

Out of Bounds: HIV and AIDS Discrimination in American Athletics

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"Everybody's talking about it. Some people are scared. This could be dangerous to us all."

- Former NBA player, Gerald Wilkins upon hearing Magic Johnson's decision to return to basketball¹

INTRODUCTION: MAGIC, MO, AND THE BEGINNING OF THE CONTROVERSY

On November 7, 1991, the world of sports changed forever. One of the most charismatic and publicly adored players in the history of the National Basketball Association (NBA), Earvin "Magic" Johnson, announced to a stunned audience that he was HIV-positive.² Shortly after Magic announced his return to professional basketball, boxer Tommy Morrison announced that he also was HIV-positive.³ In the wake of these announcements issues such as exclusion from participation, disclosure of HIV-positive status, and mandatory testing were heavily debated and are still widely argued.

This article will discuss the presence of HIV/AIDS-based discrimination in American sports. To do this, I will first provide an explanation and brief background of the disease and how it is transferred. Second, I will discuss the presence of discrimination in the context of amateur sports, particularly focusing on high school athletics. Third, I will discuss the presence of discrimination in professional sports, focusing on the four major sports leagues – the NBA, the National Football League (NFL), Major League Baseball (MLB), and the National Hockey League (NHL) – as well as professional boxing. Fourth, I will discuss the current anti-discrimination regulations. Fifth, I will discuss the topic of mandatory testing and whether it has any place in the professional sports world. Finally, I will discuss ways of ending discrimination in both amateur and professional sports.

TRUTH AND RUMORS: WHAT IS HIV/AIDS AND HOW IS IT TRANSMITTED

Discrimination and stigma are often the result of a lack of understanding that one group or person has toward another. Thus, before delving any deeper into the primary subject matter of this paper, it is important to clear up any misconceptions about HIV and AIDS by discussing the background of the disease and how it is actually caused and transmitted.

The Human Immunodeficiency Virus (HIV) is the virus that causes Acquired Immune Deficiency Syndrome (AIDS).⁴ HIV causes AIDS by destroying a certain kind of blood cell

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¹ Harvey Araton, *Johnson's Return to League Isn't Welcomed by Some*, N.Y. TIMES, Nov. 1, 1992, at 8.

² Mark Heisler, *Magic Johnson's Career Ended by HIV-Positive Test*, L.A. TIMES, Nov. 8, 1991, at A1.

³ Reports: *Morrison Is HIV Positive; Heavyweight Boxer Is Suspended Hours Before Fight on Saturday*, WASH. POST, Feb. 12, 1996, at C1.

⁴ <http://www.cdc.gov/hiv/topics/basic/index.htm>

(CD4 T cells), which are crucial to the normal function of the human immune system.⁵ AIDS is characterized by a weakening of the immune system, making patients with AIDS vulnerable to many infections.⁶

The earliest known case of HIV in a human was found in the blood sample of a man in Kinshasa, Conga in 1959.⁷ It is not known how he became infected. Genetic analysis of his blood sample suggested that HIV may have stemmed from a single virus in the late 1940s or early 1950s.⁸ The virus has existed in the United States since at least the mid-to-late 1970s.⁹ HIV is spread through sexual contact with an infected person, the sharing of needles or syringes, or exposure to HIV-infected blood.¹⁰

Since its discovery some twenty-five years ago, AIDS has become one of the deadliest epidemics in history.¹¹ According to government officials, AIDS has killed more than twenty-five million people worldwide, including 500,000 Americans.¹² Despite major advances in the prevention and treatment of HIV/AIDS, an estimated 40,000 Americans still become infected with HIV every year.¹³

Among athletes, the primary concern is that people can become infected with HIV if infected blood makes contact with their bloodstream through either open cuts or splashes into their eyes.¹⁴ However, most experts agree that transmission in this way is very unlikely, the reason being that the virus is extremely fragile outside of the body and cannot survive in either open air or water.¹⁵ The United States Olympic Congress has determined that the risk of transmission during athletic competition is as low as 0.035-percent.¹⁶ Other experts have gone so far as to determine that the likelihood of transmission in any sports is so infinitesimally small that it cannot even be quantified.¹⁷

Despite the extremely low possibility of transmission during athletic competition, there is at least one case of possible transmission during a sports event. In a 1989 Italian soccer match, two players were involved in a bloody collision. At the time, one of the players was HIV-positive, while the other player was HIV-negative. Two months after the incident, the previously

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ John T. Wolohan, *An Ethical and Legal Dilemma: Participation in Sports by HIV Infected Athletes*, 7 MARQ. SPORTS L. REV. 373, 378 (1997).

¹⁵ *Id.*

¹⁶ Michael T. Flannery & Raymond C. O'Brien, *Mandatory HIV Testing of Professional Boxers: An Unconstitutional Effort to Regulate a Sport that Needs to be Regulated*, 31 U.C. DAVIS L. REV. 409, 411 (1998).

¹⁷ American Academy of Pediatrics Policy Statement, *HIV and Sports: Human Immunodeficiency Virus in the Athletic Setting*, 20 PHYSICIAN & SPORTS MED. 189, 189 (1992).

HIV-negative athlete tested positive. However, this case should be read with skepticism, as Italian health officials concluded that the infection may have been due to off-field activities.¹⁸

Despite the low risk of transmission and lack of compelling precedent of transmission occurring during athletic competition, the fact remains that there is still some risk, however scientifically minute, and for many people any possibility of transmission is cause for concern.

DISCRIMINATION IN HIGH SCHOOL/AMATEUR SPORTS

Discrimination against HIV/AIDS-infected athletes is present at all levels of competition, but its presence in amateur and high school sports is particularly disconcerting. For most people, participation in amateur athletics is strictly about enjoyment of the sport. With no prize money, free agency, or endorsement deals at stake, amateur athletics are supposedly as pure as competition gets. Unfortunately, several incidents and recent statistics reveal that many people think that amateur athletic competition and even coaching are privileges that should not be given to people infected with HIV/AIDS.

