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Intentional Grounding: How The NCAA And NFL Have Engaged In Practices That Unreasonably Restrain The Football Player Labor Market

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Abstract

Young athletes often dream of becoming the next star in their respective sports.¹ A select few go on to realize that dream and become professional athletes.² Within this group of superb athletes, there are a rare few who almost seem as though they were *meant for the game*, showing flashes of greatness at a young age

KEYWORDS: NFL, NCAA, Practices

INTENTIONAL GROUNDING: HOW THE NCAA AND NFL HAVE ENGAGED IN PRACTICES THAT UNREASONABLY RESTRAIN THE FOOTBALL PLAYER LABOR MARKET

STEPHEN O. AYENI JR.*

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* Stephen Ayeni earned his bachelor’s degree in Finance at Florida State University. He is currently a Juris Doctorate Candidate for May 2018 at Nova Southeastern University, Shepard Broad College of Law. Stephen would first like to thank God for his continued blessings. He also would like to thank his family and friends for their unwavering support during his time in law school. Most importantly, Stephen would like to express his gratitude for his parents, who always lead by example and instilled a solid foundation at an early age to ensure that with hard work and dedication, success would follow. Lastly, Stephen would like to extend a special thanks to the board members and his fellow colleagues of *Nova Law Review*, Volume 41 for the countless hours spent perfecting this Comment.

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I. INTRODUCTION

Young athletes often dream of becoming the next star in their respective sports.¹ A select few go on to realize that dream and become professional athletes.² Within this group of superb athletes, there are a rare few who almost seem as though they were *meant for the game*, showing flashes of greatness at a young age.³ National Basketball Association (“NBA”) superstar, LeBron James, was being touted as an elite player, drawing comparisons to the all-time great—Kobe Bryant—despite still being a high school junior.⁴ Although the NBA has since amended its draft eligibility, the delay in going professional after high school is limited to one year.⁵ There still remains the possibility of basketball players profiting financially from their abilities immediately after high school graduation while foregoing college.⁶

Baseball prospects are afforded an opportunity to enter the professional ranks, becoming draft eligible, immediately upon high school graduation.⁷ Similarly, the National Hockey League (“NHL”) allows players, age eighteen or older, to enter the draft.⁸

Unlike these sports leagues, the National Football League (“NFL”) imposes a draft eligibility requirement stipulating that a prospective player

1. See John Underwood, *Does Herschel Have Georgia on His Mind?*, SPORTS ILLUSTRATED, Mar. 1, 1982, at 22, 22; NCAA RESEARCH, ESTIMATED PROBABILITY OF COMPETING IN COLLEGE ATHLETICS (2016), http://www.ncaa.org/sites/default/files/2016RES_probability-chart-web-pdf_20160502.pdf.

2. See Underwood, *supra* note 1, at 22; NCAA RESEARCH, *supra* note 1.

3. See Grant Wahl, *Ahead of His Class*, SPORTS ILLUSTRATED, Feb. 18, 2002, at 62, 64.

4. *Id.*

5. See *NBA Draft Rules*, DRAFTSITE.COM, <http://www.draftsite.com/nba/rules/> (last visited Apr. 9, 2017).

6. See Pete Thamel, *At 19, Plotting New Path to N.B.A., Via Europe*, N.Y. TIMES, Oct. 5, 2008, at 1.

7. *MLB Draft Rules*, DRAFTSITE.COM, <http://www.draftsite.com/mlb/rules/> (last visited Apr. 9, 2017).

8. *NHL Draft Rules*, DRAFTSITE.COM, <http://www.draftsite.com/nhl/rules/> (last visited Apr. 9, 2017).

be at least three years removed from high school.⁹ Furthermore, these prospects are not afforded a realistic interim alternative to college that produces a monetary benefit.¹⁰ Essentially, the only legitimate path to becoming a professional football player begins by playing at the collegiate level.¹¹ The problem arising from the disparity between the NFL draft eligibility requirements in comparison to the other *Big Four* American sports leagues is magnified by the average career spans of each sport's athletes.¹² Professional football players in the NFL have the shortest career spans in comparison to players in the NBA, NHL, and Major League Baseball ("MLB").¹³ As of 2013, NFL players average a full year less than the average NBA player, and two years less than NHL and MLB players.¹⁴ Additionally, the NFL provides the lowest average player salary of the four major sports.¹⁵ This results in the lowest average potential earnings in what has been documented as an extremely violent sport that could potentially have dangerous long-term health effects.¹⁶

Due to these draft eligibility restrictions, football prospects are forced to attend college in an attempt to showcase their talents to prospective employers in the NFL.¹⁷ Under the National Collegiate Athletic Association ("NCAA") guidelines, these colleges essentially operate as a de facto farm system that guarantees the maturation and development of players at no cost to the NFL.¹⁸ There are some players that have been viewed as NFL-ready once they have graduated from high school.¹⁹ However, these players are

9. *NFL Draft Rules*, DRAFTSITE.COM, <http://www.draftsite.com/nfl/rules/> (last visited Apr. 9, 2017).

10. Underwood, *supra* note 1, at 24; *see also CFL Adjusts Eligibility Rules for Draft*, CANADIAN FOOTBALL LEAGUE (Sept. 06, 2013), <http://www.cfl.ca/2013/09/06/cfl-adjusts-eligibility-rules-for-draft/>. The CFL has more stringent eligibility standards than the NFL, requiring players to be from a Canadian school—CIS is the Canadian equivalent of NCAA—or having non-import status. *Id.*

11. Underwood, *supra* note 1, at 22.

12. *See* Nick Schwartz, *The Average Career Earnings of Athletes Across America's Major Sports Will Shock You*, USA TODAY (Oct. 24, 2013, 10:07 AM), <http://ftw.usatoday.com/2013/10/average-career-earnings-nfl-nba-mlb-nhl-mls>.

13. *See id.*

14. *See id.*

15. *See id.*

16. *See id.*; Jason M. Breslow, *New: 87 Deceased NFL Players Test Positive for Brain Disease*, PBS: FRONTLINE (Sept. 18, 2015), <http://www.pbs.org/wgbh/frontline/article/new-87-deceased-nfl-players-test-positive-for-brain-disease/>. In a recent study about 87 out of 91 players tested positive for brain disease CTE. *Id.*

17. *See NFL Draft Rules*, *supra* note 9.

18. Underwood, *supra* note 1, at 24, 26.

19. Skip Bayless, *Clarett Belonged in the NFL*, ESPN.COM (Aug. 11, 2006), <http://www.espn.com/espn/page2/story?page=bayless/060811>; Jeff Legwold, *Adrian Peterson*

subjected to the threat of an injury that could negatively affect, or entirely eliminate, their earning potential due to the restrictive practices instituted by the NFL and NCAA.²⁰ Despite the talents of a top prospect, an injury could potentially shrink the market for their services, as teams will be less willing to invest millions into a player who may never fully recover.²¹

While in college, a football player is considered an *amateur student-athlete*.²² The NCAA operates as a non-profit organization that promotes the academic and overall well-being of the student-athlete.²³ Notwithstanding the threat of injury, a college football player must submit to the strict compensation restrictions imposed by the NCAA.²⁴ A player who receives compensation for their athletic abilities or violates other provisions within the bylaws may be deemed ineligible to participate in all collegiate sports.²⁵ Since playing college football serves as the sole realistic option to obtaining employment for their athletic abilities, athletes are forced to accept a free education as compensation without protest.²⁶ Furthermore, they must refrain from receiving any compensation that may be attributed to their athletic abilities.²⁷ This restriction enables only the conference and school that the player attends to benefit financially from his or her talents.²⁸ Although the NCAA prides itself on protecting the *student* aspect of the *student-athlete* label for college football players, it has hypocritically committed an act that the organization was originally founded to protect against: *exploitive athletic*

Among Few Who Could Make Leap from High School to NFL, ESPN.COM: NFL NATION (Oct. 2, 2015), http://www.espn.go.com/blog/nflnation/post/_id/182078/adrian-peterson-among-few-who-could-make-leap-from-high-school-to-nfl.

20. See NAT'L COLLEGIATE ATHLETIC ASS'N, 2009-10 NCAA DIVISION I MANUAL art. 12.1.2.1 (2009); John Harris, *2016 NFL Draft: Injury Crushes Draft Stock of Notre Dame LB Jaylon Smith*, WASH. POST (Feb. 29, 2016), <http://www.washingtonpost.com/news/sports/wp/2016/02/29/2016-nfl-draft-injury-crushes-draft-stock-of-notre-dame-lb-jaylon-smith/>; Mark Viera, *Rutgers Player Is Paralyzed Below the Neck*, N.Y. TIMES, Oct. 18, 2010, at D1.

21. See Harris, *supra* note 20.

22. See NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 20, at art. 12.01, 12.1.

23. *Finances*, NCAA, <http://www.ncaa.org/about/resources/finances> (last visited Apr. 9, 2017).

24. See NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 20, at art. 12.1.

25. *Id.*

26. See *id.* at art. 12.1.2.1, 15.1.

27. *Id.* at art. 12.1.

28. See *id.*; Kristi Dosh, *College Football Playoff: Conference Payouts*, BUS. C. SPORTS (Dec. 8, 2014), <http://www.businessofcollegesports.com/2014/12/08/college-football-playoff-conference-payouts/>. Over \$50 million in revenue was distributed to each Power 5 conference for the 2014 through 2015 bowl season. Dosh, *supra*.

practices.²⁹ It is no secret that college football is a massive source of revenue for schools.³⁰ However, these schools are operating under the guise of the NCAA's core values, enabling them to use unfair bargaining power to obtain the services of football players without fair compensation.³¹ On average, college football players are less prepared academically to succeed in the classroom.³² If they are not able to maintain a certain grade point average, they may not only lose their scholarship, but also their ability to obtain employment in the NFL.³³ There are similarities between a development league like the MLB minor league system and the college ranks of football.³⁴ The most notable is the ability to develop talent to play at a professional level.³⁵ However, a minor league prospect is able to simultaneously hone his or her skills while benefitting financially from these same talents, whereas a college football player must endure at least three years of schooling prior to receiving an opportunity to be compensated financially for his or her athletic prowess.³⁶ Some student-athletes benefit from the education received from this arrangement.³⁷ However, a substantial amount of college football players enter college with the sole intention of going to the NFL without obtaining a college degree.³⁸

29. See Dosh, *supra* note 28; *History*, NAT'L COLLEGIATE ATHLETIC ASS'N, <http://www.web.archive.org/web/20110807060521/http://www.ncaa.org:80/wps/wcm/connect/public/ncaa/about+the+ncaa/who+we+are/about+the+ncaa+history> (last visited Apr. 19, 2017).

30. See Steve Berkowitz et al., *NCAA Finances: 2014-15 Finances*, USA TODAY, <http://www.sports.usatoday.com/ncaa/finances/> (last visited Apr. 9, 2017); Dosh, *supra* note 28.

31. See *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1058–59 (9th Cir. 2015), *cert. denied*, 137 S. Ct. 277 (2016).

32. Doug Lederman, *The Admissions Gap for Big-Time Athletes*, INSIDE HIGHER ED (Dec. 29, 2008, 4:00 AM), <http://www.insidehighered.com/news/2008/12/29/admit>. “[C]ritics tend to argue that the colleges are doing a disservice to athletes who come in underprepared, and suggest that colleges may be achieving those higher graduation rates, in part, by directing athletes into less demanding academic programs . . .” *Id.*

33. See Seth Soffian, *College Sports: Scholarships Not Four-Year Guarantees*, NEWS-PRESS.COM (Oct. 17, 2015, 5:59 PM), <http://www.newspress.com/story/sports/college/fgcu/2015/10/16/college-sports-scholarships-not-four-year-guarantees/74009542/>.

