

Working Twice as Hard for Less Than Half as Much: A Sociolegal Critique of the Gendered Justifications Perpetuating Unequal Pay in Sports

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INTRODUCTION

“The difference is the total amount of revenue. It’s not a gender issue. It’s a revenue issue.”¹ This was Mark Cuban’s response when called out about the pay gap between men’s and women’s professional basketball players by Women’s National Basketball Association (WNBA) player Skylar Diggins-Smith. So often when the question, “Why do male athletes get paid more than female athletes?” arises, the response is, “Because men’s sports generate more revenue.”² While men’s sports typically do generate more revenue, people seldom consider why this is the case. Is it because men produce a higher quality product? Is it because men’s sports require more skill? Is it because men tend to win more international competitions? This Note argues that none of these explanations account for the differences in revenue and the subsequent pay gap, and contrary to the opinion expressed by Mark Cuban, the three are inseparable: The wage gap is both a revenue and gender issue. Through the lens of feminist theory and critical race theory, I argue that men’s sports generate more revenue than women’s sports in part because consumer preferences are rooted in internalized racism, sexism, and homophobia.

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1. Brad Townsend, *Mavericks Owner Mark Cuban Met with Skylar Diggins-Smith After Her Pay-Gap Comments. Here’s What Happened*, DALLAS MORNING NEWS (Oct. 22, 2018), <https://perma.cc/YXV8-A6NR>.

2. Shane Ferro, *Here’s Why It’s Fair that Female Athletes Make Less than Men*, BUS. INSIDER (July 7, 2015), <https://perma.cc/HY7F-JNHS>; Olivia Abrams, *Why Female Athletes Earn Less than Men Across Most Sports*, FORBES (June 23, 2019), <https://perma.cc/H28F-5JN7>.

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A foundational assumption of feminist theory is that, because society organizes people based on stereotypical gender roles, women are expected to perform gender in ways that conform to hegemonic femininity.³ A key component of critical race theory is intersectionality, which puts forth idea that people experience discrimination because of multiple marginalized identities.⁴ Therefore, women who play sports, especially Black women and queer women, directly defy hegemonic femininity by exhibiting characteristics that do not conform to the way society expects women to look and behave. As a result, I argue that one reason why consumers do not want to watch women—let alone women who possess several marginalized identities—play sports, is that these women are not performing gender in the way that consumers expect of them.

From Kathryn Johnston cutting off her hair in order to play Little League Baseball in 1950,⁵ to Katherine Switzer registering under a pseudonym in 1967 to participate in the (then men's-only) Boston Marathon,⁶ women throughout history have fought for equality in the sports industry. With the passage of Title IX in 1972, the future looked promising for creating equal opportunities for women in sports. However, even after the passage of Title IX, we have seen female athletes threatening to boycott major sporting events, protesting unequal facilities, and, most recently, suing governing organizations for gender discrimination.⁷

Leagues and teams generate most of their revenue from three sources: media rights, gate receipts, and sponsorships.⁸ It is no coincidence that these main sources of revenue are largely dictated by consumer viewership and demand. Under the Equal Pay Act of 1963, it is generally illegal for employers to discriminate on the basis of sex regarding wages.⁹ Further, in *Diaz v. Pan American World Airways, Inc.*, the Fifth Circuit held that employers cannot discriminate based on consumer preferences unless consumer preferences are essential to a company's ability to perform its main function or service.¹⁰ This Note argues that because women in sports directly contradict notions of femininity, consumer's desire to watch women play sports is adversely affected, thereby lowering their revenue-generating potential. As a result, by paying women lower wages based on revenue, leagues, teams, and governing organizations are discriminating against women athletes and

3. Vikki Krane, *We Can Be Athletic and Feminine, But Do We Want To? Challenging Hegemonic Femininity in Women's Sport*, 53 QUEST 115, 117 (2001).

4. Jane Coaston, *The Intersectionality Wars*, VOX (May 28, 2019), <https://perma.cc/K3UR-P8WZ>.

5. Mia Warren, Jud Esty-Kendall & Emma Bowman, *A Little League of Her Own: The First Girl in Little League Baseball*, NPR (Mar. 30, 2018), <https://perma.cc/KW9S-MHWJ>.

6. Jenny McCoy, *13 Times Women in Sports Fought for Equality*, GLAMOUR (Apr. 1, 2020), <https://perma.cc/AR9P-5MPF>.

7. *Id.*

8. *PwC 2021 Sports Outlook*, PWC, <https://perma.cc/5SS8-27AM>.

9. 29 U.S.C. § 206(d).

10. *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 388-389 (5th Cir. 1971). In *Diaz*, plaintiff sued Pan American Airways for discrimination after being denied a flight attendant position because the airline only hired female flight attendants. According to Pan American Airways, this policy of only hiring female flight attendants was justified because customers preferred female flight attendants.

coaches based on consumer preferences, thereby potentially violating the Equal Pay Act.

Part I provides a historical and current look at the state of women in sports. Part II argues that the simple rationale that “men generate more revenue” quells the fight for equal pay because it fails to consider the reality of *why* men generate more revenue—which is in part attributable to consumer preferences that are rooted in sexism, homophobia, and racism. Part III analyzes sports examples in order to introduce the theoretical underpinnings of feminist theory and critical race theory and the application of these theories to legal doctrine. Lastly, Part IV proposes that the doctrine set forth in *Diaz* should be expanded and applied to the sports context. Doing so would allow women in sports to argue that an important reason why men generate more revenue is due to consumers internalized sexism, racism, and homophobia; therefore, basing compensation off revenue is discriminating based on consumer preferences.

I. WOMEN’S SPORTS OVERVIEW

The sports industry is dominated by the “Big Four” sports leagues: National Basketball Association (NBA), National Football League (NFL), Major League Baseball (MLB), and National Hockey League (NHL). Despite the fact that there are over twenty professional women’s sport leagues and the fact that there are roughly equal numbers of men and women participants in sports at both the high school and college levels,¹¹ according to Sportscasting, none of the top ten most profitable sports leagues in the world are women’s sports leagues.¹² To make this point more concrete, it was estimated that the Ladies Professional Golf Association (LPGA), which is one of, if not *the*, highest revenue-generating women’s professional leagues, generated approximately \$126 million in 2018.¹³ Conversely, the NHL, which is the lowest revenue-generating league out of the Big Four, generated \$5.09 billion during the 2018–19 season,¹⁴ or over forty times the 2018 LPGA revenue.

Unsurprisingly, a league’s profitability is largely determined by its revenue. Since the argument against equal pay for women in sports is that men’s sports generate more revenue, it is important to consider *how* sports organizations generate revenue. While there are numerous revenue streams for leagues and teams, the main sources of revenue are broadcasting rights, ticket sales, and sponsorships. In 2019,

11. High school and college athletic programs are feeders for professional sports leagues. During the 2017–18 academic year, men represented 56% of all NCAA athletes and women represented 44%. Amy Wimmer Schwarb, *Number of NCAA College Athletes Reaches All-Time High*, NCAA (Oct. 10, 2018), <https://perma.cc/7MCK-Z2GT>. During the 2018–19 school year, 57.13% of high school athletes were men and 42.87% were women. *2018–19 High School Athletics Participation Survey*, <https://perma.cc/62Q9-N2PY>.

12. Zack Willis, *America Only Has 4 of the Most Profitable Sports Leagues in the World*, SPORTSCASTING (Apr. 11, 2020), <https://perma.cc/D3L8-J8RX>.

13. *Ladies Professional Golf Association (LPGA)*, CAUSE IQ, <https://perma.cc/MTD5-RPFB> (last visited Sept. 30, 2021).

14. Christina Gough, *Total Revenue of NHL Teams 2005–2009*, STATISTA (Jan. 14, 2020), <https://perma.cc/RKL7-J6VY>.

media rights generated \$20.9 billion, gate revenues generated \$19.6 billion, and sponsorships generated \$17.9 billion in the North American sports market.¹⁵ Merchandising was the fourth largest source of revenue, generating \$14.7 billion in 2019.¹⁶ Because broadcasting rights, ticket sales, and sponsorships are the largest sources of revenue, it is important to note that these sources are greatly influenced by consumer viewership and demand. While women's sports leagues similarly have the opportunity to sell media rights, tickets, and sponsorship rights, the value of these revenue sources is reduced due to both the athletes' marginalized identities and the historical and present denial of equal opportunity for women in the industry.

A. HISTORICAL INEQUALITY IN THE SPORTS INDUSTRY

Title IX declares that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”¹⁷ Before the passage of Title IX in 1972, very few women participated in sports. Before 1972, only “one in 27 girls played sports,”¹⁸ and, when women did play at the collegiate level, “women’s sports teams received 2% of the average university’s athletic budget.”¹⁹ Because athletics in schools are included in “education program[s] or activit[ies],” Title IX mandates that institutions provide both women and men equal opportunities to compete, equitable scholarships proportional to participation, and equal treatment.²⁰ As of 2016, forty-four years after the passage of Title IX, “there has been a 545% increase in the percentage of women playing college sports and a 990% increase in the percentage of women playing high school sports,” and two in five girls play sports.²¹

Despite the effectiveness of Title IX at increasing participation in sports, women in the sports industry continue to be denied equal opportunities to compete, equal access to facilities and resources, and most notably, equal pay. In 1973, a lawsuit filed by group of women in sports, *Kellmeyer v. NEA*, prompted the Association for Intercollegiate Athletics for Women (AIAW) to change their rule that prohibited women with scholarships from participating in AIAW competitions.²² In 1976, women on Yale’s varsity crew team stripped down in protest over the inadequate shower facilities offered to them compared to those provided to the men’s rowing team.²³ And, in 2008, women ski jumpers sued the Vancouver Organizing

15. 2019 *PwC Sports Outlook*, PwC, <https://perma.cc/DC9C-VREK>.

