

Gambling on Disability Rights

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ABSTRACT

In light of the recent legalization of sports betting across the United States, leading American sports organizations have increased their efforts to protect the integrity of their competitions. These efforts include the implementation and enforcement of what this Article calls “anti-tipping rules,” which are internal rules prohibiting athletes and other personnel from disclosing nonpublic information that can be used by gamblers. Under these rules, the disclosure of information about athletes’ psychosocial impairments might be considered prohibited “tipping,” because these impairments may affect athletes’ availability for and performance in sporting events.

This Article argues that anti-tipping rules may encourage athletes to mask their impairments, leading to a chilling effect on the disclosure of information about mental health in the sporting arena. As a result, these rules may adversely affect psychosocially disabled athletes in at least three distinct ways: (1) They may exacerbate pre-existing impairments by preventing diagnosis, treatment, and the therapeutic impact of disclosure; (2) they may discourage athletes from seeking reasonable accommodations or modifications under the Americans with Disabilities Act; and (3) they may perpetuate the stigma of mental health issues and hinder a rising movement of athletes seeking to create a new, more accurate narrative of psychosocial disability.

This Article examines these overlooked consequences of anti-tipping rules and, drawing on U.S. insider trading law, proposes several strategies to address these detrimental effects.

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INTRODUCTION

For more than two decades, sports betting in the United States was banned by federal law.¹ In 1992, Congress passed the Professional and Amateur Sports Protection Act (“PASPA”), prohibiting states from authorizing and licensing sports gambling within their jurisdictions.² PASPA established a blanket prohibition—in addition to pre-existing anti-sports-betting regulations at the federal and state levels—preventing the establishment of legalized sports betting markets in most states.³

In May 2018, however, the Supreme Court struck down PASPA in *Murphy v. National Collegiate Athletic Association*.⁴ This decision opened the door for states to authorize and regulate sports gambling. Since then, more than a dozen states have legalized sports betting, and other states are expected to follow suit in the near future.⁵

As a result of the ensuing emergence of the legalized sports gambling industry, sports organizations have increased their endeavors to protect the integrity of their competitions,⁶ including the implementation and enforcement of internal regulations, which this Article calls “anti-tipping” rules.⁷ The anti-tipping rules and their harmful effect on psychosocially disabled⁸ individuals stand at the core of this Article.⁹

Anti-tipping rules prohibit athletes and other sports personnel from disclosing nonpublic information that might be used for manipulating betting markets. The following scenario illustrates the type of situation the anti-tipping rules aim to prevent. Imagine that, hours before an important match, a high-profile athlete confides to a friend that she has just experienced a panic attack. Knowing that, due

1. In this Article, the terms “gambling” and “betting” are used interchangeably. This Article focuses on traditional sports betting and does not include “fantasy sports” within the definition of this practice. For more on fantasy sports as sports betting, see Marc Edelman, *Regulating Sports Gambling in the Aftermath of Murphy v. National Collegiate Athletic Association*, 26 GEO. MASON L. REV. 313, 331 (2018).

2. Pub. L. No. 102-559, 106 Stat. 4227 (1992) (codified at 28 U.S.C. §§ 3701–3704 (2012)).

3. Four states were exempt from PASPA, at least in part. See *infra* Part I.A.

4. 138 S. Ct. 1461 (2018).

5. See *infra* Parts I.B–C.

6. See *infra* notes 88–89 and accompanying text.

7. See *infra* Part II.B.2.

8. Part III.A.1 provides an analysis of the use of the term “psychosocial disability.” In short, for the purposes of this Article psychosocial disability (and the corresponding term “psychosocial impairment”) refers to what are typically thought of as psychiatric conditions or mental disorders (for example, major depressive disorder or bipolar disorder).

9. In this Article, I use “disability-first” language (“disabled people”) rather than “people-first” language (“people with disabilities”). While I recognize the advantages of the “people-first” approach, I chose the language that aligns with the social model of disability, according to which “people with impairment [sic] are disabled by society, not by their bodies.” See TOM SHAKESPEARE, *DISABILITY RIGHTS AND WRONGS* 32 (2006). My approach is deeply influenced by the work of the scholar and disability rights activist Simi Linton, who explains that the term disabled people “has become a marker of the identity that the individual and group wish to highlight and call attention to.” SIMI LINTON, *CLAIMING DISABILITY: KNOWLEDGE AND IDENTITY* 13 (1998). For more on the social model of disability, see *infra* notes 206–214 and accompanying text.

to her panic attack, the athlete may perform at a lower standard than usual, the friend then hurries to the nearest casino, where he places a bet against the athlete's team. Thus, the friend exploits the "tip" he has just received, much like an insider trading offense.

Examples of nonpublic information in the sporting context include the physical or mental condition of athletes, the identity of the referee assigned to a particular game,¹⁰ or the starting lineup of a team.¹¹ Such information, when known only to some people, can be used to increase a gambler's chances of winning. By misusing this kind of nonpublic information, however, gamblers undermine the integrity of betting markets and sporting competitions. This is where the anti-tipping rules come into play, since they are designed to ensure that gamblers will not benefit from this kind of informational advantage. While anti-tipping rules may indeed decrease the risk of manipulating betting markets, they also have negative ramifications. One direct consequence is that these rules may prohibit, or at least deter, athletes and other sports personnel from speaking openly about their psychosocial impairments for fear of being accused of tipping.

This Article examines the anti-tipping rules of several leading American sports organizations: the National Football League ("NFL"), the National Basketball Association ("NBA"), the Women's National Basketball Association ("WNBA"), the PGA Tour, and the Ladies Professional Golf Association ("LPGA"). Some of these anti-tipping rules are limited only to the disclosure of information for the purposes of betting on sports competitions. However, most of these rules also apply to the negligent leaking of information, suggesting that the scope of their application is broader than it may appear. Perhaps more significantly, all of these rules pertain, either explicitly or implicitly, to information about an athlete's health.

In prohibiting the disclosure of information regarding an athlete's mental health, the anti-tipping rules adversely affect psychosocially disabled athletes in at least three distinct ways. *First*, from a mental health perspective, concealing information about psychosocial disability may prevent diagnosis and treatment of the symptoms of psychosocial disorders.¹² In fact, the very process of concealing may, in and of itself, exacerbate pre-existing impairments or result in new symptoms.

Second, the anti-tipping rules may deter athletes from requesting reasonable accommodations or modifications under the Americans with Disabilities Act ("ADA").¹³ An athlete whose anxiety disorder is triggered by a fear of flying, for example, might be reluctant to request reasonable accommodations to manage her disability (for instance, by traveling via train or bus) for fear that speaking up about her disability would be considered tipping.

10. See *infra* note 44 and accompanying text.

11. See Brian Raftery, *Gambling Prompts Major League Baseball to Change Lineup Rules*, YAHOO! FINANCE (Mar. 7, 2019), <https://perma.cc/8QG8-ES3Q>.

12. See *infra* Part IV.A.

13. Americans with Disabilities Act (ADA) of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 (2018)). See *infra* Part IV.B.

Third, from a broader perspective, the anti-tipping rules may perpetuate negative attitudes towards psychosocial disability.¹⁴ Instead of encouraging athletes to change widespread misconceptions about psychosocial disability by sharing experiences of their impairments, sports organizations require athletes to conceal such information. In doing so, the anti-tipping rules may play a role in the stigmatization of psychosocial disability, reinforcing the culture of silence that characterizes mental health issues in society. Since athletes are public figures who serve as role models for many, the anti-tipping rules thus affect not only the athletes themselves, but society at large.

Indeed, the legalization of sports gambling and its ensuing regulatory developments intersect with psychosocial disability at a crucial moment. After decades of suppression and silencing, in recent years dozens of active athletes have publicly voiced their experiences with anxiety disorder, clinical depression, and other forms of psychosocial impairments. Many of these athletes are still competing in sports leagues that have adopted anti-tipping rules. Drawing on more than forty athletes' accounts, this Article demonstrates why the anti-tipping rules are dangerous, and why they contradict contemporary efforts to destigmatize psychosocial disability.

At first glance, the seriousness and severity of this problem may not be clear. After all, athletes are often perceived as “strong,” healthy individuals.¹⁵ But these very assumptions embody the misconceptions about how psychosocial disability operates in mainstream society. We have a certain set of expectations from elite athletes, which makes it difficult for us to conceive of an athlete with severe psychosocial impairments.

But these perceptions do not reflect reality. A recent meta-analysis study shows that thirty-four percent of current elite athletes experience symptoms of anxiety or depression—a figure slightly higher than in the general population.¹⁶ Athletes who have recently spoken up about their psychosocial impairments have reported experiences of physical distress, substance abuse, and suicidal thoughts. Some athletes with severe depression have committed suicide. In light of these data, it is clear that the potential impact of the anti-tipping rules is significant.

Given the consequences, this Article proposes a policy argument against the anti-tipping rules in their current form.¹⁷ I do not argue that the motivation behind the

14. See *infra* Part IV.C.

15. For more on what I have termed the “triviality objection,” see *infra* Part V.A.

16. See *infra* note 147 and accompanying text.

17. This Article does not discuss the legal means to challenge the anti-tipping rules. Since the anti-tipping rules are not intentionally discriminatory (as mentioned below), an ADA claim against them is not likely to prevail under the current disability rights regime. While Title I of the ADA includes disparate impact provisions (see, e.g., 42 U.S.C. § 12112(b)(3) (2018)), the disparate impact theory is rarely used in the disability area for several reasons, including the courts' general reluctance to apply the theory. See Michael Ashley Stein & Michael E. Waterstone, *Disability, Disparate Impact, and Class Actions*, 56 DUKE L.J. 861, 864 (2006); MARGO SCHLANGER, AM. CONSTITUTIONAL SOC'Y FOR LAW & POLICY, HOW THE ADA REGULATES AND RESTRICTS SOLITARY CONFINEMENT FOR PEOPLE WITH MENTAL DISABILITIES 7 (2016) (“[D]isparate impact claims—under the ADA as under other civil rights statutes—

formulation of the anti-tipping rules is to discriminate against athletes with psychosocial impairments. Nor do I claim that these rules are completely ineffective in protecting the integrity of sports. Instead, this Article asserts that when the anti-tipping rules, in their current form, apply to the disclosure of information about athletes' psychosocial impairments, the social costs of these rules greatly outweigh their benefits. Therefore, I propose other, less restrictive strategies to attain the objectives of these rules.

Following this Introduction, the Article proceeds as follows. Part I provides the necessary background for understanding the normative framework of sports betting in the United States. Part II describes the risks sports betting poses to the integrity of sports competitions and betting markets, focusing on the risk of tipping, and continues with a review of the anti-tipping rules of several leading American sports organizations. Part III defines psychosocial disability and reviews the status of professional athletes with psychosocial impairments. Part IV provides the main argument of this Article, pointing to three ways in which the anti-tipping rules may affect athletes with psychosocial impairments. Part V then discusses some objections that might arise concerning the arguments in this Article. In Part VI, this Article proposes alternative measures that may address the risk of tipping while safeguarding the rights of athletes with psychosocial impairments. Lastly, Part VII provides several conclusions.

I. SPORTS BETTING IN THE UNITED STATES: PAST, PRESENT, AND FUTURE

Times have changed since [PASPA] was enacted. . . . There is an obvious appetite among sports fans for a safe and legal way to wager on professional sporting events. . . . In light of these domestic and global trends, the laws on sports betting should be changed. . . . [S]ports betting should be brought out of the underground and into the sunlight where it can be appropriately monitored and regulated.

—Adam Silver, NBA Commissioner¹⁸

This Part provides an historical account of the normative status of sports gambling in the United States before and after the Supreme Court's decision to strike down PASPA.

make judges extraordinarily suspicious, and are notoriously difficult to win.”). For more on the ADA, see *infra* Part III.A.2.

18. Adam Silver, *Legalize and Regulate Sports Betting*, N.Y. TIMES (Nov. 13, 2014), <https://perma.cc/3B4L-478A>.

A. SPORTS BETTING IN THE UNITED STATES BEFORE *MURPHY*

Throughout most of the nineteenth and twentieth centuries, sports betting in most states was prohibited under state law.¹⁹ In addition, several federal statutes have banned certain aspects of sports gambling, even prior to the enactment of PASPA.²⁰ Beyond the problems associated with gambling in general, including its addictiveness and links with organized crime, lawmakers traditionally opposed the legalization of sports gambling for an additional reason: the inherent risk of collusion between gamblers and athletes.²¹ During the 1970s through the early 1990s, however, several states changed their stance on the legalization of sports betting, and there were signs that legislators in some of these states intended to soften restrictions on sports gambling within their jurisdictions.²² In 1992, Congress responded to these developments by enacting PASPA.

Under PASPA, states were not permitted to “sponsor, operate, advertise, promote, license, or authorize by law or compact . . . betting, gambling, or wagering schemes” based on competitive sporting competitions.²³ Furthermore, PASPA prohibited private actors from sponsoring, operating, advertising, or promoting sports gambling schemes when such actions were committed “pursuant to the law or compact of a governmental entity.”²⁴ Four states—Nevada, Oregon, Delaware, and Montana—were exempt, at least to a certain extent, from PASPA. This was because these states already allowed certain forms of sports gambling when Congress passed PASPA.²⁵

The fact that sports betting was largely prohibited in the United States does not mean that, *de facto*, Americans were not involved in sports betting. In addition to the wide variety of legal sports betting activities they could access in PASPA-exempt Nevada, many Americans engaged in sports betting through illegal betting operations active mostly outside of the United States.²⁶ This is one of the reasons sports organizations that traditionally opposed sports betting suddenly called for its legalization. The underlying rationale behind this shift in approach was pragmatic: If sports gambling is a solid fact, these organizations would be better off regulating the practice in order to protect the integrity of the game.²⁷

19. Paul M. Anderson, *The Regulation of Gambling Under U.S. Federal and State Law*, in *SPORTS BETTING: LAW AND POLICY* 867 (Paul M. Anderson ed., 2012); Edelman, *supra* note 1, at 314–15.

20. Anderson, *supra* note 19, at 855–63.

21. Edelman, *supra* note 1, at 317.

22. *Id.* at 317–21.

23. 28 U.S.C. § 3702(1) (1992).

24. *Id.* § 3702(2).

25. *Id.* § 3704(a)(1)–(2).

26. The National Gambling Impact Study Commission, a federal body acting pursuant to the National Gambling Impact Study Commission Act, composed a report in 1999 estimating that U.S. citizens spent between \$80 billion and \$380 billion a year on illegal sports betting. *See* Anderson, *supra* note 19, at 854–55. Anderson notes that “this number has surely increased” since then. *Id.* at 855.

27. Justice Alito’s opinion for the majority in *Murphy* refers to this argument: “Supporters argue that legalization will . . . critically weaken illegal sports betting operations, which are often run by organized crime.” *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1484 (2018).

B. *MURPHY V. NCAA*

In *Murphy*, the Supreme Court struck down PASPA, holding that the law's provision prohibiting state authorization of sports gambling violated the "anti-commandeering" principle enshrined in the Tenth Amendment. Writing for the majority, Justice Alito explained that the anti-commandeering principle recognizes that Congress lacks the power "to issue direct orders to the governments of the States."²⁸ Based on this doctrine, the Supreme Court held that PASPA's provision prohibiting state authorization of sports gambling was unconstitutional because it "unequivocally dictat[ed] what a state legislature may and may not do."²⁹ The Court further concluded that other portions of PASPA were not severable and therefore determined that the entire Act was unconstitutional.³⁰

It is important to note that the question of whether sports gambling should be legalized, in and of itself, was not the focus of the Court in *Murphy*. The Court did not address policy considerations relating to whether sports betting should be legal or how it should be regulated. In fact, Justice Alito acknowledged that the "legalization of sports gambling requires an important policy choice, but the choice is not ours to make."³¹ As a result, unless Congress regulates sports betting directly, "each State is free to act on its own."³² The next Section will describe how the states reacted to this change in the law.

C. SPORTS BETTING IN THE UNITED STATES AFTER *MURPHY*

Since *Murphy*, several states have passed laws permitting sports gambling, while others are in the midst of enacting such legislation. As of December 2019, in addition to Nevada, twelve states currently regulate full-scale legalized sports betting, including New Jersey, New York, Mississippi, Pennsylvania, West Virginia, and Iowa.³³ Eight other states have passed bills legalizing sports betting but have yet to implement a sports betting scheme, while many other states are moving toward legalization. Only six states have taken no action thus far.³⁴

28. *Id.* at 1476.

29. *Id.* at 1478.

30. *Id.* at 1484.

31. *Id.*

32. *Id.* at 1484–85.

33. Delaware, which was exempt from PASPA, had long authorized at least one form of sports betting. Less than a month after the decision in *Murphy*, Delaware authorized full-scale sports betting. See Edelman, *supra* note 1, at 322–23, 325–26.

34. Ryan Rodenberg, *State-by-State Sports Betting Bill Tracker*, ESPN (last visited Dec. 4, 2019), <https://perma.cc/445K-FFF7>.

Congress also has the authority to regulate sports gambling directly under the Commerce Clause,³⁵ and many believe that Congress should exercise its powers in this regard.³⁶ However, as of December 2019, Congress has yet to do so.

States are not the only actors involved in shaping new sports gambling markets. Sports organizations and gambling operators are also influential actors in this process. Following *Murphy*, some of the leading American sports leagues have signed multiyear deals with gambling operators, designating these entities as the leagues' "official gaming partner."³⁷

Currently, sports gambling in the United States takes various forms. Some states permit betting only in licensed casinos; others also authorize online betting.³⁸ Developments in this field are extremely rapid, as states seek to profit from new betting markets as quickly as possible. These developments, however, are still subject to constraints on sports gambling at the federal level.³⁹ In the years to come, lawmakers are expected to address significant public policy matters regarding sports betting; questions of revenue sharing, taxation, gambling addiction, and intellectual property are just a few examples of the issues that the new regulatory regime for sports betting is expected to address.⁴⁰ The ensuing Part discusses one of these matters: the need to protect the integrity of both sports competitions and betting markets.

35. U.S. CONST. art. I, § 8, cl. 3. Although Justice Alito's opinion does not refer to the Commerce Clause specifically, it states that "Congress can regulate sports gambling directly." See *Murphy*, 138 S. Ct. at 1484. Justice Ginsburg's dissenting opinion is more specific, asserting that "direct federal regulation of sports-gambling schemes nationwide, including private-party schemes, falls within Congress' power to regulate activities having a substantial effect on interstate commerce." *Id.* at 1490 (Ginsburg, J., dissenting). However, Justice Thomas, who concurred with Justice Alito's opinion, raised a doubt as to whether "Congress can prohibit sports gambling that does not cross state lines." *Id.* at 1485 (Thomas, J., concurring).

36. Some sports organizations have called for federal legislation to regulate sports betting. See Adam Candee, *NHL's Bettman Joins NBA, NFL in Call for National Sports Betting Rules*, L. SPORTS REP. (May 29, 2018), <https://perma.cc/2BM8-H6PU>. Former Senator Orrin Hatch and Senator Chuck Schumer introduced such a federal bill. See Sports Wagering Market Integrity Act of 2018, S. 3793, 115th Cong. (2018). For a review of this bill, see John T. Holden, *Regulating Sports Betting*, 105 IOWA L. REV. (forthcoming 2020) (manuscript at 12–14), <https://perma.cc/PZ4D-ZMTQ>.

37. See, e.g., Matt Rybaltowski, *MGM Resorts Hits Trifecta with MLB Gaming Partnership, Not Close on Potential NFL Betting Deal*, FORBES (Nov. 29, 2018), <https://perma.cc/8WQ7-XRZX>.

38. Edelman, *supra* note 1, at 325–30.

39. The Interstate Wire Act of 1961, for example, makes it illegal for whoever is "engaged in the business of betting or wagering" to use a wire communication facility to transmit sports bets in interstate commerce. 18 U.S.C. § 1084(a) (2018). The Act includes a "safe harbor" provision, according to which "the transmission of information assisting in the placing of bets or wagers on a sporting event" is not illegal if such a transmission is made between two states in which sports betting is legal. *Id.* § 1084(b). For more on the way this Act may restrict legal betting, see Holden, *supra* note 36, manuscript at 33 n.318; Daniel L. Wallach, *The "Shifting Line" of Sports Betting Legalization*, in THE OXFORD HANDBOOK OF AMERICAN SPORTS LAW 297, 299–302 (Michael A. McCann ed., 2018).