Less than two years after Magic Johnson's announcement, several high school football teams in rural Oklahoma canceled games against an opposing team because one of its players was HIV-positive.¹⁹ Six years later, the Poudre School District in northern Colorado adopted a policy that HIV-infected students "may be excluded from participation in school athletics" depending on an assessment given by school administrators, public health officials and the particular student's parents. A school district official attempted to justify the action as "intended to be a cooperative policy, not a restrictive, exclusionary policy."²⁰

Unfortunately, these instances of overt discrimination are not rare. The fear that student-athletes have of contracting the disease through athletic competition appears to be abundant. In a recent study conducted in Virginia, only twenty-three of the fifty-four high schools surveyed reported that they would permit a football player with HIV/AIDS a reasonable accommodation in order to compete.²¹

High school athletes are not the only individuals dealing with discrimination based on their HIV-infected status. Coaches are also feeling the effects. In August 2003, a children's football league in suburban Akron, Ohio barred an HIV-positive man from being an assistant coach. The director of the league claimed that the ban was the result of anonymous phone calls made by parents of children in the league who said they had a fear of the former firefighter coming in contact with their children. The decision came after a meeting in which a local physician assured the league's board members and players' parents that "occupations such as coaching present no risk for AIDS transmission."²²

¹⁸ Wolohan, *supra* note 13, at 378.

¹⁹ Jerry Kirschenbaum, *Lone Wolf's Battler*, SPORTS ILLUSTRATED, May 24, 1993, at 9.

²⁰ James Brooke, *School Policy Could Bar Athletes With HIV*, N.Y. TIMES, Jan. 16, 1999, at A8.

²¹ Donald H. Stone, *The Game of Pleasant Diversion: Can We Level the Playing Field for the Disabled Athlete and Maintain the National Pastime, in the Aftermath of PGA Tour, Inc. v. Martin: An Empirical Study of the Disabled Athlete*, 79 ST. JOHN'S L. REV. 377, 395 (2005).

²² Julie Wallace, *Football Coach Banned*, AKRON BEACON JOURNAL, Aug. 5, 2003, at A1.

The league reversed its decision a few days later after meeting with additional doctors and an attorney. The director of the league said that allowing the coach to return was “what the board had planned to do all along.”²³ Unfortunately the effects of discrimination on an individual are immediate, and the psychological impact does not go away instantly after a legally-based decision. Although the coach was allowed to return, he was certainly aware that there were parents in the bleachers who disapproved of him being on the field, and this likely played a role in his ability to be an effective coach.²⁴

Perhaps the most famous, as well as most controversial, AIDS-infected amateur athlete is former Olympic champion Greg Louganis. In February 1995, Louganis, widely recognized as the greatest diver in history, announced in an interview with Barbara Walters that he had AIDS.²⁵ The shocked media and public quickly flashed back to the 1988 Olympics when Louganis famously hit his head on the diving board, resulting in a deep cut requiring several stitches. Louganis, who knew he was HIV-infected at the time of the dive, was instantly portrayed as a reckless man who put lives at risk by diving. An onslaught of questions followed: Should Louganis have competed? Why didn't he inform the attending US team doctor of his condition, who stitched his head without gloves? Were other divers at risk because his blood was in the water?²⁶

Although many of these worries are without basis given the inability of the virus to survive in water, the concern over the doctor's stitching without using gloves brought up a valid concern. Did Louganis, by not informing the United States team and the International Olympic Committee, put the physician's life at risk? Given the infinitesimal risk of transmission during such a procedure, Louganis was probably less reckless than portrayed by the media. But the fact remains that there was a risk of transmission, and the physician had the right to know Louganis' status before coming in contact with his blood. The Louganis incident created a difficult ethical question about whether he had crossed the line in keeping his condition private.

DISCRIMINATION IN PROFESSIONAL SPORTS

Magic Johnson

After Magic Johnson's announcement that he was HIV-positive, there was very little discussion whether he would continue to play basketball.²⁷ This was probably a result of an ill-informed media, fellow basketball players, and general public that likely equated the disease with severe illness and imminent death. Magic proved them wrong. After sitting out a year, he announced his intention to return to the NBA for the 1992-1993 season.²⁸

By announcing his return, Magic spoke for the HIV-infected masses, letting people know that the remainder of his life would not be spent in a hospital bed feeling sorry for himself and

²³ *Id.*

²⁴ Julie Wallace, *Ousted Coach Back in Game*, AKRON BEACON JOURNAL, Aug. 8, 2003, at A1.

²⁵ John Weyler, *Olympic Diver Louganis Reveals that he has AIDS*, L.A. TIMES, Feb. 23, 1995, at A1.

²⁶ Anthony DiMaggio, Comment, *Suffering in Silence: Should They be Cheered or Feared?*, 8 SETON HALL J. SPORTS L. 663, 665 (1998).

²⁷ Wolohan, *supra* note 13, at 373.

