back here everything is aggressive. Everything is intense. I know I am an asset to someone’s locker room on so many levels. I’ve survived some of life’s worst struggles. I am not a statistic. I am still here and I am still living. I didn’t and won’t give up. I am a winner. I am optimistic. I am inspirational. I am alive. I want to play for the love and the respect. I want to play for the underdogs. I want to play because I know how to really well. Hopefully, they’ll open these gates soon and I’ll be able to get out on the field again. I am healthy mentally and physically. I am rock solid. I train hard. I go hard. I’m HERE.”).
\textsuperscript{138} Fourteen high school seniors were drafted with a top ten pick by NBA teams from 1995-2005. Interestingly, Kobe Bryant was not one of them, as he was selected with the 13\textsuperscript{th} pick in the 1996 NBA Draft.
\textsuperscript{139} Forty-five high school players were drafted by NBA teams between 1962 and 2005.
Rashard Lewis, Tyson Chandler, Amare Stoudemire, LeBron James and Dwight Howard. It only takes one look at either the 2009 NBA Finals rosters or the 2009 NBA All-Star game rosters to realize the effect these players have on the game today. Between the two teams competing in the Finals, five players began playing professional basketball prior to when they would be allowed to under the current NBA rule. In the All-Star game, eight of the 24 players fit this description.

Recent NBA Drafts also provide evidence that teams who have the top picks are still willing to draft younger players based on potential over older, more experienced players. In 2007, the top two picks were college freshmen, Greg Oden and Kevin Durant. Oden and Durant were ranked one and two, respectively, in the 2006 high school basketball recruiting rankings. Similarly, in the 2008 NBA Draft, four of the top five players selected were college freshmen, and the fifth was just a sophomore. In comparison, only five college seniors were drafted in the entire first round. Like Oden and Durant, those four freshmen were among the top six of the 2007 high school basketball recruiting rankings their senior year. Arguably, all of these college freshmen chosen high in the drafts would have been drafted at or about the same

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140 For a complete list of high school players who have entered the NBA Draft, see http://ssbasketball.rivals.com/content.asp?SID=1132&CID=356192 (last visited Dec. 3, 2009).
141 The Los Angeles Lakers faced the Orlando Magic in the 2009 NBA Finals; the five players on the rosters who began playing professional basketball prior to turning nineteen were, for the Magic: Hedo Turkoglu, Rashard Lewis and Dwight Howard, and for the Lakers: Andrew Bynum and Kobe Bryant.
142 The eight 2009 NBA All-Stars who began playing professional basketball prior to turning nineteen included: LeBron James, Kevin Garnett, Dwight Howard, Kobe Bryant, Amare Stoudemire, Rashard Lewis, and international players Dirk Nowitzki and Tony Parker.
143 Greg Oden played at Ohio State for one season, leading them to a Big Ten Championship and National Runner-Up; he was drafted with the first pick in the 2007 NBA Draft by the Portland Trailblazers.
144 Kevin Durant played one season at the University of Texas where he was named the 2007 National College Player of the Year; he was selected second overall in the 2007 NBA Draft by the Seattle SuperSonics; after his first season in the NBA, he was named Rookie of the Year.
146 NBA.com, Draft 2008, http://www.nba.com/draft2008/ (College freshmen Derrick Rose, Michael Beasley, O.J. Mayo and Kevin Love were selected with the first, second, third, and fifth picks, respectively; sophomore Russell Westbrook was selected with the fourth pick.).
147 Id.
spot the year prior had the age rule not barred them from participating. While their draft “stocks” may not have dropped due to the one year they spent in college, they are still harmed. They were not able to earn a paycheck for that year, they will become free agents one year later, and their professional careers have been shortened by a year.

The popular counter-argument to this is that for every success story, such as Kobe Bryant, there are multiple failures, such as Kwame Brown. However, this argument falls short because there are plenty of highly touted high school recruits who choose to attend college and never live up to the lofty expectations. High school players have done so well in the NBA because they knew they would; otherwise, they would not have declared. The facts illustrate the truth, which is that there are far more “prep-to-pro” successes than failures. Of the forty-eight American players who entered the NBA Draft right out of high school prior to the implementation of the new rule, forty-two were drafted. Twenty-nine of those forty-two were first round picks. Of the forty-four high school players drafted since 1995, only six are no longer playing in the NBA. On the other hand, of those same forty-four players, six were selected to play in the 2009 NBA All-Star Game. Clearly, the argument that for every success there are multiple failures is flawed.

149 Kwame Brown was a McDonald’s High School All-American; he committed to the University of Florida, but later decided to enter the 2001 NBA Draft straight out of high school where he was the first overall pick by the Washington Wizards; he has largely failed to live up to the high expectations, averaging only seven points per game over his nine year career; http://www.nba.com/playerfile/kwame_brown/.
150 See McCann, Illegal Defense, supra note 96, at 322.
151 It should also be noted that, while six high school seniors went undrafted, one of those six, Jackie Butler, was signed by the New York Knicks during the 2004-2005 season.
153 Id.
Every year there are top high school prospects that are forced to either attend college or move overseas because of the draft rule.155 This year is no exception, as some NBA scouts believe that University of Kentucky freshman John Wall would have been the first overall pick in this past year’s draft had he been allowed to enter it.156 Blake Griffin of Oklahoma was selected with that pick, and was handsomely rewarded with a rookie salary scale contract of $16,071,840.157 If Wall suffers a career-ending injury playing for the Wildcats this season, he will never see a dime of what he could have earned had he been given the opportunity to participate in the draft. Similarly, if he suffers even a minor injury, it may cause his draft “stock” to drop. Even if Wall plays all year long injury-free, his performance at the college level may not live up to expectations, causing his draft “stock” to fall, which would decrease his potential earnings in the NBA. As Brandon Haywood, a star basketball player at the University of North Carolina who played all four years put it, “the longer you stay, the more they’re going to criticize your game. The shorter you stay, the more they’ll draft you on potential.”158 The long history of successful players in the NBA who have made the jump directly from high school illustrates that certain athletes are willing and able to compete at the professional level. Furthermore, scouts have become proficient at identifying them. Given the risks these players face by having their careers delayed, they should be allowed to compete directly out of high school.

