Mandatory HIV Testing of Professional Boxers: An Unconstitutional Effort to Regulate a Sport that Needs to Be Regulated

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TABLE OF CONTENTS

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> As the triumphant boxer left the ring to pass up the aisle, an ecstatic fight fan, male, followed closely after him, wiping all he could of the sweat from the boxer's body onto himself.[1]

INTRODUCTION

In February 1996, just six hours before his scheduled heavyweight fight in Las Vegas, Nevada, the Nevada State Athletic Commission suspended boxer Tommy Morrison from competition after he tested positive for the human immunodeficiency virus ("HIV").[2] Had Morrison's manager scheduled the fight to take place in California, a state that did not require HIV testing at that time,[3] Morrison would not have been tested and, consequently, would not have been suspended. He would have fought another fight, perhaps spattering blood and sweat upon his opponent, the referee, and the fans. Instead, as a result of his HIV-positive status, the Nevada State Athletic Commission banned Morrison from boxing.[4] Once the state verified the re-

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[1] Joyce Carol Oates, *On Boxing, in* READING THE FIGHTS 286, 303 (1988).

[2] *See Reports: Morrison Is HIV Positive; Heavyweight Boxer Is Suspended Hours Before Fight on Saturday*, WASH. POST, Feb. 12, 1996, at C1 [hereinafter *Reports*]. HIV-1 is a retrovirus, recognized as the etiologic agent of Acquired Immune Deficiency Syndrome ("AIDS"). It is classified as a lentivirus in a subgroup of the retroviruses, and is closely related to HIV-2, another virus found to cause immune suppression, but which, to date, has been discovered mostly in Africa. *See* AMERICAN FEDERATION FOR AIDS RESEARCH, 8 AIDS/HIV TREATMENT DIRECTORY 246 (1996).

[3] *See* Steve Springer & Earl Gustkey, *Boxer's HIV Test Heats Up Debate Over Risk to Others*, L.A. TIMES, Feb. 13, 1996, at 1 (stating that California did not require HIV testing of boxers in February 1996). HIV testing is now required in California pursuant to section 18712(a) of the Business and Professions Code, which provides as follows:

> Notwithstanding any other provision of law, any person applying for a license or the renewal of a license as a professional boxer or a professional martial arts fighter shall present documentary evidence satisfactory to the commission that the applicant has been administered a test, by a laboratory in the United States that possesses a certificate under the Clinical Laboratory Improvement Act (42 U.S.C. Sec. 263a), to detect the presence of antibodies to the human immunodeficiency virus (HIV) and to detect the presence of the antigen of virus hepatitis type B (HBV) within 30 days prior to the date of the application and that the results of both tests are negative.

CAL. BUS. & PROF. CODE § 18712(a) (West 1997) (citation omitted).

[4] *See* Springer & Gustkey, *supra* note 3, at 1. Although Nevada does not statutorily mandate that boxers test for HIV, its state athletic commission is statutorily permitted to mandate the tests through its own regulations. *See* NEV. REV. STAT. § 467.030 (1995). In fact, Nevada was one of the first states to require HIV testing. *See Health and Safety of Profes-*

sult of his positive HIV test, Morrison's ban from boxing went into effect in Nevada. The Nevada ban also prevented Morrison from fighting in any other "non-testing" states that recognized the Nevada ban.[5] In fact, Morrison's HIV status negatively affected his ability to box throughout the world.[6] By implementing Morrison's suspension, Nevada may have done the boxing world and society a public health service. Conversely, Nevada may have intrusively invaded the privacy of a male athlete, thereby unleashing discrimination and paranoia.

For the boxing community, Morrison's disclosure was momentous, even after other sports personalities made similar announcements — superstars like Olympic diving champion Greg Louganis,[7]

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sional Boxing: Hearings Before the Comm. on Commerce, Science, and Transp., 103d Cong. 2 (1994) (statement of Sen. Richard H. Bryan) [hereinafter *Health and Safety Hearings*]. Nevada was also one of the first states to mandate drug testing for every title fight, to decrease the maximum rounds from 15 to 12, and to require 24-hour pre-fight weigh-ins. *See id.*

Nevada does not require a boxer to be tested before every fight but only before the first fight of each calendar year. *See Reports*, *supra* note 2, at C1. Therefore, had the state not discovered the HIV virus in Morrison's body in the February 1996 mandated test, he could have fought in Nevada for another 10 months while being HIV-positive during that time. *See* Springer & Gustkey, *supra* note 3, at 1. It is important to note that once the human body is infected with HIV, standard technological devices cannot identify the presence of the virus. *See generally id.* (describing new techniques for early detection). Several weeks after primary infection, the host may experience a brief, acute, mononucleosis-like syndrome associated with acute infection. *See* Guiseppe Panateleo et al., *The Immunopathogenesis of Human Immunodeficiency Virus Infection*, 328 NEW ENG. J. MED. 327, 327 (1993). Seroconversion then occurs and HIV testing is verifiable. *See id.* The infected person remains free of symptoms associated with an impaired immune system for many years, but once symptoms do occur, this event signals the progression to what is called AIDS. *See* Centers for Disease Control and Prevention, U.S. Dep't of Health and Human Services, *1993 Revised Classification System for HIV Infection and Expanded Surveillance Case Definition for AIDS Among Adolescents and Adults*, 41 MORBIDITY AND MORTALITY WKLY. REP. 1, 8-10 (1992).

[5] Once a boxer tests positive for HIV and that test is confirmed, this HIV-positive status affects the boxer's ability to box in other states, provided those states recognize and honor the regulations of other jurisdictions. *See generally* Springer & Gustkey, *supra* note 3, at 1 (noting worldwide suspension of boxer Tommy Morrison based on his HIV-positive status). Prior to the cancelled Las Vegas bout, Morrison's last fight was in New Jersey, which did not then require pre-fight testing for HIV. *See* William Gildea, *Morrison Referee Gets Tested for HIV; Lane Bloodied in Lewis Bout*, WASH. POST, Feb. 14, 1996, at F2. In that fight, Morrison received a bloody beating from his competitor. *See id.* However, it is not known whether Morrison was infected with HIV at the time. *See id.* Morrison had tested negative for the AIDS virus prior to his June 1993 victory over George Foreman. *See id.*

[6] *See* Springer & Gustkey, *supra* note 3, at 1 (noting that Morrison was suspended after his test results were known).

[7] In 1994, Olympic diving champion, Greg Louganis, who is recognized as the greatest diver in the history of the sport, announced that he was homosexual. *See Louganis: Breaks*

tennis great Arthur Ashe,[8] and, most notably, basketball legend Earvin "Magic" Johnson.[9] Most of these athletes have returned to

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His Silence Another World-Famous Athlete Discloses He Has AIDS, L.A. TIMES, Feb. 24, 1995, at 6 [hereinafter *Louganis*]. In February 1995, Louganis announced on the nationally televised news show "20/20" that he was HIV-positive. *See* Art Caplan, *Louganis Scores 0.0 on the Ethics Test*, SAN DIEGO UNION-TRIB., Feb. 28, 1995, at B5. While HIV-positive, Louganis earned two gold medals at the 1988 Olympics in Seoul, South Korea. *See id.* Louganis had previously won two gold medals at the 1984 Olympics in Los Angeles. *See* Larry Reibstein & Sharon Begley, *Public Glory, Secret Agony*, NEWSWEEK, Mar. 6, 1995, at 48. He also won a silver medal at the 1976 Olympics in Montreal. *See* Mark Zeigler, *Diving Champ Louganis Has AIDS*, SAN DIEGO UNION-TRIB., Feb. 23, 1995, at A1. He is the winner of 47 national championships, six world titles and six Pan American titles. *See* Sharon Robb, *Olympic Gold-Medal Diver Greg Louganis Has AIDS*, SUN-SENTINEL (Fort Lauderdale, Fla.), Feb. 23, 1995, at A1. During the 1988 Olympics and while aware that he had AIDS, Louganis hit his head on the diving board, spilling blood into the pool into which other divers subsequently dove. *See Louganis*, *supra*, at 6. Louganis was stitched by an Olympic physician, who did not wear protective gloves. *See id.* Louganis has since developed full-blown AIDS. *See id.* Louganis's failure to inform the Olympic committee of his condition and his decision to participate in the games despite knowing that he was HIV-positive has stirred debate over the propriety of his actions. *See id.* (questioning Louganis's decision to remain silent); *see also* Caplan, *supra*, at B5 (suggesting that Louganis' failure to inform anyone about his HIV infection after hitting his head on diving board was irresponsible); Kirk Wessler, *Non-Hero Should Be Heeded*, PEORIA J. STAR (Ill.), Feb. 18, 1996, at C3 (opining that Louganis's announcement was self-serving). *But see Louganis Deserves Admiration*, SALT LAKE TRIB., Feb. 27, 1995, at A8 (suggesting that Louganis's failure to disclose his HIV status was courageous).

[8] Ashe announced on April 9, 1992 that he had contracted AIDS from a blood transfusion during heart bypass surgery in 1983. *See* Mike Freeman, *Arthur Ashe Announces He Has AIDS; Tennis Great's Transfusion After '83 Surgery Blamed*, WASH. POST, Apr. 9, 1992, at A1. Ashe's operation was done before March 1985, when it first became standard for transfused blood to be tested for the virus. *See Calls About Transfusions Fill AIDS Hot Lines*, ST. PETERSBURG TIMES, Apr. 10, 1992, at 13A [hereinafter *Calls About Transfusions*]. Ashe was one of the most popular figures in professional tennis; he was the first black tennis player to win a Grand Slam tournament and was twice ranked the number one tennis player in the world. *See* Freeman, *supra*, at A1. He was also known as a civil rights leader. *See id.* Calls to the National AIDS Hotline more than doubled (from 55,000 to 117,458) the day after Ashe's announcement, which was the third-busiest day ever for the hotline. *See Calls About Transfusions*, *supra*, at 13A.

[9] Johnson announced that he was infected with the AIDS virus on November 7, 1991. *See* Mike Freeman & Alison Muscatine, *Magic Johnson's Departure Stuns the Sport He Reshaped; Sports World Shocked by Tragic News*, WASH. POST, Nov. 8, 1991, at C1; Mark Heisler, *Magic Johnson's Career Ended by HIV-Positive Test*, L.A. TIMES, Nov. 8, 1991, at 1. Johnson contracted the disease through a heterosexual encounter. *See* Lou Cannon & Anthony Cotton, *Johnson's HIV Caused by Sex; 'Heterosexual Transmission' Cited; Wife Is Pregnant*, WASH. POST, Nov. 9, 1991, at A1. Like Greg Louganis, Johnson caused wide controversy over how society viewed celebrities who contracted the disease through sexual behavior. *See* Harvey Araton, *Magic a Hero for Creating Debate on HIV*, OTTAWA CITIZEN, Feb. 27, 1996, at F4 (calling Johnson hero for his openness about his disease); Cannon & Cotton, *supra*, at A1 (quoting then vice-president Dan Quayle as referring to Johnson as true champion); Heisler, *supra*, at 1 (noting comments of Los Angeles Laker physician, Michael Mellman, hailing Johnson as

competition after disclosing their HIV-positive status.[10] Nonetheless, after Nevada discovered Morrison's HIV-positive status, state boxing commissions and state legislatures wasted no time in drafting and implementing mandates, guidelines, and protocols concerning HIV in professional boxing. Until Morrison's announcement, the issue of regulating HIV-positive boxers was only a remote hypothetical query. After his announcement, both state boxing commissions and state legislatures enacted restrictive mandates associated with HIV status. Since Morrison's suspension, state legislatures and state athletic commissions in at least seventeen states have implemented legislation and regulations mandating HIV testing for boxers.[11] However, these

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modern-day hero); Jennifer Nagorka, *Health Workers Praise Athlete for His Candor*, DALLAS MORNING NEWS, Nov. 8, 1991, at 1A (viewing Johnson as hero to people of all ages). *But see* Mark Kiszla, *Little Magic About Being a Role Model*, DENV. POST, Feb. 6, 1996, at D1 (citing Johnson's reckless promiscuity and estimated 2500 sexual partners as reasons not to hold Johnson as sports role model); Bill Lyon, *A Troubling Aspect to Magic's Return*, PHILA. INQUIRER, Feb. 4, 1996, at C1 (describing martyr and hero views of Johnson as disturbing); Brian Schmitz, *Big Comeback? Magic Never Should Have Quit*, ORLANDO SENTINEL, Jan. 31, 1996, at C1 (labeling celebrity groupies as worst models of morality); Barbara Yost, *No Escape from Peril of Promiscuity*, SAN DIEGO UNION-TRIB., Feb. 8, 1996, at B13 (questioning Johnson's status as hero because of manner in which he contracted disease). Johnson, an 11-time all-star of the Los Angeles Lakers, is known as one of the best players ever to play professional basketball. *See* Freeman & Muscatine, *supra*, at C1; Heisler, *supra*, at 1. He played on five championship teams and, three times, was voted the most valuable player in the National Basketball Association. *See* Heisler, *supra*, at 1. Calls to the Ventura County AIDS hotline increased by 600% on the day after Johnson made his announcement. *See* Mack Reed, *Hot Line Overrun by Calls on AIDS Health: Requests for Testing and Information Leap by 600% After Magic Johnson's Announcement that He Has the Virus*, L.A. TIMES, Nov. 9, 1991, at 1.

[10] Despite being banned from boxing in the United States after his disclosure in February 1996 that he was HIV-positive, Tommy Morrison returned to boxing in November 1996 with a win in Tokyo, Japan. *See* Ron Borges, *Morrison Wins His Battle; He Returns a Winner After KO of Rhode*, BOSTON GLOBE, Nov. 3, 1996, at F2; Gerald Eskenazi, *Morrison Admits He Has Tested Positive for AIDS Virus*, SAN DIEGO UNION-TRIB., Feb. 13, 1996, at D7. Greg Louganis participated in the 1988 Seoul Olympics while knowing that he was HIV-positive. *See Louganis*, *supra* note 7, at 6. After learning in 1991 that he was HIV-positive, Magic Johnson played in the 1991-1992 NBA All-Star Game and participated in the 1992 Olympics in Barcelona. *See* Scott Howard-Cooper, *Magic's Return Keeps Hall of Fame in Guessing Game*, L.A. TIMES, Jan. 31, 1996, at 5 (stating that Johnson came out of retirement to play in All-Star game and Olympics). Johnson retired from professional basketball in 1992 due to other players' fears of contracting the disease from him while playing, but he later returned to the game in 1996, only to retire again. *See* Bill Fay, *Magic Brings Agenda to Game; Magic Johnson's Return Has Put to Rest Fears Many Had About Playing Against Someone with HIV*, TAMPA TRIB., Mar. 26, 1996, at 1; Frank Hughes, *Magic Does an About-Face, Disappears into Retirement*, WASH. TIMES, May 15, 1996, at B1; Kenneth B. Noble, *Basketball: Part Man, Part Myth, All Player; Los Angeles Embraces Star's Return*, N.Y. TIMES, Feb. 1, 1996, at B9.

[11] *See* Springer & Gustkey, *supra* note 3, at 1. California, Maryland, Ohio, Rhode Island,

regulations are unnecessary and unduly restrict the due process rights of boxers. Additionally, such state regulations[12] offend the U.S. Constitution by invading a right of privacy not surrendered when athletes choose to enter the boxing ring.[13] Indeed, this irrational administration of invasive testing of only certain athletes violates the equal protection guarantees of the Constitution.

Part I of this Article discusses the history of boxing as a bloody and violent sport and the justification behind the perpetuation of boxing. The sport was banned for many years because of its barbaric nature and lack of uniform rules and regulations. However, the resurgence of the sport and the demand for its acceptance and promotion in otherwise civilized societies clearly demonstrate the importance of boxing in many cultures. Many advocates point to the opportunities boxing offers to underprivileged minorities[14] or the

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and Utah statutorily mandate HIV testing of professional boxers. *See* CAL. BUS. & PROF. CODE § 18712 (West 1997); MD. CODE ANN., BUS. REG. § 4-304.1 (Supp. 1996); OHIO REV. CODE ANN. § 3773.34 (Banks-Baldwin Supp. 1997); R.I. GEN. LAWS § 41-5-11.1 (Supp. 1996); UTAH CODE ANN. § 58-66-605(1) (1996). *See generally* Karen S. Lovitch, *State AIDS-Related Legislation in the 1990s: Adopting a Language of Hope Which Affirms Life*, 20 NOVA L. REV. 1187 (1996) (offering general discussion of AIDS-related legislation).

[12] *See, e.g.*, CAL. BUS. & PROF. CODE § 18712 (West 1997); MD. CODE ANN., BUS. REG. § 4-304 (Supp. 1996); OHIO REV. CODE ANN. § 3773.34 (Banks-Baldwin Supp. 1997); R.I. GEN. LAWS § 41-5-11.1 (Supp. 1996); UTAH CODE ANN. § 58-66-605(1) (1996).

[13] *See generally* Matthew J. Mitten, *AIDS and Athletics*, 3 SETON HALL J. SPORT L. 5, 12-13 (1993) (noting absence of legal challenges to mandatory HIV testing). *But see* Jennifer L. Johnston, Note, *Is Mandatory HIV Testing of Professional Athletes Really the Solution?*, 4 HEALTH MATRIX 159, 187-88 (1994) (commenting that athletes who submit to mandatory HIV testing waive individual rights of privacy).

[14] *See The Professional Boxing Safety Act: Joint Hearing Before the Subcomm. on Commerce, Trade, and Hazardous Materials of the Comm. on Commerce and the Subcomm. on Workforce Protections of the Comm. on Economic and Educational Opportunities*, 104th Cong. 14-15 (1996) (statement of Rep. Major R. Owens); *Professional Boxing Corporation: Hearing Before the Subcomm. on Commerce, Consumer Protection, and Competitiveness of the Comm. on Energy and Commerce*, 103d Cong. 40 (1994) (statement of Rep. Bill Richardson); Frank Main, *No Punches Pulled when Talking Drugs — Tulsan Has Young Toughs Boxing, Not Dealing*, TULSA WORLD, June 18, 1989, at A1; Pat O'Malley, *Boxing Gym Could Help Take Kids off the Street*, BALT. SUN, Dec. 8, 1991, at 30; Ronald W. Powell, *Fighting Against Drugs: With Fists; Boxing Club May Be Down, but Not Out*, SAN DIEGO UNION-TRIB., Jan. 8, 1993, at B3; Larry Tye, *Boxers Can't Knock Out Risk: Doctors Say Brain Damage a Peril for Aging Holmes*, BOSTON GLOBE, Jan. 22, 1988, at 1; Tom Wheatley, *Conley Plans New Twist for Matches Here*, ST. LOUIS POST-DISPATCH, June 19, 1993, at 7C; Cornel H. Williams, *Boxing: The Stuff of Dreams*, TULSA WORLD, July 24, 1991, at A9. *But see* Glenn Dickey, *Boxing Fans Were Fooled Once Again*, S.F. CHRON., June 29, 1988, at D3 (stating that boxing managers and promoters cheat thousands of young minority men who eventually return to ghetto); Terry Todd & John Hoberman, *Boxing Plays Misleading Role in Advancement of Minorities*, AUSTIN AMERICAN-STATESMAN, Oct. 29, 1989, at D20 (referring to black historian Jeffrey T. Sammons' state-

significant state revenues generated through cable and other media promotions.[15] Nevertheless, despite these benefits, the unique and

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ment that chances of boxing success are low, that boxing discourages pursuing other means to success, and that, in general, success in boxing is illusory or short-term).

[15] *See* Jack Cavanaugh, *A Boxing Revival Begins in the State*, N.Y. TIMES, Apr. 19, 1992, at 10. Boxing is the leading marketing tool for the casinos in Nevada. *See* Dave Palermo, *Marketing the Main Event*, INT'L GAMING AND WAGERING BUS., Apr. 1, 1997, at 50. From just one five-championship fight card at Caesars Palace on April 8, 1995, Nevada collected $58,221 in taxes from ticket sales, $24,472 in taxes from complimentary tickets, and $50,000 from television fees. *See* Royce Feour, *Foreman to Stage Open Workout Today*, LAS VEGAS REV.-J., Apr. 16, 1995, at 8E. In fiscal year 1988-1989, the Nevada Athletic Commission collected more than $1.5 million in revenues. *See Briefs*, CHI. TRIB., Apr. 5, 1989, at 2. The state of New Jersey collected more than $500,000 in fight taxes in fiscal year 1988-1989. *See* Rudy Larini, *Atlantic City Climbs to Top in Boxing*, STAR-LEDGER (N.J.), Aug. 13, 1989, *available in* 1989 WL 3144783. Boxing revenues for New Jersey jumped from $74,000 in 1978 to $437,300 in 1983. *See* Jon Shure, *Assembly Unanimously Approves Boxing Rules to End Abuses, Promote Safety*, REC. (N.J.), Dec. 7, 1984, at A3. In the United States, boxing brings in higher pay-per-view revenues than motion pictures. *See True Fans: Sports Lovers Should Not Expect Their Addiction to Be Satisfied on Television, Free of Charge*, ECONOMIST, Dec. 9, 1995, at 13. In 1993, after a drop in state revenues generated from taxes on gate receipts, *see* Charles E. Beggs, *Falling Revenues Put Boxing Commission Future on Line*, PORTLAND OREGONIAN, Sept. 22, 1992, at B2, Oregon passed a law whereby the state would levy a 6% tax on all pay-per-view boxing matches. *See Oregon to Collect 6% Tax on Pay-Per-View Boxing, Wrestling*, COMM. DAILY, Aug. 24, 1993, *available in* 1993 WL 2631234. Since May 1992, Pennsylvania has assessed a 3% tax on its pay-per-view boxing events. *See id.*; Linda Haugsted, *Lobbying Helps Defeat Calif. PPV Tax*, MULTICHANNEL NEWS (Cal.), July 6, 1992, at 36. For years, Florida has reaped a 5% tax on its pay-per-view boxing events. *See id.* In 1991, the Arkansas state senate, state agencies, and Governmental Affairs Committee passed Arkansas Senate Bill 618, which funnels sanctioning fees from boxing matches to the maintenance of memorials on the grounds of the state capitol. *See Memorial Upkeep Measure Passes Senate Committee*, ARK. GAZETTE, Mar. 6, 1991, at 4H. State revenues are usually greater in states that have a boxing commission. For example, prior to creating a boxing commission, North Carolina, which was one of the last four states that lacked a boxing commission, received only the sales tax from the concessions sold at the fights. *See* Scott Solomon, *Former Fighter Takes Boxing Panel Corner*, GREENSBORO NEWS & REC. (N.C.), Nov. 28, 1995, at B2. After establishing a commission, the state now enjoys a larger share of the monies generated by the fights. *See id.* New York collects 6% of gate receipts and licensing fees. *See* Al Myatt, *Sour Side to Sweet Science in North Carolina; State Lacks a Boxing Commission*, NEWS & OBSERVER (N.C.), Dec. 17, 1994, at C1. While these revenues can be substantial for states where boxing is prominent, in a state like Ohio, where only 19 professional events were held in 1992, and only 11 were held in 1993, the revenues generated from the fights do not match the costs of running the events. *See* Joe Maxse, *Up from the Canvas, OBC Tries to Regroup*, PLAIN DEALER (Ohio), June 8, 1994, at 9D. In 1993, costs to operate the Ohio Boxing Commission were approximately $70,000, but revenues from the sport were only $12,000. *See id.* In the state of Washington, the boxing commission was terminated in 1993 because revenues from fights were less than that necessary to pay salaries. *See* Bart Wright, *Boxing: Department of Licenses Lacks Expertise to Run Fights*, NEWS TRIB. (Wash.), Sept. 29, 1995, at C2.

historically violent nature of boxing must serve as a backdrop to the need for regulation of the sport and the resulting constitutional analysis.

Part II explains the need for regulation in boxing. Unlike every other major sport, only boxing is subject to regulatory government oversight to protect the health and safety of the participants.[16] Historically, the lack of regulation in boxing has caused a multitude of problems, ranging from licensing fraud to organized crime.[17] Regulations in boxing, particularly with regard to HIV transmission, present significant problems in the effort to promote the health and safety of the participants. Part II also describes the problems associated with boxing regulations in general and incorporates a discussion of the similar regulatory problems related to HIV test mandates. Although there is a clear need to regulate the sport of boxing, there are limits to the extent to which the government may regulate the sport for the sake of the health and safety of its participants.

While boxing may be unique in its need for government regulation due to its violent nature, as Part III discusses, the sport is not a unique source for HIV transmission. While the presence of HIV on the playing field may be increased due to the promiscuous lifestyles led by many professional athletes[18] and the high volume of minorities in boxing, who, statistically, are at a high risk of HIV,[19] the possibility for transmission of the virus in sports is extremely remote.

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[16] *See, e.g.*, ARK. CODE ANN. § 17-22-303 (Michie 1995) (prohibiting persons from engaging in boxing without license from State Athletic Commission). Horse racing is also recognized as a highly regulated sport. *See* Shoemaker v. Handel, 795 F.2d 1136, 1137 (3d Cir. 1986) (allowing drug testing of jockeys on basis of highly regulated nature of industry). However, horse racing is regulated because of the need to maintain the integrity of the sport due to parimutuel wagering on the outcome of races, rather than the interest in protecting the health and safety of the participants, which distinguishes the regulations to perform HIV tests on boxers. *See id.* at 1138 (citing public wagering and preservation of integrity as basis for commission regulations).

[17] *See Corruption in Professional Boxing: Hearings Before the Permanent Subcomm. on Investigations of the Comm. on Governmental Affairs*, 102d Cong. 1-6 (1992) (statements of Sen. Nunn and Sen. Roth) [hereinafter *Corruption in Professional Boxing — Part I*]; *Corruption in Professional Boxing — Part II: Hearings Before the Permanent Subcomm. on Investigations of the Comm. on Governmental Affairs*, 103d Cong. 4 (1993) (statement of Sen. Roth) [hereinafter *Corruption in Professional Boxing — Part II*]; *FBI Sting Operation Reported in New Jersey Boxing Probe*, REC. (N.J.), July 9, 1984, at S9.

[18] *See infra* notes 174-79 and accompanying text (describing promiscuous lifestyles of some professional athletes).

[19] *See infra* notes 180-86 and accompanying text (discussing statistically higher HIV risks for minorities in boxing).

Courts have acknowledged that HIV can be transmitted through some forms of sexual contact, exchange of blood or other bodily fluids, sharing needles for drug use, and mother to neonate.[20] In the boxing arena, blood, saliva, and sweat seem to be the obvious potential modes of transmission; these modes seem to validate the actions of state legislatures and boxing commissions when they condition the renewal of a boxer's license to fight upon mandatory HIV testing. However, despite the potential risks of the existence of HIV within the ring, it is the likelihood of transmission during a boxing match that is the linchpin in the analysis.[21] The fact remains that no athlete has ever transmitted HIV to another athlete during a boxing match or any other sports event.[22] Moreover, in analyzing the propriety of state regulatory measures, analogies to other transmission arenas, such as health care workers and pregnant women, are appropriate. This Article demonstrates that the risk of HIV transmission within the boxing ring is no more significant than the risk associated with other transmission arenas in which mandatory testing for HIV has been prohibited.

Although no one has brought a constitutional challenge against state mandatory testing procedures for boxers, Part IV discusses the possible privacy, equal protection, and due process considerations within the issue of mandatory testing. Addressing these constitutional issues vis á vis the professional boxer will force courts to analyze a sport historically known for violence, gender-oriented in no less a fashion than football, plagued by widespread brain damage, and recognized for the very real risk of death in the ring. If society is to countenance boxing at all for the health and safety of the participants, does it not countenance the boxer's right to box within an HIV-positive world in just the same way that it countenances a

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[20] *See* Gerald H. Friedland & Robert S. Klein, *Transmission of the Human Immunodeficiency Virus*, 317 NEW ENG. J. MED. 1125, 1125-31 (1987) (explaining methods of HIV transmission).

[21] *See generally* Richard A. Goodman et al., *Infectious Diseases in Competitive Sports*, 271 JAMA 862 (1994) (describing risks of transmission of infectious diseases in sports); Eric E. Mast et al., *Transmission of Blood-Borne Pathogens During Sports: Risk and Prevention*, 122 ANNALS INTERNAL MED. 283 (1995) (discussing risk and prevention of pathogen); Donato Torre et al., *Transmission of HIV-1 Infection via Sports Injury*, 335 LANCET 1105 (1990) (reporting case of HIV-1 seroconversion after injury during football match).

[22] *See* D. Peter Drotman, *Professional Boxing, Bleeding, and HIV Testing*, 276 JAMA 193, 193 (1996).

boxer's right to box within a brain-injuring world? Indeed, does society have the obligation to only mandate HIV testing?

Part IV argues that the government's interest in promoting the health and safety of the professional boxer must be rationally related to the regulation that the government enacts. Based on the insignificant likelihood of transmission during a boxing match, there is no rational relationship between mandatorily testing boxers for HIV and protecting against its transmission during the match. Therefore, regulations that effectuate mandatory HIV testing of professional boxers are unconstitutional. In contrast, statistics demonstrate that more effective regulation of brain injuries in the sport may serve to protect and promote the health and safety of the boxer.[23] Therefore, Part V proposes that the interests of the government and the boxer may be better served by focusing on more effective regulation of brain injuries in the sport.

Courts will soon be forced to balance the constitutional interests of athletes against the government's interest in regulating the competitions. For boxing, because the likelihood of transmission is statistically so insignificant, this Article concludes that mandatory HIV testing and potential exclusion from boxing is ineffective, unwarranted, intrusive, and unfair. Indeed, mandated HIV testing validates the maxim once posited by Justice Oliver Wendell Holmes: "Does one man's right to swing his arm truly end at the tip of another man's nose?"[24] Concerning the likelihood of incurring brain damage in professional boxing, for some, the answer to Holmes's query may be: "Yes." Concerning the constitutional analysis of the transmission of HIV in professional boxing, the answer must be: "No."

I. BOXING: A HISTORY OF BLOOD AND VIOLENCE

For as long as boxing has existed, it has been associated with violence. From the fifth century B.C., when the Greek hero Theagenes was said to have killed 800 opponents,[25] to June 30, 1997, when, during a championship rematch, Mike Tyson bit off part of Evander Holyfield's right ear, violence has accompanied the

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[23] *See infra* notes 62, 74-83 and accompanying text (discussing punch-drunk syndrome, which is often caused by multiple blows to head).

[24] *See* ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 31 (1954).

[25] *See* GILDA BERGER, VIOLENCE & SPORTS 57 (1990).

sport.[26] Boxing has existed as a sport for more than 5000 years, dating back to ancient Egypt and, later, Greece, where it became part of the first Olympic games.[27] The ebb and flow of violence in the sport developed over time. Ancient Egyptians fought with their bare hands.[28] The Greeks then added wrappings to the hands.[29] The Romans modified the technique and added power to the punches by inserting a heavy metal weight into the wrapping, thereby making a "cestus."[30] In an effort to increase the bloodshed in the sport, sharp metal spikes were added to the cestus to form a "murmex," which caused most bouts to end in fatality, frequently after only one blow.[31] By the year 500 A.D., the sport had become so violent, it was abolished by the Roman Emperor, Theodoric.[32] The ban lasted for some 1200 years before the sport became legal again in the British Isles, where contestants won by gouging the eyes of their opponents.[33]

During the eighteenth century, Britain's primary pugilist was James Figg, known as "The Father of Boxing." To exhibit the sport,[34] he opened an amphitheater in his own name where boxers fought in rings made of wood instead of ropes, and referees officiated from outside the ring.[35] On August 16, 1743, Jack Broughton,[36] a British fighter and a champion in his own right, promulgated the first regulations to govern the sport consisting of no more than seven minimum rules of sportsmanship.[37] In 1867, the Broughton

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[26] *See* William Gildea, *Tyson Offers an Apology to Holyfield; Boxer Pleads Not to Be 'Penalized for Life,'* WASH. POST, July 1, 1997, at A1; William Gildea, *Tyson's Conduct Under Review; Nevada Athletic Commission, Las Vegas Police Investigate Fight, Aftermath*, WASH. POST, June 30, 1997, at A1; Tim Kawakami, *A Sorry Time for Boxing: Tyson Apologizes for Biting Holyfield's Ears and Asks to Be Forgiven*, L.A. TIMES, July 1, 1997, at C1.

