

Title IX, Esports, and #EToo

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ABSTRACT

As colleges and universities increasingly award video gaming scholarships, field competitive esports teams, construct esports arenas in the centers of campuses, and promote student interaction through gaming, schools should anticipate the sexual cyberviolence, harassment, and technology-enabled abuse that commonly occur through gaming.

This Article is the first to examine Title IX and First Amendment implications of schools promoting and sponsoring gaming. To date, the rare Title IX discussion concerning esports has focused on increasing female representation in this male-dominated realm. As campuses invest heavily in esports, they also should foresee that funding and promoting esports—without attending to gender-based harassment and sexual violence in games and gaming—could lead to concerns that college campuses and organizational climates signal tolerance of sexual harassment and create “chilly” climates conducive to underreporting and retaliation. Colleges instead could lead in creating safe and inclusive gaming experiences.

Esports is one of the fastest growing competitive markets in the world, and the gaming industry is repeating past mistakes of professional sports leagues like the National Football League, as demonstrated through the summer 2020 outpouring of allegations of gender-based harassment, discrimination, and sexual assault from competitive gamers and streamers. Rather than waiting for a global #EToo movement to create demand for a comprehensive gender-based violence policy, colleges should affirmatively act to create responsible gaming initiatives with goals of violence prevention, player protection, and harm minimization.

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INTRODUCTION

“[S]exual harassment is part of [the] culture,”¹ an esports coach said in defense of his in-game harassment of a female player on his team.² “Try being a girl on Xbox live,” one female player said of her experience in gaming.³ “My gender is set to M because otherwise I get people sending me [pornography].”⁴

¹ Amy O’Leary, *In Virtual Play, Sex Harassment Is All Too Real*, N.Y. TIMES (Aug. 1, 2012), <https://archive.nytimes.com/www.nytimes.com/2012/08/02/us/sexual-harassment-in-online-gaming-stirs-anger.html> [https://perma.cc/9QY7-MZJS] (quoting esports coach Aris Bakhtani-ans, as captured in a video recording from a 2012 competitive gaming tournament).

² See *id.* (observing that over six days of the competitive gaming tournament, the coach interrogated a player on his team on camera about her bra size, said “take off your shirt,” and “focused the team’s webcam on her chest” and other body parts); see also *Online Harassment Gets Real for Female Gamers*, NPR (Aug. 8, 2012, 1:00 PM), <https://www.npr.org/2012/08/08/158433079/virtual-harassment-gets-real-for-female-gamers> [https://perma.cc/D4UD-74WM] (stating that “[t]aunting and trash-talking are a regular part of the culture for online video gamers” and harassment directed at female gamers is particularly concerning).

³ Oliver Moore, *Woman’s Call to End Video Game Misogyny Sparks Vicious Online Attacks*, GLOBE & MAIL (July 11, 2012), <https://www.theglobeandmail.com/news/world/womans-call-to-end-video-game-misogyny-sparks-vicious-online-attacks/article4405585/> [https://perma.cc/GF6S-MDHK].

⁴ *Id.*

With COVID-19 necessitating physical distancing, our lives moved online, making gaming and esports⁵—and corresponding technology-enabled abuse, sexual cyberviolence, and harassment⁶—more relevant and prevalent than ever before.

Nearly all youth game. Although white males “dominate” professional and scholastic-based esports nationwide⁷ and more males than females identify as “gamers,”⁸ ninety-seven percent of teenagers in America play video games⁹ across socioeconomic status, sexual orien-

⁵ Electronic sports are more colloquially called “esports” and include a wide range of organized and competitive video game tournaments. John T. Holden, Marc Edelman & Thomas A. Baker III, *A Short Treatise on Esports and the Law: How America Regulates its Next National Pastime*, 2020 U. ILL. L. REV. 509, 511.

⁶ Technology-enabled abuse includes online harassment while playing video games, sexual assault through avatars, pressure to share passwords, the nonconsensual dissemination of intimate photographs, and stalking through technology.

⁷ Matt Zalaznick, *How Higher Ed Is Shaping the Business of Esports*, UNIV. BUS. (Nov. 21, 2019), <https://universitybusiness.com/colleges-shape-esports-business-management-degree-programs/> [<https://perma.cc/8LGD-SRN7>]; Stefanie Fogel, *Esports Is Getting Bigger Every Year—So Where Are All the Women?*, VARIETY (Nov. 1, 2018, 12:30 PM), <https://variety.com/2018/gaming/features/women-in-esports-1203016379/> [<https://perma.cc/FR3F-YDQ7>].

⁸ See Vasilis Stavropoulos, Baxter L.M. Adams, Charlotte L. Beard, Emma Dumble, Steven Trawley, Rapson Gomez & Halley M. Pontes, *Associations Between Attention Deficit Hyperactivity and Internet Gaming Disorder Symptoms: Is There Consistency Across Types of Symptoms, Gender and Countries?*, 9 ADDICTIVE BEHAV. REPS., June 2019, at 1, 3 (noting that gaming content is more “directed to males,” and finding that more college males than college females play video games and game for longer periods of time, while females spend more time on social media than gaming); GLOBALWEBINDEX, ESPORTS TRENDS REPORT 3 (2018), <https://cdn2.hubspot.net/hubfs/304927/Downloads/Esports-report.pdf?t=1528372092399> [<https://perma.cc/CFK6-R36V>] (reporting that seventy-one percent of esports fans identify as male); Associated Press, *Women in Professional Esports Navigate Hyper Masculinity and Harassment*, MKT. WATCH (Jan. 3, 2019, 11:43 AM), <https://www.marketwatch.com/story/women-in-professional-esports-navigate-hyper-masculinity-and-harassment-2019-01-03> [<https://perma.cc/P729-42ZA>] (noting that forty-five percent of gamers are female, albeit few females reach the highest level of play); Mark D. Griffiths, Mark N.O. Davies & Darren Chappell, *Breaking the Stereotype: The Case of Online Gaming*, 6 CYBERPSYCHOLOGY & BEHAV. 81, 86 (2003) (studying fan sites and finding that eighty-five percent of gamers on Everlore and Allakhazam are male).

⁹ AMANDA LENHART, JOSEPH KAHNE, ELLEN MIDDAGH, ALEXANDRA RANKIN MACGILL, CHRIS EVANS & JESSICA VITEK, PEW INTERNET & AM. LIFE PROJECT, TEENS, VIDEO GAMES, AND CIVICS 8 (2008), <https://files.eric.ed.gov/fulltext/ED525058.pdf> [<https://perma.cc/Y9GZ-7Y8T>]; see also NPD GRP., INC., EVOLUTION OF ENTERTAINMENT STUDY 5 (2019), <https://s3-us-east-2.amazonaws.com/igda-website/wp-content/uploads/2019/10/16161928/NPD-2019-Evolution-of-Entertainment-Whitepaper.pdf> [<https://perma.cc/Q7HK-JUVD>] (concluding that seventy-three percent of people in the United States over the age of two play video games); Andrew Perrin, *5 Facts About Americans and Video Games*, PEW RSCH. CTR.: FACT TANK (Sept. 17, 2018), <https://www.pewresearch.org/fact-tank/2018/09/17/5-facts-about-americans-and-video-games/> [<https://perma.cc/E3RW-YFLN>] (finding that eighty-four percent of teenagers “have a game console at home or have access to one,” and even higher rates have access to video games on cellular phones or computers).

tation, and racial, ethnic, and gender identities.¹⁰ Further, nearly sixty percent of college students self-identify as “gamers.”¹¹ Following school closures and stay-at-home directives during the COVID-19 pandemic,¹² gaming usage increased by seventy-five percent.¹³ High levels of gaming are expected to continue once life returns to greater normalcy because, during the quarantine period, “[e]sports has [become] forever popularized.”¹⁴

Gaming is not just a youth pastime, but is increasingly recognized as a high school, collegiate, and professional sport. For example, the National Federation of State High School Associations has recommended that high schools adopt esports programs to accompany their soccer, baseball, debate, and other after-school athletics and activi-

¹⁰ Men of color play video games at high rates as well, and experience significant interpersonal racialized violence, both through structural racism in game design and as recipients of blatant hate speech. KISHONNA L. GRAY, *RACE, GENDER, AND DEVIANCE IN XBOX LIVE*, at xvii (Victor E. Kappeler ed., 2014) (discussing the sexist, racist, homophobic, and violent communications that exist during gaming); Lisa Nakamura, *Gender and Race in the Gaming World, in SOCIETY AND THE INTERNET* 127, 127 (Mark Graham & William Dutton eds., 2d ed. 2019) (noting that despite the large numbers of girls and women who play video games, including multiplayer competitive games, video games are “still perceived as a ‘boys’ club,” and the cultural domain of young white men”); Stephanie M. Ortiz, “*You Can Say I Got Desensitized to It*”: *How Men of Color Cope with Everyday Racism in Online Gaming*, 62 *SOCIO. PERSPS.* 572, 577 (2019) (“Racist trash talk is a regular feature of Xbox Live, heard from the moment respondents began playing.”).

¹¹ Jeffrey A. Stone, *Self-Identification as a “Gamer” Among College Students: Influencing Factors and Perceived Characteristics*, 21 *NEW MEDIA & SOC’Y* 2607, 2614 (2019).

¹² Jennifer Kates, Josh Michaud & Jennifer Tolbert, *Stay-At-Home Order to Fight COVID-19 in the United States: The Risks of a Scattershot Approach*, KAISER FAM. FOUND. (Apr. 5, 2020), <https://www.kff.org/coronavirus-policy-watch/stay-at-home-orders-to-fight-covid19/> [https://perma.cc/37SS-SB62].

¹³ Patrick Shanley, *Gaming Usage Up 75 Percent Amid Coronavirus Outbreak, Verizon Reports*, HOLLYWOOD REP. (Mar. 17, 2020, 4:23 PM), <https://www.hollywoodreporter.com/news/gaming-usage-up-75-percent-coronavirus-outbreak-verizon-reports-1285140> [https://perma.cc/PQ8S-B2H7]; see also Eustance Huang, *Sales of Video Games Soar as the Coronavirus Leaves Millions Trapped in Their Homes*, CNBC (Apr. 3, 2020, 3:35 AM), <https://www.cnbc.com/2020/04/03/video-games-sales-soar-as-coronavirus-leaves-millions-trapped-at-home.html> [https://perma.cc/K4HG-WRQK] (reporting that consumers in March 2020, mid-coronavirus, “spent around 65% more on video games compared to the same period [the prior] year”); Noah Smith, *The Giants of the Video Game Industry Have Thrived in the Pandemic. Can the Success Continue?*, WASH. POST (May 12, 2020, 4:38 PM), <https://www.washingtonpost.com/video-games/2020/05/12/video-game-industry-coronavirus/> [https://perma.cc/B8YV-FUM9] (“Twitch, the most popular video game streaming platform, saw 1.49 billion gaming hours watched in April [2020]—a 50% increase since March [2020] . . . [I]n April [2020] alone, players racked up a combined 3.2 billion hours [in Epic Games’s *Fortnite*].”).

¹⁴ Smith, *supra* note 13 (describing how during COVID-19, an influx of sponsors purchased advertising time for esports, especially due to the lack of live sports, which elevated the visibility of esports).

ties.¹⁵ Similar to other high school programs, esports involves organized competition. The world of competitive organized video gaming includes competitors from different leagues or teams facing off in the same games that are popular with at-home gamers, including *Fortnite*, *League of Legends*, *Counter-Strike*, *Call of Duty*, and *Overwatch*.¹⁶ Massively Multiplayer Online (“MMO”) games, such as *EverQuest*, *Fortnite*, *World of Warcraft*, and *Minecraft*, enable a large number of people to play the same game within the same session without having physical proximity, encouraging online social interaction and communication as players pursue goals in three-dimensional space.¹⁷ Esports readily accommodates physical distancing and is flourishing in the digital age, COVID-19 context, and beyond.

Colleges are awarding scholarships,¹⁸ granting degrees,¹⁹ fielding traveling esports teams, organizing gaming clubs, and building state-

¹⁵ Sarah E. Needleman, *Are High-School Esports the Next Friday Night Lights?*, WALL ST. J. (Apr. 19, 2018, 2:55 PM), <https://www.wsj.com/articles/are-high-school-esports-the-next-friday-night-lights-1524162330> [https://perma.cc/ED97-DJBQ] (identifying that esports programs teach students strategic thinking and team-play skills while costing less than traditional sports).

¹⁶ AJ Willingham, *What Is Esports? A Look at an Explosive Billion-Dollar Industry*, CNN (Aug. 27, 2018, 2:18 PM), <https://www.cnn.com/2018/08/27/us/esports-what-is-video-game-professional-league-madden-trnd/index.html> [https://perma.cc/U3PJ-AD5D]. Esports law is considered “an amalgamation of multiple disciplines—labor and employment, contracts, endorsements, sponsorships, intellectual property,” gaming, and more. Shelby White, *Game of Laws: McNees Launches Esports Practice Group*, CENT. PENN. BUS. J. (July 10, 2018, 3:00 AM), <https://www.cpbj.com/game-of-laws-mcnees-launches-esports-practice-group/> [https://perma.cc/P6QF-D5Z6]. Sheppard Mullin recently announced its esports practice group, focused on labor and employment issues with about twenty attorneys, and other firms are expected to also create esports practices. *Sheppard Mullin Creates Opportunities for Esports Stakeholders and Launches a Dedicated Esports Team*, SHEPPARD MULLIN (Feb. 19, 2019), <https://www.sheppardmullin.com/pressrelease-548> [https://perma.cc/WBQ6-AHT2].

¹⁷ See Dmitri Williams, Nicolas Ducheneaut, Li Xiong Yuanyuan Zhang, Nick Yee & Eric Nickell, *From Tree House to Barracks: The Social Life of Guilds in World of Warcraft*, 1 GAMES & CULTURE 338, 347, 351 (2006); Stavropoulos et al., *supra* note 8, at 1; *see also* Robert Earl Wells III, *What Is an MMO?* LIFEWIRE (Apr. 7, 2021), <https://www.lifewire.com/what-is-an-mmo-4687003> [https://perma.cc/9JHF-WJ4W]. Sports games and racing, shooting, fighting, puzzle, simulation, and role-playing games are generally available in single-player and multiplayer formats for cooperative and competitive play, lending to socialization. Christian M. Jones, Laura Scholes, Daniel Johnson, Mary Katsikitis & Michelle Colder Carras, *Gaming Well: Links Between Videogames and Flourishing Mental Health*, 5 FRONTIERS PSYCH. 1, 5 (2014).

¹⁸ Jeremy Bauer-Wolf, *Video Games: Entertainment or Sports?*, INSIDE HIGHER ED (Feb. 12, 2019), <https://www.insidehighered.com/news/2019/02/12/new-frontier-college-athletics-video-games> [https://perma.cc/4QXQ-QYBW] (identifying that nearly \$15 million in scholarships for esports were awarded for the 2018–2019 academic year); Needleman, *supra* note 15 (“More than 475 colleges and universities support esports at a club level, and approximately 50 schools offer scholarships in esports, according to the NCAA.”).

¹⁹ Zalaznick, *supra* note 7 (describing multiple colleges and universities that offer esports-management degree programs covering facets of the business ranging from “game design, business management and computer infrastructure to livestreaming and finance,” and noting that

of-the-art esports arenas at the centers of campuses equipped with gear and gaming chairs.²⁰ Before the pandemic erupted, esports was heralded for its ability to provide a “focal point for campus activity” and broadly enhance campus life and school spirit.²¹ As colleges seek to build and maintain a sense of community among students, they are investing in esports programs to attract students, given the “direct correlation between having an esports program and students wanting to come to your school,” even while tightening other areas of the budget during the economic downturn.²² While operating remotely during COVID-19, colleges constructed esports arenas,²³ promoted student interaction by offering free intramural gaming leagues,²⁴ hosted virtual esports bootcamps,²⁵ and outfitted team members at home with equipment to remotely compete in national esports tournaments.²⁶

The gender and racial composition of esports players has implications for all online gamers. Professional esports is ninety-five percent male,²⁷ esports scholarships and team memberships have mostly been

Hampton University in Virginia hopes “to become the first historically black college . . . to develop an esports curriculum”); Alexis Shaw, *The Ohio State University Launches First-of-its-Kind Comprehensive Esports Program*, OHIO ST. NEWS (Oct. 3, 2018, 10:21 AM), <https://news.osu.edu/the-ohio-state-university-launches-first-of-its-kind-comprehensive-esports-program/> [<https://perma.cc/UW5R-4SFW>] (discussing Ohio State’s development of a comprehensive esports curriculum); Press Release, UCI Div. of Continuing Educ., UC Irvine Division of Continuing Education Announces New Online Course in Esports, (Jan. 3, 2018) [hereinafter UC Irvine Press Release], <https://ce.uci.edu/about/releases/pr.aspx?id=473> [<https://perma.cc/U8FD-YN26>] (discussing the development of a new esports certificate program).

²⁰ See Zalaznick, *supra* note 7 (noting that Hampton University in Virginia received a technology grant of nearly \$350,000 from the Department of Homeland Security to build an “esports innovation lab”); David Bloom, *Esports Arenas Coming to a Campus, or Cafe, Near You*, TV[R]EV (June 11, 2019), <https://tvrev.com/esports-arenas-coming-to-a-campus-near-you/> [<https://perma.cc/GRK7-XEYM>] (discussing that multiple universities have built or are building esports arenas on campus for broad student use, regardless of degree program).

²¹ Adam Stone, *COVID Is Not Stopping Esports*, EDTECH (June 3, 2020), <https://edtechmagazine.com/higher/article/2020/06/covid-not-stopping-esports-perfcon> [<https://perma.cc/MWB7-2UEN>].

²² *Id.* (identifying that colleges are motivated to support esports because, as explained by A.J. Dimick, the University of Utah’s esports director, “they know that competitive esports appeals to exactly the kind of students they want—the STEM students with high GPAs, the international students, the engineers”).

²³ *Id.*

²⁴ See, e.g., *Spring Intramurals*, UCI ESPORTS, <https://esports.uci.edu/intramurals/> [<https://perma.cc/7ZDY-2GCP>].

²⁵ See, e.g., *Camps*, UCI ESPORTS, <https://esports.uci.edu/camps/> [<https://perma.cc/4938-XEV9>]; *Online STEAM Camp: Esports Bootcamp*, N. ILL. UNIV., https://calendar.niu.edu/event/onlinesteam_camp_esports_bootcamp#.X3y26ZNKgcg [<https://perma.cc/DS6M-FUCY>].

²⁶ Stone, *supra* note 21 (identifying Boise State University, University of California, Los Angeles, and University of California, Irvine).

²⁷ Erick Orantes & Aalok Sharma, *Title IX Compliance Creates Hurdles for Collegiate*

awarded to male students from affluent backgrounds,²⁸ and the gaming industry has largely been driven by and for white men and has marginalized other identities and people.²⁹ Although teamwork and relationship building are common aspects of gaming,³⁰ hypermasculine atmospheres, harassment, hostility, and misogynistic and racist attacks frequently occur in this pervasive culture of harassment,³¹ and women, LGBTQIA, and non-gender-conforming individuals are particularly targeted and harassed.³² Many gamers experience everyday fears of toxic harassment and sexualized gender-based violence and report that games amplify sexism.³³ A study of multiplayer online gamers found that over seventy percent of women play as male characters, presumably to avoid the constant sexual harassment and questioning

eSports Programs, JDSUPRA (Mar. 4, 2019), <https://www.jdsupra.com/legalnews/title-ix-compliance-creates-hurdles-for-99240/> [<https://perma.cc/9MUA-DBX6>] (noting that professional esports players are ninety-five percent male while approximately fifty percent of video game enthusiasts are women); see also *The Effects of Esports' Sizable Gender Gap*, DOT ESPORTS (Feb. 18, 2014, 8:59 AM), <https://dotesports.com/general/news/esports-gender-race-gap> [<https://perma.cc/2VMD-TRW4>] (“A profound 90 to 94 percent of esports viewers are male, according to a survey of viewers taken across three events in [2013] . . .”).

²⁸ J. Collins, *Esports Scholarships Are Growing. Do They Leave Some Students Behind?*, EDSURGE (Feb. 27, 2019) <https://www.edsurge.com/news/2019-02-27-esports-scholarships-are-growing-do-they-leave-some-students-behind> [<https://perma.cc/4K5W-P4FQ>] (“The reality of the growing esports scholarship phenomenon is that universities and the gaming industry are inadvertently creating a college access gap (an ‘Esports Access Gap,’ if you will) by using tournament and scholarship structures that primarily favor affluent young men from affluent schools.”).

²⁹ See B. Mitchell Peck, Paul R. Ketchum & David G. Embrick, *Racism and Sexism in the Gaming World: Reinforcing or Changing Stereotypes in Computer Games?*, 3 J. MEDIA & COMMUN. STUD. 212, 212, 216 (2011) (finding that “no significant gains have been made in the past two decades [regarding] how women and [people of color] are portrayed in gaming advertisements,” “racial groups are depicted using stereotypes,” “[a]ll the black characters were depicted using a racial stereotype” in 2009 *PC gamer* advertisements, and women are generally “stereotyped and sexualized” with over ninety-seven percent of female characters in advertisements depicted through gender stereotypes).

³⁰ See Albert Courie, *Team Building Through Gaming*, ARMY LAW., no. 5, 2019, at 29.

³¹ See Jesse Fox & Wai Yen Tang, *Women's Experiences with General and Sexual Harassment in Online Video Games: Rumination, Organizational Responsiveness, Withdrawal, and Coping Strategies*, 19 NEW MEDIA & SOC'Y 1290, 1291, 1304 (2017); Ortiz, *supra* note 10, at 573, 577 (discussing intersectional attacks based on race in gaming platforms).

³² See Mary Elizabeth Ballard & Kelly Marie Welch, *Virtual Warfare: Cyberbullying and Cyber-Victimization in MMOG Play*, 12 GAMES & CULTURE 466, 478, 480–81 (2017) (finding that males perpetrate most cyberbullying, that heterosexuals perpetrate more cyberbullying than LGBT individuals do, that female and LGBT participants in video games experienced significantly higher rates of sexually related cybervictimization than men, and that they experienced this abusive behavior regularly).

³³ See generally EMMA A. JANE, MISOGYNY ONLINE (2017) (exploring the global phenomenon of gendered cyberhate).

of their competence that they otherwise endure.³⁴ Such gender switching, however, makes women and nonbinary individuals invisible.

Universities are rightfully taking note that Title IX,³⁵ the civil rights law that prohibits sex discrimination in education,³⁶ requires them to increase participation of all genders in these school-sponsored programs.³⁷ While schools are beginning to articulate the need to achieve greater gender balance in the esports programs and teams they fund and promote,³⁸ they have yet to meaningfully evaluate and address their Title IX obligation to ensure that campuses are free from sex discrimination and sexual harassment, which Title IX prohibits as a form of sex discrimination. This Article tackles evolving Title IX issues and First Amendment questions, foreseeing problems such as (1) how games commonly feature gendered norms including misogyny, hypersexualization of women, male entitlement, and explicit gender-based violence, (2) the harassment and sexual cyberviolence that often occurs through online games, and (3) how funding and focusing on gaming may affect the campus climate.

Environments that are male-dominated and institutional cultures with high levels of sex segregation are shown to produce high levels of gender-based violence, racism, misogyny, homophobia, and “sexualized abuse of girls and low-status boys as a method of establishing and maintaining status within the male group.”³⁹ Additionally, the “suppression of emotion and empathy, the glorifying of competition and aggression, and the cultures of silence and protection” further produce gender-based violence and harassment.⁴⁰ Schools will have to confront intertwined dynamics of the historic lack of gender balance in gaming and esports and realities of the gaming platforms in which harassment abounds.

³⁴ See Fox & Tang, *supra* note 31, at 1298–99.

³⁵ Education Amendments Act of 1972, 20 U.S.C. §§ 1681–88 (2018).

³⁶ See generally *Requirements Under Title IX of the Education Amendments of 1972*, U.S. DEP’T OF EDUC. OFF. FOR C.R. (Jan. 10, 2020), <https://www2.ed.gov/about/offices/list/ocr/docs/interath.html> [<https://perma.cc/FNC8-2BGS>].

³⁷ See Collins, *supra* note 28; Orantes & Sharma, *supra* note 27. Gender binaries are inherent in Title IX, and this Article acknowledges that the context of Title IX is one of gender binaries and the vast majority of research on Title IX and gender-based harassment and abuse have operated in a gender-binary way. Future scholarship, however, should grapple with what Title IX proportionality means in a nonbinary world.

³⁸ See Collins, *supra* note 28.

³⁹ Nancy Chi Cantalupo, *Masculinity & Title IX: Bullying and Sexual Harassment of Boys in the American Liberal State*, 73 MD. L. REV. 887, 922, 928 (2014) (citing examples from numerous educational institutions and hypermasculine cultures of fraternities, American policing, and the military).

⁴⁰ *Id.* at 932–33.

While cyber mediums and gaming platforms are fairly new, the systemic sexism, heterosexism, and racist and patriarchal undercurrents of the gaming industry⁴¹ reflect historic ownership, oppression, racism, and gender-based violence.⁴² Reports of abuse through the use of technology have been increasing,⁴³ including in the youth age bracket for which prevention efforts are most opportune,⁴⁴ and COVID-19 has exacerbated technology-enabled abuse concomitant with dramatic increases in virtual interactions.⁴⁵ Respondents to a Pew Research Center survey on online harassment identified gaming as the most inequitable community in terms of its treatment of women.⁴⁶ Males experience high rates of being insulted and embarrassed by other players,⁴⁷ and females experience severe stalking, sexual harassment, and threats, including rape and death threats, and report significant emotional distress.⁴⁸

⁴¹ See O'Leary, *supra* note 1 ("Sexism, racism, homophobia and general name-calling are longstanding facts of life in certain corners of online video games."); Nakamura, *supra* note 10, at 127–28 ("[G]ames contain some of the most egregiously narrow, racist, and sexist storylines and depictions imaginable."); Moore, *supra* note 4 (discussing the "campaign of harassment" directed at Anita Sarkeesian, who sought "to expose misogyny in video games"); cf. Jennifer Jenson & Suzanne de Castell, *Theorizing Gender and Digital Gameplay: Oversights, Accidents and Surprises*, 2 ELUDAMOS: J. FOR COMPUT. GAME CULTURE 15, 20–21 (2008) (deemphasizing gender and focusing on differences between novice and experienced gamers).

⁴² This is a form of what Professor Reva Siegel has termed "preservation through transformation," in which legal change gives the appearance of correcting a wrong but perpetuates the status quo. Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2119 (1996).

⁴³ NAT'L DOMESTIC VIOLENCE HOTLINE, A YEAR OF IMPACT 3 (2019), <https://www.thehotline.org/wp-content/uploads/sites/3/2020/04/Impact-Report-2019.v1.pdf> [<https://perma.cc/RVA9-HLLL>] (reporting that calls regarding digital abuse increased 101% from 2018 to 2019); see also Jill Messing, Meredith Bagwell-Gray, Megan Lindsay Brown, Andrea Kappas & Alesha Durfee, *Intersections of Stalking and Technology-Based Abuse: Emerging Definitions, Conceptualization, and Measurement*, 35 J. FAM. VIOLENCE 693, 700 (2020) (studying over 1,000 abuse survivors and finding that sixty to sixty-three percent had experienced technology-based abuse by an intimate partner).

⁴⁴ See LENHART ET AL., *supra* note 9, at 8, 31–32.

⁴⁵ See Emma Grey Ellis, *Tech Is a Double-Edged Lifeline for Domestic Violence Victims*, WIRED (Apr. 28, 2020), <https://www.wired.com/story/covid-19-coronavirus-domestic-violence/> [<https://perma.cc/BT4T-N6KM>].

⁴⁶ PEW RSCH. CTR., ONLINE HARASSMENT 9 (2014), <http://www.pewinternet.org/2014/10/22/online-harassment/> [<https://perma.cc/DW3R-62W7>].

⁴⁷ MAEVE DUGGAN, PEW RSCH. CTR., ONLINE HARASSMENT 2017, at 24 (2017), <https://www.pewresearch.org/internet/2017/07/11/online-harassment-2017/> [<https://perma.cc/GP6E-859Y>].

⁴⁸ See PEW RSCH. CTR., *supra* note 46; Dave Smith, *Most People Who Play Video Games Online Experience 'Severe' Harassment, New Study Finds*, BUS. INSIDER (Jul. 25, 2019, 11:08 AM) <https://www.businessinsider.com/online-harassment-in-video-games-statistics-adl-study-2019-7> [<https://perma.cc/R9EU-ZRYF>].