34. See Legwold, *supra* note 19; *MLB Draft Rules*, *supra* note 7.

35. See Legwold, *supra* note 19; *MLB Draft Rules*, *supra* note 7.

36. See NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 20, at art. 12.1.2.1; *MLB Draft Rules*, *supra* note 7; *NFL Draft Rules*, *supra* note 9.

37. See Christopher Bogan, *41% in NFL Graduate from College: Rate in Pacific 10 Conference Only 38%, Report Shows*, L.A. TIMES (Jan. 27, 1986), http://articles.latimes.com/print/1986-01-27/sports/sp-719_1_graduation-rate; Lederman, *supra* note 32.

38. Bogan, *supra* note 37; see also Lederman, *supra* note 32.

This Comment will explain how the application of antitrust laws has affected previous sports related litigation.³⁹ Furthermore, it will explain the rule of reason, a test courts have used to determine whether certain conduct falls within the purview of antitrust scrutiny.⁴⁰ Subsequently, this Comment will apply the rule of reason to the deceptive practices engaged by the NFL and NCAA, revealing unreasonable labor market restrictions whilst debunking the previous litigation defenses used by both entities.⁴¹

II. ANTITRUST LAWS

The Sherman Act states that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is [hereby] declared to be illegal.”⁴² While the broad language of the Sherman Act may encompass almost any contract, the Supreme Court of the United States has consistently recognized that the Act is “intended to prohibit only unreasonable restraints of trade.”⁴³

A. Labor Exemption

The National Labor Relations Act was enacted primarily to “promote collective bargaining and to protect . . . concerted employee” efforts—including unionizing.⁴⁴ Unfortunately, unions are inherently anticompetitive, as the “Court has recognized that a legitimate aim of any national labor organization is to obtain uniformity of labor standards and that a consequence of such union activity may be to eliminate competition based on differences in such standards.”⁴⁵ By relinquishing individual rights to obtain an employment contract, employees are able to collectively benefit as a group in negotiations based on their strength in numbers.⁴⁶ A sacrifice for the greater good can certainly be identified as anticompetitive.⁴⁷ Labor

39. See *infra* Part II.

40. See *infra* Section II.B.

41. See *infra* Part III.

42. 15 U.S.C. § 1 (2012).

43. *Id.*; Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 98 (1984).

44. 29 U.S.C. §§ 151–169 (2012); Robert A. McCormick & Matthew C. McKinnon, *Professional Football’s Draft Eligibility Rule: The Labor Exemption and the Antitrust Laws*, 33 EMORY L.J. 375, 383 (1984).

45. McCormick & McKinnon, *supra* note 44, at 383–84; see also *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 666 (1965).

46. See McCormick & McKinnon, *supra* note 44, at 384–85.

47. See *id.* at 383–85.

negotiations such as standard wages may benefit some workers, but may be detrimental for others who may be able to command a higher wage based on experience or other factors.⁴⁸ This ultimately leads to the conflict regarding whether agreements between employers and unions fall under antitrust scrutiny due to their inherent anticompetitive nature.⁴⁹ After all, the Sherman Act was created “to promote freedom of competition in the marketplace.”⁵⁰ Although agreements between employers and unions are considered to be restraints on trade, a “[n]on-statutory exemption] generally applies when a union, acting with a non-labor party, seeks to attain goals which are mandatory or *permissive* subjects of bargaining under the National Labor Relations Act, unless the Union acts with a predatory anti-competitive purpose.”⁵¹ Mandatory subjects of bargaining have been defined as “wages, hours, and other terms and conditions of employment.”⁵²

B. *Rule of Reason*

Since sports leagues consist of numerous competing teams, mutual agreements to have restraints on competition are necessary to maintain the integrity of the product.⁵³ Therefore, it is likely that, while the rules of these leagues may constitute a per se violation, the appropriate rule to apply would be the rule of reason.⁵⁴ The rule of reason test is comprised of three steps.⁵⁵ In the first step, the plaintiff must demonstrate that the conduct has a substantial adverse effect on competition within a market.⁵⁶ Second, the defendant must provide evidence that the challenged conduct promotes competition.⁵⁷ Third, the plaintiff must demonstrate that there are substantially less restrictive means to achieve the procompetitive justifications provided by the defendant.⁵⁸ After each side has presented its arguments on the issue, the court will apply a balancing test to determine whether the conduct presents an unreasonable restraint.⁵⁹

48. *Id.* at 384–85.

49. *See id.* at 385.

50. *Id.* at 383.

51. *Clarett v. Nat’l Football League*, 369 F.3d 124, 139 n.17 (2d Cir. 2004).

52. *Clarett v. Nat’l Football League*, 306 F. Supp. 2d 379, 392 (S.D.N.Y. 2004); *see also* 29 U.S.C. § 158(d) (2012).

53. *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 1049, 1069 (9th Cir. 2015), *cert denied*, 137 S. Ct. 277 (2016).

54. *Id.* at 1064.

55. *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1062–63 (9th Cir. 2001).

56. *Id.* at 1063.

57. *Id.*

58. *Id.*

59. *Id.* at 1062.

C. *Litigation History Based on Labor Market Restraint in Sports Leagues*

1. The *Spencer Haywood* Rule

Spencer Haywood was a tremendous basketball prospect hailing from Detroit, Michigan.⁶⁰ During his prep years, he won several prestigious accolades, including *All-Detroit*, *All-Michigan*, and *All-American* honors.⁶¹ His success would continue after his graduation from high school in 1967.⁶² At the collegiate level, he earned *All-American* honors during his lone seasons at Trinidad Junior College and the University of Detroit.⁶³ More impressive was the fact that he was named Outstanding Player at the Olympic basketball games⁶⁴ at the age of nineteen.⁶⁵ At the age of twenty, he entered into a contract with the Denver Rockets of the American Basketball Association (“ABA”).⁶⁶ His talents clearly transcended across every level of competition, as he would go on to be “named ‘Rookie of the Year,’ and ‘Most Valuable Player in the ABA’ for the 1969-70 [s]eason.”⁶⁷

After his rookie season, he signed a new contract with the Rockets but would later refuse to render services due to its fraudulent terms.⁶⁸ Later that year, he signed with a NBA team, the Seattle Supersonics, despite a provision in the NBA bylaws that would deem him ineligible to play.⁶⁹ Haywood would then file claims against the NBA and its member teams for

60. See *Denver Rockets v. All-Pro Mgmt., Inc.*, 325 F. Supp. 1049, 1052 (C.D. Cal. 1971).

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Denver Rockets*, 325 F. Supp. at 1052; Scoop Jackson, *It’s Time to Honor Spencer Haywood’s Impact on Hoops and History*, ESPN.COM (Sept. 10, 2015), http://www.espn.com/nba/story/_/id/13627349/spencer-haywood-impact-hoops-history.

One thing that will probably be overlooked in Spencer Haywood’s induction into the Basketball Hall of Fame . . . is the gift God gave him to play the game. How, as a [twenty-one] year-old playing in the NBA, Haywood was a rarity. How, at [nineteen] years old, he became the youngest American to make an Olympic basketball team.

Jackson, *supra*.

66. *Denver Rockets*, 325 F. Supp. at 1052.

67. *Id.*

68. *Id.* at 1053–54. “The contract does not provide for compensation for Haywood’s services for six years in the amount of \$1,900,000. Compensation in excess of \$394,000 is illusory and indefinite.” *Id.* at 1053.

69. *Id.* at 1054. “At the time that Haywood contracted to play professional basketball for Denver, the ABA had a four-year rule similar to that provided for in By-Law 2.05 of NBA. The ABA found that its four-year rule was a hardship on Haywood and waived it.” *Denver Rockets*, 325 F. Supp. at 1054.

engaging in an “unlawful conspiracy to monopolize and restrain trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 2 of the Sherman Act, 15 U.S.C. § 2.”⁷⁰ Shortly following a decision by the Supreme Court of the United States to lift a stay on an injunction allowing him to play for his team,⁷¹ the NBA and Haywood would reach an out-of-court settlement that allowed him to play for the Supersonics.⁷²

The argument in Haywood’s favor was that, as the sole wage earner in his struggling family, he was a *hardship case* and therefore had a right to begin earning his living. . . . Beginning in 1971, underclassmen were allowed to enter the NBA Draft provided they could give evidence of *hardship* to the NBA office. In 1976, the hardship requirement was eliminated in favor of the current Early Entry procedure, whereby any athlete with remaining college eligibility can enter the NBA Draft on the condition that he notifies the league office at least [forty-five] days before the draft.⁷³

Although the court did not ultimately rule on the draft eligibility rule, it provided insight into the court’s view on the restraint it created.⁷⁴ The NBA provision at the time provided that:

A person who has not completed high school or who has completed high school but has not entered college, shall not be eligible to be drafted or to be a Player [in the NBA] until four years after he has been graduated or four years after his original high school class has been graduated⁷⁵

The court determined that without an injunction, the rule would eliminate Haywood’s chances of playing basketball, at any level, for an

70. *Id.* at 1054.

71. Haywood v. Nat’l Basketball Ass’n, 401 U.S. 1204, 1207 (1971); *see also* William C. Rhoden, *Early Entry? One and Done? Thank Spencer Haywood for the Privilege*, N.Y. TIMES (June 29, 2016), <http://www.nytimes.com/2016/06/30/sports/basketball/spencer-haywood-rule-nba-draft-underclassmen.html>.

72. Rhoden, *supra* note 71.

73. *Spencer Haywood*, NBA.COM, http://www.nba.com/history/players/haywood_bio.html (last visited Apr. 9, 2017).

74. *See Denver Rockets*, 325 F. Supp. at 1056. “There is a substantial probability in light of all the evidence presented to this [c]ourt that the so-called *college draft* . . . constitutes an arbitrary and unreasonable restraint upon the rights of Haywood and other potential NBA players to negotiate freely for the rendition of their services to NBA teams.” *Id.*

75. *Id.* at 1055, 1058 (alteration in original) (stating that the conduct by the NBA “[was] in furtherance of . . . violations of the antitrust laws”).

entire year, because it would deem him ineligible to play in the NBA.⁷⁶ Furthermore, he was already ineligible to participate at the collegiate level.⁷⁷ This would certainly be a travesty, given the fact that Haywood had already proven that he could compete and dominate in the professional ranks.⁷⁸ The court found that “[a] professional basketball player [had] a very limited career.”⁷⁹

If Haywood is unable to continue to play professional basketball for Seattle, he will suffer irreparable injury in that a substantial part of his playing career will have been dissipated, his physical condition, skills and coordination will deteriorate from lack of high-level competition, his public acceptance as a super star will diminish to the detriment of his career, his self-esteem and his pride will have been injured and a great injustice will be perpetrated on him.⁸⁰

The impact of this case can be felt still today, as underclassmen entering the draft has become commonplace.⁸¹ Although the NBA argued that the influx of young players would destroy the league and college basketball by “siphoning . . . talent from college basketball teams . . . [effectively] ruin[ing] the NBA’s pool of talent,”⁸² both entities are thriving.⁸³

76. *See id.* at 1057, 1060.

77. *Id.* at 1056. Due to NCAA amateurism rules, Haywood would be considered ineligible as he already signed and played for a professional team. *See Denver Rockets*, 325 F. Supp. at 1060–61.

78. *See Spencer Haywood*, *supra* note 73. Haywood led the league in scoring, averaging 30 points a game and rebounding 19.5 rebounds per game while also winning the league’s Most Valuable Player. *Id.*

79. *Denver Rockets*, 325 F. Supp. at 1057.

80. *Id.*

81. *See Rhoden*, *supra* note 71.

