

THE CRUELEST SPORT: BOXING, BANNING, AND THE HART-DEVLIN DEBATE

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Abstract:

Because physical harm seems to be the sport's chief objective, boxing—the centuries-old art of hand-to-hand combat—has long been under fire from both legal and moral activists who call for its proscription. Most recently, when doctors induced a coma to curb the injuries of a heavyweight boxer after a nationally televised prizefight, activists reignited calls to ban boxing.

The lasting question of the sport's morality recalls the famous debate between Lord Devlin and Professor Hart on the legal enforcement of moral principles, which provides a bifurcated view on morality and a useful way to evaluate the ethical legality of boxing. Lord Devlin's legal moralism and Professor Hart's harm principle may seem diametrically opposed, but neither perspective demands a ban on boxing. Boxing prepares its participants for society, and boxers understand the dangers inherent to the sport. Therefore, even though the two sides of the Hart-Devlin debate reference different justifications for the enforcement of morals, neither Lord Devlin nor Professor Hart would approve of boxing's proscription.

I. INTRODUCTION

On November 2, 2013, heavyweight boxer Magomed Abusalamov lost a prizefight to Mike Perez at Madison Square Garden in New York City.

¹ Premium cable giant HBO televised the fight.² After the loss, Abusalamov vomited outside the arena and

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was rushed to a hospital, where doctors induced a coma to curb brain swelling and remove a blood clot.³ The story appeared on the front page of *The New York Times*.⁴

The tragedy reignited uncertainty over boxing's legality. The *New York Daily News* answered bluntly with a headline stating, "It's time for New York to give up the fight and ban boxing."⁵ Boxing's barest question still surrounds the sport today: "Is this the cruelest sport of all, or the sweet science?"⁶

Even as far back as the late 19th and early 20th centuries, critics, both legal and religious, called for the ban of boxing on moral grounds. These criticisms ranged from laws condemning boxing for its viciousness⁷ to ministers rallying against boxing's spectacle of violence.⁸ The intersection of law, morality, and boxing recalls the enduring debate over morality-based lawmaking, revived in

was circulated to the private membership of the International Boxing Research Organization.

1. *HBO World Championship Boxing: Golovkin vs. Stevens* (HBO television broadcast Nov. 2, 2013).

2. *Id.*

3 Greg Bishop, *Reconciling a Sport's Violent Appeal as a Fighter Lies in a Coma*, N.Y. TIMES, Nov. 21, 2013, at A1.

4 *Id.*

5 Filip Bondy, *It's time for New York to give up the fight and ban boxing*, DAILY NEWS, (Nov. 30, 2013, 4:27 PM), <http://www.nydailynews.com/sports/more-sports/score-time-ko-boxing-article-1.1533617>.

6. *HBO World Championship Boxing: Guerrero vs. Berto* (HBO television broadcast Nov. 24, 2012) (commentary by Jim Lampley, Max Kellerman, and Roy Jones).

7. *See, e.g., Seville v. State*, 30 N.E. 621, 622 (1892) (affirming an Ohio statute prohibiting professional boxing).

8. *See, e.g., Stuart Mews, Puritanicalism, Sport, and Race: A Symbolic Crusade of 1911*, 8 STUD. IN CHURCH HIST., 303, 330 (1972) (recounting Baptist Minister F.B. Meyer's protest of the heavyweight championship match between Jack Johnson and Bombardier Billy Wells).

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the 1960s by legal thinkers Lord Patrick Devlin and Professor H.L.A. Hart.⁹

The exchanges between Lord Devlin and Professor Hart constitute the most celebrated discourse on the legal enforcement of morality.¹⁰ The prominence of the Hart-Devlin debate qualifies the discussion as an appropriate lens through which to view professional boxing and its potential proscription. Professional boxing continues to suffer criticism from both religious and secular perspectives, each calling for the law to ban the sport.¹¹

This article contends that neither of the two leading arguments on the legal enforcement of morality indicates that lawmakers should ban boxing. Part II of this article assesses three cases that demonstrate how the law and the public historically authenticated the sport. Part III summarizes Lord Devlin's case for legal moralism.¹² Part

9. See J. Paul McCutcheon, *Morality and the Criminal Law: Reflections on Hart-Devlin*, 47 CRIM. L. Q. 15 (2002) (explaining the background of the Hart-Devlin debate and providing criticism for either side).

10. Daniel F. Piar, *Morality as a Legitimate Government Interest*, 117 PENN. ST. L. REV., 141 n.13 (2012) ("The most famous debate to date on the enforcement of moral principles is that between H.L.A. Hart and Patrick Devlin."); but see ROBERT P. GEORGE, MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY 1 (1993) (outlining a more recent argument for the legal enforcement of morality).

11. See, e.g., Antoinette Vacca, *Boxing: Why It Should Be Down for the Count*, 13 SPORTS LAW J. 207, 231 (2006) (concluding that government has a public interest in addressing health issues related to boxing and substantially reforming the sport); *Boxing Condemned as Attempted Murder in Signs of the Times*, AMERICA, Oct. 31, 2005, <http://americamagazine.org/issue/548/news/signs-times> (reporting the severe criticism lobbied against boxing by the Jesuit magazine *La Civiltà Cattolica*).

