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The Downward Spiral of the Misogynistic Video Game Industry: It's Truly Up to the "Last Of Us"

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THE DOWNWARD SPIRAL OF THE MISOGYNISTIC VIDEO GAME INDUSTRY: IT'S TRULY UP TO THE "LAST OF US"

*Lauren Cho**

With the surge of lawsuits in 2021 against video game companies alleging gender discrimination, it is evident that sexism and misogyny run rampant within the video game industry, but two questions remain. What causes, if any, may be attributable to the misogynistic mindset of male gamers? And what can the video game industry and the law do to rectify the dominance of “frat boy culture” that continues to plague women—regardless of whether they are casual or professional gamers, or regular employees in game developing companies?

California’s labor laws are supposed to be the most protective of employees; yet two lawsuits in particular—*McCracken v. Riot Games, Inc.* and *Department of Fair Employment & Housing v. Activision Blizzard*—highlight the need for heightened scrutiny to properly acknowledge how the law does not adequately implement solutions to gender discrimination. This Note analyzes the psychological roots of sexism in male gamers, diving deep into the lack of diversity, equity, and inclusion in the esports industry, and suggests practical resolutions to properly address the toxicity against women in the video game world, both online and offline.

* The author would like to thank her advisor, Professor John T. Nockleby, for his continued guidance and support; as well as the esteemed following, without whom this Note would have been impossible: her mentor, Sydney Wong; Genie Doi, Esq.; Harris Peskin, Esq.; Michael Fagan, Esq.; and Tina Sang.

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I. INTRODUCTION

A girl decides to play an online video game for fun, to destress after a hard day at work. She settles on *VALORANT*, an immensely popular online first-person shooter (FPS) game. As soon as she logs on, enters the team lobby, and chooses an agent to maneuver, a randomly queued teammate turns on his mic to say hello. When the girl responds in kind, the teammate, upon hearing her voice, immediately bemoans, “Aw f***, that’s unlucky. We’re going to lose; we have a girl on our team. Let’s just throw the game.”¹ While the girl is normally unfazed by this type of trash talk, she is emotionally exhausted. She has also been having trouble at work with her boss, who has refused to give her a promotion—likely on the basis of her gender—despite her loyalty to the company for the past five years. She decides she has had enough and puts down her computer mouse, effectively laying her interest in gaming as a hobby to rest.

This is a common experience for female video game players who play online games, yet sadly, it is not the end of it. Female players are “continually humiliated, threatened, stalked, and sexually harassed during and after playing games.”² While the industry has finally begun acknowledging the issue to a certain extent, accountability is a separate matter that has gone mostly unchecked. The industry’s failure to implement pragmatic solutions is insufficient because such a halfhearted approach will stunt the video game industry from humanitarian progress. The hostility towards women in the video game industry must change, and while there is no easy solution to the matter, “[c]hange will not come if we wait for some other person or if we wait for some other time. We are the ones we’ve been waiting for. We are the change that we seek.”³

1. This dialogue exchange was based on the actual experience of Canadian content creator Kyedae “Kyedae” Shymko during one of her *VALORANT* streams on Twitch. Kyedae, *KYEDAE VS TOXIC TEAMMATES IN VALORANT !!!*, YOUTUBE (Oct. 6, 2021), <https://www.youtube.com/watch?v=LBxWbjOOFmc>.

2. Young-nam Seo, Poong Oh & Woo Yeong Kil, *Into the Wolves’ Den: An Investigation of Predictors of Sexism in Online Games*, in *BEHAV. & INFO. TECH.* 1 (2021).

3. See Miller Center, *U.S. Presidents / Barack Obama*, UNIV. OF VA., <https://miller-center.org/president/obama> [<https://perma.cc/E5AE-5H5G>] (during Barack Obama’s campaign speech).

Part II of this Note provides background on the unique video game industry (which includes the booming esports industry), the deep-rooted issue of misogyny in video games, and what underlies the toxic “bro culture.”⁴

Part III analyzes the relevant legal issues that are promulgated because of this toxic culture, which affect not only female professional esports players and streamers, but also casual gamers at home and employees of video game companies. The former issue is discussed at length in connection to statistical comparisons from various studies comparing social factors and psychology behind toxic behaviors against women. The latter issue is exemplified by two major recent lawsuits against video game companies Riot Games, Inc., and Activision Blizzard.

Part IV discusses how other countries have addressed these same issues, and specifically analyzes how California statutes, like the Fair Employment and Housing Act (FEHA), play a role (or do not play a role) in the video game workspace and industry. This section also explores potential law reform that may properly address gender discrimination in the video game industry, although none are necessarily ideal. Potential solutions include: (1) unionization; (2) changing the way women are depicted in video games (women are hypersexualized, reduced to stereotypes, and violence against them are condoned in video games); and (3) implementing community management strategies like an employee resource group—essentially, an informal union comprised of women in the industry who have a clear understanding of the issues at hand to enable other women to have a voice.

Finally, Part V concludes with the opinion that the video game industry needs to affirmatively address the rampant misogyny within, which will not only ensure the progression of women’s rights, but will also bolster its potential for growth and societal influence.

II. BACKGROUND: THE CURRENT STATE OF THE VIDEO GAME INDUSTRY

Esports refers to “organized competitive digital gaming that has taken on the aesthetics of professional sports.”⁵ While its potential for both professional and amateur gameplay as well as investment value has been

4. In this Note, “bro culture” and “frat culture” are interchangeably used as they mean the same thing.

5. Selen Türkay et al., *See No Evil, Hear No Evil, Speak No Evil: How Collegiate Players Define, Experience, and Cope with Toxicity*, ASS’N FOR COMPUTING MACH. 1 (Apr. 23, 2020).

skyrocketing, esports is also infamous for its toxic bro culture that ostracizes new players and damages their psychological and social well-being.⁶

Toxicity, defined as “antagonistic actions including harassment, cheating . . . and cyberbullying,”⁷ is a systemic issue that is prevalent in online communities, particularly esports.⁸ Various theories help explain the misogynistic behavior in the male gamer population.

A. Synchronous Sexism

It is important to recognize the difference between synchronous and asynchronous sexism. Synchronous sexism can be defined as “male gamers’ negative attitudes towards female gamers, which possibly triggers actual hostile in-game behaviours against women in games (online harassment) (i.e. gendered flaming, sexual harassment).”⁹ The effects of synchronous sexism are felt instantaneously in-game.

Synchronous sexism obviously applies to multiplayer online games (for example, esports leagues).¹⁰ First, it appears male gamers’ sexist attitudes are not necessarily always spurred in the online environment; rather, sometimes these sexist attitudes are embodied in their inherent beliefs.¹¹ Once those beliefs are reproduced and reinforced online, the result is the creation of “male-dominant gaming cultures” in gaming.¹² The reverse is also true: certain inherent factors of online gaming may contribute to the promulgation of gender harassment and hostility against women.¹³ For instance, “[m]ale gamers with biased perceptions of online games (i.e. *territoriality*)

6. *Id.*

7. Other examples include “raging (aggressive outbursts, also called flaming), grieving (targeted attempts to annoy a player) . . . and intentionally helping opposing player(s) (or throwing the game).” The term “toxicity” can mean a variety of antagonistic behaviors, as it varies depending on game context, and every game and its community is different. *Id.*

8. *Id.*

9. Seo et al., *supra* note 2, at 3.

10. *Id.* at 2.

11. *Id.* at 2–3.

12. *Id.* at 2.

13. *Id.*

tend to treat female gamers as illegitimate intruders who deserve hostility.”¹⁴ In other words, male gamers tend to perceive video games as an inherently male activity that almost functions as an exclusive social club; in their view, women are the “other,” effectively barring females from membership solely because of their gender. Finally, synchronous sexism appears partly influenced by the competitiveness of online gaming.¹⁵ “Male gamers with strong motivations for *advancement* and *competition* [] tend to stereotype female gamers as too inept to play games with either as partners or opponents.”¹⁶ Indeed, sometimes male gamers will be toxic toward their own teammates just because they are female.

Although some esports organizations have attempted to rally support for female gamers to participate as athletes via the creation of exclusively female teams, these attempts have so far been unsuccessful. For example, in 2013, Team Siren announced themselves as the first-ever, exclusively female *League of Legends* (*LoL*) team with a promotional video emphasizing gender.¹⁷ The video was met with widespread criticism, with the *LoL* fan base citing to its “cringe” factor; despite the Siren players boasting they would “bait you and outsmart you” and that “losing was not an option,” as a team they lacked the synergy and skill to back up their claims.¹⁸ Eighteen days after the video release, the team disbanded, partly due to the negative publicity but also because of the overemphasis of gender. By claiming their strength was that they were women in an overwhelmingly male gaming population,¹⁹ they were left open to scrutiny and debasement by a male-

14. *Id.*

15. *Id.*

16. *Id.*

17. Kudo, *The Story of the Infamous Team Siren*, YOUTUBE (Sept. 10, 2017), <https://www.youtube.com/watch?v=alAzuD2-Qk>; see Daniel Fu, *A Look at Gaming Culture and Gaming Related Problems: From a Gamer's Perspective*, CTR. FOR MH IN SCHOOLS & STUDENT /LEARNING SUPPORTS AT UCLA 1, 14.

18. Kudo, *supra* note 17. In modern slang, “cringe[y]” is defined as something that causes one to be embarrassed on behalf of another. See, e.g., *Cringey*, DICTIONARY.COM, <https://www.dictionary.com/e/slang/cringey/> [<https://perma.cc/6BTV-N2Z4>].

19. This effort to idealize gender identity opens the door to further harassment, allowing men to use this opportunity to debase female gamers further by downplaying efforts to increase inclusivity of women as wasted time. As a result, such idealization should not be necessarily encouraged.

dominated fanbase.²⁰ Because Team Siren was ultimately unable to prove they had “mechanics and skill” in comparison to other professionally established teams, it could not sustain itself financially, leading to disbandment.²¹ This example suggests that while female empowerment is an important issue to tackle in the video game industry as a whole, it must be handled adequately and strategically. The industry must be realistic and take into account the perceptions of the gaming world, which are averse to women, and emphasize the fact that women are just as skilled in games as men whilst deemphasizing gender.²²

In esports, it is equally important to have the requisite skills to ward off Internet users who use “lack of skills” as a justification for harassment and hostility against women.²³ Nevertheless, talent is often not enough, and women will always be ousted as the “other.” Former professional Hearthstone player-turned-attorney Michael “Insom” Fagan notes that unfortunately, the general consensus amongst males in esports—players and audience members alike—is that women simply do not belong because they do not *deserve* to be included; women do not *deserve* their popularity or to be invited to prestigious esports events. For instance, in December 2021, a prevalent male esports journalist, or “self-described ‘esports historian,’” Duncan “Thorin” Shields made news headlines when he lashed out against an esports league for creating an all-female tournament for the game *Counter-Strike: Global Offensive (CS:GO)*.²⁴ His statements on social media²⁵

20. Kudo, *supra* note 17.

21. *Id.*

22. Perhaps a lesson to be learned from Team Siren’s failure, along with the companies behind these exclusive female esports teams, is that these companies fail to maximize the female players’ marketing potential. In other words, the inartful and outdated advertisement designs that poorly emphasize female empowerment do not resonate with the particular generation of gamers in the audience, thereby setting the teams up for failure from the very beginning.

