

# License to Abuse: Confronting Coach-Inflicted Sexual Assault in American Olympic Sports

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## LICENSE TO ABUSE: CONFRONTING COACH-INFLICTED SEXUAL ASSAULT IN AMERICAN OLYMPIC SPORTS

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## INTRODUCTION

In 2014, Chuck Wielgus, the Executive Director of USA Swimming, was voted into the International Swimming Hall of Fame (ISHOF).<sup>1</sup> In the months leading up to the formal induction ceremony, the Women's Sports Foundation (WSF) spoke out against his nomination, and submitted materials to the ISHOF board, pointing to his numerous efforts to cover up instances of sexual abuse within USA Swimming during his seventeen-year tenure as executive director.<sup>2</sup> One former swimmer reported that she was molested by her coach when she was fourteen in 2008 and 2009.<sup>3</sup> Wielgus had the necessary means of preventing the abuse as early as 2003,<sup>4</sup> but instead, he ordered complaints filed against the coach be kept confidential.<sup>5</sup> Later in 2010, Wielgus reported to ESPN that the coach in question was not "on USA Swimming's radar" until he was arrested in 2009.<sup>6</sup> Wielgus alluded that such reports were merely rumors and that he did not intend to "engage in [speculation]."<sup>7</sup>

Representing nineteen victims of coaching sexual assault, the Women's Sports Foundation's petition to the ISHOF read,

[M]ore than 100 USA Swimming coaches have been banned for life, making this one of the worst sexual abuse scandals in the U.S. Olympics sports world. . . . Many of these coaches had well-known, long histories of sexual abuse, yet Wielgus enabled these men to continue to coach for years. . . . He has not been a leader in protecting victims; he has instead responded to outside pressure, and only after other avenues of obfuscation have been exhausted.<sup>8</sup>

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1. ISHOF Reviewing Protest Letter Against Chuck Wielgus Induction From Sexual Abuse Victims, SWIMMING WORLD, (May 29, 2014, 3:12 PM), <https://www.swimmingworldmagazine.com/news/ishof-reviewing-protest-letter-against-chuck-wielgus-induction-from-sexual-abuse-victims> [<http://perma.cc/U2SV5XMZ>].

2. Kelly Whiteside, *Hall of Fame Rescinds Chuck Wielgus' Invite Amid Sexual Abuse Allegations*, USA TODAY, (June 3, 2014, 10:23 AM), <http://www.usatoday.com/story/sports/olympics/2014/06/02/chuck-wielgus-usa-swimming-hall-of-fame/9893275> [<http://perma.cc/CYJ7P8WJ>].

3. 19 Victims of Coaching Sexual Abuse, *Rescind Chuck Wielgus' Hall of Fame Nomination*, CHANGE.ORG, <https://www.change.org/p/bruce-wigo-rescind-chuck-wielgus-hall-of-fame-nomination> [<http://perma.cc/U2XELXG2>].

4. *Id.*

5. *Id.*

6. *Id.*

7. Rachel Sturtz, *The Sex Abuse Scandal Plaguing USA Swimming*, OUTSIDE ONLINE, (Nov. 6, 2014), <http://www.outsideonline.com/o/outdoor-adventure/water-activities/swimming/The-Sex-Abuse-Scandal-Plaguing-USA-Swimming.html> [<http://perma.cc/ADQ4CDEK>].

8. *Id.* (brackets omitted).

After five days of ardent protest led by the WSF,<sup>9</sup> Wielgus rescinded his nomination and never got formally inducted into the International Swimming Hall of Fame.<sup>10</sup>

Within the larger context of sexual abuse in Olympic sports, Wielgus' resignation represented a small, yet significant, victory for Olympic athletes.<sup>11</sup> The Wielgus anecdote is indicative of the larger issue at play: Olympic athletes,<sup>12</sup> mostly underage females,<sup>13</sup> have almost no effective grievance procedure within their own National Governing Bodies (NGB), nor do they have statutory grounds for a civil suit, to combat sexual abuse from coaches.<sup>14</sup> Title IX protects students from sexual harassment and assault by requiring educational institutions to address its occurrence,<sup>15</sup> but Olympic athletes do not fall within Title IX's protection.<sup>16</sup> Additionally, Title VII requires employers to prevent harassment and also holds employers responsible for other employees who create a hostile work environment.<sup>17</sup>

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9. In their Change.org petition, the WSF and the nineteen victims made the following claims: (1) Chuck Wielgus failed to remove known serial molesters from swimming, (2) Chuck Wielgus did not demonstrate the necessary leadership to protect swimmers from sexual harassment and abuse, the way students and employees are protected, (3) Chuck Wielgus's legislative strategy has been hostile toward victims that report sexual abuse, (4) USA Swimming's mandatory insurance policies made it unlikely victims would get the counseling help they needed to move on with their lives, and (5) Chuck Wielgus has refused to apologize to victims of sexual abuse. Victims of Coaching Sexual Abuse, *Petition to Remove Chuck Wielgus from Swimming Hall of Fame*, [https://drive.google.com/folderview?id=0B4Ya\\_nRTOEogQi0yaGNZc3Zod0k&usp=sharing](https://drive.google.com/folderview?id=0B4Ya_nRTOEogQi0yaGNZc3Zod0k&usp=sharing) [http://perma.cc/44T37N2N].

10. Whiteside, *supra* note 2.

11. *Women's Sports Foundation Facilitates Protest on Behalf of Victims of Sexual Abuse*, WOMEN'S SPORTS FOUND., (June 2, 2014), <http://www.womenssportsfoundation.org/en/home/media-center-2/press-releases/press-release-June-2-2014> [http://perma.cc/R5784NPQ].

12. The United States Olympic Committee does not know exactly how many athletes it serves. Many underage amateur athletes with Olympic potential practice under NGB-sanctioned coaches without officially being part of Team USA yet. See Donna Lopiano & Connee Zotos, *Athlete Welfare and Protection Policy Development in the USA*, in SAFE-GUARDING, CHILD PROTECTION AND ABUSE IN SPORT: INTERNATIONAL PERSPECTIVES IN RESEARCH, POLICY AND PRACTICE 97, 103 (Melanie Lang & Mike Hartill eds., 2015).

13. This Note will refer to perpetrators as male and victims/complainants as female. While this author recognizes that there are exceptions, this paper primarily addresses how the legal voids within the Sports Act affect female athletes.

14. Nancy Hogshead-Makar, *Olympic Athletes Need Better Protections from Sexual Harassment and Assault*, WOMEN'S SPORTS FOUND. (Oct. 1, 2012, 9:59 AM), <https://www.womenssportsfoundation.org/en/home/she-network/education/olympic-athletes-need-better-protections-from-sexual-harassment-and-assault> [http://perma.cc/U7S47S36].

15. Laura L. Dunn, *Addressing Sexual Violence in Higher Education: Ensuring Compliance with the Clery Act, Title IX and VAWA*, 15 GEO. J. GENDER & L. 563, 569 (2014) (discussing schools' obligations to respond to sexual harassment claims under Title IX). See *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 75 (1991) (holding that sexual assault is a form of gender discrimination that invokes Title IX's application), (*remanded to 959 F.2d 1022*) (11th Cir. 1992).

16. Hogshead-Makar, *supra* note 14.

17. See *id.*

However, Olympic athletes are not employees and therefore do not trigger Title VII's application.<sup>18</sup>

Though more efforts must be made, publicly removing Wielgus from ISHOF signaled to the larger Olympic community the importance of leaders protecting victims, reinforcing a zero tolerance policy for sexual abuse, and performing thorough investigations into sexual abuse complaints.<sup>19</sup> It also indicated that efforts leading up to the Wielgus debacle to combat the issue had been minimal. In 2010, before the Chuck Wielgus scandal, USA Swimming became the first Olympic NGB to create a public list<sup>20</sup> of coaches and officials who have been banned either for making advances on their athletes or having sexual contact with them.<sup>21</sup> However, victims successfully getting the NGB to ban a coach is still rare, and a coach is only likely to get banned when a full criminal prosecution takes place.<sup>22</sup>

In response to the Chuck Wielgus and USA Swimming scandal, leaders in the Olympic community have put forth new efforts to combat the issue.<sup>23</sup> In July 2015, the United States Olympic Committee (USOC) “announced that it is developing a new agency [to investigate sexual assault allegations],”<sup>24</sup> but advocates “are in the difficult position of waiting to see exactly what that means.”<sup>25</sup> Until the USOC clarifies the scope and independence of its new agency, sexual abuse in our national governing bodies will likely continue without a mechanism for getting abusers out of sports.<sup>26</sup>

Additionally, the USOC adopted a strict policy prohibiting romantic and sexual relationships between coaches and athletes.<sup>27</sup>

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18. *Id.*

19. Whiteside, *supra* note 2.

20. Sturtz, *supra* note 7; see *Individuals Suspended or Ineligible—Permanently*, USA SWIMMING (Aug. 8, 2016), <http://www.usaswimming.org/ViewMiscArticle.aspx?TabId=1963&mid=10011&ItemId=5107> [<http://perma.cc/2FYZ7N5S>].

21. See Sturtz, *supra* note 7 (discussing offenders like Andy King, a swimming coach who coached several club teams, raped dozens of girls, and impregnated one. Sturtz also mentions Charles Arabas, a swimming coach that has actually served a prison sentence for his crimes. Arabas was fired from a coaching position for raping and sexually harassing minor athletes. After, he moved to northern Arizona and assaulted seven more girls on his new club team before finally being prosecuted for his crimes).

22. See *id.*

23. See *id.* (noting that coaching sexual assault happens across all Olympic sports, but for some reason, USA swimming has been particularly “riddled with [it].”).

24. Irvin Muchnick, *Nancy Hogshead-Makar: Women's Sports Advocates in "Difficult" Wait-and-See Mode on Sex Abuse Oversight*, CONCUSSION INC. (July 22, 2015), <http://concuSSIONinc.net/?p=10197> [<http://perma.cc/2Y9DX3JM>].

25. *Id.*

26. *Id.*

27. *United States Olympic Committee Coaching Ethics Code*, TEAM USA, <http://www.teamusa.org/USA-Karate/Officials-and-Coaches/Coaches-Resources/USOC-Coaching-Ethics-Code> [<http://perma.cc/53P3FLK2>].