12. See Keith Burgess-Jackson, *Our Millian Constitution: The Supreme Court's Repudiation of Immorality as a Ground of Criminal Punishment*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 407, 411

IV outlines Professor Hart's advocacy for the harm principle. Part V applies each argument to boxing to evaluate whether the law should criminalize the sport today and introduces a recent perspective on the Hart-Devlin debate from Professor Jack Anderson. Part VI concludes, as a legal enforcement of morality, neither Lord Devlin nor Professor Hart would support a ban on boxing.

II. BOXING AND THE LAW

A short review of boxing's legal history in the United States reveals how the law paralleled public sympathies regarding the morality of boxing and how the public began to accept the sport as both a personal choice and a regulated enterprise. This section uses three cases to illustrate the shifts in the public perception on boxing: the 1876 case *Commonwealth v. Collberg*,¹³ the 1895 case *People v. Fitzsimmons*,¹⁴ and the 1919 case *State v. District Court of Gallatin County*.¹⁵

A. Commonwealth v. Collberg

Commonwealth v. Collberg voiced a supposed distinction between boxing and other sports. In *Collberg*, two men engaged in a fistfight in the presence of several dozen people.¹⁶ Neither man received compensation for the fight, nor was either man hospitalized afterward.¹⁷ The Commonwealth of Massachusetts indicted both men for assault and battery against each other.¹⁸ At trial, the defendants asked for a jury instruction stating that if both

(2004) (defining legal moralism as "the principle that there is always a good reason for prohibiting and punishing immoral conduct").

13. *Commonwealth v. Collberg*, 119 Mass. 350 (1876).

14. *People v. Fitzsimmons*, 34 N.Y.S. 1102 (Ct. Sess. 1895).

15. *State v. Dist. Ct. of Ninth Judicial Dist., Gallatin Cnty.*, 185 P. 157 (1919).

16. *Collberg*, 119 Mass. at 351.

17. *Id.*

18. *Id.* at 350.

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men consented to the fistfight, then both men should be acquitted. The judge refused to give this instruction, and the defendants alleged exceptions.¹⁹

The Supreme Judicial Court of Massachusetts overruled the exceptions because boxing, unlike other sports, disturbed the community and had no utility.

*The common law recognizes as not necessarily unlawful certain manly sports calculated to give bodily harm, strength, skill and activity, and “to fit people for defence, public as well as personal, in time of need.” Playing at cudgels or foils, or wrestling by consent, there being no motive to do bodily harm on either side, are said to be exercises of this description. But prize-fighting, boxing matches, and encounters of that kind, serve no useful purpose, tend to breaches of the peace, and are unlawful even when entered into by agreement and without anger or mutual ill will.*²⁰

The Court distinguished boxing from other sports by highlighting the skills of self-preservation learned in fencing and wrestling. These sports taught useful tools for the defense of both public and person. Boxing, meanwhile, not only failed to teach the same skills but also disturbed the public. The Court’s view constituted an example of how many saw boxing as a disruptive and dishonorable activity, regardless of its designation as a sport and the participants’ consent.

By 1895, this view had softened once gloved boxing overtook bare-knuckled boxing. Gloves gave boxing the appearance of safety and arguably kept the sport from devolving into an unrefined and uncomfortable

19. *Id.*

20. *Id.* at 353 (citations omitted).

pursuit.²¹ The public began to view boxing as a more legitimate sport.

B. People v. Fitzsimmons

People v. Fitzsimmons became emblematic of this view. In *Fitzsimmons*, the state of New York charged the defendant with manslaughter when his sparring partner failed to regain consciousness after a boxing exhibition.²² The defendant conducted the fight under the Queensberry Rules, which prescribed gloved combat.²³ The Court highlighted the defense of lawful activity and further instructed the jury of boxing's inherent perils. "It is fairly to be inferred from their contention (what is a matter of common knowledge) that in any athletic contest, exhibiting powers of skill, there is necessarily involved an element of danger."²⁴ The jury acquitted the defendant,²⁵ suggesting that they acknowledged the difference between homicide and gloved athletic activity. Both the defendant and his sparring partner had agreed to box and, therefore, agreed to assume the risks inherent to boxing.

The public perception had changed. In 20 years, boxing had gone from an unlawful hobby to something approaching an athletic contest. "The Queensberry Rules

21. See, e.g., U.S. Patent No. 320,972 (filed Feb. 23, 1884) ("Boxing with gloves should be a pleasant and healthy exercise Persons of sedentary habits, professional men, and invalids—those that would be most benefited by such exercise—are generally prevented from engaging or benefiting themselves thereby from fear of the hard knocks and injuries they may receive. I have therefore invented a glove provided with an elastic inflated bag for a cushion, by means of which hard blows may be received without injury or disagreeable effects.").

22. *People v. Fitzsimmons*, 34 N.Y.S. 1102, 1102 (Ct. Sess. 1895).

