

The #E-Too Movement: Fighting Back Against Sexual Harassment in Electronic Sports

John T. Holden,* Thomas A. Baker III,** & Marc Edelman***

ABSTRACT

Competitive video gaming or esports has captured the attention of hundreds of millions of people across the globe. With that attention has come billions of dollars' worth of investment and promotion. But, it has also exposed an underlying toxic environment that features widespread sexual and gender harassment. This pervasive culture of harassment threatens to derail the esports industry and mars the promise of gender equity in one of the few competitive "sports" where physical strength, agility and body size do not dictate success. In this Article, we examine the rise of competitive gaming, and provide an in-depth analysis of the pervasive issue of harassment that permeates esports. We then propose a series of tangible reforms that would hold harassers and their corporate accomplices accountable for their harassing behavior.

ABSTRACT.....	1
INTRODUCTION	3
I. AN OVERVIEW OF ESPORTS, #METOO, AND THE ONLINE GAMING ENVIRONMENT	5

* John T. Holden is an Assistant Professor in the Department of Management at the Spears School of Business at Oklahoma State University. Dr. Holden received his Ph.D. from Florida State University, and his J.D. from Michigan State University.

** Thomas A. Baker III is a tenured Professor of Sports Law in the Sport Management Program at the University of Georgia. Dr. Baker received his Ph.D. from the University of Florida, and his J.D. from Loyola University of New Orleans.

*** Marc Edelman is a tenured Professor of Law at the Zicklin School of Business, Baruch College, City University of New York and an adjunct professor at Fordham University School of Law. Professor Edelman received his J.D. from Michigan Law School, his M.S. (higher education administration) from Baruch College, his M.A. (sports management) from University of Michigan, and his B.S. (Economics) from the Wharton School, University of Pennsylvania. Professor Edelman may be reached at Marc@MarcEdelman.com.

A. The Growth of Esports	6
B. Online Video Gaming Environment	8
C. The #MeToo Movement	10
D. Harassment of Women in Competitive Video Gaming	11
II. THE INTERNET LANDSCAPE AND THE COORDINATION OF HARASSMENT.....	14
A. Policing Speech on the Internet	15
B. Twitter	16
C. Twitch	18
D. YouTube.....	19
E. Reddit	20
F. 4chan and 8chan.....	20
G. The Costs of Harassment	21
III. THE GAME INDUSTRY RESPONSE	22
A. Negative Public-Perception of the Gaming Community	23
B. Fear of Retribution	24
IV. THE SHORTCOMINGS OF CURRENT ANTI-HARASSMENT LAWS	25
A. Section 230 of the Communications Decency Act	25
B. The Subjective Intent to Threaten	27
C. Computer Fraud and Abuse Act.....	29
D. Anti-Cyber Stalking	30
E. State Laws	30
V. WHAT CAN THE INDUSTRY DO, OR HAVE DONE TO IT TO BRING ABOUT CHANGE?	33
A. Building A Better Environment	34
B. Game Makers Need To Take Responsibility for What Is Taking Place.....	36
C. A Legal Avenue for Victims of Sexual Harassment.....	37
D. Institutional and Structural Changes at the Competition Level.....	39
1. Lessons Learned from Professional Sports Leagues.....	39
2. Best Practices for Implementing Whistleblower Protections.....	42
3. Reasonable Internal Jurisprudence and Punishment.....	43
E. Alternative Potential Solutions Involving Player Unions and Shared Governance	43
CONCLUSION.....	46

INTRODUCTION

Electronic sports (esports), which are competitive videogame contests, represent one of the fastest growing segments of the world entertainment market.¹ With more than 106 million people having watched the 2017 League of Legends championship, esports has the capacity to transcend social boundaries and bring together gamers from diverse cultures, nationalities, and genders.²

In many respects, esports has a promise of gender equity that has never materialized within traditional sports. Within esports, physical strength, agility, and body size do not dictate sporting success.³ Rather, success in esports is determined based on skills that require no segregation based on sex.⁴

Yet, despite the potential for a post-gender-classified sporting universe, esports remains constrained by sexism that keeps very few women from reaching the upper echelons of competition.⁵ Troublingly, sex and gender harassment in esports has led elite female and LGBTQ gamers to walk away from their passion, and it has called into question the long-term potential for industry growth and sustainable mainstream business partnerships.⁶

The case of Miranda “Super_Yan” Pakozdi exemplifies the sexual harassment that many young, female gamers encounter on an ongoing basis.⁷ Pakozdi specialized in fighting games and her talent and skills placed her

1. 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. (forthcoming 2020) (manuscript at 1) (on file with authors).

2. *Id.* (manuscript at 12).

3. There is debate as to whether esports are properly classified as a sport, but for the purposes of this paper that discussion is largely not germane. For a discussion of whether esports qualify as sports, see generally John T. Holden, Anastasios Kaburakis, & Ryan M. Rodenberg, *The Future Is Now: Esports Policy Considerations and Potential Litigation*, 27 J. LEGAL ASPECTS SPORT 46 (2017).

4. Holden et al., *supra* note 1.

5. Associated Press, *Women in Professional Esports Navigate Hyper Masculinity and Harassment*, MARKET WATCH (Jan. 3, 2019), <https://www.marketwatch.com/story/women-in-professional-esports-navigate-hyper-masculinity-and-harassment-2019-01-03> [<https://perma.cc/H942-WMWD>] (noting that 45% of gamers are female, albeit few females reach the highest level of play).

6. *Id.*; Stefanie Fogel, *Esports Is Getting Bigger Every Year—So Where Are All the Women?*, VARIETY (Nov. 1, 2018), <https://variety.com/2018/gaming/features/women-in-esports-1203016379/> [<https://perma.cc/ZJ5F-WGBA>].

7. Jason Schreier, *This Is What A Gamer’s Sexual Harassment Looks Like*, KOTAKU (Feb. 29, 2012), <https://kotaku.com/this-is-what-a-gamers-sexual-harassment-looks-like-5889415> [<https://perma.cc/PMQ3-637K>].

among the elite within the genre.⁸ But, Pakozdi's professional expertise did not elevate her above the type of harassment that pervades esports.⁹ In Pakozdi's case, the abuse she faced extended beyond her having to endure crude comments from spectators, as she was repeatedly ridiculed by someone who was supposed to be in her corner—her coach.¹⁰ During an online stream of a competition, Pakozdi's coach (Aris Bakhtanians) took control of the camera and, instead of filming game-play, focused on Pakozdi's breasts and buttocks and proceeded to make lewd comments about her bra size and boyfriend.¹¹ After repeatedly enduring harassment of this sort, Pakozdi took action.¹² In her final act as a competitive gamer, she intentionally allowed her avatar to be killed during a competition—signaling to the world she was no longer going to tolerate such pervasive harassment.¹³

Pakozdi's situation resulted in media attention because it took place during a broadcasted esports tournament.¹⁴ However, there are many other individuals who left competitive esports, or never actualized their potential to reach the professional level, because they were pushed away from their keyboards and consoles at earlier stages of their development in electronic gaming.¹⁵ Harassment within esports and electronic gaming deserves serious

8. See *Online Harassment Gets Real for Female Gamers*, NPR (Aug. 8, 2012), <https://www.npr.org/2012/08/08/158433079/virtual-harassment-gets-real-for-female-gamers> [<https://perma.cc/7XJU-V284>]. Fighting games involve a genre in which competitors engage in close combat and use combinations of attack and defense moves. Examples of fighting games include *Street Fighter*, *Super Smash Bros.*, and *Tekken*.

9. *Id.*

10. *Id.*

11. Schreier, *supra* note 7.

12. *Online Harassment Gets Real for Female Gamers*, *supra* note 8.

13. *Online Harassment Gets Real for Female Gamers*, *supra* note 8. Unlike Pakozdi, Bakhtanians remains active in professional esports and would later defend his behavior by saying that “sexual harassment is part of the [fighting games] culture” and that he took no issue with abusive statements directed at women players such as “Rape that bitch!” Bakhtanians later apologized on Twitter for making those comments but continued to defend what he described as “mild hostility” that he believed to be a defining characteristic of fighting games as a genre. Kirk Hamilton, *Competitive Gamer's Inflammatory Comments Spark Sexual Harassment Debate [Update]*, KOTAKU (Feb. 28, 2012), <https://kotaku.com/competitive-gamers-inflammatory-comments-spark-sexual-h-5889066> [<https://perma.cc/6LNR-MZFB>].

14. See, e.g., Carol Pinchefskey, *Hate Sexual Harassment in Videogame Culture? So Does This Kickstarter Project*, FORBES (May 1, 2013), <https://www.forbes.com/sites/carolpinchefskey/2013/05/01/hate-sexual-harassment-in-videogame-culture-so-does-this-kickstarter-project/#5155b14411ac> [<https://perma.cc/7LCV-6KCM>].

15. See Stefanie Fogel, *Esports Is Getting Bigger Every Year—So Where Are All the Women?*, VARIETY (Nov. 1, 2018), <https://variety.com/2018/gaming/features/women-in-esports-1203016379/> [<https://perma.cc/WD4B-6B4G>].

attention due to the growing size of the video gaming industry.¹⁶ The problem of harassment is extensive and involves a culture of toxicity that permeates virtually all aspects of electronic gaming, including esports.¹⁷

This Article explores the culture of sex and gender-based harassment that has emerged within the electronic gaming community, and it seeks to propose tangible mechanisms for holding harassers and their corporate accomplices responsible for facilitating online harassment. Part I of this Article provides an overview of the market for esports, the #MeToo movement, and the broader online gaming environment. Part II examines the policies governing harassment on a number of Internet sites that have been historically used as a commons¹⁸ for harassment against individuals in the gaming community. Part III discusses what has been done by the gaming industry to address the culture that has been connected to esports. Part IV provides an overview of the state and federal framework that has allowed harassers, companies and websites to largely escape responsibility for online harassment. Finally, in Part V, we analyze potential avenues for reform within the industry.

I. AN OVERVIEW OF ESPORTS, #METOO, AND THE ONLINE GAMING ENVIRONMENT

The proliferation of esports is not entirely a new phenomenon, as esports can be traced back to pinball machines.¹⁹ However, the recent professionalization and venture capital funding for the industry has created a huge boom in interest.²⁰ Esports is an umbrella term for organized and competitive video gaming.²¹ Esports are not uniform and they can best be

16. *Id.* In particular, competitive gaming plays an important function in creating online and offline communities for some. Online harassment restricts the agency and liberty of those affected in electronic gaming. For more on this, see Keith Stuart, *Gamer Communities, the Positive Side*, THE GUARDIAN (July 31, 2013), <https://www.theguardian.com/technology/gamesblog/2013/jul/31/gamer-communities-positive-side-twitter> [https://perma.cc/9QA5-Z3YW].

17. Yolanda L. Jackson, *Sexism in Esports*, HUFFINGTON POST (Nov. 14, 2017), https://www.huffpost.com/entry/sexism-in-esports_b_5a0b55cee4b06d8966cf333e [https://perma.cc/SDZ8-2VDL].

18. The idea of a commons historically was to provide a space open to all within a city, regardless of one's ability to own property. The Internet in some senses is the modern version of a commons open to most, where there is a broad autonomy to post what you please. See Bill Davidow, *The Tragedy of the Internet Commons*, THE ATLANTIC (May 18, 2012), <https://www.theatlantic.com/technology/archive/2012/05/the-tragedy-of-the-internet-commons/257290/> [https://perma.cc/XH6J-N2JN].

19. Holden et al., *supra* note 1 (manuscript at 56).

20. *Id.* (manuscript at 11–14).

21. *Id.* (manuscript at 4).

thought of as like the Olympics, a grouping of events under one umbrella.²² Esports games typically fall into one of six genres: (1) fighting games; (2) first-person and third-person shooter games; (3) real-time strategy (RTS) games; (4) sports games; (5) multiplayer online battle area games; and, (6) other games, which include a set of games that do not neatly fit into any of the other five aforementioned categories.²³ Esports is currently in the midst of an industrial revolution of sorts and as an influx of new capital floods the industry, the new investors threaten to disrupt the status quo, angering some within the gaming community.

A. *The Growth of Esports*

Esports has grown from local tournaments, to cross-country roadshow events, to multi-game leagues like Major League Gaming, to an industry with multiple games attracting viewership numbers that rival or exceed those numbers of traditional professional sporting events.²⁴ While esports still lag behind professional sports leagues like the National Football League (NFL), Major League Baseball (MLB), the National Basketball Association (NBA), and the National Hockey League (NHL) in terms of revenue, esports is growing in popularity at a rapid rate.²⁵ Esports brought in an estimated \$345 million in revenue in the North American market in 2018.²⁶ The industry is expected to surpass \$1 billion in revenue in 2019.²⁷ Prize money for the most lucrative esports tournament, the International Defense of the Ancients 2 (DOTA 2), was second only in prize pools to Wimbledon in 2018, and larger than the purses for sporting events like the Daytona 500, the Tour de France, and the Kentucky Derby.²⁸ The peak viewership numbers accompanying the growth of esports are staggering with 106.2 million viewers watching the 2017 League of Legends Championship,²⁹ which was more viewers than those for just about any sporting event outside of the Super Bowl and World

22. *Id.* (manuscript at 13).

23. *Id.* (manuscript at 17–20).

24. *Id.* (manuscript at 10–11).

25. Christopher Ingraham, *The Massive Popularity of Esports, in Charts*, WASH. POST (Aug. 27, 2018), https://www.washingtonpost.com/business/2018/08/27/massive-popularity-esports-charts/?utm_term=.7d170a4ad495 [https://perma.cc/42AP-VQ37].

26. *Id.*

27. Hilary Russ, *Global Esports Revenues to Top \$1 Billion in 2019: Report*, REUTERS (Feb. 12, 2019), <https://www.reuters.com/article/us-videogames-outlook/global-esports-revenues-to-top-1-billion-in-2019-report-idUSKCN1Q11XY> [https://perma.cc/8F9B-NZAK].

28. Ingraham, *supra* note 25.

29. *Id.*

Cup Final.³⁰ Accompanying the viewership numbers has been a steady stream of investors looking to monetize the massive interest in esports.³¹

The flood of investors into esports has come just a few short years after former ESPN President John Skipper declared that esports were not sports and that the network was only interested in “doing real sports.”³² Despite Skipper’s shortsightedness, esports has developed an online presence in streaming content that the worldwide leader in sports broadcasting, ESPN, must envy.³³ Investors have come in a variety of different forms and even include traditional sports teams like the Golden State Warriors—an organization that has invested in not only basketball-based esports, but also in a variety of other teams across a spectrum of games.³⁴ Esports has also attracted various celebrity investors like Shaquille O’Neal and celebrity DJ Steve Aoki who perceive esports as a good investment for growing their personal wealth.³⁵ But, by far the biggest backers of the esports industry have been corporate investors and venture capital firms looking for a new industry poised for a level of growth that traditional investments simply cannot deliver.³⁶

The promise of growth for esports is immense and represents almost everything for which an investor might consider when making decisions about where to place their capital. This includes year-over-year revenue growth upwards of twenty-five percent, as well as spending per fan that is much lower than fans of traditional sports, which leaves room for future growth.³⁷ Esports consumers are also quite wealthy by comparison to

30. See John T. Holden, Ryan M. Rodenberg & Anastasios Kaburakis, *Esports Corruption: Gambling, Doping, and Global Governance*, 32 MD. J. INT’L L. 236, 237 (2017). In 2014, the League of Legends Championship drew 27 million viewers, which ranked it higher than every major North American sports championship other than the Super Bowl. *Id.*

31. Tom Huddleston Jr., *From Michael Jordan to Drake: The Athletes and Celebs Who Invested Millions in Esports in 2018*, CNBC (Dec. 27, 2018), <https://www.cnbc.com/2018/12/19/from-michael-jordan-to-drake-athletes-celebrities-invested-millions-esports.html> [<https://perma.cc/EEE3-EG4W>].

