

Boxing, Paternalism, and Legal Moralism

Studies have shown that blows to the head cause boxers chronic brain damage, due to the rapid movement of the brain within the skull, tearing vessels and nerve fibers.¹ Nor are those who suffer knockouts the only fighters at risk for brain damage: "the number of bouts rather than knockouts correlates best with the development of chronic brain damage."² 64-87% of current and former boxers tested in studies done in the 1980s suffered from measurable brain damage, leading Robert Glenn Morrison to conclude that "the evidence is indisputable that modern boxers do suffer brain damage as a result of their profession, despite improved safety standards."³

Interestingly, while any death from boxing is a tragedy, it appears that the risk of death is fairly remote. For instance, in absolute numbers, fewer boxers died in various time periods and places than participants in such other sports as American football and baseball. And the number of deaths per 1,000 participants is similar to or lower than the numbers for such other high-risk sports as mountaineering and motorcycle racing.⁴ The risk of such injuries as cuts, bone fractures, and damage to the cornea and retina is much greater. However, since these injuries are generally treatable and rarely if ever debilitating, debate over whether we should ban boxing has focused on the problem of brain damage. Largely

¹Peter W. Lampert, MD, and John M. Hardman, MD, "Morphological Changes in Brains of Boxers," *Journal of the American Medical Association*, vol. 251, no. 20 (May 25, 1984), p. 2676.

²Ibid. See also Robert Glenn Morrison, "Medical and Public Health Aspects of Boxing," *Journal of the American Medical Association*, vol. 255, no. 18 (May 9, 1986), pp. 2476-77.

³Morrison, "Medical and Public Health Aspects of Boxing," p. 2478. For more on the medical dangers of boxing, see also Ira R. Casson, MD, et al., "Brain Damage in Modern Boxers," *Journal of the American Medical Association*, vol. 251, no. 20 (May 25, 1984); and Jeffrey T. Sammons, "Why Physicians Should Oppose Boxing: An Interdisciplinary History Perspective," *Journal of the American Medical Association*, vol. 261, no. 10 (March 10, 1989).

⁴Morrison, "Medical and Public Health Aspects of Boxing," p. 2475.

due to its concern over the risk of brain damage, in 1984 the American Medical Association House of Delegates proposed that professional and amateur boxing be banned.⁵

This paper is devoted to examining arguments supporting the ban on boxing proposed by the AMA. My major focus will be on professional boxing, because, with its longer fights and greater tolerance of punishment of fighters before bouts are stopped, it is more dangerous than amateur boxing, and also because only the professional sport raises questions about the autonomy of decisions to risk injury in order to gain untold wealth. Because his fierce defense of the liberal view—"[t]he harm and offense principles, duly clarified and qualified, between them exhaust the class of good reasons for criminal prohibitions"—provides such a stringent test of any proposal to restrict liberty, I will make extensive reference throughout this paper to Joel Feinberg's arguments against legal paternalism and legal moralism in his monumental work, *The Moral Limits of the Criminal Law*.⁶ I will conclude that we should impose a single legal restriction that would effectively eliminate boxing's main medical risk: a complete ban on blows to the head.

1. Paternalistic Arguments for Restricting Boxing

The most obvious rationale for restricting boxing is to protect boxers from harm. The initial paternalistic case for prohibition—that is, that the risks of brain damage are so severe that we have a duty to protect fighters from the harm that they are likely to suffer—falls foul of Mill's famous defense of individual freedom in *On Liberty*. According to Mill, we should respect the right of autonomous adults to exercise their ability to rationally guide their behavior by their own freely chosen values. To interfere with the career choices of adults who wish to take up boxing is wrong, on this view, because it treats them as children and not as autonomous beings.⁷ To justify restricting boxing, then, we need to turn

⁵RESOLVED, That the American Medical Association: 1. Encourage the elimination of both amateur and professional boxing, a sport in which the primary objective is to inflict injury; 2. Communicate its opposition to boxing as a sport to appropriate regulatory bodies; 3. Assist state medical societies to work with their state legislatures to enact laws to eliminate boxing in their jurisdictions; and 4. Educate the American public, especially children and young adults, about the dangerous effects of boxing on the health of participants.

⁶Joel Feinberg, *The Moral Limits of the Criminal Law*, vol. 3, *Harm to Self* (Oxford: Oxford University Press, 1986), and vol. 4, *Harmless Wrongdoing* (Oxford: Oxford University Press, 1990). The definition of the liberal view comes from *Harm to Self*, p. xvii.

⁷For good objections to banning boxing based on Mill's argument against paternal-

to more sophisticated paternalistic arguments.

The entire paternalism v. respect for autonomy debate as it applies to boxing is cast in nonconsequentialist terms. Confining our attention to the results of boxing for the fighters, a cost-benefit analysis seems to indicate that the utilities are stacked overwhelmingly against allowing boxing. In return for the psychological benefits of being allowed to live according to their own lights, and the minuscule chance of becoming rich, boxers face the likelihood of irreversible brain damage. The pro-autonomy, anti-governmental interference view gains its strength not from the claim that it will produce the best results for boxers, but rather from the claim that boxers should be free to act on their own decisions, even if those decisions will probably end up hurting them.

a. Soft Paternalism

Even the liberal view, though, as defended by Mill and Feinberg, allows for paternalistic restrictions in the case of people whose decisions lack autonomy, for example, children, the mentally ill, and people acting under duress or in predicaments. In such cases, respect for autonomy may actually *require* paternalistic intervention. Following standard usage, let us call paternalism to protect people from the results of inautonomous requests or actions "soft paternalism," in contrast to "hard paternalism," which permits interference with fully voluntary, autonomous requests or actions. The question we have to consider, then, is whether we have any reason to suspect that boxers' decisions to enter the profession are lacking in autonomy.

