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NOTES

SPENDTHRIFT TRUST: AN ALTERNATIVE TO THE NBA AGE RULE

SUSAN MCALEAVEY†

INTRODUCTION

Brandon Jennings, one of the top point guards in the draft class of 2008,¹ had to put his dream of playing in the National Basketball Association (“NBA”) aside this past year. The million dollar contract that Jennings had prayed would bring him and his family out of the impoverished and crime infested city of Compton, California² would have to wait at least one year because of the NBA Age Rule. Through this rule, which requires that a player be at least nineteen years of age and one year removed from when the player graduated or would have graduated from high school,³ the NBA has determined that this 6'1", 170-pound athlete,⁴ who clearly dominated high school basketball, lacked the maturity necessary to compete in the NBA.⁵ Try telling that to Lebron James, Kobe Bryant, Kevin Garnett, or Tracy McGrady, four NBA superstars who, prior to the NBA Age Rule, made the jump into the NBA directly from

¹ Articles Editor, St. John’s Law Review; J.D. Candidate, 2010, St. John’s University School of Law; B.S., 2007, Vanderbilt University.

² Matthew Wells, LA Suburb Sees Murder Rates Soar, BBC NEWS, Mar. 16, 2006, http://news.bbc.co.uk/1/hi/world/americas/4787252.stm (identifying Compton as a place where “[y]ou have to watch your back all the time” for fear of drive-bys and random shootings).

³ NBA Collective Bargaining Agreement, art. X, § 1(b)(i) (July 2005), available at http://www nbpa.org/sites/default/files/ARTICLE%20X.pdf [hereinafter CBA]. This CBA will expire in 2011; at that time, the parties will renegotiate the terms of the agreement. Id. § 2.


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high school. Yet, unlike other high school superstars who felt coerced into attending college, Jennings sacrificed his collegiate eligibility to play professionally in Europe where, unlike in the National Collegiate Athletic Association ("NCAA"), he can actually receive proceeds from his jersey sales and expects to earn the equivalent of a $500,000 salary. Jennings represents the beginning of a possible trend of players leaving the NBA to play in international leagues as a means of escaping the shackles of the NBA Age Rule.

Although intended to protect young athletes from their own inexperience and the pressures of professional sports, the NBA Age Rule fails to achieve this policy goal. Taking effect in the 2006 NBA Draft, the NBA Age Rule raised the minimum age for Draft eligibility from eighteen to nineteen. Effectively, the rule bars players from entering the NBA directly out of high school. Consequently, the NBA Age Rule withholds economic opportunity and stunts career development for the nation's most promising high school basketball players. Thus, the NBA Age Rule has become nothing more than a creature of paternalism and cognitive bias based on the unfounded view that high school players' immaturity renders them incapable of surviving in the NBA. Unfortunately, the NBA and the National Basketball Players Association ("NBPA") seem quite content to force these athletes down a path that they would rather not take.

This Note argues that the NBA Age Rule has created a problem for which a legal solution exists: the adoption of a spendthrift trust system. The NBA Age Rule fails to achieve the NBA's goal of protecting amateur players. Instead, it merely

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9 See Cohen, supra note 7.

10 CBA, supra note 3.
limits potential and growth for both the NBA and aspiring players. Part I details the history and rationale behind the NBA Age Rule. Part II analyzes the inefficiency of the NBA Age Rule and demonstrates how the NBA Age Rule unfairly denies amateur players the opportunity to play in the NBA. Part III outlines a spendthrift trust system that would permit high school players to enter the NBA Draft directly out of high school and would alleviate the NBA's policy concerns.

I. THE NBA AGE RULE

A. History of the NBA Age Rule

The NBA was established in 1949 and consists of thirty privately owned basketball teams. In 1954, the NBPA formed as a union to exclusively represent the NBA players' interests. Working in concert, these two organizations established a collective bargaining agreement ("CBA") that governs the terms of player employment and eligibility for each team in the league.

Early on, these two groups abided by a rule that prevented an athlete from being drafted until four years after he had graduated from high school. Spencer Haywood, a nineteen-year-old Olympian from an impoverished background, successfully challenged this rule in the Supreme Court in 1971. There, Haywood had signed a contract with an NBA team after his second year of college—when he was ineligible for the NBA

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13 See McCann, supra note 11 (discussing how NBA players tried to improve their earning potential).
14 See Rodenberg, supra note 6, at 14.
15 Section 2.05 of the NBA Bylaws stated: “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 his original high school class has been graduated...” Denver Rockets v. All-Pro Mgmt., Inc., 325 F. Supp. 1049, 1054 (C.D. Cal. 1971); see also Jayda Evans, A Long Rise Back for Spencer Haywood, SEATTLE TIMES, Feb. 25, 2007, available at http://seattletimes.nwsource.com/html/sports/2003588104_haywood250.html.
16 See Haywood v. Nat'l Basketball Ass'n, 401 U.S. 1204, 1204–05 (1971) (reinstating Haywood's injunction against the NBA, allowing him to continue playing for his team and forbidding the NBA from imposing sanctions).
Draft. The NBA threatened to disallow the contract, and Haywood brought suit on the grounds that the rule violated the Sherman Act’s prohibition on contracts or combinations that unreasonably restrain competition. To succeed on this claim, Haywood had to establish: (1) a contract, combination, or conspiracy; (2) the contract, combination, or conspiracy produced a restraint of trade; and (3) the restraint affected trade or commerce among the several states.

Alternatively, Haywood could prove per se illegality and bypass this inquiry. Some agreements and practices have such a “pernicious” effect on competition that they are conclusively presumed to be unreasonable, and therefore, illegal without the elaborate analysis as to the precise harm. This principle of per se illegality applies to practices such as price fixing, division of markets, group boycotts, and tying arrangements.