32. Paul Tassi, *ESPN Boss Declares Esports ‘Not A Sport,’* FORBES (Sept. 7, 2014), <https://www.forbes.com/sites/insertcoin/2014/09/07/espn-boss-declares-esports-not-a-sport/#5f02f9055f80> [<https://perma.cc/47W2-T88S>]. Skipper abruptly resigned from ESPN in 2017 following revelations about an extortion plot involving his alleged use of cocaine. James Andrew Miller, *John Skipper Details His ESPN Exit and a Cocaine Extortion Plot*, HOLLYWOOD REP. (Mar. 15, 2018), <https://www.hollywoodreporter.com/features/john-skipper-details-espn-exit-cocaine-extortion-plot-1094657> [<https://perma.cc/4REA-SCUY>].

33. See Riad Chikhani, *The 3 Types of Esports Investor: Sports Teams, Celebrities, and Moguls*, VENTURE BEAT (May 15, 2018), <https://venturebeat.com/2018/05/15/the-3-types-of-esports-investor-sports-teams-celebrities-and-moguls/> [<https://perma.cc/SL6Q-BPJQ>].

34. *Id.*

35. *Id.*

36. See *id.*

37. Holden et al., *supra* note 1 (manuscript at 14).

consumers of traditional sports, with more than thirty-one percent of fans having a household income above \$90,000 U.S. dollars.³⁸ The fans are also younger than traditional sports fans, and the majority are in the desirable advertising category of 18 to 34, with women making up thirty-eight percent of esports fans.³⁹

Esports has tremendous growth potential, and investors and cities are beginning to develop infrastructure to host esports events. The future of esports, however, is contingent on the creation of an environment that is conducive to investors. At present, there are likely doubts about whether being associated with esports and the accompanying online spaces makes sense for some investors.⁴⁰ Driving the professional expansion of esports are millions of online fans, many of whom have a unique connection to online communities. Nevertheless, a few of these online communities are so toxic that they threaten the rise of the industry.⁴¹

B. Online Video Gaming Environment

The online gaming environment has long had a problem with harassment.⁴² Part of the online experience is that many games rely on teamwork, often between strangers connected only via avatars and the sounds of each other's voices.⁴³ The anonymity of the avatars can provide a perfect shield for comments that people otherwise would not make in a real-world setting.⁴⁴ While harassment in online gaming is not limited to women and LGBTQ players, the targeting of females and those who identify as LGBTQ is most pronounced.⁴⁵

There are a variety of theories as to why individuals may be more likely to act antisocially in online groups than in other contexts. One prominent

38. Joss Wood, *New Research: Esports Fans May Not Be Exactly Who You Think They Are*, THE LINES (Jan. 22, 2018), <https://www.thelines.com/esports-fan-demographic-research/> [<https://perma.cc/JF9P-FY8T>].

39. *Id.*

40. Rob Fahey, *Professionalism and Toxicity Threaten eSports' Breakthrough*, GAMESINDUSTRY.BIZ (May 20, 2016), <https://www.gamesindustry.biz/articles/2016-05-20-professionalism-and-toxicity-threaten-esports-breakthrough> [<https://perma.cc/XP96-8GB2>].

41. Jay Castello, *Foul Play: Tackling Toxicity and Abuse in Online Video Games*, THE GUARDIAN (Aug. 17, 2018), <https://www.theguardian.com/games/2018/aug/17/tackling-toxicity-abuse-in-online-video-games-overwatch-rainbow-seige> [<https://perma.cc/8VMJ-WXLT>].

42. Jesse Marczyk, *Online Games, Harassment, and Sexism*, PSYCHOL. TODAY (Nov. 26, 2017), <https://www.psychologytoday.com/us/blog/pop-psych/201711/online-games-harassment-and-sexism> [<https://perma.cc/6HHM-CBKS>].

43. *Id.*

44. *Id.*

45. Castello, *supra* note 41.

theory is that the anonymous online environments allow users to effectively lose themselves and meld into the group, effectively limiting social accountability.⁴⁶ It is thus not surprising that the historic anonymity of online gaming has fostered the growth of antisocial behavior where upwards of one-third of female gamers reported abuse or discrimination by male gamers, and ten percent of female gamers who participated in the study claimed to have been threatened with rape by male players during online play.⁴⁷

Moreover, the video game industry has been especially at risk for antisocial behaviors as it has been a domain of men and boys for many years, and having women achieve success in video gaming has pushed the males behavior too far.⁴⁸ The catering to men was bigger than men being attracted to video games, and there was a purposeful advertising strategy to show video gaming as a male activity.⁴⁹ Another theory is that as gaming culture has transitioned to the mainstream, this has led to a push back by certain members of the electronic gaming community who have banded together in online forums like 4chan to launch coordinated attacks.⁵⁰ While those who commit acts of harassment are responsible for their own actions, a partially complicit gaming industry may also share blame for not doing enough to address the harassment inherent to the environments built around their game products.⁵¹ In the wake of the #MeToo movement, segments of the entertainment and business communities have taken some (even if modest) remedial steps;⁵² yet, esports and online gaming have lagged behind in addressing the harassment and misogyny that exists within the industry.

46. Bree Royce, *For Science: The Psychology of Online Gaming Toxicity, Fanpersonism, and Gamer Identity*, MASSIVELY OVERPOWERED (Jan. 11, 2019, 12:30 PM), <https://massivelyop.com/2019/01/11/for-science-the-psychology-of-online-gaming-toxicity-fanpersonism-and-gamer-identity/> [<https://perma.cc/JA35-9BFF>].

47. Rebekah Valentine, *One-Third of UK Women Gamers Report Abuse or Discrimination from Male Gamers*, GAMESINDUSTRY.BIZ (June 5, 2018), <https://www.gamesindustry.biz/articles/2018-06-04-one-third-of-uk-female-gamers-report-abuse-or-discrimination-from-male-gamers> [<https://perma.cc/ZPA7-9YTG>].

48. Colin Campbell, *Gaming's Toxic Men, Explained*, POLYGON (July 25, 2018, 12:00 PM), <https://www.polygon.com/2018/7/25/17593516/video-game-culture-toxic-men-explained> [<https://perma.cc/2GJ5-ZUR7>].

49. *Id.*

50. *Id.*

51. *Id.*

52. See generally Audrey Carlsen, Maya Salam, Claire C. Miller, Denise Lu, Ash Ngu, Jugal K. Patel & Zach Wichter, *#MeToo Brought Down 201 Powerful Men. Nearly Half of Their Replacements Are Women*, N.Y. TIMES (Oct. 29, 2018), <https://www.nytimes.com/interactive/2018/10/23/us/metoo-replacements.html>

[<https://perma.cc/S8YG-RZEC>]; Nicole Lyn Pesce, *The #MeToo Movement Has Changed Policies Across Industries, but There Is Still Work To Be Done*, MARKETWATCH (Oct. 4, 2018, 6:59 PM), <https://www.marketwatch.com/story/the-metoo-movement-has-changed-policies-across-industries-but-theres-still-work-to-be-done-2018-10-04> [<https://perma.cc/VZ2S-3NVY>].

C. The #MeToo Movement

The #MeToo movement came to the national spotlight when actress Ashley Judd accused Hollywood producer Harvey Weinstein of sexual harassment.⁵³ However, the earliest seeds for the movement were planted even earlier, in 2006, by Civil Rights activist Tarana Burke, to raise awareness of the more general “pervasiveness of sexual violence.”⁵⁴ What followed Burke’s efforts was the resignation of the head of Amazon Studios Roy Price, and thereafter actress Alyssa Milano tweeting, “If you’ve been sexually harassed or assaulted write ‘me too’ as a reply to this tweet.”⁵⁵ Milano’s tweet generated thousands of replies from women, both celebrity and non-celebrities, who responded with their own stories of sexual abuse or harassment.⁵⁶ Over the next two years, tweets including the “#MeToo” hashtag led to many prominent men, and a number of women, being accused of abusing their positions.⁵⁷

In the year that followed, thousands of women spoke about harassment and abuse that they have suffered in the workplace.⁵⁸ Several states passed new laws, strengthening protections against harassment.⁵⁹ Washington, Vermont, Tennessee, and Maryland banned non-disclosure agreements, which would preclude going public with sexual harassment complaints as a condition of employment.⁶⁰ Delaware, Illinois, and California moved to mandate sexual harassment training for employers training new employees.⁶¹

53. Lindsay Bahr, *Harvey Weinstein To Take Leave of Absence After Bombshell New York Times Sex Harassment Report*, CHI. TRIB. (Oct. 5, 2017, 7:48 PM), <https://www.chicagotribune.com/entertainment/movies/ct-harvey-weinstein-new-york-times-sexual-harassment-report-20171005-story.html> [https://perma.cc/GW26-H7X6].

54. Tarana Burke, *#MeToo Founder Tarana Burke on the Rigorous Work that Still Lies Ahead*, VARIETY (Sept. 25, 2018), <https://variety.com/2018/biz/features/tarana-burke-metoo-one-year-later-1202954797/> [https://perma.cc/9RN4-5W9X].

55. See Christen A. Johnson & K.T. Hawbaker, *#MeToo: A Timeline of Events*, CHI. TRIB. (Jan. 06, 2020), <https://www.chicagotribune.com/lifestyles/ct-me-too-timeline-20171208-htmlstory.html> [https://perma.cc/5XYB-AJ7P].

56. Mary Pflum, *A Year Ago, Alyssa Milano Started A Conversation About #MeToo. These Women Replied*, NBC NEWS (Oct. 15, 2018, 2:59 PM), <https://www.nbcnews.com/news/us-news/year-ago-alyssa-milano-started-conversation-about-metoo-these-women-n920246> [https://perma.cc/S4DR-69CL].

57. See Johnson & Hawbaker, *supra* note 55.

58. Zoe Greenberg, *What Has Actually Changed in a Year*, N.Y. TIMES (Oct. 6, 2018), <https://www.nytimes.com/interactive/2018/10/06/opinion/sunday/What-Has-Actually-Changed-in-a-Year-me-too.html> [https://perma.cc/QL5T-HAQ3].

59. *Id.*

60. *Id.*

61. *Id.*

California also passed a law that required all publicly traded companies to have at least one woman on their boards.⁶²

The #MeToo movement had an important effect on private companies' conduct during its first year as well. Microsoft, Uber, and Lyft all abandoned mandatory arbitration agreements for settling sexual harassment claims and book publisher Simon & Shuster added morality clauses to their publishing contracts, which would require authors to return their advance payments if they are accused of sexual misconduct.⁶³

The #MeToo movement also prompted action in Silicon Valley, home to many of the country's largest technology companies and a hot bed of gaming culture.⁶⁴ Google saw thousands of employees stage a walkout in protest of the company giving lucrative exit packages to executives who left upon the reveal of credible evidence that they had violated the company's sexual harassment policies.⁶⁵ The #MeToo movement also hit Silicon Valley where Uber and venture capital firms like Binary Capital terminated executives accused of assault and harassment.⁶⁶ While the #MeToo movement has brought about positive changes across a number of industries, the competitive video gaming industry continues to lag behind.

D. Harassment of Women in Competitive Video Gaming

The harassment of women online in both recreational and professional video gaming is well documented.⁶⁷ One of the most notorious examples of gender harassment started on August 8, 2014, when a twenty-four-year-old computer programmer published a lengthy blogpost about alleged infidelity by his ex-girlfriend, a video game programmer.⁶⁸ The post set off a frenzy of largely anonymous harassment against female video game programmers and

62. *Id.*

63. *Id.*

64. Shannon Bond, *#MeToo in Silicon Valley*, FIN. TIMES (Jan. 21, 2019), <https://www.ft.com/content/af5f42a8-1501-11e9-a168-d45595ad076d> [<https://perma.cc/4PP2-9JM4>].

65. *Id.*

66. Ryan Mac & Davey Alba, *These Tech Execs Faced #MeToo Allegations. They All Have New Jobs*, BUZZFEED (Apr. 16, 2019, 8:00 AM), <https://www.buzzfeednews.com/article/ryanmac/tech-men-accused-sexual-misconduct-new-jobs-metoo> [<https://perma.cc/5RNH-SJ72>].

67. Saira Mueller, *Sexual Harassment in Esports: It's More Common Than You Think, and It Needs To Stop*, DOT ESPORTS (Oct. 19, 2017, 9:10 PM), <https://dotesports.com/general/news/sexual-harassment-esports-18144> [<https://perma.cc/53DF-SZD6>].

68. Eron Gjoni, *TL;DR:*, THEZOEPOST, <https://archive.fo/MeIYt> [<https://perma.cc/C6VZ-Z5P8>].

video game journalists, ranging from email campaigns suggesting they should be fired to death threats.⁶⁹ Eron Gjoni, the computer programmer who launched the post that started the onslaught, was one of the few male antagonists who was not anonymous in what would be dubbed GamerGate.⁷⁰ Gjoni, who claimed to have written the original post for “ethical reasons,” played an advisory role in the GamerGate phenomenon.⁷¹ At the center of the harassment was Gjoni’s contention that his ex-girlfriend had traded sex for a positive game review—a *quid pro quo* that there is no evidence ever took place.⁷² But, GamerGate was only one of many high profile harassment instances in videogaming.

Another notorious instance of harassment in esports involved Maria “Remilia” Creveling, the only transgender woman to compete in the prestigious League of Legends Championship Series (LCS).⁷³ Creveling saw her career in esports cut short due to anxiety brought on by fans who flooded comment sections on live-stream feeds with sexist and transphobic statements about her appearance and gender identity.⁷⁴ Moreover, despite the fact that the first esports team to receive backing from an American professional sports team was composed of six female gamers, these professionals faced “persistent harassment” and comments related to their looks too.⁷⁵ The harassment that exists in the industry is not centralized into certain segments. Instead, it appears to permeate virtually all aspects of the industry.

In some cases, the perpetrators of sexual harassment have been very highly ranked gamers. For example, one of the top Finnish Overwatch players commented about an interviewer that “he was ‘going to explore that

69. Joseph Bernstein, *The Man Who Sparked GamerGate Regrets the Harassment, Says He’d Do It Again*, BUZZFEED (Oct. 16, 2014, 11:50 AM), <https://www.buzzfeednews.com/article/josephbernstein/the-man-who-sparked-gamergate-regrets-the-harassment-but-say> [https://perma.cc/CPV9-CQWG].

70. *Id.*

71. *Id.*

72. Sean Illing, *The Woman at the Center of #Gamergate Gives Zero Fucks About Her Haters*, VOX (Sept. 19, 2017, 8:00 AM), <https://www.vox.com/culture/2017/9/19/16301682/gamergate-alt-right-zoe-quinn-crash-override-interview> [https://perma.cc/EL69-HRGX].