²⁸ Robert Lipsyte, *Celebrate Magic, but There's More Work to Be Done*, N.Y. TIMES, Feb. 16, 1992, at 11.

waiting to die. Upon his announcement, despite his status as one of the most-liked and greatest players of his generation, Magic felt the stigma that HIV/AIDS brings with it. Fellow players spoke out about their concerns of playing with an HIV-infected player. Just four days before the start of the season, Magic announced his retirement, citing the fear that his return to the court was creating among his fellow players.²⁹ But Johnson did return midway through the season, and proved that HIV-infected athletes could compete at the highest levels of competition. Magic led his team to victory and earned the Most Valuable Player award at the 1992 All-Star game.³⁰ Magic also helped lead the United States to a gold medal at the 1992 Olympics. Unfortunately, his effort was partially overshadowed by a member of the Australian team, who stated that if his team was scheduled against the United States he would prefer to forfeit than risk contracting HIV.³¹

After another brief retirement, Magic returned to basketball once more in January 1996. Upon his return there was almost universal acceptance by his fellow players and team owners. Asked why there was such a difference between his 1992 comeback and his 1996 comeback, Magic gave credit to the NBA in educating players about the HIV virus and how transmission was virtually impossible during competition.³²

Magic's statement about the relationship of HIV/AIDS education to the decrease in discrimination is particularly noteworthy. In speaking up against the discrimination against HIV-infected athletes, Magic proved to be more than a victim of the disease. He was someone who was willing to use his fame and marketing savvy to get the word out about a disease that was affecting millions, but had no recognizable advocates.

Tommy Morrison

At a pre-fight press conference on February 22, 1996, just two weeks after Magic announced his second comeback, heavyweight boxer Tommy Morrison announced that he was HIV-positive. Morrison was immediately shunned by the boxing world.³³ Six hours before his scheduled fight in Las Vegas, the Nevada State Athletic Commission suspended Morrison from any competition. The ban not only prevented Morrison from fighting in Nevada, but in any other "non-testing" State that recognized the Nevada ban. In effect, the Nevada ban affected Morrison's ability to box throughout the world.

Other Athletes

Numerous other professional athletes have been diagnosed with HIV/AIDS, but their diagnoses came after their playing days were completed. Perhaps the most famous of these athletes is former tennis champion Arthur Ashe, who most likely contracted the disease during a

²⁹ Michael Martinez, *Controversies: Johnson Retires Again*, N.Y. TIMES, Nov. 3, 1992, at B9.

³⁰ Kerry Eggers, *Emotional Energy Makes Magic*, THE OREGONIAN, Feb. 10, 1992, at D4.

³¹ Matthew L. Milton, *AIDS and Athletics*, SETON HALL J. SPORTS L. 5, 6 (1993).

³² Wolohan, *supra* note 13, at 374.

³³ Karen Ahearn, *HIV-Positive Athletes*, 7 SPORTS LAW. J. 279 (2000).

blood transfusion. Ashe's diagnosis came eight years after retirement, but he had the opportunity to bring attention to the AIDS epidemic world-wide before dying.³⁴

Former Los Angeles Dodgers' and Oakland Athletics' pitcher Glenn Burke, the only Major League Baseball player openly to admit his homosexuality while playing, died of AIDS in 1995.³⁵ Other professional athletes who have died from AIDS-related complications include former Washington Redskins all-pro tight end Jerry Smith, who died in 1986, Olympic decathlete Tom Waddell, who died in 1987,³⁶ and former NBA player Chad Kinch, who died in 1993.³⁷

Although the list of professional athletes who have died from AIDS-related complications is rather short, it is evidence that professional athletes are not immune to the disease. Rather, with the increasing salaries and decreasing age of professional athletes, the lure of sexual promiscuity and other temptations is great as athletes travel from a hotel to hotel.

ANTI-DISCRIMINATION LAWS PROTECTING ATHLETES WITH HIV/AIDS

It is without question that HIV/AIDS-infected athletes should be able to continue to play sports as long as they are able without being subjected to discrimination. The federal government made this abundantly clear in its enactment of two laws that apply to HIV/AIDS-infected athletes, the Americans with Disabilities Act of 1990³⁸ and The Rehabilitation Act of 1973.³⁹

Americans with Disabilities Act

The Americans with Disabilities Act (ADA) was enacted in 1990 to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities by removing social and architectural barriers that have segregated individuals with disabilities from full participation in society."⁴⁰ The ADA focuses on removing the barriers presented by a person's given disability and encouraging the creation of reasonable accommodations.⁴¹ Reasonable accommodations refer to "any modifications of a program or activity which create an equal opportunity for an individual with a disability."⁴²

For our concerns, Titles I, II, and III are the most relevant sections of the ADA. Title I prohibits discrimination in employment, and thus is applicable to athletes on professional sports teams and coaches at all levels of play. Due to this prohibition of discrimination, most professional sports leagues, with the exception of boxing, have developed guidelines for athletes

³⁴ Steve Springer, *Arthur Ashe, Champion On and Off Court, Dies of AIDS*, L.A. TIMES, Feb. 7, 1993, at A1.

³⁵ http://www.baseballlibrary.com/baseballlibrary/ballplayers/B/Burke_Glenn.stm

³⁶ *Id.*

³⁷ *Id.*

³⁸ The Americans with Disabilities Act, 42 U.S.C. § 12101 (1990).

³⁹ The Rehabilitation Act of 1973, 29 U.S.C. § 706 (1973).

⁴⁰ 42 U.S.C. § 12101(b)(1) (1990).

⁴¹ Wolohan, *supra* note 13, at 384.

⁴² *Id.*

with HIV/AIDS to participate.⁴³ Furthermore, these guidelines discourage the testing of athletes for HIV/AIDS, with boxing again being the exception.⁴⁴

Title II is applicable if the defendant is a public entity.⁴⁵ Courts have repeatedly allowed Title II cases involving high school athletic associations, thus establishing that high school athletic associations are public actors for the purpose of the ADA.⁴⁶

Title III is designed to protect people with disabilities against discrimination by a private entity. It is clear, however, that this protection is not absolute, and that private entities may "exclude disabled individuals from participation in an activity if that person poses a threat to the health and safety of others."⁴⁷ To be successful in a claim under Title III, an athlete must establish that he or she: (1) is a "qualified individual with a disability;" (2) is "otherwise qualified" for the athletic activity; (3) is being excluded from athletic participation "solely by reason of" his or her disabilities; and (4) is being discriminated against by a private entity that performs a public service.⁴⁸