Following the Haywood analysis, the District Court of California in Denver Rockets v. All-Pro Management Inc. found that the eligibility rule represented an illegal group boycott, constituting a per se violation of the Sherman Act. The district court in granting the injunction, noted that “the rule[] in question [was] absolute and prohibit[ed] the signing of not only college players but also those who did or could not attend college and even those who lack the mental and financial ability to do so.” This direct refusal to deal with actors at a specific level of trade amounted to a group boycott. Because of the “Early Entry

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17 See Denver Rockets, 325 F. Supp. at 1060. Haywood was able to enter the league through a “hardship rule” due to the fact that he was one of ten children from a poor family. See Evans, supra note 15.
18 See Haywood, 401 U.S. at 1205 (explaining how Haywood commenced an antitrust action against the NBA, claiming that its actions against him were a per se violation of the Sherman Act); see also Denver Rockets, 325 F. Supp. at 1060 (noting the Supreme Court’s position that all professional sports, with the exception of baseball, are governed by antitrust laws).
22 Id.
24 McCann, supra note 11, at 218.
Rule's discriminatory nature and its impact on trade and commerce in the several states, the court invalidated the rule.\textsuperscript{26}

In response to this ruling, the NBA created a new rule, "the 'hardship rule,' which allowed players who suffered from 'severe economic hardship' to be drafted prior to the four year anniversary of their high school class graduation."\textsuperscript{27} Because the NBA viewed economic hardship liberally, any player who claimed hardship earned eligibility, and the rule became meaningless.\textsuperscript{28} Thus, in \textit{Haywood}, the Court essentially opened the door for young players to enter the NBA Draft.

Due to the liberal application of the "hardship rule," the NBA abandoned this rule five years after the \textit{Haywood} ruling.\textsuperscript{29} In its place, the NBA adopted the "Early Entry Process." This process declared that any amateur player may forfeit his collegiate eligibility and enter the NBA Draft provided that his high school class has graduated and he has made his declaration within forty-five days of the Draft.\textsuperscript{30} Essentially, this opened the NBA Draft to seventeen-year-old players. From 1949 to 1994, only two players entered the NBA directly from high school.\textsuperscript{31} In 1995, however, the entrance and success of "prep-to-pro" star Kevin Garnett triggered a new trend of "prep-to-pro" players.\textsuperscript{32} Thirty-six high school players entered the NBA Draft from 1995 to 2004, an average of nearly than four players year.\textsuperscript{33}

Concerned with the influx of high school players to the NBA Draft, Commissioner of the NBA David Stern proposed increasing the eligibility rule from eighteen to twenty.\textsuperscript{34} In their July 2005 collective bargaining negotiations, the NBA and NBPA promulgated the current minimum age eligibility rule. The current NBA Age Rule restricts NBA Draft eligibility to those who, by December 31 of the year of the Draft: (1) are at least nineteen years old; and (2) have had at least one NBA season pass between high school graduation or what would have been

\textsuperscript{26} See id. at 1066–67.
\textsuperscript{27} McCann, supra note 11, at 218.
\textsuperscript{28} Id.
\textsuperscript{29} See id. at 218–19.
\textsuperscript{30} Id. at 219.
\textsuperscript{31} McCann, supra note 8, at 832.
\textsuperscript{32} Id.
\textsuperscript{33} Id.
\textsuperscript{34} See Greg Sandoval, \textit{NBA Wants a Minimum Age of 20}, WASH. POST, Mar. 26, 2004, at D04.
Consequently, amateur players can no longer make the jump from high school into the NBA. This rule has forced stars like Greg Oden and Kevin Durant, both of whom could have competed in the NBA earlier than they did, to defer to college for one year before entering the Draft.

**B. Rationale of the NBA Age Rule**

Paternalism and cognitive bias—a tendency to draw incorrect conclusions based on cognitive factors rather than substantiated evidence—encompass the principal rationales of the NBA Age Rule. The NBA primarily justifies the NBA Age Rule as a means of providing amateur athletes with the "life experience" imparted from college that is necessary to handle the pressures of life in the NBA. NBA Commissioner David Stern believes that the rule "allow[s] [the] kids another reason to have another year or two to grow, to deal with the stress, the discipline and, really, the life experience that would be helpful" in the NBA. This one year of college is believed to transform immature adolescents into experienced adults.

This bias arises from the widely shared, yet unfounded, belief that because of their immaturity, "young NBA players are especially susceptible to nefarious influences" and will "get in trouble." Proponents of the NBA Age Rule fear that without college, players "skip[] the basic foundation they need to take advantage of."
care of themselves and their families for the rest of their lives."\textsuperscript{42}
Consequently, players "make poor decisions that reflect badly on the league and hurt its bottom line."\textsuperscript{43}

In addition to protecting players from themselves, advocates of the NBA Age Rule argue that it protects high school players from those who may prey upon their naiveté. For example, the NBA Age Rule protects players against the opportunistic agent who may provide poor advice and consequently sacrifice the player's NCAA eligibility.\textsuperscript{44} It also limits the damage that can result from "the injustice... where we make every kid believe they too can have The Dream."\textsuperscript{45} Whether this push comes from parents, coaches, or scouts. This philosophy paternalistically attempts to save players from potential failure. Therefore, supporters of the NBA Age Rule defend the rule as a means of protecting the player against himself and from others.

Although intended primarily as a means of protecting the young players, the NBA Age Rule provides less publicized benefits for the NBA. Whereas prior to the rule, the NBA committed resources to scouting high school players, NBA teams now have at least one more year to observe players in "a de facto and free minor-league" college system.\textsuperscript{46} Thus, the NBA Age Rule removes the risk inherent in drafting and developing high school players and better enables the teams to select players wisely.\textsuperscript{47} When players are drafted from college, they are also more recognizable based on exposure in the NCAA. These players' reputations and promise likely draw more fans to the NBA. Given the NBA Age Rule's admirable goal to protect


\textsuperscript{43} Michael Cunningham, \textit{The Fountain of Youth; Twolves Trailblazer Garnett Best Argument for No Age Limit}, SUN-SENTINEL (Fort Lauderdale, Fla.), Mar. 10, 2005, at 1C (paraphrasing David Stern).

\textsuperscript{44} See McCann, supra note 11, at 188.

\textsuperscript{45} Bryan Burwell, \textit{Tiger Lives the Dream; McDavid Lives Nightmare}, USA TODAY, Aug. 29, 1996, at 12C (quoting Sharon Shields, professor of human development at Vanderbilt University).