155 Brandon Jennings, ranked as the top point guard coming out of high school in 2008, verbally committed to the University of Arizona, then decided to play professionally in Europe; after one year in Italy, Jennings declared for the 2009 NBA Draft and was selected tenth overall by the Milwaukee Bucks.
158 Michael Murphy, Going Straight from High School to the Pros was Once Unheard of, but the Success of Players like Kobe Bryant and Kevin Garnett has More Teens Trying to Make the Leap, Houston Chronicle, June 24, 2001, § 2, at 17.
The leagues, as well as much of the public, are convinced that since age-based restrictions “allow” student-athletes to pursue higher education and attend college, these rules are inherently a positive thing for the athlete, the leagues, and society as a whole. Unfortunately, this is not true. By enforcing these rules, athletes are not given a choice. Were there no such rules, a player could freely choose whether to join the leagues, or go to college. With the current rules in place, they have no such choice. The exceptional student-athlete today essentially has two options: move to a foreign country and play professionally, or go to college and play for no pay. Taking a year off is not a viable option, as these players’ elite skills and physique are likely to deteriorate, as was the case with Maurice Clarett. Playing professional football in the Canadian Football League or professional basketball overseas means less money, less publicity, and uprooting to a foreign country. Therefore, most highly skilled high school athletes choose the college route.

Since these athletes essentially have no other option, many go to college when they do not want to. Players might not meet the academic requirements of educational institutions, which can lead to cheating and NCAA rules violations. A recent example of this is Derrick Rose. Rose was a star basketball player at his Chicago high school. He was barred entry into the NBA due to the current age rule, so he attended the University of Memphis. He played just one year at Memphis, leading the Tigers to the National Championship game, before declaring for the 2008 NBA Draft where he was the first overall selection by the Chicago Bulls.

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159 Isamu Bae, *High school athletes should go to college, not the pro level*, June 1, 2004, http://silverchips.mbhs.edu/story/3626.
160 Derrick Rose was the top-rated point guard prospect in the class of 2007; see Rivals.com, supra note 148.
161 *Id.*
Bulls. Less than a year later, an NCAA investigation revealed that Rose cheated on his SAT exam to gain entrance into Memphis. As a result, Memphis was forced to vacate its entire 2008 season. Had the NBA age rule not been in effect, Rose likely would have gone straight to the NBA, and this embarrassing sequence of events would have been avoided.

Similarly, players who are forced to play college ball and not earn a paycheck seek other forms of monetary gain. This too can lead to NCAA rules violations, the likelihood of which is increased considering the fact that a majority of the elite NCAA athletes come from impoverished families. A recent example of this is Reggie Bush. Bush led the University of Southern California football team to two National Championships. Bush was also the recipient of college football’s highest individual honor, the Heisman Trophy. After following the NFL’s age-eligibility requirement, Bush decided to forego his senior year and entered the NFL Draft where the New Orleans Saints selected him with the second overall pick. After leaving USC, reports surfaced that Bush and his family may have been receiving substantial gifts.
in violation of NCAA rules.\textsuperscript{171} The investigation is currently ongoing.\textsuperscript{172} If the NFL rule had not been in place, Reggie Bush may have gone directly to the NFL from high school, or perhaps he could have entered the NFL Draft after one or two years of college, before any gifts were made to his family. Reggie Bush is just one example of the many student-athletes who have tried to procure financial incentives while attending college and being prohibited from entering their respective professional league due to the age restrictions.\textsuperscript{173} While encouraging NCAA rules violations alone may not be a justification for striking down the leagues’ age restrictions, it is yet another example of how the restrictions harm the individual athletes and college athletics.

While in college, these athletes spend an average of forty hours per week working on their game.\textsuperscript{174} This leaves limited time to work on their academics. The best players, although forced to attend college, typically leave well before they graduate. In the 2009 NBA Draft, only six of the thirty first round picks were college seniors.\textsuperscript{175} Perhaps even more telling, none of the first ten draft picks were seniors.\textsuperscript{176} In the 2009 NFL Draft, less than half of the first round picks were college seniors.\textsuperscript{177} Kevin Garnett’s agent, Arn Tellem, provides clear evidence of why these athletes should choose the pros over college: “In Garnett’s case, those four extra years of