82. *Id.*

83. *Id.*; *see also Total NBA League Revenue from 2001/02 to 2014/15 (in Billion U.S. Dollars)*, STATISTA, <http://www.statista.com/statistics/193467/total-league-revenue-of-the-nba-since-2005/> (last visited Apr. 9, 2017). During the 2014–15 season the NBA posted revenue of 5.18 billion. *Total NBA League Revenue from 2001/02 to 2014/15 (in Billion U.S. Dollars)*, *supra*; Chris Isidore, *Most Profitable NCAA Teams*, CNN: MONEY (Mar. 16, 2015, 10:13 AM), <http://www.money.cnn.com/2015/03/16/news/companies/ncaa-most-profitable/>. The Louisville Cardinals “posted \$24 million in profits on [college basketball] revenue of about \$40 million during the 2013–14 school year . . .” Isidore, *supra*.

2. Maurice Clarett

Before his legal troubles, Maurice Clarett was a star in the making.⁸⁴ To this day, he is still arguably one of the best prep football players in Ohio's prep football history.⁸⁵ During his high school senior season, he amassed 2194 rushing yards, a mind-blowing thirty-eight touchdowns, and was on his way to being named "USA Today National Offensive Player of the Year and Mr. Football."⁸⁶ In 2002, he would enroll at Ohio State University, becoming the first freshman running back to start for the school since 1943.⁸⁷ Standing at six feet tall and weighing two hundred and thirty pounds, he was already bigger than some of the NFL's all-time great running backs.⁸⁸ During his freshman campaign, he set freshman rushing and touchdown records, while also providing an influential performance that resulted in Ohio State emerging victorious in the National Championship over favored Miami.⁸⁹

Close friend LeBron James was just finishing his senior season at St. Vincent-St. Mary when this was transpiring.⁹⁰ After all the glory Clarett had brought to Ohio State, he still had to wait two more years to be draft-eligible.⁹¹ To add insult to injury, James called Clarett to inform him of a massive, seven-year, \$93 million deal with Nike before he had even been drafted.⁹² Being immersed in the luxuries that accompany a professional

84. See *Timeline: The Rise and Fall of Maurice Clarett*, ESPN.COM (Sept. 18, 2006), <http://www.espn.com/nfl/news/story?id=2545204>.

85. Eric Frantz, *Ohio's Top 50 Athletes of the Decade: No. 36 Maurice Clarett*, JHJHuddle.COM (Feb. 5, 2010), <http://www.jjhuddle.com/2010/02/05/ohios-top-50-athletes-of-the-decade-no-36-maurice-clarett/>. To cap his senior season, Clarett rushed for 785 yards and eight touchdowns in the playoffs—in three games. *Id.*

86. *Id.*

87. *Timeline: The Rise and Fall of Maurice Clarett*, *supra* note 84.

88. *Clarett v. Nat'l Football League*, 306 F. Supp. 2d 379, 388 (S.D.N.Y. 2004). "Clarett . . . is taller and heavier than some of the NFL's all-time greatest running backs, including Walter Payton—5'10", 200, Barry Sanders—5'8", 203, and Emmitt Smith—5'9", 207." *Id.*

89. See Frantz, *supra* note 85; *Timeline: The Rise and Fall of Maurice Clarett*, *supra* note 84.

90. See Pablo S. Torre, *Lost Stories of LeBron, Part 2*, ESPN.COM, http://www.espn.com/nba/story/_id/9825057/lebron-james-maurice-clarett-were-fellow-ohio-natives-dramatically-different-futures-espn-magazine (last updated October 19, 2013, 10:13 AM). The Ohioans were "born one year and [fifty] miles of I-76 apart"—James hailing from Akron, and Clarett from Youngstown. *Id.*

91. See *Clarett v. Nat'l Football League*, 369 F.3d 124, 126 (2d Cir. 2004); Torre, *supra* note 90.

92. Torre, *supra* note 90. Clarett was often with James during James' rise to fame. *Id.* This included meeting numerous celebrities. *Id.* ("There was the time they hung out with Jay Z backstage. There was the time they attended a party in Cleveland and Biz

career, Clarett fell victim to wanting compensation for his athletic achievements as well.⁹³ “Clarett sa[id] he was intoxicated by being *a somebody*. And, if [you are] a somebody, you want to be around another somebody.”⁹⁴ NFL executives commenting about Clarett’s status as a NFL caliber player, despite not being eligible, certainly boosted his ego as well.⁹⁵ Before his sophomore season, Clarett was suspended for the entire season “for accepting *thousands of dollars* in illicit extra benefits,” coupled with allegations of academic fraud.⁹⁶ Unable to play at the collegiate level for a year and not wanting his skills to diminish from inactivity, Clarett decided to challenge the NFL’s draft eligibility rule that mandated a player be three years removed from high school.⁹⁷

a. *Clarett: Circuit Court of Appeals Reversal*

A district court ruled in Maurice Clarett’s favor in *Clarett v. National Football League* (“*Clarett I*”),⁹⁸ holding that the NFL’s eligibility rules were an unreasonable restraint of trade in violation of antitrust laws.⁹⁹ On appeal, the court reversed the ruling.¹⁰⁰ The stark difference between these two rulings was that the appellate court found that the eligibility rule was afforded non-statutory exemption status from antitrust scrutiny, whereas the district court did not.¹⁰¹ In *Brown v. Pro Football, Inc.*,¹⁰² the Supreme Court of the United States provided that although a collectively bargained provision may be a mandatory bargaining subject, it should be examined by

Markie deejayed. There was the time Clarett traded numbers with Snoop Dogg, who knew the tailback from controlling him on PlayStation.”) *Id.*

93. *See id.*

94. Torre, *supra* note 90.

95. *See* Bob Glauber, *Clarett Sues NFL for Right to Enter Draft*, NEWSDAY (Sept. 23, 2003, 8:00 PM), <http://www.newsday.com/sports/clarett-sues-nfl-for-right-to-enter-draft-1.399287>. “If Clarett is deemed eligible for the draft, it [is] likely he would be a first-round choice, according to several league executives . . . ‘I [am] sure someone would take a chance on him,’ one NFL personnel director said.” *Id.*

96. Rusty Miller, *Clarett Suspended for 2003 Season for 16 NCAA Violations*, USA TODAY (Sept. 10, 2003, 2:36 PM), http://usatoday30.usatoday.com/sports/college/football/bigten/2003-09-10-clarett-suspension_x.htm; *see also* Mike Freeman, *When Values Collide: Clarett Got Unusual Aid in Ohio State Class*, N.Y. TIMES, July 13, 2003, at SP1.

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

98. 306 F. Supp. 2d 379 (S.D.N.Y. 2004).

99. *Id.* at 410–11.

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

101. *Compare Clarett II*, 369 F.3d at 138, *with Clarett I*, 306 F. Supp. 2d at 397.

102. 518 U.S. 231 (1996).

balancing the “interests of union members” served by the restraint against “its relative impact on the product market,” before being granted exemption status.¹⁰³

The court reasoned:

[T]o permit antitrust suits against sports leagues on the ground that their concerted action imposed a restraint upon the labor market would seriously undermine many of the policies embodied by these [federal] labor laws, including the congressional policy favoring collective bargaining, the bargaining parties’ freedom of contract, and the widespread use of multi-employer bargaining units.¹⁰⁴

Rather than determine the impact on the product market in accordance with the test formulated by Justice White, the court provided support for the power of unions and their importance in the labor law relations.¹⁰⁵ Additionally, they found that “the eligibility rules constitute a mandatory bargaining subject because they have tangible effects on the wages and working conditions of current NFL players.”¹⁰⁶ This Comment will further examine those tangible effects in Part B.¹⁰⁷

3. O’Bannon Case

Ed O’Bannon was a former All-American basketball player at the University of California, Los Angeles (“UCLA”) who was informed by a friend that his likeness was being used in a video game.¹⁰⁸ In 2009, O’Bannon sued the NCAA and the Collegiate Licensing Company (“CLC”) in *O’Bannon v. NCAA* (“*O’Bannon I*”),¹⁰⁹ claiming “that the NCAA’s amateurism rules [prohibited] . . . student-athletes from [receiving]

103. *Id.* at 261. The court agreed with Justice White’s approach “[w]hen confronted with allegations that agreements between labor and employers damaged competition in the business or product market, we have previously regarded Justice White’s decision in *Jewel Tea* as setting forth the ‘classic formulation’ of the non-statutory exemption.” *Clarett II*, 369 F.3d at 132 n.12 (citing *Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co.*, 381 U.S. 676, 689–90 (1965)).

104. *Id.* at 135.

105. *See id.* at 132, 138–39. “The players union’s representative possesses ‘powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents.’” *Id.* at 139.

106. *Id.* at 140.

107. *See infra* Section III.B.2.

108. *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 1049, 1055 (9th Cir. 2015), *cert. denied*, 137 S.Ct. 277 (2016).

109. 802 F.3d 1049 (9th Cir. 2015).

compensat[ion] for the use of their [name, image, and likeness].”¹¹⁰ Meanwhile, Sam Keller, a former college quarterback filed a separate suit against the NCAA, CLC, and Electronic Arts (“EA”), “a software company that produced video games based on college football and men’s basketball from the late 1990s until around 2013.”¹¹¹ The two cases were consolidated, receiving class certification.¹¹² After the plaintiffs settled their claims with EA and CLC, the cases were deconsolidated, and in 2014, the antitrust claims against the NCAA went to trial before the district court.¹¹³ The district court ruled in favor of the plaintiff, holding that the NCAA’s rules prohibiting student-athletes from receiving compensation for their name, image, and likeness violated Section 1 of the Sherman Act.¹¹⁴ On appeal, the NCAA asserted that because the NCAA court held amateur rules valid, any challenge to them must fail.¹¹⁵ Rather than categorically approving all amateurism rules, the NCAA explained why its rules should be analyzed under the rule of reason.¹¹⁶ Although the opinion on amateurism served as mere dicta, the *O’Bannon I* court held high regard for its contents.¹¹⁷ Summarily, despite amateurism rules serving a procompetitive purpose, it “can . . . be invalid[ated] under the rule of reason if a substantially less restrictive rule would further the same objectives equally well.”¹¹⁸ The appellate court’s decision “reaffirm[ed] that NCAA regulations are subject to antitrust scrutiny and must be tested in the crucible of the [r]ule of [r]eason.”¹¹⁹

110. *Id.* at 1055.

111. *Id.*

112. *Id.*

113. *Id.* at 1056.

114. *O’Bannon*, 802 F.3d at 1056; *see also* *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 7 F. Supp. 3d 955, 1009 (N.D. Cal. 2014).

115. *O’Bannon*, 802 F.3d at 1061; *see also* *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 104 (1984).

116. *O’Bannon*, 802 F.3d at 1062–63; *see also* *Nat’l Collegiate Athletic Ass’n*, 468 U.S. at 113–20.

117. *O’Bannon*, 802 F.3d at 1063. “To be sure, ‘[w]e do not treat considered dicta from the Supreme Court lightly;’ such dicta should be accorded *appropriate deference*.” *Id.* (alteration in original).

118. *Id.* at 1063–64.

119. *Id.* at 1079. “[T]he NCAA is not above the antitrust laws, and courts cannot and must not shy away from requiring the NCAA to play by the Sherman Act’s rules.” *Id.*

III. NFL AND NCAA RESTRAINT ON LABOR MARKET

It can be argued that football, and not baseball, is America's true national pastime.¹²⁰ Despite the violence of the sport, its media appeal has helped the sport grow tremendously.¹²¹ Colleges and NFL teams profit from the services of a distinct individual—a football player.¹²² The demarcation of college football players and professional football players are monotonous when the horrifying possibility of permanent injury is a common threat faced on any play.¹²³ Yet, these college football players subject their bodies to this threat for a hopeful financial reward.¹²⁴ Given the rise in player contract values,¹²⁵ or the huge investments into athletic facilities by colleges to lure recruits,¹²⁶ the market for football players' services is ever-growing. As fans' demands grow, so too does the supply.¹²⁷ In 2008, ESPN agreed to pay the Southeastern Conference ("SEC") "a staggering \$2.25 billion over the

120. See Lucy McCalmont, *Football Has Taken Over Baseball as the True National Pastime*, HUFFINGTON POST (Apr. 16, 2015, 11:35 AM), http://www.huffingtonpost.com/2015/04/16/football-national-pastime_n_7078660.html.

