

## THE PROHIBITION OF PROFESSIONAL BOXING: HART-DEVLIN APPROVED

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In his article “The Cruellest Sport: Boxing, Banning, and the Hart-Devlin Debate,” Jeremy Camacho analyzes whether either Lord Patrick Devlin or Professor H.L.A. Hart would approve<sup>1</sup> of the legal prohibition of professional boxing. Devlin and Hart were two legal philosophers who debated whether a society may justifiably use its laws to enforce its morality. After first explaining each philosopher’s theory, Camacho analyzed under each theory some arguments for boxing’s prohibition. Camacho concluded that neither Devlin nor Hart would approve of the prohibition of professional boxing. I feel that Camacho’s analysis of Hart and Devlin’s philosophies was sparse and left the reader wanting. In my own analysis, I find that both philosophers would approve of the prohibition of boxing.

As a preliminary matter, Camacho does not attempt to determine which of the two theories, Hart’s or Devlin’s, is “correct.” As such, there is no need for me to analyze whether society may justifiably enforce its morality through lawmaking.

Devlin’s position is that society may justifiably create laws to enforce its morality, and Hart’s position is that society may only justifiably create laws to prevent

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1. Camacho characterizes his goal differently throughout the article. At times he states that he will determine whether the philosophers would “approve” of the prohibition; other times he seems to question whether the philosophers would “support,” “encourage,” or “call for” the prohibition. Because neither philosopher actually advocated for the use of laws to proscribe any conduct, but instead they merely argued as to a society’s justification, I will determine whether either philosopher would “approve” of the prohibition.

harm to its members. Thus, when pursuing the question of whether each respective philosopher would approve of the prohibition of boxing, it is clear that Devlin will only approve if society feels that boxing is immoral and Hart will only approve if boxing is harmful to members of society.

Because Hart's philosophy is more stringent than Devlin's, I will address it first. Hart's position is that laws may only prohibit conduct that causes harm to others or, in some circumstances, harm to self.<sup>2</sup> Because laws impede on an individual's exercise of his or her free choice, and the restriction of one's free choice causes one harm, any restrictions on free choice must be justified as preventing more harm than they cause.<sup>3</sup>

Camacho, in his application of Hart's theory, concludes that Hart would not approve of boxing's prohibition because the boxers consent to the harm they experience; therefore, no "real" harm occurs. Camacho does address the counterargument that boxers cannot consent because they do not fully comprehend the risks associated with boxing.<sup>4</sup> Camacho, also, recognizes that Hart's theory did allow for the use of laws to protect individuals from themselves ("paternalistic laws").<sup>5</sup> However, Camacho determined that boxers fully

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2. HERBERT LIONEL ADOLPHUS HART, LAW, LIBERTY, AND MORALITY 4-5, 33 (1963); *see also* Richard Arnesen, *The Enforcement of Morals Revisited*, 7 CRIMINAL LAW AND PHILOSOPHY 435, 438-440 (2013), *available at* <http://philosophyfaculty.ucsd.edu/faculty/rarneson/> (explaining Hart's expansion of John Stuart Mill's "harm principle").

3. *Id.* at 22.

4. *See* Antoinette Vacca, *Boxing: Why It Should Be Down for the Count*, 13 Sports Law. J. 208, 228 (2006) (equating the risks of boxing to the risks of smoking tobacco, and lobbying for the "protection of people who are not aware of the medical dangers they face each time they step into the ring").

5. HART, *supra* note 2, at 33.

understand the risks they face but consent nonetheless. Thus, he determined, Hart would not approve of boxing's prohibition.

Camacho, in my opinion, both misconstrues Hart's acceptance of paternalistic laws and pays too little respect to the argument that boxers do not fully comprehend the risks they face. Camacho states that Hart would only allow paternalistic laws if an individual did not know his desires and did not know the consequences. For Camacho, boxers do not fall into this category, because they understand their desires and the consequences. As support for this assertion, Camacho relies on statements made by boxers, as well as Professor Jack Anderson's statement that the intense training boxers undergo is an "implicit testament to their awareness of the invasive nature of the sport."<sup>6</sup> I argue that Hart's acceptance of paternalistic laws was broader than this, and that boxers may not fully understand the risks they face.