\begin{itemize}
  \item \textsuperscript{171}Associated Press, \textit{Reggie Bush Denies Allegations He Took Money From Marketing Agents}, FOXNEWS.com, Sept. 16, 2006, http://www.foxnews.com/story/0,2933,214133,00.html (“Allegations that they accepted gifts, money and other benefits worth more than $100,000 from two marketing agents during his career at Southern California.”).
  \item \textsuperscript{172}Beth Harris, \textit{USC Trojans rebuild under shadow of NCAA probe}, SL.com, Nov. 16, 2009, http://sportsillustrated.cnn.com/2009/basketball/ncaa/wires/11/16/2060.ap.bkc.rebuilding.usc.0867/; Also, O.J. Mayo, a star high school basketball player who would have gone straight to the NBA if not for the age restriction, is alleged to have received gifts and money from BDA Sports, a sports agency, during his short stint at USC.
  \item \textsuperscript{173}Eamonn Brennan, \textit{Brandon Jennings: Go east, young man}, June 24, 2008, Rivals.com, http://rivals.yahoo.com/ncaa/basketball/blog/the_dagger/post/Brandon-Jennings-Go-east-young-man?urn=ncaab.89942 (“The NBA’s one-year rule is producing some truly strange new situations. In the case of O.J. Mayo, we got to see what happens when people stop being polite, are forced to go to college for one year, take a bunch of money from shady agents, leave for the NBA, don’t have to face the repercussions of their actions, and start getting real.”).
  \item \textsuperscript{175}NBA.com, http://www.nba.com/draft2009/.
  \item \textsuperscript{176}Id.
  \item \textsuperscript{177}NFL.com, http://www.nfl.com/draft/2009.
college could have cost him as much as $100 million.”  

Given the financial incentives and risks discussed above, the “smart” thing for most star athletes to do is to join the professional leagues, not attend college. Athletes can always return to school later in life if they want to earn their degree, after they have made their millions. However, they cannot turn back the clock and return to their athletic “prime”.

C. Anticompetitive Effects on the Market

In Haywood v. National Basketball Association, which was the seminal sports eligibility case prior to Clarett, the plaintiff argued that the NBA’s then four-year rule constituted a “group boycott” in violation of the Sherman Act. The district court concluded that the rule would inflict “irreparable harm” on Haywood because he only had a limited window of time to play professional basketball. Conversely, the NBA would not endure any substantive harm from allowing Haywood to enter the league. The court found that the boycott victimized excluded players by not allowing them to enter the desired market, and that the ban injured competition within that market since the excluded players could not sell their services. Simply put, by imposing an arbitrary age restriction, the leagues are not allowing the best players to play.

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178 Tellem, supra note 123.
180 Clarett II, 369 F.3d 124 (2d Cir. 2004).
181 Haywood, 401 U.S. 1204, supra note 179.
182 Denver Rockets, 325 F. Supp. 1049, supra note 6 at 1057.
183 Denver Rockets, 325 F. Supp. 1049, supra note 6 at 1058.
184 Denver Rockets, 325 F. Supp. 1049, supra note 6 at 1061.
Eighteen-year-old men should be allowed to compete for positions within the market. The best example of this is LeBron James. \(^{185}\) He entered the NBA right out of high school at the age of eighteen, and he was arguably the best player in the NBA the second he stepped on the court. Players out of high school help, rather than hurt, the NBA. The NBA players who make the jump from high school are among the most popular players in the league. Not allowing them to play hurts the market of professional basketball. Professional sports leagues rely on the popularity of their players. Perhaps the best measurement of an individual player’s popularity is by analyzing jersey sales. The most popular jerseys in 2008-2009 were: (1) Kobe Bryant, (2) Kevin Garnett, and (3) LeBron James. \(^{186}\) All three of the highest selling jerseys in the entire NBA are those of players who came straight out of high school. Perhaps even more telling is the all-time jersey sales list. Three of the top six selling NBA jerseys of all time are those of high school players: Kobe Bryant, LeBron James and Tracy McGrady. \(^{187}\)

Players who go straight to the NBA from high school also provide the league with increased publicity. Players such as Kevin Garnett, Kobe Bryant, LeBron James and Sebastian Telfair have all graced the cover of Sports Illustrated while still in high school. \(^{188}\) The interest these players create clearly helps boost jersey sales and publicity. Other positive effects that are likely to follow are increased ticket sales, television ratings, and competition as a whole. While some may argue that the NBA benefits from having well-known college players drafted instead

\(^{185}\) Nicknamed “King James”, LeBron was named Mr. Ohio Basketball three times in high school; at eighteen he was selected with the number one overall pick by the Cleveland Cavaliers; James signed a $90 million Nike shoe contract before ever playing a game in the NBA; James was named NBA Rookie of the Year in 2003-2004 and Most Valuable Player in 2008-2009; he has been an All-Star every season since 2005.


\(^{187}\) Darren Rovell, *NBA 10 year Jersey Sales List – Guess Who’s Number One!*, CNBC.com, Mar. 26, 2008, http://www.cnbc.com/id/23810523 (Kobe Bryant’s jersey sales were second all-time behind Michael Jordan, LeBron James’ jersey was already at number four after being on sale for just five years).


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of relatively little known high school players, the truth is that the college players do not create anywhere near the buzz the high school players do. Fans want to see what these high school kids can do in the NBA, and they will watch them play, even if just to see if they will fail. An example of this was the anticipation of LeBron James’ first NBA game in 2003 versus that of college star Tyler Hansbrough’s in 2009. LeBron James made his home debut before a sellout crowd at Gund Arena. So far this year, the Pacers have the seventh worst home attendance record and have yet to sell out a game.