73. Jake Seiner, “*You’re a Girl, You’re Being Targeted*”: *Women in Esports Navigate Toxicity, Other Barriers*, DENVER POST (Jan. 3, 2019, 8:15 AM), <https://www.denverpost.com/2019/01/03/esports-women-navigate-toxicity-barriers/> [https://perma.cc/VPQ8-4YXT].

74. *Id.*

75. Sam Cooke, *Heather Garozzo—Team Dignitas—From Shame to Pride*, ESPORTS INSIDER (Aug. 16, 2017), <https://esportsinsider.com/2017/08/heather-garozzo-team-dignitas-shame-pride/> [https://perma.cc/34EH-Y8YT].

interviewer girl's thighs."⁷⁶ Despite the comment, the player kept his status on his team.⁷⁷ The response from many esports leagues and tournaments has been to issue minor fines or to demand apologies, but these minimal punishments remain largely inconsequential and appear to have little deterrent effect.⁷⁸ Coaches in esports have also been accused of misusing their position to harass players on the teams that they coach.⁷⁹ The problem of sex and gender harassment in esports goes all the way to the top rungs of the industry, as some of the top game makers have been exposed for institutionalizing workplace harassment.

Of particular note, videogaming website Kotaku undertook an exposé into the culture of sexism at Riot Games.⁸⁰ One former Riot Games employee noted that the company had code language to seemingly disqualify female applicants from top-level roles.⁸¹ Amongst the purported practices at Riot Games were sexual email threads shared about female colleagues amongst the male employees and lists of which female employees the males at the company would most like to engage sexually.⁸² In a study of their own employees' videogaming behavior and their work behavior, Riot found that twenty-five percent of the employees they terminated in the previous year had high levels of in-game toxicity.⁸³ In May of 2019, a change appeared to be afoot as 150 Riot Games employees walked out of the company over harassment lawsuits—the largest protest in the history of the videogame industry.⁸⁴ The walkout was in part prompted by Riot's steadfast allegiance

76. *Does Esports Have a Sexual Harassment Problem?*, ESPORTS.NET (Sept. 11, 2018), <https://www.esports.net/esports-sexual-harassment-problem/> [<https://perma.cc/SST5-JVXQ>].

77. Alena Alambeigi, *'Overwatch' Player's Lewd Comment Toward Interviewer Costs Team Prize Money*, MASHABLE (Oct. 18, 2016), <https://mashable.com/2016/10/18/taimou-pro-player-sexual-comments/> [<https://perma.cc/VQ2F-MCRK>].

78. Ethan Gach, *Pro Overwatch Player Fined for 'Lewd Comment' About Interviewer*, KOTAKU (Oct. 15, 2016, 2:10 PM), <https://kotaku.com/pro-overwatch-player-fined-for-lewd-comment-about-inter-1787837655> [<https://perma.cc/QZG4-9AD9>]. This player had been sanctioned on a variety of occasions for his propensity to use homophobic and racist slurs in addition to his harassment of the reporter from the OGN Channel. See Bo Moore, *Overwatch League Pro Apologizes for Using Homophobic Slur*, PC GAMER (Mar. 9, 2018), <https://www.pcgamer.com/overwatch-league-pro-apologizes-for-using-homophobic-slur/> [<https://perma.cc/L99B-MQMP>].

79. See *Does Esports Have A Sexual Harassment Problem?*, *supra* note 76.

80. Cecilia D'Anastasio, *Inside the Culture of Sexism at Riot Games*, KOTAKU (Aug. 7, 2018, 3:00 PM), <https://kotaku.com/inside-the-culture-of-sexism-at-riot-games-1828165483> [<https://perma.cc/HNF9-NK53>].

81. *Id.*

82. *Id.*

83. *Id.*

84. Keza McDonald, *Riot Games Employees Walk Out over Workplace Harassment Lawsuits*, GUARDIAN (May 7, 2019), <https://www.theguardian.com/games/2019/may/07/riot->

to its forced arbitration agreements, which companies like Google ended in the wake of #MeToo allegations.⁸⁵ The walkout was followed by five employees, or former employees, filing lawsuits alleging harassment, discrimination, and violations of California's Equal Pay Act.⁸⁶

The sex- and gender-based harassment that entangles the esports industry threatens to derail the growth of the industry, as mainstream entities are unlikely to continue to support an industry that brings about sustained negative attention. There have been some efforts to bring about change in segments of the industry, like the game-maker unionization effort Game Makers Unite.⁸⁷ But, the problem of harassment in video gaming is a far larger problem than the unionization of game-maker employees alone can solve. In Part II, we examine the online environment where much of the harassment has been allowed to flourish due to lax or non-existent enforcement of terms of use policies.

II. THE INTERNET LANDSCAPE AND THE COORDINATION OF HARASSMENT

Online gaming harassment in part relies on there being places that allow for the assembly of individuals to share and commiserate amongst others who perceive themselves as similarly aggrieved.⁸⁸ It was in one of these online spaces—Reddit's Kotaku in Action forum—that the harassment associated with GamerGate was planned.⁸⁹ The forum was started by Reddit user, david-me, who was initially policing the forum himself but quickly found that the popularity of the forum made policing it alone impractical.⁹⁰ The difficulty controlling user-moderated online spaces was highlighted by david-me when

games-employees-walk-out-over-workplace-harassment-lawsuits [https://perma.cc/C7A3-4XUJ].

85. *Id.*

86. *Id.* Riot Games had previously taken some steps to improve the workplace environment, including hiring a Chief Diversity Officer, though it remains too early to determine the effectiveness of these measures. Andy Chalk, *Riot Gamers Hires Its First Chief Diversity Officer*, PC GAMER (Mar. 1, 2019), <https://www.pcgamer.com/riot-games-hires-its-first-chief-diversity-officer/> [https://perma.cc/56WL-5EEF].

87. Aron Garst, *How Video Game Industry Unionization Would Happen*, VARIETY (Dec. 17, 2018), <https://variety.com/2018/gaming/features/video-game-industry-union-unionization-1203091114/> [https://perma.cc/3W8W-KN4J].

88. See Joseph Knoop, *With Toxic Gamers out of Control, Beloved Reddit Forum Goes Dark*, DAILY DOT (Apr. 1, 2019, 1:09 PM), <https://www.dailydot.com/parsec/reddit-games-shutdown-april-fools/> [https://perma.cc/X5EE-A8QY].

89. Steve Rousseau, *Founder of Gamergate Subreddit r/KotakuInAction Calls It a 'Cancerous Growth,' Attempts to Delete It*, DIGG (July 13, 2018, 2:22 PM), <http://digg.com/2018/david-me-deletes-kotaku-in-action> [https://perma.cc/F6NG-DVFA].

90. *Id.*

he noted that he was too afraid that if he shut down the GamerGate forum, he might become targeted by those who had been targeting women in the gaming industry.⁹¹ In response to the publicity that GamerGate generated, Reddit's CEO commented, "[T]hey [Reddit] are not the thought police."⁹² The GamerGate scandal highlighted one of the challenges in addressing harassment in an online environment, the reliance on site operators to police speech when they possess virtual immunity.

A. Policing Speech on the Internet

The First Amendment protects offensive speech from government restriction, barring limited exceptions.⁹³ The question of how to handle online speech and what responsibility private online corporations should have for it has been a subject of debate for more than twenty years.⁹⁴ While the Internet and online forums have given a voice to many who may not have been heard prior to its creation, the Internet as a private space has not always been well understood.⁹⁵ This leaves much of the policing of content (except where criminal law supersedes) to private companies that can make the rules for their websites and allow the content they desire, while banning content with which they disagree.⁹⁶ While Internet companies are free to impose regulations on users, many of the larger online giants, like Google, Facebook, and Word Press, all reference the importance of their platforms for spreading ideas and providing access to knowledge.⁹⁷

Twitter and Google may appear to be free speech havens, but one professor remarked that Google's lawyers are more powerful than the Chief Justice of the Supreme Court because they determine what speech is accessible.⁹⁸ The Internet serves as a source for the stories that become news and has the potential to be something of a utopian dream for unfettered free

91. *Id.*

92. *Id.*

93. Content-based restrictions on speech are typically not allowed by the First Amendment unless they involve "incitement, threats, obscenity, child pornography, defamation of private figures, criminal conspiracies, and criminal solicitation." See Andrew Koppelman, *Revenge Pornography and First Amendment Exceptions*, 65 EMORY L.J. 661, 662 (2016).

94. See Kim L. Rappaport, Comment, *In the Wake of Reno v. ACLU: The Continued Struggle in Western Constitutional Democracies with Internet Censorship and Freedom of Speech Online*, 13 AM. U. INT'L L. REV. 765 (1998).

95. David S. Ardia, *Government Speech and Online Forums: First Amendment Limitations on Moderating Public Discourse on Government Websites*, 2010 BYU L. REV. 1981, 1990 (2010).

96. *Id.* at 1990–91.

97. Marvin Ammori, *The "New" New York Times: Free Speech Lawyering in the Age of Google and Twitter*, 127 HARV. L. REV. 2259, 2260 (2014).

98. *Id.* at 2261 (noting that Google's lawyers determine which content is allowable).

speech. Yet the reality of the matter is that private companies already exert a great deal of control over the speech that is published in online spaces.⁹⁹ Many of the stances used by Internet companies to avoid taking action against harassment are coded as protecting free speech.¹⁰⁰ As a result, Google, Twitter, and Reddit's policies for what content is allowable has been applied in seemingly arbitrary fashion, and this is particularly true in responding to gender-related online harassment.¹⁰¹ Yet, despite their apparent arbitrary enforcement of their own policies, virtually all of the major online gathering places have policies in place for banning harassing content.

B. Twitter

The Twitter User Agreement is a 31-page document that is specific to U.S. residents.¹⁰² The Terms of Service make clear that users are responsible for "compliance with applicable laws, rules, and regulations."¹⁰³ Twitter allows users a personal license to use the site, with the company having the ability

99. *Id.*

100. For example, Google-owned company YouTube declined to take action against a video containing racist and homophobic harassment of a journalist. *See* Emily Birnbaum, *YouTube Declines to Take Action Against Commentator Accused of Racist, Homophobic Harassment*, HILL (June 4, 2019, 10:53 PM), <https://thehill.com/policy/technology/447009-youtube-declines-to-take-action-against-commentator-accused-of-racist> [<https://perma.cc/T5H9-BXLY>]. YouTube responded that the videos did not violate the website's terms of service. *Id.* In seeking to use their embrace of free speech, YouTube representatives wrote: "As an open platform, it's crucial for us to allow everyone—from creators to journalists to late-night TV hosts—to express their opinions w/in the scope of our policies." *Id.* Despite policies stating that "harassment and cyberbullying" violate the company's policies, the site defended its decision to leave the controversial video up. *Id.* While Twitter has been one of the companies that President Donald Trump accused of enforcing a bias against "conservatives," the company has had a history of what appears to be different standards for enforcing what type of speech violates its terms of use. For instance, the site chose not to remove anti-Semitic tweets by Louis Farrakhan where he compared Jewish people to termites. *See* Nahila Bonfiglio, *Twitter Says Louis Farrakhan's Controversial Tweet Doesn't Violate Policies*, DAILY DOT (Oct. 18, 2018, 8:38 AM), <https://www.dailydot.com/debug/louis-farrakhan-anti-semitic-tweets/> [<https://perma.cc/BJ8U-7ZUA>].

101. *See, e.g.*, Adi Robertson, *New Reddit Rules Will Crack Down on Some Hate Communities, Leave Others Standing*, VERGE (July 16, 2015, 4:17 PM), <https://www.theverge.com/2015/7/16/8978181/reddit-code-of-conduct-steve-huffman> [<https://perma.cc/G6HV-96RQ>]; *see also* Thuy Ong, *Twitter Starts Enforcing New Policies on Violence, Abuse, and Hateful Conduct*, VERGE (Dec. 18, 2017, 9:00 AM), <https://www.theverge.com/2017/12/18/16789606/twitter-new-safety-policies-hate-groups> [<https://perma.cc/TH6Y-PXEY>].

102. *Twitter User Agreement*, TWITTER CAREERS, <https://cdn.cms-twdigitalassets.com/content/dam/legal-twitter/asset-download-files/TheTwitterUserAgreement-1.pdf> [<https://perma.cc/H3PP-KEQ3>].

103. *Id.* at 2.

to terminate or suspend access if (1) users violate the Terms of Service or Twitter's rules; (2) users expose the company to a possible legal risk; (3) users allow for prolonged inactivity; or, (4) the company decides to shut the platform down.¹⁰⁴ Twitter also reserves the right to change the terms of its service.¹⁰⁵ Twitter's rules are framed with the statement that it believes that "everyone should have the power to create and share ideas and information instantly, without barriers."¹⁰⁶

Following the description of a barrier-free platform, Twitter's Terms of Service describe the actions that result in violation of its rules.¹⁰⁷ Specifically, Twitter reserves the right, should it be brought to its attention, to suspend users for violations of others' intellectual property rights, as well as for posting graphic violence or adult content.¹⁰⁸ However, Twitter does not promise to affirmatively police its own content. Then, under the term "Abusive Behavior," the company states:

We believe in freedom of expression and open dialogue, but that means little as an underlying philosophy if voices are silenced because people are afraid to speak up. In order to ensure that people feel safe expressing diverse opinions and beliefs, we prohibit behavior that crosses the line into abuse, including behavior that harasses, intimidates, or uses fear to silence another user's voice.¹⁰⁹

Twitter's policies continue by recognizing that "[c]ontext matters," and they provide a non-exclusive list of factors that may be used to determine whether particular conduct is worthy of suspension.¹¹⁰ Twitter also prohibits users from engaging in behavior that would lead to violence and physical harm, as well as abuse and hateful conduct such as making unwanted sexual advances and other types of sexual misconduct.¹¹¹ Twitter's rules allow the company a great deal of leeway to distinguish what conduct it would force users to remove.¹¹²

104. *Id.* at 7.

105. *Id.* at 9.

106. *The Twitter Rules*, TWITTER (last visited June 6, 2019), <https://web.archive.org/web/20190606014944/https://help.twitter.com/en/rules-and-policies/twitter-rules>. The current version of *The Twitter Rules* can be found at <https://help.twitter.com/en/rules-and-policies/twitter-rules>.

107. *The Twitter Rules*, TWITTER (last visited June 6, 2019), <https://web.archive.org/web/20190606014944/https://help.twitter.com/en/rules-and-policies/twitter-rules>.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *See id.*

C. Twitch

Much like Twitter, Twitch, which is owned by Amazon and has been described as the biggest video game platform in the world, primarily uses its terms of use to combat harassment.¹¹³ The principal enterprise for Twitch is broadcasting video-game streams, and the streaming service has also served as a forum for many gamers who engage in abusive behavior directed at a variety of individuals, particularly women.¹¹⁴ The company lists behaviors that are banned, including “hateful conduct,” which includes “content or activity” that encourages harassment or violence based on a number of classes including “Sex, Gender, or Gender Identity.”¹¹⁵ While Twitch provides a detailed list of harassing activities that are banned and notes that “[v]iolating our policy against harassment will result in [an] account being suspended,”¹¹⁶ harassment on the platform remains prevalent.¹¹⁷ Twitch’s policies and enforcement raise questions about their commitments to providing a harassment-free space for their users and promoting free dialogue. In May of 2019, popular esports streamer Jenna Weowri engaged her legal team to pressure Twitch into taking down content, including her own, and her pressures led to two other popular Twitch streamers (“Mizkif” and “Esfand”) receiving seven-day bans.¹¹⁸ Annemunion, a popular female esports streamer who has more than 300,000 followers on Twitch, was more direct in her approach to addressing toxic content when she made an example of abusers by posting a video of harassment targeting her to her Twitter account.¹¹⁹ The video she posted received more than a half million views and evidenced the type of gender harassment that exists on Twitch.¹²⁰

113. See Shawn Ketcherside, *Everything Parents Need to Know About Twitch*, PARENTS GUIDE TO GAMES (Mar. 11, 2018), <http://theparentsguidetogames.com/everything-parents-need-to-know-about-twitch> [https://perma.cc/WEE4-2GR9].