[27] *See* BERGER, *supra* note 25, at 56.

[28] *See id.*

[29] *See* Ian Forman, Comment, *Boxing in the Legal Arena*, 3 SPORTS L. J. 75, 75 (1996) (stating that Greeks recognized need for safety measures and required boxers to wear protective gear on their hands during Olympic games).

[30] *See* BERGER, *supra* note 25, at 56.

[31] *See id.* at 57.

[32] *See id.* Boxing was banned at the college level in 1960 after University of Wisconsin boxer Charles Mohr died of complications resulting from a fight in which he wore a head protector. *See id.* at 61.

[33] *See id.* at 57.

[34] *See* SAM ANDRE & NAT FLEISCHER, A PICTORIAL HISTORY OF BOXING 9 (1984).

[35] *See id.*

[36] Jack Broughton's entombment in Westminster Abbey, a mark of considerable honor in British society, reflects the high status he enjoyed as a champion boxer.

[37] *See* BERGER, *supra* note 25, at 57-58. Broughton's Rules read as follows:

rules were revised by the more modern Marquis of Queensberry rules, which included timed rounds, rest periods, and a specified ten-count to signal that the fight was over. Broughton originally introduced "mufflers," or padded gloves, to his sparring pupils, who were usually of aristocratic descent.[38] Padded gloves did not become standard until later in the nineteenth century, but were issued to protect the students' hands, rather than their opponents' heads and faces.[39]

James Figg's grandson, Jack Slack, known as the "Norwich Butcher" and the "Knight of the Cleaver," took over Broughton's Championship and held the title for ten years, only to introduce crooked-

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> I. That a square of a Yard be chalked in the middle of the Stage; and on every fresh set-to after a fall, or being parted from the rails, each Second is to bring his Man to the side of the square, and place him opposite to the other, and till they are fairly set-to at the Lines, it shall not be lawful for one to strike at the other.
> II. That, in order to prevent any Disputes, the time a Man lies after a fall, if the Second does not bring his Man to the side of the square, within the space of half a minute, he shall be deemed a beaten Man.
> III. That in every main Battle, no person whatever shall be upon the Stage, except the Principals and their Seconds, the same rule to be observed in bye-battles, except that in the latter, Mr. Broughton is allowed to be upon the Stage to keep decorum, and to assist Gentlemen in getting to their places, provided always he does not interfere in the Battle, and whoever pretends to infringe these Rules to be turned immediately out of the house. Every body is to quit the Stage as soon as the Champions are stripped, before the set-to.
> IV. That no Champion be deemed beaten unless he fails coming up to the line in the limited time, or that his own Second declares him beaten. No second is to be allowed to ask his man's Adversary any questions, or advise him to give out.
> V. That in bye-battles, the winning man to have two-thirds of the Money given, which shall be publicly divided upon the Stage, notwithstanding any private agreements to the contrary.
> VI. That to prevent Disputes, in every main Battle, the Principals shall, on coming on the stage, choose from among the gentlemen present two Umpires, who shall absolutely decide all Disputes that may arise about the Battle; and if the two Umpires cannot agree, the said Umpires to choose a third, who is to determine it.
> VII. That no person is to hit his Adversary when he is down, or seize him by the ham, the breeches, or any part below the waist: a man on his knees to be reckoned down.

ANDRE & FLEISCHER, *supra* note 34, at 12. In 1838, the "London Prize Ring Rules" were adopted. *See id.* at 10.

[38] *See id.* at 13.

[39] *See* BERGER, *supra* note 25, at 58.

ness and fixed fights into the sport,[40] a characteristic of boxing that remains to this day.[41] Slack also became infamous for what is currently known as the "rabbit punch," consisting of a strike to the back of the head.[42] After losing a large amount of money on what is believed to be one of Slack's fixed fights, the Duke of Cumberland expressed opposition to boxing. As a sport, British boxing suffered a setback during Slack's reign.[43] Nonetheless, in the United States,

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[40] *See* ANDRE & FLEISCHER, *supra* note 34, at 13.

[41] Rumors about fixed fights in professional boxing are longstanding. *See, e.g.*, Glenn Henderson, *Part of Cobb's Lawsuit Against 'SI' Dismissed*, NASHVILLE BANNER, May 10, 1995, at B3 (reporting federal judge's decision to dismiss part of Randall "Tex" Cobb's libel suit against *Sports Illustrated*, which printed story on Cobb entitled "The Fix Was In"); Graham Houston, *Dead Men, Including Sonny Liston, Tell No Tales About Possibly Fixed Fight*, VANCOUVER SUN, June 2, 1995, at D23 (discussing documentary about Sonny Liston, who was alleged to have purposely lost fight against Muhammad Ali after being threatened by Black Muslims); Dave Hyde, *Liars, Cheats & Whores*, SUN-SENTINAL (Fla.), Feb. 2, 1997, at 12 (describing story of Tim Anderson, former boxer who was pressured by his promoter, Rick Parker, to fix his fight with former football star, Mark Gastineau); Harry Mullan, *The Heavy Burden of History*, INDEP. (London), Mar. 16, 1997, at 13 (noting affidavit signed by Jack O'Brien stating that fight between Bob Fitzsimmons and himself was fixed so that O'Brien would knock out Fitzsimmons for light-heavyweight title); Jim Murray, *$5-Million No-Hitter for Tyson*, L.A. TIMES, Sept. 15, 1996, at C1 (suggesting that only recorded instance of proven fixed fight was Jake Lamotta-Billy Fox fight in 1947). Many suspect that fights remain fixed today through scheduled mismatches, for example, if for no other reason than to promote exciting and lucrative rematches. *See* Tom Archdeacon, *Decision Based on Popularity*, DAYTON DAILY NEWS (Ohio), Apr. 14, 1997, at 1C (commenting on suspected bias of judges in controversial fight between Oscar De La Hoya and Pernell Whitaker); Ron Borges, *Mismatches a Fact, Not a Fix*, BOSTON GLOBE, Sept. 15, 1996, at C4 (describing Mike Tyson's 109 second victory over Bruce Seldon); Steven P. Garmisa, *Strict Guidelines Govern RICO Cases*, CHI. SUN-TIMES, Nov. 12, 1996, at 44 (discussing allegations that promoter Don King fixed fights involving Craig Houk, including 1995 fight between Julio Cesar Chavez and Houk, which lasted 96 seconds); Gary Sheldon, *Believe It, Boxing Has Taken a Dive*, ST. PETERSBURG TIMES, Sept. 11, 1996, at 1C (suggesting that boxing fans' belief that fights are fixed is more important than whether fights are actually fixed). Commentators have recently alleged corruption and fight-fixing. *See generally* ANDREW JENNINGS, THE NEW LORDS OF THE RINGS: OLYMPIC CORRUPTION AND HOW TO BUY MEDALS 79-92 (1996) (discussing accusations of corruption during 1988 Olympics); Norm Frauenheim, *U.S. Won't Appeal Tainted '88 Carbajal Loss*, ARIZ. REPUBLIC/PHOENIX GAZETTE, Aug. 5, 1996, at D4 (reporting that East German secret police files contain evidence that several fights during 1988 Olympics were fixed); Ron Jackson, *Labor Department Targets Boxing; Sources Say Gibbons "Fixed Fights,"* DAILY OKLAHOMAN, Feb. 19, 1997, at 23 (discussing report by Oklahoma Department of Labor studying allegations of fraud and other corruption within professional boxing); David Mayo, *Golden Gloves Stays Honest, But Fighter Pays Random Tournament, Draw Leaves National-Caliber Boxer Out in Cold*, GRAND RAPIDS PRESS (Mich.), Feb. 27, 1996, at B1 (noting temptation to fix scheduling of fights at Golden Gloves amateur tournament in Western Michigan).

[42] *See* ANDRE & FLEISCHER, *supra* note 34, at 13.

[43] *See id.* One of the first "British Era" fighters to die during a fight was Simon Byrne,

where boxing was illegal, the sport began to appear in the back rooms of taverns.[44]

However, boxing did not remain illegal in the United States and it slowly emerged from the back rooms of American taverns into the public eye. As it progressed, regulations and precautions for the safety of boxing participants accompanied the sport's development. Today, violence in boxing is still the focus of controversy. For example, on March 24, 1962, at Madison Square Garden in New York City, Benny "Kid" Paret, World Welterweight Champion from 1960 to 1962, fought Emile Griffith, World Welterweight and Middleweight Champion from 1961 to 1965.[45] In the twelfth round of their third fight, Paret became twisted in the ropes and was left unable to protect himself.[46] Griffith punched Paret solidly in the head eighteen times before the referee determined that Paret was unconscious and stopped the fight.[47] Paret died ten days later from his injuries.[48] Many other deaths in the ring[49] have spurred heated debate over the propriety of such a violent sport.[50]

The violent and especially bloody nature of boxing is undoubtedly part of the charisma of the sport. In his testimony regarding the health and safety of professional boxing before the Committee on

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one of many Irish Champions. *See id.* at 34. Byrne died at the hands of James "the Deaf'Un" Burke, during the longest championship fight on record (98 rounds) on May 30, 1833. *See id.* Ironically, three years earlier, in a 47-round fight, Byrne had brutally beaten Sandy McKay, who later died from his injuries. *See id.* Byrne was arrested and tried for manslaughter after the killing, but was acquitted of the charges. *See id.* For a discussion of other legal ramifications of boxing, such as tort issues, see Forman, *supra* note 29, at 78-89.

[44] *See* ANDRE & FLEISCHER, *supra* note 34, at 39. Boxing rules were not formally accepted in the United States until 1816 when Jacob Hyer, "Father of the American Ring," defeated Tom Beasley in the first professional boxing match to be viewed publicly in the United States. *See id.*

[45] *See* GILBERT ODD, ENCYCLOPEDIA OF BOXING 48-49, 90 (1983).

[46] *See id.*; BERGER, *supra* note 25, at 59.

[47] *See* BERGER, *supra* note 25, at 59.

[48] *See id.*; ODD, *supra* note 45, at 90.

[49] *See, e.g.*, BERGER, *supra* note 25, at 61 (listing names of several fighters who died in ring or shortly thereafter, including Jimmy Doyle, Duk Koo Kim, "Young Ali," and, most recently, Francisco "Kiki" Benjines); ODD, *supra* note 45, at 96 (describing "Sugar Ray" Robinson's killing of Jimmy Doyle in 1974 Welterweight Championship); *id.* at 76 (recounting November 13, 1982 World Lightweight Championship where Ray "Boom Boom" Mancini knocked out Duk Koo Kim, who never regained consciousness and later died).

[50] *See* Michael Wilbon, *Unsafe at Any Bleed*, WASH. POST, Feb. 14, 1996, at F1 (noting impressions of boxing manager, Rock Newman, from his first ringside experience). Newman found the fight both compelling in its drama and repugnant in its brutality. *See id.*

Commerce, Science, and Transportation, the chairman of the South Carolina State Athletic Commission stated:

> [Promoters and managers] are throwing . . . [boxers] to the wolves, because of the fans, just like back in the ancient Roman days, when they put gauntlets [on] their fists, so that they could make people bleed, and caused boxing to disappear. And throughout the years, the fans have been the major problem, because they want blood.[51]

However, blood and violence do not automatically result in HIV transmission. The estimated risk of HIV transmission is low in all sports.[52] Thus, the question presented by the bloody and violent history of the sport is whether mandated testing is the most appropriate protection in boxing or any other contact sport. Will a less invasive procedure than mandated testing of all participants accommodate the objective of human protection? Indeed, is the mandatory testing of professional boxers rationally related to the prohibition of the transmission of HIV during a boxing match? To answer these questions, it is important to first understand the context of boxing regulations.

II. THE REGULATION OF BOXING

A. The Need for Consistent Regulation

The violence and blood associated with contact sports has received considerable attention from the medical, legal, and sports communities.[53] Because boxing has no universal governing regulatory agency, individual governing state agencies, which have jurisdictional limitations, administer inconsistent protocols to handle

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[51] *Health and Safety Hearings*, *supra* note 4, at 91 (statement of John H. Holliday, Chairman, South Carolina Athletic Commission).

[52] *See id.*; *see also* Lawrence S. Brown et al., *Bleeding Injuries in Professional Football: Estimating the Risk for HIV Transmission*, 122 ANNALS INTERN MED. 271, 273 (1995) (discussing low rate of HIV transmission in athletic competitions).

[53] *See, e.g.*, Mitten, *supra* note 13, at 7 (discussing blood spillage). Because of the fear of HIV transmission through blood, protracted litigation and legislation has resulted, all in an effort to protect the dignity of infected persons and the safety of those not infected. *See, e.g.*, United States v. Morvant, 898 F. Supp. 1157, 1157 (E.D. La. 1995) (involving dentist accused of discrimination because he refused to treat HIV-infected persons); Scoles v. Mercy Health Corp. of Southeastern Pa., 887 F. Supp. 765, 769-72 (E.D. Pa. 1994) (finding that surgeon infected with HIV posed significant risk and direct threat to health of patients who underwent invasive procedures, thus justifying hospital's restrictions on his surgical practice).

blood in the ring. In contrast to boxing, the National Hockey League ("NHL") follows guidelines set by the Occupational Safety and Health Act ("OSHA").[54] The National Football League ("NFL") follows guidelines promulgated by the Centers for Disease Control and Prevention.[55] Similarly, when players in the National Basketball Association ("NBA") suffer wounds or lacerations that bleed, they must leave the game and be treated before returning to the competition.[56] The United States Olympic Committee has adopted guidelines designed to protect the participants, the officials, and the fans.[57] According to the guidelines, "when a bleeding injury occurs, the game or match must be stopped, all bleeding athletes receive care as soon as practical, and injured players not resume participation until bleeding is halted and the wound dressed."[58] In addition, "Olympic boxers wear shirts and headgear and use larger gloves, among other differences that tend to make Olympic boxing safer than professional boxing."[59]

In these major sports, individual leagues, organizations, or private persons administer the regulations and protocols for blood on the playing field and other health and safety issues. However, in boxing, the precautions taken are not privately employed; rather, they are legislatively mandated.[60] Therefore, one must ask what unique

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[54] *See* Jerry Crasnick, *Athletes Wonder About AIDS*, DENV. POST, Feb. 18, 1996, at B12; Allen Panzeri, *Facing Off with HIV in the NHL: The Biggest Threat to Hockey Players Doesn't Come on the Ice — It Comes from Off-Ice 'Play'*, OTTAWA CITIZEN, Feb. 24, 1996, at G1. OSHA includes a clause that trainers wear protective gloves "when necessary." *See* Chris Jenkins, *Athletes Facing up to Risks*, SAN DIEGO UNION-TRIB., Dec. 20, 1992, at H1 (describing OSHA's guidelines calling for gloves for treatment of wounds, adopted as part of NBA's six-point policy).

[55] *See* Crasnick, *supra* note 54, at B12.

[56] *See id.*

[57] *See, e.g.*, Drotman, *supra* note 22, at 193 (describing Olympic rule of halting fight when participant is bleeding); *see also* Karen Goldberg, *Sports Not Embracing HIV Tests*, WASH. TIMES, Feb. 18, 1996, at A1 (explaining that Olympics follow Center for Disease Control and Prevention's guidelines, including protective equipment and education). Olympic boxers, judo participants, and wrestlers all adhere to these guidelines. *See generally* WORLD HEALTH ORGANIZATION, GLOBAL PROGRAMME ON AIDS: CONSENSUS STATEMENT FROM CONSULTATION ON AIDS AND SPORTS (1989) (discussing low risk of HIV transmission through sports participation and possible ways to avoid infection).

[58] Drotman, *supra* note 22, at 193.

[59] *Id.*

[60] *See infra* notes 126-57 and accompanying text (discussing legislative enactments in boxing).

characteristic boxing has that requires the government's regulatory involvement.

The unique characteristics of boxing have led many to question not just the propriety of the regulations in the sport but the validity of the sport itself.[61] Two arguments supporting legislative regulation of boxing are: (1) medical data that, while evidencing a statistically low incidence of death, reveal a comparatively high incidence of brain damage,[62] and (2) moral issues that support regulation primarily because boxing is the only sport in which the primary objective is to damage the opponent's brain, thereby rendering the athlete unable to continue participating in the competition.[63]

The risk of fatality in boxing is far exceeded by the statistical risk of death in other sports. Between 1900 and 1990, more than 500 recorded deaths were directly related to boxing.[64] Between 1970 and 1978, the fatality rate averaged twenty-one deaths per year in the sport, which is equivalent to 3.8 deaths per thousand boxers.[65] It is estimated that, between 1945 and 1979 — a thirty-five-year period — approximately 335 deaths occurred in worldwide amateur boxing. In contrast, 450 deaths occurred in American football between 1958 and 1972 — only a fifteen-year span.[66] In fact, it is estimated that boxing's fatality rate as of 1986 — 0.13 deaths per thousand participants per year — "is lower than or similar to the rates for other high-risk sports such as horse racing, sky diving, mountaineering, motorcycle racing . . . hang gliding, and parachuting."[67] However, compared with other contact sports, injury rates for boxing are much higher.[68]

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[61] *See infra* notes 116-20 and accompanying text (discussing complete ban on boxing).

[62] *See* Kevin M. Walsh, *Boxing: Regulating a Health Hazard*, 11 J. CONTEMP. HEALTH L. & POL'Y 63, 67-68 (1994); *see also* Robert Glenn Morrison, *Medical and Public Health Aspects of Boxing*, 255 JAMA 2475, 2476-77 (1986) (describing results of animal research simulating punches to head).

[63] *See* Walsh, *supra* note 62, at 67-68.

[64] *See* BERGER, *supra* note 25, at 60.

[65] *See id.*

[66] *See* Morrison, *supra* note 62, at 2475.

[67] *See id.*

[68] *See id.* For example, in New York City, between 1918 and 1950, more deaths occurred in both football and baseball — 43 and 22 respectively — than in boxing, which sustained only 21 deaths during that time. *See id.* Between 1953 and 1977 in New York, only two of the 20,505 licensed professional boxers died from the sport. *See id.*

A 1984 study by the National Safety Council revealed that at least half of all boxers sustain injuries from the force contained in each punch.[69] For example, the "straight right," considered the most powerful of punches, typically possesses a force sixty times greater than gravity and a speed of more than thirty miles per hour.[70] One study equates such a punch as being hit on the head with a thirteen-pound wooden mallet swung at a speed of twenty miles per hour.[71] Any typical blow to the eye in boxing causes a deformation of the eyeball.[72] Given the strength of the average punch, consider that a boxing match may be won in only one of three ways: (1) both fighters finish the fight and are scored with points for each round based on the number of injurious strikes on the opponent; (2) a knockout, where one fighter is rendered unconscious for a period of at least ten seconds; or (3) a technical knockout, where one of the opponents bleeds so profusely that the referee or, usually, a doctor determines that the fighter cannot continue.[73]

The most common medical consequence to boxers in the sport is traumatic boxer's encephalopathy or "punch-drunk syndrome."[74] This syndrome is caused by repeated blows to the head, resulting in progressive brain damage.[75] Many ex-boxers suffer from this syndrome, such as former Welterweight Champion Wilfred Benitez, who is now barely coherent; former heavyweight contender Jerry Quarry, age fifty, who cannot put on his own socks and whose doctors say has the brain of an eighty-year-old man; and, of course, Muhammad Ali, the most infamous punch-drunk casualty, who suffers with Parkinsons-like symptoms as a result of the syndrome.[76]

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[69] *See* BERGER, *supra* note 25, at 60.

[70] *See id.*

[71] *See* J. Atha et al., *The Damaging Punch*, 291 BRIT. MED. J. 1756, 1756-57 (1985).

[72] *See* David McLeod, *Ocular Injuries from Boxing*, 304 BRIT. MED. J. 197, 197 (1992); *see also* Vincent J. Giovinazzo et al., *The Ocular Complications of Boxing*, 94 OPHTHALMOLOGY 587, 590 (1987) (noting that 58% of boxers in one study suffered vision-threatening injuries).

[73] *See* BERGER, *supra* note 25, at 58-59.

[74] For a discussion of the punch-drunk syndrome, see Walsh, *supra* note 62, at 66.

[75] *See id.*

[76] *See* Joan Ryan, *Brain-Rattling Punches Boxing's Biggest Foe*, S.F. CHRON., Mar. 9, 1996, at E1 (describing injuries to Benitez and Quarry); Angela Trafford, *Injuries to Brain Big Threat to Boxers*, SAN ANTONIO EXP.-NEWS, Feb. 26, 1996, *available in* 1996 WL 2822605; *see also* Ross Rosen, *In the Aftermath of McClellan: Isn't It Time for the Sport of Boxing to Protect Its Participants?*, 5 SETON HALL J. SPORTS L. 611, 611-12 (1995) (discussing Gerald McClellan's life-threatening injury). One Italian boxer, Gianfranco Rosi, was suspended from boxing for one year for taking drugs used to treat Parkinson's disease. *See* Carlo Colosimo &

The syndrome is caused as much by the number of bouts fought as by the degree of damage inflicted in any particular bout.[77] Scholars describe it as the Alzheimer's disease for boxers.[78] Studies reveal that up to half of all veteran boxers experience some progression of the syndrome,[79] while other research indicates that the percentages are even higher — between 60 and 87% of all boxers.[80] Studies involving other sports reveal that the syndrome is exclusive to boxing, a factor which significantly adds to the controversy involving the sport's participants.[81] Therefore, the haunting question remains: why is Muhammad Ali so less a medical casualty than Tommy Morrison?

William Ghent, as chairman of the Canadian Medical Association's Council on Health Care, once affirmed that "[n]o medical organization can support boxing because it's against the Hippocratic Oath."[82] Dr. David Fiore of the University of Nevada School of Medicine suggests: "Perhaps it is time for us to step away

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Alberto Albanese, *Boxer Disqualified for Taking Selegiline*, 346 LANCET 647, 647 (1995).

[77] *See* Atha et al., *supra* note 71, at 1756 (citing British Medical Association report that identified severe blows to head as one of two main causes of structural damage to brain attributable to boxing). Typical characteristics of a punch-drunk boxer, in progressive degree of effect, are:

> unsteadiness in gait and slight mental confusion, . . . distinct leg dragging, hand tremors, general slowing of muscular movements, hesitant speech, and nodding movements of the head, and finally . . . facial characteristics of a parkinsonian syndrome, tremors, staggering gait, and mental deterioration so severe in some cases that it [leads] to commitment to an asylum.

Morrison, *supra* note 62, at 2476. Some studies revealed characteristic symptoms of rage and jealousy. *See id.* Studies also reveal that the syndrome was more prevalent in the premodern era (before World War II) because the typical modern boxing career is shorter and is subject to better medical care and more stringent safety requirements. *See id.* at 2477.

[78] *See* Trafford, *supra* note 76, *available in* 1996 WL 2822605; *see also* Beverly Merz, *Is Boxing a Risk Factor for Alzheimer's?*, 261 JAMA 2597, 2597-98 (1989) (suggesting that boxing injuries should be viewed as predisposing factor for Alzheimer's disease).

[79] *See* Morrison, *supra* note 62, at 2476.

[80] *See* George D. Lundberg, *Boxing Should Be Banned in Civilized Countries — Round 3*, 255 JAMA 2483, 2483 (1986); Dana Swartzberg, *Air Force Academy Ends Mandatory Boxing Activity*, 274 JAMA 784, 784 (1995).

[81] One survey conducted in 1974 revealed that punch-drunk syndrome occurred in 5 cases involving professional soccer players, 2 cases of amateur rugby football players, 2 cases of professional wrestlers, 1 parachutist, and 12 cases of steeplechase jockeys. *See Brain Damage in Sports*, 1 LANCET 401, 401-02 (1976). However, the study revealed 290 cases involving boxers. *See id.*

[82] *See* Morrison, *supra* note 62, at 2478.

from moral rhetoric and focus on the issue of brain injury in boxing."[83] The extremely violent dynamics of the sport justify some form of governmental oversight. However, no accord has been reached on what form this regulation should take, or who should regulate boxing.

B. Problems Associated with the Regulation of Boxing

One of the inherent problems with boxing regulations is that they cannot eliminate all risk of injury without fundamentally and permanently altering the sport. "[P]rofessional prizefighting[] cannot be made safe. It can be made safer. . . ."[84] Making boxing safer requires strict regulatory oversight that is comprehensively and consistently administered in and among the fifty states.[85] But not every state regulates boxing,[86] and those states that do regulate the sport do so in varying degrees. In at least one state — Kansas — the regulation of boxing is left to city officials.[87] At least four other states — Colorado, Oklahoma, South Dakota, and Wyoming — do not have boxing commissions.

Even in individual states with regulatory commissions, legislation and administrative regulation varies considerably. Most legislating states control licensure[88] and require medical examinations of all

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[83] *See* David C. Fiore, *Boxing: Does the Size of the Prize Affect the Drain on the Brain?*, 276 JAMA 954, 954 (1996). Other significant injuries in boxing occur to the eyes. *See* Marsha F. Goldsmith, *Physicians Aim to KO Boxers; Injuries; Focus on Eye as Title Bout Nears*, 257 JAMA 1697, 1697 (1987) (discussing New York physicians' study of 75 boxers finding high number of serious eye injuries); *see also supra* note 72 and accompanying text (discussing eye injuries suffered by boxers).

[84] *See Health and Safety Hearings*, *supra* note 4, at 8 (statement of Hon. Mills Lane, Judge, Second Judicial District Court, Reno, Nevada and Ring Magazine's Referee of Year for 1993).

[85] One of the earliest legislative proposals regarding boxing was proposed in 1961 and 1962 by Senator Estes Kefauver. *See id.* at 67 (opening statement of Sen. McCain).

[86] As of 1994, only 42 states and the District of Columbia regulated boxing. *See* Walsh, *supra* note 62, at 72.

[87] *See* KAN. STAT. ANN. §§ 12-5101 to -5103 (1991).

[88] *See, e.g.*, ARK. CODE ANN. § 17-22-302-(d)(1) (Michie 1995) (granting state athletic commission authority to issue annual licenses to boxers, managers, promoters, and referees); MINN. STAT. ANN. § 341.05(2) (West 1990) (granting boxing board power to issue and revoke licenses for individual boxers and for organizations promoting or conducting boxing matches); R.I. GEN. LAWS § 41-5-1 (1990) (requiring division of racing and athletics to issue boxing licenses to individuals and organizations conducting boxing matches); *see also, e.g.*, W. VA. CODE § 29-5A-14 (1992) (providing that boxing license may be revoked for moral turpitude or immorality, drunkardness, or drug use).

participants.[89] Some states require drug tests.[90] Many states also regulate different aspects of the sport, including age requirements for participation;[91] weight requirements for the participants;[92]

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[89] *See* ALASKA STAT. § 05.10.040 (Michie 1996); ARIZ. REV. STAT. ANN. § 5-233 (West 1995); CAL. BUS. & PROF. CODE §§ 18646(c), 18706, 18711(a) (West 1997); CONN. GEN. STAT. ANN. § 21a-205(a) (West 1994); FLA. STAT. ANN. § 548.046.2 (West 1997); GA. CODE ANN. § 31-31-4.1(a) (Harrison 1994); HAW. REV. STAT. § 440-21 (1993); IDAHO CODE § 54-413 (1997); 225 ILL. COMP. STAT. ANN. 105/12 (West 1993); IND. CODE ANN. § 25-9-1-18(a) (West Supp. 1997); IOWA CODE ANN. § 90A.6. (West 1996); KY. REV. STAT. ANN. § 229.111 (Michie 1995); LA. REV. STAT. ANN. § 4:70 (West 1987); MASS. GEN. LAWS ANN. ch. 147, § 37 (West 1991); MICH. COMP. LAWS ANN. § 339.811 (West 1997); MICH. COMP. LAWS ANN. § 339.805a (West 1997); MINN. STAT. ANN. § 341.115 (West 1990); MONT. CODE ANN. § 23-3-405.2(d) (1995); NEB. REV. STAT. § 81-8,134.2 (1994); N.H. REV. STAT. ANN. § 285:15 (Supp. 1996); N.J. STAT. ANN. §§ 5:2A-8, -15, -18.2 (West 1996); N.Y. UNCONSOL. LAW §§ 8912.2, 8925.1 (McKinney Supp. 1997); OHIO REV. CODE ANN. §§ 3773.41, .45 (Banks-Baldwin Supp. 1997); OR. REV. STAT. § 463.135 (1995); 5 PA. CONS. STAT. ANN. § 709 (West 1995); R.I. GEN. LAWS §§ 41-5-7.1, -11 (1990); S.C. CODE ANN. § 52-7-90 (Law Co-op. 1992); TENN. CODE ANN. § 68-115-203 (1996); TEX REV. CIV. STAT. ANN. art. 8501-1 sec. 7(c)(6) (West Supp. 1997); UTAH CODE ANN. § 58-66-301.4(d) (1996); WASH. REV. CODE ANN. §§ 67.08.015, .090 (West Supp. 1997); W. VA. CODE § 29-5A-18 (1992); WIS. STAT. ANN. § 444.10 (West Supp. 1997); *see also* ME. REV. STAT. ANN. tit. 32, § 13507 (West 1988 & Supp. 1996) (establishing medical advisory committee); R.I. GEN LAWS § 41-5-13.1 (1990) (requiring physical examination following knockouts).

[90] *See* MD. CODE ANN., BUS. REG. § 4-315 (Supp. 1996); R.I. GEN. LAWS § 41-5-11.1 (1990); UTAH CODE ANN. § 58-66-605 (1996).

[91] *See* ARIZ. REV. STAT. ANN. § 5-232 (West 1995); CAL. BUS. & PROF. CODE § 18702 (West 1997); CONN. GEN. STAT. ANN. § 21a-207 (West 1994); FLA. STAT. ANN. § 548.041 (West 1997); GA. CODE ANN. § 31-31-4.3 (Harrison 1994); IND. CODE ANN. § 25-9-1-16(a)(1) (West Supp. 1996); IOWA CODE ANN. § 90A.10 (West 1996); KAN. STAT. ANN. § 12-5113 (1991); KY. REV. STAT. ANN. § 229.121 (Michie 1995); ME. REV. STAT. ANN., tit. 32, § 13507 (West 1988 & Supp. 1996); MASS. GEN. LAWS ANN., ch. 147, § 39 (West 1991); N.H. REV. STAT. ANN. § 285:16 (1987); N.M. STAT. ANN. § 60-2A-22 (Michie 1997); OHIO REV. CODE ANN. § 3773.46(A) (Banks-Baldwin Supp. 1997); 5 PA. CONS. STAT. ANN. § 702 (West 1995); R.I. GEN. LAWS § 41-5-13 (1990); S.C. CODE ANN. § 52-7-80 (Law Co-op. 1992); UTAH CODE ANN. § 58-66-301(4)(a) (1996); WIS. STAT. ANN. § 444.09(4) (West 1988 & Supp. 1997); *see also* Zannelli v. Di Sandro, 121 A.2d 652, 657 (R.I. 1956) (holding that commission could deny license to 38-year-old boxer because his advanced age rendered him more susceptible to injury).

