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Is Mandatory HIV Testing of Professional Athletes Really the Solution?

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Note

IS MANDATORY HIV TESTING OF PROFESSIONAL ATHLETES REALLY THE SOLUTION?

AS THE PATHS OF LAW AND MEDICINE so often intertwine, so too do the paths of sports and medicine. Since adeptness in sports requires "vigorous bodily exertion,"[1] an uncommonly high degree of physical fitness and an exposure to physical risks not incurred by most, routine medical practices become fundamental to sports. In fact, athletes grow accustomed to physical examinations and medical procedures as a necessary part of the sporting life. However, in the latter part of 1991, when the results of one such medical examination of a well-known professional athlete were announced, shockwaves were sent through the world of sports, causing such discourse and debate that the paths of sports and medicine came to intersect with a third path — that of the law.

The issue was the mandatory Human Immunodeficiency Virus ("HIV") testing of athletes by their teams and leagues. The announcement was that of the now-retired National Basketball Association ("NBA") superstar, Earvin "Magic" Johnson.[2] For the first time, a professional athlete known and re-

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1. WEBSTER'S NEW WORLD DICTIONARY 1377 (David B. Guralnik ed., 2d ed. 1984) [hereinafter WEBSTER'S].

2. On November 7, 1991, Earvin "Magic" Johnson, captain of the NBA's Los Angeles Lakers, announced his retirement from professional basketball after testing positive for the HIV virus. Magic's announcement was forthright; he admitted that he contracted the virus through unprotected heterosexual sex during a life filled with promiscuity and sexual indulgences. *See* Thomas Heath & Christine Spolar, *Magic Johnson's World: A Life of Temptations; Star Resisted Few Until Stricken by HIV*, WASH POST, Nov. 24, 1991, at A1; Jack McCallum, *Two Weeks After Magic Johnson's Revelation, The Sports World Struggles Over What to Do Next*, SPORTS ILLUSTRATED, Nov. 25, 1991, at 29.

Although retired from seasonal play, Magic Johnson gave a Most-Valuable-Player performance at the NBA's All-Star Game in February 1992. Ian Thomsen, *What, David Stern Worry? But Someday They'll Lose*, INT'L HERALD TRIB, Apr. 17, 1992, at 17. In May 1992, the Secretary-General of the International Basketball Federation ("F.I.B.A.") stated that there was no reason why Magic Johnson, although HIV-positive, could not play

vered throughout the world had contracted the deadly HIV virus through unsafe heterosexual activity.[3] The fears which were brought to the forefront of the minds of the members of the sports community with this single, yet devastating, announcement of HIV infection in their community were multiplied less than one month later. On December 3, 1991, two Canadian physicians in Montreal, Quebec, announced that a young woman who had died of AIDS two years prior, had disclosed to them that she had had sexual intercourse with between thirty and seventy different players of the National Hockey League ("NHL").[4] With the possibility that ten per-

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in the 1992 Summer Olympics. *See Digest*, OTTAWA CITIZEN, May 7, 1992, at F5. Not only did Magic Johnson compete on the U.S. Olympic basketball squad, but he also led the "Dream Team" to a gold medal. *See* Matt Spetalnick, *Johnson Announces Return to Professional Basketball*, REUTERS, LIMITED, Sept. 29, 1992, *available in* LEXIS, Nexis Library, Wires file.

After fighting the international controversy involved in his Olympic competition, Johnson came out of retirement. On September 29, 1992, he announced that he would resume his playing career by playing between fifty and sixty of the L.A. Lakers' eighty-two regular season games. *Id.* In October 1992, Magic even received a $14.6 million one-year contract extension with the L.A. Lakers. *See* Clifton Brown, *A Precious Gesture to Magic From Boss*, N.Y TIMES, Oct. 2, 1992, at B9, col. 6. Johnson admitted he was taking a risk with his own health by returning to play, but explained that precautions would be taken to try to limit his risk (i.e., eating well, following a health regime, avoiding back-to-back games, putting on weight and muscle mass and taking AZT). His physician "described him as 'an experiment called Earvin Johnson' and said AIDS experts were uncertain exactly how a return to NBA play would affect his health. 'He is a unique case . . . .'" Spetalnick, *supra.*

Although it appeared that Magic Johnson's forthrightness and candor with the press in dealing with his HIV infection, and its effect upon his professional basketball career, was beneficial to the education of the public and other athletes in his league, many NBA athletes were concerned about playing against Johnson upon his return. *See Woman Suing 'Magic' Johnson for Allegedly Giving Her HIV*, UPI 1992, Nov. 6, 1992 *available in* LEXIS, Nexis Library, Wires file. After seeing fear on the faces of fellow players when he cut himself during a pre-season game, Magic Johnson announced on November 2, 1992, that he had decided to retire from professional basketball permanently. *Id.*

3. It is suggested that, as far as the general public is concerned, many people would consider Magic Johnson the first famed professional athlete to be infected with the HIV virus, at least through heterosexual activity. Actually, his was just the first professional athlete case to be openly and personally announced in the media. Prior to this, though, at least five professional athletes have died of AIDS-related infections.

They were: NFL player Jerry Smith, major league baseball player Alan Wiggins, boxer Esteban DeJesus, stock car driver Tim Richmond and figure skater Robert McCall. *See* Kevin Sherrington & Mitch Lawrence, *Sex and Sports: Many Athletes Say Barrage of Sex Offers Blurs Their Judgment*, OTTAWA CITIZEN, Nov. 18, 1991, at C5. Furthermore, we have no idea, nor any means for determining at present, how many other professional athletes are HIV-positive.

4. Dr. Clement Olivier and his associate, Dr. Rejean Thomas, declined to identify the NHL players she had named. *See* Robert McG. Thomas Jr., *Warning on AIDS Surprises N.H.L.*, N.Y. TIMES, Dec. 4,1991, at B19, col. 6; John F. Burns, *Canada Reckons*

cent of all NHL players were exposed to the HIV virus by one woman, fears escalated. Concern grew that this deadly epidemic was reaching into the sports arena, so often considered a fantasy world.

The subject of mandatory HIV testing of athletes was not brought forth by the general public in an effort to protect the general populace from transmission from a specific "high risk" population.[5] Nor was the proposal an effort to exclude HIV-positive athletes from the spotlight of celebrity. In fact, the general public has hardly been involved in the debate at all. Rather, it has been a debate largely internal to the sports industry itself. Not only the coaches[6] and owners[7] of certain professional sports teams, but also a number of well-respected professional athletes themselves, have called for the institution of mandatory testing policies for all athletes within their respective leagues.[8] The reason is fear — fear that players[9] are at

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with AIDS, N Y TIMES, Dec. 5, 1991, at B24, col. 6. It should be noted that 50 NHL players constitute approximately 10% of the combined rosters of the 22 NHL teams in existence in 1991. Thomas, *supra.*

5. Many who argue that mandatory HIV testing is necessary to help slow the spread of AIDS are willing to narrow their proposal to certain groups of persons to be tested. "Some of the problems with universal mandatory testing would lessen if the required testing were limited to members of 'high risk groups': groups with a high incidence of infection such as gay men, IV drug users, hemophiliacs and their sexual partners." Martha A. Field, *Testing for AIDS: Uses and Abuses*, 16 AM. J.L. & MED. 34, 61 (1990).

"High risk groups" have been defined as "subpopulations initially classified as having greater numbers of HIV-infected persons. When these were proposed, the concomitant message was that sexual and needle-sharing activities with members of these groups carried a risk of getting AIDS . . . . The modern trend is to abandon labeling groups and to focus on individual conduct such as unprotected sex or unsterile needle-sharing with an HIV-positive partner." MICHAEL L. CLOSEN ET AL., AIDS: CASES AND MATERIALS xi (Supp. 1992).

6. *See* Appendix B. Although none of the nine East Coast Hockey League head coaches responding have implemented any sort of HIV testing policy (neither mandatory nor voluntary) for players, 66.67% believe that mandatory HIV testing is necessary in professional hockey; 22.22% believe that mandatory testing is not necessary in professional hockey, while 11.11% "don't know." Furthermore, 44.44% of the coaches responding feel that a professional hockey player who is HIV-positive could not continue to play in the ECHL without jeopardizing the health and safety of other players and staff. Only 22.22% of the coaches responding feel that HIV-positive players playing would not be a threat, while 33.33% do not know if such players would pose a danger.

7. For example, Norman Green, owner of the NHL's Minnesota North Stars (now the Dallas Stars), considered requiring HIV tests before agreeing to any major salary increase for his players. *See* Rosie Dimanno, *Hockey Wives Tackle AIDS: 'Suddenly, yes, I am scared,'* TORONTO STAR, Dec. 14, 1991, at B1.

8. Arthur Ashe, professional tennis player, spent much time advocating the use of mandatory HIV testing in professional sports, before his death from AIDS in early 1993. *See* Larry Tye, *Ashe Foresees AIDS Test Becoming Mandatory*, BOSTON GLOBE, Dec. 1,

risk of contracting the virus every day at work, from blood-to-blood contact during the not uncommon injuries and fights on the playing field.[10] This fear may or may not be legitimate, but so long as it exists there will be debate.

1992, at 61. Hockey superstar Wayne Gretzky also has called for mandatory HIV testing in the NHL. *See* Larry Still, *Gretzky Wants Mandatory AIDS Testing for NHL Players*, VANCOUVER SUN, Dec. 5, 1991, at F1; *Gretzky Urges Mandatory AIDS Test for Hockey Players*, REUTERS, Dec. 4, 1991. Similarly, Todd Gill, the Toronto Maple Leafs' representative to the National Hockey League Players' Association, supports mandatory testing. *But see Gretzky's Support for Mandatory AIDS Tests in NHL is Dead Wrong*, MONTREAL GAZETTE, Dec. 8, 1991, at B3 (disagreeing with Gretzky's endorsement of mandatory testing). Damien Cox, *AIDS Scare Rocks NHL Players, Owners Agree Disease Must Be Faced Head-On*, THE TORONTO STAR, Dec. 4, 1991, at F1. In the NBA, Phoenix Suns' guard, Kevin Johnson, is one of a number who support mandatory HIV testing in their league. *See Mandatory Testing for AIDS Sparks Different Views*, USA TODAY, Nov. 11, 1991, at 3C.

It also should be noted that those East Coast Hockey League coaches responding to the "Mandatory HIV Testing and Professional Hockey Questionnaire" also estimated their players' opinions on mandatory testing in the athletic workplace. The results vary greatly: 33.33% of the coaches responding believe more of their players are for testing than against; 33.32% believe more of their players are against than for testing; 22.22% estimate that almost all are against mandatory testing; and 11.11% estimate that almost all of the team's players are in favor of mandatory testing. Interestingly, not one coach replied that he did not know or that the groups were approximately equal. *See* Appendix B.

9. It should be noted that the term "players" in this context describes not only athletes as individual persons, but also athletes as a sort of "property" of their respective team. *See infra* Part I.A.

One commentator even stated his assumption that "management's motivation [for mandatory testing] is to protect their monetary investment, ensuring that they aren't left holding the bag the next time a player is diagnosed HIV positive." Len Elmore, *HIV testing for Athletes: Mandatory Testing By Teams Begs Questions About Motives*, USA TODAY, Nov. 12, 1991, at 10C. Similarly, one news article stated:

> There are . . . some obvious economic reasons our professional leagues should concern themselves with the issue. It's bad business to ignore it. "The more pragmatic and less humanitarian reason is that the clubs have a huge investment in players, and this is a disease than [sic] can not only destroy a player's ability but also can kill him . . . They're signing players to three-, four-, five-year guaranteed contracts, and the disease literally can kill them."

Michael Knisley & Steve Meyerhoff, *AIDS & Sports*, SPORTING NEWS, Nov. 9, 1992, at 15 (quoting Major League Baseball Deputy Commissioner Steve Greenburg).