23. Again, the author would like to thank Mr. Michael Fagan, Esq. for agreeing to an interview to discuss his unique personal and professional experience regarding sexism, particularly in but not limited to Hearthstone esports.

24. James Troughton, *Thorin Gets Mad About Inclusivity, Declares He Is Esports*, THEGAMER (Dec. 29, 2021), <https://www.thegamer.com/thorin-gets-mad-about-inclusivity-declares-that-he-is-esports/> [<https://perma.cc/6Q65-PP66>].

25. Thorin (@Thorin), TWITTER (Dec. 27, 2021, 5:58 PM), <https://twitter.com/Thorin/status/1475647210188689412> [<https://perma.cc/M59F-B9NW>] (“Women in esports: boo hoo. Poor white man feels oppressed. You that mad that women get to play in a tournament? You get no pussy / Thorin: Don’t dismiss an opinion from an industry veteran with connections and

missed the point of inclusivity entirely; he dismissed the toxicity women experience in the gaming world and boosted his own credentials as an “industry veteran.”²⁶ Such egotistic perspectives are ubiquitous in and harmful to esports.

In addition, “female gamers might be viewed as those who trespass on the territories owned by men.”²⁷ This territorialism enacts a group mentality that leads to the formation of a collective that is hostile to outsiders.²⁸ When sexist behavior surfaces in online gaming communities, it often “cascade[s] . . . due to peer influences. Once sexist behavior is established as a group norm, group members are desensitized with it and more likely to show sexist behaviors, which they would not otherwise do, in order to feel accepted and valued by their peers.”²⁹

B. Asynchronous Sexism

Conversely, regarding video games generally (console and single-player games), asynchronous sexism is a persistent issue. Asynchronous sexism occurs when those negative attitudes transfer into the offline environment (though not necessarily precluding online, just not in-game), and the effects are not as instantaneous.³⁰ Of course, this is not to say that sexist

relationships with women for countless years.”; “Wonder why only cynical marketers and future sex offender male feminists want to help you gals and you can’t seem to get the most talented and prolific individuals in this industry to engage with you or your initiatives?”).

26. Troughton, *supra* note 24. Indeed, Thorin would proceed to infamously decry: “I AM ESPORTS!” *Id.*

27. Seo et al., *supra* note 2, at 2.

28. *Id.*

29. *Id.*

30. See Rebecca Chui, *A Multi-Faceted Approach to Anonymity Online: Examining the Relations Between Anonymity and Antisocial Behavior*, 7 J. VIRTUAL WORLDS RSCH. 1, 6 (2014) (explaining “where communication occurs synchronously through rooms called ‘channels’ or through direct user-to-user private messages, it is comparatively easier to type multiple messages at once as it requires only a single keystroke to submit a message. As a result, automatic countermeasures such as flood filters are less strict. On a forum, where communication occurs asynchronously, the process of flooding is comparatively harder as it requires additional clicks and navigation of the forum to create a discussion thread or post. Due to the asynchronous nature of forum communication, countermeasures such as flood filters can be made stricter to prevent users from posting messages in rapid succession and further add as a deterrent for antisocial behaviour. Technological features are often restrictors or enablers of antisocial activity, inadvertently motivating some antisocial activities to occur more readily on certain media channels. These aspects in the

attitudes develop online and then transfer to the offline environment. Rather, it means that online anonymity may cultivate sexist motivations offline by enhancing antisocial behavior against women online.³¹ There are multiple applicable theories to explain misogynistic behavior in gamers in this context.

1. Social Cognitive Theory and Cultivation Theory

The social cognitive theory³² posits that “the digital representation of the female body is not a mere innocent succession of entertaining polychromatic polygons on a screen,” but rather molds into sexist behavior and beliefs in the real world.³³ The cultivation theory, on the other hand, suggests that “repeated exposure to media content influences how social realities are perceived and understood.”³⁴ These two theories intertwine to suggest that social factors are mainly to blame for online toxicity against women.

First, an analysis of the intersection of the social cognitive and cultivation theories is warranted. There is a causal relationship established between the hyper-sexualization of the female sex in video games and violence against women, the latter being split into two subparts: (1) “sexual harassment judgments” and (2) “rape-supportive attitudes.”³⁵ Sexual harassment judgments commonly manifest in the video game industry, especially against

online environment can have a strong effect on the extent of antisocial behaviour exhibited, depending on the levels of accountability and availability of opportunities to act antisocially.”).

31. *Id.* at 2 (“Anonymity alone is not adequate to solely induce either antisocial behaviour or hyper-personal relations: they entail the *motivation* to act in that manner. . . . the development of this motivation to display antisocial behavior involves a multifaceted perspective that consolidates the self (e.g. socio-economic backgrounds and the degree of value placed on anonymity) with the other (e.g. group norms). This is, in turn, influenced by the chosen media channel (e.g. games, forums, virtual worlds, chat-rooms), the presence of any wider motivations (political and sociological), and the degree of anonymity afforded by the media channel; these factors affect the way anonymity is perceived and utilised.”).

32. See Laurent Bègue et al., *Video Games Exposure and Sexism in a Representative Sample of Adolescents*, 8 FRONTIERS IN PSYCH. 1, 2 (2017) (attributing the origin of the social cognitive theory to Bandura 2001 study).

33. *Id.*

34. *Id.*

35. Karen E. Dill, Brian P. Brown & Michael A. Collins, *Effects of Exposure to Sex-Stereotyped Video Game Characters on Tolerance of Sexual Harassment*, 44 J. EXPERIMENTAL SOC. PSYCH. 1402, 1402 (2008).

streamers and content creators.³⁶ For instance, female streamers or content creators who primarily play video games as their content source are often trolled with comments such as, “Get back in the kitchen and make me a sandwich, sweetheart!”³⁷ The portrayal of women as weak beings who need to be saved by male protagonists in video games—for example, the classic Peach and Mario dynamic,³⁸ where a princess is repeatedly kidnapped by a villain and it is up to the male hero to save her—lends credence and leads to the manifestation of these sexual harassment judgment values in the male gamer audience.

As for rape-supportive attitudes, prominent streamer and former competitive esports player Rumay “Hafu” Wang provides an unfortunate example. In 2008, when she was seventeen and competing in a qualified tournament for *World of Warcraft* (*WoW*), a video game created by the game developer giant Blizzard Entertainment, a team named themselves “Gonna Rape Hafu At Regionals.”³⁹ Despite the offensive name, the team qualified

36. “Streaming” is when a person broadcasts him or herself live to a particular audience—the type being usually dependent on the streaming platform—where both the streamer and the audience may interact to generate entertainment and business. For instance, a streamer has a live “chat box” where members of the audience can inform the streamer what is working well in the stream and what is not; from this, the streamer may then address the feedback accordingly and influence how that stream will progress. “Content creators” are people who create original content and shares it online, e.g., pictures, art, and most commonly some type of video streaming (e.g., cooking, playing video games). Content creators usually depend on their streams—which generate revenue through advertisements, sponsorships, “subs” (when a viewer subscribes as a follower to the streamer’s channel for future content), and “gifts” (when a viewer donates money to support the streamer). While the primary mode of monetization varies depending on which platform the streamers use, it is fundamentally crucial for the streamer to have a likable and engaging personality to draw in followers and viewers. The higher the viewership and subscription numbers, the higher their revenue, and the more likely major commercial brands will reach out to the streamer for partnerships or sponsorships, which contribute to the streamer’s overall success.

37. Esports Talk, *LG Destroy Tells Girl to Make Him a Sandwich, Deserves a Kick?*, YOUTUBE (Dec. 30, 2019), <https://www.youtube.com/watch?v=0lma0PArqUA>; see also Amanda Cote, *Here’s What It’ll Take to Clean Up Esports’ Toxic Culture*, CONVERSATION (Aug. 21, 2020, 8:38 AM), <https://theconversation.com/heres-what-itll-take-to-clean-up-esports-toxic-culture-143520> [<https://perma.cc/Q3UG-WV8V>].

38. James McMahon, *It’s-a Complicated: A Brief History of Mario and Princess Peach’s On-off Romance*, GAMESRADAR+ (Nov. 14, 2019), <https://www.gamesradar.com/its-a-complicated-a-brief-history-of-mario-and-princess-peachs-on-off-romance/> [<https://perma.cc/4PGB-V6HK>].

39. Andrés Aquino, *G2’s Hafu Recounts Horrific Story of WoW Esports Team Harassing Her While Competing*, GINX (Sept. 26, 2020), <https://www.ginx.tv/en/twitch/hafu-retells-horrific-story-of-a-professional-esports-team-harassing-her-while-competing> [<https://perma.cc/9AB2-A5D2>].

for regionals at BlizzCon, and nothing was done administratively to rectify the issue.⁴⁰ “It’s hard to be part of something when I don’t feel welcome in the community,” Hafu commented during an interview video, voicing her concerns regarding sexism in esports and explaining the rationale behind quitting the competitive scene.⁴¹ Now aged twenty-nine, she has focused solely on streaming, although that career’s stability is uncertain as she continues to face sexism from online trolls on her Twitch channel. “When you have like 70,000 people watching a stream, and all you see is like just terrible things being said about you, it’s kind of like, why am I competing?” she said in the interview.⁴² It is important to note that although it is fairly anticipated that streamers will face online harassment as a normal part of their unique job, a distinction must be made between general “trash-talking,” which is common in competitive gaming, and sexual harassment.⁴³ Specifically, “[t]rash-talking bad play is an integral part of the sports-watching experience, but hurling threats of sexual violence or abuse at a player’s gender or appearance” is not.⁴⁴ Male professional gamers do not experience the same level of gender discrimination.⁴⁵ Earlier this year, when the news revolving the Activision Blizzard gender discrimination lawsuit launched, Hafu expressed she was “not surprised at the news,” given her 2008 experience.⁴⁶

Hyper-sexualization occurs when video games depict women in a sexual manner—“as beautiful, busty, scantily clad sex objects”⁴⁷—usually for the purpose of attracting the predominantly male audience’s attention. Additionally, women are “under-represented and marginalized” in video

40. *Id.*

41. FUSION, *Real Future: A Female eSports Champion Speaks Out About Harassment (Episode 7)*, YOUTUBE (Feb. 17, 2016), <https://youtu.be/y0WIE-ySC7c>.

42. *Id.*

43. Andy Chalk, *Hearthstone Pro Hafu Speaks Out About Sexist Trolling on Twitch*, PC GAMER (Feb. 19, 2016), <https://www.pcgamer.com/hearthstone-pro-hafu-speaks-out-about-sexist-trolling-on-twitch/> [<https://perma.cc/8WKN-CGV5>].

44. *Id.*

45. *Id.*

46. Hafu (@itshafu), TWITTER (July 28, 2021, 12:52 PM), <https://twitter.com/itshafu/status/1420472254496837632?lang=en> [<https://perma.cc/Q6WC-V8B2>].