16. *Id.*

17. 20 U.S.C. § 1681(a).

18. *Title IX and the Rise of Female Athletes in America*, WOMEN’S SPORTS FOUND. (Sept. 2, 2016), <https://perma.cc/GZE9-EFLN>.

19. Rebecca Levinson, *Title IX: History, Influence and More*, <https://perma.cc/Q222-FXWN>.

20. *Title IX Frequently Asked Questions*, NCAA, <https://perma.cc/6PAG-A84U>.

21. *Title IX and the Rise of Female Athletes in America*, *supra* note 18.

22. McCoy, *supra* note 6. Complaint, *Kellmeyer v. Nat’l Educ. Ass’n*, 73-CV-21 (S.D. Fla. Jan. 4, 1973). The case was ultimately dismissed because the AIAW changed the rule after the complaint was filed. YING WUSHANLEY, *PLAYING NICE AND LOSING: THE STRUGGLE FOR CONTROL OF WOMEN’S INTERCOLLEGIATE ATHLETICS, 1960–2000*, at 69 (2004).

23. McCoy, *supra* note 6.

Committee so that they could compete in the then men's-only sport at the 2010 Winter Olympics.²⁴ While these specific issues have been resolved, equal pay continues to be at the forefront of the discourse surrounding women in sports. From Billie Jean King threatening to sit out of the U.S. Open to protest unequal prize money in 1973, to Venus Williams penning an open letter to Wimbledon pleading for equal pay in 2006, to the U.S.A. Hockey Women's National Team threatening to boycott the 2017 World Championships unless there was a wage increase, to the U.S. Women's National Soccer Team suing the U.S. Soccer Federation for equal pay,²⁵ the fight for equal pay has been going on for decades and has yet to be resolved.

B. CURRENT STATE OF WOMEN'S SPORTS

While they have faced many setbacks, women in sports have made significant gains. The WNBA, widely considered the most successful professional women's sports league, entered its twenty-fifth season in 2021. The WNBA continues to show an upwards trajectory: Average viewership increased by 68%²⁶ and Finals viewership grew by 15% during the 2020 season.²⁷ Even more impressively, during COVID-19, the WNBA's 2020 season competed with the NBA season, MLB season, and NHL season. However, out of these leagues, the WNBA was the only one that saw an increase in viewership. Indeed, the NBA, NFL, MLB, and NHL all saw declining viewership in 2020.²⁸ Another women's league that experienced rapid growth in 2020 was the National Women's Soccer League (NWSL). The 2020 Challenge Cup saw a 493% increase in viewership.²⁹ One of the newest professional women's leagues, the Premier Hockey Federation (PHF), formerly the National Women's Hockey League, has also shown significant growth: Viewership from the NWHL's partnership with Twitch surpassed expectations in 2019.³⁰

The success of U.S. women's sports leagues also extends to U.S. Women's National and Olympic Teams. The U.S.A. Women's Basketball Team ("Team U.S.A.") is one of the "winningest" teams in Olympic history. Team U.S.A. has not lost an Olympic tournament game since 1992,³¹ and recently captured a seventh straight Olympic gold medal in 2021, tying the longest gold medal streak in Olympic

24. Allan Dowd, *Women Ski Jumpers Sue for Place in 2010*, REUTERS (May 21, 2008), <https://perma.cc/HHH9-EKJF>.

25. Maya Salam, *The Long Fight for Pay Equality in Sports*, N.Y. TIMES (Mar. 11, 2019), <https://perma.cc/TY5U-P2UE>.

26. Cassandra Negley, *WNBA Average Viewership Grows 68 Percent During a Season Focused on Social Justice*, YAHOO SPORTS (Oct. 1, 2020), <https://perma.cc/8JXN-PBQA>.

27. Eric Nemchock, *Viewership of 2020 WNBA Finals up 15 Percent from 2019*, SWISH APPEAL (Oct. 9, 2020), <https://perma.cc/YY69-MCA8>.

28. *Id.*; Sam Carp, *Report: Stanley Cup Final TV Ratings Down 61% on 2019*, SPORTSPRO (Sept. 30, 2020), <https://perma.cc/ALV8-QLW3>; Meredith Cash, *TV Ratings for North America's Top Women's Soccer League Are up a Whopping 493%. Here's how They Succeeded as Other Sports Are Losing Viewers*, INSIDER (Oct. 29, 2020), <https://perma.cc/G8NW-366W>.

29. Cash, *supra* note 28.

30. Sam Carp, *NWHL's Twitch Deal "Surpassing Expectations", Says Commissioner*, SPORTSPRO (Nov. 8, 2019), <https://perma.cc/GS2F-TU9R>.

31. Andrew Keh, *U.S. Women's Basketball Routs Japan for 7th Consecutive Gold*, N.Y. TIMES (Aug. 7, 2021), <https://perma.cc/CJ83-8SNX>.

team sports.³² The U. S. Women's National Team (USWNT) is also incredibly successful: Not only has the team won the most Olympic soccer gold medals in the world,³³ but also the most World Cups compared to their competition.³⁴ In fact, the 2015 Women's World Cup Final, in which the USWNT defeated Japan, is the most watched soccer match domestically in U.S. history.³⁵ The USWNT is one of the only, if not *the* only, women's sports teams that generates more revenue than its male counterparts.³⁶

Despite these significant gains, women in sports are still treated as second class citizens. For example, women make up 40% of all participants in sports, but receive only 4% of sports media coverage.³⁷ Furthermore, these discrepancies are not limited to comparing men in sports to women in sports—discrepancies in media attention and overall treatment exist even *within* women's sports when accounting for race, sexual orientation, and gender expression.³⁸

C. A DEEPER LOOK AT THE WAGE GAP

One of the easiest ways to observe the disparities between men and women in sports is through examining the glaring wage gap. Sports aside, the gender pay gap has been a topical issue over the past few years. When looking at the uncontrolled gender pay gap—the median salary regardless of job type or seniority—white women earned \$0.81 for every dollar earned by white men in 2020.³⁹ Exploring the data even further reveals that American Indian & Alaska Native, Black, and Hispanic women make \$0.75, Native Hawaiian and Other Pacific Islander women make \$0.80, and Asian-American women make \$0.95 for every dollar earned by white men.⁴⁰

32. Nick Selbe, *U.S. Women's Basketball Team Captures Seventh Straight Gold with Win over Japan*, SPORTS ILLUSTRATED (Aug. 8, 2021), <https://perma.cc/YXB5-NQ7D>.

33. *USWNT's Olympics Record: How Many Gold Medals Has the U.S. Women's Soccer Team Won?*, GOAL (Mar. 9, 2021), <https://perma.cc/FC7M-RWRV>.

34. *Women's Soccer World Cup Winners*, <https://perma.cc/A2K9-TD3K> (last visited Sept. 30, 2021).

35. *Women's World Cup Final Is Most-Watched Soccer Match in U.S. History*, USA SOCCER (July 8, 2015), <https://perma.cc/PC9P-XTWD>.

36. Complaint, *Morgan v. U.S. Soccer Fed'n, Inc.*, No. 2:19-cv-01717, 2019 WL 1199270 (C.D. Cal. Mar. 8, 2019); Rachel Bachman, *U.S. Women's Soccer Games Outearned Men's Games*, WALL ST. J. (June 17, 2019), <https://perma.cc/Y3TB-WW5H>.

37. Macaela MacKenzie, *Female Athletes Receive Only 4% of Sports Media Coverage—Adidas Wants to Change That*, GLAMOUR (July 16, 2019), <https://perma.cc/KHS5-FV2G>.

38. A study conducted by Risa F. Isard and Dr. E. Nicole Melton showed that, in a league that is 80% Black, WNBA players received an average of 52 media mentions while white WNBA players had an average of 118. Further, gender presentation exacerbates these numbers, as Black players who presented masculine received an average of 44 media mentions while white athletes who presented masculine received an average of 212 media mentions. Risa F. Isard & E. Nicole Melton, *Make This the Season We End Discriminatory Sports Coverage*, SPORTS BUS. J. (May 4, 2021), <https://perma.cc/Z2AZ-L4ZS>.

39. *The 2020 Gender Pay Gap Report Reveals that Women Still Earn Less for Equal Work*, Payscale, <https://perma.cc/X543-CLYN>.

40. *The 2020 Gender Pay Gap Report Reveals that Women Still Earn Less for Equal Work*, *supra* note 39.

While these statistics are troubling enough, the wage gap in the sports context is even more glaring. But just how bad is the sports wage gap?

In 2018, A’ja Wilson, the WNBA’s number one draft pick, made \$52,564 from her rookie contract.⁴¹ Meanwhile, the NBA’s number one draft pick that year, Deandre Ayton, made \$6.8 million.⁴² During the 2019 season, the average compensation for a WNBA player was approximately \$116,000, while the average salary for an NBA player was \$7.5 million.⁴³ For the 2019 season, the NWSL had a minimum salary of \$16,538 and a maximum salary of \$46,200; during that same season, Major League Soccer (MLS) had a minimum salary of \$70,250.⁴⁴ This pay gap is not only observed with professional athletes, but it also extends to coaches. Kim Mulkey, former head coach of Baylor Women’s Basketball team, has been coaching for thirty-six years and has won three NCAA Division I titles, eleven conference tournaments, and two AP College Basketball Coach of the Year awards.⁴⁵ The Baylor Men’s Basketball coach, Scott Drew, has been coaching for twenty-eight years and has never won a conference tournament, AP College Basketball Coach of the Year, and prior to the 2020–21 season, had never won an NCAA Division I title.⁴⁶ In 2017, it was estimated that Kim Mulkey’s total compensation was \$1,884,206;⁴⁷ on the other hand, Scott Drew’s total compensation was estimated to be \$2,818,811.⁴⁸ While Scott Drew won his first NCAA Division I title earlier this year, this pay differential was in place prior to these achievements.