Many boxers probably fail to clear the very first hurdle required for an autonomous decision: having adequate information. Boxers are unlikely to have subscriptions to the *Journal of the American Medical Association*, whose detailed accounts of the medical dangers of their profession are cited above, while promoters, managers, and trainers have a vested interest in not drawing their potential breadwinners' attention to information that might deter them from entering the ring. At best, the majority of boxers are aware that some fighters have died in the ring, and that some have suffered serious injuries, but they likely share—doubtless due to an understatement of risks on the part of the boxing business as well as their own self-deception—the popular misconception that brain damage is a rare occurrence that happens only to fighters who

ism, see Russel H. Patterson, Jr., MD, "On Boxing and Liberty," *Journal of the American Medical Association* vol. 255, no. 18 (May 9, 1986); and Robert L. Simon, *Fair Play: Sports, Values, and Society* (Boulder: Westview Press, 1991), pp. 54-57.

suffer repeated knockouts. However, boxers' ignorance of the full extent of the dangers of prizefighting will not persuade the liberal to support prohibition. A far better remedy, according to the liberal view, would be to institute mandatory education on these dangers—supervised by a neutral boxing commission that has no financial stake in minimizing the risks—as one of the requirements for receiving a boxing license. These educational programs should also include detailed information on the likely career earnings of boxers and the very low percentage of fighters who ever reach the level of lucrative title fights. Such an approach, which parallels government health warnings on cigarette packs and bottles of alcohol, would enable boxers to make autonomous decisions and would show maximal respect for their autonomy.⁸

A far stronger paternalistic argument arises from the fact that an autonomous decision must flow from the agent's own values, without undue pressure from other people or external circumstances. When such pressure is too great, it becomes coercive and precludes autonomous action. In this light, we must consider the argument that since boxers often come from severely disadvantaged backgrounds and may see boxing as their only means of escaping from dangerous, poverty-stricken neighborhoods, their decision to become boxers may reflect their desperation, rather than an authentic desire that flows from their own considered values.⁹ Can the offer of a career in professional boxing ever be coercive?

The idea of a coercive offer seems paradoxical, since an offer that actually increases a person's options hardly seems capable of forcing him or her into an action. However, as Joel Feinberg has argued, increasing people's freedom is sometimes compatible with coercing them.¹⁰ He asks us to consider the example of a millionaire who offers to pay for the expensive surgery necessary to save the life of a woman's child, on the condition that the woman agree to have sexual relations with him for a period of time. By hypothesis, the woman has no other means to save her child's life. In these circumstances, Feinberg suggests, the woman is indeed forced to do something she would far rather not do—have sex with a lecherous, exploitative stranger—by her desperate desire to save her child's life. From her point of view, the situation is just as coercive as one in which a man kidnaps her healthy child and threatens to kill him unless she agrees to have sex with the kidnapper.¹¹

⁸Thus, while the AMA's proposal to ban boxing is obviously contrary to the liberal position, its call to educate the public, especially children and young adults, on the dangers of boxing (item #4) is entirely consistent with liberalism.

⁹See Simon, *Fair Play*, pp. 59-60.

¹⁰See Feinberg, *Harm to Self*, chap. 24, esp. pp. 229-49.

¹¹*Ibid.*, pp. 229-33. As Feinberg says, "one person can effectively force another per-

The "lecherous millionaire" example belongs to the clearest category of coercive offers: those in which the coerced person is pressured to choose an option she does not desire in order to avoid an alternative that she desires even less. The "differential coercive pressure" is greatest when the offered option is vastly less unattractive than the option avoided by taking up the offer. More difficult to categorize are situations in which the offered option is mildly attractive in its own right to its recipient. Suppose, Feinberg asks us, that the woman with the dying child would have regarded an affair with the millionaire as somewhat desirable independently of his offer. (Let us assume for the sake of argument that her mild attraction to the millionaire is not destroyed by the crass opportunism of his offer.) In this event, he suggests, while the differential coercive pressure is even greater than in the original example, making the offer even harder to refuse, the fact that the woman would have had a mild desire to have an affair with him regardless of the offer relegates this case to the status of "impure" coercion. The "coercive minimum"¹²—the degree of unpleasantness of the action that the offer induces the woman to perform—is negligible or even negative. The situation is coercive, but her choice is made willingly, and not because of the coercion.¹³ One measure of the degree of coercion exerted by any given offer is a function of the amount of differential coercive pressure and the unpleasantness of the coercive minimum.¹⁴

Into which category—relatively harmless impure coercion or morally problematic coercion—does the pull that boxing exerts on poor youths and adults fall? It all depends on the attitude that boxers take toward their profession. There are doubtless some boxers who thoroughly enjoy fighting and would do so anyway as members of amateur clubs even if the rich rewards of professional boxing were unavailable. They may be driven by a variety of motivations: the desire to hurt and physically dominate opponents or gain the status of macho cult heroes, or pride in the skill, courage, and discipline that successful boxers require.¹⁵ Such

son to do what he wants by manipulating his options in such a way as to render alternative choices ineligible and, in so doing, quite incidentally enlarge his freedom in general" (p. 233).

¹²Following Feinberg (*ibid.*, p. 211), I base both the coercive minimum and the differential coercive pressure on boxers' subjective assessment of the harms of boxing and of the poverty that it enables them to escape. As I explain in the next paragraph, boxers' assessments of these harms may vary.

¹³*Ibid.*, pp. 233–40.

¹⁴For more detail on the nature of differential coercive pressure and coercive minimums, see *ibid.*, pp. 199–205.

¹⁵For sympathetic accounts of the pride that some boxers take in their sport, see Mi-

boxers are subject only to morally innocuous impure coercion. I suspect that the majority of fighters, while they may share some of all of these motives, are more ambivalent toward their occupation. They regard the pain and injuries that they suffer, the damage that they inflict on opponents, and the indignity of performing in public in their underwear before a crowd that wants to see at least one of the two fighters get hurt, as unpleasant necessities to be endured in order to achieve financial and physical security and have a shot at the rich rewards that are available to highly successful boxers. This is the likely attitude of the large number of boxers known as "opponents," whose role is primarily to provide opposition for rising stars who are working their way up through the ranks, compiling impressive win-loss records as they go. These opponents, who are an integral part of the boxing world (after all, not everyone can be a champion or contender), occasionally score upset victories but are usually content to survive a fight and collect their paycheck with a minimal amount of injuries. That many fighters, even successful ones, harbor reservations about their profession is strikingly supported by Michael Burke in the context of his impassioned *defense* of the sport as viewed by boxers themselves:

[T]he quasi-religious link of the boxer to his craft is not without tension, and sometimes resentment, which the fighters suggest is produced by the "barbaricness" (sic) of the sport, the grind and torture of the body resulting in its breakdown, the physical abuse of self and others, and the ruthless and despotic exploitation of the boxer by his manager and controllers for the enjoyment of others. The boxers understand it as a coerced affection, a poor man's love ... There are no rich, white boxers in the semi-professional game ... Boxers leave parts of themselves in the ring. The body which has been trained and disciplined to perform the "sweet craft" does not survive intact. The contradiction in this ruination of the cherished masculine body creates a further ambivalence toward boxing. As a result, the overwhelming majority of boxers [in the study by Lois Wacquant that Burke cites], who speak of the love of their craft, do not want their sons to follow in their footsteps ... Therefore, the boxers' passion is a skewed and malicious one. It is tainted by the idea that boxing, for all of its benefits, exacts too high a price.¹⁶

For such boxers, plying their trade requires that they endure a coercive minimum of varying degrees of unpleasantness and grave doubts therefore arise about the autonomy of their decision to enter the ring.

