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THERE'S NO LAWSUITS IN BASEBALL: HOUSTON ASTROS' LIABILITY FOR SIGN STEALING

*Michael Conklin**

“There are interested parties with financial stakes in the issue who have lawyers circling around like a Bram Stoker vampire who smells blood.”¹

INTRODUCTION

On February 10, 2020, former Major League Baseball (MLB) pitcher Michael Bolsinger filed suit against the Houston Astros for alleged damages that resulted from the Astros' sign-stealing scheme.² The five causes of action in the complaint are unfair business practices, negligence, intentional interference with contractual relations, intentional interference with prospective economic relations, and negligent interference with prospective economic relations.³ This essay briefly covers the events leading up to the lawsuit as well as issues of causation, assumption of risk, and damages.

* Powell Endowed Professor of Business Law, Angelo State University.

¹ Everything You Need to Know About MLB's Sign-Stealing Scandal, ESPN (Feb. 13, 2020), https://www.espn.com/mlb/story/_/id/28476282/everything-need-know-mlb-sign-stealing-scandal.

² Complaint, *Bolsinger v. Houston Astros, LLC*, No. 20STCV05242 (Sup. Ct. L.A. Cty. Feb. 10, 2020).

³ *Id.* at 9–13.

BACKGROUND

The Houston Astros employed a sign-stealing scheme during their home games in the 2017 season.⁴ They used a camera to record the opposing team's catcher's signals, the signals were then decoded and relayed to someone who would strike a trash can to communicate to Astros batters which pitch to anticipate.⁵ MLB fined the Astros \$5 million and revoked their first- and second-round picks in the 2020 and 2021 drafts.⁶

Bolsinger was drafted by the Arizona Diamondbacks in 2010.⁷ After pitching in the minor leagues ("the minors"), Bolsinger was called up to the major leagues ("the majors") in 2014.⁸ He was traded to the Los Angeles Dodgers and went back and forth from the majors to the minors, at one time winning the Dodgers' MLB Pitcher of the Month Award.⁹ In 2016 he made the opening day roster for the Dodgers but then suffered an injury that sent him back to the minors.¹⁰ After being traded to the Toronto Blue Jays and pitching relief in five games, his sixth performance was against the Astros on August 4, 2017.¹¹ Although he only pitched twenty-nine pitches, Bolsinger gave up four runs, four hits, and three walks—a very poor performance.¹² Audio files from that game show that the Astros were engaging in the trash-can-banging scheme during Bolsinger's pitches.¹³ After this performance, Bolsinger was sent down to the minors and has never played in the majors since.¹⁴

After he was cut from the majors, he made the tough decision to play in Japan while his wife was pregnant in the United

⁴ James Dator, The Astros Sign-Stealing and Cheating Scandal, Explained, SBNATION (Jan. 13, 2020, 4:40 PM), <https://www.sbnation.com/mlb/2020/1/13/21064250/astros-sign-stealing-suspensions-fines-mlb>.

⁵ *Id.*

⁶ *Id.*

⁷ Complaint, *supra* note 2, at 4.

⁸ *Id.*

⁹ *Id.* at 5.

¹⁰ *Id.*

¹¹ *Id.* at 2.

¹² Everything You Need to Know, *supra* note 1.

¹³ *Id.*

¹⁴ Complaint, *supra* note 2, at 5.

States.¹⁵ He performed well in Japan and was selected to play in the 2018 Japanese All-Star game.¹⁶ Bolsinger is currently a free agent trying to play in the United States for the 2020 season.¹⁷

A week before Bolsinger's lawsuit was filed, a class action lawsuit by more than one hundred DraftKings fantasy sports contestants was filed against the MLB, Houston Astros, and Boston Red Sox (who were also caught stealing signs in 2017).¹⁸

CAUSATION

The complaint alleges that Bolsinger's performance was "due to the Houston Astros' sign stealing scheme"¹⁹ and that "this ultimately cost him his job . . ."²⁰ Additionally, the complaint alleges that the Astros' sign-stealing scheme "result[ed] [in their] winning the World Series."²¹ Although never explicitly stated, the complaint also insinuates that—but for the Astro's sign stealing—Bolsinger would have continued to have a career in the majors after 2017.²² Counterfactual claims such as this are often difficult to dispositively prove. In Bolsinger's case, there is evidence the Astros can present to contradict the claim that it was the sign stealing that caused Bolsinger's fate and the Astros' World Series win.

Regardless of the sign stealing, Bolsinger's pitches simply were not that good in his inning against the Astros. According to Statcast, the expected batting average for the quality of his pitches in that game was .560²³—more than double the MLB

¹⁵ Mike Bolsinger, *The Astros' Cheating Derailed My Career. So I'm Suing.*, WASH. POST (Feb. 14, 2020, 10:52 AM), https://www.washingtonpost.com/opinions/why-im-suing-the-houston-astros-over-their-cheating/2020/02/13/c15bef00-4e9f-11ea-bf44-f5043eb3918a_story.html.

¹⁶ Complaint, *supra* note 2, at 6.

¹⁷ *Id.*

¹⁸ Michael McCann, *Why Daily Fantasy Players Are Suing MLB over Sign Stealing*, Sports Illustrated (Feb. 7, 2020), <https://www.si.com/mlb/2020/02/07/daily-fantasy-lawsuit-sign-stealing>. Relevant to this lawsuit is the MLB's ongoing financial relationship with DraftKings.

¹⁹ Complaint, *supra* note 2, at 5.

²⁰ *Id.*

²¹ *Id.* at 2.

²² *Id.* at 5–6. The inning is described as "the death knell" to Bolsinger's career. *Id.* at 5.

²³ Everything You Need to Know, *supra* note 1.

average.²⁴ Also, the cheating scandal is now known by every MLB scout. This begs the question—if the only thing keeping Bolsinger from playing in the majors today is his one performance against a cheating Astros team, then why is he currently not signed by a major league team?

As for what caused the Astros' 2017 World Series win, the owner claims that it was not sign stealing. As recently as February 2020, he said that the sign-stealing scheme "didn't impact the game. We had a good team."²⁵ While the Astros' owner is clearly a biased source, there is evidence to suggest the Astros may have won regardless. The practice of sign stealing did not occur in a bubble. Leading up to the 2017 season, the Astros were being praised for "[b]rilliant draft picks and front-office algorithm strategizing"²⁶ And the 2017 Astros' roster was "loaded with talent."²⁷ Also, the division the Astros play in was relatively weak in 2017.²⁸

To further complicate the causation issue regarding what led to the Astros' 2017 World Series win, their away game win percentage of 0.654 was greater than their home game win percentage of 0.593. But the Astros only engaged in sign stealing during their home games.²⁹ Bolsinger will have to show that the Astros' conduct caused him harm—mainly his termination and inability to gain employment playing baseball in the MLB. For

²⁴ *Batting Average* - AVG, SPORTINGCHARTS, <https://www.sportingcharts.com/dictionary/mlb/batting-average-avg.aspx> (last visited Feb. 15, 2020) ("The league-wide batting average has generally ranged between .250 and .275.").

²⁵ Bolsinger, *supra* note 15.

²⁶ Roger Angell, Long Wait, Great Win, *NEW YORKER: SPORTING SCENE* (Nov. 2, 2017), <https://www.newyorker.com/sports/sporting-scene/long-wait-great-win-houston-astros-los-angeles-dodgers-world-series-game-seven>.

²⁷ Barry Svrluga & Dave Sheinin, The World Just Learned of the Astros' Cheating. Inside Baseball, It Was an Open Secret, *WASH. POST* (Feb. 11, 2020, 3:44 PM), https://www.washingtonpost.com/sports/mlb/astros-cheating-open-secret/2020/02/11/1830154c-4c41-11ea-9b5c-eac5b16dafa_story.html.

²⁸ The other four teams in the American League West all had losing records in 2017. 2017 Regular Season Standings, *MLB.COM*, <https://www.mlb.com/standings/2017> (last visited Feb. 17, 2020).

²⁹ Lamond Pope & Tim Bannon, 8 Things to Know About the Astros' Sign-Stealing Scandal, Including a Former White Sox Pitcher's Early Suspicions, *CHI. TRIB.* (Jan. 17, 2020, 9:00 AM), <https://www.chicagotribune.com/sports/white-sox/ct-cb-houston-astros-sign-stealing-danny-farquhar-white-sox-20200117-ckfumn2wzfhabbb25ltl24gfb4-story.html>.

example, to prevail on the negligence claim, he will have to prove that the Astros' scheme was "the proximate or legal cause of the resulting injury."³⁰ In other words, was the Astros' sign stealing the "necessary antecedent to the injury, without which no injury would have occurred"?³¹ He will have to prove that the Astros' sign-stealing scheme led to his termination and the fact that he never played baseball professionally in the MLB again. It will be interesting to see whether Bolsinger can prevail on this issue—especially regarding the harm of him never returning to professionally play baseball in the MLB.

ASSUMPTION OF RISK

The MLB has a rich history of sign stealing, and certain types of sign stealing are even allowed under the rules.³² The Astros were not even the only team caught stealing signs in 2017; the Boston Red Sox were fined for an elaborate sign-stealing scheme that year too.³³ One sportswriter describes how believing that those were the only two teams engaged in sign stealing "would be to deny the realities about human behavior in hypercompetitive environments with massive economic stakes in play, especially where policy loopholes and gray areas exist"³⁴ Two former Astros have hinted that sign-stealing practices were far more prevalent in the MLB than even what the Astros were doing.³⁵

The known prevalence of sign stealing is why teams implement secret signs in an effort to reduce the risk of their signs being stolen by opposing teams. Some teams even change signs every batter for this reason.³⁶ This is why it was necessary for the

³⁰ See *Ladd v. Cty. of San Mateo*, 911 P.2d 496, 498 (Cal. 1996) (discussing elements of negligence).

³¹ *Evan F. v. Hughson United Methodist Church*, 10 Cal. Rptr. 2d 748, 752 (1992).

³² Emma Baccellieri, Sign Stealing Has Long Been a Part of MLB. It's Not Going Anywhere, *SPORTS ILLUSTRATED* (Nov. 13 2019), <https://www.si.com/mlb/2019/11/13/sign-stealing-baseball-history> (explaining that sign stealing is only illegal when mechanical devices are utilized).

³³ Svrluga & Sheinin, *supra* note 27 (explaining that the Red Sox would relay sequences of signs from the video room to a trainer's Apple Watch located in the dugout).

³⁴ Everything You Need to Know, *supra* note 1.

³⁵ *Id.*

³⁶ Baccellieri, *supra* note 32.

Astros to implement “Codebreaker,” a custom-developed algorithm used to decipher the signs of opposing teams.³⁷

Of course, the mere awareness of tortious conduct and effort to minimize the harmful effects does not negate a victim’s ability to seek compensation. But one could argue that, given the known prevalence of sign stealing in baseball, it has become part of the game. The outcomes of baseball games are affected by numerous factors. These include fallible umpires, player injuries, weather, equipment malfunctions, manager decisions, fan interference, and various methods of cheating.

It is unclear where the line should be drawn as to what prohibited behavior is actionable in civil court and what is not. Famously, NBA teams would sometimes implement the strategy to intentionally foul Shaquille O’Neil because he was a poor free throw shooter.³⁸ These fouls were deliberate violations of the rules, and they likely caused damage to O’Neil’s future earning potential. Should O’Neil therefore have been able to seek damages from the teams, coaches, and players whose rule violations caused this harm?

The doctrine of assumption of risk often applies to suits between sports coparticipants.³⁹ Sports players generally are not liable to another participant for harm “from conduct in the course of the sport that is merely careless or negligent.”⁴⁰ Liability may only be imposed if a participant “intentionally injures another player or engages in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport.”⁴¹ While the Astros’ activity was certainly deliberate, the foreseeability of how it would affect people such as Bolsinger is less clear. Furthermore, if sign stealing was not outside the range

³⁷ Everything You Need to Know, *supra* note 1.

³⁸ See generally Andrew Keh, The Birth of Hack-a-Shaq, N.Y. TIMES (Apr. 30, 2016), <https://www.nytimes.com/2016/05/01/sports/basketball/the-birth-of-hack-a-shaq.html> (describing the practice of intentionally fouling players who frequently missed free throw attempts).

³⁹ *Jimenez v. Roseville City Sch. Dist.*, 247 Cal. App. 4th 594, 601 (2016).

⁴⁰ *Ford v. Gouin*, 834 P.2d 724, 726 (Cal. 1992).

⁴¹ *Knight v. Jewett*, 834 P.2d 696, 710 (Cal. 1992); see also CAL CIV. JI 408 (providing the jury instruction for primary assumption of risk for liability of a coparticipant in sport or other recreational activity).

of ordinary baseball activity—despite being against the rules—assumption of risk may preclude liability for the harm done.

DAMAGES

The prayer for relief in the complaint does not provide a specific dollar amount request for damages.⁴² The only specific amount in the complaint is the request for approximately \$31 million in post-season bonuses the Astros earned from winning the 2017 World Series.⁴³ The complaint seeks to direct these restitutionary damages to charitable causes “focused on bettering the lives of children with an emphasis on charities in Los Angeles as well as a fund for elderly retired professional baseball players in need of financial assistance.”⁴⁴

In the event Bolsinger wins, calculating damages will be a somewhat nebulous task. The jury would essentially need to undertake the highly probabilistic nature of calculating how much Bolsinger was harmed by the Astros’ cheating.⁴⁵ In lieu of the Astros’ cheating, Bolsinger may have gone on to be a star pitcher in the MLB. Or, he may have continued to toggle between the majors and the minors. The jury would also need to consider how much longer Bolsinger would likely have played. The average baseball career is only 5.6 years,⁴⁶ and Bolsinger is now thirty-two years old, five years older than the average MLB player.⁴⁷

The jury may also find the Astros’ conduct so reprehensible that they will award punitive damages. Punitive damages are awarded when compensatory damages alone are not adequate to punish and deter the defendant.⁴⁸ Punitive damages are subjective by nature, requiring the defendant’s conduct to be “outrageous,

⁴² Complaint, *supra* note 2, at 14.

⁴³ *Id.* at 2–3.

⁴⁴ *Id.*

⁴⁵ See *Meister v. Mensinger*, 230 Cal. App. 4th 381, 396 (2014); see also CAL. CIV. JI 3900.

⁴⁶ Average Major League Baseball Career 5.6 Years, Says New Study, SCI. DAILY (July 11, 2007), <https://www.sciencedaily.com/releases/2007/07/070709131254.htm>.