23. See W. Russel Gray, *For Whom the Bell Told: The Decline of British Prize Fighting in the Victorian Era*, 21 J. POPULAR CULTURE 53, 59-60 (Fall 1987).

24. *Fitzsimmons*, 34 N.Y.S. at 1107.

25. *Id.* at 1113-14.

gave prizefighting respectability, legality (or at least legal acquiescence), and the modern look of today's contest.²⁶ In another 20 years, the public perception would shift even further.

C. State v. District Court of Gallatin County

State v. District Court of Gallatin County illustrated the public's final objections to seeing boxing as acceptable competition in 1919. In *Gallatin County*, the state of Montana imprisoned a boxing promoter for staging a prizefight in violation of a state statute.²⁷ The promoter contended that a subsequent statute, which provided for a state commission to regulate boxing, had constituted a *de facto* repeal of the state's anti-prizefighting statute.²⁸

*[The statute] sought to render boxing contests less offensive to the sensibilities of citizens opposed to prize ring contests, and...attempt[ed] to dress boxing with official sanction by empowering a commission to supervise the actions of all persons promoting boxing matches, to require contestants to submit to physical examination, to prescribe the kind of gloves to be worn, and to impose restrictions designed to remove the obnoxious influences frequently attending such affairs[.]*²⁹

The statute endeavored to validate boxing in a tangible way. Through an oversight commission, the government gained control over several of the alleged dangers of boxing, such as sham mismatches, poor equipment, and corruption. These safeguards helped alleviate the public disgust surrounding the sport.

26. Gray, *supra* note 23, at 60 (parenthetical included).

27. *State v. Dist. Ct. of Ninth Judicial Dist., Gallatin Cnty.*, 185 P. 157, 157 (1919).

28. *Id.* at 158.

29. *Id.*

Although Montana repealed this particular commission statute,³⁰ New York instituted the Walker Law in 1920, creating a state athletic commission with very similar oversight over boxing.³¹ “The Walker Law proved to be a critical turning point for boxing in the United States. It became a model for the legalization of the sport in other states, where similar legislation creating athletic commissions was passed. Furthermore, the new commissions lent structure and authority to the sport.”³² With state regulations in place, however minimal, the public accepted boxing and the risks inherent to each fighter’s choice. The public had quashed the distinction between boxing and other major sports, turning prizefighters into legitimate professionals. These issues of public acceptance and personal choice, overcome in 1920, were also central considerations in the works of Lord Devlin and Professor Hart.

III. LORD PATRICK DELVIN AND LEGAL MORALISM

Lord Devlin and Professor Hart’s debate emerged from the 1957 Wolfenden Report, which argued against the criminalization of homosexual adult activity done with consent and in private.³³ In 1959, Lord Devlin gave a lecture to the British Academy that responded to the

30. *Id.*

31. N.Y. UNCONSOL. LAW §§ 8901-8933 (McKinney 1974).

32. ROBERT G. RODRIGUEZ, THE REGULATION OF BOXING: A HISTORY AND COMPARATIVE ANALYSIS OF POLICIES AMONG AMERICAN STATES 35-36 (McFarland & Co. 6th ed. 2009).

33. Michael S. Saper, Comment, *Lord Devlin’s Hart Attack: The Hart-Devlin Debate on Law and Morality*, 1 HARV. LEGAL COMMENT. 202, 202-03 (1964) (providing a commentary on the Hart-Devlin debate and outlining the similarities of each side).

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Wolfenden Report.³⁴ In his lecture, Lord Devlin promoted a central tenet: that the law could enforce a public morality when necessary to preserve society and thereby justify legal moralism.³⁵

Lord Devlin believed that, without a public morality, society would collapse.³⁶ Therefore, a public morality acted as an adhesive to bond society together. Lord Devlin defined public morality as “a fundamental agreement about good and evil.”³⁷ Society needs this agreement to survive, because society is a community of ideas, with common thought being the foundation of society.³⁸ Morality is only one of many things a society requires to prosper. “A common morality is part of the bondage. The bondage is part of the price of society; and mankind, which needs society, must pay its price.”³⁹ Lord Devlin posited that public morality carries a maintenance cost to society, just like any other ethical or political system that helps a society sustain itself. Lord Devlin believed the law could exact this cost. His vision of the law safeguards society against any serious threat to morality.⁴⁰ “[S]ociety may use the [criminal] law to preserve morality in the same way as it uses it to safeguard anything else that is essential to its existence.”⁴¹ According to Lord Devlin, immoral acts could menace society’s safety and longevity because societies crumble more often from within.⁴² Thus, the law

34. PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* 1 (1965) (collecting Lord Devlin’s various lectures on the legal enforcement of morals as well as responding to criticisms levied against his argument).

35. *Id.* at 11.

36. *Id.* at 10.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 12-13.

41. *Id.* at 11.

42. *Id.* at 13.

under Lord Devlin punishes immoral conduct that threatens to unglue society.