If boxers are primarily motivated by the intrinsic enjoyment that they gain from the activity, we would expect that they would be evenly distributed throughout all socioeconomic classes. The reality that the vast

chael Burke, "Is Boxing Violent? Let's Ask Some Boxers," and Baydon Beddoe, "'In the Fight': Phenomenology of a Pugilist," both in Dennis Hemphill (ed.), *All Part of the Game: Violence and Australian Sport* (Sydney: Walla Walla Press, 1998).

¹⁶Burke, "Is Boxing Violent? Let's Ask Some Boxers," pp. 118-19.

majority of fighters come from poor backgrounds lends credence to the claim that economic motivations are the primary ones for their choice of occupation. As Colin Radford, a defender of boxing, concedes,

for most boxers ..., boxing was their only escape from hard labor—or, as it is more likely to be these days, unemployment. (Whether a country has a lot of good boxers, or few, is a pretty good indicator of the state of its economy, or of the economic opportunities available to some community within that country.)¹⁷

The very small number of fighters who come from affluent backgrounds would not be subject to coercion at all, but, for the majority of the others, the offer of boxing contracts creates a strong differential coercive pressure with a more or less significant coercive minimum. A plausible soft paternalist argument for restricting boxing, then, is to protect boxers—those who regard fighting as an unpleasant necessity in order to escape poverty—from acting on inautonomous decisions.

However, does the argument just presented not have the unfortunate consequence that *all* offers of menial work, which often brings little intrinsic satisfaction and is performed largely out of economic necessity, are coercive? In response, while a Marxist would indeed regard the need to find a job in a capitalist society as coercive, no *particular* job offer is coercive. The reason I have singled out the offer of a career in boxing as coercive is that it provides a unique opportunity for a slim chance of vast wealth and, thus, exerts vastly greater differential coercive pressure than the prospect of poorly-paid menial jobs. Moreover, for many fighters boxing exacts a far more burdensome coercive minimum than unskilled jobs in order to enjoy the rewards: physical pain, the risk of serious injury, and moral qualms about injuring opponents, as opposed to the tedium of menial jobs. When, as in the case of most minimum-wage jobs, the coercive minimum that an offer induces a person to perform is only mildly unpleasant, little if any coercion occurs. Similarly, the view that people can be coerced by offers to become professional boxers does not entail that lucrative contracts for such other sports as basketball would also be coercive for youths from disadvantaged backgrounds. While such offers may indeed be hard to refuse, basketball contracts impose *negative* coercive minimums and are, therefore, only impurely coercive. For most people, accepting such contacts would impose no costs at all, since they regard playing basketball as a positively pleasant experience. Hence

¹⁷Colin Radford, "Utilitarianism and the Noble Art," *Philosophy* 63 (1988): 63-81, p. 70. For more on the link between boxing and poverty, see Stephen Brunt, "Boxing is not to blame: A fighter died of his injuries this week, but the culprit isn't pugilism, it's poverty," *The Globe and Mail* (Toronto), December 10, 1999, p. A19.

offers of professional boxing contracts can be coercive in a way that offers of minimum wage jobs and professional basketball contracts are not.

However, Feinberg argues that the coerciveness of an offer does not necessarily invalidate its recipient's consent. When the coercer deliberately creates the situation that makes the coercee unable to refuse the offer—for example, if the millionaire had actually caused the child's illness that now requires expensive medical care—the coercee's consent is indeed involuntary and invalid. But when the coercer merely takes advantage of the coercee's pre-existing predicament—and such is clearly the case for any coercion that promoters, managers, and trainers exert over those whom they persuade to become professional boxers—their exploitation does not preclude an autonomous decision by the coercee to accept the offer.¹⁸ Since boxing promoters, managers, or trainers, who are not the cause of a potential fighter's socioeconomic disadvantages, merely provide him with an opportunity to overcome those disadvantages, he can surely make a voluntary decision to accept their offer as the best (though unfortunate) solution to a sorry situation.

Nonetheless, even though exploitative coercers who take advantage of their coercees' pre-existing predicaments do not normally prevent coercees from voluntarily accepting their offers, Feinberg concedes that in the case of "unconscionable contracts," coercees' voluntariness may be so impaired as to make their consent to the contract invalid.¹⁹ An offer is unconscionable when it is coercive and imposes harsh conditions on the coercee or confers unfair benefits on the coercer. Feinberg argues that the lecherous millionaire's offer is unconscionable if the woman is coerced into sexual relations, which constitutes a harsh cost for her. This unconscionability reduces her voluntariness in consenting to the agreement to a level that renders it null and void. If she broke the agreement once the millionaire had paid for her child's medical care, courts should dismiss his claim for compensation for her breach of contract.

Since offers to become professional boxers are sometimes coercive, and since the medical evidence cited at the outset of this paper gives ample reason to consider the costs imposed on boxers as harsh, these offers therefore do indeed sometimes qualify as unconscionable. Does the unconscionability of the contracts that boxers sign reduce boxers' voluntariness to a sufficiently low level to justify outlawing such agreements? By analogy with Feinberg's treatment of the lecherous millionaire example, if the contracts are unconscionable, courts would be justified in denying promoters et al. any legal recourse should a boxer break a con-

¹⁸Feinberg, *Harm to Self*, pp. 244-48.