There are also a variety of states that regulate the age of boxing spectators. *See, e.g.*, GA. CODE ANN. § 31-31-4.3 (Harrison 1994); LA. REV. STAT. ANN. § 4:74 (West 1987); 5 PA. CONS. STAT. ANN. § 1122 (West 1995).

[92] *See, e.g.*, HAW. REV. STAT. § 440-29 (1993) (regulating allowable weight difference between contestants); IDAHO CODE § 54-406 (1997) (regulating weight classifications); IND. CODE ANN. § 25-9-1-25 (Michie 1997) (restricting weight differences between contestants); KAN. STAT. ANN. § 12-5119 (1991) (regulating weight classification and limiting differences in weight between contestants); ME. REV. STAT. ANN. tit. 32, § 13507 (West 1988 & Supp. 1995) (granting Maine Athletic Commission power to adopt rules for boxing, including weight standards); N.Y. UNCONSOL. LAW § 8922 (McKinney 1974) (granting commission power to prescribe weights and classes of boxers); 5 PA. CONS. STAT. ANN. §§ 710, 711

number and length of rounds and rest periods;[93] qualifications of the boxing rings,[94] gloves,[95] and equipment;[96] grounds for

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(West 1995) (requiring that commission promulgate rules establishing weight classes and limiting difference in weight between contestants to 10 pounds in certain classes); WASH. REV. CODE ANN. § 67.08.015 (West Supp. 1997) (providing for weight certification); W. VA. CODE § 29-5A-19 (1992) (regulating weight differences for participants under 150 pounds).

[93] *See* CAL. BUS. & PROF. CODE § 18720 (West 1997); CONN. GEN. STAT. ANN. § 21a-203 (West 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 (West 1996); KAN. STAT. ANN. § 12-5108 (West 1991); KY. REV. STAT. ANN. § 229.101 (Michie 1995); ME. REV. STAT. ANN. tit. 32, § 13507 (West 1988 & Supp. 1995); MD. CODE ANN., BUS. REG. § 4-315(d) (Supp. 1996); MASS. GEN. LAWS ANN. ch. 147, § 38 (West 1991); MICH. COMP. LAWS ANN. § 339.810 (West 1997); MINN. STAT. ANN. § 341.07 (West 1990); MO. ANN. STAT. § 317.011 (West Supp. 1997); MONT. CODE ANN. § 23-3-405 (1995); NEB. REV. STAT. § 81-8,134(2) (1996); NEV. REV. STAT. § 467.150 (1995); N.H. REV. STAT. ANN. § 285:17 (1987); N.M. STAT. ANN. § 60-2A-21 (Michie 1997); N.Y. UNCONSOL. LAW § 8923 (McKinney Supp. 1997); OHIO REV. CODE ANN. § 3773.45(B) (West Supp. 1997); 5 PA. CONS. STAT. ANN. § 714 (West 1995); R.I. GEN. LAWS § 41-5-12 (1990); S.C. CODE ANN. § 52-7-110 (Law Co-op. 1992); TENN. CODE ANN. § 68-115-101 (1996); WASH. REV. CODE ANN. § 67.08.080 (West Supp. 1997); W. VA. CODE § 29-5A-12 (1992); WIS. STAT. ANN. § 444.09 (West 1988 & Supp. 1996).

[94] *See, e.g.*, CAL. BUS & PROF. CODE § 18724 (West 1997) (specifying ring floor of one-and-one-quarter inch plywood and ring floor padding of one-and-three-quarters inch combination of closed cellular foam and high density polyvinylchloride (PVC)); KAN. STAT. ANN. § 12-5112 (West 1991) (requiring ring size of between 16 and 20 square feet with floor extending not less than two feet beyond ropes and poles over edge of platform with felt or soft material); KY. REV. STAT. ANN. § 229.141 (Michie 1995) (specifying that boxing structures need proper ventilation, fire exits, and fire escapes, if appropriate); LA. REV. STAT. ANN. § 4:72 (West 1987) (stating that seats cannot be within four feet of ring sides or within six feet of ring corners); 5 PA. CONS. STAT. ANN. § 713 (West 1995) (requiring that ring padding be at least two inches thick and be made from soft felt, foam rubber, or similar material).

[95] *See, e.g.*, CAL BUS. & PROF. CODE § 18723 (West 1997) (requiring that gloves be made of most current materials and glove padding be evenly distributed over back of glove and covering knuckles and back of hands); IDAHO CODE § 54-412 (1997) (requiring gloves of at least eight ounces or of at least 10 ounces for contestants weighing more than 165 pounds); 225 ILL. COMP. STAT. ANN. § 105/12 (West 1993) (specifying minimum glove requirement as eight ounces); MI. COMP. LAWS ANN. § 339.810 (West 1997) (requiring gloves of at least six ounces); MONT. CODE ANN. § 23-3-405 (1995); 5 PA. CONS. STAT. ANN. § 712 (West 1995) (requiring gloves of at least eight ounces for boxers weighing 160 pounds or under and minimum glove weight requirement of 10 ounces for boxers over 160 pounds); R.I. GEN. LAWS § 41-5-12 (1990) (requiring gloves of at least 12 ounces); S.C. CODE ANN. § 52-7-110 (Law Co-op. 1996) (requiring gloves of at least eight ounces); TENN. CODE ANN. § 68-115-101 (1996) (requiring properly padded gloves weighing at least six ounces); TEX. REV. CIV. STAT. ANN. art. 8501-1, sec. 6A (West 1996) (requiring gloves weighing eight ounces); WASH. REV. CODE ANN. § 67.08.080 (West Supp. 1997) (requiring gloves of at least eight ounces); WIS. STAT. ANN. § 444.09 (West 1994 & Supp. 1995) (requiring boxers weighing under 140 pounds to wear gloves weighing at least five ounces and all others at least six ounces); W. VA. CODE § 29-5A-12 (1996) (requiring gloves of at

stopping a fight;[97] nature of the fights;[98] rules distinguishing amateur from professional fights;[99] and exceptions to the rules for special kinds of fights.[100] All of these regulations can be justified

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least 10 ounces).

[96] *See, e.g.*, CAL. BUS. & PROF. CODE § 18725 (West 1997) (empowering boxing commission to set round lengths, glove weights, equipment and safety standards); D.C. CODE ANN. § 2-610 (1994) (requiring various protective equipment); FLA. STAT. ANN. § 548.043 (West 1988 & Supp. 1997) (requiring protective devices, such as gloves, or other devices as commission deems necessary); KAN. STAT. ANN. § 12-5120 (West 1991) (specifying requirements for protective apparatus, bandages, and taping); ME. REV. STAT. ANN. tit. 32, § 13507 (West 1988 & Supp. 1995) (stating that commission may regulate uniforms and gear); ME. REV. STAT. ANN. tit. 32, § 13508 (West 1988 & Supp. 1995) (requiring head gear for amateurs); N.J. STAT. ANN. § 5:2A-25 (West 1996) (providing study of use of thumbless gloves and headgear); N.M. STAT. ANN. § 60-2A-31 (Michie 1991 & Supp. 1996) (requiring head gear for boxers under 15 years of age); N.M. STAT. ANN. § 60-2A-32 (Michie 1991 & Supp. 1996) (requiring head gear for amateurs); N.Y. UNCONSOL. SPORTS LAW § 8923 (McKinney 1974 & Supp. 1997) (waiving thumbless gloves for championship fights); R.I. GEN. LAWS § 41-5-3.5 (1990) (providing for examination of equipment prior to event).

[97] *See, e.g.*, CAL. BUS. & PROF. CODE §§ 18733, 18757 (West 1997) (specifying grounds for stopping contest and persons entitled to stop amateur boxing contests).

[98] *See, e.g., id.* § 18738 (penalizing for rabbit punches); FLA. STAT. ANN. § 548.008 (West 1997) (banning tough-man and badman competitions); MISS. CODE ANN. § 75-75-101 (Supp. 1997) (regulating tough-man contests); N.C. GEN. STAT. § 143-653 (1996) (prohibiting warrior matches); 5 PA. CONS. STAT. ANN. § 1701 (West 1995) (banning tough-man contests); TENN. CODE ANN. § 68-115-401 (1996) (defining and permitting tough-man or badman competitions).

[99] *See, e.g.*, CAL. BUS. & PROF. CODE § 18750 (West 1997) (stating qualifications for boxing amateurs); HAW. REV. STAT. § 440-31 (1993) (discussing individuals barred from amateur boxing); MINN. STAT. ANN. § 341.115 (West 1990) (addressing professional boxing); NEV. REV. STAT. ANN. § 467.170 (Michie 1995) (distinguishing rules for amateurs); OKLA. STAT. ANN. tit. 3A, § 606 (Supp. 1997) (exempting amateurs from state sanctioning laws); 5 PA. CONS. STAT. ANN. § 702 (West 1995) (stating age restrictions for amateurs); TEX. REV. CIV. STAT. ANN. art. 8501-1, sec. 7(a) (West 1997) (exempting amateurs from state licensing and permit requirements); VA. CODE ANN. § 54.1-807.1 (Michie 1996) (exempting amateurs); W. VA. CODE § 29-5A-24 (1996) (discussing separate regulations for amateurs).

[100] *See, e.g.*, CAL. BUS. & PROF. CODE § 18748 (West 1997) (exempting championship fights from regulations if health and safety of participants and public are not jeopardized); HAW. REV. STAT. § 440-35 (1993) (exempting Army boxing from regulations); NEB. REV. STAT. § 81-8,134 (1996) (addressing championship matches); WIS. STAT. ANN. § 444.09 (West Supp. 1997) (exempting championship fights from round limitation). States have regulated a number of other aspects of the sport as well. *See* CAL. PENAL CODE § 414 (1997) (delineating penalties for leaving state to evade boxing regulations); CAL. BUS. & PROF. CODE § 18755 (West 1997) (regulating use of bandages); KAN. STAT. ANN. § 12-5114 (West 1991) (limiting number of matches); LA. REV. STAT. ANN. § 4:77 (West 1987) (stating that boxer must be in city three days prior to fight); 5 PA. CONS. STAT. ANN. § 708 (West 1995) (noting duration of suspensions as result of injuries); R.I. GEN. LAWS § 41-5-13.1(b) (1990) (regarding number of knockouts); R.I. GEN. LAWS § 41-5-22 (1990) (noting exceptions for

because they protect and promote the health and safety of the boxers.

This current state-by-state regulatory scheme is inadequate and inconsistent. One senator, commenting on the ineffectiveness of the regulatory scheme already in place in most states, noted: "the primary obstacle facing boxing . . . is the sport's ineffective system of regulation. This state-based regulatory scheme is comprised of inconsistent and often inadequate rules and regulations, compounded by equally inconsistent enforcement policies."[101] For example, the inconsistency of boxing regulations resulted in the death of Korean fighter Duk Koo Kim in 1982.[102] Kim, an unranked boxer, died at the hands of then-champion Ray "Boom Boom" Mancini.[103] Because of the poor regulatory system employed at the time, Kim was allowed to fight the far superior Mancini and was killed.[104] While the Mancini-Kim fight may not have been intentionally fixed, the practice of carding a superior fighter against a less skilled fighter to bolster the superior fighter's record is especially problematic for boxing regulators.[105]

For any minimum level of uniformity to exist among the states, the federal government must revamp this hit-or-miss system of regulation.[106] Many feel that federal oversight is necessary to implement the degree of safety and consistency truly warranted by such a violent sport.[107] To this end, the Senate has passed the Professional Boxing Corporation Act — a bill including federal

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demonstrations of "science" of boxing); WIS. STAT. ANN. § 444.09 (West Supp. 1997) (prohibiting abusive language).

[101] *See Health and Safety Hearing, supra* note 4, at 36 (statement of Sen. Roth, Ranking Minority Member of Senate Permanent Subcommittee on Investigations).

[102] *See id.* at 75.

[103] *See id.* Mancini was widely accepted as the proven champion because of his superior boxing abilities. Kim, on the other hand, was not even ranked in the "top 10" by any of the 50 experts from *The Ring* magazine, which regularly ranked fighters. *See id.* In fact, Kim was not even ranked in the top 40 Korean fighters by the Korean supervising agency. *See id.*

[104] *See id.*

[105] *See id.* at 74-75.

[106] *See* Kelley C. Howard, *Regulating the Sport of Boxing — Congress Throws the First Punch with the Professional Boxing Safety Act*, 7 SETON HALL SPORT L. 103, 126 (1997); *see also* Lawrence Bershad & Richard J. Ensor, *Boxing in the United States Reform, Abolition or Federal Control? A New Jersey Case Study*, 19 SETON HALL L. REV. 865, 912 (1989) (presenting case study of boxing regulation and attempted reform of such regulation).

[107] Regulations are particularly needed for the protection of unknown club fighters — not only the infamous championship fighters who bring in multimillion dollar purses. *See Health and Safety Hearings, supra* note 4, at 3.

regulations that require state boxing commissions to recognize a fighter's suspension by another state.[108] The House of Representatives has passed similar legislation.[109] Currently, however, not every state maintains a state boxing commission to employ oversight of the sport. In the five states without regulatory commissions,[110] boxing matches are becoming increasingly violent. For example, a popular new style of fighting called the Ultimate Fighting Championship has almost a cult-like following in many nonregulated states. Available through cable television, it is a bloody, no-holds-barred, bare-fisted, tough-man competition that inevitably results in injury.[111]

Government officials can control or even ban these contests under a federal or state regulatory regime.[112] But in nonregulated states, there are no restrictions. Ironically, Oklahoma, Tommy Morrison's home state, will not allow him to fight there, yet it allowed the Ultimate Fighting Challenge to take place within its

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[108] *See* S. 1189, 103d Cong. (1993) (proposing Professional Boxing Corporation Act of 1994).

[109] *See* H.R. 2607, 103d Cong. (1993); *see also Tennessee Suspends Poly Graduate Kyler for Second Time*, BALT. SUN, Sept. 27, 1996, at 3E (reporting that House of Representatives passed bill requiring state commissions to recognize fighters' suspensions in other states).

[110] *See* Sharon Robb, *What Would Make HIV-Infected Morrison Seek a Comeback?*, SUN-SENTINAL (Fla.), Sept. 23, 1996, at 14C.

[111] *See Health and Safety Hearings*, *supra* note 4, at 68 (statement of Sen. John McCain).

> For $14.95, cable viewers will be able to gorge themselves on a visual feast of broken bones and blood. No gloves allowed. It is a bare-knuckle contest between experts in various fighting disciplines. The fights are staged in a ring enclosed with chicken wire, and that will ensure the gruesome. You can open up a guy pretty good with an elbow, or a knee, a head butt, or an uncontested bare-fisted haymaker. The promotional video is heavy on defenseless fighters getting stomped on the canvas. Each match will run until there is a designated winner, according to the company's press release, by means of knockout, surrender, doctor's intervention, or death.

See id.

[112] *See, e.g.*, Ohio Boxing Comm'n v. Dore, No. L-95-295, 1996 WL 339927 (Ohio Ct. App. 6th Dist. June 21, 1996) (subjecting tough-man contest to regulation by boxing commission); *see also, e.g.*, FLA. STAT. ANN. § 548.008 (West 1988 & Supp. 1997) (prohibiting tough-man or badman competitions where participants use any combination of boxing, wrestling, kicking, or martial arts skills); LA. REV. STAT. ANN. § 4:81.1 (West 1987 & Supp. 1996) (outlawing tough-man contests); MONT. CODE ANN. § 23-3-404 (1995) (subjecting all "so you think you are tough" matches involving prizes to management of Montana Board of Athletics); N.C. GEN. STAT. § 143-653 (1996) (prohibiting warrior matches); 5 PA. CONS. STAT. ANN. § 1701 (West 1995) (prohibiting tough-man contests); TENN. CODE ANN. § 68-115-401 (1996) (authorizing tough-man or badman matches, subject to state provisions).

jurisdiction.[113] Equally disturbing is the fact that Sam Adkins, a former sparring partner of Morrison, participated in the Ultimate Fighting Challenge in Puerto Rico and was "beaten to a bloody pulp" so badly that the cable station airing the program refused to show an instant replay of the beating.[114] Commenting at a congressional hearing on a video segment of such a contest, one Senator remarked: "The video shows something that I find sickening. If, God forgive us, we decide that is the way we want to entertain ourselves in America, there is something wrong with us."[115] Clearly, there is something wrong with a sport that has the potential death of one of the participants as its inherent purpose. The violence of the Ultimate Fighting Championship that enthralls sports fans should not preclude state intervention and regulation.

Notwithstanding boxing's popular appeal for some, many support the medical community's long-standing call for a complete ban of boxing because of its sheer violence, high risk of injury, and the inconsistency of administration among state regulating bodies.[116]

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[113] *See* Bernard Fernandez, *Morrison Finds Unlikely Ally in Foreman*, SEATTLE TIMES, Sept. 29, 1996, at D5. In early 1997, the Labor Department finally banned all tough-man competitions in the state after a participant in one competition was killed. *See* Ron Jackson, *Protesters Will Target Boxing Panel*, DAILY OKLAHOMAN, Sept. 19, 1997, at 10.

[114] *See* Bill Conlin, *Boxers in Worse Danger than Ever*, HOUS. CHRON., Feb. 20, 1996, at 1.

[115] *See Health and Safety Hearings*, *supra* note 4, at 81 (statement of Sen. Byron L. Dorgan).

[116] *See* George D. Lundberg, *Boxing Should Be Banned in Civilized Countries*, 249 JAMA 250, 250 (1983) (commenting that brutality inherent in boxing is inconsistent with modern social mores); George D. Lundberg, *Boxing Should Be Banned in Civilized Countries: Round 2*, 251 JAMA 2696, 2697 (1984) (arguing that either boxing should be abolished or blows to head should be made illegal); Robert E. Piston, *Boxing, Personal Freedom and the Right of Lions to Christians*, 256 JAMA 1895, 1895 (1986) (rebutting suggestion that ban on boxing will interfere with personal freedom); Nelson G. Richards, *Ban Boxing*, 34 NEUROLOGY 1485, 1485-86 (1984) (calling for ban of boxing because of its intent to cause injury to brain); R.J. Ross et al., *Boxers: Computed Tomography, EEG, and Neurological Evaluation*, 249 JAMA 211, 213 (1983) (concluding that data from study showed "boxing is deleterious to the human brain"); *Roundup of Actions by AMA House of Delegates*, AM. MED. NEWS, July 12, 1985, at 32 (noting that AMA has called for complete ban of boxing) [hereinafter *Roundup of Actions by AMA House of Delegates*]; Jeffrey T. Sammons, *Why Physicians Should Oppose Boxing: An Interdisciplinary History Perspective*, 261 JAMA 1484, 1484 (1989) (supporting AMA's opposition to boxing because of its intent to harm participants); *Time To Ban British Boxing*, 377 NATURE 561, 561-62 (1995) (arguing that boxing is degrading and substandard of principles of enlightened society); M.W. Van Allen, *The Deadly Degrading Sport*, 249 JAMA 250, 251 (1983) (detailing brain damage caused by knockout). The American Academy of Pediatrics, the American Association of Neurological Surgeons, the American Neurological Association, the American Academy of Neurology, and several state medical associations have also called for a ban on boxing. *See* Morrison, *supra* note 62, at 2479.

Both Norway and Sweden have already banned professional boxing.[117] In 1983, the American Medical Association ("AMA") House of Delegates adopted a resolution requesting a ban on amateur boxing and restrictions on professional boxing.[118] One year later, the organization called for a ban on all boxing in the United States and focused on individual state legislatures to effectuate their recommendations.[119] Medical associations in Britain, Canada, and Australia and the World Medical Association, have followed suit with similar recommendations.[120] In 1985, however, the AMA House of Delegates defeated a motion authorizing ringside physicians and referees to stop bouts for medical reasons.[121]

Those opposing a complete ban of the sport fervently defend the sheer beauty of the sport and the masterful skills required to be a world champion; at most, they reluctantly resolve to employ greater protective measures.[122] But perhaps the risk of injury so inherent in the sport has become its own downfall. One director of a state athletic commission observed that "'[t]he perception [of the risk]

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[117] *See Morrison, supra* note 62, at 2479 (stating that medical community has become increasingly vocal in calling for boxing reforms). The ban in Sweden has been in effect since 1969. *See* Robert Ludwig, *Making Boxing Safer: The Swedish Model*, 255 JAMA 2482, 2482 (1986). In Sweden, where there is strict oversight of amateur boxing, medical consequences such as brain damage are minimal. As of 1986, none of the 1080 active amateur boxers had been knocked out more than twice, only five had more than 100 bouts, and none were over the age of 30. *See id.* If a boxer is knocked out, he is prohibited from fighting for one month and must undergo a neurological examination before returning to the ring. *See id.* A second knockout brings a three-month suspension. *See id.* Participants are not permitted to compete in actual boxing until the age of 15 and there are never any "victors"; scoring only warrants a "diploma" for good technique. *See id.*

[118] *See* William Gildea & Dennis Collins, *AMA Resolution: Eliminate Boxing*, WASH. POST, Dec. 6, 1984, *available in* 1984 WL 2003882.

[119] *See AMA Agrees to Lobby for Ban on Boxing*, REC. (N.J.), Dec. 6, 1984, *available in* 1984 WL 2458254 (describing AMA House of Delegates vote to eliminate amateur and professional boxing); Gildea & Collins, *supra* note 118, *available in* 1984 WL 2003882 (stating that AMA offered to work with state legislatures to eliminate boxing).

[120] *See* Morrison, *supra* note 62, at 2479.

[121] *See Roundup of Actions by AMA House of Delegates*, *supra* note 116, at 32 (rejecting resolution to make boxing safe sport).

[122] *See, e.g.*, Walsh, *supra* note 62, at 70-71 (describing views of Dr. Max Novich, director of National Boxing Safety Center at United Hospitals in New Jersey and founder of Association of Ringside Physicians, who advocates minimal reforms in boxing instead of complete ban of sport). In Britain, these reforms include closer restrictions on medical exams, mandated MRI testing after a knockout, longer periods of compulsory rest after a knockout, and greater oversight of dehydrated boxers who struggle to "make weight." *See* Douglas Carnall & John Warden, *Tighter Medical Controls Proposed for Boxing*, 311 BRIT. MED. J. 1183, 1183 (1995).

can be as bad [for the sport] as the reality.'"[123] The fears of those who oppose more restrictive federal regulation of professional boxing, compared to other sports, are arguably justified. In his testimony to the congressional Committee on Commerce, Science, and Transportation, one Senator commented on the focus of professional boxing as a target of federal investigation:

> I was often asked why we were investigating and considering federal oversight of boxing and not other sports. The answer is plain — boxing is different than other sports. Boxing does not have a central self-regulatory authority like a league president or commissioner, nor is it likely that, in the absence of federal legislation, any such self-regulatory authority will be established. Instead, professional boxing is governed by a patchwork system of state-by-state regulations. Again, unlike other sports, boxing lacks uniformity. There is no other sport in which the rules and regulations vary so widely, as does their enforcement. And there are still some states where professional boxing takes place, but is totally unregulated. The current system of inadequate, or no regulation presents grave dangers to the health and safety of the young men who choose to enter the boxing profession.[124]

It is with this perspective that many state legislatures have begun to regulate boxing more strictly, particularly concerning the transmission of HIV.

C. The Regulation of HIV Testing

The basis of any sports regulation rests in the government's interest in protecting the health and safety of the participants.[125] But several scholars advocate that the existing regulations do little to achieve those ends.[126] The problem with existing regulations is that boxers are legally able to fight long after they are physically able to

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[123] *See* David Alfonso, *Florida to Formulate HIV Testing Program in November*, TAMPA TRIB., Sept. 25, 1996, at 2 (statement by Mike Scionti, executive director of Florida Athletic Commission).

[124] *Health and Safety Hearings*, *supra* note 4, at 36 (statement of Sen. Roth).

[125] *See, e.g.*, ME. REV. STAT. ANN. tit. 32, § 13502 (West 1988) (stating that Maine shall supervise boxing in order to insure safety of both participants and spectators); N.J. STAT. ANN. § 5:2A-2 (West 1996) (requiring state to regulate boxing to promote safety and well-being of participants); OR. REV. STAT. § 463.018 (1995) (stating that boxing should be regulated to protect participants' and public's interest).

[126] *See, e.g.*, John T. Wolohan, *An Ethical and Legal Dilemma: Participation in Sports by HIV Infected Athletes*, 7 MARQ. SPORTS L.J. 373, 376 (1997) (stating that present HIV testing may not catch all infected boxers).

fight. For example, one forty-one-year-old fighter lost more than 150 fights, with ninety-one knockouts.[127] In considering the health and safety of this fighter, is a state legislature or boxing commission more justified in denying him a license to continue boxing if he has HIV?

As of 1994, only five states — Connecticut, Idaho, Nevada, Oregon and Washington — required HIV testing for professional boxers, either statutorily or through regulation.[128] Nine states have mandated testing since Tommy Morrison's announcement of his HIV status.[129] Currently, only five states — California, Maryland, Rhode Island, Ohio and Utah — mandate HIV testing by statute.[130] Several states, including California, Maryland, and Utah, mandate testing through individual regulations promulgated by their respective state athletic commissions.[131] Other states, like

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[127] *See Health and Safety Hearings, supra* note 4, at 4 (statement of Sen. John McCain).

[128] *See id.* at 88 (displaying chart with statement of Marc Ratner, Executive Director of Nevada State Athletic Commission and Vice President of Association of Boxing Commissions).

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

[130] *See* CAL. BUS. & PROF. CODE § 18712 (West 1997); MD. CODE ANN., BUS. REG. § 4-304.1 (Supp. 1996); OHIO REV. CODE ANN. § 3773.34 (Banks-Baldwin Supp. 1997); R.I. GEN. LAWS § 41-5-11.1 (Supp. 1996); UTAH CODE ANN. § 58-66-605 (1996).

[131] *See, e.g.*, CAL. BUS. & PROF. CODE § 18712 (1997) (requiring that applicants for professional boxing license or license renewal provide documentary evidence of negative HIV and HBV tests); NEV. ADMIN. CODE § 467.027 (1994) (discussing blood tests for boxers and kick boxers); N.J. ADMIN. CODE tit. 13, § 46-12.1 - 12.2 (1997) (amended by 28 N.J. Reg 3806(b)) (requiring that physical exam of boxers include HIV test); OR. ADMIN. R. § 230-20-300 (1996) (requiring that boxers submit evidence of negative HIV test results); 21 Tex. Reg. 7782 (1996) (requiring that boxers submit proof of negative HIV test results).

The Nevada Athletic Commission will not license a boxer who is HIV infected. *See* Elliott Almond, *Sports Have Varying Guidelines on AIDS*, L.A. TIMES, Jan. 31, 1996, at 4. Of the more than 2100 boxers who have been tested in Nevada since 1988, Tommy Morrison was only the second to test positive. *See* Springer & Gustkey, *supra* note 3, at 1; *Nevada Leads U.S. in Testing for HIV*, SACRAMENTO BEE, Feb. 13, 1996, at C4. On May 6, 1996, the New Jersey Department of Law and Public Safety/Athletic Control Board implemented regulations requiring any participant in a boxing match to be tested for HIV. *See* N.J. ADMIN. CODE §§ 13:46-12.1, -12.2 (1996). As a condition of licensure, a boxer must provide documented evidence of a negative HIV test, taken within two weeks prior to the event or date of licensure. *See id.* Additional examinations may be ordered at any time to determine a boxer's continued fitness. *See id.* Florida opted to join other states in mandating HIV tests for boxers, not because the risks of transmission were significant, but because of the public perception that these risks were significant. *See* Alfonso, *supra* note 123, at 2. In other states, however, no such legislation has been sponsored. *See* Springer & Gustkey, *supra* note 3, at 1. Commenting on the resistance to legislation in this area, Bill Eastman, Chairman of the California Athletic Commission, stated:

Pennsylvania, are currently considering mandatory HIV testing of boxers.[132] When considering the implementation of mandated testing for boxers, however, legislators must also consider their individual state's version of the Acquired Immune Deficiency Syndrome ("AIDS") Prevention Act.[133] Pennsylvania, for example,

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> [e]very time it comes up, . . . the politicians scatter like cockroaches under a light. They are afraid of not being politically correct. I've been trying to get legislation passed for this test for three years. We have actively sought an author for such a bill, but we haven't been able to find one. . . . [P]eople need to wake up. We need to find a legislator who is not afraid of the tarring that comes with this subject, someone who is not afraid of being branded a homophobic or is not ignorant about AIDS.

Springer & Gustkey, *supra* note 3, at 1.

[132] *See* Telephone Interview with Gregory P. Sirb, Executive Director, Pennsylvania State Athletic Commission (Feb. 25, 1997) (discussing current legislation on mandatory HIV testing of boxers). While a statutory mandate and an official policy by the Commission is still pending in Pennsylvania, both the Commission and the state House have approved various versions of a testing mandate for boxers. *See* Samuel Davis, *Boxers Must Submit to AIDS Test to Fight in Pa.: State Board Approves New Measure*, PHILA. TRIB., May 7, 1996, at 6C (discussing State Athletic Commission's approval of testing requirement); Russell E. Eshleman, *Bill Requiring HIV Test for Boxers Clears House*, PHILA. INQUIRER, May 1, 1996, at B2 (noting state House's approval of mandatory HIV test for boxers). Although the regulation passed unanimously by the State Athletic Commission, the proposal must be approved by other state boards before it becomes policy. *See* Mario F. Cattabiani, *Pa. Panel Approves HIV Tests for Boxers, Other State Boards Will Review the Proposal*, ALLENTOWN MORNING CALL (Pa.), Apr. 30, 1996, at A4 (describing implementation of HIV testing requirements in professional boxing). Historically, the Louisiana Boxing Commission has not tested boxers for HIV, but it has recently considered such a mandate. *See* George Sweeney, *La. Fighters Will Be Tested*, NEW ORLEANS TIMES-PICAYUNE, Feb. 13, 1996, at E1 (noting recent proposal to require AIDS testing for boxers). More than 200 fighters were licensed in Louisiana in 1995. *See id.* Illinois requires physical tests and random drug screens but no mandatory HIV test. *See* Michael Hirsley, *In Illinois, Boxers Escape HIV Tests*, CHI. TRIB., Feb. 13, 1996, at 1 (describing Illinois' position on mandatory HIV testing). While Illinois and several other states do not require boxers to be tested, they do require referees and cornermen to wear protective gloves to prevent transmission. *See Boxers Can't Count on Testing for Virus; Unfortunately for Many Fighters, Politics Has Prevented Mandatory Testing in Most States*, ORLANDO SENTINAL, Feb. 13, 1996, at C5 [hereinafter *Boxers Can't Count on Testing*] (discussing mandatory HIV testing in boxing). Proposals have been made in New Jersey to extend the requirement of HIV testing to amateur boxers. *See* Robert Schwaneberg, *AIDS Test Asked for Jersey Boxing as Tommy Morrison Case Is Cited*, STAR-LEDGER (N.J.), Feb. 14, 1996, at 13 (debating policy behind HIV testing proposal).