10. Certain team contact sports often are labelled as "bloody" due to the high incidence of injuries and fights in which blood is drawn. Of the four major league team sports (football, baseball, basketball and ice hockey), hockey and football are often described as such bloody sports. *See* Pat Carroll, *Athletes Are Playing Dangerous Games with AIDS*, SPORTING NEWS, Sept. 7, 1992, at 7 (stating, "[f]ootball is not only the most violent team sport with a high incidence of bloody injuries, it is also potentially the most risky in terms of blood exposure because players block and tackle with skin-to-skin contact"); Kevin Paul DuPont, *AIDS Scare May Be Way to Check the Overuse of Fists in NHL*, HOUSTON CHRONICLE, Dec. 8, 1991, at 10 (calling hockey "a game often marked by bloody one-on-one fights and occasional brawls, [which] could be leaving players at risk of contracting the virus. . . . Once discarding their gloves to fight, players often tear the skin off their knuckles . . . while flailing away with punches to their opponent's head. To see a fight end with both combatants bloodied is hardly uncommon.").

Although to date, none of North America's four major professional sports leagues has adopted a mandatory HIV testing policy,[11] some leagues' players' associations have introduced the testing issue into collective bargaining discussions.[12] Furthermore, a number of individual teams have initiated mandatory testing policies.[13] Opponents of mandatory HIV testing in athletics have labelled such policies "a hysterical re-

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> While acknowledging that the chance of HIV transmission in sports "is remote," the United States Olympic Committee has ranked categories in order of risk. At greatest risk are the bloodiest: boxing, tae kwon do and wrestling. Moderate risk sports . . . are basketball, field hockey, ice hockey, judo, soccer and team handball. Physicians should inform HIV-positive athletes involved in "a sport involving blood exposure, such as wrestling or football . . . of the theoretical risk of contagion to others and strongly encourage him to consider another sport," concludes the American Academy of Pediatrics.

Carol Krucoff, *AIDS Time-Out: Assessing the Risk of HIV Transmission in Sports*, WASH POST, March 10, 1992, at Z20.

11. *See AIDS Test Guidelines Missing at Pro Level*, TORONTO STAR, Nov. 8, 1991, at C7.

12. For example, on November 11, 1991, both the Major League Baseball Players' Association and the NBA Players' Association announced plans to discuss the possibility of testing athletes for the HIV virus. *See, e.g.*, Tim Panaccio, *Pros Talk About Testing*, CALGARY HERALD, Nov. 12, 1991, at E5.

13. The National Football League ("NFL") has consistently stood against league-wide HIV testing, preferring to let its individual teams handle the issue. Mark Asher, *Tagliabue Says Testing Should Be Up To Teams*, WASH POST, Nov. 9, 1991, at D6.

This is not a new issue for some teams in the NFL. In 1987, the Dallas Cowboys were the first NFL team to allow for voluntary AIDS testing of athletes who requested it. *Id.* In 1991, Dallas expanded its testing policy to allow for HIV testing to be available to everyone on a voluntary basis (not just upon individual request) at the 1992 training camp. *See id.*; *Cowboys May Make AIDS Testing Available*, UPI, Nov. 12, 1991, LEXIS, Nexis Library, UPI File.

Since 1988, at least nine other NFL teams have set up some variation of an HIV testing policy. The list includes the Giants, Eagles, Browns, Redskins, Vikings, Oilers, Cardinals, Raiders and Rams. *See* Asher, *supra*; *Giants Fourth Team to Undergo Testing for the AIDS Virus*, TORONTO STAR, May 21, 1992, at B10 [hereinafter *Giants*]. The Philadelphia Eagles and New York Giants have both arguably put into effect policies for HIV testing which are mandatory. *See Giants, supra.* In 1991, the Eagles tested every player and some front office personnel for the virus at the start of their training camp, which could be in violation of a Pennsylvania statute. *See id.*

The NFL Players' Association protested that some Eagles' players were unaware that they had been tested for the virus. *See id.*; Frank Dell'Apa, *Patriots Mull AIDS Testing*, BOSTON GLOBE, Nov. 9, 1991, at 29; Steve Springer, *Testing Not Mandatory in Pros, NCAA*, L A TIMES, Nov. 9, 1991, at C7. Similarly, the New York Giants expanded their medical exams to include HIV testing, as of the end of May 1992. *See Giants, supra*, at B10. Although the NFL stressed in a letter to clubs, dated December 1991, that testing must be voluntary, several Giants' players were unaware they were being tested for the virus. George Willis, *Giants Test for HIV*, NEWSDAY, May 20, 1992, at 145. ("[A]pparently if a player didn't question the blood work, he was not told [of the HIV tests].") One writer went so far as to generalize that, "[a]lthough the players were not informed they were being tested for HIV, none seemed to mind." Michael Eisen, *New York Giants*, SPORTING NEWS, June 8, 1992, at 37. *But see supra* note 6 (noting that not

action,"[14] very "simplistic,"[15] and "a kneejerk response."[16] Furthermore, they question the effectiveness and legality of such policies.

This note will examine the issues surrounding HIV and professional sports in an attempt to answer the question whether a professional sports league or team legally may mandate its players to submit to HIV testing. A parallel question that will be examined is whether a league or team ethically should require such HIV testing. In doing so, this note will analyze the legitimacy of the professional athletes' concerns — both their concern regarding transmission risks and their concern regarding the loss of individual rights should testing be mandated.

Part I of this note will focus on the world of the professional athlete. Part II will provide a medical background of Acquired Immune Deficiency Syndrome ("AIDS") and the transmission of HIV. Part III will discuss the means of testing for HIV antibodies; it also will describe the premise behind the mandatory HIV testing proposals. Finally, Part III will explain the analytical approach which is taken in the final sections of this note to determine whether a professional sports team or league may legally, and should ethically, impose a mandatory HIV testing policy upon its players. Part IV is devoted to determining whether such a policy has an ethically acceptable purpose. Part V will discuss whether mandatory testing is necessary and effective for achieving that purpose. Part VI will cover the legalities involved, including the common law privacy issue, the state statutory issues of consent and confidentiality and the issue of freedom from discrimination in light of the Americans with Disabilities Act ("ADA"). Part VII will draw conclusions as to why mandatory testing for HIV antibodies in professional athletes violates the individual rights of the athlete and why it is, at best, unethical.

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one of the East Coast Hockey League teams whose coaches responded to the survey has developed any sort of mandatory HIV testing policy as of yet).

14. Paul Radford, *No AIDS Tests at Olympics, 'Magic' Johnson Will Be Welcome*, REUTERS, Feb. 3, 1992 *available in* LEXIS, Nexis Library, Wires file (quoting the head of the International Olympic Committee).

15. Charles Grantham, *HIV Testing for Athletes: Equitable Program for Players at Top of Agenda*, USA TODAY, Nov. 12, 1991, at 10C.

16. *See Flawed Thinking on AIDS in Sport*, TORONTO STAR, Dec. 8, 1991, at B2; Elmore, *supra* note 9, at 10C.

I. THE WORLD OF THE PROFESSIONAL ATHLETE[17]

The first question that must be answered in a note discussing mandatory HIV testing of professional athletes is "why professional athletes?" What is so special about this class of individuals that warrants discussion about a mandatory screening of the group? To answer this question, one needs only to look to the literature of sports law:

> Professional sports have grown to be an integral part of the history, folklore, and habits of the American people. The "star" athletes are publicized, glamorized, and eulogized. In spite of the fact that the professional athlete earns his livelihood by participating in sports, the public tends to disassociate him from the economic and business aspects of the sports industry. The world of sports is looked upon in a romantic manner as a world of entertainment, separate and unique in itself. . . . However, the economic aspects of sports as a commercial unit in the entertainment industry seem to be studiously neglected by the sports commentators. In the process of building images of "folk heroes," the sportswriters have failed to give proper coverage to the professional athlete's status and working conditions as an "employee."[18]

The preceding statement illustrates the three areas of the world of the professional athlete which distinguish him from the general public. As will be seen, each of these areas demonstrates why the issue of the legality and ethics of mandatory HIV testing of this class of persons is worthy of examination. The three areas to be discussed are: the "economic and busi-

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17. This note will be limited in scope to the issues involving the mandatory HIV testing of the *professional* athlete. This may be defined as a non-amateur athlete who receives some form of monetary compensation (whether or not such compensation is wholly or in part deferred) for athletic performance. Particularly, this note will look at the professional athletes of the National Football League, Major League Baseball, NBA, and NHL, as well as their minor league affiliates. Part I will discuss the reasons for looking at the issues involved in mandating HIV testing of professional athletes. Although some of the discussion also may be pertinent to amateur athletes, such as those in the National Collegiate Athletic Association, the business and property aspects of professional sports add many different facets to the mandatory testing issue not found with amateur athletics.

Further, it may be noted that this note is limited to the examination of HIV testing in *team* sports. The reason for this being the clearer concept of transmission of the virus (potentially) through the contact of more than one athlete on the playing field simultaneously. Although such sports as boxing and wrestling fit this criterion, I am limiting discussion of policies involved in these one-on-one sports, when pertinent, to the footnotes.

18. Erwin G. Krasnow & Herman M. Levy, *Unionization and Professional Sports*, 51 GEO L J 749, 749 (1963).

ness aspects," the "professional athlete's status and working conditions as an 'employee'," and the fact that "athletes are publicized, glamorized, and eulogized."[19]

A. Economic and Business Aspects

Although often romanticized, professional sports ownership and management is a business like any other. As such, the profitmaking objective, simply put, calls for assets to outweigh liabilities. The difference here between professional sports and most businesses is the nature of the assets. In professional sports, the athlete is an asset of the team[20] arguably giving the team certain property rights in that player and his health.[21] Some may argue, rather, that a contract between a team and an athlete is not a sales contract but rather a personal service employment contract as is common in many businesses. However, the differences in terms of a professional athlete's contract illustrate that there is some justification for the property argument:

> The ordinary man expects that with success in his field, he can realize an increasing measure of personal freedom. The satisfaction of such a hope is, in fact, largely denied to the professional athlete . . . . The professional athlete is treated as the legal chattel of his club ownership. He can be sold or traded at will. He is thus denied both employment security and the ordinary opportunity to create a stable and relatively secure home life for himself and his family. . . .[22]

Numerous commentators similarly have argued that systems, which, to some extent, bind a player to one team which holds the right to assign the player's contract to any other

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19. *Id.*

20. It is important to note the different ways in which the term "team" may be interpreted. The team may be seen as an owner of the "property" known as the athletes, as the employer of these athletes, or as a group of athletes in and of themselves.

In the context at hand, as well as at various times in the text of this note, the term "team" will be used to describe the ownership of the athletic property. This may involve an individual owner of the team; or, it may involve the team as a legal entity, such as a corporation, partnership or limited partnership. In any case, the "team's" property rights would, generally speaking, be represented by and looked after by the team's hired management, particularly a general manager or coaching staff.

21. *See infra* part I.B.

22. Michael Schneiderman, *Professional Sport: Involuntary Servitude and The Popular Will*, 7 GONZ L REV 63, 67-69 (1971).

team,[23] are "promoting involuntary servitude"[24] and treating professional athletes basically like "peons"[25] or "slaves."[26] Such statements may be overly harsh and one-sided, though it should be remembered that the athlete consensually entered into an agreement, quite possibly in exchange for a very large salary. This raises an issue which will be discussed in Part VI. To what extent are we, as a society, willing to allow professional athletes to bargain away their individual rights and freedoms?

The standard player contract is another business aspect of sport which is worthy of comment.[27] Interestingly, one well-known sports law treatise limits the purpose of most contracts to obtaining the player's consent to abide by any rules which the team or league may create.[28] In fact, most of the major professional sports teams typically include a clause in their standard player contract which specifically incorporates the league and team rules and by-laws as a part of the contract.[29]

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23. *See, e.g.*, J WEISTART & C LOWELL, THE LAW OF SPORTS 292 (1979) [hereinafter WEISTART]. Most standard player contracts include a provision noting that the signing player has agreed that the team will have the right to assign the contract to any other team. Many of these contracts further provide that the player promises to fully perform for any assignee team. *Id.* Although the usual rule is that rights under personal service contracts cannot be assigned, unless prior consent of the employee is secured, these major sports standard player contracts are considered the vehicle for securing the requisite prior consent. *Id.* at 300.

24. Note, *The Balance of Power in Professional Sports*, 22 MAINE L. REV. 459, 469 (1970).

25. WEISTART, *supra* note 23, at 777 (quoting American League Club v. Chase, 149 N.Y.S. 6, 19 (Sup. Ct. 1914).

26. *Id.* at 777 (quoting Gardella v. Chandler, 172 F.2d 402, 409 (2d Cir. 1949) (Frank, J., dissenting)).

