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Cautious Defense: Should I Be Afraid to Guard You? (Mandatory AIDS Testing in Professional Team Sports)

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COMMENT

CAUTIOUS DEFENSE: SHOULD I BE AFRAID TO GUARD YOU? (Mandatory AIDS Testing in Professional Team Sports)

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I. INTRODUCTION

When Magic Johnson announced to the world that he had the HIV virus, the world was shocked. Activists heralded it as a breakthrough. People would finally realize that AIDS can affect everyone. Unfortunately, since this revelation, there has also been fear; fear expressed by other players in response to the unknown dangers that may be inherent in playing against someone with the HIV virus.

This comment will analyze the possibility of implementing a mandatory HIV testing policy in what will be called "professional team sports"; i.e., the National Basketball Association (NBA), the National Football League (NFL), and Major League Baseball (MLB). In making a judgment as to whether to implement such a policy, several areas will be analyzed, including: (1) the fears of professional athletes relating to the HIV virus; (2) the risks involved with and the nature of the HIV virus; (3) the helpful example of league policies and judicial decisions relating to drug testing; (4) justifications for, and the case law involving AIDS testing; (5) labor law concerns in implementing testing policies;

(6) important federal laws which need to be examined before attempting any such policy; and, (7) some precautionary safety measures that leagues should be aware of before considering the implementation of any HIV testing policy. After this analysis a proposal will be made concerning mandatory HIV testing policies in professional team sports.

II. THE FEAR OF AIDS IN PROFESSIONAL TEAM SPORTS

A. Magic Johnson

On November 7, 1991, Magic Johnson stunned the sports world by announcing that he was retiring from the National Basketball Association (NBA).[1] Johnson stated that during a routine medical examination for an insurance policy he had tested positive for HIV - human immunodeficiency virus - the virus which leads to AIDS.[2] Fans and players alike were shocked at this revelation. Magic was a legend - surely he could not have gotten this dread disease?

As Magic explained, he had probably contracted AIDS while engaging in unprotected heterosexual intercourse.[3] To the excitement of AIDS activists, along with his coming out Magic said that he would lend his incredible popularity to the fight against AIDS.[4]

Soon Magic proved restless, and he decided that he wanted to play in the 1992 NBA All-Star game.[5] Though reassured that they had nothing to fear by playing against Magic, many players stated that they would be hesitant to guard him.[6] And while doctors such as William Reiter, the Director of Clinical Research at the Center for Special Immunology, stated that the possibility of "[g]etting AIDS from contact in a basketball game is negligible," players responded by saying, "doctors say the risk is very, very low of having the virus transmitted from one person to another in a basketball game, but why take the risk at all?"[7]

After the All-Star game and his extraordinarily good health and play, Magic announced that he would also participate in the Olympics. Imme-

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1. Tracey E. George, *Secondary Break: Dealing With AIDS in Professional Sports After the Initial Response to Magic Johnson*, 9 U. MIAMI ENT. & SPORTS L. REV. 216 (1992); *Laker's Magic Has AIDS Virus, Milwaukee Sentinel*, Nov. 8, 1991, at 1A; Gregg Boeck, *HIV forces Magic to Retire*; 'This Is Not Like My Life Is Over', USA TODAY, Nov. 8, 1991, at 1A.
2. George, *supra* note 1, at 216.
3. *Id.*
4. *Id.*
5. Ira Berkow, *All-Stars to Give Magic a Nervous Embrace*, N. Y. TIMES, Feb. 7, 1992, at B9.
6. *Id.*
7. *Id.* Mark Price of the Cleveland Cavaliers even said that "any risk was too great." *Id.*

diately Australian players expressed the possibility that they would not play against Magic, though they were also resoundingly dismissed as not understanding the total lack of risk of contamination.[8] Later on, another unnamed American player stated that he could not understand how players could feel safe if Magic were injured and started bleeding on the court.[9]

When Magic decided to rejoin the Lakers for the 1992-1993 season more players spoke up. Karl Malone, Gerald Wilkins and many other NBA stars went public with their fears of playing against Magic; fears that many other players would not publicly express.[10] As precautions, the NBA instituted new rules whereby players who were cut during a game were to leave immediately. Trainers had to wear gloves at all times while treating such wounds, and were to handle each player's towels and other items separately.[11] Along with these precautions, officials were still adamant in stating that there was no possibility of contracting HIV by playing basketball. As one doctor stated, "the chance of being infected by playing basketball is roughly the same as being kicked to death by a duck."[12]

Even as doctors and activists dismissed the fears of NBA and other professional athletes, several commentators admitted that, though it is easy to criticize players for their ignorant fear, "it is important to re-

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8. George, *supra* note 1, at 218-19.

9. Jack McCallum, *Orlando, Si, Barcelona...?*, SPORTS ILLUSTRATED, Jan. 20, 1992, at 56. Again experts tried to dismiss the possible risks, *see* Gina Kolata, *Experts Try to Dispel Unease on Johnson*, N. Y. TIMES, Feb. 2, 1992, § 8, at 7.

10. Harvey Araton, *Johnson's Return to League Isn't Welcomed by Some*, N. Y. TIMES, Nov. 1, 1992, Sec. 8, at 1; *See also* Tom Friend, *No Anger by Johnson On Malone's Remarks*, N. Y. TIMES, Nov. 4, 1992, at B22. As Mark Price said, "We have people telling us there is a less than one-per-cent chance of catching it on the basketball court, [b]ut this is not like catching a cold. We are talking about a deadly disease. If one person catches it, that's one person too many. If someone doesn't want to play that person should not be criticized. We all have a right to be concerned." Gerry Dulac, *Athletes' AIDS hysteria baffles experts*, THE GAZETTE, February 21, 1992, at C5. Moreover, as one writer said, "who can be sure that a bloody cut can't pass the virus, or mucus or infected sponges or wraps? Evidence is meager, but it does exist." Robert Lipsyte, *Celebrate Magic, but There's More Work to Be Done*, N. Y. TIMES, Feb. 16, 1992, Sec. 8, at 11. And even Arthur Ashe said, "They say the risk is minimal, but that's not the same as no risk." *'Not the Same As No Risk'*, N. Y. TIMES, Nov. 3, 1992, at B11.

11. Araton, *supra* note 10, § 8, at 1.

12. George, *supra* note 1, at 219; As experts point out it is "iron[ic] that professional athletes who don't practice safe sex run a far greater risk of acquiring H.I.V. than they would in playing against Magic Johnson." Lawrence K. Altman, *Decision Disappoints AIDS Experts*, N. Y. TIMES, Nov. 3, 1992, at B11.

member that they are the ones who are exposed to the risk, however slight that risk may be."[13]

Eventually, Magic decided to retire a second time, stating that, "[i]t has become obvious that the various controversies surrounding my return are taking away from both basketball as a sport and the larger issue of living with H.I.V., for me and the many people affected."[14]

B. Reality

Magic Johnson is not the only athletic figure to have contracted the AIDS virus, although he may be the most famous. Arthur Ashe recently died of AIDS, most likely contracted during a blood transfusion.[15] Jerry Smith, a former All-Pro tight end for the Washington Redskins, died of AIDS in 1986.[16] Tom Waddell, a 1968 Olympic decathlete, died in 1987.[17] Estaban DeJesus, former World Boxing Council lightweight champion, died in 1990.[18] Chad Kinch, a former NBA player for the Cleveland Cavaliers and Dallas Mavericks died in 1993.[19] Presently, former Major League Baseball player Glenn Burke is dying of AIDS.[20] And, former Olympic diver Greg Louganis recently announced that he had AIDS. This list is merely a representation of the problem. It is important to note that even with the knowledge of these infected players, there has only been one alleged report of possible transmission of the

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13. George, *supra* note 1, at 221; *see generally*, Robert J. Johnson, *HIV Infection In Athletics: What Are The Risks? Who Can Compete?*, 92 POSTGRADUATE MEDICINE 73 (1992) (describes the risk of HIV transmission in the sports setting); Several doctors were also realizing that these fears may have some truth, as one Johns Hopkins official stated that the odds of attaining AIDS "were about the same odds AIDS experts once offered on something as innocuous as a dental visit. They were of little comfort to Kimberly Bergalis, the young Florida woman who died. . .after contracting the disease from her dentist." Thom Loverro, *It's Showtime for Magic*, THE WASHINGTON TIMES, Feb. 9, 1992, at C1.

14. Michael Martinez, *Citing 'Controversies,' Johnson Retires Again*, N. Y. TIMES, Nov. 3, 1992, at B9.

15. Roger S. Magnusson and Hayden Opie, *Infectious Diseases In Sport: Some Legal Issues*, *in* "AMATEUR" SPORT IN A PROFESSIONAL WORLD; NEW HORIZONS FOR LAWYERS AND SPORTS ADMINISTRATORS: PROCEEDINGS OF THE 3RD ANNUAL ANZSLA CONFERENCE, December 2-4, 1993, at 119.

16. Robert Lipsyte, *A Jarring Reveille For Sports*, N. Y. TIMES, Nov. 10, 1991, § 8, at 1.

17. *Id.*

18. *Id.*

19. *Former NBA Player Dies of AIDS*, 8 THE SPORTS, PARKS & RECREATION L. REP. 14 (June 1994).

