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# DUMP AND CHASE: WHY THE NFL, NBA, AND MLB SHOULD ABANDON THEIR PROBLEMATIC AMATEUR DRAFT AGE LIMITS AND ROOKIE WAGE STRUCTURES AND ADOPT THE CURRENT NHL MODEL

ZACH LEACH\*

## I. INTRODUCTION

It is March of 2018 in State College, Pennsylvania. On the campus of Pennsylvania State University (Penn State), twenty-one-year-old Saquon Barkley is hard at work training for several scheduled workouts with National Football League (NFL) teams. The Penn State junior running back is considered a generational talent, expected to be selected within the top five picks of the first round of the 2018 NFL Draft on April 26, 2018.<sup>1</sup> Michael Salfino of the Wall Street Journal even declared Barkley the best running back prospect ever.<sup>2</sup> In

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1. Barkley was projected as a top five pick by NFL Draft experts such as Todd McShay and Mel Kiper Jr. of ESPN, Daniel Jeremiah and Peter Schrager of the NFL Network, and Matt Miller of Bleacher Report, among others. See generally Cork Gaines & Scott Davis, *2018 NFL Mock Draft Expert Predictions*, BUS. INSIDER (Apr. 26, 2018), <https://www.businessinsider.com/2018-nfl-mock-draft-consensus-first-round-2018-1>. Barkley was drafted second overall by the New York Giants. Gregg Rosenthal, *Giants Select RB Saquon Barkley With No. 2 Pick*, NFL (Apr. 27, 2018), <http://www.nfl.com/news/story/0ap3000000928912/article/giants-select-rb-saquon-barkley-with-no-2-pick>.

2. See generally, Michael Salfino, *Is Saquon Barkley the Best Running Back Prospect Ever?*, WALL STREET J., Mar. 2, 2018, <https://www.wsj.com/articles/is-saquon-barkley-the-best-running-back-prospect-ever-1520028520>.

2017, Barkley rushed for 1,271 yards, 18 rushing touchdowns, and made 54 receptions for another 632 receiving yards and 3 touchdowns.<sup>3</sup> It was an impressive performance that confirmed Barkley as a top NFL prospect and propelled Penn State football to eleven wins.<sup>4</sup> Yet in 2016, Barkley rushed for 1,496 yards—225 more yards than in 2017—with the same amount of rushing touchdowns and an additional receiving touchdown as the Nittany Lions also won eleven games during his true sophomore year.<sup>5</sup> NFL Draft expert Matt Miller of Bleacher Report had seen enough of Barkley to call him “the best running back prospect in a decade” back in June of 2017.<sup>6</sup> However, due to the NFL’s age limit for entering the draft, Barkley endured another season of amateur National Collegiate Athletic Association (NCAA) play, and given the NFL’s complicated rookie wage scale, he continues to train endlessly in preparation for the draft knowing the difference between being drafted first overall or fifth overall could be millions of dollars in his rookie contract, which for many players can be their only contract.<sup>7</sup>

Across campus, nineteen-year-old Evan Barratt is relaxing and reflecting on his freshman season with the Nittany Lions hockey team. Penn State went 18–15–5 in the 2017-18 season, advancing to the semifinals of the Big Ten Conference Tournament and qualifying for the 2018 NCAA Men’s Ice Hockey Tournament.<sup>8</sup> Barratt recorded eighteen points in thirty-two games for Penn State in his first collegiate season.<sup>9</sup> Although he finished only tenth on the team in scoring, Barratt does not need to worry about his professional future. The teenage forward has already been drafted into the National Hockey League (NHL); he was selected in the third round of the 2017 NHL Draft by the Chicago Blackhawks.<sup>10</sup> Barratt knows that he can take his time and develop properly at Penn State while keeping in contact with Blackhawks’ management throughout his college career. The NHL’s lack of an age limit in its draft rules allows for

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3. *Saquon Barkley College Stats*, SPORTS REFERENCE, <https://www.sports-reference.com/cfb/players/saquon-barkley-1.html> (last visited Dec. 13, 2018).

4. *Id.*

5. *Id.*

6. See Stick to Football (@sticktofootball), TWITTER (June 14, 2017, 7:30 AM), <https://twitter.com/sticktofootball/status/874982360944660481>. Matt Miller made his claim about Barkley on the June 14th edition of Bleacher Report’s Stick to Football Podcast. *Id.*

7. See Collective Bargaining Agreement Between National Football League and National Football League Players Ass’n, art. 7, <https://nflabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf> (last visited Dec. 13, 2018) [hereinafter NFL CBA].

8. See generally *DI Men’s College Ice Hockey*, NAT’L COLLEGIATE ATHLETIC ASS’N, <https://www.ncaa.com/sports/icehockey-men/d1> (last visited Dec. 13, 2018).

9. *Evan Barratt*, ELITE PROSPECTS, <http://www.eliteprospects.com> (last visited Dec. 13, 2018).

10. *Id.*

players to be drafted without having to be placed on a “draft list.”<sup>11</sup> Such action would be counter to NCAA regulations and would cause an athlete in most other sports to lose his or her amateur status under the governing body of intercollegiate athletics.<sup>12</sup> The NHL also allows for teams to retain the rights of drafted players who are currently playing or committed to playing in the NCAA for five years.<sup>13</sup> Barratt can play a full four seasons at Penn State or, at any time, leave and sign an entry-level contract with Chicago.<sup>14</sup> When he does sign, his first contract will not look much different than that of the player selected first overall.<sup>15</sup>

Barratt faces far less pressure to perform at Penn State than does Barkley. Barratt can focus more on his development into a professional player rather than his performance as a collegiate player; the value of his first contract in the NHL depends far less on draft slot and NCAA résumé than does Barkley’s in the NFL. Barratt can focus more on his education without the additional concerns of draft-readiness, seeing as he is already been drafted. Barratt does not face the same worries that an injury could derail his pursuit of a professional career; if health became an issue at the amateur level, he has the flexibility to turn professional at any time and receive professional care, courtesy of the Blackhawks, to aid in his recovery. Barkley is undoubtedly the superior player in his sport, but faces a far more challenging amateur experience and a more difficult road to the professional level. How can two student-athletes with similar professional ambitions, competing at the same level at the same institution, be in such different situations?

For more than eighty years now, entry drafts and—soon after—collective bargaining agreements (CBAs) have dictated how players enter each of the four major North American professional sports leagues: the NFL, National Basketball Association (NBA), Major League Baseball (MLB), and the NHL.<sup>16</sup> Throughout that time, the inherent anticompetitive aspects of the amateur draft system employed by all four league have only been amplified by age limits and

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11. See Collective Bargaining Agreement Between National Hockey League and National Hockey League Players Ass’n, art. 8, at 16, [http://www.nhl.com/nhl/en/v3/ext/CBA2012/NHL\\_NHLPA\\_2013\\_CBA.pdf](http://www.nhl.com/nhl/en/v3/ext/CBA2012/NHL_NHLPA_2013_CBA.pdf) (last visited Dec. 13, 2018) [hereinafter NHL CBA].

12. NCAA, 2018-19 NCAA DIVISION I MANUAL art 12.2.4.2., at 70 (Aug. 1, 2018).

13. See NHL CBA, *supra* note 11, art. 8.6(c).

14. *Id.*

15. *Id.* art. 9.

16. The NFL held the first Entry Draft in 1936, while the NBA and National Basketball Players Association struck the first CBA agreement in 1957. *Draft Timeline – Football History*, PRO FOOTBALL HALL OF FAME, <http://www.profootballhof.com/draft-timeline/#1930s> (last visited Dec. 13, 2018); *NBA Draft Lottery: Facts, History, Probabilities & All-Time Results*, NBA (May 18, 2015), <http://www.nba.com/news/draft-lottery-history/>.

restrictive rookie contracts, which have been an ongoing cause of concern for players and teams alike. As early as 1971, the rules governing professional sports drafts have faced numerous legal challenges.<sup>17</sup> In most cases, it has been a player—both current and future—who has brought a league to court.

However, the NHL has quietly avoided such situations in its long history. Even before the first NHL CBA, eighteen-year-olds were debuting at the professional level and those drafted players in need of further development were suiting up for NCAA teams without issue.<sup>18</sup> As will be discussed in far greater detail, the flexibility afforded to both young players and member teams by the NHL system, the language of which has now been translated into the league's CBA, has eliminated many of the issues that have plagued their professional league peers.

For too long, the other three major professional leagues have come up with excuses to enforce their age limits and complicate their rookie wage configurations, all while ignoring the success that the NHL has had with a much simpler approach. Now, the corruption in college basketball and the subsequent creation of the Commission on College Basketball has re-opened the discussion into the ideal path for athletes from high school to the professional ranks.<sup>19</sup> The Commission openly criticizes the draft structures of the NBA and MLB in their findings and calls for sweeping changes to the landscape of both intercollegiate and professional basketball.<sup>20</sup> The many unnecessary and inequitable requirements thrust on eager young athletes in basketball, as well as football and baseball, are clear—a commissioned investigation is not necessary to understand this—but the leagues themselves are handicapped by these rules as well. Instead of waiting for another player to inevitably file a lawsuit challenging the customs of one of these leagues, it is time that all three, and their member teams, take a step back, re-evaluate their own policies and their relationship with the NCAA, and consider the wide-spread benefit of adopting the NHL Entry Draft and “Entry Level System” model.

This Article will introduce the history and basic structure of professional sports amateur drafts and rookie salary limitations, as well as the effect of collective bargaining, the previous legal challenges against these policies, and the continuing struggles of collegiate athletes. It will then explore the reality of

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17. See generally *Denver Rockets v. All-Pro Mgmt.*, 325 F. Supp. 1049 (C.D. Cal. 1971) (the case was the first of its kind – a challenge to the restrictive NBA age limit).

18. *Barratt*, *supra* note 9.

19. See generally COMMISSION ON COLLEGE BASKETBALL, REPORT AND RECOMMENDATIONS TO ADDRESS THE ISSUES FACING COLLEGIATE BASKETBALL (2018), [https://www.ncaa.org/sites/default/files/2018CCBReportFinal\\_web\\_20180501.pdf](https://www.ncaa.org/sites/default/files/2018CCBReportFinal_web_20180501.pdf).

20. *Id.* at 29-32.

the negative effects that these draft structures have on the member teams themselves and the changing landscape of each league, as well as examine the role of the NCAA. Finally, it will outline the superior system implemented by the NHL and hypothesize that the benefits of adopting the NHL model would outweigh the benefits afforded by the current structures of the NFL, NBA, and MLB.

## II. THE EVOLUTION OF AND CHALLENGES TO THE PROFESSIONAL SPORTS ENTRY DRAFT

### *A. Draft Defined*

The “draft” is the primary mechanism by which amateur players have been added to each of the four major North American professional sports leagues for the better part of each of their existences. Every team in the league is assigned one pick per round, which they are free to trade to another team if they so choose, with no limits on the maximum or minimum number of selections a team may make in a given draft year. Held on an annual basis, each league determines their draft order following the completion of the league year. In one manner or another, each of the four leagues implements a reverse-standings draft order, rewarding the poor-performing teams finishing closer to the bottom of the standings in the season prior with the opportunity to select the best remaining players at the beginning of each round.<sup>21</sup>

The purpose of the reverse-standings order is a representation of the overall purpose of entry drafts: competitive balance.<sup>22</sup> Over time, the standard amateur draft has been proven to be the fairest method for allocating talent across each league and maintaining several balances crucial to success.<sup>23</sup> The first North American professional sports draft was held by the NFL in 1936.<sup>24</sup> Prior to that inaugural draft, incoming young players were free to sign with any team they liked.<sup>25</sup> The result was large market teams and more successful teams continually stockpiling the more elite young talent, leaving little for the remainder and creating great disparity across the league. Although member teams in a professional sports league are framed as competitors, it is in each team’s best interests for the level of competition to be more balanced in order to create a more entertaining product. For that reason, the league’s nine owners, led by

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21. Jeffrey A. Rosenthal, *The Amateur Sports Draft: The Best Means to the End?*, 6 MARQ. SPORTS L. REV. 1 (1995).

22. *Id.*

23. *Id.*

24. *Draft Timeline – Football History*, *supra* note 16.

25. *Id.*

Bert Bell of the last-place Philadelphia Eagles, created a method for all pro-caliber players to be selected into the league, rather than signed as “free agents,” and an inverse order that would enable weaker teams to select the top draft-eligible talent.<sup>26</sup> As a result, University of Minnesota star and the inaugural recipient of the Heisman Trophy, Jay Berwanger, was selected first overall by Bell’s Eagles in that first draft.<sup>27</sup>

Without a players’ union at the time, there was little resistance to the NFL’s idea of a draft or its accompanying restrictions. It was soon embraced by the NBA, then the Basketball Association of America, in 1947.<sup>28</sup> Though the league originally dismissed the NFL’s “round” system, in favor of simply having teams select collegiate players until the draft list was complete, the NBA would adopt “rounds” ten years later in 1957.<sup>29</sup> From there the league would go through several iterations of their draft model, including a territorial element and a separate “hardship draft” for financially struggling underclassmen, before settling on a structure that more closely resembles the other three major leagues.<sup>30</sup>

The NHL held its first Amateur Draft, now called Entry Draft, in 1963.<sup>31</sup> Not only did the NHL seek competitive balance like the NFL and NBA, they also struggled with a unique problem of member teams “sponsoring” amateur organizations and holding exclusive access to the products of those programs.<sup>32</sup> Unlike their peers, the NHL recruited almost exclusively from Canada in its infancy and the Canadian junior-level teams had become similar to minor league affiliates for specific NHL organizations.<sup>33</sup> NHL President Clarence Campbell was a major proponent of adopting the “draft,” stating “[w]e’re ultimately hopeful it will produce a uniform opportunity for each team to acquire a star player.”<sup>34</sup> Set up very similar to the NFL model, though drawing from a more eclectic talent pool, the draft met Campbell’s expectations and there has been little issue with the draft format in the league ever since.

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26. *Id.*

27. *Timeline Detail*, PRO FOOTBALL HALL OF FAME, <http://www.profootballhof.com/timeline/1930/1936-the-nfl-s-first-draft/> (last visited Dec. 13, 2018).

28. See John C. Graves, *Controlling Athletes with the Draft and Salary Cap: Are Both Necessary?*, 5 SPORTS L.J. 185, 187 (1998).

29. *Id.*

30. *Id.* at 187-88.

31. *NHL Entry and Amateur Draft History*, HOCKEY REFERENCE, <https://www.hockey-reference.com/draft> (last visited Dec. 13, 2018).

32. Graves, *supra* note 28.

33. *NHL Entry and Amateur Draft History*, *supra* note 31.

34. Staff Writer, *NHL Draft History*, VANCOUVER CANUCKS (Apr. 21, 2008), <https://www.nhl.com/canucks/news/nhl-draft-history/c-452733>.

