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Daniel Berger

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## Articles

### CONSTITUTIONAL COMBAT: IS FIGHTING A FORM OF FREE SPEECH? THE ULTIMATE FIGHTING CHAMPIONSHIP AND ITS STRUGGLE AGAINST THE STATE OF NEW YORK OVER THE MESSAGE OF MIXED MARTIAL ARTS

DANIEL BERGER\*

#### I. INTRODUCTION

The promotion-company known as Ultimate Fighting Championship (“UFC”) made headlines in America late last August when it announced that it had reached a seven-year agreement with Fox Sports to place live mixed martial arts (“MMA”) events on prime-time television alongside similar broadcasts produced by the NFL, MLB, and NASCAR.<sup>1</sup> On November 12, 2011, Fox performed on the contract and showcased the UFC’s brand of MMA to 5.7 million viewers, the highest rated television audience for an event of that kind in the past eight years.<sup>2</sup>

In the midst of this increased media attention, Zuffa LLC, the parent organization of the UFC, took another step in its struggle for acceptance when it filed a lawsuit against the state of New York just three days after its Fox debut. In the complaint, Zuffa alleges that the rules and regulations of the New York State Athletic Com-

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\* J.D., expected 2013, Dwayne O. Andreas Barry University School of Law; B.A., English, University of Hawai’i at Manoa. The author wishes to thank professor and sports business expert Marc Edelman for his continued guidance throughout the conception, composition and completion of this article. In addition, the author wishes to thank his cousins and high ranking judokas Louis and Andrew Hung for inspiration on initial drafts, as well as mixed martial arts and professional wrestling enthusiast Evan Kidd for insight on the earlier stages of working through the *Murdock* case. Finally, the author wishes to thank Amy Owen German for help with citations.

1. See Richard Sandomir, *U.F.C. Lands a Seven-Year Deal With Fox Sports*, N.Y. TIMES, Aug. 19, 2011, at B11, available at [http://www.nytimes.com/2011/08/19/sports/ufc-lands-a-seven-year-deal-with-fox-sports.html?\\_r=0](http://www.nytimes.com/2011/08/19/sports/ufc-lands-a-seven-year-deal-with-fox-sports.html?_r=0) (explaining that deal entitles Fox to broadcast four fights per year for length of contract for annual payment of \$100 million dollars to UFC).

2. See Richard Sandomir, *Fox’s U.F.C. Broadcast Hits an Eight-Year High for Fight Ratings*, N.Y. TIMES, Nov. 14, 2011, at D7, available at <http://www.nytimes.com/2011/11/14/sports/foxs-ufc-broadcast-a-hit-with-viewers.html> (stating that viewership of 5.7 million was most for televised fight since 7 million watched boxing match between Lennox Lewis and Vitali Klitschko on HBO in 2003).

mission (“NYSAC”), which currently ban MMA events produced by the UFC, are unconstitutional and in violation of its fighters’ First Amendment freedom of speech right to express themselves in the state of New York.<sup>3</sup> In order to understand the unique role MMA plays in America, it is necessary to understand the complete evolution of the art throughout time. This is not an easy task, due mostly to the fact that the concept of MMA has not remained stagnant. As history has shown, the sport is an ever-changing, turbulent, and fast-paced world of physical competition. Thus, an understanding of the ancient beginnings of this type of competition is crucial to a better understanding of the current status of the sport, the way it got there, and the proper place it holds, or should hold, in the perception of its viewers, promoters, participants, and regulators.

Although MMA is sanctioned by most state commissions, New York represents only one of a handful of states that continues to prohibit the quickly growing sport.<sup>4</sup> After nearly four years of failed attempts to pass a bill in the state senate which would effectively overturn the New York law, Zuffa and other proponents of MMA in the state felt the lawsuit was their only option.<sup>5</sup> Marc Ratner, vice president of regulatory affairs for the UFC, commented that the increased focus on the state of New York is due in small part to the possibility of holding fights at Madison Square Garden, the “mecca of combat sports.”<sup>6</sup>

Within the UFC’s struggle to secure acceptance in American sports, a larger and more unique issue is presented to the court. Discussing this point of interest, Barry Friedman, New York University law professor and current lawyer for the UFC, remarked that according to his knowledge, this is the first time “a professional athlete is claiming a First Amendment right to communicate with fans in a live event.”<sup>7</sup> Therefore, if the litigation is pursued to comple-

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3. See Complaint at 1, *Jones v. Schneiderman*, No. 11 Civ. 8215 (S.D.N.Y. Nov. 11, 2011) (discussing Zuffa’s First Amendment claim against NYSAC).

4. See Richard Sandomir, *U.F.C. Sues State Over Ban On Mixed Martial Arts Bouts*, N.Y. TIMES, Nov. 15, 2011, at B18, available at <http://www.nytimes.com/2011/11/16/sports/ufc-sues-to-lift-new-york-ban-on-mixed-martial-arts-fighting.html> (mentioning New York is one of several states that bans MMA fights).

5. See *id.* (quoting New York University law professor and lawyer for UFC, Barry Friedman, who said that “despite indications that a bill would pass the Assembly, it didn’t, and we had no recourse but to sue”).

6. See Ray Krueger, *A Debate Rages On In Words, Not Punches*, N.Y. TIMES, Mar. 20, 2011, at 11, available at <http://www.nytimes.com/2011/03/20/sports/20mma.html> (referencing UFC’s interest in holding fights in Madison Square Garden).

7. See Joe Palazzolo, *UFC Wants to Express Itself in New York*, WALL ST. J. (Nov. 16, 2011), <http://blogs.wsj.com/law/2011/11/15/ufc-wants-to-express-itself-in-new-york/> (discussing UFC’s lawsuit against New York State).

tion, the court will have to determine whether mixed martial artists are actually sending a message to the live crowds who pay to watch them perform.

In order to fully understand the constitutional issues at play in this litigation, it is necessary to gain a complete understanding of MMA; thus, Part I of this Comment discusses the definition, history, and evolution of mixed martial arts, from its first recorded appearance in competition to the present-day place it holds in America. Part II focuses specifically on the state of New York and the legal history that lead to the current ban against MMA in the state. Part III considers recent attempts Zuffa has taken to legalize MMA through the New York State legislature and the lawsuit that gave rise to the Constitutional issue at the heart of this article. Part IV outlines the First Amendment freedom of speech claim and recent case law that will likely govern the action. Finally, Part V presents possible outcomes of the litigation and the future of MMA in the state of New York.

## II. DEFINITION, HISTORY & EVOLUTION OF A SPORT

### A. Definition of Mixed Martial Arts

Mixed martial arts is defined by the Nevada State Athletic Commission as a competition “reasonably expected to inflict injury,” in which two combatants are permitted to use striking, grappling, and other techniques from the martial arts.<sup>8</sup> This combination of maneuvers characterizes MMA and ensures that participants are able to utilize, or at least understand, the wide range of combat disciplines allowed in the sport and how to best use the varying philosophies they evoke, in order to outpoint or defeat their opponent.

In many states, the *unified rules of mixed martial arts* (“unified rules”) set the standard for the sport and provide a uniform guideline that state commissions choose to follow when sanctioning MMA events.<sup>9</sup> The unified rules were developed in April of 2001 by the New Jersey State Athletic Control Board, and when adopted by state commissions, govern everything from weight classes, round length, prohibited maneuvers, equipment standards, and even out-

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8. See NEV. ADMIN. CODE §§ 467.00285, 467.0037 (2012) (discussing attributes of MMA).

9. See Morgan Campbell, *UFC, T.O. on Target for Spring Smackdown*, TORONTO STAR, Nov. 5, 2010, at S6, available at 2010 WLNR 22145569 (explaining how UFC is currently one of biggest proponents for adoption of unified rules in new territories).

line the appropriate appearance of competitors.<sup>10</sup> The creation and current adoption of the unified rules by almost every state in the nation represents an attempt to harness and guide the evolution of this historically unrestrained sport towards a positive and predictable place in society.

### B. The Ancient Sport of MMA

The concept of entering or even witnessing a competition where different disciplines of combat are displayed is neither a recent phenomenon nor a trivial pursuit.<sup>11</sup> The first and most well-documented occurrence of a mixed form of fighting can be dated back to the year 648 BC at the 33rd Ancient Greek Olympics.<sup>12</sup> It was at these games that a new combat sport was introduced called *pankration*: a contest which mixed the styles of both wrestling and boxing, allowing combatants the ability to strike with both hands and feet, while standing or on the ground, along with the ability to perform throws and apply submissions.<sup>13</sup> Pankration matches had no time limits or no weight divisions and went on until an opponent was knocked out, submitted, or could no longer continue.<sup>14</sup>

Despite the unregulated nature of the ancient pankration matches, the pankratiasts themselves were highly skilled athletes and were held in high regard by the ancient people for their abilities in competition.<sup>15</sup> Pankratiasts knew the complexity of the sport they practiced and in response developed unique styles that would work to their advantage during competition.<sup>16</sup> However, strength

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10. See Brendan S. Maher, *Understanding and Regulating the Sport of Mixed Martial Arts*, 33 HASTINGS COMM. & ENT. L.J., 26-28 (2010) (mentioning what is covered under unified rules).

11. See MICHAEL B. POLIAKOFF, *COMBAT SPORTS IN THE ANCIENT WORLD: COMPETITION, VIOLENCE AND CULTURE* 1-2 (1987) (recounting that Ancient Greeks were first to institutionalize combat sports and noting that study of sports can reveal important information about character, values, and priorities of society).

12. See JIM ARVANITIS, *PANKRATION: THE TRADITIONAL GREEK COMBAT SPORT AND MODERN MIXED MARTIAL ART* 11 (2003) (detailing early example of documented mixed form of fighting).

13. See *id.* at 11-12 (explaining that only two rules were prohibitions on biting and eye gouging).

14. See *id.* at 12 (indicating that referee oversaw each match and was equipped with staff or rod to strike competitors who broke the rules). However, these rules were not often enforced, especially in matches where a smaller contestant utilized the prohibited techniques against a larger one. *Id.*

15. See CLYDE GENTRY III, *NO HOLDS BARRED: THE COMPLETE HISTORY OF MIXED MARTIAL ARTS IN AMERICA* 5 (2011) (referencing that ancient champions in sport of pankration were paid handsomely for their efforts, much like many of today's modern athletes).