121. *Id.*

It has been a long, long time since baseball was truly America's pastime, and it has nothing to do with anything baseball has done wrong. It has been since . . . television. . . . The NFL is terrific to watch on television in a way baseball [is not] and never was, and we are a nation of television watchers. The minute people realized how easy football was to follow on television—even if it really tells you very little of [what is] actually going on—was the minute baseball stopped being America's pastime.

Id.

122. See Will Hobson & Steven Rich, *Colleges Spend Fortunes on Lavish Athletic Facilities*, CHI. TRIB. (Dec. 23, 2015, 6:40 AM), <http://www.chicagotribune.com/sports/college/ct-athletic-facilities-expenses-20151222-story.html>.

123. See Viera, *supra* note 20, at D1.

124. See *id.*; Adam Schefter & Jeff Legwold, *Broncos Sign Von Miller for 6 Years; Deal Worth \$114.5M, Sources Say*, ESPN.COM (July 15, 2016), http://www.espn.com/nfl/story/_/id/17084231/denver-broncos-von-miller-agree-6-year-1145-million-deal.

125. See Schefter & Legwold, *supra* note 123.

126. Hobson & Rich, *supra* note 121.

Big-time college athletic departments are taking in more money than ever—and spending it just as fast. A decade of rampant athletics construction across the country has redefined what it takes to field a competitive top-tier college sports program. Football stadiums and basketball arenas now must be complemented by practice facilities, professional-quality locker rooms, players' lounges with high-definition televisions and video game systems, and luxury suites to coax more money from boosters.

Id.

127. See ACC, *ESPN Partner for New Conference Channel*, ESPN.COM (July 18, 2016), http://www.espn.go.com/college-sports/story/_/id/17102933/acc-espn-agree-20-year-rights-deal-lead-2019-launch-acc-network.

next [15] years—about \$150 million a year—for the conference’s TV rights.¹²⁸ More recently, Mercedes-Benz purchased the naming rights to a newly constructed NFL stadium for \$1.4 billion.¹²⁹ This is all driven by the on-field product provided by these football players.¹³⁰

A. NCAA

Due to the NFL’s draft eligibility rules, it is common practice for a football prospect to play at the collegiate level prior to becoming a professional.¹³¹ In fact, colleges serve as a de facto development league for the NFL.¹³² The NFL is grateful for the financial rewards of having colleges as a supplier of premier football services.¹³³ Although both the NFL and NCAA may identify as competitors providing similar products, they both benefit financially from practices that unreasonably restrain the market for football players.¹³⁴ This is possible because of their firm control on the market for the players’ services.¹³⁵

128. Michael Smith & John Ourand, *ESPN Pays \$2.25B for SEC Rights*, SPORTS BUS. J. (Aug. 25, 2008), [http://www.sportsbusinessdaily.com/Journal/Issues/2008/08/20080825/This-Weeks-News/ESPN-Pays-\\$225B-For-SEC-Rights.aspx](http://www.sportsbusinessdaily.com/Journal/Issues/2008/08/20080825/This-Weeks-News/ESPN-Pays-$225B-For-SEC-Rights.aspx).

129. Tim Tucker, *Falcons Officially Announce Mercedes-Benz as Naming Rights Partner*, AJC.COM (Aug. 24, 2015, 10:04 AM), <http://www.ajc.com/news/sports/football/falcons-officially-announce-mercedes-benz-as-namin/nnP9Y/>.

130. See Underwood, *supra* note 1, at 22.

131. See *id.* at 22–23; *NBA Draft Rules*, *supra* note 5.

132. Underwood, *supra* note 1, at 24.

133. See *id.*

134. See *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 1049, 1062 (9th Cir. 2015) *cert denied*, 137 S. Ct. 277 (2016); *Clarett v. Nat’l Football League*, 306 F. Supp. 2d 379, 409 (S.D.N.Y. 2004).

135. Michael Janofsky, *U.S.F.L. Loses in Antitrust Case; Jury Assigns Just \$1 in Damages*, N.Y. TIMES (July 30, 1986), <http://www.nytimes.com/1986/07/30/sports/usfl-loses-in-antitrust-case-jury-assigns-just-1-in-damages.html>. Despite losing, the U.S.F.L. succeeded in proving that the NFL was a monopoly. *Id.*; see also *United States v. Walters*, 997 F.2d 1219, 1225 (7th Cir. 1993).

The NCAA depresses athletes’ income—restricting payments to the value of tuition, room, and board, while receiving services of substantially greater worth. The NCAA treats this as desirable preservation of amateur sports; a more jaundiced eye would see it as the use of monopsony power to obtain athletes’ services for less than the competitive market price.

Walters, 997 F.2d at 1225.

1. Amateurism

Founded in 1906, the NCAA sought out to remedy the problem that was being created by colleges competing for the best players.¹³⁶ In doing so, “one of [its] earliest reforms . . . was a requirement that . . . participants be amateurs.”¹³⁷ To maintain amateurism, a student-athlete must not receive compensation other than what is permitted by the NCAA.¹³⁸ Even then, the compensation received was insufficient.¹³⁹ In 2014, the NCAA finally allowed scholarships to be awarded up to the full cost of attendance.¹⁴⁰ In addition to the compensation rules, the NCAA adopted several other amateurism protecting rules that restrain the market for football players’ services.¹⁴¹ An amateur may lose their eligibility to play at the collegiate level if they sign a contract with a professional team, enter a professional league’s player draft, or hire an agent.¹⁴² Additionally, the NCAA generally limits the mobility of an athlete by imposing a transfer penalty, mandating that a transferring athlete sit-out one season immediately after transferring before being eligible to play.¹⁴³ This can potentially affect an athlete’s ability to market themselves to the future purchasers of their services, the NFL.¹⁴⁴

Players, however, suffer a severe penalty for transferring—the loss of a year of athletics eligibility. This can make them a very unattractive option for coaches who are under constant *win now* pressure. The NCAA’s transfer rules restrain players’ ability to make the best choices for themselves, including

136. *O’Bannon*, 802 F.3d at 1054; *History*, *supra* note 29.

137. *O’Bannon*, 802 F.3d at 1054.

138. NAT’L COLLEGIATE ATHLETIC ASS’N, *supra* note 20, at art. 12 § 12.1.2.

139. *See O’Bannon*, 802 F.3d at 1054.

The *cost of attendance* at a particular school includes the items that make up a grant in aid plus ‘[nonrequired] books and supplies, transportation, and other expenses related to attendance at the institution.’ The difference between a grant in aid and the cost of attendance is a few thousand dollars at most schools.

Id. at 1054 n.3 (alteration in original).

140. *Id.* at 1054–55.

141. *Id.* at 1055.

142. NAT’L COLLEGIATE ATHLETIC ASS’N, *supra* note 20, at art. 12 § 12.1.2.

143. Joe Nocera, *With College Transfer Rules, Hypocrisy Never Sits Out a Year*, N.Y. TIMES (Apr. 1, 2016), <http://www.nytimes.com/2016/04/02/sports/ncaabasketball/with-college-transfer-rules-hypocrisy-never-sits-out-a-year.html>; *see also* NAT’L COLLEGIATE ATHLETIC ASS’N, *supra* note 20, at art. 14 § 14.5.1.

144. *See* Nocera, *supra* note 143; NAT’L COLLEGIATE ATHLETIC ASS’N, *supra* note 20, at art. 14 § 14.5.1.

ones based on financial considerations, academic considerations, athletics considerations, and personal circumstances.¹⁴⁵

However, the most important rule prohibits athletes—with a few exceptions—from receiving, either direct or indirect, payment for their athletic skill.¹⁴⁶

The NCAA, with varying success, has used the defense that all amateurism rules are legally valid.¹⁴⁷ Recently, *O'Bannon I* provided a clearer depiction of the intent in the *NCAA v. Board of Regents of the University of Oklahoma*¹⁴⁸ case, holding that not all rules that are linked to amateurism were immune from antitrust scrutiny.¹⁴⁹

2. Rule of Reason Application to Amateurism Rules

The NCAA's bylaws applying to amateurism may be afforded antitrust scrutiny due to their effect on commerce.¹⁵⁰ “[T]he modern legal understanding of *commerce* is broad, ‘including almost every activity from which the actor anticipates economic gain.’”¹⁵¹ “Despite the nonprofit status

145. Steve Berkowitz, *Lawsuit Challenges Rule for Transfers Between NCAA Division I Football Schools*, USA TODAY (Mar. 9, 2016, 6:44 AM), <http://www.usatoday.com/story/sports/ncaaf/2016/03/08/lawsuit-ncaa-division-football-transfer-rules-peter-deppe-iowa-hawkeyes-northern-illinois-huskies/81510022/>; see also Nocera, *supra* note 143.

[T]he case of Baker Mayfield, the Sooners' current quarterback, who walked on to the Texas Tech team as a freshman, then transferred to Oklahoma, where he walked on to its football team, too. Mayfield not only had to sit out a year but also lost a year of eligibility because of a Big 12 rule that punishes players who dare to move to a different college within the conference. The fact that Mayfield [did not] have an athletic scholarship made no difference.

Nocera, *supra* note 143.

146. *O'Bannon*, 802 F.3d at 1055; NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 20, at art. 12 § 12.1.2.1. “[M]ost importantly, an athlete is prohibited—with few exceptions—from receiving *any pay* based on his athletic ability, whether from boosters, companies seeking endorsements, or would-be licensors of the athlete's name, image, and likeness, NIL.” *O'Bannon*, 802 F.3d at 1055 (alteration in original).

147. See *O'Bannon*, 802 F.3d at 1063. “Quoting heavily from the language in *Board of Regents* that we have emphasized, the NCAA contends that any Section 1 challenge to its amateurism rules must fail as a matter of law because the *Board of Regents* Court held that those rules are presumptively valid.” *Id.*; see also Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 120 (1984).

148. 468 U.S. 85 (1984).

149. *O'Bannon*, 802 F.3d at 1063; *Nat'l Collegiate Athletic Ass'n*, 468 U.S. at 120.

150. *O'Bannon*, 802 F.3d at 1065.

151. *Id.*; see also *Agnew v. Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328, 340 (7th Cir. 2012). “No knowledgeable observer could earnestly assert that big-time college

of NCAA member schools, the transactions those schools make with premier athletes—full scholarships in exchange for athletic services—are not noncommercial, since schools can make millions of dollars as a result of these transactions.”¹⁵² Student-athletes considering scholarship offers often weigh economic factors, such as the earning potential of a degree or the likelihood of entering the NFL.¹⁵³ Therefore, the transactions that take place between the NCAA and student-athletes are somewhat commercial in nature.¹⁵⁴

“In December 2010, the Buckeyes suspended star quarterback Terrelle Pryor,” and four other players “for the first five games of the 2011 season for selling memorabilia and receiving discounted services at a local tattoo parlor.”¹⁵⁵ “Pryor sold his 2008 Big Ten championship ring, Fiesta Bowl sportsmanship award,” and other personal items.¹⁵⁶ “He was ordered to repay a total of \$2500.”¹⁵⁷ This punishment seems counterintuitive to the promotion of capitalism to prevent anyone from profiting from his or her own hard work in any capacity.¹⁵⁸

a. *Substantial Adverse Effect on Competition Within the Market*

There is a market for football players’ services, in which some football players are the reluctant sellers—and the schools are the purchasers—of their “athletic services and licensing rights.”¹⁵⁹ The NCAA thus operates as a monopsony,¹⁶⁰ in that it is the only purchaser of this particular good for a reserved population of football players.¹⁶¹ Consequently, price-fixing occurs when the compensation awarded to

football programs competing for highly sought-after high school football players do not anticipate economic gain from a successful recruiting program.” *Agnew*, 683 F.3d at 340.