⁴⁷ Conor Wakeman, Age to Reason: The MLB Player’s Average Age, BLEACHER REP. (Mar. 22, 2010), <https://bleacherreport.com/articles/367083-age-to-reason-the-mlb-players-average-age>.

⁴⁸ Jennifer K. Robbennolt, Determining Punitive Damages: Empirical Insights and Implications for Reform, 50 BUFF. L. REV. 103, 110 (2002).

because of the defendant's evil motive or his reckless indifference to the rights of others."⁴⁹

CONCLUSION

This case brings up interesting issues of cheating in professional sports, whether liability can arise from such cheating, and the extent to which the doctrine of assumption of risk might be applied to nontraditional sports tort cases. Bolsinger's suit has the potential to create precedent for future litigation involving banned practices by other athletes and sports teams. As the previously mentioned class action lawsuit from fantasy sports players demonstrates, the ramifications from this case could even extend beyond just players as the plaintiffs. Other parties can be harmed by the outcomes of sporting events, including fantasy sports players, businesses located near a sporting venue, television networks with contracts to broadcast sports, businesses that hired an athlete as a spokesman, season ticket holders, and businesses that advertise at sports venues. The case could even lead to litigation over the use of performance-enhancing drugs. If the Astros are found liable for cheating through technology and a trash can, why could a cyclist who lost the Tour de France or a boxer who lost a big fight not seek compensation from an opponent who was later found to have been using banned performance-enhancing drugs during the competition? As one headline put it, the Bolsinger case is "only the beginning."⁵⁰

⁴⁹ RESTATEMENT (SECOND) OF TORTS § 908(2) (AM. LAW INST. 1977).

⁵⁰ Aubrey Hansen, *This Astros Sign-Stealing Lawsuit Is Only the Beginning*, CCN.COM (Feb. 12, 2020, 1:46 PM), <https://www.ccn.com/this-astros-sign-stealing-lawsuit-is-only-the-beginning/>.

COLLEGE ATHLETICS AND CRIMINALITY: HOW *GATTO* HAS OPENED A PANDORA'S BOX IN COLLEGE SPORTS

Zachary Cooper

INTRODUCTION

College sports have become a staple of American life and consumerism. Evidence of this phenomenon can be seen every Saturday from September through November as well as the entire month of March each year. According to Business Insider, twenty-seven universities made over \$100 million in 2017.¹ These high numbers not only come from ticket sales, but merchandise and, mostly, television deals. Who is at the top of all of this? The National Collegiate Athletic Association (NCAA) of course. The NCAA is supposed to be a private association making rules for its member universities. However, its rules are now being enforced by the federal government. This paper will explore a few of the problems that this new FBI backed NCAA regime poses for both individuals involved with college sports, universities, and those who work in university athletic compliance offices.

THE HISTORY OF THE NCAA

The NCAA is a private association made up of around 1,200 universities in the United States.² The NCAA promulgates rules that all universities must follow, with a few exceptions of autonomous rules created by individual divisions and the Power 5 Conferences. The most important rules by far are those rules which regulates who is eligible to play in NCAA sanctioned sporting events. The spirit of these rules is that only “amateur” athletes may participate in NCAA athletics. The question is, who

¹ Cork Gains, The 27 Schools that Make at Least \$100 Million in College Sports, Business Insider (Nov. 25, 2017), <https://www.businessinsider.com/schools-most-revenue-college-sports-texas-longhorns-2017-11>.

² NCAA, <http://www.ncaa.org/about/who-we-are/membership>.

qualifies as an “amateur”? Thus, the rules set forth a host of criteria to determine who is an amateur and who is not, and therefore, who is eligible to play and who is not. The NCAA’s view of what an “amateur” looks like has changed overtime. This paper will not address the merits of the NCAA amateurism rules; however, one must remember the background against which these criminal prosecutions are taking place. The NCAA is trying to protect its product and enforce its rules. However, as detailed below, they need a lot of help doing both.

ENFORCEMENT OF NCAA RULES

If the NCAA was a governing body of a country, its citizens most likely would live in a state of chaos. This is because the NCAA has virtually no enforcement power over its rules. It can only enforce its rules if the university agrees to the sanctions imposed for breaking said rules. The NCAA is also very limited in its policing power. The NCAA does not have the resources to put investigators at every single NCAA institution to look for violations. Therefore, it relies almost solely on self-reporting by universities. This is done through each universities’ athletic compliance office.

Self-reporting to the NCAA via an athletic compliance office creates a host of problems, especially for the athletic compliance officials. Athletic compliance offices are staffed and funded by the university and not the NCAA. This means the university, not the NCAA, has total control over the athletic compliance office, which includes the ability to hire and fire individuals who work in the compliance office. This creates a predicament rarely seen anywhere else: that of an employee being paid by an employer to essentially work for the employer’s regulatory body. While the NCAA and the university do not always have an adversarial relationship, they almost always do in the context of compliance. The athletic compliance official is hired and paid by the university. That person’s job is to report that university’s violations of NCAA rules to the NCAA. What happens though when the university does not want a violation reported to the NCAA? They can simply instruct the compliance office not to do report the violation while threatening termination if for disobedience. Until now, a compliance official acting under

direction from a university was not subject to any direct punishment from the NCAA, as fault fell on the university and the university received NCAA sanctions. Now, however, there is the prospect of punishment far beyond what the NCAA can give. This punishment will be discussed later.

UNITED STATES V. GATTO

On September 25, 2017, federal prosecutors filed an official complaint in the Southern District of New York against James “Jim” Gatto and four others with conspiring to commit wire fraud under 18 U.S.C. § 1343.³ The charges stemmed from actions in early 2017 in which Gatto and his coconspirators attempted to make cash payments to the families of high school basketball players. Receiving such money is against NCAA rules and would cause the player to be ineligible to play in NCAA sanctioned events. It was not until now, however, that such payments were violations of federal law.

The legal theory that federal prosecutors use in going after Gatto and his coconspirators is intriguing. They claim that he violated 18 U.S.C. § 1343, which states:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.⁴

It seems a little strange that making payments to a family in return for a basketball player to play for a school could be considered wire fraud. However, the prosecutors claimed he,

[P]articipated in a scheme to defraud, by telephone, email, and wire transfers of funds, among other means and methods, the University of Louisville and the University of Miami by

³ Indictment at 18, *U.S. v. Gatto*, (S.D.N.Y. 2017) (17 Crim 686).

⁴ 18 U.S.C. § 1343.

making and concealing bribe payments to high school student-athletes and/or their families in exchange for, among other things, the student-athletes' commitment to play basketball for the University of Louisville and the University of Miami, thereby causing the universities to agree to provide athletic scholarships to student-athletes who, in truth and in fact, were ineligible to compete as a result of the bribe payments.⁵

Essentially, Gatto and his coconspirators were using telephone, email, and wire transfers to bribe certain players to play for certain universities. The universities contend, however, that they offered scholarships to these athletes believing they were amateurs who would be able to compete in NCAA sanctioned events. These payments, however, caused these players to be ineligible, depriving the university of an amateur athlete.

It must be noted that the payments themselves were not the basis for the complaint. Instead, it was the fact that payments were made to encourage players to falsify documents pertaining to their NCAA eligibility. The NCAA requires all athletes to complete several "clearinghouse" documents, meant to certify athletes as amateurs and, therefore, they are eligible to compete in NCAA events. After being paid, the athletes would no longer be eligible to compete in NCAA events. However, the athletes that were paid filled out and signed these clearinghouse documents stating that they had never been paid for being an athlete and were eligible to compete. At first glance, it seems that the athletes were the ones committing fraud. If they knowingly falsified the documents, then they were. However, that is a debate for another day. The reason Gatto and his coconspirators can be charged with fraud pertaining to those documents is because they induced the athletes to lie on these documents. Gatto and his coconspirators knew that the athletes would be lying on these documents, whether the athletes knew they were doing so or not. Therefore, Gatto and his coconspirators, using telephone, email, and other forms of wired communication, induced athletes to lie on documents that universities relied on in making scholarship decisions, thus fraudulently inducing universities allot their

⁵ Indictment, *U.S. v. Gatto* at 19.

resources to these players who, in fact, could not benefit the university, and could harm the university, because they were not eligible to compete in NCAA events. This is how federal prosecutors were able to charge Gatto and his coconspirators under 18 U.S.C. § 1343.

The question that does not seem to have a firm answer is why federal prosecutors are just now going after people who engage in this activity. This kind of behavior has been prevalent in college basketball and football for a long time. It is probably even more prevalent in college football than in college basketball. Surely the FBI and federal prosecutors know this, so why not go after people who commit similar offenses in the college football context? Is it because the NCAA generates literally all its revenue, around a billion dollars, from college basketball? Did the NCAA ask the FBI and federal prosecutors to get involved? If so, why? Is the NCAA tired of not having the ability to enforce its rules and, therefore, needs the FBI to help? Unfortunately, these questions are yet to be answered, but they are important questions that need to be answered in order to fully understand why only now people are being charged under 18 U.S.C. § 1343 for actions that have been going on for decades.

PROBLEMS FOR ATHLETIC COMPLIANCE OFFICIALS

As discussed earlier, the NCAA has no way of policing universities except via self-reporting. This is done almost exclusively via athletic compliance departments that are completely staffed and funded by the university. This presents a problem for compliance officials because their duty is to both protect the university and report its violations to the NCAA, violations which often carry some sort of penalty. Until now, the most trouble a compliance official could get into was if the university directed him or her not to report a violation and then did report said violation, they could be fired. The possibility of not having a job is enough for some compliance officers to not report, and even cover up violations. Now, however, compliance officials may not only lose their jobs, but may indeed be charged with the crime of conspiracy or misprision.

Conspiracy

Under 18 U.S.C. § 371, a person can be charged with conspiracy if they conspire to commit any federal crime.⁶ Under federal law, conspiracy simply means “two or more persons conspire to commit any offense.”⁷ Generally, however, each chapter regarding crimes in the United States Code has its own conspiracy section that specifically applies to the crimes within the chapter. Chapter 63 of Title 18 of the United States Code, where the wire fraud statute is found, indeed has its own conspiracy section. 18 U.S.C. § 1349 states, “any person who attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.”⁸ This means that anyone who knowingly participates in any part of a crime, even simply planning, can be charged as if they had actually committed the crime themselves.

This presents a problem for athletic compliance officials. One of the main jobs as a compliance official is to “clear” incoming athletes and certify they are amateurs for NCAA purposes. Therefore, compliance officials can clear athletes who may not truly be eligible and, because they are the ones monitoring violations, such violation would not get reported to the NCAA. In some scenarios, they could get swept into a conspiracy to commit a federal crime. Consider this hypothetical:

A prospective athlete completes all the clearinghouse paperwork honestly and is cleared because they meet NCAA amateurism requirements. However, after being cleared through the NCAA Clearinghouse, the athlete then gets paid (or his father or his uncle or whoever) to sign with a certain university. This of course violates NCAA rules and would make the athlete ineligible to compete in NCAA events. However, a person involved with paying to get the athlete to the universities alerts a compliance official of the payment and lets the official know that the athlete knows about the payment and is weary of signing documents declaring he still maintains amateur status. Furthermore, the athletic director

⁶ 18 U.S.C. § 371.

⁷ *Id.*

⁸ 18 U.S.C. § 1349.

or the university president now asks the compliance official to “ease the athlete’s mind” and encourage him to sign the papers. The compliance official knows it is a violation of NCAA rules and that by encouraging the athlete to falsify these papers, the university could be sanctioned should the NCAA find out what occurred. However, the pressure from above, and the desire to keep his job, forces the compliance official to encourage the athlete to falsify the documents, and the athlete does. Everyone seems to win! Then, however, the NCAA finds out and declares the athlete permanently ineligible. Now the university has lost an amateur athlete by way of fraud. Now, everyone involved can be charged with conspiracy to fraudulently deprive the university of an amateur athlete, by way of wire fraud or other fraud, including the compliance official.

This is an unfortunate situation. Some may say the compliance official in the hypothetical should have simply quit, not encouraged the athlete to sign the papers, or report the violation to the NCAA. However, many athletic compliance officials do not understand how criminal law works. When they are being pressured by their boss to not report to the NCAA, they generally understand that they work for the university and the repercussions breaking an NCAA rule will not ultimately fall upon the compliance official. Unfortunately, in the situation described above, the compliance official probably feels that he is simply breaking an NCAA rule and it is no big deal. Compliance officials do not report stuff all the time to protect the university from NCAA sanctions. Now, however, by simply following orders, the compliance official has now been swept into a conspiracy to commit a federal crime and can be charged, convicted, and sentenced just as if he committed the actual crime himself. While it may seem unlikely, such a situation is not out of the question after *Gatto*.

Misprision of a Felony

While conspiracy is not out of the question for athletic compliance officials, the problem they most likely face is misprision of a felony. Misprision simply means to conceal after

the fact. The primary misprision statute is 18 U.S.C. § 4 which states:

Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.⁹

Essentially, concealment of or failure to report a felony is a federal crime.

This has huge implications now for athletic compliance officials because their job sometimes, in order to protect the university, is to cover up NCAA violations. As we now know, some NCAA violations are now crimes. Consider the previous hypothetical with a few changes:

The athlete has falsified several documents under the direction of someone who has paid him to do so. The compliance official does not actively help encourage or facilitate the falsification of these documents but is now made aware that they are falsified. The athletic director and the president of the university instruct the compliance official to not report the violation. Further, the compliance official is instructed to conceal the violation by any means possible. The compliance official does so, but the NCAA still finds out, declares the athlete permanently ineligible, and the university has now been fraudulently deprived of an amateur athlete. Therefore, those involved with the conspiracy to have the athlete falsify the documents are charged as coconspirators. The athletic compliance official, however, is now charged with misprision of a felony because he covered up the false documents.

This is another unfortunate situation for compliance officials. By simply doing their job at the direction of their superiors, they can be on the hook for misprision of a felony. As stated earlier, compliance officials do not report NCAA violations all the time. Therefore, their regular business actions of covering up violations

⁹ 18 U.S.C. § 4.

to protect the university now opens them up to criminal liability under misprision.

DEPRIVING A UNIVERSITY OF AN AMATEUR ATHLETE?