20. Bill Koenig, *Burke, Dying of AIDS, Has 'No Regrets'*, USA TODAY, Oct. 5, 1994, at 6C.

HIV virus at an athletic event. This occurred during a collision in an Italian soccer game, and this report has been resoundingly criticized.[21]

Given the knowledge that several players have died due to AIDS, it must be granted that some players in professional team sports today probably are infected with AIDS, though they may not know it. Though the risk of transmission is minimal, the danger is great, because there is no known cure for AIDS. To understand what can be done to deal with the problems associated with AIDS in professional team sports, it is necessary to have some understanding of the disease itself and the risks involved.

III. An Overview of the Disease

AIDS is a complex disease which progresses in different stages. Since this comment does not profess to be medical in nature, it will proceed with a brief description of the basic problems encountered with AIDS and the nature of its transmission. There will not be any differentiation noted between different stages and treatments. Any sections of this comment should be assumed to apply to the problems of athletic participation by those with any form of AIDS (however defined in the medical literature). And since players were fearful of playing against Magic Johnson, who did not even have any symptoms which might be associated with AIDS, this lack of distinction between stages should not prove costly to the analysis which will follow. The focus is on the possible risk of transmission and not the many problems of AIDS itself, which are beyond the scope and expertise of this paper.

A. HIV

AIDS is a disease caused by the infection of an individual with HIV.[22] HIV is "a retrovirus that penetrates the chromosomes of certain

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21. Matthew J. Mitten, *Aids & Athletics*, 3 Seton Hall J. Sport L. 5, 9 n.26 (1993); Torre et. al., "Transmission of HIV-1 infection via sports injury," Lancet 335 (1990). The players involved collided, causing severe cuts above their eyebrows, which resulted in the transfer of some blood among them. Before the match, one of the players was HIV positive while the other was uninfected. Two months after the incident, the HIV virus was found in the blood of the earlier uninfected player. *Id.* Officials in Italy and around the world have not been able to rule out nonathletic factors for this contamination. Richard A. Gordon, et al., *Infectious Diseases in Competitive Sports*, 271 JAMA 862, 865 (1994); *See also SHOULD ATHLETES FEAR HIV CONTRACTION IN THE SPORTS SETTING?*, 8 The Sports, Parks & Recreation L. Rep. 6 (June 1994).

22. Penn Lerblance, *Legal Redress for Disability Discrimination: Bob, Carol, Ted and Alice Encounter AIDS*, 24 Golden Gate U. L. Rev. 307, 313 (1994). For further broad discussion of the AIDS virus *see, e.g., NEW DEFINITION INCREASES CASELOAD AND*

human immunity cells that combat infection."[23] People with the HIV infection may remain healthy for a number of years. Eventually, a number of symptoms occur due to the destruction of the individual's immune system by the virus, "[w]hen the immune system becomes compromised, the infected person becomes susceptible to a variety of so-called 'opportunistic infections,' many of which can prove fatal."[24]

AIDS refers to the onset of life-threatening illnesses caused by the destruction of the immune system and subsequent infection with these opportunistic diseases.[25] Examples of the diseases which may occur are the following; pneumonias, infections, malignancies, and neurological illnesses.[26] In the end, the "AIDS virus infects and brutally kills its victims, for no known patient diagnosed with AIDS has ever recovered and the fatality rate stands at 100%."[27]

B. Transmission

The basic AIDS related fear of professional athletes is the possibility that the disease could be transmitted to them through their contact with infected players. However, the HIV virus which causes AIDS is not easily transmitted.[28] The disease can only be transmitted in several distinct ways; by the direct injection of an infected person's bodily tissue, blood or blood products into the blood stream, through intimate sexual contact, intravenous drug administration with an infected needle, and from the breast milk of a contaminated mother to a newborn.[29] HIV cannot be transmitted by ordinary casual contact, contact with the saliva or spit of an infected person, or by ordinary physical contact in the sports set-

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PROBABILITY OF SURVIVAL, AIDS WKLY., May, 9, 1994, at 24; *Update: Acquired Immunodeficiency Syndrome — United States*, 255 JAMA 593 (1986); Karen M. Farizo, et. al., *Spectrum of Disease in Persons With Human Immunodeficiency Virus Infection in the United States*, 267 JAMA 1797 (1992); *Surgeon General's Report on Acquired Immune Deficiency Syndrome*, 256 JAMA 2784 (1986); *Treatment of Infections in the Patient With Acquired Immunodeficiency Syndrome*, ARCHIVES INTERNAL MED., May 9, 1994, at 949.

23. Lerblance, *supra* note 22, at 313.

24. *Id.*

25. Magnusson & Opie, *supra* note 15, at 121.

26. *Id.* at 122.

27. Susan J. Levy, *The Constitutional Implications of Mandatory Testing for Acquired Immunodeficiency Syndrome — AIDS*, 37 EMORY L.J. 217 (1988).

28. Wayne R. Cohen, *An Economic Analysis of the Issues Surrounding AIDS in the Workplace: In the Long Run, The Path of Truth and Reason Cannot Be Diverted*, 41 Am. U.L. REV. 1199, 1205 (1992).

29. *Id.*

ting not involving bloody contact.[30] Still, though the risk of transmission during an athletic event is so low, it is not zero.[31]

For instance, it is unclear whether a collision between two athletes in a basketball game, which causes bloody cuts to open up in both players and some co-mingling of blood, could cause the transmission of the HIV virus. Or if such a collision between two outfielders could lead to the same result. Or if the frequent bloody injuries and physical contact in professional football could cause such transmission. To theoretically transfer HIV from an infected to an uninfected athlete, the infected athlete would have to be injured and bleed extensively.[32] The infected athlete would have to be in the later stages of the disease where the concentration of the virus would be higher in his blood, and a substantial amount of this blood would then have to enter the other athlete in an open wound.[33] Since the virus cannot survive for more than a few minutes in open air, the exposure would have to be for a relatively substantial amount of time.[34] Though this seems possible, experts agree that the possibility is very low.

Obviously, it is this low risk of transmission in professional sports which has led many commentators to dismiss the fears of professional athletes as unreasonable. However, one must remember that at present time, if even one player is infected through physical contact on the playing field, that player will die, because there is no cure. It is understandable that athletes, who fear that they may be that one player, would fear the possibility of such contamination.

IV. Analogy to Drug Testing

An initial aid in determining what professional team sports leagues and organizations should do to best serve their players in dealing with the problem of AIDS is by looking at drug testing in professional sports. Such testing has been done for several years. It can act as an example of how any testing policy might be enacted. In addition, the experience and

30. Magnusson & Opie, *supra* note 15, at 122; *see also* Randall W. Dick, *HIV TRANSMISSION UNLIKELY IN PRACTICE OR COMPETITION*, NCAA SPORT SCI. EDUC. NEWSL., Fall 1994, at 3 (discussion of the risks of transmission of the HIV virus in NCAA competition).

31. As Dr. Reiter said regarding the risk of such transmission, "I didn't say they were nil." Berkow, *supra* note 5, at B9.

32. George, *supra* note 1, at 226.

33. *Id.* It is speculated that an individual with such a high concentration of the virus would not be able to participate in professional athletics because they would not have the requisite stamina to so participate due to the dehabilitating effects of the disease. *Id.*

34. *Id.*

problems the leagues have encountered with drug testing can help to anticipate problems associated with HIV testing.

A. League Policies

Due to the severe problems that the three major professional leagues have encountered regarding drug use by players, each league has developed some sort of drug testing policy.

1. The NBA

Article XXXIII of the NBA's Collective Bargaining Agreement contains the NBA's "Anti-Drug Program."[35] The NBA's procedure is based purely on a reasonable cause method of drug detection. If the NBA or National Basketball Players Association have any "reasonable cause" to believe that a player "may have been engaged in the use, possession, or distribution of a prohibited substance,"[36] then an Expert appointed through the collective bargaining agreement to oversee the drug program will make a determination as to whether such reasonable cause does exist.[37] If the Expert determines that there is reasonable cause, the player will be forced to submit to testing.[38] Players are also given the opportunity to come forward voluntarily, and if they do so they must undergo a treatment program as proscribed by the agreement.[39] However, any player who has been convicted of, or has pled guilty to a crime involving the prohibited substances as described in the agreement, shall be disqualified from any further association with the NBA.[40] All players agree to follow this provision of the collective bargaining agreement when they sign their Uniform Player Contract.[41]

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35. NBA-NBPA COLLECTIVE BARGAINING AGREEMENT (1988-1994), Art. XXXIII. It is acknowledged that as a result of the current labor negotiations this provision may be changed in the new collective bargaining agreement. But at the present time the courts have allowed the NBA to use the labor exemption and keep this agreement in place until negotiations have ended.

36. *Id.* at § 4(a).

37. *Id.*

38. *Id.*

39. *Id.* at § 1-2.

40. *Id.* at § 1; *see also* PAUL C. WEILER & GARY R. ROBERTS, SPORTS AND THE LAW: CASES, MATERIALS AND PROBLEMS 54-55 (1993) (overview of NBA drug policy).

41. NATIONAL BASKETBALL ASSOCIATION UNIFORM PLAYER CONTRACT, Par. 6(d); *see also* MARTIN J. GREENBERG, SPORTS LAW PRACTICE § 3.09, at 247-253 (1993) (discussion of the NBA Drug Testing Plan as contained in the Uniform Player Contract).