This policy against such relationships is addressed under the heading “exploitive relationships,”<sup>28</sup> prohibiting coaches from engaging in sexual or romantic relationships with athletes or other participants.<sup>29</sup> The USOC justifies the policy by noting that the coach has “evaluative, indirect authority,”<sup>30</sup> over the athletes, so such relationships would likely “impair judgment.”<sup>31</sup> This policy strives to “safeguard the well-being of persons for whom [coaches] are responsible, rather than for the benefit of those in power.”<sup>32</sup> However, this policy is not enforced by the NGBs unless specifically adopted by the coaching associations.<sup>33</sup>

This Note will explain that there are two fundamental issues facing coaching sexual assault victims: (1) currently, there is not an effective way within the USOC and its NGBs to remove abusive coaches from sports, and (2) there is no viable cause of action under the Ted Stevens Amateur Sports Act (the Sports Act) available to victims to sue their NGBs for safe-harboring abusive coaches.<sup>34</sup> Ultimately, this Note will argue that a truly independent agency is needed to investigate sexual abuse allegations and remove abusers from the sport. It will also argue that Congress must strengthen the Sports Act so that there is a cause of action available to current victims in civil court.

Part I will explain current and existing law relevant to the athletic world. This section will deal with Title IX and explain how it provides students and student-athletes protections against campus sexual assault, particularly when it comes to removing those found to have committed sexual assault from campus. Part I will also discuss the Sports Act and describe the processes established in the Act for resolving controversies relating to participation and eligibility for athletes and coaches.

Part II will address the legal voids the Sports Act creates for athletes, and how the problem of sexual abuse illuminates these deficiencies. In this section, this Note will examine how the USOC policy toward sexual abuse is fragmented. Additionally, this part will point out other problems that compound the policy issue, such

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28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. Nancy Hogshead-Makar, *The Ethics of Title IX and Gender Equity for Coaches: Selected Topics*, in *THE ETHICS OF COACHING SPORTS: MORAL SOCIAL AND LEGAL ISSUES* 193, 204 (Robert L. Simon ed., 2013).

33. *Id.* at 204.

34. As will be discussed later, the Sports Act grants USOC exclusive jurisdiction regarding athletes' eligibility and participation claims.

as how some abusive coaches have evaded law enforcement and criminal prosecution. Lastly, this Note will address how the Sports Act precludes productive remedies for victims of coaching abuse in two ways: (1) the Act lacks a cause of action allowing victims to pursue private causes of action against NGBs for their own intentional or negligent conduct in hiring or retaining abusive coaches within NGB membership, and (2) the current internal NGB grievance procedure fails to remove abusers without a criminal conviction from sports. Comparisons will be drawn to Title IX to illustrate exactly where the cause of action is lacking. This section will also explain that, even without a private cause of action, NGBs sometimes tailor captive insurance policies to exclude intentional torts, thus further minimizing victim damages.

Part III will offer proposals to address the aforementioned issues. First, it will suggest that an independent agency must be created to investigate sexual assault allegations and initiate the necessary steps to remove abusers from sports. Second, it will suggest that a tort cause of action must be carved out from the Sports Act that will encompass the USOC and NGBs and hold them civilly liable for sexual abuse claims.

Some commentators have touched upon the relationship between the Sports Act and private right of action in state tort law,<sup>35</sup> and others have made sexual assault a widespread discussion in relation to Title IX.<sup>36</sup> Despite one 2015 law review article discussing the fairness of captive insurance policies,<sup>37</sup> no article was found that specifically examines the lack of legal recourse granted to amateur female athletes seeking retribution for coaching sexual assault. A few journalists and victims' attorneys have confronted the matter, taking special notice of the USOC's reporting mechanisms, but advocates have yet to approach the academic sphere to propose policy changes and a private cause of action under the Sports Act. This paper intends to establish the first stepping stone to academic legal advocacy on the topic.

## I. CURRENT AND SUPPORTING LAW

Under the current legal regime, there are two sources of sports law that are relevant to discussions of coaching sexual abuse: Title IX

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35. Dionne L. Koller, *How the United States Government Sacrifices Athletes' Constitutional Rights in the Pursuit of National Prestige*, 2008 BYU L. REV. 1465, 1484 (2008).

36. Dunn, *supra* note 15, at 569.

37. John S. Carroll, Comment, *Captive Insurance Companies and Sexual Abuse Policies*, 84 UMKC L. REV. 211, 212 (2015).

of the 1972 Education Amendments and the Ted Stevens Olympic and Amateur Sports Act. Though Title IX only applies to educational institutions receiving federal funding,<sup>38</sup> it serves as a backdrop for how a similar legal framework can apply to the Sports Act. Additionally, the Sports Act outlines a dispute resolution process for claims arising from athletes' eligibility to participate in Olympic NGBs.<sup>39</sup> However, as later sections will articulate, it does little to provide remedies for victims of coaching sexual abuse.<sup>40</sup> This part will describe the current law and how it is applied to explain the legal voids that facilitate abuse.

*A. Title IX Is a Model for Providing Victims of Sexual Abuse With a Range of Protections from Schools*

Understanding how the Title IX legal framework addresses sexual assault will establish a foundation for eliminating coaching sexual abuse in Olympic Sports. Title IX empowered women's equal opportunity in education, and consequently, the professional world.<sup>41</sup> The Amendment states, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ."<sup>42</sup>

Title IX is probably best known for its protection of women's equal opportunity in athletics, but it also provides women and girls affiliated with public colleges and universities restitution for sexual assault on school campuses.<sup>43</sup> Title IX addresses sexual assault as a civil rights violation and protects all students pursuing their education at public colleges and universities.<sup>44</sup> Sexual violence also occurs in other sport contexts such as at the collegiate level where

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38. Title IX of the 1972 Education Amendments, 20 U.S.C.A. § 1681 (Westlaw through Pub. L. No. 114-219).

39. See Amateur Sports Act, 36 U.S.C.A. § 220509 (LEXIS through Pub. L. No. 114-218).

40. See *infra* Part II.

41. Susan Reichle, *Title IX Creates Opportunities for Women in Sports and Development*, USAID (June 26, 2012), <https://blog.usaid.gov/2012/06/title-ix-creates-opportunities-for-women-in-sports-and-development> [<http://perma.cc/C98KLGBN>].

42. 20 U.S.C.A. § 1681 (Westlaw through Pub. L. No. 114-219).

43. According to the Department of Education, "Young women aged 16–24 experience the highest rates of rape and sexual assault, while 1 in 5 will be a victim of sexual assault during college." *Vice President Biden Announces New Administration Effort to Help Nation's Schools Address Sexual Violence*, OFFICE OF THE VICE PRESIDENT, (Apr. 4, 2011), <http://www.ed.gov/news/press-releases/vice-president-biden-announces-new-administration-effort-help-nations-schools-ad> [<http://perma.cc/US69GGSA>].

44. Dunn, *supra* note 15, at 568.

many high-profile campus rape cases have involved student-athletes as both alleged perpetrators and victims.<sup>45</sup>

The U.S. Supreme Court has interpreted Title IX by defining sexual harassment as a form of gender discrimination.<sup>46</sup> As a supplement to the case law controlling Title IX's application to sexual violence, the Office for Civil Rights (OCR) released a *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (2001).<sup>47</sup> In 2011, the OCR published the "Dear Colleague Letter" (DCL) to provide further guidance for schools handling sexual violence on campus.<sup>48</sup> Under these provisions, a campus rape victim has different options for action. They include: invoking a school's administrative hearing procedure, reporting to the police, submitting a complaint to an administrative agency like the OCR, or filing a civil cause of action against the school if it had notice and remained deliberately indifferent.<sup>49</sup>

Because Title IX protects students in all activities related to schools' educational programs, the DCL instructs schools to respond to all instances of sexual harassment and violence.<sup>50</sup> When responding, schools must adhere to specific procedural requirements.<sup>51</sup> They include: disseminating a notice of nondiscrimination, designating one employee as a Title IX coordinator, and adopting and publishing "grievance procedures providing for prompt and equitable resolution of student and employee sex discrimination complaints."<sup>52</sup>

For Title IX purposes, an investigation into a sexual assault complaint is a "decision-making process [a] school uses to determine: (1) whether or not the [alleged] conduct occurred; and, (2) if the [act did occur], what actions the school will take to end sexual violence,

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45. See *Williams v. Bd. of Regents*, 477 F.3d 1282, 1299 (11th Cir. 2007) (ruling against the University of Georgia for admitting a student-athlete that went on to rape a fellow student, despite previous knowledge that he was removed from other colleges for harassing women), *declined to follow by*, 2011 U.S. Dist. LEXIS 77888); see also *Jennings v. Univ. of North Carolina*, 482 F.3d 686, 691 (4th Cir. 2007) (discussing whether two female student-athletes were entitled to damages after their coach violated Title IX by sexually harassing them).

46. See *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 60, 76 (1991) (holding that Title IX does provide a remedy for students experiencing sexual harassment from school officials).

47. *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, OFFICE FOR CIVIL RIGHTS, U.S. DEPT OF EDUC. (Jan. 2001), <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

48. Russlynn Ali, *Dear Colleague Letter*, OFFICE FOR CIVIL RIGHTS, U.S. DEPT OF EDUC. 1, 2 (2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

49. *Id.* at 2–3, 10, 19.

50. *Id.* at 3–4.

51. *Id.* at 4.

52. *Id.* at 6.

eliminate the hostile environment, and prevent its recurrence . . . .”<sup>53</sup> The OCR also requires that Title IX investigations be “adequate, reliable . . . impartial [and] . . . prompt . . . .”<sup>54</sup> Throughout the investigation, the university must afford both parties the “equal opportunity to present relevant witnesses and other evidence.”<sup>55</sup> Additionally, if the school permits one party to have lawyers or an appeal, it must do so for both parties.<sup>56</sup>

Title IX sexual assault investigations may also intersect with a local criminal investigation.<sup>57</sup> While a school has a duty to conduct its own thorough investigation of a sexual assault complaint,<sup>58</sup> it is also required to notify the complaining student of his or her right to file a criminal complaint and should not discourage a student from doing so.<sup>59</sup> As a whole, the DCL investigation requirements incentivize schools to make specific and sound policies toward investigating and preventing sexual assault on campus.<sup>60</sup> By incorporating consistent and clear policy, schools are in an appropriate position to mitigate disruptions in potential victims’ and perpetrators’ education.<sup>61</sup>

As will be discussed later, the Sports Act does not offer amateur athletes the same protections that Title IX provides students; and yet, both statutes cover different groups of vulnerable individuals. Particularly, coach-inflicted sexual assault involves similar issues found in campus sexual assault investigations, such as how to effectively remove perpetrators and provide victims a productive mechanism for reporting abuse.<sup>62</sup> The following subsection will outline, in contrast to Title IX, the mechanism current Olympic athletes have and its potential pitfalls.