27. *See id.* at 664-65, stating:

> In most leagues, a club's right to control a player's conduct arises from the contract which is entered into with the employee. But that contract is not wholly the product of individual negotiation between the two parties. In most cases, the basic outline of the agreement is prescribed by the league and embodied in a uniform player's contract which all clubs must use. One of the uniform terms is that which exacts the player's agreement to abide by the rules which the club imposes . . . . The image of the league as sponsoring competition between teams of athletes who are serious, dedicated, and well-trained will be promoted if each club accepts responsibility for controlling its own employees. Thus, the common agreement on the need for discipline by individual employers can be seen as a part of the larger design to insure the success of the joint venture.

Furthermore, "[since] [t]he parties typically use a standard form contract, . . . it is normally assumed that except for matters of compensation and length of contract, there is little room for negotiation." *Id.* at 200.

28. *Id.* at 259.

29. *Id.* at 207.

This traditionally has led to much discretion on the part of league and team management over controlling and monitoring aspects of the player's life which directly relate to his ability to perform. For example, rules regarding practices, curfews and medical examinations[30] are found in every team in every league.

The National Labor Relations Act provides professional athletes with the right to collectively bargain about employment terms and conditions through representatives that they have chosen.[31] A treatise in sports law noted:

> While the disciplinary process in the sports industry has historically been presented to the players on a take-it-or-leave-it basis, that is changing in some important respects. The advent of players' unions increases the likelihood of player-input into the disciplinary process. The players' interests in this regard receive substantial support from the [National Labor Relations Act] . . . which requires that the employer-clubs must bargain about all matters affecting "wages, hours, and other terms and conditions of employment."[32]

The collective bargaining unit is generally the league, with player representatives from each team.[33] These representatives may discuss any matter relating to the terms and conditions of the players' employment,[34] including issues such as mandatory testing.

The question arises as to individual opinions of athletes which differ from the collective opinion.

> Once a bargaining representative is recognized, however, it becomes the exclusive bargaining agent for all employees within the unit, whether or not they are members of the union or agree with the terms and conditions that are negotiated in their behalf. Individual employees may bargain on

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30. *See* discussion *infra* part I.B.

31. National Labor Relations Act § 7, 29 U.S.C. § 157 (1988); *see also* WEISTART *supra* note 23, at 788.

32. WEISTART, *supra* note 23, at 263 (citing National Labor Relations Act § 8(d), 29 U.S.C. § 158(D) (1974)).

33. *Id.* at 792.

34. The exception is that illegal subjects may not be included in a collective bargaining agreement. *Id.* at 819 ("Illegal subjects may not be included in a collective bargaining agreement and the insistence of either side that they be included will constitute a failure to bargain in good faith. Such subjects include those which would be unlawful or inconsistent with the basic policies of the NLRA."); *see also* NLRB v. Wooster Div. of Borg-Warner, 356 U.S. 342, 349-50 (1958) (holding that employers cannot legally insist on acceptance of provisions outside the scope of mandatory bargaining).

> their own only if so provided in the collective bargaining agreement.[35]

Once the collective bargaining agreement is reached, so long as all parties have bargained in good faith, it will be binding upon all players in the league who have signed the standard player contract.[36] Whether or not an individual player agrees with negotiated terms is irrelevant, so long as the player representative "fairly represented" all members of the bargaining unit—minority as well as majority opinions.[37] The U.S. Supreme Court stated in *Ford Motor Co. v. Huffman*,

> Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. . . . [38] The complete satisfaction of all who are represented is hardly . . . expected. A wide range of reasonableness must be allowed a . . . bargaining representative in serving the unit it represents . . . . [39]

There is little room for individual negotiation as to terms and conditions of professional sports employment, at least so far as the non-"star" quality player is concerned. Therefore, many skilled athletes who disagree with certain league policies are forced into compliance in exchange for the opportunity to play their sport and fulfill their long-time dreams.[40]

Finally, in this discussion of the "business" of sport, one should note the special issues that arise regarding the termination of a professional athlete's contract. First, the individual player cannot end the contractual relationship easily; "the player has relatively few grounds upon which he can terminate, and if the player is a star performer, the team will attempt to do everything it can to avoid providing a basis for termination."[41] On the other hand, the team management has very

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35. WEISTART, *supra* note 23, at 806-07.

36. *Id.* at 803.

37. Steele v. Louisville & Nashville RR, 323 U.S. 192, 202 (1944) (holding that a labor organization must represent all members, minority as well as majority, and cannot act with "hostile discrimination" amongst its members). *See also* WEISTART *supra* note 23, at 807.

38. 345 U.S. 330 (1953).

39. *Id.* at 338.

40. It should be remembered that many professional athletes have been groomed to play their particular sport from a very tender age, sometimes as early as two years of age. Years of hard work are spent developing skills and abilities necessary to be a winner, sometimes neglecting education and occupational skills.

41. WEISTART, *supra* note 23, at 279.

broad discretion to terminate a player's contract, oftentimes ending his career.[42] Therefore, the non-"star" quality player is left with relatively little job security.[43]

B. Status and Working Conditions as an "Employee"

As was discussed in the preceding section, a professional athlete is bound by the numerous rules, policies and procedures of the league and the team by which he is employed, by the terms of his contract and by the collective bargaining agreement.[44] This section briefly will examine how the physical nature of sport raises special issues in terms of working conditions and terms to be met to retain the athlete's employment status.

In contracts for personal services, the employee's continuing physical ability to perform the service generally is considered a condition precedent to the employer's duty of remuneration.[45] In the world of the professional athlete, by signing the standard player contract:

> [T]he player typically represents that he is free from debilitating injuries. In addition, he makes a general warranty that he is in good physical condition, which presumably means that his general overall state of physical well being is such that he can endure the rigors of professional sports training and competition.[46]

For this reason, teams require thorough pre-season physical examinations. Furthermore, teams employ physicians and trainers to provide medical treatment and physical training in an effort to maintain the health and fitness of each player. Generally, a

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42. *Id.* at 230 (stating "clubs retain vast powers to terminate the contracts, and usually the careers, of the athletes they employ . . . [as] the coach must retain broad prerogatives to make personnel changes in his search for the magic combination of talent, attitude, and leadership which will produce a winning team"). Although teams, and oftentimes coaches and general managers of teams, retain broad discretion to terminate a player's contract, any termination must have some grounds based in the written contract. *Id.* at 230-31.

There are four grounds for termination which are often recognized in standard player contracts. The team may terminate if the athlete: (1) is not physically fit; (2) fails to exhibit sufficient skill and ability to play the particular sport; (3) fails to observe team and league rules or (4) otherwise materially breaches the contract. *Id.* at 236-37. Furthermore, some of the standard player contracts recognize a fifth ground, for the athlete's failure to exhibit good moral character. *Id.* at 237.

43. WEISTART, *supra* note 23, at 197.

44. *See* discussion *supra* part I.A.

45. WEISTART, *supra* note 23, at 216.

46. *Id.* at 216-17.

team's standard player contract defines the consequences of a failure to maintain one's physical fitness to play or of a failure to pass the pre-season medical exam to include suspension or termination of the player's contract.[47]

Generally, the standard player contracts for most leagues are very explicit in providing for the question of who bears the risk of injuries. As physical injuries often are considered by players and management alike to be a cost of the game, the team generally accepts liability for injuries sustained by the player while performing the terms of the contract.[48] These expenses are generally limited by the contract to those incurred within the time frame of the contract and not otherwise covered by medical insurance.[49] As soon as the player is once again physically fit to return to play, he is obligated to play under his contract; this determination often is based upon the sole discretion of the team physician.[50] Interestingly, a conflict may be involved here when the team physician makes this determination. "If he is found not to be [fit to play], then he will continue to be a drain on the club's payroll without contributing to its revenue-producing ventures on the field."[51] Should the player be declared fit to play and then found to no longer exhibit the minimum level of skill required to play on that team, the team has a ground for termination of his contract.[52]

The risk of physical injury in such sports as basketball, baseball, football and ice hockey is great. Economically speaking, from the perspective of the professional athlete, "the consequences of an injury can be quite severe, as the athlete's earning potential is reduced from that of highly paid player to that of a poorly trained, unspecialized male, who in many cases does not even have a college degree despite four years attend-

47. *Id.* at 217.

48. *Id.* at 217.

49. *Id.* at 222.

50. *Id.* at 240-41. It should be noted that, generally, the team physician is given great discretion, if not sole discretion, to determine whether the athlete is physically fit to play. "The athlete may well be concerned that a . . . physician's loyalty to the team will influence his decision." WEISTART, *supra* note 23, at 241. *See also* Charles V. Russell, *Legal and Ethical Conflicts Arising from the Team Physician's Dual Obligations to the Athlete and Management*, 10 SETON HALL LEGIS J. 299 (1987); Joseph H. King, Jr., *The Duty and Standard of Care for Team Physicians*, 18 HOUS L REV 657 (1981).

51. WEISTART, *supra* note 23, at 227.

52. *Id.* at 228.

ance at such an institution."[53] Although this commentary might be unfairly harsh, it illustrates the extreme consequences which are sometimes involved in the world of the injured professional athlete.

Obviously, the risk of injury to a player is a subject which is clearly provided for, in advance, by the professional sports team. It is, to some extent, considered a cost of business. Furthermore, teams incur other costs in an attempt to prevent such injuries; they do this by monitoring the fitness and health of each player, as provided for in the terms of the contract and collective bargaining agreement. On the other hand, although the athletes who incur the physical risks of injury can be presumed to realize that they are putting themselves at risk by playing, they continue to play the sport. Oftentimes these athletes are not prepared for any other career should their sports career suddenly end. Quite possibly it is this very same reason why most athletes continue to play, despite the risks of physical injury to themselves. Other factors that come into play in the world of professional sports are the incentives of wealth, fame, a glamorous lifestyle and the achievement of a dream created in childhood. These are factors which do not commonly play into the analysis of why, in the realm of the general public, employees endure working conditions which may be unsafe and comply with policies with which they may disagree.

C. Publicity, Glamour and Eulogy

Finally, in this note's discussion of why the legality and ethics of mandatory HIV testing policies of professional sports teams and leagues need to be examined, one must look at the factors of publicity and the sports lifestyle.

Generally speaking, professional athletes are often in the public eye, in and out of the sports pages. A clear example of the significance of this, within the context of the AIDS issue, was the threat by the press to disclose to the public tennis star Arthur Ashe's battle with AIDS.[54] Through the years, many

53. *Id.* at 215-16.

54. Arthur Ashe, who has since died of an AIDS-related infection, grudgingly reported his HIV infection in late 1991, as it was about to be announced by the press. A former Wimbledon and U.S. Open tennis champion, Ashe became infected with the virus when he had a blood transfusion during heart bypass surgery. *See generally* Tye, *supra*

have argued that once a professional athlete signs a "big league" contract, he gives up his right to privacy.[55]

It should be noted that the publicity of professional athletes need not always be negative. For example, Earvin "Magic" Johnson clearly and deliberately has used his celebrity, and its companion publicity, to educate the general public about HIV infection and AIDS.[56] Furthermore, the publicity regarding the great debate within the four major professional leagues as to whether to initiate a mandatory HIV testing policy for their players has raised much discourse on the subject. Such discussion educates the general public regarding the rationales behind mandatory testing of any group and may inform people of their individual rights.

Finally, the glamour of the lifestyle of professional athletes is an obvious reason to single them out. Before discussing any potential risk of transmission of the HIV virus during the games, one must recognize "the games after the games. . . ."[57] Although statistics are not readily available on this point, it appears safe to say that professional athletes quite often are given the opportunity to engage in promiscuous behavior. Potentially, these athletes actually could engage in an equal amount of such unsafe[58] behavior. As one writer opined:

> Few athletes come out of high school or college prepared for the lifestyle they encounter. . . . Some athletes are so intoxicated with sudden wealth and celebrity, 'they invite the various vices that are readily available. . . . Others, either unsophisticated or uneducated in dealing with new-found money

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note 8, at 61; *Ashe Says AIDS Sports Testing May Be Necessary*, PRESS ASSOC NEWSFILE, Dec. 1, 1992, *available in* LEXIS, Nexis Library, Wires file.