The final major sport to modernize, which is often true in many regards, was baseball. The inaugural MLB First-Year Player Draft was held in 1965.<sup>35</sup> The league had finally grown tired of the disparity between teams, created by the ability of large-market teams to both attract superior talent and afford the means to scout and recruit more often and over a wider geographical area.<sup>36</sup> They also worried about inflating player salaries, driven up by the competition between teams to sign largely unproven young players.<sup>37</sup>

However, where baseball took things one step further was creating a dichotomy of draft-eligible players. The NHL aside—the league has always been comfortable with drafting teenagers—the NFL and NBA only allowed college graduates to be eligible for selection in their earlier drafts.<sup>38</sup> The MLB was not satisfied with this structure, but wanted to continue utilizing the NCAA for player development when it suited them. Disguising the decision as preventing young players from being “exploited,” the league ruled that those choosing to attend college to further their athletic development would be prohibited from entering the draft until after their sophomore year and, more importantly, having reached the age of twenty-one.<sup>39</sup> The true intention of this rule was again with an eye on salary inflation, allowing only those high school graduates with the talent to immediately play at a professional level the ability to command a salary, while ensuring that those deemed to be in need of seasoning in the NCAA could not be drafted until an arbitrary point in the future that the league saw as a fitting starting point for another class of prospects.<sup>40</sup> More than fifty years later, the essence of this draft structure is still the basis of the MLB’s draft structure.<sup>41</sup>

### *B. The Impact of the CBA Era*

The problem with the concept of a “draft” in professional sports, or any other unilateral decision by the leagues which restricted the movement of their players, is that it could be classified as an antitrust violation. Section 1 of the Sherman Antitrust Act, signed into law by President Benjamin Harrison in 1890,

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35. See *First-Year Player Draft*, MLB, <http://mlb.mlb.com/mlb/history/draft/> (last visited Dec. 13, 2018); see generally Joanna Shepherd Bailey & George B. Shepherd, *Baseball’s Accidental Racism: The Draft, African-American Players, and the Law*, 44 CONN. L. REV. 197, 201 (2011).

36. Bailey & Shepherd, *supra* note 35.

37. *Id.* at 200-01.

38. *Draft Timeline – Football History*, *supra* note 16; *NBA Draft Lottery: Facts, History, Probabilities & All-Time Results*, *supra* note 16.

39. *Id.* at 201-02.

40. Graves, *supra* note 28.

41. *First-Year Player Draft*, *supra* note 35.

explicitly states that “[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several State . . . is declared to be illegal.”<sup>42</sup> A Section 1 claim requires: a) the showing of the existence of such a contract, combination, and conspiracy, and b) that it created a restraint of trade which c) affected interstate commerce.<sup>43</sup> Section 2 was designed to punish monopolies who, by definition, engage in the very same combinations and conspiracies affecting trade, if there is evidence of the presence and use of monopoly power.<sup>44</sup> The implied purpose of the statute was to dissuade companies from engaging in practices that unreasonably restrained interstate commerce within an industry, both in the product and labor markets. Preventing the free market from deciding where young, incoming players in professional sports leagues may sign a contract, and rules that limit rookie compensation, are very much the type of labor market restraints that garner attention under the Sherman Act.

However, professional sports have always been held to be unique industries worthy of special considerations in terms of antitrust practices. In fact, a 1922 Supreme Court case held that baseball was exempt from antitrust law altogether, a decision that protected the game from many challenges and allowed for labor control that today may be considered unconscionable.<sup>45</sup> In *Federal Baseball*, the court weighed the merits of the MLB’s controversial “reserve clause” under antitrust law.<sup>46</sup> Justice Oliver Wendell Holmes came to the conclusion—since seen by many as an aberration—that baseball’s labor market did not constitute interstate commerce, and that player movement throughout the country was purely incidental to a game played only within one state at a time.<sup>47</sup> Without the element of interstate commerce, baseball could not be further challenged on an antitrust basis, and the reserve clause was thus left unchecked. Football, basketball, and hockey never enjoyed the same antitrust protections as baseball, having never earned recognition as being exempt from antitrust scrutiny, but

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42. Sherman Antitrust Act, 15 U.S.C. § 1 (2018).

43. *Id.*

44. Sherman Antitrust Act, 15 U.S.C. § 2 (2018).

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

46. *Id.* The “reserve clause” required a player to re-sign in perpetuity with the team whom they had first signed with until the point that either the team did not want him or the player decided to retire. It was not until seventy-six years after *Federal Baseball* that Congress amended baseball’s antitrust exemption with the Curt Flood Act of 1998, in honor of one of many antitrust challenges against the league that truly awarded free agency rights to MLB players. *See generally* Edmund P. Edmonds, *The Curt Flood Act of 1998: A Hollow Gesture After All These Years?*, 9 MARQ. SPORTS L. REV. 315 (1999).

47. *Id.* at 209.

courts have acknowledged the functional and economic uniqueness of industries wherein competitors share revenue and prefer a higher level of competition.

Yet, challenges to the draft and other elements of each league constitution, which restrained the player markets, would have been more frequent and more successful had it not been for the timely rise of labor unions. Although counter-intuitive, the organizations created to protect players' rights also gave the league an avenue to safely negotiate terms that violate antitrust law. The National Labor Relations Act of 1935, or Wagner Act, gave employees in an industry the right to form labor unions and bargain in good faith with their employers over employment terms, without the fear of interference or discrimination.<sup>48</sup> This negotiation process, called "collective bargaining," results in a "Collective Bargaining Agreement" (CBA), a term that has gained general awareness among laypeople due to its role in professional sports. The doctrine of the "non-statutory labor exemption" shields agreed-upon terms resulting from good faith collective bargaining from antitrust scrutiny; meaning, amateur draft terms offered by a league and agreed upon by a players' association cannot be found to violate the Sherman Act.<sup>49</sup> It also protects unilaterally-imposed rules that resulted from a breakdown of the collective bargaining process.<sup>50</sup>

While many industries see labor unions as the enemy, there is no doubt that players associations have helped the major North American professional sports leagues maintain the status quo when it comes to the allocation and control of talent.<sup>51</sup> The NBA was first to the table, establishing the National Basketball Players Association (NBPA) in 1954 behind efforts of Boston Celtics star Bob Cousy, and agreeing to the first CBA in 1957, under threat of strike.<sup>52</sup> It was then that the unruly NBA Draft gained some structure with the adoption of the "round" system.<sup>53</sup> Additionally, Cousy and company negotiated improvements in playing and travel conditions, including a more flexible schedule, and in the formation of a formal player-owner dispute system.<sup>54</sup>

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48. See National Labor Relations Act, 29 U.S.C. § 151 (2018).

49. See generally *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996).

50. *Id.* at 258-60.

51. This is not to say that the NFL, MLB, NBA, and NHL have not had their fair share of conflicts with their respective players' unions; several work stoppages, both lockouts by the leagues and strikes by the players, have occurred in the decades since collective bargaining began. Anthony Castellano, *Work Stoppages in U.S. Sports History*, NEWSDAY, Oct. 24, 2012, <https://www.newsday.com/sports/hockey/work-stoppages-in-u-s-sports-history-1.2720169>.

52. *About Us*, NBPA, <https://nbpa.com/about/> (last visited Dec. 13, 2018).

53. *NBA Draft Lottery: Facts, History, Probabilities & All-Time Results*, *supra* note 16.

54. *About Us*, *supra* note 52.

The National Hockey League Players Association (NHLPA) was next up, becoming certified by the NHL in 1967.<sup>55</sup> A group of players, led by respected Detroit Red Wings player Ted Lindsay, worked toward being recognized as a union a decade earlier, but fell short of matching the success of their NBA counterparts.<sup>56</sup> A second attempt, spearheaded by player agent Alan Eagleson, was not only successful, but surprisingly led to twenty-five years of relatively conflict-free negotiation between the league and its players.<sup>57</sup>

The National Football League Players Association (NFLPA) was actually formed in 1956, but was not recognized by the league until 1968, when a work stoppage forced the first CBA to be negotiated.<sup>58</sup> In the years prior, the NFLPA had simply used the threat of an antitrust lawsuit challenging the NFL's unilateral rules restraining the player market, such as the draft, to get the league to meet some of the players' demands. In *Radovich v. National Football League*, the NFL realized that it did not enjoy the same antitrust exemption as baseball, and was therefore willing to work behind the scenes with the NFLPA to prevent yet another decision detrimental to their rules.<sup>59</sup> It was not until the threat of missed games and the growing stress of competing with the American Football League—which would soon after merge with the NFL—became too much that the league gave in and recognized the players union.<sup>60</sup> However, the NFLPA failed in bargaining for many of the proposed changes most valued by the players in the first CBA.<sup>61</sup> This may have been the precursor to a league-union relationship that, in present day, many feel is the most unbalanced of the four major sports leagues.

The year of 1968 also marked the first CBA between the MLB and the Major League Baseball Players Association (MLBPA).<sup>62</sup> Baseball players had long tried to unionize against the strict hold that the league had on player movement, but had been largely unsuccessful.<sup>63</sup> A new approach in 1965 finally gained enough traction to earn the union recognition three years later.<sup>64</sup> Under the leadership of lauded economist Marvin Miller, the MLBPA succeeded in

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55. Liz Mullen, *The Making of a Union*, SPORTSBUS. J. (Jan. 23, 2017), <https://www.sportsbusinessdaily.com/Journal/Issues/2017/01/23/Labor-and-Agents/NHLPA.aspx>.

56. *Id.*

57. *Id.*

58. *History*, NFLPA, <https://www.nflpa.com/about/history> (last visited Dec. 13, 2018).

59. *See* 352 U.S. 445, 456 (1957).

60. *See History*, *supra* note 58.

61. *Id.*

62. *History*, MAJOR LEAGUE BASEBALL PLAYERS ASS'N, <https://www.mlbpa.org/history.aspx> (last visited Dec. 13, 2018).

63. *Id.*

64. *Id.*

raising the minimum player salary and implementing an arbitration system for grievances in their first CBA negotiation.<sup>65</sup> This was just the beginning, as Miller would help change the landscape of professional baseball during his tenure as MLPBA Executive Director. However, the Curt Flood Act of 1998, which finally limited baseball's antitrust exemption, stopped short of subjecting the "First-Year Player Draft" to antitrust scrutiny and the rules have remained unchallenged and under unilateral control of the league to this day.<sup>66</sup>

### *C. Off the Court and Into the Courtroom*

In the brief span of time between each league's adoption of the amateur draft model and the advent of players unions, professional sports—except antitrust-immune baseball—were susceptible to bona fide legal challenges. After the decision in *Radovich*, football, basketball, and hockey were confirmed to not share in the same antitrust exemption as baseball, leaving them open to attack for their unilateral decisions that restricted the players' employment location and terms, such as the draft and rookie contract restrictions.<sup>67</sup> Yet, no such cases arose before the formation of each league's players' union and what once could have been a more straightforward challenge became much more difficult when a CBA was factored in.

That did not stop both the NBA and NFL from losing anti-trust challenges in the 1970's. Until the leagues and their respective players' unions had come to an agreement on all draft terms and elements of rookie compensation structure, those rules remained unilateral and subject to antitrust scrutiny.

In 1971, Spencer Haywood challenged the restraints of the NBA Draft rules, which had not yet become a subject of collective bargaining between the league and the NBPA, and succeeded.<sup>68</sup> Haywood argued that the unilaterally imposed age limit rule that an individual may not play in the NBA until his high school class had graduated from college was unreasonable.<sup>69</sup> Haywood had the experience to back up this claim; he had already won a gold medal with Team USA Basketball at the 1968 Olympic Games as a teenager; played two successful seasons of college basketball, including an All-American nod; and, most importantly, had more than proved himself at the professional level as the Most Valuable Player, Scoring Champion, All-Star, and Rookie of the Year

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65. *Id.*

66. See Edmonds, *supra* note 46; see also *supra* note 45.

67. See *Radovich v. Nat'l Football League*, 352 U.S. 445, 454 (1957).

68. See *Denver Rockets v. All-Pro Mgmt.*, 325 F. Supp. 1049, 1066-67 (C.D. Cal. 1971); see also *Haywood v. Nat'l Basketball Ass'n*, 401 U.S. 1204 (1971).

69. *Denver Rockets*, 325 F. Supp. at 1059.

with the American Basketball Association's Denver Rockets in 1969-70.<sup>70</sup> When Haywood signed with the NBA's Seattle SuperSonics in 1970, few could argue that he did not belong in the world's top basketball league, even if he had not played the four full years of college basketball.

Yet, the NBA decided to uphold its rule and nullify Haywood's contract. In response, Haywood argued that this arbitrary age rule was a boycott in violation of the Sherman Act.<sup>71</sup> The court agreed, holding that the inflexibility of the age limit rule exposed its arbitrary nature, and using the financial struggles of Haywood and his family as proof of this point.<sup>72</sup> The NBA's argument that this rule constituted a valid self-regulatory scheme fell short, as the court pointed out that the lack of procedural safeguards for making reasonable exceptions to the rule for talent and financial hardship made the policy overbroad and arbitrary.<sup>73</sup> Had those safeguards been in place, the court may have come to a different conclusion, but instead they ruled that the entire ban on players who were not four years out of high school was unenforceable.<sup>74</sup> Haywood was reinstated by the league and the NBA's immediate reaction was to institute an "economic hardship" draft, and later a waiver into the standard draft, before eventually settling on simply allowing all high school graduates to enter the draft—a policy that lasted nearly forty years.<sup>75</sup>

Seven years later, James "Yazoo" Smith attacked not the age limit of the NFL Draft, but its entire essence.<sup>76</sup> Forgotten by football history is the fact that Smith actually won the case, as the NFL Draft was ruled to be an unreasonable restraint of trade by the D.C. Circuit of the United States Court of Appeals.<sup>77</sup> In the decade since the establishment of the NFLPA, the two sides had honored the NFL's draft rules, but it had not been a subject of collective bargaining. Smith, an All-American from the University of Oregon, who had been a twelfth-round pick of the Washington Redskins in 1975 and received just \$50,000 for a one-year contract, recognized this.<sup>78</sup> When injuries ended his career after just that one year, Smith sued the league for the difference in salary from what he would have been able to receive if given the opportunity to

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70. See *Spencer Haywood College Stats*, SPORTS REFERENCE, <https://www.sports-reference.com/cbb/players/spencer-haywood-1.html> (last visited Dec. 13, 2018).

71. See *Denver Rockets*, 325 F. Supp. 1049.

72. *Id.* at 1066; see *Linseman v. World Hockey Ass'n*, 439 F. Supp. 1315, 1323 (D. Conn. 1977).

73. *Denver Rockets*, 325 F. Supp. at 1065.

74. *Id.*

75. Graves, *supra* note 28.

76. See *Smith v. Pro Football Inc.*, 593 F.2d 1173, 1174-75 (D.C. Cir. 1978).

77. *Id.* at 1189.

78. *Id.* at 1176.

negotiate with every team in the league instead of just the one team that drafted him.<sup>79</sup> The court agreed that the draft had an anti-competitive effect on rookie salaries and was in violation of the Sherman Act.<sup>80</sup> Smith was awarded treble damages of the estimated difference between his actual and fair-market salaries.<sup>81</sup>

The court in *Smith* stated that “[t]he draft inescapably forces each seller of football services to deal with one, and only one buyer, robbing the seller, as in any monopsonistic market, of any real bargaining power.”<sup>82</sup> This statement is undeniably true, and the NFL—along with the other major sport leagues—knew it. However, the NFL had a fool-proof plan for countering the decision in *Smith*: taking advantage of the “non-statutory labor exemption.”<sup>83</sup> Before the final decision had even been made, the NFL and the NFLPA agreed to a new CBA in which the players association had, for the first time, officially sanctioned the NFL Draft, with all pre-existing rules intact.<sup>84</sup> Smith’s victory against the NFL would serve to only benefit himself, as the essence of the draft was back at full-strength almost immediately.