Lord Devlin drew a parallel with government and treason law to illustrate how the legal enforcement of morality could weld society together.⁴³ “[A] recognized morality is as necessary to society as, say, a recognized government.”⁴⁴ Just as the law protects the government, Lord Devlin’s vision of the law protects the public morality. “The law of treason is directed against aiding the king’s enemies and against sedition from within. The justification for this is that established government is necessary for the existence of society and therefore its safety against violent overthrow must be secured.”⁴⁵ Essentially, treason law protects the institution of government because government is an essential aspect of society. In much the same way, Lord Devlin believed morality-based lawmaking secures the public morality because public morality is necessary for society’s continuation.

After justifying the legal enforcement of morals, Lord Devlin established a framework for determining whether the law should prevent a given action. Lord Devlin rejected the existence of a bright-line rule in the legal enforcement of morals and instead believed lawmakers should consider each type of action individually.⁴⁶ “The boundary between the criminal law and the moral law is fixed by balancing in the case of each particular crime the pros and cons of legal enforcement in accordance with the sort of considerations [outlined above].”⁴⁷ Lord Devlin refused to apply a bright-line rule because public morality

43. *Id.*

44. *Id.* at 11.

45. *Id.* at 13.

46. *Id.* at 21-22.

47. *Id.* at 22.

may shift with society and the law should not shackle a man to a morality with which few agree.⁴⁸

In essence, Lord Devlin asked lawmakers to consider two questions when deciding whether to create a law based in morality: (1) whether the given act is immoral; and (2) whether the given act threatens the preservation of society. While the latter question focuses on Lord Devlin's chief premise, the former question centers on the beliefs of the reasonable man. "Immorality then, for the purpose of the law, is what every right-minded person is presumed to consider to be immoral."⁴⁹ Lord Devlin preferred this method because it finds root in the practical public policy decisions of old Parliament.⁵⁰ Lord Devlin then concluded that, for the narrow purposes of law, this perception of immorality aligns closely with Christian teaching.⁵¹

IV. PROFESSOR H.L.A. HART AND THE HARM PRINCIPLE

Professor Hart disagreed with Lord Devlin and responded in a series of lectures at Stanford University.⁵² Professor Hart advanced the harm principle proposed by 19th-century philosopher John Stuart Mill: "'The only purpose for which power can rightfully be exercised over any member of a civilised community against his will is to prevent harm to others.'"⁵³ With regard to when the law should enforce morality, Professor Hart thought that Mill was correct.⁵⁴

48. *Id.* at 15, 22.

49. *Id.* at 15.

50. *Id.* at 15.

51. *Id.* at 23.

52. *See generally* H.L.A. HART, LAW, LIBERTY, AND MORALITY 16-17 (1963) (collecting Professor Hart's various lectures on the legal enforcement of morals).

53. *Id.* at 4.

54. *Id.* at 5.

Professor Hart favored the harm principle because he placed considerable value in individual liberty. “[A] right to be protected from the distress which is inseparable from the bare knowledge that others are acting in ways you think wrong, cannot be acknowledged by anyone who recognizes individual liberty as a value.”⁵⁵ Professor Hart believed in the right of a person to do as the person pleases, without regard for the personal judgment of others.⁵⁶

Professor Hart distinguished his position from Lord Devlin’s in part by examining the rationale behind laws against cruelty to animals. “It is too often assumed that if a law is not designed to protect one man from another its only rationale can be that it is designed to punish moral wickedness or, in Lord Devlin’s words, ‘to enforce a moral principle.’”⁵⁷ Professor Hart used the law against cruelty to animals as an example and believed another rationale justified such a law. “[I]t is certainly intelligible, both as an account of the original motives inspiring such legislation and as the specification of an aim widely held to be worth pursuing, to say that the law is here concerned with the *suffering*, albeit only of animals, rather than with the immorality of torturing them.”⁵⁸ Professor Hart differed from Lord Devlin because Professor Hart’s view of the law focused on the effect on the individual rather than the effect on society. Here, Professor Hart validated laws against cruelty to animals by highlighting the harm inflicted on the animal instead of highlighting any damage done to the community. Professor Hart also offered several additional

55. *Id.* at 46.

56. *Id.* at 47.

57. *Id.* at 34.

58. *Id.*

criticisms of Lord Devlin's argument that go beyond the scope of this article.⁵⁹

For the author's purposes, Professor Hart's analysis of morality-based lawmaking also boils down to two questions: (1) whether the given act involves an immature person or sexual morality; and (2) whether the given act harms another individual. The former question echoes Mill's own caveats about the harm principle that limited its application to human beings in the maturity of their faculties, because children and backward-thinking societies lack the reasoning ability the harm principle assumes an individual possesses.⁶⁰ Moreover, Professor Hart added a special exception for sexual morality and acknowledged the difficulty lawmakers face in dealing with delicate subjects such as prostitution.⁶¹ The latter question reiterates the general contention of the harm principle.

V. BOXING AND THE HART-DELVIN DEBATE

While Lord Devlin's view and Professor Hart's view seem divergent, neither perspective supports a ban on boxing. This section first examines boxing under Lord Devlin's criteria for morality-based lawmaking and then examines the sport under Professor Hart's criteria for the same. Finally, this section examines the perspectives of Professor Jack Anderson, who has also applied the Hart-Devlin debate to boxing.