47. Dill et al., *supra* note 35, at 1402.

games,⁴⁸ and are more likely to appear as sidekicks or the hero's romantic interest. However, even if a video game represents a female protagonist, she is still susceptible to the male gaze, which sexually objectifies the character; for example, one need not consider further than *Tomb Raider*'s Lara Croft.⁴⁹ As such, "[t]he veil of feminine empowerment, employed by iconic characters like Lara Croft, falls under analysis that reveals their role as a 'visual spectacle' for the masculine gaze."⁵⁰

This representation (and overall underrepresentation) of women translates from the offline to the online world, enabling male incel behavior in the competitive gaming scene. "Incels," or "involuntary celibates," are a group of straight, binary men who "have constructed a violent political ideology around the injustice of young, beautiful women refusing to have sex with them."⁵¹ Incels are notorious for harboring beliefs stemming from white supremacy and misogynistic notions.⁵² In fact, they are "diabolically misogynistic"⁵³—their misguided perception of women as the root of their sexual inadequacies fosters hostile behavior against women, especially in the video game environment. This is because video games reinforce the concept of a male hierarchy, encouraging misogynistic behavior amongst gamers.⁵⁴

Furthermore, since "video games remain a bastion of sexual stereotypes and inequality," male gamers tend to believe they must fend off women in the video game environment to feel superior, "to remove them from a

48. *Id.*

49. *Id.*; see also Exhibit A.

50. Anastasia Salter & Bridget Blodgett, *Hypermasculinity & Dickwolves: The Contentious Role of Women in the New Gaming Public*, 56 J. BROAD. & ELEC. MEDIA 401, 402 (2012).

51. Jia Tolentino, *The Rage of the Incels*, NEW YORKER (May 15, 2018), <https://www.newyorker.com/culture/cultural-comment/the-rage-of-the-incels> [https://perma.cc/Q557-V25N].

52. *Id.*

53. *Id.*

54. See Michael M. Kasumovic & Jeffrey H. Kuznekoff, *Insights into Sexism: Male Status and Performance Moderates Female-Directed Hostile and Amicable Behaviour*, 10 PLOS ONE 1, 2 (2015) ("[G]ender differences in perceptions of hierarchies and behaviours associated with negotiating them could potentially explain the increased hostility women experience in competitive scenarios. Nowhere is this more apparent than in online environments where physical differences are inconsequential, yet women receive more than four-times the negative comments from men") (emphasis added); see also *infra* Part II(B)(2) (explanation of evolutionary theory).

male-dominated arena (i.e. backlash).”⁵⁵ As a result, women are less likely to speak into their microphones to communicate with their teammates due to a fear of backlash once their male counterparts realize she is female.⁵⁶ Thus, the social constructionist theory suggests that a male gamer will be more hostile to a female-voiced teammate simply because of the notion that women are not allowed in this male-dominated arena, regardless of that male gamer’s “in-game performance or status.”⁵⁷

2. Evolutionary Theory

An alternative explanation is the evolutionary theory, which combines both social and biological approaches to hypothesize that male gamers are sexist when they feel their position in the hierarchy is threatened, thereby lessening their chances of successful reproduction.⁵⁸ Thus, lower-status male gamers (i.e., gamers who perform poorly in comparison to others), whose positions in the hierarchy become unstable and uncertain after a female competitor joins the fray, start exhibiting toxic behavior against female gamers in the online gaming environment.⁵⁹ As researchers Michael Kasumovic and Jeffrey Kuznekoff explain:

[I]ntrasexual competition is common and is one of the strongest forces shaping sex differences. . . . Despite these historical sex-differences in competition, men and women currently interact and compete for the same professional positions and accolades. The modern competitive environment has shifted in such a way that individual status is determined by performance metrics largely unrelated to physical differences. Nonetheless, gender differences in perceptions of hierarchies and behaviours associated with negotiating them could potentially explain the increased hostility women experience in competitive scenarios. Nowhere is this more apparent than in online environments where physical

55. Kasumovic & Kuznekoff, *supra* note 54, at 2–3.

56. *See id.*

57. *Id.* at 3.

58. *See id.* at 1, 3 (hypothesizing that “female-initiated disruption of a male hierarchy incites hostile behaviour from poor performing males who stand to lose the most status”).

59. *Id.* at 3, 11.

differences are inconsequential, yet women receive more than four-times the negative comments from men.⁶⁰

In contrast to the social cognitive and cultivation theories, the evolutionary theory finds male gamers are not sexist because they want to dominate women; rather, it “predicts that a male’s behavior [is] moderated by status and performance, such that only lower-status males that have the most to lose with a hierarchical reorganization by the introduction of a female competitor will be hostile towards female players.”⁶¹ In other words, when women enter the gaming world as competitors, males feel that their attractiveness as a potential mate is automatically lessened should the women outperform them.⁶² As such, when they feel their hierarchical position is threatened, they are more likely to be negative and hostile toward women.⁶³ Additionally, evolutionary theory makes a secondary prediction regarding the relationships between males in gaming—lower-status gamers tend to act submissively in relation to other male gamers who perform better.⁶⁴ If these higher-status male gamers harass women, their “subordinates,” so to speak, will follow their lead.

3. Hybrid Theory

It is likely a combination of both social factors (e.g., environmental influence) and evolutionary factors that influence misogynistic behavior in male gamers. In support of this hybrid theory, a cross-sectional French study (N = 13520)⁶⁵ found that “general video game exposure was significantly related to sexism, *irrespective of gender, age, socioeconomic status, and religion.*”⁶⁶ The study suggests that social factors are not entirely to blame for the development of sexist attitudes in gaming; there is also an inherent aspect. Surprisingly, in contrast, there was no correlation found between

60. *Id.* at 2.

61. *Id.* at 3.

62. *See id.*

63. *Id.*

64. *Id.*

65. Indicates study’s sample size.

66. Bègue et al., *supra* note 32, at 4 (emphasis added).

sexism and television exposure in the study, even with controlled variables.⁶⁷ More specifically, while “sexism is generally embedded in a mesh of cultural beliefs and grounded in social and institutional practices,” the study found “no evidence of a cultivation effect.”⁶⁸ However, the study cited a need for further cross-sectional and longitudinal studies to make a more definitive conclusion.⁶⁹

Perhaps because gamers embody the avatars they play in games, which has massive implications in both online and console gaming, the resultant blurring of reality and fantasy may further contribute to the adoption of misogynistic attitudes. The Proteus⁷⁰ Effect⁷¹ is the idea that with the invention of artificial intelligence in the form of avatars and agents:

It [has become] imperative to investigate the effects of virtual representations because they have distinct features compared to other media figures. Unlike images in other media, virtual humans are typically designed to be engaging and to respond to a user’s actions. This dynamic creates a new and powerful experience beyond passive media consumption; rather, these interactions mirror communication in the physical world, and users often react to virtual humans in natural and social ways. Also, rather than merely observing characters, users may embody characters in virtual worlds and experience the virtual body as their own, which has been shown to have stronger effects than passively watching them. Because of the enhanced realism, the opportunities for interactivity, and the experience of embodiment, it is possible that

67. *Id.*

68. *Id.* at 2–3.

69. *Id.* at 2.

70. In ancient Greek mythology, Proteus was a sea-god who was known for his shape-shifting skills. In this context, the Proteus Effect hypothesizes that gamers who control in-game AI avatars similarly shape-shift into, or merge in identity with, the avatar’s “features or behaviors” that “may lead to shifts in self-perception both online and offline.” The implication that follows is that due to the affluence of gender stereotypes in video games, it becomes easier for the gamer, regardless of whether male or female, to accept the portrayal of those stereotypes more readily as truth, and perhaps do so subconsciously. See Jesse Fox, Jeremy N. Bailenson & Liz Tricase, *The Embodiment of Sexualized Virtual Selves: The Proteus Effect and Experiences of Self-Objectification Via Avatars*, 29 *COMPUTS. HUM. BEH.* 930, 930 (2013).

71. See generally *id.*

these representations will have powerful effects on users' beliefs, attitudes, and behaviors offline as well.⁷²

Although research surrounding the Proteus Effect is scant, it is evident that the portrayal of females in a sexually objectifying manner in video games propels the adoption of sexist attitudes to a degree.⁷³ The adherence to the stereotype that women are nothing more than sex objects “have been linked to self-objectification, rape myth acceptance (i.e., false beliefs about rape that blame the victim), acceptance of interpersonal violence and violence against women, and aggression.”⁷⁴ This adherence is dangerous, for both men and women become susceptible to harboring “less favorable attitudes toward women’s cognitive abilities,”⁷⁵ with some women believing they deserve negative treatment. A research study discovered that women who played sexualized female avatars were more likely to harbor self-deprecating beliefs, accepting that they would be unable to achieve a certain goal, than those who did not play sexualized female avatars.⁷⁶

Nevertheless, sexism in the video game industry is a systemic problem, which needs to be properly addressed with a systemic solution. Esports, in particular, has significant potential to shape the future of the video game industry as a whole because esports leagues have more manpower and funds to encourage the changes in perception necessary to tackle gender discrimination issues. More specifically, esports leagues—which are also often run by video game publishers—possess the ability to cease the hyper-sexualization of female avatars to discourage the subconscious formation of misogynistic notions in both male and female gamers.

72. *Id.* at 930–31 (citations omitted).

73. *Id.* at 931.

74. *Id.* (citations omitted).

75. *Id.*

76. *Id.* at 931–32 (citing Elizabeth Behm-Morawitz & Dana Mastro, *The Effects of the Sexualization of Female Video Game Characters on Gender Stereotyping and Female Self-Concept*, 61 SEX ROLES 808 (2009)).

III. LEGAL ISSUES

A. Application: Overview of Diversity, Equity, and Inclusion (DE&I) Issues in Esports

Esports is a male-dominated industry.⁷⁷ Earlier this year, a study reported that 90.4% of the roster were reserved for male esports players, and 88.5% of esports scholarship funds went to males.⁷⁸ This is the case even though nearly half of the gamer population (41%) consists of females.⁷⁹ This gender gap is attributable to a toxic culture harbored against women, with the stereotype that women are either not good at games or are not interested.⁸⁰

Additionally, esports is becoming the new “football for universities” and thus “carving out their place on college campuses”;⁸¹ the battle over monetary resources for collegiate teams is fierce. Indeed, the gender disparity broadens because no central agency is supervising the division of equal resources,⁸² raising the inference that a majority of these funds are funneled to male-dominated esports collegiate teams. The disparity spills over from the online to the offline world, affecting not only athletes and streamers but also ordinary employees in video game companies (e.g., indie game developers), which function as the embodiment of such gender discriminatory values.

Women in esports are assumed to have obtained their employment through their sex appeal, not their own skills. In 2013, a game developer named Zoe Quinn released her new game, “Depression Quest.”⁸³ When the

77. Jake Seiner, *AP Study: Nearly 90% of Esports Scholarships Going to Men*, AP NEWS (Mar. 12, 2021), <https://apnews.com/article/esports-gender-inequality-scholarships-men-1823321276db40fea37dc8d9e5410643> [<https://perma.cc/R99U-ALJL>].

