

3-1-2023

Let Them Play: The Case for Allowing Minors to Play Professional Sports

Zachary Bawduniak

Maurice A. Deane School of Law at Hofstra University

Follow this and additional works at: <https://scholarlycommons.law.hofstra.edu/hlej>



Part of the [Labor and Employment Law Commons](#)

Recommended Citation

Bawduniak, Zachary (2023) "Let Them Play: The Case for Allowing Minors to Play Professional Sports," *Hofstra Labor & Employment Law Journal*: Vol. 40: Iss. 2, Article 6.

Available at: <https://scholarlycommons.law.hofstra.edu/hlej/vol40/iss2/6>

This document is brought to you for free and open access by Scholarship @ Hofstra Law. It has been accepted for inclusion in Hofstra Labor & Employment Law Journal by an authorized administrator of Scholarship @ Hofstra Law. For more information, please contact lawscholarlycommons@hofstra.edu.

Let Them Play: The Case For Allowing Minors To Play Professional Sports

INTRODUCTION

In the United States, professional sports are a hugely popular source of entertainment that generates tens of billions of dollars annually.¹ Becoming a professional athlete is a dream for many children.² With hard work, commitment, and a little luck, this dream can and will be achieved, albeit only by a select few people.³ However, no matter how talented and capable a person may be of playing a sport at the professional level, many players will be limited by one rule that most of the top American sports leagues have on the books: the “Age Rule.”⁴

The National Football League (hereinafter “NFL”) requires athletes to wait a minimum of three years after graduating high school to become eligible to play in the league.⁵ Similarly, the National Basketball Association (hereinafter “NBA”) requires at least one year after high school before they may enter the league.⁶ The NBA’s age rule is commonly known as the “one and done” rule, referring to the one-year period between graduating high school and becoming eligible for the NBA draft.⁷ Because of these rules, a young athlete who may otherwise be physically, mentally,

1. See John McDuling, *America’s \$60 Billion plus Sports Business, in Five Charts*, QUARTZ (Oct. 6, 2014), <https://qz.com/276638/americas-60-billion-plus-sports-business-in-five-charts/>.

2. See Alison Doyle, *Top 15 Kids’ Dream Jobs*, THE BALANCE CAREERS (May 20, 2020), <https://www.thebalancecareers.com/top-kids-dream-jobs-2062280>.

3. See MALCOLM GLADWELL, *OUTLIERS: THE STORY OF SUCCESS* (Back Bay Books, Little, Brown and Co., 2013) (explaining that some successes are explainable while others are extraordinary, considering many different factors).

4. TJ Mathewson, *How Young is Too Young to Play Professional Sports?*, GLOBAL SPORT MATTERS (Apr. 25, 2019), <https://globalsportmatters.com/culture/2019/04/25/how-young-is-too-young-to-play-professional-sports/#:~:text=The%20NFL%20requires%20athletes%20to%20be%20at%20least,for%20U.S.%20players%20and%2017%20for%20international%20players.>

5. See *id.*

6. See *id.*

7. Rosajaimé, *History of the ‘One and Done Rule’*, WORDPRESS (Apr. 25, 2011) <https://nbapublicargument.wordpress.com/2011/04/25/history-of-the-one-and-done-rule/>.

and emotionally ready to play their sport at the professional level will be prevented from doing so.⁸ As a result, the athletic development of many young athletes can be stunted, putting them at risk of falling short of their full athletic potential or experiencing a career altering injury in a field where careers are notoriously short.⁹

This note will demonstrate that minors are wrongfully being deprived of their right to play professional sports, and that this deprivation has a lasting negative impact on minors' ability to reach their full potential as athletes.¹⁰ Section II of this note provides background information on the labor rights of minors, in both historical and modern contexts.¹¹ This section further details the social attitude toward young players in professional sports and provides examples to illustrate the significance of the negative impact brought on by Age Rules.¹² Section III analyzes existing laws relating to the child entertainment industry,¹³ how courts have applied these laws,¹⁴ and the overall impact of the laws on child entertainers.¹⁵ Section III also provides an example of a current federal program with similar characteristics to state child entertainment law.¹⁶ Section IV proposes an amendment to existing law that would enable minor-athletes to become subject to protections already enjoyed by minors in the entertainment industry, as well as an improved model for the development of minors in athletics.¹⁷ Lastly, Section V discusses the importance of fairness in the equal application of the law between minors and adults, and the value of allowing minors autonomy to make choices for themselves.¹⁸

8. See Scott Davis, *NBA Players Have a Simple Reason for Wanting to Eliminate the 'One-and-Done' Rule, and the League Might Already be Ready for it*, BUSINESS INSIDER (Mar. 6, 2018), <https://www.businessinsider.com/nba-players-one-and-done-should-end-2018-3>; See generally Kevin O'Connor, *High School Angst: What Abolishing the One-and-Done Rule Would Mean for the NBA*, THE RINGER (Feb. 25, 2019), <https://www.theringer.com/nba/2019/2/25/18239529/nba-one-and-done-draft-zion-williamson> (explaining that Zion Williamson was prevented from going directly from High School to NBA because of their Age Rule).

9. See *O.M. v. Nat'l Women's Soccer League, LLC*, 541 F. Supp. 3d 1171, 1184 (D. Or 2021) (finding that the Age Rule impeded a young soccer player's athletic development).

10. See *infra* Sections I-V.

11. See *infra* Section II.

12. See *infra* Section II.

13. See *infra* Section III.a.

14. See *infra* Section III.c.

15. See *infra* Section III.

16. See *infra* Section III.

17. See *infra* Section IV.

18. See *infra* Section V.

I. BACKGROUND

A. *Olivia Moultrie's Case Against the NWSL*

Olivia Moultrie's life has always revolved around soccer.¹⁹ She began her soccer training at age four,²⁰ was the first girl to play on a boys' club team in the U.S. Soccer Development Academy System,²¹ and committed to play soccer for the University of North Carolina at only eleven years old.²² Shortly thereafter, Moultrie withdrew her commitment from the University of North Carolina and forfeited her college eligibility altogether after signing a six-figure endorsement deal with Nike.²³ Moultrie then moved from her home in California to Oregon and joined the developmental academy of Portland Thorns F.C. (hereinafter "the Thorns").²⁴ The Thorns are one of twelve teams that compete annually in the National Women's Soccer League (hereinafter "NWSL").²⁵ The NWSL, like the NFL and NBA, had an Age Rule in effect that prohibited players from signing professional contracts until they had turned eighteen.²⁶

The NWSL's Age Rule was the lone obstacle preventing Moultrie from beginning her career as a professional soccer player.²⁷ Similar Age Rules in various leagues around the United States likewise restrict young athletes from advancing to the highest level, and instead force them to play in college or in an inferior league.²⁸ While federal law sets the

19. See MKhanal, *Olivia Moultrie*, PLAYERSWIKI (May 23, 2021), <https://playerswiki.com/olivia-moultrie>.

20. See *id.*

21. See *id.*

22. See Chris Ballard, *Is 13-year-old Olivia Moultrie the Grand Experiment that American Women's Soccer Needs Right Now?*, SPORTS ILLUSTRATED (May 29, 2019), <https://www.si.com/soccer/2019/05/29/olivia-moultrie-pro-us-soccer-nwsl-portland-thorns-nike>.

23. See TJ Mathewson, *How Young is Too Young to Play Professional Sports?*, GLOBAL SPORT MATTERS (Apr. 25, 2019), <https://globalsportmatters.com/culture/2019/04/25/how-young-is-too-young-to-play-professional-sports>.

24. See Jamie Goldberg, *13-year-old Phenom Olivia Moultrie to Move to Portland to Join Thorns Developmental Academy*, OREGONLIVE, <https://www.oregonlive.com/portland-thorns/2019/02/13-year-old-phenom-olivia-moultrie-to-move-to-portland-to-join-thorns-developmental-academy.html> (Feb. 26, 2019, 10:53 AM).

25. See NAT'L WOMEN'S SOCCER LEAGUE, *About the NWSL*, <https://www.nwslsoccer.com/about-the-nwsl> (last visited Apr. 4, 2023).

26. See *O.M. v. Nat'l Women's Soccer League, LLC*, 541 F. Supp. 3d 1171, 1176 (D. Or. 2021).

27. See *id.*

28. See NAT'L BASKETBALL ASS'N, *Collective Bargaining Agreement*, <https://cosmic-s3.imgix.net/3c7a0a50-8e11-11e9-875d-3d44e94ae33f-2017-NBA-NBPA-Collective-Bargaining-Agreement.pdf> at 273; NAT'L FOOTBALL LEAGUE, *Collective Bargaining Agreement – 2020* at 17,

minimum working age at fourteen,²⁹ these professional sports leagues set their own minimum age standards and usually require athletes to be at least eighteen years old.³⁰ These rules effectively limit the competition within the league by preventing perfectly capable participants from joining an industry where competition is a key element.³¹

In 2021, Moultrie brought a suit against the NWSL, challenging the Age Rule based on its arbitrary restriction on competition and seeking a temporary restraining order against the enforcement of the rule.³² The primary purpose of setting a minimum age for labor is for the protection of children from exploitation.³³ In Moultrie's case, exploitation was not at issue—all she wanted to do was be allowed to play professional soccer.³⁴ Moultrie argued that the Age Rule was anti-competitive, such that it violated the Sherman Anti-Trust Act.³⁵ The Age Rule was detailed in the NWSL's competition manual for the 2021 season and clubs were required to agree to in order to participate in the league.³⁶ Thus, Moultrie said, the league and member clubs acted collectively in enforcing the rule.³⁷ Moultrie further argued that for a woman who wants to play professional soccer in the United States, the only option is to play for one of the NWSL's twelve clubs.³⁸ Additionally, Moultrie argued that she would suffer irreparable harm if she continued to be barred from playing in professional matches, that her harm outweighed any harm that may be suffered by the NWSL, and that public policy favored the preservation of free and open competition and the promotion of gender equality.³⁹

https://nflpaweb.blob.core.windows.net/media/Default/NFLPA/CBA2020/NFL-NFLPA_CBA_March_5_2020.pdf (last visited Apr. 20, 2023).

29. See *Child Labor Provisions for Nonagricultural Occupations under the Fair Labor Standards Act*, U.S. DEP'T OF LAB. WAGE AND HOUR DIV., <https://www.dol.gov/sites/dolgov/files/WHd/legacy/files/childlabor101.pdf> (last visited Apr. 20, 2023).

30. See NAT'L BASKETBALL ASS'N, *supra* note 2828; see NAT'L FOOTBALL LEAGUE, *supra* note 2828.

31. See *O.M.*, 541 F. Supp. 3d at 1176; *Sport*, OXFORD ENGLISH DICTIONARY, <https://www.oed.com/view/Entry/187476?rskey=suB5Zq&result=1&isAdvanced=false#eid> (defining *sport* as “[a]n activity involving physical exertion and skill, esp. (particularly in modern use) one regulated by set rules or customs in which an individual or team competes against another or others.”) (emphasis added).

32. See *O.M.*, 541 F. Supp. 3d at 1176.

33. See U.S. DEP'T OF LAB., *Child Labor*, <https://www.dol.gov/agencies/whd/child-labor> (last visited May. 19, 2023).

34. See *O.M.*, 541 F. Supp. 3d at 1176.

35. See *id.*

36. See *id.* at 1179-80.

37. See *id.* at 1180.

38. See *id.* at 1176.

39. See *id.* at 1176, 1184.

The justification offered by the NWSL in their case against Moultrie essentially boiled down to three points.⁴⁰ First, the NWSL claimed that it was better for the development of players to not allow them to play against other professionals until they turned eighteen.⁴¹ At trial, however, one of Moultrie's teammates from the Thorns testified to the contrary, that "[p]laying against top professional competition, when the opponents play their hardest and when your failures have consequences, is how you learn to be at your best."⁴² Second, the NWSL argued that excluding minors from the league was important in order to protect the league from increased costs.⁴³ The NWSL feared that the ability of minors to avoid employment contracts combined with the increased costs of being compliant with the Safe Sport Act, which requires abuse of minors to be reported to law enforcement,⁴⁴ was too great of a risk to allow anyone under the age of eighteen to play.⁴⁵

Lastly, the NWSL offered a bandwagon argument, stating that the benefits conferred by the Age Rule were evident based on the fact that other professional leagues have their own age rules.⁴⁶ However, Major League Soccer (hereinafter "MLS"), which is the top men's soccer league in the United States and closest counterpart to the NWSL, does not have an Age Rule.⁴⁷ In fact, MLS has detailed rules designating extra roster spots for players younger than twenty-two in an effort to incentivize teams to sign young players.⁴⁸ Furthermore, the league did not elaborate or explain how these benefits make their league more competitive.⁴⁹ The court asserted that the list of benefits "appears to be more directed at reducing Defendant's overhead costs than benefitting competition."⁵⁰

40. See *O.M.*, 541 F. Supp. 3d at 1181.

41. See *id.*

42. *Id.* at 1184 (alteration in original).

