Utah Law Review

Volume 2015 | Number 3 Article 1

2015

Hoop Dreams Deferred: The WNBA, the NBA, and the Long-Standing Gender Inequity at the Game's Highest Level

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HOOP DREAMS DEFERRED: THE WNBA, THE NBA, AND THE LONG-STANDING GENDER INEQUITY AT THE GAME'S HIGHEST LEVEL

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I. INTRODUCTION

The top three picks in the 2013 Women's National Basketball Association (WNBA) draft were perhaps the most talented top three picks in league history, and they were certainly the most celebrated.[1] Brittney Griner, Elena Delle Donne, and

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[1] In addition to their on-court exploits, each of these athletes has a unique off-court story that captivated the basketball community as well as the nation generally.

Delle Donne, the nation's best player when she graduated high school, committed to play her college basketball at the University of Connecticut—arguably the nation's best women's college basketball program. Within a week, though, she realized that she could not bear to be apart from her sister who suffers from several disabilities, cannot hear or speak, and is therefore unable to communicate by telephone. Delle Donne left Connecticut and certain collegiate basketball stardom and moved back to her family home in Delaware, where she eventually enrolled at the University of Delaware. She took a year off from basketball. For fun she walked on to Delaware's volleyball team, showing so much natural athleticism that she became an All-American. The following year she joined Delaware's basketball team and embarked on her storied basketball career, launching the previously unheralded Blue Hens on to the national stage. *See* Adam Himmelsbach, *Happy Back Home*, N.Y. TIMES, Mar. 18, 2012, at SP1; *Elena Delle Donne*, WNBA, http://www.wnba.com/playerfile/elena_delle_donne/bio.html, *archived at* http://perma.cc/HLG7-B27R (last visited Aug. 28, 2014).

Griner, who played for the Baylor University Bears, dominated college basketball—dunking the ball at a rate entirely unprecedented in the women's game—while enduring incessant and at times malicious rumors about her sexuality. The talk never impacted Griner's performance and she refused to comment on it during her collegiate career. In advance of the 2013 WNBA draft, in which she would become the first overall pick, Griner publicly announced that she is gay. She did so in hopes of becoming a role model for youth being bullied about their sexuality and has happily assumed that mantle as a WNBA star. *See Brittney Griner*, WNBA, http://www.wnba.com/playerfile/brittney_griner/index.html, *archived at* http://perma.cc/QS4E-MUBV (last visited Aug. 28, 2014); *see also Brittney Griner Discusses Being Gay*, ESPN (Apr. 21, 2013, 11:34 AM), http://espn.go.com/wnba/story/_/id/9185633/brittney-griner-comes-says-just-are, *archived at* http://perma.cc/FP4T-C988.

Skylar Diggins were phenomenal youth players, attracting attention from collegiate coaches shortly after they began playing competitively. Delle Donne received her first major university scholarship offer when she was in the seventh grade, and Diggins received her first in the eighth.[2] Griner did not start playing competitive basketball until her freshman year of high school, but before long, she too was receiving scholarship offers from major universities.[3] As high-school seniors, all three made the McDonald's All-American team, and each was named the best high-school women's basketball player of the year by one ranking service or another.[4]

Diggins grew up in South Bend, Indiana, seven miles from the University of Notre Dame's campus, and despite being recruited by virtually every elite women's collegiate basketball program in the country, she chose to stay home and help build her hometown school into a powerhouse. *See* Mike Lopresti, *Skylar Diggins' Notre Dame Legacy Goes Beyond Twitter, Final Four*, USA TODAY SPORTS (Mar. 5, 2013, 9:32 PM), http://www.usatoday.com/story/sports/ncaaw/bigeast/2013/03/05/skylar-diggins-notre-dame-fighting-irish/1965359/, *archived at* http://perma.cc/996D-ZV58. She did just that, bringing Notre Dame its first two national championship appearances since 2001. Along the way, Diggins, described by various observers as "the total package," "truly beautiful," "blessed with model looks," and "supreme attractiveness," developed a following, by both social and traditional media, of a scope seldom, if ever, seen for a female collegiate athlete. *See* Scoop Jackson, *The Skylar Diggins Balancing Act*, ESPN (Dec. 24, 2011) http://espn.go.com/espn/commentary/story/_/page/jackson-111223/skylar-diggins-notre-dame-balances-beauty-athleticism, *archived at* http://perma.cc/Y9DZ-M5B2; Sam Laird, *Skylar Diggins Is the Beautiful Hoops Star Twitter Wants to Marry*, MASHABLE (Mar. 5, 2013), http://mashable.com/2013/03/05/skylar-diggins-twitter/, *archived at* http://perma.cc/KPY2-TMXU. She became a bona fide celebrity, receiving amorous tweets from hip hop artist Lil' Wayne, singer Chris Brown, and many of her other 400,000 Twitter followers. In doing so, she popularized and marketed women's basketball. *See* Jackson, *supra*.

[2] *See* Luke Cyphers, *This Time It's Different, Skylar Diggins Is Not the Next Big Thing in Women's Basketball. She's the Next Big Thing, Period.*, ESPN THE MAG., Nov. 14, 2011, at 102, 108 (stating that Notre Dame head coach Muffet McGraw offered Diggins a verbal scholarship before she finished eighth grade); Jeré Longman, *Walking Away*, N.Y. TIMES, Oct. 19, 2008, at SP1 (noting that Delle Donne received her first college scholarship offer when she was in seventh grade).

[3] Brian D. Sweany, *Brittney Griner*, TEX. MONTHLY (June 2010), http://www.texasmonthly.com/story/brittney-griner, *archived at* http://perma.cc/BQ58-XMPU (stating that Griner did not play basketball until her freshman year of high school, but she quickly found that it was her best sport).

[4] Delle Donne graduated from high school in 2008, a year before Diggins and Griner, and as a senior she was named USA Today High School Basketball Player of the Year, Naismith Prep Player of the Year, and EA Sports Player of the Year. *NCAAW Profile: Elena Delle Donne*, SHE'S A BALLER, http://www.shesaballer.com/index.php?option=com_content&view=article&id=194:ncaaw-profile-elena-delle-donne&catid=43:nvaaw-profiles, *archived at* http://perma.cc/EM7A-RY7U (last visited May. 28, 2015). The following year, Diggins was named Naismith Prep Player of the Year and Gatorade High School Player of the Year, *NCAA Player Profile: Skylar Diggins*, SHE'S A BALLER, http://www.shesaballer.com/index.php?option=com_content&view=article&id=93:ncaa-player-profile-skylar-diggins&catid=43:nvaaw-profiles, *archived at* http://perma.cc/JF74-

Griner, Delle Donne, and Diggins could almost certainly have competed in the WNBA straight out of high school, and after their first collegiate seasons—during which Griner led the nation in blocked shots, Delle Donne was fourth in the nation in scoring, and Diggins led her team in scoring, steals, and assists—each was clearly WNBA ready.[5]

Male collegiate basketball players are eligible to declare for the draft in the WNBA's brother league, the National Basketball Association (NBA), after their freshman year (or when they are one year removed from high school), and many of Griner's, Delle Donne's, and Diggins' fellow rising sophomores did just that.[6] Griner, Delle Donne, and Diggins did not, however, have the option to launch their professional careers then, because female collegiate basketball players are not eligible to enter the WNBA until after their senior year (or when they are four years removed from high school).[7]

6WTP (last visited Sept. 27, 2014), and Griner was named USA Today High School Basketball Player of the Year and Women's Basketball Coaches Association (WBCA) High School Player of the Year, *Brittney Griner*, THE OFFICIAL SITE OF USA BASKETBALL (Oct. 7, 2013), http://archive.usab.com/bios/griner_brittney.html, *archived at* http://perma.cc/K59-L3WY.

[5] *About Elena*, ELENADELLEDONNE.COM, http://elenadelledonne.com/#about, *archived at* http://perma.cc/G624-P6CP (last visited Jan. 5, 2015); *Baylor's Brittney Griner Sets NCAA Mark for Blocked Shots*, ABC13.COM (Jan. 27, 2013, 2:17 AM), http://abc13.com/archive/8969594, *archived at* http://perma.cc/47NS-7SMX; Skylar Diggins, UND.COM, http://www.und.com/sports/w-baskbl/mtt/diggins_skylar00.html, *archived at* http://perma.cc/MRF8-3CPJ (last visited Sept. 26, 2014).

[6] A complete list of male collegiate players who declared for the NBA draft after their freshman year in 2010, the year in which Delle Donne, Diggins, and Griner became sophomores, follows: Al-Farouq Aminu, Eric Bledsoe, Avery Bradley, DeMarcus Cousins, Derrick Favors, Keith Gallon, Xavier Henry, Tommy Mason-Griffin, Daniel Orton, Lance Stephenson, John Wall, and Hassan Whiteside. *2010 NBA Draft Results Round 1*, ESPN NBA DRAFTTRACKER, http://insider.espn.go.com/nbadraft/results/rounds/_/year/2010/round/1, *archived at* http://perma.cc/ZQ8X-NNKU (last visited Sept. 27, 2014); *2010 NBA Draft Results Round 2*, ESPN NBA DRAFTTRACKER, http://insider.espn.go.com/nbadraft/results/rounds/_/year/2010/round/2, *archived at* http://perma.cc/P245-AG25 (last visited Sept. 27, 2014).

[7] The WNBA's age eligibility rule is housed in Article XIII of the WNBA Collective Bargaining Agreement (CBA) and reads, in relevant part, as follows:

> (b) A player is eligible to be selected in the WNBA Draft if she: (i) will be at least twenty-two (22) years old during the calendar year in which such Draft is held and she . . . has no remaining intercollegiate eligibility . . . (ii) has graduated from a four-year college or university prior to such Draft, or "is to graduate" from such college or university within the three (3)-month period following such Draft . . . or (iii) attended a four-year college or university, her original class in such college or university has already been graduated or "is to graduate" within the three (3)-month period following such Draft . . . .

Were the NBA and WNBA distinct, unaffiliated organizations, their disparate age eligibility rules would be an unfortunate but unactionable gender-based reality. However, in that the NBA founded the WNBA as a subsidiary corporation, has long funded the WNBA, instituted the WNBA's age eligibility rule, and has generally exercised control over the WNBA throughout the majority of the WNBA's existence, the disparate age eligibility rules raise sex-discrimination concerns. This paper explores these concerns and concludes that, because of the NBA's involvement in and dominance over the WNBA, the NBA is potentially liable for Title VII sex discrimination caused by the WNBA's age eligibility rule.

Part II of this Article explores age eligibility rules in American professional sports generally. It then turns its focus to the close relationship between the NBA and the WNBA, particularly those two leagues' age eligibility rules, how they came to be, and the inequity between them. Part III examines the impact of the inequitable age eligibility thresholds, with respect to both risk of injury and lost compensation, on female basketball players. Part IV addresses the three most commonly asserted justifications for the WNBA's age eligibility rule—(1) that WNBA players should be scholars and role models; (2) that the age eligibility rule reduces the likelihood of poor financial outcomes for WNBA players, and (3) that the age eligibility rule strengthens the WNBA—and argues that none of them justifies that the WNBA's rule is more stringent than the NBA's rule. Part V argues that the NBA, by virtue of being the WNBA's parent company, is responsible for this inequity and the effects that flow therefrom. Part VI explores Title VII of the Civil Rights Act of 1964 and subjects the inequity between the NBA's age eligibility rule and the WNBA's age eligibility rule to Title VII analysis, ultimately arguing the inequity violates Title VII. Finally, Part VII concludes that the NBA, in light of its relationship with the WNBA, may be liable for this Title VII violation.

II. AGE ELIGIBILITY RULES IN AMERICAN PROFESSIONAL SPORTS

Age eligibility rules in American professional sports have long triggered substantial debate.[8] Many sports leagues and associations, such as Major League

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WOMAN'S NAT'L BASKETBALL ASS'N, COLLECTIVE BARGAINING AGREEMENT art. XIII § 1, at 105 (2014) [hereinafter WNBA CBA], *available at* http://wnbpa-uploads.s3.amazonaws.com/docs/WNBA%20CBA%202014-2021Final.pdf, *archived at* http://perma.cc/44U8-FSZE. An exception to this rule applies to international players, which the CBA defines as players "born and residing outside the United States." *Id.* An international player "is eligible to be selected in the WNBA Draft if she will be at least 20 years old during the calendar year in which such Draft is held." *Id.*

[8] *See, e.g.*, Christian Dennie, *From Clarett to Mayo: The Antitrust Labor Exemption Argument Continues*, 8 TEX. REV. ENT. & SPORTS L. 63 (2007); Michael A. McCann, *Illegal Defense: The Irrational Economics of Banning High School Players from the NBA Draft*, 3 VA. SPORTS & ENT. L.J. 113 (2004); Michael A. McCann & Joseph S. Rosen, *Legality of Age Restrictions in the NBA and the NFL*, 56 CASE W. RES. L. REV. 731 (2006); Andrew M. Jones, Comment, *Hold the Mayo: An Analysis of the Validity of the NBA's Stern No Preps*

Soccer, the Professional Golfers' Association, and the Ladies Professional Golfers' Association have no age eligibility rules at all.[9] Others, like Major League Baseball (MLB), the Association of Tennis Professionals, and the Women's Tennis Association, have age eligibility rules set well below the age of majority.[10] The National Hockey League (NHL) requires entrants achieve nineteen years of age, the NBA requires entrants be one year removed from high school, and the National Football League (NFL) requires entrants be three years removed from high school.[11]

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to Pros Rule and the Application of the Nonstatutory Exemption, 26 LOY. L.A. ENT. L. REV. 475 (2006); David G. Kabbes, Note, *Professional Sports' Eligibility Rules: Too Many Players on the Field*, 1986 U. ILL. L. REV. 1233 (1986); Joseph A. Litman, Note, *Tremendous Upside Potential: How A High-School Basketball Player Might Challenge the National Basketball Association's Eligibility Requirements*, 88 WASH. U. L. REV. 261 (2010); Jack N.E. Pitts, Jr., Comment, *Why Wait?: An Antitrust Analysis of the National Football League and National Basketball Association's Draft Eligibility Rules*, 51 HOW. L.J. 433 (2008).

[9] *See* McCann & Rosen, *supra* note 8, at 731 ("The NFL and the NBA are the only major sports organizations that prohibit players from entrance until a prescribed period after high school graduation."); Jenna Merten, Comment, *Raising a Red Card: Why Freddy Adu Should Not Be Allowed to Play Professional Soccer*, 15 MARQ. SPORTS L. REV. 205, 218 (2004) (arguing that MLS should enact an age eligibility rule rather than maintain its current model).

[10] Major League Baseball's First-Year Player Draft eligibility is limited to (1) "High school players, if they have graduated from high school and have not yet attended college or junior college;" (2) "College players, from four-year colleges who have either completed their junior or senior years or are at least 21 years old;" and (3) "Junior college players, regardless of how many years of school they have completed." *First-Year Player Draft, Official Rules,* MLB.COM, http://mlb.mlb.com/mlb/draftday/rules.jsp, *archived at* http://perma.cc/CBQ-79DU (last visited Aug. 28, 2014).

Male and female tennis players cannot play professional tournaments or in international tennis competitions until they are fourteen years old. ASS'N OF TENNIS PROF'LS, 2015 ATP OFFICIAL RULEBOOK § 7.02(A)(1) (2015), *available at* http://www.atpworldtour.com/Corporate/Rulebook.aspx, *archived at* http://perma.cc/B4JA-TDZC ("Male players under the age of fourteen (14) shall not be eligible for entry into any ATP World Tour or ATP Challenger Tour tournament."); WOMEN'S TENNIS ASS'N, 2015 WTA OFFICIAL RULEBOOK § XV(A)(2)(a)(i) (2015), *available at* http://www.wtatennis.com/SEWTATour-Archive/Archive/AboutTheTour/rules2015.pdf, *archived at* http://perma.cc/L2AC-MATG ("A player who has not yet reached the date of her 14th birthday may not participate in any Professional Tennis Tournament on the WTA or ITF Women's Circuit, or in any level of Fed Cup competition.").