The NFL had previously learned first-hand of the power of the “non-statutory labor exemption.” In *Mackey v. National Football League*, a group of veteran players challenged a rule that had previously been unilaterally enforced by the league.<sup>85</sup> In analyzing the situation in the context of a rule that could have been collectively bargained but was not, the court laid a new groundwork for antitrust review in this area that stretches beyond just professional sports cases. The court developed a three-prong test to determine if the term must be collectively bargained or, if not, if it is an unreasonable restraint of trade in violation of antitrust law: 1) does the restraint of trade primarily affect parties of the collective bargaining agreement; 2) was the subject matter part of the collective bargaining agreement; and 3) was the subject matter a product of bona fide arm’s length bargaining.<sup>86</sup> The court held

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79. *Id.* at 1177-78.

80. *Id.* at 1186-89.

81. *Id.* at 1189-91.

82. *Id.* at 1185.

83. See Eriq Gardner, *In 1970, James “Yazoo” Smith Sued the NFL to Shut Down the Draft. What Happened Next?*, SLATE (Apr. 23, 2009), [http://www.slate.com/articles/sports/sports\\_nut/2009/04/rookie\\_abuse.html](http://www.slate.com/articles/sports/sports_nut/2009/04/rookie_abuse.html).

84. *Id.*

85. 543 F.2d 606 (8th Cir. 1976). The rule in question, known as the “Rozelle Rule” after Commissioner Pete Rozelle, required a team signing a free agent to compensate the free agent’s former club. *Id.* at 610-11. Although this rule was struck down as violating antitrust law, the essence of it still remains to this day in the NFL’s collectively-bargained restricted free agency rules. *Id.* at 623; see NFL CBA, *supra* note 7, art. 9.

86. *Mackey v. Nat’l Football League*, 543 F.2d 606, 614 (8th Cir. 1976).

that the rule only affected veteran players, a party of the CBA, and was thus a mandatory subject of bargaining, but had not, in fact, been collectively bargained.<sup>87</sup> As such, there was no “statutory labor exemption” in play and the rule was a Sherman Act violation.<sup>88</sup>

However, the main takeaway from *Mackey*, in the sport context, was that—perhaps unintentionally—the court gave the NFL and the other major North American sports leagues a step-by-step process to create valid, collectively bargained rules that could restrict the player market while withstanding antitrust challenge.

Thus, began a new, far less successful era of antitrust challenges against the major North American sports leagues. By opening up draft and rookie compensation rules to collective bargaining, the leagues knew that the product would be a format for introducing new, young talent to their teams by antitrust-impervious means. NBA star Oscar Robertson and several of his peers were the first to learn of this new reality.<sup>89</sup> The players filed a suit against the league challenging almost every element of its governance on antitrust grounds.<sup>90</sup> The court agreed that nearly every system for restricting players was a per se violation of the Sherman Act, but simply held that since each was a result of bona fide collective bargaining, they were exempt under the “non-statutory labor exemption.”<sup>91</sup>

The true victims of this fundamental exception to antitrust laws are those held to the terms of a CBA without having a true seat at the table. While Robertson and other veteran players already in a professional sports league are represented by their players’ union, those at the college level must abide by the collectively bargained rules even though they do not have a voice. In 1987, California State University - Fullerton basketball player Leon Wood brought an antitrust suit against the NBA, challenging the draft and other unreasonably restrictive measures that deflated his earning potential as a rookie, with his primary argument being that college student-athletes are “outside of the bargaining unit” and, under *Mackey*, should not be held to collectively-bargained rules.<sup>92</sup> However, the court held that the National Labor Relations Act includes potential future employees in their definition of employees; thus, including student-athletes in a group with veteran professional

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87. *Id.* at 615.

88. *Id.* at 616.

89. *See* Robertson v. Nat’l Basketball Ass’n, 556 F.2d 682 (2d Cir. 1977).

90. *Id.* at 686.

91. *Id.*; *see generally* Powell v. Nat’l Football League, 678 F. Supp. 777, 789 (D. Minn. 1988).

92. Wood v. Nat’l Basketball Ass’n, 809 F.2d 954, 960 (2d Cir. 1987).

athletes, even though their goals often may not align.<sup>93</sup> The court more or less sanctioned the concept that the NBA and other professional sports league could limit the salaries and employment autonomy of incoming “employees” who never had, and will never have, a say in the matter.

In the most recent major antitrust case in sports, Ohio State University running back Maurice Clarett sued the NFL over their age limit, arguing that a rule bargained without the representation of college athletes that specifically excluded college athletes of a certain age from joining the league was a Sherman Act violation.<sup>94</sup> Clarett had been an elite talent at Ohio State, contributing eighteen touchdowns during his freshman season, leading the Buckeyes to a National Championship in 2002.<sup>95</sup> The combination of his success, the financial struggles of his family, and a suspension from college football in 2003 for receiving improper benefits, led Clarett to challenge the league for entry prior to the three-year mark required.<sup>96</sup> Clarett attacked the three prongs of the *Mackey* test, arguing that the NFL failed to secure antitrust protection for its age limit because the rule: 1) does not concern the rights of NFL teams or players, but instead the players excluded from participating in the NFL; 2) does not concern a mandatory subject of bargaining, as Clarett would not “vitaly affect” any veteran players, but rather draft-eligible players; and 3) the age limit rule was not contained in the current CBA.<sup>97</sup> The district court found Clarett’s argument to be persuasive and ruled in his favor.<sup>98</sup> However, the U.S. Court of Appeals for the Second Circuit overturned the decision on appeal, dismissing the *Mackey* test argument.<sup>99</sup> The court held that the age limit rule was a valid, collectively bargained rule that withstood antitrust scrutiny.<sup>100</sup> Having already hired an agent ahead of the 2004 NFL Draft, forfeiting his remaining NCAA eligibility in the process, Clarett was left without a place to play that year. After a year off, Clarett entered the 2005 draft and was selected in the third round by the Denver Broncos; but never saw a regular season snap in the NFL.<sup>101</sup> The age limit not only prevented a professional ready prospect from entering the league, but in defending it the NFL lost a potential star.

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93. *Id.*; see generally *Fibreboard Paper Products Corp. v. N.L.R.B.*, 379 U.S. 203 (1964).

94. *Clarett v. Nat’l Football League*, 369 F.3d 124, 126 (2d Cir. 2004).

95. *Maurice Clarett College Stats*, SPORTS REFERENCE, <https://www.sports-reference.com/cfb/players/maurice-clarett-1.html> (last visited Dec. 13, 2018).

96. *Clarett*, 369 F.3d at 126.

97. Michael A. McCann & Joseph S. Rosen, *Legality of Age Restrictions in the NBA and the NFL*, 56 CAS. W. RES. L. REV. 731, 741-43 (2006) (discussing *Clarett v. Nat’l Football League*, 306 F. Supp. 2d 379 (S.D.N.Y. 2004)).

98. *Clarett v. Nat’l Football League*, 306 F. Supp. 2d 379, 409-11 (S.D.N.Y. 2004).

99. *Clarett*, 369 F.3d at 142-43.

100. *Id.*

101. *Maurice Clarett College Stats*, *supra* note 95.

The next part of this Article will discuss how the recent lack of success in the courtroom will not necessarily dissuade further challenges to the structures of the NFL, NBA, and MLB, as student-athletes continue to struggle with the same problems.

### III. AN UNSELFISH PERSPECTIVE

#### *A. The Struggles of a Student-Athlete*

The legal avenue to challenging professional sports leagues' policies on antitrust grounds, so long as they are the product of collective bargaining with a players' union, appears to be closed. Courts have been consistent in their decision that collectively bargained terms are impervious to antitrust scrutiny. Yet, in all likelihood, another case will come along soon enough, with efforts to poke holes in that precedent. Student-athletes with professional ambitions will continue to push to eliminate the age limits and rookie structures of the NFL, NBA, and MLB because those student-athletes continue to feel the negative effects of their entry into the professional ranks being limited.

In many ways, the NCAA takes advantage of standout student-athletes by capitalizing on their value, both on the field and in their name, image, and likeness, without the actual athletes getting fair value for their services and identities. Countless authors have written about the plight of the college athlete and now actual change has begun to improve student-athlete rights behind the efforts of those like Ed O'Bannon.<sup>102</sup>

However, the source of many problems for student-athletes in "revenue-generating sports" comes not from the NCAA, but from the restrictions enforced by the professional leagues. While the NCAA and its member institutions benefit from these student-athletes participating in intercollegiate sports, it is the NFL, NBA, and MLB keeping them at the amateur level when often they are ready—and desperately needing—to move on to the professional game.

Situations like those of Spencer Haywood and Maurice Claret, wherein an athlete from a poor background needs money to support his family, are still very present in college athletics. As professional ready basketball and football prospects are denied the ability to enter their respective professional leagues by age limits, many of their families struggle to get by, and zero income is being provided from the college level. This is the exact scenario that the court in *Haywood* ruled that leagues needed to have flexible safeguards for, which led

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102. See *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049 (9th Cir. 2015); see also ED O'BANNON & MICHAEL MCCANN, COURT JUSTICE: THE INSIDE STORY OF MY BATTLE AGAINST THE NCAA (Diversions Books 2018).

to the short-lived “hardship draft.”<sup>103</sup> Now that draft terms are collectively bargained, that inflexible nature can no longer be exploited.

Shabazz Napier, a two-time National Champion for the University of Connecticut men’s basketball program in the early 2010’s, is one of a number of high-profile student-athletes who have gone public with their distress of living through these dire conditions.<sup>104</sup> Napier spoke up, not only for himself but for a number of his peers going through the same struggles and was met with support from around the college level.<sup>105</sup> While Napier needed four years of collegiate experience to establish himself as a legitimate NBA prospect, he was a first-round pick of the Charlotte Hornet in 2014, others around him in collegiate basketball, football, and even baseball are felt the same pressures to support their families and already had the talent to play at the professional level.<sup>106</sup> Instead, they were held back by arbitrary age limits implemented by the leagues. It is no wonder that the NCAA stage suffers from “levels of corruption and deception . . . that threaten the very survival of the college games” when some student-athletes are simply desperate to accept a payout wherever they can get it.<sup>107</sup>

While poverty is a serious problem, those professional caliber college athletes know that eventually they will be paid to some extent. The same is not true for professional caliber athletes whom deal with injuries while in the NCAA. When the professional leagues force players to remain at the amateur level for a certain amount of time, they are adding additional wear and tear to their bodies (while they play for free at school), and limiting their future earnings if those injuries continue. Sometimes, especially in football, recurring injuries over a college career can completely derail a student-athlete’s professional ambitions.

One of the best college running backs in recent memory was Marcus Lattimore of the University of South Carolina. As a true freshman in 2010, Lattimore played in all thirteen games for the Gamecocks, rushing for 1197

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103. *Denver Rockets v. All-Pro Mgmt.*, 325 F. Supp. 1049, 1060 (C.D. Cal. 1971).

104. *Shabazz Napier College Stats*, SPORTS REFERENCE, <https://www.sports-reference.com/cbb/players/shabazz-napier-1.html> (last visited Dec. 13, 2018); Rodger Sherman, *Shabazz Napier: ‘There’s Hungry Nights Where I’m Not Able to Eat’*, SB NATION (Apr. 7, 2014), <https://www.sbnation.com/college-basketball/2014/4/7/5591774/shabazz-napier-uconn-basketball-hungry-nights>.

105. Sherman, *supra* note 104; Jeremy Fowler, *Ole Miss’ Bo Wallace: Shabazz Napier Was Right, Players Go Hungry at Night*, CBS SPORTS (July 17, 2014), <https://www.cbssports.com/college-football/news/ole-miss-bo-wallace-shabazz-napier-was-right-players-go-hungry-at-night/>.

106. *Shabazz Napier College Stats*, *supra* note 104.

107. COMMISSION ON COLLEGE BASKETBALL, REPORT AND RECOMMENDATIONS TO ADDRESS THE ISSUES FACING COLLEGIATE BASKETBALL, *supra* note 19, at 1.

yards and 17 touchdowns.<sup>108</sup> In his first season of collegiate football, Lattimore recorded rushing numbers that were superior to Heisman Trophy winner, and 2011 first-round pick, Mark Ingram, as well as Ryan Williams, and Shane Vereen, whom were both selected early in the second round.<sup>109</sup> Had he been draft-eligible, Lattimore almost surely would have been selected in the first round ahead of that trio of talented players. Perhaps with professional medical supervision and professional strength training, he could have gone on to be a top NFL running back. However, as a true freshman, Lattimore was not one, but two years away from meeting the NFL's age limit and had to stay at South Carolina. In 2011, Lattimore suffered a torn right knee ligament and was limited to just seven games; in 2012, he suffered a dislocated knee cap and tore every ligament in that same right knee after just nine games.<sup>110</sup> Desperate for professional care, Lattimore entered the 2013 NFL Draft despite missing considerable time in each of the past two seasons.<sup>111</sup> He was selected in the fourth round by the San Francisco 49ers and spent his entire rookie season rehabbing his knee, but was forced to retire in 2014, having never played a professional snap.<sup>112</sup> Lattimore received just over \$800,000 for the parts of two seasons he spent in the NFL; in comparison, Ingram has earned more than \$22 million in his eight years of service.<sup>113</sup> It was not just his own loss, but the NFL's, as Lattimore was a potential star who never got his chance.

### *B. Time for Teams to Take a Stand*

Stories such as these, which outline the many struggles of student-athletes, are far too common. In many, it is far too apparent that the fault lies with the professional leagues and their arbitrary draft rules. Yet, the NFL, NBA, and MLB continue to turn a blind eye to the plight of their potential future players in favor of a system that they feel benefits their teams.

Do these draft structures really provide the overwhelming benefits to their member teams that the leagues think they do? Age limits and rookie wage structures handicap the teams' abilities to control their own roster management.

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108. *Marcus Lattimore College Stats*, SPORTS REFERENCE, <https://www.sports-reference.com/cfb/players/marcus-lattimore-1.html> (last visited Dec. 13, 2018).

109. *Id.*

110. SI Wire, *San Francisco 49ers Running Back Marcus Lattimore Retires Due to Knee Injury*, SPORTS ILLUSTRATED, Nov. 5, 2014, <https://www.si.com/nfl/2014/11/05/san-francisco-49ers-marcus-lattimore-retires-knee-injury>.

111. *Id.*

112. *Id.*

113. *Mark Ingram Contract Details, Salary Cap Breakdowns, Salaries, Bonuses*, SPOTRAC, <http://www.spotrac.com/nfl/new-orleans-saints/mark-ingram-7743/cash-earnings/> (last visited Dec. 13, 2018).

Teams should be allowed to determine who is and is not ready to play professionally. They should be free to call upon a prospect when they see fit and compensate him according to his role, potential, and performance, not by a value and term predetermined by the league. In many ways, the NFL, NBA, and MLB, who are supposed to represent the owners of their member teams, are only making it more difficult for those teams to do their jobs.

The next part of this Article will describe the current draft structure of each of the other three major North American leagues, including their age limit policy and rookie wage scale, and debate the pros and cons of the restrictions that they have placed upon themselves and their players.

#### IV. THE CURRENT FORMAT OF AND ONGOING PROBLEMS WITH THE NFL, NBA, AND MLB AMATEUR DRAFTS AND ROOKIE WAGE SCALES

##### *A. The National Football League*

The NFL Draft is by far the most well-known professional sports draft. The three-day event takes place annually each spring.<sup>114</sup> The first two days air during prime-time on Thursday and Friday, and the third and final day takes place on Saturday afternoon with all days covered by the NFL Network, ESPN, and ESPN2, and, for the first time in 2018, coverage expanded to Fox and ABC.<sup>115</sup> The popularity of the college game, which in some parts of the country exceeds its professional counterpart, combines with the popularity of the NFL to create a large-scale television event, which generates year-long intrigue and a near cottage industry surrounding what is essentially an administrative operation of the league.

