

Suffering in Silence: Should They Be Cheered
Or Feared?
(Mandatory HIV Testing of Athletes as
A Health and Safety Issue)

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I. INTRODUCTION

Should mandatory HIV testing of athletes become a routine medical practice and procedure required by professional sports teams and leagues? A vast majority of people give credence to the theory that requiring an athlete to be tested for HIV unjustly infringes upon his privacy rights.¹ Proponents of mandatory HIV testing policies have characterized this debate as “unfounded paranoia and hysteria” as well as “ludicrous

1. The Fourth Amendment of the United States Constitution guarantees: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized;” U.S. CONST. amend. IV. See also Jennifer L. Johnston, Note, *Is Mandatory HIV Testing of Professional Athletes Really The Solution?*, 4 HEALTH MATRIX 159, 185 (1994)(concluding that mandatory HIV testing of athletes is not the solution to the AIDS dilemma in professional sports); see generally Daniel M. Webber, *When The “Magic”Rubs Off: The Legal Implications of AIDS in Professional Sports*, 2 SPORTS LAW. J. 1 (1995)(concluding that there is no legal support for a professional team to discriminate against a player on account of their HIV status).

fear campaigns."² Contrary to this point of view is the belief that non-infected athletes have a justifiable right to be informed of the potential dangers they face when competing with infected athletes.³ Attendant to the above debate is the fact that many athletes may be suffering in silence. "The idea that dozens of active athletes could have HIV, kept secret or [perhaps] unknown to them, fuels emotional debate on the subject of transmission through competition."⁴

The start of the controversy over implementing a mandatory HIV testing policy is traceable to the popularity and fame of known professional athletes such as Los Angeles Laker Earvin "Magic" Johnson, professional boxer Tommy Morrison and Olympic diving gold medalist Greg Louganis. When these athletes publicly disclosed that they had tested positive for HIV, the general public and national media were hit with the realization that HIV is not just a disease affecting gay men.

On November 7, 1991, Magic Johnson,⁵ one of the most gifted athletes in the National Basketball Association (NBA), shocked the nation when he announced his retirement as a result of his testing positive for HIV.⁶ With a strong desire to play once again, Johnson declared that he would return to the basketball court for the 1992-1993 season.⁷ However, Johnson abandoned his 1992 comeback because of the fear and hysteria of AIDS which plagued the Association players.⁸ Adamant

2. See Ron Wynn, *HIV, Aids Hysteria Still Runs Rampant*, TENN. TRIB., Feb. 28, 1996, at 5.

3. See generally Paul M. Anderson, *Cautious Defense: Should I Be Afraid To Guard You? (Mandatory Aids Testing in Professional Team Sports)*, 5 MARQ. SPORTS L.J. 279 (1995).

4. Greg Cote, *AIDS and the No-Fear Factor. Despite Warnings, High Life Goes on for Pro Athletes*, CHI. TRIB., Mar. 31, 1996, at 7.

5. See John T. Wolohan, *An Ethical and Legal Dilemma: Participation in Sports by HIV Infected Athletes*, 7 MARQ. SPORTS L.J. 373 n.1 (1997). Johnson, a former member of the Los Angeles Lakers, assisted his team to five NBA championships and nine play-off finals. See *id.* He participated in 11 All-Star Games, awarded the Most Valuable Player of the NBA in 1987, 1989 and 1990, and named the Most Valuable Player of the NBA Finals in 1980, 1982 and 1987. See *id.*

6. See Steve Springer & Sonni Efron, *HIV & Sports: What Have We Learned? SPECIAL REPORT: Does Disease Win With Morrison?*, L.A. TIMES, Nov. 3, 1996, at C9.

7. See Wolohan, *supra* note 5, at 373-74.

8. See Anderson, *supra* note 3, at 282. Karl Malone, Gerald Wilkins and other basketball players publicly expressed their fears of contracting HIV by playing against Johnson. See *id.* Also, two players on the Australian national basketball team stated that they may not compete in the Barcelona Olympics if Johnson was playing. See Tracey E.

about continuing his basketball career, Johnson again returned to the hardwood floors in 1996, but inevitably retired from the NBA due to similar fears and concerns regarding HIV transmission.⁹

In February 1995, Olympic diver Greg Louganis¹⁰ announced that he had AIDS in a television interview with Barbara Walters.¹¹ The mass media quickly concentrated on the unforgettable two and one-half pike dive in the 1988 Olympics, where Louganis struck his head on the diving platform. Unbeknownst to anyone at the time, the pool was contaminated with infectious blood.¹² As a result, an overflow of questions began to surface from this tragic incident: "Should [Louganis] have competed in the Olympics knowing he was HIV-positive? Why, after cutting his head on the diving board, didn't he inform Jim Puffer, a U.S. team doctor, of his condition before Puffer stitched him up without wearing gloves? Was it dangerous for others to dive into the pool after he had bled into the water? Should the International Olympic Committee now test all athletes for HIV, so a potential tragedy might be averted?"¹³ Based upon the facts at hand, I argue yes to this final critical question.

Finally, on February 22, 1996, professional boxer Tommy Morrison¹⁴ announced that he was infected with HIV at a press conference and therefore was retiring.¹⁵ Similar to Johnson, Morrison also returned to the boxing ring for one last fight in

George, *Secondary Break: Dealing With AIDS in Professional Sports After the Initial Response to Magic Johnson*, 9 U. MIAMI ENT. & SPORTS L. REV. 216, 218 (1992). Australian player Ray Borner "declared that he would pass up the chance to win the gold if it meant being on the same court as Magic." *Id.*

9. See Anderson, *supra* note 3, at 282.

10. Greg Louganis was an Olympic diver who won the 1984 and 1988 Olympic gold medals in diving. See E.M. Swift, *A Message Worth Repeating*, SPORTS ILL., Mar. 6, 1995, at 100. Louganis learned that he was infected with HIV six months before the 1988 Olympic Games in Seoul, South Korea. See Springer & Efron, *supra* note 6, at C9. Louganis did not disclose his HIV status to the public until February 1995. See *id.*

11. See Swift, *supra* note 10, at 100.

12. See *id.*

13. *Id.*

14. Tommy Morrison was a professional heavyweight boxer who was suspended from boxing competition by the state of Nevada after testing positive for HIV. See *AIDS and Athletes*, SAN DIEGO UNION & TRIB., Feb. 13, 1996, at D2. Just hours after confirming that he was HIV positive, Tommy Morrison pronounced, "To all my young fans out there, I ask that you no longer consider me a role model." John Roberts, *Light and Dark in Life and Death*, BRIT. MED. J., Feb. 24, 1996, at 466.

15. See Springer & Efron, *supra* note 6, at C9.

which he donated his compensation to the K.O. AIDS Foundation, an organization established to help children infected with HIV or AIDS.¹⁶ Again, another prominent athlete has been thrown into the spotlight because of his HIV infection.

As the HIV dilemma continues to grow in the world of sports, Americans need to take a "new, more realistic perception of HIV infection,"¹⁷ such as implementing mandatory HIV testing. We need to encourage professional sports organizations to develop effective mandatory HIV testing policies that include education, safety and privacy without excluding HIV-infected players from participation. Although we continue to hope for a cure and/or effective treatment, it is vital we recognize that mandatory HIV testing will enable the medical community to suppress the progression of HIV infection while prolonging the life of an HIV-infected athlete.

This article examines the legal implications of implementing a mandatory HIV testing policy for professional athletes. Section II of this comment focuses on the nature of HIV and how it is transmitted. Section III emphasizes how HIV has affected the attitudes and lives of many athletes. Section IV examines federal legislation and case law which would apply to any mandatory HIV testing policy. Section V explores the justifications for a mandatory HIV testing policy for athletes. Finally, Section VI concludes by suggesting a mandatory HIV testing policy for professional sports teams and leagues which would not exclude HIV-infected athletes from participation, but rather act as a guideline for safety and educational objectives.