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53. Russlynn Ali, *Questions and Answers on Title IX and Sexual Violence*, OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC. 1, 24–25 (2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

54. *Id.* at 12.

55. *Id.* at 26.

56. *Id.*

57. *Id.* at 27.

58. Ali, *supra* note 48, at 4.

59. *Id.* at 10.

60. Nick Rammell, Comment, *Title IX and the Dear Colleague Letter: An Ounce of Prevention is Worth a Pound of Cure*, 2014 BYU EDUC. & L.J. 135, 139–40 (2014) (discussing how CU Boulder could have behaved more preventatively given that it had prior notice of sexual discrimination in their recruiting program, including a Sports Illustrated article, knowledge of prior sexual assaults within the football recruiting program, and discussion with local law enforcement).

61. Katharine K. Baker, *Why Rape Should Not (Always) Be a Crime*, 100 MINN. L. REV. 221, 222 (2015) (arguing that characterizing rape as a civil wrong will make it more likely for the DOE to succeed in reducing the amount of nonconsensual sex taking place on college and university campuses).

62. *Id.* at 232, 235 (explaining that very few reports of sexual assault on college campuses result in charges).

*B. The Sports Act's Dispute Resolution Process Only Implicates the Grievances That Directly Affect an Athlete's Eligibility and Ability to Compete*

While Title IX provides remedies for students and student-athletes experiencing sexual assault, the Sports Act only implicates athletes seeking solutions to issues affecting their ability to participate in competition.<sup>63</sup> Congress originally passed the Sports Act as a response to the lack of organizational structure in the American Olympic Sports program.<sup>64</sup> Without a governance structure, American Olympic officials engaged in intra-organizational political "squabbles."<sup>65</sup> As a result, the Olympic governing bodies neglected their sporting associations by focusing on intra-organizational disputes rather than on training their athletes to compete at the Olympic level.<sup>66</sup> In response to these issues, Congress passed the Sports Act in 1978 and instilled in the USOC the necessary powers to govern American Olympic sports.<sup>67</sup>

In 1998, Congress passed an amended version of the act, this time providing athletes with some power to conduct dispute resolution within their NGBs.<sup>68</sup> However, there are two reasons it is difficult for an athlete to pursue relief for an issue inhibiting her ability to participate: (1) an athlete has no federal constitutional right to participate in Olympic sports,<sup>69</sup> and (2) the Sports Act does not create any substantive athletic participation rights that athletes can enforce in private litigation against the USOC or an NGB.<sup>70</sup> Courts have also reinforced that Congress specifically granted the USOC jurisdiction to make athlete eligibility determinations,<sup>71</sup> and the Sports Act only applies to very narrow questions of eligibility,<sup>72</sup> such as whether an athlete can continue competing after testing positive for performance-enhancing drugs.<sup>73</sup>

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63. 36 U.S.C.S. § 220503 (LEXIS through Pub. L. No. 114-219).

64. James A.R. Nafziger, *The Amateur Sports Act of 1978*, 1983 BYU L. REV. 47, 47 (1983).

65. *Id.* at 49. n.15.

66. *See id.*

67. *See id.* at 50.

68. *See* 36 U.S.C.S. § 220509 (LEXIS through Pub. L. No. 114-219).

69. *See* DeFrantz v. USOC, 492 F. Supp. 1181, 1194 (D.C. Cir. 1980).

70. *Id.* at 1191.

71. *Id.*

72. *See* Slaney v. Int'l Amateur Ath. Fed'n, 244 F.3d 580, 595 (7th Cir. 2001) (holding that "when it comes to challenging the eligibility determination of the USOC, only a very specific claim will avoid the impediment to subject matter jurisdiction that [the Sports Act] poses.>").

73. *Id.* at 595-96.

There are several components to the Sports Act's legal framework for Olympic participation. First, the USOC is required to have an Athletes' Advisory Council to represent athletes' interests and establish an open line of communication between athletes and the USOC.<sup>74</sup> U.S. athletes currently participating in international amateur athletic competitions elect members to the Council.<sup>75</sup> Athletes also maintain voting power within the USOC; they must have at least 20% of membership and voting power held by the USOC Board of Directors,<sup>76</sup> committees,<sup>77</sup> and each NGB.<sup>78</sup> Additionally, the NGB is required to provide all amateur athletes with an equal opportunity to participate "without discrimination on the basis of race, color, religion, sex, age, or national origin . . . ."<sup>79</sup>

When problems arise with an athlete's participation, the USOC must enact some mechanism to resolve the dispute on its own, and NGBs must initiate their own internal investigation.<sup>80</sup> If an athlete is not satisfied with the outcome of the investigation, he or she has only one remaining available option: submit to a "final and binding arbitration in accordance with the Commercial Rules of the American Arbitration Association ('AAA')." <sup>81</sup> The proceeding takes place between the athlete and the NGB;<sup>82</sup> the AAA selects a single arbitrator or a panel of arbitrators to investigate a finding of fact and conclusion of law to settle the dispute.<sup>83</sup>

Because arbitration awards are bound by AAA confidentiality obligations, it is difficult to determine how effective the arbitration requirement is for athletes seeking restitution for NGB action that may inhibit their ability to participate.<sup>84</sup> Additionally, even if a court disagrees with the outcome of an arbitration proceeding,<sup>85</sup> it will

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74. 36 U.S.C.S. § 220504(b)(2) (LEXIS through Pub. L. No. 114-218).

75. *Id.*

76. *Id.*

77. *Id.*

78. 36 U.S.C.S. § 220504(b)(1) (LEXIS through Pub. L. No. 114-218).

79. 36 U.S.C.S. § 220522(a)(8) (LEXIS through Pub. L. No. 114-218).

80. Matthew J. Mitten, *Legal Protection of Sports Participation Opportunities in the United States of America*, 19 NAT'L SPORTS L. INST. 1, 3 (2008), <https://law.marquette.edu/assets/sports-law/pdf/for-the-record/v19i4.pdf>.

81. *Id.*

82. *Id.* at 4.

83. *Id.* at 4.

84. *Id.*

85. Arbitration in any context remains a controversial topic; in employment contracts, arbitration seems to benefit the employer and place too many burdens on the complaining party. See Eric Koplowitz, Note, "*I Didn't Agree to Arbitrate That!*"—How Courts Determine if Employees' Sexual Assault and Sexual Harassment Claims Fall Within the Scope of Broad Mandatory Arbitration Clauses, 13 CARDOZO J. CONFLICT RESOL. 565, 570 (2012).

apply very limited scrutiny to the AAA arbitration award.<sup>86</sup> However, a court will interfere with an arbitration outcome if the arbitrator exceeded his authority, especially if the award is “the result of ‘corruption,’ ‘fraud,’ ‘evident partiality,’ or any similar bar to confirmation.”<sup>87</sup>

Overall, arbitration is primarily intended to solve issues that affect the athlete’s membership in the NGB, namely issues that concern an athlete’s overall athletic eligibility.<sup>88</sup> In that sense, athletes face even more difficulty pursuing specific causes of action that may *indirectly* affect their ability to compete, like sexual assault or sexual harassment, against their respective NGBs.<sup>89</sup> In these indirect cases, it is difficult for an athlete to concretely say that her NGB is keeping her from actively practicing and participating at an elite level.<sup>90</sup> Consequently, the Sports Act creates an exclusive and limited means for solving conflict arising from sports participation.

## II. THE LEGAL VOID

As noted above, the Sports Act serves a broad purpose for all Olympic athletes: establish a clear organizational structure for Olympic sports, one that affords and protects an athlete’s opportunity to participate and compete.<sup>91</sup> While many athlete grievances can be properly addressed, others carry long-lasting trauma for which arbitration is not ideal.<sup>92</sup> As a harm that cuts against a young woman’s ability to effectively participate in Olympic sports, sexual assault presents similar issues to NGBs as it does to college administrations. This part discusses three issues: (1) the USOC’s policy directed toward abuse, especially when the abuse involves minors, is fragmented, (2) the Sports Act poses roadblocks to removing abusers

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86. Mitten, *supra* note 80, at 4.

87. *Id.*

88. See Hogshead-Makar, *supra* note 14.

89. When an athlete’s claim does not directly involve her right to participate, she may file a grievance pursuant to the NGB’s internal complaint procedures, which includes discrimination claims. See *Athlete Guide to Resolution of Olympic and Paralympic Disputes*, TEAM USA, <http://www.teamusa.org/Athlete-Resources/Athlete-Ombudsman/Dispute-Resolution> [<http://perma.cc/99359RLH>].

90. This assumes that though sexual assault may disrupt an athlete’s experience, it does not keep her from actually participating; therefore, an NGB may have more reason to detach itself even from arbitration in a coaching sexual abuse proceeding. This argument, unique to this Note, is derived from the fact that the Amateur Sports Act *does have* a non-discrimination clause (which would encompass sexual assault claims), but the Act requires such claims to go through AAA arbitration rather than the court system. See Hogshead-Makar, *supra* note 32, at 204.

91. See 36 U.S.C.A. § 220509 (Westlaw through Pub. L. No. 114-219).

92. This point will be discussed more thoroughly further on in this section, and it will use recent pleadings to show the difficulties victims’ lawyers face when confronting coaching sexual abuse.

from sports, and (3) there is no cause of action under the Sports Act that victims can utilize against NGBs to win suitable damages for experiencing coach-inflicted sexual assault.

*A. Current USOC Policy Does Not Offer Victims Concrete Solutions*

The separate entities involved—the USOC, NGBs, and club teams—are not equipped to address abuse committed by a sanctioned coach. As noted in the introduction, the USOC has a specific ethics policy directed toward Olympic coaches: “Coaches do not engage in sexual/romantic relationships with athletes or other participants over whom the coach has evaluative, direct, or indirect authority, because such relationships are likely to impair judgment or be exploitative.”<sup>93</sup> Even prohibiting relationships with former athletes, the USOC describes any kind of personal relationship between coach and athlete as exploitative.<sup>94</sup>

Before 2012, NGBs were not required to adopt the minimum policy standards set forth by the USOC.<sup>95</sup> Victims faced other issues, especially in USA Swimming, when reporting sexual abuse: the NGB did not prohibit sexual touching in its code of conduct until 1999, nineteen years after the NGBs’ creation.<sup>96</sup> Also, the NGB did not require criminal background checks of coaches until 2006,<sup>97</sup> and it did not formulate a procedure for dealing with abuse allegations until 2011.<sup>98</sup> When victims did make allegations, reports went to a National Board of Review hearing, as required by the Sports Act.<sup>99</sup> In the USA Swimming context, hearings were typically chaired by USA Swimming’s own legal counsel, thus violating the impartiality requirement in the Sports Act.<sup>100</sup>

In 2012, USOC expanded its protection of athletes by requiring NGBs to adopt an athlete welfare strategy.<sup>101</sup> USOC outlined minimum components that NGBs were required to adopt by December 2013.<sup>102</sup> These components included:

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93. *United States Olympic Committee Coaching Ethics Code*, *supra* note 27.