The NFL Draft is comprised of seven rounds with each round containing the same number of picks as NFL teams (thirty-two), as well as additional compensatory picks (also at a maximum of thirty-two) awarded to teams for “losing certain Unrestricted Free Agents” for a maximum of 256 selections (verify amount).<sup>116</sup> The draft order for each round is determined by a purely inverse-standings basis.<sup>117</sup>

Those picks are used to select from a narrow group of draft-eligible athletes. For an individual to be eligible for entry into the NFL Draft, three NFL seasons

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114. NFL CBA, *supra* note 7, art. 6 § 2(a).

115. National Football League, *NFL Expanding Television Coverage for 2018 NFL Draft*, NFL (Mar. 21, 2018), <http://www.nfl.com/news/story/0ap3000000922401/article/nfl-expanding-television-coverage-for-2018-nfl-draft>.

116. NFL CBA, *supra* note 7, art. 6 § 2(a).

117. *Id.*

must have passed since his high school graduation.<sup>118</sup> In general, this means that the earliest a college football player may enter the NFL is following his junior season. A more common occurrence in recent years has also seen players enter the draft after their sophomore season, given that they spent one year as a “redshirt” at the college level and did not see any game action. For any player to be eligible for selection, he must specifically apply for eligibility.<sup>119</sup> For those student-athletes who have not yet exhausted their NCAA eligibility—redshirt sophomores and redshirt and true juniors—this application process requires risking the remainder of their NCAA careers.<sup>120</sup> A student-athlete may enter the NFL Draft one time during their collegiate tenure without losing their amateur eligibility, so long as they declare their intention to resume playing at the college level prior to the draft and are not drafted by any team.<sup>121</sup> Absent these conditions, a student-athlete declaring early for the NFL Draft will not be allowed to play football in the NCAA again, even if they go undrafted or refuse to sign a contract with the team that drafted them.<sup>122</sup>

Once drafted, rookies—and teams—face a complex and strict salary structure to determine their first contract. A team must first only offer a four-year, minimum salary contract to each selection to ensure exclusive negotiating rights with that player.<sup>123</sup> However, most players receive contract offers exceeding this minimum amount. When negotiating those contracts, the NFL not only limits each team, but all teams in aggregate.<sup>124</sup> The “Total Rookie Compensation Pool” is a league-wide limit on total rookie salary, drafted and undrafted, over the entirety of their contracts.<sup>125</sup> This allotment is further broken down into a “Year-One Rookie Compensation Pool,” which limits overall team spending in the first season of these rookie contracts.<sup>126</sup> Each club’s proportional share of these pools is determined by their total number of draft selections as well as the round and position of each selection, plus a one-thirty-second share of the “Undrafted Rookie Reservation.”<sup>127</sup> Then, each individual rookie is limited in their share of the team’s allocation by a formula

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118. *Id.* art. 6 § 2(b).

119. *Id.*

120. NCAA, *supra* note 12.

121. *Id.* art. 12.2.4.2.3.

122. *Id.* art. 12.2.4.2.

123. *See* NFL CBA, *supra* note 7, art. 6 §§ 3–4(c) (explaining that if a player does not sign the required tender or a superior offer by the tenth week of the regular season, he forfeits his rookie year eligibility and must re-enter the subsequent draft and repeat the process).

124. *Id.* art. 7 § 1(c).

125. *Id.*

126. *Id.* § 1(d).

127. *Id.* §§ 1(e)–(f), (i).

that determines a range for their allotment of the total and first-year pools based on the round and position they were selected.<sup>128</sup> The length of these contracts are also dictated by round: first-round picks are required to sign for four years with a fifth-year team option, all other draft picks must sign a four-year contract, and undrafted rookie free agents may only sign a three-year contract.<sup>129</sup> Even the types of bonuses and clauses that may be included in a rookie contract are dependent on if and where a player was drafted.<sup>130</sup>

The NFL Draft and rookie wage structure are overwhelmingly restrictive. The league's policies leave little to no free will for teams in negotiating rookie contracts nor do they allow teams to make many decisions in terms of player development. The term "prospect" is one rarely heard in regards to professional football. Due to the age of draft-eligible players—three years or more out of high school, generally over twenty-one—and the physicality of the game, teams have little option but to play rookies right away. While the average NFL career for a first-round pick is nine years, the average overall is much shorter at just three years.<sup>131</sup> Running backs in particular, like Barkley, Claret, and Lattimore, last around two-and-a-half years on average.<sup>132</sup> For some players, these durability concerns often mean that their largely predetermined rookie contracts are their only NFL contracts. For teams, durability concerns mean that there is little time to waste with acclimating rookies to the professional level. If a young player with guaranteed money in his contract is struggling to fit into a team's game plan, the mandated length of his contract will either cost the team a roster spot or cost the player his job and the team a salary cap penalty. With the growth of college football, an unintended side effect has been the development of different, non-professional offensive and defensive schemes that are designed to win in the NCAA, but handicap players, especially coveted quarterbacks, at the next level.<sup>133</sup> The NFL teams must shoulder this burden, as it lacks a minor-league system, and thus must themselves spend time re-teaching players whom may be only a few years away from retirement.

So why not allow players to be drafted earlier and developed more naturally, and allow teams more flexibility to judge durability and professional readiness when determining contract length and value? The plaintiff in the *Clarett* case

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128. *Id.* § 1(g)-(h).

129. *Id.* § 3(a).

130. *Id.* § 3(b).

131. *NFL: Average Career Length*, STATISTA, <https://www.statista.com/statistics/240102/average-player-career-length-in-the-national-football-league/> (last visited Dec. 13, 2018).

132. *Id.*

133. Barry Petchesky, *College QBs Are Unprepared for the NFL*, DEADSPIN (Sept. 9, 2015), <https://deadspin.com/college-qbs-are-unprepared-for-the-nfl-1729636094>.

asked the same question.<sup>134</sup> The NFL's response was that the age limit rule was premised on four beliefs: 1) the players lack the requisite maturity, mentally and physically, at a younger age; 2) younger players are more prone to injury; 3) allowing younger players would damage the NFL product and alienate fans; and 4) younger players are more likely to use steroids.<sup>135</sup> Among the many problems with this rationale is that the league is making these determinations on behalf of all of their teams. The coaching staffs and front offices of all thirty-two NFL franchises are more than capable of making their own decisions on a player's maturity and behavior, durability, and image. In fact, they make those decisions every year when drafting players. The NFL's argument is essentially that their teams cannot make the same decisions on players who are only a couple of years younger.

The other problem the NFL faces, regarding its "damaged image" claim, is that the demand for younger players is rising among both fans and team executives. Football players are getting better at a younger age than ever before, and some are professional ready even out of high school. There were 106 "underclassmen" athletes whom applied for the NFL Draft in 2018 with NCAA eligibility still remaining.<sup>136</sup> This set a new record for the draft, exceeding the previous mark set in 2014 by nearly twenty players.<sup>137</sup> The first overall pick in each of the past four drafts have been an underclassmen, including redshirt sophomore quarterback Jameis Winston in 2015.<sup>138</sup> In that same time span, six of the eight recipients of the Rookie of the Year Award, given out to both an offensive and defensive player each season, left college with eligibility remaining, with the 2017 winners—running back Alvin Kamara and cornerback Marshon Lattimore—having both played just two years in the NCAA.<sup>139</sup> Even at the college level, younger talent is being recognized for its improved

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134. See *Clarett v. Nat'l Football League*, 306 F. Supp. 2d 379, 382 (S.D.N.Y. 2004).

135. *Id.* at 408.

136. College Football 24/7 Staff, *List of Underclassmen Granted Eligibility for 2018 NFL Draft*, NFL (Jan. 19, 2018), <http://www.nfl.com/news/story/0ap3000000908163/article/list-of-underclassmen-granted-eligibility-for-2018-nfl-draft>.

137. *Id.*

138. See *2018 NFL Draft Listing*, PRO-FOOTBALL REFERENCE, <https://www.pro-football-reference.com/years/2018/draft.htm> (last visited Dec. 13, 2018); see also *2017 NFL Draft Listing*, PRO-FOOTBALL REFERENCE, <https://www.pro-football-reference.com/years/2017/draft.htm> (last visited Dec. 13, 2018); *2016 NFL Draft Listing*, PRO-FOOTBALL REFERENCE, <https://www.pro-football-reference.com/years/2016/draft.htm> (last visited Dec. 13, 2018); *2015 NFL Draft Listing*, PRO-FOOTBALL REFERENCE, <https://www.pro-football-reference.com/years/2015/draft.htm> (last visited Dec. 13, 2018).

139. See *AP Offensive Rookie of the Year Winner*, PRO-FOOTBALL REFERENCE, <https://www.pro-football-reference.com/awards/ap-offensive-rookie-of-the-year-award.htm> (last visited Dec. 13, 2018); see also *AP Defensive Rookie of the Year Winner*, PRO-FOOTBALL REFERENCE, <https://www.pro-football-reference.com/awards/ap-defensive-rookie-of-the-year-award.htm> (last visited Dec. 13, 2018).

standing. Before 2004, only thirteen underclassmen had ever received the Heisman Trophy as the best player in college football in its sixty-nine-year history.<sup>140</sup> Since 2004, twelve of the fourteen recipients have been underclassmen, including three sophomores (in a row) and two freshman (back-to-back).<sup>141</sup>

The NFL is undeniably the most popular sport in the United States, but it is not without its flaws.<sup>142</sup> As the popularity of the college game grows, the competition level in the NCAA will increase. The NFL will continue to see more elite talent at a younger age, but will also see more frequent injuries and more players being groomed to win at the college level, rather than succeed in the professionals. The strict nature of the NFL Draft age limit and the league's rookie wage structure do not suitably accommodate these trends and the teams would be better off if the league would consider changes.

### *B. The National Basketball Association*

Of the three leagues in question, the NBA is closest to making changes to its current draft model. The notorious "one-and-done" rule, as it has become known, is mired in controversy with opposition coming from players, teams, and college programs alike. The past year has seemingly led the NBA to a tipping point and the league must decide soon: eliminate the age limit or extend the age limit.

In 2005, NBA Commissioner David Stern worked to limit the entry of players into the NBA Draft for the first time since the *Haywood* decision. He succeeded in negotiating an age limit into the 2005 CBA that stated a player may only enter the NBA Draft if he is age nineteen or older and at least one NBA season has passed since his high school graduation.<sup>143</sup> This rule has gone unchanged since 2005 despite immediate and continuing backlash.<sup>144</sup>

As a result, a precedent has been set that all professional caliber basketball players should attend at least one year of college before they can play in the

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140. *Heisman Trophy Winners List*, HEISMAN, [http://heisman.com/sports/2015/12/7/Heisman%20Winners\\_records.aspx](http://heisman.com/sports/2015/12/7/Heisman%20Winners_records.aspx) (last visited Dec. 13, 2018).

141. *Id.* (including the vacated 2005 Heisman Award given to USC running back Reggie Bush).

142. The NFL was responsible for twenty-two of the twenty-five most-watched sporting events in 2017. *See generally Most Watched Sporting Events in the U.S. 2017*, STATISTA, <https://www.statista.com/statistics/619023/number-tv-viewers-sporting-events-usa/> (last visited Dec. 13, 2018).

143. *See generally CBA Principal Deal Points*, NBA (Aug. 4, 2005), [http://www.nba.com/news/cba\\_summary\\_050804.html](http://www.nba.com/news/cba_summary_050804.html).

144. *See Collective Bargaining Agreement Between the National Basketball Association and National Basketball Players Ass'n*, art. X § 1(b)(i), <http://3c90sm37lsaecdwtr32v9qof.wpengine.netdna-cdn.com/wp-content/uploads/2016/02/2017-NBA-NBPA-Collective-Bargaining-Agreement.pdf> (last visited Dec. 13, 2018) [hereinafter NBA CBA].

NBA. Stern publicly stated that the age limit decision was meant to protect players, to both keep NBA scouts out of high school gyms, and to prevent further cases of underdeveloped teenagers struggling at the professional level.<sup>145</sup> In reality, Stern was representing the frustrations of NBA coaches and executives, whom felt developing high school players paid off too infrequently.<sup>146</sup> The NBA saw an opportunity to use the NCAA as a free minor-league, to scout and develop young talent, for at least one year.

As such, the NBA Draft class each year is a hotchpot of players at varying levels of college experience. Freshmen, sophomores, juniors, and seniors comprise the available talent, as well as international players whom meet the age criteria. Held annually, usually in late June, the NBA Draft consists of two rounds with only as many picks in each round as the thirty NBA teams.<sup>147</sup> The NBA has used a lottery system to determine the first three picks of the draft since 1985.<sup>148</sup> The trend in recent years has been to use those top selections to take the best of the youngest players; a lottery pick has not been used on a non-freshman since Victor Oladipo and Otto Porter were selected second and third overall respectively in 2013.<sup>149</sup> The 2017 draft class was the youngest in league history, with the most freshman and fewest seniors ever selected.<sup>150</sup>

Much like in the NFL, once a player has been drafted into the NBA there is little flexibility when it comes to negotiating their first contract. All draft picks are first offered a “Required Tender” of a minimum-value contract determined by the league to lock in exclusive negotiating rights.<sup>151</sup> All first-round picks are required to sign a two-year contract with team options for third and fourth years.<sup>152</sup> The “Rookie Salary Scale” determines a value that the player should be compensated with, depending on the position they were drafted and the salary cap ceiling in the first year.<sup>153</sup> In the first two years of the contract, as well as the first option year, the player must be paid at least 80% of that value in base

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145. Buzz Bissinger, *Bring Back Basketball's Little Big Men*, N.Y. TIMES, Oct. 26, 2009, <https://www.ny-times.com/2009/10/27/opinion/27bissinger.html>

146. *Id.*

147. NBA CBA, *supra* note 144, art. X §§ 2-3(a).

148. *NBA Draft Lottery: Facts, History, Probabilities & All-Time Results*, *supra* note 16.

149. *2013 NBA Draft*, BASKETBALL REFERENCE, [https://www.basketball-reference.com/draft/NBA\\_2013.html](https://www.basketball-reference.com/draft/NBA_2013.html) (last visited Dec. 13, 2018).

150. *See 2017 NBA Draft*, BASKETBALL REFERENCE, [https://www.basketball-reference.com/draft/NBA\\_2017.html](https://www.basketball-reference.com/draft/NBA_2017.html) (last visited Dec. 13, 2018).

151. NBA CBA, *supra* note 144, art. X § 4(a). Like in the NFL, an NBA rookie must sign his required tender, if it is the best offer made, or else he may not play in the NBA that season and would be forced to re-enter the subsequent draft. *Id.*

152. *Id.* art. VIII § 1(a).

153. *Id.* § 1(b)(i).

salary, but base salary plus “unlikely bonuses” may not exceed 120% of the value.<sup>154</sup> The NBA provides both the “Rookie Salary Scale” value and required base salary scale value up front, so teams and first-round selections know immediately what their negotiating range is.<sup>155</sup> A second-round pick or undrafted free agent does not face the same negotiating restrictions as a first-round pick, but also does not enjoy the same benefits. Often these players must accept the minimum “Required Tender.” While inflexible, the NBA’s rookie wage system is by-and-large a fair process for the thirty first-round selections. Beyond that, there is a severe lack of security for late picks and undrafted free agents.