What exactly constitutes “depriving a university of an amateur athlete?” This may seem straightforward like in the two hypotheticals above. These hypotheticals lay out the most obvious situation when a university is deprived of an amateur athlete, i.e., when the athlete is declared permanently ineligible. Is this the only time a university is considered deprived of an amateur athlete or are there other scenarios in which a university is considered to be deprived of an amateur athlete? Take for example an athlete who is given \$50 to eat by a university booster. This is an unauthorized benefit according to NCAA rules and could cause the athlete to be suspended. A suspension is another way of saying the athlete is ineligible, but only temporarily. In this situation, has the booster deprived the university of an amateur athlete? Probably not, but it is now possible. The more likely scenario is an instance where the athlete is declared ineligible for a year. Would a violation induced by fraud by someone constitute depriving the university of an amateur athlete for a year? Unfortunately, that question is still to be answered. After *Gatto*, there is literally no way of knowing just how far this could go.

PROBLEMS FOR UNIVERSITIES

As mentioned above, universities are considered the victims of the fraud perpetrated by men such as *Gatto*. This does not mean, however, that universities are immune to being caught up in a similar federal investigation. While it is less likely that universities would be targeted for such investigations, there is at least one scenario in which the university could run into problems: corporate criminal liability.

Corporate Criminal Liability

Before discussing how universities can be held criminally liable as a corporation, it is important to first understand the basis for corporate criminal liability. The United States Code explicitly allows for businesses and organizations to be held

criminally liable. In defining terms that apply to federal statutes the Code states, “the words ‘person’ and ‘whoever’ include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.”¹⁰ Unfortunately, the Code does not define who makes up a corporation or entity. Put another way, because corporations are made up of several people, there is the question of whose actions can be attributed to the corporation as a whole? Fortunately, the Supreme Court clearly answered this question in *New York Central & Hudson River Railroad Company v. United States*. In this case, the Court stated, “a corporation is held responsible for acts not within the agent’s corporate powers strictly construed, but which the agent has assumed to perform for the corporation when employing the corporate powers actually authorized.”¹¹ Essentially, the Court is saying that when an employee, acting within the scope of his employment, acts to benefit the corporation, the actions of the employee are attributable to the corporation, whether they be harmless, tortious, or criminal in nature.

There is an issue, however, with defining universities as corporations for legal purposes. The most obvious problem is the difference between public and private universities. Virtually every single private college and university in the United States is a legally incorporated institution. This makes private universities easy to bring under the umbrella for corporate culpability. However, public universities in some states are legally chartered as corporations while others are the result of a legislative act. In fact, almost every state flagship university was created by legislative act and not by granting incorporation. Does this mean that public institutions cannot be charged with a crime as a corporation?

Public universities generally are more difficult to sue because they usually enjoy the same immunity from suits as the state itself. This also seemingly prevents a state, and a state university, from being held criminally liable for its actions. However, one exception to sovereign immunity is that the United States can sue

¹⁰ 1 U.S.C. § 1.

¹¹ *New York Cent. & H.R.R. Co. v. U.S.*, 212 U.S. 481, 493-94 (1909).

a state in federal court. This idea has existed since at least *United States v. Texas* decided in 1892. In that case, there was a dispute between the United States and Texas concerning a border. A crucial question in the case, however, was if the Constitution allows the United States to sue a state. The court stated, “[i]t would be difficult to suggest any reason why this court should have jurisdiction to determine questions of boundary between two or more states, but not jurisdiction of controversies of like character between the United States and a state.”¹² While there is no case that explicitly states the United States can charge a state with a federal crime, this case certainly leaves open the possibility.

Victim of Its Own Crime?

As discussed above, it is possible that both private and public universities can be charged with federal crimes. What is interesting, however, is that if a university is charged with the same crime as Jim Gatto, the crime of “depriving a university of an amateur athlete,” the university then is both the perpetrator and the victim of the same crime. Could this really be possible? Consider this hypothetical:

A university is actively recruiting a star high school football player. The player is still undecided as to where he wishes to play in college. A friend of the university’s president, who is also a booster for the university’s athletic department, approaches the president and tells him that he is willing to pay the player a large sum of money in order to lure him to the university. Knowing this would violate NCAA rules, but desperate to obtain such a talented player who would benefit the university as a whole, consults with the vice president of admissions, the athletic director, the football coach, and the associate athletic director for compliance. All of them conclude that the benefit of having the player outweighs any potential NCAA violations that may occur. Each individual is willing to do their part to bring him to campus. The president directs the booster to pay the player (or more likely his father) \$1 million in exchange for choosing to play at the university. Once the player commits, the coach then encourages him to

¹² U.S. v. Texas, 143 U.S. 621, 645 (1892).

sign all the certification documents as true and accurate, including the ones that say he has never been paid for playing football. The player then sends these documents to both the school and the NCAA, some via mail and some via an internet portal. The athletic director and the associate athletic director for compliance both order all the compliance officials who come across the player's file to certify him without question. The player is then given a full scholarship to play football at the university. The FBI then investigates a tip that came from an NCAA official about the university potentially paying players to play at the university. The FBI then uncovers the scheme and decides to charge each individual involved. The FBI then decides that it has enough of the university's agents committing the crime to benefit the university that it can hold the university corporately liable for the criminal acts of the individuals who acted collectively. The federal prosecutor then charges the university with both mail fraud and wire fraud under the theory that the university was "deprived of an amateur athlete" because of the criminal actions of the university.

Under the facts above and the outcome of *Gatto*, it is entirely possible that a university can be both the perpetrator and the victim of the same crime. While it is highly unlikely that federal prosecutors would go after a university in this way, it is not something that is completely off the table if *Gatto* were taken to its logical end. If the above hypothetical was to actually take place, and federal prosecutors did go after the university, it would be possibly the only instance in United States criminal law in which a person or entity can be the victim of its own crime.

CONCLUSION

The world of college sports is a glorious thing. Nothing brings people together and gets them more fired up than a college sporting event. Unfortunately, the efforts to preserve college sports as they are have caused many unintended consequences. One of these consequences is the now opened door to criminal prosecution for violating rules meant to protect college sports. While the idea of amateurism and its rules are subject of great debate, whether one agrees with such rules or not, the question people should be asking is whether federal prosecutors should be

helping the NCAA enforce such rules. After *Gatto*, athletic compliance officials are given the tough choice to either follow orders and potentially be charged with a federal crime or disobey orders and lose their job. Is this really necessary just to preserve the integrity of college sports? Furthermore, to preserve college sports is it necessary to create the greatest of all criminal paradoxes: a perpetrator that is the victim of a crime it commits? These are the questions that need to be asked and answered in the aftermath of *Gatto*.

EQUAL PAY FOR EQUAL (OR BETTER) PLAY

Haley C. Dakin

I. INTRODUCTION

The current employment climate is unbalanced, to say the least.¹ For as long as women have been in the workforce, women have earned comparatively less money than their male counterparts.² For example, approximately three out of five women are paid less than their male counterparts.³ The sports arena proves to be no exception to this disparity.⁴ The United States Women's National Soccer Team ("USWNT") brought significant light to this issue when they filed a lawsuit in March 2016, pursuant to the Equal Pay Act.⁵ Around the same time of this lawsuit, the United States Women's Hockey Team ("USWHT") went on strike to pursue a better agreement for their league and additionally to receive equitable benefits which equate to that of the Men's Hockey Team.⁶ These two organizations have made a proverbial "splash" in the news, as they have brought attention to this nationwide problem of gender inequality and income.

There are multiple ways to attack the issue of gender inequality, and women in the sports arena should be taking note of such ways.⁷ Change cannot be effected without action taking place; thus, the question remains as to which measure is the better path of action to take. The USWNT decided to take the

¹ Nicole Zerunyan, *Time's Up: Addressing Gender-Based Wage Discrimination in Professional Sports*, 38 Loy. L.A. Ent. L. Rev. 229 (2018).

² *Id.* at 1.

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 7.

⁶ *Id.*

⁷ Jenna N. Rowan, *Equal Protection for Equal Play: A Constitutional Solution to Gender Discrimination in International Sports*, 20 Vand. J. Ent. & Tech. L. 919 (2018).

route of litigation, which, as it turns out, takes years and, of course, money to achieve. A better route than litigation, which would be more effective to leagues not protected by the Equal Pay Act, is to attack the collective bargaining agreement of each league. This would be a better mode of action because, in short, a collective bargaining agreement has more options and is less constrictive than any type of litigation available. Furthermore, this method allows for female athletes to do what they do best – stand up for themselves. Although litigation is a good way to force one’s hand into doing the right (and legal) thing, it would be an even greater success to demonstrate a proactive approach by demanding equal pay and benefits from the beginning.

II. CURRENT STATE OF PROFESSIONAL FEMALE SPORTS

a. Women’s Hockey

The USWHT, which formed in the 1980s, has been around a relatively short time in comparison to other sports.⁸ Since the formation of women’s hockey teams, female hockey teams managed to win multiple championships and gold medals.⁹ Despite their multiple successes on the ice, the USWHT realized that their achievements were still being greatly undervalued in comparison to the work of their male counterparts. For example, during travel, male hockey players can bring a guest to championship games, receive free transportation, stay in single rooms, and receive extra game tickets and an apparel package.¹⁰ In contrast, female players were not allowed to bring a guest and instead shared rooms with other teammates.¹¹ Thus, with this glaring disparity, the USWHT sought to bring their salaries up to a “living wage” with better travel accommodations.¹² Unlike the USWNT, Women’s Hockey pursued a route different from that of

⁸ Patrick C. Coyne, *A Huge Win for Equal Pay: Women’s National Teams Grab Their Biggest Victories Yet in Recent Contract Disputes*, 25 *Jeffrey S. Moorad Sports L.J.* 315 (2018).

⁹ *Id.* at 1.

¹⁰ *Id.* at 9.

¹¹ *Id.*

¹² *Id.* at 6.

litigation. Instead, the USWHT decided to sit down with the league and negotiate for change.¹³ Also, unlike the USWNT, Women's Hockey threatened team owners with a strike.¹⁴ Thus, with the potential loss of money weighing over their heads, team owners were more willing to come to the table to work out this dispute. As a result, the USWHT made a deal that provided them "around \$70,000 each per year, although they could make more than \$100,000 in Olympic years if they win gold," as well as improved and equal travel accommodations to the Men's Hockey Team.¹⁵ Further, the parties agreed to implement a "Women's High-Performance Advisory Group," which aimed at increasing visibility and opportunities for Women's Hockey.¹⁶ The teams seem happier with the combination of these new provisions within the USWHT's collective bargaining agreement and, for now, have settled for "equitable pay" rather than equal pay.¹⁷

b. Women's Soccer

On one hand, the USWHT demonstrated success in fighting for equality because they pursued an avenue aside from litigation. On the other hand, USWNT and the U.S. Soccer Federation ("Federation") are still in the midst of ongoing litigation with no end in sight. In March 2016, five of the USWNT's most prominent players filed a wage-discrimination lawsuit under the Equal Pay Act.¹⁸ Regardless of the immense success that the USWNT had on the field in recent years, coupled with the increased viewership, these athletes were paid much less in comparison to Men's Soccer Teams.¹⁹ To break it down, the top tier players of USWNT made \$72,000 per year for twenty Friendly games, with a bonus of \$1,350.00 for each Friendly won – none if they lost.²⁰ As for the Men's Team, however, players make a range from \$6,250 to \$17,625 for each of the 20 Friendly games played, regardless of

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 9-10.

¹⁶ *Id.* at 12-13.

¹⁷ *Id.* at 2.

¹⁸ Zerunyan, *supra* note 1, at 7.

¹⁹ *Id.* at 7.

²⁰ Honey Campbell, *Superior Play, Unequal Pay: U.S. Women's Soccer and the Pursuit for Pay Equity*, 51 U.S.F. L. Rev. 545 (2017).

the outcome.²¹ Therefore, even if the USWNT won all twenty Friendlies, they would make less than if the Men's Team lost all twenty of their games.²² Further, the average pay range for the Men's Team is between \$53,000 and \$326,129, while the Women's range is from \$6,842 to 37,800.²³ With this visual disparity, the USWNT filed suit. Not long after the USWHT came to a new deal with their hockey league, the USWNT also made a deal with their employer, although this did not deter their lawsuit.²⁴ Unlike the USWHT, the USWNT agreed with the Federation upon a Memorandum of Understanding to a "no strike, no lockout" provision.²⁵ Thus, the USWNT had to negotiate a new collective bargaining agreement without its best bargaining chip.²⁶ The new terms of the 2017 collective bargaining agreement remain surreptitious but are said to "include significant increases in both direct and bonus compensation for national team players. . . enhanced travel benefits. . . and per diems equal to the men's national team."²⁷ Nevertheless, the USWNT persisted.

III. CURRENT LEGAL OPTIONS

To better understand what is actually occurring, it is important to look at the options for the courtroom, as well as what is possible behind the conference room doors at the negotiation table. The options that we have seen thus far include the Equal Pay Act, which is the vehicle for which the USWNT has chosen to voice their cause, as well as the collective bargaining agreement, as seen with the USWHT. However, there are more options on the table that these groups have not considered, such as Title VII of the Civil Rights Act ("Title VII"). Being that the current state of unequal pay is so apparent, it is important to examine these approaches and see how they can fit into the arena of female sports.

²¹ Id. at 9.

²² Id.

²³ Zerunyan, *supra* note 1, at 4.

²⁴ Coyne, *supra* note 8, at 5.

²⁵ Id.

²⁶ Id.

²⁷ Id. at 6.

a. Equal Pay Act

The Equal Pay Act delineates:

No employer ... shall discriminate ... between employees on the basis of sex by paying wages to employees in such establishment at a rate less at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions. . . .²⁸

Under this provision, it is a statutory violation to pay a person less for doing the same work as someone of another sex. In order to prove a case of wage discrimination, a plaintiff must prove (1) the jobs held by male and female employees are substantially similar, and (2) the employer is paying different wages to those engaged in this similar work.²⁹ Further, courts have delved deeper into the discussion of which cases qualify for a wage discrimination suit, by looking more at the direct language of the statute.³⁰ Specifically, the word “establishment” has been of some consequence.³¹ The Supreme Court has held “establishment” to mean “a distinct physical place of business,” while other courts have held an “establishment” to be “a central administrative unit” that controls hiring, setting wages, and assigning duties.³²

While looking at the statute and court rulings, it seems that the USWNT has a strong case. The USWNT plays professional soccer – exactly like the Men’s Team - with similar contractual responsibilities.³³ As stated earlier, the USWNT is being paid substantially less than the Men’s Team.³⁴ Further, the Men’s Team and the USWNT are operating under the umbrella of the Federation.³⁵ The USWNT and the Men’s Team are both employed by the Federation, which fits the meaning of “establishment”

²⁸ Id. at 5.