II. THE NATURE AND TRANSMISSION OF HIV

In order to understand the nature and transmission of HIV in sports, it is important to have a brief overview of HIV, the virus that causes Acquired Immune Deficiency Syndrome (AIDS).¹⁸ Medical research has brought to light the fact that AIDS is caused by a human virus, known as Human Immu-

16. *See id.*

17. Roberts, *supra* note 14, at 466. This new, more realistic perception on HIV awareness was taken by Magic Johnson when he returned to the basketball court and won the support of many Americans. *See id.*

18. *See OXFORD COMPANION TO MEDICINE* 4 (1986). AIDS is the acronym for Acquired Immune Deficiency Syndrome. *See id.*

odeficiency Virus (HIV).¹⁹ When the HIV virus infects an individual, it attacks and weakens a person's immune system.²⁰ The human immune system is viewed as the body's defense mechanism that protects against viruses, bacteria, infections and other illnesses.²¹ When the immune system encounters an illness, white blood cells called lymphocytes are utilized to protect the body.²² However, HIV destroys these blood cells through a constant and gradual process, thereby debilitating the human immune system to the point that it cannot combat germs or infections, eventually resulting in death.²³

The most common AIDS-related concern for professional athletes is the likelihood of contracting the HIV virus through bodily contact with HIV-infected athletes. HIV can be transmitted through blood, saliva, urine, semen, vaginal fluids, tears and other bodily fluids of infected persons.²⁴ The leading forms of HIV transmission are the direct contact of blood, semen or vaginal fluids through (1) intimate sexual contact with an infected person, (2) needle sharing among intravenous drug users, and (3) blood transfusions.²⁵ Less probable forms of transmission are contact with tears and saliva of an HIV-infected individual.²⁶

With respect to transmission of HIV in the realm of professional sports, there is a great deal of controversy over whether the blood of an HIV-positive athlete could contaminate the open wound of another athlete due to a collision or contact during a sporting event. Conceptually, both athletes would have to be injured and bleed extensively.²⁷ Additionally, the infected athlete would probably have to be in the later stages of the disease since the concentration of HIV in his or her blood is

19. See George, *supra* note 8, at 223.

20. See *id.*

21. See *id.* Without a cure for AIDS, persons infected with the HIV virus stay infected for the rest of their lives. See *id.*

22. See *id.*

23. See George, *supra* note 8, at 223. A recent study estimated that 1 to 1.5 million people in America are infected with HIV. See *id.* at 222-23. Initially recognized as a gay man's disease, society is now willing to acknowledge that HIV affects all classes of people. See *id.* at 223. Notwithstanding the deathly plague that HIV has cast over the gay male community, there has been a great increase in HIV infection among heterosexual males and females. See *id.*

24. See Webber, *supra* note 1, at 2-3.

25. See *id.*

26. See Johnston, *supra* note 1, at 175.

27. See George, *supra* note 8, at 226.

high.²⁸ Even if an athlete in the advanced stages of HIV suffers a severe laceration, a substantial amount of the infected blood must enter the open wound of another athlete to effectuate transmission of the virus.²⁹ However, since HIV can only survive in the atmosphere for a brief period, the contact must be precise and last for a relatively long period of time.³⁰ Based upon the foregoing, experts agree that the possibility of transmission through athletic contact is extremely improbable.³¹ Yet, the risk still exists.³²

Studies demonstrate that the majority of HIV infected individuals will acquire AIDS within seven to ten years of the initial infection.³³ There is a high probability that many professional athletes are infected with HIV yet unaware of this deadly disease.³⁴ In light of the aforementioned information regarding the nature and transmission of HIV, it is clear that many experts and commentators have been too hasty in dismissing the risks professional athletes face of contracting HIV.³⁵ These fears are not unreasonable. Despite the fact that

28. *See id.* The four stages of the AIDS disease are: Stage 1, Seropositive, person tests positive for the presence of HIV antibodies in the blood; no symptoms; Stage 2, ARC, AIDS-related Complex, person displays non-life threatening symptoms; Stage 3, AIDS I, person suffers from more critical illnesses; Stage 4, AIDS II, person is incapable of daily routines without support. *See id.* at 225.

29. *See id.* at 226.

30. *See id.*

31. *See Cote, supra* note 4, at 7. The NFL commissioned a study that estimated its players have one chance per eighty-five million "game contacts" to contract the AIDS virus. *See id.* The study observed 155 games and found 575 bleeding injuries, or 3.7 per game, then calculated the odds of two bleeding players colliding and sufficiently exchanging blood. *See id.*

32. Kris King, a hockey player for the Maple Leafs' of the National Hockey League stated, "It is not zero percent. There's a chance that someone will contract AIDS through fighting, however small, and I'm a family man. I won't put my family in that sort of a situation." Rick Westhead, *Some Players In Violent NHL Want Mandatory HIV Testing*, SEATTLE TIMES, Oct. 26, 1997, at D8.

33. *See* A. Alyce Werdel, *Mandatory AIDS Testing: The Legal, Ethical and Practical Issues*, 5 NOTRE DAME J. L. ETHICS & PUB. POL'Y 155, 160 (1990).

34. *See Cote, supra* note 4, at 7 (stating that Dr. Lawrence Brown, NFL adviser on AIDS and HIV issues, nor any other AIDS expert believes Magic Johnson is the only HIV carrier among the nearly three thousand active athletes in the NFL, NBA, NHL or MLB). The Center for Disease Control's Dr. Peter Drotman estimated there may be approximately thirty active, HIV-infected players in these four major contact sports based on national averages for age group, gender and race. *See id.*

35. *See generally* George, *supra* note 8, at 219. For example, one physician stated that "you are more likely to be struck by lightning in an open field on a sunny day." *Id.* Another doctor claimed that the probability of being infected with HIV during a basketball game is "roughly the same as being kicked to death by a duck." *Id.* In addition, Dr.

most medical authorities agree that the transmission of HIV during athletic contact is extremely unlikely, we must attempt to place ourselves in the athlete's shoes and look at the worse-case scenario. Namely, a player who contracts HIV from another player on the playing field will eventually die. It is this reality which should be the impetus for mandatory HIV testing and protection of our athletes.

III. HIV AND ATHLETES

As the AIDS epidemic has progressed into professional sports, non-infected players have expressed concerns regarding the danger of playing with or against an infected athlete.³⁶ Since the amount of people in the United States diagnosed with AIDS takes on alarming proportions,³⁷ the issue of HIV transmission in the athletic arena and the accompanying debate over the use of mandatory HIV testing has received widespread attention.³⁸ These players deserve to know the risks that exist.³⁹

Although the abundance of medical authority asserts that the risk of an athlete contracting HIV through sports is insignificant, experts acknowledge that there is some chance, how-

David E. Rodgers, the NBA's consultant on AIDS, in maintaining that players fears were excessive stated, "The risk of someone passing the disease along during athletic competition are small. The chances are infinitesimal." *Id.*

36. See generally D. Peter Drotman, *Professional Boxing, Bleeding, and HIV Testing*, 276 JAMA 193 (1996); see generally *NHL Goons' Bloody Fear: HIV*, THE STAR-LEDGER (Newark), Oct. 24, 1997, at 43. For example, Chris Simon, a hockey player for the Washington Capitals, stated that even though he routinely fights other hockey players, he would not fight anyone infected with HIV. See *id.* Simon said, "I'd skate the other way. No way I'm fighting someone with HIV or AIDS." *Id.* In addition, Ryan VandenBussche, a hockey player for the New York Rangers, stated, "It should be mandatory to have an AIDS test every year at training camp. There's a lot of blood exchanged when your scrap-pin'. Just shaking hands at the end of a game, even a teammate's hand, they could have a cut." *Id.*

