



Transitioning to the NBA: Advocating on Behalf
of Student-Athletes for NBA
& NCAA Rule Changes

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I. INTRODUCTION

The landscape of professional basketball in the United States is in considerable disarray. The most recent collective bargaining agreement (CBA) between the NBA and its union expired at midnight on July 1, 2011 and there were genuine disagreements as to the financial viability of the current

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league structure.² Unfortunately for fans around the globe, the NBA closed its doors for the third time in league history as teams locked out their players just one week after the NBA held its draft.³ The lockout lasted 149 days as the two sides, led by NBA Commissioner David Stern and National Basketball Players Association (NBPA) Executive Director Billy Hunter, debated the framework in which professional basketball would operate before agreeing upon a new CBA.⁴

At the time of this publication it appears that the end result of this labor strife is that the league will lose approximately a half a billion dollars and teams will play a 66 game schedule, down from the traditional 82 games, beginning on Christmas Day.⁵ As a sign of the times, the NBA is not alone in enduring labor strife. The NFL's lockout lasted 130 days during the spring and summer of 2011, and both MLB and the NHL are in the last year of their collective bargaining agreements (CBAs).⁶

² *NBA Lockout Timeline*, LOS ANGELES TIMES, (Nov. 26, 2011, 9:55 AM), <http://articles.latimes.com/2011/nov/26/sports/la-sp-nba-lockout-timeline-20111127>. One of the contentious disagreements has to do with whether or not teams are, in fact, losing revenue. The NBA claims that 22 teams (out of 30) are losing money on an annual basis, lending credence to the argument that there may be little incentive for an NBA season under the parameters of the recently expired CBA. Larry Coon, *Is the NBA Really Losing Money?*, ESPN.COM (July 12, 2011, 12:39 AM), http://sports.espn.go.com/nba/columns/story?columnist=coon_larry&page=NBA_Financials-110630.

³ *Id.*

⁴ *Tentative Deal Moves the NBA Lockout Closer to End*, WALL ST. J. (Nov. 26, 2011, 10:07 AM), <http://online.wsj.com/article/AP38298437eeef4ccd8316e33797017f04.html>.

⁵ *Id.*

⁶ The NFL lockout began on March 11, 2011, and ended on July 25, 2011. See *NFL Locks out Players, Who File Suit*, ESPN.COM (Mar. 12, 2011, 4:26 PM), <http://sports.espn.go.com/nfl/news/story?id=6205936>; *Sources: Deal to end Lockout Reached*, ESPN.COM (July 25, 2011, 12:14 AM), http://espn.go.com/nfl/story/_/id/6797238/2011-nfl-lockout-owners-players-come-deal-all-points-sources-say. The current CBA between the NHL and NHLPA is set to expire on September 15, 2012. See Liz Mullen, *Their Turn: NHL a Year out from Expiration of CBA*, SPORTSBUSINESS-DAILY.COM, (Sept. 12, 2011), <http://www.sportsbusinessdaily.com/Journal/Issues/2011/09/12/Labor-and-Agents/NHL-CBA.aspx>. The CBA between MLB and MLBPA is set to finish even sooner, on December 11, 2011 although there are rumors of a tentative deal at the time of this writing. See Bob Nightengale, *MLB May Get Early Start on Labor Deal, Which Expires Dec. 11*, USATODAY.COM, (Feb. 22, 2011, 11:29 PM), http://www.usatoday.com/sports/baseball/2011-02-21-mlb-labor-talks_N.htm.

Many sports fans across the country have spent as much time and energy in the past year reading about court decisions and the intricacies of labor law as they have watching games. This most recent standoff further highlights the fact that professional basketball is indeed a business. The National Collegiate Athletic Association (NCAA) governs intercollegiate athletics and, as such, defines the rules under which college basketball is played and operated. While the NBA and its players struggle to negotiate appropriate rules to govern its operations, the NCAA, which has full control of its workforce, appears safe from future work stoppages.⁷

And while NCAA reform is once again a topic of great conversation⁸ (including a roundtable panel discussion in front of members of Congress),⁹ so long as student-athletes are not classified as employees and thus unable to unionize, the NCAA will safely maintain its monopoly on college athletics.¹⁰ The revenues for intercollegiate sports continue to rise, as schools competing in the Football Bowl Subdivision (FBS) generated median revenue of \$48 million in 2010.¹¹ While the NCAA does not receive money directly from football bowl games, the popularity of men's college basketball allowed it to secure a 14-year, \$10.8 billion television rights agreement with CBS and Turner Broadcasting to cover "March Madness" beginning in 2011.¹²

⁷ A legal challenge to the NCAA's definition of "amateurism" can be found in the *O'Bannon v. NCAA* class action lawsuit, now called *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*, No. C 09-01967 CW, 2011 WL 3240518 (N.D. Cal. Jul. 28, 2011).

⁸ For the latest article generating much debate on college reform, see Taylor Branch, *The Shame of College Athletics*, THEATLANTIC.COM, October 2011, <http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/8643/>.

⁹ *Hypocrisy or Hype? The Impacts of Back-Room Deals, Payoffs, and Scandals in American Collegiate Student Athletics: Before Rep. Bobby L. Rush*, Nov. 1, 2011, <http://rush.house.gov/event/hypocrisy-or-hype-impacts-back-room-deals-payoffs-and-scandals-american-collegiate-student>.

¹⁰ During the beginning of August 2011 the NCAA held a "NCAA Reform Retreat" as 50 college and university leaders addressed potential changes to the NCAA. Doug Lederman, *New Wave of NCAA Reform?*, INSIDEHIGHERED.COM (Aug. 11, 2011), http://www.insidehighered.com/news/2011/08/11/ncaa_presidents_to_propose_increased_academic_standards_tougher_penalties_more_athletic_aid.

¹¹ *NCAA Division 1 Intercollegiate Athletics Report*, NCAAPUBLICATIONS.COM, <http://www.ncaapublications.com/productdownloads/2010RevExp.pdf> (last visited Oct. 25, 2011).

¹² *Time Warner Joins CBS in \$10.8 Billion March Madness TV Deal*, FOXBUSINESS.COM (Apr. 22, 2010), <http://www.foxbusiness.com/markets/2010/04/22/time-warner-joins-cbs-billion-march-madness-tv-deal/>.

Clearly the NBA and NCAA, as the overseers of business operations, are the dominant players in shaping the multi-billion dollar basketball industry in our country. In contrast to NBA players, who have the NBPA to represent their business interests, college basketball players lack representation. Thus, while NCAA executives, NBA owners, NBA players and the NBPA govern and negotiate changes in the basketball world, there is no advocacy group speaking on behalf of those individuals who represent the sport's future—student-athletes in college and high school now.

Seen as a fungible commodity with no voice in the direction and operation of their sport, the manner in which college athletes enter the professional market of basketball has significantly deteriorated over the past several decades. The transition from college to the NBA has become more fraught with challenges and misinformation than ever before, a fact likely to lead to a wide range of mistakes by countless student-athletes trying to evaluate whether and when to enter professional basketball.

This Article calls attention to the challenges that men's college basketball players face when trying to make a fully informed decision as they evaluate whether or not to enter the NBA draft and forgo remaining college eligibility.¹³ Unfortunately this difficult decision is not unique to men's basketball, but highlights a broader trend showing that colleges, conferences, and the NCAA have done shockingly little to provide guidance and counsel to student-athletes who are navigating the transition from college to the professional leagues.¹⁴

This Article will address both how we developed the current legal rules governing the NBA draft and the NCAA's role in overseeing college athletes. With this recent trend in mind, this Article will then turn its attention to a recent NCAA rule change that unambiguously illustrates the fact that the best interests of the student-athlete are marginalized, if not ignored, in the process of making the leap from college to the NBA. Finally, to foster dialogue, this Article will propose solutions on how to address the hardships college student-athletes face during this transition period.

¹³ For a wonderful position piece advocating on behalf of student-athletes in the sport of men's basketball, see Marc Isenberg, *Proposed New NBA Deadline Ignores Players' Best Interests*, MONEYPLAYERSBLOG.COM, http://www.moneyplayersblog.com/files/bt_com_a16_c_041911.pdf (last visited Oct. 25, 2011).

¹⁴ For a comprehensive discussion of this topic, please refer to Glenn Wong, Warren K. Zola and Chris Deubert, *Going Pro in Sports: Providing Guidance to Student-Athletes in a Complicated Legal & Regulatory Environment*, 28 CARDOZO ARTS & ENT. L. J. 3, 553-607 (2011).

II. THE NBA AND ITS PLAYER ENTRY DRAFT

As is the case for virtually every sport, the process of entering the NBA is often confusing to those considering this move. Unfortunately, unbiased guidance to navigate this morass is, for the most part, nonexistent in this transition process. For college seniors, the NBA entry draft is the day either when their basketball dreams come true or when they face the harsh reality that their career in professional basketball – at least in the NBA – may be over before it even began. The dynamics of this process have changed considerably over the past several decades, as we have seen a decrease in the number of college seniors selected in the draft and an increase in the number of underclassmen and European players selected. In fact, over the past six years (2006 through 2011), a total of 37 seniors have been taken in the first round of a draft out of a total of 180 selections, meaning that underclassmen and international players comprise 80% of first round draft picks.¹⁵ How did we arrive at this point? To answer that question, the history and evolution of amateur player distribution in the NBA must be understood.

Strangely enough, professional basketball in America owes its start to professional hockey, as basketball was originally promoted as a way to keep hockey arenas filled when home teams were on the road. As hockey gained popularity in the middle of the 20th Century, ice rink owners considered different ways to keep their arenas occupied while their hockey teams were traveling. It was Walter Brown, owner of the Boston Garden, who determined that hosting basketball games would provide the Garden with additional revenue when hockey was not played. This determination led to the formation of the Basketball Association of America (BAA) on June 6, 1946, the first professional basketball league in the United States.¹⁶

The BAA was comprised of eleven teams and included the Boston Celtics and New York Knickerbockers in its inaugural 1946-47 season.¹⁷ In 1949, after three successful years, the BAA merged with a competing league, the National Basketball League (NBL), and the resulting league was

¹⁵ *Historical Drafts*, THE DRAFT REVIEW.COM, http://thedraftreview.com/index.php?option=com_content&task=category§ionid=5&id=15&Itemid=103 (last visited Oct. 25, 2011).

¹⁶ ZANDER HOLLANDER, *THE MODERN ENCYCLOPEDIA OF BASKETBALL* 281 (Dolphin Books 2d ed. 1979).

¹⁷ The teams included the Boston Celtics, Chicago Stags, Cleveland Rebels, Detroit Falcons, New York Knicks, Philadelphia Warriors, Pittsburgh Ironmen, Providence Steamrollers, St. Louis Bombers, Toronto Huskies and Washington Capitols. See Hollander, *supra* note 16 at 281.

rebranded as the National Basketball Association (NBA).¹⁸ Since that time, the NBA has been the predominant professional basketball league in the world. Today it consists of thirty franchises scattered throughout North America.¹⁹

Notwithstanding the recent labor dispute, the league has enjoyed surging popularity with fans around the world over the past several decades. Innovative global marketing, rule changes, visionary leadership, technology advances and colorful individuals have helped professional basketball grow into a financial success. Individual teams claim to be struggling financially as expenses rise, yet the league announced that an audit of the 2010-11 financials showed there was a 4.8% increase in basketball related income (BRI) this past year, bringing league revenues to \$ 3.82 billion—up from \$ 3.65 billion for the 2009-10 season.²⁰ This audit found that average player salary rose to \$ 5.2 million this past year and total player compensation was \$ 2.18 billion, making 2011 the sixth consecutive season of salary increases.²¹

Having an audience, both in person and on television, is what generates revenue, and close competition draws in more viewers.²² The success of any league is largely determined by competitive balance—the concept that the outcome of a particular game is unknown at the onset, thereby sparking interest in fans to watch the contest. While a variety of factors go into a team's ability to compete, the most important factor is the skills of the individual players who compete. Accordingly, the allocation of this talent is the lifeblood that helps ensure and maintain a league's competitive balance—and, thus, its popularity.