²⁹ Id.

³⁰ Zerunyan, *supra* note 1, at 6.

³¹ Id.

³² Id.

³³ Campbell, *supra* note 20, at 10.

³⁴ Zerunyan, *supra* note 1, at 6.

³⁵ Id. at 7.

under the statute.³⁶ There seems to be no reasonable, legally-viable justification for this pay disparity, and the Federation is currently facing the music for its behavior.

b. Title VII

Another venue that has not seen much light in the fight for equal pay in female sports is Title VII of the Civil Rights Act of 1964. Section 703 provides:

It shall be an unlawful employment practice for an employer

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.³⁷

However, this is not the route that the USWHT or USWNT took because of its limitations on filing. It is not as direct as litigation under the Equal Pay Act, which goes straight to the courts.³⁸ Rather, there are additional hoops to jump through with a Title VII violation filing; the biggest being that one must first file a claim with the Equal Employment Opportunity Commission ("EEOC").³⁹ Moreover, there are more time limitations regarding the EEOC, being that it must be filed within 180 days of the alleged discrimination.⁴⁰ Once the claim is filed, the EEOC performs its own investigation to determine if a violation has

³⁶ *Id.*

³⁷ Rowan, *supra* note 7, at 5.

³⁸ *Id.* at 6.

³⁹ *Id.*

⁴⁰ *Id.*

occurred.⁴¹ If the EEOC determines a violation has occurred, it attempts conciliation between the parties or chooses to file a civil claim against the private employer.⁴² On the other hand, if the EEOC finds no violation, it notifies the potential plaintiff, who then has 90 days to file a civil lawsuit.⁴³

Another obstacle for a Title VII claim stems from the fact that an employee must prove intent to establish a prima facie case.⁴⁴ Under the Equal Pay Act, a plaintiff must demonstrate simply that discrimination occurred.⁴⁵ Title VII, of course, goes further by requiring a plaintiff to prove an employer intended to discriminate against an employee based on her gender.⁴⁶ Because intent is one of the hardest elements to prove in any case, Title VII presents itself as a less desirable choice for a wage-discrimination lawsuit, particularly for female athletes. On the bright side, Title VII greatly increases the number of damages a plaintiff can receive.⁴⁷ Under an Equal Pay Act claim, a plaintiff may recover compensatory damages and possibly punitive damages with limits based on how many people the company employs.⁴⁸ As for Title VII, a successful plaintiff may recover back pay, compensatory damages, attorneys' fees, and punitive damages.⁴⁹ So, although the rewards might be greater, it seems that the increased number of procedural hoops in comparison to other options available deter female athletes from filing a Title VII claim.

c. Collective Bargaining Agreement

A collective bargaining agreement is like a contract between two parties that many labor unions across the country, and most, if not all, major sports leagues have, although it is usually not as

⁴¹ Id.

⁴² Id.

⁴³ Id.

⁴⁴ Coyne, *supra* note 8, at 3.

⁴⁵ Id.

⁴⁶ Id.

⁴⁷ Id.

⁴⁸ Remedies for Employment Discrimination, U.S. Equal Employment Opportunity Commission, <https://www.eeoc.gov/employers/remedies.cfm>.

⁴⁹ Coyne, *supra* note 8, at 3.

collaborative of a process as it sounds.⁵⁰ In the sports context, the collective bargaining agreement, which expires every so many years depending on the league, handles the conditions of play, certain league rules, and – most importantly – pay.⁵¹ This negotiation generally takes place between players in the league and team owners; the negotiation is like any other collective bargaining agreement between employer and employees of other industries.⁵²

As a collective bargaining agreement is an exclusive privilege offered by the National Labor Relations Act (“NLRA”), it is important for a group to be classified as an employee instead of an independent contractor.⁵³ Under the NLRA, only employees, as defined under the NLRA, are permitted to collectively bargain.⁵⁴ The definition of “employee” caused some grief for the USWHT because their label of either employee or independent contractor was unclear, as both organizations do not operate under the umbrella of the National Hockey League.⁵⁵ The USWNT, on the other hand, distinctly fell under the classification of an employee.⁵⁶ The USWNT has continued to collectively bargain with the Federation for almost twenty years, beginning first in 2001 and with the most recent agreement established in April 2017.⁵⁷

The purpose of a collective bargaining agreement is to promote labor peace while supporting stable terms of employment.⁵⁸ One of the paradoxes that lie within this statement is that striking is one of the most valuable tools given to an employee under labor law, and specifically a collective bargaining agreement. Thanks to online streaming, smartphones, and the ever-expanding ESPN, watching sports has become an event in and of itself. Thus, eyes on screens generate a lot of money for

⁵⁰ Paul C. Weiler et al., *Sports and the Law: Text, Cases, and Problems* (5th ed. 2019).

⁵¹ *Id.* at 85-91.

⁵² *Id.*

⁵³ Coyne, *supra* note 8, at 4.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Weiler, *supra* note 50, at 85-91.

employers, perhaps even more than physical ticket sales. As such, refusal to get into uniform and on the field would cost employers significantly more than an employee-player.

d. Defenses

i. Exceptions to the Equal Pay Act and Title VII

Due to the fact that there is no such thing as a perfect statute, the Equal Pay Act has exceptions that an employer can assert as a defense in court. These exceptions include work environments that incorporate systems of (1) seniority, (2) merit, (3) quality or quantity of work, and (4) factors other than gender.⁵⁹ To rationalize a wage disparity according to a seniority system, an employer must prove that pay standards are objectively neutral and not based on gender.⁶⁰ A merit system must prove to be legitimate and fair-minded with terms and criteria. Additionally, the employer must provide evidence of an organized and structured procedure “whereby employees are evaluated systematically according to predetermined criteria.”⁶¹ Quality, quantity, and factors that are not based on gender are determined to legitimize each case.⁶²

Title VII has exceptions that are used as a defense, similar to the Equal Pay Act.⁶³ Employers are allowed to provide different compensation or terms, conditions, or privileges of employment if it follows a seniority system, merit system, or a system that measures earnings by quantity or quality of production.⁶⁴ These systems similarly follow the definitions of acceptable systems described in the Equal Pay Act.⁶⁵

ii. Money

Another defense that employers, like the Federation, utilize in wage discrimination cases is that men’s teams make more

⁵⁹ Zerunyan, *supra* note 1, at 5.

⁶⁰ *Id.* at 7.

⁶¹ *Id.*

⁶² *Id.*

⁶³ Rowan, *supra* note 7, at 6.

⁶⁴ *Id.*

⁶⁵ *Id.*

money.⁶⁶ The money employers vaguely refer to is the money they see from the efforts of the employee.⁶⁷ Specifically, in the case of the USWNT, the money mainly comes from profits made off of viewers from watching games.⁶⁸ In 2015, the USWNT earned \$6.6 million for the Federation and the men's team earned less than \$2 million.⁶⁹ More, in 2016, the USWNT was projected to make more than \$5 million in profit while the men's team was expected to draw a loss of \$1 million.⁷⁰ Knowing these statistics, the Federation can no longer use revenue as an argument to pay its female players less money. The fact of the matter is, the USWNT makes more money than men's teams and should be paid accordingly, in a proportional manner; that is—equal to that of their male counterparts.

iii. Success

Some team owners and organizations argue that women's teams are not as successful as men's teams. Again, this is not always a valid argument, particularly in the case of the USWNT. The USWNT has won several World Cup championships and 4 Olympic championships while the men's team has difficulty just making it to the game.⁷¹ The USWNT plays more games than the men while managing to win far more championships.⁷² The term "equal pay for equal play" should run true for female athletes. Yet it seems that even better, more successful, play does not equate to equal pay. In fact, with the most recent World Cup win this year, it appears it is not just the players that understand success on the field should translate to their paychecks.⁷³ After the USWNT's win at the 2019 World Cup, fans began chanting "equal pay."⁷⁴ It is not in the Federation's best interest to use success, either on the

⁶⁶ Campbell, *supra* note 20, at 3.

⁶⁷ Rowan, *supra* note 7, at 2.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Zerunyan, *supra* note 1, at 8.

⁷² *Id.*

⁷³ Graham Hays, Chants of 'equal pay' accompany U.S. win, E.S.P.N (Jul. 7, 2019), <https://www.espn.com/soccer/fifa-womens-world-cup/story/3895899/chants-of-equal-pay-accompany-us-win>.

⁷⁴ *Id.*

field or with revenue, to justify a blatant wage discrimination violation.

iv. Television and Audience

The number of viewers of an event ties directly to a team's revenue. Eyes on a television translate directly into how much a channel, like ESPN, will pay an organization to broadcast the game.⁷⁵ During the 2015 World Cup, the USWNT had roughly 25.4 million viewers, making it the most-watched soccer game in American history.⁷⁶ To no surprise, after their World Cup win, the USWNT went on a victory tour that attracted tens of thousands of fans to soccer stadiums across the United States and generated tens of millions of dollars.⁷⁷ Going beyond television popularity is a social media presence, which can also translate into viewership and popularity.⁷⁸ Accordingly, after a third World Cup title, the USWNT's Twitter followers grew immensely from 286,000 to 490,000.⁷⁹

USWNT arguments aside, it is unfair for employers to argue that equal pay is justified for lack of viewership regarding female athletes when these employers actively make deals that reduce female sports' air time.⁸⁰ In 2014, female sports made up about 4 percent of the total sports media coverage.⁸¹ Later, a 2015 study found that ESPN's daily sports reporting program, *SportsCenter*, featured 376 stories on men's sports and only 13 on women's sports.⁸² It is both a cyclical and nonsensical argument to say that there is a lack of viewership when employers and broadcasting companies curb female sports coverage.⁸³ Media outlets undeniably deprioritize female sports which enable female sports employers to claim that there is less viewership⁸⁴. Rather, the

⁷⁵ Zerunyan, *supra* note 1, at 3.

⁷⁶ Campbell, *supra* note 20, at 4.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Zerunyan, *supra* note 1, at 4.

⁸¹ *Id.*

⁸² Rowan, *supra* note 7, at 4.

⁸³ Zerunyan, *supra* note 1, at 4.

⁸⁴ *Id.*

limited coverage produces limited viewership.⁸⁵ Fewer viewers of female sports in comparison to male sports should not be a valid argument since it is false in cases like the USWNT. Additionally, the argument fails because limited viewership is directly caused by employers and those that control the media coverage.⁸⁶

v. Misogyny

The underlying reasons that no one says out loud, which further limits female athletes are misogyny and sexism.⁸⁷ One of the most prominent displays of sexism is the way that many female athletes are portrayed by the media.⁸⁸ Commentators and the media sexualize female athletes by commenting on their hair, makeup, and body shape.⁸⁹ A great example of this was illustrated with Serena Williams who is one of the best tennis players in the world. After her sixth Wimbledon title, the media claimed that her body was not feminine enough.⁹⁰ More recently, after Williams argued with a referee during the 2018 U.S. Open, a cartoon appeared in the *Herald Sun*, depicting Williams as an overgrown child throwing a tantrum. The cartoon also overemphasized the shape of her lips.⁹¹ The cartoon instantly drew criticism because of its sexist and racist nature.⁹² Other tennis athletes, such as John McEnroe, are notorious and almost glorified for arguing with referees regularly. In contrast, Williams faced criticism for not acting “ladylike” and for being a “sore loser.”⁹³ If media outlets treated male and female athletes equally in their coverage, there is a good argument that equality may spread to other aspects, such as pay.⁹⁴

⁸⁵ Id.

⁸⁶ Id.

⁸⁷ Rowan, *supra* note 7, at 4.

⁸⁸ Id.

⁸⁹ Id.

⁹⁰ Id.

⁹¹ Michael Cavna, A racist Serena Williams cartoon went viral. Here's how to caricature her the right way, *Wash. Post* (Sept. 13, 2018), https://www.washingtonpost.com/news/comic-riffs/wp/2018/09/13/a-racist-serena-williams-cartoon-went-viral-heres-how-to-caricature-her-the-right-way/?utm_term=.9ae1a53761df.

⁹² Id.

⁹³ Id.

⁹⁴ Campbell, *supra* note 20, at 3.

Not only is misogyny pervading both the media and sports as a whole, but more importantly, it is making its way down the chain and influencing young women throughout the United States.⁹⁵ With all of the current factors the USWNT presented in its claim, the only conclusion that can possibly be drawn is that the Federation values male contributions more than female contributions.⁹⁶ This message is becoming more apparent to younger generations, specifically young female soccer players.⁹⁷

Although it may seem minuscule to some, misogyny endures even based on how statutory relief is written. In the Equal Pay Act and Title VII text, it discusses how “he [the employer] pays” and “his employees.”⁹⁸ The language of these legal texts indicate that misogyny is not only present in sports, the workforce, and society, but it is also embedded in our laws.⁹⁹ In one of the few places that a female athlete can seek recourse for wage discrimination, a misogynistic shadow that cannot be ignored still remains.¹⁰⁰

IV. COLLECTIVE BARGAINING AGREEMENTS AND EFFECTIVENESS

a. Why the Collective Bargaining Agreement?

A collective bargaining agreement between a team’s employer and the Players’ Association is governed by the NLRA.¹⁰¹ The NLRA works to maintain relationships between an employer and employee, acting as a set of checks and balances between the parties.¹⁰² Even though the course that the USWNT seems to be working for them and has drawn a great amount of attention to a problem that has only been uttered in hushed tones, the fact is,

⁹⁵ Barry Svrluga, U.S. women’s soccer players deserve equal pay, and it shouldn’t take a lawsuit, Wash. Post (Mar. 8, 2019), https://www.washingtonpost.com/sports/us-womens-soccer-players-deserve-equal-pay-and-it-shouldnt-take-a-lawsuit/2019/03/08/abe9ad28-41db-11e9-9361-301ffb5bd5e6_story.html?noredirect=on&utm_term=.1b72fb16bf92.

⁹⁶ Id.

⁹⁷ Id.

⁹⁸ Rowan, *supra* note 7, at 5.

⁹⁹ Svrluga, *supra* note 95.

¹⁰⁰ Id.

¹⁰¹ Coyne, *supra* note 8, at 4.