37. See *HIV & Sports: What Have We Learned? AIDS Facts*, L.A. Times, Nov. 3, 1996, at C9. In 1981, there were 128 AIDS deaths and 323 cases diagnosed. See *id.* The total AIDS deaths reported through June, 1996 was 343,000 and the total cases diagnosed through June, 1996 was 548,102. See *id.*

38. See Wynn, *supra* note 2, at 5. At the same time heavy-weight boxer Tommy Morrison announced he was infected with HIV, the mass-media began requesting that every athlete from basketball to track consent to mandatory HIV testing, despite constitutional and privacy issues. See *id.*

39. Since the revelation of Magic Johnson's HIV infection, there has been an increase in concerns expressed by non-infected players about the unfamiliar dangers of playing with or against someone infected with HIV. See *id.*

ever small, of transmission if certain conditions occur.⁴⁰ Dr. Robert Voy, chief physician for the 1996 Olympic Games boxing competition stated, "We know that this is an infectious disease transmitted through blood. It doesn't matter that there hasn't been an incident. The first one that happens is the death sentence."⁴¹ Therefore, although the risks are low, the stakes are still high. The exigency is heightened since there is no known cure for HIV or AIDS.⁴²

Many athletes throughout professional teams and leagues share the following sentiments. In boxing, the ex-heavyweight champion Larry Holmes declared, "Everybody that steps into that ring should be tested. Nobody has a right to put another person's life on the line."⁴³ In basketball, when asked about the concern of playing against an HIV-infected player, Atlanta Hawk's Grant Long stated, "Most guys are politically correct about it in public, but guys, behind closed doors, will admit they are frightened to play with Magic."⁴⁴ In hockey, Toronto Maple Leaf player representative Todd Gill stated, "I feel I should have the right to know if someone I'm playing against has the HIV virus, I should feel I'm safe when I go to work."⁴⁵ In football, a survey of the 100 college football players most likely to be drafted by the NFL in 1992 found that eighty-two percent of the players supported mandatory HIV testing in the NFL.⁴⁶ Finally, in tennis, Arthur Ashe, before dying from AIDS in 1993, spent a substantial amount of time supporting the implementation of mandatory HIV testing in professional sports.⁴⁷

Clearly, famous athletes like Magic Johnson, Greg Louganis and Tommy Morrison have generated much legal discus-

40. See Wolohan, *supra* note 5, at 394. The circumstances required to transmit HIV during a sports incident are: 1) an HIV infected athlete; 2) an HIV infected athlete who is bleeding; and 3) a substantial amount of infected blood penetrate the bloodstream of another athlete. *See id.* at 394 n.152.

41. See Athelia Knight, *Doctor Proposes HIV Tests*, COM. APPEAL (Memphis), June 30, 1996, at D4.

42. See Anderson, *supra* note 3, at 284.

43. See Jon Saraceno, *Boxing Eyes Counterpunch To HIV Concerns*, USA TODAY, Mar. 12, 1996, at 1C.

44. See Cote, *supra* note 4, at 7.

45. See Webber, *supra* note 1, at 6.

46. See Joel Kaplan, "The Most Fun They've Ever Had"; *Lawyers in the World of Pro Sports*, 78 A.B.A. J. 56, 59 (1992).

47. See Larry Tye, *Ashe Foresees AIDS Test Becoming Mandatory*, BOSTON GLOBE, Dec. 1, 1992, at 61.

sion on the possibility of mandatory HIV testing. The reality is that AIDS has infected many other athletes and often has been the cause of death. For example, in 1995, Glenn Burke, a Los Angeles Dodgers and Oakland Athletics outfielder died of AIDS-related complications.⁴⁸ John Curry, a former Olympic and world champion figure skater, died from an AIDS-related disease in 1994.⁴⁹ Also in 1994, Chad Kinch, a former player for the Cleveland Cavaliers, died of AIDS.⁵⁰ Arthur Ashe, a champion tennis player, died of AIDS-related pneumonia in 1993.⁵¹

In 1991, Alan Wiggins, a baseball player for the San Diego Padres and Baltimore Orioles died of AIDS complications.⁵² In 1986, Jerry Smith, formerly a member of the Washington Redskins, died from AIDS-related complication.⁵³ In 1995, Bill Goldsworthy, an NHL player, announced he had AIDS.⁵⁴ This list is simply an indication that the AIDS epidemic has proceeded into professional sports.⁵⁵ This list however, is by no means exhaustive.

Given the basic overview of the disease itself, its nature and transmission, and the stigma and deadly effects on professional athletes, it is now important that we focus on the legal issues that accompany the AIDS epidemic in professional team sports.

IV. FEDERAL LEGISLATION

Prior to making a judgment as to whether or not professional sports teams and leagues should implement a mandatory HIV testing policy, it is necessary to examine the federal laws which would be implicated under this type of policy. The following section is an analysis of the Rehabilitation Act of 1973⁵⁶ and the Americans with Disabilities Act⁵⁷ (ADA).

48. See *AIDS and Athletes*, *supra* note 14, at D2. Glenn Burke says he was "blackballed" from baseball because of his homosexuality. See *id.*

49. See *id.*

50. See *id.*

51. See *id.* Arthur Ashe was also known as a human rights advocate and AIDS research supporter. See *id.*

52. See *AIDS and Athletes*, *supra* note 14, at D2.

53. See *id.*

54. See *id.*

55. See *id.* Other athletes who have died from AIDS include: Esteban DeJesus, a former WBC lightweight boxing champion and Tim Richmond, a stock car racer. See *id.*

56. See 29 U.S.C. §§701-796I (Supp. V. 1993).

These federal laws not only have an impact on individuals with HIV or AIDS, but they also serve as an important guide in deciding how to implement a mandatory HIV testing policy.⁵⁸

A. The Rehabilitation Act of 1973

The Rehabilitation Act of 1973⁵⁹ was the first federal legislation passed by Congress in response to discrimination against the handicapped or disabled.⁶⁰ Section 504 of the Act specifically prohibits discrimination against the handicapped by all organizations or employers who receive federal funds.⁶¹ Under the Rehabilitation Act, an athlete infected with HIV must prove that they are: (1) handicapped or disabled; (2) excluded particularly because of their handicap; (3) otherwise qualified to partake in the specific sport; and (4) excluded from participation and discriminated against under a federally

57. See 42 U.S.C. §12101 (1995).

58. See generally Johnston, *supra* note 1, at 192-93. For example, the problem of discrimination is especially notable in professional sports. See *id.* at 193. Since a team has broad discretion to terminate an athlete's contract if he or she is physically unfit, a team may skillfully try to terminate the contract of an HIV-infected athlete on the same grounds. See *id.* However, if a mandatory testing policy exercises discriminatory practices, the ADA would safeguard an athlete's right to be unimpeded by such discrimination in employment. See *id.*

59. See 29 U.S.C. §§701-796i (Supp. V. 1993). Section 701(b) states that its purpose is:

- (1) to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society, through -
 - (A) comprehensive and coordinated state-of the art programs of vocational rehabilitation;
 - (B) independent living centers and services;
 - (C) research;
 - (D) training;
 - (E) demonstration projects; and
 - (F) the guarantee of equal opportunity.

Id.

60. As defined by the Rehabilitation Act §706(8)(B), "the term 'individual with a disability' means . . . any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment." *Id.*

61. See 29 U.S.C. §794 (West Supp. 1992). Section 504(a) of the Rehabilitation Act provides in pertinent part:

No otherwise qualified individual with handicaps in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . .

Id.

funded program.⁶²

Although the Supreme Court has not yet ruled on whether or not an HIV-infected athlete is handicapped or disabled, there is case law that has dealt with related questions under the Rehabilitation Act. For example, in *School Board of Nassau County v. Arline*,⁶³ the Supreme Court examined the issue of whether the School Board discriminated against a professor infected with recurring tuberculosis.⁶⁴ The Court determined that "allowing discrimination based on the contagious effects of a physical impairment would be inconsistent with the basic purpose of section 504."⁶⁵ Thus, the Supreme Court held that individuals with contagious diseases such as tuberculosis are categorized as handicapped persons under section 504.⁶⁶

In reaching the conclusion that persons with contagious diseases were handicapped under the Rehabilitation Act, the Supreme Court in *Arline* also considered the question of whether Arline was "otherwise qualified for the job" of a schoolteacher.⁶⁷ In deciding whether an individual is "otherwise qualified for the job," the Court ruled that if a person presents a significant risk of transmitting the disease to others within the workplace, then he or she is not "otherwise qualified" unless reasonable accommodations⁶⁸ would rule out the

62. See 29 U.S.C. §794.

63. 480 U.S. 273 (1987).

64. See *id.*

65. See *id.* at 284. The *Arline* Court states that the basic purpose of §504 is to "ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others." *Id.* The *Arline* court declares that "the fact that some persons who have contagious diseases may pose a serious health threat to others under certain circumstances does not justify excluding from the coverage of the Act all persons with actual or perceived contagious diseases." *Id.* at 285. In sum, the *Arline* court concludes that a person with a contagious disease is also covered under §504. See *id.*

66. See *id.* at 286.

67. See *Arline*, 480 U.S. at 287. "An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap." See *id.* at 288 n.17(citing *Southeastern Community College v. Davis*, 442 U.S. 397, 406 (1979)).

68. The Court in *Arline* stated:

"Employers have an affirmative obligation to make a reasonable accommodation for a handicapped employee. Although they are not required to find another job for an employee who is not qualified for the job he or she was doing, they cannot deny an employee alternative employment opportunities reasonably available under the employer's existing policies."

Id. at 289 n.19.

risks of communicating the disease to others.⁶⁹

In holding that *Arline* did not create a significant risk of transmitting a contagious disease, the Supreme Court established that the following four factors should be considered:

[F]indings of facts, based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm.⁷⁰

However, it is important to note that the Supreme Court in *Arline* stopped short of declaring AIDS as a handicap⁷¹. Therefore, the *Arline* Court's opinion does not stand for the proposition that a person with HIV is regarded as handicapped under the Rehabilitation Act.

Approximately one year later, the Ninth Circuit in *Chalk v. United States District Court, Central District of California*,⁷² considered the issue of dismissing a teacher because he had AIDS.⁷³ In adopting the *Arline* standard, the court decided that the teacher's dismissal violated the Rehabilitation Act due to his AIDS status.⁷⁴ The court concluded that the teacher's AIDS status did not pose a significant risk to the children in his classroom and that it was the school's obligation to provide reasonable accommodation to the teacher.⁷⁵ Therefore, the *Chalk* court held that under section 504 of the Rehabilitation Act, AIDS was a protected handicap.⁷⁶

69. *See id.* at 288 n.16.

70. *See id.* The court "should defer to the reasonable medical judgments of public health officials." *Id.*

71. *See Arline*, 480 U.S. at 282 n.7. In footnote 7, the Supreme Court stated, "This case does not present, and we therefore do not reach, the questions whether a carrier of a contagious disease such as AIDS could be considered to have a physical impairment, or whether such a person could be considered, solely on the basis of contagiousness, a handicapped person as defined by the Act." *Id.*

72. 840 F.2d 701 (9th Cir. 1988).

73. *See id.* at 703. In February 1987, Chalk was diagnosed as having AIDS. *See id.* On April 20, Chalk was found fit for duty by his personal physician. *See id.* However, the school placed him on administrative leave awaiting the opinion of another physician. *See id.* Finally, on August 5, the School informed Chalk that he could no longer return to his position as a teacher. *See id.*

74. *See id.* at 711.

75. *See id.*

76. *See Chalk*, 840 F.2d at 711. The court reasoned that "there was no evidence of any significant risk to children or others at the school. To allow the court to base its

Another case relevant to the examination of possible employment discrimination against HIV-infected individuals under section 504 of the Rehabilitation Act is *Doe v. District of Columbia*.⁷⁷ In *Doe*, a fire department revoked an offer for a firefighter position when it learned that the applicant was HIV-positive.⁷⁸ In order to prove that the fire department's actions were discriminatory, the court held that *Doe* must demonstrate that: 1) he was not a threat to others (in spite of his HIV infection); 2) he was otherwise qualified for the position (in spite of his handicap); and 3) he was refused employment exclusively by reason of his HIV status.⁷⁹

First, the court found that *Doe* did not pose a direct threat to others in the fire department during fire-fighting work because the risk of contact and transmission of HIV infected blood was remote and extremely isolated.⁸⁰ Secondly, in questioning whether *Doe* was "otherwise qualified"⁸¹ to carry out the tasks of a firefighter, the court reviewed the medical documentation submitted at trial and determined that *Doe* was in good physical health, not impaired by his HIV status. As a result, the court found *Doe* was "otherwise qualified" to work as a firefighter.⁸² Finally, in determining whether *Doe* was refused the firefighter position wholly on account of his HIV status, the court found that "the fire department's records unequivocally reflect that the offer of employment to *Doe* was withdrawn because of a medical determination that his HIV status rendered him unfit to serve as a firefighter."⁸³ Therefore, the *Doe* court found that the fire department was in violation of section 504 of the Rehabilitation Act.

decision on the fear and apprehension of others would frustrate the goals of section 504." *See id.*; *see also* *Thomas v. Atascadero Unified School District*, 662 F. Supp. 376 (C.D. Cal. 1987)(holding that the Rehabilitation Act granted statutory protection to a six-year old boy with AIDS and thus permitted the handicapped child to attend school).

77. 796 F. Supp. 559 (D.D.C. 1992).

78. *See id.* at 565.

79. *See id.* at 568.

80. *See id.* at 568-69.

81. "An otherwise qualified person is one who can perform 'the essential functions' of the job in question . . . When a handicapped person is not able to perform the essential functions of the job, the court must also consider whether any 'reasonable accommodation' by the employer would enable the handicapped person to perform those functions." *Arline*, 480 U.S. at 287, n.17.

82. *See Doe*, 796 F. Supp. at 569.

83. *Id.* at 570.

B. *The Americans with Disabilities Act (ADA)*

In 1990, Congress passed The Americans with Disabilities Act (ADA)⁸⁴ to deter disability discrimination by private employers.⁸⁵ This federal statute likely affords an HIV-infected athlete with the most protection.⁸⁶ Under the ADA, employers are obligated to arrange reasonable accommodations to qualified employees with disabilities, provided that the employer does not suffer an undue burden.⁸⁷ The ADA defines a disabled individual as one who either: (1) has a physical or mental impairment that substantially limits one or more major life activities of such individual; (2) has a record of such an impairment; and (3) is regarded as having such an impairment.⁸⁸

Title III of the ADA, which is grounded on section 504 of the Rehabilitation Act, provides that: "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by such an entity."⁸⁹ To successfully maintain a claim under Title III of the ADA, a disabled athlete must demonstrate that he or she is: (1) a "qualified individual with a disability;" (2) "otherwise qualified" for the athletic sporting event; (3) barred from participating in the sport "solely by reason of" his or her disabilities; and (4) discriminated against by a private employer who performs a public service.⁹⁰

The ADA strictly prohibits discrimination against disabled

84. See 42 U.S.C. §12101 *et seq.* (1995).

85. See 42 U.S.C. §12101. The purpose of this chapter is:

to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities; (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

Id.

86. The ADA was the first federal legislation established to safeguard persons infected with HIV or AIDS from discrimination by private employers. See Anderson, *supra* note 3, at 304.

87. See *id.*

88. See 42 U.S.C. §12102(2) (West Supp. 1991).

89. 42 U.S.C. §12132 (1990).