For youth, “[s]exual harassment is part of everyday life in middle and high schools.”⁴⁹ Nearly half of the youth surveyed in a nationwide study had experienced sexual harassment during the prior year, whether through cyberspace or in person, with some sexual harassment targeting gender identity or sexual orientation; further, eighty-seven percent of harassed students, who were mostly female, reported that the sexual harassment negatively affected them.⁵⁰

Gender-based violence, sexual harassment, and corresponding long-term harms persist through college.⁵¹ Over one-third of college students in America report experiencing some form of unwanted sexual contact or intimate partner abuse during their higher education,⁵² twenty-one percent of women report having experienced a completed sexual assault during college,⁵³ twenty-eight percent of women report being sexually harassed during college,⁵⁴ and women students of color report sexual harassment at disproportionately higher rates.⁵⁵

Colleges nationwide should anticipate that their increasing support of gaming and esports⁵⁶ could signal tolerance of sexual harassment and thereby create a climate conducive to underreporting and retaliation. Given youth gaming rates and research that gender-based

49 CATHERINE HILL & HOLLY KEARL, *CROSSING THE LINE: SEXUAL HARASSMENT AT SCHOOL 2* (2011), <https://www.aauw.org/app/uploads/2020/03/Crossing-the-Line-Sexual-Harassment-at-School.pdf> [<https://perma.cc/E8JA-NNGS>].

50 *Id.* at 2–3 (also reporting high rates of students witnessing sexual harassment of peers).

51 In a Pew Research Center survey, twenty-one percent of women ages eighteen to twenty-nine had been sexually harassed online, while fifty-three percent of women had received sexually explicit images that they had not sought. Monica Anderson, *Key Takeaways on How Americans View—and Experience—Online Harassment*, PEW RSCH. CTR.: FACT TANK (July 11, 2017), <https://www.pewresearch.org/fact-tank/2017/07/11/key-takeaways-online-harassment/> [<https://perma.cc/3AM5-MSBF>].

52 Lisa Fedina, Jennifer Lynne Holmes & Bethany L. Backes, *Campus Sexual Assault: A Systematic Review of Prevalence Research From 2000 to 2015*, 19 TRAUMA, VIOLENCE, & ABUSE 76, 84–85 (2018); Melissa A. Sutherland, Heidi Collins Fantasia & M. Katherine Hutchinson, *Screening for Intimate Partner and Sexual Violence in College Women: Missed Opportunities*, 26 WOMEN’S HEALTH ISSUES 217, 217 (2016).

53 CHRISTOPHER KREBS, CHRISTINE LINDQUIST, MARCUS BERZOFKY, BONNIE SHOOK-SA, KIMBERLY PETERSON, MICHAEL PLANTY, LYNN LANGTON & JESSICA STROOP, BUREAU OF JUST. STAT., *CAMPUS CLIMATE SURVEY VALIDATION STUDY FINAL TECHNICAL REPORT 73* (2016), <https://www.bjs.gov/content/pub/pdf/ccsvsfr.pdf> [<https://perma.cc/5LYG-GQFP>] (surveying 15,000 women and 8,000 men in college). Seven percent of men report experiencing a completed sexual assault during college. *Id.* at 74.

54 *Id.* at 138. Over thirteen percent of men report experiencing sexual harassment during college. *Id.* at 140.

55 See Nancy Chi Cantalupo, *And Even More of Us Are Brave: Intersectionality & Sexual Harassment of Women Students of Color*, 42 HARV. J.L. & GENDER 1, 24–54 (2019).

56 Zalaznick, *supra* note 7; Shaw, *supra* note 19; UC Irvine Press Release, *supra* note 19; Stone, *supra* note 21.

violence prevention efforts are best targeted to younger age groups,⁵⁷ schools should consider how abuse can proliferate or be prevented through gaming, as well as how the attitudes and behaviors in the gaming world may impact the next generation's relationships and relationship violence.⁵⁸

Esports has a global platform with unlimited potential to prevent or promote gender-based violence, but it is not yet being utilized for abuse prevention.⁵⁹ Unfortunately, the esports industry and the public are unknowingly repeating the past mistakes of professional sports leagues. Waiting for high-profile incidents to create demand for a comprehensive gender-based violence policy, as the National Football League did, is a failed model and lost opportunity for violence prevention.⁶⁰

Recent social movements revealed how common and ceaseless sexual harassment, assault, and domestic abuse are,⁶¹ and ongoing

⁵⁷ See WORLD HEALTH ORG., PREVENTING INTIMATE PARTNER AND SEXUAL VIOLENCE AGAINST WOMEN 44–47 (2010), https://www.who.int/violence_injury_prevention/publications/violence/9789241564007_eng.pdf?ua=1 [<https://perma.cc/R53W-MXZD>].

⁵⁸ State legislatures have been slow to mandate education on gender-based violence prevention, and most secondary schools do not devote curricular time to this topic. See HILL & KEARL, *supra* note 49, at 46–47; Casey Quinlan, *Schools Often Fail to Provide Quality Education on Dating Violence—and Students Pay the Price*, THINKPROGRESS (Dec. 8, 2017, 2:50 PM), <https://archive.thinkprogress.org/schools-education-teen-dating-violence-ac8ddcaf6963/> [<https://perma.cc/B5CS-KEQK>] (identifying the variability in whether and how schools teach students about healthy relationships and address dating violence); D. Kelly Weisberg, *Lindsay's Legacy: The Tragedy that Triggered Law Reform to Prevent Teen Dating Violence*, 24 HASTINGS WOMEN'S L.J. 27, 27–28 (2013) (detailing the historic neglect of teen dating violence as a public health issue and policy concern); ANDREW MORSE, BRIAN A. SPONSER & MARY FULTON, STATE LEGISLATIVE DEVELOPMENTS ON CAMPUS SEXUAL VIOLENCE 4–5 (2015), https://www.naspa.org/images/uploads/main/ECS_NASPA_BRIEF_DOWNLOAD3.pdf [<https://perma.cc/3SPT-PL56>] (addressing state legislative efforts to combat sexual violence in four policy areas); *Teen Dating Violence*, NAT'L CONF. ST. LEGISLATURES (Oct. 11, 2018), <https://www.ncsl.org/research/health/teen-dating-violence.aspx> [<https://perma.cc/K7M5-RU57>] (listing enacted legislation that addresses teen dating violence).

⁵⁹ See, e.g., Sharyn J. Potter, Mary Flanagan, Max Seidman, Hannah Hodges & Jane G. Stapleton, *Developing and Piloting Videogames to Increase College and University Students' Awareness and Efficacy of the Bystander Role in Incidents of Sexual Violence*, 8 GAMES FOR HEALTH J. 24 (2019).

⁶⁰ See Maleaha L. Brown, *When Pros Become Cons: Ending the NFL's History of Domestic Violence Leniency*, 50 FAM. L.Q. 193, 201–03 (2016); CORY YOUNG & TERRY RENTNER, *The NFL as a Mega-Crisis: Applications of Fractal Theory*, in PROCEEDINGS OF THE INTERNATIONAL CRISIS & RISK COMMUNICATION CONFERENCE 2018, at 42, 44 (2018); Megan Mariah Jefferson, *Media, Fandom, and Corporate Social Responsibility: An Advertising Campaign to Reframe Domestic Violence in the National Football League* (July 2018) (M.A. non-thesis project, Pepperdine University) (on file with Pepperdine Digital Commons), <https://digitalcommons.pepperdine.edu/etd/979> [<https://perma.cc/TVT9-6J7Z>].

⁶¹ Tarana Burke created the MeToo movement over a decade ago as a grassroots move-

calls for intersectional responses to gender-based violence⁶² should also prompt change. Especially as national attention during the popularization of the #MeToo movement expanded from an initial focus on famous actors and celebrities to farmworkers, hotel workers, law clerks, and USA Olympic gymnasts, vast institutional failures were revealed.⁶³ Sites of vulnerability and problematic power differentials were exposed, millions of people spoke out in bold demonstrations of solidarity, and abusers faced consequences.⁶⁴ The #WhyIStayed,⁶⁵ #MeToo, #TimesUp,⁶⁶ and #WhyIDidn'tReport⁶⁷ movements of the

ment to aid sexual assault survivors in underserved communities. Tarana Burke, *#MeToo Was Started for Black and Brown Women and Girls. They're Still Being Ignored*, WASH. POST (Nov. 9, 2017, 8:04 PM), <https://www.washingtonpost.com/news/post-nation/wp/2017/11/09/the-waitress-who-works-in-the-diner-needs-to-know-that-the-issue-of-sexual-harassment-is-about-her-too/> [<https://perma.cc/FX5R-5FLJ>]. Based out of Harlem, Ms. Burke identified the lack of resources and services for Black sexual assault survivors in her community and began a movement of Black women talking to each other and sharing their stories. Najja Parker, *Who Is Tarana Burke? Meet the Woman Who Started the Me Too Movement a Decade Ago*, ATLANTA J.-CONST. (Dec. 6, 2017), <https://www.ajc.com/news/world/who-tarana-burke-meet-the-woman-who-started-the-too-movement-decade-ago/i8NEiuFHKaIvBh9ucukidK/> [<https://perma.cc/ECD4-94P6>]. The hashtag #MeToo was popularized by actor Alyssa Milano in her tweet on October 15, 2017. *Id.*; see Alyssa Milano (@Alyssa_Milano), Twitter (Oct. 15, 2017, 4:21 PM), https://twitter.com/Alyssa_Milano/status/919659438700670976 (last visited May 15, 2021).

⁶² See Kimberlé W. Crenshaw, *We Still Have Not Learned from Anita Hill's Testimony*, 26 UCLA WOMEN'S L.J. 17, 17 (2019) (discussing how Anita Hill was "trapped between an antiracist movement that foregrounded black men, and a feminism that could not fully address how race shaped society's perception of black victims," and noting how Black women's vulnerability continues to be ignored).

⁶³ See Jane K. Stoever, *Introduction*, in *THE POLITICIZATION OF SAFETY* 6–8 (Jane K. Stoever ed., 2019).

⁶⁴ *Id.* (also identifying some of the "privileging, silencing, and infighting" of the feminist movement during the popularization of the #MeToo movement); see also Kaitlynn Mendes, Jessica Ringrose & Jessalynn Keller, *#MeToo and the Promise and Pitfalls of Challenging Rape Culture Through Digital Feminist Activism*, 25 EUR. J. WOMEN'S STUD. 236, 243–44 (2018) (discussing a range of tactics to make visible and challenge rape culture, misogyny, and harassment, and examining the mental and practical challenges of doing digital feminist activism); Angela Onwuachi-Willig, *What About #UsToo?: The Invisibility of Race in the #MeToo Movement*, 128 YALE L.J.F. 105, 111 (2018) (identifying the "heightened vulnerability" to harassment "that women of color . . . face in the workplace" and the need for consideration of complainants' intersectional and multidimensional identities).

⁶⁵ See Melinda R. Weathers, Jimmy Sanderson, Alex Neal & Kelly Gramlich, *From Silence to #WhyIStayed: Locating Our Stories and Finding Our Voices*, 17 QUALITATIVE RSCH. REPS. COMM'C'N 60, 64 (2016); Sarah Kaplan, *#WhyIStayed: She Saw Herself in Ray Rice's Wife, Janay, and Tweeted About It. So Did Thousands of Others*, WASH. POST (Sept. 9, 2014, 2:57 AM), <https://www.washingtonpost.com/news/morning-mix/wp/2014/09/09/whyistayed-she-saw-herself-in-ray-rices-wife-janay-and-tweeted-about-it-so-did-thousands-of-others/> [<https://perma.cc/WXA9-YQ8W>] (reporting on Beverly Gooden's viral hashtag about why she stayed despite ongoing domestic violence).

⁶⁶ See *About*, TIME'S UP Now, <https://timesupnow.org/about/> [<https://perma.cc/N7RM-UHYW>] ("TIME'S UP Now aims to create a society free of gender-based discrimination in the

past decade have created opportunities for conversations and action about accountability, healing, redemption, and what it takes to create sustained social change. As schools invest in esports and strive to create inclusive gaming experiences and esports programs, the Black Lives Matter movement also provides an essential framework and imperative for schools to commit to eradicating anti-Black racism and addressing intersectional oppressions.⁶⁸

Rather than waiting for a global #EToo movement, secondary schools, colleges, and the gaming industry should anticipate the all-too-foreseeable issues of sexual harassment and gender-based violence in gaming and esports, and intentionally act to prevent abuse.

Part I of this Article reveals that esports is the fastest-growing competitive market in the world. This exponential growth is occurring in a “Wild West” fashion, without norms and recommended practices, even as colleges and universities heavily invest in esports.

Part II considers positive aspects of gaming, recognizing that video game play can improve an individual player’s mental wellbeing and life satisfaction, along with developing social relationships without need for geographic proximity.⁶⁹ This Part also explores problematic dynamics with esports, including gaming disorders, violence and misogyny as prominent themes in video games, and the intersection of gender-based violence and gaming.

Part III discusses the rapid growth and subsequent challenges of school sponsorship of gaming and esports in the context of Title IX

workplace and beyond.”); *see also* Lesley Wexler, Jennifer K. Robbennolt & Colleen Murphy, *#MeToo, Time’s Up, and Theories of Justice*, 2019 U. ILL. L. REV. 45, 58, 71–72, 95–96 (discussing the complexities of utilizing restorative justice and transitional justice to respond to workplace harassment).

⁶⁷ When Dr. Christine Blasey Ford made allegations against Supreme Court nominee Brett Kavanaugh in 2018, she was critiqued by President Donald Trump for not reporting the incident to authorities when it occurred approximately thirty years prior. *See, e.g.*, Rhiannon Lucy Cosslett, *Trump Mocking Christine Blasey Ford Shows How Women Are Silenced*, GUARDIAN (Oct. 3, 2018, 6:43 AM), <https://www.theguardian.com/commentisfree/2018/oct/03/trump-mockery-christine-blasey-ford-sexual-assault-script-male-dominance> [<https://perma.cc/Z2GK-G9N4>]. Tens of thousands of people responded to the president’s tweet with their #WhyIDidntReport explanations of the multitude of reasons and complexities behind why they did not report their assaults. *See* Abigail Garrett & Naeemul Hassan, *Understanding the Silence of Sexual Harassment Victims Through the #WhyIDidntReport Movement*, in PROCEEDINGS OF THE 2019 IEEE/ACM INTERNATIONAL CONFERENCE ON ADVANCES IN SOCIAL NETWORKS ANALYSIS AND MINING 649, 650 (2019) (analyzing 40,000 #WhyIDidntReport tweets).

⁶⁸ *See* David Batty, *Universities Criticised for ‘Tokenistic’ Support for Black Lives Matter*, GUARDIAN (July 6, 2020, 12:52 PM), <https://www.theguardian.com/education/2020/jul/06/universities-criticised-for-tokenistic-support-for-black-lives-matter> [<https://perma.cc/6JAL-KTVZ>].

⁶⁹ Jones et al., *supra* note 17, at 6.

and the First Amendment. While this Article focuses on colleges and universities, Title IX and the analysis herein equally apply to middle and high school education programs.

Part IV proposes current and future opportunities for gender-based violence prevention in esports participation. This Article recognizes that the development of esports and gaming are part of the digital era and have relevance in the COVID-19 context and beyond. This Article also makes normative recommendations to colleges—building from recent social movements—to create responsible gaming initiatives with goals of violence prevention, player protection, and harm minimization as they invest in esports.

I. ESPORTS: THE FASTEST-GROWING COMPETITIVE MARKET IN THE WORLD

Esports is one of the fastest-growing competitive markets in the world.⁷⁰ From the first computer game in the 1960s, to the popularity of home-based gaming during the 1970s and 1980s, to virtual reality headsets and the esports phenomenon, digital gaming has become a “major worldwide cultural industry.”⁷¹ Over 250 million people have registered to play the online battle game *Fortnite*,⁷² and over 100 million players engage in *League of Legends*—the Multiplayer Online Battle Arena game developed by Riot Games—each month.⁷³ Total revenue from sponsorships, advertising, ticket sales, and betting increases annually.⁷⁴

United States video game content generated \$35.4 billion in revenue in 2019 alone,⁷⁵ and Goldman Sachs estimates that by 2025, the

⁷⁰ See John T. Holden, Anastasios Kaburakis & Ryan Rodenberg, *The Future Is Now: Esports Policy Considerations and Potential Litigation*, 27 J. LEGAL ASPECTS SPORT 46, 46–47 (2017) (connecting the recent “explosive growth” of video game tournaments to the launch of Twitch, an online streaming platform).

⁷¹ Garry Crawford, *Digital Gaming, Sport, and Gender*, 24 LEISURE STUD. 259, 259 (2005).

⁷² Ian Sherr, *Gaming Can Be Toxic Toward Women and Minorities. Electronic Arts Wants to Help Fix That*, CNET (June 13, 2019, 9:00 AM), <https://www.cnet.com/news/gaming-can-be-toxic-toward-women-and-minorities-electronic-arts-wants-to-help-fix-that/> [<https://perma.cc/4982-LQTV>].

⁷³ Paul Tassi, *Riot Games Reveals ‘League of Legends’ Has 100 Million Monthly Players*, FORBES (Sept. 13, 2016, 9:54 AM), <https://www.forbes.com/sites/insertcoin/2016/09/13/riot-games-reveals-league-of-legends-has-100-million-monthly-players/#bd78e415aa8b> [<https://perma.cc/ZFC3-9FE9>].

⁷⁴ See Hilary Russ, *Global Esports Revenues to Top \$1 Billion in 2019: Report*, REUTERS (Feb. 12, 2019, 11:05 AM), <https://www.reuters.com/article/us-videogames-outlook/global-esports-revenues-to-top-1-billion-in-2019-report-idUSKCN1Q11XY> [<https://perma.cc/6PWX-SDN5>].

⁷⁵ *U.S. Video Game Content Generated \$35.4 Billion in Revenue for 2019*, ENT. SOFTWARE

virtual reality industry will be worth as much as \$182 billion.⁷⁶ Video and online game sales surpassed global box office totals and streaming services beginning in 2018, reporting an eighteen percent increase from 2017.⁷⁷ In a shareholder letter, Netflix stated, “We compete with (and lose to) Fortnite more than HBO.”⁷⁸ Perhaps unsurprisingly, more digital games are now sold in the United States and United Kingdom than books.⁷⁹

The COVID-19 pandemic created boons for the video game industry.⁸⁰ Adhering to stay-at-home orders while schools, workplaces, sporting events, and other forms of entertainment were closed, much of America turned to gaming to pass time and connect with others. Spending on gaming hardware, software, and accessories totaled \$1.6 billion in March 2020, a thirty-five percent increase over March 2019.⁸¹ The Nintendo Switch set an all-time record for unit sales, and PlaySta-

Ass’n (Jan. 23, 2020), <https://www.theesa.com/press-releases/u-s-video-game-content-generated-35-4-billion-in-revenue-for-2019/#:~:text=U.S.%20Video%20Game%20Content%20Generated,for%202019%20%2D%20Entertainment%20Software%20Association> [https://perma.cc/462M-656X].

⁷⁶ Arwa Mahdawi, *A Bug in the Matrix: Virtual Reality Will Change Our Lives. But Will It Also Harm Us?*, GUARDIAN (Nov. 2, 2016, 9:31 AM), <https://www.theguardian.com/technology/2016/nov/02/virtual-reality-oculus-palmer-luckey-harassment-diversity> [https://perma.cc/8JXB-QXYZ].

⁷⁷ Jonathan Shieber, *Video Game Revenue Tops \$43 Billion in 2018, an 18% Jump from 2017*, TECHCRUNCH (Jan. 22, 2019, 6:00 PM), <https://techcrunch.com/2019/01/22/video-game-revenue-tops-43-billion-in-2018-an-18-jump-from-2017/> [https://perma.cc/X5XB-YHAJ]; *U.S. Video Game Sales Reach Record-Breaking \$43.4 Billion in 2018*, ENT. SOFTWARE ASS’N (Jan. 22, 2019), <https://www.theesa.com/press-releases/u-s-video-game-sales-reach-record-breaking-43-4-billion-in-2018/> [https://perma.cc/6F5T-292X].

⁷⁸ Shieber, *supra* note 77.

⁷⁹ Crawford, *supra* note 71, at 259.

⁸⁰ See Kevin Costelloe, *Activision Blizzard Reports Pandemic-Boosted Earnings*, ORANGE CNTY. BUS. J. (Aug. 4, 2020), <https://www.ocbj.com/news/2020/aug/04/activision-blizzard-reports-pandemic-boosted-earnings/> [https://perma.cc/YWU3-XR9V] (reporting net revenue of \$1.9 billion for Activision Blizzard, Inc. for the second quarter of 2020, and noting that the figure “far outpaced expectations, due in large part to gamers staying home during the COVID-19 pandemic”); John J. Edwards III, *Video Games Set a Record for Quarterly Sales*, BLOOMBERG (May 15, 2020, 10:31 AM), <https://www.bloomberg.com/news/articles/2020-05-15/video-games-hit-quarterly-sales-record-amid-virus-driven-surge> [https://perma.cc/2CCN-8PLV] (“U.S. consumer spending on video games jumped to \$10.9 billion in the first quarter [of 2020], up 9% from a year earlier”); cf. Jason Schreier, *Gaming Sales Are Up, but Production Is Down*, N.Y. TIMES (Apr. 26, 2020), <https://www.nytimes.com/2020/04/21/technology/personaltech/coronavirus-video-game-production.html> [https://perma.cc/BEK9-PFK3] (reporting that “game sales . . . are breaking franchise records” amidst the COVID-19 pandemic but companies have also faced added production and development hurdles).

⁸¹ Jeff Grubb, *March 2020 NPD: Animal Crossing Powers March to Blockbuster Game Sales*, VENTUREBEAT (Apr. 21, 2020, 6:00 AM), <https://venturebeat.com/2020/04/21/march-2020-npd-animal-crossing-powers-march-to-blockbuster-game-sales/> [https://perma.cc/E946-TZF9].

tion 4 and Xbox One sales similarly soared.⁸² The pandemic prompted record-breaking sales in video games, with Nintendo's *Animal Crossing: New Horizons* selling 13.41 million copies within its first six weeks of release in March 2020.⁸³ As a point of comparison, the video game *Grand Theft Auto V*, "the highest-selling title in any category of entertainment[.]" has sold over ninety million units since its release in 2013, with those sales grossing over \$6 billion.⁸⁴

With over ninety-seven percent of teens in America playing video games,⁸⁵ gaming is a shared societal experience. Given the "critical mass" of esports fans, broader industries are recognizing esports fans as a valuable advertising target.⁸⁶ While the average age of a Major League Baseball viewer is fifty-seven years old,⁸⁷ esports audiences are largely younger, ranging from sixteen to thirty-four years old (or sixty-three percent of all gamers), and mostly male.⁸⁸ ESPN has been investing in the coverage of esports during the past decade because "it's cool, it's intense, the competition is crazy, it has million-dollar performers, it has high stakes, it has owners who are trying to steal team members from different teams, it has everything that makes sports interesting to cover. And it has an audience"⁸⁹ Worldwide, viewership for esports championships now eclipses that for Major League Baseball's World Series and the National Basketball Association Finals.⁹⁰ It has also surpassed the Super Bowl; in 2018, the *League*

⁸² *Id.*

⁸³ Nicole Carpenter, *Nintendo Sold 13.41M Copies of Animal Crossing: New Horizons in Six Weeks*, POLYGON (May 7, 2020, 9:22 AM), <https://www.polygon.com/2020/5/7/21250384/animal-crossing-new-horizons-sales-nintendo-switch> [<https://perma.cc/WRB6-JRCN>].

⁸⁴ *Investing in the Soaring Popularity of Gaming*, REUTERS (Dec. 13, 2018, 9:14 PM), <https://www.reuters.com/article/sponsored/popularity-of-gaming> [<https://perma.cc/E8Z6-XXBJ>].

⁸⁵ LENHART ET AL., *supra* note 9.

⁸⁶ Travis Hoium, *Esports Is Big Business, and It's Here to Stay*, MOTLEY FOOL (July 18, 2018, 5:56 PM), <https://www.fool.com/investing/2018/07/18/esports-is-big-business-and-its-here-to-stay.aspx> [<https://perma.cc/PT4C-7JL8>] ("Esports fans are the valuable under-30 crowd, and . . . we'll see advertising to them go mainstream now that Overwatch League has built critical mass.").

⁸⁷ Jason Notte, *The Sports with the Oldest—and Youngest—TV Audiences*, MARKETWATCH (June 30, 2017, 1:34 PM), <https://www.marketwatch.com/story/the-sports-with-the-oldest-and-youngest-tv-audiences-2017-06-30> [<https://perma.cc/22MK-7WCX>].

⁸⁸ See GLOBALWEBINDEX, *supra* note 8, at 3.

⁸⁹ Matt Peckham, *Why ESPN Is So Serious About Covering Esports*, TIME (Mar. 1, 2016, 3:07 PM), <https://time.com/4241977/espn-esports/> [<https://perma.cc/Q689-WY63>].

⁹⁰ Compare Christina Gough, *All Time Leading eSports Tournaments Worldwide as of 2018, by Unique Viewers*, STATISTA (Oct. 29, 2020), <https://www.statista.com/statistics/507491/esports-tournaments-by-number-viewers-global/> [<https://perma.cc/QYX5-PQCT>] (reporting that two of the most watched esports tournaments of all time recorded sixty million and forty-six million unique viewers respectively), with *World Series Game 7 Averages Over 40 Million View-*

of *Legends* championship match had 205 million simultaneous viewers at its peak, whereas the Super Bowl had approximately half that viewership.⁹¹

Viewing sporting events provides many Americans with respite and escape from the challenges of everyday life, but major and minor sporting leagues were forced to cancel or postpone their seasons in the midst of the COVID-19 pandemic.⁹² With uncertainty surrounding in-person games, the demand for esports escalated.⁹³ Esports also offers viewers a more immersive experience than traditional major league sports broadcasts, as online viewers can use YouTube, Mixer, Twitch, and other social media or instant messaging platforms to communicate with players during tournaments and read others' streaming chats.⁹⁴

COVID-19 prompted "long-term transformation" in the gaming industry that will endure post-COVID.⁹⁵ As gaming and esports grow, adapt to new technologies, and are incorporated into educational life, participants, creators, sponsors, and school administrators will need to be acutely aware of a bevy of issues, including those addressed in Part II.

ers, FOX SPORTS PRESSPASS (Nov. 3, 2016), <https://www.foxsports.com/presspass/latest-news/2016/11/03/world-series-game-7-averages-over-40-million-viewers> [<https://perma.cc/Z93H-2C7X>] (reporting that the seventh game of the 2016 World Series had 40.045 million viewers, making it the most watched baseball game in the past 25 years), and Douglas Pucci, *Sunday Finals Nationals: Cavaliers-Warriors NBA Finals Game 7 on ABC Draws Best NBA Game Ratings in 18 Years*, PROGRAMMING INSIDER (June 21, 2016), <https://programminginsider.com/sunday-final-nationals-cavaliers-warriors-nba-finals-game-7-abc-draws-best-nba-game-ratings-18-years/> [<https://perma.cc/9FHV-N8NE>] (reporting that viewership of the 2016 NBA Finals peaked at 44.511 million viewers, making it the most watched NBA Finals since 1998).

⁹¹ Christopher Payne, *The Gaming World Meets Title IX: Paving the Way for Women in Esports*, DAILY UTAH CHRON. (Feb. 24, 2019), <http://dailyutahchronicle.com/2019/02/24/the-gaming-world-meets-title-ix-paving-the-way-for-women-in-esports/> [<https://perma.cc/9RUR-GT3E>].

⁹² See Chris Sosa, *The Major Events that Have Disrupted Sports, from Work Stoppages to Wars to Hurricanes*, CHI. TRIB. (May 27, 2020), <https://www.chicagotribune.com/sports/ct-cb-sports-strikes-wars-pandemic-liststory-20200527-rggxdp3bpfamhdtldndpvgbn6u-list.html> [<https://perma.cc/2HTP-46HE>].

⁹³ *COVID-19 Accelerates Expansion of Esports as the Industry Navigates New Obstacles, Survey Finds*, BUS. WIRE (Nov. 17, 2020, 11:14 AM), <https://www.businesswire.com/news/home/20201117006017/en/COVID-19-Accelerates-Expansion-of-Esports-as-the-Industry-Navigates-New-Obstacles-Survey-Finds> [<https://perma.cc/3EKM-MSQD>].

⁹⁴ Zalaznick, *supra* note 7.

⁹⁵ Stefan Hall, *How COVID-19 Is Taking Gaming and Esports to the Next Level*, WORLD ECON. F. (May 15, 2020), <https://www.weforum.org/agenda/2020/05/covid-19-taking-gaming-and-esports-next-level/> [<https://perma.cc/2H9D-5AMK>].