¹⁹*Ibid.*, pp. 249-53.

tract. And the same reasoning—protecting boxers from the effects of agreements to which they have not given sufficiently voluntary consent—justifies *pre-emptive* protection of boxers, in the form of banning such contracts in the first place. In the case of the lecherous millionaire, we could allow the woman to benefit from the offer (since denying her the opportunity to save her child seems wrong) and then protect her from the millionaire's harsh demand by declaring the agreement void on the ground of its unconscionability when he sues her after she refuses to fulfill her end of the contract. In contrast, in the case of boxing the benefits are inseparable from the unduly harsh cost: the only way that boxers can enjoy the chance of earning a fortune in the ring is by simultaneously risking the probability of irreversible brain damage. Consequently, the only way we can protect boxers from the effects of unconscionable contracts is to prohibit such contracts.²⁰

Since some boxers—those who are not socioeconomically disadvantaged and those who find fighting intrinsically enjoyable and do not experience its hardships as costs—may make fully voluntary decisions to become boxers, restricting boxing would reduce their freedom in order to protect others from the effects of inautonomous decisions. While this interference is regrettable, it is justified by the need to protect the large number of fighters who currently enter the ring under varying degrees of *de facto* coercion. In defense of a cautious, paternalistic approach, since boxers run the risk of serious, irreversible harm, we are entitled to demand a high standard of autonomy before we allow them to do so.²¹ Given the socioeconomic realities in which most fighters enter the profession and given the brutality that most fighters regard as a necessary unpleasantness to be endured, many of them do not meet that standard, and we are entitled to restrict boxing in order to protect them.

b. Pre-Emptive Paternalism

If the previous soft paternalistic argument fails, on the ground that many or most boxers do indeed choose their profession autonomously, the case for restricting boxing in order to protect boxers from harm will have to resort to the far more controversial principle of *hard paternalism*: the permissibility of interfering with people's fully autonomous choices in order to protect them from harm.

²⁰I refer here to contracts in today's sport of boxing, in which boxers risk the probability of brain damage. I have no objection to professional contracts in the reformed sport of boxing that I propose in the conclusion, since the ban on blows to the head virtually eliminates that danger.

²¹See Feinberg on variable standards for voluntariness, *Harm to Self*, pp. 117-21.

The most defensible type of hard paternalism was originally proposed by John Stuart Mill, in the context of his famous *anti*-paternalistic argument in *On Liberty*. Mill argues that we are permitted to prevent people from acting on their desire to become slaves, even in the unlikely event that their decision is fully voluntary.²² Mill points out the irony of letting our desire to respect people's freedom to live their lives according to their own values lead us to permit people to perform a single act, however voluntarily, that would irrevocably relinquish this freedom. If autonomy really is important, we are surely justified in this minor restriction on people's current autonomy in order to prevent the complete loss of autonomy that occurs in slavery. We could compare this paternalistic restriction with the act of pruning a tree in order to facilitate its future growth. Let us call restrictions on autonomous actions in order to preserve greater future autonomy *pre-emptive paternalism*.

If pre-emptive paternalism is ever justified, restricting boxing seems to fall well within its rationale. According to the recent studies cited above, most boxers will suffer from irreversible brain damage, and brain damage is the most direct way to reduce a person's autonomy. And pre-emptive paternalism itself seems to be well established in our legal system, since it is the most obvious rationale for our prohibition on dangerous, addictive drugs and our laws requiring the use of car seat belts and motorcycle safety helmets.²³ A landmark judicial opinion on informed consent recognized, on the same ground of pre-emptive paternalism, that exceptions to physicians' normal duty of disclosure exist in the case of currently autonomous patients

when risk-disclosure poses such a threat of detriment to the patient as to become unfeasible or contraindicated from a medical point of view. It is recognized that patients occasionally become so ill or emotionally distraught on disclosure as to foreclose a rational decision.²⁴

Boxers face a considerably higher probability of autonomy-reducing injuries than do automobile drivers and motorcycle riders, whom we already protect with paternalistic laws. For instance, whereas motorcycle riders face a relatively small lifetime risk (2%) of serious injury or death,²⁵ we have seen that boxers face the *probability* of brain damage.

²² John Stuart Mill, *On Liberty* (Indianapolis: Hackett Publishing Co., 1978), p. 101.

²³ See Gerald Dworkin, "Paternalism," in Richard Wasserstrom (ed.), *Morality and the Law* (Belmont, Cal.: Wadsworth Publishing Co., 1971), section VI.

²⁴ *Canterbury v. Spence* (U.S. Court of Appeals, District of Columbia Court, 1972). The quotation is from the reprint in Thomas A. Mappes and David DeGrazia (eds.), *Biomedical Ethics*, 4th ed. (New York: McGraw-Hill, 1996), p. 87.

²⁵ Feinberg, *Harm to Self*, p. 392, n. 38.

However, we need to consider Feinberg's powerful and original critique of *any* pre-emptive paternalism.²⁶ He insists that we should respect a fully autonomous decision to embark on a course of action that a person knows may result in a loss of autonomy. While liberty is obviously the central value that the liberal position is designed to protect, "liberty too is a means to a person's good which a sovereign chooser might voluntarily decide to trade off for some other value."²⁷ Even though a fully voluntary decision to risk the probability of a loss of future autonomy may lead to a life with diminished autonomy,

it would be an autonomously chosen life in any case, and to interfere with its choice would be to infringe the chooser's autonomy at the time he makes the choice, that is to treat him in a manner precluded by respect for him as an autonomous agent.²⁸

Feinberg argues that we must give priority to the autonomous wishes of my current self, even if I explicitly "disenfranchise" my future self by waiving my right to revoke my decision.

[T]he earlier choice, being the genuine choice of a sovereign being, free to dispose of his own lot in the future, must continue to govern. After all, the earlier self and the later are the same self, not morally distinct persons, but rather one person at different times.²⁹

Feinberg presents a *reductio ad absurdum* argument against banning slavery on pre-emptive paternalistic grounds. He fears that the rationale of preserving future autonomy would also justify banning suicide and euthanasia, imposing "a 'Spartan regime' of enforced health and hygiene" including bans on fried food and smoking, and forbidding any agreements that would commit a person to narrowing his or her future options.³⁰ However, Feinberg's attempt to show that all pre-emptive paternalism has absurd consequences is vulnerable to several objections.