90. 42 U.S.C §12101-12 (1990).

individuals in employment.⁹¹ In the domain of professional sports, discrimination by a team or league against an athlete infected with HIV raises a multitude of legal issues.⁹² There are many people who believe that AIDS discrimination is fading by virtue of the protections afforded by states' civil rights statutes and by the ADA.⁹³ Contrary to this view, many observers still believe that AIDS-related discrimination is "alive and well."⁹⁴ "AIDS-based discrimination is still rampant. It really happens in places outside San Francisco. When you talk to people in small towns around the country, you find out how much fear there really is," says Eileen Hansen, executive director of San Francisco's AIDS Legal Referral Panel.⁹⁵

In recent case law, federal laws such as the ADA, as construed by the courts, are not the "all-secure safety nets they were first thought to be."⁹⁶ There are cases in the circuit courts of appeals which hold that the ADA does not prohibit discrimination of persons infected with HIV in every situation or condition.⁹⁷ For example, in *Runnebaum v. Nationsbank of*

91. The ADA applies to all entities which employ fifteen or more persons. The Act prohibits discrimination against "a qualified individual with a disability" in private employment, public accommodations, state and local government services, transportation and telecommunications. *Id.*

92. For example, the following list is only an illustration of the possible legal issues or claims that may arise: employment discrimination, right of privacy, confidentiality and safety measures.

93. See Mike McKee, *HIV Reporting: Privacy Versus Public Health*, 150 N.J.L.J. 206, 217 (1997).

94. See *id.*

95. See *id.*

96. *Id.* For example, one commentator has stated 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.'

Johnston, *supra* note 1, at 193. Under this analysis, proponents of mandatory HIV testing are likely to assert that an HIV-infected athlete poses a "direct threat to the health and safety" of other athletes. *Id.* Also, in questioning whether an HIV-infected athlete is capable of fulfilling job-related activities, they may contend that termination of an HIV-infected athlete's contract is proper under the ADA. See *id.*

97. See McKee, *supra* note 93, at 217. One court of appeals case that curtails the strength of the ADA is *Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006 (6th Cir. 1997), where the court held that Title III of the ADA does not prohibit an employer from providing an employer-sponsored insurance plan to its employees which awards more extensive

Maryland, N.A.,⁹⁸ the Fourth Circuit Court of Appeals concluded that an individual with asymptomatic HIV infection is not protected under the ADA and therefore, "asymptomatic HIV infection is not a disability under the statute."⁹⁹

In order to establish discrimination in a discharge case under the ADA, the court in *Runnebaum* stated that an individual must demonstrate by a "preponderance of the evidence that (1) he was a member of the protected class; (2) he was discharged; (3) at the time of the discharge, he was performing his job at a level that met his employer's legitimate expectations; and (4) his discharge occurred under circumstances that raise a reasonable inference of unlawful discrimination."¹⁰⁰

In *Runnebaum*, the plaintiff failed to prove three of the four factors of a *prima facie* case of discrimination.¹⁰¹ In regard to the first factor, plaintiff failed to establish that his asymptomatic HIV infection was a disability and that he was a member of a protected class under the ADA.¹⁰² The court stated that the statute's "individualized focus' contemplates a case-by-case determination of whether or not a person has a disability."¹⁰³ As a result, a plaintiff must demonstrate two criteria in order to be considered disabled under the ADA: "first, that

benefits to employees who develop disabilities by reason of a physical illness than to employees who develop disabilities by virtue of a mental illness. *See id.* at 1008.

98. 123 F.3d 156 (4th Cir. 1997). In *Runnebaum*, the plaintiff, an individual infected with HIV, was discharged because he failed to complete assignments and present a professional image. *See id.* at 162-63.

99. *See id.* at 170. In view of the plain statutory language of §12102(2)(A) of the ADA, the *Runnebaum* court held that because Runnebaum's infection is asymptomatic, it is not a "physical or mental impairment." *Id.* at 169.

100. *See id.* at 164.

101. *See id.* at 175. The court stated:

He failed to show that he had a disability and that he therefore was a member of the class of persons protected by the ADA; he failed to show that at the time he was fired he was meeting NationsBank's legitimate expectations; and he failed to show that his termination took place under circumstances raising a reasonable inference of discrimination.

Id.

102. *See Runnebaum*, 123 F.3d at 175. Under the ADA, the term "disability" is defined as: (A) a physical or mental impairment that substantially limits one or more of the major life activities of such an individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment. *See id.* at 166 (citing 42 U.S.C.A. §12102(2)(West 1995)).

103. *See Runnebaum*, 123 F.3d at 166. The *Runnebaum* court reaffirmed its holding in *Ennis v. National Ass'n of Bus. & Educ. Radio, Inc.*, 53 F.3d 55 (4th Cir. 1995), where it stated that "the term 'disability' is specifically defined, for each of subparts (A), (B), and (C), 'with respect to [the] individual,'" *Id.* at 59.

asymptomatic HIV infection is a 'physical or mental impairment'; and second, that asymptomatic HIV infection, if an impairment, 'substantially limits one or more of the major life activities' of the plaintiff."¹⁰⁴

First, the *Runnebaum* court noted that the Supreme Court has determined whether asymptomatic HIV infection is a "physical or mental impairment."¹⁰⁵ While the term "impairment" was not defined under the ADA,¹⁰⁶ it was medically defined as a "decrease in strength, value, amount, or quality."¹⁰⁷ Under this definition, the *Runnebaum* Court found that asymptomatic HIV infection did not amount to an impairment because there was no diminishing character of the individual.¹⁰⁸ The *Runnebaum* court also stated that the plain statutory definition of "impairment" implied that asymptomatic HIV infection would in no way be characterized as an impairment, since "by definition, asymptomatic HIV infection exhibits no diminishing effects on the individual."¹⁰⁹

Secondly, assuming *arguendo* that asymptomatic HIV infection is an impairment, a plaintiff must nevertheless show that the asymptomatic HIV infection limits a major life activity.¹¹⁰ Although the statute does not define the word "major",¹¹¹ the *Runnebaum* court interpreted it within its natural and ordinary definition as "demanding great attention or concern,"¹¹² and as "greater in dignity, rank, importance, or interest."¹¹³ Furthermore, the court viewed this significance or importance to a plaintiff to be an objective inquiry and suggested that courts should only take into account whether the impairment itself significantly restrains the plaintiff from

104. *Runnebaum*, 123 F.3d at 167.

105. *Id.*; see generally *Arline*, 480 U.S. at 282 n.7 (refusing to decide whether an asymptomatic HIV-infected person "could be considered to have a physical impairment").

106. See *Runnebaum*, 123 F.3d at 168.

107. *Id.* (citing WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 612 (1988)).

108. See *Runnebaum*, 123 F.3d at 168; see generally *Chalk v. United States Dist. Court*, 840 F.2d 701, 706 (9th Cir. 1988) ("Individuals who become infected with HIV may remain without symptoms for an extended period of time."); *Cain v. Hyatt*, 734 F. Supp. 671, 679 (E.D. Pa. 1990) ("There is a time lapse, often of several years, between exposure to HIV and onset of symptoms.").

109. See *Runnebaum*, 123 F.3d at 169.

110. See *id.* at 170.

111. *Id.*

112. *Id.* (citing WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 718 (1988)).