II. GAMING DYNAMICS

Universities understandably seek to promote social cohesion, creative outlets, and leisure opportunities while challenging students; given the popularity of gaming, schools hope to build a community around gaming.⁹⁶ Discussion of video games must move beyond a “good–bad” dichotomy to a more nuanced understanding of video game play. Section II.A discusses the breadth of gaming impacts, recognizing many positive outcomes of gaming. But school investment in and promotion of gaming bring concerns related to gaming disorders and the prevalence of violence and gender-based harassment and sexual cyberviolence through gaming and esports. Section II.B addresses the gendered nature of gaming, the gaming industry, and character portrayal. Section II.C discusses how research on the effects of playing violent video games is fractured, with some studies finding increases in aggression and antisocial or violent behavior, and others finding no deleterious effects. While avoiding moral panic,⁹⁷ regardless of the extent to which video game violence results in real-world violence, universities should be aware of the implications of seemingly endorsing (or actually endorsing) various games and harassment within gaming as they provide spaces and opportunities for gaming for the general student body and esports team members. Section II.D concerns overt misogyny, sexual harassment, and sexual cyberviolence in gaming and elevates the experience of attempting to game while female.

A. *Gaming Impacts*

The first video game was a tennis game called *Pong*, released in the mid-1970s, with black and white graphics of a virtual square ball

⁹⁶ See Stone, *supra* note 21 (“[A] vibrant college esports program enhances campus life across the board. Done well and equipped with top-end gear, esports teams can draw a student fan base, provide communal gaming spaces and even boost students’ grades.”).

⁹⁷ See generally STANLEY COHEN, *FOLK DEVILS AND MORAL PANICS* 9 (2d ed., 1980) (coining the term “moral panic” to describe when “a condition, episode, person, or group” is “defined as a threat to societal values and interests” and “is presented in a stylized and stereotypical fashion by the mass media”); Howard M. Wasserman, *Moral Panics and Body Cameras*, 92 WASH. U. L. REV. 831, 831 (2015) (discussing how legislators may overreact to a societal threat or uproar with laws resulting from moral panic); Kobe De Keere, Estrelle Thunnissen & Giseline Kuipers, *Defusing Moral Panic: Legitimizing Binge-Watching as Manageable, High-Quality, Middle-Class Hedonism*, MEDIA, CULTURE & SOC’Y, Dec. 16, 2020, at 1, 2–3 (describing “moral concern” as a social regulation strategy concerning cultural practices); Michele Goodwin, *Fetal Protection Laws: Moral Panic and the New Constitutional Battlefield*, 102 CAL. L. REV. 781, 795–818 (2014) (exploring the influence of moral panic in the interpretation and implementation of fetal protection laws).

bouncing between two virtual rectangular bats.⁹⁸ Early games such as *Pac-Man* and *Donkey Kong* raised little concern about negative impacts, except for possibly wasting time.⁹⁹ The second generation of games featured destruction—but not human aggression—with games such as *Breakout*.¹⁰⁰ The third generation of games involved hand-to-hand combat and close-up human aggression, with games such as *The Empire Strikes Back* and *Mortal Kombat*.¹⁰¹ By the late 1990s, approximately eighty percent of games had violence or aggression as a primary objective, with games including *Doom*, *DukeNukem*, *Mortal Kombat 2*, and *Mace*.¹⁰² In this generation of games, there were no female characters in forty-one percent of the games with characters; in twenty-eight percent of games with characters, women were portrayed as sex objects, and over twenty percent of games featured violence directed at women.¹⁰³ The U.S. Army also published a first-person-shooter game in 2002 as a recruitment tool and continues to utilize video games for recruitment.¹⁰⁴

Gaming technology now features “near photorealistic images based on the real life movements and physics of humans and objects.”¹⁰⁵ The evolving realism of video game graphics and advance-

⁹⁸ See Jo Bryce & Jason Rutter, *Gender Dynamics and the Social and Spatial Organization of Computer Gaming*, 22 LEISURE STUD. 1, 1 (2003).

⁹⁹ See Whitney D. Gunter & Kevin Daly, *Causal or Spurious: Using Propensity Score Matching to Detangle the Relationship Between Violent Video Games and Violent Behavior*, 28 COMPUTS. HUM. BEHAV. 1348, 1348 (2012).

¹⁰⁰ Kaveri Subrahmanyam, Patricia Greenfield, Robert Kraut & Elisheva Gross, *The Impact of Computer Use on Children's and Adolescents' Development*, 22 APPLIED DEVELOPMENTAL PSYCH. 7, 24 (2001).

¹⁰¹ *Id.*

¹⁰² Tracy L. Dietz, *An Examination of Violence and Gender Role Portrayals in Video Games: Implications for Gender Socialization and Aggressive Behavior*, 38 SEX ROLES 425, 425, 436 (1998); Subrahmanyam et al., *supra* note 100, at 24–25.

¹⁰³ See Dietz, *supra* note 102, at 425, 437.

¹⁰⁴ Whitney DeCamp, *Who Plays Violent Video Games? An Exploratory Analysis of Predictors of Playing Violent Games*, 117 PERSONALITY & INDIVIDUAL DIFFERENCES 260, 265 (2017); Josh White, *It's a Video Game, and an Army Recruiter*, WASH. POST (May 27, 2005), <https://www.washingtonpost.com/archive/politics/2005/05/27/its-a-video-game-and-an-army-recruiter/55e4745a-5e0d-494a-90f6-cb7abec1f132/> [<https://perma.cc/3XSX-NRYW>].

¹⁰⁵ Bryce & Rutter, *supra* note 98, at 1. Some games require the player to aggress human beings, such as a first-person-shooter game in the violent condition, in contrast with a puzzle game in the nonviolent condition. For example, one experiment pretested a range of violent and nonviolent games to ensure the games prompted equivalent enjoyment, arousal, frustration, and challenge. See Christopher R. Engelhardt, Bruce D. Bartholow, Geoffrey T. Kerr & Brad J. Bushman, *This Is Your Brain on Violent Video Games: Neural Desensitization to Violence Predicts Increased Aggression Following Violent Video Game Exposure*, 47 J. EXPERIMENTAL SOC. PSYCH. 1033, 1034 (2011). The researchers included the “violent” games *Call of Duty: Finest Hour*, *Hitman: Contracts*, *Killzone*, and *Grand Theft Auto: Vice City*. *Id.* The nonviolent games

ments in virtual reality, coupled with research showing that some middle schoolers were playing “intensely violent games,”¹⁰⁶ prompted increasing concern about the effects of playing violent video games.¹⁰⁷ Politicians expressed moral panic,¹⁰⁸ and ratings groups, such as the Entertainment Software Rating Board, were created to rate video games.¹⁰⁹ Although some states passed legislation to limit minors’ ability to purchase violent games, the Supreme Court of the United States concluded in *Brown v. Entertainment Merchants Ass’n*¹¹⁰ that the lack of evidence that video games cause violence made such laws unconstitutional.¹¹¹

Following mass shootings, which have been largely perpetrated by white males,¹¹² social narratives often highlight the shooter’s history of violent video game play.¹¹³ For example, following the Columbine High School massacre in 1999, commentators noted that the two shooters were avid players of *Doom*, a first-person-shooter game in which the objective is to kill the most people.¹¹⁴ Following the 2014 Santa Barbara/Isla Vista mass shooting by Elliott Rodger, journalists and scholars discussed Rodger’s obsession with *World of Warcraft* and displays of male entitlement, and also his withdrawal into online forums, including the “Incel” community (or “involuntary celibates,” who are deeply “disparaging of women, whom they blame for denying them their right to sexual intercourse”).¹¹⁵

included *Sonic Plus Mega Collection*, *Jak and Daxter: The Precursor Legacy*, *MVP Baseball*, and *Tony Hawk’s Pro Skater 4*. *Id.*

¹⁰⁶ See Jones et al., *supra* note 17, at 3.

¹⁰⁷ See Gunter & Daly, *supra* note 99, at 1348–51.

¹⁰⁸ See Anne Curley, *Senator Decries Violent Video Games*, CNN: ALLPOLITICS (Nov. 25, 1997), <http://edition.cnn.com/ALLPOLITICS/1997/11/25/email/videos/> [<https://perma.cc/RX4S-WFZQ>] (Senator Joseph Lieberman referring to violent video games as “digital poison”); William Vitka, *Senator Clinton on Violent Games*, CBS News (Aug. 2, 2005, 9:22 PM), <http://www.cbsnews.com/news/senator-clinton-on-violent-games/> [<https://perma.cc/9STA-A3MW>] (Senator Hillary Clinton declaring that “[p]laying violent video games is to an adolescent’s violent behavior what smoking tobacco is to lung cancer”).

¹⁰⁹ DeCamp, *supra* note 104, at 260.

¹¹⁰ 564 U.S. 786 (2011).

¹¹¹ *Id.* at 800.

¹¹² John Haltiwanger, *White Men Have Committed More Mass Shootings than Any Other Group*, NEWSWEEK (Oct. 2, 2017, 11:39 AM), <https://www.newsweek.com/white-men-have-committed-more-mass-shootings-any-other-group-675602> [<https://perma.cc/F4HT-HRZ7>].

¹¹³ See Patrick M. Markey, Charlotte N. Markey & Juliana E. French, *Violent Video Games and Real-World Violence: Rhetoric Versus Data*, 4 PSYCH. POPULAR MEDIA CULTURE 277, 277–80 (2015).

¹¹⁴ Matt Bai, *Anatomy of a Massacre*, 133 NEWSWEEK 24, 24–30 (May 3, 1999).

¹¹⁵ Niraj Chokshi, *What Is an Incel? A Term Used by the Toronto Van Attack Suspect, Explained*, N.Y. TIMES (Apr. 24, 2018), <https://www.nytimes.com/2018/04/24/world/canada/incele>

Researchers who study the impact of playing video games are finding that different types of games produce different effects on the brain. Individuals who play action games that involve first-person shooters, such as *Medal of Honor* or *Call of Duty*, experience shrinkage of the hippocampus, the part of the brain associated with memory, spatial navigation, and stress regulation.¹¹⁶ In contrast, playing *Super Mario* games, in which a plumber strives to rescue a princess, causes growth of the hippocampus.¹¹⁷ Some studies, discussed in the next section, have found that violent game exposure increases immediate aggression, while nonviolent video game exposure increases prosocial thoughts and decreases aggressive thoughts, feelings, and behavior,¹¹⁸ and some long-term real-life effects have been established.¹¹⁹ Games known for being competitive and populated by men, such as *Call of Duty*, have particularly hostile climates towards women and those perceived as “outsiders,”¹²⁰ making sexual harassment of women more common.¹²¹

Making distinctions between violent games and nonviolent games that may have valuable effects is important to avoid essentializing video games. Researchers create video games to assist children and adults with physical therapy,¹²² and educational games with beneficial

reddit-meaning-rebellion.html [https://perma.cc/J592-7987]; see also Adam Nagourney, Michael Cieply, Alan Feuer & Ian Lovett, *Before Brief, Deadly Spree, Trouble Since Age 8*, N.Y. TIMES (June 1, 2014), <https://www.nytimes.com/2014/06/02/us/elliott-rodger-killings-in-california-followed-years-of-withdrawal.html> [https://perma.cc/W35P-EE5T].

¹¹⁶ G.L. West, K. Konishi, M. Diarra, J. Benady-Chorney, B.L. Drisdelle, L. Dahmani, D.J. Sodums, F. Lepore, P. Jolicoeur & V.D. Bohbot, *Impact of Video Games on Plasticity of the Hippocampus*, 23 MOLECULAR PSYCHIATRY 1566, 1569, 1572 (2018).

¹¹⁷ *Id.* at 1572. The construct of rescuing a woman is, itself, sexist and rooted in patriarchy.

¹¹⁸ Marc A. Sestir & Bruce D. Bartholow, *Violent and Nonviolent Video Games Produce Opposing Effects on Aggressive and Prosocial Outcomes*, 46 J. EXPERIMENTAL SOC. PSYCH. 934, 936, 938–39 (2010).

¹¹⁹ Jodi L. Whitaker & Brad J. Bushman, *A Review of the Effects of Violent Video Games on Children and Adolescents*, 66 WASH. & LEE L. REV. 1033, 1036–37 (2009). But see *Daily Dose of Violent Video Games Has No Long-Term Effect on Adult Aggression, Researchers Find*, SCIENCEDAILY (Mar. 14, 2018), <https://www.sciencedaily.com/releases/2018/03/180314102008.htm> [https://perma.cc/4AJ5-DHDU].

¹²⁰ Wai Yen Tang & Jesse Fox, *Men's Harassment Behavior in Online Video Games: Personality Traits and Game Factors*, 42 AGGRESSIVE BEHAV. 513, 514, 518 (2016); see also Thorsten Quandt, Vivian Chen, Frans Mäyrä & Jan Van Looy, *(Multiplayer) Gaming Around the Globe?*, in MULTIPLAYER 23, 36 (Thorsten Quandt & Sonja Kröger eds., 2014).

¹²¹ See PEW RSCH. CTR., *supra* note 46, at 3–4.

¹²² H. Lynn Horne-Moyer, Brian H. Moyer, Drew C. Messer & Elizabeth S. Messer, *The Use of Electronic Games in Therapy: A Review with Clinical Implications*, 16 CURRENT PSYCHIATRY REP. 520, 521 (2014).

outcomes abound.¹²³ New virtual reality technology is being utilized for psychological care, such as helping people with paranoia of public spaces¹²⁴ or treating anxiety and other psychiatric disorders.¹²⁵ Virtual reality is also utilized for physical therapy and medical treatment.¹²⁶ Video game play has also been shown to improve surgeons' skills.¹²⁷

Moderate video game playing, which is defined as between seven and ten hours per week, has been linked to reduced stress levels and increased social interactions, emotional stability, happiness, life satisfaction, sense of achievement, and psychological resilience.¹²⁸ A majority of gamers report positive impacts from gaming, including "mental stimulation, relaxation, and stress relief."¹²⁹ The reasons people give for playing video games—socializing, collaborating, competing, escaping routine, and seeking recognition¹³⁰—are relatable and especially desirable during COVID-19 quarantines.

In contrast to positive outcomes, "pathological gaming" among adolescents diminishes social competence, increases loneliness, and lowers self-esteem.¹³¹ Researchers have found a "reciprocal relation"

¹²³ See, e.g., T. Atilla Ceranoglu, *Video Games in Psychotherapy*, 14 REV. GEN. PSYCH. 141, 145 (2010).

¹²⁴ See Kristiina Kompu, *Virtual-Reality-Assisted Therapy in Patients with Psychosis*, 5 LANCET PSYCHIATRY 189, 190 (2018); Roos Pot-Kolder, Chris N.W. Geraets, Wim Veling, Marije van Beilen, Anton B.P. Staring, Harm J. Gijsman, Philippe A.E.G. Delespaul & Mark van der Gaag, *Virtual-Reality-Based Cognitive Behavioural Therapy Versus Waiting List Control for Paranoid Ideation and Social Avoidance in Patients with Psychotic Disorders: A Single-Blind Randomised Controlled Trial*, 5 LANCET PSYCHIATRY 217, 221–22 (2018).

¹²⁵ See Jessica L. Maples-Keller, Brian E. Bunnell, Sae-Jin Kim & Barbara O. Rothbaum, *The Use of Virtual Technology in the Treatment of Anxiety and Other Psychiatric Disorders*, 25 HARV. REV. PSYCHIATRY 103, 104–07 (2017) (discussing current applications and future directions for virtual-reality-based treatment and clinical research).

¹²⁶ See, e.g., *Virtual Reality Eases Phantom Limb Pain*, SCIENCE DAILY (May 31, 2017) <https://www.sciencedaily.com/releases/2017/05/170531102921.htm> [<https://perma.cc/6TY5-4PJG>].

¹²⁷ See Maarten B. Jalink, Jetse Goris, Erik Heineman, Jean-Pierie E. N. Pierie & Henk O. ten Cate Hoedemaker, *The Effects of Video Games on Laparoscopic Simulator Skills*, 208 AM. J. SURGERY 151, 154–55 (2014) (discussing several controlled experiments showing that video games can be used to improve laparoscopic basic skills in surgical novices and as a warmup before laparoscopic surgery).

¹²⁸ See Jones et al., *supra* note 17, at 2–3; Emma Louise Anderson, Eloisa Steen & Vasileios Stavropoulos, *Internet Use and Problematic Internet Use: A Systematic Review of Longitudinal Research Trends in Adolescence and Emergent Adulthood*, 22 INT'L J. ADOLESCENCE & YOUTH 430, 435–38 (2017).

¹²⁹ Halley M. Pontes, Vasileios Stavropoulos & Mark D. Griffiths, Editorial, *Emerging Insights on Internet Gaming Disorder: Conceptual and Measurement Issues*, 11 ADDICTIVE BEHAV. REPS., June 2020, at 1, 1.

¹³⁰ See Nadia Jimenez, Sonia San-Martin, Carmen Camarero & Rebeca San Jose Cabezedo, *What Kind of Video Gamer Are You?*, 36 J. CONSUMER MKTG. 218, 219–20 (2019).

¹³¹ Jeroen S. Lemmens, Patti M. Valkenburg & Jochen Peter, *Psychosocial Causes and Consequences of Pathological Gaming*, 27 COMPUTERS HUM. BEHAV. 144, 144, 150 (2011) (re-

between loneliness and pathological gaming: low social competence, self-esteem, and loneliness were significant predictors of pathological gaming six months later, and greater loneliness resulted from pathological gaming.¹³² Researchers also note that replacing real-world social interaction with video gaming deteriorates existing personal relationships, leading to gamers' feelings of loss of real-life connections.¹³³

Taken to an extreme, gaming can consume a person and impair basic life functioning. Experts estimate that approximately five percent of adolescents (aged thirteen to nineteen) suffer "gaming disorder,"¹³⁴ which is termed a medical addiction.¹³⁵ The consequences of excessive and addictive gaming have been researched for over forty years, and in light of conceptual and diagnostic advances, the American Psychiatric Association identified "Internet Gaming Disorder" as a tentative addictive disorder for inclusion in the fifth revision of the Diagnostic and Statistical Manual of Mental Disorders ("DSM-5").¹³⁶ The classification concerns "persistent and recurrent online activity" that may "result in clinically significant impairment or distress."¹³⁷

Similarly, in 2019, the World Health Organization ("WHO") announced the inclusion of a "gaming disorder" diagnosis in its official diagnostic manual.¹³⁸ The disorder is not simply gaming too much; instead, the WHO defines gaming as a disorder when it significantly in-

porting results from a six-month longitudinal study, defining "pathological gaming" as "persistent and excessive" video gaming "that cannot be controlled despite associated social and/or emotional problems").

¹³² *Id.* at 150.

¹³³ *Id.*

¹³⁴ PATTI M. VALKENBURG & JESSICA TAYLOR PIOTROWSKI, *PLUGGED IN* 214–15 (2017), https://yalebooks.yale.edu/sites/default/files/files/Media/9780300228090_UPDF.pdf [<https://perma.cc/DNU9-MZTN>].

¹³⁵ See Daniel L. King et al., *Screening and Assessment Tools for Gaming Disorder: A Comprehensive Systematic Review*, 77 *CLINICAL PSYCH. REV.* 101831, 101832, 101844 (2020) (evaluating thirty-two English language tools to measure gaming disorder employed in 320 studies); Antonius J. van Rooij, Tim M. Schoenmakers, Regina J.J.M. van den Eijnden, Ad A. Vermulst & Dike van de Mheen, *Video Game Addiction Test: Validity and Psychometric Characteristics*, 15 *CYBERPSYCHOLOGY, BEHAV., & SOC. NETWORKING* 507 (2012).

¹³⁶ AM. PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 795–98 (5th ed. 2013); see also Andrew K. Przybylski, Netta Weinstein & Kou Murayama, *Internet Gaming Disorder: Investigating the Clinical Relevance of a New Phenomenon*, 174 *AM. J. PSYCHIATRY* 230, 230, 235 (2017).

¹³⁷ Oscar G. Bukstein, *Substance Use Disorders and Addictions*, in *DULCAN'S TEXTBOOK OF CHILD AND ADOLESCENT PSYCHIATRY* 219, 220–24 (Mina K. Dulcan ed., 2d ed. 2016).

¹³⁸ World Health Org., *Gaming Disorder*, ICD-11, <https://icd.who.int/dev11/l-m/en/http%3a%2f%2fid.who.int%2fid%2fentity%2f1448597234> [<https://perma.cc/WS99-SDR5>].

terferes with daily life.¹³⁹ An individual who loses control around gaming, prioritizes gaming over daily activities, and persists in gaming despite “impairment in personal, family, social, educational, occupational, or other important areas of functioning” may qualify for such diagnosis.¹⁴⁰ Under the WHO guidelines, a person typically needs to exhibit symptoms for twelve months to receive the diagnosis.¹⁴¹ The Occupational Safety and Health Administration does not regulate gamers,¹⁴² allowing people to practice and compete for lengthy periods. Recent tragedies, like teenagers dying of strokes while endlessly gaming and children being neglected by parents consumed by gaming, caution against extreme degrees of gaming.¹⁴³

Research shows that hyperactive-impulsive males, as well as inattentive males, in the United States display higher levels of disordered gaming.¹⁴⁴ This is concerning because “videogame addiction has been systematically linked to aggressive/oppositional behavior, maladaptive coping strategies, [and] decreased academic achievement and performance,”¹⁴⁵ along with interference with sleep, work, and outside interests and hobbies.¹⁴⁶ Overall, adolescents with game addiction

¹³⁹ See *id.*; Anya Kamenetz, *Is ‘Gaming Disorder’ an Illness? WHO Says Yes, Adding it to Its List of Diseases*, NPR (May 28, 2019, 5:48 PM), <https://www.npr.org/2019/05/28/727585904/is-gaming-disorder-an-illness-the-who-says-yes-adding-it-to-its-list-of-diseases> [<https://perma.cc/2X58-UF9J>].

¹⁴⁰ World Health Org., *supra* note 138.

¹⁴¹ *Id.*

¹⁴² See Occupational Injury and Illness Recording and Reporting Requirements, 66 Fed. Reg. 5915, 6038 (Jan. 19, 2001) (codified at 29 C.F.R. pts. 1904, 1952). The Occupational Safety and Health Administration’s standards apply only to the employer-employee relationship, and factors for determining whether such relationship exists are set forth in *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 322–25 (1992). See Letter from Richard E. Fairfax, Dir. of Enf’t Programs, Occupational Safety & Health Admin., to Robert Van Laanen (Sept. 12, 2008) <https://www.osha.gov/laws-regs/standardinterpretations/2008-09-12> [<https://perma.cc/SRN4-BMNQ>]; Adam M. Finkel, Chris Deubert, Orly Lobel, I. Glenn Cohen & Holly Fernandez Lynch, *The NFL as a Workplace: The Prospect of Applying Occupational Health and Safety Law to Protect NFL Workers*, 60 ARIZ. L. REV. 291 (2018).

¹⁴³ See Joshua Rhett Miller, *Teen Video Game Addict Dies After Marathon Session: Report*, N.Y. POST (Nov. 5, 2019, 2:56 PM), <https://nypost.com/2019/11/05/teen-video-game-addict-dies-after-marathon-session-report/> [<https://perma.cc/2JQQ-8D36>]; Haniya Rae, *When Gamers Become Parents, Finding Balance Is Next Level*, N.Y. TIMES (Apr. 17, 2020), <https://www.nytimes.com/2020/04/17/parenting/video-games-parents.html> [<https://perma.cc/7YKB-WAQR>].

¹⁴⁴ Stavropoulos et al., *supra* note 8, at 7.

¹⁴⁵ *Id.* at 100159.

¹⁴⁶ *Id.*; see also Douglas Gentile, *Pathological Video-Game Use Among Youth Ages 8 to 18*, 20 PSYCH. SCI. 594, 600–01 (2009) (finding poor academic performance among pathological video game players and that “the amount of time spent playing video games is a consistent negative predictor of school performance”).

symptoms display greater depressive symptoms than normative classes.¹⁴⁷ There are also significant differences in symptoms amongst genders, with males reporting greater social anxiety and females having lower self-esteem.¹⁴⁸

Even if the video game industry does not accept the DSM-5 inclusion or the WHO's decision to classify gaming disorder as a genuine mental disorder, such attention places "an onus on the . . . industry" and on schools investing in gaming to create "responsible gaming initiatives aimed at player protection and harm minimization."¹⁴⁹

B. Gender in Gaming

For decades, computer technology, including modern video games, has been marketed to male audiences.¹⁵⁰ In an address at an international conference held in the Bay Area in 1999, the Chief Executive Officer of Lucas Learning admitted that its products were "designed exclusively for boys";¹⁵¹ females, while half of the world's population, have instead been viewed by the gaming industry as a niche market.¹⁵² Unsurprisingly, despite overall trends in computer

¹⁴⁷ See Michelle Colder Carras, Antonius J. Van Rooij, Dike Van de Mheen, Rashelle Musci, Qian-Li Xue & Tamar Mendelson, *Video Gaming in a Hyperconnected World: A Cross-Sectional Study of Heavy Gaming, Problematic Gaming Symptoms, and Online Socializing in Adolescents*, 68 COMPUTERS HUM. BEHAV. 472, 476–78 (2017).

¹⁴⁸ See *id.*

¹⁴⁹ Mark D. Griffiths & Halley M. Pontes, *The Future of Gaming Disorder Research and Player Protection: What Role Should the Video Gaming Industry and Researchers Play?*, 18 INT'L J. MENTAL HEALTH & ADDICTION 784, 785 (2020). "Harm reduction is a cluster of principles developed in the [public health] context of working with individuals engaging in high-risk behavior. Rather than demand that an individual abstain from such behavior, which may not be realistic, harm reduction focuses on mitigating collateral dangers associated with the behavior." Courtney Cross, *Harm Reduction in the Domestic Violence Context*, in THE POLITICIZATION OF SAFETY 332, 333 (Jane K. Stoevers ed., 2019) (footnote omitted). Rather than a dogmatic set of rules, harm reduction is grounded in principles of autonomy, dignity, and empathy. See generally Susan E. Collins, Seema L. Clifasefi, Diane E. Logan, Laura S. Samples, Julian M. Somers & G. Alan Marlatt, *Current Status, Historical Highlights, and Basic Principles of Harm Reduction*, in HARM REDUCTION 3, 6–10 (G. Alan Marlatt, Mary E. Larimer & Katie Witkiewitz eds., 2d ed. 2012); *Principles of Harm Reduction*, NAT'L HARM REDUCTION COAL., <https://harmreduction.org/about-us/principles-of-harm-reduction/> [<https://perma.cc/H4XZ-7K2K>].

¹⁵⁰ DeCamp, *supra* note 104, at 265. A study of video game box covers found that only male characters were depicted striking a dominant pose and that male characters appeared over twelve times as often as female characters. Eugene F. Provenzo Jr., *The Video Generation*, 179 AM. SCH. BD. J. 29, 31 (1992).

¹⁵¹ Subrahmanyam et al., *supra* note 100, at 12 (referencing statements at CILT99, the Chartered Institute of Logistics and Transport).

¹⁵² See Suneel Ratan, *Game Makers Aren't Chasing Women*, WIRED (July 15, 2003, 2:00 AM), <https://www.wired.com/2003/07/game-makers-arent-chasing-women/> [<https://perma.cc/577D-5Q36>]; Becca Caddy, *I Was Always Told I Was Unusual: Why So Few Women Design*

technology use,¹⁵³ more people in the United States who identify as male play video games than those who identify as female,¹⁵⁴ and video game-playing is the most popular form of entertainment for males between the ages of twelve and twenty-five.¹⁵⁵

Currently, over ninety percent of esports players are male.¹⁵⁶ Most professional teams are composed of men, and esports coaches, team owners, and casters are mainly male.¹⁵⁷ Among people who identify as “gamers,” “gender influence[s] time spent on games,” with male gamers spending an average of 13.6 hours per week on games, and female gamers spending an average of 5.5 hours per week on games.¹⁵⁸

In contrast to professional men’s and women’s soccer, for example, esports has no gender divisions and coed teams can exist.¹⁵⁹ Because physical strength and body size do not dictate success in gaming—and no evidence exists that the physical skills required for gaming are unevenly distributed between men and women—gender should not affect the equality of opportunities within a competition.¹⁶⁰ Thus, esports has great potential for gender equality. Women and nonbinary individuals are making inroads into this male-dominated realm, but pervasive sexism and gender barriers perpetuate gender imbalance.¹⁶¹

Video Games, GUARDIAN (Feb. 17, 2020, 2:00 AM), <https://www.theguardian.com/education/2020/feb/17/i-was-always-told-i-was-unusual-why-so-few-women-design-video-games> [https://perma.cc/Y2HZ-ZDW8].