While the concept of competitive balance is widely accepted as necessary, the manner in which to best distribute amateur talent to specific teams

¹⁸ Hollander, *supra* note 16.

¹⁹ *Teams*, NBA.COM, <http://www.nba.com/home/teams/> (last visited Oct. 25, 2011).

²⁰ John Lombardo, *NBA Reports Increase in Salaries, Basketball-Related Income for '10-11*, SPORTSBUSINESSDAILY.COM (July 25, 2011), <http://www.sportsbusinessdaily.com/Daily/Morning-Buzz/2011/07/25/NBA-Finance.aspx?hl=basketball%20financials&sc=0>.

²¹ *Id.* Perhaps a fairer way to evaluate the distribution of money to players would be median, rather than mean, salary in the NBA, which is “only” \$ 2.3 million. Steve Aschburner, *NBA's 'Average' Salary - \$5.15M - A Trendy, Touchy Subject*, NBA.COM (Aug. 19, 2011, 11:03 AM), http://www.nba.com/2011/news/features/steve_aschburner/08/19/average-salary/index.html.

²² Henry Abbott, *What Good is Parity?*, ESPN.com, (June 21, 2011, 4:30 PM), http://espn.go.com/blog/truehoop/post/_id/30539/what-good-is-parity.

has always been a challenge for professional sports leagues.²³ This is true both legally under antitrust and labor law as well as strategically, as leagues seek the fairest way to ensure an appropriate allocation of talent amongst all competing teams. The solution, now widely accepted in professional sports leagues, is the amateur entry draft. This draft allows existing teams to select new players with whom they may replenish their teams' talent pools. As the talent and skills of older players erode, younger players are brought in to replace them, allowing the league to maintain competitive balance.²⁴

Of course, the draft mechanism causes tension between the league and its players as it limits amateur players from negotiating with multiple teams, thereby intentionally keeping salaries below free market rates. Under the rules of every professional sports' league draft, a single team is granted the exclusive rights to negotiate with the players it selects. If a drafted player doesn't want to play for that team or live in that particular city under the proposed financial package offered, that player may "hold out," but under no circumstances is he allowed to negotiate with other teams.

Not surprisingly, this player restraint has led a number of players to bring legal challenges under antitrust law over the past several decades, attacking player entry drafts as illegal restraints of trade.²⁵ Despite these challenges, however, it appears drafts themselves will remain part of the landscape of professional leagues for the foreseeable future.²⁶ What has emerged from this litigation is a careful balancing test between the pro- and anti-competitive effects resulting from this restraint of trade.²⁷ The result has been a sharp decrease in the number of draft rounds and the length of time a team can retain exclusive players' rights before allowing them to

²³ This is chronicled in a number of legal challenges against professional sports league drafts. *See, e.g.,* *Denver Rockets v. All-Pro Mgmt.*, 325 F. Supp. 1049 (D. Cal. 1971) (player brings suit against age eligibility requirement for the NBA draft); *Robertson v. National Basketball Ass'n*, 556 F.2d 682 (2d Cir. 1977) (antitrust lawsuit filed by player against the NBA's draft system); *Clarett v. NFL*, 306 F. Supp. 2d 379 (S.D.N.Y. 2004), *rev'd*, 369 F.3d 124 (2d Cir. 2004), *cert. denied*, 125 S. Ct. 1728 (2005).

²⁴ For a more thorough discussion on competitive balance and the role of player drafts see Scott R. Rosner & Kenneth L. Shropshire, *THE BUSINESS OF SPORTS*. (Jones & Bartlett Learning 2d ed. 2011). Chapter 2, Leagues: Structure & Balance.

²⁵ *See supra* note 23 and accompanying text.

²⁶ As of the time of this Article, the CBAs for professional baseball, basketball, football, and hockey all have provisions for player entry drafts moving forward.

²⁷ The "rule of reason" was developed by the Supreme Court in 1911, in *Standard Oil Co. of N.J. v. United States*. *See* 221 U.S. 1 (1911) (holding only combinations and contracts that unreasonably restrain trade are illegal under antitrust laws).

enter free agency.²⁸ Player unions have, for the most part, accepted these stipulations as they reduce the perceived restraint on free markets and have been reached as a negotiated component of CBA discussions.²⁹

As the summer of 2011 illustrated with lockouts in both basketball and football, the business of professional sports leagues has radically changed in the past century. The power of players—through their unions—has grown dramatically, primarily as a result of the expanded role of collective bargaining. When the NBA was created in 1949, there was no players' union. The National Basketball Players Association (NBPA) was formed in 1954.³⁰

Bob Cousy, a Hall of Fame point guard and member of the Boston Celtics, was a driving force behind the development of the NBPA. Cousy identified an established player from each NBA team and urged those selected to begin to act in solidarity.³¹ Armed with their support, Cousy met with NBA President Maurice Podoloff before the 1955 NBA All-Star Game and shared a list of the players' concerns.³² Podoloff promised various improvements in playing conditions, the creation of a pension plan, and the acknowledgment of the legitimacy of the union.³³ Unfortunately, the players' demands were ignored as Podoloff stalled the implementation of these promises.³⁴ Finally, Cousy contacted AFL-CIO leadership about the creation of a union.³⁵ At that point, the league relented and began to bargain in good faith. Finally, in 1957, the first NBA CBA was executed.³⁶

²⁸ Steve Aschburner, *As NBA Draft Grows Increasing Specialized, Uncertainty Remains*, SPORTS ILLUSTRATED (June 8, 2009, 11:06 AM), http://sportsillustrated.cnn.com/2009/writers/steve_aschburner/06/08/draft.process/index.html. See also Zach Lowe, *Does NBA's 'Franchise Tag' Do Enough to Help Incumbent Teams*, SPORTS ILLUSTRATED (Nov. 23, 2011, 11:07 AM), <http://nba-point-forward.si.com/2011/11/23/does-nbas-franchise-tag-do-enough-to-help-incumbent-teams/>.

²⁹ The NHL CBA settlement in 2005 included the negotiation of the reduction of two rounds in the entry draft—from nine to seven. See *Collective Bargaining FAQs*, NHL.COM, <http://www.nhl.com/ice/page.htm?id=26366> (last visited October 29, 2011).

³⁰ *About the NBPA*, NBPA.ORG, <http://www.nbpa.org/about-us> (last visited Nov. 7, 2011).

³¹ Robert Bradley, *Labor Pains Nothing New to the NBA*, APBR.ORG, <http://www.apbr.org/labor.html> (last visited Oct. 4, 2011).

³² *Id.*

³³ OSCAR ROBERTSON, *THE BIG O: MY LIFE, MY TIMES, MY GAME*, 179-80 (2003).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

Because the NBA formed without a vehicle for negotiations between the league and its players, the league was able to unilaterally devise the initial draft system.³⁷ Thus, until 1957, teams in the NBA continued selecting players until the clubs determined that there was no one else worthy of being picked.³⁸ The second iteration of the draft came when the “round” system was instituted in 1957.³⁹ Under this scheme, the draft consisted of between fourteen and twenty-one rounds.⁴⁰ This iteration lasted until 1961.

In 1962, a unique draft mechanism called the “territorial choice” system was introduced with the intention of sparking local interest in the NBA. The “home market” of an NBA team was defined as being within a fifty-mile radius from its home arena.⁴¹ Any player who played in college within that geographic area could be selected by the home team if the team chose to forfeit its first round pick.⁴²

This territorial concept was successful. By 1966, teams had made twenty-two territorial picks; eleven of those individuals have been inducted into the Naismith Memorial Basketball Hall of Fame, including notable players such as Tom Heinsohn, Wilt Chamberlain, Oscar Robertson, and Jerry Lucas.⁴³ In 1965 Bill Bradley was the last player selected under the territorial pick system.⁴⁴ By 1966, after watching Red Auerbach and the Boston Celtics win eight consecutive NBA championships, the league eliminated the territorial pick system and modified the allocation of amateur players by formally adopting a straight, ten round draft.⁴⁵

In addition to the territorial choice system, the league also implemented age eligibility rules. In 1961 the NBA unilaterally instituted a rule

³⁷ See *supra* note 30.

³⁸ John C. Graves, *Controlling Athletes with the Draft and Salary Cap: Are Both Necessary?*, 5 SPORTS L. J. 185, 187 (1998).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Peter A. Coclanis & Alex Coclanis, *Home Cooking: Reliving the NBA's Territorial Draft*, SLAM ONLINE (June 21, 2011, 4:08 PM), <http://www.slamonline.com/online/nba/2011/06/home-cooking/>.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Michael A. McCann, *Illegal Defense: The Irrational Economics of Banning High School Players from the NBA Draft*, 3 VA. SPORTS ENT. L.J. 126 (2004). See also Percy Allen, *How the NBA Draft Became a Lottery*, The Seattle Times, May 21, 2007, http://seattletimes.nwsourc.com/html/nba/2003715404_lotterytimeline21.html. Also taken from NBA webpage highlighting NBA draft history – now taken down during lockout.

requiring that “a player could not make himself available” for the draft until four years after his high school graduation.⁴⁶ These rules came under fire when Spencer Haywood brought suit against the league, claiming the requirement was a restraint of trade.⁴⁷ Because this age requirement was never collectively bargained, Haywood claimed that this rule was a clear violation of antitrust law.⁴⁸ Ultimately, in 1971, the District of California agreed with Haywood, finding that the age requirement was a per se illegal boycott.⁴⁹ This debate as to whether sports leagues can mandate a minimum age requirement has continued over the past 40 years.⁵⁰

As a result of Haywood’s lawsuit, a “hardship draft” was conducted in 1972 for individuals who could show financial hardship.⁵¹ After one year, this supplemental “hardship draft” was eliminated, and beginning in 1973, anyone wishing to declare hardship was automatically included in the regular draft.⁵² Finally, in 1976, the hardship requirement was eliminated entirely and the “early entry” procedure was adopted.⁵³ This provision allowed any athlete with college eligibility to enter the NBA draft by sending the Commissioner a letter formally forfeiting his remaining NCAA eligibility at least forty-five days before the draft.⁵⁴ As a result, three high school players, Moses Malone, Darryl Dawkins, and Bill Willoughby, entered the NBA draft in the 1970s.⁵⁵ While all three of these players enjoyed

⁴⁶ Graves, *supra* note 38.

⁴⁷ *Denver Rockets*, 325 F. Supp. at 1049.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ For a more thorough law review article on this topic, see Michael McCann & Joseph Rosen, *Legality of Age Restrictions in the NBA and the NFL*, 56 CASE W. RES. L. REV. 731 (2006).

⁵¹ Graves, *supra* note 38, at 193. See also *Legends Profile: Spencer Haywood*, NBA.COM (Aug. 9, 2011), <http://www.nba.com/history/legends/spencer-haywood/index.html>, [hereinafter *Legends Profile*]; John Rohde, *Sonic’s Spencer Haywood Helped Clear the Way for Kevin Durant*, NEWSOK.COM, (Jan. 11, 2010), <http://newsok.com/john-rohde-sonics-spencer-haywood-helped-clear-path-for-kevin-durant/article/3431142>.

⁵² *Legends Profile*, *supra* note 51.

⁵³ Graves, *supra* note 38, at 193.

⁵⁴ *Legends Profile*, *supra* note 51.

⁵⁵ Chris Broussard, *Why Pros Spent 20 Years Shunning High Schoolers*, N.Y. TIMES, (Nov. 16, 2003), <http://www.nytimes.com/2003/11/16/sports/why-pros-spent-20-years-shunning-high-schoolers.html>.

success in the NBA, it would be 20 years until the next high school student would bypass college for the NBA draft.⁵⁶

The 1983 CBA reduced the draft was from ten to seven rounds, beginning in 1985.⁵⁷ The 1985 draft was also the first year the league instituted a “draft lottery” in which the worst seven teams (as determined by NBA records the previous year) were entered to determine the first seven picks in the draft.⁵⁸ This modification was devised to address the perception that teams were intentionally losing games at the end of the season to enhance their draft prospects.⁵⁹ Finally, as negotiated in the 1983 CBA, the number of rounds in the draft was further reduced to three rounds in 1988 and to the current two round system beginning in 1989.⁶⁰

While the “modern” NBA draft rules have been in place since 1989, how NBA franchises use the draft has changed significantly since then. The largest shift is that teams have moved away from selecting college seniors, instead looking at “upside” and “potential” when evaluating draft prospects. In 1995, twenty years after Malone, Dawkins and Willoughby skipped college; Kevin Garnett followed their path and entered the NBA draft directly from high school.⁶¹ He was followed in 1996 by Kobe Bryant and thereafter by Amar’e Stoudemire, Dwight Howard and LeBron James, just to name a few of the most visible of the NBA stars who entered the NBA directly from high school in the decade between 1995 and 2004.⁶²

⁵⁶ Bob Carter, *‘Da Kid’ Progressed Quickly*, ESPN CLASSIC, http://espn.go.com/classic/biography/s/Garnett_Kevin.html.