In contrast, the National Hockey League implemented a new drug policy in 1996 that did not mandate drug testing, but offered confidential counseling and treatment, without suspension, and included counseling to players and families on the behavioral health issues associated with AIDS and HIV. *See* Paul Moran & Marshall Lubin, *Arena*, NEWSDAY (N.Y.), Sept. 27, 1996, at A63 (commenting on NHL's new drug policy not requiring HIV testing).

[133] *See, e.g.*, ALA. CODE § 22-11A-54 (Supp. 1996) (mandating confidentiality in testing);

specifically promotes testing on a voluntary basis.[134] At least sixteen states have adopted statutes specifically prohibiting involuntary HIV testing.[135] At least three state statutes imply that testing must be voluntary.[136] Three state statutes specifically require actual consent,[137] and seven states require informed consent.[138]

This disparity in regulatory policy creates difficulty for state boxing commissions and boxers alike.[139] For example, recently, the Oklahoma Labor Department, which is the state regulatory agency for boxing has enforced a new set of regulatory policies involving HIV testing.[140] These policies have not been adopted as law and have not gone through the proper administrative channels prior to

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DEL. CODE ANN. tit. 16, § 1203 (1995) (requiring confidentiality in HIV testing); GA. CODE ANN. § 24-9-47 (Harrison 1994); KY. REV. STAT. ANN. § 214.181 (Banks-Baldwin 1997) (discussing disclosure of AIDS confidential information); N.C. GEN. STAT. § 130A-143 (1995) (requiring confidentiality of all public and private records of AIDS victims); OHIO REV. CODE ANN. § 3701.243 (Banks-Baldwin 1994) (describing government agencies that can access HIV test results); 35 PA. CONS. STAT. ANN. § 7607 (West 1993) (describing confidentiality requirement and effect on promoting testing).

[134] *See* 35 PA. CONS. STAT. ANN. § 7602(c) (West 1993) (noting General Assembly's intent to encourage testing by promoting confidential testing that is informed and voluntary).

[135] *See* ALA. CODE § 22-11A-51 (Supp. 1996); COLO. REV. STAT. ANN. § 25-4-1405(8)(a) (West Supp. 1997); CONN. GEN. STAT. ANN. §19a-582 (West Supp. 1997); GA. CODE ANN. § 31-17A-2 (Harrison 1994); HAW. REV. STAT. ANN. § 325-16 (1993); IND. CODE ANN. § 16-41-6-1 (West 1997); KY. REV. STAT. ANN. § 214.181(5)(a) (Banks-Baldwin 1997); ME. REV. STAT. ANN. tit. 5, § 19203-A (West Supp. 1996); MONT. CODE ANN. § 50-16-1007 (1995); N.C. GEN. STAT. § 130A-148(h) (1995); OHIO REV. CODE ANN. § 3701.242 (Banks-Baldwin 1994); OKLA. STAT. ANN. tit. 63, § 1-502.3 (West 1997); 35 PA. CONS. STAT. ANN. § 7605(a) (West 1993); R.I. GEN. LAWS § 23-6-12 (1996); TEX. HEALTH & SAFETY CODE ANN. § 81.105 (West 1992); W. VA. CODE § 16-3C-2 (1995).

[136] *See* COLO. REV. STAT. ANN. § 25-4-1401 (West 1989 & Supp. 1997) (suggesting that voluntary testing would help control AIDS); GA. CODE ANN. § 31-17A-3 (Harrison 1994) (noting that infected persons should voluntarily seek assistance); MO. ANN. STAT. § 191.674 (West 1996) (stating that department of health may seek court order directing individual to undergo HIV testing only after making reasonable efforts to obtain informed consent to HIV testing).

[137] *See* OKLA. STAT. ANN. tit. 63, § 1-502.3 (West 1997); WASH. REV. CODE ANN. § 70.24.330 (West 1992).

[138] *See* CAL. HEALTH & SAFETY CODE § 199.22(a) (West 1990); FLA. STAT. ANN. § 381.004(3) (West 1997); KY. REV. STAT. ANN. §§ 214.181(5), 214.625(5) (Banks-Baldwin 1997); N.C. GEN. STAT. § 130A-148(h) (1995); OHIO REV. CODE ANN. § 3701.242(A), (Banks-Baldwin 1994); OR. REV. STAT. § 433.045 (1992); TEX. HEALTH & SAFETY CODE ANN. § 81.105 (West 1992).

[139] *See* Walsh, *supra* note 62, at 79-80.

[140] *See* Ron Jackson, *Review KO's Changes in Boxing Rules*, DAILY OKLAHOMAN, Oct. 7, 1997, at 1.

implementation and enforcement.[141] As a result of the premature enforcement of the regulations, eleven boxers were unlawfully suspended from boxing and missed opportunities to fight.[142]

There are at least seven identified boxers who have tested positive for HIV.[143] At least three of these — Paul Banke, Lamar Parks, and Carl Madison[144] — participated in boxing matches while harboring the HIV infection.[145] Other lesser-known HIV-positive fighters have fought in California.[146] Most recently, Massachusetts boxing officials allowed Carl Madison to fight light heavyweight David Lawhorn before the results of Madison's HIV test had been reported.[147] Madison had been hired for the fight at the last minute and, allegedly, had never boxed before in his life.[148] After the fight, his test results were disclosed and indicated that he was HIV-positive.[149] Madison provided false information on his application, including a false address and a false amateur boxing record.[150] Madison's doctor told officials that the test had been "taken care of" in his office the day before the fight. Officials misunderstood this to mean that the test had proven negative when, in fact, the doctor meant that he

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[141] *See id.*

[142] *See id.*

[143] *See* Gildea, *supra* note 5, at F2.

[144] *See Nevada Dodged Boxer's Ploy on Falsified HIV Test*, CHI. TRIB., Feb. 13, 1996, at 4; *Boxers Can't Count on Testing*, *supra* note 132, at C5 (noting boxer Lamar Parks's HIV status during McClellan fight). In March 1994, Parks was scheduled to fight in Nevada for the World Boxing Council Middleweight Title. *See id.* Pursuant to Nevada requirements, he had to be tested for HIV prior to the fight. *See id.* A few months prior to his mandatory test in Nevada, Parks's former fiancée died of AIDS-related complications. *See id.* Before she died, she disclosed that Parks also had tested positive for the disease while training for the fight. *See id.* Consequently, days before the scheduled fight, Parks withdrew from the bout, claiming that he had injured his shoulder, after he had attempted to fraudulently submit a friend's blood sample as his own to the Nevada Athletic Commission. *See id.*

[145] *See* Springer & Gustkey, *supra* note 3, at A1 (stating that Paul Bank fought while HIV-positive); Wilbon, *supra* note 50, at F1 (stating that Lamar Parks fought numerous times after testing HIV-positive).

[146] *See* Fernandez, *supra* note 113, at D5.

[147] *See Fanfare*, WASH. POST, Oct. 3, 1997, at C2.

[148] *See id.*

[149] *See id.*

[150] *See Sports Digest*, DAYTON DAILY NEWS (Ohio), Oct. 3, 1997, at 6D.

had taken the test.[151] Because of Madison's obvious lack of skills, the fight was stopped in the first round before either fighter bled.[152]

Some boxers have taken great pains to ensure that they can continue to box. The South Carolina State Athletic Commission suspended one boxer who subsequently boxed in North Carolina where there is no boxing commission or regulatory oversight.[153] This same boxer has allegedly fought in another state that has a boxing commission that simply did not honor South Carolina's suspension.[154] Even if nonqualified fighters did not go to this extent to sidestep regulatory restrictions in order to fight, many others at least attempt to obtain permission to fight by simply going to other nonregulating states. This maneuver is demonstrated outside of the HIV context by boxer Aaron Pryor, who, in May 1990, was denied a license to fight in forty-nine states based on his physical examinations.[155] He finally obtained a license to fight in Wisconsin despite the fact that he was legally blind.[156] It is suspected that HIV-positive boxers who cannot obtain a license in HIV testing states may employ this same forum-shopping tactic.

The violent nature of boxing and the probability of injury clearly justifies at least some degree of governmental oversight of the sport. However, the current level and dynamics of oversight do not protect the health and safety of the boxer, nor do they safeguard the boxers, referees, medical personnel, and fans from the transmission of HIV. If the high incidence of injury justifies regulating the health

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[151] *See Lawhorn Fought an Opponent with HIV Virus; Carl Madison, Stopped by David Lawhorn in the First Round, Was Allowed in the Ring Through Bad Communication*, PORTLAND PRESS HERALD, Oct. 3, 1997, at 3D.

[152] *See* George Kimball, *A Bout with a Doubt — Test Fails to Sideline Mystery Boxer with AIDS Virus*, BOSTON HERALD, Oct. 2, 1997, at 103.

[153] *See Health and Safety Hearings*, *supra* note 4, at 94 (statement of John H. Holladay, Jr., Chairman, South Carolina State Athletic Commission).

[154] *See id.*

[155] *See* Walsh, *supra* note 62, at 80, 83-84 n.179 (citing *Professional Boxing, Hearings on H.R. 2129, Before the Subcomm. on Commerce, Consumer Protection and Competitiveness*, 101st Cong. 1 (1989) (statement of Rep. Bill Richardson)).

[156] *See id.* at 80, 83 n.179.

and safety of fighters, then the justification for the regulation of HIV in boxing will depend on the likelihood of transmission[157] during any given boxing match.

III. THE TRANSMISSION OF HIV

A. Groups at Risk

Whenever a medical emergency has threatened society in the past, society has implemented preventative measures such as quarantine,[158] mass inoculation,[159] and mandatory testing.[160] The nature of the protective measures varies based upon the degree of risk involved in the activity at issue.[161] For example, the Americans With Disabilities Act ("ADA") allows public and private sector entities to discriminate against current drug users in employment, public services, and public accommodations.[162] In high-risk areas of HIV transmission, such as prostitution[163] and hypodermic drug use,[164]

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[157] The transmission of HIV is a constant concern — not just in the world of sports but in the most variant aspects of society and daily living. As recently as June 1996, reports of HIV transmission through oral sex, thought of as "safe sex," caused widespread concern. *See* Timothy W. Baba et al., *Infection and AIDS in Adult Macaques After Nontraumatic Oral Exposure to Cell-Free SIV*, 272 SCIENCE 1486, 1486-87 (1996); Jon Cohen, *HIV Data Raise Concern on Oral-Sex Risk*, 272 SCIENCE 1421, 1421 (1996). Although the study upon which the report was based concerned only monkeys and the human epidemiology lacked any corroboration of HIV transmission through oral sex, the findings caused concern over exactly how the virus is transmitted and what precautions need to be taken. *See* Baba et al., *supra* at 1486-89.

[158] *See, e.g.*, Compagnie Francaise de Navigation a Vapeur v. Louisiana Bd. of Health, 186 U.S. 380, 391-97 (1902) (permitting involuntary quarantine of persons suffering from communicable diseases).

[159] *See* Jacobson v. Massachusetts, 197 U.S. 11, 35-39 (1905) (upholding state compulsory vaccination law).

[160] *See, e.g.*, Piroglu v. Coleman, 25 F.3d 1098, 1102-03 (D.C. Cir. 1994) (upholding mandatory drug testing of emergency medical technician trainees to protect public health, despite lack of regulation).

[161] At one point during the history of the HIV epidemic in the United States, a few states took the preventative measure of mandating HIV testing before issuing a marriage license. *See* Raymond C. O'Brien, *AIDS: Perspective on the American Family*, 34 VILL. L. REV. 209, 255 (1989). No state requires HIV testing today, but nearly all recommend it to couples applying for a marriage license. *See id.* at 254-55.

[162] *See* Lawrence Gostin, *Waging War on Drug Users: An Alternative Public Health Vision*, 18 LAW MED. HEALTH CARE 385, 386 (1990).

[163] *See, e.g.*, Love v. Superior Court, 276 Cal. Rptr. 660, 666-67 (Ct. App. 1990) (discussing special need for government-mandated AIDS testing for prostitutes); People v. Adams, 597 N.E.2d 574, 584-85 (Ill. 1992) (stating that testing of convicted prostitutes did not violate equal protection clause); *In re* Juveniles A, B, C, D, E, 847 P.2d 455, 463 (Wash. 1993) (holding that testing of sexual offenders is reasonable).

[164] *See, e.g.*, People v. C.S., 583 N.E.2d 726, 731-32 (Ill. App. Ct. 1991) (holding that

courts have upheld mandatory HIV testing. Courts have also allowed mandatory HIV testing when test subjects admit that they are infected with HIV.[165] Mandatory testing of donated blood has been required since 1985 with great success.[166]

Testing prostitutes and drug abusers is logical because the risk of transmission by and among the members of these communities is very high. For example, among prostitutes, the chances of contracting HIV are greater because of the risks associated with sexually transmitted diseases.[167] Among intravenous drug users, the risk is high because of needle use and contaminated blood.[168] There has been a constant debate over how to address these two high-risk groups during the HIV epidemic, but testing for the virus has been treated as routine.[169] Conversely, courts have held mandatory testing in per se low risk areas, such as mental retardation health services[170] and the right to child custody,[171] to be invalid.[172]

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mandatory testing of hypodermic drug user was constitutional); *see also* Anonymous Fireman v. City of Willoughby, 779 F. Supp. 402, 418 (N.D. Ohio 1991) (finding that firefighters and paramedics are in high-risk group for contracting and transmitting HIV and, therefore, mandatory testing is constitutional).

[165] *See, e.g.*, Syring v. Tucker, 498 N.W.2d 370, 375-78 (Wis. 1993) (holding that testing individual for HIV was permissible because he had acted wantonly, recklessly, and without regard for social worker's rights, and court was justified under Fourth Amendment in upholding testing for HIV, regardless of test subject's admission of HIV infection).

[166] *See* Eve M. Lackritz et al., *Estimated Risk of Transmission of the Human Immunodeficiency Virus by Screened Blood in the United States*, 333 NEW ENG. J. MED. 1720, 1722, (1993); Elaine M. Sloand et al., *Safety of the Blood Supply*, 274 JAMA 1368, 1368 (1995); Girish Vyas et al., *The Risk of HIV Transmission by Screened Blood*, 334 NEW ENG. J. MED. 992, 992 (1996).

[167] *See* Love v. Superior Court, 276 Cal. Rptr. 660, 663 (Ct. App. 1990).

[168] *See* Centers for Disease Control and Prevention, U.S. Dep't of Health and Human Services, *Knowledge and Practices Among Injecting-Drug Users of Bleach Use for Equipment Disinfection — New York City, 1993*, 43 MORBIDITY AND MORTALITY WKLY. REP. 439, 439 (1994).

[169] *See, e.g., id.* at 439 (discussing sterilization of drug-users' equipment with bleach to prevent HIV infection); Michael Kirby, *Human Rights and the HIV Paradox*, 348 LANCET 1217, 1217-18 (1996) (arguing against criminalization activities of certain target groups and for methods that would modify behavior); John K. Watters, *Behavioural Science in the AIDS Epidemic*, 344 LANCET 1312, 1313 (1994) (stating that behavioral intervention remains principal tool for AIDS prevention).

[170] *See* Glover v. Eastern Neb. Community Office of Retardation, 867 F.2d 461, 464 (8th Cir. 1989).

[171] *See* Doe v. Roe, 526 N.Y.S.2d 718, 718 (Sup. Ct. 1988) (commenting that involuntary testing for AIDS virus could be ordered upon showing of compelling need).

[172] *See generally* Michael L. Closen, *Mandatory Disclosure of HIV Blood Test Results to the Individuals Tested: A Matter of Personal Choice Neglected*, 22 LOY. U. CHI. L.J. 445 (1991)

For boxing, the answer to the question of whether mandatory testing for HIV is appropriate depends upon where the sport of boxing falls on the spectrum of risk. The following sections discuss several factors that are arguably relevant to the high-risk inquiry. However, these relevant factors serve only to increase the presence of HIV within the sport and not the risk of transmission in the ring.

1. The Promiscuous Lifestyles of Many Professional Athletes

Since Magic Johnson's disclosure of his HIV-positive status, the concern over HIV within the sports community has undergone intense scrutiny.[173] The promiscuous lifestyles of many celebrity athletes have provoked even greater concern over, and support for, mandatory testing of professional athletes.[174] For example, Magic Johnson has admitted to hundreds, perhaps thousands, of sexual encounters.[175] Stock-car racer Tim Richmond, who died of AIDS, is reported to have infected more than thirty women, including his former fiancée.[176] Former NBA star, Wilt Chamberlain, estimates that he had sexual relations with as many as 20,000 women during his professional career.[177] Tommy Morrison described his lifestyle

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(discussing disclosure of HIV confidential testing and right not to be informed of HIV test results); Roger Doughty, *The Confidentiality of HIV-Related Information: Responding to the Resurgence of Aggressive Public Health Interventions in the AIDS Epidemic*, 82 CAL. L. REV. 111, 141-60 (1994) (describing statutory restrictions on AIDS testing); Steven Eisenstadt, *An Analysis of the Rationality of Mandatory Testing to the HIV Antibody: Balancing the Governmental Public Health Interests with the Individual's Privacy Interests*, 52 U. PITT. L. REV. 327, 348-50 (1991) (discussing problems associated with mandatory testing of low-risk groups); Arthur S. Leonard, *Employment Discrimination Against Persons with AIDS*, 10 U. DAYTON L. REV. 681, 689-96 (1985) (discussing employment discrimination laws applicable to AIDS); Nancy Perkins, *Prohibiting the Use of the Human Immunodeficiency Virus Antibody Test by Employers and Insurers*, 25 HARV. J. ON LEGIS. 275, 278-85 (1988) (claiming that high cost of testing is not worthwhile for low risk employees).

[173] *See* Jennifer L. Johnston, Note, *Is Mandatory HIV Testing of Professional Athletes Really the Solution?*, 4 HEALTH MATRIX 159, 160 (1994).

[174] *See* Cote, *supra* note 129, at 7 (describing sexual promiscuity associated with professional athletes as job perk and noting that some sports industries have adopted mandatory HIV testing).

[175] *See id.*; Kevin Sherrington & Mitch Lawrence, *Reckless Play: Athletes Say Deluge of Offers for Sex Hard to Turn Down*, DALLAS MORNING NEWS, Nov. 17, 1991, at 1A.

[176] *See* Greg Cote, *Dangerous Liaisons*, NEWS & OBSERVER (N.C.), Apr. 7, 1996, at C1.

[177] *See* Sherrington & Lawrence, *supra* note 175, at 1A. Jack Haley, then a member of the NBA Chicago Bulls, commented that "[s]ex and the NBA still go hand in hand. We are primary candidates to contract the disease. You either take care of yourself, or play Russian roulette." *See* Cote, *supra* note 129, at 7.

as "permissive, fast and reckless."[178] Clearly, the lifestyles led by many professional athletes increases the likelihood that HIV may be introduced onto the playing field.[179]

2. The Statistically Higher HIV Risk of Minorities in Boxing

Many variables can be examined within these legal issues, but the issue of race is a nebulous, albeit pervasive, component. During the 1980s, AIDS was a predominantly gay, white, male disease.[180] However, from 1990 to 1991, the number of AIDS cases among whites at Los Angeles's largest community AIDS group rose only 17%, while cases among African-Americans and Hispanics rose by 28 and 38%, respectively.[181] These statistics reflect the national trend that demonstrates that minorities have a statistically higher probability of being HIV-positive.[182] In February 1996, the same month in which Tommy Morrison was tested for HIV, the Centers for Disease Control and Prevention published an analysis of data concerning HIV in the United States.[183] It stated:

> This analysis of provisional mortality data for 1993 and 1994 indicates a continuing increase in HIV infection as a leading cause of death in the United States, particularly among persons aged 25-44 years. Among persons in this age group, HIV infection became

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[178] *See* Cote, *supra* note 129, at 7.

[179] One report tells of a woman who offered sex to a professional football team's security chief just to tell her the hotel room number of the team's quarterback. *See id.* Several Canadian reports describe one woman who claims to have had sexual relations with 10% of the entire NHL roster. *See* Robert McG. Thomas, Jr., *Warning on AIDS Surprises N.H.L.*, N.Y. TIMES, Dec. 4, 1991, at B19.

[180] Studies show that men 18- to 22-years-old have the highest rate of HIV infection. *See* Lisa M. Krieger, *Disturbing Trend Among Young Men*, S.F. EXAMINER, Feb. 14, 1996, at A2. Studies in New York show a significant drop in new infections in pregnant women and young teenagers. *See id.* The HIV spread among older homosexual males has also slowed since its peak in the early 1980s. *See id.*

[181] While the number of AIDS cases continues to increase, the Centers For Disease Control and Prevention reports that the number of AIDS deaths has recently decreased for the first time. *See* Judy Foreman, *AIDS Deaths Decline for the First Time*, ROCKY MTN. NEWS, Feb. 28, 1997, at 3A (reporting that AIDS deaths fell 12% during first six months of 1996). These statistics may not indicate a drop in the disease, but may only show that more people with AIDS are living longer with the disease.

[182] *See* Malcolm Gladwell & Alison Muscatine, *Legend's Latest Challenge; Sports Hero's Message May Resonate*, WASH. POST, Nov. 8, 1991, at A1.

[183] *See* Centers for Disease Control and Prevention, U.S. Dep't of Health and Human Services, *Update: Mortality Attributable to HIV Infection Among Persons Aged 25-44 Years — United States, 1994*, 45 MORBIDITY AND MORTALITY WKLY. REP. 121, 121 (1996).

> the most common cause of death for black men in 1991, for all men (all racial/ethnic groups combined) in 1992, and for white men in 1994.[184]

The participation of a disproportional number of African-American and Latino men in the sport of boxing who are within the ages specified by the Centers for Disease Control and Prevention increases the odds of HIV-infected boxers in the ring.[185] However, this factor does not increase the risk of transmission nor transform boxers into a suspect classification for purposes of a constitutional analysis of mandatory HIV testing.[186]

3. The Volume of Homosexual Professional Athletes

Some might argue that the homosexual orientation of some professional athletes increases the potential for HIV transmission on the playing field. However, this logic is patently false. As of 1993, only approximately twelve professional athletes had openly professed their homosexuality.[187] But it is commonly accepted, even among professional athletes, that many homosexual athletes in professional sports conceal their orientation. Many homosexual sports figures maintain this "conspiracy of silence" out of fear that self-disclosure will damage their careers or their images as professional athletes.

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[184] *Id.* at 122. The racial imbalance for HIV and AIDS is consistent: "The disproportionate impact of the epidemic among racial/ethnic minorities is reflected by rates of reported AIDS cases that are six and three times higher for blacks and Hispanics, respectively, than for whites." *See* Centers for Disease Control and Prevention, U.S. Dep't of Health and Human Services, *First 500,000 AIDS Cases — United States, 1995*, 44 MORBIDITY AND MORTALITY WKLY. REP. 849, 852 (1995).

[185] A substantial proportion of professional boxers are African-American. *See* The Professional Boxing Corporation Act of 1995, H.R. 2212, 104th Cong. (1995); Joseph L. Amprey, Jr., *African-Americans, Latinos Share a Fighting Spirit*, READING TIMES (Pa.), Mar. 4, 1992, at B9; Jack Fiske, *King Won't Fade Away*, S.F. CHRON., Feb. 15, 1992, at D7; Dick Meister, *At Last, an Attempt to Civilize Boxing*, S.F. EXAMINER, July 10, 1995, at A13. Of the 10,000 new HIV infections each day, world-wide, 80% originate in developing countries in Africa and Southeast Asia. By the year 2000, of the estimated five million uninfected orphans under age 10 and additional 1.5 million under age five who will survive parents who die from the disease, more than 85% will live in these two regions. *See* Krieger, *supra* note 180, at A2. It has been said that the history of immigration patterns in the United States can be charted through the history of professional boxing. *See* Ron Borges, *Risk Is Their Business*, BOSTON GLOBE, Sept. 22, 1996, at C5.

[186] *See infra* notes 243-471 and accompanying text (summarizing constitutional limits that Supreme Court has placed upon drug testing).

[187] *See* Barry Meisel, *Conspiracy of Silence: Gays in Sports — Male Machismo a Huge Obstacle*, MORNING NEWS TRIB. (Wash.), Aug. 3, 1993, at C1.

While it is impossible to pinpoint a percentage, most experts estimate that the percentage of homosexual professional athletes is about 3 to 5%.[188] This percentage is no different from the percentage of homosexuals outside of the world of professional athletics.[189] Clearly, participation by homosexual athletes on the playing field provides a means of transmission equally prevalent to the heterosexual, non-professional athlete population for which HIV testing is not mandated. Therefore, whether a boxer is homosexual should not affect the scope or reach of mandatory testing initiatives.

B. The Statistically Insignificant Likelihood of Transmission During a Sporting Event

The notoriety of athletic superstars like basketball legend Magic Johnson, Olympic diving champion Greg Louganis, tennis great Arthur Ashe, and boxer Tommy Morrison has redefined the concern over HIV in professional sports.[190] But notoriety cannot justify

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[188] *See id.*

[189] *See id.*

[190] One study of AIDS coverage reveals that there has been a marked shift toward the "celebritization" of AIDS stories in the media. *See* Debra Gersh Hernandez, *Covering AIDS*, 129 EDITOR & PUBLISHER 19 (1996), *available in* 1996 WL 9086527. Over time, as AIDS stories became more "celebritized," the coverage of the stories gradually moved from the primary news pages to the style and sports sections, thereby making the coverage of AIDS less scientific. *See id.* Of the three major newspapers involved in the study — *New York Times*, *Washington Post*, and *USA Today* — the *New York Times* was the least likely to orient its coverage toward celebrities and was the most likely to feature medical or scientific representatives. *See id.* Despite the waning medical perspective of the topic, however, the study shows that the celebrity coverage has tended to increase the public's awareness of the disease. *See id.* During the weeks and months following Magic Johnson's announcement of his HIV status, 800-number calls and AIDS testing increased significantly. *See id.* In terms of the sheer volume of coverage of the topic of AIDS, in the five newspapers and three network news shows that were involved in the study, a typical news week normally incorporated 30 AIDS-related stories. During the week of Magic Johnson's announcement of his HIV status, there were 259 news stories focused on AIDS. This is the highest volume of AIDS stories ever covered in one week and is more than double the 98 stories that ran during the week of Arthur Ashe's announcement, which prompted the second highest volume of stories covered. *See id.*

Several years before Tommy Morrison announced that he was HIV-positive, middleweight Lamar Parks refused to participate in a mandatory AIDS test prior to a title fight in Las Vegas, Nevada. *See* Graham Houston, *Middleweight Parks Fails HIV Test Prior to Pulling Out of Fight*, VANCOUVER SUN, Oct. 14, 1994, at F5. Parks subsequently tested positive for HIV. *See id.* In 1995, former WBC Boxing champion, Paul Banke, was the first American boxer to publicly announce that he had AIDS. Banke discovered that he had AIDS after spending a brief period in jail for a traffic violation where he participated in an AIDS test

coerced intrusion into the privacy of an athlete's body. Only a definite medical opinion that would either compel or balance an intrusive mandatory test will justify an invasion of bodily privacy.[191] Is there a medical reason to believe that HIV may be transmitted through blood or bodily sweat during a boxing match? Some experts say the likelihood of transmission in boxing, or in any sport, is so remote — so infinitesimally small — that it cannot even be quantified.[192] For such a transmission to occur, two "simultaneously bleeding players [must] collide in such a way that the blood from the HIV-infected player enters the wound of the uninfected participant."[193] Transmission under such circumstances is unlikely. Most noteworthy is the evidence that "[n]o instance of HIV transmission has been documented in any sports contest."[194]

The most suspicious case of possible HIV transmission on the playing field involved two Italian soccer players. However, results were inconclusive and the mode of transmission was uncertain.[195]

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mandated for all Nevada prisoners. *See* Carlos Arias, *He's Fighting Against Fear,* ORANGE COUNTY REGISTRAR (Cal.), Mar. 27, 1996, at D1; Steve Springer, *This Ex-Champion Fights AIDS Without Spotlights,* L.A. TIMES, Mar. 2, 1996, at C5.

[191] *But see* Scott Burris, *Rationality Review and the Politics of Public Health,* 34 VILL. L. REV. 933, 935-37 (1989) (presenting doctrinalist approach to health care cases, which does not require medical or scientific data in support of rational basis).

[192] *See, e.g.,* American Academy of Pediatrics Policy Statement, *HIV and Sports: Human Immunodeficiency Virus [Acquired Immunodeficiency Syndrome (AIDS) Virus] in the Athletic Setting,* 20 PHYSICIAN & SPORTSMED. 189, 189 (1992) (concluding that risk of infection from skin exposure is minute); Leonard H. Calabrese et al., *HIV and Sports: What Is the Risk?,* 21 PHYSICIAN & SPORTSMED. 173, 173 (1993) (stating that risk of contracting HIV from sports participation is "infinitesimally small"); Mast et al., *supra* note 21, at 283 (finding that potential risk for transmission during sports and athletic competition is extremely low); *see also* Kevin B. Blackstone, *Detecting HIV Rare for Ring,* DALLAS MORNING NEWS, Feb. 14, 1996, at 1B (quoting NCAA sports medicine handbook, which states that precise risk of transmission is impossible to calculate); Bob Mutter, *HIV Risk in Boxing Called Low,* CHI. SUN-TIMES, Feb. 12, 1996, at 74 (noting that virus in person healthy enough to box is not advanced enough to be threat during type of contact occurring during boxing match); John Romano, *Risk of Aids in Athletics Remains a Question; Boxing the Only Sport Where Experts Differ on the Infinitesimally Low Chance of Transmission,* ROCKY MTN. NEWS, Apr. 14, 1996, at 33C (commenting that chances of transmission of HIV infection during athletic competitions are too remote to even quantify). *But see* Michael Wilbon, *Ring Is High-Risk Arena for HIV Transmission; Mandatory Testing Would Protect Boxers, Trainers, Refs,* ST. LOUIS POST-DISPATCH, Feb. 17, 1996, at 1C (arguing that, because of free flow of blood during boxing match, risk is sufficient to warrant mandated testing).

[193] *See* Drotman, *supra* note 22, at 193.

[194] *See id.*

[195] *See* Marsha F. Goldsmith, *When Sports and HIV Share the Bill, Smart Money Goes on Common Sense,* 267 JAMA 1311, 1311-12 (1992); Torre et al., *supra* note 21, at 1105.

Nevertheless, the thought that transmission of a disease during a sporting event is even possible has led many athletic commissions and associations to implement policies on the subject.

1. Other Sports

In the wake of Magic Johnson's[196] and Arthur Ashe's disclosures, HIV transmission and collateral issues such as mandatory testing, exclusion from participation, and disclosure of HIV status became critical topics of debate. Consequently, in 1992, the NFL implemented a comprehensive HIV/AIDS policy that addressed four major areas of concern for competitive sports.[197] These areas included: (1) education;[198] (2) health care procedures;[199] (3) counseling

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[196] *See* Daniel M. Webber, *When the "Magic" Rubs Off: The Legal Implications of AIDS in Professional Sports*, 2 SPORTS LAW. J. 1, 1-2 (1995). Magic Johnson subsequently returned to professional sports in 1991 by playing in the NBA All-Star Game where he won the Most Valuable Player Award and in the 1992 Barcelona Olympics where he won a gold medal. *See id.* at 5.

[197] *See* Lawrence S. Brown et al., *HIV/AIDS Policies and Sports: The National Football League*, 26 MED. & SCI. IN SPORTS & EXERCISE 403, 405 (1994).