113. *Runnebaum*, 123 F.3d at 170 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1363 (1986)).

achieving a major life activity.¹¹⁴

Runnebaum asserted that both procreation and sexual relations were major life activities significantly limited by the plaintiff's asymptomatic HIV infection.¹¹⁵ Although the court agreed that both were fundamental human activities, it was not persuaded that procreation and intimate sexual relations fell within major life activities.¹¹⁶ Even if they were both perceived as major life activities, the court stated that plaintiff must still establish that his asymptomatic HIV status hinders his capability to engage in procreation or sexual relations.¹¹⁷

Still, the court concluded, "nothing inherent in the virus substantially limits procreation or intimate sexual relations. The statutory language is plain: the impairment in question, not the individual's reaction to the impairment, must 'substantially limit one or more of the major life activities of such individual.'"¹¹⁸ Therefore, under the purposes and definition of the ADA, asymptomatic HIV infection was not regarded as a disability.¹¹⁹

In examining the effect of *Runnebaum*, legal groups stated that "it now appears that the ADA, as courts are interpreting it, may not allay fears that testing could lead to lost jobs, health care or homes."¹²⁰ Based on *Runnebaum*, a professional state organization could hold the position that an athlete who has an asymptomatic HIV infection is not disabled or impaired, and would not be subject to the ADA's strict prohibition on discrimination against disabled individuals in employment. As a result, a mandatory testing policy for professional athletes could fall through a loophole in the ADA.¹²¹

V. MANDATORY HIV TESTING FOR PROFESSIONAL SPORTS

The publicity that Magic Johnson generated when he announced his retirement in 1991 has particular importance in

114. *Runnebaum*, 123 F.3d at 170.

115. *See id.*

116. *See id.* at 170-71.

117. *See Runnebaum*, 123 F.3d at 171.

118. *Id.* at 172(citing 42 U.S.C.A. § 12102(2)(A)).

119. *See Runnebaum*, 123 F.3d at 172.

120. *See McKee*, *supra* note 93, at 217 (stated by the American Civil Liberties Union, the New York's Lambda Legal Defense and Education Fund and New York Medical College in a letter dated September 25, 1997, to The New England Journal of Medicine).

121. *See Johnston*, *supra* note 1, at 193.

the arena of AIDS education.¹²² Johnson provided a great contribution to AIDS awareness when he acknowledged his HIV infection.¹²³ Over the past six years, Johnson has continued to be a spokesperson on AIDS prevention and AIDS-related discrimination.¹²⁴ However, in spite of Magic's leadership role in AIDS awareness, none of the four major professional sports or leagues have established a mandatory HIV or AIDS testing policy for their athletes.¹²⁵

In the National Basketball Association (NBA), a player with open wounds must immediately depart from the game until the bleeding stops and wound is bandaged, and must change his uniform if it is soaked with blood.¹²⁶ In the National Hockey League (NHL), players may procure confidential assistance for substance abuse or other problems through a counselor and are provided with educational material by a medical staff at least once each season.¹²⁷ In the National Football League (NFL), the determination of whether or not an infected player should continue participation is a personal medical decision between the player and his physician.¹²⁸ Furthermore, if a player is infected, then counseling is recommended but not mandatory.¹²⁹ In Major League Baseball (MLB), teams generally maintain AIDS awareness seminars for players in the spring, which are conducted by team physi-

122. See Donald H.J. Herman, *Magic Has Learned A Lot—Now He's Teaching Us*, CHI. TRIB., Feb. 11, 1996, at 5. After Johnson announced that he was infected with HIV, the National Basketball Association instituted a policy requiring players who are bleeding to depart from the game until the cut is bandaged. See *NHL Goons' Bloody Fear: HIV*, *supra* note 36, at 43.

123. See Herman, *supra* note 122, at 5. "While Johnson himself, professional basketball and its fans are all benefiting from his return to the court, it is important to realize that the public, whose awareness of AIDS and HIV infection needs to be continually reinforced, gains the most from Johnson's return. Those who see him on the court will see that people with HIV can lead productive lives." *Id.*

124. See *id.*

125. See *HIV & Sports: What Have We Learned? AIDS Facts*, *supra* note 37, at C9.

126. See *id.*

127. See *id.*

128. See *id.* The NFL has continually opposed league-wide HIV testing, while allowing each team to deal with the issue. See Johnston, *supra* note 1, at 196 n.13. In 1987, the Dallas Cowboys were the first team in the NFL to allow athletes to be voluntarily tested for AIDS. See *id.* Subsequently, around nine other NFL teams set up some type of HIV testing policy. See *id.* However, in 1991, the Philadelphia Eagles, unbeknownst to some players, tested every player for the HIV virus at the beginning of their season training camp. See *id.* Likewise, in 1992, the N.Y. Giants also included HIV testing in their routine medical exams. See *id.*

129. See *HIV & Sports: What Have We Learned? AIDS Facts*, *supra* note 37, at C9.

cians and trainers.¹³⁰

Contrary to the aforementioned professional sport leagues, fifteen state boxing commissions have required professional boxers to submit to mandatory HIV testing.¹³¹ There are an increasing number of states that have implemented mandatory HIV testing programs for professional fighters following Tommy Morrison's recent disclosure of his HIV status.¹³² Nevada is the boxing industry's leading safety authority that has tested more than 2,150 boxers since 1988.¹³³ It is apparent that boxers are exposed to a greater deal of blood due to the violence and excessive bleeding associated with the sport. Since the commingling of blood between fighters is common in the ring, there is a greater concern or fear of HIV transmission.¹³⁴

In the ongoing debate over mandatory HIV testing, one commentator vigorously states, "Testing isn't a civil rights or privacy issue. It's a health and safety issue . . . Even if the odds are low, the competitors would be better protected by testing."¹³⁵ Many other commentators in favor of mandatory HIV policies agree that one of the broadest issues for HIV infected athletes is how privacy concerns relate to public health concerns.¹³⁶

A. Protection of HIV-Infected Athlete's Rights

A professional athlete's individual right to privacy would be affected by a mandatory HIV testing policy.¹³⁷ Additionally, individuals infected with the HIV virus are frequently discrim-

130. *See id.*

131. *See Saraceno, supra* note 43, at 1C.

132. *See id.* The race to establish commission policy, or pass legislation, is marked by Morrison's fame as a known heavyweight. *See id.* "Tommy Morrison is our Magic Johnson," said Greg Sirb, executive director of the Pennsylvania Commission." *Id.* One month after Morrison revealed his HIV status, nine states had adopted mandatory testing. *See id.* States in which HIV testing is mandatory include: Arizona, Georgia, Hawaii, Indiana, Louisiana, Maryland, Massachusetts, New York, New Hampshire, New Jersey, New Mexico, Nevada, Oregon, Utah and Washington. *See id.*

133. *See id.* In Nevada, boxers must display certified test results completed within the last 30 days which states that he or she is HIV-negative. *See HIV & Sports: What Have We Learned? AIDS Facts, supra* note 37, at C9.

134. *See Bill Eastman, This is a Health Issue, USA TODAY, Feb. 15, 1996, at 10A.*

135. *See id.*

136. *See McKee, supra* note 93, at 206.

137. *See Johnston, supra* note 1, at 187. The right to privacy is defined as: "The right to be let alone; the right of a person to be free from unwarranted publicity . . . The right

inated against.¹³⁸ "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."¹³⁹ An individual can suffer a considerable amount of emotional and social harm when there is an undesired disclosure of personal health information.¹⁴⁰ "Stigmatization may be a consequence of such disclosure. . ." ¹⁴¹ It is apparent that a professional athlete's individual right to privacy may be infringed when a sports team or league implements a mandatory HIV testing policy.¹⁴² However, the question still remains of whether or not this invasion of privacy should be permitted in light of public health concerns.¹⁴³

In the midst of a national debate between privacy rights and public health issues, there has been a prevalent rise in public sentiment favoring mandatory policies that would require reporting any incidents of HIV infection.¹⁴⁴ Currently, there are approximately thirty states that have some type of arrangement mandating HIV reporting. For example, the Centers for Disease Control and Prevention (CDC) was planning to recommend that all new incidents of HIV be recorded country-wide by the end of 1997.¹⁴⁵

In addition, the American Medical Association and *The New England Journal of Medicine* have supported mandatory HIV reporting in lieu of information verifying that HIV reporting could protect and save the lives of those infected with HIV by obtaining promising modernistic drug therapies much

of an individual . . . to withhold himself and his property from public scrutiny, if he so chooses." *Id.*(citing to BLACK'S LAW DICTIONARY 1075 (6th ed. 1990)).