40. See Edelman, *supra* note 1; Holden, *supra* note 36.

II. BETTING, THE THREATS TO SPORTS INTEGRITY, AND REGULATORY RESPONSES

A. MANIPULATION OF BETTING MARKETS AND THE RISK OF TIPPING

The manipulation of sports betting takes on three forms that are not always mutually exclusive: (1) match-fixing;⁴¹ (2) betting on oneself;⁴² and (3) tipping. While all of these forms involve the misuse of inside information, tipping is the closest in essence to the insider trading offense. Probably the most notorious example of manipulation by tipping in recent decades concerns not an athlete but a sports referee. In 2007, it was discovered that NBA referee Tim Donaghy gambled on games that he officiated and disclosed confidential information to other gamblers.⁴³ The information Donaghy provided mainly concerned his prediction of the winning team in certain games, in addition to the names of referees who were assigned to specific games and relationships among players, coaches, and referees.⁴⁴ In August 2007, Donaghy pleaded guilty to conspiracy to commit wire fraud and conspiracy to transmit gambling information through interstate commerce. He was fined and sentenced to fifteen months in federal prison.⁴⁵ The Donaghy scandal demonstrates that the fear of tipping is not baseless.⁴⁶

41. There is no single definition of match-fixing. One dictionary defines match-fixing as “the fraudulent manipulation of a match result by a gambling syndicate.” See ADRIAN ROOM, *DICTIONARY OF SPORTS AND GAMES TERMINOLOGY* 94 (2010). This definition, however, is far from being universally accepted. The classic form of match-fixing involves a group of athletes who receive payment to throw a game, while the perpetrator who “bribed” the athletes places a wager against their team. A notorious example of match-fixing in the United States is the 1919 baseball scandal in which players from the Chicago White Sox allegedly received money from bettors in exchange for throwing the World Series. See Stephen F. Ross et al., *Reform of Sports Gambling in the United States: Lessons from Down Under*, 5 ARIZ. ST. SPORTS & ENT. L.J. 6, 30–32 (2015).

42. This refers to a situation where an athlete (or other sports personnel) gambles on sporting events in which she participates or sporting events that are somehow related to her. An infamous past example is when baseball star Pete Rose was banned from the game amid allegations that he gambled on games in which he played. See Ross et al., *supra* note 41, at 29–30; Chuck Klosterman, *What If an Athlete Wants to Bet on Himself?*, N.Y. TIMES MAGAZINE (Nov. 14, 2014), <https://perma.cc/68DR-E774>.

43. For a detailed account of the Donaghy scandal, see Scott Eden, *How Former Ref Tim Donaghy Conspired to Fix NBA Games*, ESPN (Feb. 19, 2019), <https://perma.cc/5XAX-9WR>; see also Ross et al., *supra* note 41, at 27–29.

44. See Howard Beck, *Former Referee Cooperated, Prosecutors Say in Letter*, N.Y. TIMES (June 4, 2008), <https://perma.cc/8XD2-SKP7>.

45. Eden, *supra* note 43.

46. For a recent sports gambling scandal that involved a college basketball player’s intentional disclosure of information about his physical health, see Shaun Assael, *Portrait of a Point Shaver*, ESPN (Mar. 6, 2014), <https://perma.cc/7QHS-YUHP>. For an historical account of the use of inside information for sports betting purposes with respect to NFL games, see Christopher R. Deubert et al., *Protecting and Promoting the Health of NFL Players: Legal and Ethical Analysis and Recommendations*, 7 HARV. J. SPORTS & ENT. L. 1, 307–08 (2016) [hereinafter Deubert et al., *Protecting the Health of NFL Players*].

The risk of tipping increases in the era of smartphones and big data, where one can place a bet at the press of a button, even after the match has begun.⁴⁷ In addition, unlike other forms of manipulation, tipping does not require intentional involvement on the athlete's part. Theoretically, an athlete might disclose information negligently, without knowing that someone might use it to manipulate gambling outcomes.

B. SPORTS GOVERNING BODIES' RESPONSE TO THE RISK OF TIPPING

In response to the threats to sports integrity described above, lawmakers have taken preventative measures at various regulatory levels. The normative responses to these threats can be found in federal legislation, state laws, and internal rules of sports organizations.⁴⁸ This Section focuses on the organizational level, describing how sports governing bodies address the risk of tipping.

1. Sports Organizations' Regulatory Powers

In the United States, competitive sports are organized primarily by private entities.⁴⁹ The major sports leagues—NFL, NBA, WNBA, Major League Baseball (“MLB”), and National Hockey League (“NHL”)—are private organizations with broad regulatory powers regarding the rules of their competitions, athlete eligibility requirements, and other sports-related issues.⁵⁰ These leagues include professional private clubs that employ athletes, coaches, and other staff. The clubs' owners elect a commissioner, who possesses rule-making, disciplinary, and enforcement powers,⁵¹ including the authority to impose disciplinary sanctions on covered entities to protect the integrity and promote “the best interests” of the game.⁵² The commissioner's powers are restricted by collective bargaining agreements (“CBAs”) negotiated between the leagues and their respective players' unions.⁵³ In contrast, in individual sports such as golf or tennis, athletes are not employees, and their relationship with their respective sports organizations relies on other contractual

47. In recent decades, betting operators all over the world have developed creative ways of betting on specific plays or events within the game (“in-game” betting). Thus, every small piece of information about an athlete's performance can be used to manipulate this kind of betting. See Luca Rebeggiani & Fatma Rebeggiani, *Which Factors Favor Betting Related Cheating in Sports? Some Insights from Political Economy*, in MATCH-FIXING IN INTERNATIONAL SPORTS 157, 164 (M.R. Haberfeld & Dale Sheehan eds., 2013).

48. See generally Matthew J. Mitten, *How Is the Integrity of Sport Protected in the United States?*, 19 TEX. REV. ENT. & SPORTS L. 89, 95–103 (2019); see also *infra* Part VI.A.

49. Mitten, *supra* note 48, at 89–90.

50. *Id.*

51. See, e.g., NBA, NATIONAL BASKETBALL ASSOCIATION CONSTITUTION AND BY-LAWS, art. 24 (Sept. 2019), <https://perma.cc/24JN-6UAF> [hereinafter NBA CONSTITUTION]; see generally Jimmy Golen & Warren K. Zola, *The Evolution of the Power of the Commissioner in Professional Sports*, in THE OXFORD HANDBOOK OF AMERICAN SPORTS LAW, *supra* note 39, at 19.

52. See, e.g., NBA CONSTITUTION, *supra* note 51, art. 24; Golen & Zola, *supra* note 51, at 19–20.

53. See Golen & Zola, *supra* note 51, at 30–33.

grounds.⁵⁴ Accordingly, the terms of competition in such sports are generally determined unilaterally by the relevant organizing body, and disciplinary sanctions are imposed by an independent commissioner or the sport's organizing authority.⁵⁵

Naturally, sports organizations have a particular interest in protecting the integrity of the competitions they organize. Corruption associated with sports competitions harms the reputation of the sport, which in turn may have significant economic consequences for the leagues.⁵⁶ To this end, sports governing bodies have introduced internal gambling policies. The following pages will outline the provisions of these policies that constitute what this Article calls anti-tipping rules.

2. Anti-Tipping Rules: An Overview

a. NFL

The 2018 version of the NFL Gambling Policy includes an anti-tipping provision under the title *Inside Information and Tipping*. This provision reads as follows:

Unless duly authorized, NFL Personnel are prohibited from using, disclosing or providing access to confidential, non-public information regarding: (a) any NFL game or event; (b) any participating individual's availability for or performance in any NFL game; or (c) any other conditions material to any NFL game for a gambling-related purpose, whether directly or through another person.⁵⁷

What exactly is the "confidential, non-public" information that this provision prohibits disclosing? The NFL Gambling Policy does not provide an answer. Nor does the policy provide examples or explanations of what constitutes "conditions material to any NFL game." Although not stated explicitly, it is implied that this rule pertains to information about an athlete's health, because this is the most prominent factor impacting a player's "availability for or performance in" NFL games.

Within this broad and vaguely-phrased provision, one element stands out: the requirement that the information be disclosed "for a gambling-related purpose." This element substantially limits the scope of the rule, but the NFL Gambling Policy does not explicitly specify that the tipper (namely, the individual who discloses the information) must intend for the disclosed information to be used for the manipulation of gambling markets. It is also unclear whether the tipper can still be held liable for disclosing the information even if the tippee (the individual who receives the information) does not gamble on the basis of this information.

54. MATTHEW J. MITTEN, *SPORTS LAW IN THE UNITED STATES* 123 (2011); *see also* PGA Tour, Inc. v. Martin, 532 U.S. 661, 678–81 (2001).

55. MITTEN, *supra* note 54, at 123–24.

56. David Forrest, *Match Fixing: An Economic Perspective*, in MATCH-FIXING IN INTERNATIONAL SPORTS, *supra* note 47, at 177, 178; Mitten, *supra* note 48.

57. NFL, *GAMBLING POLICY FOR NFL PERSONNEL*, art. 2(5) (2018), <https://perma.cc/9FEH-B895> (last visited Aug. 5, 2019).

In August 2019, the NFL distributed via email to its players, coaches, owners, and officials a copy of a new gambling policy that “is similar” to the league’s 2018 Gambling Policy.⁵⁸ While the 2019 policy is not public, it has been reported that it includes an anti-tipping provision.⁵⁹

b. PGA Tour and LPGA

The PGA Tour, an organization sponsoring several golf tournaments in the United States, has recently implemented an Integrity Program Manual that prohibits PGA Tour personnel from engaging in various types of betting-related conduct.⁶⁰ Similarly, the LPGA has implemented its own Integrity Program Manual.⁶¹ Both manuals include an identical anti-tipping provision, which states as follows:

Providing Inside Information. Any Covered Person providing Inside Information to a third party that he or she knew would be used, or should have known would be used, for Betting on the outcome or any other aspect of any [Women’s] Professional Golf Event. In this Manual, “Inside Information” means information relating to a Professional Golf Event (e.g., the health of a player, the conditions of a course, etc.) that is not publicly available and that a Covered Person knows due to his or her unique position in the game of golf.⁶²

As the provision above demonstrates, unlike the NFL gambling policy, the PGA Tour/LPGA’s anti-tipping rule provides specific examples of the kinds of information that might be considered “inside information.” The first example is information about “the health of a player.” Thus, the PGA Tour/LPGA’s rule explicitly regulates information about players’ health, including their mental health.

In addition, the PGA Tour/LPGA’s anti-tipping rule seems to be broader than the NFL’s rule, because it extends to negligent disclosure (“she knew would be used, or *should have known would be used*, for Betting”).

c. NBA and WNBA

The NBA and WNBA’s anti-tipping rule is part of the leagues’ Gaming Policy, which applies to a wide array of sports personnel, including referees, players, and

58. Sean Chaffin, *NFL Issues a List of Gambling Dos and Don’ts to Employees for 2019 Season*, LINES (Aug. 9, 2019), <https://perma.cc/7AEJ-9NC8>.

59. *Id.* An official NFL document from March 2019 includes an anti-tipping rule that is almost identical to the rule presented above. See *NFL Compliance Plan*, NFL (Mar. 2019), <https://perma.cc/8CV3-JLFA> (last visited Dec. 15, 2019).

60. PGA TOUR, INTEGRITY PROGRAM MANUAL, <https://perma.cc/79PC-T9ZZ> (last visited Aug. 11, 2019) [hereinafter PGA TOUR INTEGRITY PROGRAM MANUAL].

61. LPGA, INTEGRITY PROGRAM MANUAL, <https://perma.cc/2N6V-YVKA> (last visited Aug. 13, 2019) [hereinafter LPGA INTEGRITY PROGRAM MANUAL].

62. *Id.* art. 2(vii); PGA TOUR INTEGRITY PROGRAM MANUAL, *supra* note 60, art. 2(vi). For ease of reference, I will refer to this provision as the “PGA Tour/LPGA’s anti-tipping rule.”

coaches.⁶³ In addition to the NBA and the WNBA, the policy also applies to the NBA G League (the NBA's official minor league) and NBA 2K League (the professional esports league founded in part by the NBA).⁶⁴ The NBA and WNBA's Gaming Policy is comprised of three "no's": No Betting, No Fixing, and No Tipping. Under the latter prohibition, this policy states that:

"Tipping," which involves the disclosure of "confidential information" to any person who does not have a legitimate business need for the information, is prohibited. "Confidential information" is non-public, proprietary or other sensitive NBA League or team information that could be used in connection with betting on NBA League games or events. Such information includes non-public information related to player health or discipline. Covered Persons may possess confidential information that would be of interest to people associated with gambling, and are therefore prohibited from disclosing confidential information to anyone associated with gambling or under circumstances in which they know or should know that the information will be used in connection with betting on NBA League games or events. To ensure that they do not violate this rule, Covered Persons should not disclose confidential information to anyone unless that person has a legitimate business need for the information.⁶⁵

The scope of the W/NBA's anti-tipping rule is limited in that it only prohibits disclosure to any person who does not have a "legitimate business need" for the information. However, the policy does not include a definition or further explanation of what constitutes "legitimate business need." In addition, similar to the PGA Tour/LPGA's rule, the W/NBA's anti-tipping rule refers specifically to information about player health and also applies to negligent disclosure ("under circumstances in which *they know or should know* that the information will be used in connection with betting").

Anecdotal evidence suggests that the W/NBA's anti-tipping rule was formulated more than a decade ago, after the Tim Donaghy scandal.⁶⁶ However, the current Gaming Policy bears the date May 17, 2018, three days after the decision in *Murphy*. This is in line with recent announcements by NBA officials that the league intends

63. NBA, NBA GAMING POLICY (May 17, 2018), <https://perma.cc/852B-95SN>. Under the NBA Constitution, the league has implemented another anti-tipping rule that applies to owners, officers, managers, coaches, referees, and agents—but not to players, who are covered by the league's Gaming Rules. See NBA CONSTITUTION, *supra* note 51, art. 35A(g)(ii). In general, NBA players are employees of their respective teams and not of the league. In certain circumstances, it is possible that courts may treat the sports leagues (as opposed to only the clubs) as employers as well. See Jessica L. Roberts & Brittainie Zinsmeyer, *Fit to Play in the NBA? Reconciling the NBA Collective Bargaining Agreement with the Americans with Disabilities Act*, 166 U. PA. L. REV. ONLINE 149, 154 (2017); Jessica L. Roberts et al., *Evaluating NFL Player Health and Performance: Legal and Ethical Issues*, 165 U. PA. L. REV. 227, 254 (2017) [hereinafter Roberts et al., *Evaluating NFL Health and Performance*]. In any event, article 35A indicates explicitly that the term "employees" as used in the article "shall mean employees other than Players." See NBA CONSTITUTION, *supra* note 51, art. 35A.

64. NBA GAMING POLICY, *supra* note 63.

65. *Id.* art. 3. For ease of reference, I will refer to this provision as "W/NBA's anti-tipping rule."

66. Ira Winderman, *Scott: Riley Is Done with Coaching*, S. FLA. SUN-SENTINEL (Nov. 9, 2008), <https://perma.cc/X2V7-NE8U> (reporting on a new rule that requires NBA teams to hang a sign in every locker room stating, "Three-point play: No betting. No fixing. No tipping").

to tighten the enforcement of its gambling policy, including the anti-tipping rule, following the invalidation of PASPA.⁶⁷

Several sources suggest that the NBA publicizes its gambling policy, including a short explanation of the tipping prohibition, on the walls of sports arenas and facilities.⁶⁸ Additionally, the NBA CBA includes an “Anti-Gambling Training” clause, according to which players are required to attend an anti-gambling training session each season.⁶⁹ It is safe to assume that the anti-tipping rule is implemented through this training.

d. Other Organizations

While this Article focuses on the anti-tipping rules detailed above, it is worth mentioning that other U.S. sports organizations have adopted similar rules. MLB, for example, employs betting policies that explicitly prohibit unauthorized disclosure of any confidential information by any league or club employee, including minor league players, though such policies are not public.⁷⁰ However, as of December 2019, MLB is still negotiating with the MLB Players Association as to how these policies will apply to major league players.⁷¹

The National Collegiate Athletic Association (“NCAA”)—the body that regulates intercollegiate athletic competition in the United States—has also adopted an anti-tipping provision. This rule supplements the general rule against gambling-related activities, prohibiting the disclosure of information “to individuals involved in or associated with any type of sports wagering activities.”⁷²

3. Anti-Tipping Rules: Analysis

The anti-tipping rules described above are not identical, but they have some noteworthy common characteristics.

67. See Mark Woods, *NBA to Reinforce Gambling Policies, Eyes EPL as Example*, ESPN (Jan. 16, 2019), <https://perma.cc/353M-4AEV> (citing Mark Tatum, Deputy Commissioner of the NBA, stating: “A lot of it has to do with education with respect to our players, with respect to our teams.”).

68. See, e.g., Erik Horne (@ErikHorneOK), TWITTER (Dec. 19, 2018, 10:13 PM), <https://perma.cc/C6FU-5YAN> (showing basketball player Russel Westbrook being interviewed while this sign is displayed in the background); Brian Dulik (@BrianDulik), TWITTER (Feb. 11, 2019, 8:45 PM), <https://perma.cc/GV2V-7737> (showing the sign on one of the walls of the Quicken Loans Arena, the home arena of the Cleveland Cavaliers).

69. NBA, NBA COLLECTIVE BARGAINING AGREEMENT, art. VI § 5, <https://perma.cc/324Y-DR6K> (last visited Aug. 1, 2019).

70. E-mail from Bryan Seeley, MLB Senior Vice President and Deputy Gen. Counsel, to author (Dec. 17, 2019) (on file with author). Regardless of the applicability of this anti-tipping rule, the already existing rules of MLB impose sanctions on players when certain conduct is incompatible “with the best interests of baseball.” *Id.* (referring to MLB, MAJOR LEAGUE RULES, rule 21 (2019), <https://perma.cc/6L6E-FPNB>).

71. *Id.*

72. NAT’L COLLEGIATE ATHLETIC ASS’N, 2019-20 NCAA DIVISION I MANUAL § 10.3 (2019), <https://perma.cc/L9AW-AL8U> (last visited Dec. 16, 2019).

a. Coverage

This Article focuses on athletes, but the anti-tipping rules apply to many other groups of people as well. The NFL gambling policy, for example, applies to “all full- and part-time club and league personnel including league office employees, players, owners, coaches, athletic trainers, game officials, security personnel, consultants, club employees, game-day stadium personnel and other staff.”⁷³ Similarly, the PGA Tour/LPGA’s anti-tipping rule applies to players, affiliated persons (including family members of the player who receive credentials to access an event at the player’s request), volunteers, directors, employees, and tournament personnel.⁷⁴

b. Physical versus Mental Health

Some of the rules described above explicitly cite health issues, whether physical or mental, as examples of nonpublic information that should not be disclosed. Other anti-tipping rules refer implicitly to physical and mental conditions, by mentioning that the anti-tipping rules apply to information about one’s availability for or performance in sporting events.⁷⁵ Against this backdrop, I argue that, in practice, anti-tipping rules are applied asymmetrically with regard to athletes’ mental and physical health.⁷⁶ The anti-tipping rules are especially burdensome for athletes with mental health issues, because information about physical injuries is often already public.

Physical injuries, by their very nature, are often more “tangible” and visible than mental health issues. In addition, most of the leading sports organizations in the United States employ “injury reporting policies,” which establish a mandatory transparency regime regarding physical injuries, but fail to fully acknowledge the existence of mental health issues.⁷⁷ The injury reporting policies are designed to provide the public with “full and complete information on player availability.”⁷⁸ The

73. GAMBLING POLICY FOR NFL PERSONNEL, *supra* note 57, art. 1.

74. PGA TOUR INTEGRITY PROGRAM MANUAL, *supra* note 60, art. 1(d); LPGA INTEGRITY PROGRAM MANUAL, *supra* note 61, art. 1(d).

75. See *infra* notes 198–202 (providing examples of the ways in which psychosocial impairments affect athletes’ performance).

76. In making this argument, I do not intend to suggest that there is a clear distinction between mental and physical health, but rather to refer to general categories that are publicly identified as separate from each other. See also Elizabeth F. Emens, *The Sympathetic Discriminator: Mental Illness, Hedonic Costs, and the ADA*, 94 GEO. L.J. 399, 404 (2006) [hereinafter Emens, *The Sympathetic Discriminator*].