Although the ADA is a powerful weapon in a disabled person's arsenal, it also presents a significant quandary when applied to athletics. If the ADA requires leveling the playing field to allow a disabled athlete to compete fairly, do athletic competitions risk losing one of their main ingredient - competition? Recently, the Supreme Court ruled that professional golfer Casey Martin should be allowed to use a cart during competition due to a degenerative leg condition.⁴⁹ The Court held that allowing Martin to use a cart would not work as a fundamental alteration of the game.⁵⁰ Many professional golfers disagreed with the Court's decision and thought that Martin was gaining an unfair advantage over the field. As one legal scholar asked: Will it get to the point where we will see "two bounces in tennis at Wimbledon, four strikes at Yankee Stadium, enlarging the basketball rim during March Madness, or a head start for track and field athletes during the Olympics?"⁵¹

Competitive athletes are not always looking for short cuts to success. It seems unlikely that athletes such as Major League pitcher Jim Abbott (born without a right hand) or former NFL kicker Tom Dempsey (born without toes on his kicking foot) would want compromises in the rules. The same can probably be said for athletes infected with HIV or AIDS. At lower levels of competition, specifically youth sports, leveling the playing field may be more accepted, but the battle between a disabled athlete's pride and creating a level playing field will presumably always remain unclear.

⁴³ Mary A. Hums, *AIDS in the Sports Arena: After Magic Johnson Where Do We Go From Here?*, 4 J. OF LEGAL ASPECTS OF SPORT, 59 (1994); Bill Brubaker, *The HIV Issue in Six Sports*, WASH. POST, June 13, 1993, at D10.

⁴⁴ Wolohan, *supra* note 13, at 384.

⁴⁵ Henry H. Perritt, Jr., *AMERICANS WITH DISABILITIES ACT HANDBOOK 5.21* (John Wiley & Sons, Inc., 3d ed.) (1997).

⁴⁶ Mark Freitas, *Applying the Rehabilitation Act and the Americans with Disabilities Act to Student-Athletes*, 5 SPORTS L.J. 139, 141 (1998).

⁴⁷ 28 C.F.R. § 36.208 (1998).

⁴⁸ 42 U.S.C. § 12101-12 (1990). *See also* *Abbott v. Bragdon*, 912 F. Supp. 580 (D. Me. 1995)

⁴⁹ *PGA Tour, Inc. v. Casey Martin*, 532 U.S. 661 (2001).

⁵⁰ *Id.* at 690.

⁵¹ Stone, *supra* note 21, at 377.

Rehabilitation Act of 1973

Section 504 of the Rehabilitation Act of 1973 states in part that “no otherwise qualified individual with a disability...shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance...”⁵² The Supreme Court has stated that the purpose of this section of the Rehabilitation Act “is to permit handicapped individuals to live as fully as they are able, without paternalistic authority deciding that certain activities are too risky for them.”⁵³ High schools, universities, and other entities receiving federal assistance must provide qualified handicapped individuals an equal opportunity to participate in their activities because the regulation applies to any program or activity receiving federal financial assistance.⁵⁴ For such individuals to pursue successfully claims under §504, they must satisfy four elements: (1) that they are within the definition of "handicapped individual," as provided in § 706(8); (2) that they are "otherwise qualified" for the athletic activity; (3) that they are being excluded from athletic participation "solely by reason of" their disability; and (4) that the institution is receiving federal financial assistance.⁵⁵

The Supreme Court has yet to rule on whether the ADA and Rehabilitation Act of 1973 apply to athletes with HIV/AIDS, which is probably the result of infected athletes willingly leaving competition after learning of their infection. But not all athletes should feel that they have to leave competition, especially if their HIV/AIDS infection has not decreased their athletic ability. Enough legal precedent exists involving people with infectious diseases that makes it clear that HIV/AIDS infected athletes are protected by these two laws. Several cases are particularly noteworthy and deserve further examination to determine that ADA and Rehabilitation Act of 1973 protect athletes with HIV/AIDS from discrimination.

In 1987, for the first time, the Supreme Court held that contagious diseases were covered under §503 of the Rehabilitation Act of 1973.⁵⁶ In *School Board of Nassau County v. Arline*, an elementary teacher was fired after the school district discovered that her tuberculosis had again become active. The District Court had held that although Arline was handicapped, she was not handicapped within the meaning of §504. The Supreme Court overruled the District Court and determined that “persons with contagious diseases are within the coverage of § 504 and that Arline’s condition falls ... neatly within the statutory and regulatory framework.”⁵⁷ The Court rejected the argument of the local school board that individuals with contagious diseases should not be protected under §504 because of the threat that they posed to the health of others, holding that it would be unfair “to seize upon the distinction between the effects of a disease on others and the effects of a disease on a patient ... to justify discriminatory treatment.”⁵⁸

⁵² 29 U.S.C.A. § 794(a) (1994).

⁵³ *Poole v. South Plainfield Board of Education*, 490 F. Supp. 984, 953-54 (D.N.J. 1980).

⁵⁴ Wolohan, *supra* note 13, at 381.

⁵⁵ *Id.* at 381-382.

⁵⁶ *School Board of Nassau County, Florida v. Arline*, 480 U.S. 273 (1987).

⁵⁷ *Id.* at 277.

⁵⁸ *Id.* at 282.

As demonstrated by the aforementioned statutes, there is no place in sports for discrimination against athletes infected with HIV/AIDS. But as long as HIV/AIDS infected athletes are allowed to compete, there will always remain the risk of transmission. For this reason, it is necessary to make the risk of transmission as small as possible to protect non-infected athletes. Many professional and amateur regulation committees have enacted guidelines to keep the risk minimal.⁵⁹ An example of this is the NBA's policy that requires bleeding players to leave the game immediately until they are bandaged and the bleeding has stopped. The NCAA has implemented a similar policy in its basketball games.⁶⁰ Because the possibility of transmission is so low, precautions such as these are effective and non-discriminatory because they do not single out HIV-infected athletes, but rather apply to everyone. Any regulation beyond this would verge on discriminatory, as the benefit of enacting more preventive measures would be greatly outweighed by the burden on athletes. This can best be shown by an examination of the current argument being made for the mandating of HIV/AIDS testing of athletes before they are allowed to compete.