It is no secret that a glaring wage gap exists in the sports industry. However, the focus of this Note is not to argue that one exists, but rather to get to the root of *why*

41. Al Neal, *Yes, The WNBA Wage Gap Is a Real Thing*, MEDIUM: GRANDSTAND CENT. (July 13, 2018), <https://perma.cc/7TD3-HHV3>.

42. *Id.*

43. Erin Delmore, “We Didn’t Back Down”: *How Women’s Basketball Players Scored Major Wins for Equal Pay*, NBC NEWS (February 6, 2020), <https://perma.cc/W7TL-K2F2>. The \$116,000 figure was initially reported in a tweet by NBA Communications. @NBAPR, TWITTER (Apr. 28, 2019, 9:15 PM), <https://perma.cc/T3BE-QCGA> (“In accordance with the CBA, the average compensation for WNBA players last season was \$116,000.”). However, some criticized the tweet for reporting compensation rather than salary. *See, e.g.*, Sue Bird (@S10Bird), TWITTER (Apr. 29, 2019, 7:22 PM), <https://perma.cc/J4JT-M7R2> (“Average comp shmaverage comp. This is an attempt to twist the issue at hand = SALARY”). In response to the controversy, Howard Megdal compiled data on base salaries, a more commonly-used figure when reporting on player pay. Howard Megdal, *Your High Post Hoops WNBA Salary Breakdowns, Team-by-Team Edition*, HIGH POST HOOPS (Apr. 29, 2019), <https://perma.cc/2B3U-EN2V>.

44. Thomas Barrabi, *As USWNT Fights for Equal Pay, League Revenue Slows Efforts To Lose Salary Gap*, FOX BUS. (July 8, 2019), <https://perma.cc/2FGP-F3DB>. To add context to this number, the federal poverty level for a one-person household was \$12,880 and was \$17,420 for a two-person household in 2019. While being a professional athlete, regardless of gender, is more than demanding enough to be a full-time job, many NWSL players work other jobs to support themselves. In fact, the NWSL Players Association recently launched the #NoMoreSideHustles campaign accompanied by a list of demands that seeks to ensure that a career in the NWSL is one that is viable and sustainable. *See #NoMoreSideHustles for Professional Athletes*, <https://perma.cc/BT7N-3BYU>.

45. *Kim Mulkey*, BAYLOR BEARS, <https://perma.cc/NL5W-G5P6> (last visited Sept. 30, 2021).

46. *Scott Drew*, BAYLOR BEARS, <https://perma.cc/KHX8-YCR4> (last visited Sept. 30, 2021).

47. *WBB Salary Survey 2016–2017*, SPORTS INFO, <https://perma.cc/DRL5-8JUQ> (last visited Sept. 30, 2021).

48. Mattisbear, *NCAA Tournament Coach Salaries*, OUR DAILY BEARS (Mar. 29, 2017), <https://perma.cc/YX6B-G54Q>.

it exists. Since revenue generation is offered as a justification for this gap and the main sources of revenue are largely dictated by consumer viewership, consumer preferences directly affect the revenue-generating potential of a sports league.

II. “MEN GENERATE MORE REVENUE” IS OVERSIMPLISTIC AND UNFAIRLY QUELLS THE FIGHT FOR EQUAL PAY

The Equal Pay Act mandates that:

[N]o employer . . . shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate 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.⁴⁹

The Act only contains four exceptions under which an employer can pay differing wages to employees of different sexes: when wages are based on (1) a seniority system; (2) a merit system; (3) quality or quantity of production; or (4) factors other than sex.⁵⁰ The Equal Pay Act sets the precedent that men and women should be paid the same for equal work.

In *Diaz v. Pan American World Airways, Inc.*, Celio Diaz sued Pan American Airways for discrimination after he was denied a flight cabin attendant position because Pan American Airways had a policy of only hiring female flight cabin attendants. The central question in this case was whether being female was a bona fide occupational qualification for the position of flight cabin attendant. Pan American Airways argued that customers preferred female flight cabin attendants because female attendants were better suited to address “the special psychological needs of its passengers.”⁵¹ Employers may hire employees based on qualities such as religion, sex, or national origin, if “religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.”⁵² The court found that just because Pan American Airways’ customers preferred female flight cabin attendants, “being female” was not a bona fide occupational qualification because hiring male flight cabin attendants would not impair the airline’s ability to transport travelers from one place to another.⁵³ As *Diaz* highlights, employers typically cannot use the preferences and prejudices of consumers to discriminate against employees. Such preferences and prejudices can be taken into account “only when it is based on the company’s inability to perform the primary function or service it offers.”⁵⁴

49. 29 U.S.C. § 206(d)(1).

50. *Id.*

51. *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 387 (5th Cir. 1971).

52. *Id.* at 386 (quoting the Civil Rights Act of 1964 § 703(e), 42 U.S.C. § 2000e-2(e)).

53. *Id.* at 388.

54. *Id.* at 389.

A. EQUAL PAY ACT CLAIMS IN THE WOMEN'S SPORTS CONTEXT

Unequal pay due to revenue generation is not a new issue. In fact, it has previously come before courts in the sports context. In this Section, I compare three cases where NCAA female coaches challenge their respective universities under the Equal Pay Act.

In *Jacobs v. College of William & Mary*, Eloise Jacobs, former Women's Basketball Coach at the College, sued the university under the Equal Pay Act.⁵⁵ Jacobs argued that her dual roles as Director of Women's Intramurals and Women's Varsity Basketball Coach, along with her teaching responsibilities for bowling, were equal to the work required of the Men's Basketball Coach, his two assistants, and the Baseball Coach. In order to defeat this claim, the College had to prove that the Equal Pay Act did not apply when comparing Jacobs's job to the job of the Men's Basketball Coach, his two assistants, and the Baseball Coach. First, the court rejected Jacobs's comparison to the Baseball Coach because he taught full time while Jacobs did not.⁵⁶ The court then rejected Jacobs's comparison to the Men's Basketball Coach and his two assistants, noting that "men's basketball is a revenue producing sport and women's basketball is not."⁵⁷ The court explained that generating revenue comes with the added burdens of selling season tickets, fundraising for scholarships, and of course, winning.⁵⁸ These added burdens led to the conclusion that "[t]he levels of coaches 'are quite broad . . . requiring widely varying skills and background.'"⁵⁹ Therefore, the court found that the Men's Basketball Coach, his assistants, and the Baseball Coach "had greater responsibilities and were required to exercise greater skill in the performance of their jobs" when compared to Jacobs.⁶⁰ *Jacobs* suggests that revenue generation creates additional burdens which increase the skill and responsibilities required of an employee.

Conversely, *Purdue v. City University of New York* is an example of a successful challenge under the Equal Pay Act. Molly Perdue was both the Women's Basketball Coach and Women's Sports Administrator at Brooklyn College. In order to prevail on her Equal Pay Act claim, Perdue needed to establish: (1) that she was paid different wages than her male counterparts; (2) that she and her male counterparts had equal jobs that required equal skill, effort, and responsibility; and (3) that both she and her male counterparts performed under similar working conditions.⁶¹

First, *Purdue* established that she was paid differently from her male counterparts. Because Perdue occupied the positions of Women's Basketball Coach and Women's Sports Administrator, her compensation was compared to that of both the Men's Basketball Coach, Ron Kestenbaum, and the Men's Sports Administrator, Mark Reiner. In 1991, Perdue was only paid \$6,500 for her coaching responsibilities

55. *Jacobs v. Coll. of William & Mary*, 517 F. Supp. 791 (E.D. Va. 1980).

56. *Id.* at 797.

57. *Id.* at 798.

58. *Id.* at 797.

59. *Id.* at 798 (quoting *Stastny v. S. Bell Tel. & Tel. Co.*, 628 F.2d 267, 281 (4th Cir. 1980)).

60. *Id.* (quoting *Orr v. Frank R. MacNeill & Son, Inc.*, 511 F.2d 166, 171 (5th Cir. 1975)).

61. *Perdue v. City Univ. of N.Y.*, 13 F. Supp. 2d 326, 333 (E.D.N.Y. 1998).

whereas Kestenbaum was paid \$45,000.⁶² As Women's Sports Administrator, she was paid less than \$38,000 whereas Reiner was paid more than \$72,000.⁶³

Perdue further demonstrated that she and Kestenbaum, as basketball coaches, had equal jobs with equal responsibilities: They "coached 'basically' the same season, the same number of games, the same number of players, and the same number of practices," were "both responsible [for] organizing and putting a team together that is going to become successful," "managed their team's budgets, scholarships, assistant coaches, scouting of opponents, game preparation, and ordering of equipment," "were responsible for the supervision, guidance, and counseling of athletes, and for team conduct," and "were accountable to the same person."⁶⁴

Finally, Perdue was able to demonstrate that as sports administrators, she and Reiner also had equal job responsibilities: Both were "in charge of organizing," had the same eleven duties in their job descriptions (and, in fact, Perdue had one additional duty), were "responsible for the daily operations of sports, game scheduling, organizing team budgets, organizing student orientation, and administering the athletic program," and "reported to the same individual."⁶⁵ As a result, Perdue successfully met her burden of proof showing that she, Kestenbaum, and Reiner had equal jobs that required equal skill, effort, and responsibilities and that were performed under similar working conditions. The only difference was that Perdue was paid less than her male counterparts for equal work.