⁵⁷ 1983 *Collective Bargaining Agreement*, NATIONAL BASKETBALL ASSOCIATION, art. X.

⁵⁸ *Id.*

⁵⁹ McCann, *supra* note 50 at 126. See also Graves, *supra* note 38, at 193.

⁶⁰ See 1983 *Collective Bargaining Agreement*, *supra* note 57.

⁶¹ Shawn Kemp was actually drafted by the NBA in 1989 without playing college basketball as well. He verbally committed to the University of Kentucky during his senior year of high school. However, allegations of theft kept him away from Kentucky and he enrolled in Trinity Valley Community College in Texas for one semester. He did not play basketball there and submitted his name for the NBA draft in 1989, when he was chosen by the Seattle SuperSonics with the 17th overall pick in the first round. *Sports People; Kemp Leaves Kentucky*, N.Y. TIMES (Nov. 8, 1988), <http://www.nytimes.com/1988/11/08/sports/sports-people-kemp-leaves-kentucky.html?pagewanted=1>; *Shawn Kemp NBA & ABA Statistics*, BASKETBALL-REFERENCE.COM, <http://www.basketball-reference.com/players/k/kempsh01.html> (last visited Oct. 17, 2011).

⁶² *NBA Draft History*, NBA.COM (Aug. 16, 2011, 09:51 AM), <http://www.nba.com/history/draft/index/index.html>.

Kevin Garnett, after earning MVP honors during the 2004 NBA All-Star game, stated “I want to thank Spencer Haywood. . .for leading the way. Without Spencer Haywood there would be no Bill Willoughby, Darryl Dawkins, Moses Malone or myself.”⁶³

The success of these players who skipped college to go straight to the NBA created a wave in which a total of thirty-nine players were drafted by the NBA immediately out of high school between 1995 and 2005.⁶⁴ As this process evolved, and more and more early entrants declared for the NBA draft, the focus of talent evaluation shifted sharply. While other factors certainly play a role, it is glaringly obvious that player evaluation for the draft is now heavily focused on a young player’s potential rather than the talent and maturity that a player displays in the college game.⁶⁵ General managers are now loathe to bypass a young player in the draft who may turn into an all-star within a few years but often skip more seasoned college players, rationalizing that those college players have already reached their potential. The unfortunate byproduct of this paradigm shift is that each year a student-athlete plays in college, his value actually decreases as he loses the ability to claim “upside” or “potential.”⁶⁶

Amidst the increase in players bypassing college for the NBA, the league’s Commissioner David Stern publicly argued for an age limit of twenty before an individual could be draft eligible.⁶⁷ Certainly the NCAA was in favor of high profile basketball stars being diverted to college, as having them on campus would help the NCAA’s visibility and increase the value of its basketball media rights.⁶⁸ Therefore, the NBA paid careful attention when Maurice Clarett challenged the NFL’s draft eligibility rules in

⁶³ Jayda Evans, *A Long Rise Back for Spencer Haywood*, SEATTLE TIMES, (Feb. 25, 2007), http://seattletimes.nwsource.com/html/nba/2003588104_haywood250.html.

⁶⁴ Nicholas E. Wurth, *The Legality of an Age-Requirement in the National Basketball League After the Second Circuit’s Decision in Clarett v. NFL*, 3 DEPAUL J.SPORTS L.& CONTEMP.PROBS. 103 (2005).

⁶⁵ A wonderful article describing the radical shift to drafting “tremendous upside” was written in 2005. Bill Simmons, *What the TUP is Going On?*, ESPN.COM (June 27, 2005, 11:20 AM). <http://sports.espn.go.com/espn/page2/story?page=simmons/050627&num=0>.

⁶⁶ Sam Amico, *Once Again Seniors Slide in the NBA Draft*, FOXSPORTS.COM (May 23, 2011, 11:26 AM). http://www.foxsports.com/msn/05/23/11/Will-seniors-be-pushed-back-in-the-draft/landing_cavaliers.html?blockID=527538.

⁶⁷ *Stern Wants NBA Age Limit Raised to 20*, ESPN.COM (Apr. 13, 2005, 9:38 PM), <http://sports.espn.go.com/nba/news/story?id=2035132>.

⁶⁸ *History of Basketball*, THEPEOPLEHISTORY.COM, <http://www.thepeoplehistory.com/basketballhistory.html> (last visited Oct. 25, 2011).

2003.⁶⁹ In his lawsuit, Claret challenged the requirement that a player be three seasons removed from high school before becoming draft eligible as violating § 1 of the Sherman antitrust laws.⁷⁰ When the Second Circuit's decision to strike down the district court's decision and uphold the NFL draft eligibility rules was released in 2004, the NBA and NBPA were quick to meet and negotiate.⁷¹

In 2005 the NBA and NBPA ultimately agreed upon a provision, which was then incorporated into the league's CBA, for the 2006 draft requiring that a player be "at least nineteen years of age during the calendar year in which the Draft is held."⁷²

This provision set the age requirement for the NBA. Because it had been collectively bargained, the labor exemption protects it from future legal challenges. This provision, however, only applies to players from the United States, as the NBA defines draft eligibility slightly differently for international players.⁷³ With respect to players from the United States, the CBA states:

"Players who are 19 years or older and are one year removed from high school graduation are automatically eligible for the NBA draft if they meet any of the following criteria:

1. They have completed four years of their college eligibility;
2. They graduated from high school in the United States; did not enroll in a U.S. college or university, and four years have passed since their graduation or, if they did not graduate, their high school class graduated;
3. They have signed with a professional basketball team outside of the NBA, anywhere in the world, and have played under that contract."⁷⁴

While this Article does not focus on the rules regarding international players, they are generally automatically eligible for the NBA draft if:

1. They are 22 years old during the calendar year of the draft; or

⁶⁹ *Clarett v. NFL*, 306 F. Supp. 2d 379 (S.D.N.Y. 2004), *rev'd*, 369 F.3d 124 (2d Cir. 2004), *cert. denied*, 125 S.Ct. 1728 (Apr. 4, 2005).

⁷⁰ *Id.* at 390.

⁷¹ Kevin J. Cimino, *The Rebirth of the NBA – Well, Almost: An Analysis of the Maurice Clarett Decision and Its Impact on the National Basketball Association*, 108 W. Va. L. Rev. 830 (2006).

⁷² 2005 *Collective Bargaining Agreement*, NATIONAL BASKETBALL ASSOCIATION, art. X § 1(b)(i).

⁷³ *Id.* at art. X § 1(g).

⁷⁴ *Id.* at art. X § 1(b)(ii).

2. They have signed a contract to play professional basketball outside of the NBA but within the United States, and played under that contract.⁷⁵

Since this provision was passed in 2005, fifty-two international players have declared for the NBA draft.⁷⁶ Here is the breakdown for each year:

2005	2006	2007	2008	2009	2010	2011
11	10	6	5	9	5	6

Additional draft rules state that if a player, domestic or international, is drafted, the rights to that player are held by the team for one calendar year after the draft.⁷⁷ Should the player sit out one year without signing a contract, he is automatically reentered into the NBA draft. If an individual sits out another full year after the second draft then he is declared a free agent.⁷⁸

The age requirement has become known as the “one and done rule” and has radically changed college basketball.⁷⁹ The NBA rule essentially mandates that every domestic basketball player go to college where he must abide by the rules and regulations of the NCAA.⁸⁰ This “one and done” rule does not consider whether the college environment is right for every player.

⁷⁵ *Id.* at art. X § 1(b)(ii)(G).

⁷⁶ *International Early Entry Players who Remained in the Draft*, REALGM.COM, http://basketball.realgm.com/nba/draft/early_entry/by_type/International/Early_Entrants (last visited Aug. 18, 2011).

⁷⁷ See *2005 Collective Bargaining Agreement*, *supra* note 72, at art. X § 4.

⁷⁸ *Id.* at art. X § 3(b).

⁷⁹ For an essay thoroughly examining age eligibility rules in the NFL and NBA, refer to Michael A. McCann and Joseph S. Rosen, *Legality of Age Restrictions in the NBA and the NFL*, 56 CASE W. RES. L. REV. 731 (2006).

⁸⁰ One notable exception is Brandon Jennings, who, after graduating high school in 2007, spent the 2008 season playing professionally overseas before returning to the NBA in the 2009 NBA Draft. Chris Broussard, *Exchange Student*, ESPN.COM (Dec. 8, 2008, 9:44 AM), <http://sports.espn.go.com/espnmag/story?id=3715746>. The other interesting example of taking this rule to the extreme was the case of Jeremy Tyler—a high school standout from San Diego who decided after his junior year to play overseas in 2009. This decision meant that he would be paid for two years and then was draft eligible for the 2011 draft—selected in the 2nd round by the Charlotte Bobcats. See Pete Thamel, *Basketball Prospect Leaving High School to Play in Europe*, N.Y. TIMES (Apr. 22, 2009), <http://www.nytimes.com/2009/04/23/sports/ncaabasketball/23prospect.html>.

III. THE NCAA

College athletics have evolved considerably in the past century, as have the rules governing participation and competition for student-athletes. The impetus behind regulating college sports began when President Theodore Roosevelt's son Ted broke his collarbone while playing football for Harvard University in 1905.⁸¹ This injury brought to President Roosevelt's attention the number of serious injuries sustained during athletic competition at the intercollegiate level. Consequently, President Roosevelt conducted meetings at the White House in which he urged the presidents of Harvard, Princeton, and Yale to address the issue of athlete safety.⁸² As a result, the Intercollegiate Athletic Association of the United States (IAAUS) was established on March 31, 1906, and in 1910 the IAAUS became the National Collegiate Athletic Association (NCAA).⁸³

The NCAA defines itself as "a voluntary organization through which the nation's colleges and universities govern their athletics programs."⁸⁴ The NCAA is comprised of member schools, each of which is categorized into one of three Divisions (I, II, and III). Schools often further align themselves into conferences to create a sense of stability and further alliance among, at least historically, similarly situated institutions of higher learning.⁸⁵ While the landscape of conference memberships has changed over time, a conference is still, as defined by the NCAA, merely a "group of colleges and/or universities that conducts competition among its members and determines a conference champion in one or more sports."⁸⁶

⁸¹ JOHN J. MILLER, *THE BIG SCRUM: HOW TEDDY ROOSEVELT SAVED FOOTBALL* (2011) (chronicling the President's efforts to save college football through the creation of the NCAA).

⁸² *See id.*

⁸³ *NCAA History* NCAA.ORG, <http://www.ncaa.org/wps/wcm/connect/public/NCAA/About+the+NCAA/Who+We+Are/About+the+NCAA+history> (last visited Nov. 28, 2011).

⁸⁴ *About the NCAA*, NCAA.ORG, http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/NCAA/About+The+NCAA/index.html (last visited Oct. 25, 2011).

⁸⁵ For an interesting history of NCAA conference realignment, refer to *History of Conference Realignment*, NBCSPORTS.COM, <http://nbcsports.msnbc.com/id/37689691/> (last visited Oct. 9, 2011).

⁸⁶ NCAA Academic and Membership Affairs Staff, *NCAA, 2011-12 NCAA Division I Manual* (2011) [hereinafter *DI Manual*], available at <http://www.ncaapublications.com/productdownloads/D112.pdf>.