\textsuperscript{47} See Mark Berman, \textit{Face to Face with NBA Boss}, ROANOKE TIMES, July 6, 2005, at C4.
players and the benefits it confers on the league, one can understand how the NBA supports the Age Rule. This, however, is not the optimal solution.

II. A CRITIQUE OF THE NBA AGE RULE

A. Inefficiencies of the NBA Age Rule

Although the NBA portrays the NBA Age Rule as a necessary protection for amateur players, the rule fails to achieve its policy goals and simultaneously limits player potential and growth while harming the league’s bottom line. First, a player’s option to pursue college after a multi-million dollar career in the NBA curtails the NBA Age Rule’s driving incentive to attend college. Second, the growth and success of international leagues serve as a promising alternative to college and the NBA. Unlike American sports leagues such as the NFL, which maintain a monopoly in the sport, the NBA faces competition from overseas leagues in both their level of play and their currency. As the dollar weakens and players impatiently await their chance at the NBA, international leagues become more appealing. This transition of basketball stars to international leagues will likely have a detrimental financial impact on the NBA as players cause fan support to shift to other leagues and profits decrease.

Even when players yield to the NBA’s push to attend college, the NBA’s policy goals still fail. Contrary to the NBA’s claim, players do not gain valuable life experience from playing one year at the college level. Although many students do mature in college, it is important to distinguish the lifestyle

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48 For example, Bill Willoughby, who was selected by the Atlanta Hawks in the 1975 NBA Draft, earned his college education at the age of forty-four. McCann, supra note 11, at 146, 175.

49 Compare Cohen, supra note 7, with Brian Lewis, A New Galaxy: Beckham’s Impact Felt Around MLS, N.Y. POST, July 18, 2008, available at http://www.nypost.com/seven/07182008/sports/soccer/a_new_galaxy_120406.htm (noting that European soccer player David Beckham’s decision to play for the L.A. Galaxy in the MLS after a career with world-renowned Real Madrid increased the Galaxy’s revenue by thirteen million dollars in his first year with the team).

50 See Cohen, supra note 7.

51 Id. (noting that because of the exchange rate, international players that are eligible for the NBA are passing on the NBA and signing long-term deals in Europe). Retention of these strong foreign players further entices high school players to consider these leagues as a competitive alternative to the NBA.
of a student athlete as compared to the typical student. In addition to maintaining the typical class schedule, Division I athletes spend between forty and fifty hours a week practicing, lifting weights, traveling, playing games, and attending team activities. Thus, unlike the typical student, athletes do not have much free time to experience college and ascertain the general life experience that the NBA promotes. Nor do athletes necessarily benefit from the academic learning experience. Many star players recognize that they are in college for only one year and thus only need to meet GPA requirements for one semester to sustain eligibility for the full year. That “the system doesn’t even require an NBA-bound player to make believe he’s a student” minimizes the NBA’s paternalistic argument. Duke University coach Mike Kryzewski proposes having college-bound players sign an agreement to stay in college for at least two years as a solution to this problem. Another year of forcing players to play the waiting game, however, will not cure this situation. It will merely add more of something that has little value to the players and will lead to potential unrest among players and coaches.

The cognitive bias that players who jump from high school to the NBA get in trouble also lacks merit. NBA players who did not attend college represent a disproportionately low percentage of troublesome players. These “prep-to-pro” players are also

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52 Division I is the NCAA’s most competitive and prestigious collegiate athletic program offered within the United States. To qualify as a Division I school, a university must sponsor at least seven sports for men and seven for women (or six for men and eight for women) with two team sports for each gender. In basketball, the team must play all but two games against Division I competition. NCAA.org, What’s the Difference Between Divisions I, II, and III?, http://www.ncaa.org/wps/ncaa?key=/ncaa/ncaalabout+the+ncaa/membership/div_criteria.html (last visited Mar. 17, 2010).

53 McCann, supra note 8, at 835 (citing Michael Wilbon, Graduation Rates Deceive, WASH. POST, Mar. 28, 2002, at D1).

54 See Bob Molinaro, College Hoops Suffers When Young Stars Leave So Soon, VIRGINIAN-PILOT, Feb. 20, 2008, at C1. Because the NCAA basketball season begins in November and concludes in March, only the first semester’s grades affect a freshman’s status for his first season of play.

55 See id.


57 McCann, supra note 8, at 834. Forty-one percent of American players attended four years of college and eight percent did not attend college. Of the NBA
consistently praised for their community service and social contributions.8 Yet even if this bias were grounded in truth, the NBA Age Rule fails to protect high school players from the nefarious activities associated with an NBA lifestyle. College athletes are prone to a maladaptive lifestyle and health-risk behaviors including, but not limited to: physical fights, multiple sexual partners, frequent unsafe sexual practices, use of anabolic steroids, excessive use of alcohol, and drunk driving.59 Surrounded by peers who frequently engage in these activities, student athletes are more likely to engage in these activities.

Nor does the NBA Age Rule protect players from manipulative agents or others who may prey on players' naiveté. Given that agents receive an average commission of only four percent, the NBA overestimates an agent's motive to provide bad advice to marginal players.60 Yet in the rare case of an "evil agent," the NBA Age Rule merely transitions agent focus from high school to college. Whereas before, agents would span the country in search of individual talent at thousands of high schools, the NBA Age Rule centralizes this process, making it even easier for manipulative agents to prey on athletes at the top Division I basketball programs.

Lastly, the concern that some athletes may never achieve "the Dream" does not validate removing this opportunity from all players. As shown from the success of LeBron James and Kevin Garnett, "the Dream" is possible. High school players have fared well in past NBA Drafts because they knew they would do well—otherwise they would not have declared.61 Even if high school players do not reach superstar status, they rarely fail. For players arrested, fifty-seven percent attended four years of college and only five percent did not. Id.
example, Korleone Young, a 1998 selection and the most popular high school "failure," earned $289,750 playing in the NBA and now earns between $50,000 and $100,000 per year playing abroad.\textsuperscript{62} Compared with the average household income in the United States—$50,740 in 2007\textsuperscript{63}—this does not seem like failure. In conclusion, because the rationales that purport to protect the players lack merit, the NBA Age Rule fails to achieve its goals.