16. See ARVANITIS, *supra* note 12, at 13 (explaining that tall fighters with long reach were known to rely primarily on hitting, while the men of shorter height and

was also revered and exhibitions were often held displaying pankratiasts who could break stones and planks with their bare fists and who could drive their feet through bronze war shields.<sup>17</sup> Greek mythology makes reference to an internal energy called “arete” which is described as a fire in the human soul that when burned brightly enough, gives its carrier almost godlike abilities; this internal energy, or arete, was said to have been the essence of a champion pankratiast’s skill.<sup>18</sup> Furthermore, pankratiasts were revered and respected at a level above their boxing and wrestling counterparts due to their ability to master both forms of combat.<sup>19</sup>

Interestingly, along with the elevated attention given to athletes in the sport of pankration, the ancient people considered pankration less dangerous than boxing.<sup>20</sup> Ancient athletes who competed in both boxing and pankration during a single Olympiad would take part in pankration matches prior to the boxing contests, as it was understood that the wrestling techniques allowed in pankration presented a better chance of delaying injury and in turn a better chance at completing both events.<sup>21</sup>

As time passed, pankration eventually reached Rome, and the Italians began to allow gladiatorial combatants to use weapons in competition.<sup>22</sup> The increasingly violent structure of the now evolving sport coupled with growing social and religious complications eventually led to the demise of pankration.<sup>23</sup> The sport came to its

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thicker stature relied on grappling, and explaining that Greek term “hypitiasmos” was used to describe a pankratiast who would deliberately fall on his back in order to utilize his wrestling skills in more strategic position); *see also* POLIAKOFF, *supra* note 11, at 57 (reflecting that some pankratiasts also developed stance to utilize both offense and defense by carrying their hands half open in competition, allowing them to either punch or grab hold of their opponent as situation demanded).

17. *See* ARVANITIS, *supra* note 12, at 17 (explaining pankratiasts).

18. *See id.* (defining “arête”).

19. *See* GENTRY III, *supra* note 15, at 4-5 (describing one account which related idea that best pankratiast was man who could be called “the best wrestler amongst boxers, and the best boxer amongst wrestlers.”).

20. *See* ARVANITIS, *supra* note 12, at 15 (explaining that while serious injuries and fatal accidents did occur in sport of pankration, they were rare in comparison to sport of Greek boxing).

21. *See id.* (reflecting that pankratiasts did not want to “spoil themselves” in boxing matches by receiving bloody gashes that would hamper performance in pankration). A skilled pankratiast could feasibly survive an entire pankration competition without any bloody gashes to hinder him in boxing. *Id.*

22. *See* GENTRY III, *supra* note 15, at 5 (describing how Roman gladiators became part of sport and made it increasingly violent, reportedly prompting Greeks to stop participating in pankration matches).

23. *See* ARVANITIS, *supra* note 12, at 17 (explaining that corruption was present in all professional athletics at time; however, it was particularly bad in “heavy sports” like pankration because there were no weight classes). Arvanitis also sug-

official end in conjunction with the final ancient Olympic Games in 393 AD.<sup>24</sup> With pankration gone, the world would not see a competition featuring the mixture of different combat arts again for almost 2000 years.

### C. Emergence of Mixed Martial Arts in Modern Times

The next mixed style of fighting to emerge in history was reported during the Edo period in Japan, between the years 1603 and 1868, during which time a complex new combat art was developed called *jujutsu*.<sup>25</sup> Jujutsu utilized numerous styles of attack, including the “throwing, hitting, kicking, stabbing, slashing, choking, bending and twisting [of] limbs,” as well as techniques for pinning an opponent and defenses against these attacks.<sup>26</sup> The fighting art was only one of many a samurai was required to study during his lifetime, and it originally developed as Japanese soldiers sought it necessary to improve the use of hand-to-hand combat in battle.<sup>27</sup>

By the latter half of the sixteenth century, jujutsu was taught systematically in Japan by the masters of numerous martial arts academies.<sup>28</sup> One student of jujutsu, Jigoro Kano, was a youth who found himself troubled by the lack of a guiding principle in the fighting system.<sup>29</sup> After years of studying under the guidance of numerous jujutsu masters, Kano created his own fighting method which utilized the most effective throwing, groundwork, and striking techniques found in jujutsu. Kano’s fighting method also inte-

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gests that downfall of pankration could be linked to the lack of guiding philosophical principles undergirding the fighting system, which made matches less scientific, more brutal, and more of spectacle than true art form. *Id.*

24. See GENTRY III, *supra* note 15, at 5 (describing how pankration was no longer practiced after Roman Emperor Theodosius discontinued Olympic games in 393 AD).

25. See JIGORO KANO, KODOKAN JUDO 15-16 (1986) (noting that jujutsu was also called taijutsu or yawara and was one of many martial arts practiced during Japanese feudal era).

26. See *id.* (defining technical maneuvers that were central to jujutsu).

27. See JONATHON SNOWDEN, TOTAL MMA INSIDE ULTIMATE FIGHTING 10 (2008) (describing how samurai incorporated jujutsu into their comprehensive martial arts training); see also GENTRY III, *supra* note 15, at 14 (explaining that jujutsu was originally embraced by Japanese soldiers looking to improve their skills in hand-to-hand combat).

28. See KANO, *supra* note 25, at 15-16 (providing historical account of when jujutsu first started to be taught in Japan).

29. See *id.* at 16 (discussing that slightly different forms of jujutsu were taught by masters of each school Kano attended, and that this lack of uniformity motivated Kano to distill best techniques from each of these various forms).

grated an emphasis on spiritual balance, a tool Kano felt was necessary to capitalize on the mental aspect of fighting.<sup>30</sup>

Kano opened his own school to teach the art he now called Judo and began by instituting a code of ethics which he required all prospective practitioners to follow.<sup>31</sup> During Kano's early attempts to set his sport apart from jujutsu, there was a time when the two terms were more or less interchangeable: this is due to the fact that Kano's school was initially seen as promulgating one of the many other spinoff forms of jujutsu experimented with at the time.<sup>32</sup> Eventually, however, Judo became so popular in Japan that a tournament was held in 1886 between students of Kano's school and those from other prominent jujutsu schools in order to establish which sport was dominant.<sup>33</sup> Kano's students won thirteen of the fifteen matches in the tournament, prompting a decline in schools which taught the wartime-combat version of jujutsu, and a rise in students for Kano's new honorable sport.<sup>34</sup>

Kano would spend the remainder of his life touring both the United States and Europe teaching judo along the way.<sup>35</sup> However as Kano grew in age, so did the sport of judo; with the latter in a position to outlive its founder, Kano's best students became missionaries for the sport in America.<sup>36</sup> While Kano used exclusively non-violent demonstrations in his attempts to bring worldwide recognition to the sport of judo, one such student, Mitsuyo Maeda, fared considerably better through the use of live performances and challenges.<sup>37</sup> Filled with excitement and ideas of his own, Maeda

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30. See GENTRY III, *supra* note 15, at 14-15 (describing how in conceiving Judo, Kano synthesized principles of mental discipline with technical elements of jujutsu).

31. See SNOWDEN, *supra* note 27, at 11 (explaining that Kano was not happy with typical students of jujutsu at time, who were too often street fighters and common thugs).

32. See *id.* at 14 (stating that judo and jujutsu, though distinct, were at times considered synonymous).

33. See GENTRY III, *supra* note 15, at 15 (referencing how rise in popularity of Kano's judo culminated in challenge by schools of traditional jujutsu); see also SNOWDEN, *supra* note 27, at 11 (explaining that tournament was organized by chief of Metropolitan police in Tokyo, who handpicked best students from both camps).

34. See SNOWDEN, *supra* note 27, at 12 (describing how Kano's students won 13 bouts and at competition with other jujutsu schools); see also GENTRY III, *supra* note 15, at 15 (stating that strong performance of Kano's students at competition resulted in eighteen jujutsu masters joining Kano's school and contributed to decrease in popularity of traditional jujutsu).

35. See GENTRY III, *supra* note 15, at 15 (describing life of Kano).

36. See *id.* (discussing growth of judo).

37. See SNOWDEN, *supra* note 28, at 13 (expressing how Maeda earned himself the name "count combat," which some have called the first MMA nickname). Maeda was not satisfied by the effect of peaceful demonstrations on audiences in

traveled across the world performing judo demonstrations at colleges and military academies, as well as entering over 2,000 professional wrestling competitions and other paid fighting challenges, acts never approved by Kano.<sup>38</sup> Not a philosopher or even much of a thinker like his teacher, Maeda exhibited his knowledge of judo the best way he knew how – in actual competition.<sup>39</sup> During a demonstration at New York's West Point Military Academy, Maeda accepted a challenge from a wrestler, was taken down and pinned clean; however, the wrestler and most everyone else in attendance were not familiar with the unique rules of judo matches and many were caught by surprise when Maeda continued fighting from his back and defeated the larger opponent by applying an arm bar.<sup>40</sup>

#### D. Brazilians Create Jiu-Jitsu From Maeda's Judo

Maeda's travels took him all over the world, and he eventually settled in Brazil, where he landed in the town of Porto Alegre on November 14, 1914.<sup>41</sup> His arrival in the country would mark the conclusion of his lengthy prize-fighting career, as he moved to the town of Belem after a few early fights, where he married and opened an academy to teach aspiring students of the martial arts.<sup>42</sup> One aspiring student, Carlos Gracie, trained at the gym for four years learning Maeda's style of judo, which was now tempered by real-world fighting experience.<sup>43</sup>

In 1925, Gracie left the tutelage of Maeda and formed his own academy in Rio de Janeiro, where he taught his brothers and other

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New York. *See id.* (describing Maeda's time in New York). Thus with the financial backing of a Japanese businessman, Maeda offered a cash prize to all challengers who thought they could defeat him in live competition. *See id.* (referencing events in New York). He repeated these exhibitions in all cities, even publicly challenging heavyweight boxing champion at that time, Jack Johnson, to a challenge match. *See id.* (noting holding of exhibitions); *see also* KELLY CRIGGER, TITLE SHOT: INTO THE SHARK TANK OF MIXED MARTIAL ARTS 32 (2008).

38. *See* GENTRY III, *supra* note 15, at 15 (explaining that at only 5 feet, 5 inches tall and 154 pounds, Maeda traveled throughout U.S., Europe, Cuba, and Central America competing in these matches).

39. *See* SNOWDEN, *supra* note 27, at 13 (describing Maeda's knowledge of judo).

40. *See id.* at 12-13 (discussing Maeda's demonstration at West Point).

41. *See* GENTRY III, *supra* note 15, at 16 (noting how he continued to issue challenges across Brazil).

42. *See id.* (describing early fighting career of Maeda).

43. *See* SNOWDEN, *supra* note 27, at 14-15 (explaining that because Maeda had been exposed to numerous fighting styles, he did not limit his teachings in his academy to strictly judo). It is documented that he implemented western-style catch-wrestling techniques and also taught classical submission holds not part of the judo curriculum. *See id.* (illustrating Maeda's western-style techniques).