77. For a detailed review of injury reporting policies in the leading sports leagues in the United States, see Christopher R. Deubert et al., *Comparing Health-Related Policies and Practices in Sports: The NFL and Other Professional Leagues*, 8 HARV. J. SPORTS & ENT. L. 1, 80–81, 86, 89, 92 (2017) [hereinafter Deubert et al., *Comparing Health-Related Policies*]. For specific injury reporting policies, see, for example, NFL, 2017 PERSONNEL (INJURY) REPORT POLICY, <https://perma.cc/D3LH-W66C> (last visited Aug. 11, 2019) [hereinafter NFL INJURY REPORT POLICY]; NBA Injury Report: 2018-19 Season, NBA OFFICIAL, <https://perma.cc/HEK8-2ZK6> (last visited Aug. 11, 2019).

78. NFL INJURY REPORT POLICY, *supra* note 77.

primary objective of these policies is to protect the integrity of sports and, more specifically, to prevent sports betting based on inside information about an athlete's health.⁷⁹ However, the injury reporting policies do not treat physical injuries and mental health issues equally. Consider, for example, the NFL Injury Report Policy, which requires teams to disclose their players' injuries "with a reasonable degree of specificity in terms."⁸⁰ While this policy does not define "injury," it is clear from its language that this term generally refers to physical conditions (referring to "calf," "wrist," and "shoulder" injuries, for example). The NFL Injury Report Policy also enables teams to use a "supplemental entry" titled "Not Injury Related" in situations where a player cannot play for reasons unrelated to "injury."⁸¹ But this term, as well as others used in injury reports that are broad enough to include mental health issues ("Undisclosed," "Rest," or "Personal"), does not provide specific information about mental health. Thus, sports teams are generally required to publish a detailed report on their injured players, which means that in most cases, information about the physical health of athletes is public. In contrast, sports teams do not include in their injury reports specific information about the mental health condition of athletes.⁸² In light of the above, it is clear that the anti-tipping rules primarily prohibit disclosure of nonpublic information about psychosocial impairments, rather than physical injuries.⁸³

c. Mandatory Transparency versus Prohibition on Disclosure

The injury reporting policies shed light on the dual nature of the measures taken by sports organizations to protect the integrity of the sports: Some of those measures take the form of forced invisibility (the anti-tipping rules, for example), while others set a regime of mandatory disclosure. In addition to the injury reporting policies, a recent example of transparency measures in this context is the NBA's intended publication of accurate data on players' height for the use of gamblers.⁸⁴ The

79. Deubert et al., *Comparing Health-Related Policies*, *supra* note 77, at 80.

80. NFL INJURY REPORT POLICY, *supra* note 77 ("For example, leg injuries must be specified as ankle, knee, thigh, or calf. Arm injuries must be identified as shoulder, elbow, wrist, hand, or muscle.").

81. *Id.*

82. WNBA player Liz Cambage effectively captured this phenomenon: "I took a *DNP* [Did Not Play]-*Rest* . . . but here's the truth of what it should have said: *DNP-Mental Health* . . . We're probably not at a place yet—and we probably won't be anytime soon—where the official box score is actually going to say something like *DNP-Mental Health*. But in the meanwhile . . . here's your Liz Cambage injury update: She was day-to-day with anxiety and depression—and she still is." Liz Cambage, *DNP-Mental Health*, PLAYERS' TRIBUNE (Aug. 11, 2019), <https://perma.cc/HJT8-DULQ>.

83. *But see* Brian Windhorst, 'Day-to-Day' LeBron and the Challenges of Disclosing NBA Injuries, ESPN (Jan. 23, 2019), <https://perma.cc/KCY5-JS55> (describing why the current format of the NBA Injury Report allows teams to provide incomplete information about their players' physical condition in a way that may also open the door for manipulation in the sports gambling market); *see also* Stephanie Apstein, *Can MLB Do Anything About Fake Injuries?*, SPORTS ILLUSTRATED (May 23, 2019), <https://perma.cc/58ST-GQX2>.

84. *See* Scott Soshnick & Eben Novy-Williams, *NBA Stars Can't Fudge How Tall They Are in Era of Sports Betting*, BLOOMBERG (June 6, 2019), <https://perma.cc/XK6R-C9EP>.

distinction between these kinds of mechanisms (mandatory transparency and prohibition of disclosure) emphasizes that not every use of informational advantage is prohibited. Sports organizations recognize that access to relevant information about athletes is an integral part of sports betting, as long as this information is already “public.” This distinction, however, may have another indirect effect: The fact that the physical status of athletes is generally public, whereas their mental condition is withheld, might exacerbate the stigma associated with psychosocial disability.⁸⁵

d. Timing

Not all of the anti-tipping rules were formulated after the Supreme Court struck down PASPA. The PGA Tour’s Integrity Program illustrates this, as it entered into effect four months before PASPA was invalidated. However, this does not mean that *Murphy* is irrelevant to the implementation and enforcement of the anti-tipping rules. First, sports organizations may have taken measures in anticipation of the legalization of sports betting.⁸⁶ More importantly, following the expansion of the legal sports betting industry,⁸⁷ sports organizations now invest more effort in protecting the integrity of their respective competitions.⁸⁸ As NBA Deputy Commissioner Mark Tatum recently noted: “The standards now, in a legalized sports betting world, are going to be much, much higher than they ever have been.”⁸⁹

e. Enforcement

Sports leagues can enforce their anti-tipping rules by imposing disciplinary sanctions by virtue of their regulatory powers, as described above. Such disciplinary proceedings may culminate in the imposition of fines and suspensions, including lifetime suspensions. A recent example of the enforcement of anti-tipping rules comes from NBA 2K League. In September 2019, the NBA 2K managing director announced that a player named Basil Rose was dismissed and disqualified from the league for violating the league’s anti-tipping rule.⁹⁰ The league has not provided further details regarding the type of information disclosed. Other than this case, I have been unable to find any cases where, after the invalidation of PASPA, U.S.

85. See also *infra* Part IV.C. For more on the “hierarchy of disability” and the ways in which cultural representations of disability reinforce the notion that physical disability is more desirable than “mental disability,” see JAY TIMOTHY DOLMAGE, *DISABILITY RHETORIC* 46 (2014).

86. See, e.g., Silver, *supra* note 18.

87. AMERICAN GAMING ASSOCIATION, *STATE OF THE STATES 2019: THE AGA SURVEY OF THE COMMERCIAL CASINO INDUSTRY 20* (2019) (estimating that the total revenue from legal sports betting in 2018 was approximately \$430.2 million, compared to \$261.3 million in 2017).

88. See, e.g., Woods, *supra* note 67.

89. See Soshnick & Novy-Williams, *supra* note 84; Mitten, *supra* note 48, at 100–01 (describing the leagues’ demand for an “integrity fee”).

90. Basil “24K Dropoff” Rose Disqualified from NBA 2K League, NBA2KLEAGUE (Sept. 12, 2019), <https://perma.cc/3WHA-XY3A>.

sports organizations imposed penalties for violations of their anti-tipping rules.⁹¹ However, the impact of these rules extends beyond the sanctions imposed. As explained further, these rules may also have a chilling effect on would-be speakers.

f. Chilling Effect

The anti-tipping rules are generally vague and broad in scope. The terms “legitimate business need” (W/NBA’s rule) and “duly authorized” (NFL’s rule), for example, are not defined, and the fact that at least some of the anti-tipping rules apply to negligent disclosure makes a wide array of disclosures unlawful. Note that according to the plain language of the anti-tipping rules described above, they apply even if the information disclosed is not material, even if no actual bet is made, and even if the tipper received no personal gain from the disclosure.⁹² This is likely to result in a chilling effect on the disclosure of information about psychosocial impairments, regardless of whether such disclosures are indeed violations of the anti-tipping provisions.⁹³

To be sure, there are circumstances in which the disclosure of information about psychosocial impairments is permitted and even encouraged. For example, it is difficult to imagine a situation where an athlete would be punished for divulging to the club’s therapist the symptoms of her depression, even if the therapist uses the information for betting purposes.⁹⁴ In fact, athletes are often *obligated*, under their respective CBAs, to disclose to their club’s medical personnel any mental condition that might interfere with their performance.⁹⁵ There are indications that some other forms of disclosures of nonpublic information would not violate the anti-tipping rules.⁹⁶ However, the rules described above do not explicitly specify positions or relationships that would permit disclosure. The concern is that athletes and other

91. There are, however, recent cases in which non-American organizations have imposed sanctions on athletes for tipping violations. See Lawrence Ostlere, *Daniel Sturridge Banned: FA to Appeal Against Two-Week Ban as Betting Punishment Deemed Too Lenient*, INDEPENDENT (July 18, 2019), <https://perma.cc/55GB-BXPH> (describing how Daniel Sturridge, an English soccer player, was fined and banned for several weeks after disclosing to his brother details about his future career plans); see also *Cricket Australia Bans Emily Smith for Posting Hobart Team on Instagram*, GUARDIAN (Nov. 18, 2019), <https://perma.cc/W96L-C3JS> [hereinafter *Cricket Australia*] (describing how Emily Smith, an Australian cricket player, was suspended for posting her team’s lineup on social media before the information was officially announced).

92. Cf. *infra* Part VI.B.1 (reviewing the laws governing tipper liability in securities law).

93. See generally Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 WM. & MARY. L. REV. 1633, 1649–55 (2013).

94. Athletes may reasonably assume that their therapists will not use their health information for sports betting purposes. Cf. *United States v. Willis*, 737 F. Supp. 269 (S.D.N.Y. 1990) (reviewing a motion to dismiss an indictment filed by a psychiatrist who was charged with violating the rule against insider trading in securities law by trading on the basis of material, nonpublic information acquired from a patient).

95. See, e.g., Deubert et al., *Comparing Health-Related Policies*, *supra* note 77, at 42.

96. The W/NBA’s anti-tipping rule, for example, permits disclosure to people who have a “legitimate business need” for the information. Similarly, the NFL’s rule permits disclosure if the speaker is “duly authorized” to do so. See *supra* Part II.B.2.

sports personnel may self-censor to avoid disciplinary proceedings, even in cases where the disclosure of information about mental health issues is benign, as illustrated below.⁹⁷

III. PSYCHOSOCIAL IMPAIRMENTS IN THE SPORTING ARENA

This Part shifts from the anti-tipping rules to a discussion of athletes with psychosocial impairments. Section A defines psychosocial disability and describes its legal status. Section B focuses on the intersection of psychosocial impairments and competitive sports.

A. PSYCHOSOCIAL DISABILITY: DEFINITION, STATISTICS, AND LEGAL STATUS

1. Definition and Statistics

In recent years, disability and human rights advocates and scholars (both within and outside legal academia in the United States and abroad) have embraced the term “psychosocial disability” instead of “mental illness” or “mental disorder,” which are commonly used in medical discourse.⁹⁸ The term “psychosocial disability” emphasizes that disability is socially constructed and does not reside in a person’s mind,⁹⁹ and conversely that “mental” impairments have a significant impact on social functioning.¹⁰⁰ Another reason for the use of “psychosocial disability” is that this is the term preferred by some advocates for those with mental health issues.¹⁰¹

There is no agreed-upon definition of psychosocial disability, and I do not intend to provide a definition of my own. For the purposes of this Article, suffice it to say that most writers who use this term recognize it as a more up-to-date designation for “mental illness.”¹⁰² All of this, of course, is complicated by the fact that there is

97. See *infra* notes 232–236 and accompanying text.

98. For example, the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders uses the term “mental disorder.” See AM. PSYCHIATRIC ASS’N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* (5th ed. 2013) [hereinafter DSM-5].

99. MARGARET PRICE, *MAD AT SCHOOL: RHETORICS OF MENTAL DISABILITY AND ACADEMIC LIFE* 18–19 (2011); Fleur Beaupert, *Freedom of Opinion and Expression: From the Perspective of Psychosocial Disability and Madness*, 7 *LAWS* 3, 7 (2018).

100. See generally Susan D. Carle, *Analyzing Social Impairments Under Title I of the Americans with Disabilities Act*, 50 *U.C. DAVIS L. REV.* 1109, 1117–18 (2017).

101. See, e.g., Anna Lawson, *People with Psychosocial Impairments or Conditions, Reasonable Accommodation and the Convention on the Rights of Persons with Disabilities*, 26 *L. CONTEXT: A SOCIO-LEGAL J.* 62, 81 n.2 (2008); Lucy Series & Anne Nilson, *Article 12 CRPD: Equal Recognition Before the Law*, in *THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: A COMMENTARY* 339, 373 n.255 (Della Fina et al. eds., 2018).

102. See, e.g., Faraaz Mahomed, Michael Ashley Stein & Vikram Patel, *Involuntary Mental Health Treatment in the Era of the United Nations Convention on the Rights of Persons with Disabilities*, 15 *PLOS MED.* 1 (Oct. 2018) (defining psychosocial disabilities as “disabilities arising from mental health conditions”); Kristin Booth Glen, *Introducing a “New” Human Right: Learning from Others, Bringing Legal Capacity Home*, 49 *COLUM. HUM. RTS. L. REV.* 1, 35–6 (2018) (referring to psychosocial disability as a term that “continues to be known” as mental illness and mentioning schizophrenia, depression, and

currently no single, precise definition of mental illness.¹⁰³ For example, the American Psychiatric Association's guide for the diagnosis of mental disorders ("DSM-5") includes a definition of "mental disorder,"¹⁰⁴ but also recognizes that "no definition can capture all aspects of all disorders in the range contained in DSM-5."¹⁰⁵

Not only is the precise definition of psychosocial disability disputed, but there is also a lack of consensus about the very use of this term. Some legal scholars prefer to use "mental disability" to track the language employed in most current laws and policies in the United States.¹⁰⁶ For example, as described below, under the ADA the term "mental disability" is used as an umbrella term for a variety of "mental" impairments, such as intellectual or learning impairments.¹⁰⁷ Other scholars avoid using "psychosocial disability" for fear of being misunderstood.¹⁰⁸

In this Article, I choose to use the more progressive term "psychosocial disability" (and the corresponding term "psychosocial impairment"), especially because this Article proposes a policy argument rather than a statutory argument that might require statutory terminology. As used in this Article, the term "psychosocial

bipolar disorder as examples of psychosocial disabilities); Christopher P. Guzelian, Michael Ashley Stein & Hagop S. Akiskal, *Credit Scores, Lending, and Psychosocial Disability*, 95 B.U. L. REV. 1807, 1809 (2015) (noting that psychosocial disabilities were formerly called mental disabilities or mental illnesses); Leslie Salzman, *Guardianship for Persons with Mental Illness—A Legal and Appropriate Alternative?*, 4 ST. LOUIS U.J. HEALTH L. & POL'Y 279, 279 n.2 (2011) (noting that the term "psychosocial disability" is "preferred over the more commonly used term of 'mental illness'"); PRICE, *supra* note 99, at 18–19 (reviewing several terms used to indicate "impairments of the mind," including "mental illness," "mental disability," and "psychosocial disability").

103. Michael E. Waterstone & Michael Ashley Stein, *Disabling Prejudice*, 102 NW. U. L. REV. 1351, 1352 n.12 (2008) ("How one draws a line between physical and mental disabilities, however, is open to interpretation."); Emens, *The Sympathetic Discriminator*, *supra* note 76, at 403 ("Defining mental illness is not an exact science.").

104. DSM-5, *supra* note 98, at 20. The first part of the definition defines "mental disorder" as a "syndrome characterized by clinically significant disturbance in an individual's cognition, emotion regulation, or behavior that reflects a dysfunction in the psychological, biological, or developmental processes underlying mental functioning. Mental disorders are usually associated with significant distress or disability in social, occupational, or other important activities." The rest of the definition includes elements that do not constitute "mental disorder." *Id.*

105. *Id.*

106. Jasmine E. Harris, *Legal Capacity at a Crossroad: Mental Disability and Family Law*, 57 FAM. CT. REV. 14, 18 n.2 (2019) (using the term "mental disabilities" to include intellectual, developmental, psychosocial, and psychiatric disabilities while recognizing the need for disaggregation and individualization in regulatory approaches); Michael L. Perlin & Alison J. Lynch, "All His Sexless Patients": *Persons with Mental Disabilities and the Competence to Have Sex*, 89 WASH. L. REV. 257, 258 n.3 (2014).

107. See *infra* Part III.A.2, and specifically note 124. Compare the UN Convention on the Rights of Persons with Disabilities, which refers to disabled people as people "who have long-term physical, *mental, intellectual or sensory* impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others." G.A. Res. 61/106, Convention on the Rights of Persons with Disabilities, art. 1 (Dec. 13, 2006) (emphasis added).

108. Margaret Price provides the following account of her use of the term: "I have started to feel like, what's the point of using a term that no one gets but me? Put simply, in most social contexts, *psychosocial* failed to *mean*." PRICE, *supra* note 99, at 19.

impairments” includes what are typically thought of as psychiatric conditions or mental disorders, and excludes intellectual impairments.¹⁰⁹ Examples of specific “mental disorders,” as defined by the DSM-5, belonging to the category of psychosocial impairments discussed in this Article are: schizophrenia, bipolar I/II disorder, major depressive disorder, social anxiety disorder, panic disorder, generalized anxiety disorder, posttraumatic stress disorder (“PTSD”), and obsessive-compulsive disorder (“OCD”).¹¹⁰

Note that an individual’s symptoms have to meet all criteria indicative of a diagnosis in order to establish a “mental disorder” according to the DSM-5.¹¹¹ These criteria usually refer to the intensity, frequency, or duration of the symptoms.¹¹² Also, a person with a psychosocial impairment is usually not symptomatic all the time. Episodes may occur or be mitigated based on numerous factors, including environmental setting, social triggers, or the use of medication.¹¹³

Studies on the prevalence of psychosocial impairments produce greatly varied results. A recent study shows that 18.9 percent of adults (age eighteen or older) in the United States experience “mental illness” within any one-year period.¹¹⁴ According to other studies, the prevalence of mental illness among adults ranges from 26.2 percent to 32.4 percent in a given year.¹¹⁵ Estimates may vary depending on how the relevant study defines “mental illness.”

2. Legal Status

Psychosocial disability is protected under several disability antidiscrimination laws in the United States. The most significant of these statutes is the ADA, which

109. See Waterstone & Stein, *supra* note 103, at 1352 n.12 (using “psychosocial disability” and “mental disability” interchangeably, explaining that these two terms “are intended to embrace persons with psychiatric conditions (e.g., schizophrenia and bipolar disorder) as well as neuro-atypical conditions (such as the autism spectrum), but not intellectual disabilities (like Down syndrome)”; cf. WORLD HEALTH ORGANIZATION, PROMOTING RIGHTS AND COMMUNITY LIVING FOR CHILDREN WITH PSYCHOSOCIAL DISABILITIES 13 (2015), <https://perma.cc/MZ2B-5YUP> (defining “psychosocial disability” to include intellectual disabilities).

110. See DSM-5, *supra* note 98, at 99, 123–39, 160, 202, 208, 222, 271, 237. Interestingly, the DSM-5 also refers to gambling disorder as a mental disorder, *id.* at 585, suggesting that the legalization of sports gambling might affect psychosocial disability in ways that go beyond what is suggested in this essay. However, the ADA, which will be discussed in the next Part, specifically excludes “compulsive gambling” from the definition of “disability.” 42 U.S.C. § 12211(b)(2) (2018).

111. DSM-5, *supra* note 98, at 19–23.

112. For example, the diagnostic criteria for major depressive disorder include the presence of at least five symptoms during the same two-week period that “cause clinically significant distress or impairment in social, occupational, or other important areas of functioning,” among other elements. *Id.* at 160–61.

113. See, e.g., Christian Otte et al., *Major Depressive Disorder*, 2 NATURE REV. DISEASE PRIMERS 2–3, 9–14 (2016); *What is Schizophrenia*, AM. PSYCHIATRIC ASS’N, <https://perma.cc/3Q4X-T2VP> (last visited Nov. 11, 2019); Emens, *The Sympathetic Discriminator*, *supra* note 76, at 405.

114. See *Mental Illness*, NATIONAL INSTITUTE OF MENTAL HEALTH, <https://perma.cc/QWD5-U5CK> (last visited Aug. 11, 2019).

115. Erin Bagalman et al., *Prevalence of Mental Illness in the United States: Data Sources and Estimates*, CONGRESSIONAL RES. SERV. (Jan. 19, 2018), <https://perma.cc/MQS5-ZL3B>.

includes three main Titles, each dedicated to addressing a different area of public life. Title I prohibits employment discrimination on the basis of disability.¹¹⁶ Titles II and III forbid discrimination against disabled people in public services and public accommodations, respectively.¹¹⁷ Since this Article discusses sports entities that are either employers of athletes or operators of public accommodations,¹¹⁸ this Section will focus on Titles I and III.