In another example, Marianne Stanley, former University of Southern California (USC) Women's Basketball Coach, attempted to make a similar argument in *Stanley v. University of Southern California*. Having had a successful tenure as coach of the USC Women's Basketball team, Stanley allegedly demanded that her compensation in her new contract be equal to the compensation offered to USC Men's Basketball Coach, George Raveling. After a series of negotiations, USC revoked its final offer, and Stanley was ultimately terminated. Stanley then filed a lawsuit, in which one of her claims was that USC Athletic Director Michael Garrett violated the Equal Pay Act.⁶⁶ In order to prevail on this claim, Stanley needed to show that her job and Raveling's job were substantially equal (but not necessarily identical).⁶⁷

When evaluating Equal Pay Act cases, courts have applied a two-step test to determine if the jobs are "substantially equal."⁶⁸ The Third Circuit articulated the test as two separate inquiries. First, the court analyzes "whether the jobs to be compared have a 'common core' of tasks, i.e., whether a significant portion of the two jobs is identical."⁶⁹ If the first threshold is met, the court would next analyze

62. Frank Litsky, *COLLEGE BASKETBALL; Former Brooklyn Coach Wins Damages in Sex Bias Suit*, N.Y. TIMES (July 10, 1998), <https://perma.cc/GD8M-F2MN>.

63. *Id.*

64. *Perdue*, 13 F. Supp. 2d at 334 (citing *Perdue Tr. 8/19/97* at 82–85).

65. *Id.* (citing *Perdue Tr. 8/19/97* at 136–37 and Plaintiff's Exh. 7A).

66. *Stanley v. Univ. of S. Cal.*, 178 F.3d 1069 (9th Cir. 1999).

67. *Id.* at 1074 (citing 29 C.F.R. § 1620.13(a)).

68. *Id.*

69. *Id.* (quoting *Brobst v. Columbus Srvs. Int'l*, 761 F.2d 148, 156 (3d Cir. 1985)).

“whether any additional tasks, incumbent on one job but not the other, make the jobs ‘substantially different.’”⁷⁰

While the court assumed, aided by the co-defendant’s acknowledgment, that the core responsibilities of the men’s and women’s head coaches were the same, the claim turned upon whether the additional tasks borne by the men’s coach rendered his job “substantially different.” While USC argued that the job of the men’s coach was substantially different because Raveling had “greater revenue generating responsibilities” and “greater media and spectator pressure,”⁷¹ Stanley countered that these differences existed because USC had not invested in or promoted the women’s program as much as the school had promoted the men’s program.⁷² However, the court did not reach the question of whether the jobs were substantially different, but rather accepted the defendant’s affirmative defense that the pay differential was due to the fact that Raveling’s experience and qualifications far surpassed those of Stanley.

While each of these cases displays different reasoning to arrive at its respective outcome, this Note focuses on the argument and reasoning of the *Jacobs* court. That precedent suggests that in order to prevail on an Equal Pay Act claim, a plaintiff must show that two employees of different sexes are paid different wages by an employer for equal jobs that require equal skill, effort, and responsibility, and are performed under similar working conditions. This Note’s proposal is centered around utilizing *Diaz* to challenge the precedent set forth in *Jacobs* that revenue generation requires employees to exercise greater responsibility and skill.⁷³

B. THE EFFECT OF CONSUMER PREFERENCES ON COMPENSATION

Multiple linear regressions have been conducted in order to determine the most significant variables that affect a NCAA coach’s salary. A linear regression is a type of statistical analysis that measures the relationship between a dependent variable and one or more independent variables. One regression collected information from a total of seventy-two coaches (forty-seven male and twenty-five female), and used compensation as the dependent variable and factors such as tenure, tournament appearances, gender, and ticket sales as independent variables.⁷⁴ The regression for all coaches and programs showed that “revenue producing potential, including ticket sales, contributions, media rights, and camp revenue, were found to be the primary drivers of compensation.”⁷⁵ Ticket sales, camp revenue, and program/novelty/parking/concessions were statistically significant at the 0.01 level, which means that there is a 1% chance the effect of ticket sales, camp revenue, and program/novelty/parking/concessions on compensation is merely coincidental and a 99% chance the effect is not due to coincidence. Contributions and media rights

70. *Id.*

71. *Id.*

72. *Id.*

73. *Jacobs v. Coll. of William & Mary*, 515 F. Supp. 791, 798 (E.D. Va. 1980).

74. Alex Traugutt, Nicole Sellars & Alan L. Morse, *Salary Disparities Between Male and Female Head Coaches: An Investigation of the NCAA Power Five Conferences*, 6 J. SPORT 40 (2018).

75. *Id.* at 49.

were both statistically significant at the 0.1 level, meaning there is a 10% chance the effect of both variables on compensation was coincidental and a 90% chance the effect was not due to coincidence. Once again, it is not accidental that revenue sources that are heavily influenced by consumers largely affect compensation. However, the coach's gender was not determined to have a statistically significant impact on the coach's compensation. While this might be surprising, the gender of the coach not being statistically significant makes sense because the gender of the players and coaches is already reflected through variables such as ticket sales, media rights, contributions, and camp revenue. Therefore, to say that the coach's gender was not statistically significant simply means it did not have an additional impact on top of the impact it already had on other variables.

A different regression concluded that women's coaches earn approximately half of what men's coaches earn, even when controlling for experience, job performance, and revenues.⁷⁶ That being said, this difference is not inherently due to the gender of the coach, but rather can be explained by discriminatory tastes of key stakeholders. Similar to the regression above, the gender of the coach was not deemed to be statistically significant; however, other variables that were used, such as revenue, already account for the impact of gender. Emphasizing key tenets of feminist theory, the author who conducted the analysis states, "[t]hese discriminatory preferences have more to do with opinions about socially appropriate roles."⁷⁷ Such discriminatory preferences can be held by athletic directors, consumers, and alumni alike. In fact, the author noted:

ticket buyers, alumni contributors, and television viewers with tastes for discrimination will act as if there is a nonpecuniary cost associated with purchasing tickets to women's basketball games or watching these games on television. If present, these tastes can also lead to lower salaries being paid to women's basketball coaches.⁷⁸

This legal and statistical context is important for showing how the simple phrase "men generate more revenue" quells the fight for equal pay. Without questioning why men generate more revenue, this response is over simplistic and incomplete. The linear regressions show that revenue-generating variables such as ticket sales, media rights, and contributions all are statistically significant factors that impact a coach's salary. The reasoning used by the court in *Jacobs* suggests that revenue production means a job requires greater responsibility and skill. However, as highlighted in the second regression, compensation is greatly impacted by discriminatory preferences. Because consumer preferences and choices largely influence revenue, which then in turn affects salary, it is worth questioning what it is about consumer interaction with women's sports that results in lower revenue generation as compared to men's sports.

76. Brad Humphreys, *Equal Pay on the Hardwood: The Earnings Gap Between Male and Female NCAA Division I Basketball Coaches*, 1 J. SPORTS ECON. 299 (Aug. 2000).

77. *Id.* at 305.

78. *Id.*

III. FEMINIST THEORY, CRITICAL RACE THEORY, AND APPLICATION TO LEGAL DOCTRINE

The implication of the “men generate more revenue” argument is that greater revenue generation leads to greater pay for athletes and coaches. However, the statement “men generate more revenue” alone is unsatisfactory without questioning why that is the case. Because consumer preferences are the drivers of revenue and therefore salary, it is imperative that we explore and understand the space that women, especially women in sports, occupy, and women athletes’ relationship with society.

A. FEMINIST THEORY

As men have often been the focus of society, the voice and perspective of women has been and continues to be silenced. Traditionally, women were forced into roles in which they were to be seen but not heard, deprived of rights, and reliant on men for almost everything. Feminist theory seeks to shift the narrative and spotlight the perspectives, voices, and experiences of women. To do so, feminist theory attempts to understand and explain gender inequality, power and oppression dynamics, objectification, stereotypes and gender roles, and discrimination against women.⁷⁹

Much of our society is based upon organizing people into easily identifiable roles and identities and then mandating how certain groups should act and look. As a result, “hegemonic femininity” prescribes that women are expected to perform gender in ways that conform with stereotypical notions of what it means to be a woman and feminine.⁸⁰ According to Vikki Krane, “[c]haracteristics of hegemonic femininity include being emotional, passive, dependent, maternal, compassionate, and gentle.”⁸¹ Women who deviate from these characteristics cross into the realm of masculinity because they act in direct contrast to the norm of hegemonic femininity, and consequently, they are marginalized and penalized for it.⁸² “Hegemonic masculinity,” on the other hand, is characterized by “strength, competitiveness, assertiveness, confidence, and independence.”⁸³ Because sports require the exhibition of characteristics associated with hegemonic masculinity, women in sports are a direct contrast to traditional gender expression which dictates how society expects women to act.

79. Ashley Crossman, *Feminist Theory in Sociology*, THOUGHTCO. (Feb. 25, 2020), <https://perma.cc/3PHN-JHXJ>.

80. Krane, *supra* note 3, at 116–17.

81. *Id.* at 117.

82. *Id.* at 118. Women incur a “social cost” when they embody traits that are considered masculine. Outside of the sports context, when women exhibit stereotypically masculine traits, they are penalized more than their male counterparts. Hannah Riley Bowles, *Why Women Don’t Negotiate Their Job Offers*, HARV. BUS. REV. (June 19, 2014), <https://perma.cc/6YLT-TQ77>; Hannah Riley Bowles, Linda Babcock & Lei Lai, *Social Incentives for Gender Differences in the Propensity To Initiate Negotiations: Sometimes It Does Hurt To Ask*, 103 ORG. BEHAVIOR & HUMAN DECISION PROCESS 84 (May 2007).