[198] The NFL's educational campaign was focused on disseminating information regarding off-the-field activities that increased the risk of HIV transmission, such as unsafe sex and drug use. *See id.* at 404. Although such an observation may be due, in great part, to increased publicity and media focus, it is intimated, if not accepted, that many (but certainly not all) popular sports figures — particularly professional "superstars" — engage in highly active, if not promiscuous, sex lives. *See, e.g.*, WILT CHAMBERLAIN, A VIEW FROM ABOVE 258 (1992) (claiming to have had sexual relations with close to 20,000 women); EARVIN "MAGIC" JOHNSON, MY LIFE 224-46 (1995) (explaining how he contracted AIDS); Tim Kawakami, *Fighting to the Finish*, L.A. TIMES, Sept. 26, 1995, at 1 (discussing former WBC champion boxer, Paul Banke, who has AIDS, and admits contracting disease through frequent drug use and careless sexual activity); John Strege et al., *Running Scared*, CALGARY HERALD, Dec. 1, 1991, at B1 (interviewing athletes and groupies in Los Angeles area after Magic Johnson's announcement); E.M. Swift, *Dangerous Games: In the Age of AIDS, Many Pro Athletes Are Sexually Promiscuous, Despite the Increasing Peril*, SPORTS ILLUSTRATED, Nov. 18, 1991, at 40 (describing promiscuity among married and unmarried professional athletes in wake of Magic Johnson's announcement that he is HIV-positive);. While this aspect of HIV education is no more pertinent to the members of the NFL than it is to every member of society, it was the purpose of the NFL policy to educate its participants to modify their personal behaviors to avoid acquiring or spreading blood-borne diseases. *See* Brown, *supra* note 197, at 404.

[199] With regard to health care procedures, the NFL has developed a model blood-borne pathogen exposure control plan, which was designed to "decrease the frequency of exposures to blood-borne pathogens by health care workers and those they treat." *See* Brown, *supra* note 197, at 404. The model plan is applicable to all personnel who fall within the scope of OSHA standards, including physicians, trainers, equipment managers, and laundry personnel. *See id.* For a discussion of the ingredient procedures in this model plan, which is

and testing;[200] and (4) exclusionary measures.[201] However, "[w]ithin the NFL, there wasn't the pressure [to take precautions because] . . . we haven't had a Magic Johnson yet — that we know of."[202]

Some sports associations require a player's removal from competition when a bleeding injury occurs. The National College Athletes Association ("NCAA") policy was adopted in 1988 (prior to Johnson's disclosure) and provides that bleeding players should be removed as soon as practical and not return to the event until bleeding is stopped or under control.[203] Similarly, the 1992 NHL policy provides that bleeding athletes should be removed from the event as soon as possible until they stop bleeding.[204] However, in the NBA, players with blood on their uniforms may not continue to participate until they change their jerseys or shorts.[205] In 1988, FIFA, the governing body for soccer, mandated that all players must wear shin guards to protect themselves from cuts.[206] If the fear of HIV transmission in professional sports is sufficient to mandate testing in professional boxing and the implementation of preventive measures in other sports, yet the actual risk of transmission is no more significant in boxing than in any other sport, why are such measures not consistent for every sport?

There may be a different medical reason for the variance in the bleeding policies of different sports. Studies involving professional football reveal that 90% of all bleeding-related football injuries are

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based on OSHA's Occupational Exposure to Blood-borne Pathogens, see Centers for Disease Control and Prevention, U.S. Dep't of Health and Human Services, *Acquired Immunodeficiency Syndrome (AIDS): Precautions for Health-Care Workers and Allied Professionals*, 32 MORBIDITY AND MORTALITY WKLY. REP. 450, 450-51 (1983); Centers for Disease Control and Prevention, U.S. Dep't of Health and Human Services, *Update: Universal Precautions for Prevention of Transmission of Human Immunodeficiency Virus, Hepatitis B Virus, and Other Blood-Borne Pathogens in Health-Care Settings*, 37 MORBIDITY AND MORTALITY WKLY. REP. 377, 377-88 (1988) [hereinafter *Update: Universal Precautions*].

[200] *See* Brown, *supra* note 197, at 405-06.

[201] *See id.* at 406.

[202] Almond, *supra* note 131, at 4 (quoting Elliott Pellman, team physician for New York Jets).

[203] *See id.*

[204] *See id.*; *see also* Bob Luder, *Morrison Situation Has Blades' Interest; HIV Is a Big Concern in a Sport that Has No Blood Policy*, KAN. CITY STAR, Feb. 15, 1996, at D1 (noting NHL policy that if player is cut, game is not necessarily stopped at time of injury).

[205] *See* Wilbon, *supra* note 50, at F1.

[206] *See* Almond, *supra* note 131, at 4.

abrasions, rather than lacerations.[207] The risk of transmission through abrasive exposure is approximately 0.05%, which does not represent a measurable risk of infection.[208] Nonetheless, compared to boxing's minimal garb of shorts and, usually, calf-high boots, professional football players are well-padded, with less than 10% of their skin exposed to an opponent's blood.[209] In contrast, the majority of a boxer's skin is exposed during a fight. Some commentators have recommended more clothing in boxing.[210] This recommendation would allow the sport to accommodate the risk of transmission without stopping the match. However, additional clothing probably does not explain the reason why sports associations like the NFL have taken so few precautions concerning open wounds on the playing field.[211] The reason is the rare, almost unquantifiable, opportunity for HIV transmission.

2. Risks of Other Diseases

In comparing HIV to several other modern-day diseases, a higher risk of transmission does not always result in testing or any extra precautions. One study published in a medical journal revealed cases of herpes simplex virus in rugby players.[212] The infection was transmitted quickly to three other members of the same team during "locking" scrimmages — a type of player position in which the players interlock their arms and undergo considerable abrasion and skin contact.[213] Despite the clear spread of the infection to other players, and despite specific education and recommendations that players be removed from competition upon the development of skin lesions, the team restricted its prophylactic measures to a

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[207] *See id.*; *see also* Crasnick, *supra* note 54, at B12 (regarding 1992 study of bleeding injuries in NFL).

[208] *See* Brown, *supra* note 197, at 405.

[209] *See id.*

[210] *See* Drotman, *supra* note 22, at 193 (noting that Olympic boxers wear shirts and headgear and use larger gloves).

[211] *See* Almond, *supra* note 131, at 4 (noting that NFL has few guidelines regarding wounded players). Major League Baseball also has failed to adopt any type of policy on open wounds. *See id.*; *see also* 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, 292 (1995) (explaining that NFL does not require HIV testing).

[212] *See* William B. White & Jane M. Grant-Kels, *Transmission of Herpes Simplex Virus Type 1 Infection in Rugby Players*, 252 JAMA 533, 534-35 (1984).

[213] *See id.* at 533-35.

"gentlemen's agreement" to prevent participation if a player has "skin trouble."[214] As another example, hepatitis B virus infection is far more common in society and far more transmittible during competitive sports activities than HIV infection.[215] A pre-1994 survey conducted in the NFL revealed three cases of transmission of hepatitis B infection among League players — each case due to off-the-field activity.[216] Because the transmission of HIV is less likely than the transmission of hepatitis B, it is unreasonable to mandate testing for one but not the other. For many other sports associations, therefore, blood is the concern, but the likelihood of transmission governs the rules.

Some argue that the threshold risk for mandatory testing or disqualification should be equal for all conditions — "comparative risk."[217] Others assert that such an argument is unsound because the risk of HIV transmission, unlike the risk of physical injury, is not a risk inherent to professional sports.[218] To further rebut the "comparative risk" argument, vaccines exist for diseases such as hepatitis and syphilis and, unlike HIV, hepatitis is rarely fatal. While few who suffer from hepatitis are subject to discrimination, HIV is unfortunately linked with reported discrimination and, in some cases, suicide.[219] These differences suggest that the very serious nature of HIV precludes any comparison to other diseases. Nevertheless, these comparisons of other sports and other diseases demonstrate that the low risk of transmitting HIV in the boxing ring has been unjustly singled out for unequal treatment. This proposition becomes clear when compared to health care workers, another group constantly exposed to blood and for whom there is data to estimate the differing risks and incidences of HIV transmission.[220]

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[214] *See id.* at 535.

[215] *See id.*

[216] *See id.*

[217] *See* Webber, *supra* note 196, at 11-12.

[218] *See id.*

[219] *See* Anonymous Fireman v. City of Willoughby, 779 F. Supp. 402, 413 (N.D. Ohio 1991); Raymond C. O'Brien, *Discrimination: The Difference with AIDS*, 6 J. CONTEMP. HEALTH L. & POL'Y 93, 107-08 (1990) (showing discrimination against homosexuals because of AIDS); *see also* Andrew L. Dannenberg et al., *Suicide and HIV Infection*, 276 JAMA 1743 (1996) (citing studies indicating that suicide risk is greatest after symptomatic HIV disease is present — AIDS has developed).

[220] *See, e.g.*, Barry R. Furrow, *AIDS and the Health Care Provider: The Argument for Voluntary HIV Testing*, 34 VILL. L. REV. 823, 837-42 (1989) (arguing that consensual HIV screening in

C. A Comparison of Transmission Arenas

1. Health Care Workers

In *Glover v. Eastern Nebraska Community Office of Retardation*,[221] the court examined a state policy requiring certain employees of the Eastern Nebraska Community Office of Retardation to submit to mandatory testing for tuberculosis, hepatitis B, and HIV. If the employees did not comply, they were disciplined for their refusal.[222] The court held, in affirming a lower court ruling, that the testing policy was unconstitutional when the risk of transmission was minimal.[223]

> [T]he evidence, considered in its entirety, leads to the conclusion that the policy was prompted by concerns about the AIDS virus, formulated with little or erroneous medical knowledge, and is a constitutionally impermissible reaction to a devastating disease with no known cure. The risk of transmission of the disease from the staff to the clients . . . is minuscule, trivial, extremely low, extraordinarily low, theoretical, and approaches zero. Such a risk does not justify the implementation of such a sweeping policy which ignores and violates the staff members' constitutional rights.[224]

One year later, in *Leckelt v. Board of Commissioners of Hospital District No. 1*,[225] a male nurse's roommate was hospitalized with AIDS. The hospital feared that the nurse, who was believed to be homosexual, was also infected. At issue in the case was the disclosure of results from a voluntary blood test and not the testing policy itself. However, the court found that the disclosure did not violate the plaintiff's right to privacy because the risk of transmission was higher in the "safety-sensitive" hospital setting than it was in *Glover*.[226]

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health care field is valid but only for protection of patients rather than staff).

[221] 867 F.2d 461 (8th Cir. 1989).

[222] *See* Glover v. Eastern Neb. Community Office of Retardation, 686 F. Supp. 243, 245 (D. Neb. 1988).

[223] *See* Glover v. Eastern Neb. Community Office of Retardation, 867 F.2d 461, 464 (8th Cir. 1989) (finding that district court's ruling was not clearly erroneous).

[224] Poorman v. Bowen, 686 F. Supp. 251, 251 (D. S.D. 1988).

[225] 714 F. Supp. 1377 (E.D. La. 1989).

[226] *See id.* at 1392; *see also* Plowman v. United States Dep't of the Army, 698 F. Supp. 627, 635 (E.D. Va. 1988) (dismissing plaintiff's claim against Army for disclosure of his HIV status, holding that Army's interests in knowing surgical patient's status outweighed plaintiff's due process and privacy rights).

In estimating the probability of HIV transmission within the occupation of health care workers,[227] the Centers for Disease Control and Prevention reported that: "[while] the estimated risk for HIV infection after a percutaneous exposure [a needlestick or a cut with a sharp object like a scalpel or lancet] to HIV-infected blood is approximately 0.3%, factors that influence this risk have not been determined."[228] These factors potentially include "a deep injury, device visibly contaminated with the source patient's blood, procedures involving a needle placed directly in a vein or artery, and terminal illness in the source patient."[229] If the HIV-infected source is not in a stage of terminal illness, it is less likely to transmit the virus without "the higher titer of HIV in blood late in the course of AIDS . . . ."[230]

The experience of American health care workers illustrates that the transmission of HIV from an HIV-infected person to a noninfected worker is rare. When it does occur, circumstances are present that simply do not exist in boxing matches: a deep injury in the noninfected person; a late stage of HIV progression, most likely AIDS, in the HIV-infected person; or a needle injected directly into the vein. Even a boxing glove covered with an HIV-positive boxer's blood is unlikely to be a contaminated device which will transmit HIV to the uninfected boxer.

It is difficult to rationalize mandatory testing of boxers when the risk of transmission is only speculative. Indeed, Dr. Peter Drotman of the Centers for Disease Control and Prevention writes: "From a medical and public health standpoint this policy [mandatory HIV testing of boxers] is absurd. If the health of the boxers is paramount, professional boxing should do what other major sports do: stop bouts when a fighter is bleeding and tend to the wound."[231]

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[227] "The incidence of AIDS among health care workers is almost twice that among the general population for unknown reasons." Anonymous Fireman v. City of Willoughby, 779 F. Supp. 402, 412 (N.D. Ohio 1991).

[228] *See* Centers for Disease Control and Prevention, U.S. Dep't of Health and Human Services, *Case-Control Study of HIV Seroconversion in Health-Care Workers After Percutaneous Exposure to HIV-Infected Blood — France, United Kingdom, and United States, January 1988-August 1994*, 44 MORBIDITY AND MORTALITY WKLY. REP. 929, 929 (1995) [hereinafter *Case-Control Study*]. The Centers for Disease Control and Prevention puts the likelihood of transmission during sports at the same percentage as health care workers — approximately 0.35%. *See* Cote, *supra* note 129, at 7.

[229] *See Case-Control Study*, *supra* note 228, at 931.

[230] *See id.* at 932.

[231] *See* Drotman, *supra* note 22, at 193. The Air Force Academy has ended all mandatory

One doctor commented on the proposal that HIV-positive boxers could participate if a fight were stopped the instant one of the boxers was cut:

> If one were cut, the referee would stop it. But think of the potential harm that could occur. Even if they stopped it at the moment blood started flowing, the blood from the fighter with the HIV virus isn't going to just stop. There's going to be blood on the gloves and towels and the trainer. There are a lot of other people who could inadvertently be at risk.[232]

Undeniably, the participation of high-risk HIV candidates in a high-contact sport, such as boxing, necessarily implies the presence of the disease. However, the mode of transmission is simply not present in the boxing ring as compared to the health care arena.[233] Further, there has been no evidence published indicating that whatever risk does exist is significant enough to warrant government-imposed mandatory HIV testing.

2. Pregnant Women

Current medical debate indicates that, someday, pregnant women may also be subject to mandatory testing.[234] There is continuing discussion over the privacy interests of pregnant women and mandatory testing for HIV to initiate a treatment with zidovudine ("AZT").[235] The unborn fetus is at a very high risk of contracting

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boxing activity not because of HIV concern but because an estimated 60 to 87% of boxers who fight suffer chronic brain injury. *See* Swartzberg, *supra* note 80, at 784.

[232] Fernandez, *supra* note 113, at D5 (quoting Dr. Kathleen Sazama, division director of laboratory medicine for Allegheny University Hospitals).

[233] *See Update: Universal Precautions*, *supra* note 199, at 380 (identifying dangers of HIV transmission through needles, scalpels, and other health-care instruments, and suggesting precautionary measures).

[234] *See* R.J. Simonds & Martha Rogers, *Preventing Perinatal HIV Infection: How Far Have We Come?*, 275 JAMA 1514, 1514 (1996) (noting increasing efforts to identify and treat HIV-infected pregnant women).

[235] *See, e.g.*, Susan A. Fiscus et al., *Perinatal HIV Infection and the Effect of Zidovudine Therapy on Transmission in Rural and Urban Counties*, 275 JAMA 1483, 1483 (1996) (describing efforts to identify and treat HIV-infected pregnant women); Josephine A. Mauskopf et al., *Economic Impact of Treatment of HIV-Positive Pregnant Women and Their Newborns with Zidovudine*, 276 JAMA 132, 132 (1996) (discussing economic assessment of voluntary screening and early detection of HIV in pregnant women); Howard Minkoff, *Pediatric HIV Disease, Zidovudine in Pregnancy, and Unblinding Heelstick Surveys*, 274 JAMA 1165, 1165 (1995) (finding that prenatal therapy reduced transmission from 25.5 to 8.3% in New York study); Raymond C. O'Brien, *The Legal Dilemma of Partner Notification During the HIV Epidemic*, 4 J. CLIN. ETHICS 245, 249 (1993) (suggesting that disclosure of HIV-infected person should be man-

HIV if the mother is HIV-positive.[236] However, AZT has been determined to substantially reduce the transmission of HIV to the fetus.[237] Based upon the countervailing interests of the unborn child and the certain evidence that AZT has a positive impact on the future health of the child, many professionals have concluded that: "Compulsory testing for HIV infection would be minimally invasive and virtually free of risk."[238] Others disagree and oppose mandatory testing:

> Crucial matters of a pregnant woman's privacy, the right of self-determination, and the interests of the future child are involved. A long and unhappy record of mandatory treatment of pregnant

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dated by local initiative); Simonds & Rogers, *supra* note 234, at 1515 (reporting that 75% of HIV-infected pregnant women in New York City hospital accepted voluntary AZT treatment); Andrew A. Wiznia et al., *Zidovudine Used to Reduce Perinatal HIV Type 1 Transmission in an Urban Medical Center*, 275 JAMA 1504, 1504 (1996) (noting that cultural factors may limit success of voluntary treatment); *Misguided/Requiring HIV Tests of Pregnant Women Would Hurt the Infants It's Meant to Help*, NEWSDAY (N.Y.), July 3, 1996, at A48 [hereinafter *Misguided*] (stating that prenatal treatment has been found to reduce mother-infant transmission).

[236] *See* Wiznia et al., *supra* note 235, at 1504 (noting that rate of maternal-infant HIV transmission in absence of therapy is between 15 and 40%).

[237] *See* Centers for Disease Control and Prevention, *AIDS Among Children — United States, 1996*, 276 JAMA 1791, 1791 (1996) (citing clinical trials noting effectiveness of AZT treatment in reducing risk of mother-infant transmission); *see also* Edward M. Conner et al., *Reduction of Maternal-Infant Transmission of Human Immunodeficiency Virus Type 1 with Zidovudine Treatment*, 331 NEW ENG. J. MED. 1173, 1173 (1994) (finding AZT to be effective in preventing mother-infant transmission of HIV); Fiscus et al., *supra* note 235, at 1483 (citing AZT as potential treatment in prevention of mother-infant transmission of HIV); Michael E. St. Louis et al., *Risk for Perinatal HIV-1 Transmission According to Maternal Immunologic, Virologic, and Placental Factors*, 269 JAMA 2853, 2853-59 (1993) (discussing factors influencing HIV transmission from mother to child); Wiznia et al., *supra* note 235, at 1504 (commenting on study that found transmission rate decreased from 25.5 to 8.3% with AZT therapy). Some clinical trials show that AZT treatment reduces by 70% the likelihood that a pregnant HIV-positive woman will transmit the virus to her unborn child. *See* Christina Kent, *AMA Reaffirms Mandatory HIV Testing in Pregnancy*, 39 AM. MED. NEWS 8, 8 (1996); *see also* Deborah L. Shelton, *Is It Time . . . . (For Mandatory HIV Testing of Pregnant Women)*, 39 AM. MED. NEWS 23, 23 (1996) (discussing study finding that AZT treatment reduced maternal-fetal transmission by about two-thirds). Some estimates are higher than 75%. *See* Christopher A. Hoffman & Ronald Munson, *Ethical Issues in the Use of Zidovudine to Reduce Vertical Transmission of HIV*, 332 NEW ENG. J. MED. 891, 891 (1995) (noting strong evidence that AZT treatment reduces mother-infant transmission of HIV); Paul M. Rowe, *Zidovudine Advised for All HIV-1 Positive Pregnancies*, 348 LANCET 1503, 1503 (1996) (finding significant reduction in mother-infant transmission by means of AZT treatment); Deborah L. Shelton, *Delegates Push Mandatory HIV Testing for Pregnant Women*, 39 AM. MED. NEWS 1, 1 (1996) (addressing change in policy for AMA regarding issue of voluntary versus mandatory testing).

[238] *See* Hoffman & Munson, *supra* note 237, at 891.

> women — in most cases imposed on those least able to resist the coercive power of the state and of the physicians — serves as a backdrop to this dispute.[239]

Only recently has the American Medical Association opted for mandatory testing of pregnant women.[240] Nevertheless, Congress recently passed legislation stating that HIV counseling and voluntary testing should be the standard of care for all pregnant women in the United States.[241] As one commentator noted: "Medicines — willing-

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[239] *Id.* at 892; *see also* Jeremy Manier, *AMA Supports HIV Tests for All Pregnant Women; Critics Fear Some Will Avoid Prenatal Care*, CHI. TRIB., June 28, 1996, at 4 (discussing opponents' argument that legal requirement for testing might discourage HIV-infected women from obtaining proper prenatal care). The proportion of black and Hispanic women who reported having been tested was substantially greater than that for white women. A greater percentage of women living below poverty level reported having been tested compared with those at or above the poverty level. *See* Centers for Disease Control and Prevention, U.S. Dep't of Health and Human Services, *HIV Testing Among Women Aged 18-44 Years — United States 1991 and 1993*, 45 MORBIDITY AND MORTALITY WKLY. REP. 733, 734 (1996). The rate of AIDS infection now increases faster in females than in males — in 1985, women accounted for only 7% of AIDS cases; in 1995, they accounted for 19%. *See* Shelton, *supra* note 237, at 23. Of the 8093 cases of heterosexually-acquired AIDS in 1995, 65% were among women. *See* Leslie Laurence, *More Physicians Should Talk with Patients About AIDS*, HOUS. CHRON., July 24, 1996, at 2. AIDS is now the third leading cause of death among women ages 25 to 44. *See* Shelton, *supra* note 237, at 23.

[240] *See AMA Backs Mandatory HIV Testing of Pregnant Women and Newborns*, WASH. POST., June 28, 1996, at A2 (offering statistics showing that 1600 newborns are infected with HIV by their mothers each year); *AMA Endorses Required HIV Test for Pregnant Women, Newborns; Policy Comes on Close Vote, Reverses Previous Stance*, BALT. SUN, June 28, 1996, at 3A (discussing rationale of AMA House of Delegates in adopting new position); Kent, *supra* note 237, at 8; Deborah L. Shelton, *AMA Offers New HIV Prevention Guide for Physicians*, 39 AM. MED. NEWS 53, 53 (1996) (discussing AMA Physician Guide to HIV Prevention, which was distributed at 11th International Convention on AIDS, and its surrounding controversy); Shelton, *supra* note 237, at 1 (addressing change in AMA policy regarding issue of voluntary versus mandatory testing).

[241] 42 U.S.C. § 300ff-33, approved on May 20, 1996, requires each state to effectuate guidelines issued by the Centers for Disease Control and Prevention concerning recommendations for human immunodeficiency virus counseling and voluntary testing for pregnant women. *See* 42 U.S.C. § 300ff-33 (1997). In proposing this legislation, Congress found that:

> (2) The Centers for Disease Control and Prevention have recommended that all pregnant women receive HIV counseling; voluntary, confidential HIV testing; and appropriate medical treatment (including anti-retroviral therapy) and support services.
> (3) The provision of such testing without access to such counseling, treatment, and services will not improve the health of the woman or the child.
> (4) The provision of such counseling, testing, treatment, and services can reduce the number of pediatric cases of acquired immune deficiency syndrome, can improve access to and provision of medical care for the wom-

ly and carefully taken — may stop this epidemic. Mandates won't."[242]

Should professional boxing be placed in the same analytical framework as health care workers or pregnant women? Whether the dynamics of boxing are compelling enough to justify mandatory testing implicates the Fourth Amendment, the Equal Protection Clause and the Due Process Clause.

IV. CONSTITUTIONAL ISSUES: BALANCING THE INTERESTS

A. Personal Liberty and the Fourth Amendment

It is well established that compulsory blood tests are searches subject to the Fourth Amendment.[243] These tests require physical penetration to remove bodily fluid and subsequent chemical testing to reveal private medical information.[244] A reasonable expectation

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an, and can provide opportunities for counseling to reduce transmission among adults, and from mother to child.

(5) The provision of such counseling, testing, treatment, and services can reduce the overall cost of pediatric cases of acquired immune deficiency syndrome.

(6) The cancellation or limitation of health insurance or other health coverage on the basis of HIV status should be impermissible under applicable law. Such cancellation or limitation could result in disincentives for appropriate counseling, testing, treatment, and services.

(7) For the reasons specified in paragraphs (1) through (6) —

(A) routine HIV counseling and voluntary testing of pregnant women should become the standard of care; and

(B) the relevant medical organizations as well as public health officials should issue guidelines making such counseling and testing the standard of care.

Id.

[242] *See Misguided*, *supra* note 235, at A48.

[243] The Fourth Amendment provides that the federal government shall not violate "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." U.S. CONST. amend. IV. The Fourteenth Amendment extends this Fourth Amendment guarantee to searches and seizures by state officers. *See* Elkins v. United States, 364 U.S. 206, 213 (1960).

"Individuals have a reasonable expectation of privacy in the personal information their body fluids contain. Compulsory administration of a blood test 'plainly involves the broadly conceived reach of a search and seizure under the Fourth Amendment.'" Glover v. Eastern Neb. Community Office of Retardation, 686 F. Supp. 243, 250 (D. Neb. 1988) (quoting Schmerber v. California, 384 U.S. 757, 767 (1966)).

[244] *See* Love v. Superior Court, 276 Cal. Rptr. 660, 662 (Ct. App. 1990) (quoting Johnetta J. v. Municipal Court, 267 Cal. Rptr. 666, 675 (Ct. App. 1990)). For a discussion of the confidentiality issues associated with HIV, see generally Richard C. Turkington, *Confi-*

of privacy in a person's bodily fluids and the information they contain is not an idle right; it is an elusive one. This right can be traced to the jurisprudential considerations of Justice Brandeis in *Olmstead v. United States*,[245] in which he wrote that the Founding Fathers "conferred, as against the Government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized men."[246] Recent Supreme Court decisions such as *Planned Parenthood v. Casey*[247] also find "a promise of the Constitution that there is a realm of personal liberty which the government may not enter."[248] The government or an employer should only invade this right of privacy when there is sufficient justification.[249] A California court held that:

> The adoption of measures for the protection of the public health is universally conceded to be a valid exercise of the police power of the state, as to which the legislature is necessarily vested with large discretion not only in determining what are contagious and infectious diseases, but also in adopting means for preventing the spread thereof.[250]

A determination by the legislature regarding mandatory HIV testing of professional athletes must be reasonable and must not infringe upon rights otherwise protected by the Constitution.[251]

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dentiality Policy for HIV-Related Information: An Analytical Framework for Sorting Out Hard and Easy Cases, 34 VILL. L. REV. 871 (1989) (suggesting that confidentiality of HIV-related information protects against invasions of privacy and encourages voluntary testing).

[245] 277 U.S. 438 (1928).

[246] *See id.* at 478 (Brandeis, J., dissenting).

[247] 505 U.S. 833 (1992).

[248] *See id.* at 847. This privacy interest caused one New York court to write, concerning judicially coerced nonvoluntary HIV testing, "The question is, therefore, what standard must be met, or what showing made before an involuntary AIDS test can be compelled." *See* Doe v. Roe, 526 N.Y.S.2d 718, 720 (Sup. Ct. 1988). To answer this question, the court stated that it would consider the current level of knowledge regarding AIDS and AIDS testing, the special problems raised by mandatory testing, relevant case law, and public policy. *See id.*

[249] It could be argued that personal autonomy issues invoke strict scrutiny consideration because of governmental intrusion upon fundamental rights. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 162-63 (1973) (discussing point at which government interest becomes compelling enough to override rights of pregnant women). Failing this, issues of privacy would at least command a balancing test analysis, weighing the state interest against the personal infringement incurred. *See* Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 464-65 (1977). For the argument that the propriety of the invasive procedure may not necessarily be grounded solely on a medical basis, see Burris, *supra* note 191, at 936.

[250] *See* Love v. Superior Court, 276 Cal. Rptr. 660, 662 (Ct. App. 1990).

[251] *See infra* notes 253-472 and accompanying text (summarizing constitutional limits Su-

Historically, mandatory testing in sports has been limited to situations where it was necessary to protect the health and safety of the athletes.[252] Arguably, the presence and transmission of HIV among professional athletes increases the government's interest in regulating the health and safety of both participants and the public. However, the government's interest must be balanced against the important and justifiable right to privacy that professional athletes possess in their bodily fluids — in this instance, their blood.

1. The *Skinner* Trilogy

Long before the transmission of HIV became a concern for professional and amateur athletes, the regulatory commissions of many sports, especially boxing, were grappling with the issue of mandatory drug testing.[253] In the past ten years, the development of standardized definitions and the implementation and enforcement of drug testing policies has created growing uncertainty in the sports industry.[254] Because the methods of screening for drugs and the HIV virus are similar, whatever standards are finally imposed in the HIV

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preme Court has placed on drug testing).

[252] *See, e.g.*, Schaill v. Tippecanoe County Sch. Corp., 864 F.2d 1309, 1320 (7th Cir. 1988) (holding that random urinalysis program for high school athletes must pass Fourth Amendment reasonableness standard); Brooks v. East Chambers Consol. Indep. Sch. Dist., 730 F. Supp. 759, 761 (S.D. Tex. 1989) (enjoining drug testing program where no athletes were previously harmed), *aff'd*, 930 F.2d 915 (5th Cir. 1991); Horsemen's Benevolent and Protective Ass'n, Inc. v. State Racing Comm'n, 532 N.E.2d 644, 651 (Mass. 1989) (holding regulation providing for drug testing upon reasonable suspicion constitutionally valid only if prior incidents created probable cause).

[253] *See* Royce Feour, *Commission Hits Hard on Drug Use*, LAS VEGAS REV. J., Jan. 29, 1993, at 2E (discussing Nevada Athletic Commission's new attitude toward cracking down on drug use); *see also Camacho Suspended 90 Days After Drug Test; 40 Boxers Cited by N.J. Commission*, WASH. POST, Sept. 1, 1985, *available in* 1985 WL 2098060 [hereinafter *Camacho Suspended*] (discussing New Jersey's suspension of boxers for drug use); Earl Gustkey, *Denkins Case Shows Depth of Neglect Here*, L.A. TIMES, Jan. 28, 1991, at 4 (describing administration of boxing in California as "near laughingstock," in part because of its tardiness in conducting random drug tests of boxers); Earl Gustkey, *State Boxing Fails in Drug Prevention*, L.A. TIMES, Apr. 7, 1990, at 1 (addressing California's failure to effectuate drug testing policy for boxers); John Rodino, *Drug Tests for State Boxers Too Costly, Officials Say*, OMAHA WORLD-HERALD, May 11, 1988, *available in* 1988 WL 5277603 (discussing Nebraska's lack of drug testing for amateur and professional boxers); Ken Stephens, *Building a Case Against Steroid Use; W. German Biochemist's Continuing Research Keeps Athletes on Run*, DALLAS MORNING NEWS, Nov. 28, 1989, at 14B (discussing problems involving International Amateur Athletic Federation in addressing drug problems in sports).