43. See *id.* at 1181.

44. See "Safe Sport Act" 115 P.L. 126, 132 Stat. 318, 2018 Enacted S. 534, 115 Enacted S. 534.

45. See *O.M.*, 541 F. Supp. 3d at 1184-85.

46. See *id.* at 1181.

47. See *id.* at 1185.

48. See Miki Turner, *U22 Initiative Officially Unveiled with 2021 Roster Rules*, SB Nation (Apr. 14, 2021), <https://www.souderatheart.com/2021/4/14/22382980/u22-initiative-officially-unveiled-with-2021-roster-rules> ("MLS announced the implementation of the 'U22 Initiative' that will allow teams to increase their investment in dynamic, promising young players without breaking the bank, or their salary budgets."); MAJOR LEAGUE SOCCER, *2021 MLS Roster Rules and Regulations*, <https://www.mlssoccer.com/about/roster-rules-and-regulations> (last visited Feb. 1, 2023) (outlining MLS rules and regulations for the signing of young players pursuant to its U22 Initiative).

49. See *O.M.*, 541 F. Supp. 3d at 1181.

50. *Id.*

The court found in favor of Moultrie,⁵¹ holding that “[Moultrie] has presented persuasive evidence that each day that passes with the Age Rule in place represents a missed opportunity for her potential professional soccer career.”⁵² Moultrie was granted a temporary restraining order and subsequently a preliminary injunction against the NWSL for the enforcement of the Age Rule.⁵³

In early 2022, the NWSL and NWSL Player’s Association agreed to the league’s first ever Collective Bargaining Agreement (hereinafter “CBA”).⁵⁴ Among the terms of the NWSL’s new CBA are increased compensation for players, the creation of a free agency system, and improved health and wellness benefits.⁵⁵ Not contained within the CBA is any sort of Age Rule, such that more players like Moultrie will be able to play for clubs in the NWSL when those players and one of the NWSL’s clubs collectively determine the players are ready, regardless of their age.⁵⁶ Moultrie no longer has to rely on a court ordered injunction in order to play professional soccer, as the NWSL recognized its past shortcomings and worked to rectify them with the new CBA.⁵⁷

B. *A History of Child Labor Laws in the United States*

In early America, child labor was commonplace; children worked on farms, in mines, and even in factories.⁵⁸ Not only were children viewed

51. See *id.* at 1177.

52. *Id.* (alteration in original).

53. See *O.M.*, 541 F. Supp. 3d at 1177; *O.M. v. Nat’l Women’s Soccer League, LLC*, 544 F. Supp. 3d 1063, 1077 (D. Or. 2021).

54. See NWSL Editor, *National Women’s Soccer League and NWSL Players Association Agree on Transformative, First-Ever CBA to Run Through 2026 Season*, NWSL (Jan. 31, 2022), <https://www.nwslsoccer.com/news/national-womens-soccer-league-and-nwsl-players-association-agree-on-transformative-first-ever-cba-to-run-through-2026-season>.

55. See *id.*

56. See Emily Caron & Michael McCann, *NWSL Labor Deal Clears Path for Young Talent, Pay Increases*, SPORTICO (Feb. 1, 2022) <https://www.sportico.com/leagues/soccer/2022/nwsl-labor-deal-cba-1234659724>.

57. See *NWSL Playoff Final, Portland Thorns 2-0 Kansas City Current*, FOTMOB <https://www.fotmob.com/match/4053608/matchfacts/portland-thorns-vs-kansas-city-current> (last visited Jan. 9, 2023) (noting on October 29, 2022, the Portland Thorns defeated the Kansas City Current to become NWSL champions); *Stats*, NWSL (click on the “Teams” menu and select “Portland Thorns FC”) <https://www.nwslsoccer.com/stats/players?season=bus8n60i95d4ka5frxvgrspg> (last visited Jan. 9, 2023) (marking that Olivia Moultrie made 15 appearances for the Thorns during this championship season and appeared in the championship game as a substitute).

58. See Michael Schuman, *History of Child Labor in the United States—Part 1: Little Children Working*, U.S. BUREAU OF LAB. STAT. (Jan. 2017), <https://www.bls.gov/opub/mlr/2017/article/history-of-child-labor-in-the-united-states-part-1.htm>.

as an extra set of hands,⁵⁹ but the small size of said hands made them more capable than adults at performing certain tasks.⁶⁰ By 1900, more than one-in-five children in the United States were employed.⁶¹ In response to the increasing amount of child laborers, the United States government passed the Keating-Owen Child Labor Act of 1916.⁶² The Act set minimum ages for employees working in factories and mines, defined the hours of when children younger than fourteen were prohibited from working, and punished violators by prohibiting the sale of their goods in interstate commerce.⁶³ However, within a year of its enactment, the Act was ruled unconstitutional with the Supreme Court's decision in *Hammer v. Dagenhart*.⁶⁴

In *Hammer*, the Supreme Court held that since the damage done by child labor occurred prior to the good's entry into interstate commerce, the federal government could not regulate it,⁶⁵ and instead the individual states should use their discretion whether to exercise their police power over child labor.⁶⁶ This decision was then overturned in 1941 with the Supreme Court's decision in *United States v. Darby*.⁶⁷ In *Darby*, the Court used the substantial effects test to determine whether a substantial link existed between the statutes impact on interstate commerce and the evils that the statute intended to prevent.⁶⁸ The Court held that congressional power extends to activities that have a significant effect on commerce, which includes regulation of child labor.⁶⁹

In 1938, the federal government passed the Fair Labor Standards Act (hereinafter "FLSA").⁷⁰ The FLSA's purpose was "to ensure that when young people work, the work is safe and does not jeopardize their health, well-being[,] or educational opportunities."⁷¹ There are also exceptions for certain industries, such as restaurants, amusement parks, and

59. See THE U.S. NAT'L ARCHIVES AND REC. ADMIN., *Teaching with Documents: Photographs of Lewis Hine: Documentation of Child Labor*, <https://www.archives.gov/education/lessons/hine-photos> (last updated Feb. 21, 2017).

60. See *id.* ("Businesses liked to hire children because they worked in unskilled jobs for lower wages than adults, and their small hands made them more adept at handling small parts and tools.").

61. See Schuman, *supra* note 5858.

62. See *Keating-Owen Child Labor Act (1916)*, NAT'L ARCHIVES <https://www.ourdocuments.gov/doc.php?flash=false&doc=59#> (last updated Aug. 3, 2011).

63. See Keating-Owen Child Labor Act of 1916, H.R. 8234, 64th Cong. Ch. 249.

64. See *Hammer v. Dagenhart*, 247 U.S. 251, 251 (1918).

65. See *id.*

66. See *id.* at 266.

67. *U.S. v. Darby*, 312 U.S. 100, 116-17 (1941).

68. See *id.* at 119-20.

69. See *id.*

70. See U.S. DEP'T OF LAB, *supra* note 33.

71. *Id.* (alteration to original).

healthcare,⁷² where more detailed regulations exist for minor-workers.⁷³ However, no such exceptions exist for minors in professional sports.⁷⁴ The closest such legislation comes in the form of child-entertainment laws, which exist at both federal and state level and provide their own exceptions to the FLSA.⁷⁵ Although child-entertainment laws have yet to be interpreted to apply to minors playing a professional sport, the idea that these laws may apply to minor-athletes is not strained.⁷⁶

This brief history of the battle for regulation of child labor shows how the government has made the safety and well-being of children a non-negotiable part of American life, especially “because children often do not have a voice in [the] legal system.”⁷⁷ Despite this, Moultrie and other young athletes have used their voice and expressed a desire to be employed as professional athletes, only to face rejection by the would-be employer sports leagues.⁷⁸ While the federal government has strengthened minors’ employment rights by passing legislation, they have lapsed in their care to minors who are on the cusp of adulthood who wish to join the workforce in the professional sports industry.⁷⁹ This lapse has enabled many American professional sports leagues to continue restricting entry to minors using Age Rules.⁸⁰

C. Age Rules in Other Professional Sports

As previously mentioned, the NWSL is not the only professional sports league in the United States to have restricted participation based on age.⁸¹ The NBA, NFL, and other leagues have their own respective Age Rules.⁸² Contrarily, the MLS has no such limit and incentivizes its clubs

72. *See id.*

73. *See id.*

74. *See id.*

75. *See* 29 C.F.R. § 570.125 (2022); U.S. DEP’T OF LAB., *Child Entertainment Laws as of January 1, 2023*, <https://www.dol.gov/agencies/whd/state/child-labor/entertainment> (last visited Feb. 7, 2023).

76. *See infra* Section IV.

77. Kristen Korn, *The Struggle for the Child: Preserving the Family in Adoption Disputes Between Biological Parents and Third Parties*, 72 N.C.L. REV. 1279, 1279 n.* (1994) (alteration to original).

78. *See* O.M. v. Nat’l Women’s Soccer League, LLC, 541 F. Supp. 3d 1171, 1180-81.

79. *See infra* Section III.

80. *See* NAT’L BASKETBALL ASS’N, *supra* note 28; *see also* NAT’L FOOTBALL LEAGUE, *supra* note 28.

81. *See supra* p. 485.

82. *See* NAT’L BASKETBALL ASS’N, *supra* note 28; *see also* NAT’L FOOTBALL LEAGUE, *supra* note 28.

to sign younger players.⁸³ Similarly, many soccer players in Europe are not subject to an Age Rule and young players who break through to the professional level at a young age are commonly celebrated.⁸⁴

The NBA outlines its eligibility rules in Article X of its CBA.⁸⁵ Article X states that the only way a player may enter the NBA is if they have been eligible for the NBA Draft.⁸⁶ Section 1(b) offers a two-element test for determining eligibility for the draft.⁸⁷ First, a player must either be nineteen years old, or for non-Americans, have had one year pass from the year that they graduated or would have graduated high school.⁸⁸ Second, a player must satisfy any one of various different sub-elements, such as graduating from college, playing for a professional basketball team not in the NBA, or submitting a writing to the NBA more than sixty days prior to the draft expressing a desire to enter the draft as an “Early Entry” player.⁸⁹ Of the first ten picks in the 2021 NBA draft, eight played for only a single season for their respective college or other professional team, seven of which were the first seven picks of the draft.⁹⁰

The NFL CBA provides similar guidelines for its draft, stating in Article 6, Section 2(d), that “[n]o player shall be eligible to be employed by an NFL Club until he has been eligible for selection in an NFL Draft.”⁹¹ The key difference between the NFL and NBA drafts is that the NFL simply requires a minimum of three NFL seasons to have passed from a player’s graduation from high school in order to be eligible.⁹² In the 2021 NFL Draft, the first nine players drafted declared for the draft as soon as they were eligible, opting not to play for their college team their senior season.⁹³

83. See MAJOR LEAGUE SOCCER, *supra* note 48.

84. See *infra* Section II.e.

85. See NAT’L BASKETBALL ASS’N, *supra* note 28.

86. See *id.* at Article X Section 1(a).

87. See *id.* at Article X Section 1(b).

88. See *id.* at Article X Section 1(b)(i).

89. *Id.* at Article X Section 1(b)(ii).