First, it does not entail a ban on suicide and euthanasia. Calling death a curtailment of autonomy sounds odd, since the paradigm case of losing autonomy is a *living* person whose ability to determine her own future is diminished. The harm that is inflicted by death, when it is indeed harmful, is not so much loss of autonomy as the cancellation of any future experiences at all. However, one might object, being alive is a necessary condition for exercising autonomy and the autonomy-preserving ration-

²⁶Ibid., pp. 71-87.

²⁷Ibid., pp. 76-77.

²⁸Ibid., p. 78.

²⁹Ibid., p. 83.

³⁰Ibid., p. 77. See also Simon, *Fair Play*, p. 58, where he raises similar concerns about using pre-emptive paternalism to justify banning boxing.

ale for pre-emptive paternalism might, after all, require that we prohibit suicide and euthanasia. In response, a crucial difference exists between suicide/euthanasia and the type of harm that I propose to prevent by pre-emptive paternalism. Whereas we may safely assume that boxers do not desire the loss of future autonomy that they risk suffering, terminally ill people seek to end their own lives precisely because they no longer value their burdensome existence, and regard the permanent loss of their autonomy as a release from suffering. Allowing suicide or euthanasia is, therefore, quite consistent with protecting people like boxers from losses of autonomy that they do not desire. But what about people who want to become slaves, who presumably desire to irrevocably give up their freedom? Does not the view that I am defending have the embarrassing consequence that we should allow such people to become slaves? We can, fortunately, avoid this unwanted entailment. A good number of those who voluntarily enter servitude are likely to come to regard their irreversible relinquishment of freedom as a terrible mistake, perhaps made in a moment of recklessness or depression. Terminally ill people are, by contrast, far less likely to undergo changes of heart: most patients suffering from painful terminal or degenerative diseases will desire even more strongly to die as their suffering increases, rather than being grateful to society for forbidding euthanasia, thus giving them the opportunity to change their minds about dying. Moreover, to anticipate a similar argument from Feinberg that I endorse later in this section, the request to become a slave is so self-destructive as to create a presumption of irrationality in the requester. Protecting such incompetent people from inautonomous decisions outweighs the occasional injustice done to those who make genuinely autonomous requests to become slaves.

Second, it isn't clear why we can't distinguish between dramatic differences in degree between different losses of future autonomy. A boxer's chronic brain damage over several decades is a far more serious loss of autonomy than that suffered by a junk food eater whose capacity to think rationally is not at all diminished during a life that is less healthy and slightly abbreviated as a result of unwise eating habits. Allowing pre-emptive paternalism to prevent such catastrophic losses of future autonomy as irrevocable slavery agreements and irreversible brain damage caused by boxing does not commit us to allowing paternalism to prevent trivial reductions in future options, any more than the harm principle commits us to draconian laws punishing such trivial harms to others as rudeness. A more appropriate comparison would be between boxing and a food that was known to cause irreversible brain damage in the majority of people who eat it. Agreeing that we should indeed ban such a food would be a relatively easy bullet to bite for the proponent of re-

stricting boxing on the ground of pre-emptive paternalism. The FDA already prohibits foods and drugs that are known to have far less dramatic harmful effects.

Third, even if using pre-emptive paternalism to ban slavery does have the absurd consequences that Feinberg alleges, this does not taint the parallel argument for restricting boxing, because of a crucial difference between the cases. Slavery is certainly a catastrophic renunciation of liberty that prevents slaves who live to regret their enslavement from acting on their newly formed values. But, unlike brain damage caused by boxing, it does not impair slaves' ability to reflect on and form values and life plans in the first place, which is the most fundamental element of autonomy. Boxing is especially pernicious in that it impairs intellectual and moral autonomy, whereas slavery, repugnant though the permanent relinquishment of freedom of action is, does not impair slaves' ability to think for themselves. As pointed out above, precisely this desire to protect people from irreversible loss of intellectual and moral autonomy may well underlie our current prohibition on dangerous, addictive drugs and our laws requiring seat belts and safety helmets.

So pre-emptive paternalism provides a plausible rationale for several of our current legal requirements and restrictions and, if justified, it makes a strong case for restricting boxing. Restricting boxing on the ground of pre-emptive paternalism entails neither a controversial ban on suicide and euthanasia nor unduly invasive laws designed to prevent trivial losses of autonomy. And Feinberg's claim that all pre-emptive paternalism is a violation of competent adults' right to choose their own life plans depends on the controversial assertion that, even in the case of such dangerous activities as taking addictive drugs, driving without seat belts or safety helmets, and boxing, the autonomous decisions of my current self always take precedence over my future self's intellectual and moral autonomy.

Feinberg argues that we may justify banning slavery contracts and requiring motorcyclists to wear helmets on grounds other than pre-emptive paternalism. Even if we accept Feinberg's rejection of pre-emptive paternalism, we can construct parallel rationales for restricting boxing that do not involve hard paternalism. The first argument is based on the premise that we should demand that people demonstrate an especially high level of autonomy before we allow them to engage in activities that create a substantial risk of serious, irreversible harm. Feinberg reasons that we may refuse to recognize slavery contracts, which involve the ultimate act of permanently renouncing one's autonomy, on the ground that inevitably fallible tests for autonomy would wrongly allow

some inautonomous people to become slaves.³¹ On the same soft paternalist ground that is acceptable to liberals, we could argue that, especially in light of the concerns about de facto coercion of fighters from disadvantaged backgrounds discussed above in section 1a, any legal tests that we devise may be too inexact for us to be sure that boxers have displayed the requisite level of autonomy for us to allow them to risk irreversible brain damage. Second, in an argument that anticipates our harm principle-based discussion in section 3, Feinberg warns against recognizing slavery contracts on the further ground that society's abandonment of those people who are reckless enough to become slaves would send a dangerous message of indifference to the plight of others that could lead to a general decrease in care and compassion in our society.³² Similarly, we could justify restricting boxing by appealing to the moral insensitivity that is caused by our government's willingness to let fighters suffer the probability of brain damage in their most likely unsuccessful pursuit of fame and fortune. Third, Feinberg justifies both the prohibition of slavery and laws requiring safety helmets for motorcyclists by appealing to the "psychic costs" to *other people* who are distressed when they see or learn of those who are harmed by the absence of such protective laws.³³ A parallel argument would justify restricting boxing due to the distress and indignation it causes to third parties. I do not endorse the second and third arguments for restricting boxing and I present them only to show that they are entailed by Feinberg's nonpaternalistic arguments for banning slavery and requiring the use of safety helmets.