94. *Id.*

95. Hogshead-Makar, *supra* note 32, at 204.

96. Sturtz, *supra* note 7.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* However, in recent years, the panel has made more informed decisions about banning a coach from sport after investigating an athlete’s allegation. *Id.*

101. Lopiano & Zotos, *supra* note 12, at 101.

102. *Id.* at 101–02.

- (1) A policy that prohibits bullying; hazing; harassment; emotional, physical and sexual misconduct, including child sexual abuse; and romantic or sexual relationships between NGB [program] participants and coaches or other supervisory personnel with direct supervisory control, or who are in a position of power or trust, over the participant.
- (2) A requirement for “criminal background checks for those individuals it formally authorizes, approves or appoints (a) to a position of authority over, or (b) to have frequent contact with athletes . . . .”
- (3) Beginning 1 January 2014, implementation of education and training concerning the key elements of their safety [program] for those individuals it formally authorizes, approves or appoints (a) to a position of authority over, or (b) to have frequent contact with athletes . . . .
- (4) A procedure for reporting misconduct.
- (5) A grievance process to address misconduct allegations that have not been adjudicated under a criminal background check, and that includes the opportunity for independent review.<sup>103</sup>

While the above policy seems progressive in its content, its application is limited.<sup>104</sup> NGBs are not required to extend further protections to their athletes outside of the USOC’s minimal requirements.<sup>105</sup> Additionally, only those working directly in an NGB are subject to the policy, which means that NGBs are “not required to extend the policy to local clubs or individual coaches outside NGB-sponsored [programs], weakening the protection available.”<sup>106</sup> The USOC also concedes that it is unaware of how many NGB-affiliated athletes it serves, but the “most recent USOC quadrennial census report suggests there are 3,220,988 NGB-affiliated athletes.”<sup>107</sup>

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103. *Id.* at 102 (citing to the *United States Olympic Committee Coaching Ethics Code*, *supra* note 27).

104. *Id.*

105. *Id.*

106. *Id.* Technically, the policy only pertains to NGB employees, the athletes selected by the NGBs, and individuals who the NGB formally authorizes to have direct interactions with athletes. Clubs and coaches outside of NGB-sponsored programs may still be affiliated with the NGB by training and preparing athletes that will funnel into the Olympic teams. Lopiano, *supra* note 12, at 102. Additionally, NGBs like USA Swimming are notorious for claiming that they are not responsible for coaching abuse taking place within club teams because club teams are “self-run.” See Sturtz, *supra* note 7.

107. Lopiano & Zotos, *supra* note 12, at 103.

At the NGB level, sporting organizations do not have an official mechanism for keeping track of information concerning coaches that are involved in *pending* criminal proceedings or civil lawsuits for alleged abuse.<sup>108</sup> Also, due to a lack of coordination, NGBs also fail to alert other sporting organizations serving young Olympic hopefuls to these investigations.<sup>109</sup> Donna Lopiano points out the gaping issue here in her work about athlete welfare policy: a coach can technically abuse an athlete at one club and leave either before the abuse is detected or if the abuse is not reported to the police.<sup>110</sup> Meanwhile, the abusing coach is free to coach at another club where athletes are unaware of his abusive history.<sup>111</sup>

Compounding the policy issues, law enforcement cannot *always* effectively remove abusers from sports, especially when an abusing coach has a particularly close relationship with his athletes. Though some abusive coaches have been prosecuted for their crimes,<sup>112</sup> others evade detection, making it difficult for law enforcement to take perpetrators into custody.<sup>113</sup> The latter scenario happens when an athlete spends significant time with her abusing coach.<sup>114</sup> In these situations, an athlete might not immediately recognize her coach's advances as abuse because the abuser is initiating a process called "grooming."<sup>115</sup> Grooming proceeds through several stages: targeting a victim, building trust with the victim, developing control over the victim, initiating abuse, and securing secrecy.<sup>116</sup> At this point, abusers establish strong relationships with their victim-athletes, making it less likely a victim will report the abuse, either to her parents or law enforcement.<sup>117</sup>

These issues, namely the fragmented policies and abusers' grooming tactics, are best exemplified by the story of Anna Strzempko, an accomplished swimmer and coaching abuse victim. At thirteen, Anna made it to the finals of the 2008 YMCA Course National Championship, becoming the second female swimmer from the Greater Holyoke

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108. *Id.*

109. *Id.*

110. *Id.* at 103–04.

111. *Id.*

112. Some abusers, like Andy King, evaded police detection before ever being criminally prosecuted for their crimes. See Megan Chuchmach & Avini Patel, *ABC News Investigation: USA Swimming Coaches Molested, Secretly Taped Dozens of Teen Swimmers*, ABC NEWS (Apr. 9, 2010), <http://abcnews.go.com/Blotter/abc-news-investigation-usa-swimming-coaches-raped-molested/story?id=10322469> [<http://perma.cc/Y72Z2KFW>].

113. See Lopiano & Zotos, *supra* note 12, at 104.

114. See Hogshead-Makar, *supra* note 32, at 203.

115. *Harassment and Abuse in Sport*, THE OLYMPIC MOVEMENT (2015), <http://www.olympic.org/sha> [<http://perma.cc/E6TV5AVL>].

116. *Id.*

117. *See id.*

YMCA Vikings swim team to make it to that stage of competition.<sup>118</sup> Afterward, Anna's coach called her into his office to tell her she had Olympic potential and then raped her in the storage room next to his office.<sup>119</sup> The abuse continued throughout Anna's high school years, and thinking no one would believe her if she said anything, she did not report the abuse to her parents or any YMCA authority.<sup>120</sup>

Anna did finally report the abuse to her mother, but she only told her mother bits and pieces of her story over the course of a few months.<sup>121</sup> Mrs. Strzempko reported the abuse to YMCA officials, and the coach was suspended.<sup>122</sup> Local police interviewed Anna and later told her mother that she did not "'act' like an abuse victim."<sup>123</sup> The Strzempko family also reported the alleged abuse to the Massachusetts Department of Children and Families.<sup>124</sup> The agency ruled in favor of Anna, but then backed off its initial decision and reinstated the coach when his lawyer attacked Anna's credibility on appeal.<sup>125</sup> By 2013, the family decided to report the abuse to USA Swimming, and after investigation, the NGB ultimately decided not to change the coach's status as a sanctioned coach in USA Swimming.<sup>126</sup> All the while, Anna and her family faced criticism throughout the YMCA community for reporting a beloved coach; critics typically accused Anna of seeking attention.<sup>127</sup> Later in 2013, one of Anna's teammates tweeted, "no one believes you anyways you stupid whore )."<sup>128</sup> Now in college, Anna still legally and emotionally battles the abuse she experienced throughout her teenage years.<sup>129</sup>

Anna's story highlights Donna Lopiano's main point about evolving athlete welfare policy: the measures aimed at protecting young athletes in NGB-affiliated teams are too fragmented and attenuated to provide proper remedies for coaching abuse victims.<sup>130</sup> As a result, victims like Anna are bound to meet resistance when they report abuse to their local club teams and respective NGBs. Additionally, as the next section will discuss, the *legal* recourse victims do have when they report abuse does not always provide them with adequate remedies.

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118. Sturtz, *supra* note 7.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. Sturtz, *supra* note 7.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. Lopiano & Zotos, *supra* note 12, at 104.

*B. The Sports Act Lacks a Clear Conflict Resolution Mechanism for Coaching Sexual Assault Victims*

While students and student-athletes have Title IX at their disposal to hold schools accountable after they experience sexual assault,<sup>131</sup> club sport athletes<sup>132</sup> are limited to the Sports Act.<sup>133</sup> Though the Sports Act provides arbitration for athletes alleging that the NGB infringed upon their participation eligibility,<sup>134</sup> it is not designed to properly address sexual assault for two reasons: (1) the Sports Act's deference to the USOC's and NGB's internal grievance procedure fails to remove abusers from sport, and (2) the Act does not contain any provision that would create liability for NGBs that knowingly retain abusers. This part will use a case currently pending litigation, *Gatt v. USA Taekwondo*,<sup>135</sup> to illustrate athletes' difficulties when submitting to an internal grievance procedure and why the current system keeps athletes from holding NGBs liable for abuse.

*1. The Amateur Sports Act Cannot Effectively Remove Coaches from Sports*

As noted before, courts have ruled that the USOC's adjudicatory jurisdiction under the Sports Act should be narrowly construed to matters directly affecting an athlete's eligibility.<sup>136</sup> When an athlete's grievance does not involve the denial of the right to compete in protected competition, she may file a grievance pursuant to the NGB's internal complaint procedures.<sup>137</sup> If the outcome is unfavorable

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131. See *supra* text accompanying notes 43–47 (discussing legal recourse students have under Title IX for campus sexual assault).

132. Amateur athletes are arguably more at risk than professional athletes. While professional athletes are paid, amateur athletes are not and therefore cannot sue for sexual harassment or assault under Title VII. See *Federal Laws Prohibiting Job Discrimination Questions and Answers*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (Nov. 21, 2009), <https://www.eeoc.gov/facts/quanda.html> [<http://perma.cc/7ZAV22ML>].

133. See *supra* text accompanying notes 64–67 (discussing why the Sports Act was passed).

134. For amateur and professional sport-related claims under the Amateur Sports Act, courts have little discretion for determining whether or not a claim falls within the mandatory arbitration requirement. In order to compete, athletes are required to sign a form agreeing to arbitration and to forego all lawsuits. Jason Gubi, Note, *The Olympic Binding Arbitration Clause and the Court of Arbitration for Sport: An Analysis of Due Process Concerns*, 18 FORDHAM INTELL. PROP., MEDIA & ENT. L. J. 997, 998 (2008).

135. I have received permission from an attorney affiliated with the plaintiff's case to cite his pleadings in this Note. At this point, the coach has been criminally convicted, so the facts of the case have already been recorded on public record.

136. *Slaney v. Int'l Amateur Athletic Fed'n*, 244 F.3d 580, 595 (7th Cir. 2001).