152. *Agnew*, 683 F.3d at 340; see also Berkowitz et al., *supra* note 30.

153. *Agnew*, 683 F.3d at 341.

154. *Id.*

155. Zach Dirlam, *Scandal at Ohio State (Part 1 of 5): The Tattooed Five and Tressel’s Cover Up*, BLEACHER REP. (June 1, 2011), <http://www.bleacherreport.com/articles/719411-scandal-at-ohio-state-part-1-of-5-the-tattooed-five-tressels-cover-up>.

156. *Id.*

157. *Id.*

158. Kevin Trahan, *How the NCAA’s Marxist Philosophy is Hurting its Athletes*, FORBES (Aug. 18, 2014, 4:49 PM), <http://www.forbes.com/sites/kevintrahan/2014/08/18/how-the-ncaa-hurts-the-players-it-claims-to-protect/>.

159. *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 7 F. Supp. 3d 955, 991 (N.D. Cal. 2014).

160. *Id.*

161. *See id.*

student-athletes is limited to the grant-in-aid provided by the school, despite the level of talent.¹⁶² The students have no bargaining power.¹⁶³ Likewise, the schools cannot exceed the compensation awarded without facing penalty.¹⁶⁴ However, due to the same rule, the schools still have another profitable venture in which they have no competition—the licensing rights of their players.¹⁶⁵ Although the NCAA prohibits the use of a student-athlete’s name, image, or appearance to promote commercial ventures,¹⁶⁶ it is able to profit from student-athletes through disingenuous means.¹⁶⁷

Throughout college stadiums, fans don the jerseys of their favorite players.¹⁶⁸ Every year, a portion of the revenue from different programs across the nation can be attributed to jersey sales.¹⁶⁹ Although a student-athlete cannot sell his or her own personal belongings attributable to their athletic ability, a school can sell a replica jersey of that same player under the facade that it does not reflect the player’s likeness or image simply because their name is missing from the jersey.¹⁷⁰ This thinking is pure lunacy.¹⁷¹ The

162. See *O’ Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 1049, 1054 (9th Cir. 2015), cert. denied, 85 U.S.L.W. 3139 (Oct. 3, 2016). “The ‘combination[s] condemned by the [Sherman] Act’ also include ‘price-fixing . . . by purchasers’ even though ‘the persons specially injured . . . are sellers, not customers or consumers.’” *Id.* at 1070 (alteration in original).

163. Nicolas A. Novy, “*The Emperor Has No Clothes*”: *The NCAA’s Last Chance as the Middle Man in College Athletics*, 21 SPORTS LAW. J. 227, 232 (2014).

164. See NAT’L COLLEGIATE ATHLETIC ASS’N, *supra* note 20, at art. 16 § 16.01.1; Eric Dodds, *The ‘Death Penalty’ and How the College Sports Conversation Has Changed*, TIME (Feb. 25, 2015), <http://www.time.com/3720498/ncaa-smu-death-penalty/>. SMU infamously violated several NCAA rules, by providing illegal compensation for recruits to attend the university. Dodds, *supra*. The NCAA imposed what was dubbed the *death penalty*, with sanctions including the program being banned from bowl games and stripped of forty-five scholarships for two years. *Id.* “There[] [is] a reason that a popular sports joke in the early ‘80s was that [Eric] Dickerson took a pay-cut when he graduated and went to the NFL.” *Id.*

165. See NAT’L COLLEGIATE ATHLETIC ASS’N, *supra* note 20, at art. 31 § 31.6.4.2.

166. *Id.* at art. 12.5.1.1.

167. Joseph Milord, *It’s All Profit and No Pay: How the NCAA is an Ingenious Business*, ELITE DAILY (Mar. 20, 2014, 1:03 PM), <http://www.elitedaily.com/money/ncaa-ingenious-business-ever-created-tuesday/>.

168. See Novy, *supra* note 163, at 237.

169. See *id.* at 236; Milord, *supra* note 167; Marc Tracy, *Days of Selling Popular College Players’ Jerseys Seems Numbered*, N.Y. TIMES (Aug. 5, 2015), <http://www.nytimes.com/2015/08/06/sports/ncaafootball/days-of-selling-popular-college-players-jerseys-seem-numbered.html>.

170. Novy, *supra* note 163, at 236–37; Milord, *supra* note 167; Tracy, *supra* note 169.

171. See Kevin Trahan, *Long Past Time for College Football Teams to Stop Selling Real Player Jerseys*, SB NATION (June 5, 2014, 2:23 PM),

number 23 is forever linked to Michael Jordan, just like any other sports hero's number will be forever tied to that team.¹⁷² If we are to believe that jersey numbers are ambiguous representations of the school themselves and not the player, then why do schools retire a revered student-athlete's number, a la professionals?¹⁷³ It is evident that this practice presents an anticompetitive arrangement that allows only the school to profit from the marketability of their athletes.¹⁷⁴ Even so, schools still use their current student-athletes likeness in a commercial setting.¹⁷⁵ Meanwhile, players are subjected to watch as schools reap the financial reward from their services, while they are unable to receive a breadcrumb for their efforts.¹⁷⁶

b. *Challenged Conduct Promotes Competition*

While the courts have generally recognized the importance of maintaining the amateurism aspect of the college football product,¹⁷⁷ they have also determined “that the NCAA’s definition of amateurism [is] *malleable*, changing frequently over time in ‘significant and contradictory ways.’”¹⁷⁸ The NCAA’s current rules do serve a procompetitive benefit by

<http://www.sbnation.com/college-football/2014/6/5/5783202/college-football-player-jerseys-real-numbers>.

172. See Maureen Callahan, *Jeter’s Retirement Marks End of Yanks’ Single-Digit Numbers*, N.Y. POST (Mar. 30, 2014, 3:45 AM), <http://nypost.com/2014/03/30/jeters-retirement-marks-end-of-yanks-single-digit-numbers/>; Tracy, *supra* note 169. “The Yankees will hit another milestone this season besides the retirement of Derek Jeter: [It is] the last time a single-digit jersey will be worn by a Bronx Bomber.” Callahan, *supra*. The Yankees are famous for not displaying player names on their uniform. See *id.*

173. See Craig Barnes, *Seminoles to Retire Deion’s Number Tonight*, SUN SENTINEL (Oct. 7, 1995), http://articles.sun-sentinel.com/1995-10-07/sports/9510060566_1_doak-campbell-stadium-sanders-charlie-ward.

174. See Tracy, *supra* note 169; Trahan, *supra* note 171. “Worried about the ramifications of selling the numbers tied to student-athletes, several schools have decided not to sell football jerseys with star players names on it this upcoming season, sources tell ESPN.” Trahan, *supra* note 171.

175. Jason Kirk, *NCAA President Faces Fact That Colleges Sell Jerseys with Real Player Numbers*, SB NATION (June 20, 2014, 12:20 PM), <http://www.sbnation.com/college-football/2014/6/20/5827802/ncaa-player-jerseys-numbers-mark-emmert-obannon>. During the *O’Bannon* case, “Georgia Tech tweeted an image of football schedule cards, each with a current [player] posed next to a corporate sponsor’s logo.” *Id.* Although the schedules were handed out by the school, and not sold, the presence of commercial sponsors implies a mutual partnership that financially benefits both parties, through advertising. See *id.*

176. See Novy, *supra* note 163, at 228.

177. *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 1049, 1062 (9th Cir. 2015), *cert. denied*, 137 S. Ct. 277 (2016).

178. *Id.* at 1058.

promoting amateurism, which helps drive the consumer's demand for the product that is college football.¹⁷⁹ However, studies have shown that these rules "do not promote competitive balance" amongst football programs.¹⁸⁰ In fact, "restrictions on student-athlete compensation lead many schools . . . to spend larger portions of their athletic budgets on coaching, recruiting, and training facilities."¹⁸¹ It is hard to argue that competitive balance is a true driving force, with the increasing number of bowl games awarded to teams.¹⁸²

The number of bowls has doubled in the last [twenty] years and [it is] unknown if there will even be enough teams to fill the slots. In order to qualify for a bowl game, teams must win at least six games, but a [five-seven] team can fill out a waiver to play for an available slot.¹⁸³

To fulfill consumers' insatiable demand for football, the NCAA has capitalized on the time period when the NFL season is dwindling down to steadily increase the number of games available to the market.¹⁸⁴ It is

The court suggested that, even today, the NCAA's definition of amateurism is inconsistent: [A]lthough players generally cannot receive compensation other than scholarships, tennis players are permitted to accept up to \$10,000 in prize money before enrolling in college, and student-athletes are permitted to accept Pell grants even when those grants raise their total financial aid package above their cost of attendance. It thus concluded that amateurism was not, in fact, a *core principle*[] of the NCAA.

Id. at 1058–59 (citations omitted).

179. *Id.* at 1059.

180. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955, 978 (N.D. Cal. 2014).

[S]ince the 1970s, numerous sports economists have studied the NCAA's amateurism rules and nearly all have concluded that the rules have no discernible effect on the level of competitive balance. . . . [Also], a 2007 study by economist Jim Peach published in the *Social Science Journal*, found that there is 'little evidence that the NCAA rules and regulations have promoted competitive balance in college athletics and no *a priori* reason to think that eliminating the rules would change the competitive balance situation.'

Id.

181. *Id.*

The fact that high-revenue schools are able to spend freely in these other areas cancels out whatever leveling effect the restrictions on student-athlete pay might otherwise have. The NCAA does not do anything to rein in spending by the high-revenue schools or minimize existing disparities in revenue and recruiting.

Id. at 978–79.

182. See Nick Schwartz & Laken Litman, *Are There Too Many College Football Bowl Games?*, USA TODAY (May 6, 2015, 3:11 PM), <http://ftw.usatoday.com/2015/05/are-there-too-many-college-football-bowl-games>.

183. *Id.* "Playing in a bowl game used to be a reward. Now [it is] getting overly commercial and out of control." *Id.*

184. See *id.*

apparent that this is mainly commercially driven based on the astounding profits from bowl games, despite the dilution of competition.¹⁸⁵

Although the NCAA promotes a product that is unique from the NFL, and amateurism is an integral component of that product, student-athlete compensation is not the driving force behind consumer demand for its product.¹⁸⁶ “Dr. Emmert, [the NCAA commissioner], himself noted that much of the popularity of the NCAA’s annual men’s basketball tournament stems from the fact that schools from all over the country participate ‘so the fan base has an opportunity to cheer for someone from their region of the country.’”¹⁸⁷

The NCAA has also argued that the restraints on student-athlete compensation integrates athletics and academics, and promotes competition for football players’ services by increasing the quality of the educational services its member schools provide to student-athletes.¹⁸⁸ Contrarily, one of the NCAA’s expert witnesses in the *O’Bannon v. NCAA* (“*O’Bannon II*”)¹⁸⁹ case, Dr. James Heckman, “testified that the long-term educational and academic benefits that student-athletes enjoy stem from their increased access to financial aid, tutoring, academic support, mentorship, structured schedules, and other educational services that are unrelated to the [compensation] rules.”¹⁹⁰ It is well documented how schools exploit the talents of student-athletes while shuffling them through the education

185. See Dosh, *supra* note 28. An increase in bowl games from thirty-five games in 2014 to thirty-nine in 2015, resulted in a \$196 million increase in revenue. *College Bowl Payouts Surpass \$500 Million*, ESPN.COM (Apr. 14, 2015), http://www.espn.com/college-football/story/_/id/12688517/college-bowl-game-payouts-surpass-500-million-first-year-college-football-playoff. Surprisingly, schools’ expenses in relation to the revenue declined more than ten percent over this span. See *id.*

186. *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 1049, 1059 (9th Cir. 2015), *cert. denied*, 137 S. Ct. 277 (2016). “[C]onsumers are primarily attracted to college sports for reasons unrelated to amateurism, such as loyalty to their alma mater or affinity for the school in their region of the country.” *Id.* (citation omitted).