If, on the other hand, we reject Feinberg's absolute opposition to hard paternalism, we can combine the arguments for restricting boxing on the ground of pre-emptive paternalism presented in the current section with the soft paternalistic arguments of the previous section to provide a compelling case. If boxing creates the probability of a severe and irreversible loss of autonomy and if serious doubts exist about the autonomy of many fighters' decisions to enter the profession in the first place, we should restrict the sport in order to protect them.

2. Arguments Based on Legal Moralism

Even if we reject all paternalistic arguments for restricting boxing, another ground for prohibition deserves consideration: the objection that professional boxing is morally repugnant. If so, fighters, managers,

³¹Feinberg, *Harm to Self*, pp. 79-80.

³²*Ibid.*, pp. 80-81.

³³*Ibid.*, pp. 81, 139-41.

trainers, promoters, and fans alike are complicit in perpetrating or supporting an immorality. Why exactly is boxing morally wrong? It cannot be the mere fact that brain damage and other injuries are the probable result, because the consent of the participants arguably prevents these harms from constituting wrongs (though, as we have seen, whether many boxers' consent is fully voluntary is doubtful). To locate any immorality in boxing we should look beyond the consequences of the actions involved and focus instead on the attitudes that these actions express. I will focus on the attitudes displayed by boxers and by fans.

Boxing, along with such offshoots as full-contact karate and ultimate combat, is unique among sports in that competitors' primary goal is to incapacitate their opponents. American football players sometimes use the morally dubious tactic of legal but bone-shattering hits designed to intimidate and shake up star opponents and, better still, force them out of the game. However, while this tactic may facilitate victory, the goal of the game remains to score more points than the opponent. In boxing, in contrast, incapacitating the opponent—by knockout or technical knockout—is sufficient for victory. By far the most effective way to incapacitate opponents is by inflicting blows to the head, thus causing (at least) temporary damage to the brain. Even winning by points is best achieved by punching opponents' heads, making knockdowns—which judges often consider decisive in awarding a round to a fighter—more likely to occur, while also reducing opponents' ability to fight back.

In attempting to injure their opponents, boxers treat them as mere objects to be disposed of in order to achieve victory. No amount of post-fight embraces and mutual congratulations can erase the savage, brutal attitude that, for the duration of the fight, each displayed toward the other.³⁴ Whereas the usual wrongness of injuring another is arguably avoided by each fighter's consent to participate in an activity known to be dangerous, this consent in no way diminishes the inherent wrongness of regarding another person as a subhuman object to be damaged. Consider, by analogy, a TV show (not too far removed from reality) in which participants hurl a torrent of racist, sexist, or homophobic abuse at other people. The voluntary participation of these victims of abuse would not lessen our moral repugnance at the attitude of contempt that the abusers display.

The attitude of many spectators of boxing is just as problematic as that of the boxers themselves. Spectators pay for the privilege of watch-

³⁴See Paul Davis, "Ethical Issues in Boxing," *Journal of the Philosophy of Sport* 20-21 (1993-94): 48-63, pp. 51-56, for an excellent account of the morally problematic attitude that boxers display toward each other.

ing two half-naked humans in a ring attempt to incapacitate one another by means of punches. "Purist" fans who appreciate the high level of skills that a talented boxer displays no doubt exist, and even less knowledgeable fans can admire the genuine courage that fighters sometimes exhibit. But many fans are especially eager to see cuts, knockdowns, and knockouts—that is, pain and injury—often standing and baying with bloodlust when one fighter gets in trouble. Promoter Mike Jacobs said in 1935 that he looked for fighters who injure opponents, because fans do not "come out to see a tea party. They come to see a man hurt."³⁵ We have little reason to believe that the majority of boxing fans today are any different. TV promotions for upcoming fights, which we may presume are based on market research and designed to attract as many viewers as possible, highlight brutal knockdowns rather than deft footwork and adroit evasions of blows. Mike Tyson, for all his misdeeds outside the ring and his failing powers within it, still commands more attention than nearly all other fighters because of his ability to inflict gruesome punishment on opponents. Sitting in comfortable ringside or living-room seats and reveling in the sight of one man hurting another is a paradigm case of the wonderful German word *schadenfreude*—pleasure derived from another person's misfortune. That this attitude is reprehensible needs no argument. Indeed, it is not far removed from sadism.

Legal moralism is the principle that would allow us to prohibit such "free-floating" evils,³⁶ even if (because of the consent of those who are adversely affected by them) no one is wronged by them. Legal moralism permits us to restrict actions solely on the ground of their immorality, even though they might be harmless.

Legal moralism is normally associated with a conservative agenda, as in the case of its most famous proponent, Patrick Devlin, who argued for the continued legal prohibition of prostitution and homosexuality on the ground that these practices tend to cause social disintegration by violating values held by the majority.³⁷ The problem with this type of legal moralism is that it gives blanket approval to the majority for imposing groundless prejudices on minority groups.³⁸ Strictly speaking, this ra-

³⁵Quoted by Jeffrey T. Sammons, "Why Physicians Should Oppose Boxing: An Interdisciplinary History Perspective," *Journal of the American Medical Association* vol. 261, no. 10 (March 10, 1989), p. 1486.

³⁶"Free-floating evils" is Feinberg's expression. See *Harmless Wrongdoing*, p. 125.

³⁷Patrick Devlin, "The Enforcement of Morals," *The Enforcement of Morals* (London: Oxford University Press, 1965), chap. 1.

³⁸See H.L.A. Hart, "Immorality and Treason," *The Listener*, July 30, 1959. For a critique of similar "communitarian" arguments for banning boxing (on the ground that it violates community standards), see Simon, *Fair Play*, p. 63.

tionale for restricting liberty is not legal moralism at all, since it is based not on moral arguments as such, but on the desire to *preserve prevailing morality*. For this reason, Feinberg refers to it instead as *moral conservatism*.³⁹ However, rejecting moral conservatism does not entail rejecting the argument for restricting boxing presented above based on *strict legal moralism* (i.e., arguments that boxing is immoral, regardless of whether prevailing morality approves or disapproves of it). First, let us examine whether strict legal moralism is ever defensible.