59. *See, e.g., id.* at 55 (criticizing Lord Devlin for the lack of evidence supporting his primary contention); *id.* at 63 (believing Lord Devlin's view to exist outside contemporary social reality); *id.* at 82 (stating that Lord Devlin has a confused definition of society).

60. *Id.* at 4-5.

61. *Id.* at 5-11.

A. Boxing and Legal Moralism

To restate, Lord Devlin's view asked lawmakers to consider two questions when justifying the legal enforcement of morals: (1) whether the given act is immoral; and (2) whether the given act threatens the preservation of society.⁶² If scrutinized from a Christian perspective, the reasonable person may find boxing immoral. However, boxing seems to toughen its partakers with the strength needed to preserve society and therefore falls short of Lord Devlin's criteria for criminalization.

Boxing may constitute an immoral act because of the Vatican's suggestion to condemn the sport. In 2005, the well-known Jesuit magazine *La Civiltà Cattolica* called boxing "a form of legalized attempted murder" and passed a "gravely and absolutely negative" moral judgment on the sport.⁶³ To many, the magazine "with very intimate ties to the Holy See" amounts to the Pope's "unofficial spokesperson."⁶⁴ In the United States, where religion has widespread influence, the public and the media particularly follow the actions of the Pope.⁶⁵ Since Lord Devlin equated the morality of the reasonable man to the morality espoused

62. *See supra* Part III.

63. *Boxing Condemned as Attempted Murder*, *supra* note 11.

64. Jan Nelis, *The Clerical Response to a Totalitarian Political Religion: La Civiltà Cattolica and Italian Fascism*, 46 J. CONTEMP. HIST. 245, 255 (2011) (offering a discourse on the role of Italian fascism in influential periodical *La Civiltà Cattolica*). *But see* Michael Hirsley, *This era's gladiators?*, CHI. TRIB., Oct. 15, 2005, § 3, at 4 (quoting Bill Ryan, spokesman for the U.S. Conference of Catholic Bishops, who called *La Civiltà Cattolica* merely "a journal of opinion").

65. Sanja Zgonjanin, *Quoting the Bible: The Use of Religious References in Judicial Decision-Making*, 9 N.Y. CITY L. REV. 31, 38-39 (2005) (outlining the vigorous media coverage over the death of Pope John Paul II and contrasting that coverage with the limited coverage over the near-concurrent death of influential microbiologist Maurice Hilleman).

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in Christian teachings, boxing may represent an immoral act that goes against the public morality.

Nevertheless, the immorality of the act is not Lord Devlin's only consideration. More important, Lord Devlin also asked lawmakers to consider whether the immoral act threatens to unravel the fabric of society. "There is disintegration when no common morality is observed and history shows that the loosening of moral bonds is often the first stage of disintegration, so that society is justified in taking the same steps to preserve its moral code as it does to preserve its . . . other essential institutions."⁶⁶

Here, boxing may not rise to the danger level necessitated by Lord Devlin because, over the past century, American society has used boxing to contribute to the social American dialogue. "The cacophony of public discourse is an essential and cherished part of American democracy."⁶⁷ Public discourse helps shape government policy and provides a social direction for the country. Strong contributions to such a key element of American society may suggest that boxing is a part of the fabric rather than a risk to unravel it.

The heavyweight championship fights between Joe Louis and Max Schmeling and between Muhammad Ali and Joe Frazier embodied political and social ideals well beyond mere sport. In the 1930s, Louis's rematch with the German Max Schmeling, who had ties to the Nazi party, inspired multiple races to cheer Louis on and, in a turbulent political climate, united Americans of many disparate

66. DEVLIN, *supra* note 34, at 13.

67. Judith L. Maute, *Selecting Justice in State Courts: The Ballot Box or the Backroom?*, 41 S. TEX. L. REV. 1197, 1216 (2000) (advocating the virtues of participatory democracy and how they relate, or fail to relate, to electing judges).

backgrounds.⁶⁸ Upon Louis's death, President Ronald Reagan called Joe Louis's boxing career "an indictment of racial bigotry and a source of pride and inspiration to millions of white and black people around the world."⁶⁹ In the 1970s, Muhammad Ali's first fight with Joe Frazier highlighted distinctly American issues such as the civil rights movement and the Vietnam War.⁷⁰ As a whole, the country engendered different ideologies and different beliefs in the two boxers, who each used the sport to carry out a very real and very American discourse.⁷¹ In these two instances, the sport contributed to the American dialogue as well as assisted Americans in dealing with global conflicts and civil rights. The sport, however, may have also emphasized intolerance and underlined brutality.