187. *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 7 F. Supp. 3d 955, 978 (N.D. Cal. 2014).

188. *Id.* at 980.

189. 7 F. Supp. 3d 955 (N.D. Cal. 2014).

190. *Id.* at 980.

The only evidence that the NCAA has presented that suggests that its challenged rules might be necessary to promote the integration of academics and athletics is the testimony of university administrators, who asserted that paying student-athletes large sums of money would potentially *create a wedge* between student-athletes and others on campus. These administrators noted that, depending on how much compensation was ultimately awarded, some student-athletes might receive more money from the school than their professors. Student-athletes might also be inclined to separate themselves from the broader campus community by living and socializing off campus.

Id. (citation omitted).

system.¹⁹¹ Recently, before a Congressional Committee, Myron Rolle, a former football player and Rhodes Scholar at Florida State University, “said that many universities [do not] prioritize an athlete’s education, rendering the term *student-athlete* inaccurate.”¹⁹²

Calling himself an anomaly, Rolle, who was a Rhodes Scholar, said the number of hours occupied by games, traveling, workouts, injury treatments, and practices left little time for studying. With so few athletes continuing their sport after college, he said, many students do not have much to show for their work upon graduation.¹⁹³

A 1980s study done by Northeastern University showed the sad state of educational affairs for prep athletes, placing “the functional illiteracy rate for . . . high school football and basketball players at 25[%] to 30[%], twice the national average.”¹⁹⁴

Ed O’Bannon, a former UCLA basketball star, testified that he felt like “an athlete masquerading as a student’ during his college years.”¹⁹⁵ A 1986 study revealed that roughly six out of every ten NFL players did not have a college degree.¹⁹⁶ Though players’ early departure to the league may have contributed to this statistic, several were ill-equipped to thrive in an academic setting anyhow.¹⁹⁷ Couple this with the rigorous demands the sport

191. *See id.* at 975, 984.

192. Paul Cottle, *Former FSU Football Star Tells Congressional Committee About College Athletes: “A Lot of Them Would Go Through this Academic Machinery and Get Spit Out, Left Torn, Worn, and Asking Questions.”* BRIDGE TO TOMORROW (July 10, 2014), <https://bridgetotomorrow.wordpress.com/2014/07/10/former-fsu-football-star-tells-congressional-committee-about-college-athletes-a-lot-of-them-would-go-through-this-academic-machinery-and-get-spit-out-left-torn-worn-and-asking-questions/> (emphasis added). ““Many of my fellow teammates struggled in that environment,” Rolle said. “Some of them sent some of their scholarship money home to help their families. They struggled academically. A lot of them would go through this academic machinery and get spit out, left torn, worn, and asking questions.”” *Id.*

193. *Id.*

194. Diana Nyad, *How Illiteracy Makes Athletes Run*, N.Y. TIMES, May 28, 1989, at S8. Former NFL and Oklahoma State football player, Dexter Manley, was a functioning illiterate, but somehow was accepted into and studied at the school for four years. *Id.*

195. *O’Bannon*, 7 F. Supp. 3d at 980–81.

196. Bogan, *supra* note 37.

197. *See* Lederman, *supra* note 32. The Atlanta Journal Constitution conducted a study of admission reports for fifty-four colleges between 1990 and 2006. *Id.* There was a noticeable difference between football players’ average SAT score when compared to the average SAT score of a non-athlete incoming student. *Id.*

requires,¹⁹⁸ and football players are left with little time to realistically focus on the education aspect that the NCAA vehemently declares is a core value.¹⁹⁹

B. *NFL*

The NFL's draft eligibility rule is not foreign to antitrust suits.²⁰⁰ However, they have escaped antitrust scrutiny due to the non-statutory exemption that promotes a national labor policy favoring free and private collective bargaining and requiring good-faith bargaining over wages, hours, and working conditions.²⁰¹ The NFL and its player union negotiated the current collective bargaining agreement that includes the agreed upon eligibility rules.²⁰² While the National Labor Relations Act was enacted primarily "to promote collective bargaining and to protect . . . concerted employee" efforts,²⁰³ eligibility rules that regulate commercial activity certainly create a restraint on trade.²⁰⁴

The mere fact that a rule can be characterized as an *eligibility rule*, however, does not mean the rule is not a restraint of trade; were the law otherwise, the NCAA could insulate its member schools' relationships with student-athletes from antitrust scrutiny by

198. See Chris Isidore, *Playing College Sports: A Long, Tough Job*, CNN MONEY (Mar. 31, 2014, 6:58 AM), <http://www.money.cnn.com/2014/03/31/news/companies/college-athletes-jobs/>.

Up until the season starts, the workload trails off to [fifty] to [sixty] hours a week. That eases to [forty] to [fifty] hours a week once the season, and classes, begin. Weeks with road games include a [thirty-seven] hour stretch that includes travel, practice, a [three] to [four] hour game and some time to sleep in a strange hotel.

The season usually runs until late November—unless the team is successful. Then it has to work through to a bowl game, sometimes played on New Year's Day. There might be a brief break for the holidays, but, as the NLRB found, "While the players are allowed to leave campus for several days before Christmas, they must report back by Christmas morning."

Id.

199. *Finances*, *supra* note 23.

200. See *Clarett v. Nat'l Football League*, 369 F.3d 124, 125 (2d Cir. 2004).

201. *Id.* at 130. "[F]ederal labor statutes . . . delegate related rulemaking and interpretive authority to the National Labor Relations Board." *Brown v. Pro Football Inc.*, 518 U.S. 231, 236 (1996).

202. *Clarett*, 369 F.3d at 126–27.

203. McCormick & McKinnon, *supra* note 44, at 383.

204. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1065 (9th Cir. 2015), *cert. denied*, 85 U.S.L.W. 3139 (Oct. 3, 2016).

renaming every rule governing student-athletes an *eligibility rule*.²⁰⁵

The broad scope in which the Supreme Court of the United States determined whether an employer-union agreement could be afforded exemption status, was announced in Justice White’s opinion “advocat[ing] that the application of the non-statutory exemption should be determined by balancing the ‘interests of union members’ served by the restraint against ‘its relative impact on the product market.’”²⁰⁶ Even so, there is ongoing debate regarding the boundaries of the exemption and what test to apply in determining whether a rule is truly a mandatory subject of collective bargaining.²⁰⁷

1. Dispelling the *Mandatory Bargaining Subject* Ruling of Clarett

In an age in which player safety has come to the forefront for issues involving the sport, it seems counterintuitive to restrain the labor market when it is known that these players will subject themselves to the same threat of injury, albeit at an *amateur* level.²⁰⁸ With the average career being around 3.5 years,²⁰⁹ the shortest of any major North American professional sport, the rule accomplishes one thing—prolonging the chance of injury without freely negotiated compensation, ensuring that “the cream [of NFL talent] will rise to the top.”²¹⁰

While it is the NFL Players Association’s (“NFLPA”) duty to seek the best deal for NFL players, it is far-fetched to still believe—with the rookie salary amendments—that the “eligibility rules . . . have tangible effects on the wages and working conditions of current NFL players.”²¹¹ The court in *Clarett v. NCAA* (“*Clarett II*”)²¹² opined that “the complex scheme by which individual salaries in the NFL . . . was built around the longstanding restraint on the market for entering players imposed by the

205. *Id.*

206. *Clarett*, 369 F.3d at 132.

207. *See id.* at 131–34.

208. *See id.* at 129.

209. Schwartz, *supra* note 12.

210. *See id.*; Chris Vannini, *David Shaw: A College Coach’s No. 1 Job is NOT to Get Players to the NFL*, COACHINGSEARCH.COM (Apr. 16, 2016), <http://www.coachingsearch.com/article?a=David-Shaw-A-college-coachs-No1-job-is-NOT-to-get-players-to-the-NFL>.

211. *Clarett*, 369 F.3d at 140.

212. 369 F.3d 124 (2d Cir. 2004).

eligibility rules and the related expectations about the average career length of NFL players.”²¹³

The court later states, “by reducing competition in the market for entering players, the eligibility rules also affect[ed] the job security of veteran players.”²¹⁴ In a dangerous sport where job security and health are so deeply intertwined that the average career span is *shorter* than the average contract length for a rookie player,²¹⁵ this problem seems de minimis.²¹⁶ The NFL has the largest roster size of the major professional sports, yet feels compelled to impose the strictest draft eligibility rules to prevent younger players from securing jobs seemingly meant for veterans.²¹⁷ “[I]t is unlikely that such *raiding* would destroy college football . . . since there are relatively few athletes who are capable of playing professional football without the benefit of . . . college competition.”²¹⁸

Furthermore, the NFL has taken less restrictive alternative steps that have directly addressed job security concerns of veteran players in the league.²¹⁹ In the latest collective bargaining agreement, the players’ union and the league agreed to modify rookie contracts by predetermining the contract amount for each draft pick.²²⁰ “[T]he NFLPA negotiating team, led by veterans who were frustrated with rookies entering the league and making more than proven players, was only too happy to shift funds to established guys.”²²¹ Through this amendment, veteran players gained more leverage in contract negotiations for their proven skills, rather than have unproven rookies set an inflated market price for their position.²²²

213. *Id.* at 140.

214. *Id.*

215. *See* McCormick & McKinnon, *supra* note 44, at 434, 438 n.284; Cork Gaines, *Here’s How Much Money Players Lose When They Fall in the NFL Draft*, BUS. INSIDER (Apr. 27, 2016, 3:06 PM), <http://www.businessinsider.com/nfl-draft-contract-values-2016-4>. Rookies generally sign a four-year contract. Gaines, *supra*.

216. *See* McCormick & McKinnon, *supra* note 44, at 434.

217. *Id.* at 407.

218. *Id.* at 433; *see also* Legwold, *supra* note 19.

219. *See* Andrew Brandt, *The New Age of Rookie Contract Negotiations*, SPORTS ILLUSTRATED: MMQB (May 22, 2014), <http://mmqb.si.com/2014/05/22/nfl-rookie-contract-negotiations>.

220. *Id.*

221. *Id.*

222. *See* John Czarnecki, *Rookie Cap Biggest Win from New CBA*, FOX SPORTS (July 27, 2011, 1:00 AM), <http://www.foxsports.com/nfl/story/NFL-rookie-salary-cap-biggest-win-from-new-CBA-less-risk-for-owners-072711>. “The new collective bargaining agreement somewhat changes what had become a ridiculous system in which a rookie, an unproven professional, often was suddenly making more money than most of his veteran teammates, even Pro Bowl selections.” *Id.*

Conversely, the NFL has taken measures that have proven to be detrimental to players' job security.²²³ NFL Europe lasted for sixteen years, operating as the NFL's development league, prior to the NFL terminating the league in 2007.²²⁴ On a roster, where more than twenty players are considered reserves, it is a constant battle to stay employed.²²⁵ The defunct development league helped to develop talents in ways unobtainable with the current teams.²²⁶ Due to player safety concerns, offseason training activities have been reduced,²²⁷ causing coaches to focus more on contributing players rather than developing depth on their roster.²²⁸ NFL Europe, though costly,²²⁹ allowed players *on the fringe* of making an NFL roster to gain valuable practice opportunities and experience, which certainly enhanced their prospects of securing and maintaining a job in the NFL.²³⁰ From a business perspective, the league simply closed NFL Europe to maximize profits,²³¹ thanks, in part, to the free farm system that is college football.²³² It can certainly be argued that the draft eligibility rule does not primarily

223. See Sean Keeler, 'You Didn't Play to Get Rich': What Killed NFL Europe?, *GUARDIAN* (June 23, 2016, 6:00 AM), <http://www.theguardian.com/sport/2016/jun/23/you-didnt-play-to-get-rich-what-killed-nfl-europe>.