Brazilian students the art he learned from Maeda.<sup>44</sup> However, having studied with the judoka for only a short amount of time, Gracie had not mastered the art completely and thus was only able to implement the more basic to intermediate ground-fighting and throwing techniques utilized by his instructor.<sup>45</sup> This partial understanding of Maeda's already evolved art had a tremendous impact on how Gracie and his brothers began to develop their own style of fighting.<sup>46</sup> The biggest innovator in the Gracie family proved to be Helio, the youngest of the brothers, who initially spent his days in the gym reduced to a spectator for lack of size.<sup>47</sup> Not letting his stature hold him back, Helio found ways to rework techniques to his advantage against larger and physically stronger athletes.<sup>48</sup>

Knowing he would likely end up on his back in competition, Helio concentrated on submitting his opponents from there, effectively creating many of the innovative techniques utilized in Brazilian jiu-jitsu today.<sup>49</sup> As the new sport gained popularity in Brazil, many practitioners of boxing and the native fighting style of capoeira began to question its effectiveness.<sup>50</sup> In response, the Gracies issued challenges to anyone who wished test their fighting style against the family's creation.<sup>51</sup> Helio led the way and entered into the majority of these widely publicized events that would go on to be called *vale tudo* matches, a phrase meaning "anything goes" in Portuguese.<sup>52</sup>

As Gracie met success in the ring, the new style of jiu-jitsu continued to gain support in Brazil, and the increased publicity eventu-

44. See GENTRY III, *supra* note 15, at 17 (stating that Gracie took it upon himself to teach judo to three of his brothers and to friends).

45. See SNOWDEN, *supra* note 27, at 15 (suggesting that Gracie did not attain judo black belt prior to leaving Maeda's instruction).

46. See *id.* (noting that Maeda's work laid foundation for Carlos, but it was then incumbent upon the Gracies to continue to learn and progress).

47. See *id.* at 15-16 (indicating that Helio Gracie's abilities were not discovered until one day at his brother's gym when someone arrived for lesson and no one else was there to offer instruction except Helio).

48. See *id.* at 16 (indicating how Helio Gracie crafted techniques to help him succeed against larger and physically stronger opponents).

49. See *id.* at 16-17 (explaining how Helio Gracie perfected "guard position," where one fighter lays on his back and controls other with his legs and hips).

50. See GENTRY III, *supra* note 15, at 18 (noting that some questioned effectiveness of Helio Gracie's techniques).

51. See SNOWDEN, *supra* note 27, at 17-18 (showing that Helio Gracie welcomed challenges from those who questioned his fighting technique).

52. See GENTRY III, *supra* note 15, at 18 (describing how Helio Gracie entered his first *vale tudo* fight in 1932 against a professional boxer, whom Gracie beat in thirty seconds).

ally reached Masahiko Kimura, a Japanese world judo champion at the time.<sup>53</sup> Gracie went on to issue a challenge, which Kimura accepted, and on October 23, 1951, the most famous vale tudo match took place in front of 20,000 spectators.<sup>54</sup> Gracie lost to the younger and more advanced judoka, retiring soon after; however, he continued to train his family in jiu-jitsu as they went on to pursue the sport and compete in challenge matches.<sup>55</sup> The guard eventually shifted to Helio's nephew Carlson Gracie, who went on to restore honor to the sport and the Gracie name in Brazil when he won a match in front of 40,000 spectators against Waldemar Santana in 1956.<sup>56</sup>

Helio, Carlson, and many of the other Gracie brothers spawned large families that now dedicate their lives to jiu-jitsu.<sup>57</sup> In 1969, Rorion, a Gracie family member who had been studying jiu-jitsu since birth, decided at the age of seventeen that it was his duty to spread his family's style of fighting art to the world.<sup>58</sup> His first attempt was largely unsuccessful;<sup>59</sup> however, he did not give up and eventually was able to bring mass media attention to jiu-jitsu in the early 1990's with an event called the Ultimate Fighting Championship.<sup>60</sup>

#### E. Mixed Martial Arts and America

Greece, Japan and Brazil are not the only countries to have experimented with various forms of mixed combat.<sup>61</sup> In the 1960s,

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53. *See id.* (stating that Masahiko Kimura learned of Helio Gracie's techniques and explaining that Helio Gracie's techniques became increasingly popular).

54. *See id.* at 20 (reporting that Brazilian newspapers called event at massive Maracana Stadium "World Championship of Jiu-Jitsu").

55. *See id.* at 20-21 (referencing that Helio Gracie lost match against Masahiko Kimura, but explaining how Helio Gracie continued to teach his techniques to his family, who went on to compete using his techniques).

56. *See* SNOWDEN, *supra* note 27, at 21-22 (explaining that fight was meaningful for Gracie family due to fact that Santana had been one to finally retire older Helio, after brief comeback following Helio's loss to Masahiko Kimura).

57. *See* GENTRY III, *supra* note 15, at 18-19 (noting that "the Gracies were to become perhaps the most remarkable family in the history of martial arts – some say in the whole history of sports").

58. *See id.* at 25 (describing how Rorion Gracie began learning jiu-jitsu at such young age that he had diaper on under his gi).

59. *See id.* (explaining that Rorion's relatives urged him not to leave on this initial trip which resulted in him sleeping on streets and panhandling for food). He later returned to Brazil for a short period of time and did not completely return to the United States to settle until 1978. *Id.*

60. *See id.* at 31-41 (illustrating Rorion's eventual break into fame).

61. *See* JAKE SHANNON, SAY UNCLE!: CATCH-AS-CAN-WRESTLING AND THE ROOTS OF ULTIMATE FIGHTING, PRO WRESTLING & MODERN GRAPPLING 6 (2011) (reporting that Native American tribes had been wrestling in style similar to judo hundreds of

the United States hosted the creation of *Jeet Kune Do*, an influential style of fighting created by America's arguably most famous martial artist, Bruce Lee.<sup>62</sup> Jeet Kune Do is not only a style of fighting, but a philosophy on the art of combat, which emphasizes the unpredictability of hand-to-hand fighting.<sup>63</sup> Jeet Kune Do is a fluid approach to the martial arts that favors formlessness above all else.<sup>64</sup> Much like his predecessors, Lee developed his revolutionary art by adapting what he felt were the most effective techniques from traditional martial arts, fusing them together, and ignoring the ones that did not serve him a purpose.<sup>65</sup>

Jeet Kune Do's inability to grab hold in the United States following its inception, as judo had done in Japan, and jiu-jitsu in Brazil, can likely be attributed to Americans' addiction to the more simplistic sport of boxing. America's confidence and enthusiasm in the sport of boxing is probably best recorded in an article in the August 1963 edition of *Rogue* magazine.<sup>66</sup> The article in the nationally circulated magazine disrespected judo by claiming that boxing was the superior sport; it went on to offer any ranking judoka \$1,000 to enter into a match against a top ranked pugilist.<sup>67</sup> It did not take long for a response and on December 2, 1963, "Judo" Gene Lebell entered into a special rules match against top-ranked middleweight boxer Milo Savage.<sup>68</sup> The contest allowed either

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years before English settlers arrived). In this form of fighting the Native Americans could win a match not by pinning opponents like in wrestling, but by performing throws on them as in the Japanese art of Judo. *Id.*

62. See GENTRY III, *supra* note 15, at 1 (stating that Bruce Lee made it his life's work to find integral link between traditional martial arts and unpredictability of hand-to-hand combat).

63. See *id.* (finding that Lee's influential book, *Tao of Jeet Kune Do*, displayed his views on changing way to look at fighting through scientific and realistic examination of its natural processes).

64. See Bruce Lee, *TAO OF JEET KUNE DO: NEW EXPANDED EDITION* 15-16 (2011) (explaining that Jeet Kune Do has no style, but can fit within all styles, and explaining further that Jeet Kune Do is not bound by any one fighting system, but instead utilizes any technique from traditional martial arts that are best suited to martial artist). Lee said that to understand Jeet Kune Do, "one ought to throw away all ideals, patterns, styles; in fact, he should throw away even the concepts of what is or isn't ideal in Jeet Kune Do." *Id.*

65. See R.M. Schneiderman, *Mixed Martial Arts for Fitness, Not Combat*, N.Y. TIMES, Oct. 8, 2009, at E7, available at <http://www.nytimes.com/2009/10/08/fashion/08fitness.html> (stating that Lee's techniques revolutionized fighting, and were "[fifty years] ahead of [their] time.").

66. See Dewey Lawes Falcone, *Judo Versus Boxing*, BLACK BELT, May 1964, at 35 (highlighting longtime dispute as to whether judo or boxing is "the superior form of self-defense.").

67. See *id.* (noting bias of article writer in favor of boxing over judo).

68. See *id.* (identifying Gene LeBell as "the 1954 and 1955 National AAU Judo Champion").

competitor to use the attacks of their respective disciplines and in the fourth round LeBell executed a left sided hip toss to get his opponent to the ground where he sunk in a choke for the win.<sup>69</sup>

Another similar contest was held on June 26, 1976, between one of boxing's most famous heavyweight champions, Muhammad Ali, and Japanese professional wrestler Antonio Inoki.<sup>70</sup> New Japan Wrestling, the promotion that hosted the bout, attempted to increase ticket sales by featuring Inoki as the "world's martial arts champion" and felt there was no better way to do this than a match against Ali.<sup>71</sup> Being primarily a sports-entertainment promotion, New Japan had previously enlisted fighters to compete in predetermined matches against Inoki; however, Ali refused to enter such a contest.<sup>72</sup> Thus the competitors agreed to engage in a real fight with altered rules and referred by none other than the winner of the last similarly publicized match, "Judo" Gene LeBell.<sup>73</sup> The contest went to a draw, with Ali landing only six punches over fifteen rounds, as his opponent spent the majority of the match laying on his back kicking at Ali's legs.<sup>74</sup> Following this more or less uneventful spectacle, the idea of a contest which mixed the martial arts largely disappeared in the minds of Americans until the year 1993, the year which saw the emergence of the Ultimate Fighting Championship.<sup>75</sup>

Interestingly enough, the idea for the UFC actually started with the September 1989 issue of *Playboy* magazine that featured a story about "the toughest man in the United States."<sup>76</sup> The article was about the young, confident Brazilian Rorion Gracie, who was issuing a \$100,000 challenge to any man who felt they could defeat him and his family's fighting art in competition.<sup>77</sup> The article caught

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69. *See id.* (explaining that hip toss LeBell utilized was maki hari goshi).

70. *See* GENTRY III, *supra* note 15, at 7-8 (explaining origins of "one of the best known MMA matches of all time").

71. *See id.* (presenting New Japan's strategy of putting Inoki against various champions from other fighting disciplines).

72. *See id.* (stating Ali refused to be predetermined loser despite \$6 million paycheck).

73. *See id.* (explaining Ali's refusal to lose caused two sides to engage in real fight).

74. *See id.* (demonstrating match proved to be inglorious because Ali had to go to hospital due to blood clots in his legs and, further, he was not paid full \$6 million purse).

75. *See* DAVID T. MAYEDA & DAVID E. CHING, FIGHTING FOR ACCEPTANCE: MIXED MARTIAL ARTISTS AND VIOLENCE IN AMERICAN SOCIETY 12 (2008) (providing explanation for disappearance of mixed martial arts contests between 1976 and 1993).