Feinberg considers a graphic hypothetical example of a free-floating evil—Kristol's imaginary gladiatorial contests held in Yankee Stadium, ending in the death of the losing combatants⁴⁰—which makes a good *prima facie* case for strict legal moralism.⁴¹ If anything is so inherently immoral, regardless of the voluntary participation of both fighters and spectators, as to justify prohibition, such gladiatorial contests are. A society that allowed such barbaric contests to occur would be so morally base that the knowledge that it at least held fast to the liberal ideal of respect for individual autonomy would be small comfort. If this example allows a foot inside the door for strict legal moralism, may we not use the same principle to justify restricting the brutal business of professional boxing, which differs from gladiatorial combat only in the severity of the injuries inflicted? Granted, the difference in degree is huge—the certainty of death for the losing gladiator v. the probability of brain damage for both boxers if they fight many contests—but the morally troubling feature is the same in both cases: the infliction of pain and injury for the pleasure of onlookers.

Feinberg's strategy in responding to this attempted counter-example to his liberal position is to argue that our intuition that we should indeed ban gladiatorial contests can be explained on grounds that are perfectly acceptable to the liberal, without resorting to strict legal moralism. The kind of people whom we allow to delight in watching brutal displays of maiming and homicide, he argues, are likely to show a similar, callous disregard for other people's welfare in their own private lives.

We cannot hold an image of these wretches in our minds without recoiling, for each of them alone will seem threatening or dangerous, and thousands or millions of them together will be downright terrifying. It is highly difficult, if not plain impossible, to think

³⁹For more detail on the difference between moral conservatism and strict legal moralism (see text below), see Feinberg, *Harmless Wrongdoing*, pp. 124-26.

⁴⁰See Irving Kristol, "Pornography, Obscenity, and the Case for Censorship," *The New York Times Magazine*, March 28, 1971. Simon presents a similar example in *Fair Play*, pp. 60-61.

⁴¹Feinberg, *Harmless Wrongdoing*, pp. 129-33.

of widespread indifference to suffering as a mere private moral failing unproductive of further individual and social harm ... [M]oral corruption as such is not a relevant ground for preventive criminalization, but when the moral dispositions that are corrupted include concern about the sufferings of others, then the interests of others become vulnerable, and the corrupting activity can no longer be thought to be exclusively self-regarding.⁴²

This corrupting effect is amplified by the fact that legal toleration of these contests, even and perhaps especially if accompanied by government regulations, would seem to send a tacit message of official approval of violence and cruelty. Moreover, the probable effects on impressionable children, who (even if they are barred from witnessing the contests “live”) are likely to idolize successful gladiators, are even more alarming. Consequently, the harm principle itself, which any liberal can embrace without fear of unjust intrusions on individual autonomy, is sufficient to justify banning Kristol’s hypothetical practice of modern gladiatorial contests.

Although Feinberg’s arguments do not *refute* legal moralism—they show only that a liberal can give a plausible analysis of hard cases without using this principle—I will not use it as an independent reason for restricting boxing. While strict legal moralism is intuitively attractive in the case of boxing, we might have difficulty avoiding sliding down a slippery slope to interferences with harmless self-regarding behavior for trivial reasons, and to the same danger of the legal enforcement of groundless prejudices that is created by moral conservatism. If strict legal moralism is not necessary to explain why we should ban gladiatorial contests, we are even less justified in using this controversial principle in arguing for restricting the far less dangerous business of boxing. In the next section, I will consider instead whether we can formulate arguments for restricting boxing based on the harm principle similar to the ones that Feinberg uses to argue for prohibiting gladiatorial contests.

3. Arguments Based on Harm to Society at Large

Boxing is considerably less violent than gladiatorial contests, primarily in that the death of the loser is only an occasional tragedy, rather than the inevitable result of each bout. Any brutalizing effect of boxing, then, will be considerably less severe than that of gladiatorial contests. Nonetheless, as pointed out above in our discussion of legal moralism, the morally troubling feature is the same in both cases: the infliction of pain and injury for the pleasure of onlookers. And it is precisely the message

⁴²*Ibid.*, pp. 131-32.

that it is acceptable to take pleasure in watching the suffering of others that creates a very real danger that it will increase anti-social behavior. And, unlike Kristol's hypothetical gladiators, boxers are real people who are idolized by real children, who learn that hurting and injuring opponents is an admirable thing to do. The number of people present at fights may be relatively small, but the television audience, including pay-per-view, closed circuit, and sports bars, is huge. Moreover, the mere knowledge that public displays of the attempts of fighters to incapacitate one another are legally tolerated may lower the inhibition to anti-social behavior of even those with no interest in boxing. Unlike boxers, the public at large does not consent to the practice and any harm that it may cause, so an uncontroversial application of the harm principle may justify restricting boxing in order to protect society as a whole.

However, this argument invites the objection that concern for freedom of expression has quite properly prevented us from banning violent films despite comparable fears that viewing them causes an increase in violent behavior. The same concern should also prevent us from restricting boxing. In response, a huge distinction exists between the *depiction* of violence, which is all that happens in films, and violence itself, which is what happens in the boxing ring. Restricting actions is less problematic than restricting the portrayal of actions in movies. A more apt analogy would be between boxing and either "snuff" films in which actors are allegedly injured or killed, or pornographic films in which unwilling actors are allegedly coerced to appear, both of which we would have less hesitation in restricting than mainstream films.

Robert Simon raises a related objection, asking whether the same reasoning that led to restricting boxing wouldn't also commit us to banning books that we have determined will have a pernicious effect, for instance, one that proposes educational reforms that would be disastrous if implemented, which is likely, given the prestige of its author. Simon claims that such restrictions would seriously impede our ability to make up our own minds on educational and other issues.⁴³ In response to Simon's *reductio ad absurdum*, while the alleged consequence that he describes is indeed unacceptable, it does not follow from the argument for restricting boxing that we are considering. The reason that his example of book banning is alarming is that it involves the outright censorship of ideas, which undeniably does interfere with our ability to exercise intellectual autonomy in reaching our own views. In contrast, restricting boxing in no way precludes the publication of books describing the alleged beauty of the activity, explaining its physical and emotional bene-

⁴³Simon, *Fair Play*, pp. 61-62.

fits, and demanding its legalization. Prohibiting boxing restricts people's actions, not their access to ideas.