224. *Football: After 16 Years, NFL Closes European League*, *N.Y. TIMES* (June 30, 2007), <http://www.nytimes.com/2007/06/29/sports/29iht-nfl.4.6417232.html>.

225. See Marc Lillibridge, *The Anatomy of a 53-Man Roster in the NFL*, *BLEACHER REP.* (May 16, 2013), <http://bleacherreport.com/articles/1640782-the-anatomy-of-a-53-man-roster-in-the-nfl>; *Released? Waived? Practice Squad? An NFL Roster Moves Primer*, *FOX SPORTS* (Sept. 2, 2016, 5:38 PM), <http://www.foxsports.com/nfl/story/released-waived-practice-squad-an-nfl-roster-moves-primer-090216>; Keeler, *supra* note 223.

226. See Keeler, *supra* note 223.

227. Judy Battista, *Players Like Camp Restrictions; They're Growing on Coaches*, *N.Y. TIMES*, Aug. 20, 2012, at B8.

228. See *id.*

229. *Football: After 16 Years, NFL Closes European League*, *supra* note 224. "The league was reportedly losing about [thirty] million a season." *Id.* But see *Total Revenue of all National Football League Teams from 2001 to 2015 (in Billion U. S. Dollars)*, *STATISTA*, <http://www.statista.com/statistics/193457/total-league-revenue-of-the-nfl-since-2005/> (last visited Apr. 9, 2017). In 2007, when NFL Europe closed, league posted revenue of 7.09 billion. *Id.* Meaning that an expense of 30 million still equated to less than 1% of their revenue. See *id.*

230. See Keeler, *supra* note 223. "The value [of NFL Europe] was just in terms of [the fact] guys that are on the lower end of the roster, you [a]re not getting much better in OTAs. You [a]re not getting much better, honestly, in camps." *Id.* (alteration in original).

231. See *Football: After 16 Years, NFL Closes European League*, *supra* note 224. "Goodell said it was time to develop a new international strategy, describing the move to fold NFL Europa as the *best business decision*." *Id.*; Keeler, *supra* note 223.

232. *Clarett v. Nat'l Football League*, 306 F. Supp. 2d 379, 408 n.181 (S.D.N.Y. 2004); Keeler, *supra* note 223; see also *Football: After 16 Years, NFL Closes European League*, *supra* note 224.

address a mandatory bargaining subject, instead acting as a market barrier for a certain population of players which forces them to bargain their services for a scholarship.²³³

2. Rule of Reason Application to Draft Eligibility Rules

Despite the unsuccessful challenge to the eligibility rules in *Clarett I*, courts have found that similar entry barriers violated the antitrust laws.²³⁴ Since the NFL has been recognized as a monopoly controlling the market for football players' services,²³⁵ it is pertinent to ensure that their practices are not unreasonable restraints on the market for these players' services.²³⁶

a. *Substantial Adverse Effect on Competition Within the Market*

The Supreme Court of the United States has allowed an intermediate inquiry, known as *quick-look*, if the conduct is a naked restriction.²³⁷ They explained that a *quick-look* analysis, under the rule of reason, is appropriate where "the great likelihood of anticompetitive effects can easily be ascertained," and "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect."²³⁸

As previously addressed, the market is clearly for football players' services.²³⁹ The market for professional football players and college football players is illusory, as the players providing this labor market involuntarily submit to the mandatory pre-requisite that they provide services as a *college football player* prior to becoming a professional.²⁴⁰ Certainly, few players can make the jump from the high school rank to the pros,²⁴¹ but they should be afforded the right to pursue their profession free of unreasonable obstructions.²⁴² The only alternative to college football that would provide monetary compensation is the minuscule Arena Football League ("AFL").²⁴³

233. *Clarett*, 306 F. Supp. 2d at 395, 401–02.

234. *Clarett v. Nat'l Football League*, 369 F.3d 124, 125 (2d Cir. 2004); *Clarett*, 306 F. Supp. 2d at 395, 401–02. *But see* *Denver Rockets v. All-Pro Mgmt., Inc.*, 325 F. Supp. 1049, 1058 (C.D. Cal. 1971).

235. *Clarett*, 306 F. Supp. 2d at 407; Janofsky, *supra* note 135.

236. *See* *Clarett*, 369 F.3d at 138; *Clarett*, 306 F. Supp. 2d at 401–02.

237. *See* *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 769–70 (1999).

238. *Id.* at 770.

239. *See* *Clarett*, 369 F.3d at 138; *Clarett*, 306 F. Supp. 2d at 401–02.

240. *See* *Clarett*, 369 F.3d at 141; *Clarett*, 306 F. Supp. 2d at 401, 409 n.185.

241. Legwold, *supra* note 19.

242. *See id.*

243. *See* COLLECTIVE BARGAINING AGREEMENT, NEGOTIATED BY AND BETWEEN ARENA FOOTBALL ONE, LLC AND ARENA FOOTBALL LEAGUE PLAYERS UNION 13

Based on the pay,²⁴⁴ it seems unfeasible to choose this path given the risk of injury and the fact that the game itself is different than the NFL style of play.²⁴⁵

In *Denver Rockets v. All-Pro Management, Inc.*,²⁴⁶ the court considered an NBA bylaw that restricted eligibility to players who were at least four years removed from the date of their high school graduation an unreasonable restraint of trade.²⁴⁷ Since then, the NBA has amended their draft eligibility rules to once again prevent immediate eligibility to high school graduates, albeit a reasonable restraint of only one year.²⁴⁸ Similar age-based restrictions have been struck down in professional hockey.²⁴⁹ Therefore, it is evident that the restriction constitutes a naked restriction that has the anticompetitive effect of excluding players' ability to render their services to the NFL.²⁵⁰

b. *Challenged Conduct Promotes Competition*

The *Clarett I* case provides the NFL's procompetitive justifications for the rule:

The purposes of the eligibility rule include [1] protecting younger and/or less experienced players—that is, players who are less mature physically and psychologically—from heightened risks of injury in NFL games; [2] protecting the NFL's entertainment product from the adverse consequences associated with such injuries; [3] protecting the NFL clubs from the costs and potential

(Aug. 10, 2012), www.aflpu.org/resources/ALFPU+AFL+CBA+2012.pdf; *Sharks to Host Open Tryout in Georgia*, ARENAFOOTBALL.COM (Dec. 9, 2015), <http://www.arenafootball.com/sports/a-footbl/spec-rel/120915aad.html>.

244. See COLLECTIVE BARGAINING AGREEMENT, *supra* note 239, at 13. AFL salary range for veteran/rookie, \$17,220–\$18,375, over a twenty-one-game schedule, based on fixed salary. *Id.*

245. See Matt Bonesteel, *Movement to Eliminate Kickoffs in College Football Reportedly Gaining Steam*, WASH. POST (July 18, 2016), <http://www.washingtonpost.com/news/early-lead/wp/2016/07/18/movement-to-eliminate-kickoffs-in-college-football-reportedly-gaining-steam/>.

246. 325 F. Supp. 1049 (C.D. Cal. 1971).

247. *Id.* at 1054.

248. *NBA Draft Rules*, *supra* note 5.

249. *Linseman v. World Hockey Ass'n*, 439 F. Supp. 1315, 1317, 1320–21 (D. Conn. 1977) (preliminarily enjoining a rule declaring players younger than twenty ineligible for the hockey league draft because it was an illegal “group boycott, or a concerted refusal to deal, [which] has been long and consistently classified as a *per se* violation of the Sherman Act”).

250. *Clarett v. Nat'l Football League*, 306 F. Supp. 2d 379, 398, 408 (S.D.N.Y. 2004); see also *Linseman*, 439 F. Supp. at 1321.

liability entailed by such injuries; and [4] protecting from injury and self-abuse other adolescents who would over-train—and use steroids—in the misguided hope of developing prematurely the strength and speed required to play in the NFL.²⁵¹

While the NFL wants to ensure the health of the younger players, the first and fourth justifications are misguided attempts to feign caring for players' health, because it simply does not want to have the players injured at its expense.²⁵² These players face the same threat of injury at the collegiate level.²⁵³ Under this notion, the NCAA should not allow *true freshmen* to play against upperclassmen who have completed at least a year of a semi-professional training regimen.²⁵⁴ This does not occur because of the numerous opportunities high school prospects have to perfect their craft.²⁵⁵ The temptation of steroid use and overtraining exists, regardless of this rule, as prep players are exposed to the pressures of reaching the exclusive collegiate level to continue their aspirations of becoming a professional.²⁵⁶ Furthermore, the Supreme Court of the United States emphasized that justifications offered under the rule of reason may be considered only to the extent that they tend to show that “the challenged restraint enhances competition.”²⁵⁷ Consequently, the first and fourth justifications hoping to protect younger players' wellbeing do not promote competition.²⁵⁸ The second explanation prescribes that by “limiting the occurrence of player injuries, [the rule] maintains the high quality of its *entertainment product* and, thus, presumably enables the League to better compete with other providers of sports entertainment such as other professional sports leagues or amateur football.”²⁵⁹ Here, the league incorrectly assumes the validity of the rule simply because it provides competition in a market—sports entertainment—other than the market—football players' service—in which

251. *Clarett*, 306 F. Supp. 2d at 408.

252. *See id.* at 408, 408 n.181.

253. *See Bonesteel*, *supra* note 245.

254. *See id.* “NCAA moved kickoffs to the [thirty-five] yard line,” similar to the NFL's kickoff amendment in lieu of player safety concerns. *Id.*

255. *See* Edwin Weathersby, *Top 10 Camps Where College Football Recruits Get Noticed*, BLEACHER REP. (Mar. 26, 2014), <http://www.bleacherreport.com/articles/2005928-top-10-camps-where-college-football-recruits-get-noticed/page/9>.

256. NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 20, at art. 16 § 31.2.3.4. Percentage of high school football players to play in NCAA is 6.7%. NCAA RESEARCH, *supra* note 1.

257. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 103–04 (1984); *Clarett*, 306 F. Supp. 2d at 408 n.182.

258. *Clarett*, 306 F. Supp. 2d at 408.

259. *Id.* at 409.

the rule has an anticompetitive effect.²⁶⁰ Lastly, the NFL asserts that the rule shields its teams from these injury-related costs.²⁶¹ Cost reduction, alone, is not considered a legitimate procompetitive justification;²⁶² rather, it is a component of a bargain that is “favorably affected by [competition].”²⁶³ Based on the reasons provided, it seems that the NFL has not offered any strong justifications that the rule promotes competition in the market for football players’ services.²⁶⁴

IV. CONCLUSION

The NCAA and NFL are the two biggest providers of American football entertainment.²⁶⁵ There is an undeniable nexus between these organizations, in that one serves as the de facto development league for the other.²⁶⁶ Both have implemented practices that unreasonably restrain this shared labor market to their economic benefit.²⁶⁷

The NFL identified that they are direct competitors in the sports entertainment market with *amateur football*.²⁶⁸

260. See *id.* at 408–09, 409 n.185.

[T]he freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster. Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy.

United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972).

261. *Clarett*, 306 F. Supp. 2d at 408.

262. *Law v. Nat’l Collegiate Athletic Ass’n*, 134 F.3d 1010, 1022 (10th Cir. 1998). “[C]ost-cutting by itself is not a valid procompetitive justification.” *Id.*

263. *Id.*; see also *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411, 423 (1990).

[T]he ‘Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices but, also, better goods and services.’ This judgment ‘recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.’

FTC, 493 U.S. at 423 (citation omitted).

264. See *Clarett*, 306 F. Supp. 2d at 408–10. Let it be noted that the only case to analyze the procompetitive justifications of the modern draft eligibility rule held that “the League . . . failed to offer *any* legitimate procompetitive justifications for the Rule.” *Id.* at 409.