138. See Johnston, *supra* note 1, at 188.

139. *Id.*(citing to Martha A. Field, *Testing for AIDS: Uses and Abuses*, 16 AM. J.L. & MED. 34, 45 (1990)).

140. See McKee, *supra* note 93, at 206 (quoting Lawrence Gostin, Georgetown University Law Center professor).

141. See McKee, *supra* note 93, at 206.

142. See Johnston, *supra* note 1, at 188.

143. See generally McKee, *supra* note 93, at 206.

144. See *id.* The American Medical Association and The New England Journal of Medicine believe that the reporting of new HIV cases and full-blown AIDS cases now mandated by all 50 states, may assist researchers in obtaining a better understanding of the AIDS epidemic. See *id.*

145. See *id.* Despite this policy or recommendation favoring HIV recording, New York and California, home to the largest U.S. AIDS populace, still decline to conduct HIV reporting for concern of infringement of privacy rights. See *id.*

sooner.¹⁴⁶ *The New England Journal of Medicine* has recommended reporting HIV incidents by name, stating that apprehensions about confidentiality and discrimination "have become less persuasive."¹⁴⁷

In effect, AIDS advocates are discovering that they are "suddenly at odds with their scientific allies and in the uncomfortable position of compromising a long-held conviction. . . AIDS advocates may be waging a losing battle in what's being billed by their opponents as a clash between civil rights ideology and public health reality."¹⁴⁸ Tom Coburn, a Republican Congressman from Oklahoma, stated, "Put simply, the federal government and the public health community have been AWOL in the battle against HIV. Sound medical practices have been abandoned and replaced with political correctness. HIV has been treated as a civil rights issue instead of the public health crisis that it is."¹⁴⁹

Parties on both sides of the HIV reporting issue say that the CDC believes that the knowledge and data collected in the current names reporting states is priceless.¹⁵⁰ In the September 19, 1997 issue of *Morbidity and Mortality Weekly Report*, the CDC pronounced, "Although AIDS surveillance [by reporting of names] continues to be essential for understanding reasons for the lack of timely access to HIV testing and care, and the failure of treatment regimens to delay HIV disease progression, HIV surveillance is becoming increasingly important as more infected persons receive effective antiretroviral therapy."¹⁵¹

Furthermore, the CDC report concluded that all states should employ name-enhanced case surveillance as an expansion of its own AIDS surveillance curriculums.¹⁵² In furthering its views on HIV and privacy issues, the CDC report acknowledged its intentions by stating, "CDC is developing HIV sur-

146. *See id.*

147. *See McKee, supra* note 93, at 206.

148. *Id.* The CDC estimates that out of 775,000 Americans, there are 225,000 persons who are infected with HIV but don't know it. *See id.*

149. *See McKee, supra* note 93, at 206. Tom Coburn, the chief sponsor of H.R. 1062, recommended a bill which would authorize a federal HIV reporting system that would demand partner notification and firmly encourage voluntary identification of the names of the individuals tested. *See id.*

150. *See id.* at 217.

151. *See id.*

152. *See id.*

veillance policy and technical guidance to assist all states and territories to conduct HIV/AIDS case surveillance.”¹⁵³

In lieu of the aforementioned argument concerning HIV reporting, it is apparent that a mandatory HIV testing policy, albeit an invasion of privacy, should be lawful in light of health and safety precautions. A mandatory HIV testing policy designed to educate, treat, and inform athletes of the existent dangers involved and safety precautions available to them should be undertaken by all professional sport organizations.¹⁵⁴ Privacy concerns notwithstanding, this policy would allow athletes to seek treatment at an earlier stage to prolong their lives while assisting other athletes in educational and precautionary procedures.¹⁵⁵

B. Education of Athletes and Health Precautions

Education is tantamount to the implementation of a successful HIV policy.¹⁵⁶ Professional teams should be motivated to seek out support, sufficient resources, and sound educational programs that are specifically designed to raise athletes' awareness and concern regarding HIV and AIDS.¹⁵⁷ Rather than heeding the material problems implicated by HIV and AIDS, which encompass primitive views concerning sex and drug treatment and also educating people on how the HIV virus is actually transmitted, “we have hysterical rhetoric that gets dismissed by the knowledgeable and ignored by those most at risk.”¹⁵⁸ Proper education of athletes through the dissemination of accurate information about HIV and AIDS may effectively reduce the risk of AIDS connected with sports.¹⁵⁹

The chance of a person being infected with the HIV virus in a sporting event is “certainly high enough to cause concern.”¹⁶⁰ By the mid-1980's, the common lay person was aware of the HIV virus and recognized it as a deadly disease with no certain

153. See McKee, *supra* note 93, at 217.

154. See generally Anderson, *supra* note 3, at 314-15.

155. See *id.* at 315.

156. See Webber, *supra* note 1, at 21.

157. See *id.*

158. See Wynn, *supra* note 2, at 5.

159. See *id.*

160. See Gavin Evans, *Backpages: Medicine Cabinet*, THE GUARDIAN (London), Nov. 28, 1997, at 19 (quoting Dr. Martin Schwelnus, a prominent Cape Town sports physician).

cure.¹⁶¹ Even though the public was cognizant of the few statistics and data related to the HIV outbreak, it was not until Magic Johnson's public acknowledgment of his HIV infection that the American people as a whole began to realize that the HIV virus was a concern for all segments of the population.¹⁶² The HIV hysteria has recently become a health risk for the very celebrated and beloved athletes.¹⁶³ As public perception of the HIV epidemic has increased in recent years, so has the perception of the athletes infected with the HIV virus.¹⁶⁴

With the AIDS epidemic on the rise¹⁶⁵ and HIV-positive athletes participating in sports¹⁶⁶, professional organizations need to act now in order to develop a mandatory HIV testing policy. Although medical evidence has shown that the dangers of HIV virus transmission are insignificant, the risks of contracting HIV should not be ruled out completely.¹⁶⁷ Rather, sports leagues and teams should take the steps necessary to implement a mandatory HIV testing policy that would assist in the early detection of the HIV virus in athletes who are unknowingly infected.¹⁶⁸ This policy should not be implemented with the objective of diminishing the risk of HIV infection to

161. See Jennifer Conger, *Aids and Sports*, SALT LAKE TRIB., Dec. 20, 1997, at A18.

162. See *id.* Terry Lyons, an NBA vice president, stated:

What we in the NBA, the media and people all over the world have learned in the last five years is monumental. And Magic Johnson is the reason, hands down. He put the news about the virus on the front page of the world. He probably saved a lot of lives, when you think about it. Until then, the medical community had been 10 years ahead of the rest of us in terms of knowledge . . . Magic brought the two sides together.

Springer & Efron, *supra* note 6, at C9.

163. See Conger, *supra* note 161, at A18.

164. See *id.*

165. AIDS is the second-leading source of death among persons within the ages of 25-44. See Westhead, *supra* note 32, at D8.

166. See Wynn, *supra* note 2, at 5. "If you truly believe that Magic Johnson and Tommy Morrison are the only athletes who've ever been infected, you're a prime candidate to purchase 1,000 acres of choice swamp land." See *id.* Dr. Cary Savitch, a physician specializing in infectious diseases stated, "I'm telling you there are players, maybe even a significant number, in the NBA, and NFL and hockey who are HIV-positive that we don't know about. Maybe they don't even know they are, which is where the real danger is." See Woody Woodburn, *Doctor Offerring these Magic Words of Warning: With Aids, You Will Die*, SEATTLE-POST INTELLIGENCER, Feb. 18, 1997, at D2.