90. See NBA.COM, *Draft History*, <https://www.nba.com/stats/draft/history/?Season=2021> (last visited Apr. 4, 2023).

91. NAT’L FOOTBALL LEAGUE, *supra* note 28, at Article 6, Section 2(d) (alteration to original).

92. See *id.* at Article 6 Section 2(b).

93. See NFL.COM, *NFL Draft – Picks*, <https://www.nfl.com/draft/tracker/picks/> (last visited Apr. 4, 2023).

D. *Maurice Clarett, Antitrust, and the Non-Statutory Labor Exception*

Moultrie's case is not the first time that a young athlete aspiring to go professional has challenged the age rule in professional sports.⁹⁴ In 2003, Maurice Clarett sued the NFL regarding its own Age Rule, which prevented him from entering the NFL draft after his sophomore season of college.⁹⁵ Clarett was a star player for The Ohio State University's football team but was suspended by the team and eventually dismissed.⁹⁶ After his dismissal, Clarett attempted to declare for the 2004 NFL Draft, but his efforts were quashed by the NFL's Age Rule, which states that a player must be at least three years removed from high school in order to be eligible.⁹⁷ Clarett argued before the district court that the NFL's Age Rule was invalid on an antitrust basis, stating that "the Rule is an illegal restraint of trade because the teams have agreed to exclude a broad class of players from the NFL labor market, thereby constituting a 'group boycott.'"⁹⁸

The district court sided with Clarett, granted him summary judgment, and held that the NFL's Age Rule violated antitrust laws.⁹⁹ The NFL appealed the judgment, and the circuit court reversed the decision, finding in favor of the NFL.¹⁰⁰ The circuit court held that since the NFL's eligibility requirements were subject to the Collective Bargaining Agreement between the NFL and NFL Players' Association (hereinafter "NFLPA"), the NFL did not violate antitrust laws.¹⁰¹ In their ruling, the court stated that the non-statutory labor exemption provided sufficient grounds for upholding the legality of the NFL's Age Rule.¹⁰²

94. See *Clarett v. NFL*, 369 F.3d 124 (2d Cir. 2004).

95. See *id.*

96. See Adam Rittenberg, *Inside the Latest Chapter of Former Ohio State Star Maurice Clarett's Life Turnaround*, ESPN.COM (May 12, 2020), https://www.espn.com/college-football/story/_/id/28490590/inside-latest-chapter-former-ohio-state-star-maurice-clarett-life-turnaround.

97. See *Clarett*, 369 F.3d 124.

98. *Clarett v. NFL*, 306 F. Supp. 2d 379, 390 (S.D.N.Y. 2004).

99. See *id.* at 410-11; *Clarett*, 369 F.3d at 129 ("Specifically, the district court held that the exemption does not apply because the eligibility rules: 1) are not mandatory subjects of collective bargaining, 2) affect only 'complete strangers to the bargaining relationship,' and 3) were not shown to be the product of arm's-length negotiations between the NFL and its players union." (citing *Clarett*, 306 F. Supp. 2d 379, 393-97)).

100. See *Clarett*, 369 F.3d 124.

101. See *id.*

102. See *id.*

The non-statutory labor exemption is a judicially created rule to favor labor-related statutes over antitrust statutes in certain situations.¹⁰³ The non-statutory exemption has been inferred “from federal labor statutes, which set forth a national labor policy favoring free and private collective bargaining which require good faith bargaining over wages, hours, and working conditions.”¹⁰⁴ These statutes also “delegate related rulemaking and interpretive authority to the National Labor Relations Board.”¹⁰⁵

The exemption exists not only to prevent the courts from usurping the NLRB’s function of “determin[ing], in the area of industrial conflict, what is or is not a ‘reasonable’ practice,”¹⁰⁶ but also “to allow meaningful collective bargaining to take place” by protecting “some restraints on competition imposed through the bargaining process” from antitrust scrutiny.¹⁰⁷

The court found that the non-statutory labor exemption was applicable to the relationship between the NFL and NFLPA regarding the parties’ CBA, particularly eligibility for the league.¹⁰⁸ In the absence of the CBA, however, or even the omission of the Age Rule within it, Clarett’s future may have turned out differently.¹⁰⁹ Had Clarett been eligible for the 2004 NFL draft and selected in the first round where he was projected at the time, he would have been subject to stronger leverage when negotiating his rookie contract.¹¹⁰ For comparison, Steven Jackson, who was drafted in the first round of the 2004 NFL Draft and played the same position as Clarett, signed a five-year, \$7 million rookie contract.¹¹¹ Clarett eventually entered the 2005 NFL Draft, where he was drafted in the third round by the Denver Broncos.¹¹² Following the draft, Clarett signed a four-year,

103. See Kieran M. Corcoran, *When Does the Buzzer Sound?: The Nonstatutory Labor Exemption in Professional Sports*, 94 COLUM. L. REV. 1045 (1994).

104. *Brown v. Pro Football, Inc.*, 518 U.S. 231, 236 (1996) (citation omitted).

105. *Id.* at 236.

106. *Clarett*, 369 F.3d 124, at 131 (alteration in original) (quoting *Brown*, 518 U.S. 231, at 236).

107. *Brown*, 518 U.S. 231, at 237.

108. See *id.*

109. See *infra* Section II.d.

110. See Karl Rasmussen, *What Happened to Maurice Clarett and Where is He Now?*, FANBUZZ (Sept. 3, 2022), <https://fanbuzz.com/college-football/big-ten/ohio-state/maurice-clarett-now/>.

111. See *Steven Jackson (Running Back)*, OVER THE CAP, <https://overthecap.com/player/steven-jackson/1353/> (last visited Jan. 31, 2023).

112. See *2005 NFL Draft*, PRO FOOTBALL REFERENCE, <https://www.pro-football-reference.com/years/2005/draft.htm> (last visited Jan. 31, 2023).

\$1,385,000 rookie contract,¹¹³ but was cut from the Broncos before the season began marking the end of his brief NFL career.¹¹⁴

E. *The Glory of the Wunderkind*¹¹⁵

The professional soccer leagues of Europe, governed by both the Union of European Football Associations (hereinafter “UEFA”) and the Fédération Internationale de Football Association (hereinafter “FIFA”), are prime examples of leagues where young athletes can thrive professionally. For example, in Spain’s “La Liga,” forty-five players under the age of eighteen have made their professional debut since the 2012-13 season.¹¹⁶ Further, on October 16, 2004, Lionel Messi made his La Liga debut for FC Barcelona.¹¹⁷ Messi moved from his home in Argentina to Barcelona, Spain at only thirteen years old with dreams of becoming a professional soccer player.¹¹⁸ Nineteen years after making his professional debut, Messi has come to be regarded as one of the best soccer players of all time,¹¹⁹ winning many accolades at both the team and

113. See Maurice Claret, SPOTRAC, <https://www.spotrac.com/nfl/denver-broncos/maurice-claret-11396/> (last visited Jan. 31, 2023).

114. See Rasmussen, *supra* note 110.

115. Wunderkind is defined as, “one who succeeds in a competitive or highly difficult field or profession at an early age.” *Wunderkind*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/wunderkind> (last visited Jan. 24, 2022).

116. See *LaLiga Youngest and Oldest Used Players*, TRANSFERMARKT, <https://www.transfermarkt.com/laliga/juengsteaelteste/wettbewerb/ES1> (last visited Jan. 1, 2023) (adjust “show players used between” filter to “12/13” and click “show”).

117. See Ritabrata Banerjee, *Lionel Messi’s La Liga Debut for Barcelona Who Were his Teammates and Where Are They Now?*, GOAL, <https://www.goal.com/en-ng/lists/lionel-messi-la-liga-debut-barcelona-who-were-his-teammates/> (last updated Oct. 6, 2021) (noting his age of seventeen years and three months).

118. See Sid Lowe, *Lionel Messi: How Argentinian Teenager Signed for Barcelona on a Servette*, THE GUARDIAN (Oct. 15, 2014), <https://www.theguardian.com/football/blog/2014/oct/15/lionel-messi-barcelona-decade>.

119. See C.f. Jack Gallagher, *The 50 Greatest Footballers of All Time*, 90 MIN, <https://www.90min.com/posts/50-greatest-footballers-all-time-ranked> (last updated Sept. 4, 2021) (ranking Messi 1st); Adnan Riaz, *The 50 Greatest Footballers Of All Time Have Been Named And Ranked*, SPORT BIBLE, <https://www.sportbible.com/football/news-top-10s-the-50-greatest-footballers-of-all-time-have-been-named-and-ranked-20200601> (last updated June 1, 2020, 9:05 PM) (ranking Messi 2nd); James Stroud, *Messi, Ronaldo, Pele: The 50 Greatest Footballers of All Time Have Been Ranked*, GIVEMESPORT (Apr. 23, 2021, 5:00 AM), <https://www.givemesport.com/1680262-messi-ronaldo-pele-the-50-greatest-footballers-of-all-time-have-been-ranked> (ranking Messi 3rd).

individual level (most notably, the 2022 FIFA World Cup¹²⁰), and holding numerous records.¹²¹

With Messi serving as an excellent example of a young athlete given the ability to chase their dreams, modern trends have led to more and more soccer players turning professional before their eighteenth birthday.¹²² Kylian Mbappé made his professional debut for AS Monaco in France's "Ligue 1" on December 2, 2015, at the age of sixteen.¹²³ In the time since his debut, Mbappé has won the FIFA World Cup with the French national team, won the Ligue 1 title five times, and been the top scorer in Ligue 1 four seasons in a row.¹²⁴ Mbappé was sold by AS Monaco to Paris Saint Germain (hereinafter "PSG") in 2017 for a transfer fee¹²⁵ of €180 million,¹²⁶ making him the second most expensive player in history, and most expensive teenage player.¹²⁷

One European soccer league that does have an Age Rule in on the books is Germany's "Bundesliga."¹²⁸ The league had previously required players to reach an age of sixteen years and six months in order to be eligible to play.¹²⁹ However, the league lowered the minimum age for

120. See Max Molski, *Argentina Celebrates World Cup Title with Millions of Supporters in Buenos Aires*, NBC SPORTS CHI. (Dec. 20, 2022), <https://www.nbcsports.com/chicago/world-cup-2022/argentina-celebrates-world-cup-title-millions-supporters-buenos-aires>.

121. See *Achievements*, MESSI.COM, <https://messi.com/en/honours-and-achievements/> (last visited Jan. 31, 2023).

122. See *infra* Section II.e.

123. See *Kylian Mbappé Debuts*, TRANSFRMARKT, <https://www.transfermarkt.com/kylian-mbappe/debuts/spieler/342229> (last visited Jan. 31, 2023).

124. See *Kylian Mbappé Achievements*, TRANSFRMARKT, <https://www.transfermarkt.com/kylian-mbappe/erfolge/spieler/342229> (last visited Feb. 6, 2023).

125. A "transfer fee" in soccer is money paid from one club to another for the purpose of signing a particular player on the receiving club. This fee varies based on factors like the player's ability, age, and how valuable the player is to each club at the time. The player involved generally does not receive any of the money from their transfer fee, but instead is incentivized to sign for the paying club with a signing bonus or increased salary. See *How Does a Football Transfer Work*, BBC, <https://www.bbc.com/worklife/article/20170829-how-does-a-football-transfer-work> (last visited Jan. 21, 2022).

126. Worth \$203 million at the time of Mbappé's transfer. See *Currency Exchange Rate Widget*, CURRENCY CONVERTER WIDGET, <http://exchangerateusd.com/historialexchangerate/2017-08-31#Yhfqi5ZOIPY> (last visited Apr. 4, 2023) (navigate to "American Dollar Currency Converter" at the right side of the page; enter "180" in the "amount" box; and select "EURO" from the "from:" dropdown menu).

127. See Robin Bairner, *Monaco Star Mbappé Completes €180 Million Paris Saint-Germain move*, GOAL (Aug. 31, 2017, 1:32 PM), <https://www.goal.com/en/news/monaco-star-mbappe-completes-180-million-paris-saint-germain/13k7x4cozao191hcdgpw1kkrrt>.