B. The NBA Age Rule as a Mechanism for Injustice

The NBA is a professional organization that should strive for a market-driven result in order to compete and maximize earnings. This requires hiring the most talented individuals in the sport, regardless of age. The NBA, however, has chosen to prohibit some of the most talented players from the NBA solely because of their age. In doing so, the NBA not only relinquishes profits, but also limits players' autonomy and unfairly denies them a life-changing opportunity.

The NBA Age Rule deprives high school athletes of an economic opportunity. Players who enter the NBA instead of choosing college may earn as much as $100 million more over the course of their careers than players who earn a college degree.\textsuperscript{64} By entering the league at an early age, a player "pay[s] his dues" and experiences the limitations of the rookie salary cap earlier in his career.\textsuperscript{65} Accordingly, he qualifies for free agent status\textsuperscript{66} at an

\textsuperscript{62} Id. at 180.
\textsuperscript{64} McCann, supra note 11, at 115.
\textsuperscript{65} Id. at 169 (demonstrating that a younger player has a better negotiating position than an older player whose career is closer to completion). The rookie salary cap assigns salaries to individual players according to their draft position for a three-year term with a team option for a fourth season. See id. at 124–25. A team option consists of a qualifying offer of the Rookie-scale amount given to the player to retain him with the team. See id. at 125.
\textsuperscript{66} Pursuant to the CBA

(i) an Unrestricted Free Agent is free at any time beginning on the first day of the Moratorium Period to negotiate, and free at any time after the last day of the Moratorium Period to enter into, a Player Contract with any Team; and

(ii) a Restricted Free Agent is free at any time beginning on the first day of the Moratorium Period to negotiate a Player Contract with his Prior Team and to negotiate an Offer Sheet (as defined in Section 5(b) below) with any Team other than his Prior Team, and is free at any time after the last day
earlier age and may negotiate a more favorable contract. Consequently, the average salary of an NBA player starting out of high school exceeds the league average. Given that an NBA player reaches his prime at the young age of twenty-seven, every year of NBA play is crucial to a player's overall earnings. This earning potential increases the opportunity cost of attending college and makes the NBA the better alternative and the rational choice. The NBA Age Rule, however, deprives a high school player of making the rational decision to enter the NBA directly out of high school, substantially curtailing his overall earnings. Moreover, the NBA Age Rule tends to affect players, like Brandon Jennings, who come from impoverished and crime-infested inner cities. Thus, denial of this economic opportunity inhibits an athlete’s career development, but it also robs him and his family of the opportunity to escape poverty and crime.

Though the NBA Age Rule serves as a barrier for high school athletes, it permits NBA teams to act opportunistically. Barring players from entering the Draft for a minimum of one year following high school gives the NBA an extra year to critique the player. Although players are only one season removed from high school, scouts hold them to a higher standard, endangering the athlete’s potential worth. Withholding the player from the NBA also shifts the risk of potential injury to the player. Instead of rationally placing this risk on the deep pockets of the NBA, the rule forces the player to bear this burden. Although a successful college career may increase a player's worth, the player should have the ultimate decision-making power to decide whether he wants to take this risk.


67 See McCann, supra note 11, at 169–72.
68 Id. at 166.
69 Id. at 170 (noting that the average NBA career lasts only five seasons).
70 See id. at 216–17.
71 See Greg Wallace, NBA Drain a Pain, CHATTANOOGA TIMES, Dec. 13, 2001, at D1 (highlighting the poverty of Kwame Brown and his family as the motivating factor for his declaration for the NBA Draft); Michael Wilbon, Steve Wyche & Josh Barr, Stern Wants Age Limit; NBA Commissioner Says He'll Work with Union, WASH. POST, June 14, 1999, at D1.
72 See McCann, supra note 11, at 177 (“NBA teams expect college players to make an immediate impact, whereas high school players are viewed more as developmental players.”).
Although the NBA Age Rule targets high school stars who would enter the Draft, the rule also interferes with the opportunities of players who desire to play NCAA college basketball. Unlike high school stars who view college as a roadblock to the NBA, some players value the opportunity of earning a college education and playing four years of NCAA basketball. Forcing stars to attend at least one year of college, however, diverts scholarship funds away from these players who value the education.

C. Challenging the NBA Age Rule

Unfortunately no outlet exists for either the stars or college-bound players to defend their interests. As outside parties to the CBA, amateur athletes have no influence in promulgating the NBA eligibility rules. Because so few high school players choose to jump directly into the NBA Draft from high school, these players have little influence as a class to affect the interests of the NBPA. Furthermore, veteran players, who are past their prime but are represented by the NBPA, counter the amateur players’ voice and support the rule’s constraint on young competition for fear of losing their jobs. Nor, as demonstrated below, do these athletes have a viable legal challenge to the NBA Age Rule.

A challenge to the NBA Age Rule on either antitrust or labor law grounds will likely fail. In 2004, the Second Circuit foreshadowed this result through its holding in Clarett v. National Football League. There, an Ohio State sophomore football player challenged an NFL rule preventing amateur players from participating in the NFL Draft until three years after their high school graduation. The player argued that the eligibility rule qualified as “an unreasonable restraint upon the market for players’ services”—a violation of Sherman antitrust laws. The Second Circuit on de novo review reversed the district court’s finding that the eligibility rule violated antitrust

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74 See supra text accompanying note 31.
76 Id. at 124.
77 Id. at 125–26.
78 Id. at 134.
laws. Unlike the eligibility rule in *Haywood* that did not result from collective bargaining, the court determined that the eligibility rule constituted a mandatory bargaining subject and was thus reserved to the NFL and players’ union’s representative to negotiate. Further, because the rule resulted from a collective bargaining relationship that federal labor law provides for and promotes, the rule did not violate antitrust laws.