As noted, Title I of the ADA forbids covered employers from discriminating against “qualified” individuals on the basis of their disability.¹¹⁹ As for public accommodations, Title III prohibits discrimination against disabled individuals in such a way as to deny those individuals “the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations.”¹²⁰

Significantly, Title I treats a failure to provide “reasonable accommodations” for a disabled person as a form of discrimination, unless the accommodation imposes an undue hardship on the employer.¹²¹ Similarly, Title III (public accommodations) defines discrimination to include “a failure to make reasonable modifications” in policies, practices, or procedures, unless making such modifications would fundamentally alter the nature of the goods, services, or facilities being provided.¹²² The reasonable accommodation and modification requirements will be discussed further in Part IV.B.

Who is protected under the antidiscrimination provisions of the ADA? An individual has a disability for the purposes of the ADA if (a) she has a physical or mental impairment that substantially limits one or more of her major life activities; (b) she has a record of such an impairment; or (c) she is “regarded as” having such an impairment.¹²³ With respect to this three-pronged definition, a psychosocial impairment falls within “mental impairment.”¹²⁴

Before the ADA Amendments Act of 2008 (“ADAAA”) came into force,¹²⁵ it was difficult for a plaintiff with a psychosocial impairment to demonstrate that she

116. 42 U.S.C. §§ 12111–12117 (2018).

117. *Id.* §§ 12131–12165, 12181–12189, respectively.

118. In most professional team sports (including the NBA and the NFL) athletes are employees of their respective clubs, and thus covered by Title I. *See supra* Part II.B.1. In individual sports, such as golf, the sports organization might be considered an operator of public accommodations. *See* PGA Tour, Inc. v. Martin, 532 U.S. 661, 677–81 (2001).

119. 42 U.S.C. § 12112(a) (2018). Covered entities under Title I are employers who have at least fifteen employees, employment agencies, labor organizations, and joint labor-management committees. *Id.* §§ 12111(2), 12111(5).

120. *Id.* § 12182(a).

121. *Id.* § 12112 (b)(5)(A).

122. *Id.* § 12182 (b)(2)(A)(ii).

123. *Id.* § 12102(1)(A)–(C).

124. The regulations issued by the EEOC define mental impairments under the ADA as follows: “any mental or psychological disorder, such as an intellectual disability (formerly termed “mental retardation”), organic brain syndrome, emotional or mental illness, and specific learning disabilities.” 29 C.F.R. § 1630.2(h)(2) (2019).

125. ADA Amendments Act of 2008, Pub. L. No. 110–325, 122 Stat 3553 (2008) (codified at 42 U.S.C §§ 12101–12213).

qualified as disabled for the purposes of the ADA. This was due to the Supreme Court's decision in *Sutton v. United Air Lines, Inc.*, in which the Court held that a determination of whether an individual has a "disability" under the ADA must take into consideration the effect of mitigating measures taken by the individual.¹²⁶ In other words, the Court concluded that when the impairment in question could be corrected or mitigated (through medications or assistive devices, for example), the matter of whether an individual is substantially limited in a major life activity should be assessed after taking into account such mitigating measures.¹²⁷ The *Sutton* decision thus created a significant barrier for people with psychosocial impairments who sought protection under the ADA, because in many cases medication and treatment alleviate the symptoms of such impairments.¹²⁸

In enacting the ADAAA, Congress explicitly overruled *Sutton*, clarifying that "[t]he determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures . . ." ¹²⁹ The ADAAA has included a "rule of construction" regarding the definition of "disability" under the ADA, such that the definition "shall be construed in favor of broad coverage of individuals under this Act."¹³⁰ It has also broadened the definition of "disability" by adding a list of examples of "major life activities" (which include caring for oneself, sleeping, learning, concentrating, thinking, and communicating), making it easier for psychosocially disabled individuals to fall within this definition.¹³¹ Furthermore, the ADAAA has explicitly recognized that disability can be a result of "[a]n impairment that *is episodic or in remission* . . . if it would substantially limit a major life activity when active."¹³² This provision is particularly relevant to psychosocial impairments, which often manifest intermittently, as noted above. Accordingly, within the last decade, courts have held that psychosocial impairments such as social anxiety disorder,¹³³ OCD,¹³⁴ PTSD,¹³⁵ and depression¹³⁶ qualify as disabilities under the ADA.

126. 527 U.S. 471 (1999).

127. *Id.* at 482.

128. For a detailed analysis of this barrier before the enactment of the ADAAA, see Emens, *The Sympathetic Discriminator*, *supra* note 76, at 450–51 ("[A] plaintiff who has successfully mitigated her severe depression with medication, such that her depression no longer substantially limits her in any major life activity, would probably not qualify as actually disabled . . . unless perhaps her medication causes side effects that substantially limit her in a major life activity.").

129. 42 U.S.C. § 12102(4)(E)(i) (2018). The ADAAA made one exception to this rule: The effects of using ordinary glasses or contact lenses must be taken into account in determining whether an impairment substantially limits one major life activity. *See id.* § 12102(4)(E)(ii).

130. *Id.* § 12102(4)(A).

131. *Id.* § 12102(2)(A).

132. *Id.* § 12102(4)(D) (emphasis added).

133. *Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562 (4th Cir. 2015).

134. *Becker v. Elmwood Local Sch. Dist.*, No. 3:10-CV-2487, 2012 WL 13569, (N.D. Ohio Jan. 4, 2012), *aff'd*, 519 F. App'x 339 (6th Cir. 2013).

135. *Gazvoda v. Sec'y of Homeland Sec.*, 258 F. Supp. 3d 799, 803 (E.D. Mich. 2017).

136. *Holland v. Shinseki*, No. 3:10-CV-0908-B, 2012 WL 162333 (N.D. Tex. Jan. 18, 2012).

Having a “disability” is not sufficient, however, for establishing a valid claim under the ADA. In order to be considered a “qualified individual” under Title I, an individual must be able to perform the “essential functions” of the employment position in question “with or without reasonable accommodation.”¹³⁷ As a recent study exploring the application of the ADA to NFL players notes, “[t]he ‘qualified individual’ inquiry is especially challenging in the context of professional sports where excellence, not mere competence, is the necessary standard.”¹³⁸

B. PROFESSIONAL ATHLETES AND PSYCHOSOCIAL IMPAIRMENTS

Professional athletes, like any other group in society, are not immune to psychosocial impairments. Although physical activity has long been recognized as a mental wellness tool, in recent years, it has become clear that the number of professional athletes with psychosocial impairments is greater than previously thought. This Section provides an account of the current data about athletes with psychological impairments, relying on both scientific studies and anecdotal evidence.

1. Mental Health and Elite Athletes: Myth and Reality

Exercise gives you endorphins. Endorphins make you happy. Happy people just don't shoot their husbands, they just don't.

—Elle Woods (Reese Witherspoon), *Legally Blonde*¹³⁹

Researchers widely agree that physical activity has the potential to boost mental health.¹⁴⁰ A combination of several factors—physiological, biochemical, and psychosocial—are thought to make physical activity beneficial by reducing stress and the risk of psychosocial impairments.¹⁴¹ Some studies point to the positive

137. 42 U.S.C. § 12111(8) (2018).

138. Roberts et al., *Evaluating NFL Health and Performance*, *supra* note 63, at 274–75. This study suggests, based on relevant case law and the standard NFL player contract, that “essential functions of being an NFL player include exceptional skills and performance, as well as a behavioral element off of the field akin to being a role model” and that “[q]ualified’ . . . would necessarily mean performing at an elite, superior level.” *Id.* at 275–76. For other recent studies that provide a rigorous doctrinal analysis of the application of the ADA to elite athletes, see Matthew Gollub, Note, *Social Anxiety Disorder and the Americans with Disabilities Act's Impact on a Professional Athlete's Media Obligations*, 15 CARDOZO PUB. L. POL'Y & ETHICS J. 179 (2017); Roberts & Zinsmeyer, *supra* note 63; Travis Tygart & Anthony R. Ten Haagen, *The Americans with Disabilities Act, the United States Anti-Doping Agency, and the Effort Toward an Equal Opportunity: A Case Study of the United States Anti-Doping Agency v. George Hartman Matter*, 2 HARV. J. SPORTS & ENT. L. 199 (2011).

139. LEGALLY BLONDE (MGM Distribution Co. 2001).

140. Mark Hamer et al., *Dose-Response Relationship Between Physical Activity and Mental Health: The Scottish Health Survey*, 43 BRIT. J. SPORTS MED. 1111 (2009); Felipe B. Schuch et al., *Exercise as a Treatment for Depression: A Meta-Analysis Adjusting for Publication Bias*, 77 J. PSYCHIATRIC RES. 42 (2016).

141. Philip Tyson et al., *Physical Activity and Mental Health in a Student Population*, 19 J. MENTAL HEALTH 492 (2010); *see also* Nancy Leong & Emily Bartlett, *Sex Segregation in Sports as a Public Health*

chemical processes and antidepressant effect that are triggered by physical exercise;¹⁴² others suggest that physical activity has indirect benefits to mental wellness, including improvement of self-esteem and body image, engagement in social interaction, and distraction from previously existing symptoms.¹⁴³ This concept that physical activity benefits mental health is deeply rooted in society and has found its way into popular culture, as the epigraph of this Subsection suggests. It was also noted in a recent law review article, which found that participation in sports is “strongly correlated with improved mental health.”¹⁴⁴

One would assume that if physical activity improves mental health, then professional athletes, who engage in physical activity as part of their daily routine, would be much less vulnerable to psychosocial impairments. Despite this conventional wisdom,¹⁴⁵ that is not the case. For example, a 2016 study found that the rate of “mental disorders” among elite athletes is similar to the rate of such impairments in the general population.¹⁴⁶ In addition, according to a study published in June 2019, thirty-four percent of current elite athletes experience symptoms of anxiety or depression, slightly *higher* than the rate in the general population.¹⁴⁷

Research suggests that the type of sport in which the athlete competes may affect her risk of developing a psychosocial impairment.¹⁴⁸ However, it is impossible to find comprehensive data broken down by sport. The most well-established report on the subject in the United States, the Football Players Health Study at Harvard University, was conducted in relation to the NFL. This study suggests that there are hundreds of active NFL players who experience some form of mental illness.¹⁴⁹

Issue, 40 CARDOZO L. REV. 1813, 1831–32 (2019) (arguing that legal analysis under the Equal Protection Clause of sex segregation in sports should take public health considerations into account).

142. See, e.g., Georgia Stathopoulou et al., *Exercise Interventions for Mental Health: A Quantitative and Qualitative Review*, 13 CLINICAL PSYCHOL.: SCI. & PRAC. 179, 186 (2006); Claudia L. Reardon et al., *Mental Health in Elite Athletes: International Olympic Committee Consensus Statement*, 53 BRIT. J. SPORTS MED. 667, 668 (2019).

143. See, e.g., Tyson et al., *supra* note 141, at 493.

144. Leong & Bartlett, *supra* note 141, at 1830. However, the authors do recognize that “sports can also increase the risk of certain mental health issues.” *Id.*

145. See, e.g., Andrew Wolanin et al., *Depression in Athletes: Prevalence and Risk Factors*, 14 CURRENT SPORTS MED. REP. 56, 56 (2015) (referring to “past notions that athletes are devoid of mental health issues”).

146. Simon M. Rice et al., *The Mental Health of Elite Athletes: A Narrative Systemic Review*, 46 SPORTS MED. 1333, 1344 (2016) [hereinafter Rice et al., *The Mental Health of Elite Athletes*] (suggesting that elite athletes “experience a broadly comparable risk of high-prevalence mental disorders (i.e. anxiety, depression) relative to the general population”).

147. Vincent Gouttebargue et al., *Occurrence of Mental Health Symptoms and Disorders in Current and Former Elite Athletes: A Systematic Review and Meta-Analysis*, 53 BRIT. J. SPORTS MED. 700 (2019). The authors point to one caveat: “[A]ccurate comparison is difficult to make because the outcomes related to mental health symptoms and disorders were not measured using the same scales from one study to another.” *Id.* at 705.

148. Simon M. Rice et al., *Determinants of Anxiety in Elite Athletes: A Systematic Review and Meta-Analysis*, 53 BRITISH J. SPORTS MED. 722, 726 (2019) [hereinafter Rice et al., *Determinants of Anxiety in Elite Athletes*].

149. Deubert et al., *Protecting the Health of NFL Players*, *supra* note 46, at 58. The authors base this estimation on data regarding the prevalence of mental illness in the general population and find

As for the NBA, John Lucas, an assistant coach in one of the league's teams, has estimated that more than forty percent of players have "mental health issues" but less than five percent seek treatment.¹⁵⁰ Lucas, himself a retired NBA player, claimed that "[i]t's an epidemic" in the league, referring to impairments "from ADHD to bipolar to anxiety and depression."¹⁵¹ Similarly, NBA Commissioner Adam Silver believes that mental health issues are a problem for NBA players; he has noted that "[w]e are living in a time of anxiety . . . A lot of players are unhappy."¹⁵²

A consensus paper recently published on behalf of the International Olympic Committee estimates that the prevalence of symptoms of anxiety and depression among male elite athletes participating in team sports (cricket, football, handball, ice hockey, and rugby) is estimated to be almost forty-five percent.¹⁵³ Furthermore, an array of international studies have found that between twenty-six and thirty-eight percent of professional soccer players report they experience symptoms of anxiety or depression.¹⁵⁴

Why, then, don't professional athletes enjoy the mental health benefits usually associated with physical activity? Studies and anecdotal data show that the world of competitive sports includes unique stressors that do not exist in other social institutions or workplaces.¹⁵⁵ One study has found that sports performers encounter 640 distinct organizational stressors.¹⁵⁶ The researchers divided these stressors into categories and subcategories, including external expectations, team atmosphere, media, travel, physical safety, finances, diet and hydration, career transitions, and logistical and environmental issues.¹⁵⁷ From a young age, athletes are subjected to the high expectations of their sports clubs, teammates, the public, their families, and themselves. As a result, professional athletes often engage in intensive training regimes that are highly taxing, both physically and mentally. In addition, pursuing a professional sports career often requires making compromises in terms of social life, schedule, and diet. Another stressor is the transition from anonymity to fame, which entails public exposure and incessant media coverage of an athlete's sporting

support in three studies conducted on this subject among former NFL athletes. One study found that approximately one quarter of the respondents had been diagnosed with depression or experienced major depression in their lifetime. Another study found that 14.7 percent of former NFL players who were interviewed experienced depressive symptoms. A third study showed that 11.1 percent of the respondents answered that they had previously been diagnosed with depression. *Id.* at 58–59.

150. Jackie MacMullan, *The Courageous Fight to Fix the NBA's Mental Health Problem*, ESPN (Aug. 20, 2018), <https://perma.cc/MR43-PVGF>.

151. *Id.*

152. See ESPN News Services, *Silver Talks Player Anxiety, Potential NBA Changes*, ESPN (Mar. 1, 2019), <https://perma.cc/QVS2-UX7M>.

153. See Reardon et al., *supra* note 142, at 668.

154. Vincent Gouttebargue & Gino M.M.J. Kerkhoffs, *Mental Health in Professional Football Players*, in RETURN TO PLAY IN FOOTBALL 851 (Volker Musahl et al. eds., 2018).

155. Rice et al., *The Mental Health of Elite Athletes*, *supra* note 146, at 1350.

156. Rachel Arnold & David Fletcher, *A Research Synthesis and Taxonomic Classification of the Organizational Stressors Encountered by Sport Performers*, 34 J. SPORT & EXERCISE PSYCHOL. 397 (2012).

157. *Id.* at 410.

performance and private life.¹⁵⁸ Nowadays, every aspect of an athlete's performance is measured, analyzed, and monitored. Moreover, the sudden wealth that comes with success, coupled with the daily preoccupation with potential failure, can result in additional stress.

Another major issue is the risk of physical injury, which is a regular part of an athlete's daily life. Such injuries often require athletes to undergo long rehabilitation periods, during which they are prevented from competing. Studies show that many athletes may respond to these periods with depressive symptoms due to the decrease in their self-esteem, the demanding recovery programs, and the uncertainty of how the injury will affect their professional performance.¹⁵⁹ Physical injuries can also contribute to the development of psychosocial impairments in other ways. Multiple concussions, for example, have been associated with adverse effects on mental health, including depressive symptoms.¹⁶⁰ Other factors that may lead to an outbreak or exacerbation of psychosocial impairments among professional athletes are sexism

158. Tadhg E. MacIntyre et al., *Mental Health Challenges in Elite Sport: Balancing Risk with Reward*, 8 *FRONTIERS IN PSYCHOL.* 1 (2017).

159. See, e.g., Aynsley M. Smith & Erik K. Milliner, *Injured Athletes and the Risk of Suicide*, 29 *J. ATHLETIC TRAINING* 337 (1994); Angela H. Nippert & Aynsley M. Smith, *Psychologic Stress Related to Injury and Impact on Sport Performance*, 19 *PHYSICAL MED. REHABILITATION CLINICS N. AM.* 399 (2008).

160. Tharmegan Tharmaratnam et al., *Chronic Traumatic Encephalopathy in Professional American Football Players: Where Are We Now?*, 9 *FRONTIERS IN NEUROLOGY* 1, 2, 4 (2018); John Hart Jr. et al., *Neuroimaging of Cognitive Dysfunction and Depression in Aging Retired NFL Players: A Cross-Sectional Study*, 70 *JAMA NEUROLOGY* 326 (2013); James Pryor et al., *The Prevalence of Depression and Concussions in a Sample of Active North American Semi-Professional and Professional Football Players*, 6 *J. LIFESTYLE MED.* 7 (2016).

and gender discrimination,¹⁶¹ the prevalence of sexual abuse,¹⁶² hazing rituals,¹⁶³ violence,¹⁶⁴ frequent air travel,¹⁶⁵ and social media.¹⁶⁶

2. Personal Accounts of Athletes with Psychosocial Impairments

The past few years have witnessed a sharp increase in the number of athletes speaking up about their mental health issues, providing a rare opportunity to understand how psychosocial impairments affect athletes in the United States. Perhaps the most notable example is NBA player Kevin Love, who in March 2018 shared his thoughts and feelings about an anxiety attack he experienced during an official game several months earlier. In an article entitled “Everyone is Going Through Something,” Love described the severity of the event:

161. See Leong & Bartlett, *supra* note 141, at 1840–47 (discussing how exclusion on the basis of gender, excessive focus on women’s appearance, and various forms of gender stereotypes may have an impact on women’s mental health).

162. The Larry Nassar sexual abuse scandal is one recent example. See Katherine Hampel, *Whose Fault Is It Anyway? How Sexual Abuse Has Plagued the United States Olympic Movement and Its Athletes*, 29 MARQ. SPORTS L. REV. 547 (2019).

163. Aaron Slone Jeckell et al., *The Spectrum of Hazing and Peer Sexual Abuse in Sports: A Current Perspective*, 10 SPORTS HEALTH 558, 561 (2018) (“[M]ultiple meta-analyses have shown that victims of hazing are at a higher risk of developing mental health disorders.”). This is especially common among junior ice hockey players. See, e.g., Rich Clune, *The Battle*, PLAYERS’ TRIBUNE (July 1, 2015), <https://perma.cc/F5Y4-6Z44>.

164. The accounts of ice hockey athletes who have reported experiences of depression are illustrative. See Clune, *supra* note 163 (“I never wanted to be the fighter. I never wanted to be the wild man or the bully. I certainly never wanted to be an alcoholic. But we all put on masks to survive.”); see also Nick Boynton, *Everything’s Not O.K.*, PLAYERS’ TRIBUNE (June 13, 2018), <https://perma.cc/HWZ4-HEZT> (“You want to know how I played the game? I tried to hurt people. . . . A lot of people don’t want to hear that, but it’s the honest truth. . . . I didn’t enjoy it, though. That’s for sure. . . . In truth, I absolutely hated to fight. I was scared to death of fighting. . . . [B]y the time the game rolled around, I’d usually be a total mess on the inside.”).

165. Professional athletes spend a considerable amount of their time on airplanes. The number and distances of flights vary, depending on the location of the teams and the number of games in each sports organization, and reach tens of thousands of miles per year. Frequent air travel may increase vulnerability to psychosocial impairments in several ways; pre-flight arrangements, oxygen deficiency, aerophobia, increased exposure to noise, jet lag, fatigue, and dehydration are among those factors, according to studies. See Vivien Swanson & Iain McIntosh, *Psychological Stress and Air Travel: An Overview of Psychological Stress Affecting Airline Passengers*, in AVIATION MENTAL HEALTH: PSYCHOLOGICAL IMPLICATIONS FOR AIR TRANSPORTATION 13–25 (Robert Bor & Todd Hubbard eds., 2006); Thomas Huyghe et al., *The Negative Influence of Air Travel on Health and Performance in the National Basketball Association: A Narrative Review*, 6 SPORTS 89 (2018).