The “one-and-done” rule is troublesome to many because it devalues education, promotes corruption, and harms young athletes. By essentially forcing young, professional caliber basketball players to go to school for a year for no reason other than to play basketball, the NBA’s age limit is at odds with the NCAA’s purpose of promoting both athletics and education. The result has been the creation of an environment at the college level that more closely resembles the professional game than the NCAA’s desired “amateurism.” Elite high school players realize that they are going to school not to learn, but to play basketball, and recently exposed scandals show that coaches and apparel companies share in that understanding.<sup>156</sup> The Federal Bureau of Investigation took a deep look into the behind-the-scenes operations of college basketball and uncovered evidence of numerous college programs receiving payouts from agents and shoe executives, which even led to criminal charges.<sup>157</sup> This prompted the creation of the Commission of College Basketball in October of 2017.<sup>158</sup> The chairman of the Commission, former Secretary of State Condoleezza Rice, called the situation in college basketball a “crisis of accountability” and did not shy away from including the NBA in the share of the blame; calling for the end of the “one-and-done” rule.<sup>159</sup> In fact, the abolishment of the NBA’s current age limit was Recommendation 1-A to open up

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154. *Id.* § 1(c)(i).

155. *Id.* at Exhibit B-1, B-2.

156. Andy Staples, *FBI Probe Into College Basketball: NCAA Must Change Rules*, SPORTS ILLUSTRATED, Feb. 23, 2018, <https://www.si.com/college-basketball/2018/02/23/fbi-probe-investigation-ncaa-recruiting-rules-andy-miller>

157. *Id.*

158. COMMISSION ON COLLEGE BASKETBALL, REPORT AND RECOMMENDATIONS TO ADDRESS THE ISSUES FACING COLLEGIATE BASKETBALL, *supra* note 19, at 1-3.

159. Liz Clarke & Will Hobson, *NCAA Basketball Commission: Loosen Some Rules, But Don’t Pay Players*, WASH. POST, Apr. 25, 2018, [https://www.washingtonpost.com/sports/colleges/college-basketball-commission-calls-for-rules-changes-but-sticks-with-amateurism/2018/04/25/8365e31c-4880-11e8-8b5a-3b1697adcc2a\\_story.html?utm\\_term=.8e96d859b088](https://www.washingtonpost.com/sports/colleges/college-basketball-commission-calls-for-rules-changes-but-sticks-with-amateurism/2018/04/25/8365e31c-4880-11e8-8b5a-3b1697adcc2a_story.html?utm_term=.8e96d859b088).

the Commission's report.<sup>160</sup> The Commission also stressed concern over the increasing number of student-athletes whom leave school early, only to go undrafted or have short-lived NBA careers.<sup>161</sup> This is not the first time that the debate has become political either: former Secretary of Education Arne Duncan previously criticized the age limit citing a disconnect between the value of education and the NBA's true intentions with the rule.<sup>162</sup>

While the NBA and NBPA released a joint statement acknowledging and supporting the findings of the Commission on College Basketball, the reality is that they currently do not feel the ill-effects of scandal at the NCAA level.<sup>163</sup> Only 1.2% of college basketball players go on to play in the NBA, and in the current landscape of the game, those that do, have already been pegged as professional prospects in high school (counter to Stern's purported concerns about high school scouting when the rule was created).<sup>164</sup> The means by which college programs acquire these players, and the extent of their educational focus, has little impact on professional basketball.

Yet, the status quo could change quickly for Commissioner Adam Silver and the NBA. The Commission on College Basketball made it clear that, absent the abandonment of the "one-and-done" rule, the next move for the NCAA to combat scandal would be to implement rules that render the age limit moot.<sup>165</sup> One offered idea was to make all freshman ineligible for competition.<sup>166</sup> This move would eliminate the most popular class of NBA Draft prospects. It would also likely lead to an exodus away from NCAA basketball altogether. Another idea was to "lock in" scholarships for a four-year term, regardless of when the student-athlete leaves for the NBA, which would cripple those college programs that typically recruit "one-and-done" high school stars.<sup>167</sup> Again, the likely result would be teams steering away from those high school athletes with immediate professional playing ability. The NBA is already dealing with a growing trend of high school graduates bypassing the college level to play professionally overseas, with players such as Brandon Jennings and Emmanuel

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160. COMMISSION ON COLLEGE BASKETBALL, REPORT AND RECOMMENDATIONS TO ADDRESS THE ISSUES FACING COLLEGIATE BASKETBALL, *supra* note 19, at 3-4.

161. *Id.* at 5.

162. Katie Thomas, *Education Secretary Criticizes N.B.A. and the N.C.A.A.*, N.Y. TIMES, Jan. 14, 2010, <https://www.nytimes.com/2010/01/15/sports/15ncaa.html>.

163. Clarke & Hobson, *supra* note 159.

164. COMMISSION ON COLLEGE BASKETBALL, REPORT AND RECOMMENDATIONS TO ADDRESS THE ISSUES FACING COLLEGIATE BASKETBALL, *supra* note 19, at 5.

165. *Id.* at 4.

166. *Id.* at 5.

167. *Id.* at 5.

Mudiay struggling to justify their early first-round selections in recent years.<sup>168</sup> There are now players simply opting to take a postgraduate year, favoring continued high school-level participation over playing in college or abroad, exemplified by the likes of Thon Maker and Anfernee Simons.<sup>169</sup> If Stern's true intention for the age limit back in 2005 was to use the NCAA as a developmental league to showcase top draft-eligible talent, rather than stick the teams with the task of scouting multiple levels and teaching raw, young players, then that purpose would be considerably stifled if elite freshman-age players are discriminated against by the college game begin to choose these different avenues to the professional league. It seems the time is now for the NBA to make a call on its controversial age limit.

### C. Major League Baseball

The Commission on College Basketball seriously considered recommending the "baseball rule" to the NBA over the "one-and-done" rule.<sup>170</sup> They also described the MLB's draft structure as keeping professional ready players "in school against their will" and "undermining the collegiate model."<sup>171</sup> The fact that this system was considered a favorable approach to the NBA's model exemplifies the dire current state of professional sports' draft structures.

Where the MLB is more flexible than the NFL and NBA is that it does not have a hard age limit.<sup>172</sup> The "First-Year Player Draft," also known as the "Rule 4 Draft," is open to two classes of players: high school graduates and collegiate student-athletes.<sup>173</sup> Each year, the MLB Draft is held in June, and is the only professional sports draft held during the playing season for that sport.<sup>174</sup> The draft order is determined purely by the inverse of the previous season's final

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168. See *Brandon Jennings Stats*, BASKETBALL REFERENCE, <https://www.basketball-reference.com/players/j/jennibr01.html> (last visited Dec. 13, 2018); see also *Emmanuel Mudiay Stats*, BASKETBALL REFERENCE, <https://www.basketball-reference.com/players/m/mudiaem01.html> (last visited Dec. 13, 2018).

169. Jonathan Givony, *Anfernee Simons Declares for NBA Draft, Foregoing Collegiate Eligibility*, ESPN (Mar. 22, 2018), [http://www.espn.com/nba/story/\\_/id/22869177/anfernee-simons-declares-nba-draft-forgoing-collegiate-eligibility](http://www.espn.com/nba/story/_/id/22869177/anfernee-simons-declares-nba-draft-forgoing-collegiate-eligibility).

170. COMMISSION ON COLLEGE BASKETBALL, REPORT AND RECOMMENDATIONS TO ADDRESS THE ISSUES FACING COLLEGIATE BASKETBALL, *supra* note 19, at 3-4.

171. *Id.* at 4.

172. *First-Year Draft Official Rules*, MLB, <http://mlb.mlb.com/mlb/draftday/rules.jsp> (last visited Dec. 13, 2018). Major League Baseball retained its antitrust protection over the "First-Year Player Draft" in the Curt Flood Act, so much of the structure remains unilaterally imposed and is not incorporated into the league's CBA. The MLB does not make the full official document of rules for the "First-Year Player Draft" readily available to the public and were unwilling to provide the author with a copy.

173. *Id.*

174. *Id.*

standings; not including compensatory picks, in each of the forty rounds—by far the largest of the professional sports drafts.<sup>175</sup> With each pick, a team may select either a high school graduate, a junior college athlete, or a junior or senior-year (or otherwise twenty-one-year-old) NCAA athlete.<sup>176</sup> All draft selections must be natives of, or students in, the United States, Canada, Puerto Rico or another United States territory.<sup>177</sup> The MLB does not require international players to enter the league through the draft.<sup>178</sup>

The draft slot of a selected player is reflected far less in the base salary and term of their contract than by the accompanying signing bonus.<sup>179</sup> Due to the expansive nature of minor league baseball, some major league teams have up to seven minor league affiliates across many levels, and the amount of time it takes to reach the MLB level—it takes on average four years to reach the majors, if at all—the first contract is usually a long-term, low-paying minor league pact.<sup>180</sup> Most draftees sign a seven-year contract worth varying amounts determined by level of play, and only see a significant raise in base salary once they sign their first major league contract.<sup>181</sup> However, for those players drafted near the top of the draft class each year, the signing bonus helps to offset what can be a long, arduous, and underpaid tenure in the minor leagues. The MLB assigns a specific signing bonus to each draft slot in the first ten rounds and accounts for an allowance of \$125,000 for each draft slot from round eleven through the end of the draft.<sup>182</sup> Each MLB team is afforded a “bonus pool,” which is calculated by the total aggregate of the signing bonuses assigned to each of that team’s draft slots.<sup>183</sup> These assigned bonuses begin very large with great variance between each slot at the top of the draft, and grow smaller and more similar to one another as the draft moves closer to the end of the round ten, after which point they are all the same.<sup>184</sup> In 2017, the first overall pick had an assigned bonus value of \$7,770,700; in comparison, the tenth overall pick had a value of \$4,376,800; the final pick in the first round had a value of \$1,888,800; the final

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175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. See Doug Bernier, *What is Minor League Baseball?*, PRO BASEBALL INSIDER, <http://probaseballinsider.com/what-is-minor-league-baseball/> (last visited Dec. 13, 2018).

181. *Id.*

182. Jim Callis, *2017 MLB Draft Bonus Pools, Pick Values*, MLB (June 8, 2017), <https://www.mlb.com/news/2017-mlb-draft-bonus-pools-pick-values/c-223686792>.

183. *Id.*

184. *Id.*

pick in the fifth round had a value of \$285,800; and the final four picks in the tenth round all had a value of \$131,300.<sup>185</sup>

MLB teams are permitted to exceed their allotted “bonus pool,” but they must pay a tax between 75-100% of the overage to the league and may also be forced to forfeit future draft picks.<sup>186</sup> It may seem strange that a team would need to exceed the value of a league-set bonus when negotiating a contract with a prospect, given the fact that they hold exclusive rights to that selection. Yet this has been a common practice since the rule was implemented. Twenty-three of the thirty teams exceeded their “bonus pool” in 2017, and it has occurred seventy-four times in the past five years.<sup>187</sup> Why? Unlike the other three major professional leagues, signing a draft pick in baseball is not a virtual certainty; in fact, losing out on selected players happens to every team each year.

Due to the structure of the MLB Draft, the players have just as much say (until their final year of draft eligibility) in what organization they sign with, as do the teams themselves. The MLB does not require a petition to be eligible for the draft, as the NFL and NBA do for early-entry college players. As such, all high school, junior college players, and NCAA juniors and seniors may be drafted, regardless of whether they wish to play professional baseball at that time or at all. The result, especially among late-round high school draftees, is that often players decide that they would rather play at the college level than at the minor-league level for the time being. This choice is occasionally made by junior college and junior-year NCAA players as well, but when it comes to players whom are drafted in the earlier rounds, these decisions usually come down to money. The differences between signing bonus values, even within the same round, incentivize draft selections to turn down contract offers if they feel that extended amateur play can improve their draft stock.

This system, which seemingly benefits the players, is actually detrimental to both the players and the teams. For the team, it loses the player it selected—and may not draft that same player in the subsequent year—and the team is also saddled with the lost opportunity cost of instead selecting a different player with that pick who may have signed.<sup>188</sup> As soon as the unsigned pick enrolls in college, the team loses any exclusive right to sign him, and unless the player was drafted in the first three rounds and made an offer of at least 40% of his assigned bonus, the team will not receive a compensatory draft pick in the

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185. *Id.*

186. *Id.*

187. *Id.*

188. *First-Year Draft Official Rules*, *supra* note 172.

subsequent draft.<sup>189</sup> Additionally, the assigned bonus value of the unsigned player's draft slot will be subtracted from the team's total "bonus pool" allotment.<sup>190</sup> There is no upside for teams to this structure allowing players to choose not to sign. Any perceived upside for the athletes is also largely illusory. The idea that a high school athlete can properly decide whether he is ready for a professional baseball career, and can accurately conduct a cost-benefit analysis between accepting the current signing bonus offer or improving their value at the college level, is irrational. To subsequently deny that athlete the ability to re-enter the draft for three years if he chooses the NCAA path is similarly illogical. Unlike the maturity arguments of the NFL and NBA, there is no case for the MLB to make when the player has already been deemed professional ready as a drafted player out of high school. For every story of a draft pick turning down the MLB out of high school to go on to a highly successful collegiate career and greatly improved draft stock, there are quite a few more where things do not work out that way.

Take the case of Milwaukee Brewers pitcher Phil Bickford as an example. Bickford was the tenth overall pick by the Toronto Blue Jays in 2013, but for reasons that likely included his label as "one of the best high school pitchers in the country," he decided to turn down a substantial signing bonus and enroll at California State University – Fullerton ("Cal State – Fullerton").<sup>191</sup> At Cal State – Fullerton, as a freshman and while playing in the best summer college league in the country, the Cape Cod Baseball League, Bickford was at the top of his game in 2014.<sup>192</sup> Hoping to capitalize on his increasing value, Bickford dropped out of Cal State – Fullerton and enrolled at Southern Nevada Junior College, so that he could enter the draft the following year instead of after his junior year had he stayed in the NCAA.<sup>193</sup> Although Bickford's domination continued at the junior college level, he was drafted only nineteenth overall by the San Francisco Giants in the 2015 Draft.<sup>194</sup> The Blue Jays lost out on an elite talent, and Bickford ended up losing signing bonus money, delaying his professional career by two years, and not inconsequentially, derailing his education along the way.

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189. *First-Year Player Draft (MLB Rule 4 Draft)*, CUB REP., <https://www.thecubreporter.com/book/export/html/3551> (last visited Dec. 13, 2018).

190. *Id.*

191. Wayne Cavadi, *The Brewers Phil Bickford's Interesting Ride to the Bigs Continues*, SB NATION (Dec. 11, 2016), <https://www.minorleagueball.com/2016/12/11/13911626/the-brewers-phil-bickford-s-interesting-ride-to-the-bigs-continues>.

192. *Id.*

193. *Id.*

194. *Id.*

Even worse is the case of Karsten Whitson, another prominent high school pitcher who, despite being taken with the ninth overall pick by the San Diego Padres in 2010, opted instead to attend the University of Florida.<sup>195</sup> While at Florida, Whitson continually struggled with shoulder injuries following his freshman year, missing the entire 2013 season and seeing his pain affect his performance when healthy.<sup>196</sup> Whitson was selected by the Boston Red Sox in the eleventh round of the 2014 Draft, falling 335 spots from his initial draft slot, out of high school, four years earlier.<sup>197</sup> He threw seven innings for Boston's Low-A affiliate that summer before succumbing to injury yet again.<sup>198</sup> He was released by the Red Sox in 2016 and has not returned to professional baseball.<sup>199</sup> Not only did the choice to attend college cost Whitson millions of dollars, it also impeded his ability to get the professional care and rehabilitation attention that a MLB team could have provided. Both the Padres and the Red Sox additionally suffered as a result of the league's current draft structure, each wasting a valuable draft pick.