Although the Second Circuit conceded that the rule may “work a hardship on prospective” players, this did not render the rule impermissible. In the context of collective bargaining, a sports organization and its players’ union can agree not to consider an individual for employment for “nearly any reason whatsoever,” provided it does not violate federal laws. Particularly in sports, federal labor law recognizes and encourages the advantage of allowing the teams to bargain with the union to establish a uniform system of rules in order to successfully operate the league. Therefore, the Second Circuit upheld the NFL eligibility rule, recognizing that although the rule may exclude some potential employees, it did not “subvert fundamental principles of our federal labor policy.”

Ten years prior to *Clarett*, the court in *Wood v. National Basketball Ass’n* protected the NBA Draft from antitrust attack, provided the draft rule resulted from collective bargaining. There, the court rejected a drafted college basketball player’s argument that the NBA Draft violated antitrust laws as “an

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79 Id. at 130.
80 Id. at 139–40 (holding that eligibility rules are a mandatory bargaining subject because they have tangible effects on the wages and working conditions of current NFL players); cf. *Haywood v. Nat’l Basketball Ass’n*, 401 U.S. 1204, 1204–07 (1971) (staying an injunction against enforcement of the NBA eligibility rule, which allowed the plaintiff to play for an NBA franchise since the NBA was not exempt from antitrust laws, and the eligibility rule was akin to a group boycott).
81 *Clarett*, 369 F.3d at 130 (demonstrating support for policy that favors free and private collective bargaining made in good faith over wages, hours, and working conditions).
82 Id. at 140.
83 Id. at 141.
84 See id. at 136 (citing Nat’l Basketball Ass’n v. Williams, 45 F.3d 684, 689 (2d Cir. 1995)).
85 Id. at 135 (quoting Wood v. Nat’l Basketball Ass’n, 809 F.2d 954, 959 (2d Cir. 1987)) (stating that to hold otherwise would undermine “the congressional policy favoring collective bargaining, the bargaining parties’ freedom of contract, and the widespread use of multi-employer bargaining units”) (internal quotations omitted).
86 602 F. Supp. 525 (S.D.N.Y. 1984), aff’d, 809 F.2d 954 (2d Cir. 1987).
agreement among horizontal competitors, the NBA teams, to eliminate competition for the services of college basketball players. Because the Draft resulted from collective bargaining negotiations, the court upheld the NBA Draft and its ability to affect amateur players or "employees outside the bargaining unit."

A challenge to the NBA Age Rule will likely mirror these two decisions. The NBA Age Rule, like the NFL eligibility rule in Clarett, is the product of a collective bargaining agreement that prevents amateur players from partaking in the Draft for a set time period after high school. As shown in Clarett, an age eligibility rule is a proper subject of collective bargaining. Like the eligibility rules in both Clarett and Wood, the NBA Age Rule is the product of a collective bargaining agreement between the players’ union and the sports organization that is promoted by federal labor law and supported by the courts. The NBA, however, has an even stronger defense than the NFL had in Clarett because the NBA Age Rule, unlike the NFL rule, is memorialized in writing. The NBA also has a secondary defense that "the antitrust laws were passed for the protection of competition, not [individual] competitors." Furthermore, because the NBA Age Rule represents part of the system of rules that contributes to the operation of a sports league, a court will likely uphold the NBA Age Rule. Thus, as shown in Wood, it does not matter that an individual athlete may experience hardship because of the rule or that the collective bargaining system excludes the individual’s class. Therefore, in light of Clarett and Wood, the NBA Age Rule is likely insulated from an antitrust or labor law challenge.

In conclusion, given the unlikelihood of a successful challenge to the NBA Age Rule and the failure of the NBA to accomplish its policy goals, it is in the best interest of both the players and the NBA to consider alternative solutions.

87 Id. at 958.
88 Id. at 960.
90 See supra notes 79–80 and accompanying text.
91 See supra note 6, at 16.
III. THE NBA TRUST SOLUTION

The NBA Age Rule fails to effectively protect young players. The eligibility rule denies qualified high school superstars the opportunity to make the economically rational choice to play in the NBA as well as the experience of competing at the sport's highest level. The NBA similarly loses as players like Brandon Jennings turn to international leagues, and those coerced into attending only one year of college fail to gain worthy life experience because they are playing the waiting game. This Part proposes that the NBA and NBPA adopt a trust system through which the NBA appoints a trustee to maintain a portion of a high school athlete's earnings, solving the inefficiencies of the NBA Age Rule and enabling qualified athletes to play at the highest level.

A. Trusts as a Means of Protection

Dating back to antiquity, the trust has been considered the crowning achievement of Anglo-American law.\(^\text{93}\) A trust represents the most flexible method to control and dispose of property, limited only by the imagination of its creator.\(^\text{94}\) A trust consists of an arrangement where one person manages property for the benefit of another.\(^\text{95}\) The settlor of a trust may decide the term length for which to hold the property, how to manage and disperse the assets, and the conditions that must precede disbursement.\(^\text{96}\)

Section 402 of the Uniform Trust Code establishes five requirements for the creation of a trust. It provides that a trust may arise if: "(1) the settlor has [the] capacity to create a trust; (2) the settlor indicates an [objective intention] to create the

\(^{93}\) See, e.g., GEORGE M. TURNER, IRREVOCABLE TRUSTS § 2.2 (3d ed. 1996) ("One of the more prominent and celebrated legal scholars of the early twentieth century described trusts as the 'greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence.'") (quoting 3 FREDERICK WILLIAM MAITLAND, The Unincorporate Body, in COLLECTED PAPERS 271, 272 (H. A. L. Fisher ed., Cambridge Univ. Press 1911)).

\(^{94}\) See RESTATEMENT (SECOND) OF TRUSTS, Introductory Note (1959) (noting that flexibility is one of the most important characteristics of a trust); see also 1 AUSTIN W. SCOTT & WILLIAM F. FRATCHER, THE LAW OF TRUSTS 2 (4th ed. 1987) (stating that trust purposes are "as unlimited as the imagination of lawyers").

\(^{95}\) See RESTATEMENT (SECOND) OF TRUSTS, Introductory Note.