Since the NCAA's inception in 1910, large numbers of student-athletes at colleges and universities across the country have dreamt of pursuing a career in professional athletics. With the growth of technology, the visibility of professional athletes has soared over the past century. Correspondingly, the expansion in the popularity of professional athletics, domestically and internationally, has translated into greater interest on behalf of students-athletes in entering the professional leagues.

The NCAA governs college eligibility and the concept of amateurism for all student-athletes for every college and university across the country.⁸⁷ Because the NCAA is a non-profit with voluntary membership, its ability to impose rules and restrictions on student-athletes is virtually absolute.⁸⁸ The 2011-12 Division I NCAA Manual consists of 426 pages of operating and administrative bylaws that define the manner in which all college players must: 1) gain initial eligibility; 2) maintain their academic and athletic eligibility; 3) follow the constraints of the NCAA's self-defined "amateur" status; and 4) continue to represent their university and the NCAA on the court.⁸⁹

One important caveat is that the NCAA is not a centralized governing body. Rather, the "NCAA" is truly a membership. While its headquarters may implement rules and policies, by and large the people who work for the NCAA are merely implementing policies created and pushed forward on behalf of the member institutions.⁹⁰ It has become easy to blame the NCAA officials who enforce its policies, despite the fact they often individually oppose those policies. But it is the colleges themselves that have fashioned and allowed this system to evolve. Higher education thus has no one to blame but itself for the burdensome regulations imposed—not some bureaucracy in Indianapolis.

Under the auspices of protecting amateurism, the NCAA membership has very clearly established lines that define the rules by which all student-athletes who transition from college to professional athletics must abide if

⁸⁷ *Id.*

⁸⁸ *NCAA's Tax-Exempt Status*, NCAA.ORG, <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Issues/Commercialism/NCAATMaxxemptstatus> (last visited Oct. 9, 2011).

⁸⁹ These specific principals are discussed in the DI Manual, both in Article 1.2 (Purposes) and Article 2 (Principles for Conduct of Intercollegiate Athletics). See DI Manual, *supra* note 86, at 1.2.2.

⁹⁰ *How We Work: NCAA Membership & the National Office*. NCAA.ORG. <http://www.ncaa.org/wps/wcm/connect/public/ncaa/about+the+ncaa/how+we+work/ncaa+membership+and+the+ncaa+national+office>.

they are to maintain their NCAA eligibility.⁹¹ Any player who hopes to play in the NBA must comply with these rules, as NBA rules now force players to attend a minimum of one year of college.⁹²

Because of this one-year requirement, colleges and universities face an increasing number of student-athletes whose sole reason for attending school is to build their brand and pass the time before declaring for the NBA draft.⁹³ The NCAA acknowledges this reality and, to its credit, has developed policies that define how these individuals may evaluate their NBA prospects while maintaining their college eligibility should they so choose.

The NCAA rules governing men's basketball players and the NBA draft have been modified over time, partly in response to changes in the NBA's collective bargaining agreement. What has remained consistent, however, is that a basketball player may "inquire of a professional sports organization about eligibility for a professional-league player draft or request information about the individual's market value without affecting his . . . amateur status."⁹⁴ Thus, under NCAA rules, a men's basketball player may always contact the NBA to determine his draft status.

While student-athletes may inquire about their draft status at any time, their ability to declare for the draft while retaining their collegiate eligibility is an entirely different story. This distinction is of critical importance is because NBA teams often don't evaluate potential prospects until they declare themselves draft eligible. With approximately 4,100 students participating in Division I men's college basketball across the country every year, NBA teams simply cannot adequately scout all potential players until they know who is coming out in any given year.⁹⁵ Thus, the only way to

⁹¹ *Id.*

⁹² 2005 *Collective Bargaining Agreement*, *supra* note 72, at art. X § 1(b)(i). Note that this could change with the new collective bargaining currently underway between the NBA and the NBPA.

⁹³ Zack Lowe, *Age Limit on Back Burner in Labor Negotiations*, http://nba-point-forward.si.com/2011/11/02/age-limit-on-back-burner-in-labor-negotiations/?sct=hp_wr_a2&eref=sihp (last visited Nov. 3, 2011). One recent example of a student-athlete being forced to attend college because of the "one and done" rule was Kansas University's Josh Shelby. Pat Forde, *Josh Selby Story Exposes One-and-Done*, ESPN.COM (April 22, 2011), http://sports.espn.go.com/ncb/columns/story?columnist=forde_pat&id=6407176.

⁹⁴ DI Manual, *supra* note 86 at 12.2.4.1 (Draft and Inquiry).

⁹⁵ There are 344 schools competing in Division I men's basketball and approximately 12 players per team. Thus, dividing by four, there are approximately 1,032 college seniors each year, to say nothing of the international evaluation necessary as well. 2011-12 Division I Men's Basketball. NCAA.ORG. http://stats.ncaa.org/team/inst_team_list?sport_code=MBB&division=1.

gauge a player's true professional potential is to declare for the draft while following NCAA rules so that he doesn't lose his amateur eligibility.

The NCAA's strict time constraints further restrict a player's ability to make an informed decision about his future. The NCAA has radically changed the deadline for pulling one's name out of the draft in a way that shows power resides with the college coaches—not with university presidents, athletic directors or the NCAA officials, each of whom may be more concerned with evaluating what is in the “best interests of the student-athlete.”⁹⁶

The NCAA imposes few restrictions on student-athletes before they enroll in college basketball. One such rule generically states:

“[a]n individual shall be ineligible for participation in an intercollegiate sport if he or she has entered into any kind of agreement to compete in professional athletics, either orally or in writing, regardless of the legal enforceability of that agreement.”⁹⁷

One other requirement imposed on student-athletes before enrollment has to do with professional representation. The NCAA has rules related to agents for all sports that specify when selecting a professional agent for representation causes a student-athlete to permanently lose his or her college eligibility.⁹⁸ The general amateurism rules regarding agents apply to all student-athletes and clearly states that an athlete will permanently lose his or her eligibility should he or she agree—either verbally or in writing—to be represented by an agent.⁹⁹

While the rules regarding agents are steadfast, an exception has evolved when securing advice about a proposed professional contract in either baseball or hockey.¹⁰⁰ Because the MLB and NHL allow individuals to be drafted directly out of high school,¹⁰¹ the NCAA has developed a distinction in its rules that allows a student-athlete and his parents to “receive advice from a lawyer or other individual concerning a proposed professional

⁹⁶ Eamonn Brennan, *The New NBA Draft Deadline is Ridiculous*. ESPN.COM. http://espn.go.com/blog/collegebasketballnation/post/_id/30366/the-new-nba-draft-deadline-is-ridiculous.

⁹⁷ DI Manual, *supra* note 86 at 12.2.5 (Contracts and Compensation).

⁹⁸ See *id.* at 12.3 (Use of Agents).

⁹⁹ *Id.*

¹⁰⁰ DI Manual, *supra* note 86 at 12.3.2 (Legal Counsel).

¹⁰¹ *Collective Bargaining Agreement Between National Hockey League and National Hockey League Players' Association* (July 22, 2005), 17 (8.4 Eligibility for Claim); *First Year Player Draft: Official Rules*, MLB.COM, <http://mlb.mlb.com/mlb/draftday/rules.jsp> (last visited Nov. 7, 2011).

sports contract.”¹⁰² However, this “advisor” is not allowed to represent the individual directly in negotiations over the contract.¹⁰³

This advice provision means that a player selected in either the MLB or NHL draft is allowed to have a lawyer review a proposed contract, but the lawyer may not represent the individual during any negotiations to improve the terms of the deal. Any direct contact (defined as any conversation in person or phone, text message, or email) with a professional sports team immediately turns the advisor into an agent under NCAA rules, thereby making the student-athlete ineligible.¹⁰⁴ If an individual receives assistance from an advisor, the student-athlete is required to pay him or her “normal rate” for such services.¹⁰⁵ Unfortunately, the NCAA has not yet decided to allow advisors in the sport of men’s basketball.

With respect to the NBA draft, NCAA rules draw a firm line for players. After enrolling in college:

“An individual loses amateur status in a particular sport when the individual asks to be placed on the draft list or supplemental draft list of a professional league in that sport, even though:

1. The individual asks that his name be withdrawn from the draft list prior to the actual draft;
2. The individual’s name remains on the list but he or she is not drafted; or
3. The individual is drafted but does not sign an agreement with any professional athletics team.”¹⁰⁶

¹⁰² DI Manual, *supra* note 86 at 12.3.2 (Legal Counsel). Also, the NCAA sends a letter to all individuals who compete in either baseball or men’s ice hockey that clearly explains their definition of “advisors.” For an example, see Rachel Newman-Baker and Steve Mallonee, *Memorandum to Men’s Ice Hockey Student-Athletes with Remaining Eligibility*, NCAA (Mar. 17, 2011), available at <http://graphics.fansonly.com/schools/mwc/graphics/pdfs/compliance/032211-nhl-ed-doc.pdf>.

¹⁰³ DI Manual, *supra* note 86 at 12.3.2 (Legal Counsel). In an interesting case, a baseball player had an advisor who directly negotiated with a baseball team in violation of these direct NCAA rules. Ultimately, he was deemed to be ineligible. He appealed this ruling in *Oliver v. Natl. Collegiate Athletic Assn.*, 920 N.E.2d 203 (2009).

¹⁰⁴ DI Manual, *supra* note 86 at 12.3.2.1 (Presence of a Lawyer at Negotiations).

¹⁰⁵ Newman-Baker, *supra* note 102 at 5.

¹⁰⁶ DI Manual, *supra* note 86 at 12.2.4.2 (Draft List).

IV. THE NCAA & NBA EVALUATION PERIOD

This Article has discussed why the changes in the NBA draft eligibility rules have forced individuals to attend college in greater numbers since 2006, resulting in large numbers of student-athletes on college campuses who want to leave early. These student-athletes face the unenviable predicament of being squeezed between the rules and regulations of both the NBA and NCAA. It is during this time, referred to as the “evaluation period,” that a student-athlete may assess his true potential in the NBA.

The combination of money and the change in the way that NBA teams evaluate talent virtually dictates that players turn professional as early as possible, greatly affecting the landscape of college basketball as a result. The elite NBA players who have completed four years of college have all but disappeared.

Looking at the players who have played in the NBA All-Star game shows how the League has evolved over the past two decades. Every player in the 1991 NBA All-Star game spent at least two years in college.¹⁰⁷ Ten years later, in the 2001 NBA All-Star game, four of the twenty-four participants had skipped college altogether – Tracy McGrady, Kobe Bryant, Kevin Garnett and European star Vlade Divac.¹⁰⁸

By 2011 NBA All-Star Game, fourteen of the twenty-four players came into the league from high school, from overseas, or with only one year of college on his resume.¹⁰⁹ In fact, only one player, Tim Duncan, had spent four years in college.¹¹⁰ These data show that while four-year college players certainly can make it into the NBA, their numbers are meager and, by and large, they are not perceived to be at the pinnacle of their profession.

This “one and done” reality is a common complaint amongst college basketball fans. The premature departure of an underclassman from school is viewed with disdain by the institution’s alma mater, academia, and even their own coaches. These players are criticized for either a lack of allegiance or chasing an early payday. But the system forcing them to make this decision was devised by the NBA and NCAA membership; the players are simply acting accordingly.

¹⁰⁷ *1991 NBA All-Star Game Box Score*, BASKETBALLREFERENCE.COM, http://www.basketball-reference.com/allstar/NBA_1991.html (last visited Oct. 25, 2011).

¹⁰⁸ *2001 NBA All-Star Game Box Score*, BASKETBALLREFERENCE.COM, http://www.basketball-reference.com/allstar/NBA_2001.html (last visited Oct. 25, 2011).

¹⁰⁹ *2011 NBA All-Star Game Box Score*, BASKETBALLREFERENCE.COM, http://www.basketball-reference.com/allstar/NBA_2011.html (last visited Oct. 25, 2011).