MANDATORY HIV TESTING IN BOXING AND OTHER PROFESSIONAL SPORTS – SHOULD IT BE REQUIRED?

Since Magic Johnson's HIV diagnosis and his decision to return to basketball, many have wondered whether there should be mandatory HIV testing in athletics. To date, none of the four major professional sports leagues (NBA, NFL, NHL and MLB) has adopted such a policy (although many boxing commissions have).⁶¹ Those who advocate such a policy most likely think that mandatory testing would not be used to eliminate athletes with HIV/AIDS from participating in athletic competition, but rather allow for more effective precautions to be taken for athletes who are capable of transmitting the disease. Given the minuscule possibility of transmission, the need for mandatory testing is unfounded and likely a violation of the constitutional right to privacy if the regulator is deemed a State actor. However, if an athlete in the near future is infected with HIV/AIDS while competing, will people defending an athlete's privacy rights change their position? Although small, there is a risk of transmission in athletic competition, and it would be helpful to analyze the advantages and disadvantages of implementing a mandatory HIV/AIDS testing policy.

Advantages: The Argument for Mandatory Testing

There are several arguments that can be made to support the implementation of a mandatory testing policy. One advantage is that mandatory testing will provide infected athletes with early detection.⁶² Although there is no known cure for HIV or AIDS, early detection could result in earlier treatment, and early treatment can slow the onset of infection-related complications. Another advantage of early detection is that informed HIV-positive athletes engaged in sexual activity may be more inclined to use protection, warn partners of their

⁵⁹ Ahearn, *supra* note 33, at 285.

⁶⁰ Matthew L. Mitten, *AIDS and Athletics*, 3 SETON HALL J. SPORT L. 5, 6 (1993).

⁶¹ Paul M. Anderson, Comment, *Cautious Defense: Should I Be Afraid to Guard You? (Mandatory AIDS Testing in Professional Team Sports)*, 5 MARQ. SPORTS L. REV. 279, 292 (1995).

⁶² A. Alyce Werdel, *Mandatory AIDS Testing: The Legal, Ethical, and Practical Issues*, 5 NOTRE DAME J. L. ETHICS & PUB. POL'Y. 155, 186 (1990).

condition, and encourage past partners to be tested and pursue necessary treatment. Informed HIV-positive athletes would also be in a position to take precautions to prevent the risk of transmission during competition. For example, minor cuts received while shaving could be properly treated before any athletic competition.

Mandatory testing could also encourage leagues and teams to take reasonable measures to ensure the safety of their athletes. The precautions taken by the NBA after Magic Johnson's positive test and return to basketball have been adopted by other leagues in recent years. Finally, one of the more persuasive arguments for requiring mandatory testing in amateur and professional sports is that team doctors should know when they are treating an athlete who is HIV/AIDS-infected. Although team doctors wear gloves and use other precautions before treating most injuries, instances can occur in which doctors are vulnerable to transmission, as evidenced by the Greg Louganis case. If mandatory testing had been required, there is little doubt that Louganis' treating doctor would have worn gloves and taken other measures to ensure his own safety.

Disadvantages: The Argument Against Mandatory Testing

Although there are advantages to implementing a mandatory testing policy in sports, they are greatly outweighed by the disadvantages of such a policy. Initially, as previously pointed out, the risk of HIV transmission during athletic competition has been called "so small as to be unmeasurable."⁶³ With such a small risk of transmission, the implementation of such a policy would unnecessarily infringe on athlete's right to privacy.

Secondly, research has shown that people infected with HIV will continue to show negative test results until antibody production begins up to six weeks after infection.⁶⁴ Obviously this makes it possible for an athlete to be infected with HIV and still pass an HIV/AIDS test and compete without taking any appropriate precautions.

Third, as with any health test, there is the possibility of a false-positive. The effect that a false-positive can have on an athlete is substantial, and can be analogized to false-positive drug tests. Most recently, sprinter Marion Jones tested positive for steroid use before a second test revealed that the first test was an error.⁶⁵ Unfortunately, news of the first test was leaked to the media before the results of the second test, and Marion's reputation had already been prematurely judged by the public and her reputation tarnished. The effects that a false-positive HIV test could have on an athlete are unsurpassed in terms of the backlash.

Finally, perhaps the most significant disadvantage can be demonstrated by balancing the risk of transmission against the stigma and discrimination that an athlete would face after testing positive. Such discrimination includes being labeled as sexually irresponsible and experiencing fear from others who are not infected. People generally, and particularly high-profile athletes, should be able to reveal their infection when they feel ready to face the onslaught of attention, as opposed to the possibility that it will be revealed by a third party.

⁶³ Wolohan, *supra* note 13, at 379.

⁶⁴ *Id.* at 396.

⁶⁵ Julie Macur, *In Wake of Jones's Result, Testing Will Be Analyzed*, N.Y. TIMES, Sept. 8, 2006, at D6.

Mandatory Testing in Boxing

As previously mentioned, boxing is currently the only sport that requires its participants to undergo mandatory HIV/AIDS testing before competing. The fear of transmission is shared by both administrators and boxers. Former heavyweight champion Larry Holmes once stated: "Everybody that steps into that ring should be tested. Nobody has a right to put another person's life on the line."⁶⁶ Since Tommy Morrison's positive pre-fight test, at least seventeen states have implemented legislation and regulation requiring mandatory testing for boxers. This, of course, has been the subject of a considerable amount of litigation and debate.