83. Krane, *supra* note 3, at 117.

Sportswriter Paul Gallico once said, “It is a lady’s business to look beautiful and there are hardly any sports in which she seems able to do it.”⁸⁴ In an ESPN article entitled *This is Who I Am*, columnist Bill Simmons wrote:

[T]he vast majority of WNBA players lack crossover sex appeal. That’s just the way it is. Some are uncomfortably tall and gawky, while others lack the requisite, um, softer qualities to captivate males between 18 and 35. The baggy uniforms don’t help. Neither does the fact that it’s tough for anyone to look attractive at the end of a two-hour basketball game.⁸⁵

In other words, in a world that expects women to be dependent, docile, agreeable, sexy, and to “act ladylike,” women athletes and coaches are seen as muscular, aggressive, unattractive, strong, and competitive.

Because athleticism and femininity appear to be mutually exclusive under hegemonic femininity and masculinity, the sports world has tried to find many solutions so that women athletes are easily identifiable as stereotypical women that attract the male gaze. Early in their careers, “women in sport learn to carefully balance feminine and less feminine characteristics. They can be strong and athletic yet also must have a heterosexually attractive appearance.”⁸⁶ In 2004, former FIFA President Sepp Blatter recommended that women soccer players wear “tighter shorts’ to make the game more appealing to male viewers.”⁸⁷ Dr. Ching-Kuo Wu, former President of the International Boxing Association, requested that female boxers wear skirts during the World Championships in 2011 because otherwise viewers “can’t tell the difference between the men and women.”⁸⁸ In 2012, badminton’s international governing body came under fire for requiring their female Olympians to wear skirts, a dress code that was subsequently retracted.⁸⁹ The governing body said the goal of this dress code was “to attract more fans through ‘a stylish presentation of the players.’”⁹⁰ Finally, until 2012, female beach volleyball players competing in International Volleyball Federation events had two options for uniforms: a one-piece bathing suit or a bikini with a maximum width of seven centimeters.⁹¹ Despite the more conservative options finally allowed during the 2012 Olympics, current U.K. Prime Minister Boris Johnson (then Mayor of London) still

84. Paul Gallico, *1936 Letter to the Editor—Women in Sports Should Look Beautiful—The Free Press Turns 115 Years Old*, FREE PRESS (Dec. 29, 2012), <https://perma.cc/4RCM-N6ZS>.

85. Bill Simmons, *This Is Who I Am . . .*, ESPN: PAGE 2 (Sept. 2005), <https://perma.cc/Q7EM-EQ4B>.

86. Krane, *supra* note 3, at 116.

87. Penny Venetis, Editorial, *Sepp Blatter Is Leaving. Fifa’s Sexist Policies Should Go with Him*, GUARDIAN (June 3, 2015), <https://perma.cc/SUP6-CSRR>.

88. Ariel Sandler, *An International Boxing Federation Wants Women To Wear Skirts in the Ring*, BUS. INSIDER (Oct. 27, 2011), <https://perma.cc/MNV6-TJ7B>.

89. Liz Clarke, *At London Olympics, Women’s Athletes’ Wardrobes Are Source of Debate*, WASH. POST (July 26, 2012), <https://perma.cc/2JC8-VDGZ>.

90. *Id.*

91. Laura Walters, *Evolution of Women’s Beach Volleyball Uniforms*, STUFF (Aug. 8, 2016), <https://perma.cc/3ZUE-GSCY>.

found a way to hypersexualize beach volleyball players, describing them as “semi-naked women playing beach volleyball . . . glistening like wet otters.”⁹²

It is also important to note that while women in sports operate in a world heavily influenced by hegemonic femininity, hegemonic femininity itself operates against the backdrop of heterosexuality and heteronormativity. Similar to the ways in which women are expected to perform and express gender, women are also expected to appear as if they are heterosexual—heterosexuality is the norm due to hegemonic beliefs about sexuality.⁹³ “Heterosexuality—like masculinity and femininity—is taken for granted as a natural occurrence derived from biological sex.”⁹⁴ However, because women athletes and coaches exhibit characteristics that are contrary to how society thinks women should act and look, they are often seen as masculine, or “manly”—which then is equated with queerness and homosexuality.⁹⁵ “Perceptions of heterosexuality are the foundation for how female athletes are interpreted. People assume goodness or badness, acceptance or nonacceptance based on whether a female in sport is perceived as masculine or feminine, heterosexual or homosexual.”⁹⁶ For example, Jake Toffler noted that, when doing a Google search for images of Abby Wambach in 2015, an openly queer woman, the results included “action shots of a fierce competitor.”⁹⁷ On the other hand, a search for Alex Morgan in 2015 resulted in a “slew of sexualized photos, many of which come in the form of bikini photo shoots.”⁹⁸ It is no coincidence that Wambach, who is openly gay, was displayed as masculine, aggressive, and competitive whereas Morgan, who is heterosexual, was hypersexualized, feminine, and therefore seemingly able to exploit her womanhood in ways that Wambach cannot. I conducted a similar Google Images search for Brittney Griner and Skylar Diggins-Smith, two prominent WNBA players. Almost all of the pictures of Griner, who is openly queer, in the first seven rows are of her in a basketball uniform or actively playing basketball.⁹⁹ While the majority of the pictures of Diggins-Smith, who is heterosexual, are also of her playing basketball, these photos are interspersed with pictures of her in a bikini, in sports bras, in dresses, and with makeup on.¹⁰⁰ Though not dispositive, this suggests that the optics and images around homosexual players confine them to their sport whereas heterosexual players get to be seen both in and out of their uniform.

In a career where women are already significantly underpaid, women in sports benefit from presenting themselves as heterosexual because, oftentimes, the more feminine and heterosexual a female athlete appears, the more likely she is to receive

92. Leah Goldman, *London’s Mayor on Beach Volleyball: Semi-Naked Women “Glistening Like Wet Otters,”* BUS. INSIDER (July 30, 2012), <https://perma.cc/4S33-JXE5>.

93. Krane, *supra* note 3, at 117.

94. Kristen Schilt & Laurel Westbrook, *Doing Gender, Doing Heteronormativity: “Gender Normals,” Transgender People, and the Social Maintenance of Heterosexuality*, 23 GENDER & SOC’Y 440 (2009).

95. Krane, *supra* note 3, at 118.

96. *Id.*

97. Jake Toffler, *Portrayal of Players: Abby Wambach vs. Alex Morgan*, SOCCER POLS., <https://perma.cc/5Q58-ED8B> (last visited Oct. 8, 2021).

98. *Id.*

99. *Brittney Griner*, GOOGLE IMAGES, <https://perma.cc/3UU7-CH4W> (last visited Nov. 7, 2021).

100. *Skylar Diggins*, GOOGLE IMAGES, <https://perma.cc/X4NX-U7AF> (last visited Nov. 7, 2021).

attention from the media and fans. This attention leads to sponsorships and endorsements, which significantly augment the income of many women in the sports industry. It should come as no surprise that in a study conducted on perceptions of female athletes, 86% of female college athletes surveyed believe that sexual images sell women's sports.¹⁰¹ “[P]ortraying a heterosexual, feminine appearance is a survival strategy for female athletes. This creates a paradox in that females are accepted in sport, but only as long as they preserve their heterosexual attractiveness.”¹⁰²

Because of hegemonic femininity and heteronormativity, women athletes and coaches are often denied attention and viewership in part because their profession contradicts how society wants to see women act, which then leads to rampant sexism and misogyny. As mentioned above, it has been acknowledged that if women in sports want to increase viewership or their appeal in order to gain sponsorships and augment their revenue, they have to conform to hegemonic femininity because it is what is expected of them.¹⁰³ Alex Morgan once admitted she has “done certain things, like Sports Illustrated swimsuit, that has guys interested in [her] not for what [she] put[s] on the field . . . but at the end of the day, they’re going to turn on the TV next time [they] have a game.”¹⁰⁴ Despite making an early exit from Wimbledon in 2000, Anna Kournikova, a tennis player known more for her looks than her athletic ability,¹⁰⁵ was referred to as the “media darling of the tournament” because “it is the more feminine athletes who also get more sponsorships.”¹⁰⁶ In an article that details the plight of women professional boxers, Christy Halbert noted that women boxers often employ various identity management techniques, such as wearing feminine uniforms, hiding their sexuality, or emphasizing their feminine qualities.¹⁰⁷ Finally, in a survey of female college athletes, 68% of respondents said they feel pressure to be pretty, 30% were afraid of becoming too muscular, and 48% wear makeup when they compete.¹⁰⁸

The internet is filled with people who consistently reinforce the need for women in sports to focus on their looks in order to gain attention and viewership. For example, in the article titled *Hey, Ladies: Here Are The Reasons Dudes Are In Love*

101. Mary Jo Kane, Nicole M. LaVoi, & Janet S. Fink, *Exploring Elite Female Athletes' Interpretations of Sport Media Images: A Window into the Construction of Social Identity and "Selling Sex" in Women's Sports*, 1 COMM'N & SPORT 269, 290 (Feb. 13, 2013).

102. Krane, *supra* note 3, at 118.

103. *Id.* at 122.

104. Janet Reitman, *The Authentication of Alex Morgan*, ESPN: ESPNW (June 8, 2015), <https://perma.cc/BR9N-DM7H>.

105. See Katherine Granish, *Kournikova: All Looks, No Skill*, CORNELL DAILY SUN (Sept. 19, 2002), <https://perma.cc/YPE5-RV75>; Manish Verma, *Anna Kournikova: The Most Famous Tennis Player To Have Never Won a Singles Title*, SPORTSKEEDA (Oct. 7, 2021), <https://perma.cc/STQX-VHTE>.

106. Patricia Reaney, *Female Athletes Judged by Sex Appeal*, ABC NEWS (Jan. 7, 2006), <https://perma.cc/Y34F-PEU8>. See also Merlisa Lawrence Corbett, *Anna Kournikova Is the Best and Worst Thing To Ever Happen To Women's Tennis*, BLEACHER REP. (June 17, 2013), <https://perma.cc/4LCD-3RQE>.