114. Jordan Ashley, *Twitch Needs to Actually Enforce Its Own Rules*, NEW NORMATIVE (Jan. 15, 2019), <http://newnormative.com/2019/01/15/twitch-needs-to-actually-enforce-its-own-rules/> [https://perma.cc/6HP3-GMDN].

115. *Hateful Conduct and Harassment*, TWITCH, <https://www.twitch.tv/p/legal/community-guidelines/harassment/> [https://perma.cc/6T2C-C98R].

116. *Id.*

117. See Laura Kate Dale, *Harassment Livestreams on Twitch Are Multiplying and Easy to Find*, KOTAKU (Aug. 12, 2017, 12:45 PM), <https://kotaku.com/harassment-livestreams-on-twitch-are-multiplying-and-ea-1797767263> [https://perma.cc/4ZKG-CQT3].

118. Will Strickland, *Streamer Behind Mizkif and Esfand’s Twitch Ban Makes Controversial Follow-up Comment*, DOT ESPORTS (May 16, 2019, 4:36 PM), <https://dotesports.com/streaming/news/streamer-behind-mizkif-and-esfands-twitch-ban-makes-controversial-follow-up-comment> [https://perma.cc/5QWF-L5B6].

119. Nathan Grayson, *Popular Twitch Streamer Makes an Example of Her Harassers*, KOTAKU (May 1, 2018, 8:05 PM), <https://kotaku.com/popular-twitch-streamer-makes-an-example-of-her-harasse-1826499663> [https://perma.cc/3W9L-82UH].

120. *Id.*

Annemunication stated, “While I understand everyone, of all genders and backgrounds, can often be the subject of toxicity online, I really feel like people underestimate just how bad it can be for women or people who are recognized as ‘other’ over voice comm[unication]s.”¹²¹

D. YouTube

The YouTube comments section was once called “the most toxic comment section on the web.”¹²² While the content of videos on YouTube has been an issue, the comments section of videos is where much of the vitriol often lies.¹²³ Google-owned YouTube has a set of simplistically-styled rules that it calls “community guidelines.”¹²⁴ Indeed, in its statement about harassment in videos or comments section, YouTube states: “It’s not ok to post abusive videos and comments on YouTube. If harassment crosses the line into a malicious attack it can be reported and may be removed. In other cases, users may be mildly annoying or petty and should be ignored.”¹²⁵

While YouTube has a slightly more detailed page explaining what behavior is viewed as harassing, the policy leaves a great deal of room for YouTube administrators to make determinations on its own.¹²⁶ YouTube has also chosen to specify that hate speech is banned, whereas other forms of harassing or intimidating conduct remain within the permissible activities for users.¹²⁷ While sites like Twitter, YouTube, and Twitch appear to have broad discretion to determine which content they will allow, other sites seem to be even more permissive.

121. *Id.*

122. Amelia Tait, *Why Are YouTube Comments the Worst on the Internet?*, NEW STATESMAN (Oct. 26, 2016), <https://www.newstatesman.com/science-tech/internet/2016/10/why-are-youtube-comments-worst-internet> [https://perma.cc/ZF79-MAEJ].

123. *Id.*

124. *Community Guidelines*, YOUTUBE, <https://www.youtube.com/yt/about/policies/#community-guidelines> [https://perma.cc/F7QL-BJEF].

125. *Id.*

126. *Id.*; *see Harassment and Cyberbullying Policy*, YOUTUBE, https://support.google.com/youtube/answer/2802268?visit_id=1-636215053151010017-1930197662&rd=1&hl=en [https://perma.cc/NWB5-3D7M].

127. *See* Ali Breland, *YouTube Announces Hate Speech Ban While Turning a Blind Eye to Homophobia*, MOTHER JONES (June 5, 2019), <https://www.motherjones.com/politics/2019/06/youtube-hate-speech-homophobia-carlos-maza/> [https://perma.cc/SWV5-CMRL].

E. Reddit

Reddit is likely the most popular message board-type website on the Internet and it also served as the home of the Kotaku in Action thread that coordinated much of the GamerGate harassment.¹²⁸ Reddit's content policy prohibits much of the conduct that is prohibited by other websites, including threatening, harassing, or bullying or encouraging others to do so.¹²⁹ Reddit states that they do not tolerate harassment, defining harassment as: "[s]ystematic and/or continued actions to torment or demean someone in a way that would make a reasonable person conclude that Reddit is not a safe platform to express their ideas or participate in the conversation, or fear for their safety or the safety of those around them."¹³⁰

Reddit notes that they provide a great deal of leeway for what content is acceptable, and that they have an escalating series of punishments with the most severe being a total ban from all Reddit communities.¹³¹ Other websites, however, are filled with messages of hate and trolls.

F. 4chan and 8chan

One article stated, "4chan has never been a nice place."¹³² 4chan is a website started by a 15-year-old New Yorker, Christopher Poole, in 2003.¹³³ 4chan's two most popular boards are /pol/, which stands for politically incorrect, and /b/, which is largely composed of pornography and violent imagery.¹³⁴ 4chan has been referred to as a "breeding ground" and the source of "nearly every evil o[n] the Internet."¹³⁵ The anonymous nature of 4chan

128. See Samantha Cole, *The Creator of the Largest Gamergate Subreddit Rage Quits, Says It's 'Infested with Racism and Sexism,'* VICE (July 13, 2018, 8:57 AM), https://www.vice.com/en_us/article/43pv3g/gamergate-subreddit-kotaku-in-action-shut-down-by-creator [<https://perma.cc/9P7B-7PHN>].

129. *Reddit Content Policy*, REDDIT, <https://web.archive.org/web/20190814195012/https://www.reddithelp.com/en/categories/rules-reporting/account-and-community-restrictions/do-not-threaten-harass-or-bully>. The current *Reddit Content Policy* may be found at <https://www.redditinc.com/policies/content-policy> [<https://perma.cc/Q24R-YF66>].

130. *Do Not Threaten, Harass, or Bully*, REDDIT, <https://www.reddithelp.com/en/categories/rules-reporting/account-and-community-restrictions/do-not-threaten-harass-or-bully> [<https://perma.cc/4EL4-2TMF>].

131. *Reddit Content Policy*, *supra* note 129.

132. Emma Grey Ellis, *4Chan is Turning 15—and Remains the Internet's Teenager*, WIRED (June 1, 2018, 10:00 AM), <https://www.wired.com/story/4chan-soul-of-the-internet/> [<https://perma.cc/LHP2-DB2M>].

133. *Id.*

134. *Id.*

135. *Id.*

has allowed users to post without inputting the information required on other sites, allowing users to coordinate virtually anything, including targeted harassment attacks, like GamerGate, in anonymity.¹³⁶ 8chan, which launched in 2013, is similar to 4chan and first gained widespread popularity during GamerGate as a site for coordinating harassment.¹³⁷ 8chan's only rule is: "Do not post, request, or link to any content that is illegal in the United States of America and do not create boards with the sole purpose of posting or spreading such content."¹³⁸ Since its inception, 8chan has operated as a place for hate and was the depository for manifestos of mass shooters in San Diego and Christchurch, New Zealand.¹³⁹ 8chan has proliferated despite not being available in Google's search results and little has been done to adequately address hate on it or 4chan.¹⁴⁰ So long as individuals have sites like 4chan and 8chan to organize their abuse, the problem of online gender harassment will remain significant.¹⁴¹

G. The Costs of Harassment

Online harassment is one of the most indelible aspects of the Internet.¹⁴² Even organizations that promote online freedom such as the Electronic Frontier Foundation have expressed concern about the effects of online harassment.¹⁴³ The Foundation suggests that one of the major issues with combatting online harassment has not been a lack of law enforcement power, but rather an unwillingness to enforce existing laws against online harassers.¹⁴⁴ The costs of harassment to victims is very real, with some choosing to leave online platforms like Twitter altogether.¹⁴⁵ Oftentimes the

136. Fernando Alfonso III, *A Beginner's Guide to 4chan*, THE DAILY DOT (Oct. 7, 2013, 11:00 AM), <https://www.dailydot.com/unclick/beginners-guide-to-4chan/> [<https://perma.cc/U6NC-SGRS>].

137. Emily Stewart, *8chan, a Nexus of Radicalization, Explained*, VOX, <https://www.vox.com/recode/2019/5/3/18527214/8chan-poway-synagogue-shooting-christchurch-john-earnest> (last updated Aug. 5, 2019, 12:56 PM) [<https://perma.cc/XN2A-PVMZ>].

138. *Id.*

139. *Id.*

140. *Id.*

141. *See id.*

142. Danny O'Brien & Dia Kayyali, *Facing the Challenge of Online Harassment*, ELECTRONIC FRONTIER FOUND. (Jan. 8, 2015), <https://www.eff.org/deeplinks/2015/01/facing-challenge-online-harassment> [<https://perma.cc/RXB6-CTH7>].

143. *Id.*

144. *Id.*

145. Shalailah Medhora, *Online Abuse and Trolling Costs Economy up to \$3.7 Billion, Research Finds*, ABC (Jan. 28, 2019, 12:06 AM),

costs are much greater than simply leaving their online presence, as online posts can affect things like potential future employment.¹⁴⁶ There may also be costs incurred by victims for things like changing a phone number, hiring a lawyer, and, in some cases, moving expenses.¹⁴⁷ The costs of online harassment also affect the economy. One study in Australia found that online abuse costs the economy \$3.7 billion annually.¹⁴⁸ Meanwhile, in terms of opportunity costs, National Collegiate Athletic Association (NCAA) president Mark Emmert cited the misogyny within electronic gaming as a significant reason for why the NCAA decided to table any sponsorship of esports.¹⁴⁹ The costs of online harassment have also had an effect on corporations and that may be a prime catalyst for change. For example, following an ill-advised tweet that was picked up by the GamerGate trolls, advertisers reportedly pulled more than \$1 million from the website Gawker.¹⁵⁰ The costs of online harassment are significant, and, if left unchecked, the toxic environment within esports may threaten continued investment and growth for this emerging industry. In Part III, we discuss the game industry's responses to online harassment.

III. THE GAME INDUSTRY RESPONSE

In the wake of GamerGate, the International Game Developers Association published a statement condemning harassment and doxxing

<https://www.abc.net.au/triplej/programs/hack/social-economic-impacts-of-trolling-online-abuse/10750650> [<https://perma.cc/3XAP-BLHW>].

146. Carolyn Wheeler, *Victims of Anonymous Online Harassment Suffer Serious Consequences*, KATZ, MARSHALL & BANKS, LLP (Jan. 30, 2018), <https://www.kmblegal.com/employment-law-blog/victims-anonymous-online-harassment-suffer-serious-consequences> [<https://perma.cc/2EAA-DK7A>].

147. *Id.*

148. Medhora, *supra* note 145.

149. For Emmert's comments on the misogyny in esports, see Joe Laramie, *NCAA President Criticizes Esports for Misogyny, Violence, and Gamer Health*, SPORTTECHIE (Jan. 28, 2019), <https://www.sporttechie.com/ncaa-president-criticizes-esports-for-misogyny-violence-gamer-health/> [<https://perma.cc/2CST-XHG7>]. For information on the NCAA's decision to not sponsor esports, see Tom Schad, *NCAA Tables Possibility of Overseeing Esports*, USA TODAY (May 21, 2019, 2:59 PM), <https://www.usatoday.com/story/sports/college/2019/05/21/ncaa-and-esports-not-just-yet-organization-tables-possibility/3751122002/> [<https://perma.cc/AX8S-CUJ5>]. One could, however, reasonably question if the NCAA had other motives as well in staying away from esports, including the fact the esports players already earn income from both esports contests and endorsement deals—something the NCAA continues to try to prevent its current athletes from enjoying.

150. Jessica Roy, *Gamergate Reportedly Cost Gawker 'Seven Figures' in Ad Revenue*, N.Y. MAG.: INTELLIGENCER (Dec. 11, 2014), <http://nymag.com/intelligencer/2014/12/gamergate-cost-gawker-seven-figures-in-revenue.html> [<https://perma.cc/M5FK-3X9P>].

attacks¹⁵¹ and called on “the entire game community to stand together against this abhorrent behavior.”¹⁵² The sentiment expressed in that report, however, has lacked significant follow-up from the industry. A minority of game producers, like Rainbow Six game-maker Ubisoft, have implemented protections into software that detect slurs and harassing language, and, when identified, the offending player is suspended from play for a period of time.¹⁵³ But, the vast majority of game producers have yet to adequately take action against harassers who use the producer’s games as tools for their harassment. The lack of response from most of the leading game producers has not gone unnoticed by the media and even potential investors.¹⁵⁴

A. Negative Public-Perception of the Gaming Community

The media’s consistent coverage of the culture that toxifies electronic gaming and esports increases public awareness of the problems.¹⁵⁵ The pull of electronic gaming and online interaction is strong for people of all ages, but informed parents may try to push their children (their daughters in particular) away from the keyboards and consoles as a means of protecting them from the toxicity.¹⁵⁶ This is not to say that the media should not cover the toxic conditions of electronic gaming and esports. Instead, the media’s willingness to address a serious problem within our society should be paired with remedial efforts from those in the industry who possess the authority

151. Doxxing occurs when harassers release private information about targeted individuals, often phone numbers and addresses, for others to anonymously harass the victim. See Zoe Quinn, *Zoe Quinn: What Happened After GamerGate Hacked Me*, TIME (Sept. 11, 2017), <http://time.com/4927076/zoe-quinn-gamergate-doxxing-crash-override-excerpt/> [<https://perma.cc/BA3U-UT2D>].

152. Emanuel Maiberg, *Game Developer Association Condemns Harassment, Offers Help to Targeted Devs*, GAME SPOT (Aug. 31, 2014, 7:52 AM), <https://www.gamespot.com/articles/game-developer-association-condemns-harassment-off/1100-6422023/> [<https://perma.cc/VJN5-D3JP>].

153. Jay Castello, *Foul Play: Tackling Toxicity and Abuse in Online Video Games*, THE GUARDIAN (Aug. 17, 2018, 4:00 PM), <https://www.theguardian.com/games/2018/aug/17/tackling-toxicity-abuse-in-online-video-games-overwatch-rainbow-seige> [<https://perma.cc/Y428-ALKY>].

154. See, e.g., Laura Hudson, *Curbing Online Abuse Isn’t Impossible. Here’s Where We Start*, WIRED (May 15, 2014, 6:30 AM), <https://www.wired.com/2014/05/fighting-online-harassment/> [<https://perma.cc/V9TD-5TJW>].