D. League Justifications and Pro-Competitive Benefits

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

1. Paternalistic Justifications

One of the reasons offered by NBA commissioner David Stern for the necessity of the age limit is that it keeps unscrupulous agents and runners from misleading players into false hope of NBA stardom and fortune. Marty Blake, the Director of Scouting Services for the NBA,

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189 Tyler Hansbrough played four years at the University of North Carolina where he swept all major individual honors in men's college basketball, winning six national player of the year awards; he was drafted by the Indiana Pacers with the thirteenth pick in the 2009 NBA Draft.
190 Roger Gordon, Tales from the Cleveland Cavaliers: the rookie season of LeBron James xi (Sports Publishing LLC, 2004).
192 Desmond Conner, Bynum Has a Test Left, Hartford Courant, May 29, at E5.
stated that “the kids are getting bad advice in some cases. Some just can’t play.” However, if greedy agents were tricking vulnerable high school athletes who did not possess NBA-caliber talent into entering the NBA, there would have been a larger number of players making the jump. Further, more high school graduates who did declare would not have been selected in the draft, and more would flop at the professional level. Research done in 2002 showed that, of high school players entering the NBA Draft, sixty-seven percent were drafted in the first round, while nineteen percent were selected in the second round, and only fourteen percent were not drafted. These statistics suggest that, contrary to David Stern and Marty Blake’s beliefs, high school players entering the NBA Draft are typically not given bad advice. Furthermore, the greedy agent theory does not succeed because NBA agents simply do not make much money off rookie contracts. The standard commission an agent would earn on the player’s contract is, at most, a mere four percent. Due to the NBA rookie slotting system, the agent is unable to do much negotiating. The real money for NBA agents comes with the second contract. Therefore, if the high school player is not good enough to excel in the NBA and earn a lucrative second contract, the agent would be wasting both time and money.

A second justification for the age rule offered by Stern is that time in college can help serve the players by advancing life skills as well as promoting the obtainment of a college degree. This argument is not persuasive for the reasons explained in detail above, including: players not wanting to go to college, potential NCAA rules violations, lack of interest in

193 Ethan J. Skolnick, Ready or Not, Here they Come, Palm Beach Post, June 27, 1999, at 14C.
194 See McCann, Illegal Defense, supra note 97, at 338.
academics, lack of ability to succeed in the classroom, lack of time to commit to studies, leaving school prior to earning a degree, and the ability to go back to college after a professional career. The rule does not promote obtainment of a college degree, but rather it promotes spending one year in college. Simply put, a player does not need a college degree to dunk a basketball.

Perhaps the most paternalistic of all the NBA’s justifications for the age rule is the desire to protect the mental, emotional & physical well-being of young student-athletes.\textsuperscript{198} This justification is not valid because the student-athletes who made the jump to the NBA prior to the imposition of the current rule and failed did so because of their talent level, not because of their physical frailty or emotional instability. If, on the other hand, the concern is with off-the-court issues, then this justification still falls short. No NBA player who came straight from high school has been the subject of a major negative media headline. NBA athletes who have been involved in such turmoil include Allen Iverson, who spent two seasons at Georgetown University;\textsuperscript{199} Latrell Sprewell, a University of Alabama graduate;\textsuperscript{200} and Ron Artest, who played three seasons at St. Johns University.\textsuperscript{201}

According to a 2005 study, of the eighty-four total NBA players who had ever been arrested, forty-eight had gone to college for four years, while only four of those arrests were of

\textsuperscript{198} See McCann, \textit{Illegal Defense}, supra note 97 at 332.
\textsuperscript{199} CBC Sports, \textit{Allen Iverson surrenders Tuesday}, July 16, 2002, http://www.cbc.ca/sports/story/2002/07/11/iverson020711.html (In 1997, Iverson pleaded no contest to a gun charge after police in Richmond stopped a car in which he was a passenger and found a gun belonging to Iverson and two marijuana cigarettes; In 2002, Iverson faced fourteen felony and misdemeanor offenses for forcing his way into a West Philadelphia apartment and confronting two men, threatening them with a handgun.).
\textsuperscript{201} Nick Fortuna, \textit{Pacers’ Ron Artest Suspended 30 Games for Fight}, Bloomberg.com, Nov. 21, 2004, http://www.bloomberg.com/apps/news?pid=10000103&sid=ayGTq68qWykY&refer=us (Artest ran into the stands and exchanged punches with fans; he was suspended thirty games for his actions.).
players who had not gone to college at all. In other words, over forty-one percent of NBA players went to college for four years, and over fifty-seven percent of those players were arrested. Meanwhile, just over eight percent did not go to college, and less than five percent of those players were arrested. This study helps prove that players who enter the NBA out of high school are just as prepared mentally, emotionally and physically to endure the rigors that come with competing at such a high level as those players who spend four years in college.

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

2. Pecuniary Justifications

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203 Id.
204 Id.
205 Clarett I at 408.
207 Clarett I at 408 (“While these may be reasonable concerns, none are reasonable justifications under the antitrust laws.”).
208 NCAA v. Board of Regents of University of Oklahoma, supra note 75.
The NBA has also put forth a few financial justifications for its age restrictions. These include keeping NBA coaches and general managers from having to travel to high school gyms, keeping the costs of scouting down, and reducing the teams’ risks involved in drafting young players. As Professor Rick Karcher, an expert in the field of sports law put it: “Even though it's only a one year difference, it's so much better for the clubs because they don't have to spend the resources scouting high school games, and they get to see the kids in a much more competitive (division one) environment, so it eliminates a lot of the risk that's involved in scouting (and) assessing high school talent.”

Similarly, Donnie Walsh, the President of Basketball Operations for the New York Knicks, believes that drafting eighteen-year-olds, rather than nineteen-year-olds, is too unpredictable, and therefore unfairly burdens NBA managers, coaches and scouts. Walsh stated, “If a general manager is going to get judged – and judged harshly – for missing the next Kobe, then he’s going to have to (scout) eighth grade. In fact, he’d get fired if he weren’t and missed a player.”