76. *See* GENTRY III, *supra* note 15, at 31 (noting Rorion Gracie was attempting to achieve American dream through his father's legacy).

77. *See id.* (explaining challenge put entire Gracie family name on line).

the attention of challengers, but before anybody could attempt to cash in, Gracie teamed up with an advertiser and a Hollywood movie director who had also read the article and they came up with an idea called The War of the Worlds (“WOW”).<sup>78</sup>

WOW was proposed as a single elimination tournament which would match several fighters of different martial arts backgrounds against each other in a single night until a champion was crowned.<sup>79</sup> WOW eventually changed its name to the UFC, and with the help of a small pay-per-view company called Semaphore Entertainment Group (“SEG”), the promotion’s first event became available to the American public on closed circuit television.<sup>80</sup>

For the first event SEG took advantage of Colorado’s lack of a boxing commission,<sup>81</sup> and a 1977 state law that repealed statutes governing boxing and wrestling, to hold its inaugural show in Denver, Colorado, on November 12, 1993.<sup>82</sup> Close to 100,000 people purchased the pay-per-view broadcast and combined with the live gate from those in attendance, SEG saw a fair amount of profit from its first UFC event.<sup>83</sup> Nevertheless, SEG felt that the best way to reach an even larger audience was by showcasing the violence and danger behind the sport.<sup>84</sup> This tactic culminated during a press conference for UFC II, where it was reported that matches in the tournament would continue “until there is a designated winner – by means of knockout, surrender, doctor’s intervention, or *death*.”<sup>85</sup>

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78. See SNOWDEN, *supra* note 27, at 25-6 (explaining that Art Davie, advertiser who saw article, was actually looking for new sports heroes for an ad campaign targeting eighteen-to-thirty-four-year-old males, and John Milius, director, had directed Red Dawn and Conan).

79. See GENTRY III, *supra* note 15, at 40 (explaining that first UFC events were designed to be spectacles and not sports and therefore neither weight classes nor strict regulations existed).

80. See SNOWDEN, *supra* note 27, at 26-28 (detailing that UFC was brought to American homes through pay-per-view).

81. See MAYEDA & CHING, *supra* note 75, at 13 (noting that Colorado had no boxing commission).

82. See GENTRY III, *supra* note 15, at 34 (explaining that only state regulation on boxing and wrestling that remained was one that required participants to be at least eighteen years of age to compete); see also MAYEDA & CHING, *supra* note 75, at 12 (describing profits from SEG’s first UFC event).

83. See Richard Sandomir, *This “Sport” is a Kick in Society’s Face*, FRESNO BEE, Mar. 8, 1994, at C1, available at 1994 WLNR 1528704 (noting viewer and attendance statistics for first UFC event).

84. See GENTRY III, *supra* note 15, at 72 (referencing that UFC promoters felt best way to reach larger audience was to sell blood, guts, and fear aspects of UFC events).

85. See *id.* at 72-73 (explaining that UFC also attempted to gain attention by claiming their form of fighting was banned in forty-nine states, statement that was

The marketing ploys used by the UFC did attract attention; however, not exclusively from the audience it would have liked.<sup>86</sup> Thus, as the UFC took its show on the road, it was met with strong resistance from politicians and medical associations.<sup>87</sup> Oklahoma was able to stop UFC IV in Tulsa after being unsuccessful in its prior attempts to ban an earlier UFC event held in the state on December 16, 1994.<sup>88</sup> In March of 1995, the Attorney General for the state of Kansas claimed that he would file criminal charges against anyone who held a UFC event in his state.<sup>89</sup> On May 24 of the same year the Charlotte City Council voted to permanently ban the UFC after it had viewed a video of UFC III, an event which took place in the city of Charlotte the year before.<sup>90</sup>

Things really started to get bad for the UFC, however, in June of 1995 when then-Arizona State Senator John McCain viewed a video of a UFC event and sent a letter to the Governor of Wyoming, urging him to stop a UFC set to take place in his state.<sup>91</sup> The letter did not work, but that did not stop McCain from convincing the Governor of Puerto Rico to stop a UFC event from taking place in the territory.<sup>92</sup> Despite McCain's efforts, however, the UFC fought

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patently untrue at time, as UFC would go on to host events in many different states shortly after claim was released).

86. *See id.* at 84-85 (detailing that some felt favorably towards promotion, like popular music channel MTV, which proclaimed UFC "the sport of the nineties" but noting that others did not feel same, such as well-known sports columnist Woody Paige who when writing about UFC II, said it was "the most disgusting, horrifying thing I've ever seen. It's basically taking cockfighting and putting it in human form").

87. *See* MAYEDA & CHING, *supra* note 75, at 13 (discussing heavy criticism of UFC after announcement to continue matches until win via knockout, surrender, doctor intervention, or death).

88. *See* GENTRY III, *supra* note 15, at 97, 100 (explaining that Oklahoma was unable to stop first event but went on to ban all future UFC shows in state, with Mississippi following shortly after).

89. *See id.* at 100 (stating that Kansas Attorney General would file criminal charges against UFC events in his state).

90. *See id.* at 92 (explaining that Charlotte's mayor pre tempore referred to UFC as "another form of pornography.").

91. *See id.* at 116 (describing how McCain's letter called UFC, "vicious," "ugly," "truly appalling," and "disturbing and bloody competition which places the contestants at a great risk of serious injury or even death, and it should not be allowed to take place anywhere in the United States.").

92. *See id.* at 116, 126 (reporting that McCain had convinced Governor Pedro Rosello and rest of Puerto Rican government that UFC had "no place in civilized society.").

back and took the issue to court, eventually attaining approval the day before the show.<sup>93</sup>

The UFC would pull off this last minute courtroom battle once more in Detroit, Michigan; this time, however, there were stipulations put in place saying that in order for the UFC to hold its event in Detroit, it had to agree that competitors would not use head-butts or closed fist strikes to the head.<sup>94</sup> The UFC complied in order to hold the Detroit event, and with all of the mounting pressure the company decided it was best to also change the format of its future events.<sup>95</sup> Thus, instead of the previously used single elimination tournament style, there were now weight classes, timed rounds, and open fingered gloves which fighters were required to use.<sup>96</sup>

The changes came too late, however, as Senator McCain became chairman of the Senate Commerce Committee, a body with direct oversight of the cable industry, and he began to target sex and violence on television.<sup>97</sup> As a result, top cable providers refused to air UFC programming on closed-circuit pay-per-view television starting in 1997, and this drastically limited the home viewing audience for UFC events from a potential thirty-five million homes to less than seven and a half million.<sup>98</sup> The missing revenue from this portion of the market forced the UFC to cut costs, and as a result the promotion lost a good portion of its more popular fighters to a new Japanese promotion, Pride Fighting Championships.<sup>99</sup> The popularity of PrideFC added to the already mounting political

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93. *See id.* at 127 (detailing that SEG legal team spent days convincing district court judge; their main argument being that authorities could not stop event because they had no regulations governing such fights.”).

94. *See id.* at 132-33, 135 (explaining that except for small circle “in the know,” nobody knew about rule making closed fist strikes illegal). UFC referee John McCarthy commented on how he did not know how to implement the rules since he was given the new instructions only hours before the fight and was told that he should only view them as “minor” infractions subject only to \$50 penalty imposed after the fight. *See id.* (describing John McCarthy’s comments).

95. *See id.* at 132 (stating decision to change rules of match that night).

96. *See id.* (noting change to format of fights).

97. *See* SNOWDEN, *supra* note 27, at 93 (describing extreme power McCain held over cable companies).

98. *See id.* at 93-95 (explaining that TCI Cable, company with over 14 million subscribers, pulled programming because violence was too extreme). With Time Warner Cable following shortly after, the only options left to viewers were DirectTV and Satellite. *See id.* (discussing viewer options with respect to UFC programming).

99. *See id.* at 95-96, 134, 140-42 (describing how Pride exploded in popularity and profitability due to former UFC stars and Japan’s Kazushi Sakuraba, who defeated 3 time UFC champion Royce Gracie and 3 other Gracie family members among others).

pressure and television trouble faced by the UFC; however, the promotion continued to produce shows, despite the fact that it was now viewed by a smaller audience.<sup>100</sup>

#### F. Regulation, Reform and Recognition

Just when mixed martial arts seemed to be in its darkest hour in America, a new ally emerged in the form of the New Jersey State Athletic Control Board (“NJSACB”) and its chairman, Larry Hazzard.<sup>101</sup> Hazzard was familiar with MMA promotions in his state and eventually helped the UFC hold its first sanctioned event in the United States in November 2000.<sup>102</sup>

Then, on January 9, 2001 MMA, received the best possible support when Zuffa Entertainment purchased the UFC for two million dollars.<sup>103</sup> Zuffa unveiled the new and improved UFC on February 23, 2001 in Atlantic City’s Trump Taj Mahal, overhauling its first show with stage effects and increased promotional merchandise.<sup>104</sup> Shortly after Zuffa’s first event, its executives and other proponents of MMA sat down with the NJSACB and established what is now known as the Unified Rules of Mixed Martial Arts.<sup>105</sup>

July 2001 brought further resurgence for the sport of MMA in America when the UFC gained approval through the Nevada State Athletic Commission to hold its first sanctioned event in the fight state.<sup>106</sup> Reporters donned the approval from the strictly regulated commission as a “defining moment in sports history,” reasoning that MMA events would now be receiving coverage as news stories

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100. See GENTRY III, *supra* note 15, at 217, 257 (explaining environment that contributed to MMA decline in popularity); see also SNOWDEN, *supra* note 27, at 146 (noting that viewers of MMA during this period of time in America referred to it as “dark days” of MMA).

101. See SNOWDEN, *supra* note 27, at 143-47 (describing failed attempt at sanctioning in Nevada prior to events in New Jersey and noting approval from major sanctioning board in United States was important, as it gave UFC stronger chance of overcoming cable ban).

102. See *id.* at 147 (explaining that Hazzard sanctioned Paul Smith’s International Fighting Championship in the state of New Jersey before he sanctioned UFC 28).

103. See GENTRY III, *supra* note 15, at 274 (stating that Zuffa was co-owned by brothers Lorenzo and Frank Fertitta, who were “consummate businessmen” and diehard MMA fans).