155. See, e.g., Associated Press, *Female Esports Players Face Routine Sexism and Toxicity: ‘I No Longer Have Power’*, N.Y. POST (Jan. 3, 2019, 12:01 PM), <https://nypost.com/2019/01/03/female-esports-players-face-routine-sexism-and-toxicity-i-no-longer-have-power/> [<https://perma.cc/3U6E-YU7E>].

156. For an example of the type of problem that has alarmed parents, see the case of Adam Isaac, a man who groomed children for abuse by targeting them in the popular game Minecraft. George Herd, *Minecraft: Grooming Dangers for Children Gaming Online*, BBC NEWS (Jan. 20, 2017), <https://www.bbc.com/news/uk-wales-38284216> [<https://perma.cc/99FZ-KJDM>].

and responsibility to effect change. In a report for the Electronic Frontier Foundation, Danny O'Brien and Dia Kayyali urged the use of counter-speech that harnesses the "power of the Net to call out, condemn, and organize against behavior that silences others."¹⁵⁷ That call came in 2015¹⁵⁸ and it has resulted in little change, beyond the occasional press release—like the one from the International Game Developers Association following GamerGate.¹⁵⁹

B. Fear of Retribution

The report on behalf of the Electronic Frontier Foundation, from O'Brien and Kayyali, recognized companies do a poor job at regulating speech.¹⁶⁰ They found that most hosting providers failed to adopt proactive policies for policing harassing behavior and instead relied on their online communities to police themselves.¹⁶¹ So why are not more within the electronic gaming industry taking proactive measures to police against harassment? The first reason is likely that doing so is costly and difficult to accomplish. Yet, there is another financial reason that can be learned from GamerGate: the industry seemingly fears retribution from consumers.¹⁶² The GamerGate supporters launched organized campaigns against major technology companies that advertised on websites authored by the campaign's victims.¹⁶³ For example, Intel pulled ads from the pro-feminist publication Gamastura in response to GamerGate after pressure from GamerGate supporters.¹⁶⁴ Intel has since apologized for pulling the ads, but its initial actions validated the actions of the harassers.¹⁶⁵ The market has not discouraged toxic behavior and has failed to adequately self-regulate; therefore, victims of online cyber harassment in

157. O'Brien & Kayyali, *supra* note 142.

158. *Id.*

159. Maiberg, *supra* note 152.

160. O'Brien & Kayyali, *supra* note 142.

161. *Id.*

162. See Verge Staff, *Gamergate: A Misogynist Harassment Campaign Disguised as Consumer Revolt*, THE VERGE (Oct. 2, 2014, 9:55 AM), <https://www.theverge.com/2014/11/4/7153549/gamergate-campaign-video-game-ethics-feminism-harassment> [<https://perma.cc/RMF3-ZSLG>].

163. Dean Takahashi, *The DeanBeat: Farewell to #Gamergate*, VENTURE BEAT (Feb. 12, 2016, 8:00 AM), <https://venturebeat.com/2016/02/12/the-deanbeat-farewell-to-gamergate/> [<https://perma.cc/DG8M-V9XF>].

164. Paul Tassi, *Intel Apologizes for Pulling Ads Due to GamerGate Pressure*, FORBES (Oct. 14, 2014, 10:29 AM), <https://www.forbes.com/sites/insertcoin/2014/10/04/intel-apologizes-for-pulling-ads-due-to-gamergate-pressure/> [<https://perma.cc/6MMZ-5RYF>].

165. *Id.*

electronic gaming had little recourse other than to turn to Congress, state legislatures, and the courts.

IV. THE SHORTCOMINGS OF CURRENT ANTI-HARASSMENT LAWS

The challenges for victims of online harassment are numerous and include them having to deal with a game-industry that has seemingly been prompted to take action only after much damage has already been done.¹⁶⁶ Reports suggest that upwards of 850,000 adults, mostly women, are victims of cyber-stalking every year.¹⁶⁷ The legal system affords victims a few avenues to target online harassers. One avenue involves filing a civil suit, but this option is limited by the tremendous cost of private litigation and often would require courts to side against (seemingly) judgment-proof defendants or minors.¹⁶⁸ Several states have recently passed laws dealing with cyber harassment, which represent a second means for victims to have their harassers held accountable. There remain, however, discrepancies among the states regarding the specific conduct that is covered by cyber harassment laws.¹⁶⁹ Part IV of this Article discusses the challenges with relying on the legal system to remedy online harassment.

A. Section 230 of the Communications Decency Act

Perhaps the most significant legal obstacle for bringing about meaningful change is the Communications Decency Act (CDA) of 1996.¹⁷⁰ In particular, Section 230 of the CDA limits the ability of harassment victims to target the publishers of harassing content.¹⁷¹ The CDA was passed by Congress with

166. See Brian Crecente, *Plague of Game Dev Harassment Erodes Industry, Spurs Support Groups*, POLYGON (Aug. 15, 2013, 1:00 PM), <https://www.polygon.com/2013/8/15/4622252/plague-of-game-dev-harassment-erodes-industry-spurs-support-groups> [https://perma.cc/L3X3-ESRK].

167. Marlis Silver Sweeney, *What the Law Can (and Can't) Do About Online Harassment*, ATLANTIC: TECH. (Nov. 12, 2014), <https://www.theatlantic.com/technology/archive/2014/11/what-the-law-can-and-cant-do-about-online-harassment/382638/> [https://perma.cc/GXW2-5XAK].

168. *Id.*

169. *Id.*

170. Sara L. Zeigler, *Communications Decency Act of 1996 (1996)*, THE FIRST AMEND. ENCYCLOPEDIA, <https://www.mtsu.edu/first-amendment/article/1070/communications-decency-act-of-1996> (last accessed June 7, 2019) [https://perma.cc/A6FW-L5M9].

171. Adi Robertson, *Why the Internet's Most Important Law Exists and How People Are Still Getting It Wrong*, THE VERGE (June 21, 2019, 1:02 PM), <https://www.theverge.com/2019/6/21/18700605/section-230-internet-law-twenty-six-words-that-created-the-internet-jeff-kosseff-interview> [https://perma.cc/4D5V-JU7M].

the intent to prevent minors from accessing pornographic material via the Internet.¹⁷² The American Civil Liberties Union challenged the bill as infringing on the online speakers' First Amendment rights, as the language in the statute went further than the permissible restrictions on speech found in *Miller v. California*.¹⁷³ The Court held:

We are persuaded that the CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech. In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another. That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.¹⁷⁴

The *Reno* decision struck portions of the CDA that infringed on the First Amendment's speech protections, but found large portions of the statute constitutionally sound (and unchallenged by the Plaintiffs).¹⁷⁵ Amongst the portions of the statute left unaffected was Section 230.¹⁷⁶ Section 230 of the CDA states: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."¹⁷⁷ This provision effectively provides a shield to websites that host or republish the speech of others.¹⁷⁸ This protects companies like YouTube, Twitter, Amazon, and Reddit from having liability simply by hosting content.¹⁷⁹

The CDA's Section 230 is also a major obstacle to combatting online harassment, as the companies that facilitate the harassment are broadly protected from liability for conduct by online posters.¹⁸⁰ The immunity provided by Section 230 has become a focus as numerous sites have allowed harassers to continue to have a presence, despite being made aware of the

172. Zeigler, *supra* note 170.

173. See *Reno v. ACLU*, 521 U.S. 844 (1997).

174. *Id.* at 874.

175. *Id.* at 882–83.

176. See 47 U.S.C. § 230 (2018).

177. *Id.* § 230(c)(1).

178. *CDA 230 the Most Important Law Protecting Internet Speech*, ELECTRONIC FRONTIER FOUND., <https://www.eff.org/issues/cda230> [<https://perma.cc/K55M-3NNA>].

179. *Id.*

180. Alina Selyukh, *Section 230: A Key Legal Shield for Facebook, Google Is About To Change*, NPR (Mar. 21, 2018), <https://www.npr.org/sections/alltechconsidered/2018/03/21/591622450/section-230-a-key-legal-shield-for-facebook-google-is-about-to-change> [<https://perma.cc/LPG7-QCCZ>].

complaints appearing to violate the websites' Terms of Service.¹⁸¹ The Section 230 immunity effectively allows major Internet companies to step in and stop harassment only if they feel like it.¹⁸² In fact, there may even be financial incentives for websites and Internet Service Providers to ignore online harassment as it is often treated as dogma within the industry that controversy helps to drive Internet traffic.¹⁸³

The challenge with reforming Section 230 has long focused on the necessity to protect First Amendment freedoms, and most prominent amongst those arguments is protecting a diversity of viewpoints.¹⁸⁴ Numerous scholars have argued that Section 230 is not necessary because sufficient First Amendment protection for websites already exists and the provision may narrow those extant protections.¹⁸⁵ The First Amendment looms large and, while there may be an excessive chilling effect on speech if Internet Service Providers and third-party hosting sites are subjected to liability, Section 230 of the CDA remains one of the biggest obstacles to stopping online harassment.¹⁸⁶ There remain additional challenges for victims of online harassment at the federal level in addition to Section 230 of the CDA. One of these challenges, proving the intent to threaten, was the subject of a recent Supreme Court decision.¹⁸⁷

B. *The Subjective Intent to Threaten*

The recent Supreme Court decision concerning online harassment involved Anthony Elonis, an avid Facebook user and aspiring rap artist who

181. Paul Blumenthal, *The One Law That's the Cause of Everything Good and Terrible About the Internet*, HUFF POST (Aug. 6, 2018), https://www.huffpost.com/entry/online-harassment-section-230_n_5b4f5cc1e4b0de86f488df86?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAECq2Kq8---AtHFBRA4U6wO76xVsqEd5COC0IFeZNRtMSoTiw78tTBJLAcshoW9GUUbtzpXp8rdBPRmGwSLHSBdjC6gcWc5Do4iaMpWMx3ynyEqZ7zw-oFOaLYwX5l_ALvTmrbgp25HR5EkAQDC5mgZGrrTF6-BCokr2GdGhR3i [https://perma.cc/P6V4-QRP9].

182. *Id.*

183. Ann Bartow, *Online Harassment, Profit Seeking, and Section 230*, 95 B.U. L. REV. ANNEX 101, 102 (2015).

184. Note, *Section 230 as First Amendment Rule*, 131 HARV. L. REV. 2027 (2018).

185. *Id.* at 2032–34.

186. See Kevin Heaphy, *California Holds that Internet Service Providers, Such as Yelp, Can Disobey Orders To Remove Defamatory Posts—so How Can Companies Remove False Reviews from the Internet?*, NAT'L L. REV. (Feb. 15, 2019), <https://www.natlawreview.com/article/california-holds-internet-service-providers-such-yelp-can-disobey-orders-to-remove> [https://perma.cc/8RLW-BSQH].

187. *Elonis v. United States*, 135 S. Ct. 2001 (2015).

changed his Facebook name to Tone Dougie.¹⁸⁸ After commencement of his divorce proceedings, the content of Elonis's Facebook page became increasingly "crude, degrading, and violent," frequently towards his soon-to-be ex-wife.¹⁸⁹ Elonis's posts were often presented as rap lyrics that he had written.¹⁹⁰ A grand jury indicted Elonis for making threats in interstate or foreign commerce.¹⁹¹ At his trial, Elonis was convicted after the jury relied on a reasonable person standard to determine the existence of a threat, based on an instruction to which Elonis objected by arguing for a subjective intent to make a threat standard.¹⁹² The Supreme Court agreed with Elonis, and though they did not address whether recklessness would satisfy the requirements for a conviction under 18 U.S.C. § 875(c), the Court found that a reasonable person standard was not sufficient and that threats communicated over the Internet must be intended, or at least be recklessly disseminated with knowledge that they would be interpreted as a threat.¹⁹³

The subjective intent requirement transposed under *Elonis* to § 875(c) has a potential negative impact for those fighting against online harassment.¹⁹⁴ The decision places a difficult burden on prosecutors in choosing to bring cases regarding online threats.¹⁹⁵ It has been proposed that threats online are often dismissed or taken less seriously than threats offline, despite there being substantial evidence that those online threats are often an indication of actual violence.¹⁹⁶ Even with the Supreme Court's decision not to address whether recklessness would satisfy the mens rea requirement, § 875(c) creates additional peril for victims of online threats that are presented in rap lyrics, or disguised as something other than a direct threat against the victim.¹⁹⁷ While some have expressed concern that without a specific intent requirement, certain actors may seek to stifle speech by falsely claiming to be threatened,¹⁹⁸ there is little evidence that there are widespread false claims

188. *Id.* at 2004–05.

189. *Id.* at 2005.

190. *Id.* at 2006–07.

191. *Id.* at 2004–05.

192. *Id.* at 2008.

193. *Id.* at 2012–13.

194. Jared Keller, *The Supreme Court Just Made Online Harassment a Little Bit Easier*, PAC. STANDARD (May 3, 2017), <https://psmag.com/news/the-supreme-court-just-made-online-harassment-a-little-bit-easier> [<https://perma.cc/5HLC-KCR2>].

195. *Id.*

196. *Id.*

197. Jessica K. Formichella, Note, *A Reckless Guessing Game: Online Threats Against Women in the Aftermath of Elonis v. United States*, 41 SETON HALL LEGIS. J. 117, 137–38 (2016).

198. Susan Kruth, *Censorship by Crying Wolf: Misclassifying Student and Faculty Speech as Threats*, 71 U. MIAMI L. REV. 461 (2017) (discussing how colleges have used social media posts by students and faculty, which are purportedly questionably threatening, to remove speakers from campus that articulate views contrary to the administration).

of threats regarding online activity.¹⁹⁹ The challenges with proving a subjective intent to threaten likely ties prosecutorial hands, but this is just one of several federal laws that present an obstacle to justice for victims of online harassment.

C. Computer Fraud and Abuse Act

The Computer Fraud and Abuse Act²⁰⁰ (CFAA) is another statute that on the surface appears to provide an avenue against online harassers but has been limited by courts to apply to a narrow set of circumstances. The CFAA is an omnibus federal criminal and civil law that addresses a wide variety of computer crimes related to misuse of computers.²⁰¹ Originally crafted in 1984, the CFAA was perhaps designed in response to the 1983 film *War Games*, starring Matthew Broderick, which led to fear that hackers could access military computers.²⁰² The CFAA has been amended many times since, but its usefulness against online harassers, absent some additional allegations of hacking, is questionable.²⁰³ Take for instance, the 2009 case involving Lori Drew, a resident of Missouri, who used a computer to harass Megan Meier, a thirteen-year-old classmate of Drew's daughter.²⁰⁴ The elder Drew created a fictitious MySpace profile of a sixteen-year-old boy named Joshua Evans—an act that violated MySpace's Terms of Service.²⁰⁵ Drew then used the Evans profile to develop an online relationship with Meier. Less than a month after creating the profile, Drew, using the Joshua Evans profile, informed Meier "the world would be a better place without her in it."²⁰⁶ Later that day, Meier killed herself.²⁰⁷

Drew was convicted by a jury of violating the CFAA, notably using a "computer involved in interstate or foreign communication without authorization or in excess of authorization to obtain information."²⁰⁸ The government's theory was that by violating MySpace's Terms of Service to create the character of Joshua Evans, Drew had intentionally accessed the

199. See Olivia Goldhill, *Naming Abusers Online May Be "Mob Justice" but It's Still Justice*, QUARTZ (Nov. 7, 2017), <https://qz.com/1120212/naming-abusers-online-may-be-mob-justice-but-its-still-justice/> [<https://perma.cc/TQ82-GTA7>].