Much like the NBA’s beliefs of evil agents and having too many unsuccessful high school players, this justification does not withstand factual scrutiny. While it is true that NBA executives are fired for misjudging talent, it happens at every level of play, whether it is with high school, college, or professional players. Even with the current ban in place, some teams are successful while others are not, and the executives of the unsuccessful teams still get fired.

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209 McCann, Illegal Defense, supra note 97 at 332.
210 Director, Florida Coastal School of Law Center for Law and Sports.
213 McCann, Illegal Defense, supra note 97 at 335.
214 In November of 2009 alone, New Orleans Hornets head coach Byron Scott and New Jersey Nets head coach Lawrence Frank were fired; Scott had been named NBA Coach of the Year in 2008; Frank was the longest-tenured coach in the NBA’s Eastern Conference and had the most wins for a head coach in Nets history. Marc Stein, Nets fire Frank amid trip, 0-16 start, ESPN.com, Nov. 29, 2009, http://sports.espn.go.com/nba/news/story?id=4697789.
Therefore, prevention of team executives having to scout high school athletes does not stand as a valid justification. Paralleling this is the argument that the NBA teams will be able to prevent having to spend valuable scouting resources on high school players. While limiting the talent pool would surely decrease overall scouting costs, this is still a weak argument. NBA executives already spend time traveling the nation, and even the world, scouting potential draftees.\textsuperscript{215} It is hard to believe that sending a scout to a handful of local high school gyms would be more costly than sending multiple scouts overseas for weeks at a time to watch hundreds of international players. Very few high school players have the talent to play at the NBA level and actually declare for the NBA Draft, while there are thousands of college and foreign players.\textsuperscript{216} If NBA scouts could draft high school players, there would be less of a need to scout foreign talent. Even if banning players due to their age actually cut resources, the district court in \textit{Clarett} correctly pointed out that a league’s “desire to keep its costs down is not a legitimate pro-competitive justification.”\textsuperscript{217}

Furthermore, even with the current age rule in place, while NBA scouts and general managers may not be actively scouting exceptional high school players like they once did, they still follow them.\textsuperscript{218} Nineteen-year-old players are drafted on potential just as much as eighteen-year-old players are. Every year there are standout college basketball players drafted who are unsuccessful in making the transition to the NBA game, including college seniors such as


\textsuperscript{216}McCann, \textit{Illegal Defense}, supra note 97 at 297 (“high school players who enter the NBA Draft are a small, self-selected group, comprised almost entirely of exceptionally talented players.”).

\textsuperscript{217}\textit{Clarett} I at 409; \textit{see Law v. National Collegiate Athletic Association}, 134 F.3d at 1022 (“cost-cutting by itself is not a valid pro-competitive justification.”).

\textsuperscript{218}Before the NBA instituted its age rule, scouts had to concern themselves with high school players who had enough talent to make the jump directly to the NBA; now that the rule is in place, they still have to be acutely aware of those high school players who are likely going to attend college for only one year before declaring themselves eligible for the NBA Draft.
Michael Olowokandi, Eric Montross and Bryant Reeves. The NBA teams also have pre-draft workouts, camps, and combines at their disposal. These give the teams an opportunity to watch, scout, analyze, and simply get to know potential draftees up close and in person. At the weeklong NBA Pre-Draft Combine, players undergo medical testing, skills workouts, anthropometric testing, strength and agility testing, and individual interviews. This combine is in addition to the individual team workouts. Perhaps most importantly, the combine and workouts come at little to no costs to the teams, since the individual players, or their families, must fund the travel and related expenses. These same points help defeat the NBA’s “risk” argument. The statistics prove that no matter how much college education players have, or how old they are, there is just as good of a chance that they will not be successful NBA players, both on and off the court. Players such as Kevin Garnett, Kobe Bryant, Amare Stoudemire, Dwight Howard and LeBron James have helped prove, beyond any doubt, that high school players can both compete and excel at the NBA level. Even if the facts proving this lack of risk were ignored, and teams believed that high school players actually did present an increased risk, there

219 After his senior year, Olowokandi was drafted with the first overall pick of the 1998 NBA Draft by the Los Angeles Clippers; Olowokandi is considered by many to be one of the biggest busts in NBA history because he was selected ahead of star players such as Vince Carter, Antawn Jamison, Dirk Nowitzki, Paul Pierce, Mike Bibby, and Rashard Lewis, and because of his injuries; In 2005, Sports Illustrated ranked him third on a list of NBA draft busts, see http://sportsillustrated.cnn.com/multimedia/photo_gallery/2005/06/24/gallery.nabusts/content.18.html.
220 At the University of North Carolina, Montross helped the Tarheels win the 1993 National Championship; he was named an All-American in both his junior and senior years; Montross was selected with the ninth overall pick in the 1994 NBA Draft; he went on to play for six different teams in less than ten years in the NBA; Montross retired having averaged less than five points per game.
221 After an outstanding collegiate career at Oklahoma State University, where Reeves averaged 21.5 points per game as a senior and led OSU to the 1995 Final Four, Reeves became the Grizzlies' first-ever draft choice, selected sixth overall in the 1995 NBA Draft; weight-control problems and injuries led to his retirement.
222 The NBA Draft Combine consists of medical testing and examinations, light skills workouts (shooting, ball-handling, position-specific drills), anthropometric testing (height, weight, wingspan) strength & agility testing (3/4 court sprint, bench press, vertical jump, and pro lane agility drill), and league organized player interviews.
224 Michael McCann, NBA Players That Get In Trouble With the Law, supra note 200.
would still be NBA teams willing to take that calculated risk and draft a high school graduate, as many teams have done in the past. 225