166. Rice et al., *The Mental Health of Elite Athletes*, *supra* note 146, at 1334, 1348. NBA Commissioner Adam Silver has recently argued that the increase in the number of athletes dealing with anxiety is “a direct result of social media.” See ESPN News Services, *supra* note 152. Some personal accounts of athletes can complete the picture. See Sid Lowe, *Bojan Krkic: ‘I Had Anxiety Attacks but No One Wants to Talk About That. Football’s Not Interested’*, GUARDIAN (May 18, 2018), <https://perma.cc/K5E4-G6QU> (quoting soccer player Bojan Krkic’s statement that “[e]ven at under-15s, players have Twitter and I’m sure they’re already getting insults . . . it’s ugly, it sullies society and football”); Sopan Deb, *A Reinvented Metta World Peace Says He’s Finally at Peace with the World*, N.Y. TIMES (May 28, 2019), <https://perma.cc/TU27-N5WY> (quoting former NBA player Metta World Peace as saying, “I don’t think it’s for everyone. . . . I would have been crazy on social media.”).

On November 5th, right after halftime against the Hawks, I had a panic attack. . . . It came out of nowhere. . . . But it was real—as real as a broken hand or a sprained ankle. . . . When I got to the bench, I felt my heart racing faster than usual. Then I was having trouble catching my breath. It’s hard to describe, but everything was spinning, like my brain was trying to climb out of my head. The air felt thick and heavy. My mouth was like chalk. I remember our assistant coach yelling something about a defensive set. I nodded, but I didn’t hear much of what he said. By that point, I was freaking out. When I got up to walk out of the huddle, I knew I couldn’t reenter the game—like, literally couldn’t do it physically. . . . I blurted something like, “I’ll be right back,” and I ran back to the locker room. I was running from room to room, like I was looking for something I couldn’t find. Really I was just hoping my heart would stop racing. It was like my body was trying to say to me, *You’re about to die*. I ended up on the floor in the training room, lying on my back, trying to get enough air to breathe.¹⁶⁷

Love is not the only star who has given public voice to his psychosocial impairment. A few weeks before Love’s column was published, Toronto Raptors star DeMar DeRozan revealed via his Twitter account that he experiences depression. “This depression get[s] the best of me,”¹⁶⁸ the NBA player posted, making public a part of his identity he had kept secret for a long time. Another example of an elite athlete who spoke out about his psychosocial impairment is NFL player Brandon Marshall, who disclosed in a press conference that he had been diagnosed with borderline personality disorder (“BPD”).¹⁶⁹ In Marshall’s words, BPD is an “emotional disorder that affects a person’s ability to cope with and control their emotions.”¹⁷⁰ Like Love and DeRozan, Marshall was in the midst of his best years as an athlete when he spoke out about his psychosocial impairment.

As noted above, Love, DeRozan, and Marshall are not alone. Within the last few years, dozens of professional athletes around the world—active or newly retired—have opened up about their mental health issues.¹⁷¹ They have done so through their

167. Kevin Love, *Everyone is Going Through Something*, PLAYERS’ TRIBUNE (Mar. 6, 2018), <https://perma.cc/X4D8-PP4H>.

168. DeMar DeRozan (@DeMar_DeRozan), TWITTER (Feb. 17, 2018, 6:06 AM), <https://perma.cc/9A78-FG3M>, quoted in Doug Smith, *Raptors’ DeRozan Hopes Honest Talk on Depression Helps Others*, TORONTO STAR (Feb. 25, 2018), <https://perma.cc/A98Q-YK6F>.

169. CBS News, *Brandon Marshall Has Borderline Personality Disorder*, YOUTUBE (Aug. 1, 2011), <https://perma.cc/Q7HV-LBKB>.

170. Brandon Marshall, *The Stigma*, PLAYERS’ TRIBUNE (May 31, 2017), <https://perma.cc/C9KD-38FJ>.

171. A non-exhaustive list includes *Olympic swimmers* Amanda Beard, Allison Schmitt, Rūta Meilutytė, and Michael Phelps; *ice hockey players* Daniel Carcillo, Robin Lehner, Kendra Fisher, Nick Boynton, Scott Darling, Rich Clune, and Corey Hirsch; *soccer players* Abby Wambach, Ashlyn Harris, Danny Rose, Andre Gomes, Aaron Lennon, Bojan Krkic, Tim Howard, and Gianluigi Buffon; *baseball players* David Freese, Zack Greinke, and Evan Gattis; *cyclists* Phil Gaimon, Taylor Phinney, Bobby Lea, and Andrea Dvorak; *mountain bike rider* Jenny Rissveds; *basketball players* Imani McGee-Stafford, Chamique Holdsclaw, Jahlil Okafor, Liz Cambage, Keyon Dooling, Larry Sanders, Channing Frye, Kelly Oubre Jr., Nate Robinson, Shane Larkin, and Jalen Moore; *tennis players* Mardy Fish, Naomi Cavaday, and Liam Broady; *track athlete* Brigetta Barrett; *football players* Brandon Brooks, Josh Gordon, Everson Griffen, Keith O’Neil, Joe Barksdale, Ricky Williams, and Gerald McRath; *golfers* Charlie Beljan and Andrew Johnston; *cricket players* Will Pucovski, Sarah Taylor, Nick Maddinson, and Glenn Maxwell,

social media accounts, in press interviews, or through other forms of public announcements. This growing list of athletes is not limited in terms of nationality, sports field, or gender.¹⁷² In light of the sharp increase in athletes speaking out about their psychosocial impairments, sports commentators have recently started referring to the current state of professional sports in the United States as a “mental health crisis.”¹⁷³ Others speak in terms of an “epidemic.”¹⁷⁴

The athletes who have recently divulged their mental health issues were diagnosed at varying stages of their careers—some prior to entering professional sports, others while competing professionally, while yet others were diagnosed only after retirement, or were never formally diagnosed at all even though they had experienced symptoms associated with such disorders. The most common disorders mentioned in these accounts are depression and anxiety, but the list also includes athletes who were diagnosed with severe panic disorder, agoraphobia (fear of leaving safe spaces), OCD, bulimia, bipolar disorder, paranoid delusions, and PTSD.

Virtually all of these athletes point out that there is a phenomenon of under-reporting of psychosocial impairments in their respective sports fields. The discrepancy between the number of professional athletes who report experiences of psychosocial conditions and the actual number of athletes who have such impairments can be attributed to various social and legal norms that discourage athletes from speaking about this issue. In contemporary society, the stigma of psychosocial disability pushes people to hide their impairments. This is especially true in the world of competitive sports, where athletes are expected to maintain an image of a certain type of strength and wellness. Hayley Wickenheiser, who was regarded by many as the greatest female ice hockey player in the world until her recent retirement, described this phenomenon concisely in 2015: “[D]epression and anxiety are the worst kept secrets in professional sports.”¹⁷⁵ Kevin Love also described this taboo in his column from March 2018:

I remember when I was two or three years into the league, a friend asked me why NBA players didn’t see therapists. I scoffed at the idea. *No way any of us is gonna talk to someone. . . .* I’d never heard of any pro athlete talking about mental health, and I didn’t want to be the only one. I didn’t want to look weak. Honestly, I just didn’t think I

and *boxers* Virginia Fuchs and Tyson Fury. A list of sources documenting each of these athletes’ statements about mental health is on file with the author.

172. According to recent meta-analyses, female athletes reported higher rates of anxiety than male athletes. See Rice et al., *Determinants of Anxiety in Elite Athletes*, *supra* note 148, at 724.

173. Dave Zirin, *Does the NBA Have a Mental-Health Crisis on its Hands?*, NATION (Mar. 7, 2019), <https://perma.cc/J88G-QAA7>.

174. See MacMullan, *supra* note 150; see also Lisa Minutillo, *Change-Maker: NBA Leads the Break in Supporting Athletes’ Mental Health*, CAN. CTR. FOR MENTAL HEALTH & SPORT (Mar. 27, 2019), <https://perma.cc/S7XQ-DN8J> (reviewing estimations and anecdotal accounts about the scope of mental health issues in the NBA, concluding that “[y]ou might call this an epidemic”).

175. Hayley Wickenheiser, *Out of the Shadows*, PLAYERS’ TRIBUNE (Apr. 23, 2015), <https://perma.cc/F94P-46E9>.

needed it. It's like the playbook said—figure it out on your own, like everyone else around me always had.¹⁷⁶

Swimmer Michael Phelps has told a similar story:

Looking back at my career, I think I was probably hiding a bunch or compartmentalizing a bunch of the stuff that I was going through just because—I think I was always taught that we weren't allowed or weren't supposed to show weakness or something like that ever because of being an athlete—you're supposed to be strong¹⁷⁷

As noted, many athletes who have shared their struggles with psychosocial impairments in recent years have emphasized these negative characteristics of the world of competitive sports. But these same athletes have also opened up the sports field, making it more inclusive for individuals with psychosocial impairments. The next Subsection discusses this point.

3. Shifting Attitudes Toward Psychosocial Disability in Professional Sports

We're in a mental health renaissance. We can speak about mental health without fear that our culture will turn its back on us. It's a beautiful place to be; we're pioneers, and this will be different when we leave.

—Larry Sanders, former NBA player¹⁷⁸

Sanders' words above suggest that in recent years, American sports have witnessed a cultural shift concerning mental health. The frank and detailed disclosures of Kevin Love and others have helped propel the creation of a new mental health discourse in the sporting arena. Two main factors characterize this new social movement.

First, as noted earlier, many athletes now decide to speak out about their mental health issues in the midst of their careers, rather than waiting for retirement. Second, they share their stories with an explicit intent to raise awareness and fight the social taboos described above. Brandon Marshall, for example, has sought to raise awareness regarding mental health issues, advocating for confronting the negative public attitudes toward people who have such experiences.¹⁷⁹ He has explained that

176. Love, *supra* note 167.

177. Today, *Michael Phelps Opens up About Struggle with Depression*, YOUTUBE (Oct. 25, 2018), <https://perma.cc/9XXX-E6XY>.

178. Shamard Charles, *How Two NBA Players, Larry Sanders and Royce White, Are Bringing Awareness to Mental Health in Sports*, NBC NEWS (May 12, 2019), <https://perma.cc/25VG-3SK8>.

179. Marshall is one of the initiators and headliners of the project *#StrongerThanStigma*, a public campaign to raise awareness about mental health featuring figures from professional sports leagues, television, and the music industry. *#StrongerThanStigma*, BRING CHANGE TO MIND, <https://perma.cc/YRN2-KXJM> (last visited Dec. 5, 2019).

he shares his story to “give people the courage to seek help”¹⁸⁰ and that he intends to use football as a platform to “bridge the gap in the mental health community.”¹⁸¹

Similarly, Love has expressed his commitment to helping others undergo the same “therapeutic” process he experienced by discussing his anxiety, depression, and subsequent treatment.¹⁸² Love has noted that “creating a better environment for talking about mental health . . . [is] where we need to get to.”¹⁸³ To this end, in May 2018, Love and DeRozan filmed a public service announcement for the NBA, in which they encouraged others to overcome any shame and seek treatment for their mental health issues.¹⁸⁴

Similar examples can be found in other sports fields as well. Since his retirement, Michael Phelps has been a staunch advocate for raising awareness about the significance of treating depression and destigmatizing psychosocial disability.¹⁸⁵ Former NHL player Daniel Carcillo has established a foundation that aims to educate and assist athletes who grapple with head injuries and mental health issues upon retirement.¹⁸⁶ Along the same lines, former NHL player Clint Malarchuk has become a prominent voice in issues related to substance abuse, suicide prevention, PTSD, OCD, and depression.¹⁸⁷ In a personal column published in March 2018, he wrote: “I realize that my life in hockey was really mainly all about gaining a platform for what I’m doing now. For helping people get through tough times.”¹⁸⁸ Similarly, ice hockey player Kendra Fisher wrote in December 2017: “Today, as a public speaker, I tell my story to thousands of people around the world By telling my story, I want to build support for people with mental illness in North America.”¹⁸⁹ Soccer player Ashlyn Harris is “heavily involved” in a nonprofit organization that

180. Marshall, *supra* note 170.

181. *Id.*

182. Motez Bishara, *NBA: Kevin Love on Mental Health: “Beating That Stigma Has Been Great,”* CNN (Oct. 31, 2018), <https://perma.cc/U3UF-68AJ>.

183. Love, *supra* note 167.

184. Bruce Y. Lee, *Kevin Love, DeMar DeRozan: Here’s What They Revealed About Mental Health*, FORBES (Apr. 30, 2018), <https://perma.cc/V4AZ-9ATL>.

185. Phelps has focused on sharing his own story in the media and on promoting mental health discourse through other forms of public and social activity. See, e.g., Jordan Muto, *‘I Didn’t Want to Be Alive’: Michael Phelps Talks About Struggle with Depression*, TODAY (Dec. 13, 2017), <https://perma.cc/432K-6TXW>; Kevin Loria, *Michael Phelps Is Speaking up About Mental Health Issues—Here’s His Advice for Anyone Who Is Struggling*, BUS. INSIDER (Sept. 20, 2018), <https://perma.cc/5EJW-68CM>.

186. See CHAPTER 5, <https://perma.cc/F4W7-SWHX> (last visited Nov. 4, 2019); see also Jeff Arnold, *For Daniel Carcillo, the Fight Against the N.H.L. Goes On*, N.Y. TIMES (Nov. 14, 2018), <https://perma.cc/J7RY-2NVP>.

187. See CLINT MALARCHUK, THE COWBOY GOALIE, <https://perma.cc/VH6P-7WVN> (last visited Oct. 30, 2019) (Malarchuk’s professional website).

188. Clint Malarchuk, *Bleeding Out*, PLAYERS’ TRIBUNE (Mar. 22, 2018), <https://perma.cc/4PCA-HP39>.

189. Kendra Fisher, *If I Should Die*, PLAYERS’ TRIBUNE (Dec. 11, 2017), <https://perma.cc/2L63-FQEX>.

helps people who struggle with addiction, depression, and suicidal thoughts.¹⁹⁰ She shares her own story of depression and addiction through different platforms, including public events and in-person interactions.¹⁹¹

The major sports leagues in the United States have not remained indifferent to this emerging discourse and have announced the promotion of mental health protection initiatives for their athletes, including provisions requiring teams to employ licensed mental-health professionals.¹⁹²

As evidenced by these efforts and initiatives, an attitudinal change toward psychosocial impairments is apparent in the sporting arena and beyond. While it is too early to assess the scope and significance of this change, preliminary evidence suggests that we are witnessing the rise of a promising social movement. One characteristic of this emerging movement is the way in which an athlete's decision to speak up about her psychosocial impairments can inspire and empower others who experience similar challenges. For example, NBA players Jahlil Okafor and Kelly Oubre Jr. have credited Kevin Love for encouraging them to reflect on their depression and anxiety.¹⁹³ Love, in turn, was driven to speak up about his panic attack by DeMar DeRozan's public disclosure.¹⁹⁴ Similarly, Olympic swimmers Allison Schmitt and Grant Hackett have mentioned that Michael Phelps helped them identify and deal with their own issues.¹⁹⁵

This influence extends beyond the sporting arena. Golfer Charlie Beljan, who experienced a panic attack during a tournament, has mentioned that "[p]eople in all walks of life" with anxiety disorders have reached out to him, saying that he has inspired them.¹⁹⁶ In the case of soccer goalie Ashlyn Harris, who has shared her experiences with depression and suicidal thoughts, fans often express their

190. Alicia DelGallo, *Orlando Pride's Ashlyn Harris Uses Battle with Addiction, Anger to Show Fans They Are Not Alone*, ORLANDO SENTINEL (Aug. 12, 2017), <https://perma.cc/3M2A-PXPW>.

191. *Id.*

192. See, e.g., David Aldridge, *NBA, NBPA Taking Steps to Further Address Mental Wellness Issues for Players*, NBA.COM (Mar. 12, 2018), <https://perma.cc/22TC-M9J2> (announcing the introduction of an independent mental wellness program for NBA players); Elijah Shama, *NBA Adopts New Rules Requiring Teams to Add Full-Time Mental Health Staff for 2019–2020 Season*, CNBC (Sept. 20, 2019), <https://perma.cc/V2GN-KC7E>; Dan Graziano, *NFL, NFLPA Announce Mental Health Initiative*, ESPN (May 20, 2019), <https://perma.cc/7S5X-KMCM> (describing new measures taken by the NFL and the NFLPA to address mental health issues, including requiring each NFL team to employ a mental health professional).

193. Jahlil Okafor (@jah8), INSTAGRAM (Aug. 17, 2018), <https://perma.cc/ZWU2-YFRZ> ("I would like to thank @kevinlove and the @playerstribune for helping me identify my feelings and informing me what I was dealing with was in fact normal"); Chase Hughes, *Kelly Oubre, Jr. on Depression, Anxiety and His Own Battles with Mental Health*, NBC SPORTS (Mar. 7, 2018), <https://perma.cc/374Y-LLJG>.

194. Love, *supra* note 167 ("One of the reasons I wanted to write this comes from reading DeMar's comments last week about depression.").

195. See Jamie Hergenrader, *Olympian Allison Schmitt Says Michael Phelps Helped Her Survive Depression*, WOMEN'S HEALTH (May 15, 2017), <https://perma.cc/R82H-W9YQ>; Karen Crouse, *How Michael Phelps Helped Turn Grant Hackett's Life Around*, SYDNEY MORNING HERALD (Sept. 24, 2017), <https://perma.cc/NU5G-BZ8V>.

196. Steve DiMeglio, *Healthier Charlie Beljan Attacks His Anxieties*, USA TODAY (Jan. 2, 2013), <https://perma.cc/L5LE-JQ9S>.

appreciation for her willingness to be open about mental health. In one of Harris' games, a fan hoisted a sign saying: "Ashlyn Harris saved my life."¹⁹⁷

As this Section has demonstrated, however, this attitudinal shift has yet to transform professional sports into an all-inclusive and safe environment for athletes with psychosocial impairments. There are reasons to believe that many elite athletes are still reluctant to disclose their psychosocial impairments. Indeed, this is a crucial moment for the movement against the culture of silence around mental health issues in the sporting arena.

IV. HOW ANTI-TIPPING RULES AFFECT PSYCHOSOCIALLY DISABLED ATHLETES

Many factors determine the manner and the extent to which psychosocial impairments affect athletes' performance, if at all. In some cases, an athlete's ability to compete is not affected by her impairments. Michael Phelps, for example, is the most decorated Olympian of all time, despite experiencing "at least half a dozen depression spells" during his career.¹⁹⁸ Anecdotal evidence suggests that in some instances, psychosocial impairments may even have a positive impact on athletic performance.¹⁹⁹

For some athletes, however, the symptoms of psychosocial impairments adversely affect their ability to compete. The impact for some can be immediate, while others suffer from long-term deterioration. According to athletes with psychosocial impairments, episodes of depression and panic attacks may be accompanied by physical distress, difficulty breathing, dizziness, heart palpitations, numbness, and general reluctance to practice or compete.²⁰⁰ When these symptoms occur prior to or during a game, they usually have a direct impact on athletic performance. Kevin Love, for example, left the court during an NBA game after having an anxiety attack, as noted above. Similarly, soccer player Bojan Krkic was absent from the 2008 European championship due to his anxiety.²⁰¹ Golfer Charlie Beljan spent a night in

197. See DelGallo, *supra* note 190; U.S. Soccer WNT (@USWNT), TWITTER (June 6, 2019, 12:00 PM), <https://perma.cc/38FP-L43R>.

198. Sarah Jacoby, *Michael Phelps Says He's Had at Least Half a Dozen 'Depression Spells'*, SELF (Jan. 4, 2018), <https://perma.cc/75FT-34Y5>.

199. See *infra* Part VII.

200. See, e.g., Love, *supra* note 167; Naomi Cavaday, *Sport's Mental Health Crisis: "Depression Felt Like a Block of Ice Pressed on My Back,"* TELEGRAPH (May 4, 2017), <https://perma.cc/E469-SDBQ> ("[I]t felt like someone had picked up a big block of ice and gently pressed it directly into my back between my shoulders. The feeling of uncomfortable cold and numbness was making me feel like I could not breathe properly."); Lowe, *supra* note 166 (quoting Bojan Krkic as saying, "Anxiety affects everyone differently. . . . With me, it was a dizziness, feeling sick, constant, 24 hours a day . . . I started to feel this powerful dizziness, overwhelmed, panicked, and they lay me on the physio's bench.").