128. See *DFL has Announced a New Minimum Age for Bundesliga Players of the Future - Including Youssoufa Moukoko*, BUNDESLIGA, <https://www.bundesliga.com/en/bundesliga/news/new-minimum-age-for-players-of-the-future-yousoufa-moukoko-10723> (last visited Jan. 24, 2022).

129. See *id.*

eligibility to sixteen years at the start of the 2020-21 season.¹³⁰ As a result of this rule change, Youssoufa Moukoko made his debut for his club, Borussia Dortmund, making him the youngest ever player to appear in a Bundesliga match and the first to debut at an age younger than the previous Age Rule had permitted.¹³¹ Moukoko had previously played for Borussia Dortmund's under-seventeen team¹³² when he was only thirteen, where he scored a whopping fifty goals and provided ten assists in only twenty-eight games.¹³³ Moukoko was selected to the German National Team for the 2022 FIFA World Cup, where he made his World Cup debut at eighteen years old.¹³⁴ Moukoko was so dominant at such a young age that to some the only explanation was that he must have lied about his age.¹³⁵ Similarly, in 2018, sixteen-year-old Karamoko Dembele signed a professional contract with Scottish club Celtic FC.¹³⁶ Dembele had previously been playing for Celtic's under-twenty team as a thirteen-year-old.¹³⁷

Beginning in 2003, the title of Golden Boy has been awarded to a soccer player in Europe who is under the age of twenty-one and has impressed in a top division of European soccer.¹³⁸ The winner is selected

130. *See id.*

131. *See Borussia Dortmund's Moukoko Becomes Bundesliga Record-Breaker as League's Youngest*, ESPN (Nov. 21, 2020), <https://www.espn.com/soccer/borussia-dortmund/story/4239455/borussia-dortmunds-moukoko-becomes-bundesliga-record-breaker-as-leagues-youngest> (noting that he is aged sixteen years and one day).

132. Youth soccer age groups are organized by the players' birth year. *See Youth Soccer Age Groups Chart*, SOCCERWIRE.COM (Mar. 2, 2021), <https://www.soccerwire.com/news/youth-soccer-age-groups/>. "[I]f a season begins in the fall of 2018 and ends in the summer of 2019 (ex: 2018-19 season), the players would be registered based on their age in the year 2019. Competitions that take place in a single year (ex: fall of 2018 only) should use that year to determine birth year. To simplify determining the age group, just subtract the birth year from the year the season ends." *Id.* For example, a player participating in the 2022-23 season who was born in 2016 would belong to the under-seven (or "U7") age group. *See id.*

133. *See Youssoufa Moukoko Stats 18/19*, TRANSFERMARKT, <https://www.transfermarkt.com/yousoufa-moukoko/leistungsdaten/spieler/467720/plus/0?saizon=2018> (last visited Feb. 6, 2023).

134. *See Ciarán Fahey, Dortmund Faces Prospect of Losing Young Germany Star Moukoko*, AP NEWS (Jan. 7, 2023) <https://apnews.com/article/sports-soccer-fifa-world-cup-borussia-dortmund-yousoufa-moukoko-7314942311f7bcc771bc22813de64701>.

135. *See Amitai Winchouse, Youssoufa Moukoko is the 15-Year-Old Hotshot Breaking Records with a €10m Nike Deal and was so Good When He was a Kid that People Thought He Had Lied About His Age...Now Dortmund Could Promote Him to the First-Team When Football Returns*, DAILY MAIL (Mar. 16, 2020, 5:45 AM), <https://www.dailymail.co.uk/sport/football/article-8095459/Youssoufa-Moukoko-15-breaking-records-10m-Nike-deal-star-Dortmund.html>.

136. *See Joe Donnelly, Delight as Celtic Sign Karamoko Dembele on First Professional Deal*, CELTIC FOOTBALL CLUB (Dec. 24, 2018), <https://www.celticfc.com/news/15514>.

137. *See id.*

138. *See What Is the Golden Boy Award? Shortlist, Rules and Past Winners*, FOOTBALL TRANSFERS (Nov. 17, 2021, 8:43 PM) <https://www.footballtransfers.com/en/transfer-news/2021/03/what-is-golden-boy-award-prestigious-prize-europes-best-21-player>.

via a vote by various sports newspapers around Europe.¹³⁹ Aforementioned players Lionel Messi and Kylian Mbappé have won past iterations of the Golden Boy (2005 and 2017, respectively),¹⁴⁰ while Youssoufa Moukoko had been nominated for the 2021 and 2022 editions.¹⁴¹ These players are celebrated across Europe for their ability to compete at the highest level of professional soccer at such a young age.¹⁴² Meanwhile, in the United States, league rules restrict young superstars from even getting the chance to prove their skills.¹⁴³

F. *Promising Careers Cut Short*

While athletes abroad are able to play professional and earn a salary for their play at whatever age a team is willing to give them a chance, many of those who wish to ply their trade in the United States must play for a college team without earning anything for their time.¹⁴⁴ In many instances, this has cost athletes who were destined for success to spend years without making a dime, only to suffer an injury that stunts their ability and effectively ends their career.¹⁴⁵ Once such instance is with Bo Jackson, who played in the NFL for the Oakland Raiders and for Major League Baseball's (hereinafter "MLB") Kansas City Royals, Chicago White Sox, and California Angels.¹⁴⁶

Jackson attended Auburn University from 1982 to 1986, played both football and baseball for the university, and excelled in both sports; he

139. *See id.*

140. *See id.*; Shallon Lewis, *Golden Boy 2022 Shortlist: Pedri, Eduardo Camavinga, Anthony Elanga, Jude Bellingham Make 100-Man Shortlist for 2022 Golden Boy Award, Check Full Shortlist*, INSIDESPORT (June 16, 2022) <https://www.insidesport.in/golden-boy-2022-shortlist-pedri-eduardo-camavinga-anthony-elanga-jude-bellingham-make-100-man-shortlist-for-2022-golden-boy-award-check-full-shortlist/>.

141. *See* Stefan Bienkowski, *Shortlist for 2021 Golden Boy Award Revealed*, FOOTBALL TRANSFERS (last updated Sept. 9, 2021, 12:35 PM) <https://www.footballtransfers.com/en/transfer-news/eu-uefa-champions-league/2021/06/shortlist-2021-golden-boy-award> (providing that Moukoko did not make the final shortlist of twenty players).

142. *See* FOOTBALL TRANSFERS, *supra* note 138138.

143. *See* Mathewson, *supra* note 4.

144. *See id.*

145. *See* discussion *infra* Section II.f.

146. *See* JT, *Bo Jackson Baseball Stats*, LINE UP FORMS (Jan. 22, 2014) <http://www.lineupforms.com/bo-jackson-baseball stats.html>.

was awarded the Heisman Trophy¹⁴⁷ in 1985¹⁴⁸ and was referred to as “the best pure athlete in America today” in his 1985 baseball scouting report.¹⁴⁹ However, Jackson’s professional career in both sports was cut short by an injury suffered while playing for the Raiders in 1991.¹⁵⁰ The injury required Jackson to undergo hip replacement surgery, and effectively marked the end of his football career.¹⁵¹ While Jackson returned to the MLB after his surgery, he was no longer able to run at the extreme speeds that had previously enabled him to excel.¹⁵²

Jackson officially retired from professional baseball in 1994, only eight years after being drafted by the Royals.¹⁵³ Over the course of Jackson’s entire professional career, for much of which he played two sports, he earned an estimated total of \$11,493,377 (\$7,274,833 from nine seasons playing baseball¹⁵⁴ and \$4,218,544 from four seasons playing football).¹⁵⁵ For comparison, Mark McGwire, who had a 15-year career in the MLB from 1986 to 2001, made an estimated \$75,294,348 over the course of his career, with 93% of his earnings coming between his seventh and final seasons of his career.¹⁵⁶ Both Jackson and McGwire participated in the 1989 MLB All-Star game, with Jackson being named the game’s Most Valuable Player.¹⁵⁷

Bo Jackson is a prime example of an athlete whose career was abruptly shortened by an unforeseeable injury, and he is unfortunately not

147. “[The Heisman Memorial Trophy] is annually awarded to the outstanding college football player in the United States whose performance epitomizes great ability combined with diligence, perseverance, and hard work.” *Heisman Trophy Trust Mission Statement*, HEISMAN, <https://www.heisman.com/heisman-trust/> (last visited Jan. 23, 2022).

148. See *Jackson 1985*, HEISMAN, <https://www.heisman.com/heisman-winners/bo-jackson/> (last visited Jan. 23, 2022).

149. Matt Snyder, *Bo Jackson’s 1985 Scouting Report (Hint: He was Good at Baseball)*, CBS SPORTS (May 7, 2013, 6:22 AM), <https://www.cbssports.com/mlb/news/bo-jacksons-1985-scouting-report-hint-he-was-good-at-baseball/>.

150. See *Bo Jackson - Injury and Comeback*, https://www.primidi.com/bo_jackson/injury_and_comeback (last visited Jan. 23, 2022).

151. See *id.*

152. See *id.*

153. See *Bo Jackson Retires from Sports Early*, <https://sports.jrank.org/pages/2228/Jackson-Bo-Retires-From-Sports-Early.html> (last visited Jan. 23, 2022).

154. See *MLB: Bo Jackson Career Earnings*, SPOTRAC, <https://www.spotrac.com/mlb/kansas-royals/bo-jackson-48861/cash-earnings/#> (last visited Jan. 27, 2023).

155. See *NFL: Bo Jackson Career Earnings*, SPOTRAC, <https://www.spotrac.com/nfl/los-angeles-raiders/bo-jackson-47487/cash-earnings/> (last visited Jan. 27, 2023).

156. See *MLB: Mark McGwire Career Earnings*, SPOTRAC, <https://www.spotrac.com/mlb/st-louis-cardinals/mark-mcgvire-48517/cash-earnings/> (last visited Jan. 27, 2023).

157. See *1989 MLB All-Star Game*, ESPN, https://www.espn.com/mlb/allstargame/history/results/_/year/1989 (last visited Jan. 27, 2023).

alone.¹⁵⁸ Greg Oden was a superstar player for Ohio State's basketball team, where he was named to the AP All-American First Team in his only collegiate season.¹⁵⁹ Oden subsequently went on to be drafted with the first overall pick in the 2007 NBA draft by the Portland Trail Blazers.¹⁶⁰ Due to a microfracture in his knee, Oden underwent surgery before ever playing a game in the NBA and was subsequently prevented from playing during the entire 2007-08 season.¹⁶¹ This would be the first of four seasons that Oden missed in their entirety due to injury over the course of his seven season career.¹⁶²

Oden retired from the NBA in 2014, having played a total of 105 regular season games in his 7 seasons in the league;¹⁶³ a standard NBA season consists of 82 games for each team.¹⁶⁴ Like Bo Jackson, Oden's injury woes prohibited him from performing at the level he had in college once he reached the eligible age to play professionally.¹⁶⁵ Further, Oden was unable to financially capitalize on his success as an athlete in his college years, the years in which he was at his best.¹⁶⁶

G. *The Role of the NCAA in Limiting Youth Success*

The National Collegiate Athletic Association (hereinafter "NCAA") regulates student athletes in American colleges and universities, and emphasizes its mission with three pillars: academics, fairness and well-being.¹⁶⁷ The NCAA uses rules relating to the grade point average (hereinafter "GPA"), class attendance, and general conduct (among others) of student athletes in determining whether they are eligible for scholarships, participation in a game, or even to hold a spot on the team at all.¹⁶⁸ While these rules are noble and important for the average student-athlete, they

158. See discussion *infra* Section II.f.

159. See *NCAA College Basketball AP All-America Teams*, BASKETBALL REFERENCE, https://www.basketball-reference.com/awards/all_america.html (last visited Jan. 27, 2023).

160. See *Greg Oden*, BASKETBALL REFERENCE, <https://www.basketball-reference.com/players/o/odengr01.html> (last visited Jan. 27, 2023).

161. See Brian Haedrich, *What Happened to Greg Oden? (Complete Story)*, THE COLD WIRE (Dec. 30, 2020), <https://www.thecoldwire.com/what-happened-to-greg-oden/>.