¹¹⁰ *Id.*

The NCAA attempted to address this “one and done” situation by developing an “evaluation period” whereby student-athletes could declare for the NBA draft, evaluate their prospects, and return to college with their eligibility intact, so long as they followed certain rules. The creation of this evaluation period began in 1994, when the NCAA carved out an exception for men’s basketball players under rule 12.2.4.2.1, which states that:

“[A]n enrolled student-athlete (as opposed to a prospective student-athlete) in the sport of basketball may enter a professional league’s draft one time during his or her collegiate career without jeopardizing eligibility in that sport, provided the student-athlete is not drafted by any team in that league and the student-athlete declares his or her intention to resume intercollegiate participation within 30 days after the draft.”¹¹¹

The intent behind this rule was to benefit the student-athlete by giving him the ability to return to college (and hopefully pursue his degree) should he make the mistake of declaring early when the NBA did not perceive him as ready for professional basketball. During the time in which a student-athlete is allowed to consider this transition, both the NCAA and NBA lose a modicum of control.

The negative response to this rule’s adoption in 1994 was immediate and harsh. In an article published by *The Los Angeles Times*, many basketball experts weighed in on this controversy.¹¹² Rick Majerus, then head coach at the University of Utah, declared, “You can tell [the rule] was done by the NCAA and not the NBA . . . [b]ecause the NCAA doesn’t know what the hell it’s doing. The ramifications of this rule are mind-boggling.”¹¹³ Then Commissioner of the Big East Conference Mike Tranghese agreed when he stated this rule is “absolutely, in my view, one of the worst rules ever adopted.”¹¹⁴ The response from the NBA towards this rule was also negative. Jerry Reynolds, director of player personnel of the Sacramento Kings, and Pat Williams, general manager of the Orlando Magic, spoke out against this rule.¹¹⁵

¹¹¹ DI Manual, *supra* note 86, at 12.2.4.2.1 (Exception—Professional Basketball Draft). Note that this rule was adopted in 1994 and was revised in 1995, 1997, and 2003.

¹¹² Gene Wojciechowski, *NCAA Change Dumb to Some: Basketball: New rule that allows undergraduates to return to school after testing NBA draft stirs controversy*, L.A. TIMES, June 28, 1994, http://articles.latimes.com/1994-06-28/sports/sp-9497_1_nba-draft.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

Despite its criticism, however, the rule did have an impact on student-athletes choosing the early entry process. A total of 674 individuals have declared themselves for the NBA draft as “early entrants” since 2005, 476 of those being college freshman, sophomores, and juniors (the balance are international players).¹¹⁶ The yearly breakdown of college players declaring early is as follows:

2005	2006	2007	2008	2009	2010	2011
61	63	59	70	74	80	69

Over the past seven years, an average of 68 NCAA underclassmen with eligibility remaining have indicated that they would like to be considered for the NBA draft. But a full 42% (198 out of 476) of those who declare early later remove their names from that year’s NBA draft.¹¹⁷ Thus, over the past seven years, although an average of sixty-eight players enter their names early for the NBA draft, only an average of forty choose to remain in the draft.

The following chart provides the specific number of early entry submissions who stayed in the draft for the last seven years:

Year	2005	2006	2007	2008	2009	2010	2011
Underclassmen staying in the draft	39	37	32	39	38	51	42

Between 2005 and 2010, 174 individuals returned to college after initially declaring their intention to enter the NBA draft. It should be noted that over 20% of those returning players (36 out of 174, or 20.7%) were drafted in subsequent years.¹¹⁸ This Article will return to these data to discuss when entering the draft is considered a “good decision.”

Randolph Morris highlighted the ramifications of these rules in 2005. Morris was a high school All-American after his senior year, and he gave serious thought to skipping college entirely and entering the NBA draft.¹¹⁹ Instead he joined future NBA players Joe Crawford and Rajon Rondo, becoming part of the top rated recruiting class in the country when the three

¹¹⁶ See *Historical Drafts*, THE DRAFT REVIEW.COM, *supra* note 15.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Adrian Wojnarowski, *The Problematic Prospect*, YAHOO!SPORTS.COM (Dec. 11, 2006, 2:25 PM), <http://sports.yahoo.com/nba/news?slug=aw-morris121106>.

enrolled at Kentucky.¹²⁰ After a successful freshman season, Morris chose to leave school, hired an agent, and entered the NBA Draft, only to go undrafted.¹²¹

After the draft, Morris decided to return to Kentucky rather than try out for the NBA as an undrafted free agent. To do so, Morris petitioned the NCAA to restore his college eligibility. Because Morris had signed with an agent prior to the draft, the NCAA initially served him with a one-year suspension.¹²² However, after the NCAA found that Morris had a “clear intent to retain his college eligibility while declaring for the NBA draft,” it reduced his full season suspension to just the first fourteen games of the 2005-06 basketball season.¹²³ Morris thus found himself in a unique situation, floating between NCAA and NBA rules.

Under the rules of the NBA’s CBA, Morris was ineligible to re-enter a future NBA draft and was therefore immediately declared a free agent.¹²⁴ As a free agent, he could be signed at any time.¹²⁵ However, Morris also had college eligibility granted by the NCAA to play for Kentucky. As a result, Morris could leave Kentucky at any time he wished. Not surprisingly, once Kentucky was eliminated from the NCAA Tournament in 2006, Morris chose to leave college mid-semester, signing a two-year, \$1.6 million contract with the New York Knicks.¹²⁶

Neither the NCAA nor the NBA was happy with this outcome. The NCAA determined in 2009 that it would change its rules relative to declar-

¹²⁰ *Rivals.com Top 25 for 2004*, RIVALDS.COM, <http://rivalshoops.rivals.com/content.asp?SID=910&CID=297763> (last visited Oct. 17, 2011). Note that this class also included Ramel Bradley and transfer Patrick Starks.

¹²¹ Howard Beck, *Knicks Sign Center Who Was Undrafted but Not Unnoticed*, N.Y. TIMES, Mar. 24, 2007, <http://www.nytimes.com/2007/03/24/sports/basketball/24garden.html?fta=y>.

¹²² *NCAA Reduces Morris Suspension*, ESPN.COM (Dec. 15, 2005, 7:36 PM), <http://sports.espn.go.com/espn/wire?section=ncb&id=2260093>. Publicly, Morris stated “in exploring my NBA options I made poor choices . . . [t]hose choices included accepting bad advice while putting distance between me and my coaches and teammates.”

¹²³ See John Clay, *Getting Legal Help Not a Good Thing for UK, Morris Case Dragging out*, LEXINGTON HERALD LEADER, Nov. 16, 2005, at C1; *Wildcats’ Morris Has Penalty Reduced*, ORLANDO SENTINEL, Dec. 16, 2005, at D5; See Jerry Tipton, *Morris Will Be Back on Jan. 10: Confidential Evidence and Fax Change season*, LEXINGTON HERALD-LEADER, Dec. 16, 2005, at A1.

¹²⁴ Beck, *supra* note 121.

¹²⁵ Wojnarowski, *supra* note 119.

¹²⁶ *Knicks Sign Kentucky Center Morris to 2-year Deal*, ESPN.COM, <http://sports.espn.go.com/nba/news/story?id=2809958> (last visited Nov. 11, 2011).

ing for the NBA draft while retaining amateur status.¹²⁷ This rule change meant that college players needed to decide whether or not they would remain in the draft before the draft was held—thus forcing them to guess their draft status rather than waiting for the results and then deciding. The rule is intended to benefit college basketball coaches who want to know what their rosters will look like for the upcoming year, which helps them on the recruiting trail.

The language of this rule is as follows:

“In men’s basketball, an enrolled student-athlete may enter a professional league’s draft one time during his collegiate career without jeopardizing eligibility in that sport, provided:

1. The student-athlete requests that his name be removed from the draft list and declares his intent to resume intercollegiate participation not later than the end of May 8th of the year in which the draft will occur;
2. The student-athlete’s declaration of intent is submitted in writing to the institution’s director of athletics; and
3. The student-athlete is not drafted.”¹²⁸

This rule results in the following timeline: a student-athlete plays their college basketball season, which hopefully includes a deep run into the NCAA’s “March Madness” Tournament, traditionally ending the first Monday in April. Those who have exhausted their four years of college eligibility (i.e. seniors) are automatically eligible for the NBA draft. Underclassmen typically declare their intention to enter the upcoming draft by formally submitting their name to the NBA’s league office.

Under NBA rules, teams are prohibited from having any direct contact with draft ineligible players.¹²⁹ This restriction makes sense, as allowing teams to contact high school or college players would be a nightmare. As a result of this restriction, the underclassmen who submit their names for the

¹²⁷ Andy Katz, *Rule Change Would Alter Draft Process*, ESPN.COM, http://espn.go.com/mens-college-basketball/blog/_name/katz_andy/id/4086305 (last visited Nov. 11, 2011).

¹²⁸ DI Manual, *supra* note 86, at 12.2.4.2.1.1 (Exception—Basketball—Four-Year College Student-Athlete, Men’s Basketball).

¹²⁹ Ken Berger, *Knicks-Thomas Reunion Against NBA Rules. . .and a Horrible Idea*, CBSSPORTS.COM, <http://www.cbssports.com/nba/story/13731440/knicksthomas-reunion-against-nba-rules-and-a-horrible-idea> (last visited Nov. 11, 2011); *see also* Adrian Wojnarowski, *Sources: N.Y. Scout Led Improper Workouts*, YAHOO! SPORTS, <http://sports.yahoo.com/nba/news?slug=aw-knicksdraft102610> (last visited Nov. 11, 2011).

upcoming draft cannot be contacted by any NBA team until the NBA officially publishes its “final” list.

Many student-athletes spend the better part of March traveling for high profile conference tournament games, and then to NCAA sites around the country for March Madness. These tournaments generate tremendous amounts of money for the NCAA and its member institutions.¹³⁰ (One need not point out the money and attention these tournaments bring to the NCAA and its member institutions.) The student-athletes then return to campus as their academic year is winding down and final examinations are beginning. It is during this time that players have approximately a three-week window in which to decide whether to submit their name for the NBA draft.¹³¹ Not surprisingly, many opt to submit and make their true decision later.

Once a player decides to declare, he must navigate the legal regulations established between the NBA and NCAA. It takes some level of expertise to properly advise student-athletes as to what they are allowed to do during this time period if they wish to obtain an evaluation of their prospects, yet retain their college eligibility. Unfortunately, the availability of unbiased guidance is rare on college campuses. Far too few schools take advantage of the Professional Sports Counseling Panel legislation aimed at assisting student-athletes in entering professional athletics with real assistance.¹³²

The NCAA has rules specifically targeted towards men’s basketball players “testing the waters” while pursuing a career in professional basketball. First, as already noted, college basketball players may enter their names into the NBA draft one time during their college career without jeopardizing their eligibility. However, under NCAA amateurism rules, these students may not sign with an agent at any point and retain their

¹³⁰ Brad Wolverton, *NCAA Agrees to \$10.8-Billion Deal to Broadcast Its Men’s Basketball Tournament*, THE CHRONICLE, <http://chronicle.com/article/NCAA-Signs-108-Billion-De/65219/> (last visited Nov. 11, 2011).

¹³¹ In 2011, the date by which to declare for the draft was April 24, 2011. *2011 NBA Draft Early Entry Analysis*, CBSSPORTS.COM, <http://www.cbssports.com/collegebasketball/story/14878964/nba-draft-early-entry-commitments> (last visited Nov. 11, 2011).

¹³² DI Manual, *supra* note 86, at 12.3.4 (Professional Sports Counseling Panel). For greater analysis of the benefits and uses of these panels, see Wong et al., *supra* note 14.

college eligibility.¹³³ Additionally, these players must withdraw their name from the draft by a certain date should they want to return to college.¹³⁴

During this evaluation period NBA teams may meet with potential draftees. In fact, players may tryout with NBA teams, at the NBA team's expense, so long as the student-athletes are enrolled full-time and do not miss any classes.¹³⁵ Prospects may also submit their names to the NBA's "Undergraduate Advisory Committee," which is composed of NBA team executives, and receive a confidential projection of their likely draft position.¹³⁶

The challenge is that the evaluation received from this Committee is neither an exact science nor particularly helpful because of the variance in the feedback of NBA scouts and executives. An assessment indicating that a player may be taken "between the middle of the first round and the middle of the second round," while an honest appraisal, provides no true insight as to whether an individual should make this jump. The difference between a first round selection and a second round selection is enormous. The first round pick is provided, under the recently expired CBA, a guaranteed three year contract, while the second round pick is guaranteed nothing.¹³⁷ Consequently, without considering a player's individual circumstances, the standard interpretation is that a player who leaves early and is selected in the first round made a "good" choice, while one who is either drafted in the second round or undrafted made a "mistake."