¹⁵³ See *Internet/Broadband Fact Sheet*, PEW RSCH. CTR. (June 12, 2019), <https://www.pewresearch.org/internet/fact-sheet/internet-broadband/> [https://perma.cc/QNC4-7PSA].

¹⁵⁴ J. Clement, *U.S. Computer and Video Gamers from 2006-2020, by Gender*, STATISTA (Jan. 29, 2021), <https://www.statista.com/statistics/232383/gender-split-of-us-computer-and-video-gamers/> [https://perma.cc/KK2V-P479]; see also Kevin Durkin & Bonnie Barber, *Not So Doomed: Computer Game Play and Positive Adolescent Development*, 23 APPLIED DEVELOPMENTAL PSYCH. 373, 381, 387 (2002).

¹⁵⁵ Erica Scharrer, *Virtual Violence: Gender and Aggression in Video Game Advertisements*, 7 MASS COMM’N & SOC’Y 393, 394 (2004); see also Perrin, *supra* note 9 (“[G]aming is nearly ubiquitous among teenage boys.”).

¹⁵⁶ Orantes & Sharma, *supra* note 27.

¹⁵⁷ Mariona Rosell Llorens, *eSport Gaming: The Rise of a New Sports Practice*, 11 SPORTS, ETHICS & PHIL. 464, 474 (2017).

¹⁵⁸ Lemmens et al., *supra* note 131, at 150 (pre-COVID-19 figures).

¹⁵⁹ Llorens, *supra* note 157, at 474.

¹⁶⁰ *Id.*

¹⁶¹ See, e.g., Danny Appleford, *Godsent Announces First All-Female Valorant Team*, DAILY ESPORTS (May 8, 2020), <https://www.dailyesports.gg/godsent-announces-first-all-female-valorant-team/> [https://perma.cc/P9KM-LARE] (discussing challenges for female teams and frequent sexual harassment in gaming, particularly if a woman speaks); Fogel, *supra* note 7.

In the video game industry, three out of four people are male, and nearly the same proportion identify as white.¹⁶² At gaming companies, women are rarely promoted to senior positions or made the heads of studios.¹⁶³ Scholars note that the gaming industry is “particularly conducive to a culture of misogyny and sexual harassment” because straight white men have “created the identity of the gamer as this exclusive property.”¹⁶⁴ Women, people of color, and LGBTQIA individuals have sought to break into the industry, only to be met with “toxic geek masculinity” that leads to sexual abuse and bullying.¹⁶⁵ Recent social movements are prompting awareness of the need for diversity among gamers and in the industry, along with the production of a greater variety of video games to appeal to different people.¹⁶⁶

Mainstream video games continue to portray few female characters, with women in games being “nonessential, passive characters.”¹⁶⁷ In a content analysis of game reviews, only approximately one-fifth of female characters were playable and thus active, rather than passive.¹⁶⁸ The few female characters that do appear in video games are typically highly sexualized, objectified, scantily clad, and engaging in sexual behaviors.¹⁶⁹ A review of the box art representation of female characters found that “‘sex sells,’ but only when the sexualized women portrayed are also depicted as marginalized,” such as women

¹⁶² Mihir Zaveri, Meron Tekie Menghistab, Gray Beltran & Alana Celii, *Fear, Anxiety and Hope: What It Means to Be a Minority in Gaming*, N.Y. TIMES (Oct. 16, 2019), <https://www.nytimes.com/interactive/2019/10/16/technology/game-developers.html?action=click&module=relatedLinks&pgtype=article> [https://perma.cc/R6AX-VV59].

¹⁶³ *Id.*

¹⁶⁴ Taylor Lorenz & Kellen Browning, *Dozens of Women in Gaming Speak Out About Sexism and Harassment*, N.Y. TIMES (June 23, 2020), <https://www.nytimes.com/2020/06/23/style/women-gaming-streaming-harassment-sexism-twitch.html> [https://perma.cc/2HJV-4WYD].

¹⁶⁵ *Id.*

¹⁶⁶ *See id.*

¹⁶⁷ James D. Ivory, *Still a Man's Game: Gender Representation in Online Reviews of Video Games*, 9 MASS COMM'N & SOC'Y 103, 104 (2006).

¹⁶⁸ *See id.* at 110; *see also* Scharrer, *supra* note 155, at 394 (stating that video game content and ads contain “potentially problematic portrayals of gender” and that “[m]ale characters appear to outnumber female characters in video game advertisements”).

¹⁶⁹ Kevin Haninger & Kimberly M. Thompson, *Content and Ratings of Teen-Rated Video Games*, 291 JAMA 856, 862 (2004) (finding that ninety-eight percent of “T-rated” games contained intentional violence, sixty-nine percent of games required the player to kill or rewarded the player for killing, over one-quarter depicted sexual themes, and games were significantly more likely to depict females partially nude or engaged in sexual behaviors than males); *accord* Scharrer, *supra* note 155, at 394, 400 (analyzing over 1,000 video game advertisements in three monthly video game magazines); *Video Games Influence Sexist Attitudes*, SCIENCE DAILY (Mar. 28, 2017), <https://www.sciencedaily.com/releases/2017/03/170328105908.htm> [https://perma.cc/GT7Z-XFEM].

who pole dance in the background or solicit sex for money and who are peripheral to the game narrative, “consistent with a gender coding of the game that fits cultural stereotypes.”¹⁷⁰ Two new games, *Apex Legends* and *Valorant* are changing this pattern. For example, in *Apex Legends*, professional male players are using the female characters Watson, Wraith, and Bangalore in tournaments.¹⁷¹ Although Watson is a defensive character, Wraith and Bangalore are both offensive characters and are used for aggressive gaming.¹⁷²

The content of games and identities of gamers need not be inevitable or unwelcoming to a wider population of players. Gaming and online worlds have the potential to be radically inclusive spaces, particularly considering the Internet’s egalitarian aim.¹⁷³ Countless examples of creative, innovative games include characters who are actually reflective of our world. One example is Joyce Lin’s online tabletop card game, in which players roleplay as young women with crushes on each other.¹⁷⁴ Lin, who describes her game as a “queer form of resistance,” explains that a player might become “Avery,” who is Japanese-Scottish and pansexual, or “Ioh,” a Korean tomboy.¹⁷⁵ The proliferation of gaming also presents opportunities for abuse prevention, such as enhancing empathy and building skills for recognizing and safely intervening in situations of harassment and gender-based violence.¹⁷⁶

Related to identity, many video games require the creation and use of an avatar, or a character through which the player is repre-

170 Christopher E. Near, *Selling Gender: Associations of Box Art Representation of Female Characters with Sales for Teen- and Mature-Rated Video Games*, 68 *SEX ROLES* 252, 253 (2013); see also Alessandro Gabbiadini, Paolo Riva, Luca Andrighetto, Chiara Volpato & Brad J. Bushman, *Acting Like a Tough Guy: Violent-Sexist Video Games, Identification with Game Characters, Masculine Beliefs, & Empathy for Female Violence Victims* 11 *PLOS ONE*, Apr. 13, 2016, at 1, 2 (“GTA . . . female characters are portrayed as sexual objects—usually prostitutes or pole-dancers—who are peripheral to the game narrative and whose sole purpose is to entertain the main male characters.”).

171 E-mail from female-identifying gamer on the current culture around selecting characters in *Apex Legends* (Aug. 11, 2020) (on file with author).

172 *Id.*

173 The Internet is often described as a forum that enables open, egalitarian, democratic, and decentralized communication among people from diverse backgrounds and political persuasions. See *The Internet as a Force for Equality*, MIT *TECH. REV.* (Feb. 18, 2015), <https://www.technologyreview.com/2015/02/18/169097/the-internet-as-a-force-for-equality/> [<https://perma.cc/Z7DU-8LGZ>]. But see Michael S. Daubs, *The Myth of an Egalitarian Internet: Occupy Wall Street and the Mediatization of Social Movements*, 8 *INT’L J. DIGIT. TELEVISION* 367, 370 (2017).

174 Zaveri et al., *supra* note 162.

175 *Id.*

176 Potter et al., *supra* note 59.

sented in the virtual world, particularly when playing MMO games or Massively Multiplayer Online Roleplaying Games (“MMORPGs”).¹⁷⁷ Gamers often form psychological attachments to their avatars that deepen over time through experience and interrelation with the avatar.¹⁷⁸ This attachment “generates a sense that a gamer’s body, physiological states, emotional states, perceived traits, and identity exist within the virtual environment.”¹⁷⁹ Gamers use their avatars to gain knowledge, skills, achievements, and resources, and “to form groups and intergroup collaborations [as they] progress in the game” and become part of “virtual communities.”¹⁸⁰ Researchers have not yet determined the long-term effects of highly realistic and immersive virtual violence on those using violence or receiving violence as virtual selves, such as avatar rape and other sexual violence.¹⁸¹ One scholar cautions that the constant, active engagement that video games “demand from the player enables them to involve players in tangled webs of complicity with the deeds committed by the characters they inhabit, leading to complex and productive ethical encounters with the perpetrator’s perspective.”¹⁸² Using an avatar has also been shown to enhance game absorption and immersion, which increases gaming disorder risk.¹⁸³

The gendered nature of gaming is frequently explained by positing that gaming content—which is often patriarchal, misogynistic, and lacking in female characters—is offensive or unappealing to women, so women do not engage in gaming as much as men.¹⁸⁴ Violence,

¹⁷⁷ See Stavropoulos et al., *supra* note 8, at 2.

¹⁷⁸ See Tagrid Lemenager, Miriam Neissner, Thomas Sabo, Karl Mann & Falk Kiefer, “Who Am I” and “How Should I Be”: A Systematic Review on Self-Concept and Avatar Identification in Gaming Disorder, 7 CURRENT ADDICTION REPS. 166, 166–67 (2020).

¹⁷⁹ Tyrone L. Burleigh, Vasilis Stavropoulos, Lucas W. L. Liew, Baxter L. M. Adams & Mark D. Griffiths, *Depression, Internet Gaming Disorder, and the Moderating Effect of the Gamer-Avatar Relationship: An Exploratory Longitudinal Study*, 16 INT’L J. MENTAL HEALTH & ADDICTION 102, 106 (2018).

¹⁸⁰ *Id.*

¹⁸¹ See Susan Persky & Jim Blascovich, *Consequences of Playing Violent Video Games in Immersive Virtual Environments*, in AVATARS AT WORK AND PLAY 167, 169–70 (Ralph Schroeder & Ann-Sofie Axelsson eds., 2006); see also Jesse Fox, Jeremy N. Bailenson & Liz Tricase, *The Embodiment of Sexualized Virtual Selves: The Proteus Effect and Experiences of Self-Objectification via Avatars*, 29 COMPUTERS HUM. BEHAV. 930, 936 (2013) (noting that “it is essential to investigate the cumulative and long-term effects of such exposure” in reference to sexualized representations in video games).

¹⁸² Tobi Smethurst, “We Put Our Hands on the Trigger with Him”: Guilt and Perpetration in Spec Ops: The Line, 59 CRITICISM 201, 203 (2017).

¹⁸³ See Burleigh et al., *supra* note 179, at 105.

¹⁸⁴ Bryce & Rutter, *supra* note 98, at 6 (explaining that “female game characters [often] fulfil traditionally feminine roles, as the helpless damsel in distress awaiting rescue, or the ‘prize’

whether fictional or real, has been considered a masculine area, and video games featuring violence have been systematically marketed to males.¹⁸⁵ One variable alone “stands as a consistent and very powerful predictor of violent game play: gender.”¹⁸⁶

C. *Violent Games*

The president of the National Collegiate Athletic Association (“NCAA”), Mark Emmert, recently expressed his reluctance to include esports as an official college sport, “criticiz[ing] video games as ‘violent[,]’ . . . ‘misogynistic,’ [and] at odds with the values held by the NCAA.”¹⁸⁷ Of course, NCAA programs have historically been biased toward men’s athletics programs over women’s and earn a large portion of revenue from college football, which is critiqued for its real-world violence and harm to players.¹⁸⁸ The International Olympic Committee has similarly declared the current esports under consideration for joining the Olympic lineup to be too violent, citing the amount of blood used in these games as inconsistent with Olympic values.¹⁸⁹ However, pressure to include esports as an Olympic sport may mount given that esports has over 320 million viewers worldwide.¹⁹⁰

Research on how, why, and for whom violent video game play produces aggression and aggression-related variables continues. Numerous experimental, cross-sectional, and longitudinal studies have found that violent video game exposure is associated with aggressive outcomes, including significantly increased aggressive cognition, feelings, and behavior, along with hostile affect and anxiety.¹⁹¹ Laboratory

for completing game tasks . . . alongside the dominance of ‘masculine’ game themes” such as “war, violence, competition, sports, [and] acquisition”).

¹⁸⁵ DeCamp, *supra* note 104, at 265.

¹⁸⁶ *Id.* at 262–63 (using five datasets that include over 19,000 American youth, and finding high levels of violent video game play among youth who had a family member recently serve in the military, whose father had recently lost his job, who recently had an incarcerated family member, or who moved frequently, and that the presence of a maternal older role model was associated with lower levels of violent game play).

¹⁸⁷ Payne, *supra* note 91.

¹⁸⁸ *Id.*

¹⁸⁹ *Esports ‘Too Violent’ to Be Included in Olympics*, BBC (Sept. 4, 2018), <https://www.bbc.com/news/newsbeat-45407667> [<https://perma.cc/VYG8-3WQF>]; *Esports Has an Intrinsic Relationship with Violence but It Might Not Last Long*, ESPORTS BETTING TIPS (Oct. 4, 2018), <https://esports-betting-tips.com/esports-has-an-intrinsic-relationship-with-violence-but-it-might-not-last-long/> [<https://perma.cc/7C4T-XKYU>].

¹⁹⁰ See *supra* notes 89–90 and accompanying text.

¹⁹¹ Craig A. Anderson & Nicholas L. Carnagey, *Causal Effects of Violent Sports Video Games on Aggression: Is it Competitiveness or Violent Content?*, 45 J. EXPERIMENTAL SOC.

studies have found that playing violent video games has a physiological desensitizing effect;¹⁹² specifically, playing violent video games can reduce empathy and “increase[] aggressive behavior in part via changes in cognitive and personality factors associated with desensitization.”¹⁹³ Longitudinal research concerning causal relationships between video game violence and aggression has found long-term effects of higher normative beliefs about aggression, as well as subsequent physical aggression among adolescents and less prosocial behavior.¹⁹⁴ The competitiveness of a video game, along with potential feelings of frustration and diminished competence with the game, also lead to

PSYCH. 731, 731, 734–35 (2009) (finding that violent sport games “increase[] . . . aggressive affect, aggressive cognition, and aggressive behavior,” as well as “attitudes towards violence in sports”); Craig A. Anderson, Akira Sakamoto, Douglas A. Gentile, Nobuko Ithori, Akiko Shibuya, Shintaro Yukawa, Mayumi Naito & Kumiko Kobayashi, *Longitudinal Effects of Violent Video Games on Aggression in Japan and the United States*, 122 PEDIATRICS 1067, 1069–70 (2008) (finding that after the initial survey of multiple independent sample groups, youths who habitually played violent video games had higher levels of aggression three to six months later); Craig A. Anderson, Nicholas L. Carnagey, Mindy Flanagan, Arlin J. Benjamin, Jr., Janie Eubanks & Jeffery C. Valentine, *Violent Video Games: Specific Effects of Violent Content on Aggressive Thoughts and Behavior*, 36 ADVANCES EXPERIMENTAL SOC. PSYCH. 199, 205, 222 (2004) (employing multiple psychological measurements and finding that violent video games in general increased the accessibility of aggressive thoughts, and that trait hostility and trait aggression positively correlated with aggressive behaviors carried out during the experimental tasks); Luca Chittaro & Riccardo Sioni, *Killing Non-Human Animals in Video Games: A Study on User Experience and Desensitization to Violence Aspects*, 10 PSYCHNOLOGY J. 215, 216 (2012) (describing “negatively valenced high-arousal affect”); Engelhardt et al., *supra* note 105, at 1034–36 (providing experimental evidence linking violence desensitization with increased aggression, and showing that a neural marker can at least partially account for the causal link between violent game exposure and aggression); *see also* Craig A. Anderson, Akiko Shibuya, Nobuko Ithori, Edward L. Swing, Brad J. Bushman, Akira Sakamoto, Hannah R. Rothstein & Muniba Saleem, *Violent Video Game Effects on Aggression, Empathy, and Prosocial Behavior in Eastern and Western Countries: A Meta-Analytic Review*, 136 PSYCH. BULL. 151, 161–69 (2010) (meta-analysis of hundreds of studies on violent video games increasing aggressive behavior). *But see* Joseph Hilgard, Christopher R. Engelhardt & Jeffrey N. Rouder, Comment, *Overstated Evidence for Short-Term Effects of Violent Games on Affect and Behavior: A Reanalysis of Anderson et al. (2010)*, 143 PSYCH. BULL. 757 (2017) (arguing that bias led to an overestimation of the effect in Anderson et al. (2010), *supra*).

¹⁹² *See* Nicholas L. Carnagey, Craig A. Anderson & Brad J. Bushman, *The Effect of Video Game Violence on Physiological Desensitization to Real-Life Violence*, 43 J. EXPERIMENTAL SOC. PSYCH. 489, 494 (2007) (comparing heart rate and electrodermal activity signals after playing nonviolent and violent games and then viewing real-life violent video footage).

¹⁹³ Bruce D. Bartholow, Marc A. Sestir & Edward B. Davis, *Correlates and Consequences of Exposure to Video Game Violence: Hostile Personality, Empathy, and Aggressive Behavior*, 31 PERSONALITY & SOC. PSYCH. BULL. 1573, 1573–74 (2005).

¹⁹⁴ Ingrid Möller & Barbara Krahé, *Exposure to Violent Video Games and Aggression in German Adolescents: A Longitudinal Analysis*, 35 AGGRESSIVE BEHAV. 75, 81–85 (2009) (finding violent video game play to be related to physical aggression thirty months after the original evaluation).

aggression and foster hostility that may lead to negative social interactions.¹⁹⁵

Hostility and harassment between and against gamers are facilitated by the violent content and competitive nature of some video games, player anonymity, physical distance, and how the games keep people engaged through increasing challenges, all of which can be frustrating and produce aggression in some players.¹⁹⁶ Related to gaming and abusive behavior, a *League of Legends* player lost his gaming contract after he livestreamed a domestic violence incident.¹⁹⁷ His girlfriend had suggested he block or ignore players who were making him upset,¹⁹⁸ and he responded by destroying multiple forms of property and threatening her.¹⁹⁹ He had previously “show[n] physical aggression onstage, smashing a keyboard and physically intimidating a camera operator during a match.”²⁰⁰ In a tragic example at a 2018 *Madden NFL* tournament, a player opened fire after he lost, killing his competitor, another individual, and himself.²⁰¹

New research shows effects on the player’s social network.²⁰² Playing violent video games increases intergroup bias and ethnocentrism,²⁰³ with games rationalizing prejudice and fears about people of color.²⁰⁴ Another study found associations between high levels of gaming and increased odds of getting into a serious fight, carrying a weapon to school, smoking regularly, drug use beyond alcohol and marijuana, and depression.²⁰⁵

¹⁹⁵ Andrew K. Przybylski, Edward L. Deci, C. Scott Rigby & Richard M. Ryan, *Competence-Impeding Electronic Games and Players’ Aggressive Feelings, Thoughts, and Behaviors*, 103 J. PERSONALITY & SOC. PSYCH. 441, 443, 448 (2014); Tang & Fox, *supra* note 120, at 514.

¹⁹⁶ Tang & Fox, *supra* note 120, at 514.

¹⁹⁷ David Lumb, ‘League of Legends’ Pro Suspended 20 Months for Domestic Violence, ENGADGET (Nov. 23, 2017), <https://www.engadget.com/2017-11-22-league-of-legends-pro-suspended-20-months-for-domestic-violenc.html> [https://perma.cc/6MLD-26CC].

¹⁹⁸ *League of Legends Pro Li ‘Vasilii’ Wei Jun Banned After Assaulting His Girlfriend While Livestreaming*, MCV (Oct. 27, 2017), <https://www.mcvuk.com/esports/league-of-legends-pro-li-vasilii-wei-jun-banned-after-assaulting-his-girlfriend-while-livestreaming/> [https://perma.cc/2UJT-U2SP].

¹⁹⁹ *Id.*; Lumb, *supra* note 197.

²⁰⁰ Lumb, *supra* note 197.

²⁰¹ Steven Musil, *EA Cancels Remaining Madden Events After Fatal Florida Shooting*, CNET (Aug. 27, 2018, 7:58 PM), <https://www.cnet.com/news/ea-cancels-remaining-madden-events-after-fatal-florida-shooting/> [https://perma.cc/F9KE-ZYPW].

²⁰² Tobias Greitemeyer, *The Spreading Impact of Playing Violent Video Games on Aggression*, 80 COMPUTERS HUM. BEHAV. 216, 217–18 (2018).

²⁰³ See Tobias Greitemeyer, *Playing Violent Video Games Increases Intergroup Bias*, 40 PERSONALITY & SOC. PSYCH. BULL. 70, 72–73 (2014).

²⁰⁴ See CHRISTOPHER A. PAUL, *THE TOXIC MERITOCRACY OF VIDEO GAMES* 79 (2018).

²⁰⁵ Rani A. Desai, Suchitra Krishnan-Sarin, Dana Cavallo & Marc N. Potenza, *Video-Gam-*

Other studies, in contrast, do not support long-term direct causes of violent video games on physical aggression or find other significant effects.²⁰⁶ In particular, studies examining actual violence, rather than aggression, find that the correlation with violent video games is largely or entirely absent after controlling for influences such as age, family involvement, and violence within the home.²⁰⁷ Recent research also provides insights into how preexisting characteristics may cause some young people to be more vulnerable to negative impacts of video games.²⁰⁸ The impact of violent video games is thus increasingly being considered from a more nuanced perspective with an understanding that publication bias and the emphasis on the use of laboratory measures of aggression may exaggerate relationships between video game violence and aggression, inaccurately predicting real life behavior.²⁰⁹

Whether or not video games actually lead to physical violence—including sexual violence and gender-based violence—as schools sponsor and promote gaming, they should consider the acts carried out through the games and how players experience cyberviolence and harassing communications on gaming platforms.

D. Gender-Based Violence in Games and Gaming

Regardless of the type of game, players' communications to each other on gaming platforms, especially with anonymity in online gaming, often lead to "toxic disinhibition such as uncivil or hateful speech, threats, and other forms of harassment."²¹⁰ One player reported that

ing Among High School Students: Health Correlates, Gender Differences, and Problematic Gaming, 126 *PEDIATRICS* 1414, 1418 (2010) (conducting a study of 4,000 adolescents).

²⁰⁶ Durkin & Barber, *supra* note 154, at 376 ("Correlational studies have led to mixed outcomes, with some evidence to suggest relationships among 18-year-olds but not among younger adolescents."); Christopher J. Ferguson et al., *Digital Poison? Three Studies Examining the Influence of Violent Video Games on Youth*, 50 *COMPUTERS HUM. BEHAV.* 399, 406–07 (2015); Randy J. McCarthy, Sarah L. Coley, Michael F. Wagner, Bettina Zengel & Ariel Basham, *Does Playing Video Games with Violent Content Temporarily Increase Aggressive Inclinations? A Pre-Registered Experimental Study*, 67 *J. EXPERIMENTAL SOC. PSYCH.* 13, 13 (2016).

²⁰⁷ See, e.g., Whitney DeCamp & Christopher J. Ferguson, *The Impact of Degree of Exposure to Violent Video Games, Family Background, and Other Factors on Youth Violence*, 46 *J. YOUTH & ADOLESCENCE* 388, 396 (2017) (identifying family and social variables as more influential factors to youth violence than violent video games).

²⁰⁸ Johannes Breuer, Jens Vogelgesang, Thorsten Quandt & Ruth Festl, *Violent Video Games and Physical Aggression: Evidence for a Selection Effect Among Adolescents*, 4 *PSYCH. POPULAR MEDIA CULTURE* 305, 320–24 (2015).

²⁰⁹ See John L. Sherry, *Violent Video Games and Aggression: Why Can't We Find Effects?*, in *MASS MEDIA EFFECTS RESEARCH* 245, 259–60 (Raymond W. Preiss et al. eds., 2007); Christopher John Ferguson, *The Good, the Bad and the Ugly: A Meta-Analytic Review of Positive and Negative Effects of Violent Video Games*, 78 *PSYCHIATRY Q.* 309, 313–15 (2007).

²¹⁰ Fox & Tang, *supra* note 31, at 1292 (emphasis omitted).

“[d]epending on the game, people can be terrible to each other via in-game chat (verbal or text). Anything perceived as poor in-game performance can lead to name calling and escalate to personal threats and attacks in seconds.”²¹¹ “[G]raphic rape threats have become a lingua franca—the ‘go-to’ response for men who disagree with what a woman says”²¹² Another survey respondent reported, “A friend of a friend found out I’m female on the gaming platform Steam. The harassment and constant sexual overtures were bad enough I contacted Steam to change all my information”²¹³

1. Technology-Enabled Abuse

The causes of gender-based violence are understood to be persistent gender inequality and patriarchal norms, including early peer relationships that instill unequal gender norms, experiencing or utilizing abuse in early dating relationships, and intergenerational cycles.²¹⁴ Given youth gaming rates and research that domestic violence prevention efforts are best targeted to the eleven- to fourteen-year-old age bracket,²¹⁵ this intersection impacts the next generation’s relationships.

Rates of teen dating violence, sexual assault, and intimate partner abuse remain alarmingly high, as revealed by the #MeToo movement and multiple national and global studies.²¹⁶ Many girls as young as

²¹¹ DUGGAN, *supra* note 47, at 24.

²¹² JANE, *supra* note 33, at 3.

²¹³ DUGGAN, *supra* note 47, at 24. Another respondent stated, “My wife plays online games (as do I). Over the years I’ve seen guys exhibit disturbing behavior toward her, for no other reason than she’s a woman. Sometimes it’s just calling her offensive names, sometimes it has been actual sexual harassment.” *Id.* As another example, pro gamer Matt “Dellor” Vaughn, who has over 350,000 followers on Twitch, was temporarily banned from Twitch after making a series of sexist statements to his partner online, calling her derogatory names, and telling his female teammate to “go cook a sandwich.” Marcus Banks, *Disgraced Overwatch Pro Tells Woman to ‘Cook a Sandwich’ in Twitch Rage*, DEXERTO (June 2, 2020, 8:56 AM), <https://www.dexerto.com/entertainment/disgraced-overwatch-pro-tells-woman-to-cook-a-sandwich-shocking-twitch-rage-580340> [<https://perma.cc/D697-HZ94>]. His career in *Overwatch* was cut short after *Overwatch* learned that he had broadcast a racist tirade and repeated a racial slur over sixty times in a row while gaming. *Id.*

²¹⁴ See LEIGH GOODMARK, A TROUBLED MARRIAGE 34–35 (2011); EVAN STARK, COERCIVE CONTROL 198–210 (2007); Louise Dixon & Nicola Graham-Kevan, *Understanding the Nature and Etiology of Intimate Partner Violence and Implications for Practice and Policy*, 31 CLINICAL PSYCH. REV. 1145, 1146 (2011).

²¹⁵ See Carrie F. Mulford & Dara R. Blachman-Demner, *Teen Dating Violence: Building a Research Program Through Collaborative Insights*, 19 VIOLENCE AGAINST WOMEN 756, 761–62 (2013); WORLD HEALTH ORG., *supra* note 57, at 45.

²¹⁶ See *supra* notes 61–64 and accompanying text.

eleven years old experience teen dating violence,²¹⁷ and approximately one-third of high school females experience dating violence.²¹⁸ One in five women are sexually assaulted while they are in college,²¹⁹ and transgender and nongender binary students suffer from high rates of sexual assault, especially forcible rape.²²⁰ Consequences of gender-based abuse include higher rates of suicidality, substance abuse, sexually transmitted diseases, teen pregnancy, future experiences of domestic violence, negative educational effects, and decreased lifetime wages.²²¹

Reports of technology-enabled abuse and sexual cyberviolence are increasing,²²² and virtual reality and video games have become ways through which stalking, harassment, and abuse are perpetrated.²²³ Nearly twenty percent of American adults have been the target of severe online harassment, including physical threats, stalking, and sexual harassment over sustained periods of time.²²⁴ Witnessing

217 MICHELE C. BLACK, KATHLEEN C. BASILE, MATTHEW J. BREIDING, SHARON G. SMITH, MIKEL L. WALTERS, MELISSA T. MERRICK, JIERU CHEN & MARK R. STEVENS, CTRS. FOR DISEASE CONTROL & PREVENTION, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY 49 (2011), http://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf [<https://perma.cc/B3D2-G22H>].