162. See BASKETBALL REFERENCE *supra* note 160 160.

163. See *id.*

164. See NAT'L BASKETBALL ASS'N, *supra* note 28 28, at 335.

165. See *Bo Jackson - Injury and Comeback*, *supra* note 150; Haedrich, *supra* note 161.

166. See *infra* Section II.g.

167. See *Mission and Priorities*, NCAA, <https://www.ncaa.org/mission-and-priorities> (last visited Jan. 27, 2023).

168. See *NCAA Academic Requirements for Freshman Eligibility*, ATHNET, <https://www.athleticscholarships.net/academic-requirements.htm> (last visited Jan. 27, 2023).

restrict the elite athlete whose main concern is the progression of their athletic ability.¹⁶⁹ Under the NCAA's eligibility rules, a student must maintain their "amateur" status in order to be allowed to play for their school.¹⁷⁰

A player can lose their status as an amateur in a few different ways, but the common theme is that accepting non-scholarship funds will render a player no longer an amateur.¹⁷¹ Traditionally, this meant that "athletes must agree not to take money for things such as sponsorship deals, celebrity appearances, or contact with professional sports personnel."¹⁷² The recent Supreme Court ruling in *NCAA v. Alston* provided a victory for student-athletes, where a unanimous Court held that the NCAA could no longer bar student athletes from receiving payment for their likeness.¹⁷³ Within the opinion, the Court remarks, "[t]he president of the NCAA earns nearly \$4 million per year[.]" and "[c]ommissioners of the top conferences take home between \$2 to \$5 million" each year.¹⁷⁴

With the salaries of top NCAA officials as an indication of the profitability of collegiate athletics, colleges bring in a net average of almost \$32 million from their football programs annually.¹⁷⁵ Further, the average men's basketball program generates over \$8 million annually for its school.¹⁷⁶ Football and men's basketball are the two sports which generate the most revenue at the collegiate level,¹⁷⁷ and both sports have Age Rules at their respective professional levels.¹⁷⁸ In the absence of an Age Rule, the best young football and basketball players would likely opt to play professionally and be paid, rather than play for a college that is not

169. See *Cardale Jones: Classes Pointless*, ESPN (Oct. 5, 2012), https://www.espn.com/college-football/story/_/id/8466428/ohio-state-buckeyes-cardale-jones-tweets-classes-pointless ("Why should we have to go to class if we came here to play FOOTBALL, we ain't come to play SCHOOL classes are POINTLESS.") (quoting Ohio State Quarterback Cardale Jones).

170. See *Accepting Payment from Agents Results in Loss of NCAA Eligibility*, ATHNET, <https://www.athleticscholarships.net/ncaa-loss-eligibility-payment-agent.htm> (last visited Jan. 30, 2023).

171. See *id.*

172. *Id.*

173. See *NCAA v. Alston*, 141 S. Ct. 1043, 8-10, 15, 36 (2021).

174. *Id.* at 7-8 (alteration in original).

175. See Cork Gaines & Mike Nudelman, *The Average College Football Team Makes More Money than the Next 35 College Sports Combined*, BUS. INSIDER (Oct. 5, 2017, 3:36 PM), <https://www.businessinsider.com/college-sports-football-revenue-2017-10>.

176. See *id.*

177. See *id.*

178. See NAT'L BASKETBALL ASS'N, *supra* note 28; see also NAT'L FOOTBALL LEAGUE, *supra* note 28.

allowed to pay them.¹⁷⁹ These players would remain in college for only the minimum amount of time required before becoming eligible to declare for their respective drafts upon meeting the criteria of the Age Rule.¹⁸⁰

Moreover, many college football players decided to “opt-out” of playing in their teams’ bowl game¹⁸¹ at the conclusion of the 2021 season.¹⁸² Players who decide to declare for the upcoming NFL draft may choose to avoid risk of injury in a final game for their college and focus on preparing for life as a professional player.¹⁸³ This decision to opt-out was criticized by ESPN television personalities, who soon faced their own criticism for comments that have been described as “antiquated” and “coerc[ive].”¹⁸⁴ Furthermore, it has been suggested that ESPN’s substantial investment into college football inevitably demonstrates its interest in increasing the quality of its televised bowl games as much as possible, and that comments made by their employees lamenting the sport’s best players’ decisions to put themselves ahead of their college teams are representative of that investment interest.¹⁸⁵ This emerging trend of opting out suggests that college football players are placing more interest in their own financial futures, and protecting their bodies from injuries that could have a substantial impact on their earning potentials as professional athletes.¹⁸⁶

While age rules remain prevalent in the United States’ professional sports leagues, many players in those leagues have voiced their opposition to such rules due to the financial limitations of playing in college.¹⁸⁷ One

179. See Mike Florio, *College Football Players Will Keep Making Business Decisions, Despite Those Who Would Rather They Don’t*, PFT, at 2-3 (Jan. 1, 2022, 9:49 PM), <https://profootballtalk.nbcsports.com/2022/01/01/college-football-players-will-keep-making-business-decisions-despite-those-who-would-rather-they-dont/> (discussing how athletes have elected to sit out of their final college football game to preserve themselves for the NFL).

180. See *id.*

181. A “bowl game” is one of many post-season college football games. See *Bowl Game*, WIKIPEDIA, https://en.wikipedia.org/wiki/Bowl_game (last visited Jan. 24, 2022). Bowl games generally feature the best performing teams from the preceding season, and are viewed as a celebration of the season with limited stakes with an emphasis on the spirit of the game. See *id.* The term “bowl” originates from the Rose Bowl Stadium, the site of the first postseason collegiate football games. See *id.*

182. See Edward Sutelán, *Updated List of College Football Stars Skipping Bowl Games for 2022 NFL Draft*, SPORTINGNEWS.COM (Dec. 16, 2021), <https://www.sportingnews.com/us/nfl/news/college-football-players-skipping-bowl-games-list/1ibqbez8j7xh1409qhmkkyl1b>.

183. See *id.*

184. Florio, *supra* note 179.

185. See *id.*

186. See *id.*

187. See Colin Ward-Henninger, *Kevin Durant Against One-and-Done Rule; Would Have Entered NBA out of High School*, CBS SPORTS (Feb. 23, 2018, 4:30 PM), <https://www.cbssports.com/nba/news/kevin-durant-against-one-and-done-rule-would-have-entered-nba-out-of-high-school>; see

such player is NBA star Kevin Durant, who played one season for the University of Texas before being drafted second overall in the 2007 NBA draft.¹⁸⁸ Durant said that he would have skipped college altogether if he had been allowed, and would have declared for the NBA draft out of high school because he needed the money.¹⁸⁹ Durant has also advocated for young players to have autonomy to make the decision to play in the NBA themselves, stating in an interview:

You should let these kids make a decision, however they want to. If they want to come out of high school, it should be on them. You know what I mean? You can't control everything. So if they feel as though they're ready, that's on them. They want to make a decision on their life, that's on them. If they don't get drafted, it's on them. You can try to control it, but you're still not really doing anything.¹⁹⁰

Another vocal opponent to the NBA's Age Rule is Australian basketball player Ben Simmons, who played for one season at the Louisiana State University prior to being drafted first overall in the 2016 NBA draft.¹⁹¹ Simmons expressed his frustration with the NCAA, stating that when it comes to college sports, "everybody's making money except the players."¹⁹²

The NBA's one and done rule was implemented in between the 2005 and 2006 NBA drafts.¹⁹³ In a 2019 study, the careers of twenty-eight high school seniors who were drafted to the NBA between 2001 and 2005 were compared with those of thirty-six college freshmen who were drafted from 2006 to 2010.¹⁹⁴ The study compared the selected players' salaries, number of playoff appearances, and number of All-Star game selections.¹⁹⁵ Regarding the players' salaries, the study found "there was a relatively

also Rick Thomas, *Ben Simmons' Thoughts on the One-and-Done Rule in College Basketball*, SPORTSCASTING (Sept. 18, 2019), <https://www.sportscasting.com/ben-simmons-thoughts-on-the-one-and-done-rule-in-college-basketball/>.

188. See Ward-Henninger, *supra* note 187.

189. *Id.* at 187 (quoting Kevin Durant).

190. *Id.*

191. See Ben Simmons, NBADRAFT.NET, <https://www.nbadraft.net/players/ben-simmons/> (last visited Feb. 28, 2022); Ohm Youngmisuk, *Sixers Take LSU's Ben Simmons with No. 1 Overall Pick*, ESPN (Sept. 23, 2016), https://www.espn.com/nba/draft2016/story/_/id/16458660/2016-nba-draft-philadelphia-76ers-take-ben-simmons-no-1-overall-pick.

192. Thomas, *supra* note 187.

193. See Courtney Williams, *Should the NBA Eliminate the One-and-Done Rule?*, SAMFORD UNIV. (Aug. 20, 2019), <https://www.samford.edu/sports-analytics/fans/2019/Should-the-NBA-Eliminate-the-One-and-Done-Rule>.

194. See *id.*

195. See *id.*

small difference between the high school seniors' and college freshmen's average annual salaries during their first 5 years in the NBA."¹⁹⁶ Regarding the players' number of playoff appearances, the study found that "[a] similar percentage of high school seniors and college freshmen appeared in 2, 3, 4, and 5 playoffs during their first 5 years in the NBA."¹⁹⁷ However, it was also determined that players drafted after playing one year of college basketball were more likely than players drafted out of high school to not play any playoff games in their first five years.¹⁹⁸ Lastly, regarding All-Star game selections, the study found that "college freshmen were more likely than high school seniors . . . to play in at least one All-Star game within 5 years of joining the league."¹⁹⁹ Based on these findings, the study concluded that "the differences between the college freshmen's and the high school seniors' salaries, number of playoff appearances, and number of All-Star games were insignificant."²⁰⁰

II. LEGAL ISSUE

A. *Brief Overview of Child Entertainment Laws*

Laws regulating child entertainers exist at the federal and state level.²⁰¹ The FLSA, which outlines general labor provisions for American workers, contains Child Labor provisions as well as exceptions to those provisions.²⁰² One such exception is for "any child employed as an actor in motion pictures or theatrical productions."²⁰³ This exception has been interpreted to also include a "performer," which is a more inclusive term than actor.²⁰⁴

The term "performer" has been further defined to mean:

[A] person who performs a distinctive, personalized service as a part of an actual broadcast or telecast including an actor, singer, dancer, musician, comedian, or any person who entertains, affords amusement to, or

196. *Id.*

197. *Id.* (alteration in original).

198. *See id.* ("In particular, 7.1% of the high school seniors and 19.4% of the college freshmen failed to advance to a single playoff within their first 5 years in the league.").

199. *Id.* (alteration in original) (19.5% for college freshmen versus 10.8% for high school seniors).

200. *Id.*

201. *See* U.S. DEP'T OF LAB., *supra* note 7575.

202. *See* discussion *infra* Section I.b.

203. Fair Labor Standards Act of 1938, ch. 676, Pub. L. No. 75-718, § 13(c), 52 Stat. 1060, 1068 (current version at 29 U.S.C. § 213).

204. 29 C.F.R. § 570.125 (2023).

occupies the interest of a radio or television audience by acting, singing, dancing, reading, narrating, performing feats of skill, or announcing, or describing or relating facts, events and other matters of interest, and who actively participates in such capacity in the actual presentation of a radio or television program.²⁰⁵

Further, those “neither seen nor heard” as part of the production cannot be classified as a performer under the statute.²⁰⁶

The State of California has its own child entertainment statute, which for purposes of the statute defines the entertainment industry as an entity which uses a minor in the production of “[m]otion pictures of any type (e.g. film, videotape, etc.), using any format (theatrical film, commercial, documentary, television program, etc.) by any medium (e.g. theater, television, videocassette, etc.); photography; recording; modeling; theatrical productions; publicity; rodeos; circuses; musical performances; and any other performances where minors perform to entertain the public.”²⁰⁷ Both the federal and California statutes provide a means for allowing a child to be employed and paid for their work, so long as it is for the purpose of entertainment.²⁰⁸

The federal statute’s child entertainment exception is broad but does require that the production that the child is involved in must be “part of an actual broadcast or telecast,” and specifically names radio and television as qualifying media under the statute.²⁰⁹ Similarly, the California statute provides a list of many specific ways in which a minor may qualify as a child entertainer, but concludes that list with a catch-all stating, “any other performances where minors perform to entertain the public.”²¹⁰ Essentially, a minor would likely be able to qualify under either statute so long as they are being paid to appear on screen of a broadcast.²¹¹

B. *Protections in Place for Child Entertainers*

Child actors have been subject to being taken advantage of by their parents.²¹² The first prominent instance of a child actor being taken

205. 29 C.F.R. § 550.2(b) (2023) (alteration in original).