137. *Athlete Guide to Resolution of Olympic and Paralympic Disputes*, *supra* note 89.

to her, she may submit the complaint to AAA arbitration.<sup>138</sup> Consequently, athletes bringing complaints that indirectly affect their participation, like those requesting to remove certain coaches for abuse allegations, run into additional challenges.<sup>139</sup> As discussed below, the reasons that athletes face difficulty removing abusers from sport are: (1) the internal NGB grievance procedure raises significant partiality concerns, and (2) arbitration, as the mechanism for appealing decisions made outside of the athlete's favor, is not suitable for sexual assault claims.

The Sports Act provides for two procedural pathways for filing a complaint within the NGB: informal resolution and formal resolution.<sup>140</sup> An informal resolution process includes "direct conversation/negotiation with the NGB . . . and/or mediation assistance from the Athlete Ombudsman."<sup>141</sup> Athletes submitting complaints through a formal process go through a more in-depth procedure.<sup>142</sup> As a violation of the code of conduct, sexual assault is classified as "[o]ther" on the USOC's list of complaints.<sup>143</sup> When submitting these complaints through a formal process, the athlete must submit it to her NGB's Grievance Procedure.<sup>144</sup> If she does not achieve the preferred outcome, her only recourse is to appeal to arbitration.<sup>145</sup>

At the NGB Internal Grievance stage, there are significant issues with partiality, namely a lack of incentive to remove abusers and a conflict of interest, as demonstrated by a recent case, *Gatt v. USA Taekwondo*.<sup>146</sup> This case demonstrates how the NGB internal grievance procedures fail victims and involves USA Taekwondo (USAT) and Marc Gitelman, a Taekwondo coach who molested three underage female athletes on separate occasions from 2007 until he was arrested in 2014.<sup>147</sup>

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138. *Id.*

139. The Amateur Sports Act requires Olympic NGBs to provide all amateur athletes with an equal opportunity to participate "without discrimination on the basis of race, color, religion, sex, age, or national origin . . ." 36 U.S.C.A. § 220522(a)(8) (Westlaw through Pub. L. No. 114-218). Additionally, an NGB must "encourage and support athletic participation opportunities for women . . ." Mitten, *supra* note 80, at 3. These requirements imply that NGBs are required to provide meaningful participation opportunities, and this Note assumes that allowing an abuser to continue coaching detracts from the meaningfulness of his athletes' opportunities.

140. *Athlete Guide to Resolution of Olympic and Paralympic Disputes*, *supra* note 89.

141. *Id.*

142. *See id.*

143. *See id.*

144. *See id.*

145. *Id.*

146. *See* Compl. for Damages ¶¶ 24–25, *Gatt v. USA Taekwondo*, No. BC599321, (Oct. 29, 2015).

147. *See id.* ¶¶ 21–25.

In September 2013, Yazmin Brown, one of the three athletes, filed a formal complaint with the USA Taekwondo Ethics Committee.<sup>148</sup> The complaint went to Malia Arrington,<sup>149</sup> the Director of Ethics and “SafeSport” for defendant USOC.<sup>150</sup> As the Director of Ethics, Arrington is responsible for enforcing the USOC’s Code of Conduct, which prohibits “any act of sexual harassment including but not limited to requests for sexual favors, physical conduct of a sexual nature by and between persons participating in the affairs or activities of USAT directed towards any other member or person participating in such events/activities . . . .”<sup>151</sup> Brown submitted Facebook conversations she had with Gitelman, outlining the extensive sexual relationship he pursued with her while she was a minor.<sup>152</sup> The two other women listed in the complaint also submitted narratives outlining their own similar experiences with the coach.<sup>153</sup> Despite this evidence, the Ethics Committee did not strip Gitelman of his status as a USAT coach *until* he was arrested in 2014 on child molestation charges.<sup>154</sup>

In October 2015, the three women filed suit against USA Taekwondo and the USOC for harboring Gitelman and failing to remove him from USAT when he was initially reported.<sup>155</sup> The complaint alleges that before the three women filed suit, the USOC had been on notice about abuse taking place within its training facilities since the 1980s.<sup>156</sup> Specifically, the complaint points to 2005 when a USAT athlete was raped at the Olympic Training Center in Colorado Springs.<sup>157</sup> “In response to that rape defendant USOC placed a guard outside the girls dormitory at its training center in Colorado Springs however, that guard was removed sometime between 2005 and 2009.”<sup>158</sup>

The Ethics Committee’s decision not to remove the USA Taekwondo coach is arguably indicative of the larger crisis: that NGBs

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148. Telephone Interview with Jonathan Little, Partner, Saeed & Little, LLP (Feb. 28, 2016).

149. See Compl. for Damages, *supra* note 146, ¶ 9.

150. Vanessa Kirbitsky, *U.S. Olympic Committee Name Malia Arrington Director of Ethics and Safe Sport*, TEAM USA (Apr. 20, 2011), <http://www.teamusa.org/Media/News/USOC/US-Olympic-Committee-names-Malia-Arrington-Director-of-Ethics-and-Safe-Sport> [<http://perma.cc/BG5J48ST>].

151. See Compl. for Damages, *supra* note 146, ¶ 17.

152. Telephone Interview with Jonathan Little, Partner, Saeed & Little, LLP (Feb. 28, 2016).

153. *Id.*

154. *Id.*

155. See Compl. for Damages, *supra* note 146, ¶ 25.

156. *Id.* ¶ 34.

157. *Id.*

158. *Id.*

might be protecting their coaches at the expense of their athletes' safety. Similar occurrences have taken place in other NGBs such as USA Fencing, Swimming, Biathlon, and Field Hockey, to name a few.<sup>159</sup> In USA Swimming, for example, an athlete submits a complaint to the National Board of Review.<sup>160</sup> The Board is responsible for "resolv[ing] matters, questions and disputes involving USA Swimming, the Local Swimming Committees, or the membership."<sup>161</sup> In theory, when an athlete reports sexual misconduct, the matter must go straight to the Board and is adjudicated by a panel of impartial committee members.<sup>162</sup> In practice, the committee often has been chaired by USA Swimming's own legal counsel.<sup>163</sup> This meant that the lawyer who was supposed to be the impartial adjudicator could also be the same lawyer who becomes adversarial to the athlete if the matter reaches a courtroom.<sup>164</sup>

The Taekwondo athletes' choice to file suit is revealing of the second issue with the NGB internal grievance procedure: arbitration, as an appeals process, is unsuitable for sexual assault claims.<sup>165</sup> The Sports Act's arbitration requirement applies to disputes about a participant's membership in an NGB; questions pertaining to a coach's eligibility also trigger the arbitration requirement.<sup>166</sup> In the employment context, the U.S. Supreme Court has typically favored arbitration as a means of solving disputes.<sup>167</sup> Though arbitration often provides efficient conflict resolution,<sup>168</sup> there are some instances where the employee's interest in restitution substantially outweighs the benefit of efficiency.<sup>169</sup> For example, in *Jones v. Halliburton Co.*, the court found that arbitration was an inappropriate dispute resolution process because the workplace assault took place outside the scope the plaintiff's employment.<sup>170</sup>

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159. Telephone Interview with Jonathan Little, Partner, Saeed & Little, LLP (Feb. 28, 2016).

160. See *National Board of Review Committee*, USA SWIMMING, <http://www.usaswimming.org/ViewMiscArticle.aspx?TabId=1599&mid=6420&ItemId=3522> [<http://perma.cc/MH5ESN3Y>].

161. *Id.*

162. Sturtz, *supra* note 7.

163. *Id.*

164. *Id.*

165. See *Jones v. Halliburton Co.*, 583 F.3d 228, 241 (5th Cir. 2009) (holding that sexual harassment and assault is not within the scope of employment and therefore should not be compelled to arbitration).

166. See 36 U.S.C.A. § 220522(a)(4)(B) (Westlaw through Pub. L. No. 114-218).

167. See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

168. See George Padis, Note, *Arbitration Under Siege: Reforming Consumer and Employment Arbitration and Class Actions*, 91 TEX. L. REV. 665, 667 (2012).

169. Koplowitz, *supra* note 85, at 580.

170. *Jones*, 583 F.3d at 240.

Given the traumatic nature of sexual assault, the court's reasoning in *Jones* should apply to Olympic sports arbitration contexts. Though an NGB, like an employer, will likely argue that an alleged sexual assault by a coach should go to arbitration because it stems from an athlete's participation,<sup>171</sup> that argument cuts against an underlying assumption that sexual assault should not be an inherent part of an athlete's right to protected competition under the Sports Act. Additionally, arbitration's advantages for an employer or NGB present challenges for a sexual assault victim seeking to appeal the NGB's decision to keep a coach in a sport. Such challenges include greater privacy for the employer, enhanced settlement potential, and lack of opportunity for appeal.<sup>172</sup>

The faulty mechanism for removing abusive coaches from sport, coupled with a non-existent cause of action against NGBs, presents serious issues for victims seeking retribution for abuse. Reviewing the internal grievance process outlined above strongly suggests that the USOC and its NGBs should not have the authority to self-police. As the following subsection argues, there is too much incentive to allow abusive coaches to remain in sports, without a cause of action or independent investigatory body.

*2. The Amateur Sports Act Lacks a Clear Cause of Action That Would Provide Victims With the Legal Recourse to Sue NGBs for Knowingly Retaining Abusive Coaches*

Victims' attorneys face two substantial issues when suing the USOC and NGBs for coaching abuse: (1) unlike Title IX for student-athletes, the Sports Act does not provide athletes a private right of action,<sup>173</sup> and (2) many NGBs have structured their insurance agreements "to make them effectively judgment-proof."<sup>174</sup> These two issues together mean that not only will the Sports Act, as currently applied, block an athlete's state law claim against an NGB, but also the NGB's insurance policy likely deters lawyers from taking athletes' cases. This section will discuss both issues in order to show how an NGB can preempt an athlete from obtaining any monetary damages in a civil suit.

In *DeFrantz v. U.S. Olympic Committee*, the court held that the Sports Act preempts state tort law, so athletes do not have an implied

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171. See Koplowitz, *supra* note 85, at 580 (discussing employers' views on why a sexual assault claim should go through arbitration).

172. *Id.* at 569.

173. See *Foschi v. U.S. Swimming, Inc.*, 916 F. Supp. 232, 239 (E.D.N.Y. 1996); see also *Walton-Floyd v. U.S. Olympic Comm.*, 965 S.W.2d 35, 40 (Tex. App. 1998).