[11] *See* NAT'L BASKETBALL PLAYERS ASS'N, COLLLECTIVE BARGAINING AGREEMENT art. X § 1(b)(i) (2011) [hereinafter NBA CBA, Article X], *available at* http://mediacentral.nba.com/media/mediacentral/2011-Collective-Bargaining-Agreement.pdf, *archived at* http://perma.cc/H8H3-M2MD ("The player (A) is or will be at least 19 years of age during the calendar year in which the Draft is held, and (B) with respect to a player who is not an international player . . . , at least one (1) NBA Season has elapsed since the player's graduation from high school (or, if the player did not graduate from high school, since the graduation of the class with which the player would have graduated had he

The WNBA's rule, requiring entrants be four years removed from high school, is the most stringent in the nation.[12]

Critics have noted the differences among the age eligibility rules adopted by various leagues and questioned why those differences exist.[13] Why, for instance, should MLB have a more forgiving age eligibility rule than the NFL? If the reason is football is more physically demanding and dangerous than baseball and therefore requires that entrants be more physically mature, why should the NHL—which, like the NFL, is extremely physically demanding—also have a more forgiving age eligibility rule than the NFL?

Some critics have attributed the differences to race, noting the sports African Americans numerically dominate—football and basketball—have higher barriers to entry than, for instance baseball, tennis, and golf, in which African Americans are

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graduated from high school)"); NFL PLAYERS ASS'N, COLLECTIVE BARGAINING AGREEMENT art. 6 § 2(b) (2011), *available at* https://nflpaweb.blob.core.windows.net/media/Default/PDFs/General/2011_Final_CBA_Searchable_Bookmarked.pdf, *archived at* http://perma.cc/WZ2H-TSB3 ("No player shall be permitted to apply for special eligibility for selection in the Draft, or otherwise be eligible for the Draft, until three NFL regular seasons have begun and ended following either his graduation from high school or graduation of the class with which he entered high school, whichever is earlier."); *Hockey Operations Guidelines*, NHL.COM, http://www.nhl.com/ice/page.htm?id=26377, *archived at* http://perma.cc/RP8V-84DJ (last visited Aug. 28, 2014) ("All players age 19 or older . . . are eligible for claim in the Entry Draft . . . .").

[12] *See supra* note 7 and accompanying text.

[13] *See, e.g.*, Michael Brogin, *The NBA Draft and The Ongoing Eligibility Debate*, BLEACHER REP. (Apr. 15, 2010), http://bleacherreport.com/articles/378812-the-nba-draft-and-the-ongoing-eligiblity-debate, *archived at* http://perma.cc/8LME-ENDF (comparing the NBA, MLB, NHL, and NFL age eligibility rules); Grant Hughes, *Why the NBA's 1-and-Done Rule Is Causing More Harm than Good*, BLEACHER REP. (Aug. 8, 2013), http://bleacherreport.com/articles/1723163-why-the-nbas-one-and-done-rule-is-causing-more-harm-than-good, *archived at* http://perma.cc/5CM-83Z6 (arguing that MLB's policy allowing 18-year-old players either to jump straight to the professional ranks or to go to college for three years is a better alternative); Matt Norlander, *Pac-12 Commish Larry Scott Wants Change to NBA Age-Limit Rule*, CBS SPORTS (Aug. 2, 2013, 9:53 AM), http://www.cbssports.com/collegebasketball/eye-on-college-basketball/22986969/pac12-commish-larry-scott-wants-change-to-nba-agelimit-rule, *archived at* http://perma.cc/7JY-J5YB (arguing the NFL has not suffered from a higher age limit).

more scarce.[14] Others have not alleged discriminatory motives, but have derided the differences as unfair nonetheless.[15]

Despite the WNBA's age eligibility rule being the most stringent in the land, the great bulk of the criticism and all of the lawsuits regarding professional sports leagues' age eligibility thresholds have dealt with men's sport.[16] Professors Marc Edelman and C. Keith Harrison, in their 2008 article, *Analyzing the WNBA's Mandatory Age/Education Policy from a Legal, Cultural, and Ethical Perspective: Women, Men, and the Professional Sports Landscape*, were the first to launch a serious and scholarly challenge to the WNBA's age eligibility rule.[17] Their article explores the rule's "ethicality"—questioning why "male basketball players are allowed to enter the NBA only one year after graduating from high school, whereas female basketball players have to wait four years before entering the WNBA"—and then explores the rule's legality under antitrust principles.[18] In doing so, Harrison and Edelman offer a thorough analysis of the cases that have molded the antitrust legal landscape in sport, including *Mackey v. National Football League*,[19] *Clarett v. National Football League*,[20] and *Denver Rockets v. All-Pro Management, Inc.*[21] Harrison and Edelman conclude that because of the "inconsistencies in the case law,

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[14] *See* TODD BOYD, YOUNG, BLACK, RICH AND FAMOUS: THE RISE OF THE NBA, THE HIP HOP INVASION AND THE TRANSFORMATION OF AMERICAN CULTURE 177 (2003) (arguing that while camouflaging the problem as an age issue, in reality people are concerned the league is "too Black"); *Stern Wants NBA Age Limit Raised to 20*, ESPN (Apr. 13, 2005, 9:38 PM), http://sports.espn.go.com/nba/news/story?id=2035132, *archived at* http://perma.cc/H6JG-6ASU (quoting Jermaine O'Neal as saying "[a]s a black guy, you kind of think [race is] the reason why it's coming up. You don't hear about it in baseball or hockey," when asked about NBA Commissioner David Stern's suggestion that the age limit be raised (alteration in original)).

[15] *See, e.g.*, Jonathan Tjarks, *Why the NBA Age Limit Is Unfair and Why It Should Be Extended*, BLEACHER REP. (Oct. 12, 2010), http://bleacherreport.com/articles/488970-why-the-nba-age-limit-is-unfair-and-why-it-should-be-extended, *archived at* http://perma.cc/CW96-KQ8T; *Cohen Calls Age Limit 'Unfair'*, ASSOCIATED PRESS (June 3, 2009, 9:35PM), http://sports.espn.go.com/nba/news/story?id=4229043, *archived at* http://perma.cc/Q3YP-RRTE.

[16] Excluded players have brought suit against the NBA and NFL for their leagues' age eligibility rules. *See, e.g.*, Clarett v. Nat'l Football League, 369 F.3d 124 (2d Cir. 2004); Denver Rockets v. All-Pro Mgmt., Inc., No. 71-1089, 1971 WL 3015 (9th Cir. Feb. 16, 1971), *rev'd sub nom. In re* Haywood v. Nat'l Basketball Ass'n, 401 U.S. 1204 (1971).

[17] Marc Edelman & C. Keith Harrison, *Analyzing the WNBA's Mandatory Age/Education Policy from a Legal, Cultural, and Ethical Perspective: Women, Men, and the Professional Sports Landscape*, 3 NW. J. L. & SOC. POL'Y 1 (2008).

[18] *Id.* at 2.

[19] 543 F.2d 606 (8th Cir. 1976).

[20] 369 F.3d 124 (2d Cir. 2004).

[21] No. 71-1089, 1971 WL 3015 (9th Cir. Feb. 16, 1971), *rev'd sub nom. In re* Haywood v. Nat'l Basketball Ass'n, 401 U.S. 1204 (1971).

it is impossible to predict with certainty whether a court would find the WNBA age/education policy to be illegal" under antitrust law.[22]

Like the Harrison-Edelman article, this article explores the rule's "ethicality"—the higher age barrier to entry for female basketball players than male basketball players—but rather than view the problem through an antitrust lens, as age eligibility rules are generally viewed, this article views it as a discrimination issue to be addressed with America's most impactful and far-reaching anti-discrimination statute, Title VII of the Civil Rights Act of 1964.

A. The NBA and Its Age Eligibility Rule

In order to understand the WNBA's age eligibility rule, one must understand the NBA's basic history, its age eligibility rule, and how that rule came to be.

The NBA began operations in New York City in 1946 as the Basketball Association of America.[23] Three years later, after merging with the National Basketball League in 1949, the NBA took its current name.[24] After struggling initially and contracting from seventeen teams to eight teams in its first few years in existence, the league began to gain steam, taking root as the preeminent professional basketball league in the United States.[25] The NBA grew further in prominence through the 1960s, and in the 1970s it endured a challenge from the upstart American Basketball Association (ABA), ultimately absorbing four of the ABA's teams.[26] The NBA's preeminence has not been challenged since. The league is now thirty teams strong and stands as one of America's most notable and well-recognized sports leagues.[27]

Age eligibility rules have for years been a controversial aspect of the NBA's regulatory framework. At its founding, the NBA had no age eligibility restrictions, and although over the league's early years a few players entered the league without playing college basketball, playing four years in college before turning professional was the norm.[28] Before long, though, the NBA established a rule stating that "'a

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[22] Edelman & Harrison, *supra* note 17, at 18.

[23] Leonard Koppett, *The NBA, 1946: A New League*, *in* THE OFFICIAL NBA ENCYCLOPEDIA 38, 39 (3d ed. 2000).

[24] *Id.* at 41 (discussing the merger of the BAA and the NBL, as well as the name change).

[25] *See id.* at 40–41.

[26] *See* John Hareas, *Coast to Coast: The NBA Expands*, *in* THE OFFICIAL NBA ENCYCLOPEDIA 72, 72–73 (3d ed. 2000).

[27] *Teams*, NBA, http://www.nba.com/teams/, *archived at* http://perma.cc/C38Z-PCK7 (last visited Oct. 28, 2014).

[28] It is unclear when the four-year age requirement began. "The original NBA age/education requirement dates back at least as far as 1969, and possibly as far as the league's inception . . . ." Marc Edelman & Joseph A. Wacker, *Collectively Bargained Age/Education Requirements: A Source of Antitrust Risk for Sports Club-Owners or Labor*

player could not make himself available' for the NBA draft until four years after his high school graduation,"[29] and because no player could sign with an NBA team until he was eligible for at least one draft, the rule created an across-the-board barrier to NBA entry.[30]

In 1970, however, Spencer Haywood brought a suit challenging the rule.[31] After two years of college basketball (one at a junior college), Haywood left college for the ABA, which, unlike the NBA, had no rule prohibiting early entrants.[32] Haywood had a sensational season with the ABA's Denver Rockets,[33] averaging 30 points and 19.5 rebounds per game and winning the league's Rookie of the Year and MVP awards.[34] After the season, Haywood left the Rockets and signed a contract to play the following season with the NBA's Seattle SuperSonics.[35] Because Haywood was only three years out of high school, however, the contract violated the NBA's age eligibility rule, and the NBA voided it.[36] In response, Haywood filed an antitrust action against the league in the United States District Court for the Central District of California seeking an injunction to stop the NBA from disallowing the contract.[37] Haywood characterized the NBA's conduct as a "group boycott" that restrained trade in violation of the Sherman Antitrust Act, and the district court agreed, finding

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Risk for Players Unions?, 115 PENN ST. L. REV. 341, 354 (2010) (citing Leonard Koppett, *Legal Factors Hamper N.B.A. – A.B.A. Talks*, N.Y. TIMES, Mar. 25, 1971, at 50).

[29] Warren K. Zola, *Transitioning to the NBA: Advocating on Behalf of Student-Athletes for NBA & NCAA Rule Changes*, 3 HARV. J. SPORTS & ENT. L. 159, 168 (2012) (citing John C. Graves, *Controlling Athletes with the Draft and Salary Cap: Are Both Necessary?*, 5 SPORTS L. J. 185, 187 (1998)).

[30] *See* NBA CBA, Article X, *supra* note 11, § 1(a).

[31] SHELDON GALLNER, PRO SPORTS: THE CONTRACT GAME 18 (1974).

[32] *Id.* at 18–19; *see also* David Friedman, *Chocolate Thunder and Short Shorts: The NBA in the 1970s*, *in* BASKETBALL IN AMERICA: FROM THE PLAYGROUNDS TO JORDAN'S GAME AND BEYOND 189, 197 (Bob Batchelor ed., 2005) ("Haywood had played only one year of junior college ball and one year at the University of Detroit before he joined the ABA's Denver Rockets for the 1969-1970 season. . . . The ABA subsequently signed numerous underclassmen . . . .").

[33] Friedman, *supra* note 32, at 197. When the Denver franchise was absorbed into the NBA in 1974, the team became the Denver Nuggets. *See* John Gardella, *Red, White & Blue: The Colorful ABA*, *in* THE OFFICIAL NBA ENCYCLOPEDIA 62, 63 (3d ed. 2000) (listing the teams affected by the acquisition of the ABA).

[34] Friedman, *supra* note 32, at 197; *see also* GALLNER, *supra* note 31, at 20 (alluding to Haywood's extremely successful performance in the ABA).

[35] GALLNER, *supra* note 31, at 18–19.

[36] *Id.* at 19. The NBA Commissioner at the time, Walter Kennedy, was tasked under the NBA bylaws with approving each player's contract, but he refused to approve Haywood's. *Id.*

[37] Denver Rockets v. All-Pro Mgmt., Inc., 325 F. Supp. 1049, 1054 (C.D. Cal. 1971).

in Haywood's favor.[38] A tortured procedural history, including appeals both by the NBA and Haywood, followed, but the district court's resolution ultimately stood.[39]

In the decision's wake, the NBA had little choice but to alter its age eligibility rule. The league articulated the view, however, that college provided NBA aspirants with valuable "life experience,"[40] so it cabined its alteration, allowing a player to leave college early to enter the NBA only if he could prove "severe economic hardship."[41] Before long, though, the exception swallowed the rule, and, as Sport magazine writer Jackie Lapin put it, by the mid-1970s, "almost anyone . . . would qualify [as a hardship case]."[42] Within five years, the NBA abandoned what had come to be known as the "easyship"[43] rule and instituted a new early entry process which declared the NBA draft "open to any person whose high school class has graduated so long as he renounces his college basketball eligibility, in writing, 45 days before the draft."[44]

With each passing year, more and more college underclassmen—and occasionally, a player straight out of high school—entered the NBA, and while many washed out, many others went on to have outstanding careers.[45] Indeed, when the NBA in 1996 announced its list of the 50 Greatest NBA Players in History, the list included eleven players who entered the league right after high-school graduation.[46] In the same year, Kobe Bryant, following in the footsteps of Kevin Garnett one year earlier, left high school directly for the NBA.[47] Bryant and Garnett quickly became

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[38] *Id.* at 1056.

[39] *In re* Haywood v. Nat'l Basketball Ass'n, 401 U.S. 1204, 1206 (1971), *reinstating* Denver Rockets v. All-Pro Mgmt., Inc., 325 F. Supp. 1049 (C.D. Cal. 1971).

[40] Susan McAleavey, Note, *Spendthrift Trust: An Alternative to the NBA Age Rule*, 84 ST. JOHN'S L. REV. 279, 284 (2010) (citing Michael A. McCann, *The Reckless Pursuit of Dominion: A Situational Analysis of the NBA and Diminishing Player Autonomy*, 8 U. PA. J. LAB. & EMP. L. 819, 832–33 (2006)).

[41] *Id.* at 283 (citing Michael A. McCann, *Illegal Defense: The Irrational Economics of Banning High School Players from the NBA Draft*, 3 VA. SPORTS & ENT. L. J. 113, 218 (2004)).

[42] Friedman, *supra* note 32, at 199.

[43] GALLNER, *supra* note 31, at 18–26.

[44] Scott R. Rosner, *Must Kobe Come Out and Play? An Analysis of the Legality of Preventing High School Athletes and College Underclassmen from Entering Professional Sports Drafts*, 8 SETON HALL J. SPORT L. 539, 553 (1998).

[45] *See* BOYD, *supra* note 14, at 175–76 (documenting the trend of underclassman and high school students leaving for the NBA); Jones, *supra* note 8, at 478–79 (stating that NBA rosters began to include many players drafted straight from high school in the years after high school phenomenon Kevin Garnett was drafted in 1995).

[46] *The NBA at 50*, NBA, www.nba.com/history/players/50greatest.html, *archived at* http://perma.cc/J5AM-N9YA (last visited Sept. 25, 2014) (including early entrants Charles Barkley, Clyde Drexler, Julius Erving, George Gervin, Magic Johnson, Michael Jordan, Moses Malone, Hakeem Olajuwon, Shaquille O'Neal, Isiah Thomas, and James Worthy among the fifty greatest players in NBA history).