55. A related issue will be discussed in Part VI of this Note.

56. *See, e.g.*, SPETALNICK, *supra* note 2 (stating that President George Bush named Johnson to the National Commission on AIDS, only days after Johnson first announced that he would retire due to HIV infection).

57. *See* Knisley & Meyerhoff, *supra* note 9, at 15; Greg Boeck, *Fears Slow Down The Walk on the Wild Side*, USA TODAY, Apr. 16, 1992, at 12C; *see also* Julie Cart & Randy Harvey, *Sex Beckons Pro Athletes at Every Turn*, TORONTO STAR, Nov. 10, 1991, at G8.

As one commentator stated, "clearly the risk doesn't happen in the sports arena, but in an athlete's personal life." Krucoff, *supra* note 10, at Z20. Experts are predicting an increase in the number of athletes who will become HIV-positive because of sexual promiscuity and intravenous drug use. *Id.* An example of the extent to which such promiscuity may be carried is seen in the case of NBA superstar Wilt Chamberlain. The fifty-five year old athlete, in his 1991 autobiography, disclosed that he had had sex with over 20,000 women during his professional sports career. Cart & Harvey, *supra*, at G8.

58. *See infra* part II.

> and fame, are easy targets for groupies looking for a "trophy" or women looking to become "subsidiaries." . . .[59]

On the other hand:

> [t]hat is not to suggest that athletes are naturally more promiscuous than the general public, but the combination of their healthy bodies and paychecks, celebrity and availability on those long, lonely nights on the road makes for a powerful aphrodisiac for members of the opposite sex.[60]

Clearly, there exists an issue whether professional athletes' celebrity, and sexual conduct in response to that celebrity, might make them a "high reservoir" of infection with the deadly AIDS virus. This may raise causation issues regarding HIV transmission in sports.

II. AIDS AND THE TRANSMISSION OF HIV

In 1981, *Morbidity and Mortality Weekly Report ("MMWR")* first reported a mysterious and deadly disease, now known as AIDS.[61] First recognized as a disease of young homosexual males and intravenous drug users, AIDS soon spread to pandemic proportions, no longer sparing heterosexual males, females and children.[62] The cause of AIDS has since been linked to a human virus,[63] known as HIV. In overly simplistic terms, the HIV virus attacks a human's immune system by destroying one type of T-lymphocyte, known as T-helper, or "T-4" cells. This prevents the multiplication of T-killer cells, thereby weakening the immune system. Gradually, the immune system is so weakened that it cannot fight off opportunistic infections,[64] which eventually leads to the patient's death. Studies have shown that most to all HIV-infected persons will develop

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59. Boeck, *supra* note 57.

60. Cart & Harvey, *supra* note 57 at C1.

61. CLOSEN ET AL., *supra* note 5, at 47-48; *see also id.* at 51-52 (discussing why AIDS was first reported in *MMWR* rather than a more prestigious, peer-reviewed journal).

62. Of the 242,146 cases of AIDS reported in the U.S. as of September 30, 1992, the Centers for Disease Control and Prevention in Atlanta report that 15,221 of these persons are believed to have contracted the virus through heterosexual sex, 136,912 through homosexual sex and 54,475 through intravenous drug use. *See* Michael Arace, *Magic: A Victim of Baseless Fears*, THE HARTFORD COURANT, Nov. 4, 1992, at C1. It should be noted that these figures only include those cases of AIDS which have been reported. Experts estimate that, as of November 1992, one million persons in the U.S. were infected with HIV. *Id.*

63. *See, e.g.*, JOHN LANGONE, AIDS THE FACTS 22-24 (1988) (describing how a virus works by invading a cell and using it to rapidly reproduce copies of itself).

64. Those infections which generally do not cause disease in humans with properly functioning immune systems are known as opportunistic infections.

AIDS within seven to ten years from the time of infection.[65] The drug azidothymidine, commonly known as AZT, has been shown to slow the onset of the symptoms of AIDS-related complex ("ARC") and AIDS in HIV-infected individuals, by preventing retroviral replication.[66]

The HIV virus has been found in the following bodily fluids of infected persons: blood, serum, semen, vaginal fluids, breast milk, saliva and tears.[67] The virus commonly is transmitted through both homosexual and heterosexual intercourse, blood transfusions and the sharing of intravenous needles. An HIV-infected pregnant woman may transmit the virus to her child *in utero*, during vaginal delivery or possibly even through breast feeding. It is important to note that no cases of transmission through tears or saliva have been reported, although this is considered theoretically possible.

The issue of theoretical possibilities for HIV transmission leads to often-asked questions regarding the scope of potential transmission through blood-to-blood contact. Various groups, including athletes and certain health care workers, are asking what the risks are of blood-to-blood transmission through open wounds. At this time, the best answer that experts can give is that it is "theoretically possible", yet "extremely unlikely."[68] This is usually followed by comments regarding the lack of awareness of any documented cases, as of yet.[69] A spokesman for the Centers for Disease Control and Prevention in Atlanta, Georgia, was quoted as saying:

> Theoretically, you could have blood-to-blood transmission via contact of open wounds, but it's extremely unlikely. Ninety percent of AIDS is transmitted by sex and injecting drug use. That's where your real risk is. . . . We are not aware of any

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65. Seven to ten years is a median figure. A. Alyce Werdel, *Mandatory AIDS Testing: The Legal, Ethical and Practical Issues*, 5 NOTRE DAME J L. ETHICS & PUB POL'Y 155, 160 (1990).

66. *Id.* at 187.

67. It should be noted that "women . . . are themselves very poor transmitters of the disease. Most studies show they are four to five times more likely to get AIDS from a male partner than vice versa." Dimanno, *supra* note 7, at B1. "Although the virus is present in both semen and cervical fluid, it is transmitted more efficiently from men to women than from women to men. This is most likely due to the fact that men inoculate women with a substantial dose of the virus during sexual intercourse, and women naturally retain the bodily secretions." Werdel, *supra* note 65, at 161.

68. *See, e.g.*, Arace, *supra* note 62, at C1.

69. *See id.*

> documented transmission through any type of sports activity. We have no data, but it would be extremely, extremely doubtful it could happen.[70]

A joint statement by the World Health Organization and the International Federation of Sports Medicine appears to give the possibility a certain amount of merit:

> There is a possible very low risk of HIV transmission if an infected athlete with a bleeding wound or a skin lesion comes into direct contact with another athlete who has a skin lesion or exposed mucous membrane that could possibly serve as a portal of entry for the virus.[71]

Such uncertainty, although unavoidable at this point, leads to fear, which in turn leads to calls for extreme action such as mandatory HIV antibody testing.

III. HIV ANTIBODY TESTING

A. Procedures, Proposals and Laws

The term "HIV testing," though widely used, often is labeled as inaccurate in describing the means for detecting the deadly virus in individuals. While testing for the HIV virus itself is possible, the common practice is to detect the presence of certain antibodies which are produced by the human immune system in response to the HIV virus.

The most commonly used test is the Enzyme-Linked Immunosorbant Assay, commonly referred to as the ELISA test. It is typically the first test given, due to its reasonably low expense and its fairly consistent results.[72] If a positive result is found, the test generally is repeated a second time.[73] Generally, typical protocol requires that two positive ELISA results be confirmed by a more precise test called the Western Blot test.[74] This confirmation test "identifies antibodies to proteins of a specific molecular weight, and therefore helps to eliminate false positives."[75] Should the results of the Western Blot be unclear, a third test, the Immunofluorescence Assay is available. It de-

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70. *Id.*
71. Krucoff, *supra* note 10, at Z20.
72. Field, *supra* note 5, at 38.
73. *Id.*
74. *Id.*
75. *Id.* at 38 n.11 (quoting AIDS AND THE LAW A GUIDE FOR THE PUBLIC 130 (Harlon L. Dalton et al., eds. 1987)).

tects, through a dye process, whether cells are infected by the virus.[76] This testing protocol has been developed in an effort to achieve the objectives of ensuring an affordable accurate testing and preventing the potential discrimination and mental anguish which may accompany a false positive result.

When discussing the accuracy of HIV antibody testing, there are three factors to be considered. The first, alluded to above, is the internal accuracy of the test itself[77] — the greater the ability of a test to detect when HIV antibodies are present, the less ability that same test has to detect the absence of HIV infection when the individual is not infected.[78] Second, the number of false positives and false negatives also will depend upon the risk factors of the particular population tested. In short, "false positive rates are much greater in low risk, or low prevalence, populations."[79] Finally, when determining the effectiveness of any HIV antibody testing policy, one must consider the timeline of the disease as well. In the infection process, there is potential for variation in the length of the latency period. Simply stated, there is a period of time, varying in length, between actual infection and the immune system's production of antibodies in response to infection. The period ranges from a few months to eighteen months, and even longer periods have been reported.[80] However, a high percentage of those infected will test positive within six weeks to three months after infection. This is important to note because, during this latency period, an HIV-infected individual will test negative yet be able to transmit HIV to another.[81] Clearly, these are factors which must be kept in mind when determining the effectiveness and necessity of a mandatory testing policy of any specific population.

Since the AIDS pandemic has spread throughout humankind, many have argued for extreme measures to prevent the transmission of the deadly virus. Arguments are made as to

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76. *Id.* at 38.

77. The possibility of human error on the part of the examiners is not considered when discussing the internal accuracy of the test itself.

78. Field, *supra* note 5, at 39-40.

79. *Id.* at 40-41; *see generally* Klemens B. Meyer & Stephen G. Pauker, *Screening for HIV: Can We Afford the False Positive Rate?*, 317 NEW ENG J MED 238, 239 (1987) (discussing false positive rates of HIV antibody testing in low-risk populations).

80. Field, *supra* note 5, at 41-42.

81. *Id.* at 41.

why, or why not, universal mandatory testing is appropriate in our society. Proponents often contend that mandatory testing of every individual would prevent transmission, at least to some extent, as well as provide the necessary specific data for epidemiological study. Some have gone as far as to say that such data could be used in an effort to quarantine HIV-infected persons.[82] Opponents of universal mandatory testing proposals generally have countered with arguments regarding the extremely high cost, the unrealistic dimensions of such a project, the lack of proven effectiveness and, most importantly, the violation of citizens' constitutional rights.[83]

State legislatures generally have agreed with the opponents of mandatory HIV testing. A number of states have enacted some variation of an AIDS prevention act;[84] some twenty states adopted statutes prohibiting involuntary HIV testing.[85] Furthermore, the vast majority of states require some form of consent for an individual to be tested for HIV antibodies.[86]

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82. *See, e.g.*, Wendy E., *AIDS and Quarantine: The Revival of an Archaic Doctrine*, 14 HOFSTRA L. REV 53, 73 (1985); *see also* Dorothy R. Gregory, *AIDS—The Leprosy of the 1980's: Is There a Case for Quarantine?*, 9 J LEGAL MED 547, 552-55 (1988) (paralleling Babylonian and biblical quarantine of lepers with modern-day suggestions for quarantine of AIDS patients). *But see* David P.T. Price, *Between Scylla and Charybdis: Charting a Course to Reconcile the Duty of Confidentiality and the Duty to Warn in the AIDS Context*, 94 DICK L REV 435, 444-62 (1990).

83. *See, e.g.*, Field, *supra* note 5; Lawrence O. Gostin et al., *The Case Against Compulsory Casefinding in Controlling AIDS — Testing, Screening and Reporting*, 12 AM J L & MED 7 (1986). *But see* Werdel, *supra* note 65.

84. *See, e.g.*, ALA. CODE § 22-11A-54 (Supp. 1993); DEL CODE ANN tit. 16, § 1203 (Supp. 1992); GA CODE ANN § 24-9-47 (Michie Supp. 1993); KY REV STAT ANN § 214.181 (Baldwin 1991); N C GEN STAT § 130A-143 (1992); OHIO REV CODE ANN § 3701.243 (Anderson 1992); 35 PA CONS STAT § 7607 (1993).