104. See *id.* (describing event put together by UFC and Zuffa)

105. See SNOWDEN, *supra* note 27, at 157 (describing process of formulating Unified Rules of Mixed Martial Arts).

106. See GENTRY III, *supra* note 15, at 276 (reporting on approval process for UFC in Nevada).

rather than as oddities or “off-the-wall” fringe stories.<sup>107</sup> Furthermore, July 2001 was also when the three-year span of major cable provider holdouts was broken; this happened when the cable company iN DEMAND announced that it would make the UFC available to twenty-eight million customers for its upcoming event.<sup>108</sup>

However, despite the increased acceptance and elevated financial backing from Zuffa, the UFC met mixed economic results in the years that followed, seldom able to recreate the early pay-per-view numbers established by the first few SEG-produced shows.<sup>109</sup> Nevertheless, the UFC remained persistent and finally found mainstream success on January 17, 2005, when it debuted a thirteen week reality series called “The Ultimate Fighter” on Spike TV.<sup>110</sup> The show placed sixteen fighters in the same house with no contact with the outside world and made them compete in challenges leading to a chance at a UFC contract.<sup>111</sup> With television in a reality series boom at the time, the show was an instant success and drew record breaking numbers for the MMA industry, with 3.3 million viewers watching the season finale between Stephan Bonnar and Forrest Griffen.<sup>112</sup> Following the hard-fought finale, the UFC secured a deal with Spike TV that ran until 2008, locking in the reality show as a promotional and educational tool for the UFC to reach the growing MMA fan base.<sup>113</sup>

Many more states continued to come on board during this time, most notably with the approval of the California State Athletic

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107. See Joe Schoenmann, *Evolution or Devolution? Brutal Mixed Martial Arts Fights Get More Popular, Crossing Many Boundaries*, LAS VEGAS SUN, Mar. 11, 2007, at A1, available at 2007 WLNR 4676253 (explaining how MMA started to become mainstream).

108. See SNOWDEN, *supra* note 27, at 163 (referencing UFC’s emergence on mainstream television).

109. See *id.* at 200-01 (explaining UFC struggles); see also GENTRY III, *supra* note 15, at 281 (describing 2008 Forbes article that details how Zuffa lost over \$44 million during first three years of owning UFC).

110. See GENTRY III, *supra* note 15, at 282 (detailing “The Ultimate Fighter” television show and its concept); see also SNOWDEN, *supra* note 27, at 214 (noting how Spike TV required Zuffa to fund cost of first season, which totaled 10 million dollars).

111. See MAYEDA & CHING, *supra* note 75, at 15 (detailing environment in which contestants on “The Ultimate Fighter” were placed).

112. See SNOWDEN, *supra* note 27 at 222, 229 (stating viewer ratings for final fight on “The Ultimate Fighter” season one).

113. See *id.* at 229 (explaining that show was featured in *Boston Globe* and *USA Today*, bringing sport much needed attention, and discussing new feature of “The Ultimate Fighter” called “Ultimate Fight Night,” which aired on Spike TV and showcased classic archived UFC fights, much like boxing’s “Tuesday Night Fights”).

Commission in 2006.<sup>114</sup> Thus, with the success of “The Ultimate Fighter” and the growing acceptance from states, the sport and its athletes started to garner attention, and almost immediately pay-per-view numbers for UFC events began to climb.<sup>115</sup> The sport continued growing in popularity as it was featured on popular mainstream media sports outlets and the cover of *Sports Illustrated*.<sup>116</sup> “Ultimate Fighting Championship” was also reported as the most searched term of the day on the Yahoo! search engine during the summer of 2006, beating out other popular terms such as “World Cup 2006,” “MLB,” “NBA,” and “Jessica Alba.”<sup>117</sup> Furthermore, ESPN’s website recently added a section devoted solely to MMA.<sup>118</sup>

As attention began to increase for the company, it quickly added to its star power by acquiring the most experienced mixed martial artists available on the market and eventually buying out rival promotions that held other appealing talent in exclusive contracts.<sup>119</sup> Following these mergers and acquisitions, the UFC clearly began to stand out as the premier MMA organization, and in response, mainstream sponsors began to pour in for the company, such as Bud Light, Harley Davidson, and Burger King.<sup>120</sup> MMA athletes themselves also began to receive support from leading sponsors like Nike, which featured the hard hitting Kevin “Kimbo Slice” Ferguson in a commercial alongside NFL running back LaDainian Tomlinson; and from software giants like Microsoft, which secured

114. See Schoenmann, *supra* note 107 (referencing California’s and Nevada’s acceptances).

115. See SNOWDEN, *supra* note 27, at 232, 324 (citing UFC 52 event in April of 2005 which garnered 280,000 Pay-Per-View buys and UFC 68 in early 2007 which pulled in 534,000 buys).

116. See GENTRY III, *supra* note 15, at 278, 283 (referring to *Sports Illustrated* cover which featured mixed martial artist for first time, UFC fighter Chuck Liddell, as well as feature done by Fox Sports Net’s “The Best Damn Sports Show . . . Period!,” that showcased match between Robbie Lawler and Steve Berger).

117. See Jesse Noyes, *Media Today; Violent Sport Tops on Yahoo*, BOSTON HERALD, June 1, 2006, at 36, available at 2006 WLNR 9420110 (detailing list of top sports terms on Yahoo! during summer of 2006).

118. See Danny Hakim, *Ultimate Fighting, Toned Down, Seeks Legalization*, N.Y. TIMES, Mar. 10, 2008, at B2, available at [http://www.nytimes.com/2008/03/10/nyregion/10empire.html?\\_r=0](http://www.nytimes.com/2008/03/10/nyregion/10empire.html?_r=0) (reporting availability of MMA tab on ESPN).

119. See SNOWDEN, *supra* note 27, at 310-11 (describing Zuffa’s acquisition of World Extreme Cagefighting (“WEC”) and purchase of World Fighting Alliance (“WFA”) at end of 2006 and subsequent purchase of PrideFC).

120. See Robert Klemko & Sergio Non, *UFC Hits Critical Juncture, Fox Deal Latest Maneuver Toward Mainstream*, USA TODAY, Nov. 8, 2011, at 1C, available at <http://usatoday30.usatoday.com/sports/mma/story/2011-11-08/UFC-eyes-mainstream-with-Fox/51119926/1> (highlighting UFC’s growth and sponsor support).

a cross-promotional partnership with former UFC light heavyweight champion Rashad Evans after he won the light heavyweight belt.<sup>121</sup>

One of the most successful Zuffa-produced events to date was the marquee UFC 100, on July 11, 2009 in Las Vegas, which set a pay-per-view record with 1.6 million television purchases at \$45 apiece and earned 5.1 million dollars of live gate revenue.<sup>122</sup> However, recently there has been a push away from the pay-per-view market, as seen with the UFC's announcement of a long-term deal with the major television network Fox Sports to bring live UFC events free into the homes of cable subscribers.<sup>123</sup> Following the deal, David Hill, chairman of the Fox Sports Media Group commented on the success of the sport, saying that it "has gone from a niche to an international powerhouse," and that he has "never seen anything go from zero to hero in so short a time."<sup>124</sup>

The increased attention has allowed the UFC to initialize movements and contribute to lobbying efforts in every unsanctioned state in the hope that it will help get MMA legalized in every corner of the country.<sup>125</sup> With a strong foothold currently forming in America, the UFC made the decision to become an international organization on January 12, 2010, when its parent company Zuffa sold a 10% interest to Flash Entertainment, an Abu Dhabi-based government-owned company.<sup>126</sup> In May of the same year, the UFC opened offices in Toronto and recruited former CFL commissioner

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121. See R.M. Schneiderman, *Companies Toss Their Brands In the Mixed Martial Arts Ring*, N.Y. TIMES, Jan. 1, 2009, at B3, available at <http://query.nytimes.com/gst/fullpage.html?res=950CEEDF1031F932A15752C0A96F9C8B63> (explaining Evans' appearance in Windows commercial that ran in United States, Britain, and Japan). Also, immediately upon winning the light heavyweight championship belt, Evans wore a t-shirt with an image of Bill Gates's "mugshot photo." *Id.* Microsoft spokespeople commented that "Rashad was chosen because he helped illustrate the point of the campaign – that Windows users represent a broad cross section of society." *Id.*

122. See GENTRY III, *supra* note 15, at 288 (discussing "UFC 100" event).

123. See Klemko, *supra* note 120 (referencing Fox Sports' addition of UFC).

124. See Sandomir, *supra* note 1 (noting trend away from pay-per-view structure).

125. See Bill King, *UFC Goes Another Round In Effort For N.Y. Sanction*, SPORTS BUS. J. DAILY (Jan. 10, 2011), <http://www.sportsbusinessdaily.com/Journal/Issues/2011/01/20110110/Leagues-and-Governing-Bodies/MMA.aspx> (explaining that "UFC spent about \$75,000 lobbying in Indiana in 18 months leading up to passage of legislation there in 2009" and stating that it spent \$216,736 in Wisconsin and \$46,550 on lobbyists in South Carolina to get another bill passed in 2009).

126. See GENTRY III, *supra* note 15, at 286-87 (discussing how Zuffa also went international in 2006 when it opened office in United Kingdom and in 2010 when it opened offices in China and Canada).

Tom Wright to head UFC Canada.<sup>127</sup> Furthermore, the UFC has placed itself in a position to make a greater worldwide impact, as it is currently airing the first season of “The Ultimate Fighter Brazil,” with plans to host similar UFC reality shows in Australia, India, and the Philippines.<sup>128</sup> Mixed martial arts is now being called “the fastest growing sport in the world,” and one research group estimated the UFC fan base at 31 million people at the end of 2010.<sup>129</sup>

### III. LEGAL AND LEGISLATIVE HISTORY LEADING TO THE BAN OF MMA IN NEW YORK

Today, through the efforts of various MMA promoters and enthusiasts, the sport has gained acceptance and sanctioning approval in almost every state.<sup>130</sup> While the state commissions that remain as holdouts likely do not present a threat to the overall growth of the sport; New York and the struggle for sanctioning approval in that state is one battle that appears as if the UFC and the rest of the MMA community is not willing to lose without a fight.

#### A. Early History of Mixed Martial Arts in New York

MMA was not always banned in the state of New York; in fact, the UFC broke a box office record on September 8, 1995, with over 8,100 in attendance at an event it held at Memorial Auditorium in Buffalo, New York.<sup>131</sup> Following this successful UFC show, another promotion, Extreme Fighting (“EF”), proposed to hold its inaugural event a month later in Brooklyn, New York, and garnered a considerable amount of negative attention during a press conference for the event.<sup>132</sup> This increased exposure did not help EF promot-

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127. See *Fight On*, HOLLYWOOD REPORTER, May 27, 2010, at 4, available at 2010 WLNR 15150894 (explaining UFC’s expansion to Canada).

128. See Josh Brown, *Canada No Longer MMA’s Mecca But Still a Stalwart*, WATERLOO REGION RECORD, Mar. 3, 2012, at D12, available at 2012 WLNR 4660210 (highlighting expansion of UFC reality show).

129. See GENTRY III, *supra* note 15, at 358-59 (presenting data from Simmons Research Database which compared UFC to NFL, MLB, NHL, NASCAR, and MLS from article on mmapayout.com entitled “The UFC Fan Base.”).

130. See Adam Hill, *Jury Happy to Get Second Swing at ‘Ultimate Fighter’ Opportunity*, LAS VEGAS REV.-J., Mar. 13, 2012, at 4C, available at <https://www.reviewjournal.com/sports/mma-ufc/jury-happy-get-second-swing-ultimate-fighter-opportunity> (explaining that remaining states that have not yet sanctioned mixed martial arts are New York, Connecticut, Vermont, Montana, and Alaska).