[47] *See Kobe Bryant*, NBA, http://www.nba.com/playerfile/kobe_bryant/bio/?ls=iref:

two of the best players in the league, which prompted a trend through the rest of the 1990s and into the early 2000s of the nation's best players, such as Tracy McGrady, Amar'e Stoudemire, LeBron James, and Dwight Howard, skipping college altogether.[48]

This influx of high schoolers caused tremendous controversy, and arguments flew in both directions.[49] Boiled down, opponents of the trend argued that players entering the league out of high school were disproportionately fundamentally unsound and were insufficiently mature to handle playing in the NBA, and some worried these young players would flounder in life with no education to fall back on if they proved ill-prepared for the NBA.[50] Those who embraced the trend, on the other hand, believed the decision to declare for the NBA draft out of high school to be a personal choice and noted that many NBA aspirants are not academically prepared for college and that lack of college preparation should not unhinge their professional goals.[51]

Ultimately, the league and union agreed in 2005 through the Collective Bargaining Agreement to implement the age eligibility rule that remains in force today, essentially requiring that NBA aspirants be at least one year removed from high school before entering the NBA.[52] The rule, colloquially known as the "one and

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playerCompleteBioLink, *archived at* http://perma.cc/SU43-3L4J (last visited Oct. 28, 2014).

[48] *See e.g.*, Logic Johnson, *LeBron James and the 10 Greatest Players Drafted Out of High School*, BLEACHER REP. (Apr. 10, 2012), http://bleacherreport.com/articles/1136047-lebron-james-and-the-10-greatest-players-drafted-out-of-high-school, *archived at* http://perma.cc/95T3-SR7V; Ryan Pratt, *NBA Basketball Players Straight from High School*, LIST AFTER LIST (Mar. 3, 2014), http://listafterlist.com/nba-basketball-players-straight-from-high-school, *archived* at http://perma.cc/B7D7-494C.

[49] *See generally* Brian Shaffer, Comment, *The NBA's Age Requirement Shoots and Misses: How the Non-Statutory Exemption Produces Inequitable Results for High School Basketball Stars*, 48 SANTA CLARA L. REV. 681, 684–99 (2008) (outlining the arguments for and against the NBA's age eligibility rule).

[50] *See, e.g.*, Jones, *supra* note 8, at 476 (recording former NBA Commissioner David Stern's concerns with young players who "never made it in the NBA, lost out on a free college education, and were out of work in their desired profession by their early twenties"); Steve Kerr, *The Case for the 20-Year-Old Age Limit in the NBA*, GRANTLAND (May 8, 2012), http://www.grantland.com/features/steve-kerr-problems-age-limit-nba/, *archived at* http://perma.cc/S24C-3SWZ (arguing that many young players struggle initially "as they adjust to the workload, schedule, travel, stress, and media scrutiny" in the NBA).

[51] *See* Kevin J. Cimino, Comment, *The Rebirth of the NBA—Well, Almost: An Analysis of the Maurice Clarett Decision and Its Impact on the National Basketball Association*, 108 W. VA. L. REV. 831, 861–64 (2006) (focusing on the financial ramifications of the age eligibility rules); Jones, *supra* note 8, at 479 (commenting that even former NBA Commissioner David Stern initially commented, "it's for [players] and their parents to make the decision rather than all of us sanctimoniously and piously making these judgments") (citing Selena Roberts, *Stern Questions the Outrage Over Early Entry to N.B.A.*, N.Y. TIMES, May 20, 1996, at C8).

[52] *See* NBA CBA, Article X, § 1(b), *supra* note 11. The text of the provision follows:

done" rule,[53] is controversial for many of the same reasons the former "none and done rule" was controversial. Opponents, however, expressed an additional concern: that the rule alteration was senseless and accomplished nothing; that many players drop out of school after the basketball season to train for the NBA and even those who stay the full year cannot be viewed as college educated or otherwise materially better prepared for the NBA than high-school seniors would be.[54]

> (b) A player shall be eligible for selection in the first NBA Draft with respect to which he has satisfied all applicable requirements of Section 1(b)(i) below and one of the requirements of Section 1(b)(ii) below: (i) The player (A) is or will be at least 19 years of age during the calendar year in which the Draft is held, and (B) with respect to a player who is not an international player (defined below), at least one (1) NBA Season has elapsed since the player's graduation from high school (or, if the player did not graduate from high school, since the graduation of the class with which the player would have graduated had he graduated from high school); and (ii)(A) The player has graduated from a four-year college or university in the United States (or is to graduate in the calendar year in which the Draft is held) and has no remaining intercollegiate basketball eligibility; or (B) The player is attending or previously attended a four-year college or university in the United States, his original class in such college or university has graduated (or is to graduate in the calendar year in which the Draft is held), and he has no remaining intercollegiate basketball eligibility; or (C) The player has graduated from high school in the United States, did not enroll in a four-year college or university in the United States, and four calendar years have elapsed since such player's high school graduation; or (D) The player did not graduate from high school in the United States, and four calendar years have elapsed since the graduation of the class with which the player would have graduated had he graduated from high school; or (E) The player has signed a player contract with a "professional basketball team not in the NBA" (defined below) that is located anywhere in the world, and has rendered services under such contract prior to the Draft; or (F) The player has expressed his desire to be selected in the Draft in a writing received by the NBA at least sixty (60) days prior to such Draft (an "Early Entry" player) . . . .

[53] *E.g.*, Kelly Dwyer, *David Stern Absolutely Eviscerates NCAA Over 'One and Done' Rule*, YAHOO! SPORTS (Mar. 28, 2012, 11:00 AM), http://sports.yahoo.com/blogs/nba-ball-dont-lie/david-stern-absolutely-eviscerates-ncaa-over-one-done-150142445.html, *archived at* http://perma.cc/C267-EL56 (commenting on the tension between the NCAA and NBA over the "one and done" rule); Jarrad Saffren, *NCAA Basketball: The All One and Done Team*, BLEACHER REP. (Jan. 26, 2012), http://bleacherreport.com/articles/1041072-ncaa-basketball-the-all-one-and-done-team, *archived at* http://perma.cc/VSX7-5SB5 (highlighting some of the best college basketball players who left for the NBA after their freshman year).

[54] John Feinstein, *John Feinstein Blog: One-and-Done College Basketball Players Aren't 'Student-Athletes,'* JOHN FEINSTEIN BLOG (Oct. 16, 2013, 3:07 PM), http://feinstein.radio.cbssports.com/2013/10/16/john-feinstein-blog-one-and-done-college-basketball-players-arent-student-athletes/, *archived at* http://perma.cc/Y53V-5X9C (finding the NCAA is simply "housing NBA players for a year" because the athletes do not want to

Since 2005, there have been numerous calls to alter or eliminate the rule, but to date no change has been made.[55]

B. The NBA, the WNBA, and the WNBA's Age Eligibility Rule

In 1996, the U.S. Women's Basketball team won the Olympic gold medal.[56] The United States had won Olympic gold medals in women's basketball previously, but this victory seemed special. One reason is the Olympics were played in the United States (Atlanta, Georgia), but in addition, as the Games were being played there was an unprecedented excitement around the women's team and women's basketball in general.[57] In 1972, Congress had enacted Title IX of the Education Amendments of 1972, which prevents sex discrimination in education and which came to have a substantial impact in high school and collegiate athletics.[58] By 1996, an entire generation of women had grown up under Title IX and with generally more opportunities to play and female athletes to emulate than their predecessors.[59] All of women's sport was benefitting from Title IX, and basketball was no exception.[60] The collegiate game was more exciting than ever, and bona fide superstars, such as Texas Tech's recently graduated Sheryl Swoopes—whose play inspired Nike to produce the Air Swoopes women's basketball shoe and campaign in the mold of its iconic Air Jordan brand—were bursting onto the national stage.[61]

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be there and are not going to bother with classes at all after their first semester in college); *cf.* Andy Clayton, *Ohio State's Third-String QB Cardale Jones Tweets That Classes Are 'Pointless' . . . Saying He Went to College to Play Football*, N.Y. DAILY NEWS (Oct. 6, 2012, 1:11 PM), http://www.nydailynews.com/sports/college/ohio-state-player-tweets-classes-pointless-article-1.1176616#ixzz2luI2rS6i, *archived at* http://perma.cc/ZYG9-6CNX (reporting that Ohio State quarterback Cardale Jones tweeted, "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").

[55] *See, e.g.*, McCann & Rosen, *supra* note 8, at 731–32.

[56] Lisa A. Ennis, *Crashing the Boards: The WNBA and the Evolution of an Image*, *in* BASKETBALL IN AMERICA: FROM THE PLAYGROUNDS TO JORDAN'S GAME AND BEYOND 231, 233 (Bob Batchelor ed., 2005).

[57] *See id.* at 234 (stating that more than 30,000 fans attended each of the team's six games).

[58] *Id.* at 231–32.

[59] *See* Kate Fagan, *More than a Dream*, ESPNW (June 19, 2012), espn.go.com/espnw/title-ix/article/8068496/more-dream, *archived at* http://perma.cc/HW7N-T3DR (asserting that the Atlanta Olympic Games are often called the "'Title IX Olympics . . . because so many of the female athletes competing [in the Games] grew up after the law, passed in 1972, had taken root").

[60] *See id.* (noting that Title IX positively affected all women's sports).

[61] *See* SANDRA STEEN & SUSAN STEEN, TAKE IT TO THE HOOP 111 (2003) (detailing Sheryl Swoopes' shoe deal with Nike); *Nine for IX: Swoopes* (ESPN television broadcast July 30, 2013).

As the national team prepared for the tournament, the nation began to embrace the team, but in addition to being a phenomenon, the team's participation in the Olympic Games presented "a business opportunity . . . not lost on the NBA."[62] As the WNBA's first President Val Ackerman has explained, "there was incredible anticipation about this particular team and what it would be able to do on the court, and the sort of hidden story . . . was that the NBA was quietly using the team as a way to test interest for the start of the WNBA."[63] Former NBA Commissioner David Stern admitted as much: "It was a huge opportunity, because I felt that tapping into the other half of the population, even though it would take some time, would open up a whole new area for basketball."[64]

Ultimately, the NBA liked what it saw and seized upon the "huge opportunity" Commissioner Stern had identified. On April 24, 1996, Stern and the NBA Board of Governors granted approval for the WNBA to exist, and during the summer of 1997, the NBA launched the WNBA.[65] The league's eight charter teams—Charlotte Sting, Cleveland Rockers, Houston Comets, New York Liberty, Los Angeles Sparks, Phoenix Mercury, Sacramento Monarchs, and Utah Starzz—were each based in a city with an NBA team and were each directly owned by the NBA, which ultimately controlled the WNBA as a single entity.[66]

The NBA did not obfuscate its ownership of the WNBA. To the contrary, it emphasized it. Anybody who watched a WNBA game, saw a WNBA advertisement, or paid even the slightest attention to the WNBA would know instantly that the upstart league was *of* the NBA. Most obviously, the WNBA's name—the Women's National Basketball Association—made the connection clear. Further, the WNBA's logo at inception was a virtual mirror image of the NBA's logo (the only material differences being that the basketball playing figure in the WNBA's logo was anatomically adjusted and sported longer hair) and each WNBA team adopted the colors of the NBA team in its city.[67] In addition, most WNBA teams used names directly related to the NBA team in its city: Charlotte Sting (WNBA) / Charlotte Hornets (NBA); Houston Comets (WNBA) / Houston Rockets (NBA); Phoenix Mercury (WNBA) / Phoenix Suns (NBA); Sacramento Monarchs (WNBA) / Sacramento Kings (NBA); Utah Starzz (WNBA) / Utah Jazz (NBA).

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[62] *Nine for IX: Swoopes*, *supra* note 61; *see also* Ennis, *supra* note 56, at 231–32 ("riding the momentum . . . of the 1996 Dream Team's popularity").

[63] *Nine for IX: Swoopes*, *supra* note 61.

[64] *Id.*

[65] Jeanne Tang, *The WNBA: A League of Their Own*, *in* THE OFFICIAL NBA ENCYCLOPEDIA 306, 306–07 (Jan Hubbard ed., 3d ed. 2000).

[66] *Id.* at 308; Lacie L. Kaiser, Comment, *The Flight from Single-Entity Structured Sport Leagues*, 2 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 1, 11 (2004).

[67] STEEN & STEEN, *supra* note 61, at 110. In 2013, the WNBA changed its logo from one that mirrored the NBA's red, white, and blue logo to one that is orange and white. Ben Chodos, *WNBA Reveals New Logo Featuring Mystery Silhouette*, BLEACHER REP. (Mar. 28, 2013), http://bleacherreport.com/articles/1585145-wnba-reveals-new-logo-featuring-mystery-silhouette, *archived at* http://perma.cc/TVX3-DT7J.

Indeed, being a part of the NBA clearly saved the WNBA from being drummed out of existence in its infancy by a rival league.[68] Commissioner Stern and his NBA colleagues were not the only people to see the potential of women's professional basketball in the mid-1990s. American Basketball League (ABL) founders Gary Cavalli, Steve Hams, Anne Cribbs, and Bobby Johnson[69] saw it as well, and when the WNBA began play in the summer of 1997, the ABL, which had franchises in eight cities, had already completed its inaugural season.[70]

The ABL was packed with talent. Nine members of the United States Olympic Women's Basketball team and forty-three former All-American collegians graced the ABL's teams' rosters, and the league featured an extremely high level of play.[71] The WNBA entered the women's basketball market with generally less renowned and less skilled players than the ABL and paid, on average, far lower salaries.[72] Still, it was clear almost from the beginning that because of the NBA's heft, the ABL stood little chance of surviving.

The WNBA's teams played in large premier venues in which NBA teams played, secured sponsorship marketing deals—through the NBA—with premier corporate entities, such as Nike, Coca-Cola, General Motors, American Express, Sears, and Spalding, and landed television contracts with NBC, ESPN, and Lifetime.[73] The ABL suddenly seemed like a minor league, and before long, the ABL's best players were migrating to the WNBA. Before the ABL's second season, the WNBA signed the ABL's top player, Nikki McCray, to a contract for less money but far more promotional opportunity than she was getting with the ABL, and other

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[68] *See* PAMELA GRUNDY & SUSAN SHACKELFORD, SHATTERING THE GLASS: THE REMARKABLE HISTORY OF WOMEN'S BASKETBALL 228–29 (2005) (citing the NBA's prominence as one factor in the WNBA's success).

[69] *American Basketball League*, N.Y. DAILY NEWS (Oct. 6, 1996, 12:00 AM), http://www.nydailynews.com/archives/sports/american-basketball-league-article-1.738073, *archived at* http://perma.cc/R5G7-UJZF.

[70] STEEN & STEEN, *supra* note 61, at 98 (stating the ABL's inaugural game was held on October 18, 1996).

[71] *See* Edelman & Harrison, *supra* note 17, at 6 & n.42.

[72] *See id.* at 7 (contrasting the WNBA model from that of the ABL because the WNBA initially implemented a league-wide salary cap on all players' contracts at $50,000); Rachel Schaffer, *Grabbing Them by the Balls: Legislatures, Courts, and Team Owners Bar Non-Elite Professional Athletes from Workers' Compensation*, 8 AM. U. J. GENDER SOC. POL'Y & L. 623, 631–32 (2000) (finding ABL contracts were significantly higher than WNBA contracts).

[73] Ennis, *supra* note 56, at 235; TANG, *supra* note 65, at 307; Jean Halliday, *GM to Sponsor Women's Basketball: Carmaker Backs WNBA; Also Ties to Sony Complex*, ADAGE (Mar. 24, 1997), http://adage.com/article/news/gm-sponsor-women-s-basketball-carmaker-backs-wnba-ties-sony-complex/73201/, *archived at* http://perma.cc/VEA3-6RWW; Jennifer Lee, *AmEx Adds to WNBA Sponsor Deal*, SPORTS BUS. DAILY (July 16, 2001), http://www.sportsbusinessdaily.com/Journal/Issues/2001/07/20010716/This-Weeks-Issue/Amex-Adds-To-WNBA-Sponsor-Deal.aspx?hl=National&sc=0, *archived at* http://perma.cc/4UZQ-WG2T.

marquee players quickly followed.[74] By 1998, the ABL was financially insolvent, and on December 22 of that year, in the middle of its third season, the ABL filed for bankruptcy.[75]

The ABL, of course, played a role in its own demise. In choosing to play an October-through-March season (rather than a summer season, which the WNBA played), the ABL played its games during the same months as the NBA, which was the dominant force in the American professional basketball market.[76] In addition, the ABL seemed to opt for small venues, signaling sideshow, rather than marquee status.[77] The biggest reason, for the ABL's fall, however, was the NBA's support of the WNBA. The ABL simply could not compete with the NBA's brand.[78]

When the ABL folded, Chief Executive Officer Gary Cavalli explained that the league was "unable to obtain the television exposure and sponsorship support needed to make the league viable long term."[79] Cavalli asserted the ABL had talent and prioritized its players, giving them healthy salaries and the option to buy ownership stakes in the league, but that it was helpless against the WNBA's NBA-aided television exposure and sponsorship deals.[80]

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[74] Edelman & Harrison, *supra* note 17, at 8 (citing Valerie Lister, *ABL Says No Bidding War Despite McCray's Jump*, USA TODAY, Sept. 17, 1997, at 10C).