Boxing and blood have long been synonymous from the days of Jack Dempsey to Mike Tyson's more recent carnivorous devouring of Evander Holyfield's ear. In a sport where the entire purpose is to attack the other person until the bell rings, is there room for discrimination against HIV-positive fighters based on the higher risk of HIV transmission? Where severe bleeding and open wounds are part of the sport, should boxers play by a different set of rules than other athletes? Because most other sports do not include an inherent amount of violence and bleeding, is this enough to create an exception for the sport of boxing? These are questions that can only be answered by examination of the pertinent constitutional issues.

Constitutional Issues

Before analyzing the constitutionality of mandatory testing in professional boxing, it is important to examine whether professional boxing commissions and amateur athletic regulation committees are even subject to the constraints of the Constitution. To find an action unconstitutional, it is generally necessary to attribute the action to the State. This does not mean that the act must be done directly by the government, as private actors can be held as State actors under certain circumstances. One of those circumstances is when the actions of private individuals or organizations have a significant State involvement in their activities.⁶⁷ This is found to exist whenever a State affirmatively facilitates, encourages, or authorizes acts of discrimination by its citizens.⁶⁸ It should be noted that it is not enough for a State merely to permit the conduct to occur; there must be some affirmative act.⁶⁹

Several key cases exist concerning whether amateur and professional sports leagues can be considered State actors. In *Brentwood Academy v. Tennessee Secondary School Athletic Association*, the Supreme Court held that when a State is entwined with a private organization, the organization's actions will be considered State action.⁷⁰ *Brentwood* involved a high school athletic association that regulated sports within Tennessee. The Court determined that an association that regulates high school sports within a single State (1) to which public high schools belong, (2) whose governing body is made up mostly of public school officials, (3) whose meetings are held during regular school hours, (4) whose employees may join the State

⁶⁶ Jon Saraceno, *Boxing Eyes Counterpunch To HIV Concerns*, USA TODAY, Mar. 12, 1996, at 1C.

⁶⁷ *Reitman v. Mulkey*, 387 U.S. 369, 375 (1967); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

⁶⁸ *Id.* at 375.

⁶⁹ *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 164 (1978).

⁷⁰ *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288, 291 (2001).

retirement system, and (5) is funded by gate receipts from the regulated sports, is so “entwined” with the State as to be considered a State actor.⁷¹

Another important case involved Jerry Tarkanian, the infamous college basketball coach known as “Tark the Shark,” who sued the National Collegiate Athletic Association (NCAA). The NCAA is a voluntary association of public and private universities that establishes rules for its members regarding intercollegiate athletics. Pursuant to its rules, the NCAA urged the University of Nevada at Las Vegas (UNLV), a member college, to suspend its men’s basketball coach Tarkanian for recruiting violations. The Supreme Court held that there was no State action by the NCAA and thus Tarkanian could not seek remedies for a violation of his constitutional rights.⁷²

These two cases reveal that an amateur or professional athletic association or team will be held to be a State actor, and thus subject to constitutional restraints, if the governing State is entwined in its activities. Under this analysis, most high school athletic associations would be deemed State actors. The same is true for professional boxing commissions. Whereas private persons oversee the rules and regulations of most major professional sports leagues, boxing is the exception. Due to the unique characteristics of boxing, the rules and precautions are legislatively mandated.⁷³ The rules of boxing that are determined by State legislators range from requiring applicants for professional boxing licenses to prove that they are HIV-negative⁷⁴ to requiring head gear and other protective devices for amateur fighters.⁷⁵ These statutes show that the entwinement between State governments and boxing commissions is extensive and clearly illustrate that boxing commissions would be deemed State actors.

The Right to Privacy

Although there is no explicit right to privacy in the Constitution, *Griswold v. Connecticut* established that various guarantees in the Bill of Rights, specifically the Third, Fourth, Fifth, Ninth, and Fourteenth Amendments create zones of privacy.⁷⁶

The implied right to privacy forbids the invasion of one’s intimate relationships or activities and gives persons the freedom to make fundamental decisions regarding their relationships and conduct.⁷⁷ When something obstructs a person’s right to privacy, it must meet the requirements of strict scrutiny to be held valid.⁷⁸ Under the strict scrutiny standard of review, a statute or conduct will only be upheld if it is the “least restrictive means tailored to compelling

⁷¹ *Id.* at 291-294.

⁷² *National Collegiate Athletic Association v. Tarkanian*, 488 U.S. 179 (1988).

⁷³ *See, e.g.*, Cal. Bus. & Prof. Code § 18720 (1997); Cal. Bus. & Prof. Code § 18724, Cal Bus. & Prof. Code § 18723, Conn. Gen. Stat. Ann. § 21(a-203) (1994); Haw. Rev. Stat. § 440-24 (1985); Idaho Code § 54-412 (1997); Ind. Code Ann. § 25-9-1-18 (West Supp. 1997); Iowa Code Ann. § 90A.6 (1996); Kan. Stat. Ann. § 12-5108 (1991); Ky. Rev. Stat. Ann. § 229.101 (1995); N.J. Stat. Ann. § 5:2A-25 (1996); R.I. Gen. Laws § 41-5-3.5 (1990).

⁷⁴ *See, e.g.*, Cal. Bus. & Prof. Code § 18712 (1997).

⁷⁵ *See, e.g.*, Me. Rev. Stat. Ann. Tit. 32, § 13508; Fla. Stat. Ann. § 548.043 (1988).

⁷⁶ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁷⁷ *See e.g., id., Roe v. Wade*, 410 U.S. 179 (1973), *United States v. Van Leeuwen*, 397 U.S. 249, 253 (1970), *Olmstead v. U.S.*, 277 U.S. 438 (1928), *Whalen v. Roe*, 429 U.S. 589 (1977).

⁷⁸ *Griswold*, 381 U.S. at 586.