Hart recognized that an individual's consent might be "artificially stimulated by external influences" and in those cases the law may justifiably prevent individuals from harming themselves.<sup>7</sup> Surely, these external influences are present in professional boxing. Boxing provides a livelihood for its boxers, and a boxer's pay is directly related to whether he puts on a good fight.<sup>8</sup> Boxers have stated that promoters influence them to put on the best fight, which may require the boxer to take punches rather than dodge them.<sup>9</sup> Professional boxing is a big business;

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6. JACK ANDERSON, *THE LEGALITY OF BOXING: A PUNCH DRUNK LOVE?* 151 (2007).

7. HART, *supra* note 2, at 33.

8. See Greg Bishop, *Reconciling a Sport's Violent Appeal as a Fighter Lies in a Coma*, N.Y. TIMES (Nov. 20, 2013), [http://www.nytimes.com/2013/11/21/sports/reconciling-a-sports-violent-appeal-as-a-fighter-lies-in-a-coma.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/11/21/sports/reconciling-a-sports-violent-appeal-as-a-fighter-lies-in-a-coma.html?pagewanted=all&_r=0).

9. *Id.*

these market forces might unduly influence boxers to risk their health for the benefit of short-term monetary gain.

In addition, the reliability of boxers' statements that they understand the risks they face is questionable. As noted in the discussion of undue influence above, professional boxers are paid to fight. Professional boxers are not likely to state that they do not understand the risks that they face; that would put them out of work. Also, when talking about risks associated with boxing, such as risks of severe long-term cognitive diseases,<sup>10</sup> more is needed than an "implicit testament" deduced from the mere intrusiveness of boxers' training regimens. Further, the long-term cognitive risks associated with boxing are unpredictable, manifesting themselves either immediately or not for many years.<sup>11</sup>

Hart only briefly touched on the justification of paternalistic laws. What he did say about paternalistic laws, however, suggests that Hart would approve of the legal prohibition of boxing.<sup>12</sup> The health risks associated with boxing are unpredictable and difficult to comprehend.<sup>13</sup> When this is coupled with influence resulting from the business aspect of boxing, Hart might find that the harm caused by impeding the boxers' liberty is justified by the goal of protecting boxers from themselves.

Now looking at Camacho's analysis under Devlin's philosophy, I must first address what I believe is a mistake in Camacho's construction of Devlin's rule, a mistake that affects Camacho's subsequent analysis. Camacho correctly states that Devlin's rule considers two questions: (1) whether the given act is immoral under societal standards, and (2) whether the given act threatens the preservation of

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10. Vacca, *supra* note 4, at 220-21.

11. *Id.*

12. See HART, *supra* note 2, at 33.

13. See Vacca, *supra* note 4, at 220-21.

society.<sup>14</sup> According to Devlin, an act is immoral to society if it falls outside the standards of conduct that a reasonable man would approve.<sup>15</sup> Camacho, however, incorrectly asserts that Devlin equated society's morality to the morality of the Christian church; Devlin does not do so.

Devlin believed that the Church served as the institution through which society has historically taught its morality. According to Devlin, society cannot maintain its morality without "teaching, which is doctrine," and "enforcement, which is the law."<sup>16</sup> Further, "no society has yet solved the problem of how to teach morality without religion."<sup>17</sup> Devlin concludes that "the law must base itself on Christian morals . . . [not] simply because they are the morals which are taught by the established Church . . . but for the compelling reason that without the help of Christian teaching the law will fail."<sup>18</sup>

By incorrectly viewing the Christian church as the moral authority, Camacho adopts the assertion that boxing is immoral because some boxing prohibitionists are Christian. Because Camacho adopts the immorality of boxing so enthusiastically, he neglects to determine exactly *why* boxing is immoral. This is important, because it ties directly into Devlin's second question, whether boxing threatens the preservation of society.

The correct interpretation of Devlin's test for immorality is whether the conduct is intolerable by the reasonable man.<sup>19</sup> The reasonable man need not have rational support for his intolerance but may base his

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14. See generally PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* (1965).

15. *Id.* at 15.