\(^{96}\) See Matthew F. Jones, The Other Family Tree: Leaving Your Legacy in a Private Foundation, 63 ALB. L. REV. 567, 570 & n.23 (1999).
trust; (3) the trust has a definite beneficiary . . . ; (4) the trustee has duties to perform; and (5) the same person is not the sole trustee and sole beneficiary. 97 Fulfillment of these requirements gives rise to a legal entity in which a trustee holds and disperses property as the fiduciary for the benefit of another. 98 The flexibility of these requirements allows the creator to deal with actual or potential beneficiary problems, including maturity, spendthrift, and capacity concerns. 99

In particular, spendthrift trusts serve the “express purpose of protecting the beneficiary from want and inconvenience by reason of the vicissitudes of life.” 100 A spendthrift trust permits the settlor to provide the trustee with detailed instructions that qualify the terms upon which the beneficiary may receive income and principal, based upon the settlor’s determination of need. 101 The settlor may mandate that the trustee distribute a specific percentage or amount of income at set intervals and/or provide for payment of particularized items that the settlor considers legitimate (for example, rent and utility bills). 102 Unless limited by statute, 103 any person may qualify as the beneficiary of a spendthrift trust. 104 Similarly, a spendthrift trust can validly protect any amount of income. 105 Both of these provisions exist independent of reference to need, the relationship to the settlor, or one’s ability to look and care for one’s business affairs or

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97 UNIF. TRUST CODE § 402(a) (2006).
98 See RESTATEMENT (SECOND) OF TRUSTS § 2 (defining a trust as “a fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it”).
100 Id. at 157.
102 See, e.g., id.
103 Although, virtually all trusts are automatically made spendthrift by statute.
104 Id.
105 Id.
These characteristics allow the settlor to protect trust assets from a beneficiary's own "improvidence" or incapacity for self-protection.107

Spendthrift trusts provide further protection by prohibiting assignment and alienation.108 Thus, the beneficiary may not transfer his interest, and the beneficiary's creditors may not reach the interest or a distribution by the trustee before its receipt by the beneficiary.109 This protects the beneficiary's right to receive income and also his right to receive principal in the future.110 Therefore, this trust system safeguards the principal as the settlor intends, and the beneficiary receives that which he bargained for on the face of the instrument.111

Spendthrift trusts are virtually indestructible—courts will only invalidate them if they violate law or public policy.112 Given the trust's ability to "provide against the improvidence or misfortune of the beneficiary," courts have never found that a spendthrift trust violated public policy.113 Yet courts will only invalidate a spendthrift trust if it violates law or public policy.114 Although state after state adopted spendthrift trusts,115 opponents raise the concern that these funds defraud creditors.116

106 Id.
107 Nichols v. Eaton, 91 U.S. 716, 727 (1875); see also Bennett v. Bennett, 75 N.E. 339, 341 (II. 1905).
109 UNIF. TRUST CODE § 502(c). Spendthrift trusts also have the benefit of remaining effective in bankruptcy. WAGGONER ET AL., supra note 103, at 14-10 (citing 11 U.S.C. § 541(c)(2) (2006)) (explaining that a restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under the Bankruptcy Code). But see Adam J. Hirsch, Spendthrift Trusts and Public Policy: Economic and Cognitive Perspectives, 73 WASH. U. L.Q. 1, 77 (1995) (listing exemption claims that may reach the trust).
111 Id. at 174, 250 N.E.2d at 348-49, 303 N.Y.S.2d at 69-70.
113 Broadway Nat'l Bank v. Adams, 133 Mass. 170, 173 (1882) (stating that a trust that defrauds creditors, such as a self-settled trust, would violate public policy); see also RESTATEMENT (THIRD) OF TRUSTS § 58 & cmt. a (2003).
114 Broadway, 133 Mass. at 173 (holding that a trust that limited beneficiary's right to semiannual income from the fund did not violate public policy).
115 See WAGGONER ET AL., supra note 103, at 14-7 (quoting JOHN CHIPMAN GRAY, RESTRAINTS ON THE ALIENATION OF PROPERTY, at iv-v (2d ed. 1895)).
116 Broadway, 133 Mass. at 173.
Creditors, however, have no right to rely on property held in a spendthrift trust because the trust declares this money inalienable and not liable to the beneficiary's debts.\textsuperscript{117} Although the danger exists that creditors may be misled by appearances, proper diligence in examining the beneficiary's estate prevents such error.\textsuperscript{118} Still a creditor is not without recourse, because he may reach a mandatory distribution of income or principal if such property has been distributed to the beneficiary or if a time reasonably necessary for the trustee to make a required distribution has passed.\textsuperscript{119}

\textbf{B. Trust Success in the Entertainment Industry}

In 1939, California enacted legislation that created a spendthrift trust system to prevent parents from squandering their children's earnings in the entertainment industry.\textsuperscript{120} Known as the Coogan Law,\textsuperscript{121} after child actor Jackie Coogan,\textsuperscript{122} this law created a trust system to protect child actors' earnings.\textsuperscript{123} The law gave the court discretion to require that up to half of the child's net earnings be set aside in a trust fund for the benefit of the minor when a minor's contract was brought before the court.\textsuperscript{124}

California expanded this law by recognizing earnings as the child performer's property and mandating a procedure for setting aside a portion of the child's income under all Coogan Law contracts—irrespective of whether the contract came before the

\begin{footnotes}
\item[117] Id.
\item[118] \textit{Id.} at 173–74; see also \textit{Nichols v. Eaton}, 91 U.S. 716, 726 (1875) (recognizing that all trust instruments are recorded in public offices and open to inspection by all, thus imputing notice to all potential creditors).
\item[119] \textit{RESTATEMENT (THIRD) OF TRUSTS} § 58 cmt. d(2) (2003); see also \textit{Waggoner et al.}, \textit{supra} note 103, at 14-12 ("All authorities agree that both income and principal are transferable and attachable once received by the beneficiary.").
\item[121] \textit{CAL. CIV. CODE} § 36.1 (West 1939), \textit{amended by CAL. FAM. CODE} § 6753 (West 2009).
\item[122] Jackie Coogan was a film and television star who earned millions as a child. Upon reaching the age of majority, he learned that his mother and stepfather legally spent nearly all of his earnings. California enacted this law in response to Coogan's situation. See Saira Din, \textit{Chapter 667: Instituting Proper Trust Funds and Safeguarding the Earnings of Child Performers from Dissipation by Parents, Guardians and Trustees}, 35 \textit{McGeorge L. Rev.} 473, 473 (2004).
\item[123] Christiano, \textit{supra} note 120, at 203.
\item[124] \textit{Id.}
\end{footnotes}
This legislation requires that at least fifteen percent of the child’s gross earnings be set aside in a trust fund monitored by the courts. The parent or guardian must then manage the fund as trustee for the benefit of the child while the court maintains jurisdiction to terminate or amend the fund on notice to the parties. The child may not access the trust fund until she reaches the age of majority. During this time, only accepted financial institutions such as banks, credit unions, or other registered lending institutions may maintain control over the trust.