The heavyweight championship fights between Jack Johnson and James J. Jeffries and between Mike Tyson and Evander Holyfield each demonstrated the possibly immoral side of the sport. In the early 20th century, Johnson—the first black heavyweight champion in the sport's history—fought the undefeated Jeffries, the white former champion who had emerged from retirement.⁷² After Johnson knocked Jeffries out in Reno, Nevada, race riots erupted

68. See BERT RANDOLPH SUGAR, BERT SUGAR ON BOXING 119-20 (2003).

69. Ronald Reagan, Statement on the Death of Former World Heavyweight Champion Joe Louis (Apr. 13, 1981), available at <http://www.presidency.ucsb.edu/ws/?pid=43685>.

70. See generally *Ali – Frazier I: One Nation...Divisible* (HBO television broadcast Aug. 17, 2000), available at <https://www.youtube.com/watch?v=0ZYbLgu8-50> (documenting the racial, social, religious, and cultural impact of the first boxing match between undefeated heavyweights Joe Frazier and Muhammad Ali).

71. *Id.*

72. See generally *Unforgivable Blackness: The Rise and Fall of Jack Johnson* (PBS television broadcast Jan. 17, 2005) (documenting the career of the controversial Jack Johnson and the Jim Crow culture he defied).

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from New York City⁷³ all the way to Washington, D.C.⁷⁴ In the late 20th century, Tyson's highly publicized rematch with Holyfield pushed boxing's allegedly brutish nucleus to the forefront.⁷⁵ Frustrated by Holyfield's tactics, Tyson bit his opponent's ear mid-round. "Watching him bite Evander Holyfield's ear, actually chewing off and spitting out a piece, as he did in their rematch, was to be plunged farther back in our evolution than is comfortable for anybody."⁷⁶ Just as Louis and Ali catalyzed progressive discourse, Johnson and Tyson sparked unbridled violence.

These incidents of progress and violence may obfuscate the spirit of Devlin's legal moralism, because these four fights are unique rather than typical. These four fights share similarities of heavyweight participants and high public visibility, but they do not represent the norm of boxing, because most boxers are not fighting for the heavyweight championship of the world. The effect of

73. *Negro Dead After Riots*, N.Y. DAILY TRIB., Jul. 6, 1910, at 4 ("The aftermath of the rioting due to the victory of Johnson over Jeffries was one man dead in this city, the negro population on Barren Island terrified and intimidated regardless of consequences and police courts working overtime to clear up dockets in which the negro and Caucasian figured as the assailed and the assailer.").

74. *Race Riots in Washington, Number Hurt*, MERIDEN DAILY J., Jul. 5, 1910, at 1 ("Two fatally hurt, two hospitals crowded with injured and 236 prisoners in the city jails summed up the results to-day of the all-night rioting here following the announcement of the result of the Johnson – Jeffries fight.").

75. See generally Richard Hoffer, *Feeding Frenzy*, SPORTS ILLUSTRATED, Jul. 7, 1997, at 32.

76. *Id.* at 34. See also *id.* at 35 ("The ugliness was infectious, spreading through the stands and into the night. After Jimmy Lennon Jr. read the once-in-a-lifetime decision . . . Tyson was showered with empty and half-empty cups. Police were busy dragging people out of the stands. Hours later the MGM hotel lobby, around the corner from the arena, was still a kind of war zone, with fights, fainting women, unconfirmed reports of gunfire and panicky stampedes.").

boxing's culture on its participants may also prove useful in considering Lord Devlin's legal moralism.

In his award-winning⁷⁷ sociological work *Boxing and Society*, Professor John Sugden suggests that boxing institutes an uncommon discipline and selflessness in its underprivileged contestants.

*Continued membership of the boxing subculture necessitates the acceptance of a value system which emphasizes respect for oneself and for others: not just physical respect, but equally respect for one's own and an opponent's character. It also requires the acceptance of a work ethic along with the principles of self-sacrifice and deferred gratification: qualities not usually associated with the ghetto experience. Boxing requires a certain deference to authority and appreciation of fairness and, despite what goes on in the ring, it demands controlled aggression and a renunciation of vicious violence which is so familiar in neighbourhoods beyond boxing-club doors. In short, boxing inculcates in its adherents the value system and behavioural trappings of a 'civilised' society.*⁷⁸

Sugden argues that boxing helps society rather than harms society. Boxing represents a difficult and isolated path vastly different from the instant gratification available in the more nefarious options besieging poverty-stricken communities. Even the many boxers who do not find success can still benefit from the hard work and dedication necessary to compete. These experiences breed individuals better geared to handle the structure and hardships ever-present in modern society. An activity that equips its participants with the tools to exist in the greater world

77. *Outstanding Book Award*, N. AM. SOC'Y FOR THE SOCIOLOGY OF SPORT, (Feb. 3, 2014, 11:07 AM), <http://www.nasss.org/awards/outstanding-book-award/>.

78. JOHN SUGDEN, *BOXING AND SOCIETY: AN INTERNATIONAL ANALYSIS* 183 (1996).

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signifies an activity that preserves the society Lord Devlin so appreciated.

Whereas treason threatens the existence of government and the continuance of community, boxing does not threaten society's bonds and instead may provide the instruments needed to live and persevere in the modern world. Thus, boxing likely does not rise to the danger level expressed by Lord Devlin and, accordingly, Lord Devlin would not support a ban on the sport.