200. 18 U.S.C. § 1030(a)–(j) (2018).

201. *Id.*

202. See H.R. REP. NO. 98-894, at 10 (1984).

203. See *United States v. Drew*, 259 F.R.D. 449 (C.D. Cal. 2009).

204. *Id.* at 452.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* at 453.

company's servers without authorization.²⁰⁹ The California District Court granted Drew's motion for a judgment of acquittal and ruled that the CFAA could not be extended to the type of conduct in which Drew engaged.²¹⁰ The court's decision thus significantly limited the use of the CFAA as a legislative tool for victims to combat online harassment in cases that do not involve hacking into the victim's accounts. While federal laws regarding online and computer conduct appear to fall short of protecting victims of online harassment, there are several federal alternatives that prosecutors could pursue to put a stop to harassment.

D. Anti-Cyber Stalking

Federal law provides for a prohibition on cyberstalking and harassment via common carrier regulations.²¹¹ The federal anti-harassment legislation has been criticized as being a paper tiger in regards to online sexual harassment.²¹² Harassers have rarely been charged, and even when they have been charged, and convicted, punishments for egregious violations have often not included any jail time.²¹³ The apparent inadequacies of federal law to protect victims of online harassment, or the failure to consistently enforce federal law against online harassers, has left much of the burden of protection to the states. Indeed, states have been proactive in attempting to provide avenues to justice for victims of cyber harassment.

E. State Laws

What constitutes online harassment and violates the law is a state-by-state question.²¹⁴ Following the tragic case of Megan Meier's suicide, numerous states undertook to update their online harassment legislation.²¹⁵ Virtually

209. *Id.* at 461.

210. *Id.* at 465, 468.

211. 47 U.S.C. § 223 (2018).

212. See Danielle Keats Citron, *Law's Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373, 403 (2009).

213. *Id.* at 403 n.244 (“[A] man who sent threatening e-mails to his ex-girlfriend and sent pornography to her colleagues under her name” received only community service and probation.).

214. A. Meena Seralathan, Note, *Making the Time Fit the Crime: Clearly Defining Online Harassment Crimes and Providing Incentives for Investigating Online Threats in the Digital Age*, 42 BROOK. J. INT'L L. 425, 427 (2016) (for instance, the conduct that Zoe Quinn was subjected to during GamerGate would likely not have triggered her home state of Massachusetts online cyber-harassment law).

215. Steven D. Hazelwood & Sarah Koon-Magnin, *Cyber Stalking and Cyber Harassment Legislation in the United States: A Qualitative Analysis*, 7 INT'L J. CYBER CRIMINOLOGY 155, 157 (2013).

every state now has a statute that addresses either online harassment or cyber stalking.²¹⁶ These laws are not a panacea for addressing harassment, as some have requirements that perpetrators first be asked to stop or include a requirement that the harassing conduct be repetitive.²¹⁷ In the case of a situation such as GamerGate where literally thousands of online users are harassing individuals, it is not possible or feasible for victims to make demands to stop to each of the individual offenders. Meanwhile, other states require there be a threat, which will likely create the necessity for a prosecutor to make a judgment as to the intent of the speaker.²¹⁸

Perhaps even more damaging to many state cyberstalking and online harassment laws has been the shadow of the First Amendment.²¹⁹ A Washington-state statute that criminalized cyber stalking was struck down by a federal district court stating that it criminalized “a large range of non-obscene, non-threatening speech, based only on (1) purportedly bad intent and (2) repetition or anonymity.”²²⁰ Washington is not the only state to have its anti-cyberstalking statute struck down on First Amendment grounds; Illinois has also seen its statute struck down, and many states have enacted well-intended legislation that lacks the precision required by the First Amendment and may leave their statutes vulnerable to a constitutional challenge as well.²²¹ While the First Amendment may pose a burden on states looking to prevent online harassment, there is no protection against true threats, which affords state prosecutors the opportunity to rein in some offensive online conduct.²²²

Additionally, state tort law likely provides limited protection for those victimized by online cyber harassment that would permit them to recover against the industry. Those harassed in forums and on streaming services would need to assert creative legal arguments against the services, and extant case law likely does not support the imposition of liability for harms caused by third-parties.²²³ Though, one creative such argument could be grounded in

216. *Id.* at 160.

217. *Id.* at 161.

218. *Id.*

219. Eugene Volokh, “Cyberstalking” Ban Violates the First Amendment, REASON (Feb. 22, 2019, 2:29 PM), <https://reason.com/2019/02/22/cyberstalking-ban-violates-the-first-ame/> [<https://perma.cc/CP77-AEVN>].

220. *Id.*

221. Sarah E. Smith, Comment, *Threading the First Amendment Needle: Anonymous Speech, Online Harassment, and Washington’s Cyberstalking Statute*, 93 WASH. L. REV. 1563, 1574 (2018).

222. *Id.* at 1581–82.

223. By analogy, plaintiffs have failed to hold gun manufacturers responsible in products liability for third-party harms. *See Marzullo v. Crosman Corp.*, 289 F. Supp. 2d 1337 (M.D. Fla.

products liability on the basis that the site providers are aware of the dangers inherent to electronic gaming forums and streaming sites. In failure to warn cases, defendant producers may be held accountable for foreseeable misuses of their products.²²⁴ Plaintiffs would need to convince the court that public policy dictates that site providers should be held accountable as they are in the best position to prevent harm. Unfortunately, the involvement of third-party harassers, along with the protections afforded to site providers under the First Amendment, likely relieve the host sites and stream providers from being held accountable in products liability as they are not the warrantors of conduct from those who are not under their direction or control.²²⁵

As the laws and cases in this section demonstrate, plaintiffs have struggled and will continue to struggle in finding a legal remedy for harassment in electronic gaming and esports, even in cases in which the abuser's identity is known. Perhaps a bigger challenge involves efforts from states to address anonymous mob-style harassment similar to that in GamerGate. When the mob acts, thousands of anonymous users from all over the world direct their vitriol against just one person or a handful of individuals.²²⁶ As we discuss in Part V of this Article, those best situated to address harassment in electronic gaming and esports may be the industry itself.

2003) (finding that gun manufacturers could not be held liable for victim's injuries under failure to warn theory); *Ileto v. Glock, Inc.*, 194 F. Supp. 2d 1040 (C.D. Cal. 2002) (finding that the connection between the distribution of firearms and injuries resulting from the use of the same firearms was too attenuated to establish a viable claim).

224. 63A AM. JUR. 2D *Products Liability* § 898 (2019) (recognizing that jurisdictions have held that a manufacturer cannot escape liability on the ground of misuse or abnormal use in situations in which the misuse was a foreseeable and proximate cause of the plaintiff's injuries. That misuse could be so foreseeable that dangers resulting from it could rise to the level that they are inherent to the product). *See generally* *Chronister v. Bryco Arms*, 125 F.3d 624 (8th Cir. 1997) (applying Missouri law); *Carlson v. Freightliner LLC*, 226 F.R.D. 343 (D. Neb. 2004) (applying Nebraska law); *Jonas v. Isuzu Motors Ltd.*, 210 F. Supp. 2d 1373 (M.D. Ga. 2002), *aff'd*, 58 F. App'x 837 (11th Cir. 2003) (applying Georgia law); *Brown v. U.S. Stove Co.*, 484 A.2d 1234 (N.J. 1984).

225. In this regard, the defendants would likely cite to products liability cases involving actions filed against media (television, film, and video game productions) for violence committed by children and young adults. *See Reno v. Am. Civil Liberties Union*, 521 U.S. 844 (1997) (finding that Internet sites can constitute protected speech); *James v. Meow Media, Inc.*, 300 F.3d 683 (6th Cir. 2002); *Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167 (D. Conn. 2002); *Sanders v. Acclaim Entm't, Inc.*, 188 F. Supp. 2d 1264 (D. Colo. 2002); *see also* Lorin Brennan, *Why Article 2 Cannot Apply to Software Transactions*, 38 DUQ. L. REV. 459 (2000) (explaining the difficulties in applying the warranties found in Article 2 of the Uniform Commercial Code to actions involving the conveyance of software).

226. *See, e.g.*, Michael Barrett Zimmerman, Note, *One-off & Off-hand: Developing an Appropriate Course of Liability in Threatening Online Mass Communication Events*, 32 CARDOZO ARTS & ENT. L.J. 1027 (2014).

V. WHAT CAN THE INDUSTRY DO, OR HAVE DONE TO IT TO BRING ABOUT CHANGE?

The quickest and easiest means of changing the environment surrounding harassment in esports, and online gaming more broadly, is for game-makers and streaming site providers to start implementing aggressive and proactive (rather than reactive) mechanisms for change.²²⁷ Following GamerGate, lawyers and commentators have made a number of suggestions about what can be done to improve the esports environment.²²⁸ One of the major challenges to the status quo has been getting the industry to buy-in to improvement.²²⁹ In particular, it is often the very same individuals and companies that have been accused of promoting toxicity in electronic gaming, which must take action to curb the gender-based harassment.²³⁰ The video game industry is 79% male, and while there have been efforts to diversify the work environment at some companies, change has been slow and recent.²³¹ We may be totally unaware of the scope of sexual harassment in the video gaming industry, as the public display of GamerGate has likely had a chilling effect on victims fearful of speaking out for fear that their lives will be adversely affected by anonymous online trolls.²³² Another challenge is that women have actually been speaking about sexism in video gaming for years before the #MeToo movement, with only incremental change.²³³ In 2012, the hashtag #1reasonwhy was launched on Twitter to bring awareness to the harassment that women in the industry suffer.²³⁴ Harassment has been an ongoing problem for years in video gaming, both online and off.²³⁵ Change will likely need to begin with game-makers assuming responsibility for what

227. YouTube and Twitch reported that in 2018 there were more than 240 million hours of League of Legends content consumed, surpassing second-place game Counter-Strike Global Offensive by 28 million hours. See Matt Porter, What Are the Top 10 Most Watched Esports in 2018?, Dexerto (Oct. 5, 2018, 3:56 PM), <https://www.dexerto.com/gaming/what-are-the-top-10-most-watched-esports-in-2018-181265> [<https://perma.cc/5WK8-2HTU>].

228. Keza MacDonald, *The Video Games Industry Isn't Yet Ready for Its #MeToo Moment*, GUARDIAN (Jan. 24, 2018, 4:00 AM), <https://www.theguardian.com/commentisfree/2018/jan/24/video-games-industry-metoo> [<https://perma.cc/3XY8-LE9P>].

229. *Id.*

230. *See id.*

231. *Id.*

232. *Id.*

233. Mary Hamilton, *#1reasonwhy: The Hashtag that Exposed Games Industry Sexism*, GUARDIAN (Nov. 28, 2012, 8:08 AM), <https://www.theguardian.com/technology/gamesblog/2012/nov/28/games-industry-sexism-on-twitter> [<https://perma.cc/B9ZY-VZAV>].

234. *Id.*

235. *See id.*

is taking place, and implementing strategies to effectively address harassment.

A. *Building A Better Environment*

Building a better environment for women in gaming should be a priority for everyone in the industry. Ending harassment in video gaming and esports not only makes moral and legal sense, but it also makes commercial sense, because women already make up a significant portion of video gaming consumers.²³⁶ As a starting point, the industry needs to identify what it considers unacceptable and align policies across streaming services, game titles, and competitions. Kate Edwards, executive director of the International Game Developers Association, said: “[o]ne of the things that would be really cool to see is if all companies adopted similar standards for what constitutes harassment and behavior so they work more in tandem.”²³⁷ Amongst the concerns that need to be addressed in order to provide a better environment is the ability for trolls to unite and organize on social media platforms.²³⁸ Twitter has long acknowledged that it struggles to deal with trolls.²³⁹ Former Twitter CEO, Dick Costolo, said: “We suck at dealing with abuse and trolls on the platform and we’ve sucked at it for years.”²⁴⁰

In response to its challenges dealing with harassment, Twitter established a council to help combat the site’s problems.²⁴¹ However, years later, the original problems continue to exist. One of the features of Twitter that makes it unique in social media is that users cannot delete other’s comments on their

236. Sander Bosman, *Women Account for 46% of All Game Enthusiasts: Watching Game Video Content and Esports Has Changed How Women and Men Alike Engage with Games*, NEWZOO (May 10, 2019), <https://newzoo.com/insights/articles/women-account-for-46-of-all-game-enthusiasts-watching-game-video-content-and-esports-has-changed-how-women-and-men-alike-engage-with-games/> [<https://perma.cc/7FRX-237R>] (noting women and men are now nearly equal in regards to being video gaming and esports enthusiasts though they each have different consumption characteristics).

237. Tali Arbel, *How To Stop Harassment in Video Games*, SEATTLE TIMES (Mar. 12, 2016, 5:08 AM), <https://www.seattletimes.com/business/how-to-stop-harassment-in-video-games/> [<https://perma.cc/E6CH-TFMZ>].

238. *See id.*

239. Sharon Gaudin, *Twitter Gets an Assist in Taking on Trolls and Bullies*, COMPUTERWORLD (Feb. 9, 2016, 11:30 AM), <https://www.computerworld.com/article/3031719/twitter-gets-an-assist-in-taking-on-trolls-and-bullies.html> [<https://perma.cc/3YH5-LMJP>].

240. *Id.*

241. *Id.*

posts.²⁴² They must instead go through a reporting system, which then leads to Twitter making a determination based on its vague Terms of Service.²⁴³ Twitter is hardly alone in the problems facing social media sites, including those responsible for harassment associated with gaming.²⁴⁴ The first step in building a better online environment is for social media sites to stop justifying offensive speech on the basis that the sites are purportedly free speech platforms. The second step, which has been widely recommended, is for streaming sites to begin enforcing the standards that they have laid out.²⁴⁵ If the providers struggle to find solutions for themselves, then they should allow third parties to develop filtering software to identify and correct problems. The status quo that puts pressure on victims and others to identify and report problems has not sufficiently protected those affected by online harassment in electronic gaming and esports.²⁴⁶

Furthermore, the challenge of dealing with websites like 4chan and 8chan, which appear to be designed largely as online islands of hate and pornography, is slightly more complex than dealing with websites that have institutional shareholders. The solution likely lies with the domain providers and security companies, like Cloudflare, who allow these sites to remain operating, taking some initiative and choosing not to stand idly by.²⁴⁷ Of course, there remains the possibility that 8chan could play a cat and mouse game in which the makers create 16chan and so on, but at some point one of the companies in power must draw a line in the sand for conduct that will not be tolerated.²⁴⁸

242. Mike Elgan, *How To End Online Harassment*, COMPUTERWORLD (June 6, 2016, 3:00 AM), <https://www.computerworld.com/article/3078831/how-to-end-online-harassment.html> [<https://perma.cc/5K8N-H6XD>].

243. *Id.*

244. *Id.*

245. Arbel, *supra* note 237.

246. *See id.*

247. Ali Breland, *Why Banning the Toxic, Racist 8chan Message Board Could Backfire*, MOTHER JONES (May 1, 2019), <https://www.motherjones.com/politics/2019/05/8chan-ban/> [<https://perma.cc/L6XX-C3BH>].

248. Adi Robertson, *Questions About Policing Online Hate Are Much Bigger than Facebook and YouTube*, THE VERGE (Mar. 15, 2019), <https://www.theverge.com/2019/3/15/18267638/new-zealand-christchurch-mass-shooting-online-hate-facebook-youtube> [<https://perma.cc/VZF2-PSFV>].