16. *Id.* at 25.

17. *Id.*

18. *Id.*

19. *Id.* at 15.

intolerance on feeling alone.<sup>20</sup> Only when the conduct is both intolerable and injurious to society may it be prohibited. The determination that an act is injurious to society, however, requires a dispassionate analysis and determination that the conduct undermines a moral principle on which society is based.<sup>21</sup> To determine which moral principle is threatened by boxing, we must first determine why boxing is immoral.

Because Camacho did not determine why boxing might be immoral, his analysis of whether boxing is injurious to society was, essentially, a pros and cons analysis of boxing's general effect on society. This is an incorrect application of Devlin's rule, because Devlin only requires that boxing be injurious to one societal principle, not society in general.<sup>22</sup> When we first determine why boxing may be immoral, we are able to then determine whether boxing is injurious to a specific societal principle.

One main argument that boxing is immoral is that, because the goal of the sport is to inflict harm on your opponent, boxing promotes and implicitly condones violence.<sup>23</sup> The societal moral principle here would be the respect for the physical person of others. It is not a far-off notion to argue that boxing builds societal tolerance for violence or creates a false belief that punching another person in the head is not dangerous. Remember, for an act to be immoral, Devlin only requires that it be intolerable to a reasonable man, not that it be immoral in an objective sense.<sup>24</sup> If a majority of society believes that the exhibition of professional boxing positively correlates to a

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20. *Id.*

21. *Id.* at 17.

22. *Id.*

23. See John Travis, *Jesuit Magazine Calls Professional Boxing 'Attempted Murder'*, CATHOLIC NEWS SERVICE (Oct. 14, 2005), <http://www.catholicnews.com/data/stories/cns/0505858.htm>.

24. DEVLIN, *supra* note 14, at 15.

disintegration of society—for example, by causing increased assaults or violence—it seems that Devlin would find the prohibition of professional boxing justified.

Another argument for the prohibition of boxing relies on the health risks involved in boxing.<sup>25</sup> Repetitive blows to the head may cause immediate impairment of cognitive abilities, as well as increase the risk of future cognitive diseases such as Alzheimer's, Parkinson's, and Pugilistic Dementia.<sup>26</sup> The societal principle at issue here is the contribution of members to society. The overall effectiveness of society is undermined when the boxers, who were once productive contributors to society, are no longer able to contribute, due to their injuries. Moreover, these boxers might become burdens on society, because they tax the healthcare system as a whole and, when boxers are unable to cover the medical costs of their boxing injuries, the costs are transferred to other members of society.<sup>27</sup> The societal benefits resulting from boxing, whether they are to the individual boxer, to the economy, or to the public enjoyment of the sport, do not justify the cost of such a loss in societal productivity. Society may very well feel that this is offensive enough to justify the outright prohibition of the professional sport. In that case, Devlin would likely approve of such a prohibition.

Finally, there is the argument that boxing discredits the value of human beings.<sup>28</sup> Some have argued that boxing promoters are the real beneficiaries of boxing exhibitions, and boxers are merely used as a means to an end, to be discarded when they are no longer of promotional value.<sup>29</sup> Further, some boxers have stated that, if they want to make

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25. See Vacca, *supra* note 4, at 218-21, 225-27.

26. *Id.* at 220-21.

27. *Id.* at 223-25.

28. See Travis, *supra* note 23.

29. *Id.*

good money from fighting, they must take punches rather than avoid them—this is how boxers ensure that they get more fights and higher pay.<sup>30</sup>

Allowing promoters to use boxers as a mere means to achieve wealth depreciates the value of individuals in general. The societal principle at risk here is the principle that every human life is valuable. In the same way that laws against murder are justified by the principle of the sanctity of human life, laws against professional boxing may be justified by the principle that a human life has more value than simply as a means to an end. If society believes that boxing threatens that foundational moral principle, Devlin would allow for the prohibition of the sport.

In conclusion, although interesting and highly relevant, I found Camacho's analysis to be lacking. Under my own analysis, I find Hart might approve of the prohibition of boxing for paternalistic reasons, and Devlin would likely approve for a number of other reasons.

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30. Bishop, *supra* note 8.