In 2004, California again amended Coogan’s law through Senate Bill 210, requiring the employer to deposit the fifteen percent of the child’s earnings into a special account held by the Actors Fund of America (“AFA”) if a Coogan trust was not established within 180 days of the minor’s first day of work. The AFA may then use this principal to fund programs for the education and benefit of child actors.

Coogan’s Law and its corresponding legislation have inspired similar legislation in other states. For example, section 35.03 of the New York Arts and Cultural Affairs Law grants the court the ability to set aside and protect as much of a child’s earnings as it deems appropriate. Likewise, Florida’s Child Performer and Athlete Protection Act states that a minor’s earnings are the sole property of the minor and provides a set-aside provision for continued monitoring of the minor’s well-being. Coogan’s Law recognizes that the pressures of the entertainment industry force minors to grow up quickly and face the same obligations as adults. Coogan spendthrift trusts facilitate the transition into maturity.
the “real world” for these actors by ensuring that they “will now have their income secured in a financial institution beyond the control of either the parents or themselves.”\textsuperscript{133} Coogan trusts serve as a model for the application of a spendthrift trust to social and economic concerns faced by industries consisting of young professionals, such as the NBA.

C. The NBA Trust

Given the established history of spendthrift trusts and their success in the child entertainment industry, this Note proposes the adoption of an NBA Spendthrift Trust (“NBA Trust”) in the CBA to allow amateur players to enter the NBA directly out of high school.

First, conditional to entering the NBA, the NBA team will place the player’s salary in monthly increments into a spendthrift trust with a financial institution as trustee until the player reaches age twenty-one. The trustee will control and maintain the principal in the best interest of the player, allotting a specified disposition of the player’s salary at selected intervals such as monthly.\textsuperscript{134} Recognizing the player’s interest in the terms of this allotment, the NBA and NBPA, on an ad hoc basis, will collectively determine the particular terms of the trust, including the percentage or amount that should be distributed to the player for that distribution period. The NBA, like the AFA under Coogan’s Law, may use the principal to fund programs for the benefit of the player, such as sessions with sports psychologists and financial counseling. Moreover, the amateur player’s contract will defer his signing bonus, if he receives one, until he reaches age twenty-one. To receive this bonus, the player must comply with the terms of the trust, including meeting behavioral and financial expectations. The NBA Trust will apply to all players who choose to enter the NBA Draft prior to reaching age twenty-one.

The NBA Trust, unlike the NBA Age Rule, furthers the policy concern to protect amateur players. Contrary to the NBA Age Rule, the trust recognizes that the unlikelihood that a player will attain maturity and life experience in one year of college

\textsuperscript{133} Christiano, \textit{supra} note 120, at 210.

\textsuperscript{134} Given that players’ salaries tend to be fairly large, a financial institution will benefit from maintaining this trust system. \textit{See} McCann, \textit{supra} note 11, at 151.
necessary to manage the pressures of the limelight. Instead the
NBA trust shifts fiscal responsibility to the trustee, a financial
institution that has actual experience. Given that the high
school player may never have had to balance a checkbook or pay
a credit card bill, the spendthrift trust provides the athlete with
a fiduciary trustee who, based upon the needs of the player and
the terms of the trust, will discipline the player through
monitoring and controlling his finances.

Maintaining twenty-one as the trust termination age will
allow the trustee to monitor the individual for several years,
giving the player guided experience in the NBA. During this
time, the individual will have access to mental health programs
and educational programs that will help him mature as both an
athlete and an adult. Thus, before these players receive their
earnings and signing bonus in a lump sum, they will have
experienced and adapted to the NBA lifestyle. By adopting
twenty-one as the age of majority, the NBA also provides
incentive for players to attend college because they will be
subject to the limitations of the trust if they elect to leave school
prior to reaching twenty-one, the customary college graduation
age. Thus, the NBA Trust encourages players to spend four
years in college and graduate.\textsuperscript{135} For those players who feel
confident in their NBA potential—typically those players who
have played one year of college basketball and then elected for
the draft—however, the trust allows the NBA to monitor the
player and promote good behavior. Therefore, maintaining the
trust until age twenty-one guarantees that all of these players
will have gained life experience in one form or another.

The limited disbursements will prevent the player from
squandering all of his earnings on nefarious activities or getting
into trouble—the second concern of the NBA Age Rule.
Rationing his earnings protects the player against the social
pressures and lavish lifestyle of the NBA that Stern alludes to in
defending the NBA Age Rule.\textsuperscript{136} By conditioning receipt of the
player's signing bonus on compliance with the trust, the NBA
also encourages the player to limit his spending and comport
with the team's code of conduct. Thus, the trust works to keep
the player from getting into trouble.

\textsuperscript{135} Twenty-one is the age at which most students graduate college.
\textsuperscript{136} See supra note 40 and accompanying text.
The NBA Trust, through the trustee, protects the player from those who may prey on his naiveté. The trustee, as a fiduciary, manages and invests the principal in a manner that provides for a continuous income flow to the player. This allocation removes the stress on the player of managing his own finances and prevents an accountant or family member from manipulating the player and his earnings. Simultaneously, the trust's intrinsic flexibility allows the NBA and NBPA to establish a trust that permits the player to support his family if he so desires. Therefore, because the trust provides the player with experience, guards against the player getting into trouble, and protects against manipulation, the NBA Trust satisfies the NBA's policy concerns.