218 ANTOINETTE DAVIS, INTERPERSONAL AND PHYSICAL DATING VIOLENCE AMONG TEENS 1 (2008), http://nccdglobal.org/sites/default/files/publication_pdf/focus-dating-violence.pdf [<https://perma.cc/NN6Z-DB5V>].

219 KREBS ET AL., *supra* note 53, at 73.

220 DAVID CANTOR, BONNIE FISHER, SUSAN CHIBNALL, REANNE TOWNSEND, HYUNSHIK LEE, CAROL BRUCE & GAIL THOMAS, REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT 50 (2017), <https://www.aau.edu/key-issues/aau-climate-survey-sexual-assault-and-sexual-misconduct-2015> [<https://perma.cc/5LWY-Z83Q>].

221 See Ctrs. for Disease Control & Prevention, *Physical Dating Violence Among High School Students—United States, 2003*, 55 MORBIDITY & MORTALITY WKLY. REP. 532, 532 (2006), <https://www.cdc.gov/mmwr/PDF/wk/mm5519.pdf> [<https://perma.cc/8FH6-GPNB>]; Glob. Health Cluster, *Gender-Based Violence in Health Emergencies*, WORLD HEALTH ORG., <https://www.who.int/health-cluster/about/work/other-collaborations/gender-based-violence/en/> [<https://perma.cc/V8DP-Y8SW>]; Anna Aizer, *The Gender Wage Gap and Domestic Violence*, 100 AM. ECON. REV. 1847, 1849, 1858 (2010).

222 See *supra* note 43 and accompanying text; Delanie Woodlock, *The Abuse of Technology in Domestic Violence and Stalking*, 23 VIOLENCE AGAINST WOMEN 584, 584, 595 (2017) (“Technology was used to create a sense of the perpetrator’s omnipresence, and to isolate, punish, and humiliate domestic violence victims. Perpetrators also threatened to share sexualized content online to humiliate victims.”); Nellie Bowles, *Thermostats, Locks and Lights: Digital Tools of Domestic Abuse*, N.Y. TIMES (June 23, 2018), <https://www.nytimes.com/2018/06/23/technology/smart-home-devices-domestic-abuse.html?auth=login-email&login=email> [<https://perma.cc/5NC9-F5F7>] (noting that many electronic household items can be controlled remotely, making them prime vehicles for harassment).

223 See DUGGAN, *supra* note 47, at 24.

224 *Id.* at 3.

online harassment is also part of digital life, with two-thirds of Americans saying they have witnessed others being harassed online.²²⁵

2. *Sexual Cyberviolence, Harassment, and Gender-Based Attacks*

In addition to featuring misogyny and male entitlement in game design, video games increasingly and actively promote and reward sexual violence, while other games permit or encourage sexual harassment, assault, and murder.²²⁶ One example is *Grand Theft Auto IV*, in which the main character can visit strip clubs, solicit sex from a female sex worker, pay her in cash, shoot and kill her, and retrieve the cash before returning to his own home.²²⁷ Researchers have found that video games depicting sexual objectification and violence against women result in significant increased “rape-supportive attitudes” for male study participants but not for female study participants.²²⁸

Already, multiple incidences of gender-based violence and sexual assault have occurred in virtual reality.²²⁹ Professor Mary Anne Franks observes, “‘Virtual’ sexual assault has been around as long as virtual communities have existed,” and “‘avatar rapes’ [have been] profoundly disturbing to the real people behind the characters.”²³⁰ To provide another example, in 2016, Sony used the game *Dead or Alive Xtreme 3* to launch its virtual reality headset PlayStation VR.²³¹ This game’s virtual reality update allows players to “continually touch a woman who is verbally protesting” with the console’s motion control-

²²⁵ *Id.*

²²⁶ See Victoria Simpson Beck, Stephanie Boys, Christopher Rose & Eric Beck, *Violence Against Women in Video Games: A Prequel or Sequel to Rape Myth Acceptance?*, 27 J. INTERPERSONAL VIOLENCE 3016, 3017 (2012) (“Along with expeditious growth of the video game industry has been growth in the development of games that sexually objectify women (e.g., pole strippers, prostitutes) and allow gamers to engage in virtual violence (e.g., battery, murder) against women.”).

²²⁷ *Id.* at 3023.

²²⁸ *Id.* at 3016; accord Karen E. Dill, *Violent Video Games, Rape Myth Acceptance, and Negative Attitudes Toward Women*, in 4 VIOLENCE AGAINST WOMEN IN FAMILIES AND RELATIONSHIPS 125, 135 (Evan Stark & Eve S. Buzawa eds., 2009) (finding greater exposure to video game violence to be positively correlated with rape myth acceptance and negatively correlated with attitudes toward women).

²²⁹ See Jessica Buchleitner, *When Virtual Reality Feels Real, So Does the Sexual Harassment*, REVEAL (Apr. 5, 2018), <https://www.revealnews.org/article/when-virtual-reality-feels-real-so-does-the-sexual-harassment/> [<https://perma.cc/99FY-3ZNC>].

²³⁰ Mary Anne Franks, *The Desert of the Unreal: Inequality in Virtual and Augmented Reality*, 51 U.C. DAVIS L. REV. 499, 527 (2017).

²³¹ Sean Buckley, *‘Dead or Alive’ VR Is Basically Sexual Assault, the Game*, ENGADGET (Aug. 29, 2016), <https://www.engadget.com/2016-08-29-dead-or-alive-vr-is-basically-sexual-assault-the-game.html> [<https://perma.cc/D33Y-NYRR>].

ler.²³² Other games feature violence in many additional forms, including a man punching a suffragette in *Red Dead Redemption 2*.²³³ Among gamers, the practice of “teabagging” an opponent (dropping one’s genitals onto the opponent’s face) is a divisive topic. Some players brush off the experience as an insulting joke, while others view it as in-game sexual assault that fosters an unwelcome environment for those who wish to avoid triggering experiences of sexual abuse.²³⁴ Abuse perpetrators have also used technology and games to carry out abuse in person, for example, using *Pokémon Go* to lure distracted players to secluded places and assaulting them.²³⁵

Researchers have noted the notoriously “vicious” player community and cycles of “toxic behavior” in popular games such as *League of Legends*,²³⁶ which is one of the most played games in the world, including in collegiate esports, and is a game for which college scholarships are available.²³⁷ Online games and game streaming are replete with hostility, aggression, and demeaning or violent insults that disproportionately target and affect marginalized individuals, including women, people of color, and LGBTQIA individuals.²³⁸ When players’ gender, race, or ethnicity-related cues are exposed in game play, those not fitting the dominant white male identity are often targeted for harassment.²³⁹ Dr. Kishonna Gray writes of her experience as a woman of color gaming in Xbox Live, “a space so often constructed as a space for white males,” noting the racist and gendered hatred and slurs

²³² *Id.*

²³³ Erik Kain, *This ‘Red Dead Redemption 2’ Feminist-Punching Controversy Is So Silly*, FORBES (Nov. 27, 2018, 8:30 AM), <https://www.forbes.com/sites/erikkain/2018/11/27/outrage-over-punching-a-feminist-in-red-dead-redemption-2-is-so-absurd/#3e5e109733f1> [https://perma.cc/VMA5-GV56].

²³⁴ Corey Plante, ‘Overwatch’ “Teabagging” Controversy Has Ignited an Internet Firestorm, INVERSE (Apr. 30, 2018, 4:30 PM), <https://www.inverse.com/article/44335-overwatch-teabagging-carpe-ado-pro-league-fusion-dragons> [https://perma.cc/YL8A-37NL].

²³⁵ See, e.g., *Man Mugged While Playing ‘Pokemon Go’ Captures His Attack on Live Video*, ABC NEWS (Sept. 21, 2016, 8:31 AM), <https://abcnews.go.com/Technology/man-mugged-playing-pokemon-captures-attack-live-video/story?id=42240566> [https://perma.cc/P5AB-WVYB].

²³⁶ Joaquim A. M. Neto, Kazuki M. Yokoyama & Karen Becker, *Studying Toxic Behavior Influence and Player Chat in an Online Video Game*, in PROCEEDINGS 2017 IEEE/WIC/ACM INTERNATIONAL CONFERENCE ON WEB INTELLIGENCE 26, 33 (2017).

²³⁷ *Esports Scholarships Guide*, NEXT COLL. STUDENT ATHLETE, <https://www.ncsasports.org/college-esports-scholarships> [https://perma.cc/N7ZS-EM29].

²³⁸ Jay Castello, *Foul Play: Tackling Toxicity and Abuse in Online Video Games*, GUARDIAN (Aug. 17, 2018, 4:00 AM), <https://www.theguardian.com/games/2018/aug/17/tackling-toxicity-abuse-in-online-video-games-overwatch-rainbow-seige> [https://perma.cc/2NYJ-SW2U].

²³⁹ See Tang & Fox, *supra* note 120, at 514–15.

against her, as well as the barrages of stereotypes about Black women that she receives when she speaks.²⁴⁰

Multiplayer games often involve using your microphone to speak to teammates, but many women describe muting themselves to avoid inciting harassment against them.²⁴¹ In one study, researchers played a networked violent video game with other anonymous players and interacted using prerecorded voices, and found that the female voices received three times more negative comments than male voices.²⁴² Another study similarly found that once players started communicating verbally with other players, linguistic profiling was common, and online players of nondominant groups were frequently derided and harassed with sexist, racist, nativist, and heterosexist attacks once they used their voices.²⁴³

Studies find that female gamers experience substantial loneliness and anxiety while gaming online, along with harassment.²⁴⁴ Fear of harassment is “well-founded,” as “half of all gamers report that they have experienced online harassment,” and one-fifth of female-identifying gamers have fully left gaming, unwilling to endure the frequent online abuse.²⁴⁵ Many other examples of toxic masculinity, gendered threats, and hostile environments exist in the gaming world. Players harass individuals who are perceived as outsiders to the “traditional, patriarchal, dude-dominated gaming culture.”²⁴⁶ Social dominance orientation and hostile sexism predict sexist comments, statements about rape, and players who otherwise engage in sexual harassment.²⁴⁷

²⁴⁰ GRAY, *supra* note 10, at xvii–xviii.

²⁴¹ See, e.g., Samson Amore, *Riot Games Will Work to Eliminate In-Game Sexual Harassment After Employee Shares Toxic Experience*, WRAP (Apr. 28, 2020, 4:09 PM), <https://www.thewrap.com/riot-games-valorant-sexual-harassment/> [<https://perma.cc/ZN7M-EYM6>].

²⁴² Jeffrey H. Kuznekoff & Lindsey M. Rose, *Communication in Multiplayer Gaming: Examining Player Responses to Gender Cues*, 15 NEW MEDIA & SOC’Y 541, 549–54 (2013).

²⁴³ K. L. Gray, *Deviant Bodies, Stigmatized Identities, and Racist Acts: Examining the Experiences of African-American Gamers in Xbox Live*, 18 NEW REV. HYPERMEDIA & MULTIMEDIA 261, 269–74 (2012).

²⁴⁴ See Lavinia McLean & Mark D. Griffiths, *Female Gamers’ Experience of Online Harassment and Social Support in Online Gaming: A Qualitative Study*, 17 INT’L J. MENTAL HEALTH & ADDICTION 970, 987–88 (2019).

²⁴⁵ Phoebe Braithwaite, *The UN’s Plan to Tackle Abuse in Gaming? Ask Gamers*, WIRED (June 9, 2018), <https://www.wired.co.uk/article/un-he-for-she-ea-abuse-women-games-industry> [<https://perma.cc/A8HK-AB8Q>].

²⁴⁶ Caitlin Dewey, *The Only Guide to Gamergate You Will Ever Need to Read*, WASH. POST (Oct. 14, 2014, 5:23 PM), https://www.washingtonpost.com/news/the-intersect/wp/2014/10/14/the-only-guide-to-gamergate-you-will-ever-need-to-read/?noredirect=on&utm_term=.f8820b1dc8cc [<https://perma.cc/E3VU-KF7H>]; see also Tang & Fox, *supra* note 120, at 513.

²⁴⁷ See Fox & Tang, *supra* note 120, at 517.

The United Nations reports that half of female gamers hide their gender identity and avoid all forms of verbal communication with other players in attempts to avoid rampant online harassment.²⁴⁸ When masking one's gender or sex while gaming, many players assume other players are male based on the genre of game,²⁴⁹ which inadvertently reinforces the idea that women are absent and that gaming is a masculine space.²⁵⁰ Harassment thus makes women invisible in gaming and creates "a spiral of silence in which women—and the men who support their presence in games—have been silenced by a perceived majority of hostile, hypermasculine players."²⁵¹ Performing an unfamiliar identity takes effort that others do not have to expend on such undertakings,²⁵² and despite attempts at masking gender, many times a female gamer's identity is exposed by her voice through chat features in multiplayer games.²⁵³ "Men of color [also] learn to navigate [online racism] in ways that encourage strategies of silence and emotional desensitization to racism"²⁵⁴

Abuse targeted at female gamers ties back to the "masculine history embedded in the video game industry."²⁵⁵ The gaming industry began with the assumption that most players were male, leading game developers to unwittingly disregard female, transgender, and nongender binary players.²⁵⁶ With the emergence of the Wii, developers attempted to attract more female gamers with the stated goal of "gender inclusivity,"²⁵⁷ but player representations were still limited to certain bodies, genders, and skin colors.²⁵⁸ Playable female characters in games are often entirely nonexistent, hypersexualized, or lacking in visual depth.²⁵⁹ The female player is typically classified as white, heter-

²⁴⁸ Braithwaite, *supra* note 245. Another study analyzed data collected from an online discussion forum and found that "[t]he most common theme in the discussion . . . was the belief that female gamers needed to stay quiet and hide their identity from other gamers, in order to . . . protect themselves from the negative behaviour of others." McLean & Griffiths, *supra* note 244, at 986.

²⁴⁹ See Allison Eden, Erin Maloney & Nicholas David Bowman, *Gender Attribution in Online Video Games*, 22 J. MEDIA PSYCH. 114, 114 (2010).

²⁵⁰ See Fox & Tang, *supra* note 31, at 1298.

²⁵¹ *Id.* at 1304.

²⁵² See Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"* 108 YALE L.J. 485, 528 (1998).

²⁵³ See Fox & Tang, *supra* note 31, at 1302.

²⁵⁴ Ortiz, *supra* note 10, at 573.

²⁵⁵ SHIRA CHESS, READY PLAYER TWO 152 (2017).

²⁵⁶ See *id.* at 10–11.

²⁵⁷ *Id.* at 162.

²⁵⁸ See *id.* at 163.

²⁵⁹ See *id.* at 164–65.

osexual, middle-class, cisgender, and able-bodied.²⁶⁰ Such stereotyping is harmful. Instead, both those in the gaming industry and those who are not “should think of [the female player], and design her, in terms of all the possible things she is able to be. [She] can be fluid and changeable. She can be queer. She can be black- or brown-skinned. . . . [She] can, and should, be transformational.”²⁶¹

Online, players utilizing abusive behavior can hide behind anonymity and “feel emboldened to say and do . . . things” because of the online format.²⁶² Increasing instances of behaviors in a virtually consequence-free world have drifted into the real world. Female gamers are subjected to multiple forms of online abuse and have been victims of real-world extensions through the uploading of private sensitive material, hacking, and doxing—the publishing of personally identifying information, such as street addresses and social security numbers—to incite anonymous people on the Internet to hunt targets in real life.²⁶³ Women who have spoken out against the gaming industry have especially been targeted.²⁶⁴

3. *The Gaming Industry and #MeToo or #EToo*

The gaming world has historically failed to take sexual harassment seriously and is replete with issues of sexism, bullying, and allegations of abuse. As an early example, in 2007, anonymous attackers forced prominent game developer Kathy Sierra out of the industry by sending her death threats and publicizing her social security number.²⁶⁵ After Anita Sarkeesian launched the video series *Tropes vs. Women in Video Games* in response to games such as *Grand Theft Auto* that encourage players to murder sex workers with impunity, she received countless rape and death threats.²⁶⁶ In response to her effort

²⁶⁰ See *id.* at 171–72.

²⁶¹ *Id.* at 172.

²⁶² Braithwaite, *supra* note 245; accord Brianna Wu, *Rape and Death Threats Are Terrorizing Female Gamers. Why Haven't Men in Tech Spoken Out?*, WASH. POST. (Oct. 20, 2014, 10:11 AM), <https://www.washingtonpost.com/posteverything/wp/2014/10/20/rape-and-death-threats-are-terrorizing-female-gamers-why-havent-men-in-tech-spoken-out/> [<https://perma.cc/62S7-S8EP>]; see also Nellie Bowles, *How 'Doxing' Became a Mainstream Tool in the Culture Wars*, N.Y. TIMES (Aug. 30, 2017), <https://www.nytimes.com/2017/08/30/technology/doxing-protests.html> [<https://perma.cc/7CWK-JG7W>] (describing how some have responded to online extremism by depriving offending individuals of their anonymity).

²⁶³ See Bowles, *supra* note 262.

²⁶⁴ Lorenz & Browning, *supra* note 164.

²⁶⁵ Kathy Sierra, Opinion, *Why the Trolls Will Always Win*, WIRED (Oct. 8, 2014, 4:49 PM), <https://www.wired.com/2014/10/trolls-will-always-win/> [<https://perma.cc/76CT-FJB6>].

²⁶⁶ See Nick Wingfield, *Feminist Critics of Video Games Facing Threats in 'GamerGate' Campaign*, N.Y. TIMES (Oct. 15, 2014), <https://www.nytimes.com/2014/10/16/technology/gamer->

to expose misogyny in video games, a man created a video game that allowed people to batter her face, with her image gaining black eyes, bruising, and cuts as users pummeled her.²⁶⁷ She was also forced to cancel a university speaking appearance after an anonymous email promised “the deadliest school shooting in American history” if she spoke.²⁶⁸

The Twitter hashtag thread #1ReasonWhy began in 2012 with a tweet that asked, “Why are there so few lady game creators?”²⁶⁹ Over the course of one day, thousands of women tweeted their experiences of sexism, harassment, and exclusion while working in a gaming industry dominated by sexist values.²⁷⁰ This hashtag was mostly used by women who had worked or who were working in the gaming industry and did not reach the broader community of women who play video games,²⁷¹ which portends an #EToo movement waiting to happen.

A prime example of vicious mob attacks is Gamergate, the campaign of rape and death threats directed at women critical of the gaming industry’s male-dominated, sexist culture.²⁷² Gamergate began in 2014 when video game designer Zoë Quinn’s ex-boyfriend posted an intimate and brutal blog post about Quinn, which quickly spiraled into online attackers threatening to kill Quinn and women in the industry.²⁷³ The online attackers associated with Gamergate forced females in the gaming industry, including Brianna Wu, who had critiqued the cultural embeddedness of misogyny, to flee their homes and occupations and call the police out of imminent fear for their lives.²⁷⁴ Al-

gate-women-video-game-threats-anita-sarkeesian.html?ref=todayspaper [https://perma.cc/K27Q-TMPF]; Robin Abcarian, *Anita Sarkeesian Bravely Confronts Sexist Video Gaming Culture*, L.A. TIMES (Oct. 17, 2014), <https://www.latimes.com/local/abcarian/la-me-ra-a-feminist-critic-video-game-culture-20141016-column.html> (last visited May 15, 2021).

²⁶⁷ Moore, *supra* note 4.

²⁶⁸ Zachary Jason, *Game of Fear*, BOS. MAG. (Apr. 28, 2015, 5:45 AM), <https://www.bostonmagazine.com/news/blog/2015/04/28/gamergate/print> [https://perma.cc/VD7J-ZHPG]; accord Cherie Todd, *GamerGate and Resistance to the Diversification of Gaming Culture*, 29 WOMEN’S STUD. J. 64, 64 (2015).

²⁶⁹ Todd, *supra* note 268, at 65.

²⁷⁰ Betsy Isaacson, *#1ReasonWhy Reveals Sexism Rampant in the Gaming Industry*, HUFFINGTON POST (Jan. 30, 2013), http://www.huffingtonpost.com/2012/11/29/1reasonwhy-reveals-sexism-gaming-industry_n_2205204.html [https://perma.cc/D7PC-KM8T]; Todd, *supra* note 268, at 65.

²⁷¹ See Todd, *supra* note 268.

²⁷² Dewey, *supra* note 246.

²⁷³ Jason, *supra* note 268.

²⁷⁴ Peter Andrew Hart, *Game Developer Brianna Wu Flees Home After Death Threats*, HUFFINGTON POST (Oct. 11, 2014), https://www.huffpost.com/entry/game-developer-death-threats_n_5970966 [https://perma.cc/5TDR-D8SL]; see also Jason, *supra* note 268 (detailing how Quinn left the video game industry after death threats and stalking).

though sexism exists in many industries and professions, the response to critics of sexism in gaming is unparalleled: anonymous attackers have broadcasted women's private information including their social security numbers and home addresses, "swatted" their victims by tricking police dispatchers into sending SWAT teams to raid women's homes, and mobilized thousands on the Internet to send violent death and rape threats.²⁷⁵ The misogyny of "GamerGaters" has been so violent that it has been compared to terrorism.²⁷⁶ The Digital Games Research Association and International Communication Association report that scholars involved in gaming and gender research receive threatening messages and advise those who critique gaming to undertake security measures.²⁷⁷

During the summer of 2019, after the global popularization of the #MeToo movement,²⁷⁸ "several game developers went public with accusations of sexual assault, harassment and abuse."²⁷⁹ While journalists, politicians, producers, actors, chefs, judges, and others experienced repercussions following public identification of the sexual harassment they committed,²⁸⁰ the game developers who revealed being victimized were met with harsh backlash from the gaming community.²⁸¹ Quinn, who experienced extreme threats during Gamergate,²⁸² went public about the extensive emotional and sexual abuse their former partner, developer Alec Holowka, committed against them, and other developers and creators made similar allegations.²⁸³ After Holowka took his own life, the threats and backlash against Quinn and others were "relentless."²⁸⁴ Women, nonbinary individuals, and people of color expressed that, even after the #MeToo movement and five

²⁷⁵ Jason, *supra* note 268. Quinn accumulated over sixteen gigabytes of online abuse during GamerGate. See Keith Stuart, *Zoe Quinn: 'All Gamergate has done is ruin people's lives,'* GUARDIAN (Dec. 3, 2014, 9:00 AM), <https://www.theguardian.com/technology/2014/dec/03/zoe-quinn-gamergate-interview> (last visited May 15, 2021).

²⁷⁶ See JANE, *supra* note 33, at 5.

²⁷⁷ Todd, *supra* note 268, at 65; Shira Chess, Mia Consalvo, Nina Huntemann, Adrienne Shaw, Carol Stabile & Jenny Stromer-Galley, *GamerGate and Academia*, INT'L COMM'C'N ASS'N (Nov. 4, 2014), <https://wp.me/p2b59O-fv> [<https://perma.cc/3X3S-JMQC>].

²⁷⁸ See *supra* notes 61–64 and accompanying text.

²⁷⁹ Lorenz & Browning, *supra* note 164.

²⁸⁰ See Stoever, *supra* note 63, at 6–7.

²⁸¹ Laurie Penny, *Gaming's #MeToo Moment and the Tyranny of Male Fragility*, WIRED (Sept. 6, 2019, 7:00 AM), <https://www.wired.com/story/videogames-industry-metoo-moment-male-fragility/> [<https://perma.cc/7KKC-YDFJ>] ("The videogames industry is having its #MeToo moment, and the backlash against it has been fast and brutal.").

²⁸² See Jason, *supra* note 268.

²⁸³ *Id.*; Penny, *supra* note 281 (noting that Quinn's pronouns are they/them).

²⁸⁴ Penny, *supra* note 281.

years post Gamergate, little had changed about toxicity in the gaming industry.²⁸⁵

Summer 2020 brought an outpouring of allegations of gender-based harassment, discrimination, and sexual assault from competitive gamers and streamers. During a single weekend in June, over seventy people in the gaming industry, most identifying as female, shared their stories on Twitter, YouTube, Twitch, TwitLonger, and other platforms, and more people have gone public with their experiences since then.²⁸⁶ Gaming scholars hope that the gaming industry and community will be more receptive to addressing these sexual abuse and harassment allegations than in the past, now motivated by social activism and public attention. Yet, despite resignations from prominent industry figures, increased individual accountability in gaming, and statements issued by gaming companies, questions remain on how gender-based discrimination and biases pervade gaming and how the culture of gaming as a whole can change.²⁸⁷ Recent Black Lives Matter protests will hopefully also prompt the gaming industry to examine and address racism and intersectionality within games and gaming.²⁸⁸

III. ESPORTS GOES TO COLLEGE

The intersection of esports and college prompts the following question: “Can you really count it as co-ed when the environment is so

²⁸⁵ See Zaveri et al., *supra* note 162.

²⁸⁶ See Lorenz & Browning, *supra* note 164.

²⁸⁷ Kellen Browning, *More Resignations, but No Sign Yet of a Change in Gaming Culture*, N.Y. TIMES (July 19, 2020), <https://www.nytimes.com/2020/07/19/technology/gaming-harassment.html> [https://perma.cc/TT5W-A5AR].

²⁸⁸ ESPN Esports Staff, *A Conversation About Race and Diversity in Esports and Gaming*, ESPN (Oct. 20, 2020), https://www.espn.com/esports/story/_/id/30067415/a-conversation-race-diversity-esports-gaming [https://perma.cc/X5MA-F8PN]. (Amanda Stevens notes, “While I am appreciative of the supportive messages from most teams in the Overwatch League and in the various League of Legends leagues—that’s all they were in most cases. Just words. We’ve yet to really hear anyone talk about diversity initiatives or discuss how they plan to empower Black and brown folks to be able to break into the esports industry.” Stevens suggests, “The way we, in esports, keep the conversation going is empowering Black folks. We KNOW there is a diversity problem, and although everyone says they want to do something about it, I don’t see it. Unfortunately, the conversation will be kept going by us—the folks who are in the crosshairs—because it doesn’t seem like our community completely has our back.”); Daisy Schofield, *Black Lives Matter Meets Animal Crossing: How Protesters Take Their Activism into Video Games*, GUARDIAN (Aug. 7, 2020, 4:00 AM), <https://www.theguardian.com/games/2020/aug/07/black-lives-matter-meets-animal-crossing-how-protesters-take-their-activism-into-video-games> [https://perma.cc/2R6U-8BLD] (providing examples of in-game protests and rallies organized by players “in contrast with the gaming industry’s relatively subdued response to BLM”).

hostile that women don't want to play it?"²⁸⁹ Section III.A describes the burgeoning field of college esports, while Section III.B details Title IX implications, and Section III.C addresses First Amendment questions.

A. Esports Arenas, Scholarships, and Traveling Teams

Recognizing that most youth game, colleges have been investing in esports over the past several years to attract students—including Science, Technology, Engineering, and Math (“STEM”) students—and to foster connection on campus.²⁹⁰ Increasingly, colleges offer gaming scholarships, field varsity esports teams, and construct esports arenas as campus hubs and gaming spaces for the general student body, with notable arenas ranging from 3,500 to 11,000 square feet and outfitted with gaming chairs, computers, and gear.²⁹¹ The Department of Homeland Security has also awarded colleges substantial grants to build Esports Innovation Labs.²⁹²

The origin of organized gaming and esports on campus began with college students joining together with groups of friends to play video games,²⁹³ and some created gaming clubs that gained traction and the attention of investors.²⁹⁴ These esports clubs set the foundation for varsity esports teams.²⁹⁵ Varsity collegiate esports grew in popularity around 2014 when Robert Morris University in Illinois added

²⁸⁹ Claudine McCarthy, *Keep Up with Esports Developments, Impact on College Campuses*, CAMPUS LEGAL ADVISOR, Apr. 2020, at 1, 4.

²⁹⁰ Stone, *supra* note 21.

²⁹¹ See Ron Mendoza, ‘Fortnite’ Now an Official College Sport, Esports Scholarships Also Offered, INT’L BUS. TIMES (Jan. 23, 2020, 7:46 AM), <https://www.ibtimes.com/fortnite-now-official-college-sport-esports-scholarships-also-offered-2907997> [https://perma.cc/WLD4-9NHC]; Eric Stoller, *An Epic Update on Collegiate Esports*, INSIDE HIGHER ED (May 16, 2019, 6:31 PM), <https://www.insidehighered.com/blogs/student-affairs-and-technology/epic-update-collegiate-esports> [https://perma.cc/ZSP3-UKFK].

²⁹² See, e.g., Zalaznick, *supra* note 7.