78. *Id.*

79. *Id.*

80. *Id.*; *see supra*, Part II (explaining the stereotypes associated with women in gaming).

81. Seiner, *supra* note 77.

82. *Id.*

83. Caitlin Dewey, *The Only Guide to Gamergate You Will Ever Need to Read*, WASH. POST (Oct. 14, 2014), <https://www.washingtonpost.com/news/the-intersect/wp/2014/10/14/the-only-guide-to-gamergate-you-will-ever-need-to-read/> [<https://perma.cc/L7Q5-JGCG>].

game took off and became immensely popular, Quinn’s ex-boyfriend posted a blog detailing his intimate knowledge of Quinn.⁸⁴ He alleged she had “cheated on him with several men in the gaming industry—ostensibly to get ahead in her career.”⁸⁵ Despite Quinn’s insistence that the allegations were false, the male-centric video game community rallied against her. Quinn started receiving elaborate death threats and ultimately had to leave her home in fear for her life, while both her ex-boyfriend and one of the men implicated in the cheating scandal have remained unscathed personally and professionally.⁸⁶ This was the beginning of what would be labeled “Gamergate” for years to come and illustrates the culture of toxicity and lack of inclusivity in the video game industry.

B. Anonymity and the Online Disinhibition Effect: Hostility Against Women “Spills Over” from the Digital Realm to the Office

Esports also propels a culture of anonymity,⁸⁷ which mostly shields online harassers and bullies from suffering any consequences for their hateful words or actions against other players.⁸⁸ The online disinhibition effect proposes that “[t]he cloak of anonymity lowers the inhibitions of bad actors,” which “clears the way for hateful and prejudicial communications.”⁸⁹ Not only does anonymity actively stimulate toxicity against women, but it also dissuades bystanders from getting involved, passively stunting progress.⁹⁰

84. *Id.*

85. *Id.*

86. *Id.*

87. Anna Chang et al., *Diversity in Esports*, 2019 ESPORTS B. ASS’N J. 19, 19 (2019) (“Anonymity plays a major role in how members of minority and marginalized groups are treated online. Under the Internet’s cloak of anonymity, actors are free to express themselves without concern for perception or repercussions in real life.”).

88. See Jake Seiner, *Women Navigate Toxicity, Other Barriers in Esports*, AP NEWS (Jan. 3, 2019), <https://apnews.com/article/entertainment-technology-us-news-ap-top-news-esports-6762c27de8f1434fb5a8e14649d2a50b> [<https://perma.cc/EJ2W-NHHS>]; see also Chang et al., *supra* note 87, at 19.

89. Chang et al., *supra* note 87, at 20 (attributing the origin of the terminology to John Suler, Ph.D.).

90. *Id.* at 20–21.

This problem carries over from the online environment to the work environment. As of 2018, studies have shown that:

Although many companies proclaim strong commitments to diversity . . . progress across industries has effectively stalled. This systemic lack of progress, coupled with the online esports culture . . . has led to everyday discrimination against women and minorities in esports workplaces. *Indeed, at least one esports title publisher, Riot Games, has identified a correlation between an employee’s in-game toxicity and their workplace toxicity. Simply put, online toxicity spills over into the real world, affecting esports workplaces everywhere.*⁹¹

Generally, video game companies have made a lackluster response to gender discrimination lawsuits because they know they have the money to settle and make their problems disappear. Riot Games, Inc. is a pertinent example.

1. McCracken v. Riot Games, Inc.

In 2018, two female Riot employees sued the company, alleging gender discrimination in the form of sexual harassment, unequal pay, and a sexually hostile work environment.⁹² For instance, the company culture celebrated the ideal of being a “Rioter”— “[t]he primary tenet of being a ‘Rioter’ is being a ‘core gamer’”—which carried “nefarious” connotations for the women.⁹³ Simply put, it was an informal system of suppression: a way to remind the women at Riot that being a “core gamer” meant being a man (even if an individual male employee did not actually play games); and because women were not core gamers, they were not true “Rioters.”⁹⁴ The two main plaintiffs in the case accused Riot of employment discrimination,

91. *Id.* (emphasis added).

92. McCracken et al. v. Riot Games, Inc., No. 18STCV03957, 2 (LASC filed Nov. 2018).

93. *Id.*

94. *Id.*

including unequal pay, retaliation after reporting sexual misconduct, and denial of promotion based on gender, amongst others.⁹⁵

The class action lawsuit settled, or so it would appear. In August 2021, esports news outlets reported that Riot had failed to comply with a June court order to send notice to its employees regarding their rights to speak with the Department of Fair Housing and Equal Employment (DFEH).⁹⁶ After an investigation was launched into the numerous gender discrimination and sexual harassment claims within the company in 2019, Riot revealed it had reached settlement agreements with approximately one hundred women who had made those claims.⁹⁷ Prior to the settlements, the company reportedly attempted to force two of the female plaintiffs to arbitration. In response, Riot's employees staged a walk-out, "the first mass worker action of its kind in the video game industry."⁹⁸ Only then did Riot actually settle, showcasing that organized mass action has a positive effect on prompting employers to act, possibly due to public pressure.

McCracken makes apparent the mistreatment of women workers as an industry-wide problem. Essentially, this case implicates that the reason California's labor laws do not sufficiently protect female employees in video game companies is because women are pressured during settlements to waive their rights in return for empty promises to address the issues. In response to the public's spiked curiosity regarding Riot's failure to comply with the June court order, Riot provided a screenshot of its standard severance agreement language to prove it did not forbid any of its *former* employees from whistleblowing.⁹⁹ However, this response misses the point entirely. While it is important to address former employees' grievances against the company, Riot failed to consider what it could do for *current and future*

95. Rebekah Valentine, *Riot Games Faces Class-Action Suit for Discrimination, Harassment*, GAMESINDUSTRY (Nov. 6, 2018), <https://www.gamesindustry.biz/articles/2018-11-06-riot-games-faces-class-action-suit-for-discrimination-harassment> [<https://perma.cc/YQ2D-7EU7>].

96. Jared Moore, *Agency Behind Activision Blizzard Lawsuit Accuses Riot Games of Stalling on Demands*, IGN (Aug. 17, 2021, 1:19 PM), <https://www.ign.com/articles/agency-behind-activision-blizzard-lawsuit-accuses-riot-games-of-stalling> [<https://perma.cc/4B2E-4WLD>].

97. *Id.*

98. Sam Dean, *Riot Games Will Pay \$10 Million to Settle Gender Discrimination Suit*, L.A. TIMES (Dec. 2, 2019, 1:29 PM), <https://www.latimes.com/business/technology/story/2019-12-02/riot-games-gender-discrimination-settlement> [<https://perma.cc/MW7L-Q5PK>].

99. Moore, *supra* note 96.

employees so that the cycle of discrimination and harassment could cease to exist, an equally important endeavor.¹⁰⁰

2. Dep't of Fair Empl. & Hous. v. Activision Blizzard

Another relevant example is Activision Blizzard, a subsidiary of Blizzard Entertainment. In 2021, the Department of Fair Employment and Housing (DFEH) sued the game developing giant, listing the female employees' grievances that were unsurprisingly similar to Riot's.¹⁰¹ The lawsuit (hereafter "Blizzard lawsuit") details allegations surrounding a "frat boy culture" which serves as "a breeding ground for harassment and discrimination against women."¹⁰² For instance, women at Activision Blizzard constantly experienced "cube crawls," where the male employees "dr[a]nk copious amounts of alcohol as they 'crawl[ed]' their way through various cubicles in the office and often engage[d] in inappropriate behavior."¹⁰³ Such behavior included playing video games while neglecting their work duties (which

100. As of December 27, 2021, Riot Games has settled the gender discrimination lawsuit for \$100 million, and also "agreed to certain workplace policy reforms," including: "greater transparency around pay scales for job applicants, not relying on prior salary history to set employees' pay or assign job titles and the creation of a pipeline for current or former temp agency contractors to apply to work for Riot Games. The publisher will also implement a policy requiring the presence of a woman or member of an underrepresented community on employment selection panels." Shannon Liao, *Riot Games Agrees to Pay \$100 Million in Settlement of Class-Action Gender Discrimination Lawsuit*, WASH. POST (Dec. 28, 2021, 2:24 PM), <https://www.washingtonpost.com/video-games/2021/12/27/riot-discrimination-100-million-settlement/> [https://perma.cc/ANZ4-RBEZ]. Although the aforementioned policy changes seem promising, and one should remain generally optimistic and hopeful, it remains too early to tell whether the game publisher will actually follow through with those promises. This is especially true considering Riot has a separate lawsuit that was filed in early 2021, alleging its CEO of sexual harassment against a former employee. The CEO and Riot have vehemently denied any wrongdoing. That case has gone to arbitration. *Id.*

101. The *DFEH v. Activision Blizzard* filed complaint lists numerous causes of action against Blizzard Entertainment, largely the same as those cited in *McCracken*, including: employment discrimination based on sex (compensation, promotion, termination, constructive discharge, harassment); retaliation; failure to prevent discrimination and harassment (on behalf of group and DFEH); unequal pay; waiver of rights, forums, or procedures and release of claims. *Dep't of Fair Empl. and Hous. v. Activision Blizzard*, No. 21STCV26571, 2021 WL 3109804 (D. Cal. Jul. 20, 2021).

102. *See generally id.* at 4.

103. *Id.*

were handed off to their female coworkers), rating female bodies, talking openly about their sexual experiences, and “jok[ing]” about rape.¹⁰⁴

One of the most flagrant allegations from the Blizzard lawsuit is that during one of the company’s annual sponsored esports conventions donned “BlizzCon,” there was an infamous hotel room known as the “Cosby Suite”¹⁰⁵ amongst Blizzard employees.¹⁰⁶ The room was used by Senior Creative Director for Blizzard’s game *World of Warcraft* Alex Afrasiabi, who “was permitted to engage in blatant sexual harassment with little to no repercussions” due to his seniority status and high position.¹⁰⁷ Afrasiabi reportedly harassed female employees so severely to the point that other male supervisors had to physically separate him from them; still, Afrasiabi “would hit on female employees, telling [them] he wanted to marry them, attempting to kiss them, and putting his arms around them.”¹⁰⁸ The DFEH alleged that although the top executives at Blizzard knew of the room and Afrasiabi’s reputation, they did nothing other than issue a *verbal* counseling session when Afrasiabi’s harassment was reported to the President, J. Allen Brack.¹⁰⁹ Unsurprisingly, Afrasiabi’s harassment and derogatory behavior towards women in the company continued, “including grabbing a female employee’s hand and inviting her to his hotel room and groping another woman.”¹¹⁰

Further, the DFEH points to the tragic death of a female Blizzard employee, who committed suicide whilst on a business trip with her supervisor.¹¹¹ This is perhaps the most serious of the DFEH’s contentions. The supervisor was alleged to have sexually abused the employee, as evidenced by another employee’s confirmation of the abuse—in particular, that a photo of the female employee’s vagina had been passed around at a company

104. *Id.*

105. *Id.* at 15 (although the complaint refers to the existence of a “Crosby Suite” [sic], it is actually referring to alleged rapist and sexual predator, Bill Cosby.).