The other major problem that professional baseball faces is the dichotomy created by forcing domestic players into the draft, but allowing foreign players to bypass the process. The MLB Draft, like all professional drafts, is a fair way to distribute young talent around the league, but the alternative system that baseball uses to import foreign talent causes more harm to teams and the league's overall competitive balance than good. In fairness, the MLB has reformed their "International Amateur Talent System" in the most recent CBA.<sup>200</sup> In the past, the international market went completely unchecked, lacking an age limit or enforcement of an age limit on foreign free agents for some time, and only recently fixing the lack of a hard spending cap on the contracts for these free agents.<sup>201</sup> The new rule sorts teams into three "International Signing Bonus Pools," based on performance and revenue, with

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195. Pat McCann, *Karsten Whitson Recovers from His Second Surgery While Keeping the Dream Alive*, PANAMA CITY NEWS HERALD, June 25, 2016, <http://www.newsherald.com/sports/20160625/karsten-whitson-recovers-from-his-second-surgery-while-keeping-dream-alive>.

196. *Id.*

197. *Karsten Whitson Stats, Highlights, Bio*, MINOR LEAGUE BASEBALL, [http://www.milb.com/player/index.jsp?sid=milb&player\\_id=592857#/career/R/pitching/2015/ALL](http://www.milb.com/player/index.jsp?sid=milb&player_id=592857#/career/R/pitching/2015/ALL) (last visited Dec. 13, 2018).

198. McCann, *supra* note 195.

199. *Karsten Whitson Stats, Highlights, Bio*, *supra* note 197.

200. See Collective Bargaining Agreement Between Major League Baseball and the Major League Baseball Players Ass'n, Attachment 46, <http://www.mlbplayers.com/pdf9/5450407.pdf> (last visited Dec. 13, 2018) [hereinafter MLB CBA].

201. Michael Bradburn, *New International Signing Rules: Who They Benefit and Who They Hurt*, SB NATION (Dec. 12, 2016), <https://www.mlbdailydish.com/2016/12/12/13921330/collective-bargaining-agreement-international-signing-rules>.

those struggling teams allotted more leeway to sign international free agents.<sup>202</sup> This is admittedly a far superior structure.

Yet, the fact that domestic prospects have no employment autonomy and cannot be drafted until age eighteen—or out of the NCAA even later—while international prospects may sign at age sixteen with whomever they like is fundamentally unfair, and the draft-eligible players are not the only ones feeling the ill-effects. Even in this new system, MLB teams can only offer so much to an international player (though the league also makes international pool money a tradeable asset), but may still use their market size and recent performance to sell the player, who is otherwise presented with similar monetary offers, on joining their team.<sup>203</sup> When “Japanese Babe Ruth,” star hitter and pitcher Shohei Ohtani, indicated in the 2017 off-season that he would like to sign in the MLB, the Minnesota Twins were one of the top teams in remaining international pool money.<sup>204</sup> However, given their market, the Twins knew they could not attract Ohtani and traded pool money to the Los Angeles Angels.<sup>205</sup> The Angels still trailed the Texas Rangers and Seattle Mariners, who had also acquired pool money from Minnesota, in the maximum bonus they could offer Ohtani, but the Los Angeles market was enough to entice him to sign.<sup>206</sup> The impact of market and talent on signing new players is the exact reason that the MLB implemented a draft in the first place, yet it continues to operate without one for international players.<sup>207</sup> It hurts the teams without the market power or winning traditions to influence free agents, and it also hurts the domestic players whom have far less freedom in their own entry process.<sup>208</sup> The majority of MLB teams, domestic players, and even the NCAA would benefit from including international players in the draft process like the other three major sports leagues. The only party that would suffer are the international prospects themselves, whom have enjoyed a far superior entry process for long enough.

The next part of this Article will introduce the league with a draft and rookie contract structure that has long avoided alienating their incoming talent, and the

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202. MLB CBA, *supra* note 200.

203. Pedro Moura, *Angels Acquire More International Pool Money to Dangle at Shohei Ohtani*, L.A. TIMES, Dec. 6, 2017, <http://www.latimes.com/sports/angels/la-sp-angels-international-pool-money-ohtani-20171206-story.html>.

204. *Id.*

205. *Id.*

206. *Id.*

207. Bailey & Shepherd, *supra* note 35.

208. A study conducted by Joanna Shepherd Bailey and George B. Shepherd of Emory Law School in 2011 even came to the conclusion that teams’ increased flexibility in the international market has drawn attention and effort away from domestic scouting, which has led to the noticeable drop-off in African-American participation in baseball. *Id.*

accompanying legal challenges that brings, and uses an entry-level process that greatly benefits its teams: the NHL.

## V. THE SUPERIOR NATIONAL HOCKEY LEAGUE DRAFT AND ENTRY-LEVEL SYSTEM

### *A. Age Is Just a Number*

Like any professional sports league, the NHL is not without its administrative flaws. The league has had four work stoppages since 1992 and has re-located five teams in that span as well.<sup>209</sup> They have also had continued struggles with competitive balance and bad teams staying bad for long periods of time. The most recent complaint has been about unnecessary changes to the playoff structure that have harmed the postseason product.<sup>210</sup> Yet when it comes to draft structure and rookie salary management, the NHL model has been far more successful and has exceedingly fewer problems than its other professional league counterparts. Most importantly, it is a system that provides the NHL's member teams with wide-spread benefits.

On its face, the NHL Entry Draft does not seem all that different. Held in late June each year, following the conclusion of the Stanley Cup playoffs, the draft consists of seven rounds with as many picks as teams—currently thirty-one—as well as occasional compensatory picks.<sup>211</sup> The NHL has used a lottery system since 1995, with each of the non-playoff teams given a weighted chance to win based on the final standings.<sup>212</sup> It began as a modest system that could only move the three selected winners four spots up the draft board, but since 2014, it has instead given all lottery teams a chance at the top three selections in the draft.<sup>213</sup>

One of the major benefits of the NHL draft model are the types of players available for teams to pick, whether a team is using a lottery pick or a late seventh-round choice. There is no age floor in the NHL; any player who will turn eighteen by September 15th of the calendar year through any player who will still be age twenty at the end of the calendar year is available to be selected in the NHL draft, as well as players aged twenty-one and twenty-two whom had

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209. James H. Marsh, *National Hockey League (NHL)*, CANADIAN ENCYCLOPEDIA (Dec. 12, 2016), <http://www.thecanadianencyclopedia.ca/en/article/national-hockey-league/>.

210. Mike Johnston, *Ron and Don: The Current Stanley Cup Playoffs Format 'Sucks'*, SPORTSNET (Apr. 19, 2018), <https://www.sportsnet.ca/hockey/nhl/ron-don-current-stanley-cup-playoffs-format-sucks/>.

211. NHL CBA, *supra* note 11, art. 8 §§ 2-3, at 16.

212. TSN Staff, *NHL Draft Lottery History*, TSN (Apr. 28, 2018), <https://www.tsn.ca/history-of-the-nhl-draft-lottery-1.236014>.

213. *Id.*

previously been drafted and did not sign.<sup>214</sup> This includes all domestic and international players, includes players who have been passed over in previous drafts, chose not to sign with the team that previously drafted them, or never received an offer from a team that previously drafted them, and includes players participating in junior-level, high school, college, or professional hockey overseas.<sup>215</sup> For those players that are not drafted, there is also a period of time in which they may sign with a team as an undrafted free agent rather than wait to re-enter the subsequent draft.<sup>216</sup> The NHL is the only North American professional league that truly allows their teams the opportunity to add any player that they feel has professional potential. The NHL entry system more closely resembles a non-sports industry, where employment is freely available after high school graduation for qualified individuals, rather than the closed-off format of the other three major leagues.

Once selected, the league's system for managing the contract status of drafted players is also very flexible and friendly to both players and teams. An NHL team has nearly a year, until the following June 1st, to retain exclusive negotiating rights with a domestic draft pick.<sup>217</sup> If during that period a "Bona Fide Offer" of an "Entry-Level Contract" is made to the player, that exclusive window is extended for an additional year.<sup>218</sup> If an offer is not made within year one or the player chooses not to sign through year two, the player may re-enter the subsequent draft.<sup>219</sup> Even if the team or player himself does not feel that the player is ready for professional hockey through those first two years following his draft, that does not impede the two sides from agreeing to a contract. The "Entry Level System" allows for the first contract signed by an eighteen-year-old to "slide" the term forward in each of the first two years if he does not play in at least ten NHL games and allows the first contract signed by a nineteen-year-old to "slide" in the first year as well under the same conditions.<sup>220</sup> This eliminates much of the risk of a team and player not agreeing to terms, as the majority of non-college players simply sign their contract in the first or second year after being drafted and are reassigned to their junior team or foreign professional team if they are unable to crack the NHL roster.

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214. NHL CBA, *supra* note 11, art. 8 §§ 4, 10, at 16, 22.

215. *Id.*

216. *Id.* art. 10 § 1(d).

217. *Id.* art. 8 § 6(a).

218. *Id.* § 6(a)(ii).

219. *Id.*

220. *Id.* art. 9 § 1(d).

### B. Retained Rights

This requirement of signing a contract within the first two years of being drafted would obviously not suit selections who are playing in or committed to playing in the NCAA. A student-athlete loses his amateur status and collegiate eligibility if he contracts to play any professional sport.<sup>221</sup> So, the NHL built in separate exceptions for this class of player, which makes up one-third of their active players.<sup>222</sup> Any drafted player, domestic or foreign, who is, or becomes, a college student by June 1st following his initial draft, does not need to agree to a contract to maintain his relationship with the team that drafted him.<sup>223</sup> Instead, the team receives exclusive negotiating rights throughout the player's five years of NCAA eligibility or until the August 15th following his graduation.<sup>224</sup> While playing in college, the draftee may keep in contact with coaches and executives and may attend team camps, giving both sides an understanding of the player's professional-readiness and organizational fit, and may even receive and consider contract offers to leave school early, so long as an agent is not used while enrolled.<sup>225</sup> If the team or player decides after graduation that there is not mutual interest in a contract, then the player does not have to re-enter the draft and may become an unrestricted free agent.<sup>226</sup>

The process is similar for international selections playing overseas. Teams may retain exclusive negotiating rights over an eighteen-year-old or nineteen-year-old foreign player for four years, or a twenty-year-old foreign player for two years without a contract or bona fide offer being necessary.<sup>227</sup> However, unlike college players, these draft picks may also sign their entry-level contract and simply be reassigned back to their international clubs.

### C. The Entry-Level Contract

Regardless of the path that a player takes to the professional hockey level, the NHL's "Entry-Level System" is the same for everyone, and benefits both teams and players with increased team control over younger prospects and increased flexibility for both older and superior prospects. The league has a

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221. NCAA, *supra* note 12, art. 12.1.2.

222. *In the NHL*, COLLEGE HOCKEY INC., <http://collegehockeyinc.com/in-the-nhl.php> (last visited Dec. 13, 2018).

223. NHL CBA, *supra* note 11, art. 8 § 6(c).

224. *Id.*

225. NCAA, *supra* note 12, art. 12.1.2, 12.2.2. Even undrafted college players may communicate with teams and attend certain camps and tryouts. *Id.* art. 12.2.1.

226. NHL CBA, *supra* note 11, art. 8 § 6(c)(v).

227. *Id.* art. 8 § 6(d).

structured system for both the term and value of a player's first contract. A player who signs his first contract between the ages of eighteen and twenty-one is given a contract with a three-year term (not including "slide" years).<sup>228</sup> As this is the most common age for draft picks to sign their first contract, this is the most common term, and, especially given the "entry-level slide" rule, gives NHL teams substantial control without the unreasonably lengthy term seen in other professional leagues. Players aged twenty-two to twenty-three may sign a two-year contract, and players of age twenty-four may sign a one-year contract.<sup>229</sup> These players tend to be unsigned college draft picks and college free agents whom, after ample time at the amateur level, are rewarded with lesser term and a quicker turnaround to a second, more lucrative contract. Any player who signs his first NHL contract at age twenty-five or older does not qualify for the "Entry Level System" and may sign any contract he likes.<sup>230</sup>

All others who do qualify for the system are limited in their rookie contract base salary. Currently, the cap on the "average annual value" over the course of an entry-level deal is \$925,000 per season.<sup>231</sup> Teams and their prospects may negotiate a base salary between that number and the league's salary minimum, which in 2017-18 was \$650,000.<sup>232</sup> However, teams may also reward rookies with bonuses. A signing bonus of up to 10% of the agreed-upon base salary is permitted and incorporated into the base, and games played bonuses and performance bonuses may also be added.<sup>233</sup> The league sets maximums for performance bonuses a team may issue to any player, and also rewards players themselves for top statistical finishes and awards voting.<sup>234</sup> Theoretically, a player on an entry-level contract with a \$925,000 salary can earn up to \$3,775,000 each year.<sup>235</sup>

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228. *Id.* art. 9 § 1(b).

229. *Id.*

230. *Id.*

231. *Id.* art. 9 § 3(a). Note that the NHL's revenue and salary restrictions are significantly less than the other three major professional leagues. The NHL's entry-level cap as a proportion of its salary cap would be equivalent to approximately \$2.1 million in the NFL in 2017, during which season the NFL's average salary was approximately \$1.5 million. See generally *NHL Salary Caps*, CAPFRIENDLY, <https://www.capfriendly.com/> (last visited Dec. 13, 2018).

232. *NHL Stats, History, Scores, & Records*, HOCKEY REFERENCE, [https://www.hockey-reference.com/#site\\_menu\\_link](https://www.hockey-reference.com/#site_menu_link) (last visited Dec. 13, 2018).

233. NHL CBA, *supra* note 11, art. 9 §§ 3(b), 5, & 7.

234. *Id.* at Exhibit 5.

235. *Id.*

#### *D. The End Result*

The combination of a broad draft class, simple exclusivity rules, and flexible contract terms puts the NHL far ahead of its competitors in terms of appeasing both the teams and players in the entry process. NHL teams are given the chance to select players of varying ages and experiences from all over the globe each year. They are permitted to pick players as young as seventeen on draft day and play them immediately in the subsequent season. They may also sign a player with no intention of playing them in the next year or two, without risking losing valuable term on the contract. Teams may also simply wait for those players in college and overseas to develop and are free to communicate and work with those prospects unconditionally. When signing their young players, teams do not have to worry about inflated salaries or exaggerated terms. They may also reward a rookie for performance, rather than guarantee an unknown commodity. On the other side of the table, players have the freedom to sign a substantial contract and play professional hockey immediately if they have the ability. They are also free to follow whichever developmental path they choose, including attending college without the fear of being locked into the amateur level for a specific amount of time. The “Entry-Level System” gives them a first contract that reflects the time spent developing outside of the NHL and rewards those older players with restricted free agency sooner. Any player who does not see a fit on the team that drafted them or is never made an offer has the ability to re-enter the draft or eventually become an unrestricted free agent. There are many benefits on both sides of a structure that comes together in a harmony and has no history of creating conflict or legal challenge. It is a structure that the other three North American professional leagues desperately need, whether they realize it or not.

The next part of this Article will address the similarities and differences between the NHL model and those of the MLB, NBA, and NFL and will simulate the conditions under which adopting the NHL’s draft structure and “Entry Level System” would not only be possible but would be greatly beneficial to each league.