[254] *See infra* notes 256-80 (discussing standardized drug testing).

context will be subject to the nebulous constitutional limits that the United States Supreme Court has placed on drug testing in other industries.[255] The following is a summary of those limits.

a. Skinner v. Railway Labor Executives' Ass'n

The 1989 case of *Skinner v. Railway Labor Executives' Ass'n*,[256] involved the Federal Railroad Administration's ("Administration") policy of standardized drug testing.[257] The Federal Railroad Safety Act of 1970 ("Act") authorized the Secretary of Transportation to promulgate regulations prohibiting drug use among railroad workers. Under the Act, the Administration required mandatory blood and urine tests for employees involved in train accidents.[258] The Association of American Railroads ("Association") implemented industry-wide sanctions for possessing or using certain drugs, but many violations of the policy went undetected. By 1983, the Administration's policy efforts to curb employee drug and alcohol use were failing miserably.[259] Consequently, in 1984, the federal government adopted regulations that included both mandatory and permissive drug testing.[260]

The Association filed to enjoin the regulations,[261] and the district court denied the Association's petition.[262] The court found that, although the employees had a valid interest in the integrity of their bodies, that interest was outweighed by the competing "public and governmental interest in the . . . promotion of . . . railway safety, safety for employees, and safety for the general public that is involved with the transportation."[263] The Court of Appeals for the Ninth Circuit reversed, holding that the mandate for testing re-

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[255] *See, e.g.*, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 664-66 (1995) (holding that school district's policy of drug testing student athletes was constitutional); National Treasury Employees Union v. Von Raab, 489 U.S. 656, 679 (1989) (permitting testing of United States Custom Service employees); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 634 (1989) (holding that testing of railway employees for drugs and alcohol is lawful).

[256] 489 U.S. 602 (1989).

[257] *See id.* at 606.

[258] *See id.*

[259] *See id.* at 607-08.

[260] *See id.* at 608-11.

[261] *See id.* at 602.

[262] *See id.*

[263] *See id.*

quired intrusive searches that violated the Fourth Amendment.[264] On appeal, the Supreme Court reversed.[265] The Court held that the governmental interest in the safety of the railway industry and its passengers and employees was sufficiently compelling to justify, without individualized suspicion, an intrusion of privacy through drug testing.[266]

Using *Skinner*, drug and alcohol testing in the railroad industry can easily be analogized to mandatory HIV testing in the boxing industry. First, courts have recognized that the nature of both industries warrants more regulatory oversight than other industries. The *Skinner* Court stated that "the expectations of privacy of . . . [railroad workers] are diminished by . . . their participation in an industry that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of . . . [the] employees"[267] and that the railroad "presents 'special needs' beyond normal law enforcement that may justify departures from the usual . . . requirements."[268] Likewise, the court in *Harvey v. Morgan*[269] recognized that "professional boxing is an activity which is subject to rigid regulation under police powers reserved to the State by the Federal Constitution . . . [more so] than . . . ordinary trades and constitutions."[270] Thus, the government has a significant interest in both the railroad industry and the sport of boxing that establishes a "special need" for regulation.

Second, it is firmly established that a government-imposed blood test does not constitute an undue imposition on the subject's bodily integrity or privacy.[271] As a result, neither the railroad worker nor the professional boxer is unique in that regard. Some argue that the privacy interest at stake in HIV testing is greater than that associated with a blood test for alcohol,[272] due to the stigmatic effect of an

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[264] *See* Railway Labor Executives' Ass'n. v. Burnley, 839 F.2d 575, 592 (9th Cir. 1988).

[265] *See Skinner*, 489 U.S. at 633-34.

[266] *See id.*

[267] *See id.* at 627..

[268] *See id.* at 620 (quoting Griffin v. Wisconsin, 483 U.S. 868, 873-74 (1987)).

[269] *See* 272 S.W.2d 621, 625 (Tex. Ct. App. 1954); *see also* Shoemaker v. Handel, 619 F. Supp. 1089, 1102, 1104 (D.N.J. 1985) (upholding New Jersey State Racing Commission's regulations imposing mandatory drug and alcohol tests on all jockeys, specifically where industry is historically intensely regulated), *aff'd*, 795 F.2d 1136, 1144 (3d Cir. 1986).

[270] *See Harvey*, 272 S.W.2d at 625.

[271] *See* Schmerber v. California, 384 U.S. 757, 770-71 (1966) (holding that withdrawal of blood for suspicion of drunk driving does not violate privacy rights).

[272] The stigmatization associated with HIV plays a particularly relevant role in the com-

HIV-positive result. However, that issue is beyond the scope of this Article. Instead, this analysis will be limited to the physically intrusive nature of the blood test, which the Supreme Court decided was not an extensive imposition in *Schmerber v. California*.[273]

Third, in holding that the government's interest in *Skinner* was compelling, the Court noted that:

> [E]mployees who are subject to testing . . . can cause great human loss before any signs of impairment become noticeable. . . . An impaired employee . . . will seldom display any outward signs detectable by the lay person or, in many cases, even the physician.[274]

Similarly, the very nature of the controversy surrounding HIV in professional boxing and the need for mandatory testing is that, without testing, boxers could be participating in bloody contests while HIV-positive. Boxers could bleed on their opponents, referees, cornermen, medical staff, and fans long before any infection became noticeable. In fact, this scenario could have become a reality if Tommy Morrison's infamous bout had been scheduled in a non-testing state. He could have continued to box while HIV-positive until the disease manifested itself at a later stage and impaired his performance. Magic Johnson, who returned to basketball after testing positive for HIV, won an Olympic gold medal, and was named the Most Valuable Player on the Olympic team,[275] is living proof that an HIV-positive athlete can perform on an equal level with HIV-negative athletes without giving any indication of the presence of the disease.

Despite these similarities, there are clear distinctions between professional boxers and railroad workers. These distinctions place professional boxers outside the intrusive scope of *Skinner* and within the scope of the protection afforded by the Fourth Amendment. For example, the danger sought to be avoided by mandating HIV testing of boxers — the transmission of HIV — has never been document-

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parative analysis between the "behavioralist" approach to rationality and the "doctrinalist" approach offered by some commentators. *See* Burris, *supra* note 191, at 949 (discussing hybrid approach to rationality review that incorporates both scientific and political exercises of power).

[273] *See* 384 U.S. at 770-71.

[274] Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 628 (1989) (quoting 50 Fed. Reg. 31562 (1985)).

[275] *See* Dan Shaughnessy, *Magic's Hurried Memoir*, WASH. POST, Dec. 11, 1992, at B2.

ed. In contrast, there was significant evidence of the avoidable danger in *Skinner*: train wrecks, injuries, and fatalities resulting from railroad employees' use of drugs and alcohol.[276] Thus, the purpose of the regulation in *Skinner* was to correct and deter a recurring danger that resulted from the specific activities of those tested. This is not the case under a mandatory system of HIV testing for boxers. Further, in *Skinner*, the drug test was triggered by a train wreck. This precipitating event was the very danger and the very reason for the government's intrusion.[277] The Court found that the precipitating train accident was the basis for allowing testing without "some quantum of individualized suspicion."[278] The intrusion became reasonable due to the deterrent qualities associated with the prohibited conduct.[279] The *Skinner* Court agreed that employees would be deterred from consuming drugs or alcohol on the job if the employees knew the government would test them for drugs or alcohol if a train wreck occurred.[280] Thus, the intrusion furthered the government interest in protecting the health and safety of railroad employees and the public, and this intrusion was reasonably related to its deterrent purpose.

In professional boxing, notwithstanding the envisioned protection of boxers, fans, and others, there can be no specifically prohibited conduct that triggers the precipitating event justifying the rejection of the individualized suspicion standard. Because the real risk of HIV transmission by boxers occurs outside of the ring, there is no deterrent effect in mandating HIV tests as a requisite for a boxing license. The "*Skinner*ian train wreck" that would trigger the HIV test in boxing is the transmission of HIV to another boxer. But this train wreck, or transmission, could not serve as a trigger for testing unless the HIV-positive status of the boxer was already known. Consequently, there is no need for testing. While suspension from further par-

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[276] From 1972 to 1983, "'the nation's railroads experienced at least 21 significant train accidents involving alcohol or drug use as a probable cause or contributing factor,' and . . . these accidents 'resulted in 25 fatalities, 61 non-fatal injuries, and property damage estimated at $19 million (approximately $27 million in 1982 dollars). . . .'" *See Skinner*, 489 U.S. at 607 (quoting 48 Fed. Reg. 30726 (1983)). The Administration further identified "an additional 17 fatalities to operating employees working on or around rail rolling stock that involved alcohol or drugs as a contributing factor." *Id.*

[277] *See id.* at 606, 620-21.

[278] *See id.* at 624 (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 560 (1976)).

[279] *See id.* at 629-31.

[280] *See id.*

ticipation may still be a viable response, under the *Skinner* framework, the question of testing boxers becomes moot. Thus, mandatory HIV testing does not further the government interest; it is only potentially furthered by mandatory suspension and, even then, only after an infected boxer has already transmitted HIV to another boxer.

Despite the inconsistencies of the *Skinner* analysis when applied to mandatory HIV testing for boxers, courts will apply the *Skinner* reasonableness standard when the mandatory HIV testing of boxers is challenged. The possibility of HIV transmission always exists within any activity in which one human comes into contact with another. However, that possibility must have a reality check based on our constitutional safeguards and the efficacy of testing to prevent transmission.

A logical conclusion from the holding in *University of Colorado v. Derdeyn*[281] is that conjecture cannot withstand a Fourth Amendment challenge.[282] In *Derdeyn*, the University of Colorado instituted a drug testing program in 1984 for its intercollegiate student athletes.[283] The university later required the student athletes to submit to a rapid eye examination test and provide a urine specimen.[284] The trial court found that the rapid eye examination did not create a reasonable suspicion of drug use and that, as a result, the urinalysis was an unreasonable search under the Fourth Amendment.[285] Relying upon *Skinner*, the Supreme Court of Colorado stated that, in determining whether the urinalysis drug testing was unreasonable, it had to balance the individual athletes' privacy expectations against the university's interests.[286] Here, the privacy of the student athletes was subjected to a significant and involuntary intrusion without any reasonable suspicion of drug use. The court held that this intrusion was unreasonable.[287] *Derdeyn* amply demonstrates that, despite factual disparities, *Skinner* and its progeny will serve as the standard of

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[281] 863 P.2d 929 (Colo. 1993).

[282] *See id.* at 946, (stating that, absent voluntary consent, suspicionless urinalysis drug testing of student athletes is unconstitutional).

[283] *See id.* at 930.

[284] *See id.* at 932. The athletes were required to give their consent to their head coach, the athletic director, their work supervisor, and the university drug counseling program. *See id.* Upon any first positive test, the athlete received a 12 month suspension. *See id.* at 931.

[285] *See* Derdeyn v. University of Colo., 832 P.2d 1031, 1033 (Colo. Ct. App. 1991).

[286] *See Derdeyn*, 863 P.2d at 936.

[287] *See id.* at 946.

reasonableness to measure the constitutionality of mandatorily testing bodily fluids.

b. Vernonia School District 47J v. Acton

After *Skinner*, two other major decisions — *Vernonia School District 47J v. Acton*[288] and *National Treasury Employees Union v. Von Raab*[289] — significantly impacted the law of mandatory drug and alcohol testing.[290] Both cases relied on *Skinner* and, in both cases, the Court found that the government's interest outweighed the personal interest of individuals objecting to the mandatory testing.[291]

The *Vernonia* Court built on the reasoning of *Skinner*[292] and followed the general rule in Fourth Amendment cases: testing requires an individualized suspicion of wrongdoing unless the intrusion is sufficiently compelling and reasonable.[293] The case centered on the random urinalysis and drug testing of students who wished to participate in high school interscholastic athletics.[294] The Court held that the testing was reasonable.[295] As in *Skinner*, the *Vernonia* court justified its ruling on the epidemic nature of drug use and the need to avoid its dangers.[296] The Court noted that school children possess a lesser expectation of privacy than adults,[297] and that student athletes enjoy an even lower expectation of privacy than other students.[298] Thus, the *Vernonia* court held that the invasion of privacy

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[288] 515 U.S. 646 (1995).

[289] 489 U.S. 656 (1989).

[290] These cases were most recently relied on in *Loder v. Glendale*, 927 P.2d 1200, 1221-27 (Cal. 1997), which upheld the mandatory urinalysis of prospective city employees who are applicants for employment, but held the mandatory drug tests of employees offered new positions or promotions to be violative of the Fourth Amendment.

[291] *See Vernonia*, 515 U.S. at 664-65; *Von Raab*, 489 U.S. at 679.

[292] *See Vernonia*, 515 U.S. at 652-54.

[293] *See id.*

[294] *See id.* at 648.

[295] *See id.* at 665.

[296] *See id.* at 664-65.

[297] *See id.* at 655-56; *see also* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (permitting censorship by school authorities of school-sponsored publications); New Jersey v. T.L.O., 469 U.S. 325, 348 (1985) (Powell, J., concurring) (stating that students within school environment generally have lesser expectation of privacy than members of general population); Goss v. Lopez, 419 U.S. 565, 581-82 (1975) (holding that adequate due process for student challenging suspension requires only that teacher informally discuss misconduct with student).

[298] *See Vernonia*, 515 U.S. at 657; Skinner v. Railway Labor Executives' Ass'n, 489 U.S.

involved in testing the student athletes was not significant,[299] and that the nature of the government's concern — deterring drug use by school children — was significantly compelling.[300] Just as the Court recognized the substantial dangers that existed in *Skinner*, the *Vernonia* Court recognized that the widespread drug use by school children was "an immediate crisis of greater proportions than existed in *Skinner*, where we upheld the Government's drug testing program based on findings of drug use by railroad employees nationwide, without proof that a problem existed on the particular railroads whose employees were subject to the test."[301] Accordingly, the Court held the suspicionless search to be reasonable and, therefore, constitutional.[302] Thus, *Vernonia* supports the *Skinner* analysis, allowing searches without individualized suspicion.[303]

c. National Treasury Employees Union v. Von Raab

National Treasury Employees Union v. Von Raab[304] involved a challenge to the mandatory drug testing of U.S. Customs Service employees seeking transfer or promotion to positions relating to drug interdiction or requiring the carrying of firearms.[305] Petitioners filed suit alleging that the drug testing violated their Fourth Amendment rights, and the district court agreed and enjoined the drug testing.[306] The Fifth Circuit vacated the district court's injunction, and the Supreme Court affirmed the portion of the Fifth Circuit's opinion relating to mandatory drug testing.[307] As in *Skinner* and *Vernonia*, the Court justified the testing of customs agents based on the actual expected risk involved.[308] In *Von Raab*, however, there was no documented history of drug use by a significant number of

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602, 627 (1989).

[299] *See Vernonia*, 515 U.S. at 660.

[300] *See id.* at 661.

[301] *See id.* at 663.

[302] *See id.* at 664-66.

[303] *See id.* at 660.

[304] 489 U.S. 656, 659-61 (1989).

[305] *See id.*

[306] *See id.* at 663.

[307] *See id.*

[308] *See Vernonia*, 515 U.S. at 661-63; *Von Raab*, 489 U.S. at 674-75; Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 628-29 (1989).

customs officials.[309] The justification for the testing rested solely on the perceived risk, rather than on any precipitating event[310] or any empirical evidence of the existence of the harm sought to be avoided.[311] The *Von Raab* analysis mirrors that which should be applied to HIV testing of professional boxers; that is, there is no documented history of the harm the government seeks to avoid, only an extremely significant perception of risk.

In *Von Raab*, the class of people subject to testing — customs agents — had a significantly reduced expectation of privacy due to the nature of their particular class, just as in *Skinner*, *Vernonia*, and professional boxing.[312] However, the similarities between the analysis of the *Skinner* trilogy and professional boxing end there. The concept of "perceived risk" is the key distinguishing factor that removes the mandatory HIV testing of boxers from the scope of governmental actions allowable in the mandatory drug-testing cases.[313] In justifying the government's intrusion into the privacy interest involved in *Skinner*, *Von Raab*, and *Vernonia*, the majority opinions[314] relied on the epidemic nature of the dangers to be avoided.[315] In *Skinner*, Justice Kennedy acknowledged the "serious threat" of drug and alcohol abuse by railroad employees and noted the relevance of the statistical data, demonstrating the seriousness of the risk involved.[316] Likewise, in *Von Raab*, Justice Kennedy urged that drug importation is "one of the greatest problems affecting the health and welfare of our population"[317] and is "[a] veritable national crisis in law enforcement."[318] *Vernonia* expressed similarly urgent concerns over drug use in schools.[319] While the risk of danger inher-

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[309] *See Von Raab*, 489 U.S. at 673.

[310] *See Skinner*, 489 U.S. at 624 (explaining that test may be reasonably ordered despite absence of individualized suspicion).

[311] *See Von Raab*, 489 U.S. at 683 (Scalia, J., dissenting).

[312] *See Vernonia*, 515 U.S. at 654-57; *Von Raab*, 489 U.S. at 672; *Skinner*, 489 U.S. at 627-28.

[313] For a counterargument, see Burris, *supra* note 191, at 970-71 (arguing that, since risk is not necessarily measured medically, reasonableness should not necessarily be qualified by purely scientific basis).

[314] Justice Kennedy delivered the majority opinions in both *Skinner* and *Von Raab*.

[315] *See Vernonia*, 515 U.S. at 660-63; *Von Raab*, 489 U.S. at 668-69; *Skinner*, 489 U.S. at 607-08.

[316] *See Skinner*, 489 U.S. at 606-07.

[317] *See Von Raab*, 489 U.S. at 668.

[318] *See id.* (quoting United States v. Montoya de Hernandez, 473 U.S. 531, 538 (1985)).

[319] *See Vernonia*, 515 U.S. at 660-63 (refusing to find clear error in district court's conclu-

ent in a customs official who fires a weapon or interdicts an illegal narcotics shipment while under the influence of drugs may be readily identified, there is no equally apparent risk in an HIV-positive boxer entering the boxing ring. That much-feared risk is pure conjecture.

The highly marketed and hysterically paranoid concern surrounding AIDS and HIV is of equal, if not greater, proportions than that of drug use by railway workers or customs employees. In *Von Raab*, the majority found the dangers involved to be so substantial that it allowed the government's intrusion, even without the statistical support that was available in *Skinner*.[320] Justice Kennedy compared the minimal likelihood that the drug test would actually disclose or deter drug use of customs employees to the federal government's practice of searching all passengers seeking to board commercial airliners.[321] In so doing, Justice Kennedy justified the drug test in *Von Raab* by noting, "When the government's interest lies in deterring highly hazardous conduct, a low incidence of such conduct, far from impugning the validity of the scheme for implementing this interest, is more logically viewed as a hallmark of success."[322] However, in the context of HIV in boxing, there is no wrongdoing or highly hazardous conduct that the government has a particularized interest in deterring.

In *Skinner*, *Vernonia*, and *Von Raab*, the government's interest in deterring drug use outweighed the individual privacy right; drug use was already an illegal activity, without a need for statistics to justify regulation.[323] In boxing, however, there is no inherent illegal activity that mandates suspicionless searches and no statistics illustrating a

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sion that substance abuse was contributing to serious disciplinary problems).

[320] *See Von Raab*, 489 U.S. at 674. Justice Kennedy noted that "[t]he mere circumstance that all but a few of the employees tested are entirely innocent of wrongdoing does not impugn the . . . [drug test's] validity." *Id.*

[321] *See id.* at 675 n.3.

[322] *See id.* Thus, the *Von Raab* analysis essentially equates Fourth Amendment "reasonableness" with Fourteenth Amendment "rationality." *See supra* notes 243-52 and accompanying text (comparing governmental interest in protecting public to privacy interests protected by constitution); *infra* notes 383-85 and accompanying text (discussing balance between AIDS victims' equal protection rights and public's fear of disease).

[323] *See, e.g.*, United States v. Martinez-Fuerte, 428 U.S. 543, 545 (1976) (upholding suspicionless stops and visual inspections of motor vehicles at fixed checkpoints); United States v. Edwards, 498 F.2d 496, 498 (2d Cir. 1974) (holding that suspicionless searches of passengers and carry-on luggage prior to commercial flight take-offs are permissible).

risk of transmitting HIV. Therefore, any government intrusion into the privacy rights of professional boxers must be based on more than the government's inherent interest in preventing a conjectured risk of HIV transmission.

2. The "Special Needs" Analysis

Under *Skinner* and its progeny, if the government can demonstrate a "special need,"[324] this creates exceptions to the general rule requiring individualized suspicion as a prerequisite for a search. If special needs are alleged, a reviewing court must conduct a context-specific inquiry that weighs the competing public and private interests to be advanced.[325] Does the danger, prevalence, and stigma of HIV necessarily heighten the privacy interests associated with HIV testing such that those privacy interests supersede the special needs?

The plethora of statistics, examples, and references in this Article clearly demonstrate that, in the world of professional sports, HIV raises special concerns and inspires a special need for precautions to avoid its effects. Predictably then, in light of the majority opinions in *Skinner*, *Vernonia*, and *Von Raab*, a special needs analysis may justify the application of mandatory HIV tests to professional boxers. This is particularly so in cases such as *Von Raab*, where the Court accommodated the special needs involved without the statistically significant medical foundation that usually forms the backdrop to a health

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[324] *See* Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 619 (1989) (quoting *Griffin*). Warrantless searches have been upheld in a variety of situations that have been held to qualify as a "special need" scenario. *See, e.g.*, Griffin v. Wisconsin, 483 U.S. 868, 872 (1987) (finding that warrantless search of probationers' homes without probable cause was constitutional); New York v. Burger, 482 U.S. 691, 702 (1987) (permitting searches of businesses engaged in activities involving high level of state regulation); O'Connor v. Ortega, 480 U.S. 709, 723-26 (1987) (upholding warrantless, work-related searches of desks and offices of public employees, without probable cause, pursuant to special needs of government-as-employer); New Jersey v. T.L.O., 469 U.S. 325, 339-41 (1985) (upholding school officials' warrantless searches of student property without probable cause because of school's special need to maintain security, order, and learning environment); Bell v. Wolfish, 441 U.S. 520, 558 (1979) (upholding body cavity search of prison inmates); *see also* Nancy D. Wagman, *Are We Becoming a Society of Suspects?* Vernonia School District 47J v. Acton: *Examining Random, Suspicionless Drug Testing of Public School Athletes*, 3 VILL. SPORTS & ENT. L.J. 325, 356 (1996) (arguing that "special needs" analysis employed in *Vernonia* effectually weakens foundations of Constitution and Fourth Amendment).

[325] *See Skinner*, 489 U.S. at 619.

care case analysis.[326] *Von Raab* and *Vernonia* employ a doctrinal analysis that seems equally applicable to professional boxing; because mandatory HIV testing is not a patently illegitimate means of protecting the health and safety of professional boxers and their audience, such testing appears to be medically related and, therefore, reasonable.

Justice Scalia, author of the *Vernonia* majority opinion, joined by Justice Stevens, offered an impassioned dissent in *Von Raab* because "neither frequency of use nor connection to harm [was] demonstrated or even likely. . . ."[327] Instead, Justice Scalia felt that the justification employed by the majority was "nothing but speculation."[328] He noted, "What is absent in the Government's justifications — notably absent, revealingly absent . . . dispositively absent — is the recitation of *even a single instance* in which any of the speculated horribles actually occurred. . . ."[329] In fact, the dissenting Justices found the majority's justification to be nothing more than "a kind of immolation of privacy and human dignity in symbolic opposition to drug use."[330] In the *Skinner* dissent, Justices Marshall and Brennan found the special needs approach to be unprincipled and dangerous.[331] They urged courts to avoid this sort of justification:

> Precisely because the need for action against the drug scourge is manifest, the need for vigilance against unconstitutional excess is great. History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure. . . . [W]hen we allow fundamental freedoms to be sacrificed in the name of real *or perceived* exigency, we invariably come to regret it.[332]

In her dissent in *Vernonia*, Justice O'Connor recognized the judge's quandary in balancing constitutional interests with governmental

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[326] *See Von Raab*, 489 U.S. at 679 (permitting suspicionless employee testing based on government's compelling interest in preventing promotion of drug users to positions where they might endanger public safety); Burris, *supra* note 191, at 937-39 (noting that, in health cases, courts tend to engage in substantive, context-specific scrutiny of challenged health measures).

[327] *See Von Raab*, 489 U.S. at 681 (Scalia, J., dissenting).

[328] *See id.* at 682.

[329] *See id.* at 683.

[330] *See id.* at 681.

[331] *See* Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 641 (1989) (Marshall, J., dissenting).

[332] *See id.* at 635 (Marshall, J., dissenting) (emphasis added).

intrusions founded on minimally perceived risks, a struggle she referred to as one of "conflicting impulses":

> It cannot be too often stated that the greatest threats to our constitutional freedoms come in times of crisis. But we must also stay mindful that not all government responses to such times are hysterical overreactions; some crises are quite real, and when they are, they serve precisely as the compelling state interest that we have said may justify a measured intrusion on constitutional rights. The only way for judges to mediate these conflicting impulses is to do what they should do anyway: stay close to the record in each case that appears before them, and make their judgments based on that alone.[333]

Specifically with regard to the competing constitutional interests in mandatorily testing professional boxers for HIV, whether this conflicting impulse stems from the nature of HIV or professional boxing, it is clear that the risk of transmitting HIV in the ring is minimal and is not based on any inherently illegal activity. Therefore, the regulation of transmission within the ring is not reasonably related to the danger of actual transmission, but is more closely related to the perceived risk of transmission. In professional boxing, HIV testing premised upon the fear inherently connected to HIV-positive status cannot be sustained as rationally related to any governmental interest. While the expansive special needs analysis employed in the *Skinner* trilogy arguably does not envelope needs that are based on pure conjecture, the scope of perceived risk can be distinctly broader, as seen in *Von Raab.* However, the recent case of *Chandler v. Miller*[334] clarified this problematic distinction.[335]

3. *Chandler v. Miller*

In April 1997, the Supreme Court breathed new life into the Fourth Amendment, which had become somewhat deflated from the cumulative effect of the *Skinner* trilogy.[336] *Chandler* examined the constitutionality of a Georgia statute[337] that required candidates for high office to submit to drug tests thirty days prior to qualifying

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[333] *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 686 (1995).

[334] 117 S. Ct. 1295 (1997).

[335] *See id.* at 1298.

[336] *See id.*

[337] *See* GA. CODE ANN. § 21-2-140 (1993).

for nomination.[338] In upholding the statute, the Eleventh Circuit relied on the *Skinner* trilogy and the special needs analysis.[339] The Supreme Court reversed the holding, however, and held the Georgia statute unconstitutional.[340] The *Chandler* Court thereby restricted the impact of the *Skinner* trilogy on Fourth Amendment analysis and broadened the scope of Fourth Amendment protections.

In applying the *Skinner* trilogy, the *Chandler* Court held that, to pass special needs muster, the privacy interest involved must be minimal and the government's interest involved must be jeopardized by the requirement of waiting for suspicion.[341] For example, in *Skinner*, testing without individualized suspicion gave invaluable information about the cause of train wrecks, which was a compelling need for the government.[342] In *Vernonia*, the sharp increase in drug use among student athletes threatened the government's interest in protecting the children entrusted to its care.[343] Finally, in *Von Raab*, the court advanced the government's interest in defending against drug smuggling to a "unique mission," which made the government's interest compelling.[344] These purposes — the protection against train wrecks, the safety of children, and the interest in drug enforcement — were far more compelling purposes than regulating nomination qualifications for high office in Georgia and are far more compelling than the regulation of professional boxing.

Furthermore, the *Chandler* Court held that a state's power to prosecute crime does not diminish the Fourth Amendment constraints on state action.[345] In noting that the invasiveness of Georgia's testing procedure in *Chandler* was relatively minimal,[346] the Court held that, regardless of the slight invasion of privacy, without a sufficiently substantial governmental interest, no special need could be shown.[347] Instead, the *Chandler* court noted the absence of "any in-

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[338] *See Chandler*, 117 S. Ct. at 1298-99.

[339] *See* Chandler v. Miller, 73 F.3d 1543, 1545 (11th Cir. 1996).

[340] *See Chandler*, 117 S. Ct. at 1298.

[341] *See id.* at 1301.

[342] *See* Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 628-29 (1989).

[343] *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 661-63 (1995).

[344] *See* National Treasury Employees v. Von Raab, 489 U.S. 656, 668-70, 674 (1989).

[345] *See Chandler*, 117 S. Ct. at 1303.

[346] *See id.* Comparatively, the procedure employed in testing professional boxers for HIV — the withdrawal of blood — is much more intrusive than the urine screens employed in *Chandler*, *Skinner*, *Vernonia*, and *Von Raab*.

[347] *See id.* at 1303.

dication of a concrete danger demanding departure from the Fourth Amendment's main rule" requiring individualized suspicion.[348] The danger had to be real and not simply hypothetical. In *Skinner* and *Vernonia*, statistics proved that the dangers were real.[349] In boxing, as in *Chandler*, however, the danger is merely hypothetical. Further, the *Chandler* Court found that the Georgia statute did not effectively deter illicit drug users seeking election to state office.[350] Likewise, there is no deterrent purpose in testing professional boxers for HIV; therefore, mandatory testing for HIV is not reasonable.

The *Chandler* Court specifically addressed the application of *Von Raab*, which, as this Article recognizes, could be the most problematic of the *Skinner* trilogy in the professional boxing analysis. The Court stated, however, that *Von Raab* is "[h]ardly a decision opening broad vistas for suspicionless searches, [and] . . . must be read in its unique context."[351] Given the unique context of *Von Raab* and the complete lack of evidence of an existing harm in *Chandler*, the only remaining support for the Georgia statute was the state's public relations image: a strong stance against drug use.[352] Unlike *Von Raab*, however, the Georgia government in *Chandler* did not rely on that purpose. Therefore, the *Chandler* Court found the government's need to be more "symbolic" than "special,"[353] and held that "[h]owever well-meant, the candidate drug test Georgia . . . devised diminishes personal privacy for a symbol's sake."[354] The Court held that the Fourth Amendment prohibited state action of this nature and, therefore, struck down the Georgia testing statute as unconstitutional.[355]

The reasoning of the *Chandler* Court is directly applicable to the issue of HIV testing of professional boxers. As in *Chandler*, no empirical evidence exists which demonstrates any danger of HIV transmission within the boxing ring. Therefore, a state statute mandating

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[348] *See id.*

[349] *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 661-63 (1995); Skinner v. Railway Labor Exec. Ass'n, 489 U.S. 602, 607-08, 628-29 (1989).

[350] *See Chandler*, 117 S. Ct. at 1303-04.

[351] *See id.* at 1304.

[352] *See id.* at 1304-05.

[353] *See id.* at 1305.

[354] *See id.*

[355] *See id.*

HIV testing of "candidates" for a boxing license is, at most, a symbolic stance against the transmission of HIV. When the public safety is not genuinely in jeopardy, the Fourth Amendment precludes intrusive state action based on such a gesture, regardless of the underlying sentiment.[356] As noted by Justice Brandeis, in *Olmstead*:

> Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.[357]

The majority in *Chandler* also applied its reasoning to questions of medical examinations designed to provide certification of a candidate's general health, including screening for HIV. Although the majority expressed no opinion on this subject, Chief Justice Rehnquist's dissent comments on the extension of *Chandler* to other cases and sarcastically quips:

> It is all but inconceivable that a case involving [questions of medical examinations] could be decided differently than the present case. . . . The only possible basis for distinction is to say that the State has a far greater interest in the candidate's "general health" than it does with respect to his propensity to use illegal drugs.[358]

The Court's reasoning in *Chandler*, its interpretation of the *Skinner* trilogy, and Justice Rehnquist's sarcastic dissent clearly express the proposition that the mandatory HIV testing of professional boxers is unconstitutional and a violation of the protections afforded by the Fourth Amendment. The urgency surrounding the transmission of the disease, while absolutely justified in other contexts like sexual relations and blood transfusions, is simply not justified in professional boxing.