¹⁰² Id.

litigation is expensive for all parties involved and takes too long. The USWNT brought their wage discrimination claim over 3 years ago.¹⁰³ Although the team has since negotiated a new collective bargaining agreement, the terms have remained secret.¹⁰⁴ Even with a pending lawsuit, a collective bargaining agreement cannot be avoided as a means of demanding change.¹⁰⁵

On the whole, the collective bargaining agreement is the best option for female athletes. The work of the USWNT is commendable, but it should not take a lawsuit.¹⁰⁶ The USWNT was lucky enough to fit within the confines of the terms to bring an Equal Pay claim.¹⁰⁷ However, not all female athletes have this option at their disposal because they do not have the same employer as their male counterparts.¹⁰⁸ For example, in 2015 the WNBA's salaries ranged from \$38,000 to \$109,500, while the NBA's of that same year ranged from \$525,093 to \$16.4 million.¹⁰⁹ The salary differences here are comparable to those of the USWNT and the men's team.¹¹⁰ But, unlike the USWNT's case, the WNBA and the NBA are two entirely different leagues, leaving them without the option for an Equal Pay Act claim.¹¹¹ This is why the collective bargaining agreement should be the first place that female athletes look for pay disparities.

b. Will It Work?

The problem with the USWNT's lawsuit is that it is reactive instead of proactive. Instead of trying to remedy the problem of wage discrimination after the lawsuit had an impact, female athletes should be working to remove the problem altogether. The work of the USWNT is "a symbol of 'girl power,' achievement, and

¹⁰³ Ali Jessani, Shooting for Equality: An Analysis of the Market Force Defense as Applied to the U.S. Women's Soccer Team's Equal Pay Claim, 25 Duke J. Gender L. & Pol'y 221 (2018).

¹⁰⁴ Id at 1.

¹⁰⁵ Id.

¹⁰⁶ Svrluga, *supra* note 95.

¹⁰⁷ Zerunyan, *supra* note 1, at 7.

¹⁰⁸ Id at 2.

¹⁰⁹ Rowan, *supra* note 7, at 4.

¹¹⁰ Campbell, *supra* note 20, at 2.

¹¹¹ Id at 1.

the synergy of feminism with athleticism.”¹¹² There is another way – the collective bargaining agreement. All major professional teams have these agreements to regulate working conditions and pay.¹¹³ Female athletes are not a special category of athletes, they leave everything on the field just as their male counterparts do.¹¹⁴ Being successful on the field leads women of all ages to look up to these athletes and aspire to live a passionate, healthy, and hardworking lifestyle.¹¹⁵ Men then follow suit and begin to see women as strong, capable, and qualified.¹¹⁶ This commanding behavior should translate and start long before they even step on the playing field. If women can be competitive, athletic, and strong on the field, there should be no problem in doing so regarding their pay and demanding equality at the negotiation table. There are legal options to seek equal pay, but it should not have to get that far. Female athletes, and women as a whole, should begin thinking proactively by standing up for themselves and for equal pay before the problem progresses to the courtroom.

V. CONCLUSION

Despite the many justifications that employers use to qualify an obvious pay disparity, they do not hold water regarding the USWNT.¹¹⁷ The USWNT’s employer, the Federation, have previously argued that they pay differences between the USWNT and men’s teams is fair because men’s teams generate more money, the USWNT negotiate their salaries, and the men’s teams and USWNT negotiate at different times.¹¹⁸ There is no denying the third prong of the Federation’s argument, but the first 2 are false.¹¹⁹ Moreover, all of these justifications come from the “basis other than sex” exception found within the Equal Pay Act.¹²⁰ We

¹¹² Marc Edelman & Elizabeth Masterson, *Could the New Women’s Professional Soccer League Survive in America? How Adopting a Traditional Legal Structure May Save More Than Just a Game*, 19 Seton Hall J. Sports & Ent. L. 283 (2009).

¹¹³ Weiler, *supra* note 50, at 85.

¹¹⁴ Campbell, *supra* note 20, at 10.

¹¹⁵ Edelman & Masterson, *supra* note 112, at 10.

¹¹⁶ *Id.*

¹¹⁷ Campbell, *supra* note 20, at 2.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Zerunyan, *supra* note 1, at 7.

are still waiting for an outcome with the USWNT's lawsuit, even after 3 years.¹²¹

The best way for female athletes to hold their respective employers accountable, especially those whose employers do not qualify as a defendant under the Equal Pay Act, is to come to the negotiation table. The collective bargaining agreement is where the Players' Association and employer come to the table and make a deal. There is no reason that this deal should not be focused around the apparent wage discrepancy between male and female athletes who perform substantially similar duties and play the same game. Rather than fighting the uphill battle once the problem has reared its head, female athletes should be willing to fight on more than the field, ice, or court, but in the negotiation room as well. Equal or better play calls for equal or better pay, and the world is now putting employers on notice - as they did after the 2019 Women's World Cup final.¹²² Now, it is time to start demanding equal pay and conditions from the start with collective bargaining agreements and being just as aggressive at the negotiating table as on the field.

¹²¹ Campbell, *supra* note 20, at 2.

¹²² Hays, *supra* note 73.

A DECISION BETWEEN AMATEUR AND PROFESSIONAL BASKETBALL: A LOOK INTO AMERICAN BASKETBALL AND HOW THE NCAA CAN INFLUENCE TOP ATHLETES TO ATTEND COLLEGE THROUGH “SAHIPP”

By: Andrew Druffel

I. INTRODUCTION

The National Basketball Association (“NBA”) is growing at a tremendous rate. Increasing viewership and participation in basketball by the younger generation are major contributing factors.¹ While America considers football its favorite sport, basketball is projected to close the gap in the coming years.² To continue its already unprecedented growth, the NBA made two strategic moves. First, the NBA sold the naming rights of their minor league to Gatorade.³ What was called the NBA Development League or “D-League”, is now called the “G-League”.⁴ The G-League will expand to provide a minor league, feeder team for each NBA team.⁵ The goal of the NBA is to provide elite prospects an alternate route to the NBA without the concern of amateurism.⁶ Beginning in the 2019-2020 season, the G-League

¹ Kareem Abdul-Jabbar, The NBA, and not the NFL, is the league of America’s future, *The Guardian* (December 12, 2017), <https://www.theguardian.com/sport/2017/dec/12/nba-surpassed-nfl-league-of-americas-future-kareem-abdul-jabbar>

² David Z. Morris, NFL vs. NBA: Which Will be America’s Biggest Sport 10 Years From Now?, *Fortune* (May 26, 2018), <http://fortune.com/2018/05/26/nfl-vs-nba-americas-biggest-sport/>.

³ Keely Diven, NBA sells D-League sponsorship to Gatorade, renames it G-League, *NBC Sports* (February 14, 2017), <https://www.nbcsports.com/washington/washington-wizards/nba-sells-d-league-sponsorship-gatorade-renames-it-g-league>

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

is allowing elite prospects the chance to play professional basketball at the age of eighteen instead of nineteen like years past.⁷ The other big change is Adam Silver, the NBA Commissioner, proposed to the National Basketball Players' Association, the "NBPA", to lower the age requirement for the NBA Draft to eighteen years of age as well.⁸ If the NBPA accepts this, then players can go straight to the NBA without playing in college or the G-League. This second change, however, will only affect a smaller number of elite athletes as few are NBA-ready at eighteen years old.

Many current NBA players, like DeMarcus Cousins, a Los Angeles Laker, are in favor of these changes. He stated the following comments after Zion Williamson, the number one overall NBA Draft choice in 2019, who was injured during a game in his one year at Duke University.

I don't understand the point of the 'one-and-done' rule, what's the difference between 18 and 19 and 17 and 18? You're immature, you're young, you're ignorant to life in general. So what's really the difference? You've still got a lot of growing to do as a man. Knowing what I know now, college basketball is [bullsh]-. My advice ... to do what's best for you and your family. Obviously, college... it does nothing for you at this point. You've proven you're the No. 1 pick. You've proven your talent. You're ready for the next level. It's happening. When I was at that age, you enjoy the moment, the experience and all that. But there's so many risks involved to get to the ultimate goal, which is this level. ... how crooked the NCAA business is. I saw a post the other day that showed the highest ticket for the UNC-Duke game was \$2,500-\$3,500. How much does Zion Wiliamson get? That's who they're coming to see. So how much does he get? Who does it go to? How does it benefit any player on that team?⁹

⁷ Id.

⁸ Tim Reynolds, Report: NBA proposes lowering draft age to 18, nba.com (February 21, 2019), <https://www.nba.com/article/2019/02/21/nba-and-union-look-end-one-and-done>

⁹ Matt Ellentuck, DeMarcus Cousins calls the NCAA 'bullshit' following Zion Williamson's injury, sbnation.com (February 21, 2019), <https://www.sbnation.com/nba/2019/2/21/18235139/demarcus-cousins-zion-williamson-ncaa>.

DeMarcus Cousins believes the NCAA is not looking out for the student-athletes' best interest.

In the world of sports, each side, whether it be the team, school, league, or athlete, must look out for their own best interest. The National Collegiate Athletic Association, ("NCAA"), is looking out for themselves in this situation by using athletes to gain more revenue, while the athletes do not see any of the profits. The current system is the antithesis of how it should work. The athlete needs to be the priority. The athletes drive the entire sports industry, and the teams need to care about the athletes as human beings. Specifically, the teams need to care for the athlete's health, whether it be physical and/or mental. In a profession which inherently depends on the health and well-being of the athletes, the athlete needs to be the priority. Without athletes at the top of their game, the leagues and teams are not earning such high revenues. Further, without the dedication, hard work, and incredible talent of these athletes, the teams would not exist.

II. AMATEURISM

The NCAA, a nonprofit, earns over a billion dollars each year.¹⁰ The large majority of the revenue comes from television contracts for the Division I Men's Basketball Tournament, or March Madness.¹¹ While one billion dollars is not necessarily close to the billions made by the major professional sports leagues in America, it is also not insubstantial. The one glaring difference between the NCAA and the NBA is that the NBA does not have an amateurism requirement.

The NCAA requires all student-athletes to have an amateur status to be eligible to participate in intercollegiate athletics.¹² Bylaw 12.01.2 marks there is a difference between amateur and

¹⁰ Ahiza Garcia, NCAA surpasses \$1 billion in revenue for first time, CNNMoney Sport (March 7, 2018), <https://money.cnn.com/2018/03/07/news/companies/ncaa-revenue-billion/index.html>

¹¹ Id.

¹² Nat'l Collegiate Athletic Ass'n, 2018-2019 NCAA Division I Manual, Const. art. 12.01.1 (2018), <https://www.ncaapublications.com/p-4547-2018-2019-ncaa-division-i-manual-august-version-available-august-2018.aspx>

professional athletics, “[m]ember institutions’ athletics programs are designed to be an integral part of the educational program. The student-athlete is considered an integral part of the student body, thus maintaining a clear line of demarcation between college athletics and professional sports.”¹³ The bylaw goes on to state the many ways a student-athlete can lose their amateurism status and therefore forfeit their opportunity to play NCAA athletics.¹⁴ Most of these involve receiving payments for athletic competitions, hiring an agent, or using one’s own image and likeness for profit.¹⁵ Over the years, though, the NCAA has loosened its grip because of legal actions against amateurism and now allows certain benefits. Some of these benefits include cost of attendance for school which includes money for rent, and the university may provide more meals to the student-athletes.¹⁶ The Court, in *O’Bannon v. NCAA*, stated that the NCAA frees itself from antitrust violations by letting colleges compensate student-athletes with the cost of college attendance.¹⁷ In 2019, the ruling was amended when Judge Claudia Wilken, in the US District Court, ruled, “[to] [a]llow[] each conference and its member schools to provide additional education-related benefits without NCAA caps and prohibitions.”¹⁸ The ruling relays payment to the education of the student-athlete instead of cash.¹⁹ Student-athletes will now be able to receive computers or scholarships for post-graduate degrees.²⁰ The case illustrates how the NCAA is moving further and further away from strict interpretation of amateurism with pressure from the Courts and the increase in other options for the athletes outside of the NCAA.

¹³ Nat’l Collegiate Athletic Ass’n, 2018-2019 NCAA Division I Manual, Const. art. 12.01.2 (2018), <https://www.ncaapublications.com/p-4547-2018-2019-ncaa-division-i-manual-august-version-available-august-2018.aspx>

¹⁴ 12. 2018-19 NCAA Division I Manual: Constitution, Operating Bylaws, Administrative Bylaws, (2018).

¹⁵ *Id.*

¹⁶ Steve Cameron, The NCAA brings in \$1 billion a year - here’s why it refuses to pay its college athletes, *Business Insider* (March 26, 2019), <https://www.businessinsider.com/ncaa-college-athletes-march-madness-basketball-football-sports-not-paid-2019-3>

¹⁷ *Id.*

¹⁸ *In re Nat’l Collegiate Athletic Ass’n Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1063, 1110 (N.D. Cal. Mar. 8, 2019).

¹⁹ *Id.* at 1088.

²⁰ *Id.*

III. CURRENT STATE OF THE NCAA

As professional athletes have voiced their disdain for the NCAA, young athletes have become aware of the woes that is college athletics. The glamour of a national championship is starting to fade, and the idea of earning money for their hard work and talent has come to light. Athletes only have so long when they are physically able to earn from their physical abilities.

Between the negative press and the changes by the NBA, the NCAA may have some concerns of whether their future profits will be affected. Allowing eighteen-year-old young men to play in the G-league or NBA will take away top athletes like R.J. Barrett and Zion Williamson from entering into college at all. Highly coveted recruits will become interested in the G-League because of the chance to earn a salary immediately and the ability to use their image and likeness for profit. The number of viewers of college basketball may begin to decrease with the diminished talent pool.

The NCAA may not be overly concerned about lowering the NBA draft age because before 2007, top high school players could go straight to the NBA, and only a small percentage were able to make the jump. Now, though, the question is how many will make the jump from high school to the G-League. The G-League allows those players who are close to being drafted but end up in college the chance to turn professional right away, thus taking more elite prospects out of college.

A lot of attention was brought to this topic in 2019 because a student athlete for Duke University, Zion Williamson. Williamson was in his first and last year in college. Zion was named by many sports websites to be the top NBA draft prospect in 2019.²¹ He is a franchise player and considered by many to be a generational player.²² Williamson earned more revenue for the NCAA and Duke University this year because everyone wanted to see him

²¹ Josh Planos, Zion Williamson Is The Best College Basketball Player In At Least A Decade, *FiveThirtyEight* (December 12, 2018), <https://fivethirtyeight.com/features/zion-williamson-is-the-best-college-basketball-player-in-at-least-a-decade/>.