201. Lowe, *supra* note 166. Other examples include Italian soccer goalie Gianluigi Buffon, who missed one game because of an episode of depression; track athlete Brigetta Barrett, who missed practice sessions due to her depression; and tennis player Mardy Fish, who withdrew from the 2012 U.S. Open tournament due to a panic attack he had experienced a few days earlier. See *Gianluigi Buffon: I Suffered with Depression, Had Panic Attack at Juventus*, ESPN (Jan. 8, 2019), <https://perma.cc/4KS8-N5H2>;

a hospital after having a panic attack during a golf tournament in 2012; when he returned to compete the next day, he won the tour.²⁰²

These instances may explain why nonpublic information about an athlete's psychosocial impairment may be useful to gamblers. But applying the anti-tipping rules to almost any disclosure of information about an athlete's mental health imposes a heavy burden on sports personnel and society at large—a burden that is heavier than the potential benefits it may yield. This Part explains why anti-tipping rules are harmful, pointing to three distinct ways in which these rules adversely affect athletes with psychosocial impairments.

A. CREATING “MINORITY STRESS,” EXACERBATING PRE-EXISTING IMPAIRMENTS, AND PREVENTING DIAGNOSIS AND TREATMENT

In the addiction world, any secrets are the kiss of death.

—Abby Wambach²⁰³

When they diagnosed me, I just . . . exhaled—like the biggest exhale of my life. It was just a huge relief. I was like, O.K. Now I know what this is. The next step was to treat it.

—Brandon Marshall²⁰⁴

In the short time I've been meeting with the therapist, I've seen the power of saying things out loud in a setting like that.

—Kevin Love²⁰⁵

Prohibiting athletes and other sports personnel from disclosing information about psychosocial impairments may have adverse mental health consequences. Although the anti-tipping rules might permit disclosure in limited circumstances, the broad scope and vague terms of these rules may deter athletes from speaking up about their mental health issues even in situations where the anti-tipping rules do not apply, as this Part demonstrates. Before delving further into this argument, I will address the relationship between disability and health.

At the core of contemporary disability rights thinking lies the “social model” of disability. The social model maintains that disability is not a result of physical or mental impairment. Rather, disability is created by the interaction between an

Jessica Ciosek, *How This Track Olympian Overcame Mental Illness*, REFINERY29 (June 20, 2019), <https://perma.cc/D55N-NGTT>; Mardy Fish, *The Weight*, PLAYERS' TRIBUNE (Sept. 1, 2015), <https://perma.cc/47CA-DLDF>.

202. Karen Crouse & Bill Pennington, *Panic Attack Leads to Hospital on Way to Golfer's First Victory*, N.Y. TIMES (Nov. 12, 2012), <https://perma.cc/UY97-34E9>.

203. Sam Borden, *Abby Wambach, Retired U.S. Soccer Star, Reflects on Her Addiction*, N.Y. TIMES (Oct. 10, 2016), <https://perma.cc/V4NK-23S9>; see also ABBY WAMBACH, FORWARD: A MEMOIR 69 (2016) (linking addiction to depression).

204. Marshall, *supra* note 170.

205. Love, *supra* note 167.

endogenous impairment and two interrelated social factors: environmental barriers and negative societal attitudes.²⁰⁶ The social model of disability was formulated and articulated as a rejection of the “medical model” of disability, according to which disability is inherent in the person with the impairment. In other words, the medical model views disability as a problem of the individual, which must be resolved by a cure or by providing care in cases where the impairment cannot be cured.²⁰⁷ In contrast, according to the social model, “[i]t is society that has to change[,] not individuals.”²⁰⁸

The social model of disability has been a fundamental principle of the disability rights movement, both in the United States and the United Kingdom.²⁰⁹ Specifically, by shifting the spotlight from a discourse of cure to a discourse of justice, the social model has become central to the articulation of disability as a civil right. Indeed, when a subway station is inaccessible to people who use a wheelchair, it is not so much a question of “health,” but rather a question of equity and social justice.²¹⁰ In light of the above, it should be clear why the disengagement from medicine as a response to disability has such a special significance in the context of disability rights.

Nonetheless, this Section focuses on the importance of treatment and prevention from a health perspective. This is not because I disagree with the social model of disability; on the contrary, the social model serves as the point of departure for this Article. This Section speaks in terms of health because the social model sometimes falls short in explaining the reality for disabled people, especially in the context of psychosocial impairments. In general, critics of the social model within the disability community have pointed out that it overlooks challenges faced by disabled people that are not socially constructed, such as pain.²¹¹ Against this backdrop, most disability scholars and activists embrace an intermediate approach toward the social model, recognizing that while disability is largely culturally constructed, some aspects of disability stem directly from the impairment.²¹² In the context of psychosocial disability, this middle-ground approach seems to be particularly pertinent, given the role of diagnosis, medication, and therapy in addressing some of

206. Samuel R. Bagenstos, *Subordination, Stigma, and “Disability,”* 86 VA. L. REV. 397, 428–30 (2000).

207. Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621, 653–59 (1999).

208. MICHAEL OLIVER, *UNDERSTANDING DISABILITY* 37 (1996).

209. SHAKESPEARE, *supra* note 9, at 29; Adam M. Samaha, *What Good Is the Social Model of Disability?*, 74 U. CHI. L. REV. 1251, 1251–52 (2007).

210. This is a variation of Simi Linton’s famous illustration of the social model of disability: “If I want to go to vote or use the library, and these places are inaccessible, do I need a doctor or a lawyer?”. See SIMI LINTON, *MY BODY POLITIC* 120 (2006).

211. SHAKESPEARE, *supra* note 9, at 29–53. For a response to some of the critics, see OLIVER, *supra* note 208, at 37–41.

212. See, e.g., Elizabeth F. Emens, *Integrating Accommodation*, 156 U. PA. L. REV. 839, 882 (2008).

the unique challenges of psychosocial impairments, as described below.²¹³ Again, this does not mean that disability is a result of one's impairment or that medication and therapy should dominate the discourse around psychosocial disability, but it does mean that the health perspective should not be completely overlooked.²¹⁴ This Section will therefore present three interrelated areas in which the anti-tipping rules may affect athletes from a health perspective: disclosure, diagnosis, and treatment.

1. The Power of Disclosure

The focus here is on disclosure itself as a tool to improve one's condition. Both scientific research and anecdotal evidence suggest that disclosure has a therapeutic effect for people with psychosocial impairments. Such disclosure has the potential to ameliorate what Dr. Ilan Meyer calls "minority stress"—"the excess stress to which individuals from stigmatized social categories are exposed as a result of their social, often a minority, position."²¹⁵ Among the stress processes that constitute the "minority stress," Meyer points to the process of "hiding and concealing" one's stigmatizing attribute.²¹⁶ According to Meyer, individuals from stigmatized social categories use concealment as a coping strategy. This strategy has a cost: It can lead to psychological distress and fear of being identified.²¹⁷ Concealment and denial of one's psychosocial disability may thus worsen the condition and lead to additional psychosocial impairments. The process of hiding one's stigmatizing condition entails what sociologists and legal scholars often call the "work of passing."²¹⁸ This process imposes a cognitive burden, which in turn may lead to adverse health outcomes. As scholar and disability rights activist Simi Linton notes, passing may take an enormous "emotional toll" on disabled people.²¹⁹ This same effect can be found in the accounts of athletes who have spoken out about their psychosocial impairments. Baseball player Zack Greinke, for example, referred to his experience

213. Cf. Rachael Andersen-Watts, Note, *Recognizing Our Dangerous Gifts: Applying the Social Model to Individuals with Mental Illness*, 12 MICH. ST. U. J. MED. & L. 141 (2008) (calling for a stronger incorporation of the social model into the legal discourse regarding "mental illness").

214. Disability activist Eli Clare, whose writing focuses on disability and queerness, effectively captures this notion: "Cure promises us so much, but it will never give us justice." ELI CLARE, *BRILLIANT IMPERFECTION: GRAPPLING WITH CURE* 184 (2017).

215. Ilan H. Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence*, 129 PSYCHOL. BULL. 674, 675 (2003). Meyer's article focuses on the prevalence of mental disorders in the LGBTQ community, but his findings about the relation between the concealment of a stigmatizing attribute and stress are not limited to this group.

216. *Id.* at 675, 681.

217. *Id.*

218. Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"* 108 YALE L.J. 485, 528 (1998). For more on "passing" and disability identity, see *infra* Part IV.C.

219. LINTON, *supra* note 9, at 20.

with anxiety and depression in an interview, stating, “I’d rather get it off [my chest] than try to hide it. I’d have to spend energy trying to hide it.”²²⁰

Meyer also notes that sharing significant aspects of one’s identity is an important factor in maintaining mental health.²²¹ Specifically, Meyer argues that “disclosing traumatic events or characteristics of the self improve[s] health by reducing anxiety.”²²²

2. The Power of Diagnosis

Even as small a step as a diagnosis can make a significant difference for an individual who is experiencing the symptoms of a psychosocial impairment but is unable to give it a name.²²³ For example, the power of diagnosis may establish that the impairment is “real,” rather than an excuse for one’s bad behavior (as psychosocial impairments are sometimes viewed).²²⁴ Similarly, in *The Rejected Body*, Professor Susan Wendell shows why diagnosis can be important in the social and familial environments (although not in the context of psychosocial impairments):

It is not uncommon for friends and even family members to desert a person who has debilitating symptoms that remain undiagnosed. They may insist that the ill person is faking . . . people whose disability is unrecognized are frequently pressured to keep up a pretense of normality, to continue to work as if nothing were wrong.²²⁵

3. The Power of Treatment

Psychologists, psychiatrists, mindfulness instructors, and different forms of group therapy have the potential to provide treatment and therapy for individuals with psychosocial impairments.²²⁶ As noted above, recent years have seen a rise in the

220. Bill Plaschke, *Zack Greinke Gets Through Anxious Moments*, L.A. TIMES (Feb. 15, 2013), <https://perma.cc/7RK3-Z4SZ>; see also Jalen Moore, *The Toughest Call of My Life*, PLAYERS’ TRIBUNE (Mar. 20, 2018), <https://perma.cc/5WPE-83Q2> (“Honestly, it was such a relief—just telling someone. . . . It felt like a huge weight was lifted off of my shoulders. . . . At least my family knew the truth. I didn’t have to hide in the dark anymore.”).

221. Meyer, *supra* note 215, at 682.

222. *Id.*

223. Phil Brown, *The Name Game: Toward a Sociology of Diagnosis*, 11 J. MIND & BEHAV. 385, 401 (1990) (noting that “for both parties, the naming of a diagnosis helps people in ‘making sense of problematic experience,’ since ‘something unknown, potentially dangerous, and worrying becomes assimilated into a familiar order’” (quoting DAVID LOCKER, SYMPTOMS AND ILLNESS: THE COGNITIVE ORGANIZATION OF DISORDER 47–50 (1981))).

224. Elizabeth F. Emens, *Against Nature*, 52 NOMOS: EVOLUTION & MORALITY 293, 308 (2012).

225. SUSAN WENDELL, *THE REJECTED BODY: FEMINIST PHILOSOPHICAL REFLECTIONS ON DISABILITY* 12 (1996). *But see id.* at 122–29 (criticizing the way medical professionals exercise their power to “confirm or deny” the reality of a person’s bodily experience).

226. In the context of professional sports, see Stathopoulou et al., *supra* note 142, at 668–70 (discussing psychotherapy and pharmacological treatment as two general approaches to managing psychosocial disorders among elite athletes). See generally Jean Addington et al., *Psychosocial Treatments for Schizophrenia*, 19 CURRENT DIRECTIONS PSYCHOL. SCI. 260 (2010); MELONY E.

number of athletes seeking treatment for mental health issues. The epigraphs of this Section and the long list of personal accounts described above suggest that diagnosis and treatment are effective therapeutic tools to mitigate psychosocial impairments in the sporting arena.²²⁷ In contrast, ignoring, repressing, or neglecting psychosocial impairments may lead to devastating consequences, including substance abuse and suicide. According to media reports, several elite athletes have committed suicide within the last decade as a result of severe depression, including soccer player Robert Enke,²²⁸ ice hockey player Rick Rypien,²²⁹ and cyclist Kelly Catlin.²³⁰ Other athletes have reported having suicidal thoughts during their athletic careers, including swimmer Michael Phelps and ice hockey player Robin Lehner.²³¹

As noted above, disclosing information about one's psychosocial impairments to the club's therapist would not constitute a violation of the anti-tipping rules.²³² But it is unclear whether this would be the case if an athlete were to seek help from someone who is not a certified therapist. Former NBA player Metta World Peace, for example, provides counseling to active NBA players with depression and anxiety.²³³ Does Metta World Peace have a "legitimate business need" (the test defined in the W/NBA's anti-tipping rule) regarding the information? And what about yoga or mindfulness teachers? Under the broad and vague standards of the anti-tipping rules, the answers to these questions remain ambiguous. As a result, athletes may refrain from discussing their mental health issues in such situations.

A policy that creates a chilling effect on the disclosure of information about psychosocial impairments further reduces the already slim chances that athletes will speak up about their impairments, seek diagnosis, or ask for treatment. It also lowers

SORBERO ET AL., *MEDITATION FOR DEPRESSION: A SYSTEMIC REVIEW OF MINDFULNESS-BASED COGNITIVE THERAPY FOR MAJOR DEPRESSIVE DISORDER* (2015).

227. See *supra* note 171 (referring to the accounts of athletes who have spoken out about their psychosocial impairments). In addition to speaking with therapists or using medication, measures taken by athletes to mitigate their impairments include: inpatient treatment (boxer Virginia Fuchs), group therapy sessions at a hospital (football player Brandon Marshall), deep-breathing techniques, meditation, and yoga (ice-hockey player Kendra Fisher). See Aimee Burg, *The Boxing Champion Who Battles O.C.D.*, N.Y. TIMES (July 31, 2019), <https://perma.cc/4HQK-B4KU>; Marshall, *supra* note 170; Fisher, *supra* note 189.

228. See generally RONALD RENG, *A LIFE TOO SHORT: THE TRAGEDY OF ROBERT ENKE* (Shaun Whiteside trans., 2011).

229. Jeff Z. Klein, *Player's Death Follows Bouts of Depression*, N.Y. TIMES (Aug. 16, 2011), <https://perma.cc/L9QM-GG9B>.

230. Juliet Macur, *Olympic Cyclist Kelly Catlin Seemed Destined for Glory. Then She Killed Herself*, N.Y. TIMES (Apr. 8, 2019), <https://perma.cc/C5PF-KHJR>. See also Kurt Streeter, *Talent. A Football Scholarship. Then Crushing Depression.*, N.Y. TIMES (Nov. 15, 2018), <https://perma.cc/HZ4L-BV3W> (discussing the relationship between competitive college sports, mental health, and suicide attempts).

231. See Muto, *supra* note 185; Robin Lehner, *'I Could Not Stand Being Alone in My Brain': Islanders Goalie Robin Lehner Opens Up About His Addiction and Bipolar Diagnosis*, ATHLETIC (Sept. 13, 2018), <https://perma.cc/5YGE-5J9J>.

232. See *supra* notes 94–96 and accompanying text.

233. See Deb, *supra* note 166.

the chances of teams keeping mental health professionals on their staff.²³⁴ Furthermore, the decision to seek diagnosis and receive treatment comes in many cases after consultation with family and friends.²³⁵ Research suggests that psychosocially disabled individuals are better off when their families are involved in their treatment process.²³⁶ This kind of familial involvement and support can only occur if athletes feel comfortable sharing their mental health issues with others. But under the current form of the anti-tipping rules, athletes might fear that such disclosure could be classified as prohibited “tipping.”

B. DETERRING ATHLETES FROM REQUESTING REASONABLE ACCOMMODATIONS OR MODIFICATIONS

Before games, Jimmy set out my warm-up clothes, all in a size large. But one day I tried them on and they felt . . . wrong . . . [w]rong as in, it had to be changed right now. I sent for him, and he came in grumbling . . .

“I need a medium,” I said.

“You’re a large.”

I shook my head. “I need a medium today, Jimmy.”

It didn’t take long for Jimmy to start setting out two complete outfits, one large, one medium. But I’m telling you: it helped . . . it gave me a sense of control. And if I was going to succeed, I needed to feel in control.

—Tim Howard, soccer goalie with OCD and Tourette syndrome²³⁷

As noted above, the ADA requires employers and public accommodations to provide reasonable accommodations and reasonable modifications to disabled individuals.²³⁸ These requirements use analogous, although not identical, language, reflecting “the enforceable duty that requires changes in the way things have always been done in order to permit people with disabilities to integrate into society on a

234. See generally Francis X. Baker, Comment, “Half Mental”: Resolving the Risks Posed by Dual Competencies in Applied Sport Psychology, 21 JEFFREY S. MOORAD SPORTS L.J. 185 (2014).

235. In the sporting context, anecdotal data include the accounts of NFL player Brandon Marshall, *supra* note 170 (“I had multiple friends and family members who spoke up and told me that they thought I needed help. So I decided to go [to] the McLean Hospital and undergo a clinical evaluation.”) and ice-hockey player Kendra Fisher, *supra* note 189 (“My mother rushed to Toronto and somehow forced me to see my old psychologist.”).

236. See, e.g., Elyn R. Saks, *College Students with Mental Health Disorders: When May Their Parents Be Told*, 24 S. CAL. REV. L. & SOC. JUST. 329, 333 (2015); David J. Miklowitz & Jill M. Hooley, *Developing Family Psychoeducational Treatments for Patients with Bipolar and Other Severe Psychiatric Disorders*, 24 J. MARITAL & FAM. THERAPY 419 (1998).

237. TIM HOWARD (WITH ALI BENJAMIN), *THE KEEPER* 158 (2014). In this passage Howard refers to Jimmy Martin, the Kit Manager of Everton (English Premier League), the team for which Howard played for several years.

238. See *supra* notes 121–122 and accompanying text.

plane equal to that of others.²³⁹ In the employment context, reasonable accommodations may take different forms, including the removal of physical barriers in the workplace and job restructuring.²⁴⁰ Similarly, reasonable modifications in the public accommodations context may include altering seating policies or adjusting a prohibition on pets to allow service animals.²⁴¹

The most prominent example of the application of these requirements in the sporting context is the 2001 case of *PGA Tour, Inc. v. Martin*.²⁴² In that case, the issue before the Supreme Court was whether a disabled golfer's request to use a golf cart should be granted under the "reasonable modification" requirement. The golfer, Casey Martin, requested to use a golf cart due to a degenerative circulatory disorder that prevented him from walking the course, as the rules of the competition required. The Supreme Court held that such a modification was a reasonable and necessary measure to provide Martin access to the tournament and that it would not fundamentally alter the nature of the competition. Therefore, the Court ordered the PGA Tour to waive its walking rule to allow Martin to use the golf cart.²⁴³ While Martin had a physical impairment, athletes with psychosocial impairments may need similar accommodations or modifications and might request them from their respective teams, sports organizations, or other entities from which they receive services related to their role as athletes.

Consider, for example, the issue of airports and air travel, which are known to cause anxiety.²⁴⁴ Against this backdrop, athletes with anxiety disorders might need to accommodate their disability in various ways. The case of basketball player Royce White provides an example of a reasonable accommodation that an athlete with a psychosocial disability might request in this context. White, who experienced generalized anxiety disorder and OCD, asked his NBA team at the time to include a provision in his contract stating that he was entitled to use ground transportation to travel to games that could be reached without air travel.²⁴⁵ Similarly, former NFL

239. Mark C. Weber, *Unreasonable Accommodation and Due Hardship*, 62 FLA. L. REV. 1119, 1122 (2010). For an analysis of the relationship between the ADA accommodation requirement and antidiscrimination law, see Christine Jolls, Commentary, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642 (2001).

240. 42 U.S.C. § 12111(9) (2018).

241. Duncan J.J. Kessler, Comment, *Plastic Straw Bans Can Run Afoul of the Americans with Disabilities Act*, 69 AM. U.L. REV. F. 1, 19–20 (2019) (providing a list of examples of reasonable modifications).

242. 532 U.S. 661, 690 (2001).

243. *Id.*

244. *See supra* note 165.