85. *See* ALA CODE § 22-11A-54 (Supp. 1993), ARIZ REV STAT ANN § 36-63 (1993), ARK CODE ANN § 20-15-905 (Michie 1991), COLO REV STAT ANN § 25-4-1405 (West 1993), CONN GEN STAT ANN § 190-582 (West Supp. 1992), GA CODE ANN § 31-17A-2, (Michie Supp. 1993) HAW REV STAT ANN § 325-16 (1992), IND CODE ANN § 16-1-9.5-2.5 (West 1992), KY REV STAT ANN § 214.181(5)(a) (Baldwin 1991); ME REV STAT ANN. tit. 5, § 19203-A (West 1993), MD [HEALTH GEN] CODE ANN § 18-336 (1993), MICH STAT ANN § 333.5133 (Callaghan 1993), MONT CODE ANN § 50-16-1007 (1993), N C GEN STAT § 130A-148(h) (1992), OHIO REV CODE ANN § 3701.292 (Anderson 1992), OKLA STAT ANN. tit. 63, § 1-502.3 (West 1993), PA CONS STAT ANN §7605(a) (1993), R I GEN LAWS § 23-6-12 (1993), TEX [HEALTH & SAFTETY] CODE ANN § 81.105 (West 1993), W VA CODE § 16-3C-2 (1993).

86. *See*, ALA CODE § 22-11A-51 (Supp. 1993); ARIZ REV STAT ANN § 36-663 (Supp. 1993); CAL HEALTH & SAVETY CODE § 199.22(a) (West 1990); CONN GEN STAT ANN § 19a-582 (West Supp. 1992); DEL CODE ANN. tit. 16, § 1202 (Supp. 1993); FLA STAT ANN § 381.004(3) (West 1993); HAW REV STAT ANN § 325-16 (1991); ILL ANN STAT ch. 111.½, ¶ 7304 (Supp. 1992); IND CODE ANN § 16-1-9.5-2.5 (West 1992); IOWA CODE ANN §§ 141.8-141.22 (West 1989); KY REV STAT ANN §§ 214.181(5) &

While four states merely imply that testing must be voluntary,[87] most statutes require some form of actual consent. Three state statutes require that actual "consent" be given,[88] while seven jurisdictions require "informed consent" by the person to be tested.[89] Five of seventeen[90] statutes require stringent written and informed consent.[91] As of 1994, only sixteen jurisdictions had not yet enacted legislation "resolving" the mandatory testing debate.[92]

Many of the jurisdictions promoting voluntary testing[93] and prohibiting HIV testing without consent, allow for limited

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.625(5) (Michie/Bobbs-Merrill Supp. 1991); LA REV. STAT ANN § 40:1300.13 (West 1992); ME REV STAT ANN tit. 5, § 19203-A (West 1964); MD. HEALTH-GEN CODE ANN § 18-336(b) (1990 & Supp. 1993); MICH COMP LAWS ANN § 333.5133 (West Supp. 1991); MINN STAT ANN. § 144.765 (West Supp. 1993); MONT CODE ANN. § 50-16-1007 (1991)*as amended by* 1993 Mont. Laws 476; N.Y PUB. HEALTH LAW § 2781 (McKinney Supp. 1993); N C. GEN STAT § 130A-148(h) (1992); OHIO REV CODE ANN. § 3701.242(A) (Anderson 1992); OKLA STAT ANN. tit. 63, § 1-502.3 (Supp. 1993); OR. REV STAT § 433.045 (1988); PA. CONS STAT ANN § 7605(a) (1993); R I GEN LAWS. §§ 23-6-12, -13 (1956); TEX HEALTH & SAFETY CODE § 81.105 (West 1992); WASH. REV CODE ANN § 70.24.330 (West 1992); W VA. CODE § 16-3C-2 (1993); WIS STAT ANN § 146.025 (West 1991 & Supp. 1992)

87. *See* ARK CODE ANN. § 20-15-905 (Michie 1991); COLO REV STAT ANN. § 25-4-1401 (1989 & Supp. 1993); GA CODE ANN. § 31-17A-2 to 31-17A-3 (Michie Supp. 1993); MO ANN. STAT § 191.674 (Vernon Supp. 1992).

88. IND CODE ANN § 16-1-9.5-2.5 (West 1992); OKLA STAT ANN. tit. 63, § 1-502.3 (Supp. 1993); WASH REV CODE ANN § 70.24.330 (West 1992).

89. CAL HEALTH & SAFETY CODE § 199.22(a) (West 1990); FLA STAT ANN § 381.004(3) (West 1993); KY REV. STAT ANN §§ 214.181(5), 214.625(5) (Michie/Bobbs-Merrill Supp. 1991); N C GEN STAT § 130A-148 (1992); OHIO REV CODE ANN § 3701.242 (E)(1), (E)(3), (E)(5)(Anderson 1992); OR REV STAT § 433.045 (1988); TEX HEALTH & SAFETY CODE § 81.105 (West Supp. 1992).

90. Sixteen if 42 U.S.C. is not included.

91. 42 U.S.C. § 300ff-61 (West Supp. 1994); ALA CODE § 22-11A-51 (Supp. 1993); CONN GEN STAT ANN § 19a-582 (West Supp. 1992); DEL CODE ANN. tit. 16, § 1202 (Supp. 1992); HAW REV STAT § 325-16 (1991); ILL ANN STAT ch. 111½, ¶ 7304 (Supp. 1992); LA. REV. STAT ANN § 40:1300.13 (West Supp. 1992); ME REV. STAT ANN. tit. 5, § 19203-A (West 1964); MD CODE ANN. HEALTH-GEN § 18-336(b) (1990 & Supp. 1993); MICH COMP LAWS ANN § 333.5133 (West Supp. 1991); MONT. CODE ANN § 50-16-1007 (1991) *as amended by* 1993 Mont. Laws 476; N Y PUB. HEALTH LAW § 2781 (McKinney Supp. 1993); 35 PA CONS STAT ANN § 7605(a) (Supp. 1991); R I GEN. LAWS §§ 23-6-12 to -13 (1956); WIS. STAT ANN § 146.025 (West Supp. 1992).

92. Alaska, District of Columbia, Idaho, Kansas, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, South Carolina, South Dakota, Tennessee, Vermont and Virginia.

93. *See, e.g.*, 35 PA CONS STAT ANN. § 7602(c) (1993) (stating that "[i]t is the intent of the General Assembly to promote confidential testing on an informed and voluntary basis in order to encourage those most in need to obtain testing and appropriate counseling.").

exceptions. These include exceptions for medical necessity,[94] in criminal justice settings,[95] and for life insurance underwriting purposes.[96] Furthermore, as one commentator notes:

> Mandatory screening is already a reality for all Defense Department recruits, for all potential immigrants to the U.S., and for State Department foreign service personnel. The Federal Bureau of Prisons and fourteen states have mandatory screening programs for prison inmates, and the courts have permitted prison officials wide discretion in controlling inmates who have AIDS. Courts are less accommodating to mandatory testing in other contexts, such as the workplace.[97]

In certain workplace settings, such as that of the professional athlete, there can be some debate as to whether a mandatory HIV testing policy is truly "involuntary" or whether consent (possibly even informed and written consent) has been given.[98]

B. Analysis to be Applied to the Professional Athlete Testing Proposal

In an effort to analyze the legalities and ethics of a proposed mandatory HIV testing policy of a professional sports club or league to be applied to its players, this note will use a variation of the analytical criteria provided by Harvard Law Professor Martha A. Field.[99] As Lawrence O. Gostin suggested, "attempts to evaluate each proposal [for HIV screening of a particular population] without a systematic theory of analysis could reach inconsistent results."[100]

Field provides several general principles for guiding the analysis and evaluation of testing proposals:

> First, the purpose of testing must be ethically acceptable. . . . Second, the proposed use of test results must contribute to the program's goal. . . . Third, the test program must be the least restrictive or intrusive means for attaining the pro-

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94. *See, e.g,* OHIO REV CODE ANN § 3701.24.2(E)(3) & (6) (Anderson 1992); 35 PA CONS STAT. ANN § 7605(g)(1)(i) (1993).

95. *See, e.g.,* LA REV STAT. ANN. § 40:1300.13(F)(7) (West 1992) (requiring HIV testing in rape and incest cases); W VA CODE § 16-3C-2(f) (Supp. 1993) (mandating HIV testing of persons convicted of sex offenses).

96. *See* AIDS & THE LAW Appendix U (William H.L. Dornette, ed., Supp. 1991) (summarizing laws regarding HIV testing by insurers).

97. PRICE, *supra* note 82, at 446-47.

98. *See infra* part VI.B.

99. Field, *supra* note 5.

100. Gostin, *supra* note 82, at 21.

> gram's purpose. . . . Fourth, the benefit to public health must warrant the extent of intrusion into personal liberties.[101]

This note will employ these four principles to answer three questions regarding the proposed policy involving mandatory HIV testing of professional athletes.

The first principle remains largely unchanged. Does the proposed testing policy serve an ethically acceptable purpose? The second question attempts to blend Field's second and third principles by asking if mandatory testing is necessary and effective for achieving that purpose. My third question for analysis differs greatly from Field's fourth. Field evaluated proposed screening policies proposed to be put into effect by government entities (generally). Such government actions require a constitutional analysis. Conversely, as the professional sports teams and leagues are both a part of the private business sector, the Constitution does not, generally speaking, provide the grounds for complaints of individuals who may feel oppressed by their employers. However, the individual rights of the professional athlete, as developed in state, federal and common law, deserve attention in the analysis of this issue. For this reason, the third question asks if a mandatory testing policy in professional sports violates the individual rights of the athlete?

Under this variation of the Field analysis, a conclusion that mandatory HIV testing of professional athletes would be both ethical and legal is warranted only if all three questions received a well-reasoned affirmative answer.

IV. AN ETHICALLY ACCEPTABLE PURPOSE?

Ethics is the first issue that must be addressed when evaluating a proposal for mandating HIV testing of all players on a particular team or in a particular league. What is the true purpose for the testing policy, and is it ethically acceptable? As ethics are merely a "system or code of morals,"[102] the question

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101. Field, *supra* note 5, at 64-65. Other commentators provide similar lists of criteria for assessing mandatory testing proposals. *See* GOSTIN, *supra* note 83, at 21-24. Gostin lists five criteria for analysis: (1) a high reservoir of infection; (2) a significant risk of transmission; (3) the effective use of test results; (4) the critical consequences of testing do not outweigh the benefits; and (5) the existence of no less restrictive or intrusive means. *Id.* at 21-24.

Id.

102. WEBSTER'S, *supra* note 1, at 481.

arises as to what should constitute "ethically acceptable"? For purposes of this analysis, this note will utilize the well-known system of ethics known as utilitarianism. In order to be considered "ethically acceptable" under this doctrine, a proposal for mandatory testing should be able "to bring about the greatest happiness of the greatest number."[103] Therefore, the utility of mandatory testing must be determined as to the impact on the athlete himself, the teammates, the opponents, the coaches and other team management, the team trainers, the team physician(s), the owner(s) of the team, the player's family, the viewing audience and other fans and the general public.

Proponents of mandatory HIV testing in professional sports are likely to claim that their policy will prevent, or help to prevent, the transmission of the HIV virus, at least within the sports community itself. Most would agree with Field's statement that both "[p]rotecting public health and preventing transmission of HIV are acceptable purposes . . . ."[104] Under the utilitarian approach, preventing HIV transmission, even if only within the sports community, would bring great benefit to an enormous number of persons; therefore, this general purpose easily could be argued to be ethically acceptable for purposes of this analysis.

Protection of the HIV-infected player is the second purpose which proponents would suggest is served by mandatory testing. This arguably could mean that the team which tests all players hopes to protect its investment in any player testing positive by providing the necessary medical treatment and drugs, such as AZT,[105] to prolong the player's career. Although not necessarily a purely humanitarian gesture, the protection of a business investment or an "asset"[106] clearly would be considered ethically acceptable under some systems of ethics, such as Materialism.[107] From the utilitarian view, it may be argued that this purpose is ethically acceptable as it provides the greatest happiness to the greatest number. For example, the player who has worked for many years in an attempt to achieve

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103. *Id.* at 1565.

104. Field, *supra* note 5, at 64.

105. *See supra* note 65 and accompanying text.

106. *See supra* part I.A.