206. 29 C.F.R. § 570.125.

207. CAL. CODE REGS. tit. 8, § 11751 (2023).

208. See 29 C.F.R. § 570.125; see also tit. 8, § 11751.

209. 29 C.F.R. § 570.125.

210. See tit. 8, § 11751.

211. See 29 C.F.R. § 570.125; see also tit. 8, § 11751.

212. See discussion *infra* Section III.b.

advantage of by their parents involved actor Jackie Coogan.²¹³ Coogan began stage acting at age four and by age five was acting in silent films.²¹⁴ At seven, Coogan starred alongside Charlie Chaplin in Chaplin's silent motion picture *The Kid*,²¹⁵ which grossed an estimated \$2,500,000 in 1925.²¹⁶ Coogan became one of Hollywood's highest-paid actors and relied on his parents to manage his finances.²¹⁷ In 1935, Coogan's father died and Coogan's mother married Coogan's business manager Arthur Bernstein.²¹⁸ After many failed attempts to retrieve his earnings from his days as a child actor, Coogan sued his mother and stepfather for approximately \$4 million.²¹⁹ Coogan quoted his mother upon confronting her about his earnings, "You haven't got a cent. There never has been a cent belonging to you. It's all mine and Arthur [Bernstein's], and so far as we are concerned you will never get a cent."²²⁰

In 1938, Coogan was awarded \$126,000 of the \$4 million he sought, causing public outrage and providing the impetus for the passage of the California Child Actor's Bill, (hereinafter "Coogan Act").²²¹ The Coogan Act provides protections for unemancipated minors in the entertainment industry, including but not limited to actors, actresses, dancers, musicians, comedians, and singers.²²² The Coogan Act also applies to "contract[s] pursuant to which a minor is employed or agrees to render services as a participant or player in a sport."²²³ While the Coogan Act was well-intentioned, it possessed flaws that prevented it from achieving its intended goal of protecting the finances of child entertainers.²²⁴ Many famous child entertainers, including Shirley Temple, Macaulay Culkin, and Gary Coleman, struggled to retain their income earned as minors.²²⁵ In

213. See Associated Press, *Jackie Coogan Sues Mother*, PRESCOTT EVENING COURIER, (Apr. 12, 1938) at 1.

214. See Tony Fontana, *Jackie Coogan, Biography*, IMDB, <https://www.imdb.com/name/nm0001067/bio> (last visited Jan. 24, 2022).

215. See *id.*

216. See 1937-38 INT'L MOTION PICTURE ALMANAC 942 (Terry Ramsaye ed., 1937), <https://archive.org/details/international193738quig/page/942/mode/2up?view=theater>.

217. See *Coogan Law*, SAG-AFTRA, <https://www.sagaftra.org/membership-benefits/young-performers/coogan-law> (last visited Jan. 24, 2022) ("Under California law at the time, the earnings of the minor belonged solely to the parent."); Fontana, *supra* note 214.

218. See Fontana, *supra* note 214.

219. See *id.*

220. Associated Press, *supra* note 213 (alteration to original).

221. See Fontana, *supra* note 214.

222. See CAL. FAM. CODE § 6750(a)(1) (West 2013).

223. CAL. FAM. CODE § 6750(a)(3) (West 2013) (alteration in original).

224. See SAG-AFTRA, *supra* note 217.

225. See Erica Siegel, *When Parental Interference Goes Too Far: The Need for Adequate Protection of Child Entertainers and Athletes*, 18 CARDOZO ARTS & ENT. L.J. 427, 438-39 (2000).

response to its continued failure to protect child actors, the Coogan Act was amended in 2000 and now requires that 15% of the minor's gross earnings be withheld by their employer in a trust or other account for the benefit of the minor.²²⁶ These accounts are known as "Coogan Accounts,"²²⁷ and the funds within the account cannot be freely withdrawn until the child actor whom the Coogan Trust Account is for turns eighteen.²²⁸

C. *Exposing the Flaws of the Coogan Act*

While the amended Coogan Act provides for increased protections for minor-entertainers, it is important to recognize the shortcomings of the original Act in order to avoid repeating them in future legislation.²²⁹ One such shortcoming was that the statute did not prevent the parents of child stars to bypass the Act's protections through the use of legal mechanisms like pension funds to appropriate their child's earnings.²³⁰ This was precisely the issue in *Diff'rent Strokes*' star Gary Coleman's suit against his adoptive parents; Coleman's parents were secretly employees of Coleman's production company with a pension plan tied to said company.²³¹ Coleman's parents sought court enforcement of the pension, and while the judge declined their request and dissolved it, this ruling awarded \$770,000 to Coleman's parents, as employees of the production company, and only \$220,000 to Coleman himself.²³² Coleman subsequently sued his parents for \$18 million but was only able to collect a \$3.8 million award.²³³

Macaulay Culkin is another child star who faced conflict with his parents over his earnings.²³⁴ Culkin starred in the hit holiday movie *Home Alone* and was his family's primary source of income upon his success.²³⁵ Culkin's father, Kit Culkin, became Macaulay's manager and began controlling his son's career to the point that Macaulay's reputation became damaged.²³⁶ Macaulay Culkin's parents decided to divorce when he was

226. See CAL. FAM. CODE § 6752(b)(1) (West 2013).

227. See CAL. FAM. CODE § 6753(a) (West 2013).

228. See CAL. FAM. CODE § 6753(b) (West 2013).

229. See *infra* Section III.c.

230. See Siegel, *supra* note 225.

231. See *id.* at 439.

232. See *id.*

233. See *id.* at 439 n.82.

234. See *id.* at 439.

235. See *id.*

236. See Edduin Carvajal, *Macaulay Culkin's Emancipation from His Parents — A Look Back at the Family Drama*, AMOMAMA (Aug. 2, 2020, 8:00 AM), <https://news.amomama.com/221137-macaulay-culkins-emancipation-his-parent.html>.

sixteen.²³⁷ In an effort to deny his father access to his earnings, Culkin emancipated himself from both of his parents and was able to transfer control of his earnings to an accountant of his choice.²³⁸ While Culkin experienced legal success in securing his finances, his parents' lengthy divorce proceedings and custody battle for their children drained their own finances.²³⁹ As a result, a portion of Culkin's now-protected earnings were spent on the rent for his family's three apartments.²⁴⁰

In Coleman and Culkin's cases, both young actors fell victim to the Coogan Act's failure to explicitly reserve the rights to their earned income to the minors themselves.²⁴¹ The 2000 amendment of the Coogan Act adjusted for this problem with its aforementioned fifteen percent requirement,²⁴² and additionally enabled a court to require that a greater portion of the minor's earnings be placed in a Coogan Trust at the court's discretion.²⁴³

Another weak point of the Coogan Act rests procedurally and outside of the direct scope of the Act itself.²⁴⁴ The Coogan Act is a state statute which has been adopted in only five states.²⁴⁵ While the Act has evolved to better protect minors in jurisdictions where the law has been adopted, minors in states where it has not been adopted will not enjoy the protections it provides.²⁴⁶ In order to ensure that minor entertainers can be protected in the forty-five states where the Coogan Act has not been adopted, the Act must be adopted either by each of the remaining states, or at the federal level such that it applies universally across the United States.²⁴⁷

D. Existing Models Similar to the Coogan Act

While the Coogan Act provides requirements for the creation and management of a Coogan Trust Account,²⁴⁸ the Act does not provide for

237. *See id.*

238. *See Siegel, supra* note 225.

239. *See id.* at 439 n.85.

240. *See id.*

241. *See id.* at 438.

242. *See id.* at 439.

243. *See* CAL. FAM. CODE § 6752(b)(2) (West 2013).

244. *See infra* Section III.c.

245. *See* SAG-AFTRA, *supra* note 217 ("At present, Coogan Accounts . . . are required by the State of California, New York, Illinois, Louisiana and New Mexico.").

246. *See* Matthew L. Schafer, *Federal Law, Federal Courts, and Binding and Persuasive Authority*, GEO. UNIV. L. CTR. (2013), at 3.

247. *See id.*

248. *See* CAL. FAM. CODE § 6753 (West 2013).

a means of enforcing these requirements.²⁴⁹ A similarly situated system of paying a portion of one's income into a trust account for use upon reaching a certain age is the federal Social Security system.²⁵⁰ While not entirely analogous to the Coogan Trust Account sections of the Coogan Act, the Social Security system offers a similar framework that has been implemented on a nationwide basis.²⁵¹

The Social Security Act of 1935 established Social Security as a system of federal benefits for groups such as elderly persons, dependent children, and people with disabilities.²⁵² Social Security is a system where workers will "pay into the system" by having a portion of their wages taxed, up to a certain amount.²⁵³ The taxed wages are then paid out as Social Security benefits to retired Americans who have previously paid into the system.²⁵⁴ The aforementioned "system" is classified as a "federal trust fund," which is an accounting tool used to keep track of how much money people have paid in or been paid out for Social Security.²⁵⁵ While not the same as private-sector trust funds, federal trust funds act similarly to serve as a secure source of funding for those entitled to said funding.²⁵⁶

Social Security benefits are intended to supplement a portion of a worker's income upon their retirement.²⁵⁷ The amount of Social Security benefits paid out depends on the retiree's age at the time of retirement, earnings, and year of birth.²⁵⁸ Further, Social Security benefits are paid

249. *See id.*

250. *See* Social Security Act, ch. 531, 49 Stat. 620 (1935).

251. *See generally id.* (explaining that the framework set out in the Social Security Act is similar when compared to that of the Coogan Act).

252. *See id.*

253. *Understanding the Benefits*, SOC. SEC. ADMIN. (2022), at 2-3 ("In 2023, that amount is \$160,200.").

254. *See id.*

255. *Budget Basics: Federal Trust Funds*, PETER G. PETERSON FOUND. (Oct. 18, 2021) <https://www.pgpf.org/budget-basics/budget-explainer-what-are-federal-trust-funds>. ("A federal trust fund is an accounting mechanism used by the federal government to track earmarked receipts (money designated for a specific purpose or program) and corresponding expenditures. The largest and best-known trust funds finance Social Security, portions of Medicare, highways and mass transit, and pensions for government employees.").

256. *See id.* The federal government uses trust fund accounting to link receipts designated by law for a specific purpose with the expenditure of those receipts. Receipts can come from the public (taxes, premiums from program beneficiaries, and other fees) as well as intragovernmental transfers from other federal accounts, including Treasury interest payments. Expenditures can include direct payments to individual beneficiaries (e.g., Social Security benefits), grants to state and local governments (e.g., highway and mass transit grants). *See id.*

257. *See* SOC. SEC. ADMIN., *supra* note 253, at 1.

258. *See id.* at 1, 7. If you start benefits in 2022 at your "full retirement age" . . . , this percentage ranges from as much as 75% for very low earners, to about 40% for medium earners, to about 27%

out on a monthly basis.²⁵⁹ On the contrary, the beneficiary of a Coogan Trust may withdraw the entirety of the funds in the trust upon turning eighteen years old, regardless of when they were born or how much they earned prior to their eighteenth birthday.²⁶⁰ The amount a Coogan Trust beneficiary will receive is simply the 15% of their wages that have previously been set aside by the beneficiary's employer.²⁶¹

While the philosophy of Social Security differs from that of the Coogan Act with regard to the safeguard of funds for a later date, the functionality of collecting and repaying the funds is indeed similar.²⁶²

I. LEGAL SOLUTION

A. *Classifying Athletes as Entertainers Under the Law*

A solution for enabling minors to play professional sports is to amend federal child entertainment laws to include athletes in the definition of "performers."²⁶³ Athletes and traditional entertainers, such as actors and musicians, are already treated similarly in various areas of the law.²⁶⁴ The United States government offers the O-1 visa to "the individual who possesses extraordinary ability in the sciences, arts, education, business, or athletics, or who has a demonstrated record of extraordinary achievement in the motion picture or television industry and has been recognized nationally or internationally for those achievements."²⁶⁵ Furthermore, athletes and traditional entertainers are subject to similar taxation, and are represented by accountants accordingly.²⁶⁶ In addition, legal

for maximum earners. If you start benefits after full retirement age, these percentages would be higher. If you start benefits earlier, these percentages would be lower. *Id.* at 1.