245. *Houston Rockets Player Royce White to Take a Private Bus to Games Rather Than the Team Plane Because of His Fear of Flying*, DAILY MAIL (Oct. 5, 2012), <https://perma.cc/4B7Q-NGB3>. The team agreed to such an arrangement, but White did not remain a member of the team for long and was eventually released from the NBA. *See id.*; Mike Chiari, *Royce White Would Play for Free Next Season in Wake of Mental Health Discussion*, BLEACHER REP. (May 8, 2018), <https://perma.cc/RJ9V-JH8S>; *see also* Michael A. McCann, *Do You Believe He Can Fly? Royce White and Reasonable Accommodations Under the Americans with Disabilities Act for NBA Players with Anxiety Disorder and Fear of Flying*, 41 PEPP. L. REV. 397 (2014) (analyzing White's situation in the legal context and expressing skepticism as to the possibility that the player could be granted relief under the ADA's reasonable accommodation mandate).

coach John Madden used trains and buses to get to long-distance games instead of flying, due to his claustrophobia.²⁴⁶

Other examples of reasonable accommodations or modifications for psychosocially disabled athletes may include granting a leave of absence;²⁴⁷ enabling athletes with general anxiety disorder to be accompanied by service animals in sports arenas and stadiums, training centers, restaurants, or airports;²⁴⁸ exempting athletes with social anxiety from sports leagues' media obligation policies;²⁴⁹ constructing a customized training or game-preparation program for an athlete with OCD; modifying training routines and schedules in order to relieve stress,²⁵⁰ or allowing athletes to see a therapist.²⁵¹

Note that having a psychosocial disability does not automatically confer entitlement to accommodations (in the employment context, under Title I) or modifications (with respect to public accommodations, under Title III). As detailed above, in order to qualify for an accommodation under Title I, an individual must be able to perform the "essential functions" of the position in question "with or without reasonable accommodation." In addition, the requested accommodation must be "reasonable" and must not impose "undue hardship" on the employer. Similarly, an individual is entitled to "reasonable modification" under Title III as long as the requested modification does not fundamentally alter the nature of the services in question.

246. David Chamberlain, *John Madden, Mr. Big: He Never Flies, Hates to Wear Socks and Won't Bet on Football. He's Made a Fortune Being Himself*, L.A. TIMES (Jan. 25, 1987), <https://perma.cc/WW69-NSYU>.

247. A leave of absence for medical treatment may be a reasonable accommodation under the ADA. *Humphrey v. Mem'l Hosps. Ass'n*, 239 F.3d 1128, 1135 (9th Cir. 2001). Ice hockey player Rick Rypien took two leaves of absence from his team, the Vancouver Canucks, to deal with his depression. See Klein, *supra* note 229. Baseball player Zack Greinke missed several months of the 2006 season while grappling with social anxiety disorder and clinical depression. Since his return, he has become a successful player in MLB and has played for several teams. See Plaschke, *supra* note 220.

248. For the use of service animals in the sporting context, see *U.S. Swimmers Using Therapy Dogs to Relax Before Olympic Trial Races*, USA TODAY (June 30, 2016), <https://perma.cc/S3X7-QV59>; Andrew Carter, *How REMINGTON the Therapy Dog Became a Part of UNC's Baseball Team*, NEWS & OBSERVER (June 2, 2017), <https://www.newsobserver.com/sports/college/acc/unc/article154009139.html>.

249. See, e.g., Gollub, *supra* note 138, at 202–06 (arguing that NFL players with social anxiety disorder who have difficulty interacting with others and therefore may feel uncomfortable speaking with traditional media should be entitled to ADA accommodations allowing them to interact with the public in other forms, such as through social media).

250. For an example of this kind of accommodation in the scholastic sporting arena, see *S.S. v. Whitesboro Cent. Sch. Dist.*, No. 11-CV-0036, 2012 WL 280754 (N.D.N.Y. Jan. 31, 2012) (dismissing plaintiff's claim that the high school failed to accommodate her by refusing to allow her to get out of the pool during swim team practices to ease her anxiety).

251. For an interesting case involving reasonable modification of this kind, see *Costello v. Univ. of N. Carolina at Greensboro*, 394 F. Supp. 2d 752 (M.D.N.C. 2005). Although the court never reached the merits on this specific claim, the requested "accommodation" was a scheduling change to allow the plaintiff, a student with OCD who was a member of the defendant university's golf team, to see a psychologist once a week.

I do not seek to claim that a *certain* individual should be provided with a *certain* accommodation. Rather, I endeavor to demonstrate an array of circumstances in which such requests might be relevant for psychosocially disabled athletes. On the surface, it would appear that at least some of these examples deal with modifications of peripheral aspects of the rules of the competitions or athletes' job tasks and therefore seem to meet the standard laid out in the ADA. The questions of whether or when such accommodations or modifications *should* be provided require a case-specific inquiry for each individual who makes such a request.²⁵²

Anti-tipping rules might, however, prevent athletes from requesting such accommodations or modifications in the first place. Much like the decision to seek treatment, the path to requesting disability accommodations often passes through preliminary consultations with family members, friends, doctors, or lawyers. These consultations require athletes to share nonpublic information—the very information that the anti-tipping rules seek to prevent from being disclosed. Once again, in an environment where speaking up about mental health might constitute a disciplinary offense, athletes may be deterred from embarking on the path leading to disability accommodations requests.

C. PERPETUATING STIGMA AND SHAPING DISABILITY IDENTITY

In previous Sections, this Article has explored how anti-tipping rules affect athletes as individuals. In contrast, this Section seeks to demonstrate how these policies influence the formation of disability identity, focusing on the relationship between disability visibility and social stigma.

Scholars have long identified how disabled people are expected to hide or downplay their disability identity when interacting with an overwhelmingly nondisabled society. In *Stigma*, sociologist Erving Goffman describes how “stigmatized” individuals try to manage their “spoiled identity” through what he calls “information control.”²⁵³ Such information control may take the form of “passing” (hiding one’s stigmatized identity) or “covering” (trying to keep already known stigma “from looming large”).²⁵⁴ The question of whether a disabled individual prefers to pass or cover often depends on how visible her impairment is or, in Goffman’s terms, whether she is “discredited” or “discreditable.”²⁵⁵

In the case of the *discreditable*, when the impairment is invisible, the stigmatized individual is allowed to pass. When the impairment is visible, however, it is no

252. See *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 402 (2002); Weber, *supra* note 239, at 1151.

253. ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 41 (1963).

254. *Id.* at 102 (“It is a fact that persons who are ready to admit possession of a stigma (in many cases because it is known about or immediately apparent) may nonetheless make a great effort to keep the stigma from looming large.”).

255. According to Goffman, the *discredited* is a stigmatized individual who assumes his differentness is known about already or is immediately evident, while the *discreditable* is a stigmatized individual who assumes his differentness is “neither known about by those present nor immediately perceivable by them.” *Id.* at 4.

longer possible to deny its existence. In such circumstances, the *discredited* individual may choose to cover. As an illustration, Goffman describes a scenario in which a near-blind individual may cover his known disability by refusing to read in public rather than highlighting his disability by bringing the book closer to his eyes.²⁵⁶ Another example of covering in the disability context is the way President Franklin D. Roosevelt made sure that his wheelchair was hidden behind a desk before meeting with his advisors.²⁵⁷ Along the same lines, Simi Linton describes how disabled children are sometimes forced to cover in family pictures: They are taken out of their wheelchairs or shown only from the waist up.²⁵⁸

Since psychosocial impairments are generally “invisible,” people with such impairments are often able to pass. Therefore, they are usually not expected to engage in covering, which is the last resort for disabled people whose impairments are apparent. There are, however, situations in which an athlete may cover her invisible impairment rather than pass. Consider, for example, an active athlete whose anxiety disorder is publicly known, but who still has control over information about when she is symptomatic. In such a case, she might choose to downplay the symptoms of her impairment, in a manner that might be better described as “covering” than “passing.” In another example, as cited above, NBA Commissioner Adam Silver stated that “[a] lot of players are unhappy”²⁵⁹ rather than saying that a lot of players “are depressed” or “experience symptoms of anxiety and depression.” In choosing to use vaguer, more subtle language, Silver covered the disability identity of those players.

Building on Goffman’s theory on stigma, Professor Kenji Yoshino describes how mainstream society imposes social and legal demands on individuals to pass or to cover their subordinated identities.²⁶⁰ Such demands, Yoshino tells us, can be discriminatory. Thus, passing and covering are not only tactics employed voluntarily by individuals from subordinated groups to avoid stigma, but also cultural and normative *demands* that are shaped by the dominant group. Indeed, various policies and rules employed both by employers and governmental agencies, some of which are ostensibly neutral, require LGBTQ people, racial minorities, and women to pass or cover their identities.²⁶¹ For example, Yoshino suggests that a company’s policy

256. *Id.* at 103.

257. KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS*, at X (preface) (2006) [hereinafter YOSHINO, *COVERING: THE HIDDEN ASSAULT*].

258. LINTON, *supra* note 9, at 20.

259. *See supra* note 152 and accompanying text.

260. Kenji Yoshino, *Covering*, 111 YALE L.J. 769 (2002) [hereinafter Yoshino, *Covering*]; YOSHINO, *COVERING: THE HIDDEN ASSAULT*, *supra* note 257. Yoshino’s theory has been criticized by scholars for several reasons, primarily for its overly inclusive perception of antidiscrimination law. *See* RICHARD T. FORD, *RACIAL CULTURE: A CRITIQUE* 98–101 (2005) (critiquing Yoshino, *Covering*); Russell K. Robinson, *Uncovering Covering*, 101 NW. U. L. REV. 1809 (2007) (critiquing YOSHINO, *COVERING: THE HIDDEN ASSAULT*).

261. *See, e.g.*, Yoshino, *Covering*, *supra* note 260, at 827–38, 849–64 (on the legal context of LGBTQ passing and covering).

prohibiting an African-American employee from wearing cornrows constitutes a demand to cover her racial identity.²⁶²

Using the term “passing” in the context of disability and sports (although perhaps not with the exact same meaning as Goffman and Yoshino),²⁶³ disability historian Professor Michael Rembis notes that “[c]rips’ of all stripes constantly have to decide whether to ‘out’ themselves as they move through the nondisabled world. Wheelchair, amputee, and blind athletes are no different.”²⁶⁴ Rembis argues that disabled athletes are forced by mainstream society to “overcome” their disability, but since their physical impairments cannot be cured, they often choose to pass. In doing so, Rembis argues, disabled athletes leave behind their disabled identity in a way that “serves the power of the dominant culture.”²⁶⁵

Tactics of passing and covering are used by disabled individuals to meet certain societal expectations of conduct, appearance, and performance.²⁶⁶ In the short term, this might enable them to avoid negative and humiliating reactions from others, including invasions of privacy and estrangement.²⁶⁷ But from a broader perspective, social demands to pass or cover are harmful because they push disabled people outside the mainstream norm. When disabled people pass or cover in order to comply with social or legal norms, they may give up part of their identity. Rather than counteracting the stigma associated with disability, social demands to pass or cover perpetuate negative attitudes toward and misconceptions about disabled people.

The stigma associated with psychosocial disability includes beliefs that both over- and underestimate the impact of the symptoms on the individual in question. On the overestimating side, psychosocially disabled individuals are perceived as dangerous, unreliable, or in need of supervision or care.²⁶⁸ On the underestimating side, they are regarded as lazy, faking, or exaggerating their condition.²⁶⁹ These exaggerations and misconceptions about psychosocial impairments are reinforced by practices of passing and covering.²⁷⁰ In other words, stigma operates as a vicious cycle: Lack of accurate visibility of disability reinforces stigma, which in turn pushes disabled people to downplay their disability identity and reduces its visibility in the public

262. *Id.* at 890–96.

263. Rembis uses the term “passing” to describe a phenomenon which seems to be “covering” in Yoshino’s terms. See Michael A. Rembis, *Athlete First: A Note on Passing, Disability, and Sport*, in *DISABILITY AND PASSING: BLURRING THE LINES OF IDENTITY* 111 (Jeffrey A. Brune & Daniel J. Wilson eds., 2013). A possible explanation can be found in the following sentence from Rembis’ piece: “It is too simplistic to think of passing strictly in terms of ‘visibility’ . . . very little is ever actually explained or revealed by the visibility of one’s identity.” *Id.* at 113.

264. *Id.* at 113.

265. *Id.* at 116.

266. *Id.* at 113.

267. GOFFMAN, *supra* note 253, at 16–19.

268. Emens, *The Sympathetic Discriminator*, *supra* note 76, at 416–17.

269. *Id.*

270. See Jasmine E. Harris, *Reconciling Privacy and Publicity Norms in Disability Antidiscrimination Law* 35–36 (Mar. 21, 2019) (unpublished manuscript) (on file with author).

sphere.²⁷¹ The only way to challenge this vicious cycle is to speak up about psychosocial disability and to reconstruct its public image. As Professor Jasmine Harris notes, “[a]cceptance and destigmatization require publicity.”²⁷²

This process of destigmatization has begun to take shape in American sports through the recent public action of Kevin Love, Kendra Fisher, Brandon Marshall, and others. By sharing their stories and engaging in a myriad of initiatives to raise awareness of mental health issues, elite athletes might harness their popularity and influence to change the way we think and speak about psychosocial disability. Just as basketball star Magic Johnson’s publicizing his HIV-positive status in the early 1990s played a central role in educating the public about the nature and management of the disease,²⁷³ athletes may lead the way toward a more accurate understanding of psychosocial disability among the general public. Indeed, professional sports serve as a promising platform for minorities to speak up,²⁷⁴ and athletes may thus spearhead the movement toward destigmatizing psychosocial disability in society at large.²⁷⁵ As Professor Elizabeth Emens notes, sports offer “powerful opportunities for narratives of disability as an integral part of an active or successful life.”²⁷⁶

Anti-tipping rules, however, undermine such opportunities by chilling disclosure about mental health issues. These rules may require athletes to pass or cover, forcing them to reject disability identity and perpetuating the stigma associated with psychosocial impairments.

V. POSSIBLE OBJECTIONS AND RESPONSES

A. THE TRIVIALITY OBJECTION

People say, “what are you depressed about? You can buy anything you want.” I wish everyone in the world was rich so they would realize money isn’t everything.

—DeMar DeRozan²⁷⁷

To some, the impact of the anti-tipping rules on athletes with psychosocial impairments may seem negligible. This sense of triviality derives from the fact that professional athletes are often perceived as wealthy, famous, and well-connected individuals. Therefore, it may be thought that elite athletes, as a group, should not

271. Cf. Sagit Mor, *With Access and Justice for All*, 39 CARDOZO L. REV. 611, 625 (2017) (describing the correlation between accessibility, stigma, and disability visibility in the public sphere).

272. Harris, *supra* note 270, at 35.

273. Laura F. Rothstein, *Don’t Roll in My Parade: The Impact of Sports and Entertainment Cases on Public Awareness and Understanding of the Americans with Disabilities Act*, 19 REV. LITIG. 399, 421 (2000).

274. See, e.g., Steve Wulf, *Athletes and Activism: The Long, Defiant History of Sports Protests*, THE UNDEFEATED (Jan. 30, 2019), <https://perma.cc/P68F-SE3U> (providing a “timeline of sports protests” to pursue social change from 1883 to 2016).

275. See Harris, *supra* note 270, Part IV.

276. Elizabeth F. Emens, *Framing Disability*, 2012 U. ILL. L. REV. 1383, 1397.

277. MacMullan, *supra* note 150.

be the top priority of contemporary efforts to combat discrimination on the basis of disability. Other objections may relate to the fact that the anti-tipping rules discussed above are the internal rules of private entities, rather than state or federal laws, and therefore may have limited effects on athletes; or the fact that these rules apply to only a fraction of society.

As I have already briefly explained, this objection fails to fully comprehend the hidden consequences of the anti-tipping rules. One possible response to the triviality objection is that the question of how these rules are applied may be a matter of life and death. During the last decade, several elite athletes have committed suicide in the middle of their careers.²⁷⁸ Others have reported having suicidal thoughts.²⁷⁹ It is safe to assume that this phenomenon is even more widespread than has been reported, given the scarcity of such disclosures. Therefore, it is critical to remove any obstacle to speaking up and seeking treatment.

Moreover, the fact that some elite athletes in the United States are powerful and well-paid individuals does not mean their rights do not deserve protection. As a recent law review article notes, “NBA players are employees, just like millions of other Americans. They are therefore entitled to all the corresponding employment discrimination rights.”²⁸⁰ In addition, under the anti-tipping rules, not only athletes, but also other sports personnel such as referees and coaches (whose positions are much less lucrative) may be held liable for tipping. For some athletes and sports personnel, the consequences of a disciplinary sanction can be more significant than a criminal conviction, given the financial and reputational considerations involved. Lastly, precisely because athletes are influential and serve as role models, imposing restrictions on their ability to speak up about mental health issues can have far-reaching social consequences. Athletes have the power to make a change in the public discourse about psychosocial disability, and such a social movement is gaining traction, as described above.

B. THE FULL DISCLOSURE OBJECTION

One may argue that the anti-tipping rules do not have a significant impact because they do not prohibit the disclosure of psychosocial impairments as long as the disclosure is full and made at once. Anti-tipping rules, the argument goes, ban only the disclosure of *nonpublic* information. Therefore, if athletes share their stories through social media or similar tools, those policies are not violated, and athletes should therefore not be deterred from engaging in such activities. The rationale behind this argument is that from an anti-betting-manipulation perspective, there is no risk of manipulation either if *no one* knows the information that may be misused for manipulating betting markets or if *everyone* knows this information. It is the intermediate option that poses a threat to the integrity of betting markets. In other

278. See *supra* notes 228–230 and accompanying text.

279. See *supra* note 231 and accompanying text.

280. Roberts & Zinsmeyer, *supra* note 63, at 163–64.

words, from an anti-betting-manipulation perspective, inside information is harmful only if *some people* know it.

While publicizing information about one's psychosocial impairment seems to comply with the rationale underlying the anti-tipping rules,²⁸¹ this does not mean that these policies are devoid of consequences. In most cases, speaking up publicly is not the first step in coming out. For example, Kevin Love, Ashlyn Harris, Brandon Marshall, and others told their family, friends, and therapists about their psychosocial impairments before the information became public. Anti-tipping rules, therefore, may deter athletes from disclosing the information to the public, given that such a move might raise questions as to whether some people were already familiar with this information. Additionally, true recognition of disability rights gives individuals a choice about when, how, and to whom they choose to disclose their disability identity. These two dichotomous options of "telling no one" or "telling everyone" do not provide an adequate solution.

VI. PROPOSED ALTERNATIVES

This Part proposes a non-exhaustive list of measures that can effectively achieve the goals of the anti-tipping rules, while safeguarding the rights of psychosocially disabled individuals.

A. CAPITALIZE ON EXISTING STATE LAW

If sports leagues want to prevent unlawful tipping, a first step might be to increase cooperation with states to enforce existing state legislation by monitoring potential tippees. Although sports gambling laws are relatively new, it seems that states use three groups of measures to address the risk of tipping: (1) monitoring systems and information sharing to detect "suspicious" gambling;²⁸² (2) restricting actors with access to inside information from engaging in betting-related activities;²⁸³ and (3) imposing criminal and civil sanctions on gamblers who place a bet on the basis of information that was acquired unlawfully.²⁸⁴ What these mechanisms have in common is that they focus on gamblers (the potential tippees) and gambling operators, rather than on sports personnel (the potential tippers).

281. So far, U.S. sports organizations have not taken action against athletes who published information about their mental health on social media. *Cf. Cricket Australia, supra* note 91.

282. *See, e.g.*, W. VA. CODE ANN. § 29-22D-12 (2018); N.J. STAT. ANN. § 5:12A-11f(4)(i) (West 2019); N.J. ADMIN. CODE § 13:69N-1.6. (2019); 58 PA. CODE § 1408.9 (a)-(b) (2018).

283. *See, e.g.*, 58 PA. CODE §§ 1401.7(b)(2), 1401.8(b) (2018); N.J. STAT. ANN. § 5:12A-11.f.(1) (West 2019).

284. W. VA. CODE ANN. §§ 29-22D-21(b)(4), 29-22D-19 (2018). Interestingly, the federal bill proposed by Senators Hatch and Schumer includes an amendment to the Bribery in Sporting Contests Act of 1964 (codified at 18 U.S.C. § 224 (2018)) that would make it illegal, in certain circumstances, to place or accept a sports bet based on "material nonpublic information." *See Sports Wagering Market Integrity Act of 2018*, S. 3793, 115th Cong. (2018), § 302(b).