107. Christy Halbert, *Tough Enough and Woman Enough*, 21 J. SPORT & SOC. ISSUES 7 (Feb. 1, 1997).

108. *Body Image Confidential*, ESPN: ESPNW, <https://perma.cc/96KL-LHBH> (last visited Sept. 23, 2021).

With Alex Morgan, Adam Silvers talks about Morgan's "long, flowing hair," her "hot girl in school" [who lets] "the ugly kids borrow [her] ruler because it was the right thing to do" vibe, and the alluring thought of her lying in a bedroom "wearing nothing but her World Cup and Olympic gold medals."¹⁰⁹ If that is not convincing enough, a 2015 article on FIFA's official website describes Alex Morgan as "a talented goalscorer with a style that is very easy on the eye and good looks to match."¹¹⁰ If an international governing body of a sport commenting on the physical appearance and attractiveness of a player does not hit home the point, there is always the *Glamour* article titled *The Sexiest Sports a Woman Can Play, According To a Guy*.¹¹¹

While feminist theory is critical to understanding how society and consumers view women in sports, it mainly focuses on the very general experience of women in a sexist, misogynistic world. This experience oftentimes takes the perspective of white women. However, there are additional identities such as race and sexual orientation, discussed above, that can further marginalize or privilege certain women as compared to other women. Therefore, it is important to explore the intersection of gender and race and how that intersection influences how consumers view women in sports of different races.

B. CRITICAL RACE THEORY

Critical race theory is an academic discipline that originated in the 1980s as a way to incorporate the realities of race into legal education.¹¹² Critical race theory quickly evolved into a body of scholarship that "critiques how the social construction of race and institutionalized racism perpetuate a racial caste system that relegates people of color to the bottom tiers."¹¹³ Some of the key tenets of critical race theory include the ideas that race is a social construct, race permeates society and its institutions, and that the law plays a significant role in creating and sustaining racial inequality. Although this is not the focus of this Note, critical race theory has recently become a controversial topic as people across the nation debate whether it should be taught in schools.¹¹⁴

While critical race theory is a large, complex framework, one of its hallmarks is the idea of intersectionality. "Intersectionality" stands for the proposition that people's experiences, both positive and negative, are informed by their social identities.¹¹⁵ Kimberlé Crenshaw, who coined the term, used it "to deal with the fact

109. Adam Silvers, *Hey, Ladies: Here Are the Reasons Dudes Are in Love with Alex Morgan*, ELITE DAILY (Jan. 20, 2016), <https://perma.cc/5FG7-PA38>.

110. *Morgan Looking for a Fairytale Finish*, FIFA (June 30, 2015), <https://perma.cc/XN55-7JZE>.

111. John Ortved, *The Sexiest Sports a Woman Can Play, According To a Guy*, GLAMOUR (May 17, 2010), <https://perma.cc/N6Q7-2W55>.

112. *What Is Critical Race Theory, and Why Is Everyone Talking About It?*, COLUM. NEWS (July 1, 2021), <https://perma.cc/8HKJ-QHNS>.

113. Janel George, *A Lesson on Critical Race Theory*, AM. BAR ASSOC. (Jan. 11, 2021), <https://perma.cc/N9F8-A35J>.

114. Stephen Sawchuk, *What Is Critical Race Theory, and Why Is It Under Attack?*, EDUCATIONWEEK (May 18, 2021), <https://perma.cc/V2DD-UHCM>.

115. Katy Steinmetz, *She Coined the Term "Intersectionality" Over 30 Years Ago. Here's What It Means To Her Today*, TIME (Feb. 20, 2020), <https://perma.cc/88N7-YJNA>.

that many of our social justice problems like racism and sexism are often overlapping, creating multiple levels of social injustice.”¹¹⁶ This injustice cannot be traced back to one singular identity, but rather is experienced due to the intersection of many marginalized identities. In the context of this Note, intersectionality can explain why female athletes who possess other marginalized identities are more harshly criticized as compared to their white female counterparts.

Throughout history, Black women have consistently been denied the right to be feminine. What originated as a comparison of Black people to primates based on their skin, body type, and other phenotypical features quickly morphed into a gendered discourse that highlighted the differences between white women and Black women.¹¹⁷ In *Hair Raising: Beauty, Culture, and African American Women*, Noliwe Rooks wrote, “the presence of blackness precludes gender identification as well as the possibility of femininity for African American women.”¹¹⁸ In a world where the features, characteristics, and bodies of white women represent the norm and therefore the standard of womanhood and femininity by which we measure Black women, the womanhood and femininity of Black women are often challenged.¹¹⁹ Physical differences in Black women such as skin tone, hair, stature, lip shape, and nose are obvious, visible deviations from the white norm of femininity and womanhood.

To illustrate how these deviations have adversely impacted Black female athletes, consider Norman Cox, who, when commenting on female African American track and field athletes, proposed that “the International Olympic Committee should create a special category of competition for them—the unfairly advantaged ‘hermaphrodites’ who regularly defeated ‘normal women,’ those less skilled ‘child bearing’ types with ‘largish breasts, wide hips [and] knocked knees.”¹²⁰ Additionally, Megan Rapinoe of the USWNT perfectly explained how white female athletes benefit from their race in comparison to Black female athletes. She described the USWNT as “the white girls next door. The straight, ‘cute,’ ‘unthreatening,’ suburban white girls next door. . . . [T]hat’s the perception. And it’s certainly how [they are] marketed to a lot of people.”¹²¹ This perception could also explain how and why, aside from their unparalleled success, the USWNT achieved rampant popularity and financial superiority over their male counterparts. Rapinoe, along with her fiancé Sue Bird, juxtaposed the special treatment given to the USWNT with the lack thereof offered to the WNBA, a league that is 70–80% Black.¹²² Bird

116. Kimberlé Crenshaw, *The Urgency of Intersectionality*, TEDWOMEN (Oct. 2016), <https://perma.cc/SNH8-LC9Z>.

117. Elizabeth Adetiba, *Caster Semenya and the Cruel History of Contested Black Femininity*, SBINATION (Apr. 20, 2020), <https://perma.cc/922L-5PQB>.

118. NOLIWE M. ROOKS, *HAIR RAISING: BEAUTY, CULTURE, AND AFRICAN AMERICAN WOMEN* 29 (1996).

119. See Hannah Eko, *As a Black Woman, I’m Tired of Having To Prove My Womanhood*, BUZZFEED NEWS (Feb. 27, 2018), <https://perma.cc/U3ZJ-KE2J>.

120. Patricia Vertinsky & Gwendolyn Captain, *More Myth than History: American Culture and Representations of the Black Female’s Athletic Ability*, 25 J. SPORT HIST. 532, 541 (Sept. 1998).

121. Megan Rapinoe, *I’ve Got Some Things To Say. Let’s Do a WNBA Finals Preview.*, PLAYERS’ TRIB. (Oct. 5, 2020), <https://perma.cc/3MQ5-ZZEL>.

122. *Sue Bird Backs Megan Rapinoe’s Perception of “Cute White Girls” in Women’s Soccer*, NBC SPORTS (Oct. 19, 2020), <https://perma.cc/B2LR-C483>.

attributed this treatment to society's acceptance of "the cute girl next door" and unwillingness "to accept, or embrace, or not judge these basketball players who are tall, Black, gay."¹²³ In an Elle magazine article, Laurie Abraham described in detail how Brittney Griner, an openly queer Black WNBA player, "felt like a guy to [her]."¹²⁴ These deviations paint Black women as the antithesis of femininity and womanhood, and therefore as masculine.

Going even further, Black women athletes in particular have not only been denied their femininity, but also their humanity. In *Sister Act VI: Venus and Serena Williams at Indian Wells: "Sincere Fictions" and White Racism*, Nancy E. Spencer discusses the idea of scientific racism. Most often used to justify slavery and a racial hierarchy, scientific racism originally used methods such as craniometry and phrenology to suggest that physical differences translate to innate differences in abilities.¹²⁵ "This correlation between external signs and innate abilities became the basis for establishing differences not only between individuals but also between whole groups of people."¹²⁶ This idea provided the basis for the argument that Black people had an innate, biological inferiority that justified their enslavement and subhuman treatment: In other words, "social inequalities became regarded as natural ones."¹²⁷ It was believed that Black people had inherent physicality and brute strength, which made them more suitable for the intense manual labor typical of slavery. In furtherance of this dehumanization and scientific racism, Black people—especially Black women athletes—were historically and are presently compared to animals.¹²⁸

The Williams sisters, for example, are often victims of this blatant racist dehumanization. In an article written by Sue Mott, Serena and Venus were described as "players of Amazonian physique and piranah [sic] mentality."¹²⁹ Serena has also been referred to as a "fat cow" by an Australian newspaper.¹³⁰ Sid Rosenberg, who is notorious for making racist comments on air, responded to another commentator's

123. *Id.*

124. Laurie Abraham, *How Slam-Dunking, Gender-Bending WNBA Rookie Brittney Griner Is Changing the World of Sports*, ELLE (Nov. 4, 2013), <https://perma.cc/Z5LB-ZCFM> ("What surprised me, what with my familiarity with jockey women, was, off court, as I trailed Griner from appointment to appointment, how much she felt like a guy to me. Not because of the style of her clothes and the lack of makeup, and not because I thought she was 'really' a man, whatever that means: Is it genitals, is it learned behaviors, it is hormones in utero and beyond? It's all three, biologists and psychologists who study gender formation say. But some combination of sensory stimuli screamed *boy* to me. So much so that I did a cognitive double take each time I heard someone refer to her as *she*: Yes, yes, Brittney is a girl, I'd think. She *is* a girl.").

125. Nancy E. Spencer, *Sister Act VI: Venus and Serena Williams at Indian Wells: "Sincere Fictions" and White Racism*, 28 J. SPORT & SOC. ISSUES 115, 119–20 (May 2004).