[75] *Competition Forces ABL to File for Bankruptcy,* LUBBOCK AVALANCHE J. (Dec. 23, 1998), http://lubbockonline.com/stories/122398/LS0439.shtml, *archived at* http://perma.cc/357T-DL52.

[76] *Id.*

[77] For instance, the league's San Jose franchise, The Lasers, played the majority of its games at the 4,600 seat San Jose Event Center on the San Jose State University campus and only a few at the city's 19,000 seat San Jose Arena (now named the SAP Arena at San Jose). *1996-1998 San Jose Lasers*, FUN WHILE IT LASTED, http://www.funwhileitlasted.net/2013/07/07/1996-1998-san-jose-lasers/, *archived at* http://perma.cc/63XT-S64J (last visited Oct. 28, 2014); *History of the American Basketball League*, THE ASS'N FOR PROF. BASKETBALL RES., http://www.apbr.org/abl9699.html, *archived at* http://perma.cc/FH8E-K8MU (last visited Jan. 14, 2015) (listing the San Jose Event Center and the San Jose Arena as home arenas for the Lasers).

[78] GRUNDY & SHACKELFORD, *supra* note 68, at 228–29 (commenting on the WNBA's higher profile because of its connection to the NBA).

[79] Rob Gloster, *American Basketball League Folds*, ASSOCIATED PRESS (Dec. 22, 1998, 4:10 PM), http://www.apnewsarchive.com/1998/American-Basketball-League-Folds/id-3578d5b373430211b933fd1bfa6d98e6, *archived at* http://perma.cc/6QYR-TPMX.

[80] Notably, the ABL did have television deals with Fox Sports Net and Black Entertainment Television; however, those deals were dwarfed by the WNBA's deals with NBC, ESPN, ESPN2, and Lifetime. Richard Sandomir, *Too Few Dollars, No Real Exposure*, N.Y. TIMES, Dec. 23, 1998, at D2, *available at* http://www.nytimes.com/1998/12/23/sports/pro-basketball-too-few-dollars-no-real-exposure.html, *archived at* http://perma.cc/U9XK-DGZA; *see also* FRANK P. JOZSA, JR. & JOHN J. GUTHRIE, JR., RELOCATING TEAMS AND EXPANDING LEAGUES IN PROFESSIONAL SPORTS: HOW THE MAJOR LEAGUES RESPOND TO MARKET CONDITIONS 159 (1999) (citing the lack of national television rights as one of the key factors resulting in the ABL's demise). In addition, unsurprisingly, the WNBA's marketing budget far surpassed the ABL's. In their first seasons, the WNBA and ABL had

Indeed, as the ABL crumbled, ABL officials openly blamed the NBA,[81] and the allegations were sufficiently thorough that Connecticut's Attorney General Richard Blumenthal, who was distressed at the economic toll caused by the demise of the ABL's New England Blizzard franchise based in Hartford, Connecticut, launched an investigation into whether the NBA was engaged in a "conspiracy to monopolize women's professional basketball."[82] Blumenthal believed there existed "evidence that the N.B.A. used sharp economic elbows to exclude the A.B.L from fair play, including access to essential financial rights and television and product sponsorship," and ultimately subpoenaed the NBA.[83] The subpoena ordered the NBA to provide documents, market studies, and any other material that discussed or named the ABL as a competitor.[84] In addition, it ordered the NBA to set forth "any conditions or restrictions it imposes on broadcasters that carry any professional basketball games of leagues other than the NBA or WNBA. . . . [and] any discussions between the NBA or WNBA and corporate sponsors concerning an exclusive arrangement that would preclude any deals with the ABL."[85]

Although none of the information the NBA produced in response to the subpoena indicated the NBA illegally prevented the ABL from securing any deals, and no suits or charges were ever filed, it is impossible to ignore the NBA's role in the WNBA-ABL battle for survival.[86] For the WNBA to win, it was not necessary that the NBA actively thwart the ABL's efforts. Being a part of the NBA and its network of contacts and corporate partners was more than enough.[87]

Just as the WNBA was born of the NBA,[88] the WNBA's age eligibility rule was born of the NBA. Indeed, "from [its] incipient stages . . . the WNBA . . . enforced . . . league regulations to prevent [its] teams from drafting players that still had NCAA college eligibility."[89] And in 1999, with the NBA owning each of the WNBA teams and controlling all facets of the WNBA's existence, the WNBA's age

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marketing budgets of $15 million and $1.5 million, respectively. *See* Barbara Huebner, *In Year 2, ABL Offers Real Alternative, League Will Reclaim Basketball Spotlight from WNBA*, THE BOSTON GLOBE, Oct. 11, 1997, at E7.

[81] Lena Williams, *N.B.A. Subpoenaed in A.B.L. Probe*, N.Y. TIMES, Jan. 12, 1999, at D7.

[82] Press Release, State of Conn. Office of the Att'y Gen., Attorney General Issues Subpoena to NBA in Probe of Alleged Conspiracy to Monopolize Women's Basketball (Jan. 11, 1999), *available at* http://ct.gov/ag/cwp/view.asp?A=1774&Q=282808, *archived at* http://perma.cc/W84W-QTRB [hereinafter Press Release, Alleged Conspiracy].

[83] Williams, *supra* note 82, at D7.

[84] *Id.*

[85] Press Release, Alleged Conspiracy, *supra* note 82.

[86] Edelman & Harrison, *supra* note 17, at 6–7.

[87] *Id.*

[88] *Id.* at 6 (noting that "on April 24, 1996—almost seven months before the first ABL game—the NBA announced that it, too, was launching a women's professional basketball league (the WNBA), which would begin play in the summer of 1997").

[89] *Id.* at 11.

eligibility rule as it exists today became a part of the WNBA's first collective bargaining agreement.[90]

The WNBA took its first steps toward quasi independence from the NBA when, in 2003, "the N.B.A. board of governors voted to change the W.N.B.A. business model from a single-entity structure to individual team ownership."[91] By this time, the league had grown from eight to sixteen teams, and the owners of NBA teams located in cities with new WNBA teams were granted the right of first refusal to purchase their sister teams.[92] Four of the team owners—those in Miami, Orlando, Portland, and Utah—declined the opportunity, opening the door for outside ownership of WNBA teams.[93] In the years since, the league has, in turn, contracted and expanded, and now consists of twelve franchises: Atlanta Dream, Chicago Sky, Connecticut Sun, Indiana Fever, New York Liberty, Washington Mystics, Los Angeles Sparks, Minnesota Lynx, Phoenix Mercury, San Antonio Silver Stars, Seattle Storm, and Tulsa Shock.[94] Nine of these franchises (Atlanta, Chicago, Indiana, New York, Washington, Los Angeles, Minnesota, Phoenix, and San Antonio) share a city with an NBA team and six of them (Indiana, New York, Washington, Minnesota, Phoenix, and San Antonio) are owned and operated by the NBA team with which they share a city.[95]

Even the independently owned WNBA teams, though, are thickly intertwined with the NBA. Indeed, at least fifteen NBA executives have supervisory roles with respect to the WNBA,[96] and the leagues work in tandem on everything from public relations initiatives—such as diversity programs and the health and wellness

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[90] *Id.* at 11–12. Importantly, the WNBA's age eligibility rule is not shielded from Title VII scrutiny by being included in the CBA because "Title VII rights are independent rights outside of the CBA . . . ." Miller v. Sw. Airlines, Co., 923 F. Supp. 2d 1206, 1211 (N.D. Cal. 2013); *see also* Chopra v. Display Producers, Inc., 980 F. Supp. 714, 716 (S.D.N.Y. 1997) ("[A] union cannot prospectively waive a member's Title VII rights in a collective bargaining situation.") (quoting Alexander v. Gardner-Denver Co., 415 U.S. 36, 51 (1974)).

[91] Lena Williams, *For Its Seventh Season, the W.N.B.A. Undergoes a Significant Makeover*, N.Y. TIMES, May 25, 2003, at SP2.

[92] Mike Terry, *Breaking Up Is Hard to Do: WNBA Is Embarking on a New Era of Individual Ownership After Six Years Under NBA's Wing. Two Teams Have Folded, Two Others Have Relocated*, L.A. TIMES, Feb. 10, 2003, at D3.

[93] *Id.*

[94] WNBA, http://www.wnba.com, *archived at* http://perma.cc/4MFA-534B (follow "Teams" hyperlink) (last visited Sept. 23, 2014).

[95] James Bowman, *The WNBA and How Leagues Survive*, SB NATION (Sept. 14, 2012, 1:51 PM), http://www.swishappeal.com/2012/9/14/3332960/the-wnba-and-how-leagues-survive, *archived at* http://perma.cc/RZ9X-BDWA.

[96] *Compare Our Management Team*, NBA, http://www.nba.com/careers/management_team.html, *archived at* http://perma.cc/CFF2-8MZE (last visited Sept. 23, 2014) (listing executives of the NBA and their job responsibilities, many which include responsibilities in the WNBA), *with League Directory*, WNBA, http://www.wnba.com/about_us/blue_book.html, *archived at* http://perma.cc/9BT9-AXLP (last visited Mar. 29, 2015) (listing executives of the WNBA and showing that many executives hold the same position in both leagues).

platform NBA FIT—to advertising and promotion campaigns.[97] Perhaps most tellingly, former NBA Commissioner David Stern, through the end of his tenure in early 2014, continued to have tremendous authority over the WNBA. Indeed, when WNBA President Donna Orender resigned in 2010, Stern was actively involved in selecting her replacement, Laurel Ritchie, and Stern made the public announcement of her hire.[98] Nothing indicates that Adam Silver, who succeeded Stern as Commissioner, is presiding any differently.

III. THE IMPACT OF INEQUITABLE AGE ELIGIBILITY THRESHOLDS

There is nothing subtle about the difference between the NBA's age eligibility rule and the WNBA's age eligibility rule. There are no uncertain terms or buried provisions that suggest trickery or sleight of hand. Rather, the difference is clear and obviously intended: women must be three years older than men to play top-flight professional basketball in the United States. This inequity is not merely an academic matter. Rather, the female player is profoundly disadvantaged in real-world tangible terms. As detailed below, the WNBA's age eligibility rule subjects the female player to an increased likelihood of injury during her college career and a decreased likelihood of financially capitalizing on her athletic talent.

A. Risk of Injury

Injuries are a part of sport, as is the prospect of losing out on riches because of them. However, when an athlete is capable of playing professionally, is prohibited from doing so, and is injured during that period of prohibition, the prohibition requires scrutiny.

In February of the 2012–2013 NCAA basketball season, Nerlens Noel, a freshman center on the University of Kentucky's men's basketball team who was projected to be the 2013 NBA Draft's first pick suffered a gruesome tear of the Anterior Cruciate Ligament (ACL) in his left knee.[99] Initially, some pundits questioned whether he would ever again be able to play at an elite level, and virtually everyone analyzing the situation predicted that his draft stock would suffer.[100] When

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[97] *See FIT,* NBA, http://www.nba.com/nbafit/overview.html, *archived at* http://perma.cc/W3YG-TQ8W (last visited Sept. 23, 2014).

[98] *Laurel J. Richie Named WNBA President*, WNBA (Apr. 21, 2011), http://www.wnba.com/news/wnba_president_richie_110421.html, *archived at* http://perma.cc/GA4C-BNXL. In 2013, the WNBA changed its logo. *See supra* note 67. The change, however, was purely superficial, as it did not accompany any change in control or organizational structure.

[99] David Leon Moore, *What Happens Now for Nerlens Noel, Kentucky After Unlucky Twist?*, USA TODAY, Feb. 14, 2013, at C1.

[100] *Id.*

the draft was held, four and a half months after the injury, Noel was picked sixth.[101] While the sixth selection is an impressive draft position, it is almost certainly lower than it would have been had Noel not injured his knee,[102] and the lower draft position correlates to less money. Under the NBA's Collective Bargaining Agreement, the first pick in the 2013 draft receives $4,436,900 for his first NBA season, while the sixth pick receives $2,643,600, and in the following season—which, like the first season, is guaranteed under the rookie contract—the salary differential between the first and sixth pick is roughly $2 million as well.[103] So, with respect to the rookie contract alone, the injury may have cost Noel almost $4 million.[104]

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[101] Benjamin Hoffman, *U.N.L.V. Star Is No. 1, and Even He Is Surprised*, N.Y. TIMES, June 28, 2013, at B16. Noel was so frustrated with his drop in the draft that upon being drafted sixth by the New Orleans Pelicans and traded to the Philadelphia 76ers, he proclaimed that he wanted to wear a number 5 jersey to acknowledge "the number of teams that passed on him on draft day." Michael Kaskey-Blomain, *Nerlens Noel Wants His Jersey Number to Acknowledge Teams That Passed on Him*, PHILLY.COM (July 11, 2013, 12:48 PM), http://www.philly.com/philly/blogs/pattisonave/Nerlens-Noel-wants-to-wear-number-five-in-honor-of-teams-that-passed-him.html, *archived at* http://perma.cc/8MWC-P8RC.

[102] Some pundits attributed Noel's lower draft position to character concerns about his close associates, Eliot Shorr-Parks, *Nerlens Noel's 'Bad Crowd' Could Have Been Reason He Fell to Sixers in Draft, According to Report*, NJ.COM (July 1, 2013, 2:16 PM), http://www.nj.com/sixers/index.ssf/2013/07/nerlens_noel_sixers_bad_crowd.html, *archived at* http://perma.cc/8UJC-9K9A, but there is virtual unanimity the injury was the predominant factor. Henry Abbott, *Why So Many Teams Passed Up Nerlens Noel*, ESPN (June 28, 2013), http://espn.go.com/blog/truehoop/post/_/id/60615/why-so-many-teams-passed-up-nerlens-noel, *archived at* http://perma.cc/488N-9SHK ("What's wrong with Noel? The best answer is creepy and just about impossible to get on the record. But it goes like this: As a player with a known medical issue, Noel falls into one of the NBA's most damning cracks, between what's good for teams and what's good for general managers. In short, Noel is the kind of player who can get a general manager fired, and most front offices couldn't stomach it."); Kurt Helin, *Injury, Risk Reasons Nerlens Noel Fell Down Draft Board*, NBC SPORTS (June 29, 2013, 2:00 PM), http://probasketballtalk.nbcsports.com/2013/06/29/injury-risk-reason-nerlens-noel-fell-down-draft-board/, *archived at* http://perma.cc/M8JU-M3KB ("Then come draft night [Noel] fell all the way [to] No. 6, where he was taken by New Orleans and promptly traded to Philadelphia. Nobody seemed to want Noel. What was going on? Turns out the knee injury and the risk that comes with it did cause him to fall. . . . Noel, coming off an ACL repair that was red flagged by a couple teams, was certainly a risk.").

[103] NAT'L BASKETBALL ASS'N, CBA 101: HIGHLIGHTS OF THE 2011 COLLECTIVE BARGAINING AGREEMENT BETWEEN THE NATIONAL BASKETBALL ASSOCIATION (NBA) AND THE NATIONAL BASKETBALL PLAYERS ASSOCIATION (NBPA) 29 (2012) [hereinafter HIGHLIGHTS OF 2011 CBA], *available at* http://www.nba.com/media/CBA101_9.12.pdf, *archived at* http://perma.cc/SL6H-RRNP.

[104] *Id.* While some collegiate athletes participate in the NCAA's Exceptional Student-Athlete Disability Insurance Program, which arranges loans for projected first round NBA and NFL picks to secure $5 million dollar insurance policies in case of career-ending injuries, Noel, whose injury was severely damaging but not career-ending, would not have qualified.