B. Game Makers Need To Take Responsibility for What Is Taking Place

The online environment, however, is not the only area that requires change. The game makers themselves, who are creating games where not only is harassment taking place, but harassers are assembling around a common interest, need to be better about addressing in-game harassment. Of course, not all male gamers are misogynists, but many misogynists appear to play the most popular titles that are produced by the companies Riot Games, Activision Blizzard, and Valve Corporation.²⁴⁹ And the fact of the matter remains that much of the harassment takes place in-game, as opposed to in other online forums.²⁵⁰ In taking accountability, game producers need to start by cleaning up their own proverbial houses by making a commitment to hiring and promoting diversity. Not only would this potentially expand the attractiveness of video games beyond traditional markets, but by increasing the representation of women and minorities amongst the top ranks, companies would help to reframe the idea of who a gamer is and thus help to break a stereotype that appears to drive much of the online vitriol.²⁵¹

Further, gaming companies should take responsibility not only for what is happening in their workplaces, but also for what their consumers are saying to other consumers via their products. A strong commitment to diversifying their workplace and giving women and gender minorities meaningful opportunities to rise through the ranks will help to redefine the image of a ‘gamer.’ What remains to be seen, however, is whether the gamers who lead these companies actually want to change.

Interestingly, an unconventional ally in the effort to clean up electronic gaming may be found on Wall Street. Many of the major game producers are publicly traded companies and thereby are responsible for answering to their shareholders that want to maximize their return on investment.²⁵² Although many game producers are currently quite profitable, these companies are still arguably leaving large sums of money on the table by not making the online environments built around their titles more inclusive for those most affected by harassment. Recall that women gamers already make up roughly 45% of

249. See, e.g., Katie Barlowe, *10 Vile Comments Said to Female Online Gamers*, CASINO.ORG (Mar. 14, 2019), <https://www.casino.org/blog/abuse-towards-female-gamers/>.

250. Sarmad Lillah, *Research: One in 3 Female Gamers Face Gender Discrimination, 32% Deal with Sexual Harassment*, SEGMENTNEXT (June 7, 2018), <https://segmentnext.com/2018/06/06/research-one-in-3-female-gamers-face-gender-discrimination-32-deal-with-sexual-harrasment/> [<https://perma.cc/HT69-NJ3U>].

251. Arbel, *supra* note 237.

252. See Bradley Seth McNew, *Top Publicly Traded Video-Game Stocks in the Industry*, THE MOTLEY FOOL (Feb. 14, 2017), <https://www.fool.com/investing/2017/02/14/top-publicly-traded-video-game-stocks-in-industry.aspx> [<https://perma.cc/75Q2-H9EJ>].

consumers of electronic games in the U.S., and (worldwide) women represent a potentially strong market for growing the success of individual game titles.²⁵³ In fact, the potential market for women gamers is projected to be extensive enough to drown out even the loudest contingent of Internet trolls.²⁵⁴ Game producer Brenda Laurel (creator of Purple Moon) spoke to the market potential for both protecting and appealing to women with her estimation that, “[t]here’s \$6 billion on the table.”²⁵⁵ The potential for increased commercial success should be enough to entice investors to pressure change from those within the industry who otherwise resist.

C. A Legal Avenue for Victims of Sexual Harassment

Online worlds within electronic gaming are perceived as different from reality, based on the idea that the virtual worlds are supposed to be “relaxed area[s] where the formal rules of social interaction do not typically apply.”²⁵⁶ While the idea of alternate and relaxed realities is not a problem in and of itself, the relaxed social norms justification has largely served as a shield by video game companies in defending their minimal efforts towards addressing players’ harassing online conduct.²⁵⁷ Similar justifications were once made for harassment in the workplace, but employers have been responsible under Title VII for workplace sexual harassment since 1986.²⁵⁸ Title VII’s reach has recently extended workplace harassment to include conduct on social media.²⁵⁹ The doctrine of third-party sexual harassment provides plaintiffs (including employees or the general public) with basis under Title VII to hold employers liable in situations in which they were unresponsive to reports of an employee’s abuse that creates a hostile environment.²⁶⁰

Third-party sexual harassment was created out of concern for service industry establishments (e.g. restaurants and other entertainment

253. Jen Ortiz, *She’s Got Game*, MARIE CLAIRE (Dec. 5, 2018), <https://www.marieclaire.com/career-advice/a25379999/female-gamers/> [<https://perma.cc/E6QP-6WZE>].

254. *Id.*

255. *Id.*

256. Miriam A. Cherry, *A Taxonomy of Virtual Work*, 45 GA. L. REV. 951, 979 (2011).

257. See Colin Campbell, *How Are Games Companies Dealing with Online Abuse?*, POLYGON (July 22, 2016), <https://www.polygon.com/2016/7/22/12256114/how-are-games-companies-dealing-with-online-abuse> [<https://perma.cc/7BM8-GJZA>].

258. See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

259. See Jeremy Gelms, *High-Tech Harassment: Employer Liability Under Title VII for Employee Social Media Misconduct*, 87 WASH. L. REV. 249 (2012).

260. Jamie C. Chanin, *What Is It Good For? Absolutely Nothing: Eliminating Disparate Treatment of Third Party Sexual Harassment and All Other Forms of Third Party Harassment*, 33 PEPP. L. REV. 385, 401–03 (2006).

establishments) but now may encompass harassment that occurs within all occupations.²⁶¹ While traditionally applied to employer liability, state laws that allow for civil recourse for sexual harassment in private situations could conceivably be interpreted to prohibit third-party harassment as well. The judicial doctrine of third-party sexual harassment does not appear to be necessarily confined to situations involving the workplace.²⁶² Indeed, the application of third-party sexual harassment has become pervasive across a variety of industries.²⁶³ Third-party sexual harassment has built in safeguards to prevent businesses from being exploited by situations beyond their control, such as requiring notice of the allegations and an opportunity to address the situation.²⁶⁴ The burden on third-parties for liability under the doctrine is to effectively act on repeated claims of sexual harassment, where there is an ability on the part of the employer to do something to prevent the abuse.²⁶⁵

Third-party sexual harassment is widely documented across industries.²⁶⁶ The harassment in online video gaming appears to be rampant and a major threat to industry growth. Harassment, whether on-the-job or online, is not something to which people should have to grow accustomed. Gamers are experiencing severe emotional distress because of video gaming²⁶⁷ and, despite their awareness of what is happening, game producers have yet to take sufficient steps to address the problem. Not every abusive comment should subject video game producers to liability, but victims should have legal recourse in situations where the companies are repeatedly notified of harassing conduct but (for whatever reason) did not take corrective action. In defending against third-party harassment, game-makers would likely argue that they are protected by Section 230 of the Communications Decency Act, although it is unclear if they could successfully prove that they are publishers akin to those the Act was intended to protect. Originally passed in 1996, Section 230 was not conceived with modern video games and online play in mind.²⁶⁸ Nevertheless, the path to establishing third-party liability against game producers for harassment in electronic gaming has not been cleared and

261. *Id.*

262. *See* Lockard v. Pizza Hut, Inc., 162 F.3d 1062 (10th Cir. 1998); *see also* Powell v. Las Vegas Hilton Corp., 841 F. Supp. 1024 (D. Nev. 1992).

263. Chanin, *supra* note 260, at 402.

264. *Id.* at 403–04.

265. *Id.* at 405–07.

266. Lea B. Vaughn, *The Customer Is Always Right . . . Not! Employer Liability for Third Party Sexual Harassment*, 9 MICH. J. GENDER & L. 1, 7–20 (2002).

267. Cecelia D'Anastasio, *If You Hear Someone Getting Harassed in an Online Game, Don't Stay Silent*, KOTAKU (July 14, 2017, 12:15 PM), <https://kotaku.com/if-you-hear-someone-getting-harassed-in-an-online-game-1796921373> [<https://perma.cc/U525-BGA6>].

268. *See* Vanessa S. Browne-Barbour, *Losing Their License To Libel: Revisiting § 230 Immunity*, 30 BERKELEY TECH. L.J. 1505, 1525–26 (2015).

will likely be difficult for plaintiffs to establish. For this reason, alternatives to litigation may prove more effective in improving conditions in online gaming and esports.

D. Institutional and Structural Changes at the Competition Level

At this juncture, the esports industry is uniquely positioned to promote institutional change to combat sex and gender harassment. While the esports industry is unique in terms of both its demographics and business structure, the more powerful publishers of esports videogames should take a page out of the U.S. professional sports leagues' playbook and seek to proactively curb sexual harassment through proactive investigations and improved hiring practices.²⁶⁹ In addition to these recommendations, those who manage esports should seek to implement mechanisms to protect individuals who blow the whistle on sex and gender harassment and implement reasonable measures to investigate and punish perpetrators of sexual harassment.²⁷⁰

1. Lessons Learned from Professional Sports Leagues

While the U.S. professional sports leagues have historically failed at curbing sexual harassment,²⁷¹ some of the U.S. professional sports leagues, in recent years, have taken steps to improve this situation.²⁷² The National Football League, for example, first recognized its problems with sexual

269. See *infra* notes 278–87 and accompanying text (discussing the National Football League and National Basketball Association's attempts to curb sexual harassment). See generally Paul Hagen, *MLB, MLBPA Reveal Domestic Violence Policy*, MLB (Aug. 21, 2015), <https://www.mlb.com/news/mlb-mlbpa-agree-on-domestic-violence-policy/c-144508842> [<https://perma.cc/5PLS-WTBP>] (discussing Major League Baseball's new policy to help eradicate off-field domestic violence).

270. See *infra* notes 288–90 and accompanying text.

271. Perhaps the most horrifying example of this failure occurred back on September 17, 1990 when players exposed themselves to *Boston Herald* sports journalist Lisa Olson while she tried to conduct an interview in the New England Patriots locker room, and one player, quite pathetically, turned to her and said, "Here's what you want. Do you want to take a bite out of this?" See Tony Kornheiser, *Travesty in the Locker Room*, WASH. POST (Dec. 2, 1990), https://www.washingtonpost.com/archive/lifestyle/1990/12/02/travesty-in-the-locker-room/6800d9cf-9adb-4704-af00-ec3eb9263b78/?noredirect=on&utm_term=.5e748a834905 [<https://perma.cc/3RYY-BLJH>]. Several other players, as well as the team's public relations director, observed the incident but did nothing. See *id.* After Olson objected to her treatment, the New England Patriots then-owner only made the harassment worse by calling the reporter a "bitch." *Can 'Hottest Sports Reporter' Have It Both Ways?*, FOX SPORTS (Sept. 14, 2010, 1:00 AM), <https://www.foxsports.com/nfl/story/ines-sainz-hottest-sports-reporter-double-standard-with-new-york-jets-091410> [<https://perma.cc/Y3PF-H2N5>] [hereinafter *Hottest Sports Reporter*].

272. See *infra* notes 278–87 and accompanying text.

harassment in 1990 after NFL commissioner Paul Tagliabue hired a former Watergate prosecutor to conduct an independent counsel's report into the mistreatment of a female reporter in the New England Patriots locker room.²⁷³ The independent investigator found that, despite the Patriots' owners claims to the contrary, *Boston Herald* reporter Lisa Olson "most assuredly was sexually harassed by a group of Patriots players" and that "no one who was there—including the Patriots public relations director and some players—made any attempt to stop it."²⁷⁴ The publication of this report marked a watershed moment for the NFL.

Although the NFL let the harassing New England Patriots football players continue their careers after merely paying a fine (a penalty that seems to downplay the severity of the players' sexually harassing conduct),²⁷⁵ the NFL responded to the independent investigator's report by implementing formal protocols for addressing and investigating subsequent allegations of harassment.²⁷⁶ For instance, in 2010, when Azteca TV reporter Ines Sainz alleged sexual harassment by New York Jets players and coaches, both the NFL and Jets ownership investigated this case "with vigilance and no delay."²⁷⁷ The NFL and the Jets were responsive to Sainz's allegations even though she stated that she "never felt attacked, nor that [anyone] reacted grossly toward [her]."²⁷⁸ The NFL then followed up its investigation of Sainz's claims by sending a memorandum to all thirty-two teams that "remind[ed] players and league employees that female reporters should be treated professionally and with respect."²⁷⁹ New York Jets owner Woody Johnson even issued a formal apology to Sainz.²⁸⁰

273. See *Hottest Sports Reporter*, *supra* note 271; see also Kornheiser, *supra* note 271.

274. Kornheiser, *supra* note 271.

275. *Id.* Although the New England Patriots could have, and probably should have, suspended its players for sexually harassing a reporter, it is questionable as to whether the NFL could have banned these players from the league entirely without running afoul to antitrust law. See *Anderson v. Shipowners' Ass'n of Pac. Coast*, 272 U.S. 359, 360–63 (1926) (noting that it is illegal for owners of companies within an industry to establish preconditions before workers can seek employment with any one); Marc Edelman, *Are Commissioner Suspensions Really Any Different from Illegal Group Boycotts? Analyzing Whether the NFL Personal Conduct Policy Illegally Restrains Trade*, 58 CATH. U. L. REV. 631, 633 (2009) (explaining that the NFL Personal Conduct Policy, to the extent it is not a product of good-faith collective bargaining, "might violate § 1 of the Sherman Act" because it bans certain players from the football workforce and prevents fans from signaling a preference for watching games that include these players).

276. See *infra* notes 277–80 and accompanying text.

277. *Hottest Sports Reporter*, *supra* note 271.

278. See *id.*

279. Chris Kokenes & Alan Silverleib, *NFL: Be Respectful to Women Reporters*, CNN (Sept. 16, 2010), <http://edition.cnn.com/2010/SPORT/09/16/nfl.women.reporters/index.html> [https://perma.cc/9NKM-M63W].

280. *Id.*

The NFL has also actively sought ways to increase the number of women in on-field leadership roles—a move that may reduce the likelihood of sustained harassing cultures.²⁸¹ In the NFL, the Tampa Bay Buccaneers made history in 2019 by hiring Lori Locust to serve as the league’s first female assistant defensive-line coach.²⁸² Similarly, Katie Sowers, who has served as a wide receivers’ assistant coach with the San Francisco 49ers since 2017, remains the NFL’s longest serving female coach.²⁸³ By having women in leadership positions within on-field activities, both the Buccaneers and 49ers have sent clear messages that league participants are to treat women, like men, with dignity.

The National Basketball Association, meanwhile, has arguably gone even further to provide a culture that recognizes women as equals to be respected within professional basketball.²⁸⁴ Under the leadership of current NBA commissioner Adam Silver, there are currently eight female assistant coaches and three female referees in the NBA.²⁸⁵ Additionally, there are six women with significant ownership stakes in NBA teams, eighteen women in operations positions in NBA team front offices, and one female assistant general manager.²⁸⁶ Recently, Commissioner Silver articulated the goal of moving toward a 50/50 male-to-female ratio when hiring new referees.²⁸⁷ Game producers and those who manage esports should consider what has been done in the NFL and NBA and adopt similar policies that address harassment by promoting diversity.

281. See *infra* notes 282–83 and accompanying text.

282. Josh Weinfuss, *How the NFL Is Working To Expand the Number of Female Coaches*, ESPN (Apr. 12, 2019), <http://www.espn.com/espnw/sports/article/26481101/how-nfl-working-expand-number-female-coaches> [https://perma.cc/FDB7-TPDR].