126. *Id.* at 120.

127. *Id.* (quoting KENAN MALIK, *THE MEANING OF RACE: RACE, HISTORY, AND CULTURE IN WESTERN SOCIETY* 71 (1996)).

128. Brent Staples, *The Racist Trope that Won't Die*, N.Y. TIMES (June 17, 2018), <https://perma.cc/B7KE-SK3L>.

129. Sue Mott, *Wimbledon: Triumph of American Values*, TELEGRAPH (July 8, 2000), <https://perma.cc/5F2Y-GTKT>.

130. Matthew Syed, *Wimbledon: Serena Williams Can Take Her Greatness to Even Higher Level*, MATTHEW SYED CONSULTING (July 7, 2018), <https://perma.cc/YMM2-SLWJ>.

statement that Serena will eventually be seen in *Playboy* by saying, “you’ve got a better shot at *National Geographic*.”¹³¹ Additionally, there was the infamous competition between Serena Williams and a horse named American Pharaoh for *Sports Illustrated*’s 2015 Sportsperson of the Year.¹³² While *Sports Illustrated*’s editors ultimately choose the Sportsperson of the Year, the controversy originated when they asked readers to vote for who they thought should win the award.¹³³ Despite winning the award, Serena finished eleventh out of twelve contenders in the reader poll, whereas American Pharaoh finished first.¹³⁴ This led to people comparing Serena directly to American Pharaoh and a debate ensued about whether she should have won the award over the horse.¹³⁵

Although they are the most frequent victims, the Williams sisters are not the only Black female athletes who are dehumanized by being compared to animals. Simone Biles was described as having “freakish athleticism” and was compared to “a shark in open water.”¹³⁶ Additionally, the French media nicknamed Olympic track and field legend Wilma Rudolph “the Black Gazelle.”¹³⁷ Or, consider Gabby Douglas, who has been consistently referred to as “the Flying Squirrel.”¹³⁸ While these comparisons may at first glance appear to be compliments, we would be doing a disservice by not realizing that dehumanizing Black people by comparing them to animals was a tactic created to uphold white supremacy and to justify Black enslavement.¹³⁹

To summarize, because Black female athletes, especially queer Black female athletes, possess other marginalized identities aside from their gender, they are viewed and criticized more harshly than their white female counterparts. Black female athletes are seldom afforded the opportunity to just exist because they are so

131. Bill Hoffmann, *Double Fault for Axed Imus Man*, N.Y. POST (June 6, 2001), <https://perma.cc/STX-3232>.

132. See Chuck Schilken, *Are Fans Right To Be Upset That Serena Williams Beat American Pharaoh for SI Sportsperson of the Year?*, L.A. TIMES (Dec. 14, 2015), <https://perma.cc/5X4Y-9KM4>.

133. *Vote Now: Who Should Be SI’s 2015 Sportsman of the Year?*, SPORTS ILLUSTRATED (Nov. 10, 2015), <https://perma.cc/JZ8S-SXSH>.

134. Deirdre Edgar, *Sportsperson of the Year Debate Draws Its Own Backlash*, L.A. TIMES (Dec. 14, 2015), <https://perma.cc/Z2XY-MHLS>.

135. See *American Pharaoh Denied Sports Illustrated Sportsman of the Year*, HORSE RACING NATION (Dec. 14, 2015), <https://perma.cc/TY5H-LJR8>; @latimes, TWITTER (Dec. 14, 2015, 12:20 PM), <https://perma.cc/SGR7-XZ5J>; Justin Zayat (@JustinZayat), TWITTER (Dec. 14, 2015, 8:26 AM), <https://perma.cc/B3EB-WVKW>; *Serena Williams Wins Sportsperson of the Year; Poll Favored American Pharaoh*, NPR (Dec. 14, 2015), <https://perma.cc/7TWD-NZFZ>.

136. Reeves Wiedeman, *A Full Revolution*, NEW YORKER (May 23, 2016), <https://perma.cc/65YD-7VSN>.

137. Scott N. Brooks & Aram Goudsouzian, *Remembering Wilma Rudolph, the “Queen of the Olympics,”* AFR. AM. INTELL. HIST. SOC’Y (Oct. 2, 2020), <https://perma.cc/9BD9-ZQK6>.

138. See, e.g., Emily Bayci, *London 2012: Gabby Douglas Is the Flying Squirrel with a Shot at Gold*, BLEACHER REP. (July 28, 2012), <https://perma.cc/4AQ2-46N6>; Alice Park, *Gabby Douglas: Team USA’s Flip Artist*, TIME (July 19, 2012), <https://perma.cc/Y8KH-SSSK> (“Throw in some teenage troubles (she is just 16, after all) and add a world championship and release moves that earn her a memorable moniker—the Flying Squirrel. If this Olympic story gets any sweeter, Disney will option the movie rights.”).

139. See Tayo Bero, *Comparing Black Women to Animals Is a Residue of Chattel Slavery*, YAHOO! (Jan. 4, 2020), <https://perma.cc/WY6X-BBX3>.

often characterized as aggressive, accused of having attitudes, compared to animals, and are generally vulnerable to critiques where nothing is off limits.¹⁴⁰ An instance that exemplifies the extent to which people will go to humiliate and tear down Black female athletes occurred in 2007 when Don Imus referred to the women on Rutgers University Women's Basketball team, comprised of two white players and eight Black players, as "nappy headed hos."¹⁴¹ Imus's comment was followed by executive producer Bernard McGuirk calling the women "hard core hos."¹⁴² It therefore can be argued that because of hegemonic femininity and topics underscored in critical race theory, sports consumers do not want to watch women, especially Black women and queer Black women, play sports.

Given the sociological backdrop of the society and context in which women in sports exist, this Note argues that because consumers have internalized sexism, racism, and homophobia that informs their viewership and consumption, because the largest sources of revenue are dictated by consumer viewership, and because revenue generation largely impacts salaries, consumer preferences have a direct impact on the revenue-generating potential of women in sports and correspondingly, the wage gap between male and female athletes.

IV. UTILIZING *DIAZ* TO FIGHT FOR EQUAL PAY

Under *Diaz*, it is generally illegal for employers to use the preferences and prejudices of their consumers to justify discrimination against their employees.¹⁴³ In order to challenge the gender wage gap in sports, I propose that the doctrine set forth in *Diaz* be expanded to the sports industry so plaintiffs can argue that men generate more revenue in part due to consumers internalized sexism, racism, and homophobia. While this proposal is limited by the requirements of the Equal Pay Act and the *Diaz* exception, this Note offers a counterargument based in the realities of revenue generation that will empower women in sports to require leagues, teams, and organizations to think more critically about the wage gap justification that "men generate more revenue."

A. APPLYING *DIAZ* TO WOMEN'S SPORTS

Ticket sales, media rights, and sponsorships, the largest sources of revenue for leagues, are all heavily influenced by consumer viewership, which is determined by consumer preferences. The more fans and viewers a league has, the more tickets they sell, the more they can charge for media rights to broadcast their games, and the more sponsors are willing to pay to have their brand associated with that league. In the case of a coach's compensation, ticket sales and media rights are influenced by consumers for the same reasons as above, but contributions are also influenced by

140. Lonnae O'Neal, *The Struggle Is Real: The Unrelenting Weight of Being a Black, Female Athlete*, UNDEFEATED (June 25, 2018), <https://perma.cc/H2Y4-PXG4>.

141. Ryan Chiachiere, *Imus Called Women's Basketball Team "Nappy-Headed Hos,"* MEDIA MATTERS (Apr. 4, 2007), <https://perma.cc/4HRG-JRHM>.

142. *Id.*

143. *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971).

consumer preferences because donors have the freedom to pick and choose, based on their desires, where to contribute money. Therefore, because consumers have internalized sexism, racism, and homophobia, which severely limits the revenue-generating potential of women's sports leagues and compensation of female coaches, the defense that men get paid more than women because they generate more revenue is discriminating based on consumer preferences, which is illegal under *Diaz*. Instead of conditioning pay on revenue generation, I believe a better wage structure would consist of a base salary that is equal for both men and women and pay differentials or bonuses based on the exceptions granted under the Equal Pay Act. Even if sexist, racist, and homophobic consumer preferences do not account for the entire revenue differential and pay gap, these preferences contribute to it in some way—and my proposal is to remedy the portion that is attributable to these preferences.

This argument has two steps: First, demonstrate how paying unequal wages based on revenue generation is discrimination based on consumer preferences, and next, translate that discrimination into an Equal Pay Act claim. As discussed in Part III, feminist theory and critical race theory—along with the other anecdotal and empirical evidence—suggests that a reason people do not watch women's sports is because it does not conform to stereotypical expectations of womanhood and performances of gender. This discrimination is augmented when female athletes are queer, Black, or generally of color. Therefore, by paying lower wages based on revenue generation, employers are discriminating based on consumer preferences. Under the Equal Pay Act, a claimant must show that an employer pays employees of opposite sexes different wages for equal jobs that require equal effort, skill, and responsibility which are performed under similar working conditions.¹⁴⁴ Although the court in *Jacobs* ruled that revenue generation means a job requires additional skill and responsibilities which renders that job different under the Equal Pay Act,¹⁴⁵ women in sports could use the ruling in *Diaz* to argue that revenue generation and the resulting unequal pay are influenced by consumers homophobic, racist, and sexist preferences. For example, assuming everything else about the two jobs in *Jacobs* was equal—including responsibilities, effort, skill, and working conditions—Eloise Jacobs could have argued that paying unequal wages based on revenue generation was discriminating based on consumer preferences because consumer preferences suppressed the earning potential of her women's basketball team.