106. *Id.*

107. Dep’t of Fair Emp. and Hous., 2021 WL 3109804, at 15.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

holiday party for the males to gawk at.¹¹² It is implied the supervisor took and circulated the picture. While investigating her death, the police discovered the supervisor had brought a butt plug and lubricant with him on the business trip,¹¹³ strengthening the belief that he had a sexual relationship with the deceased female employee. These two cited incidents from the Blizzard lawsuit illustrate the need for accountability and make it painfully apparent that the mistreatment of women workers is an industry-wide problem, although not necessarily limited to the video game industry.

The DFEH is not alone in its battle against the formidable game developing giant. Other federal agencies such as the U.S. Securities and Exchange (SEC) are also investigating into whether Activision Blizzard hid the ball from its investors by failing to disclose the existence of sexual harassment and gender discrimination claims over the years.¹¹⁴ In addition, the U.S. Equal Employment Opportunity Commission (EEOC) sued Activision Blizzard in September 2021, riding on the coattails of the DFEH lawsuit and alleging workplace discrimination.¹¹⁵ Unfortunately, the EEOC's case settled for \$18 million, even though Blizzard insisted it had done nothing wrong—a peculiar position to take notwithstanding the fact that Blizzard decided to settle very quickly once the EEOC sued.¹¹⁶ Last but not least, the Communication Workers of America, a workers' rights group, also filed suit with the U.S. National Labor Relations Board (NLRB), “alleging the company has prevented the discussion of workplace activities protected by law, and allegedly ‘threatened employees that they cannot talk about or communicate about wages, hours and working conditions.’”¹¹⁷

112. *Id.*

113. *Id.*

114. Shannon Liao, *SEC Investigating Game Publisher Activision Blizzard Over Sexual Harassment, Discrimination Allegations*, WASH. POST (Sept. 20, 2021, 5:22 PM), <https://www.washingtonpost.com/video-games/2021/09/20/sec-activision-blizzard-investigation/> [https://perma.cc/973P-CUSK]

115. *Activision Settles \$18M Workplace Discrimination Case*, BBC TECH NEWS (Sept. 28, 2021), <https://www.bbc.com/news/technology-58720517?xtor=AL-72-%5Bpartner%5D-%5Bbbc.news.twitter%5D-%5Bheadline%5D-%5Bnews%5D-%5Bbizd%E2%80%A6>. [https://perma.cc/D4GA-B3WD].

116. *Id.*

117. *Id.*

Hence, it is undeniable that Blizzard retains the need for serious improvement in relation to championing female workers' rights, but the question remains as to whether it will ultimately claim responsibility by implementing concrete steps to address these issues properly. In the end, talk is cheap. The EEOC settlement and, frankly, Blizzard's lack of candor in its public responses suggest sweeping reformation is unlikely, or at least that it will take a considerable amount of time before the video game industry sees actual progress.

C. Lack of Unionization in Esports and its Effects

It is necessary to observe not only the aspired humanitarian effects but also the economic implications of purported change to address gender discrimination in the video game industry. Professional esports is likely headed in the same direction as traditional professional sports leagues, adopting a similar business model and revenue-generating structure. For example, like traditional sports leagues (e.g., National Football League) prior to the imposition of salary caps, esports teams are currently "operating at a loss" because of "large costs and uncertain revenues, an estimated 70% to 80% of which come from sponsorships, the highest of which do not exceed a reported \$3 million per year."¹¹⁸ There is a noted concern regarding the issue of "game developer power"; i.e., whether league organizers like Riot Games, Inc. should be permitted to fund players associations due to conflict of interest implications.¹¹⁹ In other words, league organizers may have an incentive to "cull player-team coordination"¹²⁰ without an objective body—like a union—to monitor their actions.

It is important to recognize that unionization will produce different ripple effects and consequences depending on the collective body involved. For ordinary workers in the video game industry, unionization will enhance workplace protections against their employers, and the main advantage to be gained is that collective bargaining action has a higher likelihood of enacting positive policy reform:

A union provides a floor of economic security for workers who face systemic oppression (BIPOC, queer people, and women, in

118. Harris Peskin, *Unionization in Esports*, 2019 ESPORTS B. ASS'N J. 8, 10 (2019).

119. *Id.* at 17.

120. *Id.*

particular). A union allows workers to level the playing field and rebalance the inequitable power dynamic where executives have unilateral power over our work and our lives. A union can result in better pay, better working conditions, and better healthcare.¹²¹

For instance, regarding the current situation at Activision Blizzard, having a union will bolster workers' efforts to be heard, who may decide to strike unless and until their employer takes affirmative action to remedy its gender discrimination issues. Indeed, the ABK Workers Alliance, an organization dedicated to representing workers from game developer companies like Activision, has already rallied support for unionization within.¹²² If 30% of Activision's workers sign union authorization cards, the company would have to allow its workers to vote on whether they want to unionize.¹²³

Despite the obvious benefits of a union, it may not necessarily be the end-all, be-all solution for all parties in the video game industry. In fact, research suggests individual esports players should consider their options more carefully.¹²⁴ Players are faced with a dilemma:

121. Emma Kinema, *How the Video Game Industry Can Unionize in the Wake of Activision Blizzard*, POLYGON (Aug. 17, 2021, 10:00 AM), <https://www.polygon.com/22627759/activision-blizzard-lawsuit-games-worker-unions-labor-organizing> [<https://perma.cc/U4ZL-D3W6>]. Unions are noted to assist in providing higher wages for women workers, increasing hourly wages on average by 4.7%. *Unions Help Reduce Disparities and Strengthen Our Democracy*, ECON. POL'Y INST. (Apr. 23, 2021), <https://www.epi.org/publication/unions-help-reduce-disparities-and-strengthen-our-democracy/> [<https://perma.cc/V5WG-D9UY>]. As a point of comparison, in Hollywood, leaders of various unions (including SAG-AFTRA, the DGA, IATSE, Actors' Equity, etc.) rallied to lobby Congress to implement laws addressing employment discrimination issues and DEI initiatives. See generally David Robb, *Hollywood's Union Leaders Call On Congress to Enact Laws Advancing Diversity and Equity in the Arts, Entertainment & Media*, DEADLINE (Feb. 11, 2021, 1:59 PM), <https://deadline.com/2021/02/hollywood-unions-urge-congress-to-pass-laws-advancing-diversity-equity-in-arts-entertainment-media> [<https://perma.cc/4TVP-FRW8>]. Such collective action is helpful because it simultaneously raises awareness of the issues, thereby prompting further action, and increases pressure on the industry to change.

122. Jason Schreier, *Activision Blizzard Workers Take First Steps Toward Unionizing*, BLOOMBERG BUS. (Dec. 10, 2021, 9:37 AM), <https://www.bloomberg.com/news/articles/2021-12-09/activision-blizzard-employees-take-steps-toward-unionizing?srnd=premium> [<https://perma.cc/MT62-HH3S>] (efforts for unionization include "the creation of a strike fund to support hundreds of workers who have been participating in a work stoppage . . . in protest of layoffs at one of Activision Blizzard's studios").

123. *Id.*

124. See generally Peskin, *supra* note 118 (explaining the cautious approach esports players should take when considering esports unionization and player salary caps, suggesting unionization is not—and should not be considered—the end-all, be-all solution). The following discussion in the section regarding the potential pitfalls of unionization was possible largely thanks to the

Should they choose to avail themselves of the benefits afforded to NLRB recognized unions, they would gain the benefit of additional bargaining strength, protection of the right to strike, and numerous other statutory rights. They would also open themselves up to the possibility of a collectively bargained salary cap, which would reduce earnings for esports players. Alternatively, the players can refuse to avail themselves of the benefits of unionization, and thus deny teams the nonstatutory labor exemption's protection.¹²⁵

As mentioned, the primary benefit of unionizing is obtaining the power of collective bargaining, but this is not to say players cannot bargain in a manner they would have advocated for those positions by lobbying. There remains a question of what the actual remedy would be—players could just not sign the papers if there is concerted activity within the contract that discriminates. Or they could self-organize an esports players association, which functions as an informal union that could nevertheless be functional in advocating for better conditions.¹²⁶

It is generally understood in esports that players are frequently swapped from team to team as each organization attempts to capitalize its performance in a league. Similarly, in traditional sports leagues, such as the National Basketball Association (NBA), teams also frequently swap players, but the key distinction between traditional sports and esports leagues deals with the issue of player autonomy. In esports, “[g]ame developers who own the sport titles themselves control the flow of media right deals, league-wide sponsorships and ticketing revenue,” which severely limits how individual teams receive funding.¹²⁷ Currently, without a union, players in less

hindsight of Mr. Harris Peskin, Esq., who kindly agreed to extrapolate on his position in the cited article for purposes of writing this Note. While this Note provides a summary of the issues revolving unionization as a potential solution against systemic gender discrimination, it is not a full encapsulation of the antitrust implications and barely touches the tip of the iceberg. The reader should be aware of this fact when reading this section.

125. *Id.* at 14.

126. For example, consider the Counter-Strike Professional Players Association (CSPPA), “a democratically run entity made up of more than 180 Counter-Strike players from across the world.” See Jason Krell, *Esports Players Facing Questions of Whether to Unionize*, GLOB. SPORT MATTERS (Dec. 18, 2019), <https://globalsportmatters.com/business/2019/12/18/organizing-esports-unions-requires-education-about-economics-and-history/> [<https://perma.cc/V3C4-RXME>].

127. *Id.*

developed and known teams (thus having less capital) can still qualify for league championships if they participate in various tournaments, which are organized by independent sponsorships. Thus, players of lesser caliber have more options and chances to play because no league union controls which teams may participate in league championships.

However, the imposition of unions in esports leagues would change that, and the structure of esports leagues would dramatically alter to match that of traditional sports leagues, like the NBA. In other words, while players would not be prevented from swapping teams, unionization would mean less opportunity to compete and potentially make a name for themselves. For established players of the higher caliber, “[t]he potential consequences of forming a union . . . could open up players to the institution of salary caps, which could limit their earning potential.”¹²⁸ So, the argument goes: why should players restrict their free agency by seeking union representation, thus reducing their investment value and funneling tax money to the league via the competitive balance tax?¹²⁹

The answer might be, as suggested above, that esports players are not the only ones who should be considered when making the decision about whether to unionize, even in such a niche industry as esports. Unlike professional esports players and streamers who maintain higher salaries, regular employees who work in video game companies arguably have more to lose from not having an established union. Regular employees do not receive exorbitant salaries like players do. In addition, because the esports industry is so male-dominated, the sexist attitude of gamers who end up working at companies like Riot, who believe women are either incapable of or disinterested in games, translates to hostility against women in the workplace. The fact is, for the ordinary workers, unionization remains a viable and potentially favorable means of addressing gender discrimination systemically.