²⁹³ See Bauer-Wolf, *supra* note 18 (discussing bringing games out of “dormitory life”); *Madison eSports Club*, WIS. INVOLVEMENT NETWORK, <https://win.wisc.edu/organization/madison-esports> [https://perma.cc/LP4W-68NV] (noting that the esports club at the University of Wisconsin–Madison “brings together a diverse group of students who share an interest in variety of video games”).

²⁹⁴ See James Thorne, *As Live College Sports Take a Time Out, Esports Score Big on Virtual Campuses*, PITCHBOOK (Sept. 8, 2020), <https://pitchbook.com/news/articles/college-sports-esports-campus> [https://perma.cc/7AZJ-TCHF]; DELOITTE CORP. FIN. & ESPORTS OBSERVER, *THE RISE OF ESPORTS INVESTMENTS* 12 (2019), <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/finance/drfa-rise-of-esports-investments.pdf> [https://perma.cc/529L-3W6U].

²⁹⁵ See Bryan W., *Varsity Esports: How US Colleges Are Earning Major ROI & Gamers Score Big Scholarships*, GAMEDESIGNING (Feb. 4, 2021) <https://www.gamedesigning.org/schools/varsity-esports/> [https://perma.cc/W7M2-5K34].

esports to its athletic program, including a scholarship-sponsored *League of Legends* team.²⁹⁶ By 2017, Big Ten universities were fielding teams to compete in conference play in partnership with Riot Games and the Big Ten Network.²⁹⁷

With a spike in investors,²⁹⁸ the field has expanded to include 130 varsity programs with a national governing body called the National Association of Collegiate Esports (“NACE”), a nonprofit membership association that strives to help esports grow and proliferate at its member institutions.²⁹⁹ NACE, which is the association of varsity esports programs at colleges and universities across America, maintains that esports can serve as an educational tool to foster a better experience for students in higher education.³⁰⁰ Collegiate Starleague, a collegiate gaming organization, has membership of 900 universities and 30,000 players.³⁰¹ Tespa is an additional organization that provides nearly 300 college chapters with support for esports at the club sport level.³⁰²

With live sports on hold during COVID-19 and schools, workplaces, and entertainment either closed or limited during stay-at-home orders,³⁰³ gaming and esports experienced dramatic increases in participation.³⁰⁴ The upward trajectory caused by the pandemic accelerated the gaming industry’s growth globally, including at colleges.³⁰⁵ Colleges also viewed gaming as a way to keep students socially con-

²⁹⁶ *RMU Becomes First University to Offer Gaming Scholarships with the Addition of eSports to Varsity Lineup*, ROBERT MORRIS UNIV. (June 11, 2014), <https://www.rmueagles.com/article/907> [<https://perma.cc/FG4K-DEM8>].

²⁹⁷ See Marc Tracy, *Big Ten Enters New Realm of Competition: E-Sports*, N.Y. TIMES, Jan. 19, 2017, at B12.

²⁹⁸ See Holden et al., *supra* note 70, at 67.

²⁹⁹ See *About*, NAT’L ASS’N COLLEGIATE ESPORTS, <https://nacesports.org/about/> [<https://perma.cc/E657-HFME>]; Sean Morrison, *List of Varsity Esports Programs Spans North America*, ESPN (Mar. 15, 2018), http://www.espn.com/esports/story/_/id/21152905/college-esports-list-varsity-esports-programs-north-america (last visited July 3, 2021).

³⁰⁰ *Get Involved*, NAT’L ASS’N COLLEGIATE ESPORTS, <https://nacesports.org/get-involved/> [<https://perma.cc/85TP-4898>].

³⁰¹ Stoller, *supra* note 291.

³⁰² See *So Tell Me . . . What Is Tespa?*, TESPA, <http://tespa.org/about> [<https://perma.cc/NDB9-UBQK>].

³⁰³ See *supra* note 12.

³⁰⁴ See *supra* note 13 and accompanying text.

³⁰⁵ Scott Heinrich, *Esports Ride Crest of a Wave as Figures Rocket During COVID-19 Crisis*, GUARDIAN (Apr. 10, 2020, 5:32 PM), <https://www.theguardian.com/sport/2020/apr/11/esports-ride-crest-of-a-wave-as-figures-rocket-during-covid-19-crisis> [<https://perma.cc/A8F8-PGMZ>]; Greta Anderson, *Are Esports a Pandemic-Era Salve for Sports-Hungry Fans?*, INSIDE HIGHER ED (July 31, 2020), <https://www.insidehighered.com/news/2020/07/31/colleges-explore-esports-opportunities-and-others-face-budget-cuts> [<https://perma.cc/XJW8-AWCG>].

nected to each other and to the campus, and encouraged gaming while operating remotely during COVID-19.³⁰⁶ Construction of new esports arenas continued during the COVID-19 pandemic, planning for a return to campus life that centers gaming.³⁰⁷

As schools invest many millions of dollars in esports programs, they must contend with Title IX concerns.

B. Title IX

While gender representation is a significant Title IX issue, harassment—largely by men of women and nonbinary individuals—has been a substantial barrier to safe participation. As women and nonbinary people seek parity with males in esports, their participation is not only about being awarded a scholarship or a place on the team, but about not being subjected to harassment while doing so. The multitude of Title IX issues are discussed next, followed by First Amendment free speech issues. Note that many scholars have written critiques of the functioning of Title IX;³⁰⁸ this Article does not suggest that Title IX will solve sexual harassment in gaming, but instead surfaces Title IX issues that schools have not yet considered and suggests prevention routes for gender-based harassment and violence instead of relying on after-the-fact Title IX complaints.

³⁰⁶ See *supra* note 21 and accompanying text.

³⁰⁷ See Chris Burt, *COVID-19 May Change College Esports Arenas: Infographic*, UNIV. BUS. (June 5, 2020), <https://universitybusiness.com/infographic-how-covid-19-may-change-college-esports-arenas/> [https://perma.cc/N234-YYDT].

³⁰⁸ See, e.g., Janet Halley, *Trading the Megaphone for the Gavel in Title IX Enforcement*, 128 HARV. L. REV. F. 103, 107–08 (2015) (recommending that university Title IX offices be reduced to compliance-monitoring, and not adjudicate cases); Alyssa Peterson & Olivia Ortiz, *A Better Balance: Providing Survivors of Sexual Violence with “Effective Protection” Against Sex Discrimination Through Title IX Complaints*, 125 YALE L.J. 2132, 2143–44 (2016) (identifying lengthy investigations and structural issues that cause case investigations to take years); Zoe Ridolfi-Starr, *Transformation Requires Transparency: Critical Policy Reforms to Advance Campus Sexual Violence Response*, 125 YALE L.J. 2156, 2160–61, 2169–70 (2016) (identifying pervasive mistrust of the Title IX system by complainants and accused students due to opacity and particularly discriminatory treatment against communities of color); Christine Taber, *Bullied LGBTQ Students Are Afraid but Their Schools Aren’t (and That’s the Problem): Why It’s Time to Move on from Broken Title IX to State Tort Law as a Solution*, 25 TEX. J. ON C.L. & C.R. 153, 164–65 (2020) (discussing the high burdens for recovery under Title IX in cases of peer-to-peer harassment); Deborah Tuerkheimer, *Beyond #MeToo*, 94 N.Y.U. L. REV. 1146, 1163, 1174 (2019) (recommending redesign of formal complaint procedures, including campus disciplinary processes, informed by the benefits of informal reporting).

1. *Title IX's Mandate to Prevent and Address Sex-Based Harassment*

Title IX of the Education Amendments Act of 1972 is one of a series of federal laws to expand the Civil Rights Act of 1964; Title IX bars gender discrimination and unequal treatment on the basis of sex at all educational institutions that receive federal funding.³⁰⁹ For colleges and universities, the federal law covers all aspects of campus life, and many environments, actions, and inactions constitute discrimination in violation of Title IX.³¹⁰ Until recent years, few students and faculty were aware that Title IX applied to academics.³¹¹ Sports fans often associate Title IX with collegiate athletics and the NCAA because schools are required to provide equal athletic opportunities to all students regardless of sex,³¹² but Title IX goes further.

Under Title IX, universities cannot deny students admission based on their gender,³¹³ and schools must provide proportional financial aid, student services, counseling, and equal access to all academic or extracurricular educational programs or activities.³¹⁴ Schools are also responsible for preventing and addressing sex-based harassment,³¹⁵ including in esports and gaming.³¹⁶ Title IX additionally “requires schools to appoint a Title IX coordinator tasked with implementing sexual-harassment policies and ensuring gender equity in virtually all areas of school life.”³¹⁷

³⁰⁹ Title IX of the Education Amendments of 1972 states: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681(a) (2018). Almost all educational programs receive federal financial assistance; therefore, most colleges and universities in the country are required to adhere to Title IX. See *Title IX Frequently Asked Questions*, NCAA, <http://www.ncaa.org/about/resources/inclusion/title-ix-frequently-asked-questions#inst> [<https://perma.cc/4HGZ-E7QM>].

³¹⁰ See *infra* notes 313–17 and accompanying text.

³¹¹ See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-639, GENDER ISSUES: WOMEN'S PARTICIPATION IN THE SCIENCES HAS INCREASED, BUT AGENCIES NEED TO DO MORE TO ENSURE COMPLIANCE WITH TITLE IX 1 (2004), <https://www.gao.gov/new.items/d04639.pdf> [<https://perma.cc/N94V-2VTD>].

³¹² See *Know Your Rights: Equity in Athletics in School and on Campus*, AM. ASS'N UNIV. WOMEN, <https://www.aauw.org/resources/legal/laf/athletics/> [<https://perma.cc/QU9N-ZX79>].

³¹³ U.S. DEP'T OF JUST., EQUAL ACCESS TO EDUCATION 1–2 (2012), <https://www.justice.gov/sites/default/files/crt/legacy/2012/06/20/titleixreport.pdf> [<https://perma.cc/U45K-9N8P>].

³¹⁴ *Id.*; see also Laura Marini Davis & Victoria Geyfman, *The Business of Title IX—Using the Law to Improve Gender Equity in Undergraduate Colleges of Business*, 46 J.L. & EDUC. 163, 183 (2017).

³¹⁵ U.S. DEP'T OF JUST., *supra* note 313, at 2.

³¹⁶ Payne, *supra* note 91.

³¹⁷ HILL & KEARL, *supra* note 49, at 7.

In enacting Title IX, Congress intended both to “avoid the use of federal resources to support discriminatory practices” and to “provide individual citizens effective protection against those practices.”³¹⁸ Title IX’s mandate that no person “shall, on the basis of sex, be excluded from participation, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance”³¹⁹ is a broad mandate that is, according to the Supreme Court, to receive “a sweep as broad as its language.”³²⁰ Note that a single Title IX liability analysis may not be appropriate because of the varying factual circumstances of each case,³²¹ and courts use different approaches to determine Title IX liability in contexts other than sex-based harassment. For example, courts apply differing tests for assessing liability in athletics, single-gender education, and pregnancy discrimination.

Generally, the denial of benefits or discrimination must be based on sex in order to be actionable under Title IX.³²² Common instances of Title IX violations include sex discrimination in sports and education as well as sexual harassment.³²³ Note that for much of Title IX’s history, gender equity has been understood and applied to gender binaries. Given current nonbinary understandings of gender and of gender fluidity, we can problematize what gender means under Title IX and the proportionality requirements. In addition, recent rulings protect transgender students from discrimination “on the basis of sex.”³²⁴

318 *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979).

319 20 U.S.C. § 1681(a) (2018).

320 *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982).

321 Brian A. Snow, William E. Thro & Stephanie Clemente, *The Problem of Determining Title IX Liability*, 154 EDUC. L. REP. 1, 2–3 (2001); *see also* *Horner v. Ky. High Sch. Athletic Ass’n*, 206 F.3d 685, 689–93 (6th Cir. 2000) (discussing the different standards to analyze intent under Title IX); *Alston v. Va. High Sch. League, Inc.*, 144 F. Supp. 2d 526, 534–36 (W.D. Va. 1999) (analyzing which standard of intentionality is proper under Title IX); Brian A. Snow & William E. Thro, *Still on the Sidelines: Developing the Non-Discrimination Paradigm Under Title IX*, 3 DUKE J. GENDER L. & POL’Y 1, 1–10 (1996) (discussing different cases that have been decided under Title IX and the want for better protection and standards).

322 *See, e.g., Doe v. Baum*, 903 F.3d 575, 586 (6th Cir. 2018); *Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist.*, 647 F.3d 156, 165 (5th Cir. 2011).

323 U.S. DEP’T OF JUST., *supra* note 313, at 1–2.

324 *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616–19 (4th Cir. 2020) (discussing Title IX’s application to and protection of transgender students); *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1741 (2020) (interpreting Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–2(a)(1), and noting “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex”); *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286, 1310 (11th Cir. 2020) (holding that a trans-

Before Title IX was enacted in 1972, women faced marked educational inequalities.³²⁵ These gender-based disparities continue today. Female participation in STEM programs funded by NASA has decreased at every education level,³²⁶ a “decade-long trend of shrinking female enrollment in undergraduate business programs” persists,³²⁷ and women in the legal education field “experience challenges like poor pay, heavy workloads, and lower status.”³²⁸ Women in the medical field also experience high rates of sexual harassment during medical residencies.³²⁹ In male-dominated fields, non-male voices and perspectives are absent from classroom discussion, and women and nonbinary people often experience systemic discrimination.³³⁰ Gender-based discrimination may “include sexist language, [the] presentation of stereotypic views of women, and instructors favoring male students.”³³¹ This discrimination and lack of female participation in education results in fewer female leaders in critical industries and lower lifetime earnings for women.³³² In 2016, only 4.2% of CEOs in Fortune 500 companies were women, and women often comprise a small minority of executive and board leadership, with some companies excluding women from executive or board roles.³³³

The Department of Education is responsible for issuing coordinating regulations such as guidelines and rules for compliance, and the Department of Justice enforces those guidelines and rules.³³⁴ The Department of Education—sometimes in conjunction with the Department of Justice—has traditionally issued guidance documents on compliance with Title IX that set forth policy on a statutory, regula-

gender student’s “psychological and dignitary harm” caused by a school bathroom policy was legally cognizable under Title IX).

³²⁵ U.S. DEP’T OF JUST., *supra* note 313, at 2.

³²⁶ Laura Marini Davis & Victoria Geyfman, *The Business of Title IX Revisited*, 48 J.L. & EDUC. 335, 345 (2019).

³²⁷ *Id.* at 335.

³²⁸ Renee Nicole Allen, Alicia Jackson & DeShun Harris, *The “Pink Ghetto” Pipeline: Challenges and Opportunities for Women in Legal Education*, 96 U. DET. MERCY L. REV. 525, 525 (2019).

³²⁹ Megan C. Maynhart, Note, *Why Title IX Matters: The Key to Breaking the Glass Ceiling in Medicine*, 51 U. TOL. L. REV. 531, 532 (2020).

³³⁰ Davis & Geyfman, *supra* note 314, at 168–69.

³³¹ *Id.* at 169.

³³² See Davis & Geyfman, *supra* note 326, at 346.

³³³ *Id.* at 336.

³³⁴ See generally Memorandum of Understanding Between the United States Department of Education, Office for Civil Rights, and the United States Department of Justice Civil Rights Division (Apr. 29, 2014), https://www.justice.gov/sites/default/files/crt/legacy/2014/04/28/ED_DOJ_MOU_TitleIX-04-29-2014.pdf [<https://perma.cc/EK2E-Z8ZM>] (describing Department of Education and Department of Justice roles in Title IX regulation and enforcement).

tory, or technical issue, or that interpret a statute or regulation.³³⁵ The documents notify schools and other recipients of federal funds of their legal obligations and tell schools how agencies enforce the law, thereby enabling schools to comply with the law.³³⁶ The guidance documents on Title IX are considered “significant guidance documents”³³⁷ that are reasonably anticipated to materially affect the economy, environment, or public health and safety, or will materially alter the budgetary impact of grants or the rights and obligations of grant recipients.³³⁸

In 1981, the Office for Civil Rights in the Department of Education issued a policy memo that, for the first time, listed sexual harassment as a form of sex discrimination under Title IX.³³⁹ A series of Supreme Court cases following that memo helped lay out the framework for what behavior constitutes harassment to the point of discrimination under Title IX. In 1992, the Supreme Court in *Franklin v. Gwinnett County Public Schools*³⁴⁰ recognized that sexual harassment is a form of sex discrimination prohibited by Title IX in the educational setting.³⁴¹ The Court unanimously held that “all appropriate remedies,” including monetary damages, are available for violations of Title IX and that the statute’s mandate to end sex discrimination in education necessarily encompasses the eradication of sexual harassment.³⁴²

In 1999, with its decision in *Davis v. Monroe County Board of Education*,³⁴³ the Court established a three-prong test for Title IX liability in cases of sexual harassment.³⁴⁴ Under *Davis*, a school is liable for damages under Title IX when: (1) harassment occurred, (2) the school had actual notice of the harassment, and (3) the school was

³³⁵ See U.S. Department of Education’s *Guidance Homepage*, U.S. DEP’T EDUC. [hereinafter *Guidance Homepage*], <https://www2.ed.gov/policy/gen/guid/types-of-guidance-documents.html> [https://perma.cc/6GU6-T788].

³³⁶ See Davis & Geyfman, *supra* note 314, at 178.

³³⁷ *Significant Guidance at the Department of Education*, U.S. DEP’T EDUC., <https://www2.ed.gov/policy/gen/guid/significant-guidance.html> [https://perma.cc/8ZZR-Y8B9].

³³⁸ See *Guidance Homepage*, *supra* note 335.

³³⁹ *A Timeline of Rulings, Regulations About Student Sex Assault*, ASSOCIATED PRESS (May 15, 2017), <https://www.apnews.com/08e761d7c9e94e5383cbc2168acc8f2a> [https://perma.cc/8EZT-259U].

³⁴⁰ 503 U.S. 60 (1992).

³⁴¹ *Id.* at 75–76.

³⁴² *Id.*

³⁴³ 526 U.S. 629 (1999).

³⁴⁴ See *id.* at 650. The *Davis* case concerned student-on-student harassment, *id.* at 632, but the *Davis* test applies to all sexual harassment in the context of education, see, e.g., *Simpson v. Univ. of Col. Boulder*, 500 F.3d 1170 (10th Cir. 2007).

deliberately indifferent to the harassment.³⁴⁵ In *Davis*, a fifth grader and her mother repeatedly reported to the child's teachers and school principal that a classmate often told her, "I want to feel your boobs" and "I want to get in bed with you" and that he sexually rubbed against her on one occasion.³⁴⁶ The school failed to respond and took over three months to allow the victimized student to change her classroom seat so she was not sitting directly next to the boy that harassed and assaulted her.³⁴⁷ The Court defined "harassment" for Title IX purposes as harassment that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.³⁴⁸ The Court explained useful factors to determine what constitutes harassment prohibited by Title IX, which "'depends on a constellation of surrounding circumstances, expectations, and relationships,' including, but not limited to, the ages of the harasser and the victim and the number of individuals involved."³⁴⁹ Under the third element, a school's response constitutes deliberate indifference when the response is "clearly unreasonable in light of the known circumstances,"³⁵⁰ and subjects its students to undergo harassment or makes them more liable or vulnerable to it.³⁵¹ The *Davis* Court found that the district was clearly unreasonable in failing to address the plaintiff's situation.³⁵²

In *Davis*, for the first time, the Court recognized that student-on-student sexual harassment is a form of sex-based discrimination under Title IX and that school officials have some level of responsibility for addressing sexual harassment occurring at their schools.³⁵³ Different administrations and courts have interpreted the *Davis* holding in different ways, resulting in conflicting guidance and enforcement priorities.³⁵⁴ Federal circuit courts have also held that if schools do not

³⁴⁵ See *Davis*, 526 U.S. at 650; *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277 (1998).

³⁴⁶ *Davis*, 526 U.S. at 633–34 (quoting petitioner's complaint).

³⁴⁷ *Id.* at 635.

³⁴⁸ *Id.* at 633.

³⁴⁹ *Id.* at 651 (citation omitted) (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998)).

³⁵⁰ *Id.* at 648.

³⁵¹ *Id.* at 644–45.

³⁵² *Id.* at 648.

³⁵³ See *id.* at 647–48.

³⁵⁴ See, e.g., *Porto v. Town of Tewksbury*, 488 F.3d 67 (1st Cir. 2007) (vacating a \$200,000 jury verdict and holding that there was no deliberate indifference as a matter of law, although the school's response to multiple notifications of peer harassment and sexual abuse was to tem-

properly address sexual harassment through discipline and the harassment's effects through counseling or other remedies, then the schools may be in violation of Title IX.³⁵⁵

The Obama Administration, with Joe Biden as the Vice President, implored colleges to take sexual harassment and violence seriously, created the "White House Task Force to Protect Students from Sexual Assault" that Biden co-chaired, and published several detailed guidelines regarding campus sexual assault.³⁵⁶ In 2010, the Department of Education issued a "Dear Colleague" letter explaining schools' obligations to protect students from student-on-student harassment on the basis of sex, race, color and national origin, and disability.³⁵⁷ The letter also clarified the relationship between bullying and discriminatory harassment, provided examples of harassment, and illustrated how a school should respond in each case.³⁵⁸ Importantly, the letter provided a broad definition for sexual harassment, including examples such as: "making sexual comments," "calling students sexually charged names," "spreading sexual rumors," "circulating . . . or creating . . . [w]eb[sites] of a sexual nature," and unwanted "touching of a sexual nature."³⁵⁹ It explained that such conduct could be "sufficiently serious" to be considered sex discrimination, in "that it limit[s] [a] student's ability to participate in and benefit from the . . . educa-

porarily separate the students); *Bostic v. Smyrna Sch. Dist.*, 418 F.3d 355, 362 (3d Cir. 2005) (holding that the school principal and assistant principal could not be considered "appropriate officials" for notice purposes based solely on their positions); *Baynard v. Malone*, 268 F.3d 228, 238 (4th Cir. 2001) (concluding that the school district could not be liable because the evidence showed that the principal should have been aware of the potential for abuse, not that he was "in fact" aware of abuse, although a student had reported observing inappropriate touching to the principal); *Wills v. Brown Univ.*, 184 F.3d 20, 41 (1st Cir. 1999) (holding that the university was not "clearly unreasonable" when it recommended that a visiting professor who had sexually assaulted a student remain on the faculty for an additional year despite the fact that he had made "mistakes").

³⁵⁵ See, e.g., *Oden v. N. Marianas Coll.*, 440 F.3d 1085, 1088–89 (9th Cir. 2006); *Gabrielle M. v. Park Forest-Chi. Heights, Ill. Sch. Dist.* 163, 315 F.3d 817, 825 (7th Cir. 2003).

³⁵⁶ Memorandum from President Barack Obama to the Heads of Exec. Dep'ts & Agencies, Establishing a White House Task Force to Protect Students from Sexual Assault, (Jan. 22, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/01/22/memorandum-establishing-white-house-task-force-protect-students-sexual-a> [<https://perma.cc/R6VB-M6E7>]; see also Andrew Kreighbaum, *Title IX Court Decisions Make It Harder for Biden to Rewrite Rules*, BLOOMBERG (Apr. 5, 2021, 5:00 AM), <https://www.bloomberg.com/news/articles/2021-04-05/devos-legacy-snags-biden-s-rewrite-of-college-male-bias-rules> [<https://perma.cc/3Y7K-Z7GL>].

³⁵⁷ Dear Colleague Letter from Russlynn Ali, Assistant Sec'y for C.R., U.S. Dep't of Educ. 1 (Oct. 26, 2010), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf> [<https://perma.cc/E69Q-C68F>].

³⁵⁸ *Id.* at 1–3.

³⁵⁹ *Id.* at 6.

tion program,” for instance because of “anxiety and declining class participation.”³⁶⁰ Notably, this letter also recognized that discrimination against transgender students was sex-based discrimination prohibited by Title IX.³⁶¹

The 2011 case *Kowalski v. Berkeley County Schools*³⁶² upheld the right of school administrators to punish online bullying and sexual harassment by students, regardless of location.³⁶³ In this case, a high school student created a website that demeaned a classmate.³⁶⁴ This internet-delivered communication took place off campus and outside of school hours.³⁶⁵ The Fourth Circuit held that a student’s off-campus creation of a MySpace page used by the student to harass another student directly violated the school’s policy against “harassment, bullying, and intimidation” and substantially interfered with the operation of the school, and that the resulting suspension did not violate the First Amendment.³⁶⁶

In 2011, the Department of Education issued another “Dear Colleague” letter focused on sexual violence on campus³⁶⁷ and published a fact sheet and “know your rights” document³⁶⁸ to further expand on some of the issues in the letter. The letter required schools “to take immediate and effective steps to end sexual harassment” and to undertake “proactive efforts . . . to prevent sexual harassment and violence.”³⁶⁹ It also explained the obligations a school has to respond to sexual harassment, such as adopting and publishing grievance procedures, training their employees on how to identify and report sexual harassment, investigating harassment when the school has constructive knowledge or reasonably should know harassment is occurring, and designating an employee to coordinate Title IX compliance.³⁷⁰ Importantly, this letter obligated schools to respond to claims of sexual

³⁶⁰ *Id.* at 7.

³⁶¹ *See id.* at 8.

³⁶² 652 F.3d 565 (4th Cir. 2011).

³⁶³ *Id.* at 573–74.

³⁶⁴ *Id.* at 573.

³⁶⁵ *Id.*

³⁶⁶ *Id.* at 567–68, 572, 575.

³⁶⁷ Dear Colleague Letter from Russlynn Ali, Assistant Sec’y for C.R., U.S. Dep’t of Educ. (Apr. 4, 2011) [hereinafter April 2011 Letter], <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [<https://perma.cc/HS3M-4QKY>].

³⁶⁸ U.S. Dep’t of Educ. Off. for C.R., Know Your Rights: Title IX Prohibits Sexual Harassment and Sexual Violence Where You Go to School (Apr. 2011), <https://www2.ed.gov/about/offices/list/ocr/docs/title-ix-rights-201104.pdf> [<https://perma.cc/EF4K-R7J6>].

³⁶⁹ April 2011 Letter, *supra* note 367, at 2.

³⁷⁰ *Id.* at 4–6.

assault that occurred off campus or outside the education program, based on the theory that what happens outside of the education program may be a reflection of a toxic campus culture, and because what happens outside of the program still affects students on campus.³⁷¹

2. 2020 Changes to Title IX Regulations and the Biden Administration's Anticipated Reforms

In 2017, the Secretary of Education of President Trump's administration, Betsy DeVos, rescinded the 2011 "Dear Colleague" letter concerning sexual violence on campus, and was heavily criticized for doing so.³⁷² She took action to change Title IX regulations, and the 2020 amendments to the Department's Title IX regulations are formally known as the "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance."³⁷³ Under the Trump-era regulations, which have the force of law unlike the Obama-era guidance, schools can offer informal resolution and could encourage some victims to report sexual misconduct who do not want to undergo the full investigation process.³⁷⁴ The regulations, however, "limit the complaints that schools are obligated to investigate to only those filed through a formal process,"³⁷⁵ and schools are not obligated under the new Title IX rules to investigate incidents that occur off campus at facilities not associated with the university.³⁷⁶ The 2020 amendments instead hold colleges responsible for off-campus sexual harassment only if it occurred at a school-owned property or under the control of school-sanctioned fraternities or sororities.³⁷⁷ The amendments also permit, and in some cases re-

³⁷¹ See *id.* at 4.

³⁷² See, e.g., Stephanie Saul & Kate Taylor, *Betsy DeVos Reverses Obama-Era Policy on Campus Sexual Assault Investigations*, N.Y. TIMES (Sept. 22, 2017), <https://www.nytimes.com/2017/09/22/us/devos-colleges-sex-assault.html?auth=login-email&login=email> [<https://perma.cc/EN3W-8X5G>]. Janet Napolitano, the president of the University of California system and a Secretary of Homeland Security in the Obama Administration, stated that the rescission would "weaken sexual violence protections [and] prompt confusion." *Id.*

³⁷³ 85 Fed. Reg. 30,026 (May 19, 2020) (codified at 34 C.F.R. pt. 106).

³⁷⁴ Jeannie Suk Gersen, *How Concerning Are the Trump Administration's New Title IX Regulations?*, NEW YORKER (May 16, 2020), <https://www.newyorker.com/news/our-columnists/how-concerning-are-the-trump-administrations-new-title-ix-regulations> [<https://perma.cc/9LDG-YDPZ>].

³⁷⁵ Erica L. Green, *DeVos's Rules Bolster Rights of Students Accused of Sexual Misconduct*, N.Y. TIMES (Sept. 22, 2020), <https://www.nytimes.com/2020/05/06/us/politics/campus-sexual-misconduct-betsy-devos.html> [<https://perma.cc/QZU2-VMEW>].