### VI. THE MIRACLE OF ADOPTION

#### *A. Criticism and Rebuttal*

The easy knock to make on comparing the NHL’s methods of admitting and contracting young players to those of the other three leagues is that the NHL draws from a much more diverse talent pool. Each NFL Draft class is almost exclusively made up of American players from the NCAA. The NBA largely drafts American NCAA players as well, though they have a significant foreign

contingent and a growing base of players bypassing college.<sup>236</sup> The MLB imports many foreign players each year, but not through the draft, which is composed almost entirely of American high school graduates or collegiate players. In contrast, the NHL's largest producer of talent is the Canadian Hockey League, the "major junior" hockey organization that houses fifty-two Canadian teams and eight American teams across three leagues.<sup>237</sup> The league also recruits heavily from foreign countries, with a greater proportion of players from outside of North America than any of the other three leagues.<sup>238</sup> Without a doubt, the NHL is the least American and least collegiate of the four major leagues.

However, the collegiate influence is growing. As of the 2016-17 season, 32% of the NHL's players came from the NCAA.<sup>239</sup> At the turn of the century, that number was at just 20%.<sup>240</sup> In the 2015 NHL Draft, three NCAA student-athletes were selected in the top eight picks, including Boston University's Jack Eichel at number two overall.<sup>241</sup> The following year, three more college or college-bound players were selected within the first fifteen picks.<sup>242</sup> In the most recent draft, four more collegiate or college-bound players were selected within the top fifteen.<sup>243</sup> Given the growth of the NCAA, the quality of players coming out of the college ranks, and the added bonus of the educational superiority of the college path, the composition of the NHL could approach 50% with collegiate experience in the next decade.<sup>244</sup>

Yet, regardless of the collegiate makeup of each league, it is the logic of the NHL's system for drafting collegiate talent that is the main consideration. The league allows players to be drafted at ages eighteen to twenty, prior to and during their NCAA careers, but continue to play at the amateur level. Teams

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236. 2018 *NBA Draft*, BASKETBALL REFERENCE, [https://www.basketball-reference.com/draft/NBA\\_2018.html](https://www.basketball-reference.com/draft/NBA_2018.html) (last visited Dec. 13, 2018). Eight of the sixty selections in the 2018 NBA Draft were international players with no collegiate experience. *Id.*

237. *About the CHL*, CANADIAN HOCKEY LEAGUE, <http://chl.ca/aboutthechl> (last visited Dec. 13, 2018).

238. Gregor Aisch et al., *Where Athletes in the Premier League, the N.B.A. and Other Sports Leagues Come From, in 15 Charts*, N.Y. TIMES, Dec. 29, 2017, <https://www.nytimes.com/interactive/2017/12/29/upshot/internationalization-of-pro-sports-leagues-premier-league.html>.

239. *In the NHL*, *supra* note 222.

240. *Id.*

241. 2015 *NHL Entry Draft*, HOCKEY REFERENCE, [https://www.hockey-reference.com/draft/NHL\\_2015\\_entry.html](https://www.hockey-reference.com/draft/NHL_2015_entry.html) (last visited Dec. 13, 2018).

242. *See 2016 NHL Entry Draft*, HOCKEY REFERENCE, [https://www.hockey-reference.com/draft/NHL\\_2016\\_entry.html](https://www.hockey-reference.com/draft/NHL_2016_entry.html) (last visited Dec. 13, 2018).

243. *See 2018 NHL Entry Draft*, HOCKEY REFERENCE, [https://www.hockey-reference.com/draft/NHL\\_2018\\_entry.html](https://www.hockey-reference.com/draft/NHL_2018_entry.html) (last visited Dec. 13, 2018).

244. *In the NHL*, *supra* note 222 (calculating a trend line with the given data points on the graph shown. The percentage of NHL players from the NCAA should exceed 45% by 2026).

maintain exclusive negotiating rights through their draftees' college careers, while the players communicate with the team's coaches and executives throughout and even attend workouts and practices. In the end, the decision of when the player should turn professional is mutual; with input from both the player and team that is more educated, as draft positions have already been determined, any continued play can be evaluated, and organizational depth can be considered. If the player does not feel that the fit is right with his team or the team does not feel the player is worthy of a contract, then the player can become an unrestricted free agent after graduation. There is little reason why this same process that has been so successful in the NHL could not be implemented in the other leagues.

The other argument would be not that the NCAA retained rights process is flawed, but that teams in the other three leagues could not properly evaluate such young talent to draft them prior to entering the NCAA. As will be discussed in more extensive detail in examining each league, this is an unsubstantiated claim. The NHL does have a long history of not only drafting, but playing teenage athletes, yet it is not the only one. The MLB has always allowed teams to select players out of high school and exceptional players often take relatively no time to reach the major-league level. For the greater part of the NBA's history they too selected players out of high school. The NFL does not share in this tradition, but the recent growth of the college game has showcased the improved talent level at younger ages and has at least indicated the potential for teams to be able to identify talent and perhaps even play athletes out of high school. The alternative answer is that teams would have the prerogative not to select eighteen-year-old high school graduates. The NHL draft structure allows for older players to retain their draft eligibility; teams could simply choose to favor the athletes that they have seen play one or two years at the NCAA level. This practice even exists in the NHL.<sup>245</sup>

It is fair to question the applicability of the NHL structure to the other three leagues when they are all different sports with different administrative customs and different methods for managing young players. However, with each of the three leagues facing significant issues with their current models and all having faced legal challenges in their histories related to age limits and restrictive rookie wage scales, it is time to reconsider what is "right," and instead think about adapting to a proven superior structure.

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245. See *Barratt*, supra note 9. For example, Penn State forward Denis Smirnov was undrafted as a promising, but undersized junior player in his first year of eligibility and went undrafted, but was selected in the sixth round of the 2017 NHL Draft by the Colorado Avalanche after he was able to maintain his high level of play at the college level.

*B. The NHL Model in Major League Baseball*

The MLB Draft and Signing Bonus systems would be the easiest to conform to the NHL design; the current format is already halfway there. MLB teams' front offices already spend considerably more time scouting high school and international talent than collegiate talent, just as NHL front offices do. They would not need to change the way they evaluate talent whatsoever. However, they currently go about retaining high school athletes, and acquiring international athletes, in a different, far more problematic way, which harms the teams, and the high school and collegiate players. Switching to the NHL system would fix this.

If the MLB were to adopt the NHL model, it would not look much different than it does today. Rather than using the fundamentally flawed "International Amateur Talent System," all foreign players would be included in the draft. This idea has been supported by the MLB's owners in the past and would put all baseball prospects on an even playing field and afford teams an equal shot at acquiring foreign talent; regardless of the attractiveness or size of their market.<sup>246</sup> The MLB could accommodate this added talent pool by expanding the draft to fifty rounds, which was the length as recently as 2011.<sup>247</sup>

The new, expanded draft class would also be easier to manage. Using the NHL's retained rights system, there would no longer be cases of teams losing coveted draft picks when high school selections decide to go to college. Instead, as has benefited hockey immensely, teams would retain control over those prospects throughout their collegiate careers, working together to decide when would be the right time for the player to enter the professional ranks. However, teams would also not be prevented from drafting college players of all ages after seeing them at the next level. The issue surrounding signing bonus values would also go away; the MLB could set a cap on signing bonuses, like the NHL's cap on rookie base salaries, and let teams negotiate up to that cap with selections based on draft slot and post-draft performance.<sup>248</sup> The first contract signed could then feature substantial bonuses far exceeding the normal earnings of a minor-league player, allowing performance to help players' recoup some of the signing bonus value lost by setting a cap.

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246. Maury Brown, *MLB Owners Drop International Draft In Effort To Get New CBA Done*, FORBES (Nov. 28, 2016), <https://www.forbes.com/forbes/welcome/?toURL=https://www.forbes.com/sites/maurybrown/2016/11/28/mlb-owners-drop-international-draft-in-effort-to-get-new-cba-done/&refURL=https://www.google.com/&referrer=https://www.google.com/>.

247. *First-Year Player Draft (MLB Rule 4 Draft)*, *supra* note 189.

248. *See generally* NHL CBA, *supra* note 11, art. 9. Given the unique nature of baseball's minor league system, the NHL's "Entry-Level System" rules would be better applied largely to signing bonuses than draftees' actual first contracts. *Id.*

The result of the MLB's adoption of the NHL system would be a new landscape in baseball that leaves what is good about the draft and rookie compensation structure and fixes the major problems. Teams can still add prospects right out of high school, without the risk of losing those players, and can still add college players as well. International players would now be available for selection and may be more willing to play at the college level since they would not risk their previous free agent status under the old structure. An unintended benefit for teams may even be a downsizing of the minor leagues, with players no longer disincentivized to enter the college ranks, which would save teams money, as many own their affiliates at the lowest levels of Minor League Baseball (MiLB). Another potential money-saving benefit would be in signing bonuses. A cap on signing bonuses would prevent teams from wasting large investments on early-round selections of unproven commodities out of high school.<sup>249</sup> Players could still earn far more than a minor-league paycheck while playing in the minors though, as performance bonuses included to offset the lost value in a guaranteed signing bonus. The cap would also eliminate any reason for a player, who would like to play in college, to instead choose to turn professional right away; the same maximum amount of money will always be there to negotiate. Thus, a greater percentage of players could go to the NCAA, which had previously lost out on foreign players and elite high schoolers. But the NCAA would now become a better product and a far superior developmental tool for players. Players would also have the freedom to leave that amateur level whenever they and their drafted team see fit. Additionally, if a player does not receive a contract prior to his senior season in the NCAA, he would become a free agent and could seek a greater opportunity with another club. For teams and players alike, the NHL model would be a considerable upgrade to the current MLB system and, not inconsequentially, would also not drastically change the fabric of baseball's developmental stage.

### *C. The NHL Model in the National Basketball Association*

The NBA would also be able to easily implement the NHL Draft model and "Entry-Level System" and, given the pressure put on by the recent Commission on College Basketball report, may need to consider a change sooner rather than later.

The two biggest problems with the "one and done" structure are: a) it forces those players with either the ability to play professionally or those who lacked

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249. Less than 60% of first-round high schoolers make it to the MLB level, with each subsequent round of high school selections having less than a 40% chance of reaching the majors. See Aaron Fitt, *Draft Study: How Likely Are Your MLB Dreams*, D1BASEBALL (Jan. 4, 2017), <https://d1baseball.com/analysis/mlb-draft-study-1996-2011/>.

the demeanor to attend college to nonetheless play in the NCAA or choose another unconventional route; and b) it sets a dangerous precedent that talented NCAA basketball players should leave the amateur level as soon as possible, leading to many players giving up their collegiate eligibility and academic path only to go undrafted in a small, two-round NBA format.<sup>250</sup> These problems led the Commission on College Basketball to recommend both the abolishment of the “one-and-done rule” and that the NCAA allow players to enter the NBA Draft and return to college if undrafted.<sup>251</sup> The NHL structure would solve both of these problems.

If the NHL Draft model was adopted by the NBA, it would serve to truly meet the needs of all players and teams. Professional caliber basketball players from ages eighteen to twenty-one could be selected in the NBA Draft which means, high schoolers would once again be eligible for selection, as they were prior to 2005. Former NBA Commissioner David Stern’s proclamation that raising the age limit was meant to protect high school students and keep scouts away from the high school ranks was a farce; the decision was meant to remove the temptation of drafting teenage players who had often proved difficult to coach and develop right away in the NBA.<sup>252</sup> NBA teams continue to scout high school players and the top freshman in each draft class are regularly predicted prior to each NCAA season. The NHL system would simply afford teams with the ability to decide on high school players sooner. If a high school draftee is truly ready for the NBA—the next LeBron James or Kevin Garnett—then the team may sign him immediately. If instead they see potential but feel that the talent or maturity level is too raw, that player can go to college and develop further. He can then communicate with his team to discuss what he needs to work on and to decide when to turn professional. Teams can also reserve judgement on those players and wait to draft them at any point in their college careers. This would put an end to both the impressment of young, professional ready players into the college game, but would also serve to better develop those who need it and eliminate the risk of giving up collegiate eligibility due to unknown market value. It would likely stymie much of the corruption at the NCAA level as well.

The NHL’s entry-level contract structure suits the NBA as well. Although the current NBA rookie wage scale is far less troublesome than its draft structure, there are still victims. Like the expansive nature of baseball, the NBA is limited in its draft size by small roster sizes. Even with a retained rights

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250. COMMISSION ON COLLEGE BASKETBALL, REPORT AND RECOMMENDATIONS TO ADDRESS THE ISSUES FACING COLLEGIATE BASKETBALL, *supra* note 19, at 3-4.

251. *Id.* at 3.

252. Bissinger, *supra* note 145.

structure like that of the NHL, the NBA draft would likely remain at two rounds, or increase only marginally. First-round picks have their contract terms narrowly restricted in the NBA's current model, but largely to their benefit. Second-round picks and undrafted free agents do not enjoy the same protections and are often compensated as players who are unlikely to make a difference at the NBA-level, either as end-of-the-bench players or G-league players. However, the retained rights structure changes the zeitgeist. These later draft picks could now have more experience and team guidance and play far greater roles. Having a system that caps rookie contract base salaries but allows for significant performance bonuses would reward these later picks for their contributions. On the other hand, the renewed allowance for younger, less experienced players to enter the league could result in first-round picks with higher guaranteed salaries to realistically play a relatively small role. In some cases, it is foreseeable that these players could spend much of their first season or two in the G League, the NBA's minor league. The NHL's "slide rule" mitigates this risk, preventing NBA teams from losing precious time on rookie contracts for those players whom turn professional, but need minor league seasoning.

The Commission on College Basketball, as well as the scandalous conditions in college basketball that resulted in its creation, have pushed the NBA's draft structure to the forefront. The onus is on the league to make changes soon, before the Commission is forced to instead make life harder on NBA teams with restrictive rules at the NCAA level. The easiest and seemingly best way for the league to go about making these sweeping changes is to adopt a similar draft and rookie compensation format with a history of success, that of the NHL.

#### *D. The NHL Model in the National Football League*

Admittedly, professional football is the most difficult of the three leagues to see adapting to the NHL's draft and entry-level structures. Much of that dissonance comes purely from the age aspect. The NFL does not have any role in high school football, nor have they ever. The league has always enjoyed using the NCAA as their sole minor league and drafting the most professional ready players of any of the four leagues: seasoned three- or four-year college athletes. To suddenly change the status quo to a system wherein teams may select eighteen-year-olds would be an immense adjustment.

However, the evidence has been presented that the time to make this change has come. Players are getting better at a younger age—bigger, faster, stronger. As a result, they are also getting injured more severely and more frequently at the amateur and professional levels. NFL teams would benefit from the ability

to identify and add professional ready talent at a younger age, and the NFL product would improve if these players were able to start earlier and last longer, with professional coaching and medical care.

There is a fair argument that NFL teams may struggle to identify future professional players at younger ages. Yet, that argument is defeated by the success of a college program such as the University of Alabama. Former NFL coach Nick Saban and the Crimson Tide have a record of 132-20 and have won five National Championships in the ten years since Saban took over in 2007.<sup>253</sup> In that time, Alabama has had over seventy players drafted into the NFL, over fifty of which were drafted in the first or second round, twenty-five of which have since been named to at least one NFL Pro Bowl, and over twenty of which have won a Super Bowl.<sup>254</sup> If Saban and his staff can have this much success at identifying top high school talent, so can NFL teams with even more resources.