²² *Id.*

play.²³ During the NCAA Men's Basketball Championship Tournament, March Madness, the networks even had a specific camera dedicated to him.²⁴ The ticket prices for the Duke University versus University of North Carolina ("UNC") game reached astronomical prices because of Williamson.²⁵ Duke and UNC are known to be top Division I perennial basketball programs which lead to high ticket prices anyway. However, this year, ticket prices reached new levels because people wanted to see Zion Williamson.²⁶ The high demand drove the ticket prices into the three thousand dollar and above range.²⁷ After fans paid thousands to see the game, Williamson, in the first minute, ripped through his Nike shoes and injured his leg.²⁸

Scottie Pippen, a former NBA player, thought Zion should sit the rest of the season to keep his draft stock high for the draft.²⁹ This is a similar approach to top college football players getting ready for the National Football League ("NFL") Draft after injuries. Controversially, Nick Bosa, a top college football player during the 2018-2019 season, skipped the second half of the

²³ Myron Medcalf, UNC-Duke tickets approaching Super Bowl prices because of Zion Williamson, ESPN (February 19, 2019), http://www.espn.com/mens-college-basketball/story/_/id/26032466/unc-duke-tickets-approaching-super-bowl-prices-zion-williamson.

²⁴ Tyler Lauetta, CBS hired a special cameraman to work the 'Zion Cam' and record every move the Duke star makes in his NCAA tournament run, Business Insider (March 22, 2019), <https://www.businessinsider.in/cbs-hired-a-special-cameraman-to-work-the-zion-cam-and-record-every-move-the-duke-star-makes-in-his-ncaa-tournament-run/articleshow/68530020.cms>

²⁵ Myron Medcalf, UNC-Duke tickets approaching Super Bowl prices because of Zion Williamson ESPN (2019), http://www.espn.com/mens-college-basketball/story/_/id/26032466/unc-duke-tickets-approaching-super-bowl-prices-zion-williamson.

²⁶ Id.

²⁷ Id.

²⁸ Kyle Boone, Zion Williamson injury update: Duke freshman star is out vs. Miami as he will miss his third game with knee sprain, CBSSports.com (2019), <https://www.cbssports.com/college-basketball/news/zion-williamson-injury-update-duke-freshman-star-is-out-vs-miami-as-he-will-miss-his-third-game-with-knee-sprain/>.

²⁹ Ricky O'Donnell, 11 thoughts on if Zion Williamson should sit out for Duke to save himself for the NBA draft, SBNation (Jan. 17, 2019), <https://www.sbnation.com/college-basketball/2019/1/17/18185937/zion-williamson-nba-draft-sit-out-duke>.

regular season after suffering an injury.³⁰ Similarly, several top players over the last few years have skipped bowl games in the interest of the upcoming NFL Draft.³¹ The highly debated situation includes the same arguments every year: whether to look out for himself and stay healthy for the NFL Draft or be a “team player” and finish the season. Some decide to skip bowl games, while others participate. Williamson’s injury, though, was a first for basketball. The less physical sport had never seen a star like this go down. The number one overall in the 2019 NBA Draft could have harmed his draft stock and lost out on a lot of money if it were a more serious injury. Williamson, however, came back with a response that in no way would he sit the rest of the year.³² He took time to recover from his leg injury and played the remainder of the season.³³ Williamson stated, “I just can’t stop playing. I’d be letting my teammates down. I’d be letting Coach K down. I’d be letting a lot of people down. If I wanted to sit out, I wouldn’t have went to college. I came to Duke to play.”³⁴

Zion Williamson decided college was the best option for him, but he potentially could have chosen to go to the G League or NBA had it been an option for him. There will be more top basketball players like Williamson in the future, but will the NCAA maintain attractive features to recruit the top talent even against the G League and NBA?

IV. THE PATHS TO PROFESSIONALISM FOR ELITE PROSPECTS

Currently, the NBA requires each prospect to be nineteen years of age by September 15 of the draft year in order to be eligible for the draft.³⁵ High school graduates, therefore, are not old enough to enter the draft.³⁶ The prospect must make a choice

³⁰ Matt Maiocco, Nick Bosa details injury that cut short his final season at Ohio State, NBC Sports (Mar. 6, 2019), <https://www.nbcsports.com/bayarea/49ers/nick-bosa-details-injury-cut-short-his-final-season-ohio-state>

³¹ *Id.*

³² Nick Schwartz, Zion Williamson explained why he won’t sit out a month before his injury, USA Today (Feb. 21, 2019), <https://ftw.usatoday.com/2019/02/zion-williamson-sit-out-draft>.

³³ *Id.*

³⁴ *Id.*

³⁵ Frequently Asked Questions: NBA G League Professional Path and Select Contracts, NBA G League, <https://gleague.nba.com/professionalpath/>.

³⁶ *Id.*

between European League basketball, NCAA basketball, and a Select Contract with the NBA's G League. Each path is a one year minimum where each high school student decides which path will prepare him best to impress scouts and be drafted in the highly selective two rounds of the NBA draft each year. Some high school athletes have gone to Europe, but it has not become a popular option even with the potential to earn a salary immediately. The risk associated with the lack of recognized success and the distance from home may be factors for the lack of popularity. Because the Select Contract option for the G League is new to the 2019-2020 season, the NCAA has been the most popular path for elite prospects. The effect on NCAA men's basketball will be seen in the coming years.

A. The NCAA Path

The college process is what most, if not all, American NBA players have gone through. Since, 2007, many elite prospects have followed the coined "one-and-done" phrase, where elite prospects attend college for one year then declare for the NBA draft. NCAA teams around the country shoot their shot to earn the top prospects commitments each year. Universities like Duke and Kentucky are two of the most infamous blue bloods who have these players on their team each year. Because of the system in place, the schools are not worried about losing their best players each year. After one year, whether the athlete gets injured or not, the athlete is eligible for the NBA draft. Other NCAA basketball players are drafted after two or more years as well.

B. The NBA's G League Path

The newest option is the NBA's G League, or just the G League.³⁷ This minor league is not new, however, rather revamped in a sense. The goal of the NBA is to rebrand the league and garner interest from elite prospects who are not yet eligible to enter the NBA draft. The NBA believes the G League can become more and more popular as basketball is growing in the United States.

³⁷ Id.

Not defined by the NBA, the term, elite prospects or elite athletes, are the ones eligible to sign Select Contracts.³⁸ Select Contracts are five-month one-way contracts to play in the G League. Starting in the 2019-2020 season, the G League is offering the Select Contracts with a starting salary of \$125,000 for the five-month season to elite prospects who are at least 18 years of age by September 15 of the G League draft year.³⁹ The Select Contracts offer “year-round professional growth and will include opportunities for basketball development, life skills mentorship and academic scholarship” on top of the five-month season.⁴⁰

V. WEIGHING THE OPTIONS

A. Benefits of attending college

While NCAA student-athletes are not getting paid, there are many benefits to playing college basketball. The NCAA garners over 80% of its revenue from March Madness alone, and the television contracts worth one billion dollars each year are guaranteed through the next 10 years.⁴¹ The athletes are commonly on primetime television for March Madness, and they have that guarantee for the foreseeable future. European league basketball is not as popular, and the players do not receive the same amount of attention. Scouts are able to see the players more often if the player is a quick flight away or on ESPN.

The players have a love for the team and college as stated by Zion Williamson.⁴² March Madness is seen as the epitome of college athletics where one is part of a team with the chance to be on the national stage with everyone’s eyes on you.

While it may not be the ideal training place with classes, these young kids can learn a lot from being in a college

³⁸ Id.

³⁹ Id.

⁴⁰ Id.

⁴¹ Rodger Sherman, The NCAA’s new March Madness TV deal will make them a billion dollars a year, SBNation.com (Apr. 12, 2016), <https://www.sbnation.com/college-basketball/2016/4/12/11415764/ncaa-tournament-tv-broadcast-rights-money-payout-cbs-turner>.

⁴² Nick Schwartz, Zion Williamson explained why he won’t sit out a month before his injury, USA Today (Feb. 21, 2019), <https://ftw.usatoday.com/2019/02/zion-williamson-sit-out-draft>.

environment. There are also fewer uncertainties in college as it has proven success at getting players into the NBA. The G League has many uncertainties right now. Will the G League be successful? Will the G League develop the players as well as college does? Many athletes want to stay near their home and families, but the G League involves a draft which may deter some prospects.

B. Benefits of going straight to G league

This five-month contract is a comparable length to the NCAA season, but without focusing on academics. There are year-round opportunities to develop skills without having to worry about attending class.⁴³ The G League does offer a chance for educational opportunities if that is important to the athlete.⁴⁴ The G League also offers the Winter Showcase, which is the "NBA G League's annual in-season scouting event, when all of the league's teams converge in one city to play in front of NBA general managers and player personnel executives from all 30 NBA teams."⁴⁵

VI. SOLUTIONS

The NCAA has several options to choose from to promote the college basketball model.

First, the NCAA can do nothing and risk the results. Doing nothing, however is risky. With unknown numbers for Select Contract recipients in the G League, the NCAA could end up losing out on more than just the top elite prospects. If the G League expands to thirty teams, then they may be signing more players to the Select Contracts than the NCAA had initially thought. The NCAA could miss out on a lot of talent causing viewership to go down. With decreased viewership, comes decreased revenue.

Another approach would be to replicate college baseball or hockey drafting bylaw exceptions. The NHL and MLB draft young

⁴³ Frequently Asked Questions: NBA G League Professional Path and Select Contracts, NBA G League, <https://gleague.nba.com/professionalpath/>.

⁴⁴ *Id.*

⁴⁵ What You Need to Know About the NBA G League, NBA G League, <https://gleague.nba.com/professionalpath/>.

men straight out of high school, but the NCAA allows them to be drafted and retain amateurism.⁴⁶ They must follow specific rules, however. The athletes are able to hire agents, but only for the limited purpose of advising and not being present for negotiations.⁴⁷ If the prospect decides to come to college, he must not retain the agent's services. These drafts allow for professional teams to obtain the rights to the prospect, while still maintaining amateurism. Both professional leagues have minor leagues which coexist with college programs. Neither college hockey nor college baseball are as popular as college basketball, so the comparison cannot be exact, but it proves the cooperation is possible.

The next option is to increase benefits and entice prospects. This is the NCAA's mode of operation as of late. The NCAA allowed universities to increase benefits like increased meals and access to Wi-Fi. While these additions may seem insignificant, they add up and could make the difference for high school athletes unsure of which path to take. This option is also fairly risky for the NCAA as the benefits they are able to give may not be able to compare to the G League's benefits. The NCAA's options of benefits are limited because certain benefits will jeopardize amateurism.

Many would like to see college athletes be able to use their own image and likeness for profit. This solution would prove to be effective at providing salary for athletes who are truly capable of going professional but want to be in college. This issue has appeared in court and was ruled to violate amateurism.⁴⁸ The fight for this is not over, however.

The final solution is a proposal which would provide certain NCAA student-athletes with an injury insurance policy. To prevent the violation of the NCAA's amateurism bylaws, a health insurance program could be established. The policy would have the NBA and NCAA partner to provide compensation for a NCAA student-athlete's injury. This policy would be subject to many stipulations, however.

⁴⁶ First-Year Player Draft Rules, Major League Baseball, <http://mlb.mlb.com/mlb/draftday/rules.jsp>.

⁴⁷ 12.02, 2018-19 NCAA Division I Manual: Constitution, Operating Bylaws, Administrative Bylaws, (2018).

⁴⁸ O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049 (9th Cir. 2015).

To be named the Student-Athlete Health & Injury Policy Program, or "SAHIPP", the program would protect the draft stock of elite men's basketball players should they chose the NCAA path. Currently, the G League has Allison Feaster, a former WNBA player, and Rod Strickland, a former NBA player, to identify elite prospects to earn a Select Contract if they want to choose the G League route. For SAHIPP, however, elite athletes would be chosen by a combined NBA and NCAA committee to determine who would be eligible to receive compensation if they are injured. The program has the downfall of only protecting elite men's basketball players, but hopefully over time the program will serve as a model to be expanded to more players and other sports.

Student-Athlete Health & Injury Policy Program

□ Summary: The Student-Athlete Health & Injury Policy Program establishes the program for which elite prospects are afforded a future earnings protection policy in certain instances which are deemed reasonably necessary by the committee.

□ Definitions:

o "Elite Prospects" are the athletes deemed at a high enough level to be eligible for the policy.

o "Future Earnings Protection" (FEP) is the percentage of the difference between the projected entry level signing bonus earnings at the time of the injury and the actual entry level signing bonus after both the injury and the NBA draft. The Committee determines the projected values.

o "The Committee" includes the group of chosen representatives from the NCAA and NBA.

o "Certain Instances" include instances which cause an NCAA Men's Basketball student-athlete to lose future signing bonus earnings from an injury in an NCAA, University sanctioned, or other qualified event deemed appropriate by the committee.

□ Application:

- o An NCAA men’s basketball student-athlete is eligible to receive compensation when:
 - ☐ selected by The Committee,
 - ☐ The Committee may determine eligibility beginning when prospects are able to commit to a university.
 - ☐ The Committee may determine eligibility up until a certain instance occurs.
 - ☐ The Committee has full discretion based on this bylaw to decide who is eligible.
 - ☐ There is no limit on how many elite prospects may be chosen.
 - ☐ A minimum of 10 student-athletes who actually attend college must be chosen each year.
- o The policy will be dispersed when the elite prospect is drafted or once the draft officially ends.
- o The amount to be dispersed is to follow:

	Fell to Top 10	Fell Outside Top 10	Fell to Second Round	Fell Out of Draft
Projected Top 5 Pick	100% of FEP	100% of FEP	100% of FEP	100% of FEP
Projected Top 10 Pick	N/A	100% of FEP	75% of FEP	75% of FEP
Projected First Round	N/A	N/A	75% of FEP	50% of FEP
Projected Second Round	N/A	N/A	N/A	25% of FEP

- ☐ Revocation:
 - o The policy may be revoked or reduced by The Committee if:

- ☐ Information is discovered related to the injury which reveals deceit or an intent to defraud,
- ☐ The elite prospect acts in other ways to decrease his draft stock including, but not limited to further injury not from NCAA or university sanctioned events or criminal behavior, or
- ☐ Other valid reasons which The Committee deems.