³⁷⁶ 34 C.F.R. § 106.44(a) (2019).

³⁷⁷ Press Release, U.S. Dep't of Educ., Secretary DeVos Takes Historic Action to Strengthen Title IX Protections for All Students (May 6, 2020) [hereinafter DeVos Press Re-

quire, a clear and convincing evidence standard in sexual harassment hearings,³⁷⁸ rather than the preponderance of the evidence standard that is used in other civil rights statutes.³⁷⁹

The 2020 amendments define sexual harassment to encompass sexual assault, dating violence, and stalking as unlawful discrimination, but exclude many instances of misconduct that previously fell within the Department of Education's definition of sexual harassment and that continue to fall within the definition of harassment based on race, national origin, and disability.³⁸⁰ The definition of "sexual harassment" is now a more demanding standard, leaving conduct that does not rise to the level of "severe, pervasive, and objectively offensive" uncovered by Title IX.³⁸¹ Additional regulations uphold all students' rights to written notice of allegations, and the right to submit, cross-examine,³⁸² and challenge evidence at a live hearing, while also shielding survivors from having to come face-to-face with the accused during the hearing.³⁸³ Primary, secondary, and other specialized schools are not required to hold a hearing or cross-examinations, but parties can submit written questions.³⁸⁴

Finally, in reviewing a university's response to sex discrimination, the Department of Education and the Department of Justice will apply a "deliberate indifference" standard such that universities will not be found to have violated Title IX unless their actions showed that

lease], <https://www.ed.gov/news/press-releases/secretary-devos-takes-historic-action-strengthen-title-ix-protections-all-students> [https://perma.cc/7HRU-ZJZV].

³⁷⁸ 34 C.F.R. § 106.45(b).

³⁷⁹ See Cantalupo, *supra* note 55, at 5.

³⁸⁰ 34 C.F.R. § 106.30(a).

³⁸¹ Gersen, *supra* note 374.

³⁸² DeVos Press Release, *supra* note 377. Much public debate has focused on the appropriateness of cross-examination in Title IX cases. This Article concerns sexual cyberviolence and harassment and the definitions of harassment and discrimination under Title IX and the scope of a school's responsibilities. On the topic of cross-examination, scholars differ over whether the new Title IX regulations could boost students' due process protections, explaining that "students shouldn't be subject to life-changing consequences of suspension or expulsion without due process safeguards." Wendy Davis, *Schooled in Due Process*, ABA J., Apr./May 2020, at 18, 18. Others fear these new regulations are a "step backward" because "survivors of sexual assault may not report incidents if they know they will face antagonistic questioning," and cross-examination may not be the best method to elicit the truth. *Id.* at 19. The American Civil Liberties Union ("ACLU") of Michigan explained that cross-examination in a Title IX hearing is not essential and is "especially susceptible to abuse." Hannah Walsh, Note, *Further Harm and Harassment: The Cost of Excess Process to Victims of Sexual Violence on College Campuses*, 95 NOTRE DAME L. REV. 1785, 1799 (2020).

³⁸³ DeVos Press Release, *supra* note 377.

³⁸⁴ Green, *supra* note 375.

they were deliberately indifferent to the sexual harassment claim, rather than the Obama-era reasonableness standard.³⁸⁵

Secretary DeVos was the first Secretary of Education since the enactment of Title IX to utilize rulemaking for campus sexual assault under Title IX, rather than using guidelines.³⁸⁶ The new Title IX regulations have been critiqued on multiple grounds, including that this civil rights law regarding sex discrimination now employs higher standards than discrimination on other bases, such as race, ethnicity, and religion,³⁸⁷ and that the new rules are both sexist and racist.³⁸⁸ DeVos's Title IX regulations immediately faced lawsuits. The ACLU filed the first lawsuit, claiming the Department of Education's actions were "arbitrary and capricious."³⁸⁹ Victims' advocacy groups and other non-profit organizations including the National Women's Law Center sued the Department of Education for rescinding the Obama-era guidance.³⁹⁰ Colleges had less than one hundred days to comply with the 2,000 pages of new regulations in the midst of a global pandemic, which the American Council on Education declared to be "cruel" timing.³⁹¹ Although numerous attorneys general,³⁹² the American Council on Education, and at least twenty-four other higher education associa-

³⁸⁵ 34 C.F.R. § 106.2(h).

³⁸⁶ See R. Shep Melnick, *Analyzing the Department of Education's Final Title IX Rules on Sexual Misconduct*, BROOKINGS INST. (June 11, 2020), <https://www.brookings.edu/research/analyzing-the-department-of-educations-final-title-ix-rules-on-sexual-misconduct/> [https://perma.cc/MK82-JZK7].

³⁸⁷ See Cantalupo, *supra* note 55, at 70–72; Greta Anderson, *Legal Challenges on Many Fronts*, INSIDE HIGHER ED (July 13, 2020), <https://www.insidehighered.com/news/2020/07/13/understanding-lawsuits-against-new-title-ix-regulations> [https://perma.cc/4QCW-PPK3]. Prominent civil rights attorneys, including Catherine Lhamon, the chair of the U.S. Commission on Civil Rights, immediately critiqued the new Title IX regulations. See Gersen, *supra* note 374. Speaker of the U.S. House of Representatives Nancy Pelosi called the new regulations "callous, cruel and dangerous, threatening to silence survivors and endanger vulnerable students in the middle of a public health crisis." *Id.*

³⁸⁸ See Nancy Chi Cantalupo, *Dog Whistles and Beachheads: The Trump Administration, Sexual Violence & Student Discipline in Education*, 54 WAKE FOREST L. REV. 303 (2019) (identifying how the Trump Administration's Department of Education's broad attack on civil rights undermines the rights of sexual harassment victims and all discriminatory harassment victims, especially students of color who are disproportionately vulnerable to harassment).

³⁸⁹ Gersen, *supra* note 374.

³⁹⁰ Davis, *supra* note 382; Anderson, *supra* note 387.

³⁹¹ Sarah Brown, *Colleges Had 3 Months to Overhaul Sexual-Misconduct Policies. Now They're Scrambling*, CHRON. HIGHER EDUC. (Aug. 13, 2020), <https://www.chronicle.com/article/colleges-had-three-months-to-overhaul-sexual-misconduct-policies-now-theyre-scrambling> [https://perma.cc/27PN-FD84].

³⁹² See Anderson, *supra* note 387; Press Release, Josh Shapiro, Att'y Gen. of Pennsylvania, AG Shapiro Leads Effort to Stop New Title IX Rule that Weakens Protections for Survivors of Sexual Violence in Schools (June 24, 2020), <https://www.attorneygeneral.gov/taking-action/press->

tions filed motions to postpone the August 2020 deadline for colleges to achieve compliance,³⁹³ they were unsuccessful and the rules took effect on August 14, 2020.³⁹⁴

During his presidential election campaign, President Joe Biden announced intentions to end DeVos's regulations by restoring the 2011 Title IX guidance.³⁹⁵ Biden also articulated plans to increase fines for Clery Act³⁹⁶ violations, strengthen enforcement protocols, require Title IX training of certain college administrators and staff, and fund Title IX training of public K-12 school administrators and staff,³⁹⁷ along with the implementation of anonymous online sexual harassment reporting systems and broadening of reporting rights for survivors.³⁹⁸ As Biden prepared to take office, his transition team indicated it was working with "intentional urgency" to roll back the Trump-era rules.³⁹⁹

On March 8, 2021, President Biden issued an executive order requiring the Department of Education and the Attorney General to "review all existing regulations, orders, guidance documents, policies, and any other similar agency actions" that may be inconsistent with the Biden Administration's policy approach to Title IX.⁴⁰⁰ The executive order instructs U.S. Secretary of Education Miguel Cardona to "consider suspending, revising, or rescinding—or publishing for notice

releases/ag-shapiro-leads-effort-to-stop-new-title-ix-rule-that-weakens-protections-for-survivors-of-sexual-violence-in-schools/ [https://perma.cc/CZA2-ABKF].

³⁹³ Anderson, *supra* note 387.

³⁹⁴ Brown, *supra* note 391.

³⁹⁵ Bianca Quilantan, *Biden Vows 'Quick End' to DeVos' Sexual Misconduct Rule*, POLITICO (May 7, 2020, 11:07 AM), <https://www.politico.com/news/2020/05/06/biden-vows-a-quick-end-to-devos-sexual-misconduct-rule-241715> [https://perma.cc/6KH9-SD33]; *The Biden Plan to End Violence Against Women*, JOE BIDEN, <https://joebiden.com/vawa/#> [https://perma.cc/A4T5-G8TA].

³⁹⁶ Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S.C. § 1092 (2018). The Clery Act is a federal law that, among other important obligations, "requires colleges to report crimes that occur 'on campus'" and "contains the Campus Sexual Assault Victim's Bill of Rights, which requires colleges to disclose educational programming, campus disciplinary process, and victim rights regarding sexual violence complaints." *Clery Act*, KNOW YOUR IX, <https://www.knowyourix.org/college-resources/clery-act/> [https://perma.cc/D5CT-6WBP].

³⁹⁷ *The Biden Plan to End Violence Against Women*, *supra* note 395.

³⁹⁸ Kathryn Zheng & Victoria Hsieh, *Biden to Try to Broaden Campus Title IX Policies*, STAN. DAILY (Dec. 1, 2020), <https://www.stanforddaily.com/2020/12/01/biden-to-try-to-broaden-campus-title-ix-policies/> [https://perma.cc/2FZ4-NB24].

³⁹⁹ Tovia Smith, *Biden Begins Process to Undo Trump Administration's Title IX Rules*, NPR (Mar. 10, 2021, 5:27 PM), <https://www.npr.org/2021/03/10/975645192/biden-begins-process-to-undo-trump-administrations-title-ix-rules> [https://perma.cc/C9D7-GKD7] (quoting Sage Carson, manager of Know Your IX, an advocacy group for students protected by Title IX).

⁴⁰⁰ Exec. Order No. 14,021, 86 Fed. Reg. 13,803, 13,803 (Mar. 8, 2021).

and comment proposed rules suspending, revising, or rescinding—those agency actions that are inconsistent” with the policies of the administration.⁴⁰¹ On April 6, 2021, the Education Department’s Office for Civil Rights announced that it will conduct a comprehensive review of the Title IX regulations instituted during the Trump Administration and will hold a multiday hearing, ultimately leading to revisions through a notice of proposed rulemaking.⁴⁰²

Possible changes to Title IX under the Biden Administration are likely to take some time because the preceding administration went through a formal rulemaking process creating binding legal authority.⁴⁰³ Without congressional action, the Biden Administration has to go through the same rulemaking procedures to amend the new Title IX regulations, which will take a minimum of eighteen months.⁴⁰⁴ The Biden Administration could agree to put the Title IX regulations on hold as litigation continues, which would “effectively kill[]” the rule.⁴⁰⁵ Attorneys or interest groups could intervene, however, and demand a federal judicial ruling for the enforcement of the regulations.⁴⁰⁶ Another route the Biden Administration could take, suggested by Professor R. Shep Melnick, is to use a two-tiered approach where the administration works to create a new framework while promulgating guidelines to schools explaining how to work around current regulations.⁴⁰⁷

Secretary Cardona explains the Biden Administration’s position that “[s]exual harassment and other forms of sex discrimination, in-

⁴⁰¹ *Id.*

⁴⁰² Press Release, U.S. Dep’t of Educ., Department of Education’s Office for Civil Rights Launches Comprehensive Review of Title IX Regulations to Fulfill President Biden’s Executive Order Guaranteeing an Educational Environment Free from Sex Discrimination (Apr. 6, 2021) [hereinafter U.S. Dep’t of Educ. Press Release], <https://www.ed.gov/news/press-releases/departments-educations-office-civil-rights-launches-comprehensive-review-title-ix-regulations-fulfill-president-bidens-executive-order-guaranteeing-educational-environment-free-sex-discrimination> [<https://perma.cc/JL7V-WBUE>]; Sarah Brown, *Biden Is Taking a Fresh Look at Title IX. Here’s What to Expect*, CHRON. HIGHER EDUC. (Apr. 6, 2021), <https://www.chronicle.com/article/biden-is-taking-a-fresh-look-at-title-ix-heres-what-to-expect> [<https://perma.cc/RKV6-DJ79>].

⁴⁰³ See Cristobella Durette, *Biden Could Bring Higher Education Policy, Title IX Changes*, COUGAR (Dec. 1, 2020), <https://thedaily cougar.com/2020/12/01/biden-could-bring-higher-education-policy-title-ix-changes/> [<https://perma.cc/RVG6-CJW7>].

⁴⁰⁴ Brown, *supra* note 402 (estimated by Melissa Carleton, a higher education lawyer who advises colleges on Title IX).

⁴⁰⁵ Tyler Kingkade, *Biden Wants to Scrap Betsy DeVos’ Rules on Sexual Assault in Schools. It Won’t Be Easy.*, NBC NEWS (Nov. 12, 2020), <https://www.nbcnews.com/politics/2020-election/biden-wants-scrap-betsy-devos-rules-sexual-assault-schools-it-n1247472> [<https://perma.cc/AM7Q-3352>].

⁴⁰⁶ See *id.*

⁴⁰⁷ *Id.*

cluding in extracurricular activities and other educational settings, threaten access to education for students of all ages.”⁴⁰⁸ He states, “As Secretary, I will work to ensure all students—no matter their background, who they are, or how they identify—can succeed in the classroom and beyond.”⁴⁰⁹

Specifically, the Biden Administration is expected to expand the current definition of harassment under Title IX to include more types of sexual misconduct,⁴¹⁰ particularly because harassment is currently defined only as conduct that is “so severe, pervasive, and objectively offensive” that it denies a person access to an education.⁴¹¹ The Trump-era Title IX regulations do not cover most off-campus incidents of harassment and abuse, which is expected to change.⁴¹² The Biden Administration also plans to account for the intersecting and compounded forms of discrimination many students experience on the basis of sex, sexual orientation, gender identity, race, national origin, and disability.⁴¹³ Procedural protections may remain because the Biden Administration emphasizes the need to ensure that procedures are “fair and equitable for all” those involved in Title IX proceedings,⁴¹⁴ procedural protections are more difficult to roll back once required,⁴¹⁵ and some federal court rulings already require in-person hearings for Title IX.⁴¹⁶

3. *Title IX Applied to Esports*

While the few Title IX discussions about esports to date have focused on increasing the numbers of female players,⁴¹⁷ examination should expand to encompass nondiscriminatory and nonharassing gaming regardless of gender identity,⁴¹⁸ and attention to campus climate and environment. This Article argues that universities should an-

⁴⁰⁸ U.S. Dep’t of Educ. Press Release, *supra* note 402.

⁴⁰⁹ *Id.*

⁴¹⁰ See Brown, *supra* note 402.

⁴¹¹ Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 633 (1999).

⁴¹² See Brown, *supra* note 402.

⁴¹³ See Exec. Order No. 14,021, 86 Fed. Reg. 13,803, 13,803 (Mar. 8, 2021).

⁴¹⁴ *Id.* at 13,804; see also Press Briefing by Jen Psaki, Press Sec’y, Juliissa Reynoso, Co-Chair of the Gender Pol’y Council & Chief of Staff to the First Lady, Jennifer Klein, Co-Chair & Exec. Dir. of the Gender Pol’y Council (Mar. 8, 2021, 11:31 AM), <https://www.whitehouse.gov/briefing-room/press-briefings/2021/03/08/press-briefing-by-press-secretary-jen-psaki-and-co-chairs-of-the-gender-policy-council-juliissa-reynoso-and-jennifer-klein-march-8-2021/> [https://perma.cc/BZ4X-FKE9].

⁴¹⁵ See Brown, *supra* note 402.

⁴¹⁶ See, e.g., Doe v. Baum, 903 F.3d 575, 582–83 (6th Cir. 2018).

⁴¹⁷ See, e.g., Bauer-Wolf, *supra* note 18.

⁴¹⁸ It is beyond the scope of this Article to resolve what Title IX proportionality means for

ticipate that sponsoring and hosting gaming, esports, and virtual reality experiences can create opportunities for sexual harassment and discrimination by and of students, and also establish a campus and organizational climate that signals tolerance of sexual harassment and is conducive to underreporting and retaliation.⁴¹⁹ As such, colleges should affirmatively tackle these issues.

Professional esports is ninety-five percent male, and college teams are male-dominated and reflect a “stark gender imbalance.”⁴²⁰ Women account for half of the global population and now outpace men in college enrollment and completion,⁴²¹ yet women have been viewed as a niche market in gaming and esports for far too long.⁴²²

Compliance with Title IX requires an equitable and fair apportionment of esports opportunities for all sexes.⁴²³ Title IX regulations list ten factors to consider in determining if there is equal opportunity in athletics at recipient schools and if schools permit an equal aggregate of expenditures on athletics for “members of each sex.”⁴²⁴ Under Title IX, the Assistant Secretary “may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity.”⁴²⁵

The Department of Education’s “Three-Part Test” enables colleges and universities to ensure Title IX compliance regarding “equal opportunity” to members of each gender.⁴²⁶ In collegiate sports, if the

gender fluid and nonbinary individuals; further research should address these important concerns.

⁴¹⁹ See Nancy Chi Cantalupo & William C. Kidder, *Systematic Prevention of a Serial Problem: Sexual Harassment and Bridging Core Concepts of Bakke in the #MeToo Era*, 52 U.C. DAVIS L. REV. 2349, 2375 (2019).

⁴²⁰ Orantes & Sharma, *supra* note 27.

⁴²¹ See LINDA DEANGELO, RAY FRANKE, SYLVIA HURTADO, JOHN H. PRYOR & SERGE TRAN, *COMPLETING COLLEGE: ASSESSING GRADUATION RATES AT FOUR-YEAR INSTITUTIONS* 8 (2011), https://www.researchgate.net/profile/Ray_Franke/publication/249644731_Completing_College_Assessing_Graduation_Rates_at_Four-Year_Institutions/links/0046351e5bb5279e3a000000.pdf [<https://perma.cc/NMG7-EJ4U>]; Mark Hugo Lopez & Ana Gonzalez-Barrera, *Women’s College Enrollment Gains Leave Men Behind*, PEW RSCH. CTR.: FACT TANK (Mar. 6, 2014), <https://www.pewresearch.org/fact-tank/2014/03/06/womens-college-enrollment-gains-leave-men-behind/> [<https://perma.cc/F2XF-48V4>].

⁴²² See *supra* note 152 and accompanying text.

⁴²³ See 34 C.F.R. § 106.41 (2019).

⁴²⁴ *Id.* § 106.41(c). Gender exclusions under Title IX regulations for teams involving “contact sports” are permissible. *Id.* § 106.41(b).

⁴²⁵ *Id.*

⁴²⁶ A university may provide “equal opportunity” to members of each gender in one of three ways: (1) the “participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments,” (2) the “interests and abilities” of the sex which is underrepresented with respect to their undergraduate enrollment are

number of female athletes is proportional to the total number of female students, the school is in compliance with Title IX; otherwise, schools are required to consider the interests and abilities of the underrepresented sex and expand programs accordingly.⁴²⁷ As schools invest in esports, they continue to face significant challenges achieving equal opportunity and proportionality across gender identity, at least in part due to how female gamers regularly contend with cyberbullying, harassment, and hostile team cultures when gaming online.

Issues of proportionality and gender-based harassment in gaming and esports should be concomitantly considered, given research that environments and institutional cultures that are male-dominated produce high levels of gender-based violence, racism, misogyny, and homophobia as ways to establish and maintain dominant status within the male group.⁴²⁸ Professor Nancy Chi Cantalupo further identifies that glorifying competition and aggression while suppressing emotion and empathy within cultures of silence produce added gender-based harassment.⁴²⁹

Harassment experienced in school-sponsored gaming and by student gamers falls within the scope of the Trump-era Title IX regulation changes and President Biden's anticipated reforms, whether or not gaming and esports are considered "sports."⁴³⁰ Assessing equity in athletics requires determining whether the activity is a sport under Title IX. The Office for Civil Rights ("OCR"), when analyzing whether cheerleading was a sport, explained it will examine each activity on a case-by-case basis, taking into account five factors.⁴³¹ In a

"fully and effectively accommodated by the present program," or (3) the underrepresented gender's interests and abilities will be accommodated by "expansion" of the athletic program. Policy Interpretation of Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979) (to be codified at 45 C.F.R. pt. 86); *Kelley v. Bd. of Trs. of the Univ. of Ill.*, 832 F. Supp. 237, 241 (C.D. Ill. 1993).

⁴²⁷ See *Cohen v. Brown Univ.*, 991 F.2d 888, 899 (1st Cir. 1993); *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 829 (10th Cir. 1993); *Favia v. Ind. Univ. of Pa.*, 812 F. Supp. 578, 584–85 (W.D. Pa. 1993); 34 C.F.R. § 106.41; Policy Interpretation of Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,413–23.

⁴²⁸ Cantalupo, *supra* note 39, at 923, 928.

⁴²⁹ *Id.* at 932–33.

⁴³⁰ See *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30,026 (May 19, 2020) (to be codified at 34 C.F.R. § 106).

⁴³¹ Letter from Harry A. Orris, Dir., Cleveland Off., U.S. Dep't of Educ. Off. for C.R., to Suzanne M. Martin, Assistant Dir., Michigan High Sch. Athletic Ass'n (Oct. 18, 2001), <http://web.archive.org/web/20050831201054/http://www.ed.gov/about/offices/list/ocr/mhsaa-cheer.html> (last visited Apr. 3, 2021). The five factors include:

[W]hether selection for the team is based upon objective factors related primarily

“Dear Colleague” letter, OCR provided guidance for what constitutes a “sport” under Title IX.⁴³² OCR lays out two main factors to consider: (1) program structure and administration, and (2) team preparation and competition.⁴³³ Under the first category, OCR considers whether the activity is structured and administered consistently with established varsity sports in the institution’s athletic programs, such as consistency with operating budgets and athletic scholarships.⁴³⁴ Under the second category, OCR considers whether the team prepares for and engages in competition consistently with established varsity sports at the institution—including practice opportunities, competitive opportunities, preseason and postseason competition—and whether the primary purpose of the activity is to provide athletic competition.⁴³⁵ Esports arguably falls under the definition of a sport and is recognized by multiple universities as such.⁴³⁶

The Trump-era regulations establish jurisdiction over sexual harassment that takes place in an educational program or activity, where the “education program or activity includes locations, events, or circumstances over which the [school] exercised substantial control over both the respondent and the context in which the harassment occurs” and “any building owned or controlled by a student organization that is officially recognized by a postsecondary institution,” regardless of whether the respondent is affiliated with the school.⁴³⁷ This definition covers harassment experienced in a gamer’s capacity as a school ath-

to athletic ability; whether the activity is limited to a defined season; whether the team prepares for and engages in competition in the same way as other teams in the athletic program with respect to coaching, recruitment, budget, try-outs and eligibility, and length and number of practice sessions and competitive opportunities; whether the activity is administered by the athletic department; and, whether the primary purpose of the activity is athletic competition and not the support or promotion of other athletes.

Letter from Dr. Mary Frances O’Shea, Nat’l Coordinator for Title IX Athletics, U.S. Dep’t of Educ. Off. for C.R., to David V. Stead, Exec. Dir., Minnesota State High Sch. League (Apr. 11, 2000), <http://web.archive.org/web/20050205120744/http://www.ed.gov/about/offices/list/ocr/stead.html> (last visited Apr. 3, 2021).

⁴³² Dear Colleague Letter from Stephanie Monroe, Assistant Sec’y for C.R., U.S. Dep’t of Educ. Off. for C.R., (Sept. 17, 2008), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-20080917.html> [<https://perma.cc/T84Y-BLXG>].

⁴³³ *Id.*

⁴³⁴ *Id.*

⁴³⁵ *Id.*

⁴³⁶ See Daniel Kane & Brandon D. Spradley, *Recognizing Esports as a Sport*, *SPORT J.* (May 11, 2017), <https://thesportjournal.org/article/recognizing-esports-as-a-sport/> [<https://perma.cc/48ZD-3L2EJ>].

⁴³⁷ *Id.* at 30,186–87.

lete, including in-game harassment perpetrated online and quid pro quo harassment committed by a coach or trainer.

Even with the new 2020 regulations utilizing the “deliberate indifference” standard, sexual harassment in gaming is so pervasive that schools should anticipate students to be vulnerable to abuse while gaming.⁴³⁸ Some aspects of the new regulations, however, pose barriers to reporting and receiving appropriate protection. The regulations do not require university employees to be trained on sexual harassment or reporting of sexual harassment, and removals—including removals from sports teams—and other supportive measures cannot unreasonably burden the other party.⁴³⁹ Emergency removal of a respondent is conditioned upon the respondent posing a risk to the physical health and safety of others arising from the sexual harassment allegations.⁴⁴⁰ Gamers will likely face a barrier to reporting sexual harassment because coaches may not know how to properly respond to sexual harassment allegations, which are commonplace in gaming and which players are expected to shrug off as “trash talk.”

Depending on the nature of harassment or threats, gamers who bring allegations against players at other schools or against their own teammates based on in-game harassment will likely face challenges when attempting to have respondents removed from the team or removed on an emergency basis, given that gaming is not a contact sport, and thus in-game harassment may not be seen as posing a threat to physical health and safety. Additionally, schools may use the broad “unreasonable burden” standard to justify not removing star athletes from teams, and coaches may avoid removing players from teams or competitions when gaming does not require physical proximity. This will result in survivors and perpetrators continuing to play on the same teams, giving space for further harassment or resulting in survivors voluntarily leaving teams when perpetrators are not removed. Therefore, gaps in school-required responses to sexual harassment allegations will leave school-sponsored gamers with less protections and at risk of further violence.

⁴³⁸ Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 644–45 (1999) (“[D]eliberate indifference must, at a minimum, ‘cause [students] to undergo’ harassment or ‘make them liable or vulnerable’ to it.” (quoting RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1415 (1966))); *see also* Shrum *ex rel.* Kelly v. Kluck, 249 F.3d 773, 782 (8th Cir. 2001) (“[D]eliberate indifference must either directly cause the abuse to occur or make students vulnerable to such abuse”); K.T. v. Culver-Stockton Coll., 865 F.3d 1054, 1057 (8th Cir. 2017).

⁴³⁹ *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. at 30,045.

⁴⁴⁰ *See id.* at 30,183.

The Biden Administration's anticipated reforms will provide much more expansive protection to students in school-promoted gaming contexts, whether students are members of a gaming club or formal esports team, and regardless of the location of the gaming. With greater obligations on schools to protect students from sex discrimination and sexual harassment, and broader definitions of sexual harassment, the Biden Administration seeks to carry out the civil rights law's intent to prevent and address sex-based harassment⁴⁴¹ and ensure "gender equity in virtually all areas of school life."⁴⁴²

With Title IX and related laws focused on sex discrimination, trauma-informed methods and comprehensive prevention goals can be extended to gaming and other contexts vital to a healthy campus climate.⁴⁴³ The combined effect could address multiple challenges faced by a diversity of students, including hostile environments based on race, gender, sexual orientation, disability, and socioeconomic status.⁴⁴⁴ Professor Cantalupo has argued that addressing the "effects of hostile educational environments, especially the trauma caused by such environments, is necessary for achieving [the] deeper meaning of diversity on higher education campuses" and fostering the educational benefits thereof.⁴⁴⁵

As college campuses increasingly create esports programs, various legal parameters and tensions that are implicated must be examined. Students may claim free speech rights concerning gaming communications that others understand to be offensive, derogatory, or threatening. These First Amendment questions are considered in the next Section.

C. First Amendment Questions

The U.S. Supreme Court in *Tinker v. Des Moines Independent Community School District*⁴⁴⁶ held that First Amendment protections extend to on-campus student speech, so long as the speech does not "materially disrupt[] classwork" or substantially interfere with others' rights.⁴⁴⁷ The Court noted that students and teachers do not "shed their constitutional rights to freedom of speech or expression at the

⁴⁴¹ U.S. DEP'T OF JUST., *supra* note 313, at 2.

⁴⁴² HILL & KEARL, *supra* note 49, at 7.

⁴⁴³ See Cantalupo & Kidder, *supra* note 419, at 2359.

⁴⁴⁴ See *id.*

⁴⁴⁵ *Id.*

⁴⁴⁶ 393 U.S. 503 (1969).

⁴⁴⁷ *Id.* at 506.

schoolhouse gate.”⁴⁴⁸ Although the Constitution does not afford students the right to participate in collegiate athletics or extracurricular activities, it *does* protect free speech “in the cafeteria, or on the playing field, or on the campus” while students participate in these activities.⁴⁴⁹ Courts have thus tasked schools with the sometimes-conflicting responsibility to promote and protect free speech while proscribing and controlling conduct for educational purposes.