To help ease the concerns that student-athletes might have with returning to college when a professional career in the NBA is available to them, the NCAA created the Exceptional Student-Athlete Disability Insur-

¹³³ DI Manual, *supra* note 86, at 12.3.1 (Use of Agents).

¹³⁴ *NCAA Makes Rule Changes*, ESPN.COM (May 1, 2011, 12:53 PM), <http://sports.espn.go.com/ncaa/news/story?id=6444510>.

¹³⁵ DI Manual, *supra* note 86 at 12.2.1.3.1 (Exception for Predraft Basketball Camp).

¹³⁶ Dana O'Neil, *Coaches, Fans Hold Their Breath as More Players Flirt with NBA*, ESPN.COM (Apr. 30, 2008), http://sports.espn.go.com/ncb/columns/story?columnist=oneil_dana&id=3373696.

¹³⁷ *2005 Collective Bargaining Agreement*, *supra* note 72, at art. VIII § 1. The CBA discusses the minimum contract requirements that must be offered a first round selection. There is no restriction, either as a minimum or maximum offer, that an NBA team must offer a second round selection. They may be treated as any other free agent with the exception that they are only able to negotiate with the team that drafts them.

ance (ESDI) program.¹³⁸ This program allows student-athletes with a future in professional athletics the ability to insure against debilitating injury during their college careers.¹³⁹ The program, offered for the first time by the NCAA in 1990 for football and men's basketball, now includes men's ice hockey, baseball, and women's basketball.¹⁴⁰

Student-athletes who have demonstrated that they have the potential to be selected in the first round of the NBA draft are eligible for the program. If the athlete suffers a permanent total disability, the policy provides the student-athlete with a lump sum payment.¹⁴¹ It is important to note that permanent total disability typically requires that the athlete be completely unable to perform his or her profession or sport for an entire twelve-month period after the initial injury.¹⁴²

In theory, the evaluation process seems to make sense. An undergraduate student-athlete can seek to evaluate his NBA potential in a variety of ways. He can submit his name to the NBA draft indicating his intention to join that year's class. He can interview agents, so long as he doesn't agree to sign with one. He can get a confidential assessment of his draft status from the NBA. He can try out with teams. In all of these areas, the NCAA has shown some leniency and common sense in understanding the magnitude of the decision a student-athlete faces at this critical time in his life. The intent behind these rules seems admirable under a cursory examination, but one must look deeper.

Unfortunately, the "evaluation period" that the NCAA affords its student-athletes to determine what is in their best interests – an immediate career in the NBA or a return to college – has been severely hampered by the dates and restrictions that the NCAA, not the NBA, has imposed. In

¹³⁸ See *Exceptional Student-Athlete Disability Insurance Program*, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/NCAA/About+The+NCAA/Budget+and+Finances/Insurance/exceptional.html (last visited Nov. 11, 2011).

¹³⁹ Jerome Solomon, *NCAA to OK Financial Allowances for Athletes*, HOUS. CHRON., Apr. 26, 2001, <http://www.chron.com/sports/college/article/NCAA-to-OK-financial-allowances-for-athletes-2053063.php>.

¹⁴⁰ See *Exceptional Student-Athlete Disability Insurance Program*, *supra* note 138.

¹⁴¹ *Id.*

¹⁴² For more information on a related argument, that the NCAA should seek to revise its current exceptional student disability insurance policy program whereby elite student-athletes should have the ability to obtain insurance for partial, not merely permanent disability coverage, see Glenn M. Wong & Chris Deubert, *The Legal and Business Aspects of Disability Insurance Policies in Professional and College Sports*, 17 VILL. SPORTS & ENT. L.J. 473 (Spring 2010).

2011 the deadline to apply for early-entry for the NBA draft was April 24, 2011. On that day, the NBA released its official list of “draft eligible” prospects, and NBA team officials were allowed to have contact with potential draftees, including scheduling tryouts. Under NBA rules, the first date that NBA teams could hold workouts for early-entry players was April 28, 2011. The date by which these potential draftees must withdraw their names from the draft in order to maintain their NCAA eligibility was May 8, 2011.

These deadlines resulted in only eleven days during which time a student-athlete was permitted to receive an appraisal from the NBA, from which he must make a career defining decision. Add to that timeframe the fact that NCAA regulations prohibit a student-athlete from missing any classes in order to travel or tryout with NBA teams.¹⁴³ This regulation is strictly enforced, despite the fact that the NCAA appears unconcerned by the number of classes these individuals miss in the month of March while promoting their school at various conference and NCAA tournaments. Furthermore, the NCAA permits a student-athlete to miss class time to interview for any job outside of professional athletics.

Additionally, while the NBA draft is an important talent-recruitment mechanism for the league, sixteen NBA teams are beginning the playoffs during this period, making it virtually impossible for these teams to concentrate on providing accurate player evaluations. The front offices of NBA teams have limited personnel, and staff are preoccupied by the team’s playoff run. The result is that NBA teams truly do not have a sense of where potential players may be selected two months before the draft. It is not until they have had adequate time to concentrate on and evaluate these college players – something that realistically happens much closer to the day of the draft – that NBA teams have any sense of a player’s likely draft prospects.

Why are there are so few days during which a real assessment of an individual’s potential is allowed? Blame must be placed on the most powerful cohort within the NCAA—the college coaches. While many NCAA rules take into account the well-being of the student-athlete, the coaches ultimately carry more weight.

Between 2009 and 2011, the NBA tryout period was reduced from fifty days to just eleven days. The reason behind this change is that coaches want to know which of their players are returning. College coaches, particularly those at the traditional basketball power schools, felt they were being

¹⁴³ One interesting note is that few in academia would think twice about an outstanding student in the field of accounting or finance leaving campus – and missing classes – to interview in Boston or New York.

held hostage as their players waited to decide whether to return to their institution.¹⁴⁴ The perception was that this uncertainty left roster spots and scholarships unused for an upcoming season, potentially preventing a team from maximizing its pool of talent.¹⁴⁵

In 2010 and 2011, 149 NCAA student-athletes declared for the NBA draft as early-entry participants. A total of fifty-seven of them (or 38%) decided to return to college—either because of a poor reception from the NBA or not having enough time to properly evaluate this decision. However, only 42% of the original 149 student-athletes were drafted so, in retrospect, another thirty players should have pulled their names from the NBA draft. Furthermore, if you add the twenty underclassmen drafted in the second round, a total of fifty of the 149, or 34%, probably would have been better served by returning to school.¹⁴⁶

Given the high numbers of individuals improperly evaluating their NBA prospects, it seems right for the NCAA to consider a better process with more time for students to make this decision. But for 2012 and beyond, according to the NCAA – or at least high profile college coaches – the NCAA will not consider such a change. In fact, in 2011 a new proposal was submitted to the NCAA which would make the time frame for a student-athlete to “request that his name be removed from the draft list and declares his intent to resume intercollegiate participation no later than the end of the day before the first day of the spring National Letter of Intent signing period for the applicable year.”¹⁴⁷

The legislation itself, put forth by the men’s basketball coaches of the ACC – most ardently by UNC’s Roy Williams, according to many¹⁴⁸ – provides some background into their thinking when it states:

¹⁴⁴ Andy Katz, *Time For the Annual Draft Deadline Changes*, ESPN.COM (Apr. 14, 2011, 1:50 PM), http://espn.go.com/mens-college-basketball/blog/_name/katz_andy/id/6354169 [hereinafter Katz, Annual Draft]; see also Andy Katz, *Should Early-Entry Withdrawal Date Move?*, ESPN.COM (Jan. 21, 2011, 1:11 PM), http://espn.go.com/mens-college-basketball/blog/_name/katz_andy/id/6045445 [hereinafter Katz, Should Early-Entry].

¹⁴⁵ *Id.*

¹⁴⁶ Note: these numbers does not take into account those who for academic reasons could not return to school.

¹⁴⁷ 2011 Division I Official Notice: Legislation for Consideration at the January and April 2011 NCAA Division I Legislative Council and NCAA Division I Board of Directors Meetings, 46, http://fs.ncaa.org/Docs/AMA/legislative_actions_issues/Division%20I/2011%20Official%20Notice/2011%20DION.pdf (last visited Nov. 4, 2011).

¹⁴⁸ Bob Geary, *NBA Lockout? We’ve Got Your Pro Basketball Right Here*. INDYWEEK.COM (Nov. 23, 2011, 2:35 PM), <http://www.indyweek.com/indyweek/nba-lockout-weve-got-your-pro-basketball-right-here/Content?oid=2712306>.

"Before the adoption of the current rule, student-athletes had approximately 50 days to decide whether to remain in the draft and tryouts with NBA teams could occur only in the last 20 days. During that period, collegiate head coaches were often in limbo regarding the status of their rosters for the upcoming season. Further, student-athletes typically spent a large part of that time away from campus training for pre-draft workouts, which resulted in academic concerns. The current legislation reduced the problem by setting the withdrawal deadline May 8, which is 40 days earlier than the previous withdrawal deadline but still 22 days after the first day of the National Letter of Intent late signing period for men's basketball in April. This year, NBA teams did not spend money to have workouts with student-athletes until the withdrawal deadline passed. By moving the withdrawal deadline, *coaches will have flexibility to address roster issues at the beginning of the spring signing period while viable prospects are still available*. Evaluations by professional scouts and others during preseason practices, regular season games and postseason games should provide student-athletes with adequate information to credibly determine NBA draft status."¹⁴⁹

Two high profile coaches, Kentucky's John Calipari and Syracuse's Jim Boeheim, argued against the implementation of this rule. With 34 years of coaching experience at his alma mater, Boeheim declared "I don't think it's a good thing. I'm not sure who actually was in favor of that or why it got in."¹⁵⁰ Calipari further argued on behalf of the student-athletes when he said, "All this stuff: For the good of college basketball? This should be about these kids. . . . They've done their good for college basketball. This should be about, 'How can we help these kids make a good decision?'"¹⁵¹ Even Gary Williams, the coach at ACC member school, the University of Maryland, opposed this rule change. He declared: "[f]or the basketball players, it's a little quick to make that decision, especially after the NCAA tournament. If you have a tough loss, it's not enough time to calm down and make a good decision."¹⁵² As Mike DeCourcy wrote in *The Sporting News* on February 14, 2011, "[t]he ACC coaches who allowed this proposal to escape with their names attached should be, each and every one of them, ashamed. Not all supported it as ardently as North Carolina's Roy Williams

¹⁴⁹ 2011 Division I Official Notice, *supra* note 147.

¹⁵⁰ Todd Dybas, *Dybas: Early Withdrawal Rule Penalizes College Basketball*, SPORTSPRESS N.W. (June 30, 2011, 7:00 AM), <http://uwhoops.sportspressnw.com/2011/06/30/dybas-early-withdrawal-rule-penalizes-college-basketball/>.

¹⁵¹ Mike DeCourcy, *NCAA Would Be Wrong to Move up Early Entry Date*, SPORTING NEWS (Apr. 13, 2011), <http://aol.sportingnews.com/ncaa-basketball/story/2011-04-13/ncaa-would-be-wrong-to-move-up-early-entry-date>.