The NCAA should create a bylaw to remove the one-and-done rule. If a high school player wants to go to college, they should commit at least three years to a team. This commitment will increase their educational value as well as their athletic product. The athletes will have more time to develop on court and with their team and coaches. The proposal is beneficial for the NCAA, but the NBA is only losing money from this deal by partially footing the bill. This does create a better player for the NBA or G League which will help bring in more viewers. The NBA draft will consist of better basketball players because of the increased development time.

The NCAA and the NBA can partner to create events to generate more revenue. The G League could have exhibition games with top college teams. The NBA would keep most of the revenue from these tournaments as well as part of the March Madness revenue. The NCAA has a chance to recruit top talent with this deal, so it may be worth the risk of giving up part of their revenue from the March Madness deal. The NCAA will benefit from a better product of top players staying longer because it creates better teams. People are more committed to their alma mater than to a minor league team and will enjoy watching their school who may have a chance to win more. More universities will have a chance at the elite prospects because of scholarship limits for the schools who are normally involved in the one-and-done rule.

The NBA should be cautious because the G league may not be that successful. Many minor leagues exist in America, and none have the popularity they may be predicting, let alone in the ballpark of college basketball. They should also buy into the policies to show good will towards the players, which may in turn help them during CBA meetings.

The NCAA may also decide to self-finance this program. They would not have to give up so much, but it may be harder to work with the G League so that the G League does not increase benefits so much as to ruin any chance of recruiting elite athletes.

SAHIPP is a common-sense approach to allow the betterment of the student-athletes' situation. This could potentially be a major selling point for the NCAA if they are able to guarantee, if injured, they will be compensated.

VII. OTHER CONCERNS

The injury insurance does not violate amateurism because the "income" is not realized until after amateurism is not applicable. Once drafted, an athlete is no longer considered an amateur. The athlete is paid once the draft occurs, and the amounts are determined by the teams. If the player is never injured, then the student-athlete does not earn anything.

SAHIPP may be considered unfair because it only covers certain athletes, this policy is really only protecting the top athletes each year who earn the protection in a sense. These are the athletes the NCAA is targeting to attend college instead of going straight to the G League or NBA. The athletes who are not eligible may eventually benefit from this policy if it were to expand.

SAHIPP may help convince elite prospects to play in college for those three years. Many young athletes grow up dreaming of playing in March Madness, and this may help coerce elite prospects. Knowing their futures are guaranteed through this program, as long as they work hard, gives elite prospects a reason to attend college. College basketball is king in March and the G League salary may not be able to keep up with the idea of playing in a national championship with millions of viewers.

As of right now, the proposal does not affect other sports. Sports like football are much more prone to injuries, but the NCAA is pressed to find a solution for basketball at the moment as basketball is where the NCAA generates most of their revenue. The partnerships are possible with other sports, but it may be more difficult. Football requires three years before becoming eligible to be drafted and there are a lot more players who end up

being drafted, so a system would be much more complex with the NFL.

In the end, the goal is to benefit the student-athletes who, in the past, have not earned anything after becoming injured. While SAHIPP may not be the prime solution, it brings together the NCAA and the NBA as an attempt to retain amateurism while also truly benefitting the student-athletes. This program will be able to help out many young men in the future, and hopefully it will spread to all college sports for all men and women.

CAN SHE PLAY? THE JOURNEY OF A FEMALE ATHLETE IN THE INDUSTRY OF BASEBALL

Emily Lovelass

For centuries, the all-encompassing world of professional sports have enraptured American citizens. Since the mid-1800s, the enthusiasm for the most popular American sports—baseball, football, and basketball—has been unceasing, with 59 percent of U.S. citizens reporting that they consider themselves sports fans and even more classified as athletes themselves.¹ Participation in athletics has been a tradition passed on for generations, inspiring children to join in on the sports they and their parents love in enormous numbers. Among the waves of young athletes are many girls hoping to turn their passion into a lifelong commitment. After various legislation made it possible for women and girls to partake in sports up to the collegiate level and beyond, several female athletes sought entry into male-dominated leagues. However, after decades of social change and increased interest, women are still being excluded from the major league and collegiate sports. This greatly contrasts with the premises behind Title IX and Equal Employment laws. From Little League to the MLB, the legality of excluding women from playing alongside men has rarely raised questions. Still, with high-caliber athletes like Serena Williams and Lindsey Vonn in the professional circuit, the need to address it has become increasingly urgent. Unfortunately, the sport hailed for being the most patriotic of any played today is also most resistant to gender inclusion.

Baseball is one of the oldest athletic events in the United States, but more than half of the population is left out of it altogether. Most Americans have heard stories over the years about successful female athletes. Whether they have picked up the

¹ Jeffrey M. Jones, As Industry Grows, Percentage of U.S. Sports Fans Steady, Gallup (Mar. 29, 2005), <https://news.gallup.com/poll/183689/industry-grows-percentage-sports-fans-steady.aspx>.

fictional story of Becky “The Icebox” O’Shea in *Little Giants* or Billie Jean King’s very real triumph over Bobby Riggs in *Battle of the Sexes*, there are plenty of narratives that seem to promote the idea that women are more than capable of excelling in every tier of athletics.² However, there is not a single woman playing alongside men in the major leagues of a team sport. Even though the mainstream media has failed to address this issue, women have been trying to break into major sports for some time, particularly in baseball. In 2015, Melissa Mayeux, a Canadian shortstop, was the first woman to be added to the Major League Baseball (MLB) International Registration List.³ Mayeux was only 16 years old and has trained with professionals at elite camps in Europe.⁴ However, four years later, she is still not signed to a MLB team in America.⁵ Although there are a handful of players floating in and out of the minor leagues, not one has gotten any closer to performing in the Big Show.

Given the ubiquitous lack of gender diversity in these sports, one would believe a law keeps these women from playing, but this is not remotely the case. Title IX and the Constitution has long banned discriminatory practices based on sex and gender. This legislation purportedly ensures that no rules are put into place by any entity that would prevent women from receiving the same opportunities as men. Even though major institutions such as the NCAA have made a distinct point of condemning discriminatory hiring practices and promoting equality between sports teams, it is still rare if a woman steps onto the field amongst a team of men. Theoretically, this should make it impossible for Major League Baseball or any collegiate athletics department to legally exclude any woman who is good enough to play. In order to better understand the absence of women in baseball, it is important to pursue the sport’s complicated history from the beginning.

Most Americans have come to know and love the story of the Rockford Peaches, either from a trip to Cooperstown, New York, or

² *Little Giants*, (Warner Bros. 1994); *Battle of the Sexes*, (Cloud Eight Films 2017).

³ Walter Villa, Miami Dade College Woman Could Have Future in Major League Baseball, *Miami Herald* (Jan. 12, 2018, 5:36 PM), <https://www.miamiherald.com/sports/college/baseball/article194239644.html>.

⁴ *Id.*

⁵ *Id.*

the quintessential sports film *A League of Their Own*.⁶ Bravely captained by the incomparable—and entirely fictional—Dottie Hinson, the Peaches are known as an exceptional team of women who stepped up and took over the game of baseball while the men were away at war.⁷ Eventually, the war ends, the men come back home, and the talented female ballplayers sink back into the shadows after the All-American Girls Professional Baseball League (AAGPBL) goes defunct.⁸ One must wonder what would happen if that were not the case, and Dottie Hinson remained dedicated and determined to play with the men in professional baseball from the start. Using Dottie's persona as an example, one can clearly see the obstacles and reprieve she would encounter throughout her journey. There would be many officials and organizations blocking her path and attempting to exclude her due to concealed or overt misogyny. Even so, she could accomplish her goals through the strides made by previous female athletes' gender discrimination suits. At the different levels of baseball, it is unlikely that baseball could legally exclude Dottie Hinson.

Presuming a modern-day Dottie developed her interest in baseball from an early age, it is likely that she would want to take part in her local Little League. There have been several cases since the foundation of Little League Baseball, where the organization attempted to exclude girls in the same age bracket as their male counterparts from participating in the sport. It was largely successful in doing so until the mid-1970s. Technically, the first girl to play in Little League was Kay Johnston.⁹ The Upstate New York ballplayer knew that she was just as good as her brother, so she asked her mother to cut off her hair and signed up as "Tubby."¹⁰ She made the team, and shortly after told her coach the truth, who accepted it given Johnston's talent and put her on first base.¹¹ Not all league officials were so gracious and

⁶ *A League of Their Own*, (Columbia Pictures 1992).

⁷ *Id.*

⁸ *Id.*

⁹ Mia Warren, Jud Esty-Kendall, & Emma Bowman, *A Little League Of Her Own: The First Girl In Little League Baseball*, NPR (Mar. 30, 2018, 4:59 AM), <https://www.npr.org/2018/03/30/597960442/a-little-league-of-her-own-the-first-girl-in-little-league-baseball>.

¹⁰ *Id.*

¹¹ *Id.*

understanding despite her obvious ability to play. Just a year after Johnston's debut, the Little League regulations were amended, including a rule that "girls are not eligible under any conditions."¹² For another two decades, the rules and gender roles kept the majority of girls across the country from partaking in America's pastime. Change finally came in the form of 12-year-old Maria Pepe.¹³ The girl from Hoboken, New Jersey, was placed on a team but only played three games before being forced to leave.¹⁴ Her coach disagreed with the League's policy adamantly, but he told Pepe that he had to cut her or the team would lose its charter.¹⁵ This launched one of the most pivotal steps toward gender equality in recreational sports and baseball specifically. After being an honoree at a Yankees game, Pepe's story gained traction, and the National Organization for Women (NOW) asked the Pepe family if it could represent her.¹⁶ The widespread attention garnered for Pepe's circumstances resulted in the New Jersey Division on Civil Rights ordering Little League, and the local baseball leagues chartered by it, to include girls in the proper age range.¹⁷

In *National Organization for Women v. Little League Baseball, Inc.*, the court found that girls were "not so physiologically inferior to boys of the same age group as to preclude them as a class from competing as safely and successfully as boys."¹⁸ In rendering this decision, it also noted that Little League was a "public accommodation" because it extended an invitation for all children to play.¹⁹ In addition, the Court noted that local governments were the source of funding for areas where practice and play took place, and even if the organization owned their facilities, there was still no proof that there was any

¹² Britni de la Cretaz, Maria Pepe: the New Jersey girl who sued to play baseball with the boys, *The Guardian* (Sep. 23, 2018, 4:30 PM), <https://www.theguardian.com/sport/2018/sep/23/maria-pepe-bfa-baseball-series-now>.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ de la Cretaz, *supra* note 12.

¹⁷ *Id.*

¹⁸ *Nat'l Org. for Women v. Little League Baseball, Inc.*, 318 A.2d 33 (Super. Ct. App. Div. 1974).

¹⁹ *Id.*

reasonable cause for restricting membership.²⁰ As a result, beginning in 1975, Pepe and thousands of girls were now able to compete alongside the boys in Little League Baseball. This decision was so monumental that it still ranks as ESPN's fifth most important moment in women's sports history.²¹ That being said, there is no legal way a League could exclude Dottie, even if a team or coach tried to do so. Girls such as Mo'Ne Davis have played successfully as a part of baseball with little resistance from fans or officials. Davis was the first girl ever to throw a no-hitter in the Little League World Series.²² It is now widely accepted that girls can play alongside boys, but as they transition to high school and higher education, there are more battles to be won.

Typically, once Little League ends for female athletes, their time in baseball does as well. With the introduction of Title IX into both high school and collegiate athletics, women presumed a bright new future for them in athletics. When it was adopted, the legislation came with the understanding that it applied to all educational institutions, whether private or public.²³ However, some pushback from men in these institutions resulted in a devastating blow for women looking to participate in male-dominated sports. The Javits Amendment, designed to essentially restrict a woman's ability to infiltrate major profitable sports, was accepted as part of Title IX.²⁴ The amendment, commonly referred to as the Contact Sport Exception, provides that the Secretary of Health, Education, and Welfare should take into consideration "regulations for intercollegiate athletics with 'reasonable provisions considering the nature of particular sports.'"²⁵ The exception spawned from a belief that the physical differences between men and women were so great that women could not compete with men without being severely injured. The rule also

²⁰ *Id.*

²¹ de la Cretaz, *supra* note 12.

²² Lindsey Adler, Mo'Ne Davis and the Unfair Exclusion of Women from Baseball, *Vice Sports* (Aug. 11, 2014, 3:00 PM), https://sports.vice.com/en_us/article/xyjkqn/mone-davis-and-the-unfair-exclusion-of-women-from-baseball.

²³ Rebecca A. Gulate, *No Girls in the Clubhouse: A Historical Examination of the Institutional Exclusion of Women From Baseball*, *Scripps Senior Theses* (2012), Paper 86, http://scholarship.claremont.edu/scripps_theses/86.

²⁴ *Id.*

²⁵ *Id.*

allows an institution to exclude women from a contact sport for any reason or without reason altogether.²⁶

Within the confines of this rule, there are some sports named explicitly as qualifying sports. It states, “contact sports under the Title IX regulation include boxing, wrestling, rugby, ice hockey, football, basketball, and other sports in which the purpose or major activity involves bodily contact.”²⁷ When evaluating the game of baseball, it is unclear why it is even considered a covered sport under the exception. As one of the most popular and profitable sports in the United States, one would think baseball would be outright indicated by the text if drafters meant for it to qualify. In addition, the sport involves very little contact at any point in a game. For the most part, the only bodily contact that would occur is when a runner is charging at or sliding into a base. Otherwise, athletes playing both offense and defense risk very little bodily contact between one another. In that respect, softball has the exact same level of contact in play, but Javits does not list it as a covered sport. Indeed, women are encouraged and expected to pursue softball as a more appropriate alternative. This has led critics to believe that deliberate attempts are made to keep women out of baseball.²⁸

Despite these considerations, there are still some effective competing methods for a woman, like Dottie, in baseball. For one, this stipulation in Title IX only indicates that coaches, athletic departments, or institutions *can* exclude women in these sports, not that they will. On one hand, some athletes will likely face prohibition from playing, yet there is always the chance that those involved will not be biased if a female athlete’s talent is on par. Beyond that, there have been some actions over the past half-century that may indicate a change is coming. In 1977, the Supreme Judicial Court of Massachusetts opined that a school district’s attempt to exclude women from participating in football and wrestling demonstrated unconstitutional discrimination.²⁹ They stated that “any governmental classification based solely on

²⁶ Id.