As demonstrated by the success of many female athletes, female coaches, and women's sports leagues and teams, in sports, more revenue does not inherently mean greater skill and greater responsibilities. However, while my proposal is situated specifically within the sports context, the *Diaz* doctrine can be applied to any context in which consumer preferences have a significant impact on wages. This is not to say that the *Diaz* doctrine applies whenever consumer preferences impact wages, as there are certainly other contexts where more revenue means greater skill and

144. 29 U.S.C. § 206(d)(1); *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974) (“In order to make out a case under the Act, the Secretary must show that an employer pays different wages to employees of opposite sexes ‘for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.’”).

145. *Jacobs v. Coll. of William & Mary*, 517 F. Supp. 791, 798 (E.D. Va. 1980).

responsibilities are required. That being said, it is worth mentioning that in situations where pay, revenue, and consumer preferences are inextricably linked, my proposal can be utilized to take a deeper look into the sociological backdrop that consumer preferences operate in to determine whether the *Diaz* doctrine applies.

B. EQUAL PAY ACT AND *DIAS*'S LIMITATIONS

However, application of the *Diaz* doctrine to mount an Equal Pay Act claim is subject to some limitations. In order to argue a case under the Equal Pay Act, the case must involve employees and the two people being compared must have the same employer.¹⁴⁶ Often in sports, especially with Olympic and National Teams, players are not considered employees but rather independent contractors. Athletes who are professional tennis players, professional golfers, UFC fighters, and many more are considered independent contractors, not employees.¹⁴⁷ As a result, these athletes do not fall under the protections guaranteed by the Equal Pay Act.¹⁴⁸ Additionally, in many cases, men's and women's sports leagues have two separate employers. For example, the MLS does not own the NWSL and the NHL does not own the PHF. While the WNBA is owned by the NBA, a claimant must still demonstrate that the NBA is a joint employer of WNBA players in order to compare WNBA player salaries to NBA player salaries in an Equal Pay Act claim. This distinction limits the application of the proposal to men and women in sports who are considered employees and have the same employer, i.e., the USWNT and NCAA coaches.

Another hurdle is the exceptions contained in the Equal Pay Act. The merit and quantity or quality of production exceptions, in particular, are not unaffected by gender. As argued in *Stanley*, due to the historical and current lack of investment in women's sports, many women's programs and leagues have not reached their full potential.¹⁴⁹ This could impact their success, or, in other words, "merit and quantity or quality of production."¹⁵⁰ Lastly, the exception for any factor other than sex also

146. 29 U.S.C. § 206(d)(1). See *Equal Pay/Compensation Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://perma.cc/CL4N-5FAB> (last visited Nov. 7, 2021).

147. Sudipto Ganguly, *Tennis-WTA Working on Better Pay, Considers Extending Tour*, REUTERS (Mar. 31, 2020), <https://perma.cc/8QY2-69RH>; Greg Crawford, *Golfers Are So Overpaid*, NBC SPORTS (May 25, 2012), <https://perma.cc/H4NQ-LVCR>; Michael Conklin, *Two Classifications Enter, One Classification Leaves: Are UFC Fighters Employees or Independent Contractors?*, 29 S. CAL. INTERDISC. L.J. 226 (Jan. 1, 2020).

148. *Coverage*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://perma.cc/3H32-R52U> (last visited Nov. 7, 2021).

149. *Stanley v. Univ. of S. Cal.*, 178 F.3d 1069, 1074 (9th Cir. 1999) ("Stanley claims that the differences between the two jobs are attributable to previous gender-based decisions on the part of the University. Essentially, Stanley claims that the differences between the two jobs result from the University's historical disparate treatment of male and female teams; namely, its decision to invest in and promote the men's program more than the women's program.").

150. For a recent example of the lack of investment in women's sports, the NCAA Women's Basketball Tournament, the most elite and ceremonious tournament in NCAA Basketball, experienced pushback for the gross inequality in accommodations and facilities between the Men's Tournament and the Women's Tournament before the Tournament even started. See, e.g., @_emcaron, TWITTER (Mar. 19, 2021, 12:38 PM), <https://perma.cc/AQV2-NHGN>; @sedonaprince_, TWITTER (Mar. 18, 2021, 10:26 PM), <https://perma.cc/A8SM-RC88>; @awebbreese, TWITTER (Mar. 18, 2021, 6:51 PM),

presents a challenge as it is a vague, catchall exception, the limits of which are frequently questioned and challenged.¹⁵¹

In addition to the aforementioned limitations, there is also a compelling counterargument under *Diaz*. The exception to *Diaz* states that customer preference can be considered “only when it is based on the company’s inability to perform the primary function or service it offers.”¹⁵² Women in sports could argue that if leagues and governing organizations paid their male athletes/coaches and female athletes/coaches equally, the organizations would still be able to produce sporting events. However, leagues and governing organizations might respond that, if they paid their male and female athletes and coaches equally, they would be unable to sustain themselves as a business because the women do not generate as much revenue as the men. Therefore, through financial projections, the leagues and organizations could project that their women’s sports teams and leagues will operate at a loss, which could put them in financial distress and risk bankruptcy. The employers could then conclude that if they paid men and women athletes and coaches equally and experienced financial distress, they would be unable to perform the primary function/service offered, putting them within the *Diaz* exception.

C. EQUAL PAY AS A REALITY THAT COULD YIELD UNINTENDED BENEFITS

While the above counterargument and limitations have merit, the USWNT nicely exemplifies how equal pay could be a real possibility, largely because the USWNT generated more revenue than the Men’s National Soccer Team. Although the court granted U.S. Soccer Federation’s summary judgement motion,¹⁵³ the fact of the matter is that the members of the USWNT were undervalued for years. If both the men’s and women’s teams played and won twenty matches, “female WNT players would earn a maximum of \$99,000 or \$4,950 per game” while “MNT players would earn an average of \$263,320 or \$13,166 per game.”¹⁵⁴ Additionally, in 2014, when the men’s team received \$5,375,000 in bonuses for losing in round sixteen of the World Cup, the USWNT received \$1,725,000 in 2015 for winning the entire tournament.¹⁵⁵ However, in 2016 alone the USWNT generated approximately \$1.9 million more in revenue than the Men’s National Soccer Team.¹⁵⁶ Furthermore, largely due to the USWNT, the U.S. Soccer Federation’s projected net loss in FY2016 became \$17.7 million in profit.¹⁵⁷ Using the above data from the twenty matches, the U.S. Soccer Federation could afford to pay each of the twenty-eight

<https://perma.cc/4D4R-GLL7>; @SarahSpain, TWITTER (Mar. 18, 2021, 11:10 PM), <https://perma.cc/3K3L-ZXLG>.

151. See *Rizo v. Yovino*, 887 F.3d 453 (9th Cir. 2019); *Kouba v. Allstate Ins. Co.*, 691 F.2d 873 (9th Cir. 1982); *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974).

152. *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir. 1971).

153. *Morgan v. U.S. Soccer Fed’n, Inc.*, 445 F. Supp. 3d 635, 656 (C.D. Cal. May 1, 2020).

154. Complaint, *Morgan v. U.S. Soccer Fed’n, Inc.*, No. 2:19-cv-01717, 2019 WL 1199270, at ¶¶ 58, 61 (C.D. Cal. Mar. 8, 2019).

155. *Id.*

156. Rachel Bachman, *U.S. Women’s Soccer Games Outearned Men’s Games*, WALL ST. J. (June 17, 2019), <https://perma.cc/6Z2B-7585>.

157. Complaint, *Morgan*, No. 2:19-cv-01717, at ¶¶ 7–8.

USWNT players listed in the complaint an additional \$164,320 (to make up the difference between \$99,000 and \$263,320) and still profit over \$13 million in FY2016.

Moreover, while one could argue that equal pay could have the unintended consequence of universities simply cutting their women's programs due to lack of profitability, I would instead offer an unintended benefit of equal pay that is aligned with the argument made in *Stanley*. Stanley argued that the men's program was revenue-generating compared to the women's program because USC had invested in the men's basketball program more so than the women's basketball program.¹⁵⁸ Using USC as an example, if USC had been required to pay Stanley a salary that was equal to the salary of their men's basketball coach, USC would have more of an incentive to ensure the profitability of their women's program in order to recoup their investment in Stanley. Rather than risk potential Title IX lawsuits by simply cutting unprofitable women's programs—because certainly there are unprofitable men's programs that do not get cut—universities that provide equal pay might logically increase, rather than decrease, their investment in women's programs to ensure their success.

Despite the limitations and counterarguments, the doctrine set forth in *Diaz* could be expanded and used to show why the argument men generate more revenue and therefore get paid more is oversimplistic and discriminatory. Since consumer preferences tend to work to the detriment of women in sports, female athletes and coaches can use this approach to demonstrate that unequal wages based on revenue generation illegally discriminates against women based on consumer preferences.

V. CONCLUSION

While the wage gap in sports is without a doubt a revenue issue, framing the problem as solely a revenue issue overlooks the fact that in sports, consumers largely influence the revenue-generating potential of a league, team, and governing organization. If society continues to justify the unequal wages earned by men and women in sports based on revenue, the burden will continuously be on women, who by no means are lacking the skill to perform at an elite level, to magically generate more revenue. Instead of patronizing women in sports by simply repeating "men generate more revenue," the proposal set forth in this Note shifts the burden onto leagues, teams, governing organizations, and, most importantly, consumers to explore *why* men generate more revenue. It is not just that men generate more revenue, it is that women generate less revenue in part because they are women.

As mentioned above, this proposal is not meant to resolve the entire pay gap, as it is impossible to definitively say that racist, sexist, and homophobic consumer preferences are solely responsible for the differential. However, this proposal is just one step towards women in sports getting paid what they deserve, and an effort to move the needle and push for gender equality in sport.

158. *Stanley v. Univ. of S. Cal.*, 178 F.3d 1069, 1074 (9th Cir. 1999).