Similar to the NBA’s justification is the desire of the NFL to keep its scouting costs down. However, as with the NBA’s argument, “cost cutting by itself is not a valid pro-competitive justification.” 226

3. Product Justifications

Concerns for the welfare of players and adolescents alone do not suffice as pro-competitive justifications. 227 In order to suffice under a rule of reason analysis, the proffered justifications must show that, when balanced, “the challenged restraint enhances competition.” 228 Therefore, the NBA attempts to establish three additional pro-competitive justifications that relate to the “product” of professional basketball: (1) that high school graduates dilute the “product” of NBA basketball; (2) that barring these student-athletes from competition promotes a positive league “brand”; and (3) that the age rule enhances college basketball. 229

Under a rule of reason analysis, none of these vague pro-competitive justifications advanced by the NBA would suffice to outweigh the anticompetitive effects. Only factors that affect economic competition may be considered in determining the legality of a restrictive practice under antitrust laws. 230 The statistics illustrate that high school players do not “dilute” the quality of the NBA product. 231 If anything, they enhance it. The number of talented players

225 See complete list of high school players who have entered the NBA Draft, supra note 140.
226 Clarett I, supra note 215.
227 Clarett I at 408 (“While these may be reasonable concerns, none are reasonable justifications under the antitrust laws.”) (emphasis in the original).
228 NCAA v. Board of Regents of University of Oklahoma, supra note 75.
229 McCann, Illegal Defense, supra note 97 at 332.
230 National Society of Professional Engineers, supra note 71 at 690.
231 See McCann, Illegal Defense, supra note 97.
in the NBA who successfully made the jump from high school is telling. The most popular teams are led by the most popular players, almost all of who did not attend a single year of college, and who would not be permitted to enter the NBA under the current rule. Ticket sales, merchandise sales and television ratings all increase due to the effect these players have on the fans. In fact, the NBA experienced notable financial growth during the time period in which the most high school players were entering the league straight out of high school.232 Fans want to watch the best of the best, and not allowing the best athletes to compete harms the market.

Another product dilution argument is that, because NBA teams have limited roster space, it may hurt competition to have teams use that roster space on younger players who are currently unable to compete at the necessary level, but whose teams are hoping will develop into quality players. The argument follows that if a team lacks the talent to win games, it might not be able to attract fans and make money, which could lead to a team folding or relocating, thus harming competition.233 However, teams are better off having younger potential stars on their bench rather than older aging ones. Younger players, especially those with enough talent to be drafted out of high school, will likely become stars. In fact, by their third year in the NBA, most do.234 Older veterans, on the other hand, will never return to their “prime”. It is very rare that an older player gets any better as they age. An NBA player enters his “prime” at about the age of twenty-seven,235 while the average age of an NBA player is just under twenty-seven years old.236

234 McCann, Illegal Defense, supra note 97 at 337.
Currently, the oldest player on an active NBA roster is thirty-eight, and only four players are thirty-seven years old.\(^\text{237}\) Clearly, professional basketball favors the young over the old.

The argument that, by allowing younger players on a roster, teams might suffer more losses, be harmed financially, and lead to the injuring of competition as a whole is even further flawed when you consider the fact that the NBA actually promotes this. If a team is struggling to win games, the typical solution is to get better by drafting younger players, not by trading away young talent for older veterans. The NBA Draft Lottery is set up to allow those teams who have the worst records to have the best chance at acquiring young talent in the draft by means of having the highest picks.\(^\text{238}\) Professional sports teams, particularly in the NBA, are more focused on the future and the potential of players than they are on a player’s history and past accomplishments. Lastly, if a team wanted to add a veteran player, it would likely have to spend more money in free agency, or give up more in a trade, than if the team drafted a young player instead, due to the NBA’s rookie salary slotting system.\(^\text{239}\) For example, the Cleveland Cavaliers paid LeBron James, arguably the best player in the NBA, a total of $12.96 million for his first three seasons in the league.\(^\text{240}\) His Cleveland teammate, Zydrunas Ilgauskas, an aging center and average NBA player, made $11.54 million per year, almost three times as much as James.\(^\text{241}\)

\begin{itemize}
\item \(^\text{237}\) As of November 22, 2009, Lindsey Hunter, born December 3, 1970, was the oldest active player in the NBA; Grant Hill, Kurt Thomas, Shaquille O’Neal and Brent Barry were the only active NBA players who were thirty-seven years old; see http://sportige.com/top-10-oldest-players-nba-2009-2010/ (last visited Dec. 3, 2009).
\item \(^\text{238}\) The fourteen non-playoff teams participate in the Draft Lottery; it is weighted so that the teams with the worst records have the best chance to obtain a higher draft pick; the lottery process determines the first three picks of the draft, while the rest of the first-round draft is done in reverse order of the teams’ win-loss record from the previous year.
\item \(^\text{239}\) See 2009-2010 NBA rookie scale, supra note 122.
\item \(^\text{240}\) Darren Rovell, Matching the hype, ESPN.com, April 16, 2004, http://sports.espn.go.com/nba/news/story?id=1782852 (“Of course, one of the biggest beneficiaries of the LeBron economy were the Cavaliers, who thanks to the NBA’s rookie salary scale are paying James a combined $12.96 million for his first three seasons.”).
\end{itemize}
You would be hard pressed to find an NBA team who would not take three rookie “King James” over one veteran “Big Z”. 242