¹⁵² See Katz, *Annual Draft*, *supra* note 144.

and Florida State's Leonard Hamilton, but neither did they successfully intervene to stop it."¹⁵³

After careful evaluation, as is part of the NCAA's legislative process, the Amateurism Cabinet reviewed the proposal. Its response, also found in the legislation as a position statement, was as follows:

"The cabinet opposes the proposal. The cabinet notes that the current rule requiring a student-athlete to withdraw his name by May 8 has only been in effect for one year and that the current rule needs further evaluation. Reducing the current time period might put student-athletes at a disadvantage by not allowing them sufficient time to gather adequate information, as well as taking away opportunities for student-athletes to participate in pre-draft workouts. Finally, there is no evidence of an academic impact on student-athletes under the current timeline."¹⁵⁴

This statement shows the NCAA Amateurism Cabinet is arguing on behalf of the welfare of student-athletes, and opposing the wishes of the ACC men's basketball coaches. However, the NCAA's "Men's Basketball Issues Committee" responded to this proposal by simply declaring "the committee supports the proposal."¹⁵⁵ Nevertheless, the Committee did express some concern as to whether an earlier date would create distractions for student-athletes at the conclusion of the regular season. Despite these concerns from groups within the NCAA, this rule passed and took effect on August 1, 2011.¹⁵⁶

What this new rule means for the 2012 draft class is unclear. What is clear is that a player needs to remove his name from the NBA draft list "no later than the end of the day before the first day of the spring National Letter of Intent signing period."¹⁵⁷ That date in 2012 is April 11.¹⁵⁸ The National Championship game in men's basketball will be played on April 2, 2012.¹⁵⁹ Thus, players either have one week to make this decision, or they must be thinking about the decision long before the end of their season in

¹⁵³ Mike Decourcy, *Making a Bad Early Decision Worse*, SPORTING NEWS (Feb. 14, 2011), <http://periodicals.faqs.org/201102/2280688401.html>.

¹⁵⁴ 2011 *Division I Official Notice*, *supra* note 147.

¹⁵⁵ Katz, *Annual Draft*, *supra* note 144 (quoting NCAA proposed legislation).

¹⁵⁶ 2010-2011 NCAA Legislation (as of August 26, 2010) available at http://www.mvc-sports.com/media/pdf/Compliance/2010-11_NCAA%20Legislation.pdf.

¹⁵⁷ *Id.*

¹⁵⁸ National Letter of Intent, National Collegiate Athletic Association, <http://www.ncaa.org/wps/wcm/connect/nli/nli> (last visited November 3, 2011).

¹⁵⁹ *March Madness 2012*, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, <http://www.ncaa.com/march-madness> (last visited Nov. 12, 2011).

March. This is certainly not an ideal situation, and it is only exacerbated by the fact that the NBA prohibits contact with college players until they have announced their decision to come out for the draft.

Another problem with a short decision-making window is determining who can provide guidance to student-athletes during this critical period. As mentioned, under current NCAA rules, men's basketball players may not receive guidance from advisors in the way that baseball and hockey players do.¹⁶⁰ Additionally, there is a true dearth of Professional Sports Counseling Panels on college campuses around the country. These panels are allowed under NCAA rules but, by and large, are not adopted by schools. As a result of this lack of trustworthy guidance, many men's basketball players turn to their AAU coaches for advice – a scary proposition.

Since no one seems to be speaking out on behalf of these student-athletes while they are in college, their professional representatives are now doing so publicly. As Andy Katz states in his blog:

“It is a further impediment to the athlete and his ability to analyze his options, said agent Bill Duffy, whose firm, BDA Sports Management, represents NBA players such as Steve Nash, Yao Ming and Rajon Rondo. ‘It is definitely self-serving for the institutions. I don’t think it impacts prospects in the top 10 but mid-to-late first-rounders looking to position themselves higher in the draft are harmed significantly.’”¹⁶¹

Mark Bartelstein, CEO of Priority Sports & Entertainment, and agent to over thirty NBA players,¹⁶² said he “regularly fields calls from players’ families seeking information on a player’s draft status.”¹⁶³ “He also said “in his daily talks with NBA general managers he’s been told [that NBA teams] are in no position to [give] draft advice in January or February since the draft is too far away.”¹⁶⁴ “It will be a disaster because college coaches will be wondering why players are distracted,” Bartelstein said.¹⁶⁵ He went on to say:

¹⁶⁰ *Example Letter Sent to Basketball Student-Athletes*, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, (Jul. 20, 2010), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2010+news+stories/July+latest+news/Example+letter+sent+to+basketball+student-athletes>. Note: similar letter was sent to men's ice hockey players as well.”

¹⁶¹ See Katz, *Should Early-Entry*, *supra* note 144.

¹⁶² Mark Bartelstein, PRIORITY SPORTS & ENTERTAINMENT, <http://www.prioritybasketball.biz/basketball/MarkBartelsteinBB.html> (last visited Nov. 16, 2011).

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ See Katz, *Should Early-Entry*, *supra* note 144.

"I've been a huge proponent for years to let the players focus on the season. I've told them they'll have plenty of time to figure out what the right thing to do is because there are no sure answers in January, February or March. No one knows in even late April what's happening [with the draft]. You're asking kids to make decisions without accurate information. Teams don't know what they're doing. It's going to be a nightmare for college coaches. . . . [Moving the date to early April will bring] all kinds of people telling [players] what they want to hear and don't have the real answer."¹⁶⁶

Many players are opposed to this legislation as well. Butler University star Matt Howard commented on moving up the date to withdraw from the NBA draft this past spring, "For players, I just don't see how that helps them a whole lot. . . . It almost makes it pointless to put your name out and not sign with an agent."¹⁶⁷

V. PROPOSALS

What is clear is that student-athletes in the sport of basketball are caught in a quagmire of rules and regulations that significantly impede their ability to properly evaluate their NBA prospects. The restraints on the manner and timing of entry into the NBA have evolved over the past several decades, as both the NBA and NCAA have developed rules that reflect their own economic self-interests. The byproduct of these rules is an inefficient marketplace for players entering the NBA from college, as demonstrated by the significant number of players that leave early yet remain undrafted.

As this Article has highlighted, many seemingly insignificant rule changes by both the NBA and NCAA have impacted student's entry into professional basketball. While each specific rule may have addressed a single issue that needed clarity at the time of creation, the result is a mess of obstacles throughout the transition period. The inefficiencies are compounded by the fact that the NBA and NCAA each react to the other's policies rather than developing better practices in tandem.

Because self-interest directs the actions of the sport's governing bodies the resulting outcome is that, in reality, there is no true advocacy group for the welfare of student-athletes in assisting their transition into the professional environment. This is not to argue that the NCAA and its members are not concerned about the general welfare of student-athletes. The NCAA is quick to point out that it has over 380,000 student-athletes and just

¹⁶⁶ *Id.*

¹⁶⁷ *NCAA Makes Rule Changes*, ESPN.COM (May 1, 2011, 12:53 PM), <http://sports.espn.go.com/ncaa/news/story?id=6444510>.

about every one of them will turn professional in something other than sports.¹⁶⁸ While this declaration is true, it ignores the small minority of student-athletes who do have the opportunity to make this transition, yet have no unbiased support at the institutional level and no advocacy group within the professional industry they hope to enter.

Unequivocally, both the NBA and NCAA have every right, and in fact a duty, to develop rules that govern their organizations and seek to further their purpose and goals. However, in so doing, a true voice for the participating individuals (i.e. student-athletes) is muted or ignored in the process. In theory, member institutions are tasked with the responsibility of advocating on behalf of the student-athlete. Yet, when student-athletes have limited legal standing to challenge inequities,¹⁶⁹ schools (or more likely high profile coaches) are free to trade the students' best interests in for financial gain for their institution or conference.¹⁷⁰

In challenging economic times one cannot disagree with the decision that when balancing the rights of a few high profile athletes against the potential revenue stream for an entire institution, schools are quick to choose revenue. Nevertheless, the end result is that we are left with an environment of rules¹⁷¹ that generate billions in revenues from amateur athletics without truly compensating the participants.¹⁷² One result of this

¹⁶⁸ NCAA Public Service Announcement: Basketball, YOUTUBE (Apr. 24, 2008), <http://www.youtube.com/watch?v=G40g9RTxurw>. NCAA Public Service Announcement developed by Young & Rubicam for JoJo Rinebold, the NCAA's managing director of brand strategies and events.

¹⁶⁹ Waldrep v. Tex. Emp'rs. Ins. Assoc., 21 S.W.3d 692 (Tex. App. 2000).

¹⁷⁰ Michelle Kaufman, *College Conference Realignment All About the Money*, INDIANAPOLIS STAR, Oct. 4, 2011, <http://www.indystar.com/article/20111004/SPORTS/110040362/College-conference-realignment-all-about-money>.

¹⁷¹ See generally DI Manual, *supra* note 86, at 16.1 (Awards). This section of the NCAA manual discusses the ability and restrictions on providing athletic scholarships to student-athletes. It should be noted that this paper does not support the argument that we should be "paying" student-athletes other than a revision to the rules to allow schools to provide the full cost of attendance. See DI Manual, *supra* note 86, at 15.02.2 (Cost of Attendance) (inability of schools to provide full cost of attendance in all circumstances).

¹⁷² An example of the revenue available to the NCAA is in their recent television contract to broadcast their Division I Men's Basketball Tournament. See Thomas O'Toole, *NCAA Reaches 14-year Deal With CBS/Turner for Men's Basketball Tournament, Which Expands to 68 Teams for now*, USA TODAY, Apr. 22, 2010, <http://content.usatoday.com/communities/campusrivalry/post/2010/04/ncaa-reaches-14-year-deal-with-cbturner/1>.

perception is the growing support amongst many to refute the NCAA's concept of amateurism and pay student-athletes.¹⁷³

Returning to the numbers helps to illustrate the importance of the evaluation period. Interpreting both NCAA legislation and NBA draft eligibility rules under the recently expired CBA, in 2011 a college athlete needed to declare for the draft, evaluate his chances, and return to college within a window of ten days.¹⁷⁴ Many critics have debated over the rule that the NBA passed in 2005 requiring basketball players be nineteen years old before they are draft eligible, yet so far the rule remains.¹⁷⁵ Of additional note is the reality that both the NBA and NBPA seem to be ignoring this matter in their current labor negotiations.¹⁷⁶

Ignoring the legal opinions, the argument that high school graduates are unprepared or too immature to compete in the NBA can be refuted with the success of LeBron James, Kobe Bryant and Kevin Garnett, among others.¹⁷⁷ Most germane to this argument is the fact that the age requirement really only affects a limited number of people. Specifically, during the decade between 1995 and 2005, only thirty-nine players skipped college to enter the NBA.¹⁷⁸ This does not mean that every one of those thirty-nine individuals made the right choice, only that it comparatively wasn't a tremendously large number of people choosing to bypass college.

The number of college students considering a transition, however, is much larger. During the seven years between 2005 and 2011, a total of 490 college underclassmen participated in this "evaluation period."¹⁷⁹ This number indicates that greater attention must be paid to the evaluation period of the amateur draft and the interests of student-athletes during this crucial time. Given the new NCAA legislation that was put through during the 2011 summer, student-athletes will need to make a decision within a

¹⁷³ Branch, *supra*, note 8.

¹⁷⁴ The NCAA Championship game will be played on April 2, 2012, and the NLI date by which a student-athlete is now required to remove his name from the upcoming NBA draft is April 11, 2012. *March Madness 2012*, *supra* note 159.

¹⁷⁵ Scoop Jackson, *NBA's Age Restriction Won't Change*, ESPN.COM (Jan. 18, 2010), <http://sports.espn.go.com/espn/commentary/news/story?id=4836818>.

¹⁷⁶ Lowe, *supra* note 93.

¹⁷⁷ For a recent article questioning the perception that high school players do not succeed in the NBA, see Tom Haberstroh, *Impact of the One-and-Done Rule*, ESPN.COM (Oct. 28, 2011, 6:27 PM), http://insider.espn.go.com/mens-college-basketball/preview2011/story/_id/7156333/state-game-impact-one-done-rule-nba-college-basketball.

¹⁷⁸ *Historical Drafts*, *supra* note 15.

¹⁷⁹ *Id.*

week after the NCAA Men's Basketball Championship game, and before getting official feedback from the NBA, making this critical time period more important now than ever before.

It would be negligent to identify problems in this process without proposing some recommendations that would truly benefit the student-athletes. Accordingly, in order for student-athletes making this transition from college to the NBA to receive an honest appraisal of their potential, it is necessary for both the NBA and NCAA to modify their rules such that student-athletes are able to make an informed decision on whether to enter professional basketball. While direct collaboration between the NBA and NCAA may well be deemed illegal,¹⁸⁰ each organization has the ability to make some rule changes that benefit the student-athlete without harming its own mission. As such, the following proposals are offered:

1. The NBA should adopt draft eligibility rules similar to those in MLB. In baseball, high school graduates are automatically draft eligible and need not petition or declare their intention for the draft. A drafted high school player has until August 15 to decide whether he will sign with the major league team or attend college.¹⁸¹ The player is allowed an "advisor," but not an agent, to help him assess both a proposed contract and the decision to enter professional baseball.¹⁸² So long as he has not accepted money, or broken NCAA rules in another way, the player has retained his amateur status and has the option of attending college—either a four-year college or junior college.