²⁷ Gularte, *supra* note 23.

²⁸ Id.

²⁹ Op. of Justices to House of Representatives, 374 Mass. 836, 371 N.E.2d 426 (1977).

sex was subject to the application of the strict scrutiny-compelling state interest test.”³⁰ After examining the district’s argument, the Court found no compelling state interest in excluding women.³¹ Given that there is far more contact in both of the sports involved in this case, one could only presume that a similar scenario involving baseball players would result in the same way.

A major justification for disallowing women in sports like baseball is because an alternative for women already exists. Softball is very similar to baseball in many ways, but the glaring differences are underhand pitching and field size. Those who denounce Title IX believe that, because the Little League created softball after the *Pepe* case, it was an overt maneuver to continue the suppression of women in sports.³² Staggeringly, many states and federal decisions have decided that a “separate but equal” standard (using similar language to early segregation laws) for sports was appropriate.³³ As a result, women are dismissed from playing baseball because they have another “equal” option.³⁴ Regarding their differences, softball is not quite equal to baseball, with some scholars going so far as to call the advent of the sport “sexist.”³⁵ In accordance with these oppositional views, the NCAA has issued documentation indicating that women in collegiate athletics may have a better chance. In 2009, after reviewing cases where student-athletes’ eligibility for playing softball was jeopardized by pursuing baseball, it announced that college should treat softball and baseball as completely separate sports.³⁶ All three Divisions agreed, ensuring that softball’s simple existence will not stand as a reason to exclude any woman from trying out for baseball teams.³⁷ This strengthens the case that all female

³⁰ *Id.*

³¹ *Id.*

³² Nancy Doublin, *Baseball Isn’t For Girls: How Title IX and a Sexist Culture Keep Women Out Of MLB*, *Bleacher Report* (Sep. 9, 2010), <https://bleacherreport.com/articles/456060-how-title-ix-and-a-sexist-culture-keep-women-out-of-mlb>.

³³ *Id.*

³⁴ *Id.*

³⁵ Emma Span, *Is Softball Sexist?*, *The New York Times* (June 6, 2014), <https://www.nytimes.com/2014/06/07/opinion/is-softball-sexist.html?module=inline>.

³⁶ *Resources to Help You Get in the Game*, *Baseball For All* (2018), <https://www.baseballforall.com/right-to-play>.

³⁷ *Id.*

athletes should be eligible to be recruited by or to try out for a team, regardless of whether the same school offers softball. This would give Dottie an excellent argument that she should play on a high school or collegiate team, so long as she was deemed good enough to play.

Supposing this athlete is adequately talented alongside her male counterparts and continues to improve, she would likely want to pursue a career in the major leagues. In order to do so, a league would need to draft her, and she would need to make her way through the minor league to get to the MLB. This is where many female major league hopefuls have gotten stuck. Unsurprisingly, due to the fact that women and girls are largely discouraged from partaking in baseball beyond their youngest years,—either institutionally or explicitly—most players who might have been among the first women to break into the MLB were weeded out in middle school, high school, and college. As *BleacherReport*'s Nancy Doublin accurately claims, "Girls don't get to play baseball on a competitive level, so they don't get drafted to play baseball at the professional level."³⁸ Thus, there are hardly any officials, owners, or coaches who are women either. These kinds of jobs go to former players and industry veterans for the most part, so this is just another byproduct of the system.³⁹ In addition, there does not seem to be any real push to make such a change. The vast majority of scholarly articles or media coverage on the subject are written by women, hoping to use their platform as a way to draw attention to an underrecognized injustice in American society. Reading through the official rules and bylaws of Major League Baseball, there is not a single indication that expressly denies women a spot on a major team. Still, the fact remains that not a single woman occupies one.

Although the MLB banned women in 1952, the organization repealed that ban in the '90s, which led to the eventual introduction of Melissa Mayeux to the sport.⁴⁰ Unlike teams run by educational institutions or recreational leagues, labor law

³⁸ Doublin, *supra* note 32.

³⁹ *Id.*

⁴⁰ Sheryl Ring, Can Major League Baseball Legally Exclude a Woman?, FANGRAPHS Blog (Mar. 7, 2018), <https://blogs.fangraphs.com/can-major-league-baseball-legally-exclude-a-woman/>.

governs Major League Baseball. This makes any intended or subliminal exclusion of women subject to analysis under employment discrimination statutes. Taking into consideration the Civil Rights Act and the Equal Employment Opportunity Commission (EEOC), it is illegal for any employer not to hire any person for the sole reason of his or her biological sex.⁴¹ Despite these restrictions, some individuals opposed to allowing women to compete in professional sports have argued that being a male is a bona fide occupational quality (BFOQ).⁴² The essential idea behind this claim is that it is necessary for a person to have a specific quality (such as being a man) in order to qualify for a job. The traditionalists argue that being male in baseball is a BFOQ because women do not possess the strength, agility, or endurance to be properly employed as a baseball player.⁴³ Historically, from cases such as *United States v. Virginia*, it is clear that no such physical deficiency can be presumed.⁴⁴ In that particular case, the court ruled that so long as it was possible that some women could meet the physical qualification to join the Virginia Military Academy, the institution had no right to exclude them.⁴⁵ The likelihood that absolutely zero women can meet the physical demands of being a professional athlete seems highly unlikely considering some serve in the United States military.

In order to disprove the idea that women either cannot compete due to the BFOQ theory or have not because they are not on par with the level of execution needed to play, it is essential to examine how the few female athletes in the minor leagues and other locales are performing. Jen Mac Ramos is a *Hardball Times* writer who has conducted extensive research on women's sports capabilities.⁴⁶ After watching several American and Canadian women play in minor league teams and similarly situated groups, she determined that women are more than capable of at least pitching, catching, and fielding at the same level as men.⁴⁷ Despite generally smaller frames, they still stand a fighting chance at

⁴¹ 42 U.S.C.S. § 2000e.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *United States v. Virginia*, 518 U.S. 515, 116 S. Ct. 2264 (1996)

⁴⁵ *Id.*

⁴⁶ Ring, *supra* note 39.

⁴⁷ *Id.*

playing baseball at an equivalent pace.⁴⁸ In addition, researchers have found that women tend to be more limber because their tendons' laxity.⁴⁹ As a result, they are less likely to sustain soft-tissue injuries in their arms that often end male players' careers or force them into physical therapy.⁵⁰ This is a frequent problem with current pitchers in the MLB, making female athletes more appealing for long-term stability.⁵¹ Therefore, it is a statistical and economic anomaly that no major league team is scouting any woman, either nationally or internationally, to play.

Another major roadblock for a female athlete is the history behind Title VII. The statute's original passing came with a comment about an "all-male baseball team" being a permissible exception to the rules set therein.⁵² Courts may seek to look at such legislative history in order to discern the writer's intent, but modern ideals have them moving away from doing so. Title VII became law in 1964, which was a far different world than the one women face today. It is indisputable that much has changed since then. Women are still facing inequalities in the workplace, and the arena of professional sports is no different. Prominent athletes such as Alex Morgan and Megan Rapinoe are pursuing a lawsuit alongside the rest of the U.S. Women's Soccer Team in order to have access to fair wages.⁵³ Despite gaining more titles and generating more profits nationally, the team discovered that they earned just 38 percent of what the Men's Soccer Team was receiving per game.⁵⁴ These women are just the latest to fight for a longstanding history of women being treated as inferior athletes, regardless of the sport. This may very well demonstrate that even though it is unlikely that the MLB would be able to exclude a

⁴⁸ Id.

⁴⁹ Gretchen Reynolds, When Will Women Play Major League Baseball? (And Not Just on TV), *The New York Times* (Sep. 22, 2016), <https://www.nytimes.com/2016/09/22/well/move/when-will-women-play-major-league-baseball-and-not-just-on-tv.html>.

⁵⁰ Id.

⁵¹ Id.

⁵² Id.

⁵³ Maggie Mertens, The U.S. National Women's Soccer Team Makes a Really Good Case for Equal Pay, *THE ATLANTIC* (Mar. 19, 2019), <https://www.theatlantic.com/entertainment/archive/2019/03/why-the-us-national-womens-soccer-team-is-suing/585202/>.

⁵⁴ Id.

woman from being on a team legally, antiquated concepts of women's physical capabilities and worth as athletes could be the most important remaining obstacle in women's paths.

What officials and team owners neglect to realize is that adding women to their rosters would have major benefits to the game. It is no secret that baseball has had some issues with attendance and viewership in recent years. According to *Forbes*, in 2018, game attendance dipped below 70 million, which has not happened since 2003.⁵⁵ Several reasons are provided for this change, including poor weather, changing sales strategies, and more strike-outs than hits for the first time in the league's history.⁵⁶ Statistically, teams are not doing as well as they used to, and fans are taking note of it.⁵⁷ All of these matters aside, however, there are more serious issues threatening Major League Baseball than rain and bad batting averages. The children of more recent generations are simply not raised to love the sport as they once were.⁵⁸ This presents obvious detriments to the longevity of the sport that could ultimately result in a major decline in interest over time. If younger people are not being brought up on baseball, the older fans might be the last group to make efforts to watch and attend games. Indeed, studies show that half of all fans of the MLB are aged 55 or older.⁵⁹ In addition, the gender makeup for the overall fanbase is typically 70 percent male and 30 percent female.⁶⁰ Most importantly, the number of women getting involved in sports is steadily rising, shattering stereotypes and creating new opportunities for leagues to expand.⁶¹ When this subsection of

⁵⁵ Maury Brown, Why MLB Attendance Dropped Below 700 Million For The First Time In 15 Years, *FORBES MAGAZINE* (Oct. 3, 2018, 7:00 AM), <https://www.forbes.com/sites/maurybrown/2018/10/03/how-mlb-attendance-dropped-below-70-million-for-first-time-in-15-years/#713d467f61bf>.

⁵⁶ *Id.*

⁵⁷ Brown, *supra* note 55.

⁵⁸ Christine Brennan, NFL certainly has its issues, but Major League Baseball is the one that's truly suffering, *USA TODAY* (Oct. 10, 2018, 5:08 PM), <https://www.usatoday.com/story/sports/columnist/brennan/2018/10/10/baseball-ratings-attendance-length-games-spell-trouble-mlb/1592862002/>.

⁵⁹ Demographics of Sports Fans in U.S. DEMOGRAPHIC PARTITIONS (July 10, 2017), <http://demographicpartitions.org/demographics-of-sports-fans-u-s/>.

⁶⁰ *Id.*

⁶¹ Shannon Ryan, Start taking female sports fans — and their impact — seriously, *CHICAGO TRIBUNE* (Dec. 3, 2016, 2:18 PM),

Americans is gone, baseball will be at a serious disadvantage unless they choose to adapt the game majorly. If a dedicated effort is not made by baseball executives to connect with a younger and more diverse group of fans, profits will greatly suffer.

As a bottom-line interest, Major League Baseball needs to start including women and girls more in their discussions, both as athletes and as fans. Women are a substantial group and untapped demographic when it comes to all sports.⁶² They are the largest growing population regarding fandom, and still, rarely recognized as a legitimate part of the game.⁶³ In order for a significant shift in successful marketing and for baseball to adapt, focusing on female participation is imperative. There have been fluctuating statistics showing ambivalent fans across all sports, with younger women being the least likely to partake.⁶⁴ Key age groups that are integral to maintaining baseball's prevalence in American culture have little interest in going to see their local teams play or catching a game broadcasted on television or radio.⁶⁵ Analyzing males' consistent interest in the sport, it is entirely apparent why the disparity exists: Men see themselves in the game. Major League Baseball has historically been played in its entirety by men. Barring the formation of the AAGPBL, men have held a monopoly over the game since its inception. Furthermore, baseball players with questionable backgrounds have remained heroes in the eyes of consumers. Fans easily forget acts like sexual violence or misconduct as an individual athlete hits another home run.⁶⁶ Not only is baseball not a safe space for female athletes, but it has continually demonstrated that it also is not a safe space for female fans. Between these two pivotal circumstances, women are not and have not been wholly invested in the sport. The easiest solution to the crisis facing baseball in America is by adding female athletes to rosters.

If women are not seeing representatives of their gender on the field, whether as a coach, umpire, or player, this demographic

<https://www.chicagotribune.com/sports/columnists/ct-sports-women-ryan-spt-1204-20161203-column.html>.

⁶² Id.

⁶³ Id.

⁶⁴ Ryan, *supra* note 55.

⁶⁵ Id.

⁶⁶ Id.

will surely turn away from baseball altogether. The profit that could result from introducing young female talent into the game would skyrocket the MLB's profits and improve attendance significantly.⁶⁷ Baseball has exhausted its appeal to their male viewership, so in order to see real growth, the MLB should explore these options. Giving women the proper respect they deserve in the stands and on the field could change sports forever. Part of the reason why the AAGPBL was so successful was because of the initial novelty of women playing the game, but a larger factor was the introduction of women in a unique position to be role models to young girls.⁶⁸ Despite some older fans who lean more toward the traditional side of athletics, fresh faces and an inclusive landscape would indubitably entice younger fans and women of all ages to watch, and more importantly, to feel welcomed by the community.⁶⁹ In an era of social change and shifting worldviews, now is the time to bridge the gap in women's and men's sports.

Despite enormous strides in women's rights, both in and out of athletics, there is still some progress needed. There are many safeguards in place that would theoretically prohibit any team, league, or official from excluding women from baseball. Yet there is still a total absence of female athletes in Major League Baseball. Whether this reality results from systematic deterrence or the sexist standards that have been plaguing the sports sphere for centuries, women are still largely underrepresented in America's pastime. Rules banning girls explicitly from Little League teams are long gone, but from the start of their educational career, the same student-athletes are either pigeonholed into softball or encouraged to quit the sport forever. As a result, even capable women have not broken into a sport that America has proven to love time and time again, despite the obvious benefits it would provide. With viewership and ticket sales declining, Major League Baseball has an opportunity to revitalize the game in a way that has never been done before, while showing women that they are worthy of recognition as teammates and supporters. Those who oppose this shift in the sport may claim

⁶⁷ Gularte, *supra* note 23.

⁶⁸ *Id.*

⁶⁹ Gularte, *supra* note 23.

tradition is as essential to baseball as hotdogs and Cracker Jacks, but as times change, so should baseball.