128. *Id.* (“Teams don’t have the money to continue to pay [players] these large salaries. That’s going to result in either consolidation or a reduction of salaries.”).

129. A caveat: according to Mr. Peskin, “players and teams could also find themselves on the same side of the bargaining table if esports leagues start to make money. Since both live under the absolute rule of law imposed by game developers, both groups might be incentivized to negotiate for changes under the right circumstances.” *Id.*

D. Scrutinizing California Statutes and their Efficacy

California is the entertainment hub of the nation, with Los Angeles being “the entertainment capital of the world, a cultural mecca.”¹³⁰ Although opinions will differ due to subjectivity, it cannot be denied that California serves as a critical ground for the entertainment world, including the video game industry. This analysis is especially applicable to the employment aspect of gender discrimination in the video game industry but should not be construed as limited only to employment.

1. FEHA

California’s labor laws are broader than most states in the United States.¹³¹ The Fair Employment and Housing Act (FEHA) was enacted to “make it illegal to discriminate against a job applicant or employee because of a protected characteristic,” including gender.¹³² The DFEH is the agency responsible for enforcing this law.¹³³

In a retaliation action under FEHA, “a complaint about sexual harassment is a protected activity when the employee opposes conduct that the employee reasonably and in good faith believes to be [in violation of the statute], whether or not the challenged conduct is ultimately found to violate the FEHA.”¹³⁴ For a plaintiff “[t]o establish a *prima facie* case of retaliation, [she] must show that (1) she engaged in protected activity, (2) the employer subjected her to an adverse employment action, and (3) a causal link existed between the protected activity and the employer’s action.”¹³⁵

130. *Facts About LA*, DISCOVER L.A., <https://www.discoverlosangeles.com/media/facts-about-la> [<https://perma.cc/XDC5-L28K>].

131. *See* Dep’t of Fair Emp. and Hous. v. Activision Blizzard, No. 21STCV26571, 2021 WL 3109804, n.1 (D. Cal. Jul. 20, 2021).

132. *Employment Discrimination*, DFEH, <https://www.dfeh.ca.gov/employment/> [<https://perma.cc/6BGG-A9P4>].

133. *Id.*

134. *See* Day v. Sears Holdings Corp., 930 F. Supp. 2d 1146, 1179 (C.D. Cal. 2013).

135. *Id.* at 1176; CAL. GOV’T CODE § 12940(h).

An employer is held strictly liable for sexual harassment under FEHA by a *supervisory* employee.¹³⁶ However, if the perpetrator is a *nonsupervisory* employee, an employer is still liable “if the employer knew or should have known of the harassing conduct and failed to take immediate and appropriate corrective actions.”¹³⁷ Once the usual elements of negligence—(1) duty of care, (2) breach (either as a negligent act or omission), (3) causation, and (4) damages—are established, a plaintiff may sue her employer separately based on a nonsupervisory employee’s harassment.¹³⁸ One of the elements of a harassment claim pursuant to section 12940, subdivision (j)(1) is that the harassment be sufficiently severe or pervasive so as to alter the conditions of employment and create an abusive working environment.¹³⁹ An employer may also be held liable for refusing to hire or discriminating in terms of compensation or other aspects of employment on the basis of sex.¹⁴⁰

Despite California having the broadest employee protections, the fact that blatant gender discrimination in the video game workspace continues to plague women—as evidenced by the aforementioned lawsuits against Riot and Activision Blizzard, both of which are corporations domiciled in California¹⁴¹—are indeed baffling.¹⁴² It would be inaccurate, however, to claim the companies have not done *anything* to address the issue. In response to the public’s criticism over its lack of accountability, Riot published its own diversity and inclusion (D&I) annual report, also updating its company policies to promote diversity, inclusion, and culture.¹⁴³ According to Riot, the purpose of creating the D&I policy was “so that everyone can see that we are

136. State Dep’t of Health Serv. v. Super. Ct., 79 P.3d 556, 558 (2003).

137. See *Dickson v. Burke Williams, Inc.*, 184 Cal. Rptr. 3d 774, 779 n.7 (Cal. Ct. App. 2015).

138. See *id.* at 779.

139. See *id.*

140. CAL. GOV’T CODE § 12940(a).

141. See *Int’l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945) (holding that a state may exercise its laws [i.e., establish personal jurisdiction] over a corporation if the corporation’s principal place of business lies within the state, or if it has certain “minimum contacts” with the forum state, as long as the notions of justice and fairness are not violated).

142. See *supra*, Part III(B).

143. *Diversity & Inclusion*, RIOT GAMES, <http://www.riotgames.com/en/diversity-and-inclusion> [<http://perma.cc/DZX3-E9LM>].

backing up our words with actions and can keep track of our progress.”¹⁴⁴ Blizzard also hired a third-party auditor to investigate the company’s workplace D&I initiatives after the DFEH sued in 2021—although the public has noted that the hired auditor, WilmerHale, is notorious for “defending wealthy clients and lack of a track record in uncovering wrongdoing.”¹⁴⁵ Nevertheless, hostility against women in the video game workplace will persist unless greater, direct, and more active measures are taken to ensure accountability.¹⁴⁶

2. Stalking

Stalking is also a prominent problem. According to California Penal Code Section 646.9(a):

Any person who willfully, maliciously, and repeatedly follows or willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family is guilty of the crime of stalking, punishable by imprisonment in a county jail for not more than one year, or by a fine of not more than one thousand dollars (\$1,000), or by both that fine and imprisonment, or by imprisonment in the state prison.¹⁴⁷

Stalking (and by extension, cyberstalking¹⁴⁸) is a critical and well-documented issue in the video game industry, yet it has not garnered nearly as much attention as it deserves.¹⁴⁹ The California stalking statute—which is

144. *Id.*

145. Shannon Liao, *Activision Blizzard Employees File Unfair Labor Practice Suit Against Company*, WASH. POST (Sept. 14, 2021, 2:42 PM), <https://www.washingtonpost.com/video-games/2021/09/14/activision-blizzard-union-busting-nlr/> [<https://perma.cc/X6NW-98F4>]. It is also contended that WilmerHale is known for being anti-union. See *id.*

146. See *infra*, Part IV, for proposed reform and solutions.

147. CAL. PENAL CODE § 646.9(a).

148. *Online Harassment & Cyberstalking*, PRIV. RTS. CLEARINGHOUSE (Oct. 25, 2018) <http://privacyrights.org/consumer-guides/online-harassment-cyberstalking> [<http://perma.cc/8PMW-49Z4>] (when “[s]talkers . . . use the anonymity of the Internet to commit their crimes.”).

149. See Virginia Glaze, *SweetAnita, XChocobars & More Expose Police Inaction to Twitch Stalkers*, DEXERTO (Sept. 8, 2020, 1:04 PM), <https://www.dexerto.com/entertainment>

unfortunately similar to other stalking laws in the United States and even abroad—does virtually nothing to help distressed female gamers when they need it.¹⁵⁰ The problem is that what constitutes harassment for an individual may vary vastly depending on the circumstances and the person’s perception of what is acceptable social behavior. As a result, the enforcement of the penal code becomes a complex analysis, where courts must consider whether there is any validity to a defendant’s First Amendment defense, which he will doubtlessly raise in an attempt to argue his communications were not *intended to be* harassment or threatening (i.e., a “true” threat).¹⁵¹ Theoretically, the argument should fail because the statute does not require a true threat—only a credible one.¹⁵² A credible threat is defined by Section 646.9(g):

a threat *implied* by a pattern of conduct or a combination of verbal, written, or electronically communicated statements and conduct, made with the intent to place the person that is the target of the threat in reasonable fear for his or her safety or the safety of his or her family, and made with the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her family.¹⁵³

Courts employ a holistic approach to determining what a credible threat would be when balancing with First Amendment protections; in other words,

/sweetanita-xchocobars-more-expose-police-inaction-to-twitch-stalkers-1416467/ [https://perma.cc/8A6W-HSKC].

150. See generally *id.*; see also Sweet Anita (@sweetanita), TWITTER (July 14, 2020, 12:37 PM), <http://twitter.com/sweetanita/status/1283123358540935168?> [<http://perma.cc/PBR2-Z2DE>] (“If anything happens to me, I really hope that I’m the last canary in the coal mine. The law needs to change, No job should have such a high risk of rape, assault or death, especially not live streaming.”).

151. See *People v. Lopez*, 240 Cal. App. 4th 436, 447 (2015) (defendant of stalking case argued that “the only speech that can be excluded from First Amendment protection is a ‘true threat,’” further arguing expression should be protected as long as “it does not threaten the use of unlawful violence.”).

152. See CAL. PENAL CODE § 646.9(g).

153. *Id.*

the issue would be “whether the *combination* of all [defendant’s] communications, expressions and conduct did so.”¹⁵⁴

Furthermore, a credible threat need not be express and can be implied.¹⁵⁵ The plain meaning of harassment is also anticipated to be challenged by defendants in a stalking case.¹⁵⁶ Section 646.9(e) defines harassment as “engag[ing] in a knowing and willful *course of conduct* directed at a specific person that seriously alarms, annoys, torments, or terrorizes the person, and that serves no legitimate purpose.”¹⁵⁷ Thus, “[t]he absence of overt threats in [defendant’s] communications notwithstanding,” a course of conduct with an impliedly threatening nature qualifies as harassment.¹⁵⁸ All of these considerations combined should enable broad protection for victims of stalking—but it does not.¹⁵⁹

Time and time again, female content creators on Twitch, the leading platform for streamers in the world,¹⁶⁰ have revealed the inadequacies of the law when it came to abuse in the form of stalking.¹⁶¹ Streamers have a unique

154. *Lopez*, 240 Cal. App. 4th at 449.

155. *Id.*

156. *See id.* (defendant argued that to qualify for harassment, it was not enough to “just cause alarm, annoyance, torment or terror; it must communicate a willingness to resort to violence”). However, there is nothing in the statute to suggest actual violence is required for a defendant to be convicted of stalking. *See generally* CAL. PENAL CODE § 646.9.

157. CAL. PENAL CODE § 646.9(e) (emphasis added).

158. *Lopez*, 240 Cal. App. 4th at 453.

159. *Online Harassment & Cyberstalking*, *supra* note 148 (“Cyberstalking is difficult to combat because the stalker could be in another state or sitting three cubicles away from the victim. Online anonymity can make it difficult to verify a stalker’s identity, collect the necessary evidence for an arrest and then trace the cyberstalker to a physical location.”).

160. Imad Khan, *Why Twitch Is Still the King of Live Game Streaming*, N.Y. TIMES (Dec. 15, 2019), <https://www.nytimes.com/2019/12/15/business/tech-video-game-streaming-twitch.html> [<https://perma.cc/GPF7-8NZY>] (“Despite [other streaming platforms’] efforts to grab a larger slice of the video game streaming arena, none has made a dent in the power of the market leader, Twitch”; “The competition among tech giants and media companies also signals the importance of live streaming in the \$180 billion video game industry, which generates more revenue than movies and music. But in an era when established platforms tend to monopolize entire sectors, taking on Twitch has proved difficult.”).