107. WEBSTER'S, *supra* note 1, at 875 (defining materialism as "the doctrine that comfort, pleasure, and wealth are the only or highest goals or values").

his dream of being a professional athlete may continue to live this dream; team management and owner(s), teammates, the viewing audience and fans of the team may continue to receive the benefits inherent in this player's continued efforts as a part of a team; and the family of the player continues to receive the benefits inherent in the player's theoretically longer career and life. It should be noted that, although this purpose is on its face ethically acceptable, it may lead to discriminatory practices if the team's management takes an overly paternalistic approach to protecting players, such as limiting a player's actual involvement in the game "for his own good."

Another purpose which some proponents may argue that mandatory HIV testing achieves is the protection of other players, coaches and trainers when management knows to use certain precautions when dealing with an HIV-positive player. Although this appears to be ethically acceptable, this purpose is somewhat suspect. In team sports, especially those with a level of contact which might make them "bloody" sports,[108] universal precautions should be taken regardless of whether anyone is HIV-positive on the team.[109] Safeguarding those who take care of a player, perhaps after an injury, raises issues similar to the HIV testing debate in the health care setting. The conclusion reached by Professor Gostin regarding screening health care patients and staff is equally pertinent to the sports setting. He states:

> The relatively low level of risk in the health care setting does not justify a wide scale screening program. Even if a screening program is implemented, its utility may be questionable. The health care worker should use the strictest precautions to avoid contracting HIV from the body fluids . . . [.] These precautions include using rubber gloves if the worker has a cut or open sore, and avoiding parenteral exposure. Health care workers should *always* be cautious in handling blood, body fluids, and items soiled with these substances.[110]

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108. *See supra* note 10 and accompanying text.

109. Universal precautions should be taken at all times when blood is involved in sport, whether or not anyone is known to be HIV-positive on the team. Mandatory testing of one team would not eliminate the chances of other teams' players being HIV-positive; mandatory testing of the entire league would raise disclosure and confidentiality problems. Furthermore, the existence of the latency period clearly illustrates the reason why universal precautions should be used at all times and in relation to all players, not just those testing positive. *See supra* notes 81-82 and accompanying text.

110. Gostin, *supra* note 83, at 37-38 (emphasis added).

The final purpose to be discussed involves the determination of fitness for the sport. Contractually, the player has represented that his "general overall state of physical well-being is such that he can endure the rigors of professional sports training and competition,"[111] so monitoring all aspects of the player's health which may affect his ability to perform under the contract is clearly an ethically acceptable purpose on its face. Arguments supporting this conclusion under Utilitarianism would be quite similar to those discussed earlier supporting the acceptance of the purpose of protecting an HIV-infected athlete. Although this purpose may appear ethically acceptable, this fitness requirement in the standard player contract could easily be used as a front for discriminatory practices.[112]

Although some of these purposes arguably may be a mere front for discrimination against HIV-positive athletes, which is clearly ethically unacceptable, proponents of mandatory testing in professional sports argue that these purposes are acceptable, even under utilitarian principles. Assuming that these individuals are correct and that an ethically acceptable purpose is served by mandatory HIV testing, one must next determine if mandatory testing is necessary and effective for achieving that purpose.

V. NECESSARY AND EFFECTIVE FOR ACHIEVING A PURPOSE?

The determination of whether mandatory HIV testing of all professional athletes, in a particular league or on a certain team, is necessary and effective for achieving a purpose depends upon the given purpose for the testing policy. For example, as has already been discussed, the safeguarding of players and staff by knowing to use certain precautions does not necessitate mandatory testing. In fact, mandatory testing would not be effective in safeguarding others, because HIV-infected players could test negative during the latency period and still be able to transmit the virus to others.[113] Furthermore, as Field states, "the false sense of security and reduced precautions that

111. WEISTART, *supra* note 23, at 216-17.
112. *See infra* part VI. A., D.
113. Field, *supra* note 5, at 41.

testing can breed pose a serious difficulty with a testing program."[114]

On the other hand, two other purposes are effectively achieved by mandatory testing. If a team wishes to determine the fitness of a player or desires to protect the team's investment in each athlete (by supplying the appropriate medical care and AZT to those testing positive), HIV testing of all athletes is necessary. In each case, the team's owners are, to some extent, protecting their investment. Therefore, anything less than mandatory testing would be ineffective for these purposes.

Although the broadly stated purpose of preventing transmission of the HIV virus is the most likely to go uncontested as ethically acceptable, its vagueness leaves much room for debate as to whether mandatory testing is necessary, or even effective, for preventing transmission. The first question that arises is whether the transmission sought to be prevented is potential transmission during the game. Or, is the purpose to also prevent transmission on or off the playing field, perhaps by encouraging behavior modification? If the goal is to answer the latter, it would be difficult to prove that mandatory testing is necessary, or even effective. Although mandatory testing arguably would allow a larger number (theoretically one-hundred percent) to know their HIV status than a voluntary testing proposal would, a number of variations for voluntary testing and education programs could be proposed which could be as effective, or more effective, in modifying behavior to prevent transmission. With such equally effective options available, mandatory testing would not seem to be necessary to achieve the purposes defined above.

Should one define the purpose of mandatory testing as the prevention of transmission only on the playing field, the analysis becomes a little more complex. First, the issue of the risk of transmission during play must be touched upon. Some argue that there is no true risk,[115] and therefore no need for mandatory testing. Those in the sports community who advocate mandatory testing of professional athletes often base their fears of transmission on very small theoretical possibilities,[116]

114. *Id.* at 60.
115. *See supra* notes 68-71 and accompanying text.
116. *See supra* notes 68-71 and accompanying text.

coupled with generalizations of athletes' opportunities for unsafe promiscuous sexual behavior.[117] Professor Gostin states that the mere possibility of a group being at "high" risk is inadequate:

> To establish the effectiveness of a screening program, it is necessary to demonstrate not only a high reservoir of infection, but also a high risk of transmission. Effective screening programs require a setting where transmission of infection is reasonably likely to occur. Screening decisions *should be grounded upon the best scientific and epidemiologic evidence* relating to transmission of the infection. . . . [Furthermore,] [i]f all persons within a selected population are to be screened, the resulting information must be used effectively to reduce the spread of infection. If the precautions that might be taken cannot reduce transmission, there is no purpose to a screening program.[118]

Therefore, it could be argued that mandatory testing is ineffective for reducing the spread of the virus through transmission on the playing field, as experts currently think that that risk is "extremely unlikely."[119] Mandating HIV testing for athletes is an extreme solution to what is currently considered by experts a practically nonexistent problem. Therefore, the necessity of a mandatory testing policy is called into question.

For the sake of the ensuing legal argument, this note will assume that a mandatory testing program whereby a team routinely tests each of its players pursuant to team rules (incorporated into the standard player contract) is both necessary and effective for preventing the transmission of the HIV virus on the playing field. The issue then becomes whether such a policy effectively could prevent the risk of transmission without violating the players' individual rights.

VI. NON-VIOLATIVE OF INDIVIDUAL RIGHTS?

Individual rights of the athletes which clearly must be protected are established by state statutes, federal legislation and the common law. The four legal issues which will be discussed in this section are: the common law right to privacy, the state statutory issues of consent and confidentiality and the freedom

117. *See supra* notes 57-60 and accompanying text.
118. Gostin, *supra* note 83, at 23 (emphasis added).
119. *See supra* notes 68 and 70 and accompanying text.

from employment discrimination, as illustrated by the federally-enacted Americans with Disabilities Act.[120]

A. The Common Law Privacy Issue

The broadest of an individual athlete's individual rights likely to be affected by a mandatory HIV testing policy is his right of privacy. This right of privacy generally has been defined as:

> The right to be let alone; the right of a person to be free from unwarranted publicity. . . . The right of an individual . . . to withhold himself and his property from public scrutiny, if he so chooses.[121]

As Professor Gostin states, "[s]creening necessarily entails a restriction on individuals' rights to privacy; it involves blood sampling and the collection of sensitive information."[122] Proponents of mandatory testing of professional athletes may argue that an athlete's acceptance of the standard player contract and its corresponding rules negates any invasion of privacy. The physical nature of sport, as has been discussed earlier, requires certain medical examinations and blood tests to determine, for example, whether a player is physically fit to play as required by his contract and whether a player is abusing drugs as is prohibited by team and league rules.[123] Therefore, it may be argued that a player's individual right to privacy is abandoned when he signs a contract, and thereby agrees to abide by team policies. Furthermore, the athlete's privacy interest is, arguably, no more violated by the HIV testing than by any other routine medical tests required by team and league policies. In fact, if the purpose of the testing policy is to determine a player's fitness to play, a player arguably has obligated himself to prove his fitness under the contract by subjecting himself to such testing, if necessary.

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120. 42 U.S.C.A. §§ 12101-12213 (1993).

121. BLACK'S LAW DICTIONARY 1075 (6th ed. 1990).

122. Gostin, *supra* note 83, at 21.

123. *See generally* Stephen F. Brock & Kevin M. McKenna, *Drug Testing in Sports*, 92 DICK L. REV 505 (1988) (discussing drug testing measures enacted by various athletic organizations); J. Otis Cochran, *Drug Testing of Athletes and the United States Constitution: Crisis and Conflict*, 92 DICK L REV. 571 (1988); Glenn M. Wong & Richard J. Ensor, *Major League Baseball and Drugs: Fight the Problem or the Player?*, 11 NOVA L REV 779 (1987) (discussing history and status of legalities of drug use and testing issues).

On the other hand, an HIV test is unlike any other blood test. In the modern world, persons who are HIV-positive are oftentimes discriminated against. "Fear, bigotry and lack of understanding are largely responsible for the consequences that can flow from a positive test result. The response is due in large part to other parties' fear that the infection will be transmitted."[124] Furthermore, the information collected should be considered more sensitive than that acquired through other medical and physical examinations, due to the fact that the virus is generally spread through some sort of "risky behavior" which oftentimes illustrates a person's most private lifestyle choices. Although it may be conceded that an athlete agreed to abide by the rules and policies of the team and league when he signed his lucrative contract, we, as a society, must begin to think about how far this should be allowed to go. To what extent may a professional athlete bargain away his individual rights?

In summary, it is clear that the individual athlete's right of privacy is intruded upon by a team or league which mandates HIV testing. But the issue remains whether or not that intrusion should be permitted, as it appears that such invasions of privacy are commonly (and often expressly) accepted by the athlete himself as part and parcel of the "big league" contract.

B. The State Statutory Issue of Consent

As discussed in Part IIIA of this note, the majority of states have enacted legislation requiring some form of consent for an individual to be tested for HIV antibodies.[125] These statutes require varying levels of consent, ranging from actual "consent" to "informed consent" to "written and informed consent."[126] It appears that such statutes are meant to prevent the very type of policy at issue in this note — the mandatory HIV testing of a class of persons such as employees. It, therefore, appears that in some states the mandatory testing of professional athletes by their respective teams and/or leagues would constitute a prima facie violation of state law.

However, this is not necessarily true. When a professional athlete signs the standard player contract, he agrees to abide

124. Field, *supra* note 5, at 45.
125. *See supra* notes 84-96 and accompanying text.
126. *See supra* notes 89-92 and accompanying text.

by the league and team rules and policies, which conceivably would include any mandatory HIV testing policy.[127] Although the NLRA requires the employer team to bargain with players collectively about terms and conditions of employment,[128] once a collective bargaining agreement is reached, it is binding on all players signing the standard player contract, whether or not they specifically agree with the bargain reached.[129] Therefore, it is theoretically possible for an individual athlete to sign a standard player contract, which could be seen as providing consent for HIV testing, without individually agreeing with the issue of "mandatory" HIV testing.

This leads directly to the issue of whether or not such a testing policy is actually "mandatory." Proponents of such testing argue that it is not truly mandatory as consent is implied when the player accepts his contract. Arguably, the player may choose not to be tested as a condition of his employment by refusing to sign a contract with such a team or in such a league. On the other hand, one must remember the years of hard work leading to a professional sports contract, the handsome monetary rewards which often accompany such a contract and the not uncommon factors of youth, inexperience and lack of other realistic opportunities. Even when a young, inexperienced athlete is adequately represented by an agent,[130] it appears to be fair to say that the athlete will choose to fulfill his dream and continue to play his sport. This may mean that he is required to consent to rules which are not generally applied to the general public, such as curfews, medical exams, routine drug testing and, arguably, routine HIV testing.