The NBA’s most valid argument is that of protecting its product image, also known as “branding”. The reasoning behind this alleged pro-competitive justification is this: by not allowing high school graduates to enter the NBA, and essentially forcing them to attend college, the league is promoting the athletes’ obtainment of a higher education. However, as noted above, the best players simply leave college after the one year required under the rule. Even if they do not leave after one season, most star college basketball players will leave for the NBA prior to graduating. 243 According to the most recent graduation rates published by the NCAA, twenty-eight percent of the 312 sports teams that graduated fewer than half of their athletes were men’s basketball teams. 244 Of those teams, twenty-three competed in the sixty-five team NCAA tournament, including two of the tournaments’ four #1 seeds, the University of Connecticut (twenty-seven percent) and the University of Louisville (thirty-eight percent). 245

Bob Knight, who has more all-time wins than any other men’s division one college basketball coach does, calls the NBA’s rule “the worst thing to happen to college basketball”. 246 Knight points out that “now you have a kid come to school for a year to play basketball and he doesn’t even have to go to class…he would not have to attend a single class the second semester to play through the whole second semester of basketball.” 247 Obviously, if the NBA really had

242 “King James” is LeBron James’ common nickname, and “Big Z” is Zydrunas Ilgauskas’.
243 McCann, Illegal Defense, supra note 97 at 329-30.
245 Id.
247 Id.
an interest in promoting a college education, the rule would require a player to be four years out of high school, or even to have earned a college degree.

E. The True Motivation Behind the Leagues’ Rules

The true motivation behind the age rule is the use of the NCAA as a free farm system. The NBA tries to hide this under the guise of “enhancing college basketball”.\(^{248}\) The NBA does not have a minor league system like Major League Baseball\(^{249}\) because the NCAA acts as the NBA’s minor league. Best of all for the NBA, this farm system comes at no cost to the league. The NBA claims that, by not allowing high school graduates to enter the NBA, it is improving the college game. The NFL made a similar argument in *Clarett* when it argued that, by excluding the most talented college players from the NFL, it was sustaining “the NCAA’s ability to compete in the entertainment market.”\(^{250}\) This justification did not succeed because it was simply sacrificing competition in one market, the NFL, for the sake of increased competition in another market, the NCAA.\(^{251}\) The current NBA age restriction merely allows the league’s teams to watch a player and see how he competes at the college level and develops over his freshman season. This is to the detriment of the player, who is not eligible to make a living, and is essentially forced to work for nothing, all while risking injury and a drop in draft “stock”.

The only possible pro-competitive justification the NFL can put forth is that allowing younger athletes to enter their league would result in a dilution of the quality of play. However,

\(^{248}\) Chris Mannix, *Age Before Beauty: Union Stance Against NBA Age Limit Misses Benefits of Time, Maturity*, Dec. 1, 2004, http://sportsillustrated.cnn.com/2004/writers/chris_mannix/12/01/age.limit/index.html (arguing that an NBA age limit would make the college game better because college fans would be exposed to top prospects, and these top prospects would have the chance to develop their talent against a lower level of competition).


\(^{250}\) *Clarett* I at 409.

\(^{251}\) *Id.* (“the League may not justify the anticompetitive effects of a policy by arguing that it has precompetitive effects in a different market) (original emphasis); see also *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972).
like the NBA, the real reason for the age-based restriction is to continue using the NCAA as a free minor league system.252 The NFL does so by using college football as an “efficient and free farm system…”(that prevents) players from selling their services to the NFL until they have completed three college seasons.”253 Age requirements in professional sports do not benefit young athletes, nor do they improve the professional sports leagues. They exist solely so that three very powerful and very profitable athletic organizations (the NBA, the NFL and the NCAA) can turn a profit, and do so at the expense of the athletes, the very individuals the NCAA was established to protect.254

F. The NBA vs. the NFL

While many of the leagues’ arguments are the same or very similar, the major difference between the NBA’s and the NFL’s is that the NFL has more paternalistic justifications. This is due to the sheer physical nature of professional football. It is likely that a plaintiff who wished to challenge the age-based eligibility rules of the leagues would have a much better chance succeeding against the NBA than the NFL. While the three-year rule imposed by the NFL may cause more irreparable harm, the difference is that we have seen many high school athletes make the jump from high school directly to the NBA and have long, successful careers. From Moses Malone to Dwight Howard, there is a long history of student-athletes who have proven that they can compete at a high level in the NBA. However, this has not been the case in the NFL. For example, when Clarett presented his antitrust case for entry into the NFL, he was arguing a

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


hypothetical. On the other hand, when Haywood challenged the NBA’s four-year rule, he was considered a “Super Star”\textsuperscript{255} Not only had he played on the U.S. Olympic Basketball Team, leading it to a gold medal and being named the outstanding player in the Olympic basketball games, but he had also received Rookie of the Year and Most Valuable Player honors after his one season in the ABA.\textsuperscript{256} This made Haywood a much more sympathetic plaintiff and provided additional justification for finding the NBA’s four-year rule in place at the time to be in violation of antitrust laws. While it is unlikely that a basketball player competing in a professional league other than the NBA will bring such a suit, the difference between Haywood’s and Clarett’s situations is analogous to the difference between eighteen-year-old athletes succeeding in the NBA as opposed to in the NFL. Simply put, if a high school graduate were to bring an antitrust claim against the NBA, and the non-statutory labor exemption did not apply, a court would be more likely to find success than if a similar suit were brought against the NFL, such as Clarett.\textsuperscript{257}