Although student speech is protected by the First Amendment, schools may curtail on-campus speech that “materially disrupts class-work” or substantially interferes with the rights of others.⁴⁵⁰ Further, schools may editorialize school-sponsored speech, offensive language, lewd expression, and messages advocating illegal drug use.⁴⁵¹ Technology has complicated current categorical student-speech distinctions by blurring the on- and off-campus speech divide.⁴⁵² Different federal courts have analyzed student speech under different tests, including sufficient nexus, reasonable foreseeability, and *Tinker*’s second “rights of others” prong.⁴⁵³

Although *Tinker* expressly sought to protect student speech whether “in the cafeteria, or on the *playing field*,”⁴⁵⁴ no Supreme Court case has considered free speech specifically in college athletics; and esports is housed in athletics departments or in freestanding programs, depending on the college. As discussed, federal law requires

⁴⁴⁸ *Id.*

⁴⁴⁹ *Id.* at 512–13.

⁴⁵⁰ *Id.* at 513.

⁴⁵¹ See *Morse v. Frederick*, 551 U.S. 393, 397 (2007) (“[S]chools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use.”); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (holding that educators may “exercis[e] editorial control over the style and content of student speech in school-sponsored expressive activities [if] reasonably related to legitimate pedagogical concerns”); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986) (holding that school officials could prevent “vulgar and lewd speech [that would] undermine the school’s basic educational mission”).

⁴⁵² See, e.g., *Kowalski v. Berkeley Cnty. Schs.*, 652 F.3d 565, 574–75 (4th Cir. 2011) (applying the *Tinker* substantial disruption test to online speech in a MySpace group created away from school).

⁴⁵³ See *Porter v. Ascension Par. Sch. Bd.*, 393 F.3d 608, 615–20 (5th Cir. 2004) (holding that a violent drawing concealed in a student’s nightstand for two years, and only inadvertently taken to school by the student’s brother, removed the speech from the realm of *Tinker* because it was not created on-campus or directed at campus); *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1050 (2d Cir. 1979) (ruling that school authorities violated the First Amendment rights of free speech and press when they suspended several students for creating an underground student newspaper that was produced largely off-campus); *J.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1107 (C.D. Cal. 2010) (holding that speech that causes or is foreseeably likely to cause a substantial disruption of school activities can be regulated and disciplined by a school).

⁴⁵⁴ *Tinker*, 393 U.S. at 512 (emphasis added).

educational institutions to maintain nondiscriminatory environments, including through Title VI and Title IX of the Civil Rights Act of 1964,⁴⁵⁵ and the Supreme Court has recognized Congress's authority to create a cause of action for individuals who experience religious discrimination in the academic community.⁴⁵⁶ Campuses can censor and punish speech that crosses the line into targeted harassment or threats, that creates a pervasively hostile environment for vulnerable students, or that is otherwise unprotected speech.⁴⁵⁷ Speech that violates Title IX by harassing or threatening a student is not protected under the First Amendment, even when it does not pose an imminent threat of violence, given the targeted nature of such speech, the educational context, and the civil rights remedy provided by Title IX.⁴⁵⁸

Over fifty years of experience with Title VII has shown that workplaces can balance civil rights and liberties with antidiscrimination and antiharassment laws, and this should also be true concerning cyber harassment.⁴⁵⁹ Universities must create environments that foster tolerance and mutual respect, and in which students can meaningfully participate in campus life without being subject to discrimination. To advance these values, campus administrators should emphasize that free expression is central to democracy and to institutions of learning⁴⁶⁰ and prepare students to understand that most speech is protected by the U.S. Constitution.⁴⁶¹ They should simultaneously clearly speak out against expressions of racist, sexist, homophobic, and transphobic speech, as well as other instances of discrimination against marginalized individuals or groups; promptly and firmly

⁴⁵⁵ See *infra* Section III.B; 42 U.S.C. § 2000d (2012) (prohibiting institutional recipients of federal assistance from excluding persons based on race, color, or national origin from “any program or activity receiving Federal financial assistance”); see also *Racial Incidents and Harassment Against Students at Educational Institutions*, 59 Fed. Reg. 11,448, 11,449 (Mar. 10, 1994) (providing notice of investigative guidance that Title VI will be interpreted to prohibit recipient institutions from creating or maintaining a hostile environment, defined as an environment in which harassing conduct “is sufficiently severe, pervasive[,] or persistent so as to interfere with or limit the ability of an individual to participate in or benefit from the services, activities[,] or privileges provided by a recipient”).

⁴⁵⁶ See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Cannon v. Univ. of Chi.*, 441 U.S. 677, 709 (1979); *Zorach v. Clauson*, 343 U.S. 306, 309–10 (1952).

⁴⁵⁷ See ERWIN CHERMERINSKY & HOWARD GILLMAN, *FREE SPEECH ON CAMPUS* 113 (2017).

⁴⁵⁸ See *Kowalski v. Berkeley Cnty. Schs.*, 652 F.3d 565, 574 (4th Cir. 2011); Alexander Tsesis, *Campus Speech and Harassment*, 101 MINN. L. REV. 1863, 1892 (2017).

⁴⁵⁹ DANIELLE KEATS CITRON, *HATE CRIMES IN CYBERSPACE* 192–93 (2014).

⁴⁶⁰ See CHERMERINSKY & GILLMAN, *supra* note 457, at 19.

⁴⁶¹ See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269–71 (1964); *Cohen v. California*, 403 U.S. 15, 21–23 (1971); *Snyder v. Phelps*, 562 U.S. 443, 455–58 (2011); *United States v. Alvarez*, 567 U.S. 709, 716–19 (2012); *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017).

counter acts of discriminatory harassment, intimidation, or invasion of privacy; host forums and workshops; and improve diversity throughout educational institutions.⁴⁶² As schools navigate speech issues concerning students and campus, they should also recognize that different people have different platforms and not everyone is positioned the same regarding the power of their speech.

IV. OPPORTUNITIES FOR GENDER-BASED VIOLENCE PREVENTION

Norms that are particularly pertinent to the continuation of gender-based violence include male and female gender stereotypes and socialization, male entitlement, the desire to have power and control over another, and “the belief that intimate relationships are entirely private.”⁴⁶³ Research also shows that regular exposure to violence leads young people to normalize violence and reduce empathy for victims, all of which increases the risk of utilizing violence.⁴⁶⁴ Secrecy surrounding intimate violence precludes early intervention, isolates those being victimized, and perpetuates patterns of violence. Sexual cyberviolence and harassment are often dismissed by law enforcement and judges as not being “real,” yet cyber abuse can have devastating psychological and physical effects on a person.⁴⁶⁵ Positive change particularly requires attention to societal attitudes regarding gender asymmetry, masculine gender role ideologies, and interpersonal power differentials.⁴⁶⁶ Prevention efforts should also counter “gender policing,” which occurs when individuals tease or shame males to uphold masculine norms of dominance, strength, toughness, and control.⁴⁶⁷

⁴⁶² See generally CHERMERINSKY & GILLMAN, *supra* note 457, at 113 (providing guidelines for different situations).

⁴⁶³ PREVENTION INST., CREATING SAFE ENVIRONMENTS 3 (2006), <http://www.preventioninstitute.org/component/jlibrary/article/id-36/127.html> [<https://perma.cc/7TAQ-Y4BE>]; see also M. Christina Santana, Anita Raj, Michele R. Decker, Ana La Marche & Jay G. Silverman, *Masculine Gender Roles Associated with Increased Sexual Risk and Intimate Partner Violence Perpetration Among Young Adult Men*, 83 J. URB. HEALTH 575, 581–82 (2006) (discussing “traditional masculine gender role ideologies being the linchpin explaining previous research findings linking non-condom use and [intimate partner violence] perpetration in men”).

⁴⁶⁴ See Asma Tarabah, Lina Kurdahai Badr, Jinan Usta & John Doyle, *Exposure to Violence and Children’s Desensitization Attitudes in Lebanon*, 31 J. INTERPERSONAL VIOLENCE 3017, 3019 (2016).

⁴⁶⁵ See generally CITRON, *supra* note 459 (detailing multiple examples of cyber abuse and harmful effects).

⁴⁶⁶ See Gerald H. Burgess, *Assessment of Rape-Supportive Attitudes and Beliefs in College Men: Development, Reliability, and Validity of the Rape Attitudes and Beliefs Scale*, 22 J. INTERPERSONAL VIOLENCE 973, 979–84 (2007); Santana et al., *supra* note 463, at 576–77.

⁴⁶⁷ See Debby A. Phillips, *Punking and Bullying: Strategies in Middle School, High School,*

Colleges attentive to Title IX concerns about gaming as they host, sponsor, and promote esports could help push the gaming industry toward a cultural transition for diversity and inclusion. If colleges are motivated to comply with federal law and the industry demands a high-school-to-college-to-professional esports pipeline,⁴⁶⁸ viewing schools as “hospitable foundations to help this industry grow and stabilize as a whole,”⁴⁶⁹ overdue change could occur. Change through schools could alter gaming and esports dynamics more broadly and for the better, preventing incidents like in 2014, where a significant number of gamers reacted with extreme hostility and violence to critiques about misogyny and racism in gaming.⁴⁷⁰ Section IV.A addresses actions the industry can take, and Section IV.B provides guidance to schools about esports and gender-based violence and harassment prevention.

A. *The Gaming Industry*

Gender-based harassment should not be an inevitable part of gaming for females, and women and nonbinary individuals should not have to shield their identities to safely participate. The answer instead is to end the harassing behavior.

Recognizing the toxic environment and behavior that often accompanies gaming, some game developers are attempting to proactively address such problems. Blizzard Entertainment, for example, introduced to its shooter game, *Overwatch*, an endorsement function that allows players to compliment each other for leadership, teamwork, and sportsmanship, along with a “looking for group” function that allows players to form more “balanced teams.”⁴⁷¹ Blizzard reports that abusive chat decreased by between fifteen and thirty percent following these implementations, and the company continues to explore measures to make its gaming communities less abusive.⁴⁷²

Similarly, Riot Games created an “Honor” system for *League of Legends* players in 2012, which “allow[s] players to praise one another

and Beyond, 22 J. INTERPERSONAL VIOLENCE 158, 163, 174–75 (2007); Elizabeth Payne & Melissa J. Smith, *Gender Policing*, in CRITICAL CONCEPTS IN QUEER STUDIES AND EDUCATION 127, 127 (Nelson M. Rodriguez et al., eds. 2016).

⁴⁶⁸ See Kendall Baker, *Esports Eyes High Schools, Colleges as Talent Pipeline*, AXIOS (Jan. 29, 2019), <https://www.axios.com/esports-professional-athletes-college-high-school-60c456d6-4e5a-446b-8177-fff9d7796de9.html> [<https://perma.cc/TGB8-D783>].

⁴⁶⁹ Orantes & Sharma, *supra* note 27.

⁴⁷⁰ See Jason, *supra* note 268.

⁴⁷¹ Castello, *supra* note 238.

⁴⁷² *Id.*

for teamwork, positivity and strategy.”⁴⁷³ On the heels of Gamergate in 2015, Riot Games declared “the success of the game’s Tribunal system, which gave players an opportunity to vote on what behaviours were unacceptable and punish offenders.”⁴⁷⁴ According to Riot Games, verbal abuse declined by over forty percent and nine in ten players who received a penalty for negative acts did not commit another offense after just one reported penalty.⁴⁷⁵

Another game developer, Ubisoft, imposed immediate half-hour suspensions of the accounts of *Rainbow Six Siege* players if they were detected typing slurs into the chat function and stream.⁴⁷⁶ A second offense triggers a two-hour suspension, and a third offense prompts an official investigation that can result in a permanent ban.⁴⁷⁷

Complaints of rampant racist, sexist, and homophobic slurs, threats, and behaviors continue today, as shown by the revelations in the summer of 2020,⁴⁷⁸ but these measures reveal that the gaming industry both acknowledges toxic behaviors and can act through technology to reduce and penalize such behaviors. Researcher Kat Lo notes that having clear consequences for harmful behavior in gaming “sends a message to the community that the developers are taking measures to instil[i] less toxic community norms, and most importantly that they’re willing to enforce those expectations.”⁴⁷⁹ Organizations like the Fair Play Alliance, a collection of companies in the gaming industry working to encourage healthy gaming communities and to reduce hate and abuse through gaming, are also starting up.⁴⁸⁰ Similarly, advocacy organization AnyKey pursues a mission of diversifying the esports community by promoting inclusivity.⁴⁸¹

In response to the outpouring of allegations of sex discrimination, harassment, and assault in the gaming industry during the summer of 2020, multiple heads of industry resigned.⁴⁸² Deeper cultural change in the industry, which has devalued women in leadership and design, remains to be seen. Scholars of the gaming industry are calling for women and people of color to hold senior roles to drive needed change,

⁴⁷³ *Id.*

⁴⁷⁴ *Id.*

⁴⁷⁵ *Id.*

⁴⁷⁶ *Id.*

⁴⁷⁷ *Id.*

⁴⁷⁸ See Lorenz & Browning, *supra* note 164.

⁴⁷⁹ Castello, *supra* note 238.

⁴⁸⁰ FAIR PLAY ALLIANCE, <https://fairplayalliance.org/> [<https://perma.cc/8ZUQ-LDZR>].

⁴⁸¹ ANYKEY, <https://www.anykey.org/> [<https://perma.cc/4ZHZ-U5QU>].

⁴⁸² Browning, *supra* note 287.

along with gaming companies to hire and dedicate resources to support a broader diversity of candidates' participation throughout the industry.⁴⁸³ Gaming companies issued statements condemning sexism, racism, and homophobia in the industry;⁴⁸⁴ employees now need to be proactively protected through the enforcement of policies so that zero-tolerance statements are not merely meaningless platitudes.⁴⁸⁵

Developers should be encouraged to tell wider stories, expanding beyond "entitled macho-male power fantasy in their games."⁴⁸⁶ Possibilities are endless for more inclusive and diverse representations and stories within games, but changes have been slow and select.⁴⁸⁷ As a starting point for change, designers can reconsider (1) how gender and sexuality are assigned to characters and storylines, (2) depictions of sexual violence against women, and (3) inclusion of nonstereotypical female characters that are not merely appearing in games as sexualized objects.⁴⁸⁸

The proliferation of esports and focus on youth audiences, and building pipelines to professional play, present opportunities for video games to be tools for abuse prevention. Computer games can also be used to address social problems, and growing evidence shows the efficacy of using video games for public health interventions.⁴⁸⁹ Games have been created to address topics of family violence,⁴⁹⁰ teen dating violence,⁴⁹¹ sexual assault during college,⁴⁹² and the prevention of sex-

⁴⁸³ *Id.*

⁴⁸⁴ *Id.*

⁴⁸⁵ See Todd, *supra* note 268, at 66.

⁴⁸⁶ *Id.*

⁴⁸⁷ *Id.*

⁴⁸⁸ See *id.*; Bryce & Rutter, *supra* note 98, at 7.

⁴⁸⁹ See, e.g., Sharon Steinemann, Glena H. Iten, Klaus Opwis, Seamus F. Forde, Lars Frasseck & Elisa D. Mekler, *Interactive Narratives Affecting Social Change: A Closer Look at the Relationship Between Interactivity and Prosocial Behavior*, 29 J. MEDIA PSYCH. 54, 62–64 (2017).

⁴⁹⁰ See, e.g., James Batchelor, *Can a Video Game Prevent Domestic Violence?*, GAMESINDUSTRY.BIZ (Oct. 29, 2018), <https://www.gamesindustry.biz/articles/2018-10-26-can-a-video-game-prevent-domestic-violence> [<https://perma.cc/JPS9-EB5L>] (discussing *Jesse*, a game for youth about a ten-year-old boy who lives with his mother and her abusive boyfriend).

⁴⁹¹ See, e.g., Drew Crecente, *Gaming Against Violence: A Grassroots Approach to Teen Dating Violence*, 3 GAMES HEALTH J. 198, 200 (2014) (describing the Life.Love. Game Design Challenge, a contest that rewards game developers for creating video games about teen dating violence without using violence in the games themselves).

⁴⁹² See, e.g., Kristen N. Jozkowski & Hamid R. Ekbia, "*Campus Craft*": A Game for Sexual Assault Prevention in Universities, 4 GAMES HEALTH J. 95, 97, 101–03 (2015) (discussing *Campus Craft*, a simulation game that provides a virtual university setting in which students listen to and participate in health-related conversations and scenario development, including discussions about consensual sex).

ually transmitted diseases,⁴⁹³ among other public health topics. Games can be created to enhance empathy and skills for recognizing and safely intervening in situations of harassment.⁴⁹⁴ Although these games have not reached blockbuster status, investing in such games and storylines would be a way for the gaming industry to demonstrate actual commitment to ending sex discrimination.

B. Strategies for Schools

School investments in esports run parallel to recent global movements against harassment, abuse, and anti-Black racism, including Black Lives Matter protests, women's marches, and the social media movements of #1ReasonWhy, #WhyIStayed, #MeToo, #TimesUp, and #WhyIDidn'tReport. Schools should be attentive to these movements' contexts and imperatives, especially because of the role of youth in the movements, and utilize the movements' calls to action as frameworks for the development of inclusive gaming programs.

With Title IX mandates and broad campus commitments to equity, inclusion, and diversity, universities have the opportunity and legal necessity to build positive, nondiscriminatory gaming and esports programs from the ground up. Schools investing in esports should involve their Title IX campus coordinator and Diversity, Equity, and Inclusion Officers in navigating the intersection of Title IX, gaming content, and behavior while gaming, including when using school equipment or facilities, gaming through school-sponsored events, representing the schools as an esports athlete or esports scholarship recipient, or participating on a school-sponsored team.

NACE, the association of American varsity esports programs, describes its support for gender equity both in terms of ensuring participation in gaming regardless of gender and without experiencing discrimination. According to NACE, "[g]ender equity is an atmosphere and a reality where fair distribution of overall competition, opportunity[,] and resources, proportionate to enrollment, are available to women and men, and where no competitor, coach, or athletics administrator is discriminated against in any way in the esports program."⁴⁹⁵ In light of the present reality concerning the toxicity of the

⁴⁹³ See, e.g., Seth Noar, Hulda G. Black & Larson B. Pierce, *Efficacy of Computer Technology-Based HIV Prevention Interventions: A Meta-Analysis*, 23 AIDS 107, 113 (2009); Ross Shegog, Christine Markham, Melissa Peskin, Monica Dancel, Charlie Coton & Susan Tortolero, "It's Your Game": An Innovative Multimedia Virtual World to Prevent HIV/STI and Pregnancy in Middle School Youth, 129 STUD. HEALTH TECH. & INFORMATICS 983, 985 (2007).

⁴⁹⁴ Potter et al., *supra* note 59.

⁴⁹⁵ *Get Involved*, *supra* note 300.

esports community culture to nonwhite and nonmale players,⁴⁹⁶ how the “climate of gaming culture tends to make women gamers feel excluded and out-of-place,” and how “dominant discourse reflects and reinforces heterosexist and masculinist values and norms,”⁴⁹⁷ schools are challenged to actually achieve NACE’s standard of equity in gaming.⁴⁹⁸

To implement Title IX’s “Three-Part Test,”⁴⁹⁹ broader gender representation starts with hiring female and nonbinary program directors, staff, mentors, and student ambassadors, which can be done while furthering roles for women and men of color. Esports programs can host incubator programs for youth interested in gaming and esports, similar to programs in STEM fields,⁵⁰⁰ to coach and mentor young women and a diversity of students. Entering a gaming space is intimidating if one is not familiar with gaming. Accordingly, schools can host gaming events that are explicitly not competitions and that are advertised as opportunities for new players to learn new games. Schools should not be content with only requiring teams to place a single female on them, as this often results in that woman being targeted or experiencing backlash and isolation.

When colleges sponsor gaming or esports, their commitment to ensuring students can participate meaningfully in campus life without being subject to discrimination extends to ensuring safe gaming experiences. Schools should educate students who play esports about the school’s honor code and other institutional policies and procedures, including those concerning student conduct and cyberbullying, and implement no-tolerance rules for use of derogatory language or chat emotes with derogatory meanings during school-based competitions.

Schools can effectuate such intentions by creating Inclusivity Plans and Codes of Conduct that prioritize principles of equity, inclusion, and healthy gaming and that refuse to tolerate harassing behavior. Codes may include standards such as, “Harassment based on any aspect of a person’s identity will not be tolerated,” and “No ‘toxicity’

⁴⁹⁶ See T.L. Taylor, Mass. Inst. of Tech., Keynote Address at the UC Irvine eSports Symposium: On the Fields, in the Stands: The Future of Women and eSports (May 19, 2017).

⁴⁹⁷ Todd, *supra* note 268, at 66.

⁴⁹⁸ *Get Involved*, *supra* note 300.

⁴⁹⁹ See generally Erin E. Buzuvis & Kristine E. Newhall, *Equality Beyond the Three-Part Test: Exploring and Explaining the Invisibility of Title IX’s Equal Treatment Requirement*, 22 MARQ. SPORTS L. REV. 427 (2012).

⁵⁰⁰ See generally Caroline Hanna, *The Incubator Program: Hatching the STEM Scientists of the Future*, AMHERST COLL. (Oct. 15, 2020), <https://www.amherst.edu/mm/633617> [<https://perma.cc/3YPG-Q89Y>].

allowed. Behaviors that create an intolerable environment such as bullying, threats of violence, stalking, or other forms of intimidation will not be tolerated.”⁵⁰¹ Requiring players to read and agree to a code of conduct has been shown to markedly decrease toxic incidents, and “fostering norms that [create and] sustain healthy environments that are . . . resilient to toxic individuals” or acts proves essential to combating toxicity in games.⁵⁰²

Student gamers should also receive cyber- and game-specific training concerning sexual harassment. The harms of cyber sexual violence and gender-based harassment are not always obvious, especially to men who may categorize online chat as “trash talk” that is inherent to gaming; research shows that educating gamers about victims’ experiences of harassment in games and the corresponding negative harms can mitigate harassment.⁵⁰³

The gaming environment is instantaneous, escalates quickly, and is often anonymous and not tied to a specific physical location, so schools and students have to actively prepare to build and maintain healthier cultures in gaming.⁵⁰⁴ Because substantial cyber harassment occurs in the presence of peers, which carries its own trauma,⁵⁰⁵ preventive programs should teach bystander skills and ways to intervene so that students can respond to abusive behaviors they witness in non-violent and context-appropriate ways.⁵⁰⁶ Without such training, players may not understand the harm during what is otherwise considered anonymous leisure activity, may brush it off as thinking the targeted person can just quit anytime and not be affected, or may fear retribution for speaking out. Programs can also make concerted efforts to

⁵⁰¹ *Arena*, UCI ESPORTS, <https://esports.uci.edu/arena/> [<https://perma.cc/Y6C7-UJL9>]; see also Yen-Shyang Tseng, *The Principles of Esports Engagement: A Universal Code of Conduct*, 27 J. INTELL. PROP. L. 209, 219 (2020) (“All esports community members deserve to participate in and enjoy esports in safe spaces and to be free from threats and acts of violence and from language or behavior that makes people feel threatened or harassed.”).

⁵⁰² Castello, *supra* note 238.

⁵⁰³ See Charlotte Diehl, Tina Glaser & Gerd Bohner, *Face the Consequences: Learning About Victim’s Suffering Reduces Sexual Harassment Myth Acceptance and Men’s Likelihood to Sexually Harass*, 40 AGGRESSIVE BEHAV. 489, 497 (2014); see also Peter Nauroth, Mario Gollwitzer, Jens Bender & Tobias Rothmund, *Social Identity Threat Motivates Science-Discrediting Online Comments*, 10 PLOS ONE, Feb. 3, 2015, at 1, 2 (illustrating that those who identify as gamers often resist negative conceptions of gaming).

⁵⁰⁴ See HILL & KEARL, *supra* note 49, at 8.

⁵⁰⁵ See Ortiz, *supra* note 10, at 573 (noting that men of color are often discussed as bystanders to women of color’s experiences being harassed in gaming, as they cope with overt racism).

⁵⁰⁶ See Kelly P. Dillon & Brad J. Bushman, *Unresponsive or Un-noticed?: Cyberbystander Intervention in an Experimental Cyberbullying Context*, 45 COMPUTERS HUM. BEHAV. 144, 148–49 (2015).

celebrate gamers who demonstrate positive behavior, not only those who win competitions.⁵⁰⁷

Games are social and cultural environments that can allow players to engage in self-discovery and try out different ways of being.⁵⁰⁸ As college students engage in relationships in person and online and have various experiences in gaming, gaming programs can convene students—and possibly councils of players and community organizations—to discuss and critique issues related to gaming. They can also explore how the university and gaming industry can respond.⁵⁰⁹ Critical analysis and reflection are part of higher education, community building, and personal growth, and schools can host discussion groups and speaker series as they develop their gaming programs.

Schools should also attend to the mental and physical needs of players, safety of players and attendees of programs, and overall well-being of their online communities. Extreme amounts of time spent gaming detract from academic studies and class attendance, sleep, meal preparation, physical exercise, and in-person engagement with family and friends.⁵¹⁰ Moreover, the amount of time spent gaming has been found to predict acts of general harassment, as players are “socialized into a culture of harassment” in many online games.⁵¹¹ Programs can normalize discussions about attending to all aspects of life and balancing gaming with other obligations. Additionally, on-campus esports arenas can track hours that students spend playing in their facilities, and coaches and esports program staff should be watchful and collaborate with campus counseling centers as needed.

Changing discriminatory environments in gaming forums is key, rather than relying on after-the-fact remedies or litigation that may address only individual cases. For a multitude of reasons, many students do not make formal complaints about abusive actions that clearly fall within Title IX⁵¹² or otherwise take legal action.⁵¹³ Campus sexual misconduct is widely underreported, whether it is because of the university culture of not reporting, fear of reprisal after reporting

⁵⁰⁷ See Sherr, *supra* note 72.

⁵⁰⁸ See Cherie Todd, ‘Troubling’ Gender in Virtual Gaming Spaces, 68 N.Z. GEOGRAPHER 101, 105–08 (2012).

⁵⁰⁹ Sherr, *supra* note 72.

⁵¹⁰ See Stavropoulos et al., *supra* note 8, at 2.

⁵¹¹ Tang & Fox, *supra* note 120, at 517–18.

⁵¹² Brian A. Pappas, *Out from the Shadows: Title IX, University Ombuds, and the Reporting of Campus Sexual Misconduct*, 94 DENVER L. REV. 71, 74 (2016).

⁵¹³ See CITRON, *supra* note 459, at 133 (arguing that real-name litigation should not apply to cyber harassment victims).

another student, the threat of harassing attacks by anonymous sources, trauma, or tensions between a student's desire for autonomy after an abusive incident and university interests in promoting safety and avoiding liability.⁵¹⁴

With colleges newly undertaking gaming endeavors, esports programs, and esports teams, schools should build programs with anti-harassment principles in mind, rather than neglecting harmful behavior until media moments force an ineffective response, as was the case with the National Football League.⁵¹⁵

CONCLUSION

Online gender-based harassment, threats, and abuse have significant offline consequences with social, psychological, physical, educational, professional, and financial harms. With ninety-seven percent of youth playing video games and interest in gaming exponentially increasing during the COVID-19 pandemic, rather than discouraging video game play, schools are investing in gaming to attract and maintain student enrollment. But they must do so in a way that welcomes and provides safe experiences for all students.

Colleges have the opportunity and mandate to build innovative, impactful, inclusive, and accessible esports programs that cross inter-sectional barriers. The summer 2020 revelations by dozens of members of the gaming industry show that the industry has not succeeded in making necessary change following Gamergate. Schools can instead lead the way for the entire gaming world.

⁵¹⁴ See Pappas, *supra* note 512, at 96–97; Dana Bolger, Alexandra Brodsky & Sejal Singh, *A Tale of Two Title IXs: Title IX Reverse Discrimination Law and Its Trans-Substantive Implications for Civil Rights*, 55 U.C. DAVIS L. REV. (forthcoming Dec. 2021) (describing how male students disciplined for perpetrating sexual harassment are bringing Title IX lawsuits against their schools, arguing anti-male gender discrimination).

⁵¹⁵ See Deborah Epstein, Opinion, *I'm Done Helping the NFL Players Association Pay Lip Service to Domestic Violence Prevention*, WASH. POST (June 5, 2018, 9:15 AM), https://www.washingtonpost.com/opinions/im-done-helping-the-nfl-pay-lip-service-to-domestic-violence-prevention/2018/06/05/1b470bec-6448-11e8-99d2-0d678ec08c2f_story.html [https://perma.cc/83J9-NH63].