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[356] *See id.*

[357] *See* Olmstead v. United States, 277 U.S. 438, 479 (1928).

[358] *See Chandler*, 117 S. Ct. at 1307-08 (Rehnquist, J., dissenting).

B. Equal Protection and the Fourteenth Amendment[359]

Are the answers to equal protection questions concerning mandatory HIV testing as a means of quelling the fear of HIV transmission in sports the same for all athletes — black, white, HIV-positive, HIV-negative, homosexual, and heterosexual? Should some boxers be tested but not others? If it is reasonable to test Tommy Morrison, who, statistically, is not likely to transmit the disease while participating in sports, what of gymnastics coach Mickey Smith, who, while HIV-positive, coached hundreds of students — none of whom, experts say, were at risk of catching the disease?[360] What of John Curry, who is described as "a visionary who redefined the sport of figure skating" and who was one of the few athletes to speak openly of his homosexuality and HIV status?[361] What of David Kopay, who one writer sympathetically refers to as "the poster boy for 'Gays in Sports'"?[362] What of former major league baseball umpire, Dave Pallone, who claims to have been fired by the National League because he is gay?[363]

As these examples demonstrate, mandatory HIV testing of boxers also raises equal protection issues. As this Article will demonstrate, in order to overcome an equal protection challenge, it must be clear that the test is required because of actual likelihood of transmission of HIV during a boxing match, not merely the unjustified fear of the introduction of HIV into the sport.

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[359] The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

[360] *See* Jerry Soifer, *Young Gymnasts Remember Their Friend/Coach*, PRESS-ENTERPRISE (Riverside, Cal.), Dec. 31, 1995, at B3.

[361] *See HIV and AIDS Through the Years*, L.A. TIMES, Nov. 5, 1996, at C10 (describing John Curry as AIDS victim whose artistry on ice revolutionized figure skating).

[362] *See* Meisel, *supra* note 187, at C1.

[363] *See id.*

1. Fear, Stigmatization, and Discrimination

One consequence of mandatory testing or exclusion of HIV-positive athletes from competition is the stigmatization and discrimination inherent in the HIV-positive label. No medical or legal justification exists for imposing this burden of stigma and discrimination on HIV-positive athletes. Another consequence is the fear created in those athletes who do not carry the virus. Despite predictions and statistics evidencing a minimal risk of transmission through physical contact in sports, fear of the disease permeates competitive sports at every level.[364] For example, HIV-positive Magic Johnson felt forced into retirement from professional basketball because of the concern of teammates and opposing players.[365] At the amateur level, several Oklahoma high school teams canceled games against an opposing team because of an HIV-infected player.[366]

This fear of the disease fuels lawsuits and discrimination. In 1992, a woman who was visiting her sister at a hospital reached into a container that appeared to be a paper towel holder.[367] Three of her fingers were pricked by sharp objects and she was subsequently informed that the container was a contaminated needle receptacle.[368] Fearful of contracting AIDS, the woman filed a negligence action, seeking damages for emotional distress.[369] The plaintiff showed no proof of actual exposure to HIV. However, a Tennessee court of appeals rejected decisions in two other states and held that, in Tennessee, proof of exposure to HIV is not a prerequisite to

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[364] Said one boxing promoter: "Boxing is a very tough sport. With the close proximity and all the other stuff, it would make it easy for blood to get into your mouth and nasal passages, where you could carry the virus to the parts of the body where it would be affected." *See* Terry Foster, *Boxing Too Bloody for Morrison to Contemplate any Magic-Like Comeback to Ring*, DET. NEWS, Feb. 13, 1996, at C1. Another promotor, commenting on Morrison's return to boxing, said: "Would I get in the ring? Absolutely not. Would I be the referee? Absolutely not, nor would I buy a ticket to sit in the first two rows." *See* Robb, *supra* note 110, at 14C (statement by Tommy Torino).

[365] *See* Crasnick, *supra* note 54, at B12. Several players in the NBA expressed reservations about playing against Magic Johnson when he returned to the sport after announcing his HIV status. *See* Bill Sullivan, *Johnson Surrenders to Controversy: Negative Mood Indicated a Resistance to Comeback*, HOUS. CHRON., Nov. 3, 1992, at 1B.

[366] *See* Jerry Kirschnbum, *Lone Wolf's Battler*, SPORTS ILLUSTRATED, May 24, 1993, at 9.

[367] *See* Carroll v. Sisters of St. Francis Health Servs., Inc., No. 02A01-9110-CV-00232, 1992 WL 276717, at *1 (Tenn. Ct. App. Oct. 12, 1992).

[368] *See id.*

[369] *See id.*

recovery for emotional distress resulting from fear of contracting AIDS.[370] The Tennessee Supreme Court later reversed this decision in *Carroll v. Sisters of Saint Francis Health Services Inc.*[371] *Carroll* was followed most recently in *Bain v. Wells*,[372] where the same Tennessee court denied a plaintiff's claim for emotional distress after he was assigned an HIV-positive roommate in the hospital, used the same toilet as the HIV roommate, and accidentally shaved with the HIV roommate's razor.[373] The court held that, because there was no medical evidence showing that the patient was actually exposed to HIV during his hospitalization, the plaintiff's fear was unreasonable.[374]

Other courts have taken a different approach to cases based upon the fear of contracting HIV. However, this different approach has yielded the same result — no recovery. For instance, the Minnesota Supreme Court heard an appeal by a patient who brought an action against a physician and his clinic for emotional distress.[375] This distress resulted from the knowledge that her physician had performed gynecological procedures while he was infected with HIV and was suffering from open sores on his hands and forearms.[376] The court found that, for a claim of negligent infliction of emotional distress, plaintiffs must show that they (1) were within a zone of danger of physical impact; (2) reasonably feared for their own safety; and (3) suffered severe emotional distress with attendant physical manifestations.[377] The court found that the patient was not within a zone of danger and denied the claim.[378] The court stated, "a remote possi-

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[370] *See id.*; *see also* Kerins v. Hartley, 21 Cal. Rptr. 2d 621, 632 (Ct. App. 1993) (holding that patient could sue physician for emotional distress for not disclosing his HIV-positive status, even though patient could not prove contamination), *superseded*, 33 Cal. Rptr. 2d 172, 181 (Ct. App. 1994) (holding that statistically insignificant chance of contamination precludes recovery of emotional distress damages for fear of AIDS).

[371] *See* 868 S.W.2d 585, 594 (Tenn. 1993) (holding that actual exposure to HIV is required to recover for emotional damages). *But see* Faya v. Almaraz, 620 A.2d 327, 336-37 (Md. Ct. App. 1993) (permitting recovery when there is no actual proof of exposure).

[372] 936 S.W.2d 618 (Tenn. 1997).

[373] *See id.* at 625 (holding that placing HIV-positive patients in same room with HIV-negative patients is not outrageous conduct, even when HIV-negative patient is not informed).

[374] *See id.*

[375] *See* K.A.C. v. Benson, 527 N.W.2d 553, 555 (Minn. 1995).

[376] *See id.*

[377] *See id.* at 557.

[378] *See id.* at 559.

bility of personal peril is insufficient to place [a] plaintiff within a zone of danger for purposes of a claim of negligent infliction of emotional distress."[379] Thus, the risk of contracting HIV must be more than a "remote possibility."[380] Because "there are no known cases of HIV transmission from a physician to a patient,"[381] the possibility of recovery seems slim.[382]

There are a few exceptions, such as some prison cases, where fear of the disease, whether warranted or not, is a rational basis to discriminatorily classify HIV-positive persons.[383] However,

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[379] *Id.*

[380] *See id.*

[381] *See id.* at 559 n.8.

[382] *See, e.g.*, Majca v. Beekil, 682 N.E.2d 253, 253 (Ill. App. Ct. 1997) (granting defendant's summary judgment motion in claim for fear of contracting AIDS because likelihood of transmission was remote); *see also* Wetherill v. University of Chicago, 565 F. Supp. 1553, 1559-60 (N.D. Ill. 1983) (holding that Illinois law only requires causal link between fear of future injury and possibility that injury will occur); Eagle-Picher Industries, Inc. v. Cox, 481 So.2d 517, 528-29 (Fla. Dist. Ct. App. 1985) (stating that merits of claim increase when actual injury occurs); Doe v. Surgicare of Joliet, Inc., 643 N.E.2d 1200, 1204 (Ill. App. Ct. 1994) (holding that compensable claim cannot be recognized without alleging actual exposure to AIDS); Vallery v. Southern Baptist Hosp., 630 So.2d 861, 866 (La. Ct. App. 1993) (describing other state courts' holdings regarding recovery of damages for fear of exposure to AIDS).

[383] *See, e.g.*, Farmer v. Moritsugu, 742 F. Supp. 525, 528 (W.D. Wis. 1990) (holding that prison's policy of precluding HIV-positive inmates from working in food services was rationally related to prison security because other inmates doubted scientific evidence that HIV is not transmitted through ingesting products handled by HIV-positive persons); Cordero v. Coughlin, 607 F. Supp. 9, 10-11 (S.D.N.Y. 1984) (holding that segregation of prisoners with AIDS is rationally related to protection from harm resulting from other prisoners' fears of disease). In *Johnetta v. Municipal Court*, 267 Cal. Rptr. 666 (Ct. App. 1990), the court upheld the HIV test of a person who bit a peace officer at a child custody hearing based on the officer's fear and anxiety, even though the uncontested medical evidence demonstrated that there had never been a reported case of transmission via saliva from a bite and that the chance of HIV being transmitted through saliva was "exceedingly low." *See id.* at 671. Medically, the likelihood of transmission through saliva in *Johnetta* may be comparable to the likelihood of transmission in boxing — although no empirical evidence exists in either case to actually compare. However, the *Johnetta* court distinguished its case from other cases on several grounds. *See id.* at 682. First, *Johnetta* involved assaultive conduct — what may be qualified in this Article as a "precipitating event" that triggers testing, which, in boxing, does not exist. *See Johnetta*, 267 Cal. Rptr. at 682; *supra* notes 276-81 and accompanying text (explaining that precipitating event allows for general testing without individualized suspicion, on basis of deterring future hazardous events). Second, *Johnetta* weighed the factual findings and medical evidence more heavily than in other similar cases. *See id.* Finally, *Johnetta* involved the special need of protecting law enforcement officers. *See id.* Except for the assaultive conduct against a law enforcement officer, the *Johnetta* court acknowledged "that the mere fact a person is infected with AIDS cannot be used to remove them from their occupation or the society of others because of some unjustified fear of an infection

> [it is] a cardinal principle of equal protection law . . . that the government cannot discriminate against a certain class in order to give effect to the prejudice of others. Even if the government does not itself act out of prejudice, it cannot discriminate in an effort to avoid the effects of others' prejudice. Such discrimination plays directly into the hands of the bigots; it ratifies and encourages their prejudice.[384]

The high standard for emotional distress claims that courts have established is a step in the right direction. To recognize a claim for fear of contracting AIDS without any medical evidence or factual proof, would "open a Pandora's box of 'AIDS-phobia' claims by individuals whose ignorance, unreasonable suspicion, or general paranoia cause them apprehension over the slightest of contact with HIV-infected individuals or objects."[385]

While the possibility of HIV in the boxing ring has caused fear, discrimination, and some paranoia, many athletes and others remain unconcerned about the bloody nature of the sport.[386] As for Tommy Morrison, at least seven professional fighters expressly stated

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incapable of transmission by casual contact." *See id.* at 682-83. The *Johnetta* court based its holding on several other courts that had reached similar holdings. *See, e.g.*, Chalk v. United States Dist. Court, 840 F.2d 701, 706-09 (9th Cir. 1988) (concluding that theoretical risk of AIDS transmission was insufficient to bar infected teacher from classroom); Ray v. School Dist. of DeSoto County, 666 F. Supp. 1524, 1536 (M.D. Fla. 1987) (finding that when no risk of transmission existed, AIDS-infected children could not be barred from school); Thomas v. Atascadero Unified Sch. Dist., 662 F. Supp. 376, 382 (C.D. Cal. 1987) (holding that theoretical risk of HIV transmission from biting incident was insufficient to warrant exclusion of child from school setting); Phipps v. Saddleback Valley Unified Sch. Dist., 251 Cal. Rptr. 720, 722 (Ct. App. 1988) (prohibiting exclusion of HIV-infected student); Doe v. Roe, 526 N.Y.S.2d 718, 726-27 (App. Div. 1988) (denying HIV test because it was unrelated to child visitation); Jane W. v. John W., 519 N.Y.S.2d 603, 605 (App. Div. 1987) (prohibiting HIV test because it was unrelated to child visitation); People *ex rel.* Glass v. McGreevy, 514 N.Y.S.2d 622, 623 (Sup. Ct. 1987) (holding that release on bail cannot be dependent on negative HIV test); District 27 Comm. Sch. v. Board of Educ., 502 N.Y.S.2d 325, 337-38 (App. Div. 1986) (finding that exclusion of HIV-infected students violates equal protection).

[384] *See* Steffan v. Aspin, 8 F.3d 57, 68-69 (D.C. Cir. 1993) (reversing district court's holding that supported ban from the military based on homosexual status); *see also* Palmore v. Sidoti, 466 U.S. 429, 434 (1984) (overturning state court's child custody order granting custody of child to father based solely on mother's remarriage to man of different race).

[385] *See* Brzoska v. Olson, 668 A.2d 1355, 1363 (Del. 1995).

[386] *See* Cote, *supra* note 129, at 7. One professional boxing referee, Brian Garry, claims that he has to rinse out his shirts in a bucket of water because there is so much blood on them. *See id.* In one fight involving a fighter from Uganda, where AIDS is an epidemic, blood spurted into Garry's eyes and forced the fight to be halted. Garry stated: "As long as I'm not going to bed with the fighters, I'm not concerned about it." *Id.*

that they would fight Morrison, were he permitted to return to the ring, despite the possible risk of infection.[387] However, this willingness to fight Morrison may be attributed not to a lack of fear, but to financial motivations. "[A]mateur boxing is a sport. Professional prizefighting is a business that has athletic implications."[388] In every fight, boxers risk their health for the winning purse; in many championship fights, even the losing purse is significant and well worth the risk of injury.[389] If the price is right, the risk and fear of contracting HIV from a four-inch gash over the eye of Tommy Morrison is no different than the risk of suffering brain damage or death from a left hook of Evander Holyfield. Regardless of the motives involved, both of these scenarios merit equal protection guarantees when implementing federal or state mandates.

2. Equal Protection Challenges by Boxers

Historically, equal protection challenges have been directed at statutes that create a classification of persons, then discriminate against the members of that class by treating them differently than persons who are not members of that class.[390] However, discrimination against particular classes does not constitute a per se equal protection violation. In reviewing equal protection claims, three levels of review may be applied.[391] If the statute in question creates a classification based on a distinction of race, alienage or national origin, or burdens a fundamental right, courts will apply a rigorous standard of strict scrutiny and uphold the statute only if it is tailored to serve a compelling state interest.[392] If the statute distinguishes the subject class based on gender, the statute will only pass constitutional muster if the distinction is substantially related to an important governmental interest.[393] All other statutes that draw a social or economic distinction or do not fit into one of the other two lev-

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[387] *See* Ron Borges, *Foreman Is Willing to Fight vs. Morrison*, BOSTON GLOBE, Sept. 20, 1996, at E1.

[388] *See Health and Safety Hearings*, *supra* note 4, at 7 (statement of Hon. Mills Lane, Second Judicial District Court, Reno, Nevada and Ring Magazine's Referee of Year in 1993).

[389] *See* Borges, *supra* note 387, at C5.

[390] *See* Hill v. Evans, No. 91-A-626-N, 1993 WL 595676, at *6 (M.D. Ala. Oct. 7, 1993).

[391] *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440-41 (1985) (describing three levels of review as rational basis, heightened scrutiny, and strict scrutiny).

[392] *See id.* at 440.

[393] *See id.* at 440-41.

els of review are subject to a rational basis standard.[394] Under this level of scrutiny, courts will uphold the statute if the distinction is rationally related to a legitimate state interest.[395] The following discussion demonstrates that a rational basis test is the proper level of analysis for mandatory HIV testing.

Although the dynamics of boxing pose the risk of HIV transmission because of the high likelihood of bleeding and physical contact,[396] other sports are no less immune from the possibility of HIV transmission. Sports like football and wrestling also exhibit similar physical and violent traits and, like boxing, are considered "blood sports."[397] But is it true that HIV transmission in other sports is less likely than in boxing? If not, are there any legal, social, or moral justifications for mandating HIV testing for athletes in any particular sport?

Statutes that single out boxers for HIV testing prior to renewing their boxing license distinguish between professional boxers and other professional athletes. Boxers may claim that the state is denying them equal protection under the law because it requires them, but not other professional athletes, to submit to HIV tests prior to competing.[398] Arguably, this distinction is based on the perception that boxers are at a high risk for the transmission of HIV because of the violent and bloody nature of the sport.[399] This perception lacks any evidentiary support indicating that boxers are at a higher risk of HIV transmission because of the violence of the sport.

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[394] *See id.* at 441-42.

[395] *See id.* at 440; *see also* Contractors Ass'n, Inc. v. Philadelphia, 6 F.3d 990, 1001 (3rd Cir. 1993) (stating that classifications involving individuals with disabilities are subject only to rational basis scrutiny).

[396] Commenting on the distinction between boxing and basketball, Dr. Paul Benson, an AIDS specialist, remarked: "Boxers routinely clutch and grab and bleed — on one another. It's risky even to contemplate a Magic-like return in [boxing]. . . . There is a difference. Basketball is a contact sport, but boxing is a blood sport." *See* Foster, *supra* note 364, at C1.

[397] *See* Brown, *supra* note 197, at 405.

[398] In addition to the distinct class of all boxers who apply for a boxing license and, therefore, must be tested, there is also a distinct class of professional boxers who test positive for HIV and are denied a license. These two classes have been held to be protected classes under an equal protection analysis. *See* Doe v. Chicago, 883 F. Supp. 1126, 1138-39 (N.D. Ill. 1994) (finding that police officer applicants who were denied employment after testing HIV-positive from forced test belonged to validly protected class for equal protection claim).

[399] *See supra* notes 196-211 and accompanying text (comparing risk of HIV transmission in boxing with risks of transmission in other sports).

Statutes mandating HIV testing that draw a legislative distinction based solely on a subjective perception of high risk violate equal protection considerations and are unconstitutional.[400]

In *Hill v. Evans*,[401] a federal district court in Alabama considered the constitutionality of a statute proscribing HIV tests without the patient's voluntary informed consent.[402] The statute provided three exceptions: (1) if the patient is at high risk for HIV infection based on reasonable medical judgment; (2) if the patient's medical care may be modified by the presence or absence of HIV infection; or (3) if the HIV status of the patient will directly affect the health and safety of health care personnel.[403] The justification for mandatory HIV testing in professional boxing mirrors the first exception in *Hill*: the "high risk" exception. In *Hill*, the court held that testing for HIV based on this justification violates equal protection standards and, therefore, is unconstitutional.[404]

In *Hill*, the plaintiff, a fifty-four-year-old single male, contested the Alabama statute after being tested for HIV without his knowledge and without his voluntarily informed consent.[405] Pursuant to the first exception under the statute, the medical personnel in *Hill* tested the plaintiff for HIV based on their perception that an unmarried fifty-four-year-old male might be homosexual and that homosexuals are at high risk for HIV.[406] Although the court recognized instances where mandatory testing would be necessary and rationally related to a government interest, the court found that the testimony at trial failed to establish that testing persons perceived to be at high risk would in any way diminish the prevalence of the disease.[407] It is likewise the case in boxing. No existing evidence demonstrates that testing boxers, based on the perception of their high risk status as compared to other professional athletes, will in any way reduce either the prevalence of the disease or the transmission of the disease within the sport.

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[400] *See* Hill v. Evans, No. 91-A-626-N, 1993 WL 595676, at *6 (M.D. Ala. Oct. 7, 1993).

[401] *Id.*

[402] *See id.* at *1 (considering ALA. CODE § 22-11A-52).

[403] *See* ALA. CODE § 22-11A-52(1-3) (Supp. 1996).

[404] *See Hill*, 1993 WL 595676, at *6.

[405] *See id.* at *1.

[406] *See id.* at *16.

[407] *See id.* at *7.

Thus, as in *Hill*, the question for a court determining the constitutionality of statutes mandating HIV tests for boxers is not whether testing would help to reduce the occurrence of the disease, but whether testing a person based solely on the perception of high risk would help to reduce the occurrence of the disease.[408] The court in *Hill* found that it would not, reasoning that the term "high risk" is "subject to varying interpretation . . . without any relation to medical treatment or danger to others."[409] Similarly, without evidence of any possibility of transmission within the boxing ring, testing boxers for HIV based solely on the perception that boxers are at high risk is an equally irrational and equally unconstitutional analysis. In *Hill*, the court reasoned that it is inherently unequal for a legislature to deprive a person of a right granted to other citizens, not on the basis of any conduct or medical history, but simply because a doctor might consider the person to be at high risk for HIV.[410] Therefore, the *Hill* court concluded that "classification between individuals who are considered 'high risk' and those who are not considered 'high risk' fails under even the rational basis standard."[411] Because the only distinction for mandatory HIV testing of boxers is the perception of high risk for infection based on the violent nature of the sport, any such testing must fail under a rational basis test.

The reasoning of other courts that have considered the concept of equal protection within the context of professional boxing supports this rational basis analysis. For example, in the early 1950s, "Sporty" Harvey was a professional African-American boxer in the state of Texas.[412] In pursuit of his goal to advance through the ranks of boxing, he wished to fight a particularly popular Caucasian opponent.[413] However, Texas law forbade anyone to "knowingly permit any fistic combat match, boxing, sparring or wrestling contest or exhibition between any person of Caucasian or 'White' race and one of African or 'Negro' race."[414] Mr. Harvey contested the state law on the basis that it violated his Fourteenth Amendment right to equal protection.[415] The district court upheld the law, however, rec-

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[408] *See id.* at *9.

[409] *See id.*

[410] *See id.* at *6.

[411] *See id.* at *7.

[412] *See* Harvey v. Morgan, 272 S.W.2d 621, 622 (Tex. App. 1954).

[413] *See id.*

[414] *See id.* (referring to art. 614-11(f) of 1954 Texas Penal Code).

[415] *See id.*; *see also* Dorsey v. State Athletic Comm'n, 168 F. Supp. 149, 153 (E.D. La.

ognizing that "professional boxing matches require much more police protection and service than do ordinary trades and occupations" and "the legislative intent in regulating professional boxing was to protect the public as well as the participants. . . ."[416]

On appeal, the Texas Court of Appeals acknowledged that African-American athletes and white athletes participate together in the same baseball, basketball, and football contests.[417] The court further recognized that the Texas legislature designed the law to prevent racial riots.[418] Such riots had never occurred in any of these other ongoing, racially-mixed sporting events.[419] In fact, not one witness testified that he or she had ever seen a racially motivated riot at a boxing match.[420] The only evidentiary support for the law came from testimony that the boxing promoters, fans, and public simply preferred the law because "there [was] a possibility, there could be [a riot]" and that it was the habit, custom, and tradition of Texans to be against "mixed matches."[421] The *Harvey* court, relying on *Brown v. Board of Education of Topeka*,[422] classified African-American professional boxers as a suspect class and held segregated boxing to violate the Fourteenth Amendment.[423]

To address the constitutionality of laws that mandate HIV testing of professional boxers today under an equal protection analysis, courts must address the following questions: Do not HIV athletes and non-HIV athletes participate together in the same baseball, basketball, and football contests? Has the activity that laws mandating HIV tests are designed to prevent — the transmission of HIV during sporting events — ever occurred? Is not the only evidence in support of mandatory HIV testing for professional boxers the fear-

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1958) (holding that segregation statute and regulation were unconstitutional). In *Dorsey*, the segregation was implemented through the regulations of the state athletic commission, which was granted its authority by statute. Dorsey contested this regulation. Subsequently, the legislature enacted a similarly discriminatory statute and Dorsey amended his petition to contest both the regulation and the statute. *See id.* at 150.

[416] *See Harvey*, 272 S.W.2d at 623 (holding that law preventing boxing matches between black and white athletes violates equal protection).

[417] *See id.*

[418] *See id.* at 624.

[419] *See id.*

[420] *See id.*

[421] *See id.* at 623-24.

[422] 347 U.S. 483 (1954) (holding that segregation in public schools violates Fourteenth Amendment equal protection).

[423] *See Harvey*, 272 S.W.2d at 625-27.

driven preference of the boxing promoters, fans, and public that the infinitesimally, almost unquantifiably small, possibility of the transmission of HIV could occur during a sporting event? In fact, in 1997, is it not the habit, custom, and tradition of AIDS-fearing people to be against any activity that introduces even the possibility of transmission? The evidence presented in this Article demonstrates that the answers to these questions for Tommy Morrison in 1997, and other potentially HIV-positive athletes in the future, are no different than the answers to these questions for "Sporty" Harvey in 1954.

Thus, although the standard of review may be different, the reasoning of the *Harvey* court clearly focuses the analysis on whether the distinction between classifications of athletes in respective sports is rational. *Fontes v. Irvine Unified School District*[424] also focused on this distinction. In *Fontes*, the school district maintained a grade eligibility policy that imposed a higher academic requirement for high school cheerleading than it did for its interscholastic sports.[425] The local high school disqualified the plaintiff from participation in cheerleading due to a failing grade.[426] Had the plaintiff wished to participate on the football team, however, she would have been eligible.[427] Therefore, the plaintiff challenged the eligibility policy on equal protection grounds, asking, "why higher standards for cheerleaders than football or basketball players?"[428]

In considering the constitutionality of the school district's policy to discriminate between cheerleaders and interscholastic athletes, the court examined the incentive to achieve high grades as a motivation for the school district.[429] The court found that both sets of activities (cheerleading and interscholastic sports) were "equally situated" when it came to the purpose of the contested statute.[430] Thus, because cheerleaders were no less likely to have incentive to achieve academic success than football players,[431] cheerleaders were not

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[424] 30 Cal. Rptr. 2d 521 (Ct. App. 1994).

[425] *See id.* at 522.

[426] *See id.*

[427] *See id.*

[428] *See id.*

[429] *See id.* at 524.

[430] *See id.*

[431] The facts considered by the court were those offered by the school district in support of its discrimination against cheerleaders as a class: (1) since cheerleading was a full-year activity, as compared to football which was a partial-year activity, cheerleaders spent

situated any differently than any of the interscholastic sports with regard to this purpose.[432] Accordingly, the court found that discrimination based on such a classification between activities was irrational and, thus, unconstitutional.[433]

Similarly, the distinction between professional boxers and other professional athletes is equally irrational under an equal protection analysis. Neither set of athletes is situated any differently with regard to the purpose of the statute, which is to reduce or eliminate the possibility of the transmission of HIV. Since the possibility for HIV transmission is remote in all sports, and statistics do not indicate a significant variance in rates of transmission among different sports, boxers are not situated any differently than any other athletes. Therefore, any statute that discriminates against boxers by requiring them, but not other athletes, to be tested for HIV when other athletes in other sports are equally unlikely to transmit the disease violates boxers' equal protection rights.

The reasoning of courts like *Schaill v. Tippecanoe County School Corp.*[434] supports this conclusion. In *Schaill*, the public school had implemented a mandatory urinalysis drug test for all varsity athletes.[435] The school wished to protect the safety of the athletes and assure a drug-free athletic program.[436] The varsity athletes contested the policy on equal protection grounds because the policy did not require nonathletes, who also participated in extra-curricular activities, to be tested.[437] The court held that, where the evidence demonstrated that participation in varsity athletics was distinct in that it was much more stressful and involved a significantly higher likelihood of injury than intramural and physical education activities, the test was rationally related to its purpose.[438] Because the evidence does not demonstrate that boxing is distinct from other sports because of a significantly higher likelihood of transmission of HIV, to discriminate on that basis is not rationally related to the

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more time away from school, thereby requiring more incentive to focus on academics; and (2) cheerleaders were official representatives of the school and, therefore, required higher academic standing. *See id.* at 523.

[432] *See id.* at 524.

[433] *See id.*

[434] 679 F. Supp. 833 (N.D. Ind. 1988).

[435] *See id.* at 835.

[436] *See id.* at 836-38.

[437] *See id.* at 856-57.

[438] *See id.* at 857-58.

government's interest in preventing the transmission of the disease. Therefore, for this and all of the foregoing reasons, such testing is unconstitutional under an equal protection analysis.

C. Due Process and the ADA

In 1993, boxer Ruben Palacio tested positive for HIV prior to a scheduled fight.[439] Consequently, the World Boxing Organization stripped him of his boxing title and prohibited him from further participation in the sport. However, the ADA[440] and the Rehabilitation Act of 1973[441] prohibit unjustified discrimination by employers or places of public accommodation against people with HIV without a medically sound basis. Thus, the question is whether excluding HIV-positive athletes from boxing is medically sound given the minimal risk of transmission.

The professional athlete who is disqualified from licensure in a given state because of an HIV-positive status may rely on the ADA, which forbids discrimination against disabled individuals who otherwise qualify to benefit from a public entity.[442] This defense has no effect on the validity of the mandated HIV test, but may apply to the subsequent exclusion from participation based on that test. Pursuant to the ADA, a disabled individual is anyone who: (1) has a physical or mental impairment that substantially limits one or more major life activities;[443] (2) has a record of such impairment;[444] and (3) is regarded as having such an impairment.[445] The applicability of the ADA to HIV-infected individuals is derived from the Supreme Court's interpretation of the Rehabilitation Act.[446]

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[439] *See* Gerald Eskanazi, *HIV Positive, He Hands in His Crown*, N.Y. TIMES, Apr. 17, 1993, at 31. Palacio was later sentenced to five years in a federal prison for importing heroin. *See* Dan Le Batard, *Life Sentence*, MIAMI HERALD, June 4, 1995, at 1.

[440] 42 U.S.C. §§ 12101-12213 (1990).

[441] 29 U.S.C. §§ 701-796i (1985 & Supp. 1994).

[442] *See* 42 U.S.C. § 12132 (1994).

[443] *See id.* § 12102(2)(A).

[444] *See id.* § 12102(2)(B).

[445] *See id.* § 12102(2)(C).