131. See GENTRY III, *supra* note 15, at 122 (describing incident where MMA was practiced in New York).

132. See *id.* at 143-44 (noting that promoters of event used similar marketing ploys utilized by the UFC to promote death and serious injury in attempt to attract attention); see also *id.* (explaining that Donald Zuckerman, lawyer, boxing manager, and former owner of NY nightclub who started Extreme Fighting (“EF”) pro-

ers, who then had to win a court order to secure a license which would allow the event to take place.<sup>133</sup> However, the show did not take place in New York but was moved to North Carolina as EF would have been forced to switch the date at the last minute, something it was not willing to do.<sup>134</sup>

During this time the NYSAC had no regulatory control of MMA, as it was only vested with jurisdictional powers over boxing, sparring and wrestling.<sup>135</sup> In response to this loophole, the New York State Senate Committee on Investigations, Taxation and Government Operations held a hearing to consider a ban on what it called “extreme fighting” on April 18, 1996.<sup>136</sup> At the hearing, statements were given by both proponents and opponents of the legalization of MMA in the state of New York.<sup>137</sup> To help the UFC’s cause, SEG hired a lobbyist from Albany who set up a meeting between UFC executives and Senate Majority Leader Joseph Bruno to discuss the future of MMA in the state.<sup>138</sup>

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motion claims to have added to attention his promotion received by paying picketers to protest his event at press conference, and admitting his tactics worked too well).

133. *See id.* at 155-56 (stating that New York Division of Military and Naval Affairs revoked Battlecade’s license to hold event at Park Slop Armory in Brooklyn); *see also id.* (indicating that Battlecade took issue to State Supreme Court and won judgment enjoining the state authorities from cancelling the lease but automatic appeal was issued that would have delayed court’s decision until after proposed date of Battlecade’s event).

134. *See id.* at 156 (indicating why license was no longer necessary).

135. *See* Memorandum of Law in Support of Motion to Dismiss at 4, *Jones v. Schneiderman*, No. 11 Civ. 8215 (S.D.N.Y. Nov. 11, 2011) (describing lack of NYSAC’s regulatory power).

136. *See* Defendant Schneiderman’s Memorandum of Law in Support of His Initial Limited Motion to Dismiss The Fourth and Fifth Causes of Action in the Complaint at 5, *Jones v. Schneiderman*, No. 11 Civ. 8215 (S.D.N.Y. Nov. 11, 2011) (arguing to allow “extreme fighting”).

137. *See* Memorandum of Law in Support of Motion to Dismiss, *supra* note 135, at 4-6 (expressing that EF promoter Donald Zuckerman read statement provided by Doctor Joseph Estwanik, who was Chairman of Sports Medicine for United States Amateur Boxing Association). Dr. Estawanik’s statement described how he had served as ringside physician for three major MMA events and the trend for those events showed that no participants sustained injuries of a severe nature. *See id.* (explaining those against sanctioning of MMA at hearing were doctors George Lundberg, board-certified pathologist, and Steven Dane, neurologist and qualified ringside physician for state); *see also id.* (stating Dr. Lundberg testified that American Medical Association was opposed to boxing in all forms and that this type of no-holds-barred fighting led to the potential for brain concussions, eye damage and blindness, fractures of bones, and brain damage, among other things); *see also id.* (reporting that Dr. Dane also reviewed early primitive rules utilized by MMA promotions at time and found particular issue with allowance of head-butts and strikes with ungloved hands).

138. *See* GENTRY III, *supra* note 15, at 154-55 (explaining that lobbyist was James D. Featherstonhaugh, business partner of Bruno’s).

Then in July of 1996, a bill that proposed to regulate MMA in New York by amending the current state statute regulating boxing, sparring, and wrestling, was making its way through the legislature.<sup>139</sup> In October of 1996, New York Governor George Pataki signed Senate Bill 7780, which effectively legalized MMA in the state by placing “combative sports” under the control of the NYSAC.<sup>140</sup> The amendment was to take effect on February 6, 1997, and the UFC hoped to stage its first sanctioned event in New York the next day at Niagara Falls on February 7, 1997.<sup>141</sup>

The new law required promotions like the UFC & EF to obtain a license from the commission prior to hosting events in the state of New York.<sup>142</sup> The UFC obtained the proper paperwork for its proposed February 7 event and began to promote it by selling media broadcast rights, contracting fighters, and obtaining over \$150,000 in ticket sales.<sup>143</sup> Then, on January 30, 1997, the NYSAC called an emergency meeting where it issued temporary rules to govern the sport of MMA.<sup>144</sup>

The rules as issued by the commission regulated the size of the ring and the length of rounds; required the use of gloves; prohibited head kicks; head-butts; choke holds; and the striking or kicking of a downed opponent.<sup>145</sup> With these new rules being in direct conflict with the rules the UFC had implemented in past events, the company had few choices: it could play by the new NYSAC rules and change the format of its event, it could choose a different state, or it could call foul and confront the problem head on.

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139. *See id.* at 155 (noting that at this time Senate Bill had already gone through both houses and was on its way to be signed by Governor Pataki).

140. *See id.* (indicating legislation gave New York State regulatory control over MMA).

141. *See id.*; *see also* *SEG Sports Corp. v. State Athletic Comm’n*, 952 F. Supp. 202, 203-04 (S.D.N.Y. 1997) (upholding MMA in New York State).

142. *See SEG Sports Corp.* 952 F. Supp. at 204 (noting statute requires promoters to obtain “a license from the New York State Athletic Commission to stage a ‘combative sports’ event”).

143. *See id.* (detailing plaintiff promoter’s actions in anticipation of New York event).

144. *See SEG Sports Corp. v. Patterson*, 97 Civ. 712 (MGC), 1998 WL 230993 at \*1 (S.D.N.Y. 1998) [hereinafter *SEG Sports Corp. II*] (reporting that SEG alleged that after passage of statute and before emergency meeting, members of their organization met with representatives of NYSAC who advised them on numerous occasions to promote their event). SEG was also apparently under the impression and had been given assurances that the commission would adopt the rules as established by the “Ultimate Fighting Alliance,” the “governing body” of the UFC at the time. *See id.* (noting Commission’s alleged agreement “to adopt the UFA Rules”).

145. *See SEG Sports Corp.*, 952 F. Supp. at 204 (S.D.N.Y. 1997) (summarizing Commission’s rules for UFC event).

The UFC decided to call foul, and its parent company SEG immediately filed for a preliminary injunction in the Southern District of New York to restrain the commission from enforcing its new rules.<sup>146</sup> In its complaint, SEG alleged that the new regulations would “radically change the nature of the event” and result in a loss of good will from its customers.<sup>147</sup> However, the court disagreed with this argument and refused to issue a mandatory injunction which would have forced the commission to adopt the UFC’s rule book; instead, the court held there was no irreparable harm because the cancelation of the UFC event was measurable in money damages and any loss to the company’s reputation was merely speculative.<sup>148</sup>

Following the District Court’s decision, SEG amended its complaint by withdrawing its claims against the NYSAC and instead suing its members and agents in their individual capacities, along with the New York State Attorney General, for alleged violations of the Contract Clause, procedural due process, and violations of the First Amendment; this time seeking compensatory and punitive damages, along with a declaratory judgment.<sup>149</sup> The defendants won a motion for judgment on the pleadings as they were entitled to qualified immunity against SEG’s claims.<sup>150</sup> However, the court’s brief discussion of the issues in the case reveals the fact that “it is unsettled whether plaintiffs have a First Amendment right to exhibit Ultimate Fighting.”<sup>151</sup> Judge Cedarbaum for the Southern District of New York further notes that no courts have directly addressed the issue; however, courts that have *considered* it have deemed sports, such as professional wrestling and surfing, not entitled to the protections of the First Amendment.<sup>152</sup>

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146. *See id.* at 203 (detailing Plaintiff’s 42 U.S.C. § 1983 claim seeking declaratory and injunctive relief under United States Constitution and New York State Constitution).

147. *See id.* at 204 (restating Plaintiff’s argument concerning Commission’s rules).

148. *See id.* at 205 (determining harm resulting from cancelation measurable and finding plaintiff’s alleged damages to reputation speculative).

149. *See SEG Sports Corp. II*, 1998 WL 230993, at \*1 (summarizing plaintiff’s complaint).

150. *See id.* (noting Court’s decision to grant defendant’s motion on basis of qualified immunity).

151. *See id.* at \*4 (acknowledging defendants’ argument that issue is “unsettled” in response to plaintiff’s First Amendment claim).

152. *See id.* (citing *Murdock v. City of Jacksonville*, 361 F. Supp. 1083, 1096 (M.D. Fla. 1973); *MacDonald v. Newsome*, 437 F. Supp. 796, 798 (E.D.N.C. 1977)) (considering court decisions in factually similar circumstances).

## B. New York Bans MMA

On February 25, 1997, New York State Governor George Pataki signed into law a statute that prohibited “combat sports,” except for those regulated through the NYSAC.<sup>153</sup> The sponsor of the bill banning MMA, State Senator Roy Goodman, said, “this is the culmination of a yearlong campaign to end what I call human cockfighting, a disgraceful, animalistic and disgusting contest which can result in severe injuries to contestants and sets an abominable example for our youth.”<sup>154</sup> The state of New York implemented this legislation during the early years of MMA in America when the UFC and other organizations had few rules and used shock advertising to create attention.<sup>155</sup>

Eric T. Schneiderman, the current Attorney General of the State of New York, recently offered that the legislative history of this statute reveals three “objectives” or “motives” behind the consideration and adoption of the bill: 1) the risk of injury to the participants, 2) the “effect upon youth”, and 3) the “civilization” or “disgust” factor.<sup>156</sup>

The risk of injury to participants in MMA contests was undoubtedly a focal point of the considerations leading to the ban.<sup>157</sup> At the April 1996 hearing on whether to ban MMA, committee chair Roy Goodman reminded witnesses that the safety of MMA compared to boxing was not “the question . . . it’s to determine basically whether Ultimate Fighting poses a threat of severe injury or death to the participants.”<sup>158</sup> Furthermore, the NYSAC went on record saying it thought the sport of MMA was “inherently unsafe”

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153. See Memorandum of Law in Support of Motion to Dismiss, *supra* note 135, at 7-8 (stating statute Governor Pataki signed was L. 1997, ch. 14, which is now codified at § 8905-a N.Y. Unconsol. Laws).

154. See James Dao, *Senate Chief in Albany, Reversing Himself, Says He Backs a Ban on Ultimate Fighting*, N.Y. TIMES, Feb. 11, 1997, at B7, available at <http://www.nytimes.com/1997/02/11/nyregion/senate-chief-albany-reversing-himself-says-he-backs-ban-ultimate-fighting.html> (quoting prominent opponent of MMA in New York).