The idea that consent is provided upon acceptance of the standard player contract incorporating the rules of the team and league, might logically pass muster in a jurisdiction requiring simple "consent" to testing. This argument becomes more obtuse when dealing with those jurisdictions requiring "informed" or "written and informed" consent to testing. In such

127. *See supra* notes 27-29 and accompanying text.

128. *See* discussion *supra* Part I.B.

129. *See supra* notes 35-36 and accompanying text.

130. It should be noted that many sports agents are not sports attorneys and are not trained in the law. For this reason, "adequately represented" in this context refers to representation by an agent who is sufficiently aware of the player's individual rights regarding testing and who properly advises the athlete on those rights.

jurisdictions the team or league conceivably would need to require under its contract that the player sign a separate consent form after being informed of the testing procedures and potential impact of the results. Would this be sufficient to meet the requirements set forth by a state statute requiring written and informed consent, such as that of Pennsylvania? That statute states: "no HIV-related test shall be performed without first obtaining the informed written consent of the subject. Any consent shall be preceded by an explanation of the test, including its purpose, potential uses, limitations and the meaning of its results."[131] This question will likely be left to the courts.

When answering the question whether teams or leagues can require a player to provide informed consent for testing, the purposes behind the legal doctrine of informed consent should serve as a guide. One commentator has stated:

> Informed consent reflects one of our highest social values, individual autonomy. It reflects a strong emotional need for a sense of control over our own lives and an admission of our dependence upon others, and it deals with a subject of fundamental importance, our health. . . . Informed consent is comprised of two legal duties imposed on physicians: to inform patients about treatment, and to obtain their consent to treatment. These duties are imposed in order to assure that a person's right of self-determination may be maintained in one particular sphere of human activity, the acquisition of medical care. In addition to safeguarding the right to determine one's own destiny, the informed consent doctrine encourages, but does not require, patients to make informed or intelligent decisions about medical care. Viewed broadly, the duties of making disclosures and of obtaining consent are supposed to allow the patient to play the role of primary medical decision maker.[132]

Although proponents of testing are likely to argue that a player gives up, to a certain extent, his right to individual autonomy when it comes to his health and fitness, when he signs the contract, arguably true informed consent may not be given under penalty of losing a "big league" contract.

In conclusion, it appears possible for a team or league to finesse a mandatory HIV testing policy so as not to violate

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131. 35 PA CONS STAT ANN § 7605(a) (1993).

132. CHARLES W LIDZ ET AL., INFORMED CONSENT A STUDY OF DECISION-MAKING IN PSYCHIATRY 10 (1984).

state consent statutes. This is theoretically true even in those states requiring the strictest form of consent, which is both informed and written. Although such a testing policy appears to be a creative possibility for a sports team or league counsel, such a policy defeats the purposes of the legal doctrine of informed consent. Once again, to what extent may a professional athlete bargain away his individual rights to play his sport and to earn a living?

C. The State Statutory Issue of Confidentiality

When evaluating any HIV testing policy, it is essential to determine how the results of such tests will be used. Simply put, a mandatory HIV testing policy cannot be created in a vacuum, and "[t]he value of testing as a strategy to combat AIDS depends completely on how the information from tests will be used."[133] One key issue which many state legislatures have examined is that of the confidentiality of the test results.

A proposed mandatory testing policy affecting all professional athletes on a particular team or in a certain league must be artfully devised so as not to violate any state confidentiality statute. This appears to be very difficult in sports. In order to fulfill the theoretical purposes discussed in Part IV, a wide variety of individuals, such as coaches, trainers, team physicians and team owners, as well as possibly the teammates and opponents, are likely to have access to HIV results. This is analogous to the situation seen in the military, which has put into effect a mandatory testing policy:

> Even when a screening program purports to ensure it, confidentiality may be difficult to maintain. For example, in the military, the guarantee of confidentiality is ineffective in practice. "Confidential" test information can be released to the commander of the infected soldier, medical personnel, spouses, local authorities and others on a "need to know" basis. Moreover, the consequences typically associated with testing HIV-positive in the military, such as reassignment or restricted duties, can act as a signal to others of a soldier's infected status. *The military example illustrates that when rules designed to maintain confidentiality are not tightly drawn and narrowly tailored, they become meaningless.*[134]

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133. Field, *supra* note 5, at 37.
134. *Id.* at 49-50 (emphasis added).

In order to evaluate effectively a mandatory testing proposal for professional sports, one must look beyond the face of the policy to determine if it will in practice preserve the confidentiality of the individual athletes tested. Clearly, in the sports business, there is much room for violation of particular state confidentiality statutes.

D. The Federal Freedom from Employment Discrimination Issue

Once again the proposal for mandatory testing of athletes must be examined in the context of the intended uses of the results. Clearly, positive HIV antibody test results may be used in various ways. The only ethically acceptable uses are those which are in line with the ethically acceptable purposes for mandatory testing discussed in Part IV. The use of such results to discriminate against members of a team or league, or potential members (by terminating a player's contract solely on grounds of his HIV status, by failing to offer an HIV-positive player a new contract, or by reducing or eliminating an athlete's playing time) is not only unethical, but also illegal. Such discrimination against an HIV-infected athlete is illegal under the Americans with Disabilities Act ("ADA").[135]

The ADA states that an employer shall not "discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[136] The legislative history of the ADA and its corresponding regulations explains that HIV infection and AIDS are to be considered "disabilities" under the Act.[137]

In the realm of professional sports the issue of discrimination is especially noteworthy. As was stated previously, professional sports teams have very broad discretion to terminate or suspend a player.[138] One acceptable cause for such termination

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135. 42 U.S.C. §§ 12101-12213 (1993). *See also* Thomas v. Atascadero Unified School District Bd., 662 F. Supp. 376 (C.D. Cal. 1987); *District 27*, Community School v. Board of Educ., 502 N.Y.S. 2d 325 (N.Y. Sup. Ct. 1986).

136. 42 U.S.C. § 12112(a) (1993).

137. CLOSEN ET AL., *supra* note 5, at 31.

138. *See supra* note 42, and accompanying text.

is that the athlete is not physically fit for the rigors of the sport. Clearly, a team may finesse its way into terminating the contract of an HIV-positive player through this cause. However, if discriminatory practices ensue from a mandatory testing program, the ADA arguably would protect the individual athlete's right to be free from such discrimination in employment.

The problem, though, occurs in the fact that athletic employment is very different from other types of employment due to its physical nature.[139] It can be argued that the mandatory testing of professional athletes may slip through a loophole in the ADA. One commentator has noted that:

> To be protected from discrimination, the person with disabilities must be able to perform essential job functions to a reasonable standard. . . . [E]mployers may not use pre-employment medical examinations except to determine whether an employee can 'perform job-related functions.' Similarly, current employees cannot be required to undergo medical examinations except for job-related reasons. One standard specifically included in the law in response to fears of contagion is that employers 'may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.'[140]

This brings the analysis back to the issue of whether there is truly a risk of transmission from blood-to-blood contact during contact on the playing field. Those who argue that there is, and who advocate mandatory testing, are likely to contend that there is a direct threat to the health and safety of other players and training staff. They may argue that a termination of such a player's contract or even a modification of his usual playing status is therefore allowable under the ADA. Furthermore, they may question whether an HIV-infected athlete is able to perform job-related functions, due to the effects of the virus on the player's immune system.[141]

Although discrimination against employees with the virus is clearly prohibited, in general, by the ADA, a mandatory

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139. *See supra* part I.B.

140. CLOSEN ET AL., *supra* note 5, at 32.

141. 42 U.S.C. § 12112 (d) (4) (A) ("a covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability . . . unless such examination or inquiry is shown to be job related and consistent with business necessity.").

testing policy for professional athletes is not necessarily violative of the ADA merely because of the potential for discriminatory practices resulting from the test results. The statute expressly gives employers the right to conduct pre-employment medical examinations to determine whether the employee can perform job-related duties.[142] An employer also can require current employees to undergo medical exams for job-related reasons. Clearly, in the professional sports context, both of these types of medical examinations are completed to ensure the continued physical fitness of the players. The ADA seems to imply that such examinations may include HIV testing, so long as it is conducted for job-related reasons. Further, the ADA appears to imply that an employer may test for HIV antibodies so as not to allow an employee to pose a direct threat to the health or safety of others in the workplace.

Although mandatory testing of professional athletes for HIV antibodies appears to be legal under the ADA, if narrowly tailored to fit this loophole, the fact remains that such testing is likely to result in discriminatory practices due to the great discretion of team management to terminate employment. The existence of such a loophole in the ADA may allow a team to lawfully discriminate against HIV-positive athletes, but such discrimination arising out of mandatory testing may be considered in many ethical systems, including Utilitarianism, to be unethical.

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142. 42 U.S.C. § 12112 (d) (2) prohibits pre-employment medical examinations except as provided in 42 U.S.C. § 12112 (d) (3) which states that a medical examination may be required:

> [A]fter an offer of employment has been made . . . and prior to the commencement of the employment . . ., and [the employer] may condition an offer of employment on the results . . . if——
>
> (A) all entering employees are subjected to such an examination . . .;
>
> (B) information obtained regarding the medical condition . . . is collected and maintained on separate forms and in separate medical files and is treated as confidential medical record, except that——
>
> (i) supervisors and managers may be informed regarding necessary restrictions on the work . . . of the employee and necessary accommodations;
>
> (ii) first aid and safety personnel may be informed, when appropriate . . . .

It should also be noted that an employer "may make pre-employment inquiries into the ability of an applicant to perform job-related functions." 42 U.S.C. § 12112 (d) (2) (B).

VII. CONCLUSION

The conclusion that a mandatory HIV testing policy for professional athletes by their team or league would be both ethical and legal, is warranted only if the following three criteria are met. The first is the finding of an ethically acceptable purpose. Clearly, various purposes could be found which, at least facially, are ethically acceptable. The second question, whether mandatory testing is both necessary and effective for achieving the purpose, is more difficult to answer. Should it be decided that the only truly ethically acceptable purpose of mandatory testing is to prevent the transmission of the virus on the playing field, then it must be concluded that mandatory testing is neither necessary nor effective, due to what experts know about the low risk of transmission from blood-to-blood contact. Finally, it is difficult to conclude that mandatory HIV testing of professional athletes is truly non-violative of the players' individual rights under state, federal and common law. Although a little finesse in drafting the policy may circumvent some of the legal problems with such a testing proposal, such a policy is not truly non-violative of individual rights when players are forced to bargain away such rights in order to play their sport and earn a living. The sports arena naturally holds great potential for violating the athletes' individual rights of confidentiality and freedom from discrimination; therefore, one must determine what will be done with the results of a positive HIV test under such a policy, both in theory and in practice. Without a clearly affirmative finding of each of the three criteria discussed, this analysis concludes that a mandatory HIV testing proposal for professional athletes within a certain league or on a particular team, is neither legal nor ethical in today's society.

Since the original disclosure by Magic Johnson, many persons involved in the world of professional sports have called for mandatory HIV testing as the answer to the AIDS problem in sports. A common retort has been that there is no problem, as the risk of transmission of HIV through sports contact is infinitesimally small. Yet, the mere existence of such fear among the athletes, team management and owners, illustrates that there is a problem. The solution to this dilemma is not clear. This note posed the question "is mandatory HIV testing of professional athletes really the solution?" The answer is no.

EPILOGUE

Since the original writing of this note, a news story developed which once again illustrates the serious and grave nature of mandating HIV testing of professional athletes.

On April 16, 1993, thirty-year-old Ruben Palacio was stripped of his World Boxing Organization ("WBO") featherweight world championship title by the WBO Championship Committee, after testing positive for HIV during a mandatory pre-fight antibody test.[143] "It took journeyman boxer Ruben Palacio 12 years to win a world title. On the eve of his first defense, he became the first champion to test positive for the AIDS virus."[144] WBO Championship Committee President, Ed Levine, stated that barring the HIV-positive boxer from the ring was the only option:

> We can't risk the life of another boxer by letting him fight. . . . It's a kind of disease that can be spread via blood contact, and boxing is a sport where that is likely to happen.[145]

The news story then quoted Levine on the fate of the Colombian boxer,

> It's a personal tragedy that goes far beyond the sport. . . . You think of Magic Johnson at the height of his basketball career. It comes into perspective and you see it's a major problem in the world. Instead of going home with the biggest payday of his career, he's going home with a test result that indicates his life is substantially shortened.[146]

Perhaps this is the most important thing to keep in mind.