161. However, the abuse goes far beyond mere stalking. Rather, these women are forced to endure abuse in various other forms. *See* Jesselyn Cook, *Female Twitch Streamers Spend Their Lives Online. Predators Are Watching.*, HUFFPOST (July 20, 2021, 5:45 AM), https://www.huffpost.com/entry/female-twitch-streamers-sexual-harassment_n_60e8ab3ee4b06dfc5e215f54

full-time job in which they interact with their viewers live, on average, 40 hours a week, and their main source of income consists of “subscriber donations, brand deals, merchandise . . . paid subscriptions and ad revenue.”¹⁶² Because a good chunk of streamer revenue comes from the viewers in the form of subscriptions and donations, sometimes the audience—predominantly male in the case of female streamers—feels entitled to the streamer’s affection.¹⁶³ In extreme cases, the audience members may fantasize that they are in a one-sided romantic relationship with the streamer, and express anger when their advances are rebuffed or unreturned.¹⁶⁴

An example concerns Janet “xChocoBars” Rose, a California streamer who endured abuse from her stalker for two years.¹⁶⁵ The police—and the law—allegedly did nothing to relieve Rose’s anxiety and fear regarding her stalker.¹⁶⁶ In an interview hosted by Sweet Anita, who wanted to help expose the issue of police inaction and the prevalent issue of stalking for female content creators, Rose commented: “I’ve given up a long time ago. I think I

[<https://archive.is/3QFzS>] (“[W]hen it comes to streaming on Twitch, women are exceptionally vulnerable to this kind of abuse, which has become normalized as an intrinsic part of their experience both on- and off-platform, regardless of the nature of their content. Most all women who earn a living on Twitch know what it’s like to have male viewers who, after spending countless hours watching them in real time, develop obsessive feelings of romantic and sexual entitlement. The result is an environment where extreme harassment, rape and death threats, blackmailing, stalking and worse have become regular workplace hazards.”). Although this example focuses on female streamers, the concerns affiliated with stalking still apply with pertinent force to women in the gaming world generally. For more information, *see supra*, Part II (discussing the culture of incels, which applies with vehement force against gaming women).

162. Cook, *supra* note 161.

163. *See supra*, note 38 (defining the concept of incels); *see also* Tolentino, *supra* note 51 (“What incels want is extremely limited and specific: they want unattractive, uncouth, and unpleasant misogynists to be able to have sex on demand with young, beautiful women. They believe that this is a natural right.”).

164. Cook, *supra* note 161 (“Most all women who earn a living on Twitch know what it is like to have male viewers who, after spending countless hours watching them in real time, develop obsessive feelings of romantic and sexual entitlement. The result is an environment where extreme harassment, rape and death threats, blackmailing, stalking and worse have become regular workplace hazards . . . signing up for a torrent of endless, dehumanizing harassment with little to no recourse.”).

165. Glaze, *supra* note 149.

166. *Id.*

gave up when the police or the authorities said they couldn't do much. That's who's supposed to protect us, you know?"¹⁶⁷

The problem stems from the blanket of anonymity that the Internet provides.¹⁶⁸ Where the law does not adequately protect women, the video game industry can step in to address and remedy the issues by implementing stricter policies to punish stalkers and prevent women from being harmed. For instance, social media and streaming platforms such as Twitter and YouTube Gaming can filter out hateful or obsessive comments, and when a user reports a stalker, permanently ban the perpetrator from returning to the platform. In addition, because the stalkers have a high likelihood of continuing their harassment by creating a new account and returning to the platform, these platforms must increase their vigilance in protecting victims by monitoring and continually banning these new accounts. Rather than leaving the victims to fend for themselves and live in constant fear for their safety, these platforms should take action to combat stalking.

Unfortunately, when victims report stalkers to the corresponding online platforms, it is not uncommon for their concerns to be downplayed "as an overreaction" or to be victim-blamed.¹⁶⁹ This is more likely to occur if the victim is a woman; in other words, a minority.¹⁷⁰ For content creators specifically, streaming platforms can and should rally to support women by

167. *Id.*; LG xChocoBars (@xChocoBars), TWITTER (Aug. 24, 2020, 4:47 PM), https://twitter.com/xChocoBars/status/1298044265071693824?ref_src=twsrc%5Etfw%7Ctw-camp%5Etweetembed%7Ctwterm%5E1298044265071693824%7Ctwgr%5E%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fwww.dexert_o.com%2Fentertainment%2Fsweetanita-xchocobars-more-expose-police-inaction-to-twitch-stalkers-1416467%2F [https://perma.cc/4RBN-67VT] ("I often think about how I will prob die by the hands of my stalker and no one can do anything about it until it really happens . . . but if it does happen I hope my death will mean something and help protect other creators from similar situations.").

168. A psychologist expert in stalking cases, Dr. Darrell Turner, explained that "[M]ost often[,] men[] are predisposed to this type of [stalking] behavior . . . Prior to the internet, the majority of these individuals may have had the urge to do this, but they were inhibited by the risk of getting caught. . . . The internet has almost completely eliminated that risk, making it incredibly easy and safe for them to do this and get away with it." He further noted that "because stalkers often conceal their identities and can be anyone from anywhere, it's particularly tricky for local law enforcement to handle." Lindsay Dodgson, *Twitch Streamers Are Sharing Their Stories of Violent Stalkers to Spread Awareness of How to Seek Help*, INSIDER (Sept. 18, 2020, 10:39 AM), <https://www.insider.com/twitch-streamers-are-being-stalked-and-harassed-online-2020-9> [https://perma.cc/7Y3U-U4EN].

169. *Id.*

170. *Id.* (noting that minorities—particularly women—are impacted disproportionately and are more subject to victim-blaming when they report stalking).

permanently banning viewers who are flagged for offensive comments or actions, which can in turn discourage stalkers from pursuing their nefarious agenda.

According to Twitch’s Transparency Report, which includes an explanation of its community guidelines and a multi-layered approach to combat harassment including stalking, “[user] [r]eports are prioritized so that the most harmful behavior can be dealt with most quickly.”¹⁷¹ However, the Transparency Report fails to clarify what it deems to be the most harmful behavior, and similarly fails to specify a time frame during which these user reports will be answered. Instead, Twitch emphasizes that due to its “ephemeral” nature as a live-streaming service, its protections to streamers are limited, and it encourages content creators to employ community moderators (known as “mods”) to regulate and filter out harmful viewers.¹⁷² While it is understandably difficult for platforms like Twitch to balance between protecting users’ privacy and freedom of speech at the same time, they must nevertheless strive to do better.

Both aspects of the law that ultimately fail to protect women—whether in the regular employment context or as applied to professional women in the video game industry—must change. Although it is unlikely that the language of the law will be amended to overcome its limitations, there are other steps agencies in the video game world can take to rectify the issue of hostility against women, as explained above.

IV. DIFFERENT LEGAL TREATMENTS; PROPOSED REFORM AND SOLUTIONS

A commentary on what other countries besides the United States are purportedly doing to address the issues, along with proposed reform and solutions that address the dual concerns of humanitarianism and practicality, are delineated below.

A. Other Countries’ Approach: Imposing Legal Limits to Young Gamer Audience Via Government Regulation

South Korea and China have fueled controversy by mandating limitations upon the gaming audience “to regulate the gaming habits of youth or

171. *Transparency Report*, TWITCH, https://safety.twitch.tv/s/article/Transparency-Reports?language=en_US [<https://archive.is/xUbH1>].

172. *Id.*

pressure gaming companies to include features that deter gaming addiction.”¹⁷³ Those countries do so by requiring minors to “register and verify their identity” and restricting the time periods in which minors may play video games at all.¹⁷⁴ China is more restrictive than South Korea; it also “regulate[s] gaming content and internet access for youths.”¹⁷⁵ By doing so, the countries’ governments presumably believe they are protecting male youths from developing gaming addiction and, indeed, potentially inhibiting the formation of incel behavior during one’s most formative years.

However, not only will government regulation bring troublesome clashes with First Amendment principles—it simply will not stand as a business model in a major capitalist society as the United States. Additionally, with the present technological development, minors may even be incentivized to resort to identity theft or look for alternate illegal ways to sidestep the regulation.¹⁷⁶ Thus, this is the least preferred and least realistic approach.

B. Current DE&I Measures Are Not Enough; Increase Awareness and Implement a Systemic Solution

The International Esports Federation (ISEF), “the international body that governs [esports] across the globe,” has a Statute which “acknowledges gender inclusion as an important aim.”¹⁷⁷ It notes that its “[m]embers and partners” should take “appropriate measures to eliminate discrimination [against women].”¹⁷⁸ However, because the language of the Statute is vague and *does not specifically prohibit discriminatory behavior against women*, nor does it specifically advocate for women inclusion, this effort is nowhere near enough.

Moreover, even if gaming companies have slowly begun publicly acknowledging the need for inclusivity by publishing DE&I initiatives and policies, they need to follow through with those initiatives and policies. In other

173. Fu, *supra* note 17, at 6.

174. *Id.*

175. *Id.*

176. *Id.*

177. Kruthika N. S., *Esports and Its Reinforcement of Gender Divides*, 30 MARQ. SPORTS L. REV. 347, 348–49 (2020).

178. *Id.* at 349.

words, adherence will be key. For instance, as previously mentioned, Riot attempted to respond to the allegations of gender discrimination by publishing its D&I initiatives and policies on its website and issuing an annual report to appease the public.¹⁷⁹ According to Riot's 2021 D&I report, "24% of Riot staff globally were women in 2020," in contrast to 22% in 2019.¹⁸⁰ Although the effort is there, a measly 2% increase should not be considered a successful endeavor. And in fact, in terms of new hires for women, the statistic *decreased* from 32% in 2019 to 28% in 2020.¹⁸¹ Similar to the ISEF, there is also no stated specific prohibition against discrimination against women anywhere on the website or report. Although not required, it is more meaningful for companies to publish such a prohibition on their website to indicate its transparency and adherence to the law, as well as their commitment to inclusivity.

Like Riot, Blizzard's D&I policy is similarly listed on its website,¹⁸² although Blizzard does not publish an annual report providing statistics of the policy implementation. Posted in 2017, it is curious that the company that claims to be "proud" of "be[ing] recognized for [their] efforts, including being named one of the 'Best Places to Work for LGBTQ Equality' by the Human Rights Campaign Foundation's Corporate Equality Index in 2019 and 2020,"¹⁸³ is so averse to championing women's rights in its work environment. Here, there are neither specific prohibitions against discrimination against women, nor any mention of fostering inclusivity values for women in Blizzard's workplace.¹⁸⁴

179. *See supra*, Part III.

180. Marie Dealessandri, *Riot Games Diversity Figures Slowly Inching Up*, GAMESINDUSTRY (Sept. 10, 2021), <https://www.gamesindustry.biz/articles/2021-09-10-riot-games-diversity-figures-slowly-inching-up> [<https://perma.cc/ZHR4-8W75>].