155. See Memorandum of Law in Support of Motion to Dismiss, *supra* note 135, at 8 (explaining UFC’s implementation of increased rules and regulations as MMA became more mainstream).

156. See Defendant Schneiderman’s Memorandum of Law in Support of His Initial Limited Motion to Dismiss The Fourth and Fifth Causes of Action in the Complaint, *supra* note 136, at 5-6 (highlighting basis of legislature’s actions).

157. See *id.* at 5 (“One major concern of [the] legislators considering a ban of [MMA] was the risk of serious physical harm that it posed to its participants.”).

158. See *id.* (quoting New York legislative committee chair).

when it attempted to urge Governor Pataki to veto the bill temporarily legalizing MMA in the state at the time.<sup>159</sup>

The next argument advanced as a reason for the 1997 law was the “effect upon youth,” and this articulates concerns voiced by supporters of the ban and by the sponsor of the outlawing bill in the assembly, Stephen Kaufman.<sup>160</sup> In seeking approval for the bill, Kaufman is quoted as saying of MMA, “to glorify this type of ‘blood sport’ serves to increase the susceptibility of our youth to violence and also desensitizes those same impressionable minds to needless brutality.”<sup>161</sup> Governor Pataki reiterated these sentiments in a comment in support of the ban: “to have someone who wins by using choke holds and kicking people while they are down . . . is not someone our children should be looking to emulate.”<sup>162</sup>

The last major motive behind the legislatures passing of the 1997 bill banning MMA goes back to the early depiction of the sport as “human cockfighting;” or an “uncivilized” and “disgusting” activity that has no place in society.<sup>163</sup> Assemblyman Kaufman felt that MMA debased society and Senator Goodman felt that it was reminiscent of “the Roman Coliseum in which gladiators fought to the death.”<sup>164</sup> This message was strongest however in Governor Pataki’s message approving the bill when he described the ‘barbaric’ and ‘savage’ qualities of MMA as the reason for the bill’s passage.<sup>165</sup>

#### IV. RECENT LEGAL & LEGISLATIVE HISTORY CONCERNING MMA IN THE STATE OF NEW YORK

Ten years after New York effectively banned MMA, John McCain went on record with National Public Radio claiming that the sport had made progress and was no longer “human cockfighting.”<sup>166</sup> Then in June 2008, MMA caught a break in the state of

159. *See id.* (referencing reason for NYSAC’s opposition to MMA).

160. *See id.* at 5-6 (setting out legislature’s second reason for action).

161. *Id.*

162. *See* James Dao, *Pataki Signs a Bill Barring Ultimate Fighting*, N.Y. TIMES, Feb. 26, 1997, at B5, available at <http://www.nytimes.com/1997/02/26/nyregion/pataki-signs-a-bill-barring-ultimate-fighting.html> (quoting another prominent opponent of MMA).

163. *See* Defendant Schneiderman’s Memorandum of Law in Support of His Initial Limited Motion to Dismiss The Fourth and Fifth Causes of Action in the Complaint, *supra* note 136, at 6 (presenting third legislative rationale for opposition to MMA).

164. *See id.* (stating additional grounds for opposition to MMA).

165. *See id.* (quoting reason New York’s governor gave in opposition to MMA).

166. *See* Klemko & Non, *supra* note 120 (describing UFC’s refinement).

New York when former professional boxing judge and MMA advocate Melvina Lathan was appointed as chairwoman of the NYSAC.<sup>167</sup> Following her appointment Lathan said: “I’m a boxing purist and I will always be, but I truly believe MMA is a sport all of its own. I think the more people are educated about it, the more they understand it and accept it.”<sup>168</sup> Shortly after Lathan’s announcement as chairwoman, Zuffa employed Albany lobbying firm Brown, McMahon & Weinraub to push for MMA legislation.<sup>169</sup> Zuffa also hired the political consulting firm Global Strategy Group in late 2008 to lead a grassroots campaign to increase fan awareness and community support for legalization of the sport.<sup>170</sup>

One group openly opposed to MMA in New York is Unite Here, an umbrella group of unions that have actively lobbied against the sport; the most prominent of the bunch being the culinary union.<sup>171</sup> Another strong opponent to professionally sanctioned MMA events in the state is Assemblyman Bob Reilly, who

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167. See George Willis, *Boxing’s Her Bag- New NYSAC Chairman Says MMA Not A Concern*, N.Y. POST, Nov. 9, 2008, at 88, available at 2008 WLNR 21480595 (reporting that “Lathan has spent much of her life around a boxing ring, serving as a professional judge for 18 years working more than 235 fights.”). The article explains further that she was appointed by Governor David Paterson and holds the distinction of being the first African-American female licensed as professional boxing judge by the State of New York. *Id.*

168. Katie Strang, *Mixed Martial Arts: New Commish in MMA’s Corner*, NEWSDAY (New York), Aug. 3, 2008, at B12, available at <http://www.newsday.com/columnists/other-columnists/mixed-martial-arts-new-commish-in-mma-s-corner-1.549689> (quoting Lathan as saying: “[I]f you look at the technique and what’s going on, who’s doing what, you have to have open mind to think like that. If you come into it with a closed mind, you can’t appreciate the beauty of the art.”). Also, “I remember being on the edge of my seat watching Royce Gracie. He was like a ballerina on stage. He was so graceful, yet he had maneuvers. He was fast and he was smart. I remember watching that, being intrigued at how he could do all the things he did . . . .” *Id.*

169. See Hakim, *supra* note 118 (reporting that state records show Zuffa was paying the lobbying firm \$10,000 month).

170. See King, *supra* note 125 (explaining that Zuffa paid Global Strategy Group \$35,000 month in 2008 and the first half of 2009, and \$22,500 month since then). The article also explains how Global Strategy Group controls a website that offers easy ways for fans to e-mail legislators and craft letters to their local newspapers. Senior vice-president of public affairs for Global Strategy Group Justin Lapatine commented that “a lot of it at the beginning was educating fans to the fact that we can’t have events here.” *Id.*

171. See Beau Dure, *New York Still Fighting UFC*, USA TODAY, May 7, 2009, at 12C, available at [http://usatoday30.usatoday.com/sports/mma/2009-05-07-ny-regulation\\_N.htm](http://usatoday30.usatoday.com/sports/mma/2009-05-07-ny-regulation_N.htm) (explaining that Unite Here has history of confrontation with UFC owners Lorenzo and Frank Fertitta, and another business venture founded by two brothers, Station Casinos). Previous disagreements were over Station Casinos’ use of nonunion labor throughout Las Vegas. *Id.*

publicly questioned the appointment of Lathan.<sup>172</sup> Reilly continues to be one of the most vocal advocates for keeping MMA out of New York and is often quoted in the media for offering statements on his ethical outlook towards the continuation of the ban due to the violent message it sends children and the dangerous situations faced by its participants.<sup>173</sup>

#### A. Legislative Lobbying & Stalled Senate Bills

In the 2007 New York State legislative session, a bill which would have brought sanctioned MMA events to the Big Apple passed a vote in the Assembly but stalled in the Senate.<sup>174</sup> The following year, in the 2008 voting session, a bill hoping to legalize the sport ended much the same way, when it got stuck in the Assembly's Tourism, Arts, and Sports Development committee due to concerns about brutality.<sup>175</sup> Following these two failed opportunities at sanctioning and in preparation for the next voting session, the UFC released an economic impact study it had funded which suggested that an event at Madison Square Garden would generate \$11 million and one in Buffalo would bring in \$5 million in economic activity for the state and local businesses.<sup>176</sup>

In light of the economic impact report, Assemblyman Steve Englebright sponsored the 2009 legislative bill that again hoped to bring sanctioned MMA events to New York.<sup>177</sup> Under the bill, the

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172. See Willis, *supra* note 167 (reporting that Reilly told ESPN.com: "It's clear to me that this new person was put in her position because of her support for legalizing mixed martial arts," and "Can I prove that? No. But if I see something that walks like a duck and it's quacking, I call it duck.").

173. See Strang, *supra* note 168 (quoting Reilly as saying: "I'm more convinced than ever that this would not be good because of its violence and its effect on people in society. It's just very brutal stuff and it has a deleterious effect on our society and our kids.").

174. See King, *supra* note 125 (discussing fate of 2007 New York State bill that would legalize MMA).

175. See Peter Duffy, *Banned Sport Gains Fans, And Seeks More in Albany*, N.Y. TIMES, Jan. 21, 2009, at A28, available at <http://www.nytimes.com/2009/01/21/nyregion/21martial.html> (analyzing 2008 attempt to legalize MMA in New York); see also George Willis, *Time for New York to Legalize MMA*, N.Y. POST, Jan. 5, 2009, at 45, available at 2009 WLNR 198110 (advocating that New York State sanction MMA).

176. See Mark La Monica, *Mixed Martial Arts*, NEWSDAY (New York), Mar. 28, 2010, at A56, available at <http://www.newsday.com/sports/columnists/mark-la-monica/ny-needs-to-wake-up-and-finally-legalize-mma-1.1834377> (explaining that estimated figures "include[s] hotels, restaurants, merchandise, tickets and everything else associated when 20,000 people from all over the world descend upon one city for a major weekend sporting event").

177. See Strang, *supra* note 168 (discussing several issues surrounding legalization of MMA).

state would have received sales tax revenues at a rate of 8.5 percent, with broadcast taxes capped at \$50,000 on televised events.<sup>178</sup> In support of the bill, Englebright urged his fellow legislators to vote in its favor, stating that New York was “missing the boat” as the sport was already legal in most other states and that “as revenue sources dry up, there is interest in finding new ones.”<sup>179</sup> However, fellow congressman Reilly was not convinced by the report, saying that it “showed millions of dollars in tax revenue, but its one-shot type of stuff. It just sucks money out of the local economy. We’d be better off building factories and supporting local businesses.”<sup>180</sup>

Aside from economics, proponents during the 2009 legislative session were also advocating for the bill’s passage due to the increased safety that would come with sanctioning; reasoning that if the bill passed, all MMA events in the state would fall under the jurisdiction of the NYSAC.<sup>181</sup> Again in support, Englebright said:

We’re kidding ourselves to believe that by not authorizing this activity – with its broad appeal and its frequency on television – we’re going to prevent underground activities from taking place and people getting hurt. If we license it, we can regulate it, we can make sure the combatants are cared for immediately by qualified medical personnel.<sup>182</sup>

In June of 2009, Englebright’s bill passed a vote in the Assembly’s committee on Tourism, Parks, Arts and Sports Development, but before it could reach a full Assembly vote, the legislative session came to an end and the bill died of inaction.<sup>183</sup>

Nevertheless, the sport received renewed support for the 2010 legislative session in December 2009 when Governor David Paterson included in his executive budget a proposal to help raise tax

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178. See Hart Seely, *Albany’s Ultimate Fight*, THE POST-STANDARD (Syracuse, N.Y.), June 25, 2009, at A1, available at [http://www.syracuse.com/news/index.ssf/2009/06/politics\\_in\\_albany\\_was\\_always.html](http://www.syracuse.com/news/index.ssf/2009/06/politics_in_albany_was_always.html) (summarizing New York’s 2009 proposed bill).