Jennifer L. Johnston†

143. *Palacio Tests Positive for HIV, Stripped of WBO Title*, ERIE DAILY TIMES, Apr. 17, 1993, at 3-C. (stating that HIV testing has been routinely required as part of the pre-fight medical examination in Great Britain for several years).

144. *Id.*

145. *Id.*

146. *Id.*

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APPENDIX A

MANDATORY HIV TESTING AND PROFESSIONAL HOCKEY QUESTIONNAIRE

Please answer the following questions as fully as possible, to the best of your knowledge. Feel free to explain any answers or to make any additional comments in the margins or on the back of the page. Your time and cooperation in this matter is greatly appreciated.

1. Does your team have an HIV/AIDS testing policy?
   YES ____ NO ____
   [If you answered NO to question number 1, please move on to question #12.]
2. Does this policy *mandate* HIV/AIDS testing, or does the policy merely allow for *voluntary* HIV/AIDS testing?
   MANDATORY TEST____ VOLUNTARY TEST ____
3. To whom does this policy apply? [check all that apply]
   PLAYERS ____ COACHES ____
   TRAINERS____ OTHER:____
4. How often is testing required/offered? [per season]
   ONCE ____ TWICE ____ THREE TIMES ____
   MORE THAN THREE TIMES ____
5. At what point are such tests required/offered? [check all that apply]
   PRESEASON/CAMP PHYSICAL ____ TRYOUT PHYSICAL ____
   DURING SEASON ____
   if "during season", please specify:_____
6. Based upon the HIV/AIDS testing policy guidelines, who receives (or knows of) the results of the tests? [check all that apply]
   PLAYER TESTED ____ COACHES ____
   GENERAL MANAGER ____ TEAM PHYSICIAN(s) ____
   INSURER ____ TRAINERS ____
   ECHL ADMINISTRATIVE OFFICIALS ____
   OTHER PLAYERS ON SAME TEAM ____
   GAME OFFICIALS ____ OTHER ECHL PLAYERS ____
   AGENT OF PLAYER TESTED ____
   FAMILY OF PLAYER TESTED ____
   OTHER: _____
7. In actuality, who do you believe learns of the results of these tests? [check all that apply] PLAYER TESTED ____ COACHES ____
   GENERAL MANAGER____ TEAM PHYSICIAN(s) ____
   INSURER ____ TRAINERS ____
   ECHL ADMIN. OFFICIALS ____
   GAME OFFICIALS ____
   OTHER PLAYERS ON SAME TEAM ____
   OTHER ECHL PLAYERS____

AGENT OF PLAYER TESTED ___
FAMILY OF PLAYER TESTED___
THE PUBLIC ___
OTHER:_____

8. Do you believe your answer to question number 7 would be different if the test results referred to showed one of your players to be HIV-positive?
YES ___ NO ___ DON'T KNOW ___
If "yes", how would your answer differ?

_____

_____

9. If your team's policy is to provide HIV/AIDS testing on a *voluntary* basis, who would be aware of a player's consent to be tested? [check all that apply] PLAYER TO BE TESTED ___ COACHES ___
GENERAL MANAGER ___ TEAM PHYSICIAN(s) ___
INSURER ___ TRAINERS ___ ECHL ADMIN. OFFICIALS___
GAME OFFICIALS ___ OTHER PLAYERS ON SAME TEAM ___
OTHER ECHL PLAYERS ___ AGENT OF PLAYER TO BE TESTED ___ FAMILY OF PLAYER TO BE TESTED ___
OTHER: _____ N/A ___

10. Under your team's HIV/AIDS testing policy, who performs the testing?
TEAM PHYSICIAN ___ INDEPENDENT PHYSICIAN ___
PLAYER's CHOICE ___
[note: by "team physician" this study is referring to a physician on the payroll of the team]

11. Are players assigned to your team by American Hockey League affiliates required to abide by the HIV/AIDS testing policy of *your* team?
YES ___ NO ___ N/A because none assigned ___

12. Does your team's insurer require HIV/AIDS testing?
YES ___ NO ___
If "yes", who performs the testing? _____

_____

13. Does your team provide any AIDS education for your players? [for example, information on the medical risks of transmission during play, through sexual contact, through IV drug use, etc.] YES ___ NO ___
If "yes", please explain to what extent education is provided (for example, bringing in team physician to talk, providing condoms, etc.]:

_____

_____

_____

14. If you were to poll your players on the question of whether or not there should be mandatory HIV/AIDS testing in professional hockey, what would the results be?
ALMOST ALL FOR MANDATORY TESTING ___
MORE FOR THAN AGAINST ___
MORE AGAINST THAN FOR ___

(ALMOST ALL AGAINST) MANDATORY TESTING ___
APPROXIMATELY EQUAL ___ DON'T KNOW ___
[Is this your estimate or the results of an actual poll?]
ESTIMATE___ POLL___

15. In your opinion, *regardless of actual team policies,* do you believe that mandatory testing for HIV/AIDS is necessary in professional hockey?
YES ___ NO ___ DON'T KNOW ___

16. In your opinion as a coach, do you believe a professional hockey player is at a greater risk of contracting HIV/AIDS during play than a professional basketball player? YES ___ NO ___ DON'T KNOW ___

17. In your opinion as a coach, do you believe a professional hockey player is at a greater risk of contracting HIV/AIDS during play than a professional football player? YES ___ NO ___ DON'T KNOW ___

18. In your opinion as a coach, do you believe a professional hockey player is at a greater risk of contracting HIV/AIDS during play than a professional baseball player? YES ___ NO ___ DON'T KNOW ___

19. In your opinion, regardless of any actual team policies or league policies, could a professional hockey player who is HIV-positive continue to play hockey in this league without jeopardizing the health and safety of other players and staff?
YES ___ NO ___ DON'T KNOW ___

20. If you were asked question number 15 and question number 19 again, but this time you were asked your opinion from the perspective of being a former professional hockey player yourself, would your answers be any different?
[please try to forget for the moment your capacity as a coach]
Question 15: SAME ___ DIFFERENT ___, explain:_____
Question 19: SAME ___ DIFFERENT ___, explain:_____

21. How many seasons have you coached hockey in this league?
This league ____ Other leagues? ____

22. How many seasons have you played as a professional? ____
In which leagues?_____

23. Please provide any comments you would like to add on the subject of HIV/AIDS testing and professional hockey:

_____
_____
_____
_____
_____
_____
_____

Thank you for taking the time to complete this questionnaire. Your answers will provide great insight into this topic. Please return this questionnaire in the envelope enclosed for your convenience. Thank you once again.

APPENDIX B

Appendix B compiles the results of a "Mandatory HIV Testing and Professional Hockey Questionnaire" which was mailed to fifteen head coaches of minor league professional hockey teams in the East Coast Hockey League ("ECHL"). The teams are located throughout the east coast region. Coaches of the following teams received questionnaires:

Birmingham (Ala.) Bulls	Knoxville (Tenn.) Cherokees
Columbus (Ohio) Chill	Louisville (Ky.) IceHawks
Dayton (Ohio) Bombers	Nashville (Tenn.) Knights
Erie (Penn.) Panthers	Raleigh (N.C.) IceCaps
Greensboro (N.C.) Monarchs	Richmond (Va.) Renegades
Hampton Roads (Va.) Admirals	Roanoke Valley (Va.) Rampage
Johnstown (Penn.) Chiefs	Toledo (Ohio) Storm
	Wheeling (W.Va.) Thunderbirds

This questionnaire (found at Appendix A) was sent to coaches in mid-February 1993. The results, which are reported below, were compiled in the early part of April 1993.

RESPONSE:

Of the fifteen ECHL coaches approached, nine graciously responded. These coaches represent a long history of hockey coaching and playing experience:

*They represent a combined total of twenty-nine years of experience coaching in the ECHL.

*They represent a combined total of thirty-three years of experience coaching in other leagues.

*They represent a combined total of eighty-two years of experience playing professional hockey in the following leagues:

National Hockey League	77.7% (of the nine responding)
American Hockey League	77.7%
International Hockey League	77.7%
Canadian Hockey League	44.44%
World Hockey Association	33.33%
East Coast Hockey League	11.11%

North Eastern Hockey League	11.11%
Atlantic Coast Hockey League	11.11%
Hockey League in European play	11.11%

RESULTS OF QUESTIONNAIRE:

Unless noted otherwise, each of the following statistics represents the percentage of the total responding (nine) who responded to the question with that particular answer. A few noted questions received responses from less than the total number of coaches responding. Furthermore, those issues raised by the questionnaire which were left unanswered by one hundred percent of the responding coaches (due to the lack of any HIV/AIDS testing policy) will not be listed below, for purposes of spatial economy.

*Does your team have an HIV/AIDS testing policy?

NO	100%
YES	0%

*Does your team's insurer require HIV/AIDS testing?

[Please note: only eight of the nine coaches responded to this particular question.]

NO	100%
YES	0%

*Does your team provide any AIDS education for your players?

NO	66.67%
YES	33.33%

*Of those who answered YES to providing some sort of AIDS education for their players, the following percentages provided the following types of education:

Talk by team physician	66.67%
Trainer's HIV/AIDS Awareness Prgm.	33.33%
Condoms made available	33.33%

*If you were to poll your players on the question of whether or not there should be mandatory HIV/AIDS testing in professional hockey, the results would be:

MORE FOR THAN AGAINST 33.33%
MORE AGAINST THAN FOR 33.33%
ALMOST ALL AGAINST MAND. TESTING 22.22%
APPROXIMATELY EQUAL 0%
DON'T KNOW 0%

*When asked if the preceding answer was the coach's estimate or the result of an actual poll, the five coaches who answered, stated that it was their estimate. Not one coach actually polled his team.

*In your opinion, regardless of actual team policies, do you believe that mandatory testing for HIV/AIDS is necessary in professional hockey?

YES 66.67%
NO 22.22%
DON'T KNOW 11.11%

*When asked if the preceding answer would change if asked his opinion from the perspective of being a former professional hockey player himself, the coaches responded:

WOULD BE THE SAME 88.89%
WOULD BE DIFFERENT 11.11%

*In your opinion as a coach, do you believe a professional hockey player is at a greater risk of contracting HIV/AIDS during play than a professional basketball player?

YES 44.44%
NO 33.33%
DON'T KNOW 22.22%

*In your opinion as a coach, do you believe a professional hockey player is at a greater risk of contracting HIV/AIDS during play than a professional football player?

YES 44.44%
NO 33.33%
DON'T KNOW 22.22%

*In your opinion as a coach, do you believe a professional hockey player is at a greater risk of contracting HIV/AIDS during play than a professional baseball player?

YES 55.50%
NO 33.33%
DON'T KNOW 11.11%

*In your opinion, regardless of any actual team policies or league policies, could a professional hockey player who is HIV-positive continue to play in this league without jeopardizing the health and safety of other players and staff?

NO 44.44%
DON'T KNOW 33.33%
YES 22.22%

*When asked if the preceding answer would change if asked his opinion from the perspective of being a former professional hockey player himself, the coaches responded:

WOULD BE THE SAME 77.78%
WOULD BE DIFFERENT 22.22%

Finally, many of the coaches responding to this questionnaire took the time to provide additional comments on the subject of HIV/AIDS testing and professional hockey. The following comments were found to be extremely helpful for purposes of this study:

—"It is a very serious matter that I believe is not given nearly enough concern. Management I believe are shunning a very dangerous matter at hand. I include myself on the shame list."

—"They need a hardened approach to scare these kids about how serious HIV/AIDS are. Better education about off ice conduct."

—"As a coach & player I would like to see mandatory testing to be sure who has AIDS and who does not. Because of the number of cuts that happen in hockey it could be dangerous to other people how [we] are taking care of that player."

—"All players should take a complete medical at the start of the season. Which means HIV/AIDS testing would be completed and results given to management (coach/managers) and these results would be private and dealt [with] by the player and management together for the safety of the player and his teammates and opponents."