174. Hogshead-Makar, *supra* note 14.

private cause of action against the USOC.<sup>175</sup> To find a private cause of action, the Supreme Court applies four factors:

- (1) whether the plaintiff is a member of a class for whose special benefit the statute was enacted;
- (2) whether there is an indication of Congressional intent to create or deny a private remedy;
- (3) whether a private remedy would be consistent with the statute's underlying purposes; and
- (4) whether the cause of action traditionally is relegated to state law.<sup>176</sup>

For the Sports Act, finding a private cause of action stops at the second factor.<sup>177</sup> Congress passed the Act to legislate the governance structure of the USOC and its NGBs so governing disputes would not harm athletes' opportunity to compete.<sup>178</sup> The *DeFrantz* court pointed out that though the purpose of the Act—to enact governance and facilitate participation—does protect an athlete's ability to compete, the USOC is a private organization, not a state actor, so athletes receive no constitutional due process–like protections.<sup>179</sup> In other words, the Act will only recognize an athlete's right to compete if an internal dispute in the USOC's governance structure infringes upon participation.<sup>180</sup>

In addition to negating a private cause of action, courts defer to the Sports Act dispute resolution process to rationalize a finding that the Act preempts state tort law.<sup>181</sup> The USOC would argue that this rationalization makes sense, considering that the ability to compete in the Olympic games is not a constitutionally protected right.<sup>182</sup> Because the Act “strongly favors athletes resolving their disputes through the internal mechanisms provided by the USOC rather than the judicial system,”<sup>183</sup> courts are less likely to find a private cause of action. Though later amendments to the Act involved provisions for athletes' disputes,<sup>184</sup> they were not designed to handle matters outside of an athlete's eligibility complaint.<sup>185</sup>

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175. *DeFrantz v. U.S. Olympic Comm.*, 492 F. Supp. 1181, 1191 (D.D.C. 1980).

176. *Walton-Floyd*, 965 S.W.2d at 38.

177. *Id.*

178. See *supra* text accompanying notes 63–65; *Walton-Floyd*, 965 S.W.2d at 36.

179. *DeFrantz*, 492 F. Supp. at 1194.

180. *Id.* at 1191.

181. *Walton-Floyd*, 965 S.W.2d at 40.

182. *Id.* at 39.

183. *Id.* at 38.

184. *Id.*

185. The grievance procedure noted in this section for athletes under the 1998 amendment of the Amateur Sports Act allows for athletes to appeal decisions made by the NGB that directly affect their ability to compete, such as an NGB's finding that an athlete's doping violation makes him or her ineligible to compete in upcoming protected competitions. See *id.* at 36.

Current litigation surrounding the *Gatt*<sup>186</sup> case illustrates the issues athletes face when they do try to file suit. These obstacles are rooted in both traditional tort concepts of negligence. First, in its response to the plaintiff's complaint, the USOC argues that, as a matter of current law, it does not owe the plaintiffs a duty.<sup>187</sup> As is well-known, tort law does not interfere with private relationships to which no legally cognizable duty attaches.<sup>188</sup> Second, it is harder for a plaintiff to demonstrate a principal/agent relationship in the context of amateur athletics. In this case, the plaintiff would have to make a showing of benefit between the USOC and Gitelman for the operation of negligent liability for maintaining the coach's sanctioned status. The reason is that sexual torts, under state law, are not within the "scope of employment."<sup>189</sup> Additionally, Gitelman was not the USOC's or USAT's formal employee; he was only a sanctioned member of USAT.<sup>190</sup> Under the current regime, the USOC's response to the plaintiff's suit is consistent with *DeFrantz's* holding that there is no private cause of action for an athlete to sue a sports organization under state tort law.<sup>191</sup>

Analogizing the Sports Act with Title IX illuminates a legal void where amateur athletes are not statutorily protected from sexual abuse. Unlike the Sports Act, Title IX imputes a duty on schools to thoroughly investigate sexual assault claims and take necessary measures to prevent the reoccurrence of sexual assault on college campuses.<sup>192</sup> Additionally, there is a clear special relationship between students and school administrators; "special relationships" such as those between students and teachers or doctors and patients can impose a common law duty of care.<sup>193</sup> Thus, in the event that a school does not properly handle a sexual assault investigation, a victim can hold the school liable.<sup>194</sup> The stark differences in the way Title IX and the Sports Act approach sexual assault are perplexing. Both the USOC and educational institutions work closely with

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186. See *supra* text accompanying note 168 (discussing current litigation pertaining to the issue of suing an NGB for a coach's sexual misconduct against minor athletes).

187. Answer at 2, *Gatt v. USA Taekwondo*, (Cal. Super. Ct. 2016) (No. BC599321).

188. See *Walton-Floyd v. U.S. Olympic Comm.*, 965 S.W.2d 35, 40 (Tex. App. 1998).

189. Answer, *supra* note 187, at 4–5.

190. *Id.*

191. *DeFrantz v. U.S. Olympic Comm.*, 492 F. Supp. 1181, 1191 (D.D.C. 1980); see also *Martinez v. U.S. Olympic Comm.*, 802 F.2d 1275, 1281 (10th Cir. 1986).

192. Ali, *supra* note 48, at 4.

193. Restatement (Third) of Torts: Duty Based on Special Relationship with Another § 40 (Am. Law Inst. 2016).

194. Ali, *supra* note 48, at 8 (discussing that schools are required to designate one employee as a Title IX coordinator, and adopt and publish "grievance procedures providing for the prompt and equitable resolution of [student and employee] sex discrimination complaints").

vulnerable individuals. As the USOC oversees coach-athlete relationships where the athlete is at a clear power disadvantage, educational institutions supervise teacher-student relationships where a similar power dynamic plays out for the student.<sup>195</sup> Yet, the Sports Act does not recognize a duty to plaintiffs filing private actions,<sup>196</sup> so a legal void remains where there arguably should be a duty.<sup>197</sup>

Also blocking victims from obtaining monetary damages, some NGB insurance policies exempt intentional torts, like sexual assault, from general liability coverage.<sup>198</sup> As recently as 2010, USA Swimming, for example, maintained a captive insurance company in Barbados, called the United States Sports Insurance Company (USSIC).<sup>199</sup> Paying premiums with membership dues in the 1980s and 1990s, USA Swimming tailored its own policy and excluded sexual misconduct from local swimming club policies.<sup>200</sup> This policy changed in the late 1990s, and sexual misconduct was reinstated on general liability coverage.<sup>201</sup> However, reinstating sexual misconduct did little for victims; the NGB paid its defense lawyers large sums out of the policy whenever athletes did sue, so athletes only received minor damages, if at all.<sup>202</sup>

Though legal, captive insurance policies have recently raised suspicion because parent entities can “custom tailor . . . policies against risks that otherwise would not be covered under a standard general liability policy, notably, coverage for sexual abuse.”<sup>203</sup> The inherent issue with captive insurance companies is that standard general liability policies do not intend to cover intentional acts,<sup>204</sup> only negligent acts. The underlying truth to this set-up is that it is impossible to negligently molest someone, so NGBs like USA Swimming open themselves to accusations of concealing sexual abuse taking place within their coaching association.<sup>205</sup> Some states have taken steps to ensure that organizations cannot abuse the captive

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195. Compare *United States Olympic Committee Coaching Ethics Code*, *supra* note 27 (outlining the ethical standards used by the USOC to regulate the conduct of coaches and thereby ensure the safety of athletes), with *Ali*, *supra* note 48, at 4 (explaining how educational institutions must address and solve harassment issues both quickly and effectively in order to protect their students).

196. See *DeFrantz v. U.S. Olympic Comm.*, 492 F. Supp. 1181, 1191 (D.D.C. 1980).

197. See *infra* text accompanying notes 252–60.

198. Hogshead-Makar, *supra* note 14.

199. Sturtz, *supra* note 7.

200. *Id.*

201. *Id.*

202. *Id.*

203. John S. Carroll, Comment, *Captive Insurance Companies and Sexual Abuse Policies*, 84 UMKC L. REV. 211, 212 (2015).

204. *Id.* at 212–13.

205. *Id.* at 214.

insurance system by tailoring their own policies.<sup>206</sup> Until such efforts become widespread, however, the captive insurance issue will continue to work in conjunction with the Sports Act to keep victims from obtaining meaningful damages for abuse.

### III. POTENTIAL SOLUTIONS

From an outside perspective, it may seem like sexual abuse in Olympic club sports is systemic and intractable. NGBs acquire the most elite coaches to turn amateur athletes into champions,<sup>207</sup> and it is within the NGBs' best interest to retain these coaches, even if some are abusive.<sup>208</sup> As noted above, victim advocates explain that, “[w]ithout enforcement . . . there’s little incentive to make change. When someone sees something they think is inappropriate . . . they fall back on their natural, human inclination to protect their own: protect the coaches, protect their club, and protect their sport.”<sup>209</sup> This part will propose an approach for victim advocates to spur real change within the USOC and NGB culture: incentives for appropriate behavior in the sport realm, namely an independent investigatory agency detached from the USOC’s influence and a real cause of action that imposes civil liability on the USOC and NGBs.

#### *A. Strengthen the National Center for Safe Sport As an Independent Agency to Investigate NGBs and Coaches Implicated in Athletes’ Sexual Assault Complaints*

News outlets have picked up stories regarding Olympic coaching sexual assault in recent years, and the USOC has found itself in a position where it must either respond or continue enduring criticism.<sup>210</sup> In 2015, the USOC announced the formation of “an independent advisory council to guide the launch of the United States Center for Safe Sport.”<sup>211</sup> The announcement came after the USOC Safe Sport Working Group submitted recommendations concerning athlete welfare.<sup>212</sup> The USOC intended the agency to “oversee education programs for safe sport, and investigate and adjudicate claims of

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206. *Id.* at 215–16, 229.

207. *See* Compl. for Damages, *supra* note 146, ¶¶ 14–15.

208. *See* Sturtz, *supra* note 7.

209. *Id.*

210. *See* Muchnick, *supra* note 24.

211. United States Olympic Committee, *U.S. Olympic Committee Announces Formation of U.S. Center for Safe Sport Advisory Council*, TEAM USA (Feb. 9, 2015, 6:15 PM), <http://www.teamusa.org/News/2015/February/09/US-Olympic-Committee-Announces-Formation-Of-US-Center-for-Safe-Sport-Advisory-Council> [<http://perma.cc/2XCMGUH8>].