259. *See id.* at 1.

260. *See* CAL. FAM. CODE § 6753(b) (West 2013).

261. *See* CAL. FAM. CODE § 6752(b)(1) (West 2013).

262. *See generally*, *Traditional Sources of Economic Security*, SOC. SEC. ADMIN., <https://www.ssa.gov/history/briefhistory3.html> (last visited Feb. 27, 2022). Although the definition of social insurance can vary considerably in its particulars, its basic features are: the insurance principle under which a group of persons are "insured" in some way against a defined risk, and a social element which usually means that the program is shaped in part by broader social objectives, rather than being shaped solely by the self-interest of the individual participants. *See id.*

263. *See infra* Section IV.

264. *See infra* Section IV.a.

265. *O-1 Visa: Individuals with Extraordinary Ability or Achievement*, U.S. CITIZENSHIP AND IMMIG. SERV., <https://www.uscis.gov/working-in-the-united-states/temporary-workers/o-1-visa-individuals-with-extraordinary-ability-or-achievement> (last visited Jan. 27, 2023).

266. *See* Harvey I. Bezosi, *Taxation of Athletes and Entertainers Under the New Tax Law*, YOUR FIN. WIZARD 1 (May 1, 2018), <https://www.yourfinancialwizard.com/taxation-of-athletes-and-entertainers-under-the-new-tax-law/>.

journals that specialize in the entertainment area of the law often include notes and articles pertaining to sports as well.²⁶⁷

Merriam-Webster defines the word athlete as “a person who is trained or skilled in exercises, sports, or games requiring physical strength, agility, or stamina.”²⁶⁸ This language is similar to the phrase “performing feats of skill,” contained within the federal statute.²⁶⁹ By amending the statute to explicitly name “athlete” as a qualifying job in the federal law, minor-athletes will be subject to the same protections and regulations as minors in traditional entertainment have been under the FLSA.²⁷⁰ By laying a framework in federal law, professional sports leagues will be supported by a legislative standard that paying minors to play a sport is both economically feasible and socially acceptable.²⁷¹

Further, by explicitly naming “athletes” in the statute, the statute will be strengthened based on the legal principle of *ejusdem generis*, meaning “of the same general kind.”²⁷² *Ejusdem generis*, “applies when a drafter has tacked on a catchall phrase at the end of an enumeration of specifics.”²⁷³ This principle essentially states that when a list of two or more items concludes with a catchall phrase, the catchall phrase is meant to apply to items similar to those preceding it.²⁷⁴ In the case of the FLSA, adding “athletes” to the list of occupations that would qualify one as a “performer” is essential to ensure that athletes will be covered by the statute.²⁷⁵ Alternatively, reliance on a court to hold that athletes are included in the definition of “performers” would be much less effective. A court’s decision to make such a determination would likely contradict *ejusdem generis*, and such a decision would only be binding authority in the certain court’s jurisdiction.²⁷⁶ Modifying the statute itself would enable the uniform applicability of the law across all federal courts, rather than on a circuit-by-circuit basis.²⁷⁷

267. See HARV. J. OF SPORTS AND ENT. L. (JSEL), <https://harvardjsel.com/> (last visited Jan. 27, 2023); ARIZ. STATE SPORTS AND ENT. L. J. (SELJ), <http://asuselj.org/> (last visited Jan. 27, 2023).

268. *Athlete*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/athlete> (last visited Jan. 27, 2023).

269. 29 C.F.R. § 570.125 (2023).

270. See *infra* Section IV.b.

271. See *infra* Section IV.b.

272. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 199-200 (2012).

273. *Id.*

274. See *id.*

275. See *infra* Section IV.b.

276. See Siegel, *supra* note 225, at 443.

277. See *id.* at 463-64.

B. *Proposed Legislation*

The proposed solution can be implemented legislatively, with the passage of an amendment to the existing FLSA.²⁷⁸ This proposed amendment's application would be two-fold.²⁷⁹ First, the amendment would broaden Section 213(c)(3) of the FLSA to include "athletes" among performers as an exception to the child labor provisions of Section 212.²⁸⁰ Second, the amendment would authorize the creation of a federal trust fund to serve an analogous purpose to that of a Coogan Trust.²⁸¹ The proposed statute follows.²⁸²

SECTION 1. SHORT TITLE. This Act may be cited as the "Underage Athlete Protection Act."

SECTION 2. INCLUSION OF ATHLETES AS A PROTECTED CLASS UNDER THE FLSA; CREATION OF A FEDERAL TRUST FUND FOR THE PROTECTION OF MINOR ATHLETE'S WAGES; OTHER REQUIREMENTS.

The Federal Labor Standards Act (29 U.S.C.S. 201) is amended by inserting the following language after section 213(3):

SEC. 3

The provisions of Section 12 [29 U.S.C.S § 212] relating to child labor do not apply to any minor employed as an actor or performer in motion pictures, theatrical productions, radio broadcasts, television productions, or to any minor who is employed or agrees to render services as a participant or player in a sport.

The employer of a qualifying minor under Section 213(3)(a) shall deposit at least 15 percent of the minor's gross earnings pursuant to their contract into the Child Athlete and Entertainer Federal Trust Fund, to be preserved for the benefit of the minor.

278. See *infra* Section IV.b.

279. See *infra* Section IV.b.

280. See *infra* Section IV.b.

281. See *infra* Section IV.b.

282. See *infra* Section IV.b.

The Child Athlete and Entertainer Federal Trust Fund is hereinafter referred to as the CAE-FTF.

The employer of a qualifying minor shall register the minor with the U.S. Department of Labor.

Prior to the date on which the beneficiary of the trust attains the age of 18 years or the issuance of a declaration of emancipation of the minor pursuant to state law in the minor's domicile, no withdrawal by the beneficiary or any other individual, individuals, entity, or entities may be made of funds on paid into the CAE-FTF without written order of the court. Upon reaching the age of 18 years, the beneficiary may withdraw the funds they have paid into the CAE-FTF only after providing a certified copy of the beneficiary's birth certificate to the court.

Upon approval by the court, withdrawal of funds may be made into a bank account in the name of the beneficiary, or into another account whereas the funds are to be held in trust where the beneficiary of the CAE-FTF funds is the sole beneficiary of the account.²⁸³

C. *Federalizing the Coogan Act*

A weakness in the applicability of the Coogan Act lies simply in its status as a state statute.²⁸⁴ By drafting a federal counterpart, the Coogan Act would be applicable across the United States and could be regulated in a more uniform fashion than on a state-by-state basis.²⁸⁵ This way, the protections provided by the Coogan Act could apply to all minors, regardless of their domicile.²⁸⁶ Federalizing the Coogan Act is an essential component of the solution: if minor-athletes are exempted from the FLSA but not granted financial protection, the horrors faced by Jackie Coogan, Gary Coleman, and Macaulay Culkin will likely be experienced by the next generation of minor-athletes.²⁸⁷

Unlike the FLSA, the Coogan Act provides financial protections for minor-athletes.²⁸⁸ The inclusion of athletes in the statute demonstrates

283. *C.f.* 29 U.S.C.S. § 212 (borrowing language from Fair Labor Standards Act, 52 Stat. 1060 § 213; CAL. FAM. CODE §§ 6750-53 (West 2013)).

284. *See generally* CAL. FAM. CODE § 6750 (West 2013) (showing the statute only has a limited effect on one state).

285. *See* Siegel, *supra* note 225, at 463-64.

286. *See id.*

287. *See id.* at 428, 439.

288. *See* CAL. FAM. CODE § 6750(a)(3) (West 2013).

awareness by the California legislature that minors are participants in professional athletics, and that these minor-athletes will benefit from similar protections as those provided to other minor entertainers.²⁸⁹ Thus, Section (a) of the proposed amendment to the FLSA will allow minor-athletes nationwide to participate in their sports at the professional level while being subject to the protections that have long been enjoyed by those in Coogan Act jurisdictions.²⁹⁰

Regarding the establishment of Coogan Trusts, this could be accomplished using a federal trust fund, in a manner comparable to the current Social Security system.²⁹¹ While federal trust funds “bear little resemblance to their private-sector counterparts,” the current text of the Coogan Act could be amended to provide the creation of a federal trust fund for purposes of the Act.²⁹² This would serve the same goals as in the original Coogan Act by protecting a portion of a minor entertainer’s wages until they reach the age of majority, while also providing for additional security by the Treasury of the United States.²⁹³ Furthermore, the retirement age-based criteria of receiving Social Security benefits is analogous to the requirement for age of majority-based criteria for minor-entertainers in order to receive the income from their Coogan Trust, such that both systems require the recipient of the funds to reach a certain age to receive said funds.²⁹⁴

The proposed amendment authorizes the creation of Child Athlete and Entertainer Federal Trust Fund (hereinafter “CAE-FTF”).²⁹⁵ The CAE-FTF is to be modeled after the Social Security system, where workers pay into the system up to a certain age, and upon reaching that age will receive the money they paid in.²⁹⁶ However, the CAE-FTF will pay benefits in a much simpler manner than Social Security, as it will provide a binary all-or-nothing payment as a lump sum, as opposed to the monthly payments of Social Security.²⁹⁷ Furthermore, beneficiaries of the CAE-FTF will receive the exact amount of money that they had paid into the CAE-FTF, where recipients of Social Security benefits receive only a percentage of what they had paid into the system.²⁹⁸ By amending the FLSA

289. See CAL. FAM. CODE § 6750 (West 2013).

290. See *supra* Section IV.b; CAL. FAM. CODE § 6750.

291. See *supra* Section IV.b; Social Security Act, ch. 531, 49 Stat. 620 (1935).

292. PETER G. PETERSON FOUND., *supra* note 255.

293. See *id.*

294. See *supra* Section IV.b.

295. See *supra* Section IV.b.

296. See *supra* Section IV.b; Social Security Act, ch. 531, 49 Stat. 620.

297. See *supra* Section IV.b; Social Security Act, ch. 531, 49 Stat. 620.

298. See *supra* Section IV.b; Social Security Act, ch. 531, 49 Stat. 620.

to merge the minor-protection goals of the Coogan Act with the payment structure of Social Security, minor-athletes will be able to play their sport, get paid, and be protected from financial abuse.²⁹⁹

D. *Existing Models for Youth Success*

The proposed amendment to the FLSA has many benefits beyond providing a framework for allowing minors to earn money playing professional sports.³⁰⁰ For example, providing a federal standard for youth athletes promotes uniform regulation of young professionals across all sports in the United States.³⁰¹ This will lead to developmental leagues and teams in the United States that are separate from the NCAA, where aspiring professionals can pursue their dreams without being hindered by unnecessary distractions.³⁰² These developmental leagues can be similar to those currently in place in leagues like the NBA (the NBA G League) but serve players from a younger age to better prepare them for life as professionals.³⁰³ Such leagues would include teams consisting of the best athletes in each age group for a particular sport, competing against each other such that they would be facing other players at their particular skill level.³⁰⁴

In England's Premier League, such a system is already in place for soccer players, with the youngest teams at the under-nine age bracket.³⁰⁵ The Premier League's Elite Player Performance Plan (hereinafter "EPPP") "is a long-term strategy with the aim of developing more and better homegrown players."³⁰⁶ The EPPP was organized through consultation between the Premier League and English professional soccer to promote the development of young English players.³⁰⁷ The Premier League's Youth Development Rules provide guidelines for the payment of youth

299. See *supra* Section IV.c.

300. See *supra* Section IV.b.

301. See COLIN HIGGS, ET AL., LONG-TERM DEVELOPMENT IN SPORT AND PHYSICAL ACTIVITY 6 (Andrea Carey et al. eds., Sport for Life 3d ed. 2019).