State interests.”⁷⁹ Although no cases have surfaced involving mandatory HIV/AIDS testing in boxing, there is case law relating to drug testing in professional sports, an area of testing that can help determine how the court would rule on the issue of mandatory HIV-testing. The case most analogous to mandatory HIV testing in boxing and the right to privacy is *Shoemaker v. Handel*.⁸⁰ In *Shoemaker*, the plaintiff was a jockey who brought suit against the New York State Racing Commission (NYRC) after it imposed a requirement that all jockeys undergo mandatory drug and alcohol tests. The court held that the State has the power to compel the disclosure of private information when its interests in the disclosure outweigh the person’s interest in non-disclosure. The court held the NYRC’s interest to be compelling, but stated that “the right to privacy is not absolute.”⁸¹

If boxing commissions are deemed State actors, which careful analysis has already revealed possible, it seems as though their policies should be subject to the strict scrutiny standard used in *Shoemaker*. Thus, for mandatory testing in boxing to be held constitutional, testing must be the least restrictive means tailored to a compelling State interest. It is reasonable to assume that preventing the transmission of HIV/AIDS among boxers in a traditionally bloody sport is a compelling State interest. However, the second-prong of the test presents the more difficult question of whether mandatory testing is the least restrictive means to achieve the State interest. As shown by the NBA and NCAA policies of stopping play when blood is drawn and closing a player’s open wounds before he or she is allowed to return to the court, less violative precautions may be enough to keep the risk of transmission low.

Although not comparable to the violence in boxing, contact and aggression are a key part of basketball and the precautions have so far proved 100-percent effective. The primary difference between basketball and boxing is the constant threat of splashing blood in a boxing match. Once the bell rings to signify the beginning of a boxing round, blood is almost immediately drawn, and cuts are opened. In addition, although rare, HIV can be transmitted by the splashing of blood into a person’s eyes,⁸² a form of transmission that seems to put boxers at high risk. But like other possible ways of transmission in the ring, infection through the eyes is extremely rare (estimated at less than 1 in 1,000).⁸³

Reducing the risk of transmission, whether through open cuts or blood splashing into a boxer’s eyes, can be achieved through less intrusive means than mandatory testing. For example, simply requiring boxers and boxing referees to wear protective goggles before entering the ring would prove to be a less restrictive means of preventing transmission than would mandatory testing. In addition, the fact that there have been no reported cases of HIV or AIDS transmission in the ring is something a court will likely view as unfavorable toward those supporting testing. Furthermore, and most importantly, it would be very difficult to keep the results of a positive test private, as seen in Tommy Morrison’s situation. When a fight is cancelled at the last minute, the media and public will suspect that something is amiss. As experts have noted, “an individual can

⁷⁹ *Id.*

⁸⁰ *Shoemaker v. Handel*, 619 F. Supp. 1089 (D.C.N.J. 1985); *aff’d* 795 F.2d 1136 (3rd Cir. 1986), *cert. denied* 479 U.S. 986 (1987).

⁸¹ *Id.* at 1106.

⁸² <http://www.cdc.gov/hiv/resources/qa/qa16.htm> (last visited March 3, 2008)

⁸³ <http://www.avert.org/needlestick.htm> (last visited March 3, 2008)

suffer a considerable amount of emotional and social harm when there is an undesired disclosure of personal health information.”⁸⁴ Is the stigma and discrimination that will stay with a boxer the rest of his life worth the implementation of a mandatory testing policy without first trying less restrictive means?

So, although *Shoemaker* establishes that mandatory drug testing would likely be a valid State interest, at least in the case of horse racing, it is unclear whether mandatory HIV testing would be upheld using the same level of scrutiny.

Equal Protection and the Fourteenth Amendment

The Equal Protection Clause of the Fourteenth Amendment to the Constitution provides that no State shall “deny to any person within its jurisdiction the equal protection of the laws.”⁸⁵ Historically, challenges based on the Equal Protection Clause have targeted statutes that create a classification of people and then discriminate against that classification by treating them differently than those outside the class.⁸⁶ By requiring mandatory HIV testing in boxing, but not in other so-called “blood sports,” including football and wrestling, State boxing commission’s run the risk of violating the Equal Protection Clause. But statutes that create classifications are not unconstitutional per se; rather they are examined by courts with various levels of scrutiny. If the statute creates a class based on race, alienage, or national origin or burdens a fundamental right, strict scrutiny will be applied and the statute will be upheld only if the statute is narrowly tailored to serve a compelling State interest.⁸⁷ If the statute separates classes based on gender or illegitimacy, intermediate scrutiny will be applied and the statute will be upheld only if the classification is substantially related to a legitimate governmental interest.⁸⁸ The remaining social or economic statutes that distinguish by classification are subject to rational-basis review and will be upheld if they are rationally related to a legitimate State interest.⁸⁹

Clearly mandatory HIV testing in boxing would fall under the third category. Thus, the State’s interests – presumably to prevent the transmission of HIV and AIDS among boxers – must be considered legitimate and their means for doing so – mandating HIV testing – must be rationally related to the end they wish to accomplish. In the context of boxing, given the minuscule risk of transmission in the ring, there appears to no basis for testing boxers and thus it appears to be unconstitutional. However, it is difficult to predict how a court will rule on this matter because of the apparent flexibility of rational-basis review. In the Supreme Court case of *Williamson v. Lee Optical* the court found that “any conceivable basis” to surmise that a law is rationally related to a legitimate goal is satisfactory.⁹⁰ Given this “any conceivable basis” review, a court could uphold the law if it concluded that the rationale for preventing transmission of HIV amongst boxers is indeed legitimate.

⁸⁴ Anderson, *supra* note 54, at 304.

⁸⁵ U.S. Const. Amend. XIV, § 1.

⁸⁶ Flannery & O’Brien, *supra* note 15, at 482.

⁸⁷ *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985).