The weakness of the argument for restricting boxing on the ground of its brutalizing effect on society is not that it entails indefensible instances of censorship. Nor is there any problem in principle with restricting behavior that fosters attitudes that lead to tangible harm to other people. The Achilles Heel of this argument is the lack of evidence that boxing actually leads to an increase in violence and other anti-social behavior. Whether boxing incites such behavior or reduces it by acting as a harmless cathartic outlet is an empirical question that is hard to answer. In particular, finding a pure control group so that we can isolate the influence of boxing on, for instance, violence is especially difficult. Comparisons between states and countries that do allow professional boxing and those that do not are of limited value, since television coverage is ubiquitous worldwide. The best evidence would come from a comparison of the level of violent and anti-social behavior in an experimental group that watches many boxing matches and a carefully matched control group that watches none. In the absence of such evidence, the argument for restricting boxing because of the danger that it harms society by lowering inhibitions to anti-social behavior is too slight to justify restricting people's freedom.

4. Conclusion

We have found two substantial paternalistic arguments for restricting professional boxing: first, the need to protect boxers from serious losses of future autonomy due to irreversible brain damage, which is all the more urgent because, second, many boxers' decisions to enter the profession in the first place are of questionable autonomy because of de facto coercion resulting from their socioeconomic disadvantages. While legal moralism does not by itself provide a defensible rationale for restricting boxing, the argument presented in section 2 that boxers and fans have inherently immoral attitudes bolsters the paternalistic argument. That is, if strong reasons exist for protecting boxers from harm, then if, furthermore, far from having redeeming value, boxing is inherently immoral, the case for restricting it is stronger still.

I propose a single legal restriction—a complete ban on blows to the head—which would allow boxing to continue, while eliminating its single most harmful aspect.⁴⁴ Injuries could still occur, of course, as a result

⁴⁴My conclusion is thus similar to George D. Lundberg's disjunctive proposal to

of body blows, but they would not have the devastating effect on boxers' well-being and future autonomy that brain damage has. Given this vast reduction in the risks of boxing, we could require potential boxers to demonstrate a considerably more relaxed standard of autonomy, one that even the most socioeconomically disadvantaged people would probably meet. Imposing this restriction would thus neutralize the two paternalistic arguments for prohibiting boxing.

Granted, boxing would remain a violent activity the goal of which is to incapacitate the opponent, so the argument for restricting boxing because of the inherently immoral attitude that boxers adopt toward one another would remain operative. However, as I argued at the end of section 2, legal moralism is not by itself a sufficient reason for restricting boxing. Moreover, the attitude of boxers and spectators is likely to be less troubling under the proposed reform. Knockouts and stoppages arise far more commonly as a result of blows to the head than from body blows. The likely result of restricting boxers to body blows is to reorient their strategy in favor of scoring points with frequent blows, rather than trying to injure opponents with heavy shots. Thus the role of skill and strategy will be increased, with a corresponding decrease in violence and intimidation.

Market forces may give rise to fighters who will meet fans' demand for violence by specializing in punches that crack ribs and cause other painful injuries. However, the many fans who are currently drawn to boxing by the prospect of seeing bloody fighters become groggy and drop to the canvas after repeated blows to the head would most likely lose interest if boxing became a relatively safe sport in which knockouts are rare and skill and strategy, rather than the infliction of injuries, are the major determinants of victory. And boxing purists who continue to like, and even prefer, this safer form of boxing would probably be too rare for professional boxing to continue to be a profitable business. The likely result of eliminating blows to the head, then, is the withering away of professional boxing, which depends on attracting large numbers of spectators to pay fighters and their handlers.

This would leave amateur boxing, which is already—with its short three-round bouts, mandatory protective headgear, and referees' greater

either ban boxing outright or ban blows to the head. See "Boxing Should Be Banned in Civilized Countries," *Journal of the American Medical Association* vol. 251, no. 20 (May 25, 1984), p. 2697. Robert L. Simon also proposes banning blows to the head as one of several ways of improving safety in boxing. See *Fair Play*, p. 64. I differ from Simon in that, whereas he suggests only that the ban be enacted voluntarily by boxing authorities, I claim that the arguments presented in this paper are strong enough to justify a government-enacted legal prohibition.

willingness to stop fights to prevent injuries to outmatched fighters—considerably safer than professional fighting.⁴⁵ It would become even safer with a prohibition on blows to the head, which would make protective headgear superfluous. Amateur boxing would continue as a recreation for boxers who enjoy the sport, but the number of participants would probably dramatically decline, since many boxers currently use the amateur arena as a prelude to the professional business that would, under my proposal, most likely soon cease to exist. The elimination of financial motives for entering the ring would completely disarm one of my major objections to today's professional boxing, namely the danger that socioeconomically disadvantaged boxers might be acting inautonomously due to de facto coercion. And pre-emptive paternalism would be out of the question, since no significant danger of irreversible brain damage would exist.

A salutary aspect of my proposal is that it achieves its carefully targeted goal of eliminating the morally objectionable components of boxing while imposing minimal legal restrictions on the actions of competent adults. The single regulation, a ban on blows to the head in any type of boxing, is justified by the uncontroversial goal of protecting boxers from acting on inautonomous decisions and suffering a permanent reduction in future autonomy. And the likely disappearance of professional boxing would be the result of market forces rather than governmental coercion, as would the likely reduction in the number of participants in amateur boxing.⁴⁶

Nicholas Dixon

Department of Philosophy

Alma College

dixon@alma.edu

⁴⁵See Robert Ludwig, MD, "Making Boxing Safer: The Swedish Model," *Journal of the American Medical Association* vol. 255, no. 18 (May 9, 1986), p. 2482, for an account of the extensive safety precautions already in place in amateur boxing in Sweden.

⁴⁶I presented earlier drafts of this paper at the International Association for the Philosophy of Sport 1997 meeting in Oslo, Norway and the Central States Philosophical Association 1998 meeting in Des Moines, Iowa. I am grateful to audience members at both conferences, CSPA commentator Jim Swindler and referees for *Social Theory and Practice* for helpful comments.

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