302. See *Introducing MLS NEXT Pro*, MLS NEXT PRO, <https://www.mlsextnetpro.com/about> (last visited Feb. 28, 2022).

303. See *What You Need to Know About the NBA G League*, NBA G LEAGUE, <https://gleague.nba.com/about> (last visited Feb. 28, 2022).

304. See *id.*

305. See PREMIER LEAGUE, *Elite Player Performance Plan*, <https://www.premierleague.com/youth/EPPP> (last visited Apr. 20, 2023).

306. *Id.*

307. See *id.*

players, through both scholarships and traditional salaries.³⁰⁸ Overall, the goal of the EPPP is to assist players in developing both their athletic skills and their personal character.³⁰⁹ While the NCAA claims to have a similar mission for American college athletes, the execution of this mission has not been utilized by many of its target demographic.³¹⁰

Another model that can be used to transition American professional sports leagues to allow minors to play is outlined in the Sport for Life Society's most recent long Term Athletic Development (hereinafter "LTAD") model.³¹¹ The Sport for Life Society is a Canadian non-profit organization whose mission is to "[t]o develop physical literacy³¹² and improve the quality of sport"³¹³ through collaboration in order provide a framework for various sporting institutions to improve and excel.³¹⁴ This LTAD model discusses twenty-two factors within three categories that play a role in the long-term development of athletes.³¹⁵ The model also emphasizes the importance of differentiating an athlete's chronological age³¹⁶ from their developmental age³¹⁷ as a matter of promoting their growth and success.³¹⁸

The United States has its own athletic development models, such as the United States Olympic Committee's (hereinafter "USOC") American Development Model (hereinafter "ADM").³¹⁹ Like the Canadian LTAD model, the ADM emphasizes the greater importance of athletic

308. *Youth Development Rules, Season 2020/21*, PREMIER LEAGUE 13, 111, <https://resources.premierleague.com/premierleague/document/2020/09/23/9af878e5-d485-4683-87d9-4e4c3834d3bf/PL-2020-21-YD-Rules.pdf> (last visited Apr. 20, 2023).

309. See PREMIER LEAGUE, *supra* note 305 305.

310. See *supra* Section I.f.

311. See HIGGS, *supra* note 301 301, at 3.

312. "Physical literacy is the motivation, confidence, physical competence, knowledge and understanding to value and take responsibility for engagement in physical activities for life. In more practical terms is the life-long development of fundamental movement skills and fundamental sport skills in a wide variety of environments." *Id.* at 43 (alteration in original).

313. "Quality Sport means good, developmentally appropriate, values-based programs, run in a safe, welcoming and inclusive environment by good people who are adequately qualified and are committed to the True Sport principles." *Id.* at 44.

314. See *id.* at 9 (modification to original).

315. See *id.* at 12.

316. "Chronological age is 'the number of years and days elapsed since birth.'" *Id.* at 42.

317. "Developmental age is the age in years and months of the average youth with the same development as the individual in question. If a 15-year-old has the same development as the average 13-year-old, their developmental age is 13. Developmental age can be based on different body systems, including skeletal maturity or sexual maturity and different systems may give slightly different developmental ages, and therefore should be treated as an approximation unless measured by skilled evaluators with specialized equipment." *Id.* at 43.

318. See *id.* at 12.

319. See U.S. OLYMPIC COMM., *REBUILDING ATHLETES IN AMERICA* 5 (2015).

development than athletic results, and advocates for a focus on physical literacy such that athletes are matched with those at a similar physical ability.³²⁰ Where the ADM falls short, however, is in its application; the ADM does not provide for an actionable model that can be easily implemented to carry out its goals.³²¹ Although the ADM has been adapted by some American sports associations to more specifically apply to their sports, the lack of guidance provided by the USOC has resulted in a regurgitation of values with little formal guidance on how to promote them.³²²

The United States' youth sports model is less functional than its international counterparts and does not enable young athletes to develop to their full potential.³²³ In order to help these minors, the United States should fund the research and development of a new ADM, similar to the Canadian government's funding of the LTAD model and use the gathered information to create actionable methods of developing the American youth athletic system.³²⁴ Doing so will both allow a more uniform promotion of the goals of the existing ADM, as well as create a system where minors can develop at their own pace such that they are always able to excel.³²⁵

A key component of this new ADM should be a uniform method to accurately measure a minor's developmental age. This could potentially be done empirically, and applied by physicians across the United States to safely measure and determine at what level a minor should be playing sports.³²⁶ By creating a cutting edge test to measure the physical capabilities of minors, youth sports leagues can transition from using age as the primary variable in determining the level a minor can play to a system where minors are grouped with those of a similar physical ability.³²⁷ Age may remain a relevant factor in determining what level of athletics a minor should play, however, age should not continue to be the dispositive factor that determines the level of athletic competition a minor will face.³²⁸

320. *See id.* at 19.

321. *See generally id.* at 9 ("The ADM 5 stage model is a guideline for sports in America to use to encourage development and pathway guidance.").

322. *See generally* JOSEPH B. MYERS, PhD, ATC, USA BASEBALL AMERICAN DEVELOPMENT MODEL (Carlo Alvarez et al. eds. 2021) (explaining key principals and definitions).

323. *See supra* Section IV.d

324. *See* HIGGS, *supra* note 301301, at 41.

325. *See id.* at 12.

326. *See id.* at 6.

327. *See* SOCCERWIRE.COM, *supra* note 132132.

328. *See* Ward, *supra* note 187.

CONCLUSION

In the United States, the length of a professional athlete's career is incredibly short.³²⁹ A main factor in short professional athletic careers is the ever present risk of injuries.³³⁰ With these careers in professional sports often shortened because of their physically demanding nature, it is important for the quality of athletes lives after their retirement to allow them as much time as possible to earn money for their craft.³³¹ In order to ensure this, Age Rules in professional sports must be eliminated, such that athletes may play professionally as early as a professional team is willing to give them the chance.³³²

Soccer player Olivia Moultrie has served as a trailblazer for the eradication of Age Rules in professional sports.³³³ Moultrie's successful suit against the NWSL earning her temporary permission to play professional soccer served as the first step in what is likely to be a long and arduous journey toward allowing minors the right to earn money for playing a sport.³³⁴ The district court's decision to allow Moultrie to play was ratified by the NWSL's inaugural CBA, which allows players of any age to participate in the league.³³⁵ The removal of the NWSL's Age Rule demonstrates a trend towards allowing minors more autonomy to make decisions about their employment, promotes the development of players to reach their highest potential, and provides foresight for the well-being of athletes upon the end of their relatively brief careers.³³⁶

329. Compare Christina Gough, *Average Length of Player Careers in the NFL*, STATISTA (Jan. 11, 2023) <https://www.statista.com/statistics/240102/average-player-career-length-in-the-national-football-league/> (3.3 seasons in the NFL), and Luke, *What is the Average Career Length of an NBA Player?*, DUNK OR THREE (Oct. 11, 2021) <https://dunkorthree.com/nba-player-career-length/> (roughly 4.5 years in the NBA), and Alaina Johnson, *What is the Average Career Length of an NHL Player*, BRAVE STICK HOCKEY (Feb. 21, 2022) <https://bshockey.com/nhl-player-career-length/> (5 years on average, 12 years for the top 25% of players in the NHL), with *Partners in Practice: The Era of Mandatory Retirement*, ABOVE THE L. (Sept. 26, 2012, 1:49 PM) <https://abovethelaw.com/2012/09/partners-in-practice-the-era-of-mandatory-retirement/> ("About 60 percent of law partners are now 55 or older."), and MATTHEW S. RUTLEDGE, *What Explains the Widening Gap in Retirement Ages by Education?*, CTR. FOR RET. RSCH. AT B.C. 1 fig. 1 (May 2018) (noting that the average age for male high school graduate retirees from 2010-2016 is 62.8 years).

330. See Luke, *supra* note 329 (naming injuries as one of three "main factor[s] that directly impact[] how long someone stays in the NBA") (alteration to original).

331. See *Bo Jackson - Injury and Comeback*, *supra* note 150.

332. See *supra* Section IV.

333. See *supra* Section II.a.

334. See *O.M. v. Nat'l Women's Soccer League*, 2021 U.S. Dist. LEXIS 97840, at *26.

335. See Caron, *supra* note 56.

336. See NWSL Editor, *supra* note 54.

In the United States, there is currently no sweeping legislative endorsement or protection for minors who wish to play a professional sport.³³⁷ The Coogan Act provides an exemption to child labor laws for entertainers and athletes, as well as protections for their earned wages during their minority.³³⁸ However, the Coogan Act has been adopted as law in only five states, and thus many minors are unable to benefit from its protections.³³⁹ In the absence of overarching protections for minor-athletes, professional sports leagues like the NFL and NBA have implemented their own Age Rules that prohibit participation by those under a certain age.³⁴⁰ This solution is not advocating for compulsory participation of minors in professional sports leagues, but rather for young athletes to be given an opportunity to achieve the ultimate goal of playing professionally without the artificial barrier of an Age Rule hampering them.³⁴¹ The proposed legislation will also provide the professional leagues and their member clubs the ability to give a young athlete a chance to start living their dream at the moment the athlete is ready.³⁴²

The best course of action for allowing minors to play professional sports is not an outright ban on private prohibition of it, but rather the implementation of a system where minor-athletes' finances will be protected by federal law, and an improved federal development plan that will serve the interests of all athletes regardless of age or ability.³⁴³ By providing federal guidelines that allow athletes to participate professionally at whatever age they are deemed capable, creating a federal trust fund to protect minor-athletes from opportunistic family members, and providing a more thorough development model for young athletes at all skill levels, professional athletes will be able to receive compensation for their service to society as entertainers as early as possible.³⁴⁴ This system would provide security to private sports leagues, as a federal endorsement of minors' participation in professional sports would demonstrate that the rights of minors to earn money for a sport, they currently earn no money for playing, outweighs whatever potential dangers are feared by the leagues.³⁴⁵

337. See *supra* Part III.

338. See CAL. FAM. CODE § 6750 (West).

339. See SAG-AFTRA, *supra* note 217217.

340. See NAT'L BASKETBALL ASS'N, *supra* note 28; see NAT'L FOOTBALL LEAGUE, *supra* note 28, at 17.

341. See *supra* Part IV.a.

342. See *supra* Part IV.d.

343. See *supra* Part IV.b.

344. See *supra* Part IV.c.

345. See *supra* Part IV.c.

In the modern world, athletes, actors, and musicians represent the pinnacle of fame and celebrity.³⁴⁶ As such, it is unjust that athletes are not subject to the freedom of participation and protections of the law that other entertainers have been for decades.³⁴⁷ Through the proposed enactment of federal legislation and implementation of a federally endorsed development plan, athletes of all ages will be further along the path to equality among entertainers in the United States.³⁴⁸

*Zachary Bawduniak**

346. See Alana Felicity, *Top 10 Most Famous Celebrities in the World*, THELISTLI (Oct. 27, 2018), <https://thelistli.com/most-famous-celebrities/#:~:text=1%20Angelina%20Jolie.%202%20Jim%20Carrey.%203%20Robert,Cristiano%20Ronaldo.%209%20Emma%20Watson.%2010%20Leonardo%20Dicaprio>.

347. See *O.M. v. Nat'l Women's Soccer League*, 2021 U.S. Dist. LEXIS 97840, at 14.

348. See *supra* Part IV.c.

* Zachary Bawduniak is a J.D. candidate at the Maurice A. Deane School of Law at Hofstra University, where he anticipates graduation in May of 2023. He is an Articles Editor for the *Hofstra Labor & Employment Law Journal*. Mr. Bawduniak thanks Theresa Kelley for her editorial, inspirational, and emotional support throughout the completion of this Note. He would also like to thank the Managing Board and staff of Volume 40 for their hard work and dedication to this publication. Finally, he thanks his parents and brother Nathan for their endless support throughout his law school career.