⁸⁸ *Id.* at 440-41.

⁸⁹ *Id.* at 440.

⁹⁰ *Williamson v. Lee Optical*, 248 U.S. 483 (1995).

Conclusion on the Mandatory Testing Debate

The mandatory HIV/AIDS testing policy that has been adopted by many boxing commissions is unconstitutional. The statistics calculated by the United States Olympic Congress make it clear that the 0.035-percent risk of transmission is so low that it is greatly overshadowed by the risk of discrimination and stigma that would follow after a positive test.⁹¹ Boxing is a highly visible and financially powerful sport. With this exposure comes a great amount of responsibility. Boxing commissions can set an example for other sports, showing compassion toward boxers by implementing precautions to reduce the risk of HIV/AIDS transmission in the ring. They can also set an example by not requiring HIV/AIDS testing of boxers.

NEED FOR EDUCATION PROGRAMS TO CLARIFY MISCONCEPTIONS THAT LEAD TO DISCRIMINATION

Education

Prejudice and discrimination, whether it is directed toward people of different races, different sexual orientations, or those with HIV/AIDS, are the direct result of ignorance and lack of information. In the case of HIV/AIDS, those who discriminate, whether it is fellow athletes or regulation committees, do so because they are uninformed about the disease and how it is transmitted. The current level of discrimination and prejudice directed toward athletes with HIV/AIDS can be greatly reduced by providing information and educational opportunities for those in the athletic world. Commenting on Magic Johnson's return to the NBA and the hysteria that followed, one AIDS expert stated that "those NBA players who have been given decent information about the disease are perfectly comfortable...but those that know less about it are concerned and worried."⁹² The key is to get this "decent information" as widely circulated as possible. The result will be a more accepting culture of competition.

Some leagues are ahead of the curve. Both the NFL and NHL have distributed information to teams and players to inform them about the low risk of transmission.⁹³ This is a start, but more effective measures can be taken. For instance, the NBA and the NBA Players Association have hired an AIDS specialist from Johns Hopkins University as a consultant to provide educational training to players.⁹⁴ Having an AIDS expert work hand-in-hand with players provides a more effective means of communication than merely handing out pamphlets. Most of the major professional sports leagues require incoming rookies to attend an orientation where such topics as money management and handling the media are discussed. Forums such as these would be an ideal opportunity to educate players about HIV/AIDS. Hopefully, the impact will stay with them throughout their careers.

⁹¹ Flannery & O'Brien, *supra* note 16, at 411.

⁹² Larry Tye, *Experts Say Fears Unfounded: Johnson Poses Virtually No Threat to Spread AIDS on Court*, BOSTON GLOBE, Feb. 9, 1992, at 52.

⁹³ Thom Loverro, *Pro Leagues Encourage Discussions on AIDS*, THE WASH. TIMES, Feb. 9, 1992, at C4; *Giants Given H.I.V. Tests*, N. Y. TIMES, May 21, 1992, at B21; Timothy W. Smith, *N.F.L.'s AIDS Policy? There Isn't One, Yet*, N. Y. TIMES, Nov. 10, 1991, 8, at 2.

⁹⁴ Marsha F. Goldsmith, *When Sports and HIV Share the Bill, Smart Money Goes On Common Sense*, 267 JAMA 1311 (1992).

The role of providing education to athletes should not rest solely on the executives running the leagues. Players infected with HIV/AIDS can also help end discrimination. Magic Johnson is a prime example of how this can be done. Despite having been out of basketball for several years, Magic is still a highly public figure. He has willingly served as a spokesman on topics such as AIDS prevention and AIDS-related discrimination.⁹⁵ Furthermore, Magic has become a successful entrepreneur, proving to doubters that HIV-infection is not a death sentence.

In short, providing education will lessen misunderstandings and, in turn, ameliorate discrimination against athletes infected with HIV or AIDS. Education will also reduce the minute possibility of transmission that exists in sports because athletes will understand and appreciate the need for precaution.

Coordination

For the above educational programs to be most successful, there needs to be coordination among leagues and teams at all levels of competition, from little league and pee-wee football to the MLB and NFL. Athletes must begin their climb to greatness somewhere and this is usually in youth sports leagues. It is at a young age that individuals begin to develop both athletically and emotionally. By receiving accurate information about HIV/AIDS at a relatively young age, athletes will remain informed as they climb the proverbial ladder of competition.

What Else Can Be Done?

In addition to education and coordination, other things can be done to reduce discrimination toward HIV/AIDS-infected athletes. For instance, voluntary testing can be encouraged. More leagues could follow the NFL's example by encouraging players to participate in voluntary testing. By emphasizing voluntary testing, leagues can stress the importance of the AIDS epidemic and the benefits of early detection, while leaving it up to the players to decide whether they want to participate. Another thing that athletic committees and leagues can do is provide counseling to both infected and uninfected athletes. Counseling can help ease disclosure for those battling the disease, while also easing the fear of uninfected players.

CONCLUSION

Athletes are representative of the general population in that they expose themselves to HIV-transmission through sexual intercourse, drug use, and other common ways of contracting the virus. Thus, it is fairly safe to assume that a number of HIV/AIDS-infected athletes are competing today. Consequently, athletes and athletic administrators must be educated about the risks of HIV-contraction during competition and life. They also must be educated that HIV-positive athletes can perform as well as HIV-negative athletes as proven by Greg Louganis and Magic Johnson. If educational steps are taken, there will be a decrease in the risk of transmission during competition and advocates of mandatory HIV/AIDS testing will understand that there are less restrictive and intrusive means to limiting transmission. Most importantly, education will result in a decrease in discrimination directed towards HIV/AIDS-infected athletes.

⁹⁵ Donald H.J. Herman, *Magic Has Learned A Lot - Now He's Teaching Us*, CHI. TRIB., Feb. 11, 1996, at 5.