2. The NFL and MLB

Both the NFL and MLB also have plans to combat drug use and abuse. The NFL has a similar "reasonable cause" type testing procedure, but all athletes are tested for potential health risks and possible chemical abuse as part of the standard preseason physical.[42] After this process, the NFL resorts to only reasonable cause type testing as described in the NBA's anti-drug policy.[43]

MLB on the other hand does not have a comprehensive substance abuse policy.[44] While past collective bargaining agreements have contained attempts to deal with the problem with "reasonable cause" types of testing programs,[45] at other times such measures have been left to management or to declarations by the commissioner.[46] At present, baseball has no procedure that has been agreed to by management and the players, and incorporated into a collective bargaining agreement.[47]

B. Attacks on Drug Testing

Drug testing policies are often attacked on the grounds that the individual's constitutional rights have been infringed upon. Such claims cover a wide range of rights, including; the right of privacy,[48] the right against self-incrimination,[49] the right to be free from unreasonable searches and seizures,[50] and equal protection rights under the Fourteenth Amendment.[51] While all of these attacks may be valid in the context of state imposed drug testing policies, "[d]rug testing in the NFL, NBA, and MLB. . .is generally a regulatory procedure conducted by pri-

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42. Laurence M. Rose and Timothy H. Girard, *Drug Testing in Professional and College Sports*, 36 KAN. L. REV. 787, 792-793 (1988); 1990 & 1991 NATIONAL FOOTBALL LEAGUE SUBSTANCE ABUSE POLICY.

43. NFL SUBSTANCE ABUSE POLICIES, *supra* note 42, at Par. 5; *see also* WEILER and ROBERTS, *supra* note 40, at 47-54 & 57-61 (discussion of NFL Substance Abuse Policies).

44. Again, due to the present climate in MLB this may change if the sides ever reach a new collective bargaining agreement; *See also* Glenn M. Wong and Richard J. Ensor, *Major League Baseball and Drugs: Fight the Problem or the Player?*, 11 NOVA L. REV. 779 (1987) (for a general discussion of the MLB policies regarding drug use).

45. *See, e.g.*, MAJOR LEAGUE BASEBALL DRUG TESTING POLICY AND PROCEDURES, April 1990.

46. As when Commissioner Fay Vincent imposed a lifetime ban on Steve Howe. Edward Rippey, *Contractual Freedom Over Substance-Related Issues in Major League Baseball*, 1 SPORTS LAW. J. 143 (1994).

47. *Id.* at 149.

48. Roe v. Wade, 410 U.S. 113 (1973).

49. U.S. CONST. amend. V.

50. U.S. CONST. amend. IV.

51. U.S. CONST. amend. XIV.

vate employers, and therefore, the professional athlete's constitutional rights are not infringed upon by requiring drug tests in those leagues."[52] These areas must still be surveyed as they may prove to be problematic if leagues attempt to impose industry wide testing procedures (for drugs or HIV infection) as state actors. Professional team sports leagues might be found to be state actors if a sufficient nexus could be established between such leagues and the state or a state agency.[53]

1. Privacy

The right of privacy prohibits intrusion into a person's intimate relationships or activities and allows the individual the freedom to make fundamental choices involving his relationships and conduct.[54] Any conduct or statute that interferes with this right must meet the requirements of strict judicial scrutiny in order to be upheld.[55] Such conduct will only withstand this scrutiny if it is the "least restrictive means tailored to compelling state interests."[56]

The closest case to deal with this right as it relates to drug testing in the professional sports context was *Shoemaker v. Handel*.[57] In *Shoemaker*, the plaintiff sued the New York State Racing Commission challenging regulations that imposed mandatory drug and alcohol testing requirements on all jockeys. The court stated that "[t]he right to privacy is not absolute."[58] The court recognized that the state has the power to compel the disclosure of private information (i.e. the use of drugs) when the state's interest in the disclosure outweighs the individual's interest in non-disclosure; and in this case the state's interest was found to be compelling.[59]

Though this case dealt with a state actor imposing drug testing requirements, it does show that professional leagues, if found to be state

52. Rose & Girard, *supra* note 42, at 807.

53. Danil R. Gregus, *The NFL's Drug-Testing Policies: Are They Constitutional?*, 10 WHITTIER ENT. & SPORTS LAW. 1, 2 (1993).

54. J. Otis Cochran, *Drug Testing of Athletes and the United States Constitution: Crisis and Conflict*, 92 DICK. L. REV. 571, 585 (1988).

55. *Id.* at 586.

56. *Id.*; *see also* Harold Edgar and Hazel Sandomire, *Medical Privacy Issues in the Age of AIDS: Legislative Options*, 16 AM. J. L. AND MED. 155 (1990) (for an overview of privacy issues involved with HIV); GARY I. WADLER & BRIAN HAINLINE, DRUGS AND THE ATHLETE 195, 235-238 (1989).

57. 619 F. Supp. 1089 (D.C.N.J. 1985); *aff'd* 795 F.2d 1136 (3rd Cir. 1986), *cert. denied* 479 U.S. 986 (1987).

58. *Id.* at 1106.

59. *Id.*

actors in any way, would also be subject to the same scrutiny. And while it seems apparent that drug testing would be upheld as a valid public interest, it is not clear whether HIV testing would be upheld under the same reasoning.

2. Search and Seizure

Interrelated with privacy claims are claims relying on the Fourth Amendment's prohibition against illegal searches and seizures. Under *Skinner v. Railway Labor Executives Ass'n*[60] and *National Treasury Employees Union v. Von Raab*,[61] drug testing by urine collection has been held to be a search and therefore subject to constitutional analysis under the Fourth Amendment. A similar Fourth Amendment claim was also brought in *Shoemaker*, but again the court weighed the interests involved and found that the drug testing program did not violate the Fourth Amendment.[62] The court found a strong state interest in conducting such searches and a reduced interest in protection from such a search because the industry was historically intensely regulated.[63] Again, if professional team sports leagues were ever attacked as state actors they would also have to show that the state's interest in discovering an individual's HIV status (which also would be found to be a search as blood would be extracted from an individual for testing) or in drug testing outweighed the individual player's interest in being free from such searches.

3. Self-Incrimination

The Fifth Amendment's protection against self-incrimination involves three basic factors. These factors include: compulsion, in that individuals should not be forced to incriminate themselves against their will; communication, the protection normally only extends to verbal communication; and criminality, the evidence must relate to some conduct that is criminally punishable.[64] Mandatory drug testing would clearly violate the compulsion requirement because the athlete would basically be forced to admit his guilt or use of drugs.[65] The communicative aspect of the protection only applies to word of mouth communication, therefore, this protection would not extend to drug testing as it is

60. 489 U.S. 602 (1989).
61. 489 U.S. 656 (1989).
62. *Shoemaker*, 619 F. Supp. at 1106-07.
63. *Id.* at 1142-1143.
64. Cochran, *supra* note 54, at 583-85.
65. *Id.*

not verbally communicative in and of itself.[66] The final element relates to criminality in that the information relates to some conduct that is criminally punishable.[67] While the use of drugs may be criminally punishable in some jurisdictions, the leagues do not profess policies of turning in players for criminal sanctions after they test positive. Therefore, this protection would also be of little value.

As to HIV testing, the compulsion and communicative elements would undergo the same analysis and conclusions as already made with drug testing. In addition, HIV testing would not directly relate to any criminal conduct in having the disease in itself. Therefore, this aspect of Fifth Amendment protection would not be violated.

4. Equal Protection

A final possible constitutional claim to testing would be an equal protection claim under the Fourteenth Amendment.[68] Players may challenge testing by claiming that though they are being tested, other individuals (officials, managers, etc.) are not. Therefore, the players are not receiving the same protection under the laws. A similar claim was presented in *Shoemaker*.[69] However, the court rejected this claim, finding that the state's interest was paramount and so the equal protection claim was invalid.[70]

It is hard to imagine what type of claim a professional athlete could make to assert that the leagues testing policies come under constitutional scrutiny because the leagues are state actors, and the policies also violate the player's equal protection rights. If the policy was uniform it would seem to avoid such problems.[71] Leagues would merely have to test all individuals under their employment to avoid these problems. This would not seem prohibitive, and even seems plausible if the leagues are intent on fighting drug abuse, and discovering those who have AIDS.

In sum, the constitutional provisions which have been discussed will only prove problematic for the major sports leagues if the leagues are

66. *Id. See also* Schmerber v. California, 384 U.S. 757 (1966) (finding that a police officer's conduct in ordering that a doctor extract blood from hospitalized person after accident to detect intoxication was not violative of this communicative aspect of fifth amendment protection).

67. Cochran, *supra* note 54, at 585.

68. U.S. CONST. amend. XIV.

69. *Shoemaker*, 619 F. Supp. at 1105.

70. *Id.*

71. Moreover, MLB has even had testing policies which required that its employees, and other officials be tested, not merely the players. MAJOR LEAGUE BASEBALL DRUG TESTING POLICY AND PROCEDURES, April 1990.

found to be state actors. This is an implausible result, especially if testing policies were instituted at the team level. Still, this analysis of drug testing shows that the leagues have had at least some past exposure to the testing of their athletes, and so they would not be unfamiliar with the ways in which they should develop a new type of testing policy.

V. MANDATORY AIDS TESTING

Professional team sports leagues might adopt some sort of testing policies to protect their players and to provide early detection to those infected with the HIV virus. However, since Magic Johnson announced his retirement, none of the three major leagues have instituted comprehensive policies to test their players.

For example, the NFL will only allow for testing on a voluntary basis, though it has also distributed informational material to its teams to let them know of the risks involved.[72] The NBA and NBPA hired an AIDS specialist from Johns Hopkins University to act as their consultant, providing educational training for all NBA members, and the NBA enacted safety guidelines (i.e. the NBA requires bleeding players to leave the game until the bleeding stops and the wound is bandaged) based on the World Health Organization Consensus Statement on AIDS in Sports.[73] MLB officials have not undertaken any particular precautions because of their perception that the risk of HIV transmission in baseball is even lower than that in the other major sports.[74]

All of these leagues seem to have taken heart in the position of so many experts that the risk of HIV transmission in the sports setting is very low, if not zero. Maybe this "viewpoint might change if definite proof of HIV transmission on the athletic field. . .becomes available,"[75] and the leagues will be unprepared.