212. *See* Lopiano & Zotos, *supra* note 12, at 101–02.

misconduct in sports that are managed by USOC-sanctioned National Governing Bodies.”<sup>213</sup>

Though USOC CEO Scott Blackmun conceded, “[t]here is no national agency today that is responsible for the safety and well-being of young athletes and we’re in position to lead this important effort,”<sup>214</sup> the announcement did not come without criticism from athlete advocates.<sup>215</sup> On its face, the USOC’s announcement about the new agency advances abuse victims’ rights, but there are substantial concerns over its design.<sup>216</sup> First, the USOC’s 2010 Safe Sport program, which immediately preceded the USOC’s most recent establishment of an investigatory agency, contained outdated attitudes toward coaching relationships, suggesting that the agency’s operation would continue flawed operations against coaching sexual abuse.<sup>217</sup>

For example, Victor Vieth, executive director emeritus of the Gundersen National Child Protection Training Center, pointed out that in regards to appropriate coach-athlete relationships, many leaders in the swimming community “struggle to see the harm in a coach-athlete relationship as long as the athlete is an adult and consents.”<sup>218</sup> Regardless of consent, the relationship is inappropriate when there is an imbalance of power.<sup>219</sup> Second, victim advocates like Nancy Hogshead-Makar and Robert Allard question whether the agency is truly independent, given that it was proposed and will be operated by USOC officials.<sup>220</sup> For this agency to be successful, the USOC must take steps to make it truly independent.

*1. The United States Anti-Doping Agency Serves As an Appropriate Model for Creating an Independent Agency to Investigate Sexual Abuse Claims*

One way to make this agency truly independent is to model it after the United States Anti-Doping Agency (USADA). In October 2000, Congress recognized the USADA as the “official anti-doping organization for all Olympic, Paralympic, Pan American and Para

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213. United States Olympic Committee, *supra* note 211.

214. *Id.*

215. Muchnick, *supra* note 24.

216. *Id.*

217. *See* Sturtz, *supra* note 7.

218. Victor Vieth, WHEN THE ATHLETE IS A CHILD: AN ASSESSMENT OF USA SWIMMING’S SAFE SPORT PROGRAM, GUNDERSEN HEALTH, 14 (Jan. 27, 2014), <https://swimswam.com/wp-content/uploads/2014/01/USA-Swimming-Report-1-27-14.pdf>.

219. *Id.*

220. Tom Goldman, *USA Swimming Faces Lingering Doubts Over Sexual Abuse*, NPR (Aug. 27, 2013, 6:35 PM), <http://www.npr.org/sections/thetwo-way/2013/08/27/216188040/usa-swimming-faces-lingering-doubts-over-sexual-abuse> [<http://perma.cc/45V795ER>].

Pan American sport in the United States.”<sup>221</sup> It is a non-profit, independent organization that is operated by a Board of Directors, and Congress granted it recognition as a result of the USOC’s Select Task Force on Externalization “in order to bring credibility and independence to the anti-doping in the U.S.”<sup>222</sup> Today, the agency has authority to execute a national anti-doping program, which includes “testing, adjudication, education, and research.”<sup>223</sup> It also develops programs, policies, and procedures related to athletic doping.<sup>224</sup>

Athlete advocates are divided on whether the USADA would serve as an adequate model for a sexual abuse investigatory agency. Irvin Muchnick,<sup>225</sup> a journalist who has spent years documenting the stories of sexually abusive coaches, questions the USADA’s independence, especially while Travis Tygart serves as the USADA’s CEP.<sup>226</sup> Before serving the USADA, Tygart worked for Holme Roberts & Owen LLP (now merged with Bryan Cave LLP), a firm representing the USOC on sexual assault matters.<sup>227</sup> Tygart himself worked on a rotation of lawyers that communicated with private investigators following up on complaints of abuse or molestation by USA Swimming members.<sup>228</sup> Muchnick’s concerns are indicative of the underlying argument against using the USADA as a model for the new investigatory agency: those in Board positions at the USADA that were once affiliated with the USOC may mean that the USADA is not truly independent, and thus should not serve as a model for a new investigatory agency.<sup>229</sup>

Other advocates believe that the USADA could serve as an effective model, citing its proclaimed independence and effectiveness.<sup>230</sup> One advocate is Nancy Hogshead-Makar, who Muchnick calls “one of the country’s longest and strongest advocates on behalf of female athletes’ rights.”<sup>231</sup> She states that the USADA is effective and independent enough to serve as a model for the new agency.<sup>232</sup> Her

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221. USADA, <http://www.usada.org/about/independence-history> [<http://perma.cc/J2QE NNKM>].

222. *Id.*

223. *Id.*

224. *Id.*

225. Irvin Muchnick is known for his sports journalism, having published numerous articles in *The New York Times* and *Sports Illustrated*. See *About Irvin Muchnick*, CONCUSSION.INC, [http://concuSSIONinc.net/?page\\_id=2](http://concuSSIONinc.net/?page_id=2) [<http://perma.cc/5ALKV5K6>].

226. Irvin Muchnick, *EXCLUSIVE: Travis Tygart, Head of Olympic Anti-Doping Agency, Investigated Sexual Abuse Cases for USA Swimming*, CONCUSSION.INC (Sept. 3, 2014), <http://concuSSIONinc.net/?p=9419> [<http://perma.cc/3LMJNGQS>].

227. *Id.*

228. *Id.*

229. *Id.*

230. Muchnick, *supra* note 24.

231. *Id.*

232. *Id.*

claim regarding the USADA's independence is corroborated by the fact that the USADA's Board has fewer representatives from the USOC than it did at its founding.<sup>233</sup> At least the remaining USOC influence on the USADA comes from the NGB Council and USOC Athlete Advisory Council,<sup>234</sup> where athletes have some influence pursuant to the Sports Act.<sup>235</sup>

Despite Tygart's past involvement with sexual abuse investigations, the USADA's effectiveness and legal framework are perhaps better indicators of whether it would serve as an appropriate model for the new agency. Before the USADA existed, the U.S. Olympic Team had the National Anti-Doping Program (NADP) that was subject to international criticism about its independence from USOC.<sup>236</sup> During Congressional hearings, Senator John McCain threatened to strip the USOC's autonomy over American Olympic sports, "if the Olympic Movement did not develop a serious, independent, and transparent anti-doping program."<sup>237</sup> Even the International Olympic Committee (IOC), which backed criticism of the USOC's alleged conflict of interest with the NADP, helped set up the World Anti-Doping Agency (WADA) and its domestic counterpart: the USADA,<sup>238</sup> thus suggesting that the USADA is independent enough while employing a few individuals affiliated with the USOC.

Given the U.S.'s historical reputation as a "dirty" nation when it comes to doping, the USADA has made numerous enforcement strides to remedy this perception,<sup>239</sup> making its endeavor to combat doping in Olympic sports effective. When the USADA adopted the WADA code, it meant that the agency's burden of proof lessened from beyond a reasonable doubt to comfortable satisfaction.<sup>240</sup> This lightened standard has raised concerns, especially because the consequences for positive drug tests are so strong for athletes.<sup>241</sup> Though commentators point out that this is an issue for athletes' rights, the USADA's independence coupled with how fiercely it investigates doping allegations may inform the USOC's new investigatory agency for coaching

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233. USADA, *supra* note 221.

234. *Id.*

235. See 36 U.S.C.S. § 220504(b)(2) (LEXIS through Pub. L. No. 114-118).

236. Doriane Lambelet Coleman & James E. Coleman, Jr., *The Problem of Doping*, 57 DUKE L.J. 1743, 1744 (2008).

237. *Id.*

238. *Id.*

239. Laura S. Stewart, Comment, *Has the United States Anti-Doping Agency Gone Too Far? Analyzing the Shift from "Beyond a Reasonable Doubt" to "Comfortable Satisfaction,"* 13 VILL. SPORTS & ENTMT L.J. 207, 225 (2006).

240. *Id.*

241. *Id.* at 222-23 (stating that there is a two-year suspension for first serious violations and lifetime bans for second violations, but also noting that the rules for accidental doping are lenient).

sexual assault complaints. Once established, the USOC must detach itself from the United States Center for Safe Sport like it did, for the most part, with the USADA so that the new agency does not have a conflict of interest when it comes to safeguarding abusive coaches.<sup>242</sup>

*B. Carve Out an Effective Cause of Action Under the Sports Act So That Victims Can Sue NGBs in Civil Court and Receive Appropriate Damages for Coaching Sexual Abuse*

As noted before, the Sports Act preempts state tort law, thus eliminating the USOC's and NGBs' explicit duties to athletes in private actions.<sup>243</sup> However, as this section argues, the Sports Act contains an implied duty to athletes by instilling the USOC and NGBs with complete authority to regulate and oversee the administration of American Olympic teams.<sup>244</sup> The Act also defines an amateur athlete as an athlete that passes the eligibility standards set forth by the NGB representing her sport.<sup>245</sup> By granting the NGB authority to determine an athlete's eligibility, the Sports Act authorizes the NGB to serve that athlete's needs,<sup>246</sup> thus creating a special relationship between the NGB and the athlete in theory.<sup>247</sup> This subsection argues that a duty for the USOC and the NGBs to properly oversee and maintain a safe sporting environment follows from that special relationship. Breaching that duty by failing to check the coach's background or not thoroughly investigating sexual abuse claims would be akin to per se negligence and entitle a victim to damages in a private cause of action.

*1. The Sports Act's Imputation of Duty on NGBs to Maintain a Safe Sporting Environment Hinges on Membership Within the USOC*

The Sports Act created the USOC as a private corporation,<sup>248</sup> but the USOC and its NGBs do not retain coaches through employment

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242. Analogies made between the USADA and the United States Center for Safe Sport are merely this author's suggestions and optimistic projections for a hopefully successful investigatory agency. Since announcing this news in 2015, the USOC has stumbled at least once. By June of that year, it missed its deadline of launching a \$5.2 million start-up phase. Only time will tell if the agency is truly analogous to the independence and effectiveness found in the USADA. *See* Muchnick, *supra* note 24.

243. *See* DeFrantz v. U.S. Olympic Comm., 492 F. Supp. 1181, 1191 (D.D.C. 1980).

244. 36 U.S.C.S. § 220503(3)(A) (LEXIS through Pub. L. No. 114-219).

245. 36 U.S.C.S. § 220501(b)(1) (LEXIS through Pub. L. No. 114-218).

246. *See id.*

247. Pl.'s Mem. of Law in Opp'n to Def. USA Gymnastics, Inc.'s Mot. for Summ. J. at 15, *Jane Doe v. USA Gymnastics, Inc.*, No. ST13CV058RT (Ga. Cir. Ct. 2016).

248. 36 U.S.C.S. § 220501(b)(4) (LEXIS through Pub. L. No. 114-218).

contracts.<sup>249</sup> Rather, they are retained and sanctioned on a membership basis within the coaching association.<sup>250</sup> The USOC and NGBs argue that they are not liable for a member coach's actions since there are no employment contracts binding the two entities together.<sup>251</sup> However, the Sports Act imposes several requirements, such as athlete welfare policy, on NGBs to uphold in order to maintain private corporate status.<sup>252</sup> As such, implied duties attach when coaches are operating in conjunction with NGB requirements.