In the wake of Noel's injury, scores of sportswriters and fans criticized, as one writer put it, "the NBA's silly and unfair rule that players must be 19 and out of high school a year before being drafted," and they called for its elimination.[105] Sportswriter Mike Lopresti of the USA Today, for instance, wrote:

> The next time David Stern gets into a discussion about age limits for the NBA, what will speak louder than Nerlens Noel's scream? Nothing. It might swing the debate. It should. It would be hard to argue otherwise, as they wheeled Noel away [on the night of the injury], his knee wrecked, his future as the probable 2013 No. 1 draft pick clouded. . . . The teenage phenoms spend a season with college basketball because they have to, hoping and praying not to take a wrong step. Please, don't get hurt and have everything change.[106]

Of course, NBA aspirants do not "have to" play a season of college basketball under the NBA's age eligibility rule, but virtually all of them do. Consistently playing competitive basketball in some capacity is necessary to maintain one's skill level and the great bulk of NBA aspirants play in college rather than overseas or in

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Zach Schonbrun, *Injury Raises Questions About Insurance for College Stars*, N.Y. TIMES, Feb. 14, 2013, at B11. The NCAA has no insurance program to protect against injuries that decrease an athlete's value, and accessing such insurance through an outside provider is extremely expensive. *Id.*

[105] Reid Forgrave, *Noel Feels "One-and-Done" Risk*, FOX SPORTS (June 2, 2014, 3:05 PM), http://msn.foxsports.com/collegebasketball/story/kentuckys-nerlens-noel-other-stars-take-all-the-risk-in-nba-one-and-done-rule-021313, *archived at* http://perma.cc/PNZ8-WBG9; *see also* Cindy Boren, *Nerlens Noel Injury Raises New Debate About NBA Age Limit (updated)*, WASHINGTON POST (Feb. 13, 2013), http://www.washingtonpost.com/blogs/early-lead/wp/2013/02/13/nerlens-noel-knee-injury-raises-new-debate-about-nba-age-requirement, *archived at* http://perma.cc/KX4T-7TNL (describing the impact of the NBA's age requirement on Nerlens Noel's NBA prospects); Rob Dauster, *Nerlens Noel's Knee Injury and the Unfairness of the 'One-and-Done' Rule*, NBC SPORTS (Feb. 13, 2013, 9:22 AM), http://collegebasketballtalk.nbcsports.com/2013/02/13/nerlens-noels-knee-injury-and-the-unfairness-of-the-one-and-done-rule, *archived at* http://perma.cc/LC2X-ERU5 (bemoaning the negative impact of forcing promising ball players to wait a year before entering the NBA draft); Hughes, *supra* note 13 (discussing how the one-and-done rule is "unfair to players who are not only physically ready to compete at the highest level, but who have nothing to gain—and everything to lose—by attending college").

[106] Mike Lopresti, *Nerlens Noel's Injury Brings NBA Age Limit Debate to Surface*, USA TODAY (Feb. 13, 2013, 10:28 PM), http://www.usatoday.com/story/sports/columnist/lopresti/2013/02/13/nerlens-noel-kentucky-nba-age-rule/1917697/, *archived at* http://perma.cc/CVQ4-AHYN.

some other forum,[107] "hoping and praying," as Lopresti writes, "not to take a wrong step."[108]

Similarly, WNBA aspirants almost all play collegiate basketball as they wait to become WNBA eligible, but the burden they bear is far greater than that of the men. Indeed, a female collegiate basketball player has to endure the risk of an injury such as Noel's for four times as long as Noel did. And if injured like Noel during her freshman season (or during her sophomore or junior seasons), she will have to return to college basketball and risk further injury rather than declare for the draft and pursue rehabilitation without fear of additional injury on the amateur level.

The juxtaposition of Noel's circumstance with those of two former star University of Connecticut women's collegiate basketball players, Caroline Doty and Shea Ralph, illustrates the inequity. Both Doty and Ralph were, like Noel, highly recruited starting players destined for professional stardom, and both, like Noel, tore their ACLs as freshmen.[109] The parallels, however, end there. While Noel's injury ended his collegiate career and he consequently declared for the Draft to be held after his freshman year, the WNBA's age eligibility rule prohibited Doty and Ralph from doing so.

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[107] On rare occasion, a young athlete bucks the norm and plays basketball abroad rather than at an American college or university. Brandon Jennings and Jeremy Tyler are two of the most heralded players to have done so, and they have experienced two very different outcomes:

In 2008, Brandon Jennings became the first American player to forego collegiate basketball to play professional basketball in Europe. Jennings cited financial constraints as his primary motivating factor for going abroad, but he likely would not have been able to play collegiately in any case, as his standardized test scores were below the NCAA eligibility threshold. Ultimately, he signed a one-year contract with the Italian club Lottomatica Roma for $1.65 million. Jennings had a strong season in Europe, entered the 2009 NBA draft and was selected tenth overall by the Milwaukee Bucks. He has become an elite NBA player. *See* Chris Colston, *Deals Add Drama to Draft Day*, USA TODAY, June 26, 2009, at C1; Ray Glier, *In Europe, a Former High School Star Sends Home a Warning*, N.Y. TIMES, Jan. 24, 2009, at D3.

In 2009, Jeremy Tyler left the United States after his high school *junior* year to play professional basketball. After two years, during which he played in Israel and Japan, Tyler was eligible for the 2011 NBA draft. *See* Christopher Johnson, *N.B.A. Prospect Gets 2nd Chance in Japan*, N.Y. TIMES, Apr. 20, 2011, at B14; Pete Thamel, *Young, Talented and Unsettled Playing Basketball Overseas*, N.Y. TIMES, Nov. 7, 2009, at SP1. He was selected thirty-ninth overall by the Charlotte Bobcats, but his NBA career never blossomed, and he currently plays in China. *See* Maggie Pilloton, *Draymond Green on Trash Talk, Clippers, Jeremy Tyler, Defense, and More*, GOLDEN GATE SPORTS, (Apr. 10, 2015), http://goldengatesports.com/2015/04/10/draymond-green-on-trash-talk-clippers-jeremy-tyler-defense-and-more/ *archived at* http://perma.cc/3YCR-4K2Y.

[108] Lopresti, *supra* note 106.

[109] Michelle Smith, *UConn's Ralph Guides Doty: Huskies Assistant Coach Helps Guard Deal With Knee Injuries*, ESPNW (Aug. 21, 2012, 5:04 PM), http://espn.go.com/womens-college-basketball/story/_/id/8289064/espnw-uconn-caroline-doty-finds-kindred-spirit-shea-ralph, *archived at* http://perma.cc/Q3TE-QALY.

After rehabilitation, with the WNBA off limits, Doty resumed her career at Connecticut as the team's starting point guard, but she tore her ACL again during the summer before her senior season.[110] Doty again rehabbed her knee, but she could not regain her elite status, and after exhausting her collegiate eligibility in the spring of 2013, professional basketball was not an option.[111]

Ralph, now an assistant coach for the University of Connecticut's women's basketball team, suffered an astounding five ACL tears and subsequent reconstructive surgeries during her collegiate career.[112] She bounced back from her first surgery, and then from her second, to play outstanding basketball, becoming the Big East Player of the Year and an All-American.[113] Eventually, however, as Ralph played out her eligibility at Connecticut, her body broke down.[114] She did not recover as successfully from her third, fourth, and fifth surgeries, and although she was ultimately drafted in the WNBA's third round by the Utah Starzz, her injuries prevented her from ever playing a WNBA game.[115]

Had these women been men, they would have been able to play professional basketball in this country. They were denied the opportunity to enter the WNBA after their freshman years because of their sex, and the subsequent injuries they suffered in college ended their professional aspirations.

Because of sex and nothing else, a WNBA aspirant must spend four years, rather than an NBA aspirant's one, "hoping and praying," as Lopresti writes, "not to take a wrong step."[116] Doty's and Ralph's stories exemplify why this inconsistency in eligibility rules is unfair and, ultimately, unlawful.

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[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] Shea Ralph, UCONN WOMEN'S BASKETBALL, http://www.uconnhuskies.com/sports/w-baskbl/mtt/shea_ralph_389988.html, *archived at* http://perma.cc/6QCW-MTDW (last visited Mar. 29, 2015).

[114] *See Smith, supra* note 109.

[115] *Id.*

[116] Lopresti, *supra* note 106.

B. Compensation

Even assuming no injuries during the course of a female basketball player's collegiate career, the three additional years she is required to wait before entering the WNBA can represent a loss of hundreds of thousands of dollars.

1. Domestic Playing Salary

WNBA salaries are relatively low for American professional athletes and they are well below what NBA players make, but they are not insignificant. According to the 2015 WNBA scale set forth in the WNBA CBA, a rookie makes between $38,913 and $49,644 in the first season of her three-year guaranteed contract, with the higher draft picks at the upper end of the range.[117] In each successive season under the contract, the pay increases, and in the third season she will make between $41,677 and $55,701.[118] While these figures may seem modest, it is important to note that the WNBA season and post-season last for only six months, from May through October. So, a highly drafted third-year player will earn the same amount of money over the six month season as any person in any profession with an annual salary of $111,402 earns over six months, which is roughly four times the average American's individual salary of $28,051.[119] This is real money that the WNBA's age eligibility rule requires women, whose male age-mates are playing in the NBA, to forgo.

Ultimately, over three years, while a woman such as Brittney Griner—who was skilled enough to play in the WNBA after her freshman year of college and would have indubitably been a high draft pick if allowed to enter the WNBA draft then—is playing her sophomore, junior, and senior seasons of collegiate basketball, she is losing out on over $150,000 in WNBA salary. When she does eventually enter the WNBA after her senior collegiate season, she will be making roughly $13,000 less as a rookie than she would be making as a fourth-year professional, and because WNBA salaries increase to as much as $109,500 for fifth year players, in her second and third WNBA seasons she will be making over $50,000 less per season than she would have been able to make had she been permitted to enter the WNBA after her freshman year.[120]

Sadly, WNBA careers, like most professional athletic careers are relatively short. The average WNBA career spans only three-and-a-half seasons,[121] most

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[117] WNBA CBA, *supra note* 7, exhibit 5 (WNBA Rookie Scale), at 277.

[118] *Id.*

[119] *State & County QuickFacts from the US Census Bureau*, U. S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/00000.html, *archived at* http://perma.cc/96SL-B5M3 (last revised Dec. 3, 2013, 2:42 PM).

[120] WNBA CBA, *supra note* 7, art. V § 8(a), at 34.

[121] pilight (@over_short), Fanpost, *Is There Enough Talent for WNBA Expansion?*, SB NATION SWISH APPEAL (June 10, 2013, 3:25 PM), http://www.swishappeal.com/2013/6/10/

players are out of the league by age thirty, and only the rare, extraordinary player lasts beyond age thirty-five. [122] By that age, the great majority of elite athletes have lost the physical gifts that made them elite in the first place, and they can rarely still compete at the top level. So the three-year prohibition that a WNBA aspirant endures while her age-mate males play in the NBA amounts to three years of lost income, a three year delay in the potential doubling of salary available to fifth year veterans, and the associated time value of money benefits, but it also likely means—all other things being equal—three fewer years to make money as a WNBA player.

2. International Playing Salary

Unfortunately for the women affected, forgoing a WNBA salary is only a small portion of the economic loss they will suffer. Almost uniformly, WNBA players play basketball overseas during the WNBA off-season, where they can earn additional money.[123] And generally, the overseas salaries far outstrip WNBA salaries. Many players earn twice as much overseas as they earn playing in the WNBA, and some earn four to five times as much.[124] Indeed, because there are few salary restrictions in other nations' leagues, "[m]arquee players can make as much [as] $600,000, including incentives . . . [and] two or three players can reach $1 million."[125] So, combining WNBA and international earnings, most female

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4415758/is-there-enough-talent-for-wnba-expansion, *archived at* http://perma.cc/CT5J-3KCN.

[122] *See, e.g.*, Kevin Pelton, *A Question of Age*, SEATTLE STORM (May 31, 2005), http://www.wnba.com/storm/news/age050531.htmlhttp://www.wnba.com/storm/news/age050531.html, *archived at* http://perma.cc/QRS3-CSGB (offering a WNBA player age comparison by team).

[123] David Woods, *Equal Pay? Not on the Basketball Court*, USA TODAY (May 19, 2012, 10:57 PM), http://usatoday30.usatoday.com/sports/basketball/story/2012-05-19/nba-wnba-basketball-salary-disparity/55079608/1, *archived at* http://perma.cc/EHN7-P7DK.

[124] Tom FitzGerald, *Stanford's Nneka Ogwumike Top Pick in WNBA*, S.F. CHRON. (Apr. 17, 2012, 4:00 AM), http://www.sfgate.com/sports/article/Stanford-s-Nneka-Ogwumike-top-pick-in-WNBA-3486282.php, *archived at* http://perma.cc/K9EG-7QY4 (stating that WNBA players can earn four or five times as much overseas); Gene Phelps, *For Women's Players, Europe Where Money Is*, DAILY J. (July 22, 2007), http://www.wnba.com/media/fever/070721_DJ_whitmorewhite1.pdf, *archived at* http://perma.cc/E2RJ-WWMQ (stating WNBA players can make four or five times as much overseas); L. Jon Wertheim, *The Big Score: The Dirty Little Secret of the WNBA Is That Many of Its Players Must Head Overseas to Make Top Dollar*, SPORTS ILLUSTRATED (Nov. 4, 2002), http://www.si.com/vault/2002/11/04/332043/the-big-score-the-dirty-little-secret-of-the-wnba-is-that-many-of-its-players-must-head-overseas-to-make-top-dollar, *archived at* http://perma.cc/SKX2-UBNK (stating WNBA players can double or triple their salaries if they play overseas).

[125] Michele Steele, *WNBA Players Cash In Overseas*, ESPNW (Feb. 6, 2012), http://espn.go.com/espnw/news-commentary/article/7538075/wnba-players-cash-overseas, *archived at* http://perma.cc/FV5K-6PDK.

American professional basketball players earn six figures per year in salary, and some earn seven figures per year.

3. Marketing and Endorsements

Salaries and incentives aside, WNBA players can command substantial sums of money through marketing and endorsement deals. Because corporate entities tend to seek out only the best and most popular players for such arrangements, not all WNBA players have access to these opportunities. But for those players who do, the economic rewards can be significant and can dwarf the money they make for actually playing basketball. WNBA players endorse products of all sorts—from athletic apparel to credit cards, including Nike, Adidas, Under Armour, Protégé Shoes, Nfinity Athletic Corporation, Gatorade, Bazi All Natural Energy, Genesis Today, Mazda, Dupont, and American Express.

Endorsement compensation figures are difficult to pinpoint, as they are rarely publicly disclosed, but some players, such as the Los Angeles Sparks' Candace Parker and the Minnesota Lynx's Maya Moore reportedly have had endorsement deals worth between $3 million and $5 million respectively.[126] Other players have smaller five- and six-figure deals.[127] But all players, once they become professionals, have the potential to sign endorsement contracts; a potential that does not exist while they are collegiate players.[128]

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[126] Allison Glock, *She's the Total Package: Your Sister's Pal, Your Brother's Prom Date, Supermom-to-be. She's also an MVP-of a League Few Watch. So Can Candace Parker Be the Female Jordan? Lots of Folks Are Banking on It.*, ESPN (July 10, 2012), http://sports.espn.go.com/espn/magazine/archives/news/story?page=magazine-20090323-article2, *archived at* http://perma.cc/Q9U5-YJWV; *Moore Endorsement Deal Makes Jordan Brand History*, SPORTSPRO MEDIA (May 19, 2011), http://www.sportspromedia.com/news/moore_endorsement_deal_makes_jordan_brand_history/, *archived at* http://perma.cc/63J-TK4K.

[127] Kelli Anderson, *The Trials of Diana Taurasi*, SPORTS ILLUSTRATED (Sept. 12, 2011), http://www.si.com/vault/2011/09/12/106107597/the-trials-of-diana-taurasi, *archived at* http://perma.cc/DR8-8WRZ (noting that with Taurasi's "WNBA and off-season overseas contracts and bonuses, as well as an endorsement deal with Nike, she reportedly makes close to $1 million a year . . . ."); Kate Fagan, *Owning the Middle*, ESPN (May 29, 2013), http://espn.go.com/espn/feature/story/_/id/9316697/owning-middle, *archived at* http://perma.cc/9G8V-RSVK ("[Nike s]ponsorship deals start at $5,000 a year, and only a handful of WNBA players earn more, with $15,000 being considered big money. Griner's deal is within this range . . . .").