181. *Id.*

182. *See generally Diversity, Equity & Inclusion*, ACTIVISION BLIZZARD, <https://www.activisionblizzard.com/content/atvi/activisionblizzard/ab-touchui/ab/web/en/diversity-inclusion.html> [<https://perma.cc/XST3-UZGF>].

183. *Id.*

184. Although Blizzard's DE&I website page does mention its investment into programs and scholarships that aim to benefit women who are interested in coding and "gaining exposure to careers in tech," this does *not* equate to issuing a blanket inclusivity statement accepting women as equals in terms of the company's general employment values. *Id.*

One gaming company, however, has paved the way as a positive example for others. Evil Geniuses (EG), an esports organization that competes in leagues for *LoL*, *WoW* and *VALORANT*, acquired Nicole LaPointe Jameson, a Forbes “30 Under 30” recipient who established herself as a young female Chief Executive Officer with a vision to change things up. LaPointe Jameson partnered with YouGov, “a global market research and data company,” to publish studies dedicated to “better understand and build an action plan to address toxicity in the gaming industry.”¹⁸⁵ In her executive summary of the published paper, LaPointe Jameson wrote:

[W]e haven’t left all the dark places behind [in the video game world]. Toxic behaviors like bullying, shaming, and discriminatory language still pervade our industry. Some gamers think it’s getting worse. Our mission . . . is to bring together diverse talent for elite gaming performance . . .

Now, we’re sharing what we found and what we’re doing. We hope this helps fuel the fire of conversations already happening in boardrooms and bedrooms. . . . **We’re not pretending this is the solution. It’s just a start. But together, this is work we can finish.**¹⁸⁶

EG’s acknowledgment that there is no easy solution, coupled with the call for cohesive action to everyone in the industry, demonstrate its willingness to handle toxicity against women pragmatically—by tackling a systemic issue with a systemic solution. Such an approach will increase awareness as well as spread a positive message to the gaming community that this is a solvable problem.

Like EG, game companies can invest in community management strategies to improve DE&I awareness. For example, league operators like Riot and Blizzard can establish an agency similar to the Fair Play Alliance, “a coalition working to address harassment and discrimination in gaming”; by blocking and banning bullies from returning to popular streaming websites permanently; or by normalizing communication via “institut[ing] ‘ping’ systems, where players can communicate essential game information rapidly,

185. Evil Geniuses & YouGov, *Gaming for All: A Study of Toxicity and Plans for Inclusivity* 3, https://assets.evilgeniuses.gg/dei/EG_YouGov_GamingForAll.pdf [<https://perma.cc/S5CA-8K2G>].

186. *Id.* at 5.

without requiring voice.”¹⁸⁷ Furthermore, community-managed systems of review, such as *LoL*’s “Tribunal” system in the past, once allowed peer-review of discrimination reports,¹⁸⁸ and this is a decent idea that should be further explored.

In the employment context, there are three suggested strategies. First, internal bias training is critical. People are reluctant to admit they are biased, so the training must be continually revisited, instead of just being a check-box implementation. Second, companies should *hire, retain, and promote* diverse candidates. This is vastly important. Leadership should be more involved in the process, and not be disconnected from the marginalized. The industry in general—even the legal industry, admittedly—has largely failed to recognize how to hire, retain, and promote women, or people who are just “different.” Perhaps the hiring process needs to be changed as a whole, to improve retaining and promoting. While hiring women is more common now, overall improvements are needed in retaining and promoting women.

Third, game companies should invest in and establish an employee resource group for women and their allies to meet and voice concerns and work with leadership to prevent creating a hostile situation in an employment setting. The group would function as an informal union but also as a support group, which would be greatly beneficial for employees to feel they have a voice and that they are not alone. The personnel in charge of running the group should be a neutral third party, like an ombudsman, who could act independently of the company so there are no conflicts of interest and the employees’ concerns could be properly raised in a safe environment without fear of retaliation.

C. Game Developers Should Increase Representation of Marginalized Groups, Especially Including Women, in a Way that Does Not Encourage Sexist or Incel Behavior

Because sexism in the video game industry is not altogether inherent,¹⁸⁹ game developers have a responsibility to ensure they do not contribute to the problem in two ways: (1) by underrepresenting marginalized women or (2) by overemphasizing gender in a negative way.

187. Cote, *supra* note 37.

188. *Id.*

189. *Supra*, Part II.

First, game developers must be more inclusive of women as video game protagonists, but not in a way that jeopardizes the task at hand through the imposition of a gender stereotype. For instance, the “damsel-in-distress” archetype is overused in video games, and one need not consider further than the classic Mario and Princess Peach dynamic.¹⁹⁰ Instead, game developers should create more female protagonists like Aloy in *Horizon: Zero Dawn*, a bright scientist-warrior whose tale of adventure does not involve hyper-sexualization.¹⁹¹

Second, game developers should not hypersexualize female bodies when including female characters in video games. As mentioned above, when female characters are sexually depicted or when their bodies are abnormally enhanced, it results in women having self esteem issues, and both men and women become more accepting of rape myth attitudes.¹⁹² A common example is *Tomb Raider*’s Lara Croft, the adventure-seeking, Indiana Jones equivalent female protagonist who made her debut to the gaming world with abnormally proportioned breasts (but no hat or rope).¹⁹³

Another example is *Catherine*, a role-playing game published by game developer Atlus in 2011.¹⁹⁴ *Catherine* received positive reviews, one of which boasted it was “a game for anyone who’s ever feared commitment, dreaded aging, felt their heart stray, dealt with a pregnancy scare, spent long booze-soaked hours commiserating with pals at the local dive bar, or simply questioned the direction their life is going as they close in on middle age.”¹⁹⁵ However,

[T]he game doesn’t confront these issues [of sexism] so much as half-ironically drown in them. Vincent [male protagonist], and the game itself, are soaked in insecurity, indecision, stupidity, and

190. McMahon, *supra* note 38.

191. *See infra*, Exhibit B.

192. *Supra*, Part II; Fox et al., *supra* note 70, at 931.

193. *See infra*, Exhibit A.

194. David Auerbach, *The Most Sexist Video Game of All Time?*, SLATE (July 24, 2014, 12:43 PM), <https://slate.com/technology/2014/07/catherine-video-game-the-most-sexist-platformer-of-all-time.html> [https://perma.cc/L495-4LV8].

195. *Id.*

above all, fear: fear of commitment, fear of children, fear of sex, and above all, fear of women.¹⁹⁶

The problem with *Catherine* is that the game forces the player (via Vincent) to choose between staying with the boring office worker girlfriend, who has been hinting she wants to get married because she might be pregnant with his child, or with a young, promiscuous succubus—revealed to be an *actual* demon succubus later in the game—who promises him sex with no strings attached. The game’s plot, which is mostly linear (meaning the player does not have much of a say in how the game ends, except one critical choice at the end—choosing the girlfriend or the succubus as your partner), involves Vincent ultimately cheating. To make matters worse, Vincent claims he remembers nothing and reassures himself, “But I didn’t make a move. She forced herself on me!”¹⁹⁷ By forcing the player to “choose between becoming Han Solo [choosing the succubus] or Homer Simpson [choosing the girlfriend],”¹⁹⁸ Atlus in essence normalized the culture of misogyny by limiting the women’s roles in the game to either one or the other. The remaining options in the game’s conclusion are to be a loner in space or, if the player can “beat the super-hard master level, the game’s narrator, goddess of love Ishtar, turns you into a god and has sex with you.”¹⁹⁹

A good example of a game developer attempting to address the issue of hyper-sexualization is *The Last of Us Part II*, a valiant but underappreciated effort. The game vastly includes representation of marginalized characters—“Ellie,” the hardhearted main protagonist who identifies as a lesbian; “Abby,” a strong female co-protagonist with a “manly” physique; and “Lev,” a transgender male ousted by members of his community in his religious cult for failing to follow their “tradition” of heterosexuality. The latter two characters received substantial hate even prior to the game’s release, “enrag[ing] an ugly, intolerant subsection of geek culture, characteri[z]ed by its unfortunate tendency to go absolutely feral when it doesn’t like something.”²⁰⁰

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. Sam Clench, *The Last of Us Part 2: Why the Hate for Its Story and Ending Is so Wrong*, NEWS.COM.AU (July 10, 2020, 8:25 AM) <https://www.news.com.au/technology/home->

Laura Bailey, the voice actress for Abby, was harassed with hateful speech, even though Abby was not modeled after her—her only sin was affiliation with the riveting character.²⁰¹ Game writers Neil Druckmann and Hailey Gross revealed their email inbox sampling from fans,²⁰² which offered a horrific glimpse into how deep-rooted the issue of misogyny and general hate for marginalized groups still persisted in the modern day. Although this is an unfortunate public response, *The Last of Us Part II* launched the video game industry into action as the game gained notoriety for its “progressive political ‘agenda,’”²⁰³ with more and more people speaking out against the toxic attitudes against women in the video game culture.

V. CONCLUSION

Research rooted in psychology suggests both social and evolutionary factors influence misogynistic behavior in male gamers, which manifests in the dominant “bro/frat culture” in the gaming industry. For instance, the so-called cultural norm that women belong in the kitchen furthers the presumptive stereotype that because they like cooking, they are bad at video games. Meanwhile, males’ evolutionary instinct to maintain a social hierarchy to increase their chances of finding mates is threatened when females enter the gaming world, causing them to feel territorial and react negatively, resulting in gender discrimination and harassment.

The future of women in the video game universe remains brittle because there are little to no industry-wide protections. Two major video game developing companies in the world, Riot and Activision Blizzard, are embroiled in gender discrimination cases, demonstrating that workplace inclusion initiatives for women are unsuccessful. Moreover, female esports players and content creators must face the harsh reality that success comes at a high cost—when faced with sexual abuse from the online community, their options are currently limited to either “dealing with it” or quitting the industry.

The video game industry should increase efforts to be more inclusive of women and openly reject the culture of misogyny by taking concrete steps

entertainment/gaming/the-last-of-us-part-2-why-the-hate-for-its-story-and-ending-is-so-wrong/news-story/3a1a767cd86d484b3f40203cd4f9ab64 [https://perma.cc/HBP4-G84E].

201. *Id.*

202. *Id.*

203. *Id.*

to change perceptions from within. This is critical because the consumer population consists of both males and females; yet based on the inaction of the industry, game developers are essentially sending the message to the male gamers that they are the only consumers that matter. By continuing to produce video games full of abhorrent gender stereotypes and failing to represent women positively, game developers are complicit in furthering the toxic frat culture and thus share some of the responsibility for the industry's degradation. True, males will continue to purchase their games, but perhaps it is time for the industry to care more about society's welfare and less about profit, though this is admittedly a tall order.

To properly address the issue of gender discrimination, we must come to terms with how the legal system does not sufficiently protect women. At the very least, California's current statutory protections are ineffective, as illustrated by the streamers and stalking example. Solutions include peer-reviewed committee actions and perhaps limiting early adolescent exposure to video games that reinforce systemic toxicity against women. Game developers also need to reinforce the idea that marginalized groups exist in reality by depicting them more commonly in games.

EXHIBIT A



EXHIBIT B