A. Example

Unlike the three major team sports leagues, professional boxers often must submit to mandatory HIV testing. Both Nevada and Oregon

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72. Thom Loverro, *Pro Leagues Encourage Discussions on AIDS*, THE WASH. TIMES, Feb. 9, 1992, at C4; *Giants Given H.I.V. Tests*, N. Y. TIMES, May 21, 1992, at B21; Commissioner Tagliabue even stated that he had not been presented with a persuasive case for league-wide testing for the HIV virus. Timothy W. Smith, *N.F.L.'s AIDS Policy? There Isn't One, Yet*, N. Y. TIMES, Nov. 10, 1991, § 8, at 2.

73. Marsha F. Goldsmith, *When Sports and HIV Share the Bill, Smart Money Goes On Common Sense*, 267 JAMA 1311 (1992); Loverro, *supra* note 72, at C4.

74. Goldsmith, *supra* note 73, at 1312.

75. Johnson, *supra* note 13, at 88.

require such testing of athletes who box within their jurisdictions.[76] Furthermore, Top Rank, Inc., requires all fighters on its card to be tested for HIV,[77] and the World Boxing Council has voted to require that all boxers in major bouts undergo testing for HIV.[78]

Another employer which does require such mandatory testing is the military.[79] Although no recruits are required to undergo such testing, the alternative is that they not enter the military.[80] Furthermore, any individual within the military who is found to be infected will be immediately discharged.[81]

B. Questionable Goals

Since the methods of transmission of the HIV virus are so restricted, sports leagues would need to come up with substantial justifications for creating HIV testing policies. It must be noted at this point that leagues that implement voluntary testing procedures would not need similar justifications because testing would be a matter of personal choice. However, even voluntary testing policies would have to avoid problems with confidentiality and privacy concerns involved with these test results.

Though sports leagues may state that any sort of testing is merely a measure to protect uninfected players from possible danger, given the low risk of transmission of HIV, this infringement on a player's right by mandatory testing may seem unfounded. In an attempt to support a possible decision to impose mandatory HIV testing requirements within a professional sports league this comment will try to provide some justifications for such a measure.

1. Reduction of HIV Transmission

One goal that may be envisioned through testing is the actual reduction of the spread of HIV infection. One rationale for why this would occur is because individuals who test positive will change their life styles and take precautions to avoid possible transmission to others.[82] Such

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76. Mitten, *supra* note 21, at 11.

77. *Id.*

78. *W.B.C. Sets H.I.V. Tests For Fights*, N. Y. TIMES, Nov. 14, 1992, § 1, at 31.

79. Emily Campbell, *Mandatory AIDS Testing and Privacy: A Psycholegal Perspective*, 66 N. D. L. REV. 449, 463 (1990).

80. *Id.*

81. *Id.*

82. *See generally* Steven Eisenstat, *An Analysis of the Rationality of Mandatory Testing for the HIV Antibody: Balancing the Governmental Public Health Interests With the Individual's Privacy Interest*, 52 U. PITT. L. REV. 327, 341 (1991).

testing may succeed in identifying those individuals infected. However, since they probably were not infected on the playing field or court, any cessation of athletic competition will not prove to be a benefit to them or an actual reduction of risk to non-infected individuals. The risk is almost zero even before an individual is detected as HIV infected. What really needs to change is the behavior of professional athletes off the court or field because that is where the real risk of HIV infection is apparent.[83] Testing in professional sports will not of itself reduce the possibility of HIV transmission as long as the risk of transmission in professional sports is so low.

2. Accuracy of Results

Another problem will be the accuracy of such tests. It has been estimated that in high-risk groups, such as intravenous drug users, HIV tests will prove 99% accurate, however, in low-risk groups (of which professional athletes will only be included regarding their risk during athletic competition) such accuracy may be one to two thirds lower.[84] Therefore, even though many athletes may be included in such high-risk groups due to their lifestyles of unprotected sex outside of athletics, they will not be a high-risk group during competition. Positive testing then, may not relate to the risks within athletics, but instead to the risks of such a lifestyle. This would point to the necessity for better education for athletes as to their risky off court lifestyles, and not necessitate testing within athletics.

3. Protection

A final justification may be that testing will insure that competitors do not have to worry about the danger of possible transmission of HIV from other competitors. This goal clearly is illusory. As already described, the possibility of transmission during athletics is very low. Athletes who fear such transmission need to be educated about this low risk. Testing will do nothing to protect uninfected players. Precautionary measures, such as removing bleeding players immediately, should be un-

83. As Mervyn Silverman of the American Foundation for AIDS Research stated, "It's what athletes are doing off the court that is the real issue." Loverro, *supra* note 13, at C1.

84. Eisenstat, *supra* note 82, at 350. The explanation for these statistics is that positive results are more likely to be accurate in high risk groups than in low risk groups because of the actual increased probability of actual infection in these high risk groups. Therefore, tests are more often accurate in these high risk groups because the probability of infection is so much higher. Positive results in low risk groups are often incorrect because the probability of infection is lower. *Id.*

dertaken as the primary means of protection. Athletes then must protect themselves outside of the playing field where the risks are probably greater.

C. *Advantages*

Even given the questionable goals of mandatory testing, there are some advantages. Initially, it must be recognized that mandatory testing will at least provide early detection to those who are infected.[85] Though there is no cure for the HIV virus, if a player knows that he is infected he can seek earlier treatment to mitigate the onset of complications resulting from HIV infection, warn those that he is in sexual relations with of possible infection, and avoid possible instances where transmission to other individuals could occur. There are many new treatments which can at least slow the onset of the disease.[86] This will at least (possibly) allow the player to live a somewhat longer life and to assess their lives so they can make a fully informed decision as to how to proceed.

If a uniform, mandatory, league-wide policy were implemented, no individuals would go undetected and lose valuable treatment time because they did not voluntarily seek to be tested to discover their HIV status. Individuals could not avoid testing due to fear that their test results might be positive.

Mandatory testing may also make uninfected individuals change risky behavior. It seems likely that many athletes have not listened to the repeated call to take precautions due to the AIDS epidemic. As evidenced by Wilt Chamberlain and Magic Johnson, athletes still "sleep around" and often engage in unprotected sex.[87] Mandatory testing may provide a wake up call to these athletes who just will not listen to the warnings that health officials have been providing since the early 1980s.

D. *Disadvantages*

Regardless of these possible advantages or benefits of mandatory HIV testing, there are disadvantages and problems that such a policy would create. As already noted, the problems with accuracy of testing

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85. A. Alyce Werdel, Student Article: *Mandatory AIDS Testing: The Legal, Ethical and Practical Issues*, 5 NOTRE DAME J. L. ETHICS & PUB POL'Y 155, 186 (1990).

86. *Id.* at 186-93. Such new treatments are beyond the coverage and expertise of this essay. For discussion of such treatments *see for example, AIDS Page: Progress Reports in the Battle Against Acquired Immune Deficiency Syndrome; New Treatment Approved*, 28 FDA CONSUMER 7 (1994), *also see, BIOCONTROL SEES RESULTS IN STUDY OF NEW TREATMENT FOR AIDS*, PR NEWSWIRE, March 1, 1994.

87. George, *supra* note 1, at 228.

will be a definite disadvantage of any mandatory HIV testing policy, and such a policy may focus the question of risk on the playing field and not on the athletes' personal lives where it should probably be.

An individual who is forced to undergo AIDS testing and is found to have the HIV virus may suffer a "severely damaging psychological reaction."[88] There is no cure, and individuals will realize that this disease, however contracted, will most likely cause their death.[89] This realization is emotionally and mentally devastating.

The public often treats professional athletes as untouchable heros. Athletes cannot be blamed for feeling that they are special with the amount of money and admiration they receive. Yet, when a player learns that he has AIDS, the public opinion of him will fall, however warrantless and unfair this may be. Beyond the realization that he will die due to this disease, he must also learn how to fit into a society that still treats those with AIDS with fear and avoidance. This social stigma is severe. Persons with AIDS are often unfairly discriminated against, and, as evidenced in the Magic Johnson situation, many people think they should be excluded from their prior activities.[90] They are also often falsely labeled as homosexual or of some other high risk group that many people perceive as deviant.[91]

It must be recognized that the social stigma and psychological problems associated with AIDS are not really a direct result of the testing. If an individual were not tested and was HIV positive he risks transmitting the disease to others and possibly avoiding treatment which might appreciably mitigate the advance of the disease.[92] Though the social stigma is unfair and unjustified, only those who pervade such stigma are degraded. They are ignorant or uncaring and only education can help change them. Avoiding positive test results merely by avoiding testing will have no affect on the disease. If someone is infected, they are infected no matter whether they know it or not. There is no justification for avoiding test results merely to avoid the truth. The infection will not change with such avoidance.

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88. Mitten, *supra* note 21, at 16.

89. As one court stated, such a positive test result "has been compared to receiving a death sentence." Doe v. Roe, 526 N.Y.S.2d 718, 722 (1988).

90. Mitten, *supra* note 21, at 23-24.

91. *Id.* at 16-17.

92. Werdel, *supra* note 85, at 186.

E. Case Law

While recognizing these negative effects of an HIV testing policy, this analysis will now move to an examination of the relevant case law which has dealt with similar policies outside of the sports world.