B. Boxing and the Harm Principle

To repeat, Professor Hart asked lawmakers to consider two different questions when deliberating the legal enforcement of morals: (1) whether the given act involves an immature person or sexual morality; and (2) whether the given act harms another individual.⁷⁹ Generally, boxing involves neither immature persons nor sexual morality. While boxing as a violent sport involves potential harm to others, lawmakers must weigh that potential harm with the individual liberty that Professor Hart prized.

Because professional boxing has age limits and does not generally involve sexuality, boxing does not fall under Professor Hart's enhanced scrutiny. Professor Hart thought the young and uncivilized deserved added protection, and he believed issues of sexuality demanded special attention. In the United States, professional boxers must have a state license to box in a particular state, and state commissions commonly issue licenses only to applicants who have reached their 18th birthday.⁸⁰ These age requirements help prevent the immature and unreasonable child from participating in the sport. Most states have additional requirements, such as experience and

79. *See supra* Part IV.

80. *See* RODRIGUEZ, *supra* note 32, at 75 (describing the standards outlined by many states in acquiring a boxing license).

fitness, for acquiring a boxing license.⁸¹ While amateur boxers are able to compete at a younger age, the call for boxing's proscription has mainly targeted professional boxing rather than amateur boxing; thus professional boxing remains the focus of this article.⁸² Additionally, boxing does not enter the fragile realm inhabited by prostitution and bigamy, because boxing does not involve sex. In fact, many boxers abstain from sex before competition.⁸³

On Professor Hart's second inquiry, boxing avoids the harm principle, because boxers know of the sport's dangers and consent to participation. Mill believed consent of the victim provides an absolute defense for an alleged crime, because Mill feared overreaching paternalism.⁸⁴ Professor Hart modified this approach and believed consent only justifies an act when the victim who consents knows his desires and knows the consequences. "Choices may be made or consent given without adequate reflection or appreciation of the consequences[.]"⁸⁵ Professor Hart added this caveat to compensate for the decline in the belief that an individual alone knows his or her own best interests.⁸⁶

Here, boxers understand the hazards essential to boxing and choose to participate anyway. "[T]he intense levels of preparation that even the most modestly ambitious boxer undertakes is an implicit testament to their awareness

81. *Id.*

82. *See supra* Part I.

83. *See, e.g.,* Jack Hawn, *Chacon Follows Old Routine*, L.A. TIMES, Feb. 2, 1975, at C15 (describing how fighter Bobby Chacon believed sex bothered him physically and weakened his legs).

84. HART, *supra* note 52, at 32.

85. *Id.* at 33.

86. *Id.*

of the invasive nature of the sport.”⁸⁷ Boxers recognize the dangers inherent to their chosen profession, because their very training and the sport’s popular history make the sport’s risks readily apparent. Crudely put, the boxer knows what he is getting into when he decides to box.

Critics contend boxers are unaware of the sport’s specific dangers or, even worse, willfully ignorant of them.⁸⁸ Boxing memoirs, however, indicate a solemn recognition of prizefighting’s general perils. “[B]iographies of professional boxers reveal consistently that boxers are all too well-aware, and have adequate levels of knowledge, regarding the unforgiving nature of the sport.”⁸⁹ These tomes suggest the damaging nature of boxing weighs constantly on the minds of boxers, and while they may not be capable of naming the particular ailments associated with the sport, they know that boxing constitutes the hurt business. Boxers know from experience that injury and bloodlust loom large; despite the violence at boxing’s core, boxers choose the sport freely.⁹⁰ Because boxers know the

87. JACK ANDERSON, *THE LEGALITY OF BOXING: A PUNCH DRUNK LOVE?* 151 (Routledge-Cavendish 2007) (examining the ethical arguments for and against the sport of boxing).

88. *See, e.g.*, Vacca, *supra* note 11, at 228 (“If legislatures have outlawed fights between animals, why is there no legislation to provide the same protection to people who are not aware of the medical dangers they face each time they step into the ring?”).

89. ANDERSON, *supra* note 87, at 151.

90. *See, e.g.*, SUGAR RAY LEONARD & MICHAEL ARKUSH, *THE BIG FIGHT: MY LIFE IN AND OUT OF THE RING* 8 (Penguin 2011) (describing how boxer Sugar Ray Leonard desperately wanted to fight despite the diagnosis of his detached retina, which put him at increased risk of blindness); *see also id.* at 7 (“I started the familiar procession down the aisle, a strange and special ritual unlike any other in sports, cheered on by the hungry masses out for blood, marching toward glory or shame or, worse, death. During the several minutes it took to reach the ropes, I remained unscathed, as did [my opponent], our bodies honed from months of sparring and running to be ready for this one momentous night. Soon we would be unscathed no more, both forced to pay the

perils of boxing and elect to participate regardless, boxing evades the harm principle. Accordingly, Professor Hart would not encourage the proscription of professional boxing.