[446] Regulations promulgated by the Department of Justice specifically include HIV status as a protected disability under the Americans With Disability Act ("ADA"). *See* 28 C.F.R. § 36.104. Many courts recognize this application. *See, e.g.*, Carparts Distribution Ctr., Inc. v. Automotive Wholesaler's Ass'n of New England, Inc., 37 F.3d 12, 21 (1st Cir. 1994) (vacating dismissal of complaint for alleged discrimination based on AIDS-related disability); Severino v. North Fort Myers Fire Control Dist., 935 F.2d 1179, 1182 & n.4 (11th Cir. 1991) (recognizing AIDS as handicap under Rehabilitation Act but refusing to find discrimination

It is questionable whether individual state boxing commissions would qualify under the employment provisions (title I) or the public accommodation provisions (title III) of the ADA.[447] However, courts could interpret the "public entity" definition under the ADA to include state and local governments.[448] In *T.E.P. v. Leavitt*,[449]

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in instant case); Leckelt v. Board of Comm'rs, 909 F.2d 820, 825 (5th Cir. 1990) (assuming that HIV is impairment protected under Rehabilitation Act); Martinez v. School Bd. of Hillsborough County, 861 F.2d 1502, 1506 (11th Cir. 1988) (finding that AIDS qualifies as handicap under Rehabilitation Act); Greenway v. Buffalo Hilton Hotel, 951 F. Supp. 1039, 1049 (W.D.N.Y. 1997) (finding no dispute as to protection of HIV-positive status under ADA); Gonzales v. Garner Food Servs., Inc., 855 F. Supp. 371, 374 n.5 (N.D. Ga. 1994) (stating that AIDS is disability under ADA); United States v. Morvant, 843 F. Supp. 1092, 1094 (E.D. La. 1994) (denying defendant's motion to dismiss for failure to state claim in case involving discrimination by dentist based on HIV-positive status); Doe v. Shapiro, 852 F. Supp. 1246, 1255-56 (E.D. Pa. 1994) (denying defendant's motion to dismiss regarding application of ADA to AIDS); Doe v. Washington Univ., 780 F. Supp. 628, 631 (E.D. Mo. 1991) (enumerating qualification factors for individuals who are handicapped under Rehabilitation Act); Doe v. Centinela Hosp., 1988 WL 81776, at *7 (C.D. Cal. 1988) (stating that HIV qualifies as handicap); Doe v. Denny's, Inc., 146 Or. App. 59, 64 (1997) (concluding that HIV status is physical impairment). It is questionable, however, whether professional athletes could prove that the program from which they are being denied benefits or from which they are being excluded is federally funded. *See* 29 U.S.C. § 794(b) (defining program or activity). However, many teams, some of which are virtually co-owned by state agencies, obtain the necessary public funding to stay in their geographic areas or to construct stadiums or arenas. *See* Anderson, *supra* note 211, at 303. Thus, it is not impossible for a professional athlete to assert a valid claim under the Rehabilitation Act even if the mandate and subsequent exclusion originates as an individual team regulation.

[447] *But see* Colome v. State Athletic Comm'n of Cal., 55 Cal. Rptr. 2d 300, 300 (Ct. App. 1996) (holding that State Athletic Commission was entitled to sovereign immunity in claim for failure to issue license).

[448] The application of the Act to state government actions was denied in *Atascadero State Hospital v. Scanlon*. *See* 473 U.S. 234, 246 (1985) (finding that Eleventh Amendment bars application of Rehabilitation Act to states). *Atascadero* was subsequently overruled by the enactment of 42 U.S.C. § 2000d-7 (1994). In *Duva v. World Boxing Association*, it was held that actions taken by a boxing association are considered state action and are subject to the provisions of the United States Constitution because the commission carries out a "public function" through its "substantial interest in strictly controlling an activity which involves the deliberate infliction of potentially serious injury on its participants." *See* 548 F. Supp. 710, 717 (D.N.J. 1982). Similarly, in *Ali v. Division of State Athletic Commission of the Department of State*, 316 F. Supp. 1246, 1250 (S.D.N.Y. 1970), wherein Muhammad Ali contested the denial of his boxing license because of his refusal to serve in the armed forces, the court held that, in determining whether Ali's equal protection rights were violated by the New York Athletic Commission, the acts of a duly constituted state commission are deemed the actions of the state itself. *See id.*; *see also* Wiley v. NCAA, 612 F.2d 473, 477-80 (10th Cir. 1979) (Holloway, C.J., dissenting) (noting that NCAA's actions would be state actions); Rivas Tenorio v. Liga Atletica Interuniversitaria, 554 F.2d 492, 494-96 (1st Cir. 1977) (concluding that actions of Puerto Rican equivalent of NCAA are state actions); Howard Univ. v. NCAA, 510 F.2d 213, 217-20 (D.C. Cir. 1975) (finding that where athletic association

which involved state action, the Court held that the ADA was applicable to the issue of AIDS.[450] In *Leavitt*, the Court addressed the validity of a Utah statute prohibiting and voiding marriages by persons with AIDS.[451] The court held that the statute's disqualification of HIV-positive candidates for marriage licenses violated the ADA and the Rehabilitation Act.[452] Following the reasoning of *Leavitt* in its application of the ADA, states that prohibit the licensure of professional boxers because of their HIV-positive status also violate the Act.

In analyzing the Rehabilitation Act in *School Board of Nassau County v. Arline*,[453] the Court held that contagious diseases[454] should qualify as "handicaps" under the Act.[455] The Supreme Court held that excluding persons carrying a contagious disease from specific activities violated federal law.[456] A similar qualification of HIV as a disability is applied under the ADA.[457] However, the degree of risk of communicating infectious disease varies from sport to sport[458] — boxing qualifies as a riskier sport than tennis.[459] Therefore, this

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consists of public bodies, state action is present); Parish v. NCAA, 506 F.2d 1028, 1032 (5th Cir. 1975) (concluding that activities of NCAA constitute state actions); Associated Students, Inc. v. NCAA, 493 F.2d 1251, 1255 (9th Cir. 1974) (finding that enforcement activities of NCAA are state actions).

[449] 840 F. Supp. 110 (D. Utah 1993).

[450] *See id.* at 111.

[451] *See* UTAH CODE ANN. § 30-1-2(1) (Supp. 1993).

[452] *See Leavitt*, 840 F. Supp. at 111.

[453] 480 U.S. 273 (1987).

[454] The contagious disease at issue in *School Board of Nassau County* was tuberculosis. *See id.* at 289.

[455] *See id.* at 285-86.

[456] *See id.*

[457] In the first two years after the ADA became effective, the Equal Employment Opportunity Commission ("EEOC") filed 23 cases under the statute, 11 of which involved HIV or AIDS-related issues. *See* RUTH COLKER, THE LAW OF DISABILITY DISCRIMINATION 35-36 (1995). In the first five years of the ADA, the EEOC filed 89 lawsuits, one-third of which involved HIV infection. *See* John Gibeaut, *Filling a Need*, 83 A.B.A. J. 48, 49 (1997). Several other recent cases have involved HIV and the ADA. *See, e.g.*, Abbott v. Bragdon, 107 F.3d 934, 937 (1st Cir. 1997) (becoming first court to hold that HIV-infected individuals are covered under ADA, even if they show no physical signs of illness); *Carparts Distribution Ctr., Inc. v. Automotive Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12, 14 (1st Cir. 1994) (discussing employer who purchased insurance through trade association, which capped benefits for AIDS-related illnesses); Anderson v. Gus Mayer Boston Store of Delaware, Inc., 924 F. Supp. 763, 769 (E.D. Tex. 1996) (concerning employer that switched to new health care plan that excluded employee who later died of AIDS).

[458] *See* Wolohan, *supra* note 126, at 394-95 (concluding that transmission of HIV in contact sports is higher than in other sports).

[459] *See* Ruth Hamel, *AIDS: Assessing the Risk Among Athletes*, 20 PHYSICIAN & SPORTSMED.

varying degree of risk significantly impacts on the applicability of the ADA to athletes who participate in a given sport.[460]

Many lower courts do not adhere to the strict standard enumerated by the Supreme Court in *School Board of Nassau County*; lower courts prohibit participation in specific activities by HIV-infected individuals without medically justifying the exclusions.[461] While the risk to opposing competitors of contracting HIV through physical contact is minimal, it may be more medically justifiable to exclude HIV-infected athletes from competition based on the medical consequences to themselves. In *Southeastern Community College v. Davis*,[462] for example, the Supreme Court held that if doctors determine that an athlete with a chronic illness is unable to meet the physical demands of the sport, the state may exclude the athlete from participating.[463] But there is little evidence demonstrating that an HIV-infected athlete is per se unable to participate in athletic competition at a satisfactory level or to a degree that places his or her own physical well-being in danger in any way.[464] In light of the First

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139, 142 (1992) (stating that sports with lowest risk of HIV transmission include tennis, baseball, and gymnastics).

[460] *See, e.g.*, Chalk v. United States Dist. Court, 840 F.2d 701, 705 (9th Cir. 1988) (discussing determination of significant risk). For a discussion of the ADA's application to high school and college athletes, see J. Timothy Gorman, *Athletic Competition and Individuals with Disabilities: Statutory Safeguards for the "Otherwise Qualified" Athlete*, 3 SPORTS LAWS. J. 103, 108-16 (1996).

[461] *See, e.g.*, Doe v. Dolton Elementary Sch. Dist. No. 148, 694 F. Supp. 440, 449 (N.D. Ill. 1988) (holding that school could exclude HIV-positive student). *But see* Ray v. School Dist. of DeSoto County, 666 F. Supp. 1524, 1536-38 (M.D. Fla. 1987) (granting injunction that barred school district from excluding HIV-positive students from attending classes).

[462] 442 U.S. 397, 398 (1979).

[463] *See id.*

[464] Medical experts believe that HIV-infected athletes compete in physically competitive sports at the high school, college, and professional levels, with relatively minimal personal risk to the individual infected athlete. *See* Leonard H. Calabrese & Dennis Kelley, *AIDS and Athletes*, 17 PHYSICIAN & SPORTSMED. 126, 127-32 (1992); Larry W. Rigsby et al., *Effects of Exercise Training on Men Seropositive for the Human Immunodeficiency Virus-1*, 24 MED. SCI. SPORTS EXERCISE 6, 6-12 (1992); Dale W. Spence et al., *Progressive Resistance Exercise: Effect on Muscle and Anthropometry of a Select AIDS Population*, 71 ARCHIVES PHYSICAL & MED. REHABILITATION 644, 644-48 (1990).

In fact, experts estimate that there are probably about 30 HIV-infected athletes who are currently participating in the major contact sports of boxing, basketball, football, and hockey. *See* Cote, *supra* note 129, at 7. The conclusion that these HIV-positive participants are at minimal personal risk is illustrated by Magic Johnson's return to professional and Olympic competition after his disclosure of HIV-positive status. Upon his return to professional basketball, Johnson's physicians initially had several concerns, which, in addition to the psychological effects, included "added stresses that could impair his immune system:

Circuit's decision in *Abbott v. Bragdon*,[465] which held that the ADA protected HIV-positive individuals even if they showed no signs of illness, it will be difficult to prohibit HIV-positive athletes from participating in a sport without medical evidence of the physical toll of HIV.[466]

Therefore, under the ADA, excluding a professional athlete from a sport because of a known disability,[467] not reasonably accommodating an otherwise qualified athlete when such accommodation is not an undue hardship,[468] and using nonjob related standards to screen out athletes with disabilities discriminates against those athletes. If mandatory HIV tests are implemented solely to discover and exclude HIV-infected athletes from the sport or to mandate other specific requirements for playing, then such a mandate violates the ADA.[469] The only justification for such discrimination under the ADA is to demonstrate that the disabled individual poses a direct threat to the health and safety of others.[470] This criteria is based on a high probability of substantial harm. In professional boxing, where the risk of transmission is low, no justification exists for such discrimination. However, as the disease progresses and the capabilities of the participant diminish proportionally, the accommodations required for a late-stage participant may quickly become a hardship and the analysis might lead to another conclusion.[471]

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exhaustion, alterations in day-night cycles from travel across time zones, exposure to large numbers of people and transmission of other infections, and changes in eating habits because of travel." *See* Amber Stenger, *Watching Magic's Comeback*, 20 PHYSICIAN & SPORTSMED. 15, 15 (1992).

[465] 107 F.3d 934 (1st Cir. 1997).

[466] It is expected that *Abbott* will find its way to the Supreme Court and, when heard, it will have direct implications for the issues addressed in this Article involving the likelihood of risk as a factor in considering the outcome. In more than two billion routine dental procedures since the outbreak of the AIDS epidemic in the early 1980s, there have been no reported cases of AIDS transmission from patient to dentist. *See* Gibeaut, *supra* note 458, at 52. Clearly, such a consideration is directly analogous to the arguments proposed in this Article regarding the likelihood of transmission as the linchpin in the issue of mandated testing of boxers.

[467] *See* 42 U.S.C. § 12112(b)(4) (1990) (defining "discriminate" to include denying equal rights or jobs to qualified individual because of known disability of another individual with whom qualified individual is known to have relationship).

[468] *See id.* § 12112(b)(5)(A).

[469] *See id.* § 12112(b)(6) (prohibiting use of job qualification standards or tests that are not job-related or for business necessity).

[470] *See id.* § 12113(b).

[471] *See* Anderson, *supra* note 211, at 307-08.

V. WHAT ELSE CAN BE DONE?

The arguments against mandating HIV testing of professional boxers, or any professional sports figures, appear incongruous. Professional athletes are at a high risk of infection due to their frequently risky personal behavior practices combined with the large volume of physical contact involved in very violent sports; yet there is a low risk of transmission within any given sports activity. Despite any off-the-field risk to which the participants may expose themselves, however, the government's interest in mandating testing must be narrowly focused within the scope of the sport. Thus, if the high risk of infection for athletes originates from extra-athletic activities, then the government or individual sports association should focus on education, counseling, and alternative preventive measures, rather than mandatory testing and exclusion from the sport. Therefore, the crux of any argument for or against mandatory HIV testing of professional athletes must be whether the government's interest is reasonably related to preventing the spread of the disease through sports activities.

This Article demonstrates that the risk of transmission through sports activities is almost zero. Because the risk of transmitting HIV on the playing field is minimal and because mandated testing does not serve to reduce the risk of transmission, the government's interest in protecting the athlete and the public from transmission on the playing field must also be minimal.[472]

The call for minimal boxing reform to promote the health and safety of the fighters has been heard. However, many proposals are narrowly focused on the physical "wear and tear" on the boxer, such as brain damage and eye injuries, resulting from the physical beatings the boxers receive in the ring.[473] Proposals tailored to minimize these injuries include the adoption of more protective gear in the ring, a reduction of injury-causing tactics during a fight, and better conditioning of the athlete to absorb the beating.[474] While

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[472] *See id.* at 311 (arguing that testing without other measures is insufficient to fight disease).

[473] *See, e.g.*, Carnall & Warden, *supra* note 122, at 1183 (stating that Britain is considering new safety measures to help prevent head injuries).

[474] *See, e.g.*, Heyward L. Nash, *Making Boxing Safer: A Fight-Doc's View*, 13 PHYSICIAN & SPORTSMED. 145, 147 (1985) (suggesting that upgraded training and conditioning by lengthening daily running distances, requiring boxers to perform more sit-ups and leg-raises, and encouraging boxers to jump rope will help boxers withstand punishment that

such proposals may be beneficial in reducing the risk of brain injury or other bodily trauma, they do not minimize the risk of HIV transmission during a fight.

The central question concerns the possibility of HIV transmission within the context of boxing: does the remote possibility of HIV transmission justify mandatory HIV testing? Some medical professionals are confident in the extremely — almost infinitesimally — low risk of transmitting the disease during a boxing event, yet remain adamant in their support of mandatory testing.[475] Perhaps testing seems justified because of data which suggests that, as of 1993, approximately .08% of NCAA athletes were infected with the virus.[476] Perhaps an implied association exists between HIV status and extra-athletic activities such as drug use, promiscuous sexual activity, and the racial composition of many boxers.[477] Surely these activities and propensities cannot justify any attempt to satisfy the constitutional safeguards associated with the Fourth, Fifth, and Fourteenth Amendments, especially because there are less invasive procedures that would accommodate health care concerns and the Constitution. These procedures vitiate any effort by state legislatures and state boxing commissions to justify mandatory HIV testing.

Because of the disparate regulatory regimes among states and athletic associations, and because of the legal debate regarding the implementation of mandatory HIV tests, many states and sports associations have developed policies oriented towards a less intrusive analysis. Recommendations for health and safety reform in boxing have been voiced by the American Medical Association and other medical organizations since as early as 1962.[478] Such recommenda-

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they receive in ring).

[475] *See* Gildea, *supra* note 5, at F2.

[476] *See* Christopher A. McGrew et al., *Survey of NCAA Institutions Concerning HIV/AIDS Policies and Universal Precautions*, 25 MED. & SCI. IN SPORTS & EXERCISE 917, 919 (1993).

[477] *See* Aurelia Nattiv & James C. Puffer, *Lifestyles and Health Risks of Collegiate Athletes*, 33 J. FAM. PRACT. 585, 585-90 (1991).

[478] *See Committee on Medical Aspects of Sports: Statement on Boxing*, 181 JAMA 242, 242 (1962). Other medical and sports groups that have implemented guidelines regarding the transmission of infectious blood during sporting events include: the American Academy of Pediatrics, American Academy of Pediatrics Committee on Sports Medicine and Fitness, *Human Immunodeficiency Virus [Acquired Immunodeficiency Syndromes (AIDS) Virus] in the Athletic Setting*, 88 PEDIATRICS 640, 640-41 (1991), the Canadian Academy of Sports Medicine, Canadian Academy of Sports Medicine Task Force on Infectious Disease in Sports, *HIV as It Relates to Sport*, 3 CLIN. J. SPORTS MED. 63, 63-65 (1993), the World Health Organization, Goldsmith, *supra* note 195, at 1311-14 (including International Federation of Sports Medi-

tions have changed little over the years and do not support mandatory testing per se.[479] Moreover, the boxing community considers some reform measures to be impractical, such as one measure to disqualify blows to the head.[480] Another proposed reform calls for boxers to be wired for electronic scoring, thereby eliminating the need for violent blows.[481] Yet another proposes to eliminate boxing gloves (which absorb sweat and effectively serve as a weighted club), thereby increasing the pain and injury incurred by the boxer with unprotected hands and, consequently, minimizing the quantity of distributed blows.[482] Even reforms mandating that protective gear be worn on the head have been rejected.[483]

The boxing community has favorably received reform measures calling for increased federal regulation of the sport, despite initial defeat in 1983. This defeat was due in great part to the fear of federal regulation of other professional sports associations.[484] As of 1994, forty-three states had commissions to regulate boxing.[485] Because of the lucrative media aspects of the sport,[486] known as the "red light

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cine, International Olympic Committee's Medical Commission, and American College of Sports Medicine), and the National Collegiate Athletic Association, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, NCAA SPORTS MEDICINE HANDBOOK, 24-26 (1992) (discussing guideline 2-h, which addresses AIDS and intercollegiate athletics).

[479] *See* Council on Scientific Affairs, *Brain Injury in Boxing*, 249 JAMA 254, 256 (1983) (recommending against ban on boxing and noting that no reliable test exists for identifying boxers at risk for sudden death or brain damage).

[480] *See* M. Kaste et al., *Is Chronic Brain Damage in Boxing a Hazard of the Past?*, 2 LANCET 1186, 1188 (1982) (proposing disqualification of blows to head).

[481] *See* Lynne Cohen, *Should the Sport of Boxing Be Banned in Canada?*, 130 CAN. MED. ASSOC. J. 767, 768 (1984); *see also Health and Safety Hearings*, *supra* note 4, at 39 (noting support by boxing commentator Al Bernstein). *But see id.* at 12 (discussing arguments of international professional boxing judge Patricia Jarman that Nevada system does work).

[482] *See* Allan J. Ryan, *Eliminate Boxing Gloves*, 11 PHYSICIAN & SPORTSMED. 49, 49 (1993) (arguing that removing boxing gloves would deemphasize knockout punches, thereby saving lives).

[483] *See* W.R. Timperley, *Banning Boxing*, 285 BRIT. MED. J. 289, 289 (1982) (suggesting that weight and irregular surface space of headgear may increase rotational forces on head, actually resulting in greater risk of brain damage).

[484] *See* Morrison, *supra* note 62, at 2480.

[485] *See Health and Safety Hearings*, *supra* note 4, at 2 (statement of Sen. Richard H. Bryan) (noting that 43 states have established commissions to regulate boxing).

[486] *See id.* at 1 (finding that live and telecast events have millions of fans, and that two leading television networks broadcasting boxing, ESPN and USA, have combined subscriptions of 120 million people).

district of sports,"[487] individual state reform is apt only to cause promoters to schedule fights in less-regulated states.

Other reforms, such as limiting the duration of boxing matches, have found medical support.[488] Studies reveal that amateur boxers who fight only three rounds per match suffer significantly less brain damage than professional boxers, who can fight up to twelve rounds per bout.[489] Some think that a compromise between the medical and boxing communities that encourages increased diagnostic and educational programs to demonstrate the correlation between boxing and severely negative medical consequences will decrease the incentive to continue in, or even join, the profession.[490] At a minimum, these programs will prevent serious injuries incurred through participation in underground clandestine events.[491] Still others, with a call for medical oversight, view a ban on boxing as a Millsian or Kantian moral oppression to the individual and its pursuits.[492]

Despite these varying perspectives, many sports oriented institutions are implementing guidelines or "universal precautions" to minimize the risk of transmission.[493] In a survey conducted in 1992, of the 65% of responding NCAA-membered institutions, only 4% routinely tested athletes for HIV.[494] Only two of those twenty-two schools required their athletes to take these tests; the remaining schools tested on a voluntary basis after a brief educational presentation to the athletes.[495] Further, the survey revealed that 18% offered tests only if requested by the athlete and without a preliminary educational presentation.[496] While HIV testing is effective, easily

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[487] *See id.* at 3 (statement of Sen. John McCain) (referring to boxing as red light district of sports because it continues to be plagued by inadequate safety measures, improper financial arrangements, and weak regulatory oversight).

[488] *See, e.g.*, G. La Cava, *Prevention in Boxing*, 23 J. SPORTS MED. PHYSICAL FITNESS 361, 363 (1983) (advocating that boxing matches be limited to six rounds).

[489] *See id.* At one time, professional boxers could fight up to 15 rounds per bout. *See id.*

[490] *See* Morrison, *supra* note 62, at 2480 (commenting on recommendation of American Academy of Pediatrics that physicians try to steer young athletes toward other sports).

[491] *See* Russel H. Patterson, Jr., *Boxing, Personal Freedom and the Right of Lions to Christians*, 256 JAMA 1895, 1895 (1986) (asserting that boxing injuries in clandestine events increased when boxing was banned).

[492] *See* Russel H. Patterson, Jr., *On Boxing and Liberty*, 255 JAMA 2481, 2481 (1986).

[493] *See* McGrew et al., *supra* note 477, at 917-18 (describing universal precautions used in handling potentially infectious bodily fluids to prevent or minimize transmission of pathogens).

[494] *See id.* at 918.

[495] *See id.*

[496] *See id.* Approximately 70% of the responding schools offered no HIV testing. *See id.*

conducted by most laboratories, quickly conclusive, and inexpensive,[497] certain drawbacks caution its mandatory employment in high-contact professional sports. The most prominent limitation is the potential for false-negative results, which inherently contradicts the behavior-modifying purpose of the model plan developed by the NFL.[498] There is also a remote possibility for false-positive results that might improperly exclude an athlete from competition and improperly disclose a false infected status. Even though the professional football population is considered a low-risk group for HIV transmission,[499] the former of the two false results is more likely. Secondary considerations include the financial and temporal investment of conducting universal tests and obtaining informed consents.[500] Further, given the relatively short careers of average professional athletes in high contact sports and the comparatively lengthy gestation period for HIV symptoms to impact athletic performance, the value of mandatory testing lacks an ideal goal orientation. Voluntary testing, however, is highly recommended and encouraged.

Of course, the issue of confidentiality permeates any policy involving HIV, even under a voluntary testing regime. The NFL encourages its players to participate in voluntary testing and, if the tests reveal an infection, the players may opt to seek medical attention from within the League. Notwithstanding their decision regarding medical attention, however, no rule requires them to disclose their test results to NFL personnel. If voluntary test results are disclosed to a

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A 1992 NCAA survey revealed that 62% of the responding schools had educational preventive-policy programs directed toward training room staff. *See id.* With regard to the guidelines recommended in these policies, however, only 55% of the schools had adherence rates of 90% or better. *See id.* at 918-19. Of the eight institutions that reported in the same 1992 survey that there were HIV-positive athletes at the school, three reported that the athletes were still competing in their respective athletic programs. *See id.* Three schools reported athletes with AIDS, only one of whom was still competing. *See id.* Only 6% of the responding schools (33 schools) had policies on the participation of HIV-infected athletes. *See id.* Only nine of those schools' policies were documented. Six of the 33 schools prohibited participation in any sport by HIV-infected athletes; nine of the 33 schools placed restrictions on participation is specific sports. *See id.* Only ice hockey and wrestling were restricted sports at all nine of the restrictive schools. *See id.*

[497] The cost of an HIV test in Nevada is approximately $25, which is typically absorbed by the fighter. *See* Springer & Gustkey, *supra* note 3, at 1.

[498] *See* Brown, *supra* note 197, at 405.

[499] *See id.*

[500] *See id.*

particular sports association, particularly those comprised of geographically localized teams, additional conflicts of law issues remain unresolved, such as which state law will apply in determining the NFL's obligation to report HIV-positive results?

One proposed solution in the world of professional sports is that, upon contracting with professional sports teams, associations, or foundations, athletes sign waivers authorizing team physicians to disclose the athletes' medical condition to the appropriate sports commission or association. Some statutes that mandate testing also address the issue of confidentiality with respect to the results of the mandated test. For example, California, which now requires HIV testing for boxers, also mandates that the information remain confidential and any suspension or denial of licensure for a positive HIV test must be justified only for "medical reasons."[501]

These concerns arise only where HIV testing is mandatorily imposed on the professional athlete. Whether such a mandate is legislative or regulatory, the tangential concerns surrounding such a mandate are relevant only if the imposition can withstand constitutional scrutiny. This Article demonstrates that mandatory HIV tests in professional sports cannot withstand constitutional scrutiny; therefore, the educational and preventive policies described above should be viewed as viable options.

The alternative in professional boxing should consist of measures that provide greater protections against the already-minimal risk of transmission. The most important preventive measure in any sport should be the education of all athletes, which serves a dual function: to educate the athletes of the risks of promiscuous sexual activity off

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[501] California's statute provides, in pertinent part:

> (b) Information received under this section and any other medical information about an applicant or licensee shall be confidential and not subject to discovery or subpoena. If the commission denies a license or the renewal of a license or suspends or revokes a license because of a licensee's HIV antibody status or HBV antigen status, it shall state only that the action was taken for medical reasons. An applicant or licensee may appeal the commission's denial, suspension, or revocation of a license under this section. The commission shall notify each person in writing of his or her right to a closed hearing for that appeal. An applicant or licensee must make a request for a hearing to the commission within 30 days of receiving notification from the commission of the applicant's or licensee's right to a hearing.

CAL. BUS. & PROF. CODE § 18712(b) (West 1997).

the playing field and to alert the athletes of the minimal risk of transmission on the playing field provided they follow certain precautions. This may both reduce the transmission of HIV and alleviate the fear and stigmatization that accompanies the disease.

CONCLUSION

The debate over mandated HIV testing of boxers occurs at a unique and promising time within the AIDS pandemic. First, efforts to educate the population of the accurate and noncasual methods of transmission have resulted in changed behavior and hope for future behavior modifications.[502] Second, there have been major successes with new drugs and combinations of drugs.[503] The effect of these new drugs and the promise they hold for HIV-infected persons who can afford to pay for them has been nothing short of miraculous.

While the new drug therapies have a dramatic effect upon the nature and consequences of HIV infection,[504] the burden, stigma,

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[502] *See generally* Jeff Stryker et al., *Prevention of HIV Infection*, 273 JAMA 1143 (1995) (arguing that education efforts have resulted in short-term behavioral changes).

[503] "New AIDS drugs that act by blocking the activity of a protease enzyme needed for AIDS virus replication can reduce the amount of HIV in the patients' blood and, in late-stage patients, possibly decrease disease and death by as much as 50%." Jon Cohen, *Results on New AIDS Drugs Bring Cautious Optimism*, 271 SCIENCE 755, 755 (1996) (commenting that protease inhibitor drugs show promise in lowering HIV levels in blood); *see also* Anthony S. Fauci, *AIDS in 1996: Much Accomplished, Much to Do*, 276 JAMA 155, 155 (1996) (remarking that new class of drugs holds great promise); Rebecca Voelker, *New HIV Drugs Cast in Supporting Roles*, 276 JAMA 585, 585 (1996) (stating that, in addition to protease inhibitors, non-nucleoside reverse transcriptase inhibitors appear to have promise in prevention and treatment of HIV); Rebecca Voelker, *Can Researchers Use New Drugs to Push HIV Envelope to Extinction?*, 276 JAMA 435, 435 (1996) (noting that developments in monitoring disease progression, along with use of new drug therapies, provide hope in managing disease); Catherine M. Wilfert, *Beginning to Make Progress Against HIV*, 335 NEW ENG. J. MED. 1678, 1679 (1996) (stating that combination of drugs reduces viral burden within two to three weeks of beginning therapy). *But see* Rebecca Voelker, *Several New Drugs Shift Direction of Treatment and Research for HIV/AIDS*, 275 JAMA 89, 89 (1996) (arguing that emergence of new HIV/AIDS drugs could be double-edged sword in that physicians will not be able to find best drug combinations).

[504] The Centers for Disease Control and Prevention reports that the number of AIDS deaths has dropped significantly for the first time in the history of the disease. During the first six months of 1996, AIDS deaths fell 13% compared to the first six months of 1995. Also, although the number of people diagnosed with AIDS continues to grow, the growth rate is slowing — from 5% between 1993 and 1994 to less than 2% between 1994 and 1995. New York City reported a decline in AIDS deaths in 1996. This turn in statistics is credited to better treatment and more accessible state and federal programs. *See* Centers for Disease Control and Prevention, U.S. Dep't of Health and Human Services, *Update: Trends in AIDS*

and possible fatality of HIV remains, particularly for many celebrity professional athletes. Thus, the recent successes in treatment should not quell the debate over mandatory testing within the boxing community. Testing for HIV, drugs, or any other element within the human person should still invite careful constitutional scrutiny.

Based on the medical evidence described within this Article, only the most remote possibility of HIV transmission exists during the course of a boxing match. Admittedly, boxing is a contact sport, one involving blood and perspiration. Moreover, boxers wear scant clothing when compared to almost any other contact sport. Under the correct and unique circumstance, a boxer could potentially transmit HIV-infected blood to another boxer in the ring. However, no such transmission has occurred to date, even before the implementation of mandatory testing. Indeed, no instance of HIV transmission has occurred at any professional sporting event in the United States. Second, the necessary criteria for successful transmission during a sporting event, such as late-stage HIV, makes participation and transmission even more unlikely. Thus, the issue quickly resolves itself to one question: does this scant opportunity for transmission provide a compelling reason or, in any balancing test, a rational basis for compelled bodily intrusion? The Constitution would say: "No."

Under certain circumstances, the Fourth Amendment protects against unreasonable intrusions into boxers' bodily fluids. The Fourteenth Amendment asks if boxers similarly situated to other athletes receive equal treatment when requested to undergo mandatory testing. The Due Process Clause invites considerations of fairness — a burden of justification. The nonprobability of transmission and the devastating economic and social consequences of identification as HIV-infected do not justify intrusion into the body of an individual boxer. Whatever one may think of the right to privacy as it appears from the penumbra of the First, Third, Fourth, Fifth, and Ninth Amendments, reality dictates that people and societies have historically safeguarded the right to bodily protection, including the protection of something so precious as blood.

Incidence, Deaths, and Prevalence-United States, 1996, 46 MORBIDITY AND MORTALITY WKLY. REP. 165, 165-72 (1997).

In questioning what more should be done to protect the boxer from HIV and bodily injury, many solutions arise. However, the mandatory HIV testing of professional boxers is an avenue that should be pursued no further; as a preventive means, it is unconstitutional, ineffective, and furthers only a symbolic end.