1. *Glover v. Eastern Nebraska Community Office of Retardation*[93]

In *Glover*, a mental health facility required that its employees submit to HIV testing or face disciplinary action. The justification for this requirement was the risk of exposure to residents due to the resident's own assaultive behavior (i.e. biting and scratching) toward the employees. In sum, the court found that this justification was insufficient since the risk of HIV transmission in this way was "minuscule, trivial, extremely low and approaching zero."[94] Therefore, this justification did not outweigh the intrusion on the employee's rights and the testing was an unreasonable search under the Fourth Amendment.[95]

2. *Leckelt v. Board of Commissioners of Hospital District No. 1*[96]

One year later in *Leckelt*, the court was faced with a similar consideration. In Leckelt, the hospital learned that a nurse's roommate had been hospitalized with AIDS. The hospital feared that the nurse (whom they believed to be homosexual) could have also been infected and would be a risk to the hospital's patients. Therefore, the hospital demanded that the nurse undergo HIV testing. When he told the hospital that he had been tested, the hospital demanded that he provide the results of his tests, which he refused to provide. The nurse was subsequently fired. The court again balanced the interests of those involved. The court found that the nurse's privacy interest, though important, had been diminished by his knowledge of the hospital's policies regarding infection control which he was well aware of (having worked there for eight years). In addition, in a hospital setting the risk of transmission of HIV was higher than that in *Glover*.[97] Therefore, there was a valid governmental interest which overrode the nurse's right to be free from such a search.[98]

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93. 867 F.2d 461 (8th Cir. 1989), *cert. denied* 493 U.S. 932 (1989).
94. *Id.* at 464.
95. *Id.* at 465; *see also* Terry Summers, *Glover v. Eastern Nebraska Community Office of Retardation: Federal Court Invalidates AIDS Policy*, 57 U. MO. KAN. CITY L. REV. 369.
96. Leckelt v. Bd of Comm's of Hosp. Dist. No. 1, et al., 714 F. Supp. 1377 (E.D. La. 1989).
97. *Id.* at 1391-1392.
98. *Id.*

3. *Plowman v. United States Department of the Army*[99]

In *Plowman*, the court was faced with a review of the army's non-consensual HIV testing of a civilian employee. In apparent violation of army policy, which required the consent of its civilian employees prior to conducting HIV testing, an admitting physician ordered that the plaintiff be tested for HIV as part of diagnostic blood tests performed upon hospital admittance. Upon finding that the plaintiff was infected, the army doctor informed four army officers before informing the plaintiff. The plaintiff sued claiming a violation of substantive due process and her right to privacy. The court dismissed these claims finding that the army doctor's interest in knowing the HIV status of the prospective surgical patient and the fact that the blood had already been drawn as part of hospital admittance, outweighed the plaintiff's fourth amendment rights.[100]

4. *Local 1812, American Federation of Government Employees v. United States Department of State, et al.*[101]

In *Local 1812*, the court reviewed a policy of the State Department which required mandatory HIV testing of employees seeking foreign assignment. The court upheld the reasonableness of this policy because (as in *Plowman*) the blood had already been drawn for other testing, and the government's interest in sending individuals who were fit for duty was related to the HIV testing, outweighing the minimal intrusions on the plaintiffs.[102]

5. *Johnetta v. Municipal Court*[103]

In *Johnetta*, the California court reviewed a lower court's decision ordering the testing of an individual who bit a police officer. The order was based on a statute which called for the testing of any individual who interfered with the duties of a police officer in a manner capable of transmitting HIV.[104] The court attempted to balance the interests of the plaintiff against those of the government in this instance. The court found that the taking of a blood sample (as drug testing in *Skinner*) was

99. Plowman v. United States Dep't of the Army, 698 F. Supp. 627 (E.D. Va. 1988).
100. *Id.* at 636-637.
101. Local 1812, Am. Fed'n of Gov't Employees v. United States Dep't of State, et al., 662 F. Supp. 50 (D.D.C. 1987).
102. *Id.* at 53.
103. Johnetta J. v. Municipal Court, 218 Cal. App. 3d 1255, 267 Cal. Rptr. 666 (1990).
104. *Id.* at 669.

a minimal intrusion.[105] Furthermore, since the testing was done as part of her being charged with a crime, again her privacy interest was diminished.[106] The court distinguished this case from *Glover* by relying on the fact that she was being tested under the statute due to her assault on the officer, even though the risk of HIV from biting was very low.[107]

6. Summary

These cases leave the impression that courts will often seek a way to allow for such HIV testing as long as there is a strong governmental interest in such testing. If defendants can show a real risk (*Plowman*), or a definite history of such precautionary measures (*Leckelt*), or that a blood sample has already been taken for a valid governmental purpose (*Local 1812*), or a statutory provision calling for such testing (*Johnetta*), such testing will be upheld. However, *Glover* showed that the courts may not always allow testing especially where the risk of infection is very low (among other deciding factors.)

In applying these cases to the professional team sports context, initially federal constitutional claims would not be applicable to such private actors. Also, until it is shown that there is more than a minimal risk of infection to other players, there may be no overriding justification for mandatory testing.

VI. LABOR LAW CONCERNS

Every professional team sport league operates within the parameters of an agreed upon collective bargaining agreement as negotiated between player unions and management.[108] Such agreements and negotiations are governed by the National Labor Relations Act (NLRA).[109] Therefore, the focus must now shift to the implications of a mandatory HIV testing policy under prevailing labor law.

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105. *Id.* at 680-681.

106. *Id.* at 684-685.

107. *Id.* at 682.

108. 1993 Settlement of All Litigation Between the NFL and the NFLPA & NFL Players (now part of the new Collective Bargaining Agreement); BASIC AGREEMENT BETWEEN THE AMERICAN AND NATIONAL LEAGUES OF PROFESSIONAL BASEBALL CLUBS AND THE MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION (1990-1993); NBA-NBPA COLLECTIVE BARGAINING AGREEMENT (1988-1994). These agreements will most likely change in the near future.

109. The National Labor Relations Act, 29 U.S.C. § 151 et. seq. (1948).

A. The NLRA

Sections 7 and 8(a)(1) of the NLRA protect employees who engage in concerted activity for their mutual benefit, from employer discipline or discharge.[110] Section 8(d) of the NLRA makes the duty to bargain with the union mandatory in certain circumstances.[111] These circumstances include bargaining over such items as "wages, hours, and other terms and conditions of employment. . . ."[112] These are known as "mandatory subjects of bargaining" and employers are required to bargain in good faith until impasse over these subjects.[113] This means that an employer cannot merely unilaterally impose mandatory terms before impasse, without risking the violation of the NLRA.[114] In relation to a mandatory HIV testing policy, the question will be whether such a policy is then a mandatory subject of bargaining.

B. Testing as Mandatory Subject

In two 1989 decisions, *Johnson-Bateman*[115] and *Minneapolis Star Tribune*[116] the National Labor Relations Board (NLRB) ruled that employers are required to bargain fully over drug testing policies.[117] Therefore, such testing policies are mandatory subjects of bargaining and an employer must bargain over them with the union until impasse. Impasse can be understood as the point where negotiations have ended and either side will not change their proposals any further to reach an agreement. The NLRB also ruled that a union does not waive its right to bargain over such policies just because a particular collective bargaining agreement is silent over drug testing or aspects of a testing policy.[118] Such rights are waived only if the union specifically relinquishes them.

This analysis would seem easily transferable to professional team sports league HIV testing policies. Mandatory HIV testing is a way to

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110. *Id.* §§ 7, 8(a)(1).
111. *Id.* § 8(d).
112. *Id.*
113. *Id.*
114. David J. Sisson & Brian D. Trexell, *The National Football League's Substance Abuse Policy: Is Further Conflict Between Players and Management Inevitable*, 2 MARQ. SPORTS L. J. 1, 21 (1991).
115. 295 N.L.R.B. 26 (1989).
116. 295 N.L.R.B. 63 (1989).
117. Sisson & Trexell, *supra* note 114, at 21. *See also* Ethan Lock, *The Legality Under the National Labor Relations Act of Attempts by National Football League Owners to Unilaterally Implement Drug Testing Programs*, 39 U. FLA. L. REV. 1 (1987) (for further analysis of the rationale behind the mandatory nature of testing in collective bargaining).
118. Johnson-Bateman, 295 N.L.R.B. at 25.

test a player to find out a certain status of that player, as is drug testing. Drug testing is done to find out whether the player is a drug user, while HIV testing would be done to find out whether the player is HIV positive. The NLRB would have to rule that it also would be a mandatory subject of bargaining. In fact, HIV testing, due to the seriousness of the possible results, the necessary confidentiality of these results, and other problems associated with such testing, would seem to be a more important subject of bargaining than drug testing. Though drug use could affect working conditions significantly, HIV infection may create the necessity for thorough precautions, education, and other changes within a professional league above the individual problems associated with drug use.

As a mandatory subject of bargaining, mandatory HIV testing would have to be collectively bargained over. As one commentator remarked,

> The process of collective bargaining affords both sides the best opportunity to articulate and weigh their respective interests, decide when and for what to compromise, and when to remain steadfast. It presents the best opportunity to reach a quid pro quo which, taking into account the unique interest of each side, is both definitive and satisfactory to both sides. . . the process of collective bargaining allows the parties mutually to draft a contract which spells out precisely which types of testing are permissible and which are not.[119]

Before it could be implemented, a mandatory HIV testing policy in professional team sports would have to be negotiated over within the context of collective bargaining. Though it is uncertain what type of policy would be agreed upon, collective bargaining is the best approach.