However, there is some hope for such a claim against the NFL in the future, and his name is Amobi Okoye.\textsuperscript{258} Okoye entered the 2007 NFL draft, where he was selected tenth overall by the Houston Texans.\textsuperscript{259} At the time, he was only nineteen years old.\textsuperscript{260} He made the transition to the NFL successfully. In just the first month of his rookie season, Okoye became the youngest player to ever be named Defensive Rookie of the Month.\textsuperscript{261} This is hard evidence that there are some individuals who can compete at the NFL level and be successful, no matter their age. The

\textsuperscript{255} \textit{Denver Rockets,} 325 F. Supp. 1049, supra note 6 at 1052.
\textsuperscript{256} Id.
\textsuperscript{257} See Clarett I and Clarett II.
\textsuperscript{258} Okoye tested into ninth grade at twelve years old; at the age of fifteen, he enrolled at the University of Louisville, even though he had been accepted to Harvard.
\textsuperscript{260} Id.
weakness to this argument is that Okoye spent four years playing college football at the University of Louisville and graduated prior to being drafted, which is why he was eligible at just nineteen.\textsuperscript{262} However, he shows that age is just one of many factors that can determine a player’s readiness for the NFL. As one of the NFL’s own affiants in \textit{Clarett} conceded, “The timeframe for a player’s physical and psychological maturation varies from individual to individual.”\textsuperscript{263} Surely, Okoye is not the only nineteen-year-old on the planet with such a timeframe.

\textbf{G. A Less Restrictive Alternative}

Less restrictive alternatives to the current rule that are less harmful to competition do exist. Both leagues should allow players to enter the draft when they are adults, at the age of eighteen. The best available alternative is simply making a case-by-case determination of each athlete who wishes to enter the leagues. Teams do not want to waste money on players who will not cut it in their respective league, no matter what their age upon entry. Potential draft picks already undergo extensive physical and medical examinations, mental evaluations, and interviews to determine if, and when, a player should be drafted.\textsuperscript{264} Teams employ scouts, doctors and psychologists to test these athletes and determine whether they will be able to compete at the professional level. These pre-draft processes should suffice to allow a team to make a determination on whether to draft a certain player, based on the individual teams’ determination of mental and physical readiness, and what amount of risk they are willing to tolerate. As Michael McCann, an expert on the subject explained, “It does not make sense to

\begin{footnotesize}
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\item[\textsuperscript{262}] Pasquarelli, \textit{No. 1 pick Okoye agrees on deal with Texans}, supra note 257.
\item[\textsuperscript{263}] \textit{Clarett I} at 410.
\item[\textsuperscript{264}] See supra note 220; Potential NFL draftees must complete the Wonderlic Exam, a twelve minute test which includes 50 common knowledge questions; during the NFL Combine players are put through a series of drills, tests and interviews with more than 600 NFL personnel including head coaches, general managers and scouts.
\end{enumerate}
\end{footnotesize}
conduct exhaustive pre-draft evaluations of prospective draft picks, and then impose an arbitrary, absolute rule that may exclude the optimal group of prospective draft picks.”

The existence of a less restrictive alternative helps prove that there are no pro-competitive justifications for the draft rules, and therefore that they violate antitrust laws.

**CONCLUSION**

Prior to the imposition of the NBA’s current age rule, even Billy Hunter, the Executive Director of the National Basketball Players Association, sided with allowing high school athletes to play in the NBA. He stated, “We see no reason why a kid should be barred if he has the skill to play in the league. Anybody who can perform should be permitted to come in. And if the owners or administrators of the teams don’t feel they have the maturity and growth, they shouldn’t select them or encourage them to come.”

If the league is correct in that high school players are not ready for the NBA, than why does the NBA need a rule that prevents teams from drafting them? A player will be drafted, make a team, and play only if he is good enough to. The eligibility of a player should not be based on age or the amount of time passed since his high school graduation. Rather, eligibility should be based on a multitude of factors, including talent and the ability of others to identify that talent. The leagues have illegally barred entry of a certain class of players without offering proper justification for doing so. If not for this unlawful exclusion, individual teams would be able to compete for these young players, and the players would be able to compete for jobs. Age-based eligibility rules are clearly a concerted action that prevent entry into the leagues. The harms to the individual athletes and the anticompetitive

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265 McCann & Rosen, *Legality of Age Restrictions in the NBA and the NFL*, supra note 4 at 751.
266 See *Capital Imaging Associates, P.C. v. Mohawk Valley Medical Associates, Inc.*, 996 F.2d 537, 541 (2d Cir.1993) (The antitrust laws do not tolerate a policy that restrains trade – even if there is some pro-competitive benefit – when a policy that results in less prejudice to competition would be equally effective).
effects on the market far outweigh the leagues’ justifications and alleged pro-competitive benefits. Thus, assuming the non-statutory labor exemption does not apply, the leagues’ age-based draft restrictions violate antitrust laws under a rule of reason analysis.

Other professional leagues, such as Major League Baseball and the National Hockey League, have permitted teenagers out of high school to enter their respective leagues on a consistent basis.\(^{268}\) As Dick Vitale, the famous college basketball announcer put it, “Would you deny someone like Tiger Woods, Alex Rodriguez or Venus and Serena Williams the chance to turn pro and earn a living before turning 20? No, because we live in America, and the right to do what you desire is one of the great gifts we have in this country. It’s all about freedom, man!”\(^{269}\)

\(^{268}\) See Tom Verducci, That’s Done, So...On to the Pennant Races, Sports Illustrated, Aug. 20, 2007, at 48.