283. *Id.*

284. See *infra* notes 285–87 and accompanying text.

285. Candace Buckner, *Women Are More Common on NBA Sidelines. Now They Want Their Presence to Feel Normal*, WASH. POST (July 15, 2019, 2:37 PM), https://www.washingtonpost.com/sports/2019/07/15/women-are-more-common-nba-sidelines-now-they-want-their-presence-feel-normal/?utm_term=.43a96738b897 [https://perma.cc/9N4H-DL78]; Jill Martin, *NBA Commissioner Adam Silver Wants More Women as Referees and Coaches*, CNN (May 10, 2019, 11:09 AM), <https://www.cnn.com/2019/05/10/sport/adam-silver-wants-more-women-as-referees-and-coaches-in-nba-trnd/index.html> [https://perma.cc/53K6-V4FN].

286. Martin, *supra* note 285; Adrian Wojnarowski, *Pacers Hire Kelly Krauskopf as NBA’s First Female Assistant GM*, ESPN (Dec. 17, 2018), https://www.espn.com/nba/story/_/id/25556927/indiana-pacers-hire-kelly-krauskopf-nba-first-female-assistant-general-manager [https://perma.cc/AN29-ARUV].

287. See Martin, *supra* note 285.

2. Best Practices for Implementing Whistleblower Protections

In addition to implementing best practices from U.S. professional sports leagues, esports managers should also implement a robust whistleblower protection system to encourage all individuals associated with esports to report harassment. Although many entities within the sports world have whistleblower protection policies, not every whistleblower protection system leads to meaningful results in promoting disclosure.²⁸⁸ The best whistleblower protection policies typically encourage individuals who have observed wrongdoing to come forward by developing “a culture that embraces such individuals and makes them feel as though their report will be valued and not used against them.”²⁸⁹

Developing a culture that promotes whistleblowing against sex and gender harassment may prove especially challenging in commercial esports where the gamers themselves seem to have accepted harassment as being part of their norms. For this reason, harassment needs to be addressed at all levels of electronic gaming—not just esports. Accordingly, game producers need to find creative ways to change the culture that tolerates harassment, including (a) the adoption of means for protecting the anonymity of those who report harassment; and (b) making those who report abuse feel respected and valued as important within the gaming community.²⁹⁰

Given the number of gamers who may fall under the category of harassers, one potential avenue to build a culture that supports reporting sexual harassment would be for the game publishers to work with the most elite and respected esports players in the industry and seek to convince these players to become advocates for ending sex and gender harassment. Social norms can be changed by leaders within societies. If leaders within esports identify sexual harassment as a threat to the growth of esports and future industry revenues, they may be able to convince elite gamers that their financial well-being would be better served by speaking out against harassment. If convinced that it is in their best interest to do so, celebrity esports competitors and streamers may join the mission to combat harassment, even if some fail to truly understand or appreciate the social importance of doing so.

288. See, e.g., Marc Edelman & Jennifer M. Pacella, *Vaulted into Victims: Preventing Further Sexual Abuse in U.S. Olympic Sports Through Unionization and Improved Governance*, 61 ARIZ. L. REV. 463, 484 (2019) (explaining how Enron had a whistleblower protection policy on the books but that it failed to prevent serious financial fraud).

289. *Id.*

290. See John Ashcroft et al., *Whistleblowers Cash In, Unwary Corporations Pay*, 40 HOFSTRA L. REV. 367, 401–02 (2011) (discussing the importance of anonymity as one way to encourage whistleblowing behavior). See generally Edelman & Pacella, *supra* note 288, at 484–85 (discussing the cultural issues that underlie the promotion of whistleblowing).

3. Reasonable Internal Jurisprudence and Punishment

Finally, until esports players begin to unionize, the tournament managers (who are often the game producers) have broad discretion in terms of determining how to investigate and sanction perpetrators of harassment. Absent a players union, those who operate esports tournaments are generally free to implement their own internal rules about contestant eligibility so long as their rules comply with the law and provide participants with the “basic rudiments of due process.”²⁹¹ For purposes of creating internal means for investigating and sanctioning wrongdoing that provide such “basic rudiments of due process,” esports managers may even look to the internal systems of jurisprudence implemented by colleges to investigate internal allegations of sexual harassment under Title IX of the Education Amendments of 1972.²⁹² They may also seek to hire individuals trained in law, or who have served in human resources roles with major companies, to help them determine appropriate investigative approaches and sanctioning protocol—at least until a gamers union comes into existence and professional gamers are able to bargain for policy creation.

E. Alternative Potential Solutions Involving Player Unions and Shared Governance

Although unilateral solutions to stamp out harassment in e-sports are adaptable from the NFL and NBA models and from best practices in creating whistleblower protection and Title IX compliance systems, the long-run

291. *Crouch v. NASCAR*, 845 F.2d 397, 402 (2d Cir. 1998) (explaining that courts generally will not interfere with the decisions of private associations unless “the rules, regulations or judgments of the association are in contravention to the laws of the land or in disregard of the chart or bylaws of the association” or the association fails to follow “basic rudiments of due process law”); *see also* *M’Baye v. World Boxing Ass’n*, 429 F. Supp. 2d 660, 667 (S.D.N.Y. 2006) (citing to *Crouch* and using “bad faith” as a synonym or proxy for the term “basic rudiments of due process”). Although, even absent a union, sports leagues are limited by antitrust law in determining how to sanction players on the league level, game-wide punishments in esports seem unlikely to give rise to meaningful antitrust concerns under Section 1 of the Sherman Act because each game publisher is a single actor and thus is not engaging in concerted conduct by banning a particular participant. *See generally* Edelman, *supra* note 275, at 641–44 (expressing the threshold issue of showing “a contract, combination or conspiracy among two or more parties” when pleading allegations of an antitrust violation under § 1 of the Sherman Act).

292. *See generally* Marc Edelman, *The Future of Sexual Harassment Policies at U.S. Colleges: From Repeal of the 2011 DOE-OCR Guidelines to Launch of the #MeToo Movement on Social Media*, 8 WAKE FOREST L. REV. ONLINE 12 (2018), <http://wakeforestlawreview.com/2018/02/the-future-of-sexual-harassment-policies-at-u-s-colleges-from-repeal-of-the-2011-doe-ocr-guidelines-to-launch-of-the-metoo-movement-on-social-media/> [https://perma.cc/23MF-7UYL].

potential for sustainable change to the culture of esports will likely require more than just corporate executives demanding a certain course of action.²⁹³ Instituting change will also require a shared governance model that allows gamers to help self-police and self-sanction toxic conduct in their “sport.”²⁹⁴

The long-term need for a shared governance structure to eradicate harassment in esports is inevitable for three reasons.²⁹⁵ First, as the esports industry grows, it seems likely that gamers will eventually unionize like athletes have done in traditional sports leagues, thus creating a legal obligation on esports managers to collectively bargain over mandatory terms that include disciplinary action.²⁹⁶ Much as it is dubious whether the NFL or NBA could ban a unionized player for off-the-field misconduct without complying with collectively bargained rules for player discipline, it is doubtful whether an esports league could ban a player for out-of-competition offenses if a players’ union is ever established and there is no collectively-bargained protocol allowing for the ban.²⁹⁷ Thus, it would be prudent for esports managers to include the players in any present discussions for reform rather than risk that their unilateral efforts to change the status quo will be uprooted at the point of union recognition.

Second, by making individuals who participate in esports part of the governance process, it will likely encourage participant support for fair play, as well as for the establishment of a robust and respected whistleblower protection mechanism. As mentioned in the previous section, whistleblower protection systems work best when there is “a culture that embraces [whistleblowers].”²⁹⁸ A culture where a big company that serves as a game publisher encourages gamers to be whistleblowers and the gamers have no say in the process is not likely to build a culture that embraces disclosure, especially given that many esports players are seen as part of an antiauthoritarian counterculture and are not likely to naturally support the corporate interest. By contrast, a union system is intended to create solidarity

293. See *infra* notes 295–97 and accompanying text.

294. See *infra* note 298 and accompanying text.

295. See *infra* notes 296–302 and accompanying text.

296. See *First Nat’l Maint. Corp. v. NLRB*, 452 U.S. 666, 674 (1981) (quoting 29 U.S.C.A. § 158(d)) (“Although parties are free to bargain about any legal subject, Congress has limited the mandate or duty to bargain to matters of ‘wages, hours, and other terms and conditions of employment.’”); HARRY C. KATZ & THOMAS A. KOCHAN, *AN INTRODUCTION TO COLLECTIVE BARGAINING AND INDUSTRIAL RELATIONS* 246 (3d ed. 2004) (explaining that when employers implement discipline only for just cause, employees gain freedom from “arbitrary discipline, discharge, or denial of benefits”).

297. Cf. Edelman, *supra* note 275, at 660 (explaining that in the context of a collective bargaining relationship, an entity must comport with the collectively bargained terms of discipline).

298. Edelman & Pacella, *supra* note 288, at 484.

among membership and create a culture where the whistleblower behavior is seen more as something operated in conjunction with the players and for the benefit of the players.

Finally, if one were to devise an industry-wide mechanism across all esports contests to investigate and punish sexual harassment, this singular system would likely run afoul to federal antitrust laws as a concerted refusal to deal.²⁹⁹ By contrast, if a union that represented players across multiple titles and genres were to agree to an industry-wide procedure for investigating and punishing sex and gender harassment, this industry-wide and collectively bargained solution would likely be immune to antitrust scrutiny.³⁰⁰ This is because antitrust law's limited non-statutory labor exemption insulates from antitrust scrutiny those labor agreements that pertain to mandatory subjects of bargaining that primarily affect parties to the bargaining relationship and are reached through bona fide arm's length bargaining.³⁰¹ Indeed, it is under this exact exemption, as well as Major League Baseball's longstanding limited antitrust exemption, that the thirty Major League Baseball teams legally came together with their union and implemented league-wide rules to investigate and punish domestic violence.³⁰²

299. See Sherman Antitrust Act, 15 U.S.C. § 1 (2000) (stating that “[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce . . . is hereby declared to be illegal”); *Union Circulation Co. v. FTC*, 241 F.2d 652, 656–58 (2d Cir. 1957) (finding that the magazine sales industry could not legally boycott a class of employees who had engaged in wrongful conduct). See generally *Quinonez v. Nat'l Ass'n of Sec. Dealers, Inc.*, 540 F.2d 824, 827–29 (5th Cir. 1976) (stating an industry-wide boycott based on past illegal conduct may violate the Sherman Act); *McCreery Angus Farms v. Am. Angus Ass'n*, 379 F. Supp. 1008, 1011, 1019 (S.D. Ill. 1974), *aff'd*, 506 F.2d 1404 (7th Cir. 1974) (disallowing the indefinite suspension of an angus farmer who violated the trade association's blood-typing rules); Edelman, *supra* note 275, at 633 (2009) (explaining that, absent union approval, the NFL's attempt to ban athletes from the entirety of the league for off-field misconduct may violate § 1 of the Sherman Act).

300. See *Clarett v. NFL*, 369 F.3d 124, 142–43 (2d Cir. 2004) (finding that industry-wide rules of governance are exempt from antitrust scrutiny where they are reached through good faith collective bargaining negotiations); *Mackey v. NFL*, 543 F.2d 606, 614 (8th Cir. 1976) (exempting from antitrust scrutiny agreements that are mandatory subjects of collective bargaining primarily affecting the parties to the bargaining relationship and reached through bona fide arm's length agreement); see also Edelman, *supra* note 275, at 660–61 (noting that a sports league would be allowed to impose league-wide discipline without violating antitrust laws if the discipline procedure was accepted by the players in the context of good faith collective bargaining negotiations).

301. See *Mackey*, 543 F.2d at 614 (laying out this test for application of antitrust law's non-statutory labor exemption).

302. See Marc Edelman & Brian Doyle, *Antitrust and “Free Movement” Risks of Expanding U.S. Professional Sports Leagues into Europe*, 29 NW. J. INT'L L. & BUS. 403, 415–17 (2009) (explaining the role of antitrust law's non-statutory labor exemption to shield certain labor conduct from antitrust scrutiny under U.S. law); Nathaniel Grow, *Defining the “Business of Baseball”*: A Proposed Framework for Determining the Scope of Professional Baseball's

CONCLUSION

Esports is at a crossroads. The esports industry is currently experiencing monumental growth and a heavy influx of capital.³⁰³ In addition, the industry has attracted an audience with demographics that traditional commercial sports leagues remain unable to reach despite years of trying.³⁰⁴ Nevertheless, the current version of the esports industry, much like the advertising industry during the *Mad Men* era of the 1960s and the investment banking industry in the 1980s, is replete with a culture of pervasive sexual harassment. Troublingly, the prophylactic structures that U.S. professional sports leagues such as the NBA and NFL have implemented to reduce the risk of sexual harassment have not been implemented in esports.

At present, the leaders of esports need to look at the effects of sexual harassment in other industries as a cautionary tale and begin to implement measures to curtail certain antisocial behaviors before they derail the industry's bright future. If the leaders of the esports industry remain silent for too much longer, they risk backlash from potential investors and consumers who have become far less accepting of sexual harassment in today's #MeToo era.

Among other things, esports operators need to adopt rules and procedures to encourage the reporting of sexual harassment and work with esports gamers to implement a robust investigation and internal punishment mechanism to address harassers. In addition, esports managers must actively engage their players in the process of developing procedures to detect and punish sexual harassment—irrespective of whether or not the players are unionized.

At the moment, there is no single silver bullet for terminating sexual harassment in electronic gaming and esports. Nevertheless, these industries still need to find an approach and take accountability for a culture where sexual harassment has become ongoing and pervasive. The #MeToo movement represents a major change in social norms within the United States, and the video gaming industry today has little reasonable choice other

Antitrust Exemption, 44 U.C. DAVIS L. REV. 557, 565–80 (2010) (discussing the contours of Major League Baseball's historic limited exemption from antitrust law); Hagen, *supra* note 269 (explaining the four prongs of Major League Baseball's collectively bargained domestic violence policy: (1) treatment and intervention; (2) investigations; (3) discipline; and (4) training, education, and resources).

303. John T. Holden & Thomas A. Baker III, *The Econtractor? Defining the Esports Employment Relationship*, 56 AM. BUS. L.J. 391, 396 (2019).

304. Holden, Edelman & Baker, *supra* note 1.

than to follow the lead of other major industries and implement new policies to help to eradicate sexual harassment from their workplace.³⁰⁵

This article builds upon the movement to end sexual harassment in the workplace, and it serves as a call to action for esports to rid itself of the hostile working culture that places at risk the industry's future. The culprits of sexual and gender harassment within esports, including corporate actors who have turned a blind eye to this behavior, need to understand that their antisocial behavior is not only frowned upon by society, but also places the financial interests of their entire industry at risk. Esports is well on its way to become America's next national pastime;³⁰⁶ however, in order for the esports industry to reach both its full financial and social potential, the time is now to take steps to affirmatively address its systemic problems of sex and gender harassment.

305. See Rebecca Seales, *What Has #MeToo Actually Changed?*, BBC NEWS (May 12, 2018), <https://www.bbc.com/news/world-44045291> [<https://perma.cc/EW37-JEDE>].

306. Holden, Edelman & Baker, *supra* note 1.