C. Boxing and Moral Reprobation

Professor Jack Anderson of Queen's University-Belfast has also considered the Hart-Devlin debate and its application to boxing.⁹¹ Professor Anderson distills both sides of the debate into a single test for legality: whether the conduct in question attracts a real feeling of reprobation from the majority.⁹² "[This is] the moral test of the limits of the criminal law common to Hart and Devlin, though achieved by very different points of reference[.]"⁹³ Professor Anderson believes this test satisfies both the rigors of Devlin's legal moralism and Hart's respect for the harm principle because, when Lord Devlin examined the "real feeling of moral reprobation" in criminal lawmakers, Professor Hart did not object to this analysis.⁹⁴

Lord Devlin explicitly rejected this constricted reading of his work. "To assert or to imply—both assertion and implication have been very frequently employed—that the author would like to see the criminal law used to stamp out whatever makes the ordinary man sick hardly does justice to the argument."⁹⁵ Lord Devlin delineated between identifying the public morality and restricting the criminal law, and he further highlighted that his examination of moral feeling applies to the latter.⁹⁶ Lord Devlin believed

dues for the brutal profession we had chosen, or, as many of us in the Sweet Science prefer to believe, had chosen us.").

91. See ANDERSON, *supra* note 87, at 161.

92. *Id.*

93. *Id.*

94. *Id.*

95. DEVLIN, *supra* note 34, at viii.

96. *Id.*

that determining the criminal law must be as detached and impartial as possible.⁹⁷ Lord Devlin emphasized that lawmakers must avoid using rash emotion or mere disapproval as benchmarks when formulating the law.⁹⁸ Rather than the central test, the distinction between disapproval and reprobation constitutes only one factor to consider when establishing criminalization. As illustrated in Part III, Lord Devlin focused on a given conduct's effect on the public morality far more than the public's feelings for that conduct.⁹⁹

Despite this narrowing of the Hart-Devlin debate, Professor Anderson still concludes that the views of Lord Devlin and Professor Hart do not call for boxing's proscription. "In any event, there is no empirical evidence available in survey form or otherwise as to the public's view on the morality of boxing; thus the argument that boxing may be considered morally repugnant remains, at best, speculative."¹⁰⁰ Even after applying the limited test for moral reprobation parsed from the Hart-Devlin debate by Professor Anderson, prizefighting endures.

VI. CONCLUSION

Morality-based lawmaking has little leg to stand on when attacking the absolute legality of boxing. The history of boxing, the law, and the public indicate that society grew to accept the sport as long as states enforced regulation. The renowned Hart-Devlin debate on the legal enforcement of morals provides an appropriate basis for analyzing

97. *Id.* at ix ("[T]he judgment which the community passes on a practice which it dislikes must be calm and dispassionate There may be some who think that intolerance and disgust can never be the product of calm and dispassionate consideration and if so I would disagree.").

98. *Id.*

99. *See supra* Part III.

100. ANDERSON, *supra* note 87, at 161.

whether the law today should proscribe professional boxing. Lord Devlin argued that society should enforce the public morality when immorality threatens society's existence, but boxing poses no such threat to society's survival and may even equip boxers to facilitate society's progress. Professor Hart advocated that lawmakers should generally criminalize only actions that harm other individuals. While boxing carries potential harms for its participants, boxers know of these harms and still decide to fight. Therefore, according to either side of the most prominent debate concerning the law and moral principles, boxing survives.

As of early August 2014, Magomed Abdusalamov has emerged from his coma and is undergoing slow rehabilitation after surgery.¹⁰¹ Abdusalamov's team and many others¹⁰² are legitimately concerned about the safety and fairness standards in boxing.¹⁰³ And yet, both Abdusalamov's manager, Boris Grinberg, and his promoter, Sampson Lewkowicz, rejected the proscription of boxing.

[T]hey shrugged off talk of cracking down on boxing. "This sport is from the time of the Greeks," Lewkowicz said. "It will never die." Grinberg added that he enjoyed watching New York's local newscasts. "Every day,

101. Mitch Abramson, *Probe slows brain-damaged boxer Magomed Abdusalamov's lawsuit*, N.Y. DAILY NEWS (Aug. 6, 2014, 10:53 PM), <http://www.nydailynews.com/sports/more-sports/probe-slows-brain-damaged-boxer-magomed-abdusalamov-lawsuit-article-1.1894800>.

102. See, e.g., Jeremy D. Camacho, *I Could Have Been a Contender: Arbitration and the Ali Act*, 20 SPORTS LAW. J. 135 (2013) (describing the promoter problems that plague the boxing business and proposing federal arbitration as a solution).

103. Bishop, *supra* note 3 ("They still did not understand why Abdusalamov did not leave the Garden in an ambulance. Grinberg, his manager, blamed the New York State Athletic Commission in an interview with New York magazine.").

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*somebody shoot, somebody kill," he said in his Russian accent. "What, we have to close New York maybe? It's life."*¹⁰⁴

Lewkowicz and Grinberg clearly apply different reasoning than Professor Hart and Lord Devlin, but despite these split opinions, there is likely not one among them who would support a ban on boxing.

104. *Id.*