First, an NGB's policies invoke a duty of care in relation to the athlete's welfare within the sport. Under the title "General duties of national governing bodies," the Sports Act requires an NGB to:

keep amateur athletes informed of policy matters and reasonably reflect the views of the athletes in its policy decisions; [and] . . . disseminate and distribute to amateur athletes, coaches, trainers, managers, administrators, and officials in a timely manner the applicable rules and any changes to such rules of the national governing body. . . .<sup>253</sup>

Formulating policy in the athletes' favor under this requirement attaches a duty to uphold the policy.<sup>254</sup> For example, the USOC bans romantic coach-athlete relationships<sup>255</sup> and drafts policy to "safeguard the well-being of persons for whom [coaches] are responsible."<sup>256</sup> From this policy, athletes would likely assume that the USOC does enforce a safe environment, and athletes' reliance on this policy should invoke a duty pursuant to the theory of undertakings.

Second, NGB bylaws attach a duty to investigate its members' infractions. The Sports Act requires NGBs to provide equal opportunities to amateur athletes and coaches "without discrimination on the basis of race, color, religion, sex, age, or national origin . . ."<sup>257</sup> This provision authorizes the NGBs to create bylaws that would regulate members' behavior in relation to the anti-discrimination policy. A member's violation of the bylaw implicates the Sports Act's anti-discrimination provision, and such violation could be grounds

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249. Hogshead-Makar, *supra* note 14.

250. *Id.*

251. Notice of Dem. at 4–5, *Gatt v. USA Taekwondo*, No. BC599321 (Cal. Super. Ct. 2015).

252. 36 U.S.C.A. § 220524 (Westlaw through Pub. L. No. 114-219).

253. *Id.*

254. See Ali, *supra* note 48, at 3–5, 9 (imputing a duty to schools by requiring specific procedures to investigate sexual assault claims).

255. See *United States Olympic Committee Coaching Ethics Code*, *supra* note 27.

256. Hogshead-Makar, *supra* note 32.

257. 36 U.S.C.A. § 220522 (a)(8)(Westlaw through Pub. L. No. 114-218).

for termination.<sup>258</sup> With this consequence, a duty does attach to NGBs through which they must investigate sexual abuse claims because they mandate action in accordance with anti-discrimination, so they should also be the entities that enforce it.

*2. There Is a Strong Proximate Cause Connection Between an NGB's Breach of the Sports Act's Implied Duty and a Victim's Damages*

As the above section shows, the Sports Act contains an implied duty for the USOC and NGBs to establish a safe environment for training and a thorough investigatory process for sexual abuse complaints. This subsection intends to illustrate that when an NGB fails to thoroughly investigate a claim, it not only breaches the duty described above, but it also detracts from the safe environment it purports to maintain. There are three theories linking an NGB's breach to the in-fact and proximate causation of a victim's damages: (1) when an NGB is on notice that sexual abuse has taken place within its facilities and takes no subsequent preventative measure, future abuse is foreseeable, (2) when a coach has been reported and an NGB takes no action, future abuse is also foreseeable, and (3) when an NGB fails to properly screen a coach before allowing him to coach minor athletes or fails to oversee him while with athletes, the opportunity for abuse becomes more likely than not.<sup>259</sup>

In *Gatt v. USA Taekwondo*, the plaintiffs demonstrated how the USOC and its NGBs were on notice to the prevalence of sexual abuse within Olympic facilities.<sup>260</sup> In that case, the plaintiffs used USA Taekwondo's riddled history with coach-inflicted sexual abuse to illustrate how an NGB's breach of the implied duties was the proximate cause of a victim's damages.<sup>261</sup> The USOC took insufficient steps in responding to a reported rape,<sup>262</sup> and consequently, Gatt and her fellow plaintiffs came in contact with their abusive coach, Marc Gitelman, just a few years later.<sup>263</sup> The underlying argument here is that if the USOC had taken proper precautionary measures to respond to sexual abuse complaints and prevent their recurrence, the current plaintiffs would have been free from damage.

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258. *See id.*

259. *See* Compl. for Damages, *supra* note 146, ¶¶ 34–35.

260. *Id.*

261. *Id.*

262. *See supra* text accompanying notes 147–50 (discussing how the USOC was on notice about rape occurring within facilities and only placed a guard at facilities—only to remove him from his post a few years later).

263. Compl. for Damages, *supra* note 146, ¶¶ 21–22.

Additionally, when a coach is shown to have been an abuser, an NGB's failure to remove him from coaching or properly screen him before allowing him to coach elsewhere suggests the NGB should reasonably foresee repeat abusive behavior. For example, in a 2011 club swimming case, USA Swimming retained Christopher Wheat, a coach for a club swim team, despite his having been forced out of coaching for sexually abusing minor athletes several years prior.<sup>264</sup> By 2009, Wheat was coaching minors again and sexually abused one of his female athletes before her father filed suit against USA Swimming in 2011.<sup>265</sup> The coach's actions in 2009 support the legal causation argument that would hold USA Swimming liable. The NGB's failure to permanently ban Wheat in the early 2000s, coupled with the NGB's negligent retention of Wheat, made it more likely that the plaintiff would be molested in 2009 and suffer emotional and psychological damages, and such abuse was reasonably foreseeable from falling below the standard of care.<sup>266</sup>

On a final note, analogizing the Sports Act's implied duty with Title IX's duty reinforces why Congress should carve out a private cause of action for amateur athletes to sue NGBs in civil court. Just like schools have a duty, pursuant to the DCL, to investigate and take proper steps to prevent sexual assault on campus,<sup>267</sup> so should the USOC and its NGBs have a duty to uphold the integrity of safe sporting environments. In both contexts, duty attaches because the overseeing institution is in the position of authority to create and enforce policy.<sup>268</sup> Without enforcing or even creating policy, it is reasonably likely that abuse can occur, especially in relationships where one individual has authority over the other.<sup>269</sup>

Additionally, just as schools must investigate sexual assault complaints,<sup>270</sup> NGB bylaws and policies imply that such investigations will take place,<sup>271</sup> which means that, at some point, someone

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264. Compl. at 4, *Jane Doe v. USA Swimming*, No. 49D11-11-11-07-43440 (no date).

265. *Id.*

266. *See id.* at 9.

267. *Ali*, *supra* note 48, at 3-4.

268. *See id.* at 7.

269. As this Note has assumed throughout this writing, there is an obvious power dynamic between coach and athlete, one that should immediately prompt protection for the athlete. *See Ali*, *supra* note 48, at 6 (citing 34 C.F.R. § 106.8(b)) (discussing that schools are required to publish "grievance procedures providing for prompt and equitable resolution of student and employee sex discrimination complaints." From the DCL, this writer infers such procedures are in place because relationships where there is a power dynamic present opportunities for abuse. Such inference can also be applied to coaching relationships).

270. *Id.* at 3-4.

271. *See* 36 U.S.C.A. § 220522 (Westlaw through Pub. L. No. 114-218) (requires NGBs to publish bylaws so that they uphold the Sports Act's anti-discrimination provision).

in the NGB recognized the possibility that sexual abuse has occurred and should be properly addressed. Pursuant to Title IX, failing to investigate a sexual assault complaint gives a student the right to either file an administrative complaint with the OCR (not the school) or a private action that alleges the school's disregard for her complaint.<sup>272</sup> As this part has demonstrated, the inherent duty that the Sports Act bestows on the USOC and its NGBs implicates a cause of action that should be available for plaintiff athletes. Without one, there is no effective legal recourse that athletes can pursue against their NGBs like students can pursue, for similar reasons, against their schools.

### CONCLUSION

Coach-inflicted sexual abuse in Olympic sports has developed into a critical legal issue for several reasons. First, the USOC's policies toward inappropriate coach-athlete relationships are fragmented and limited in their application; NGBs are only required to adopt the most basic athlete welfare policies proposed by the USOC. Even when they do, these policies do not apply to all NGB-affiliated athletes and coaches, only the athletes chosen for Team USA and NGB employees. Coaches operating in club teams, though still NGB members, are outliers, as evidenced by Anna Strzempko's story and her swim team's affiliation with USA Swimming.

Second, the Amateur Sports Act does not offer a concrete *legal* framework designed to address issues of sexual assault and abuse taking place within Olympic Sports. Victim-athletes seeking to remove their abusers from sports are funneled through USOC and the NGB, usually by an arbitration clause that was not designed to handle sexual assault claims. Meanwhile, the Sports Act preempts state tort law and eliminates private causes of action against USOC.

Without an incentive to remove abusive individuals from sport, many young athletes, mostly female, are left without clear legal recourse as they either struggle through their athletic careers or give up on those careers as a result of ongoing abuse. As a matter of civil rights, these female athletes deserve either an agency outside of the USOC to address sexual assault complaints or a cause of action to obtain damages so that they can vindicate their claims. Ideally, they should have both in order to effectively sue and remove the coaches for future athletes' safety.

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272. U.S. DEPT OF EDUC. OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES, iii, 14–15 (2001).

Aside from the legal questions raised in this Note, the issue underscores other questions beyond its scope that other academic disciplines should answer. For example, research into why the sexual abuse that is plaguing Olympic sports has not been given more national attention would also be productive. This Note largely derives its supplemental research from a handful of news articles and recent victims' pleadings obtained from the few attorneys currently confronting the legal thicket. Coaches abusing their minor, elite, female athletes have not made national headlines like Jerry Sandusky and Joe Paterno did in the Pennsylvania State football scandal.<sup>273</sup> This phenomenon begs the question of whether, "we feel an automatic disgust toward stories like Sandusky's, one that doesn't always carry over to heterosexual crimes committed against teenage girls."<sup>274</sup>

Maybe the first step to serving justice and garnering more public recognition took place when Chuck Wielgus, the symbol of one of the largest Olympic sex abuse cover-ups, removed himself from his International Swimming Hall of Fame nomination. However, this only occurred as a result of ardent efforts by the Women's Sports Foundation and athletes brave enough to come forward with their stories. For lasting justice to emerge, changes must be made to the legal system in the form of an independent agency and a real cause of action for athletes. Until then, abusive coaches, not athletes, are safe in sports.

HALEY O. MORTON\*

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273. See Malcolm Gladwell, *In Plain View*, THE NEW YORKER (Sept. 24, 2012), <http://www.newyorker.com/magazine/2012/09/24/in-plain-view> [<http://perma.cc/6RDY22RG>].

274. Sturtz, *supra* note 7.

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