[128] Bloom v. Nat'l Collegiate Athletic Ass'n, 93 P.3d 621, 625 (Colo. App. 2004) ("[N]one of the NCAA's bylaws mentions, much less explicitly establishes, a right to receive 'customary income' for a sport. To the contrary, the NCAA bylaws prohibit every student-athlete from receiving money for advertisements and endorsements."); Alain Lapter, Bloom v. NCAA*: A Procedural Due Process Analysis and the Need for Reform*, 12 SPORTS LAW. J. 255, 257 (2005) ("In short, the NCAA's policies do not allow a scholarship athlete to receive

Taken together, the money a female basketball player can make per year through her WNBA salary, her international basketball salary, and her endorsement deals can be impressive. And when that amount is multiplied by three—the number of years a woman is barred from playing in the WNBA while her male age-mates are permitted to play in the NBA—it can become staggering. Of course, not every female basketball player who, if not for the WNBA's age eligibility rule, would choose to enter the WNBA after one year of a collegiate basketball could command such money. Some might play in the WNBA and internationally but have no endorsement deals. Others might play only in the WNBA at the league minimum salary. Still others might prove insufficiently skilled to make a WNBA team, or they might suffer career-ending injuries in training camp before playing a single professional game. Whatever the outcome, each female basketball player one year removed from high school, if not for the WNBA's age eligibility rule, would have the same opportunity as her male counterparts to make the best of a professional basketball career. With the rule in place, she must wait three years to do what the men are able to do immediately.

IV. PURPORTED JUSTIFICATIONS FOR THE WNBA'S AGE ELIGIBILITY RULE

Notwithstanding this inequity and the criticism and controversy it has sparked, the WNBA's age eligibility rule has historically been justified on three principal grounds:[129] First, the rule helps portray female athletes as scholars (and therefore as role models) and ensures that they are emotionally mature enough to handle both playing competitive professional basketball and the off-court adulation and burdens that accompany it. Second, the rule prepares its players for life after basketball because WNBA salaries are not high enough to secure for its players financial independence in retirement. Third, the rule strengthens women's college basketball,

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endorsement money for any sport, whether or not the endorsements are related to a sport the athlete competes in at the college level.").

[129] Edelman & Harrison, *supra* note 17, at 24–26 (listing the three defenses to the WNBA's age eligibility rule); *All Stars Too Soon: The NBA Age Dilemma* (CNN television broadcast Feb. 11, 2001) [hereinafter *NBA Age Dilemma*] (arguing the age eligibility rule results in more mature athletes and a more "vibrant" college game), transcript available at http://transcripts.cnn.com/TRANSCRIPTS/0102/11/se.01.html, *archived at* http://perma.cc/GRB2-SNJ6; Tommy Craggs, *Female Basketball Stars Hate Age Rules, Too*, DEADSPIN (June 17, 2009, 2:45 PM), http://deadspin.com/5294245/female-basketball-stars-hate-age-rules-too, *archived* at http://perma.cc/3VHT-UTL7 (remarking that the WNBA's defense of the age eligibility rule, particularly that a college degree is valuable for female athletes, is paternalistic); *see* Greg Bishop, *Rutgers Basketball Star to Turn Pro in Europe*, N.Y. TIMES June 16, 2009, http://www.nytimes.com/2009/06/17/sports/ncaabasketball/17ncaa.html, *archived at* http://perma.cc.PA4R-DJ5K ("I really hate to see any college kid leave college before their eligibility is up . . . I've been a pro coach. I've been a college coach. I've seen every side of this deal. And the equation is such that it's hard enough in the women's game to make enough money for a lifetime. You're going to have to have a college education.") (quoting Louisiana State Coach Van Chancellor).

which benefits the WNBA. While these aims may be laudable, none of them reasonably justifies the rule. Each is addressed in turn.

A. The Scholar / Role Model Justification

It certainly is commendable that a professional sports league would want its athletes to be scholars and role models, and it is arguable that requiring the athletes be at least four years removed from high school will make it more likely they will be considered as such. It is unclear, however, why it is more important for WNBA players to be scholars and role models than it is for NBA players—who must be only one year removed from high school—to be scholars and role models. Similarly, if a four-year wait after high school will yield more physically and emotionally mature WNBA players, then an analogous rule in the NBA would make sense. In sum, if these rationales motivate the WNBA's age eligibility rule, they should motivate the same age eligibility rule in the NBA. The fact that they do not indicates these reasons are pretextual or further indicia of the NBA's facial and unlawful differentiation between male and female professional basketball players.

Moreover, the dangers of relatively younger players entering professional sports may be oversold. Like the WNBA's age eligibility rule, the NBA's rule requiring that entrants be one year removed from high school has long been justified on maturity grounds.[130] The argument is simple: the older players are when they enter the league, the more mature and responsible they are, and increased maturity and responsibility leads to better personal decision-making.[131] This, the argument goes, benefits the player and the league, which seeks to hold its players out as professional and personal successes.[132]

Professor Michael McCann, who has studied the NBA's age eligibility rule and the NBA's defense of it, has, however, convincingly challenged the NBA's premise that its older players are more mature and responsible than its younger players. Using criminal arrests as a metric, McCann contrasted the experiences of athletes who entered the NBA immediately after graduating from high school with those who had attended four years of college, and he found the former group—the "prep-to-pro" players—made up a smaller proportion of the league's arrested players.[133] Specifically, he found that although players who spent four years in college comprised 41% of the NBA's players, they accounted for 57% of its arrested players.[134] In contrast, while players who did not attend college comprised 8% of the NBA's players, they accounted for only 5% of its arrested players.[135] "Unbeknownst

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[130] Michael A. McCann, Symposium, *The Reckless Pursuit of Dominion: A Situational Analysis of the NBA and Diminishing Player Autonomy*, 8 U. PA. J. LAB. & EMP. L. 819, 832–34 (2006).

[131] *Id.*

[132] *Id.*

[133] *Id.* at 834.

[134] *Id.*

[135] *Id.*

to most NBA fans and league observers," McCann concluded, "prep-to-pro players appear to be the best behaved group of . . . players in the NBA."[136]

While no analogous study of WNBA players has been conducted, there is no reason to believe that such a study would produce a different conclusion, and the WNBA has offered no evidence to suggest younger entrants to the league are more likely than older entrants to damage themselves or tarnish the league's reputation.

B. Financial Security

Seeking to protect WNBA aspirants from abandoning a college or university degree program for a relatively low-paying job as a basketball player, like seeking to ensure WNBA aspirants are scholars and role models, is a noble aim. Such protection is, however, overly broad and sexually discriminatory in its paternalism.

While the majority of WNBA aspirants will, as noted above, make far less money per year as professionals than the majority of NBA players, some WNBA aspirants stand to earn millions of dollars in salary and endorsements. The WNBA's age eligibility rule makes no distinction among WNBA aspirants who are likely to earn millions and those likely to earn only tens of thousands. Instead the rule restricts them all regardless of their circumstances or potential earning power. Moreover, although NBA players make, on average, far more per year than WNBA players, their financial outcomes are surprisingly dire. According to a *Sports Illustrated* study, a substantial percentage of NBA players are bankrupt or otherwise financially distressed within five years of retirement.[137] If it is true that a four-year collegiate playing experience improves financial outcomes, it would appear the NBA should adopt an age eligibility rule requiring its entrants be four years removed from high school. If, however, NBA aspirants are permitted to take their financial chances and turn professional after one year of college, the same should be the case for WNBA aspirants. That it is not the case suggests the continued resonance of paternalistic perspectives that have long hampered women athletes in American sport.

Such paternalistic perspectives have historically centered, for the most part, on physical exertion. Examples abound across the sporting landscape and throughout the world. For instance, beginning in 1921 and for over fifty years thereafter, "England's Football Association banned women from playing soccer on Football League grounds because the game was deemed 'quite unsuitable for females and ought not to be encouraged.'"[138] More recently, after a 1964 military coup, Brazil's

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[136] *Id.*

[137] Pablo S. Torre, *How (and Why) Athletes Go Broke*, SPORTS ILLUSTRATED (Mar. 23, 2009), http://www.si.com/vault/2009/03/23/105789480/how-and-why-athletes-go-broke, *archived at* http://perma.cc/E73F-4PMA.

[138] Joseph White, *Once Banned, Women's Soccer Thriving at Olympics*, SEATTLE TIMES (Dec. 4, 2010, 7:43 AM), http://seattletimes.com/html/sports/2018823250_apolysocnotjustformen.html, *archived at* http://perma.cc/JQX4-L3PC.

National Council of Sports (CND), with the approval of the dictatorship, banned women from playing soccer, Brazil's national game, for over twenty years.[139]

Distance running was also long considered too strenuous for women. Women were excluded from Olympic track and field entirely until 1924, and although various events were opened to women over the course of the following years and decades, women were not permitted to participate in the Olympic marathon until 1984.[140] And even then, other Olympic sports remained off limits to women. Most notable among these were ski jumping and Nordic combined (a combination of ski jumping and cross country skiing). The resistance to permitting women to compete in these events came from the very top and was unabashed. Indeed, in 2005, the President of the International Ski Federation, Gian Franco Kasper, justified excluding women from the events because "it's like jumping down from, let's say, about two meters on the ground about a thousand times a year, which seems not to be appropriate for ladies from a medical point of view."[141] Kasper did not identify any medical research to support his position.[142] Despite a robust movement to secure inclusion of women's ski jumping and Nordic combined in the 2010 games, women ski jumpers and women Nordic combined athletes found themselves on the outside looking in.[143]

This paternalistic sense, which has long hampered women's athletic ambitions, may well be at play—consciously or perhaps subconsciously—in the rationale supporting the WNBA's age eligibility rule. Whatever the case, a woman should be no more restricted from making a financially risky professional decision as a college student than she should be from "jumping down from . . . two meters on the ground about a thousand times a year."[144] If men are permitted to attempt it, there is no reason that women should not be.

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[139] *See Brazilian Women's Soccer Guerreiras!*, INSPIRING SPORTS WOMEN (May 23, 2011), http://niamhgriffin.blogspot.com/2011/05/brazilian-womens-soccer-guerreiras.html, *archived at* http://perma.cc/KGF5-NV6U.

[140] *Summer Olympics Competitions Fast Facts*, CNN, http://www.cnn.com/2013/10/01/world/summer-olympics-competitions-fast-facts/, *archived at* http://perma.cc/B739-X3MJ (last updated Oct. 1, 2013, 4:33 PM).

[141] Beau Dure, *Women's Jumpers Still Hoping for Flight in 2010 Games*, USA TODAY, http://usatoday30.usatoday.com/sports/olympics/vancouver/nordic/2009-10-07-womens-ski-jump_N.htm, *archived at* http://perma.cc/4XMS-SADU (last updated Oct. 22, 2009, 9:18 PM).

[142] *See id.*

[143] Katie Thomas, *After Long Fight for Inclusion, Women's Ski Jumping Gains Olympic Status*, N.Y. TIMES, Apr. 7, 2011, at B16. Women's ski jumping was finally added to the Olympic roster in advance of the 2014 games in Sochi, Russia, but Women's Nordic Combined was not. Christopher Clarey, *Woman Ski Jumpers Win Their Place in Olympics*, N.Y. TIMES (Apr. 6, 2011), http://www.nytimes.com/2011/04/07/sports/07iht-SKI07.html, *archived at* http://perma.cc/92J7-MBY4 (noting that "Nordic combined remains a male-only preserve . . . .").

[144] Dure, *supra* note 141.

C. Strengthening the Women's Game

Former NBA Commissioner David Stern, former WNBA President Val Ackerman, and former NCAA President Myles Brand have all touted age eligibility requirements in professional basketball as being beneficial to college basketball.

In 2001, when CNN correspondent Wolf Blitzer asked then-WNBA President Val Ackerman about the WNBA's age eligibility rule, Ackerman defended it, noting "it's enabled the women's college game to stay very vibrant, and that's critical to us as [a] league. We need a strong college game in order for women's pro basketball to be successful."[145] Five years later, Ackerman, Stern, and Brand, along with other leaders in amateur and professional basketball, met at the NCAA's headquarters in Indianapolis, Indiana to address "areas of common interest,"[146] and a number of potential action items emerged from the meeting and follow up talks took place in subsequent months.[147] Among the potential action items was an increase in the NBA's age eligibility threshold from one year removed from high school to two years removed from high school.[148]

Ultimately, the NBA made no change, but Stern and Brand's collaboration on the rough outlines of such a proposal created the same concern that Ackerman's comments to Blitzer, years earlier, created. It is certainly true that the NBA and WNBA age eligibility rules benefit college basketball—allowing teams to build legacies and encouraging strong, committed fan bases—and they may well also benefit the NBA and WNBA. Nevertheless, this suggestion of a mutually beneficial relationship seems to ignore completely the interests of the athletes themselves and raises the antitrust and collusion concerns that Harrison, Edelman, and others have explored.[149]

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[145] *NBA Age Dilemma*, *supra* note 129.

[146] *See Statement from David Stern and Myles Brand*, INSIDEHOOPS (Sept. 27, 2006), http://www.insidehoops.com/brand-stern-statement-092706.shtml, *archived at* http://perma.cc/8MJ7-6S75.

[147] *See Bigwigs Meet to Fix Basketball*, ESPN (Sept. 27, 2006, 2:28 PM), http://espn.go.com/blog/truehoop/post/_/id/2324/bigwigs-meet-to-fix-basketball, *archived at* http://perma.cc/UP4L-MAW3 (discussing some of the topics addressed during the meeting).

[148] David Sanchirico, *Stern's Brilliant Idea*, SPECTRUM (Apr. 16, 2008), http://www.ubspectrum.com/sports/stern-s-brilliant-idea-1.1411087#.UjnCeLyoUmB, *archived at* http://perma.cc/ERW2-X2ZU.

[149] Edelman & Harrison, *supra* note 17, at 2; Daniel A. Rascher & Andrew D. Schwarz, *Neither Reasonable Nor Necessary: "Amateurism" in Big-Time College Sports*, ANTITRUST, Spring 2000, at 51, 52 (noting that the NCAA's attempt "to insulate itself from competition from the NBA" by discussing how to prevent underclassmen from entering the professional basketball draft would surely be illegal in other employment contexts). *Contra* Andy Katz, *NBA, NBPA Make Call on Draft Eligibility*, ESPN (July 1, 2011, 1:12 PM), http://espn.go.com/mens-college-basketball/blog/_/name/katz_andy/id/6730094, *archived at* http://perma.cc/XDQ5-PHM6 (arguing "the various rules in the different sports are

Potential antitrust violations aside, notwithstanding the justifications for the WNBA's age eligibility rule, the rule may be legally vulnerable, because it creates and perpetuates gender inequity, which is precisely what Title VII's prohibition on sex discrimination was designed to eliminate.

V. THE NBA'S LEGAL RESPONSIBILITY FOR THE WNBA'S AGE ELIGIBILITY RULE

Although, as noted above, the WNBA has evolved since its founding, it remains an NBA subsidiary,[150] and while parent corporations are generally not liable for their subsidiaries' discriminatory acts,[151] there exist several exceptions to this rule, two of which—the integrated enterprise doctrine and the direct participation liability doctrine—suggest the NBA would be legally responsible for any Title VII-triggering sex discrimination flowing from the WNBA's age eligibility rule.

This section of the article explores these two doctrines as applied to the NBA-WNBA relationship, assuming the WNBA's age eligibility rule does in fact trigger Title VII, and Part VI, which follows, tests that assumption.

A. Integrated Enterprise Doctrine

When a parent exhibits substantial control over a subsidiary, as the NBA does with respect to the WNBA, that parent can be held liable for the subsidiary's unlawful acts under the "integrated enterprise doctrine."

The integrated enterprise doctrine was born in the labor context. In 1965 in deciding *Radio & Television Broadcast Technicians Local Union 1264 v. Broadcast Service of Mobile, Inc.*,[152] the United States Supreme Court developed a four-part test to determine when separate entities constituted an "integrated enterprise" for purposes of establishing National Labor Relations Board jurisdiction.[153] The Court found an integrated enterprise exists when the following four characteristics are in place: (1) interrelations of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control.[154] In the years that followed, as federal courts began to explore parent-corporation liability in the Title VII context, they borrowed *Broadcast Service of Mobile*'s test for

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initiated by the leagues themselves" and, because of antitrust concerns, the NCAA has nothing to do with these decisions).

[150] Michael A. McCann, *The NBA and the Single Entity Defense: A Better Case?*, 1 HAR. J. SPORTS & ENT. L. 39, 42 (2010) (stating "the WNBA is a partially owned, rather than wholly owned, subsidiary of the NBA").