VII. FEDERAL LAW

Before any suggestion as to whether to implement a mandatory HIV testing policy in professional team sports, it is important to look at the federal laws which would be implicated by any such policy. These laws will be important in deciding both how to implement such testing and what measures to take with regards to those individuals who are found to be HIV positive.

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119. Stephen F. Brock & Kevin M. McKenna, *Drug Testing in Sports*, 92 DICK. L. REV. 505, 569 (1988). Furthermore, if unions and management collectively bargain over any drug testing scheme, "a strong presumption supports the legality of the scheme." RAY YASSER, JAMES R. MCCURDY AND C. PETER GOPLERUD, SPORTS LAW: CASES AND MATERIALS 463, 491 (1990).

A. Rehabilitation Act

The Rehabilitation Act of 1973[120] was passed to prevent discrimination against the handicapped. Section 504 of the Act prohibits discrimination against handicapped people by all organizations that receive federal financial assistance.[121] To recover under this Act an individual athlete with HIV must show that they are: (1) an individual with a handicap; (2) excluded solely because of their handicap; (3) otherwise qualified to participate; and (4) excluded from participation in, denied the benefits of or subjected to discrimination under a program receiving federal financial assistance.[122]

Several cases have dealt with the question of whether HIV infection is covered as a disability under this Act. Initially in *School Board of Nassau County v. Arline*,[123] the Supreme Court dealt with a case involving the dismissal of an elementary school teacher after a third relapse of tuberculosis. Shortly after this case was granted certiorari, the Justice Department issued its opinion that discrimination by an employer against persons infected with HIV or suffering from AIDS would not be unlawful if prompted by fears of contagion, even if such fears were found to be unreasonable.[124] The Court refused to follow this opinion as it might relate to tuberculosis, another infectious disease. The Court found that "[a]llowing discrimination based on the contagious effects of a physical impairment would be inconsistent with the basic purpose of section 504."[125] In other words, individuals with contagious diseases such as tuberculosis (and AIDS) were meant to be covered under section 504 and can be classified as handicapped individuals under the Act. The possible risk of contagion would then be a factor in determining whether such individual was otherwise qualified as also required under Section 504.[126]

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120. Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. §§ 701-96 (1982)).

121. 29 U.S.C. § 794. *See also* Michael L. Closen, Susan Marie Connor, Howard L. Kaufman and Mark E. Wojcik, *AIDs in America: Death, Privacy and the Law*, 14 HUM. RTS. Q. 26, 26-30 (Summer 1987); Robert P. Wasson, Jr., *Aids Discrimination Under Federal, State, and Local Law After Arline*, 15 FLA. ST. U. L. REV. 221 (1987).

122. 29 U.S.C. § 794.

123. 107 S.Ct. 1123 (1987).

124. Memo from Assistant Attorney General Cooper on Section 504 of Rehabilitation Act to Persons with AIDS, DAILY LAB. REP. (BNA) No. 195, at D-11 (October 7, 1988).

125. *School Bd. of Nassau County*, 107 S.Ct. at 1129.

126. *Id.* at 1129-1130; *see also* M.E. Lally-Green, *Is AIDs a Handicap Under the Rehabilitation Act of 1973 After School Board v. Arline and the Civil Rights Restoration Act of 1987?*, 19 U. TOL. L. REV. 603 (1988).

Two further cases also bear noting. First, in *Chalk v. United States District Court*,[127] the Ninth Circuit held that absolute certainty of HIV transmission from schoolroom or workplace contact is not a prerequisite to protection under Section 504.[128] And second, in *Cain v. Hyatt*,[129] a district court held that Section 504 protected an employee who was discharged after testing positive for HIV.[130]

Taken together these cases suggest that if a professional athlete could meet each part of the requirements of Section 504 of the Rehabilitation Act, he could be protected from any discrimination that might occur due to his HIV positive status. Clearly after *Arline*, HIV infection or AIDS would count as disabilities under the Act. Moreover, following *Cain*, a player could not be fired for testing positive for HIV infection regardless of how the player became infected. The prohibitive factor would most likely be the showing that the employer received federal funds. However, since many teams acquire public funding to stay in an area, to build a stadium or arena, or are literally co-owned by state agencies, this burden may not be impossible to overcome.

B. Civil Rights Restoration Act

Section 9 of the Civil Rights Restoration Act of 1987[131] amended the Rehabilitation Act in two significant ways (for the purposes of this analysis.) First, the Rehabilitation Act was amended so that it now prohibits discrimination against handicapped individuals in all operations of a federal institution or an institution receiving federal funds.[132] Second, the Act amended the Rehabilitation Act to provide that protection does not extend to an individual who has "a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals or who, by reason of the currently contagious disease or infection is unable to perform the duties of the job."[133]

It is possible that due to the expanded definition of covered entities, professional sports leagues might again come under the Rehabilitation Act as previously discussed. And it seems that a mandatory HIV testing

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127. 840 F.2d 701 (9th Cir. 1988).
128. *Id.* at 709.
129. 734 F. Supp. 671 (E.D. Pa. 1990).
130. *Id.* at 686-687.
131. Pub. Law 100-259, 102 Stat. 28.
132. 102 Stat. at 29-30.
133. *Id. See generally* Leigh Ann Tschirn, Comment, *AIDS as a Protected Handicap Under the Civil Rights Restoration Act of 1987*, 35 LOY. L. REV. 243 (1989).

policy could be made which would allow for the dismissal of certain individuals if it were ever shown that HIV infection does cause significant risk of transmission to other players in these sports (though this determination has not been even remotely hinted at yet), or if the particular infected athletes are not able to perform their jobs due to their HIV infection (this also seems irrelevant because an individual at such a dehabilitating stage of HIV infection would not have the stamina to participate anyway, so it seems implausible that such an individual would even attempt to play).

C. *The Americans with Disabilities Act*

The federal statute that will have the most impact on any proposed mandatory HIV policy is the Americans with Disabilities Act (ADA).[134] The ADA was the first federal law enacted to protect persons with AIDS from discrimination by private employers.[135] In essence, the ADA requires that employers provide reasonable accomodations to otherwise qualified individuals with disabilities, provided that such accomodations do not force the employer to suffer an undue burden.[136]

1. Employers Covered

There are three sections of the ADA which are particularly important to the sports field.[137] First, the ADA applies to public entities and to employers with fifteen or more employees, with jobs in industries that affect interstate commerce.[138] Second, anyone who owns, leases, or operates a place of public accommodation is also covered by the ADA.[139] And third, such places of accommodation include; gymnasiums, golf courses, or any other place of exercise or recreation.[140] Therefore, given these requirements any "professional teams, and operators of sporting

134. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12102-12114.

135. Laura Pincus, *The Americans With Disabilities Act; Employer's New Responsibilities to HIV-Positive Employees*, 21 HOFSTRA L. REV. 561, 566 (1993).

136. *Id.*; For a good overview of the ADA *see* Gerald L. Mantman, Jr., *An Overview of the Americans With Disabilities Act*, 38 No. 7 PRAC. LAW. 21 (1992) *and* WALTER T. CHAMPION, JR., SPORTS LAW 232-234 (1993); *See also* G. William Davenport, *The Americans With Disabilities Act: An Appraisal of the Major Employment-Related Compliance and Litigation Issues*, 43 ALA. L. REV. 307 (1992).

137. Mitten, *supra* note 21, at 35.

138. 42 U.S.C. §§ 12131-32, 12111(5)(A).

139. *Id.* at § 12182(a).

140. *Id.* at § 12181(7)(L).

events held in facilities open to the public are subject to the ADA."[141] This definition would also include professional sports leagues.

2. Prohibition against Discrimination

The ADA prohibits covered employers from discriminating against a covered employee. A covered employee will include any "qualified individual with a disability" who is discriminated against "because of the disability of such individual."[142] Furthermore, such a qualified individual must also be a disabled person who, with or without reasonable accommodation, could perform the essential functions of the employment position that they hold.[143] Discrimination by an employer, such as a professional sports league, will encompass the following; (1) "excluding a professional athlete from a sport because of a known disability,"[144] (2) not reasonably accommodating for a known disability of an otherwise qualified athlete, when such accommodation would not impose undue hardship on the league,[145] and (3) using standards that are not job-related for the position and consistent with business necessity, to screen out athletes with disabilities from such positions.[146] A mandatory HIV testing policy might be enacted so as to discover infected players and find some way to keep them from playing or to force them to follow special requirements for playing. Such goals would be discriminatory under the ADA as long as HIV infection or AIDS is found to be a covered disability under the ADA.

3. Who Is Disabled?

For an employee, such as a professional athlete, to show that they are protected by the ADA, they must meet three requirements. The ADA defines a person with a disability as an individual who: (1) has a physical or mental impairment that substantially limits one or more major life activities of such individual;[147] (2) has a record of such an impairment;[148] or (3) is regarded as having such an impairment.[149] The ADA regulations promulgated by the Equal Employment Opportunity Commission

141. Mitten, *supra* note 21, at 35.
142. 42 U.S.C. § 12112(a).
143. Lerblance, *supra* note 22, at 332.
144. 42 U.S.C. § 12112(b)(4).
145. *Id.* § 12112(b)(5)(A).
146. *Id.* § 12112(b)(6).
147. *Id.* § 12102(2).
148. *Id.*
149. *Id.*

(EEOC) specify that a person with HIV infection is disabled within the meaning just described.[150] The EEOC also states that HIV is an impairment which is substantially limiting as the term is used under the ADA definition.[151] Therefore, any covered employer (such as a professional sports league) would violate the ADA by discriminating against any individual (or player) who has HIV or AIDS, because of this disability.