As some scholars suggest, cooperation of sports leagues with gambling operators and state regulators could play a central role in successful sports betting schemes. Such cooperative schemes incorporate mechanisms such as joint monitoring systems and information sharing. For example, sports leagues might exchange information with other stakeholders to improve the detection of suspicious betting activities.²⁸⁵ Sports leagues are also in the best position to identify the forms of betting most susceptible to manipulation, particularly certain forms of “in-game” betting.²⁸⁶

B. NARROW THE SCOPE OF THE ANTI-TIPPING RULES

To prevent the chilling effect on the disclosure of information about mental health issues, sports leagues can amend the anti-tipping rules in a way that would draw a clear line between statements that are likely to be used to manipulate betting markets and benign statements about an athlete’s mental health. To this end, it is beneficial to review the insider trading rules in securities law, where judges and scholars have grappled with a similar question of how to ban socially undesirable disclosures while maintaining a socially desirable flow of information. While the rule against insider trading and the anti-tipping rules differ in certain respects,²⁸⁷ they also have some aspects in common, the most prominent of which is the attempt to prevent a party from misusing some form of informational advantage. Therefore, the law surrounding insider trading may serve as a promising source for comparison when analyzing the anti-tipping rules.²⁸⁸ Hence, the following paragraphs will show how the Supreme Court has addressed the issue of “tipping” in insider trading and, in particular, the question of how to maintain an anti-tipping rule while protecting the flow of useful information.

1. Tipping and Insider Trading: Insights from Securities Law

Under securities law, insider trading involves “buying or selling securities (or derivatives, such as puts, calls, or futures) on the basis of material, nonpublic information.”²⁸⁹ The federal prohibition on insider trading in securities is based on SEC Rule 10b-5, which was promulgated by the SEC pursuant to its authority under

285. See, e.g., Ross et al., *supra* note 41, at 38–39.

286. *Id.* For more on “in-game” betting, see *supra* note 47 and accompanying text.

287. For example, they differ in the broader social goals they aim to achieve and the kind of disclosures they seek to prevent. In securities trading, inside information is primarily concerned with corporate information (e.g., a company’s acquisition plans). In contrast, tipping in the sporting context is typically concerned with personal, often sensitive, information related to athletic performance.

288. Other scholars have noted this comparison, albeit indirectly. Henry Manne, one of the most influential writers on insider trading law, opened an article with an epigraph from a Sherlock Holmes story dealing with manipulation of horse racing for betting purposes. See Henry G. Manne, *Insider Trading: Hayek, Virtual Markets, and the Dog that Did Not Bark*, 31 J. CORP. L. 167 (2005); see also Christine Hurt, *Regulating Public Morals and Private Markets: Online Securities Trading, Internet Gambling, and the Speculation Paradox*, 86 B.U. L. REV. 371, 392-93 (2006).

289. Jonathan Macey, *Getting the Word Out About Fraud: A Theoretical Analysis of Whistleblowing and Insider Trading*, 105 MICH. L. REV. 1899, 1910 (2007).

Section 10(b) of the Securities Exchange Act of 1934.²⁹⁰ Rule 10b-5, however, does not specifically forbid securities trading based on inside information. Thus, the existing insider trading law is “largely judge made,”²⁹¹ and imposes liability not only on an insider who trades on material nonpublic information but also on an insider who discloses such information (the “tipper”) to someone else (the “tippee”), who in turn trades on the basis of the tipper’s tip.²⁹²

The landmark case on tipper-tippee liability is *Dirks v. SEC*.²⁹³ In this case, a securities analyst (Dirks) received inside information about the existence of “fraudulent corporate practices” within a particular company. The insider who disclosed the information, a former officer in the company, urged Dirks to disclose the information publicly.²⁹⁴ While investigating whether the information was true, Dirks disclosed it to a number of investors who then sold their holdings in the company.²⁹⁵ Following the disclosure, the price of the company’s stock declined significantly. The SEC found that Dirks had violated Rule 10b-5 by providing the information to tippees who traded on the basis of it.²⁹⁶ The Supreme Court rejected the SEC’s argument, holding that, under the “classical theory” of insider trading,²⁹⁷ a tipper is liable for violating Rule 10b-5 only if he personally benefits, directly or indirectly, from the disclosure.²⁹⁸ This requirement, also known as the “personal benefit test,” was defined and construed broadly to include not only pecuniary gains but also “reputational benefit that will translate into future earnings” or a “gift of confidential information to a trading relative or friend.”²⁹⁹ Since the insider in *Dirks* received no personal benefit for revealing the information to Dirks, the Supreme Court declined to impose liability.³⁰⁰ In other words, the Court recognized that not every disclosure of material nonpublic information should be punished, even if some traders enjoyed an advantage as a result of the disclosure.

290. 17 C.F.R. § 240.10b-5 (2019).

291. John C. Coffee, Jr., *Introduction: Mapping the Future of Insider Trading Law: Of Boundaries, Gaps, and Strategies*, 2013 COLUM. BUS. L. REV. 281, 283.

292. *Dirks v. SEC*, 463 U.S. 646, 659 (1983).

293. *Id.*

294. *Id.* at 649.

295. *Id.*

296. *Id.* at 650–51.

297. The classical theory is premised on a “relationship of trust and confidence” between a corporate insider and the corporation’s shareholders and was formulated a few years earlier, in *Chiarella v. United States*, 445 U.S. 222 (1980). The rule against insider trading is also based on another theory, “the misappropriation theory,” which is premised on a duty owed to the source of the information. The differences between these two theories extend beyond the scope of this Article. The Supreme Court has yet to determine whether the personal benefit requirement (discussed below) applies to the misappropriation theory, and lower courts have taken different stances on the issue. For more on this topic, see Merritt B. Fox & George N. Tepe, *Personal Benefit Has No Place in Misappropriation Tipping Cases*, 71 SMU L. REV. 767 (2018) (arguing that the personal benefit requirement should not be inserted into misappropriation cases for both doctrinal and policy reasons).

298. *Dirks*, 463 U.S. at 662.

299. *Id.* at 663–64.

300. *Id.* at 659–60. A tippee’s liability is derivative of the liability of the tipper. In case of a breach of the insider’s fiduciary duty to shareholders, the tippee inherits the duty to disclose or abstain. *Id.*

Scholars have criticized the use of the personal benefit test in securities law, arguing that it is both over- and underinclusive.³⁰¹ Additionally, several recent federal bills seek to amend or eliminate the personal benefit requirement.³⁰² However, this test is still part of the positive law and was recently reaffirmed by the Supreme Court.³⁰³

One implication of the personal benefit test is that tipping that occurs by accident, mistake, or simply without receiving personal gain does not give rise to tipper liability, at least in some circumstances.³⁰⁴ Relying on the personal benefit test, one court has determined that an insider who inadvertently revealed nonpublic information in a public space had not breached his fiduciary duty, even if the tippee, who had overheard the conversation, profited from trading on the basis of this confidential information.³⁰⁵ Additionally, an insider who disclosed material nonpublic information to his barber, while having a haircut, was not liable because he did not benefit from the disclosure (even though the barber traded and profited).³⁰⁶

Importantly, in establishing the personal benefit test, the Supreme Court has sought to promote certain policy objectives,³⁰⁷ including preventing a chilling effect on analyst interviews.³⁰⁸ Thus, the Court has used this test as a tool to outlaw undesirable tipping while protecting legitimate activities that involve the disclosure of information.

The notion that not all tipping should be punished has also been embraced by scholars. At least one commentator has argued that the prohibition on insider trading is entirely misguided because, among other things, it hinders the incorporation of

301. See, e.g., Jonathan R. Macey, *Beyond the Personal Benefit Test: The Economics of Tipping by Insiders*, 2 U. PA. J.L. & PUB. AFF. 25, 29 (2017) [hereinafter Macey, *Beyond the Personal Benefit Test*].

302. For a review of these bills, see JOHN P. ANDERSON, *INSIDER TRADING: LAW, ETHICS, AND REFORM* 236–41 (2018).

303. *Salman v. United States*, 137 S. Ct. 420, 427 (2016).

304. Coffee, *supra* note 291, at 291–94; Macey, *Beyond the Personal Benefit Test*, *supra* note 301, at 47–54 (“Where a tip is passed along by happenstance, prosecutors are unable to obtain a conviction because they are unable to meet the personal benefit test in *Dirks*.”). Macey criticizes this reality, arguing that mistaken tips often constitute a breach of the insider’s fiduciary duty of care. *Id.* at 47–52.

305. *SEC v. Switzer*, 590 F. Supp. 756, 766 (W.D. Okla. 1984) (holding that “only when a disclosure is made for an ‘improper purpose’ will such a ‘tip’ constitute a breach of an insider’s duty” and that “[t]he information was not intentionally imparted to Switzer by G. Platt, nor was the disclosure made for an improper purpose”).

306. *SEC v. Maxwell*, 341 F. Supp. 2d 941, 950 (S.D. Ohio 2004) (“Defendant Maxwell did not derive a personal benefit from the disclosure of material, nonpublic information to Defendant Jehn and, hence, did not breach a duty that he owed to Worthington shareholders.”).

307. Merritt B. Fox, *Regulation FD and Foreign Issuers: Globalization’s Strains and Opportunities*, 41 VA. J. INT’L L. 653, 660 (2001); STEPHEN M. BAINBRIDGE, *INSIDER TRADING LAW AND POLICY*, 45–46 (2014).

308. *Dirks v. SEC*, 463 U.S. 646, 658 (1983) (“Imposing a duty to disclose or abstain solely because a person knowingly receives material nonpublic information from an insider and trades on it could have an inhibiting influence on the role of market analysts.”); see also Merritt B. Fox et al., *Informed Trading and Its Regulation*, 43 J. CORP. L. 817, 865 (2018); Coffee, *supra* note 291, at 290.

accurate information into the price of stock.³⁰⁹ But even among those who believe that insider trading should be generally prohibited, many agree that there should be an exemption for certain disclosures that are socially desirable (for example, to promote efficiency and liquidity or for “whistleblowing” purposes).³¹⁰ As Professor Jonathan Macey puts it, “tipping by insiders is sometimes not just benign, but also decidedly curative for capital market imperfections.”³¹¹

In sum, in shaping the current law against insider trading, the Supreme Court has incorporated broader policy considerations into the scheme that prohibits the use of inside information in securities trading. The Court’s motivation was to protect socially desirable practices that could be chilled if the scope of the prohibition was broader. These conclusions should direct us when thinking about how to address the problem of the anti-tipping rules. Since voluntary disclosure of nonpublic information about mental health is a socially desirable practice, the rules must be amended to ensure the flow of such information.

2. Specific Strategies

Drawing on the insights from securities law and from anti-tipping policies employed by non-American sports organizations, the following Subsection identifies potential strategies to narrow the scope of the anti-tipping rules.

a. Establish Objective Criteria for Distinguishing Between Different Kinds of Tipping

Anti-tipping rules can be narrowed by adopting objective criteria, according to which disclosures made in exchange for pecuniary gain or other forms of benefit would be the only kinds of disclosures that constitute a disciplinary offense, in similar fashion to the personal benefit test. The point here is not to adopt the personal benefit test as a whole, but rather, to implement similar objective criteria aimed at distinguishing between legitimate and harmful disclosures of information while taking into consideration the unique characteristics of tipping in the sporting arena.

309. Manne, *supra* note 288, at 169–70. In addition to the information argument, Professor Manne has also argued that insider trading can serve as a promising tool for compensating corporate executives. *Id.* at 168, 170–71.

310. Macey, *Beyond the Personal Benefit Test*, *supra* note 301, at 55–60, 67 (arguing that trading on the basis of information about corporate corruption or fraud should be allowed even when the tipper receives a personal benefit); Zohar Goshen & Gideon Parchomovsky, *On Insider Trading, Markets, and “Negative” Property Rights in Information*, 87 VA. L. REV. 1229, 1269–73 (2001) (suggesting that small companies whose shares are traded with low liquidity should be exempt from the blanket ban on “selective disclosure,” because such a disclosure is socially desirable under certain circumstances); Fox et al., *supra* note 308, at 870–74 (arguing that an accidental disclosure of material, non-public information during an analyst interview should not be punished even though it is socially *undesirable* because doing so might have a chilling effect on the practice of analyst interviews at large, and that the disclosure of immaterial nonpublic information is socially desirable and therefore should be permitted).

311. Jonathan R. Macey, *The Genius of the Personal Benefit Test*, 69 STAN. L. REV. ONLINE 64, 64 (2016).

As noted above, the criteria presently used by the anti-tipping rules fail to effectively distinguish between desirable and undesirable disclosures of nonpublic information and have the potential to deter athletes from disclosing information about their mental health.³¹² Interestingly, a mechanism similar to the personal benefit test has been adopted by the Women's Tennis Association ("WTA") and the Association of Tennis Professionals ("ATP"). The WTA and the ATP prohibit any "covered person" from "directly or indirectly, solicit[ing], accept[ing], or conspir[ing] to solicit or accept *any money, benefit or consideration*, for the provision of any Inside Information."³¹³

b. Establish Subjective Criteria for Distinguishing Between Different Kinds of Tipping

While the personal benefit test is based on objective criteria that preclude the need for courts to "read the parties' minds,"³¹⁴ it is possible to narrow the scope of anti-tipping rules by establishing subjective criteria focused on the tipper's purpose in disclosing the information.³¹⁵ According to such a test, a tipper could be held liable only if she had disclosed the information with the intention of manipulating betting markets. Of the anti-tipping rules described in this Article, the NFL's rule seems to be the only one that might establish such criteria, by requiring that the information be disclosed for betting-related purposes. In contrast, the anti-tipping rules of the W/NBA and the PGA Tour/LPGA fail to refer to the tipper's purpose in disclosing the information. Also, these rules explicitly impose liability on negligent disclosures. Therefore, the anti-tipping rules should include an explicit requirement that the tipper must have intent to manipulate betting markets for establishing a disciplinary offense, at least with regard to the disclosure of information about mental health.

c. Do Not Impose Disciplinary Actions If No Betting Occurs

Under the plain language of the anti-tipping rules described above, liability can be imposed even if the tippee did not place a bet on the basis of the tip she had received. Against this backdrop, another way to limit the scope of these rules is to set a requirement that they would apply only when the disclosed information has actually been used for betting purposes. Note that under current insider trading law,

312. See *supra* Part II.B.3; notes 232–234 and accompanying text.

313. See WTA TOUR, 2019 WTA OFFICIAL RULEBOOK, Appendix H, D.1.h., <https://perma.cc/AA5C-VSE6> (last visited Aug. 5, 2019) (emphasis added); ATP TOUR, THE 2019 ATP OFFICIAL RULEBOOK, Section VIII, 8.06, D.1.h., <https://perma.cc/5J2X-W895> (last visited Aug. 5, 2019).

314. *Dirks v. SEC*, 463 U.S. 646, 663–64 (1983).

315. The difference between objective and subjective criteria may not be significant. In *Dirks*, for example, the Court sought to trace the mindset of the tipper by setting objective criteria. *Id.* at 662–63 ("Whether disclosure is a breach of duty therefore depends in large part on the purpose of the disclosure . . . This requires courts to focus on objective criteria, i.e., whether the insider receives a direct or indirect personal benefit from the disclosure.").

the existence of a securities transaction is a requisite for imposing liability.³¹⁶ In the sporting context, the anti-tipping policy of the English Football Association may serve as an example of such a requirement. This policy includes an anti-tipping rule that reads as follows:

Where a Participant provides to any other person any information relating to football which the Participant has obtained by virtue of his or her position within the game and which is not publicly available at that time, the Participant shall be in breach of this Rule *where any of that information is used by that other person for, or in relation to, betting.*³¹⁷

d. Establish Exceptions

The most effective way to prevent the chilling effect on speech about mental health issues in sports is to establish exceptions to the anti-tipping rules stating that there is no liability in situations in which the tippees are medical personnel, mental health professionals, lawyers, or family members of the tipper. Thus, the anti-tipping rules would still be effective for preventing disclosure of information in other contexts.

e. Establish a Defense Clause

Sports governing bodies might include a defense clause in their respective anti-tipping rules, which could be used by sports personnel in circumstances where they are accused of violating those rules but have a legitimate cause or justification for the disclosure. Once again, the English Football Association is illustrative. Rule E8(1)(c) of the Association's Handbook states that "[i]t shall be a defence to a charge . . . if a Participant can establish, on the balance of probability, that the Participant provided any such information in circumstances where he did not know, and could not reasonably have known, that the information provided would be used by the other person for or in relation to betting."³¹⁸

VII. CONCLUSION

"Jimmy?" I said.

Jimmy grumbled. "What now?"

316. ANDERSON, *supra* note 302, at 96. Against this backdrop, at least one commentator has argued that if the tippee does not trade, the tipper cannot be held liable. Simon A. Rodell, Note, *Plumbing in the Boardroom: Plugging Boardroom Leaks Through A Good Faith Duty of Confidentiality*, 59 FLA. L. REV. 631, 657 (2007).

317. FA HANDBOOK 2019/2020, RULES OF THE ASSOCIATION, art. E8(1)(b), <https://perma.cc/A9WS-5AU6> (last visited Aug. 5, 2019).

318. *Id.* art. E8(1)(c).

"I need another pair of white socks." I wear white athletic socks under my soccer socks, but the ones that I put on today felt wrong. Completely wrong.

"All our socks are the same," he said, sighing. But he knew me well enough by now. He handed me another pair of identical white socks. I tried them on, but they were still not right. "Sorry Jimmy." He set out another pair. Then another. It was only the fifth pair that felt right.

Jimmy shook his head at me. "You just shut those guys out today."

—Tim Howard³¹⁹

This Conclusion begins with another epigraph from Tim Howard's memoir for a reason. Howard's experience playing professional soccer with Tourette syndrome and OCD sheds light on another characteristic of psychosocial impairments. In the words of the doctor who diagnosed Howard when he was eleven, such impairments may have a "flip side";³²⁰ they sometimes come with "special gifts."³²¹ In the case of Howard, his gift was the ability to be hyper-focused on the soccer field.³²²

Perhaps this anecdote embodies the ideal solution to the problem of tipping in the context of psychosocial disability.³²³ If psychosocial impairments have the potential to be both destructive and beneficial to the performance of athletes, then a "tip" about one's impairment is useless to corrupt bettors. Would someone place a bet against Howard if she was the only one who knew that Howard had OCD? If she had placed such a bet, hoping that Howard's impairment would adversely affect his performance, it might not have been a smart move.

It is doubtful, however, that sports organizations will exempt disclosures about mental health issues from their anti-tipping rules just because such impairments have the potential to be seen as neutral with regard to athletes' performance. There has to be another way to dissuade these organizations from applying the anti-tipping rules to information related to psychosocial impairments.

This Article endeavors to provide such reasons. In prohibiting athletes from disclosing inside information regarding their mental health, the anti-tipping rules create an environment where speaking out about one's psychosocial impairment is not legitimate. This kind of "forced invisibility" has a negative impact both on

319. HOWARD, *supra* note 237, at 184.

320. *Id.* at 30.

321. *Id.* at 29.

322. *Id.* at 30. Interestingly, boxer Virginia Fuchs, who also has OCD, made a similar observation about the link between OCD and the ability to stay focused. In an interview, Fuchs said that boxing is the only setting where the symptoms of OCD do not affect her, because it requires "total and immediate focus." See Burg, *supra* note 227.

323. In making this argument, I do not intend to portray Howard and other athletes who have acknowledged the beneficial aspects of their impairments as inspirational "supercrips" who "overcame" their disabilities. Cf. JOSEPH P. SHAPIRO, NO PITY 16–17 (1993). Rather, my goal is to provide the most accurate picture possible of psychosocial disability in professional sports.

athletes' health and on their disability rights.³²⁴ From a broader perspective, an environment in which discussing mental health is taboo is detrimental to the disability antidiscrimination project. Admittedly, sports organizations' regulation of speech is not a new phenomenon.³²⁵ But anti-tipping rules do more than monitor commercial interests or respectable language for referees and officials; they regulate athletes' disability identity and impede their actions to protect their civil rights.

This Article concludes with proposed solutions to address the shortcomings of the anti-tipping rules. To be sure, these rules are not the only social or legal norm pushing athletes toward secrecy.³²⁶ But the proposed strategies have the potential to promote visibility and inclusion of psychosocial disability in the sporting environment. Put differently, modifying the anti-tipping rules is a necessary—but far from sufficient—intervention in the direction of greater acceptance of mental health issues in the sporting arena and society at large.

324. For the use of the term “forced invisibility” in a different context, see Yoshino, *supra* note 218, at 550.

325. See Jonathan Falk & Brad Eric Scheler, *The Professional Athlete and the First Amendment: A Question of Judicial Intervention*, 4 HOFSTRA L. REV. 417 (1976); Matthew J. Parlow, *Race, Speech, and Sports*, 52 U. RICH. L. REV. 923 (2018); Jonathan G. Finck, *Can NFL Players Be Punished for Kneeling? An Analysis of the Banter Surrounding the Star-Spangled Banner*, 21 U. DEN. SPORTS & ENT. L.J. 125, 137 (2018).

326. See, e.g., *supra* notes 176–177 and accompanying text.