[151] United States v. Bestfoods, 524 U.S. 51, 61 (1998) ("It is a general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries.") (citation omitted).

[152] 380 U.S. 255 (1965).

[153] *Id.* at 256.

[154] *Id.*

determining whether separate organizations can be viewed as one for purposes of Title VII analysis.[155]

While each of these factors is important, the second—centralized control of labor relations—has developed primary importance and ultimately drives the inquiry.[156] If the parent company exhibits centralized control of the subsidiary's labor relations, it is vulnerable to Title VII liability for its subsidiary's act. If the parent company does not exhibit such control, liability is unlikely.

Because the second factor has become the most important of the integrated enterprise test's four factors, it has also become the most debated, with various circuits supporting different interpretations.

The Fifth Circuit applies a strict test in determining whether centralized control of labor relations exists, requiring that for such control to exist, the parent must control the subsidiary's day-to-day employment decisions or have "some nexus to the subsidiary's daily employment decisions."[157] Under this view, which the Tenth Circuit shares, parent-corporation liability for a subsidiary's alleged discriminatory acts rests on the question, "what entity made the final decisions regarding employment matters relating to the person claiming discrimination."[158]

Although neither the Fourth Circuit nor the Eighth Circuit has explicitly adopted the integrated enterprise test in assessing Title VII actions, district courts in both circuits appear to rely on the test and apply it essentially as the Fifth and Tenth Circuits do.[159]

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[155] *E.g.*, Tipton v. Northrup Grumman Corp., 242 F. App'x 187, 190 (5th Cir. 2007); Pearson v. Component Tech. Corp., 247 F.3d 471, 486 (3d Cir. 2001); Cook v. Arrowsmith Shelburne, Inc., 69 F.3d 1235, 1240 (2d Cir. 1995); McKenzie v. Davenport-Harris Funeral Home, 834 F.2d 930, 933 (11th Cir. 1987).

[156] *See, e.g.*, Llampallas v. Mini-Circuits, Lab, Inc., 163 F.3d 1236, 1244–45 (11th Cir. 1998) (finding that control of employment decisions is critical under the integrated-enterprise doctrine); Swallows v. Barnes & Noble Book Stores, Inc., 128 F.3d 990, 994 (6th Cir. 1997) ("[C]ontrol over labor relations is a central concern."); Frank v. U.S. West, Inc., 3 F.3d 1357, 1363 (10th Cir. 1993) ("Whether the parent controls labor relations is 'an important factor' in the four-part integrated enterprise test."); Frishberg v. Esprit De Corp., Inc., 778 F. Supp. 793, 800 (S.D.N.Y. 1991) (The doctrine "focuses on the degree of control by the parent or related company over the direct employing company."), *aff'd without opinion*, 969 F.2d 1042 (2d Cir. 1992). *But see* Carpenters Local Union No. 1846 of United Bhd. of Carpenters & Joiners of Am. v. Pratt-Farnsworth, Inc., 690 F.2d 489, 505 (5th Cir. 1982) ("[N]o one of the factors is controlling nor need all criteria be present") (citing NLRB v. Welcome-Am. Fertilizer Co., 443 F.2d 19, 21 (9th Cir. 1971)).

[157] Lusk v. Foxmeyer Health Corp., 129 F.3d 773, 777–78 (5th Cir. 1997) ("This analysis ultimately focuses on the question whether the parent corporation was a final decision-maker in connection with the employment matters underlying the litigation . . . .").

[158] *See* Florez v. Holly Corp., 154 F. App'x 707, 708 (10th Cir. 2005) (citing Frank v. U.S. West, Inc., 3 F.3d 1357, 1363 (10th Cir. 1993)).

[159] *See, e.g.*, Fish v. Ristvedt, 192 F. Supp. 2d 1024, 1029 (D.N.D. 2002); Glunt v. GES Exposition Servs., Inc., 123 F. Supp. 2d 847, 874 (D. Md. 2000).

The Sixth Circuit, which like the Fifth and Tenth Circuits, has explicitly adopted the integrated enterprise test, has taken a far more flexible view toward what constitutes "centralized control of labor operations."[160] It found that for a parent corporation to be liable under Title VII, the parent must have "participation [that] is sufficient and necessary to the total employment process, even absent total control or ultimate authority over hiring decisions."[161] The Second Circuit, in the 1995 case of *Cook v. Arrowsmith Shelburne, Inc.*,[162] opted for the Sixth Circuit's more flexible approach over the Fifth Circuit's strict approach, and the First Circuit has since done the same.[163]

The Ninth, Eleventh, and D.C. Circuits have each gone their own way on the issue, taking unique positions that do not conform fully to either the Fifth or Sixth Circuit approaches and that could reasonably be construed as falling somewhere between the two.[164]

Under the integrated enterprise doctrine, the likelihood of success for a Title VII sex discrimination challenge based on the WNBA's age eligibility rule, therefore, would rest largely on the location of the suit.[165] Although a plaintiff would be hard-pressed to show that the NBA controls the WNBA's "day-to-day employment decision[s],"[166] a plaintiff's chances of success would be higher under the more forgiving approach taken in the First, Second, and Sixth Circuits.[167] Because the NBA and WNBA are both based in New York City, it is likely that any such challenge would be filed in the United States District Court for the Southern District of New York and, if appealed, would end up before the Second Circuit.

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[160] *See Swallows*, 128 F.3d at 994.

[161] *See id.* at 996 (citing Armbruster v. Quinn, 711 F.2d 1332, 1338–39 (6th Cir. 1983), *abrogated by* Arbaugh v. Y&H Corp., 546 U.S. 500 (2006)).

[162] 69 F.3d 1235 (2d Cir. 1995).

[163] *See* Romano v. U-Haul Int'l, 233 F.3d 655, 665 (1st Cir. 2000) (adopting the four factors of the integrated enterprise test).

[164] *See, e.g.*, Anderson v. Pac. Mar. Ass'n, 336 F.3d 924, 928 (9th Cir. 2003) (holding that the integrated enterprise test "does not determine joint *liability* . . . but instead determines whether a defendant *can meet the statutory criteria* of an 'employer' for Title VII applicability"); Fike v. Gold Kist, Inc., 514 F. Supp. 722, 727 (N.D. Ala.) *aff'd without opinion*, 664 F.2d 295 (11th Cir. 1981) ("It is well settled that the 'control' required to meet the test of centralized control of labor relations is not potential control, but rather actual and active control of day-to-day labor practices."); Local No. 627, Int'l Union of Operating Eng'rs v. NLRB, 518 F.2d 1040, 1046 (D.C. Cir. 1975) (framing the control required for centralized control as "a very substantial qualitative degree of centralized control of labor relations . . . at the top level of management [that] would not be found in the arm's length relationship existing among unintegrated companies"), *aff'd in part*, *rev'd on other grounds sub nom.* S. Prairie Constr. Co. v. Local No. 627, Int'l Union of Operating Eng'rs, 425 U.S. 800 (1976) (per curiam).

[165] *See supra* notes 157–164 and accompanying text.

[166] *Romano*, 233 F.3d at 666.

[167] *See supra* notes 160–164 and accompanying text.

A challenge to the age eligibility rule on gender grounds, therefore, would rest largely on the extent to which the NBA is intertwined with, and directs, WNBA policy-making. And under such a standard, the presiding court may deem the NBA and WNBA an integrated enterprise for purposes of considering the sex discrimination claim. As noted above, when the NBA founded the WNBA and the WNBA's age eligibility rule took effect, the NBA's dominance over the WNBA was obvious in the latter's finances and its very existence.[168] And since then, the NBA and WNBA have continued to operate as an integrated enterprise—sharing corporate offices and executives, and collaborating in marketing, community service, and other initiatives.[169]

B. Direct Participation Liability Doctrine

The direct participation liability doctrine presents another theory under which the NBA may be found liable for the WNBA's acts. Direct participation liability exists when a parent company's direct participation in a subsidiary's affairs creates the conditions producing the challenged conduct.[170] In particular, under the direct participation liability doctrine, "a parent corporation may be held liable if 'there is sufficient evidence to show that the parent corporation directed or authorized the manner in which an activity is undertaken.'"[171]

Courts have examined various factors in determining whether direct participation liability exists, but the "key" elements are "a parent's specific direction or authorization of the manner in which an activity is undertaken and foreseeability of injury."[172] Thus, "if a parent company specifically directs a subsidiary activity, where injury is foreseeable . . . the parent could be held liable."[173]

Cima v. WellPoint Health Networks, Inc.[174] is illustrative. In *Cima*, the plaintiffs were customers of an insurance company called RightCHOICE, which was acquired by WellPoint, making RightCHOICE a WellPoint subsidiary.[175] The

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[168] *See* Edelman & Harrison, *supra* note 17, at 11.

[169] *See, e.g.*, *NBA Joins American Diabetes Association and Sanofi-Aventis U.S. to Support New Dribble to Stop Diabetes Awareness Campaign*, WNBA (Feb. 16, 2011), http://www.wnba.com/news/asg_dribble_diabetes_110216.html, *archived at* http://perma.cc/TG6Y-KMYV (discussing one of the community service projects sponsored jointly by the NBA and WNBA). *See generally Marketing Partners*, NBA, http://origin.nba.com/nba_cares/partners/marketing_partners.html, *archived at* http://perma.cc/BJ3M-PBB8 (last visited Oct. 28, 2014) (discussing some of the collaborative efforts between the NBA and WNBA).

[170] Forsythe v. Clark USA, Inc., 864 N.E.2d 227, 241 (Ill. 2007).

[171] Destiny Health, Inc. v. Conn. Gen. Life Ins. Co., 741 F. Supp. 2d 901, 907 (N.D. Ill. 2010) (quoting Forsythe v. Clark USA, Inc., 864 N.E.2d 227, 242 (Ill. 2007)).

[172] 111 Am. Jur. *Trials* § 6 (2009).

[173] *Id.* (citing Forsythe v. Clark USA, Inc., 864 N.E.2d 227, 237 (Ill. 2007)).

[174] 556 F. Supp. 2d 901 (S.D. Ill. 2008).

[175] *Id.* at 904.

plaintiffs theorized that WellPoint acquired RightCHOICE "for the purpose of causing the latter to withdraw from the Illinois insurance market, thereby forcing RightCHOICE insureds to convert to more expensive policies issued through . . . Illinois subsidiaries of WellPoint."[176] Moreover, they alleged that the withdrawal of RightCHOICE from the market constituted a breach of their policies' renewability provisions and that WellPoint should be liable for the breach because it was a "de facto party to the plaintiffs' policies with RightCHOICE under the . . . 'direct-participant' doctrine."[177]

Although the facts of *Cima* are dissimilar from the NBA context in that they do not involve Title VII, the *Cima* court's application of the direct participation liability doctrine is not at all fact dependent. The court articulates the doctrine as follows:

> a corporation may be held liable for the acts of affiliates if an alleged wrong can be traced to that corporation 'through the conduit of its own personnel and management' and the corporation exerted control over affiliates 'in a way that surpasses the control exercised by a parent as an incident of ownership.'[178]

And the court goes on to explain that "'[t]he key elements' in imposing liability on a corporation under the direct participant doctrine are the corporation's 'specific direction or authorization of the manner in which an activity is undertaken and foreseeability.'"[179]

In short, the *Cima* court found the test for direct participation liability "focuses on the degree to which a corporation used its ownership interest in another corporation to 'command rather than merely cajole' the latter."[180] Under the *Cima* court's application of the direct participation liability doctrine, the NBA could certainly be deemed liable for the sex discrimination flowing from the WNBA's age eligibility rule.

The court in *Forsythe v. Clark USA, Inc.*[181] took the same view of the direct participation liability doctrine, and indeed, seemed to inspire the *Cima* court's perspective. In *Forsyth*, the wives of two men who died in an oil refinery fire at Clark Refining sued Clark USA, which was Clark Refining's only shareholder, for wrongful death, alleging budget cuts instituted by Clark USA made the refinery less safe.[182] Clark USA defended on the grounds that it was merely a holding company,

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[176] *Id.*

[177] *Id.*

[178] *Id.* at 905.

[179] *Id.* (citing Santora v. Starwood Hotel & Resorts Worldwide, Inc., No. 05 C 6391, 2007 WL 3037098, at *6 (N.D. Ill. Oct. 16, 2007)).

[180] *Id.* at 905–06 (citing Esmark, Inc. v. NLRB, 887 F.2d 739, 757 (7th Cir. 1989)).

[181] 864 N.E.2d 227 (Ill. 2007).

[182] *See id.* at 231.

but the court was not persuaded, finding that "if a parent company specifically directs an activity, where injury is foreseeable, that parent could be held liable."[183]

While there is no way to predict the particular factors a court will look to in applying the direct participation liability doctrine, if the court focuses on the "key" specific direction and foreseeable injury elements, it is likely the NBA would be found to have "direct participation" in the WNBA's affairs.

Even assuming the NBA is deemed responsible for the WNBA's age eligibility rule under the integrated enterprise doctrine or the direct participation liability doctrine, it is necessary to determine whether that rule actually triggers Title VII liability.

VI. POTENTIAL TITLE VII LIABILITY

The Civil Rights Act of 1964, which Congress passed "to implement [America's] national commitment to equality,"[184] is widely considered to be "the most far-reaching bill on civil rights in modern American history."[185] In total, the Act has eleven titles,[186] prohibiting discrimination of various sorts, but Title VII—which prohibits employers, employment agencies, and labor organizations from discrimination with respect to personnel decisions—"has emerged as having the most significant impact in helping to shape the legal and policy discourse on the meaning of equality."[187]

While Title VII has wide berth, it is not a general civility law. It has limitations, chief among which is that it applies to only a particular subset of covered entities: employers, employment agencies, and labor organizations.[188] Assuming, as argued in Part V, that the NBA is deemed responsible for the WNBA's age eligibility rule's effects, the NBA would be subject to Title VII liability if the NBA were deemed to be a covered entity and if disparate treatment analysis were to reveal a Title VII violation.

A. Is the NBA a Covered Entity under Title VII?

There are two ways the NBA could be subject to Title VII: as an employer or as an employment agency.

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[183] *Id.* at 237.

[184] Robert Belton, *Title VII at Forty: A Brief Look at the Birth, Death, and Resurrection of the Disparate Impact Theory of Discrimination*, 22 HOFSTRA LAB & EMP. L.J. 431, 432 (2005).

[185] Emmanuel O. Iheukwumere & Phillip C. Aka, *Title VII, Affirmative Action, and the March Toward Color-Blind Jurisprudence*, 11 TEMP. POL. & CIV. RTS. L. REV. 1, 14 (2001) (internal quotation marks omitted).

[186] *See* Belton, *supra* note 184, at 432.

[187] *See id.* at 432–33.

[188] 42 U.S.C. § 2000e-2(a) to (c) (2006).

1. The NBA as an 'Employer'

Title VII defines an employer as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . ."[189] And it defines a "person" as "one or more . . . partnerships, associations [or] corporations . . . ."[190]

The NBA is a corporation with operations throughout the nation and the world, and it lists sixty-eight people on its website as being a part of the NBA "Management Team."[191] The NBA is, therefore, unquestionably an employer under Title VII and is bound by section 703(a) of the statute, which reads as follows:

> It shall be an unlawful employment practice for an employer -
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[192]

Notably, the NBA's individual clubs, not the NBA itself, employ the league's players, but under the doctrine of third-party liability, the NBA may still be liable under section 703(a) of Title VII for the sex discrimination of its clubs. While Title VII applies primarily to the relationships between individuals and employers, third parties often "control . . . an individual's access to employment or the terms of his employment with another employer."[193] Under such circumstances, many courts have found that the third party, in addition to or as opposed to the direct employer, is potentially liable for any discrimination that transpires.[194]

Such a reading makes sense under the statute as third parties can control employment opportunities just as direct employers do. And, indeed, the two

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[189] *Id.* § 2000e(b).

[190] *Id.* § 2000e(a).

[191] *Our Management Team*, *supra* note 97.

[192] 42 U.S.C. § 2000e-2(a)(1)-(2) (2006).

[193] Andrew O. Schiff, Note, *The Liability of Third Parties Under Title VII*, 18 U. MICH. J.L. REFORM 167, 167 (1984).