265. See *Clarett v. Nat’l Football League*, 369 F.3d 124, 126 (2d Cir. 2004); *Clarett*, 306 F. Supp. 2d at 409, n.185.

266. Underwood, *supra* note 1, at 24.

267. See *Clarett*, 306 F. Supp. 2d at 409.

268. *Id.*

The conspiracy or agreement to fix prices or to rig bids is the key element of a Sherman Act criminal case. In effect, the conspiracy must comprise [of] an agreement, understanding or meeting of the minds between at least two competitors or potential competitors, for the purpose or with the effect of unreasonably restraining trade.²⁶⁹

More damning is the fact that the NFL attempted to justify their draft eligibility rule by “excluding the most talented college players from the NFL, [to sustain] ‘the NCAA’s ability to compete in the entertainment market.’”²⁷⁰ With the dissolution of NFL Europe, it is apparent that the NFL has a keen interest in the viability of its free farm system.²⁷¹ Unfortunately, this is in direct conflict with the precedent established in *United States v. Topco Associates, Incorporated*,²⁷² that competition in one market—football players services—may not be suppressed in favor for another market—entertainment market.²⁷³ Additionally, the NCAA has further impacted the restraints on football players’ services by promoting *amateurism rules* that render any hopeful professional player an indentured servant for a minimum of three years.²⁷⁴

Since the NCAA has now allowed for student-athletes to receive scholarships capped at the full cost of attendance,²⁷⁵ it seems that any further compensation may contradict the idea of amateurism.²⁷⁶ With perpetual

269. Antitrust Resource Manual: Elements of the Offense, U.S. DEP’T JUST., <https://www.justice.gov/usam/antitrust-resource-manual-7-elements-offense> (last updated Oct. 2011).

270. *Clarett*, 306 F. Supp. 2d at 409 n.185.

271. See *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972); *Football: After 16 Years, NFL Closes European League*, *supra* note 220; Mike Florio, *Fournette Definitely Should Take a Year off in 2016*, NBC SPORTS (Sept. 30, 2015, 9:33 AM), <http://profootballtalk.nbcsports.com/2015/09/30/fournette-definitely-should-take-a-year-off-in-2016/>.

272. 405 U.S. 596 (1972).

273. *Id.* at 610.

274. See Daniel Roberts, *Does the NCAA Make Its Money from Indentured Servants?*, YAHOO! FIN. (Feb. 19, 2016), <http://finance.yahoo.com/news/does-the-ncaa-make-its-money-from-indentured-servants-184409356.html>.

[T]he athletes are promised an education, but in fact [do not] get the same one their fellow students get because they devote the vast majority of their time to their sport. Second, the NCAA’s strict rules around amateurism bring down harsh punishments on athletes for even the tiniest of infractions The third problem is the big money the NCAA sees, while its athletes see none of it. “The NCAA is running a cartel,” Nocera rails, “where everybody gets rich except the labor force.” He likens NCAA athletes to indentured servants.

Id.

275. *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 1049, 1054–55 (9th Cir. 2015), *cert. denied*, 137 S. Ct. 277 (2016).

276. See *id.* at 1058; Novy, *supra* note 163, at 229.

yearly revenue increases,²⁷⁷ this appears to be a temporary solution to an aspect of a larger problem.²⁷⁸ Schools will continue to benefit financially from the services provided by football players at a fixed cost of attendance, which ensures unfathomable profit margins.²⁷⁹ The state of college sports will continue to have *improper benefits* scandals, ironically, due to the collusion by the NFL and NCAA to promote the importance of college.²⁸⁰ As students are forced to attend class each day and go through the rigors of being a college athlete, they realize the limited earning potential of their fragile careers.²⁸¹ With the popularity of the sport being at an all-time high, student-athletes see the earnings that their respective programs gross as a result of their hard work.²⁸² Yet they face unreasonable restrictions that, if violated, could effectively end their ability to earn a living from their skill before it ever materialized.²⁸³ This greedy practice has led sports pundits to call for star college players to sit-out seasons to remain healthy and keep their professional aspirations intact.²⁸⁴ However, it would take a selfless individual to do so, because this is a daunting task to place on a nineteen or twenty year old who does not want to offend the *establishment*.²⁸⁵ This displays the overwhelming amount of power these two entities possess.²⁸⁶

Some students choose to attend college to obtain marketable skills that will benefit them in their career.²⁸⁷ Although the likelihood of reaching the professional level is low,²⁸⁸ some football players only want to acquire

277. See Berkowitz et al., *supra* note 30. Texas A&M's 2014 revenue increased by \$73,133,004 in comparison to the previous year. *Id.*

278. See Novy, *supra* note 163, at 230.

279. See *O'Bannon*, 802 F.3d at 1054–55; Berkowitz et al., *supra* note 30.

280. See *O'Bannon*, 802 F.3d at 1054. “[T]he NFL has required aspiring professional football players to wait a sufficient period of time after graduating high school to accommodate and encourage college attendance before entering the NFL draft.” *Clarett v. Nat’l Football League*, 369 F.3d 124, 126 (2d Cir. 2004). This statement makes the rule seem far less stringent than it actually is. See *id.* It appears as though football players are truly given a choice to either play at the collegiate level in exchange for only a college education or become a professional. See *id.* Since there is no realistic alternative to college, they are forced to accept the only option on the table. *Id.*

281. See *O'Bannon*, 802 F.3d at 1055; Novy, *supra* note 163, at 229–30.

282. See *Clarett*, 369 F.3d at 126; Berkowitz et al., *supra* note 30.

283. See *Clarett*, 369 F.3d at 126; Florio, *supra* note 271.

284. Florio, *supra* note 271. The position Fourmette plays, running back, has the second shortest average career span, at only two and a half years. Rob Arthur, *The Shrinking Shelf Life of NFL Players*, WALL ST. J., <http://www.wsj.com/articles/the-shrinking-shelf-life-of-nfl-players-1456694959> (last updated Feb. 29, 2016, 12:42 AM).

285. See Florio, *supra* note 271.

286. See *id.*

287. *Id.*

288. See NCAA RESEARCH, *supra* note 1.

marketable skills that will benefit them in their professional careers.²⁸⁹ In *Denver Rockets*, the court stated, “[p]rofessional basketball is the only trade in which Haywood can employ his unusual talents and skills. Unless Haywood plays professional basketball, those skills and talents will depreciate.”²⁹⁰ Taking the same approach in regards to football players, professional football is the only trade in which players can employ their talents and skills.²⁹¹ Though some players have no desire to obtain a college education, the NFL sees fit to force it upon them—possibly depreciating a players’ talent and worth at that players’ expense.²⁹² Unlike other careers, where certain skills transcend across a variety of jobs giving an individual several options to establish a career path, the unique skill of a football player is forced down the same beaten path.²⁹³ Even in other professional sports, players are afforded various options into the labor market.²⁹⁴ This liberty would certainly help improve the amateur image that the NCAA tries so vehemently to uphold because athletes would be given a true choice to attend school for the benefit of an education rather than begin their professional careers.²⁹⁵

It is unfortunate that arguably the most violent sport is controlled by two entities that continually exploit the skills of football players.²⁹⁶ It is almost a guarantee that a football player will suffer some type of injury prior to embarking on their professional career.²⁹⁷ The limits placed on these individuals ensures that both the NCAA and NFL can milk a player for six or seven years of labor while only paying compensation, at an equitable rate,²⁹⁸ for half that time.²⁹⁹ The NFL gets a player that is possibly already in their

289. See Florio, *supra* note 271.

290. *Denver Rockets v. All-Pro Mgmt., Inc.*, 325 F. Supp. 1049, 1053 (C.D. Cal. 1971).

291. See Glauber, *supra* note 95.

292. Thamel, *supra* note 6, at 42.

293. See Clarett v. Nat’l Football League, 306 F. Supp. 2d 379, 382 (S.D.N.Y. 2004); Glauber, *supra* note 95.

294. *MLB Draft Rules*, *supra* note 7. A baseball prospect can turn professional immediately after graduating from high school or after their junior college season. *Id.* If prospects elect to go to junior or community college, they can declare for the draft regardless of time spent in school. *Id.* Basketball prospects can play a season overseas to avoid college and immediately turn professional once graduating high school. See Thamel, *supra* note 6.

295. Thamel, *supra* note 6; see also Roberts, *supra* note 274.

296. See Viera, *supra* note 20, at D1.

297. See *id.*

298. See Soffian, *supra* note 33; Underwood, *supra* note 1, at 24. Until 2015, a majority of school scholarships were year-to-year and renewable at the school’s discretion. Soffian, *supra* note 33. Ironically, the athlete’s performance on the field could determine whether he remained a student. *Id.*

299. Underwood, *supra* note 1, at 24.

prime without spending a dime to develop them, while the NCAA just milked that *cash cow* and maybe did not even have to pay for a fourth year of schooling.³⁰⁰ The average NFL career span shows the sacredness of every snap in a player's career—meaning that a lot of players may not be able to maximize their earnings because the NFL would of course devalue them as *damaged goods*.³⁰¹ Yes, there are superstar football players being paid boatloads of cash, but there are only a few of these players on every team roster.³⁰² For a majority, lasting past their rookie contract is a blessing and they are willing to take what a NFL team deems is their value.³⁰³ Older players commanding a higher *veteran minimum* salary are essentially ushered out of the league because they are considered to have too much *wear and tear* on their bodies.³⁰⁴ It is a tragedy to limit these players' talents as their value diminishes with each hit.³⁰⁵

Pending the conclusion of *O'Bannon*, the NCAA's amateurism rules may receive another chink in its armor.³⁰⁶ However, hopes are that this Comment has displayed the collusive practices that the NCAA and NFL have engaged in to effectively control the labor market for all football players' services.³⁰⁷ The NFL and NCAA have a symbiotic relationship in that the League's eligibility rule provides a steady flow of talent to colleges—whom fatten their wallets from this talent—while colleges provide the best developed talent at no cost to the league.³⁰⁸ Forget the *Fail Mary* or the *Immaculate Reception*, this arrangement between the NCAA and NFL is the biggest logic-defying play in the sport's history.³⁰⁹ There's just one problem: There is a flag.³¹⁰

300. *See id.*

301. *See* Gaines, *supra* note 215; Schwartz, *supra* note 12.

302. *See* Gaines, *supra* note 215; Schwartz, *supra* note 12.

303. *See* Gaines, *supra* note 215; Schwartz, *supra* note 12.

304. Brandt, *supra* note 215.

305. *See* Breslow, *supra* note 16.

306. *See* *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1062–63 (9th Cir. 2015), *cert. denied*, 85 U.S.L.W. 3139 (Oct. 3, 2016).

307. *Id.*; Clarett v. Nat'l Football League, 306 F. Supp. 2d 379, 408–09 (S.D.N.Y. 2004); Janofsky, *supra* note 135.

308. *See* Clarett, 306 F. Supp. 2d at 409; Underwood, *supra* note 1, at 22.

309. John McTigue, *MNF Moments, No. 1: The Fail Mary*, ESPN.COM (Sept. 8, 2014), http://www.espn.go.com/blog/nflnation/post/_id/138835/mnf-moments-no-1-the-fail-mary; *see also* Gary Meyers, *Top 10 Greatest Plays in NFL History: From the Immaculate Reception to John Elway's Helicopter Ride*, N.Y. DAILY NEWS (Sept. 9 2015, 8:51 PM), <http://www.nydailynews.com/sports/football/top-10-greatest-plays-nfl-history-article-1.2354371>. During a brief NFL referee lockout, a replacement referee notoriously incorrectly declared an interception a touchdown to give the Seattle Seahawks an improbable win over the Green Bay Packers. McTigue, *supra*.

Just [twenty-two] seconds remained and [the Steelers] trailed the Raiders 7–6 in the divisional round of the playoffs. Steelers owner Art Rooney was already on his