167. See Conger, *supra* note 161, at A18.

168. See Springer & Efron, *supra* note 6, at C9. Dr. Jeffrey Laurence, director of the AIDS laboratory at New York Hospital, stated, "Few athletes are ready to acknowledge they have the disease. . . You don't have people coming out, saying, 'I'm an athlete. I have HIV.' 'And they must be out there based on the statistics.'" *Id.*

athletes by eliminating persons infected with HIV from the world of sports.¹⁶⁹ Instead, an athlete infected with HIV should be entitled to compete without any extremely unfavorable effects on other athletes so long as they are willing to participate in mandatory HIV testing.¹⁷⁰

By engaging in such a policy, sports teams and leagues will be able to utilize medical precautions and safety while still allowing infected athletes to continue playing.¹⁷¹ The best method of reducing the HIV virus is through education of both infected and non-infected athletes.¹⁷² All sports leagues and teams should establish mandatory HIV testing policies coupled with mandatory AIDS/HIV education programs in order to help the athletes overcome any unwarranted fears they may have about participating in their respective sport alongside HIV-infected athletes.¹⁷³

All professional sporting events should be controlled by reasonable and sound guidelines.¹⁷⁴ Even though athletes infected with HIV should be entitled to engage in all competitive sports, routine mandatory testing of athletes for the HIV virus is still necessary.¹⁷⁵ The risks of contracting HIV are just too costly. Physicians treating athletes infected with the HIV virus should be able to offer proper assistance to their patients by monitoring their health to avoid exacerbating the effects of HIV.¹⁷⁶ Physicians should also be available to advise these HIV-infected athletes about the possibility of blood exposure and the isolated chance of endangering the health of other ath-

169. See Conger, *supra* note 161, at A18.

170. See *id.*

171. Some sport organizations have instituted changes to address these fears:

Doctors and trainers now wear latex gloves when treating athletes; players who begin to bleed during a competition are immediately removed from the game and cannot return until the wound is cleaned and bandaged; and all blood is treated as potentially contaminated blood. These are prudent and sensible measures.

See Swift, *supra* note 10, at 100.

172. See Conger, *supra* note 161, at A18.

173. See *Welcome Back, Magic*, SAN FRAN. CHRON., Jan. 31, 1996, at A16.

174. See Herman, *supra* note 122, at 5.

175. See *id.*

176. See *id.* In Magic Johnson's circumstances, some medical experts have pronounced that a good daily diet, routine exercise and relaxation may ultimately extend his life expectancy. See *id.* Other physicians have determined that a good diet and exercise will not augment Magic's chances of accelerating his HIV infection. See *id.*

letes.¹⁷⁷ In addition, classes and seminars in the prevention of HIV transmission in the professional sport setting should be required for all athletes, coaches and athletic trainers.¹⁷⁸

Although the initial objective of mandatory HIV testing is to safeguard the uninfected athletes from exposure to the HIV virus, there is a corresponding responsibility to avoid intensifying the condition of any HIV-infected athletes.¹⁷⁹ Hence, the establishment of a mandatory HIV testing policy will allow athletes to detect HIV at its early stages and therefore permit treating physicians to closely supervise and oversee the health of these infected athletes.¹⁸⁰ It is important to note that such a mandatory policy would require an athlete to be educated about sexual behaviors, drug use, HIV counseling and testing.¹⁸¹ It would not be utilized to exclude athletes from participating in sports, as such a policy goal would not be justified on medical or legal grounds.¹⁸² Rather, a mandatory testing policy that focuses on education, safety and medical precautions should be adopted by leagues and teams to protect the health of all athletes and curtail the chances of the progression of HIV-infections.

"Aids is a 100% fatal disease. But it is also 100% preventable."¹⁸³ The best defense we have for battling the war on HIV/AIDS is education.¹⁸⁴ Education by way of current medical information will undoubtedly lessen the apprehensions and misunderstanding of this deadly disease.¹⁸⁵ This type of education

177. See *id.* Physicians treating Magic Johnson need to closely supervise his state of health to ascertain whether increased pressure, anxiety or other condition in his life is endangering his immune system. See *id.*

178. See Herman, *supra* note 122, at 5. Mandatory HIV testing may facilitate the protection of uninfected athletes, coaches and trainers when organizations know to employ precautions while caring for an HIV infected athlete. See Johnston, *supra* note 1, at 183.

179. See *id.*

180. See *id.*

181. See Drotman, *supra* note 36, at 193.

182. See *id.* There is no reported or substantiated instance of HIV transmission during any sporting event. See *id.* Also, the risk of HIV transmission on the playing field is estimated to be relatively low. See *id.*

183. Springer & Efron, *supra* note 6, at C9. For example, the Los Angeles Laker's trainer's room has certain areas designated for dirty uniforms and towels. See *id.* In addition, hypodermic needles are discarded in a solid container instead of a soft bag so that the needle cannot stick out and puncture someone. See *id.*

184. See *Education Best Defense in War on Aids*, THE JOURNAL RECORD (OKLAHOMA CITY), July 15, 1992, available in 1992 WL 8109015.

185. See Webber, *supra* note 1, at 21.

will also encourage players to be more accepting of HIV-infected athletes while increasing their knowledge of reducing the chances of AIDS transmission connected with their participation in their respective sport.¹⁸⁶

VI. CONCLUSION

There is a necessity for professional sports teams and leagues to develop an extensive mandatory HIV testing policy that includes education, safety, and confidentiality without excluding an HIV infected athlete from participation. Those athletes who are infected with HIV should no longer suffer in silence. The underlying intent of a mandatory testing policy should not be to discriminate against an infected athlete, but rather to educate and inform athletes of the risks involved and safety precautions available. Mandatory HIV testing is beneficial to both the infected and non-infected players. The infected HIV players will discover their HIV status at an earlier stage in life and will have an opportunity to prolong their lives through treatment. On the other hand, non-infected players will be able to take reasonable safety precautions as well as participate in a far-reaching program based on education and awareness.

The appropriate question is not whether there is a statistically slight possibility that an athlete can transmit AIDS in the sports setting, but rather whether the apprehension of transmission is reasonable.¹⁸⁷ It is important not to overlook the fact that hundreds of thousands of Americans infected with the HIV virus "can take courage from the example of Magic Johnson that it is better to learn to live with HIV infection rather than to await death from AIDS."¹⁸⁸ For this reason alone, a mandatory HIV testing policy would demonstrate that an athlete who lives in fear or suppresses the truth about his or her HIV-infection would be the ultimate loser in the game of life.

186. *See id.*

187. *See* Wolohan, *supra* note 5, at 395. Statisticians have estimated that those infected with HIV will spread to 110 million people by the year 2000. *See School is a Mainstay to Prevent HIV/AIDS, Minister Says*, THE INDONESIA NATIONAL NEWS AGENCY, Dec. 2, 1997, available in 1997 WL 15129799. Also, in the year 2000, an estimate of 30 to 40 million people will die due to HIV or AIDS. *See id.*

188. *See* Herman, *supra* note 122, at 5.

Times and viewpoints have changed dramatically since that day in 1991 when Magic Johnson informed the entire country that he had the HIV virus.¹⁸⁹ In a country where HIV and AIDS has spread in such haste and without a moment of pause, it is now appropriate to promote mandatory HIV testing policies in professional sports, notwithstanding assertions that such testing would infringe upon an athlete's legal rights.¹⁹⁰ "This is the health of our country we are talking about. If we are to beat this scourge - not just develop new drugs to delay its conclusion - policy leaders have to rise to [this] challenge."¹⁹¹

In conclusion, players want to have the safest workplace possible.¹⁹² In order to achieve this end, mandatory HIV testing policies must be implemented in professional sports.

Anthony DiMaggio

189. See *Welcome Back, Magic*, *supra* note 173, at A16.

190. See *Battle Against Aids Demands Leadership*, CHI. SUN-TIMES, Feb. 17, 1997, at 27.

191. *Id.*

192. See Westhead, *supra* note 32, at D8. Ryan Vandenbussche, a player for the New York Rangers, states, "It should be mandatory to have an AIDS test every year at training camp. There's a lot of blood exchanged when you're scrappin'." *Id.*