[194] *E.g.*, People v. Holiday Inns, Inc., Nos. 83-CV-564S, 86-CV-103S, 1993 WL 557881 (W.D.N.Y. May 23, 1993) (holding a third party parent corporation who interferes with employment policies may be considered an employer within the meaning of Title VII).

categories of entities enumerated in the statute other than employers—employment agencies and labor organizations—are essentially third parties.[195] As Andrew O. Schiff writes in *The Liability of Third Parties Under Title VII*:

> Congress's inclusion of employment agencies and labor organizations demonstrates its awareness of the damage that third parties can cause through discrimination. Since it has before it both a party—a covered employer—to which Title VII refers, and an activity—discriminatory exercise of control over employment relationships with other employers—that Title VII prohibits, a court does not reach very far by forbidding a covered employer that has a relationship with an individual similar to that of an employment agency or labor organization from discriminating in a manner prohibited to those institutions. . . . Reading Title VII to prohibit the discriminatory activities of third parties helps effect Congress's purpose of eliminating discrimination from the job market and the work place.[196]

Puntolillo v. New Hampshire Racing Commission[197] is instructive. In that case, a harness horse driver-trainer, Puntolillo, brought Title VII national origin employment discrimination charges against the New Hampshire Racing Commission (NHRC), which regulates horse racing in New Hampshire, and the New Hampshire Trotting and Breeding Association (TBA), which conducts horse races in New Hampshire.[198] Puntolillo alleged that in 1971 and 1972 the NHRC and the TBA "unlawfully interfered with his employment opportunities by discriminating against him because of his Italian national origin."[199] The defendants moved to dismiss Puntolillo's action, arguing that owners of the horses Puntolillo trained, not the NHRC or the TBA, were his employers.[200] They noted the horse owners hire, fire, and pay the trainers, and neither the NHRC nor the TBA conducts any of these traditional employment activities.[201] Puntolillo did not argue otherwise, but he insisted that the NHRC and the TBA were involved in determining whether he could work,[202] and the court agreed.[203]

The court found the NHRC and the TBA exercised control over the ability of a driver-trainer to earn a living, which created a third-party employment relationship with the driver-trainer.[204] In particular, the court explained the TBA controlled and

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[195] Schiff, *supra* note 193, at 173.
[196] *Id*. at 173–75.
[197] 375 F. Supp. 1089 (D.N.H. 1974).
[198] *Id.* at 1090.
[199] *Id.*
[200] *Id.*
[201] *Id.*
[202] *Id.* at 1091.
[203] *Id.* at 1092.
[204] *Id.* at 1090.

assigned horse stalls at the racetrack, and the NHRC issued licenses to participate in the races, and both a stall space and a license are necessary to work as a driver-trainer, whoever the particular owner may be.[205]

Ultimately, despite recognizing that "the [employment] relationship here is not the traditional one,"[206] the court denied defendants' motion to dismiss, finding that:

> [t]o permit a covered employer to exploit circumstances peculiarly affording it the capability of discriminatorily interfering with an individual's employment opportunities with another employer, while it could not do so with respect to employment in its own service, would be to condone continued use of the very criteria for employment that Congress has prohibited.[207]

The facts of the *Puntolillo* case are strikingly analogous to the NBA context. Just as the horse owners in *Puntolillo* employ the rider-trainers, the NBA and WNBA clubs employ the players. And just as the TBA and the NHRC control, through stall and license allocation, whether driver-trainers will have the opportunity to work for a horse owner, the NBA controls, through its age eligibility rules, whether a player will have an opportunity to work for a team. Puntolillo successfully defeated defendants' argument that because they were not Puntolillo's direct employers they could not be held liable for their discrimination,[208] and plaintiffs challenging the WNBA's age eligibility rule would likely similarly defeat an NBA defense based on not being a direct employer.

Such a liberal reading of Title VII is not unorthodox. Courts have generally recognized that, as a piece of remedial legislation, Title VII *should* be read liberally,[209] and the *Puntolillo* court followed that time-honored practice. In deciding as it did, the court wrote:

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[205] *Id.* at 1091.

[206] *Id.*

[207] *Id*. at 1092.

[208] *Id.* ("Defendants here are certainly employers within the meaning of 42 U.S.C. § 2000e(b); and they certainly 'control . . . access to plaintiff's job market.'") (citing Sibley Memorial Hosp. v. Wilson, 488 F.2d 1338, 1341 (D.C. Cir. 1970)).

[209] *See* Adeyeye v. Heartland Sweeteners, LLC, 721 F.3d 444, 450 (7th Cir. 2013) ("Title VII is a remedial statute that we construe liberally in favor of employee protection."); Slagle v. Cnty. of Clarion, 435 F.3d 262, 267 (3d Cir. 2006) ("Of course, because Title VII is a remedial statute, it must be interpreted liberally."); Zinn v. McKune, 143 F.3d 1353, 1360 (10th Cir. 1998) (Briscoe, J., concurring) ("Because Title VII is a remedial statute, it must be interpreted liberally to effectuate its purpose of eradicating employment discrimination."); Philbin v. Gen. Elec. Capital Auto Lease, Inc., 929 F.2d 321, 323 (7th Cir. 1991) ("Title VII is remedial legislation which must be construed liberally."); Diggs v. Harris Hosp.-Methodist, Inc., 847 F.2d 270, 273 (5th Cir. 1988) ("Because Title VII is remedial and humanitarian in nature, it should be liberally construed, resolving ambiguities in favor of the complainant."); Owens v. Rush, 636 F.2d 283, 287 (10th Cir. 1980) ("Title VII should be liberally construed in order to effectuate its policies. 'Such liberal construction is also to be

> [Title VII] is aimed at providing equal employment opportunities. Its purpose is to 'achieve equality of employment opportunities and remove barriers that have operated in the past' in a discriminatory fashion. . . . The courts have consistently recognized that 'Title VII of the Civil Rights Act of 1964 should not be construed narrowly.'[210]

It is, therefore, reasonable that the NBA be deemed a third party employer with respect to WNBA players, and as such, it should be prohibited from engaging in the unlawful employment practices set forth in section 703(a) of Title VII, above. Indeed, subsection (2) of 703(a) describes precisely what the NBA, through the WNBA's age eligibility rule, does: it serves to "classify . . . applicants for employment in [a] way which would deprive or tend to deprive [an] individual of employment opportunities or otherwise adversely affect [her] status as an employee, because of such individual's . . . sex."[211]

By classifying men as eligible for the NBA one year removed from high school and classifying women as eligible for the WNBA four years removed from high school, the NBA deprives scores of women the opportunity to gain employment as professional basketball players in the United States for no other reason than their sex. Such classification is unlawful under Title VII and should be eliminated.

2. The NBA as an 'Employment Agency'

If, for some reason, the NBA is not deemed an employer under Title VII, it should certainly be deemed an employment agency. The statute defines an employment agency as "any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person."[212]

Procuring employees for employers is a core part of the NBA's mission. For the NBA to exist, its teams must have players, and the NBA works steadfastly to ensure that happens. It hosts combine events at which NBA aspirants audition for NBA clubs,[213] it conducts a lottery to determine the order in which clubs will select players in the NBA draft,[214] it conducts the actual draft during which clubs select the

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given to the definition of 'employer.'") (quoting Baker v. Stuart Broad. Co., 560 F.2d 389, 391 (8th Cir. 1977)).

[210] *Puntolillo*, 375 F. Supp. at 1092.

[211] 42 U.S.C. § 2000e-2(a)(2) (2012).

[212] *Id*. § 2000e(c).

[213] *2013 NBA Pre-draft Combine Measurements and Results*, NBA (May 20, 2013, 8:25 A.M), http://www.nba.com/2013/news/05/17/nba-draft-combine-results/, *archived at* http://perma.cc/W8KU-S22G.

[214] Alex Kay, *2013 NBA Draft Lottery: Breaking Down Process Behind How It Works*, BLEACHER REP. (May 20, 2013), http://bleacherreport.com/articles/1645789-2013-nba-draft-lottery-breaking-down-process-behind-how-it-works, *archived at* http://perma.cc/3R

players who will likely become their employees,[215] and it hosts post-draft summer leagues in which recently drafted players, undrafted players, and other free agents compete against each other in front of potential employers.[216] Moreover, the NBA creates and enforces the rules that determine how an NBA team can acquire players already in the league, whether by way of a trade or free agency.[217] The NBA has all the trappings of an employment agency and could be easily construed as one by a court. With respect to employment agencies, Title VII states,

> it shall be an unlawful employment practice . . . to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.[218]

In procuring players for clubs, the NBA draws clear eligibility distinctions based on sex. It "refuse[s] to refer for employment" women who are fewer than four years out of high school while referring for employment similarly situated men.[219] In doing so, the NBA unlawfully discriminates against these women.

B. Title VII's Disparate Treatment Analysis

If a court determines the NBA is an entity covered under Title VII, the disparate treatment discrimination inquiry will follow. Generally, Under Title VII disparate treatment analysis, a plaintiff must first prove a prima facie case of discrimination, which usually involves showing: she (1) is a member of a protected class, (2) applied for or was otherwise available for a position, (3) was qualified for the position, and (4) was rejected under circumstances that give rise to an inference of unlawful discrimination.[220] A prima facie case can also be made, however, through a showing of direct evidence of discrimination.[221] In contemporary times, direct evidence usually proves hard to come by because bias is often covert or even subconscious, resulting in no "smoking-gun proof" of discrimination.[222] With respect to the

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[215] *E.g.*, *2015 NBA Draft*, NBA, http://www.nba.com/draft/, *archived at* http://perma.cc/ST63-C9B2 (last visited Mar. 29, 2015).

[216] *E.g.*, *NBA Summer League 2014*, NBA, http://www.nba.com/summerleague/, *archived at* http://perma.cc/6R7M-SAVS (last visited Mar. 29, 2015).

[217] *See* HIGHLIGHTS OF 2011 CBA, *supra* note 103, at 1–2.

[218] 42 U.S.C. § 2000e-2(b) (2012).

[219] *Id.*

[220] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

[221] *See* Holmes v. Bevilacqua, 794 F.2d 142, 146 (4th Cir. 1986) ("[A] *prima facie* case may be established by direct evidence of discrimination or by indirect evidence . . . .").

[222] *See* United States v. City of New York, 713 F. Supp. 2d 300, 322 (S.D.N.Y. 2010) (stating courts have recognized direct evidence of intentional discrimination can be difficult

WNBA's age eligibility rule, however, direct evidence exists in the form of the rule itself as read in conjunction with the NBA's age eligibility rule. Men are held to one standard and women are held to another. Thus, assuming a court determines that the NBA can be held responsible for its subsidiary's age eligibility rule by way of the integrated enterprise test or direct participation liability theory, a plaintiff who was barred from entering the WNBA because of the WNBA's age eligibility rule would have no problem making out a prima facie case.

Once a prima facie case is made, the defendant normally has the option of either (1) denying that it discriminated and arguing that the plaintiff was barred for a legitimate nondiscriminatory reason[223] or (2) admitting that it discriminated and justifying its discrimination under the bona fide occupational qualification (BFOQ) doctrine.[224] In this case, the NBA would not be able to avail itself of the former option, because the discriminatory distinction is clear. Rather, it would have to turn to the BFOQ doctrine to shelter its discriminatory rule.

The BFOQ doctrine serves as a limited exception to Title VII's general prohibition on employment discrimination. While the BFOQ doctrine does not apply in cases of race-based and color-based discrimination, it does permit an employer to discriminate on the basis of religion, sex, or national origin if the discriminatory requirement is "reasonably necessary to the normal operation of the particular business or enterprise."[225]

For instance, the WNBA's requirement that all players in the league be female would almost certainly trigger the BFOQ exception. The WNBA was created specifically for female basketball players, and including males would, by definition, fundamentally transform the league. A male plaintiff might challenge the all-female rule, claiming that being a woman is not a BFOQ of playing basketball in the WNBA, but he would almost surely lose. Although courts construe the BFOQ doctrine narrowly, it has been found in some cases to justify discrimination when an employer is concerned about privacy, authenticity, or safety.[226] Courts have

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to ascertain, so plaintiff's in Title VII cases are not obligated to present "smoking gun" proof of intentional discrimination and can rely on circumstantial evidence).

[223] *See McDonnell Douglas Corp.*, 411 U.S. at 802 (indicating that after the employee establishes a prima facie case of discrimination, "[t]he burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection").

[224] *See, e.g.*, Healey v. Southwood Psychiatric Hosp., 78 F.3d 128, 132 (3d Cir. 1996) (justifying a gender-based staffing policy as a bona fide occupational qualification in defense to a Title VII complaint).

[225] 42 U.S.C. § 2000e-2(e)(1) (2012).

[226] Int'l Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 201 (1991) ("The BFOQ defense is written narrowly, and this Court has read it narrowly."); *see also* Katie Manley, *The BFOQ Defense: Title VII's Concession to Gender Discrimination*, 16 DUKE J. GENDER L. & POL'Y 169, 176 (2009) ("Employers attempt to evoke the BFOQ defense in a variety of contexts. However, given that the BFOQ exception is intended to be extremely narrow, employers' efforts are typically rejected. The defense is generally only successful in three main contexts: privacy, safety, and authenticity.").

repeatedly found that men can be prohibited for safety reasons from participating in women's contact sports,[227] and it is difficult to imagine such a defense failing with respect to the WNBA gender restriction.

With respect to the WNBA's age eligibility rule, however, it is difficult to imagine the defense succeeding. In order to prevail under the BFOQ exception, the NBA would have to show that being fewer than four years removed from high school would adversely affect a woman basketball player's ability to do her job[228] and that the requirement that women basketball players be at least four years removed from high school relates "to the central mission of the employer's business."[229] There are certainly no privacy or authenticity interests in requiring women be four years removed from high school before entering the WNBA. And while the WNBA could perhaps argue that young women must be several years removed from high school to safely compete with older and in some cases stronger WNBA veterans, without evidence that this safety concern is greater for WNBA aspirants than for NBA aspirants the argument would fall flat.

VII. CONCLUSION

From the beginning, the WNBA—which was born of the NBA's approval in the NBA's cities with NBA teams' colors and largely NBA-related names and which survived a challenge from the ABL by virtue of its NBA affiliation—has featured a more stringent age eligibility rule than the NBA. When taken together, the two rules create two different tracks—one for men and one for women—to be negotiated on route to a professional basketball career in the United States. This sort of dual-tracking, in which one route presents advantages over the other, is unacceptable in a nation committed to gender equity, and it therefore requires Title VII scrutiny.

Although parent companies often are not held liable for their subsidiaries' acts, both the integrated enterprise doctrine and the direct liability participation doctrine

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[227] *See* Williams v. Sch. Dist. of Bethlehem, Pa., 998 F.2d 168, 172–74 (3d Cir. 1993); *see also* Kleczek v. R.I. Interscholastic League, Inc., 612 A.2d 734, 738–39 (R.I. 1992) (As "boys and girls are not similarly situated as they enter athletic competition . . . the classifications are based on the realization that distinguishing between boys and girls in interscholastic sports will help promote safety . . . ."); B.C. v. Bd. of Educ., Cumberland Reg'l Sch. Dist., 531 A.2d 1059, 1067–70 (N.J. Super. Ct. App. Div. 1987) (affirming the Commissioner of Education's conclusion that the petitioner's son could not play on the high school girls' field hockey team for safety reasons).

[228] 1 SUSAN M. OMILIAN, SEX-BASED EMPLOYMENT DISCRIMINATION § 13:2, 13-20-21 (2013) ("In essence, the Court said, the BFOQ defense is available if the sex of the employee affects that worker's ability to do the job."); *see also* Int'l Union, UAW, 499 U.S. at 201 ("By modifying 'qualification' with 'occupational,' Congress narrowed the term to qualifications that affect an employee's ability to do the job.").

[229] *Int'l Union*, 499 U.S. at 203 ("[I]n order to qualify as a BFOQ, a job qualification must relate to the . . . 'central mission of the employer's business.'") (citing W. Air Lines, Inc. v. Criswell, 472 U.S. 400, 413 (1985)).

suggest the NBA could be held liable for the discrimination that flows from the divergent policies. And, therefore, whether the NBA is determined under Title VII analysis to be a third party employer or an employment agency, an aggrieved woman basketball player who is ruled ineligible under the WNBA's age eligibility rule but who would be eligible, were she a man, under the NBA's age eligibility rule, will have a potentially viable claim. As such, the NBA and WNBA would do well to revise their age eligibility policies such that men and women of the same age have the same access to employment in the NBA and WNBA, respectively.