4. What Employers Can Do

The only way in which an employer will be allowed to treat a disabled individual differently than one who is not disabled, is if that individual poses a direct threat to the health or safety of others in the workplace.[152] The EEOC Guidelines further provide that such a risk "can only be considered when it poses a significant risk, i.e., high probability of substantial harm; a speculative or remote risk is insufficient."[153] Discrimination against such disabled employees will only be justified if there is objective medical evidence that the individual poses a high probability of substantial harm to others.[154] In the case of someone in Magic Johnson's condition, where he posed such a low risk to anyone else, it would be discriminatory to disallow individuals such as him, with HIV infection but no real symptoms or health problems, to participate in professional athletics. If the disease had progressed further a team might not want to risk any danger to the infected player due to the physical nature of competition, or the possibility that the higher concentration of HIV in the infected player's blood might increase the risk of transmission to other players. But it is still hard to imagine how such an individual would be able to play in the first place. They would not be otherwise qualified and would not fall under the protection of the ADA.

Though the ADA does not prohibit medical testing of employees, leagues would have to show that such testing was related to some job-related concern and that the testing was carried out in a non-discriminatory manner.[155] And even if a collective bargaining agreement could be reached regarding such testing on a league-wide level, there would still

150. 56 Fed. Reg. 35,548 (1991); 28 C.F.R. § 36.104 (1992); The ADA's legislative history also specifically listed HIV infection as a covered physical impairment so it is clear that Congress intended it to be so covered by the Act. *See* S. Rep. No. 116, 101st Cong., 1st Sess. 22 (1989); H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 2, at 51 & pt. 3, at 28 (1990).

151. 56 Fed. Reg. 35734 (1991); Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. pt. 1630 app., § 1630.2(g) (1992).

152. 42 U.S.C. § 12113(b).

153. 29 C.F.R. pt. 1630, app. at 414.

154. *Id.*

155. George, *supra* note 1, at 233.

be problems of privacy and confidentiality. The actions of the leagues might be found to be discriminatory depending on what they do to players who test positive.

Once it is determined that an individual is actually disabled (possibly through positive HIV testing) and still qualified for the particular job, the ADA requires that the employer make reasonable accomodations to the known disabilities of the employee.[156] Reasonable accommodation as explained by the EEOC includes any modification or adjustment that enables a qualified individual with a disability to (1) be considered for the position that individual desires, (2) perform the essential functions of that position, or (3) enjoy the same benefits and privileges of similarly situated employees without disabilities.[157] These accomodations must only be undertaken by employers if they do not impose an undue hardship on the operation of the employer's business.[158] The ADA lists examples of such reasonable accomodations which may include:

> [m]aking existing facilities used by employees readily accessible to and usable by individuals with disabilities. . .and job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, training materials and policies. . . and other similar accomodations for individuals with disabilities.[159]

It is possible that if a player were found to be HIV infected, a team would have to change practice or training requirements for that player, change the amount or duration of road trips, and even modify what games he would be able to play in, assuming that the player wanted to continue playing, and assuming that the player was in worse physical shape than someone like Magic Johnson, due to the progression of the disease. Furthermore, employers may have to initiate some stringent confidentiality policies as to the identity of HIV positive players,[160] though it is unclear how this would be done in such a public arena as professional sports.

Clearly, an employer would not have to come up with measures that would allow infected players to continue playing, if they were not healthy enough to even participate on a regular basis, and if such accom-

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156. 42 U.S.C. § 12112(b)(5)(A); SEE FOR FURTHER EXPLANATION Patricia K. Loop, *Accommodating HIV-Positive Employees*, 38 No. 3 PRAC. LAW. 27 (1992).

157. 29 U.S.C. pt. 1630.2(o).

158. *Id.*

159. 42 U.S.C. § 12111(9).

160. Pincus, *supra* note 135, at 580.

modation of this player would cause further extensive difficulties on the part of the employer. These measures could be seen as unreasonable. These types of situations would most likely fall in the realm of undue hardship as defined in the Act.[161]

VIII. NECESSARY PRECAUTIONS

Before a professional team sports league would even consider adopting a mandatory HIV testing policy they should consider taking several precautionary or safety measures.

A. World Health Organization Consensus Statement

In 1989 the World Health Organization (WHO) developed its Consensus Statement on "AIDS and Sports."[162] This statement was in-

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161. "Undue hardship" is defined as "an action requiring significant difficulty or expense." 42 U.S.C. § 12111(10)(A).

162. The full text of the consensus statement is as follows:

World Health Organization Consensus Statement — Consultation on AIDS and Sports

1. No evidence exists for a risk of transmission of the human immunodeficiency virus (HIV) when infected persons engaging in sports have no bleeding wounds or other skin lesions. There is no documented instance of HIV infection acquired through participation in sports. However, there is a possible very low risk of HIV transmission when one athlete who is infected has a bleeding wound or a skin lesion with exudate and another athlete has a skin lesion or exposed mucous membrane that could possibly serve as a portal of entry for the virus.

2. The possible very low risk of HIV transmission through sports participation would principally involve the combative sports with direct body contact and other sports where bleeding may be expected to occur. In such sports, the following procedures should be considered:

a. If a skin lesion is observed, it should be immediately cleansed with a suitable antiseptic and securely covered.

b. If a bleeding wound occurs, the individual's participation should be interrupted until the bleeding has been stopped and the wound is both cleansed with antiseptic and securely covered or occluded.

3. As in other health care settings, for the safety of personnel drawing blood samples from athletes, protective gloves should be worn.

4. Sports organizations, sports clubs and sports groups have special opportunities for additional meaningful AIDS education of athletes, sports officials and ancillary personnel.

The following should constitute the core of information provided:

a. HIV can be transmitted through sexual intercourse, blood, and from infected mother to child. Sexual transmission can be either man to woman, woman to man or man to man, and transmission by blood can include any injection practice in which nonsterile needles and/or syringes are used.

b. For transmission of HIV through blood to occur during sport, the blood of an infected person must contaminate a lesion/wound or mucous membrane of another person. It should be the responsibility of any athlete participating in a combative sport with direct body contact who has a wound or other skin lesion to report it immediately to a responsible official, and to report for medical attention.

tended to serve as guidance for sports organizations and health professionals as to the dangers and realities of AIDS in sports. The Consensus Statement makes it clear that there is a very low possibility of HIV transmission in sport, although that possibility may be higher in contact sports (such as football and possibly basketball).[163]

The statement also provides many suggestions that professional team sports organizations should consider in making any policy decisions toward treating or dealing with players with AIDS. In fact, these precautions should be taken with respect to all players to avoid any possible problems with transmission of AIDS, even though the chances are very remote. These precautions include: immediately cleaning and securely covering all skin lesions,[164] removing any bleeding players until the bleeding has stopped and the wound is covered,[165] and the wearing of protective gloves whenever drawing blood samples from athletes.[166]

The Consensus Statement also suggests that athletes should be informed about the ways HIV can be transmitted, and that these athletes should be responsible for reporting cuts or other wounds immediately to be safely treated.[167] The Statement says that there is no "medical or public health justification for testing or screening for HIV infection prior to participation in sports activities."[168] Overall, education is needed to show athletes that the risk is minimal though precautions should still be taken.

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c. HIV is not transmitted through saliva, sweat, tears, urine, respiratory droplets, handshaking, swimming, pool water, communal bath water, toilets, food or drinking water.

5. There is no medical or public health justification for testing or screening for HIV infection prior to participation in sports activities.

6. Persons who know they are HIV infected should seek medical counseling about further participation in sports in order to assess risks to their own health as well as the theoretically possible risk of transmission of HIV to others.

7. Sports organizations, sports clubs and sports groups should be aware of the above recommendations and ensure that all participants, sports officials and ancillary personnel are aware of them. In addition, this may provide the opportunity for reviewing general hygienic practices relating to sports.

8. National level sports organizations are urged to contact national acquired immunodeficiency syndrome committees or programmes for further information regarding HIV infection and acquired immunodeficiency syndrome (AIDS). *World Health Organization Consensus Statement — Consultation on AIDS and Sports*, 267 JAMA 1312 (1992).

163. *Id.* para. 1-2.

164. *Id.* para. 2(a).

165. *Id.* para. 2(b).

166. *Id.* para. 3.

167. *Id.* para. 4(a & b).

168. *Id.* para. 5.

B. OSHA Regulations

Another statement of precautions is contained in the Occupational Safety and Health Administration's (OSHA) 1991 final regulations regarding occupational exposure to HIV and other bloodborne pathogens.[169] These regulations extend to employers "who reasonably anticipate the skin, eyes, or mucous membranes of their employees will come into contact with blood or other potentially infectious material during job performance."[170] Therefore, these regulations may not apply to professional team sport employers. Still they present recommendations similar to the WHO statement and they should be looked at for further safety measures that can only help a professional team sport employer.