Moreover, the trust benefits the NBA financially. Individual teams will benefit from the individual talent of the high school superstars. High school players have an unusually successful track record in the NBA, which will attract fans to games. While the NBA may enjoy receiving players who have attained national fame from playing in the NCAA, true high school superstars—a rare commodity who tend to evolve into NBA superstars—would likely garner even more interest and have a reputation of evolving into NBA superstars. This interest translates into ticket sales and profits. Moreover, the trust will allow teams and coaches to develop and mold the players, both physically and mentally, at an earlier age. The trust, through the fiduciary trustee and funded programs supported by the principal, allow individual teams to monitor the behavior and well-being of their young players. The NBA Trust and the programs minimize the risk that a team takes in drafting a young player by focusing on his mental development and guaranteeing his financial security. Allowing the best players to play in the NBA, regardless of age, will promote competition in the NBA and preserve the league's status as the world's top

138 See McCann, supra note 11, at 145–57.
139 Only forty-one players have been drafted from high school in thirty years. See McCann, supra note 8, at 832.
140 See McCann, supra note 11, at 146, 157–58 (classifying high school stars such as LeBron James, Kevin Garnett, Kobe Bryant, Jermaine O'Neal, and Tracy McGrady as superstars). Thus, fans will anxiously await the next superstar to enter the NBA from high school.
basketball organization. Consequently, foreign players who have elected to play in international leagues will reconsider a career in the NBA.  

These attributes of the trust system outweigh the incidental benefits that the NBA Age Rule provides, without depriving players of an economic opportunity. For example, the NBA Age Rule’s role in lowering scouting costs does not validate barring high school players from the NBA when an alternative exists. Prior to the current eligibility rule, the NBA did not force teams to scout high school players. Individual teams made that choice. Lowering scouting costs does not justify the economic injustice to high school players. Under the trust system, if a team does not want to allocate money to scouting high school players, the team can opt not to. Therefore, scouting costs will only increase if the team believes such an allocation serves the team’s best interest. Similarly, although the NBA Age Rule provides teams with an extra year to critique players, this does not justify withholding players from the NBA. Again, individual teams have the ability to allocate or minimize this risk through their draft decisions. In conclusion, given the potential benefits of the NBA Trust and a team’s ability to opt out of drafting high school players, the trust places no costs on the NBA and avoids the inherent unfairness to amateur players that exists under the current rule.

Contrary to the NBA Age Rule, the NBA Trust protects high school players without unjustly denying them an economic opportunity. On its face, the NBA Trust benefits the player by allowing him to enter the NBA from high school. Rather than force the player into college (or an international league) for one year, the trust system gives him a choice. The trust enables the player to rationally weigh the benefits of increasing his potential NBA earning potential and shifting the risk of injury through an early career start against the cost of skipping college and the restricted financial independence. Although a utilitarian would argue that the spendthrift trust still deprives one of making a rational decision because the player does not have complete

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141 See Cohen, supra note 7 (noting the trend of foreign players electing to play in international leagues instead of the NBA).

142 Teams do not have to draft high school players. Under the trust system, a coaching staff may strategically choose to recruit high school players—or may opt not to.
control over his salary, the player has the authority to concede or forego this opportunity. This argument also fails to consider that the trust benefits the player in that it spares him possible economic regret, provides a stable source of present income, and ensures him financial stability over time. The flexibility intrinsic in spendthrift trusts also allows the individual to maintain a fairly luxurious lifestyle. Thus, high school players will not likely view the trust as a major setback because it allows the player to enter the NBA and it protects his earnings.

The opportunity to balance costs against benefits also prevents the NBA from acting opportunistically as it did under the Age Rule. The NBA would no longer force players to bear the burden of potential injury or subject the player to another year of scout scrutiny in the NCAA. Moreover, although not a party to the CBA, a player who wants to attend college and play NCAA basketball benefits from the opening of scholarships that high school stars feel forced to accept under the NBA Age Rule.

Although it does not seem likely that one would challenge the NBA Trust because of its mutual benefits, an antitrust or labor law challenge to the NBA Trust will likely fail. The NBA Trust, like the NBA Age Rule, results from collective bargaining. Like the NBA Age Rule, the NBA and NBPA memorializes the NBA Trust in writing as part of the CBA. As shown in Clarett and Wood, because federal labor law promotes collective bargaining and the freedom of contract, a court would likely uphold the NBA Trust.

Nor would a court void the NBA Trust for public policy reasons. Given that the NBA Trust "provide[s] against the improvidence or misfortune" of the player, the NBA Trust would not violate public policy. Nor would it defraud creditors. Unlike the standard spendthrift trust, the courts would allow creditors to attach trust principal because it consists of the

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143 See Hirsch, supra note 109, at 15–16.
144 See WAGGONER ET AL., supra note 103, at 14-7.
145 See generally CBA, supra note 3.
146 Id.
player's salary, and thus, is the player's property. Only the signing bonus and salary not yet earned would be protected from creditors because that money is not yet the property of the player and cannot justifiably be relied on by a creditor. Therefore, a court would likely uphold the NBA Trust.

CONCLUSION

Brandon Jennings is not the first to feel the constraints of the NBA Age Rule, but he is the first to undermine the NBA's control over players by turning to an international league. His story alone embodies the inefficiencies of the NBA Age Rule and exposes the rule as nothing more than a paternalistic creature driven by distorted cognitive biases. The NBA Age Rule strips our most talented players of a life-changing opportunity and deprives them from making a rational decision. But this need not be the case because a legal solution exists. A trust like that proposed in this Note provides the necessary reform by giving high school players the opportunity to make an educated, rational decision while protecting and furthering the NBA's policy interests and concerns.

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149 See JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 557–58 (8th ed. 2009) (stating that one cannot shield his assets from creditors by placing them in a trust for one's own benefit, even if the trust is spendthrift, discretionary, or both).

150 See Broadway, 133 Mass. at 173.