Once a player enrolls in school, the team that drafted him immediately loses all right to the player.¹⁸³ Furthermore, the player is not eligible for the MLB draft again until after his junior year (unless he enrolls in a junior college), meaning a minimum of three years of college.¹⁸⁴

¹⁸⁰ 15 U.S.C.A. § 1. Unfortunately, the ability of these two organizations to work together will be restricted by antitrust laws that govern conspiracy. Specifically, §1 of the Sherman Act declares that "Every 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 declared to be illegal." By agreeing to restrictions that may limit the market for wages and the ability to earn a living, the NBA and NCAA are limited in their ability to agree upon rules.

¹⁸¹ *First Year Player Draft: Official Rules*, MLB.COM, <http://mlb.mlb.com/mlb/draftday/rules.jsp> (last visited Nov. 7, 2011).

¹⁸² DI Manual, *supra* note 86, at 12.3.2 (Legal Counsel).

¹⁸³ *First Year Player Draft*, *supra* note 181.

¹⁸⁴ *Id.*

While MLB's structure, specifically its minor league system, is quite different from the NBA, its draft eligibility rules appear transferable. History has proven that talented high school players can succeed in the NBA, and NBA teams should be allowed to draft high school seniors. This would also ensure that those players who go to college do so by choice—not because of regulations established by the NBA or NCAA.

If a player decides to attend college, NBA rules should require that the player not be draft eligible for two years—after a player's sophomore year of college. This revision would allow players two years of a college education, and provide some level of stability for the NCAA. These provisions should ideally be part of the ongoing CBA discussions between the NBA and NBPA.

2. As outlined earlier, just as the NCAA allows in baseball and hockey,¹⁸⁵ NBA rules should encourage potential players to hire an “advisor” to assist during this challenging period. If the NBA draft eligibility rules do change to permit the drafting of high school players, the rules should allow advisors to contact teams and assist these individuals in the evaluation of their NBA prospects, and ultimately, with their decision of entering the draft or attending college. The abilities of advisors to properly counsel their clients shouldn't be neutered by antiquated NCAA amateurism guidelines. It is important to allow student-athletes to receive valuable advice during this critical period in their lives.

The relationship can be strictly limited in scope to the procurement of draft potential information and the negotiation of the tryout calendar with NBA teams. These services can be billed to the student-athlete, just as advisors are required to receive compensation in baseball and hockey, at the going rate.¹⁸⁶

3. The NCAA should expand and shift the number of days during which student-athletes may explore their potential as an NBA player while maintaining their college eligibility.

The benefits of this proposal are obvious. With a longer time to engage in this process, student-athletes can continue with their academic

¹⁸⁵ DI Manual, *supra* note 86, at 12.3.2 (Legal Counsel).

¹⁸⁶ *Sample letter Sent to Baseball Student-Athletes: Letter from Chris Fitzpatrick to Selected Division I Baseball Sports Information Contacts; and Selected Television and Broadcast Outlets*, May 30, 2011, available at http://www.ncaa.org/wps/wcm/connect/7682fa8046f91bbb87e5e7ac20c3c72c/DI_BSB_Reg_Broadcast_Rights_Memo.pdf?MOD=AJPERES&CACHEID=7682fa8046f91bbb87e5e7ac20c3c72c.

responsibilities and ensure compliance and eligibility should they return to campus in the fall. Additional time seems like a simple and easy accommodation on behalf of the NCAA.

While time to make a sound decision is necessary, the period of evaluation often occurs during the end of the spring semester. Thus, the actual timing of this evaluation period should be shifted as well. Rather than forcing student-athletes to declare and return in the first week of April, when many NBA teams are distracted and not fully evaluating potential talent, this period should be pushed back to the middle of May. This change would bring with it several important benefits.

First, college student-athletes can finish their academic studies without additional distraction. The NCAA should seemingly be in favor of allowing more time for student-athletes pursue their educations. Second, a later time period coincides with a time when the NBA is better prepared to do a thorough evaluation of potential players.

Certainly conferences, schools and basketball coaches will object because such an extension of time, during which a student-athlete remains undecided on his future, keeps the fall roster for a particular program up in the air. It may even impact recruiting. However, there are a limited number of programs that would disproportionately be affected by this change. Further, the potential negative impact on these elite programs could be good for the concept of "competitive balance" in college basketball. Ultimately, the goal should be to allow student-athletes the ability to get a better sense of their true draft prospects. Thus, any pressure on a particular college coach or program must be weighed against the ability of an individual to make an irrevocable decision about his future.

4. Coupled with additional time to evaluate the decision on leaving early, the student-athletes should have a real opportunity to determine their draft potential directly from the NBA in a timely fashion. In this regard, NBA rules could be changed to allow:
 - a) Allow student-athletes in the sport of basketball have to access to advisors under NCAA rules as discussed earlier;
 - b) Permit direct contact between the league and Professional Sports Counseling Panels during an identified time period far greater than the current 11 days; and
 - c) The creation of a true "NBA Combine" – similar to the NFL Combine – within the time frame the NCAA permits tryouts that enable all underclassmen to compete and perform in front of NBA personnel. This initiative will reduce travel time for college students and allow for a greater comparison between individual players.

Presently there is an NBA combine, but it consists only of measurements – height, weight, and a few workouts – no 5 on 5 competition.¹⁸⁷ Game competition is something that would be tremendously valuable for both the NBA and participants in assessing their true draft prospects. While game participation could be optional, all prospects should be required to attend the combine for physical measurements and interviews.

The NFL holds a combine in February in which the entire league gets to evaluate potential players two full months before the draft. The NFL's combine has turned into a tremendous success.

The selection process for the NFL Scouting Combine is clearly outlined by the NFL: a "Selection Committee," which includes the Directors of both National and BLESTO scouting services, is joined by members of various NFL player personnel departments.¹⁸⁸ All draft eligible players are evaluated and voted on by the Committee. The most highly sought after prospects – numbered somewhere in the neighborhood of 300 – are then invited to the Combine. The NFL's intention is to predict those college football players that they anticipate being selected in the upcoming NFL Draft.¹⁸⁹ And while it's highly likely that the players selected in the first several rounds will be invited, it is not an exact science. Being invited to the NFL Scouting Combine is by no means a guarantee of hearing your name in the April draft, just as failing to be invited is not a determinative sign that you will not be drafted or make it to the NFL.

The NFL Scouting Combine has grown in hype each year, and now is fully televised by the NFL Network.¹⁹⁰ What used to be a reasonably quiet tryout for a select number of college players now gets hundreds of media members in attendance and millions more watch-

¹⁸⁷ Bjorn Zetterberg, *2011 NBA Draft Combine: Day 1 Workout Notes and Analysis*, BLEACHERREPORT.COM, <http://bleacherreport.com/articles/704727-2011-nba-draft-combine-day-1-workout-notes-and-analysis> (last visited Nov. 7, 2011).

¹⁸⁸ *How are players selected for the NFL Combine?*, NFL.COM, <http://www.nflcombine.net/faq/how-are-players-selected-for-the-nfl-combine> (last visited Nov. 7, 2011).

¹⁸⁹ *Id.*

¹⁹⁰ *NFL Network & NFL.com Programming Notes (2/23-3/1)*, NFL.COM, <http://www.nfl.com/news/story/09000d5d81e7561f/article/nfl-network-and-nflcom-combine-coverage> (last visited Nov. 7, 2011).

ing at home.¹⁹¹ At the Combine, representatives from every team are in attendance, from owners to general managers, head coaches, position coaches and area scouts. Probably the most important part of this intense, four-day job interview is the medical evaluations, as team doctors determine the physical and mental capabilities of these young men.

This additional information can only help student-athletes in men's basketball make a more educated choice.

5. Colleges and universities should invest in Professional Sports Counseling Panels ("PSCPs") so that student-athletes can get unbiased guidance during this critical period of their lives.¹⁹² Schools have the ability under NCAA rules to provide support to student-athletes when making the transition from college to professional leagues but, for the most part, this ability has been ignored.¹⁹³ If schools do not have the ability – either in financial resources or intellectual talent – on campus to provide this level of guidance, it should be done at the conference level.

Just as funding for PSCPs needs to be increased by member institutions, the NCAA needs to increase funding to combat these problems. A clear source of this funding could be the television deals the NCAA and the conferences have negotiated.¹⁹⁴ As pointed out in the Wong article, funding at the NCAA level could be used in a variety of ways, including: grants to support PSCPs at individual schools, a repository of best practices in the industry, education on a conference or national level to student-athletes, and proper disability insurance protection.

¹⁹¹ Frank Tadych, *Strength in Numbers? Media Crush at Combine*, NFL.COM <http://blogs.nfl.com/2011/02/24/strength-in-numbers-media-crush-at-combine/> (last visited Nov. 7, 2011).

¹⁹² Wong et al., *supra* note 14, at 575-76.

¹⁹³ *At Some Schools, Advisers Help Navigate Going Pro*, ESPN.COM (Oct. 14, 2011, 4:17 PM), <http://sports.espn.go.com/espn/wire?section=ncf&id=7101951>.

¹⁹⁴ In April of 2010, CBS and the NCAA reached a new 14-year, \$10.8 billion deal. See John Ourand and Michael Smith, *NCAA's Money-making Matchup*, SPORTSBUSINESSDAILY.COM (Apr. 26, 2010), <http://www.sportsbusinessjournal.com/article/65533>. In July 2010, ESPN and the Atlantic Coast Conference (ACC) reached a 12-year, \$1.86 billion deal. Just two years earlier, CBS and ESPN agreed to television deals with the SEC for a total of 15-years and \$3.075 billion. See Zach Berman, *Under New TV Deal with ESPN, ACC Schools to See Increased Payout*, WASH. POST, July 9, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/08/AR2010070803383.html>.

6. The NBA and the NCAA should jointly revise the rules relative to the NBA draft, whereby any student-athlete who declares himself eligible has the ability, if not selected in the first round of the NBA draft and thus guaranteeing himself a contract under the latest CBA, to return to college. Teams should have little vested in someone they don't value as a first round pick. These student-athletes, so long as they haven't committed other NCAA infractions, would then have the opportunity to continue on towards a college degree while honing their craft and promoting their schools with another year of college basketball.
7. Student-athletes should be encouraged to graduate with financial incentives from the NBA for those who have spent additional years in college. It would be possible to grant free agency earlier if a player has completed his college degree or offer a slightly higher NBA minimum salary for those with college degrees. Either financial incentive could be enough to help a marginal prospect decide to invest in another year of college education. However, it is also feasible that the additional financial burden would be enough to impact the value of a particular player to an individual team.

One potential solution to this conflict is the creation of a separate league-wide pool that doles out "graduation bonuses." A set amount could be provided to anyone on an NBA roster who earns – or subsequently obtains – his college degree. This "bonus" could be reserved for those with a completed season of service.

The purpose of this enticement is to encourage student-athletes to further their education. However, a side benefit would be enjoyed by college athletics, as star players remain eligible for NCAA competition longer. There is no reason why the NCAA couldn't contribute funds to this league pool from the revenue it obtains from television contracts for March Madness. There is symmetry in allowing the student-athletes who generate the interest in the NCAA tournament to receive some financial return on their participation.

VI. CONCLUSION

The NBA and NCAA have each developed a regulatory framework that supports their own organizational missions. Unfortunately, the welfare of student-athletes is not a priority for either institution. The result is that when NCAA student-athletes consider their entry into professional basketball, the rules that govern this transition significantly hamper their ability to properly evaluate their options. Although the NBA and NCAA certainly

should maintain their own priorities, this Article has suggested a few easy remedies that would significantly enhance the ability of individual student-athletes to increase the likelihood that they are making the right decision during this life-changing decision period.