C. Education

Probably the most important aspect of any program instituted in professional team sports is education. Many athletes still fear possible infection with HIV due to contact with other players during athletic competition, despite all of the assurances that such a risk is remote, if not zero.[171] Athletes must be educated about the remote danger of HIV infection from athletic participation, and also of the necessary safety precautions they should undertake on the playing field and in their personal lives. As already mentioned some leagues have instituted these types of educational endeavors. Education about HIV will not only help players understand the low risk if they take precautions, it may also prevent uninfected players from creating the social stigma against those that are infected. As one AIDS expert stated regarding playing with Magic Johnson, "[t]hose NBA players who have been given decent information about the disease are perfectly comfortable. . .but [t]hose that know less about it are concerned and worried."[172]

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169. 56 Fed. Reg. 64004; 29 C.F.R. pt. 1910.1030 (1991); The Wisconsin Intercollegiate Athletic Association (WIAA) has promulgated similar precautions which are also helpful. *See Clean Up Procedures For Blood Or Bodily Fluid Spills*, 71 WIAA BULLETIN 18 (November 18, 1994).

170. Loop, *supra* note 156, at 29.

171. Mitten, *supra* note 21, at 9.

172. Larry Tye, *Experts Say Fears Unfounded: Johnson Poses Virtually No Threat to Spread AIDS on Court*, BOSTON GLOBE, Feb. 9, 1992, at 52 (quoting Dr. Rogers, NBA AIDS consultant.)

D. Coordination

The only way that these measures can be successful is if there is some form of coordination among the leagues and among all levels of athletic participation; amateur and professional.[173] Players will always begin at the lower levels of athletic competition. Even at these initial levels, they should be given the same information regarding the risks and necessary precautions that must be taken to avoid possible infection with the HIV virus.[174] Such coordination is another form of education. And if learned at these early stages of development the risks at higher levels of play can only be lowered because players have become more thoroughly informed.

IX. A Testing Policy

While it is true that the best solution to the problem of HIV and AIDS may be through more education for players about the risks involved, this does not mean that a mandatory HIV testing policy would have no merit. All of the problems with testing that have been mentioned seem to focus on the reason for such testing. And, admittedly, if leagues were to institute a testing policy only to find out who was HIV positive and to terminate them, they would be found to have acted discriminatorily, under the ADA. Moreover, if such a policy was unilaterally implemented, it would come under the scrutiny of the NLRA and the NLRB.

The problem with any rationale in treating a mandatory HIV testing policy in the same way as a drug testing policy is that drug testing is usually done more for the image of a league than for the protection of the players. Even if the aim is protection it is protection of the player using drugs and not the other players. HIV testing would not be for the protection of any players involved, as long as the probability of transmission through competition is so low. The league would not be protecting any uninfected players by finding out which players were infected unless the league undertook some other safety and educational measures in addition to such testing. Testing would not protect those found to be HIV positive because they would only be learning their status. Without other measures this would do nothing to fight the disease.

As repeatedly mentioned, though the risk is close to zero, it is not zero. At present time, there is no cure for AIDS. A player who is in-

173. George, *supra* note 1, at 239.
174. *Id.*

fected within this window between no and minimal probability will still most likely die of AIDS.

Given this knowledge, the only rationale players could put forth to avoid such testing is that they will face psychological problems or social stigma as already discussed. The answer to the problem of social stigma is education of those involved. If this does not work, then those who still treat HIV positive players in a different way are merely uneducated. The stigma may still hurt, but it cannot compare to the fact that one is infected with HIV. Furthermore, the stigma is society wide. Leagues cannot be held responsible for something they have no control over.

As to the psychological trauma a player will encounter when he finds out that he is HIV positive, that will come regardless. It is not only unreasonable, but also ill-advised for a player to avoid testing for this reason. The player may lose valuable time in treatment that could prolong his life and help him avoid transmitting the disease to others. No one wants to get AIDS but any reasonable person should want to know whether they have it to assess their future and see what can be done to prolong their life.

If the leagues were able to collectively bargain on an AIDS testing policy, they should push for a mandatory policy. To protect against discriminatory problems under the ADA (or even the Rehabilitation Act) the leagues should make clear that individuals will not be terminated for testing HIV positive. Testing will be done to provide players and league officials with information to properly act in problematic situations where possible transmission may occur, and to provide early detection and support to those who test positive. The leagues should make it clear that the policy is only there to properly assess the problem within each particular sport, to better approach accommodating these individuals and dealing with the problem of AIDS.

Of course there are personal privacy and confidentiality considerations which must be recognized. Players may state that their HIV status is a personal matter. Therefore, they would feel that involuntary testing violates their right to keep the knowledge of their status to themselves.

These privacy concerns are important, but such information can be protected even in an involuntary testing system. The system could be set up carefully with cooperation between management and the players to best keep such information from going public. Often these privacy concerns are offered when a particular player wants to avoid the reality that he might be infected, and not because the athlete is concerned about his privacy interest.

There is fear involved in this knowledge of course, but that should not be a reason to avoid reality. This fear is the real fear that underlies all of the cries by players to not have to play against Magic Johnson or anyone with HIV. Though the players may have feared contraction of the virus, with the risk so low this fear is clearly unreasonable when well-informed.[175] The only fear left is a player's fear that he is actually HIV positive; a fear which leads him to avoid testing, to stigmatize those who are HIV positive, and to avoid precautions in personal life where the dangers may be higher. This fear is also unreasonable due to the obvious benefits to a player in knowing that he is HIV positive.

Confidentiality concerns are also misleading. Even if players found out that they were HIV positive on a voluntary basis from a personal physician, the public nature of their job would make it almost impossible for this fact to be kept confidential.[176] This may not be fair, but this is reality. The leagues with their vast resources should serve to help HIV positive athletes deal with this fact and could better help keep this information confidential. Leagues could also present this information to the public, with the approval, consent and cooperation of the player, in a more positive way. Positive in that the league can support the player in their coming out with the fact that they are HIV positive to dissuade public perception that may assume that the player is homosexual or an intravenous drug user, or of some other group that the public may unjustifiably characterize as deviant.

Leagues should not go public with such results just because they have such information. But if a player wants to continue playing, as they should be allowed to do in following the ADA and reasonable accomodations, this information will come out at some time. Therefore, unions and management can develop methods to protect this information and only let it out in a way which has the least negative effects on the player.

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175. This fear is unreasonable in the same way that it could be said that smokers are unreasonable in not recognizing the risks of cancer that may be inherent in smoking. After all of the testing and documented affects how could anyone who continues to smoke be thought of as reasonable in an objective sense. This is similar to a players being unreasonable in refusing to play with someone who has the AIDS virus. Once informed about the negligible risk involved, an objectively reasonable judgement would lead one to believe that taking precautions could reduce the risk even to zero. Admittedly, such judgements are always clouded with emotion and this use of reason may not be possible in such a situation. However, it is just this emotional fear which takes away from a player's reasoned judgement and adds to the further stigmatization of those with AIDS.

176. Even if a player was a "role player" or "bench warmer" in some small town, this would be just the type of information reporters would look for to make a big story.

A mandatory HIV testing policy will not actually reduce the transmission of the virus, be positively accurate, or protect other players in and of itself. However, as tests become more accurate, and those infected and uninfected become better informed about the risks of transmission, this testing will result in fewer possibilities of transmission. All those concerned will know the dangers and the risks and presumably take adequate precautions. There may be no medical justification or necessity for such testing, but, because it primarily benefits those found positive it is something leagues and unions should consider as their duty to provide.

Many commentators, activists and experts seem to think that it is no one else's right to know whether another player has AIDS or to force someone to undergo testing to see if they are so infected. Though it may be true that there is no right to such information, the possible harm without it is tremendous. Even with precautions, if one highly improbable accident takes place and an uninfected player becomes infected, that player will most likely die of AIDS. That player should have the right to protect himself from such a possibility (however remote). The leagues should take the responsibility to develop a policy whereby such risk is not merely "negligible" but actually zero.

More importantly, although players may not want their HIV status to become known within the league, this information will help the early detection and treatment for those found positive. And with education others can learn that they have nothing to be afraid of. The fear associated with AIDS is real fear, even if unreasonable. The only way to fight it is through education and awareness.

X. Conclusion

Professional sports leagues should take the lead in the fight against AIDS by developing comprehensive HIV educational, precautionary, and testing procedures. Though most past commentators have condemned mandatory testing, if it is done with the aim of better assessing the problem within a sport, as a part of comprehensive program of awareness and education, in conjunction with reasonable accommodation of those found HIV positive, and within the context of collective bargaining, it should be undertaken. A policy could be developed with a goal of providing early detection to those who are infected, helping them seek treatment, accommodating them in the playing arena, and keeping this information as confidential as possible.

Sports are highly public and powerful mediums to inform many people throughout the United States. If sports leagues would take the lead

in the fight against AIDS they could hopefully help alleviate some of the stereotypes and discrimination caused towards those with HIV or AIDS. This may seem like an unreasonable assessment. Yet, how many people watch Monday Night Football? Or the Super Bowl? Or the World Series? Or the NBA Finals? Professional team sports as an industry has access to millions, if not billions, of people. This industry also employs stars who are known worldwide. If this industry were to develop a plan as envisioned in this comment, many more people would at least be aware of the dangers of HIV contagion within risky lifestyles.

Beyond this goal, the individuals who have HIV will know that they are infected earlier, and may even be able to prolong their lives. What greater benefit could such a policy look for? They may face scorn from other players or other people, but this is nothing compared to the harm the disease will cause them.

In the end, an integrated safety-minded and educational mandatory HIV testing policy aimed at informing those infected of their status and the treatment available, and informing those uninfected of the actual dangers involved and safety precautions they should take, is something that leagues should try to develop. Hopefully some leagues will have the courage to make such proposals in future collective bargaining negotiations. Then players will realize that they need not fear the spread of AIDS through competition, and that some of their friends and teammates infected with HIV need their help to travel the hard road ahead of them.

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