The alternative defense is that the NHL Draft system does not pigeonhole players into small windows of draft eligibility. The NFL could adopt the NHL model and its member teams could decide for themselves that there is little upside to drafting any high school graduates. Without an NFL minor league, it is likely any eighteen-year-old selection would go on to play at least one season in the NCAA anyway, so teams could choose to wait to draft freshman, sophomore, or even older players. While the custom in the NHL is to draft most players in their first year of eligibility, the flexibility exists to select “overage” players as the exception. The NFL teams would have the freedom to establish their own custom of drafting players later in their eligibility and only take first-year players as an exception. The point would still stand that the teams and players would be able to communicate and jointly decide when the best time for the player to enter the professional ranks would be, as opposed to the current system which forces at least three years of amateur play on to every individual, regardless of exceptional ability or other circumstances.

The current NFL rookie compensation system is unnecessarily complex and does not fit with the NHL’s retained rights structure. Draft slot should not play such a major role in determining the value of a first contract if the player is able to go to school and show improved performance after being drafted. Instead, having a cap on rookie contract values as well as substantial bonuses, which are already a major piece in NFL contract negotiations, would be a much better fit. Right now, the lengthy required contract terms only benefit teams when draft

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253. *Alabama Crimson Tide Football Record by Year*, SPORTS REFERENCE, <https://www.sports-reference.com/cfb/schools/alabama/> (last visited Dec. 13, 2018) (only accounting for seasons 2007-17).

254. *List of Alabama Crimson Tide Players in the NFL Draft*, WIKIPEDIA, [https://en.wikipedia.org/wiki/List\\_of\\_Alabama\\_Crimson\\_Tide\\_players\\_in\\_the\\_NFL\\_draft#National\\_Football\\_League](https://en.wikipedia.org/wiki/List_of_Alabama_Crimson_Tide_players_in_the_NFL_draft#National_Football_League) (last visited Dec. 13, 2018).

selections pan out and only benefit those players who do not pan out. The more moderate contract term requirements of the NHL are a far better fit. With a younger draft class, there is more risk to the NFL teams and a lesser need for a first long-term contract. For players, the average NFL career is too short to be locked into a restricted rookie contract for too long as well. The NHL model, which rewards more experienced players who spent a longer time at the amateur level with a shorter term, is a happy medium in the NFL as well.

On its face, the transition of the NFL from its current status to one incorporating the NHL's lack of an age limit and "Entry Level System" seems daunting. However, a closer look shows that such a change would combat current problems facing NFL teams and would fit well in many aspects. Few outwardly complain about the NFL system in comparison to the NBA or MLB, but if the league were proactive in addressing the need for their teams to have more flexibility, they would find wide-spread benefits to adopting the NHL model.

This final part of this Article will show how the MLB, NBA, and NFL can only do so much to change the way they manage young talent to be more like the NHL without the aid of the NCAA.

## VII. THE INTERESTS OF THE NCAA

### *A. The Invisible Hand*

The NCAA is not without both a crucial role and fair share of the blame in how the professional leagues operate in terms of adding young players, and the many challenges they have faced in this regard over the years. The policies of the NCAA dictate the flexibility that each league has to change its draft rules, whether it outwardly seems so or not. The NCAA is an organization "dedicated to the well-being . . . of college athletes,"<sup>255</sup> but that does not mean that it is not self-interested. The NCAA implements policies that ensure student-athletes remain amateurs and not professionals until a certain point, as well as policies that punish those who attempt to join the professional ranks early.<sup>256</sup> This is certainly not to protect the athletes' "well-being." The NCAA has grown into a billion-dollar organization and that value is worth protecting even more so than the interests of the young individuals who work to create it.<sup>257</sup> The NCAA has

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255. NCAA, *What Is The NCAA?*, NCAA, <http://www.ncaa.org/about/resources/media-center/ncaa-101/what-ncaa> (last visited Dec. 13, 2018).

256. See generally NCAA, *supra* note 12.

257. Rodger Sherman, *The NCAA's New March Madness TV Deal Will Make Them a Billion Dollars a Year*, SB NATION (Apr. 12, 2016), <https://www.sbnation.com/college-basketball/2016/4/12/11415764/ncaa-tournament-tv-broadcast-rights-money-payout-cbs-turner>. For example, the NCAA recently sold the

shown that they will be flexible when it benefits their bottom line, but strict if the purpose is to defend the precious status quo.

Case in point is the relationship between the NCAA and NHL. There are special exceptions for Men's Ice Hockey players throughout the NCAA Division I Manual.<sup>258</sup> It is the only team sport singled out as facing less restrictions regarding tryouts and practices with professional teams.<sup>259</sup> This includes permission to attend the NHL Draft Combine, when football players are not allowed the same access.<sup>260</sup> The NCAA even passed recent legislation that now allows men's hockey players to join baseball players in their ability to use an agent for contract negotiations prior to enrollment.<sup>261</sup> The reason that men's hockey is given this leeway is simple: the NCAA needs to make the college path more attractive. With alternative developmental paths readily available in the form of multiple levels of junior hockey in the United States and Canada and multiple professional leagues overseas, the NCAA knows that their pipeline of high-end hockey talent depends on those athletes feeling that the college route will not impede their pursuit of an NHL career.

The NCAA does not feel the same need to appeal to athletes in football or basketball, who are essentially captives to the collegiate level. The NFL currently has no alternatives to NCAA play and those who choose to bypass college basketball in hopes of reaching the NBA do so at their own peril. For this reason, the NCAA maintains rules that restrict these student-athletes' access to the professional level. No rule causes greater harm to the professional pursuits of football and basketball players, and eliminates the possibilities of one of the NHL model's greatest strengths than the "Draft List" bylaw.<sup>262</sup> Unlike hockey and baseball, the age limits of the NFL and NBA require players to apply for draft-eligibility.<sup>263</sup> Once a student-athlete is placed on the draft list, the bylaw states that he has surrendered his amateur status, and with it his collegiate eligibility.<sup>264</sup> This rule applies even if the student-athlete asks to be withdrawn from the draft list after a certain date or if he is undrafted or chooses not to sign.<sup>265</sup> This bylaw is punitive in nature, punishing collegiate players for

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television rights to the March Madness Division I Men's Basketball Tournament for the years 2025 to 2032 to CBS and Turner Broadcasting for \$8.8 billion. The two sides had already signed a fourteen-year, \$10.8 billion contract in 2010 before agreeing to this extension.

258. *See generally* NCAA, *supra* note 12.

259. *Id.* art. 12.2.

260. *Id.*

261. *Id.* art. 12.3.1.1.

262. *Id.* art. 12.2.4.2.

263. *Id.* art. 12.2.4.2.3. & 12.2.4.2.1.

264. *Id.*

265. *Id.*

testing their value in the professional market. It also nullifies clauses in both the NFL and NBA CBAs that otherwise would bring both leagues closer to the NHL model. The NBA CBA allows for an early-entry drafted player to return to school and the team that drafted him to retain exclusive negotiating rights in each subsequent year until after graduation, so long as a “Required Tender” offer is made to the player each year.<sup>266</sup> The NFL CBA details that a drafted athlete with remaining collegiate eligibility who returns to school remains the exclusive property of the team that drafted him through the end of that eligibility, meaning that hypothetically, a student-athlete could be drafted into the NFL and still play another year or two in the NCAA before signing with his team, much like the NHL.<sup>267</sup> In either scenario, teams would have more long-term control and athletes would have more career flexibility and security. Instead, the NCAA prevents its most valuable product, elite football and basketball talent, from having the option to return to school, seemingly only to dissuade other players from leaving early.

### *B. Reality Check*

Much like the NFL, NBA, and MLB maintain problematic draft and rookie wage structures out of a misguided sense of benefiting their member teams, the NCAA too appears to be protecting itself from change that is not necessarily going to impact the organization negatively. If the NCAA were to work with the three leagues to implement systematic changes that would mimic the NHL structure and relationship, then it would actually stand to benefit.

The MLB already enjoys a symbiotic relationship with the NCAA. Without an age limit in the MLB, college baseball does lose out on a significant amount of elite high school talent. However, the MLB’s current draft rules reward the collegiate ranks with long-term control over athletes if they do attend school. If the MLB were to adopt the NHL model, there are no NCAA bylaws that could stop them.<sup>268</sup> However, the NCAA would have little reason to fight the MLB on that change. Allowing drafted high school players to attend college and leave for the professionals when they wish would only increase the number of talented domestic players that choose the college route. The league could then also abolish free agent rights for draft-age international players so they too might choose to play in the NCAA. The result would likely be a major uptick in interest in college baseball, as the superior product, and ties to professional organizations through drafted products, would make the game far more

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266. NBA CBA, *supra* note 144, art. X § 6(b).

267. NFL CBA, *supra* note 7, art. 6 § 6.

268. *See* NHL CBA, *supra* note 11, art. 8 § 6(c); *see also* NCAA, *supra* note 12, art. 12.1.2.

attractive. There is no downside to the college level should the MLB choose to adopt the NHL model.

In football and basketball, there would indeed be a talent drop-off. It would be unavoidable if the leagues adapted to the NHL model and allowed players to be drafted out of high school, and at any point while in college. Yet, there are many positive trade-offs that the NCAA would enjoy. The first is that there is no concrete evidence that the popularity of either sport, and the prized television ratings, would also drop-off. Local college fan bases are passionate and loyal and would likely be unaffected. As far as national audiences and attracting new viewers, the loss of some star power in both sports would likely be off-set to an even greater extent than baseball by the additional interest of professional fans. Players drafted into the NFL, the most popular sport in the United States, and the NBA, whom then continue playing at the college level, would draw a substantial new crowd of those who now have a stock in the college game in the form of their favorite team's future players.

Another trade-off would likely be a decreased concern over amateurism problems and major infractions cases. If young football and basketball players are afforded the freedom to be drafted earlier and choose when they turn professional, they would be given a clearer picture at their potential future at the professional level. As such, they should be far less tempted to accept impermissible benefits.

Finally, the NCAA would do well to work with the NFL and NBA on these more flexible, player-friendly policies so as to shatter any perceptions of inequality between sports. Student-athletes' rights champion Ed O'Bannon applauds the NHL system in his autobiography.<sup>269</sup> O'Bannon strongly supports the rights of players to be drafted or enter a draft and still be eligible to play in college, as well as work with an agent or advisor without risking their amateurism status.<sup>270</sup> However, O'Bannon stresses that these rights should be available to all student-athletes.<sup>271</sup> When they are not, there is an inescapable stigma, real or imaginary, that there could be a racial component to the inequities.<sup>272</sup> As O'Bannon points out, it is hard to ignore racism questions when the favored NCAA sports, men's hockey and baseball, are primarily white, while the disadvantaged and most lucrative sports, football and men's basketball, are primarily black.<sup>273</sup> This is a skeptical viewpoint shared by many and one less thing that the NCAA would need to worry about if it were to work

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269. O'BANNON & MCCANN, *supra* note 102, at 228-32.

270. *Id.*

271. *Id.* at 230.

272. *Id.* at 231-32.

273. *Id.*

with the leagues to ensure all professional caliber student-athletes are on an even playing field.

#### VIII. CONCLUSION

Fortunately, O'Bannon's musings are in line with the recommendations of the Commission on College Basketball, perhaps indicating there is a growing consensus that the treatment of student-athletes with professional ambitions is lacking, that the problem is structural on both the professional and amateur ends, and that the solution is not to simply pay student-athletes. Both have advocated for allowing student-athletes to work with agents to make informed decisions on their professional value and when to enter a draft, and both have expressed the value in letting athletes enter a draft whenever they see fit and not lose their collegiate eligibility as a result.<sup>274</sup> While O'Bannon focused solely on the NCAA, the Commission took it one step further by making a recommendation to the NBA that it abolish the "one-and-done" rule, while also issuing some threatening alternatives to undermine the NBA's current structure if it chooses not to comply.<sup>275</sup>

The hope, at the very least, is that a conversation is beginning nationwide about how to improve the disconnect between talented young athletes, the NCAA, and the other three major North American professional sports leagues. For too long, athletes have struggled on their way to the professional level and there appears to be no greater legal challenge to make today than there was when Maurice Clarett was defeated by the NFL in 2004.<sup>276</sup> Making the situation worse is the fact that many of the policies being protected by the leagues no longer benefit the member teams, and the NCAA is similarly disillusioned. It is time for all parties to listen to the rising noise and take a step back to re-evaluate their structure.

If the NFL, NBA, and MLB took the time to review their draft and rookie compensation structures and examine the issues that they are causing themselves with these rules, they should want to make a change. They could then look to the NHL, a league that has never suffered from the same problems with young players that the other three have faced. There are admittedly many differences between the NHL and its peers, but none that could not be overcome by each league adapting the general structure to their own specific needs and customs. Adopting that NHL structure—a draft model without an age limit,

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274. *See id.*; *see also* COMMISSION ON COLLEGE BASKETBALL, REPORT AND RECOMMENDATIONS TO ADDRESS THE ISSUES FACING COLLEGIATE BASKETBALL, *supra* note 19, at 6-7.

275. COMMISSION ON COLLEGE BASKETBALL, REPORT AND RECOMMENDATIONS TO ADDRESS THE ISSUES FACING COLLEGIATE BASKETBALL, *supra* note 19, at 3.

276. *Clarett v. Nat'l Football League*, 369 F.3d 124, 143 (2d Cir. 2004).

special rights retention for collegiate players, and a flexible, mutually beneficial “Entry Level System”—should be the goal of each league. It may not be a clean transition, or an easy one, but all three leagues stand to benefit greatly.

The current CBA between the NFL and the NFLPA expires after 2020.<sup>277</sup> The current CBA between the NBA and NBPA has an opt-out clause after the 2023-24 season.<sup>278</sup> The MLB has unilateral control over draft rules but will need to work with the MLBPA on a new CBA to change other aspects after the current pact expires in 2021.<sup>279</sup> Until then, absent the unions decertifying, there is only a certain amount of sweeping change that each league can make. However, some serious effort will need to be put in to reforming the way the leagues manage young, incoming talent, even with the NHL as a model. The leagues are now on the clock.

Imagine, though, that the hypothetical changes have already been made. The effects have been felt around the country, with better situations for professional-caliber athletes and professional teams alike. It is March of 2018 on the campus of Penn State, and Saquon Barkley has returned to his alma mater. Rather than select Jeremy Langford in the fourth round of the 2015 NFL Draft, the Chicago Bears took a chance on Barkley out of high school. He still enrolled at Penn State as a freshman and rushed for over 1000 yards.<sup>280</sup> He then signed with the Bears for less than the maximum entry-level salary. However, he has made up for it substantially in performance bonuses as one of the top young running backs in the league. Barkley meets up with Chicago Blackhawks prospect and rising Penn State sophomore Evan Barratt and together they head to the Penn State baseball game. On the mound is Dante Biasi, a twenty-second round pick of the Chicago Cubs in 2016.<sup>281</sup> After missing his freshman season due to injury, Biasi is excited for the 2018 season at Penn State and has had conversations with the Cubs about signing with the team at the end of the year. He hopes to continue a line of talented Nittany Lions associated with Chicago professional teams.

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277. NFL CBA, *supra* note 7, art. 69.

278. NBA CBA, *supra* note 144, art. XXXIX § 1.

279. MLB CBA, *supra* note 200, art. XXVI.

280. *Saquon Barkley College Stats*, *supra* note 3.

281. *MLB Draft Tracker*, MAJOR LEAGUE BASEBALL, <http://m.mlb.com/draft/tracker/> (last visited Dec. 13, 2018) (2016 MLB Draft results).