179. See Strang, *supra* note 168 (summarizing details of New York’s 2009 proposed bill to legalize MMA).

180. *Id.*

181. See Seely, *supra* note 178 (mentioning “[a]ll events would fall under the domain of the state Athletic Commission.”).

182. *Id.*

183. See *id.*; see also Paul Grondahl, *Combat Sport Bill Gets New Life*, ALBANY TIMES UNION (June 4, 2010), <http://www.timesunion.com/news/article/Combat-sport-bill-gets-new-life-549243.php> (explaining “[t]he bill had died of inaction without being brought to a vote on the Assembly floor, and had to be sent back to the Assembly Committee on Tourism, Parks, Arts and Sports Development, where it passed by a vote of 14-6 one year ago.”).

revenue for the state by utilizing legislation proposing to sanction MMA.<sup>184</sup> The 2010 sanctioning legislation came in the form of two companion bills in both the Senate and Assembly.<sup>185</sup> However, despite the supporting bills, Governor Paterson's proposal was met with opposition, as again assemblyman Reilly stood against the sport, this time disagreeing with Paterson's budget proposal.<sup>186</sup> In protest, Reilly wrote a petition-style letter to Assembly Speaker Sheldon Silver, asking to have the Governor's language regarding the sanctioning of MMA removed from the budget; a request with which Sheldon complied.<sup>187</sup> Spokespeople for Paterson said that the budget proposal had planned for a projected \$2.1 million in state taxes from MMA events; however, due to differences between the companion bills and the Governor's proposed plan, details still had to be worked out before it could be included.<sup>188</sup>

Nevertheless, the 2010 Senate bill went forward and was met with heated debate, but was able to pass a vote of approval by a margin of thirty-two to twenty-six.<sup>189</sup> However, the bill eventually got stuck in the Assembly, because it was left off the legislative voting calendar by Speaker Silver.<sup>190</sup> The 2010 Assembly bill was approved by two committees, again receiving a favorable vote from Tourism, Parks, Arts and Sports Development; however, for the second year in a row, it also did not make it to the general floor for a vote.<sup>191</sup>

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184. See Ray Krueger, *Garden Shows An Interest in M.M.A.*, N.Y. TIMES, Mar. 24, 2010, at B16, available at <http://www.nytimes.com/2010/03/24/sports/24mma.html> (noting that "Gov. David A. Paterson included a proposal to legalize the sport as a way to raise money in his budget proposal in December.").

185. See Grondahl, *supra* note 183 (noting legislative history of bill).

186. See Krueger, *supra* note 184 (explaining that Reilly said of MMA, "[It] is violence for violence's sake . . . violence begets violence.").

187. See *id.* (noting: "He sent a letter signed by 48 members of the 150-seat Assembly to Assembly Speaker Sheldon Silver asking to have the sanctioning of mixed martial arts removed from the budget process.").

188. See Grondahl, *supra* note 183 (discussing state tax implications from MMA events).

189. See Peter N. Spencer, *State Senate Paves Way for MMA*, STATEN ISLAND ADVANCE, June 18, 2010, at A01, available at [http://www.silive.com/news/index.ssf/2010/06/state\\_senate\\_paves\\_way\\_for\\_mix.html](http://www.silive.com/news/index.ssf/2010/06/state_senate_paves_way_for_mix.html) (explaining that Long Island Senator Diane Savino "likened MMA to gladiator matches."). She also reminded her colleagues how the ancient Romans fed Christians and Jews to the lions for entertainment. See *id.* (discussing Savino's opinion on MMA). The article also quotes Savino saying that "maybe we will call it a money saver because we won't have to feed the lions in the zoo." *Id.*

190. See Rick Karlin, *Reilly To Reid: This Is Our Ring*, ALBANY TIMES UNION, Aug. 20, 2010, at A1, available at <http://www.timesunion.com/local/article/Reilly-to-Reid-This-is-our-ring-621478.php> (denoting bill's progress).

191. See Ray Krueger, *A Debate Rages On in Words, Not Punches*, N.Y. TIMES (Mar. 19, 2011), <http://www.nytimes.com/2011/03/20/sports/20mma.html> (dis-

In response to these three years of stalled legislative actions, U.S. Senate Majority Leader Harry Reid expressed his desire to help bring MMA to the state of New York. In an interview following the 2010 inaction Reid said, "I'm aware of the issue, and I know a few people in New York. I'm going to see if I can talk a little sense to them."<sup>192</sup> The executive branch also seemed to be in support of MMA as Secretary of State Lorraine Cortes-Vazquez submitted a piece to the Albany Times Union writing that, "when properly regulated, professional MMA showcases fair and disciplined bona-fide athletic competition" and that "a goal of legalizing MMA is to cut down on the number of poorly regulated or unregulated knockoffs that put unlicensed, unprepared individuals in harm's way."<sup>193</sup> In an attempt to bring even more awareness to the battle for legalization, UFC executives and many of the promotion's most popular fighters held a press conference at Madison Square Garden on January 13, 2011, where they showcased the details of the previously conducted 2008 economic impact report.<sup>194</sup>

Following the UFC presser, bills which proposed to legalize MMA were again introduced into the New York State Assembly and Senate.<sup>195</sup> Also, with additional support from inside and outside the state, proponents of MMA attempted to influence Governor Andrew Cuomo to include another free-standing executive bill to generate funding from MMA events in the budget.<sup>196</sup> However, this time around there was no such provision accounting for the sport as Governor Paterson had attempted to advance the year before.<sup>197</sup>

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cussing debate over 2010 Assembly bill); *see also* Grondahl, *supra* note 183 (referencing bill's regeneration after original failure to obtain necessary vote).

192. *See* Karlin, *supra* note 190 (quoting Harry Reid and analyzing his efforts to bring MMA to New York).

193. *See* Beau Dure, *State of New York Still Not Submitting to MMA Advances*, USA TODAY, Mar. 26, 2010, at 8C, available at [http://usatoday30.usatoday.com/sports/mma/2010-03-25-new-york-mma\\_N.htm](http://usatoday30.usatoday.com/sports/mma/2010-03-25-new-york-mma_N.htm) (speculating about MMA's progress in achieving support of executive branch).

194. *See* GENTRY III, *supra* note 15, at 167 (explaining that report was done by HR&A Advisors); *see also* Grace Rauh, *State's UFC Ban Enters New Round Of Debate*, NY1 (Jan. 13, 2011, 07:15 PM), <http://www.ny1.com/content/132194/state-s-ufc-ban-enters-new-round-of-debate> (describing further details of report to reveal that MMA in New York would create 212 jobs and generate \$23 million in economic activity for state, with \$1.3 million in state revenues).

195. *See* B. A04146A, Gen. Assemb., Reg. Sess. (N.Y. 2011) (proposing legalization of MMA); *see also* B. S01707A, S. Reg. Sess. (N.Y. 2011) (proposing legalization of MMA).

196. *See* King, *supra* note 125 (describing efforts to obtain funding for MMA events).

197. *See* Krueger, *supra* note 191 (noting lack of executive bill to generate funding for MMA events).

Nevertheless, on May 23, 2011, the New York State Senate voted for the second time to pass a sanctioning bill for MMA events by a margin of 42-18.<sup>198</sup> Once again after passing the Assembly's Tourism, Parks, Arts and Sports Committee, it got stalled before it could reach the Ways and Means Committee for a vote.<sup>199</sup> The Assembly bill met the same fate as the Senate bill and Speaker Silver commented that the inaction was due to the fact that "there does not appear to be widespread support in the Assembly for this legislation."<sup>200</sup> Marc Ratner for the UFC had a different perspective on the stalled bills, saying, "there is another agenda out there stopping this. I wish that I knew what it was. We never got an at-bat, we never got a chance to be in the game. Let the people, and the will of the Assembly who represent the people, vote on it. We never got a vote and that to me is not the American way."<sup>201</sup>

### B. UFC Brings Suit Again

With the seemingly endless string of bills stalled in the Assembly, proponents of MMA decided to try another American approach to their problem. On November 15, 2011, the parent organization of the UFC, along with various fighters and fans of MMA in New York, filed suit against the New York State Attorney General and District Attorney in their official capacities, seeking a declaration that the ban on MMA is unconstitutional, facially and as applied, and an injunction against its enforcement.<sup>202</sup>

The ban in question is section 8905-(2) of N.Y. Unconsolidated Laws, which proclaims that "no combative sport shall be conducted, held or given within the state of New York, and no licenses may be approved by the commission for such matches or exhibitions."<sup>203</sup>

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198. See Mark La Monica, *MMA Assembly Vote Has Fighting Chance*, NEWSDAY (New York), June 5, 2011, at A57, available at <http://www.newsday.com/sports/columnists/mark-la-monica/mma-assembly-vote-has-fighting-chance-1.2930529> (chronicling second New York State Senate vote to determine sanctioning of MMA events in New York).

199. See Matt Flegenheimer, *No Resolution for Mixed Martial Arts*, N.Y. TIMES, June 27, 2011, at 16, available at <http://www.nytimes.com/2011/06/27/nyregion/obstacles-in-push-to-legalize-mixed-martial-arts-in-new-york.html> (indicating fate of 2011 New York State Senate vote on bill).

200. See Kenneth Lovett, *Ultimate Fighting Legislation Not Going to Happen in New York, Silver Says*, N.Y. DAILY NEWS (June 8, 2011, 4:00 AM), <http://www.nydailynews.com/news/politics/ultimate-fighting-legislation-happen-york-silver-article-1.127731>.

201. Ryan Marfurt, *State Not Pulling Punches with MMA*, BUFFALO NEWS, July 12, 2011, at D1, available at 2011 WLNR 13791679.

202. See Complaint, *supra* note 3, at 234 (explaining that plaintiffs also seek attorney's fees).

203. N.Y. Unconsol. Laws § 8905-(2) (quoting statute).

The commission defines a “combative sport” as “any professional match or exhibition other than boxing, sparring, wrestling or martial arts wherein the contestants deliver, or are not forbidden by the applicable rules thereof from delivering kicks, punches or blows of any kind to the body of an opponent . . . .”<sup>204</sup> Although the NYSAC exempts “martial arts” from the ban, the commission’s definition of “martial arts” only includes specific professional matches or exhibitions sanctioned by organizations approved by the commission.<sup>205</sup> Currently, there are no MMA organizations approved by the commission.<sup>206</sup>

Organizations can be added or removed from the NYSAC’s list of approved “martial arts” sanctioning bodies, through a process that considers three factors: 1) whether the organization’s “primary purpose is to provide instruction in self-defense techniques;” 2) whether the organization requires “the use of hand, feet and groin protection during any competition or bout;” and 3) whether the organization has an established set of rules that require the “immediate termination of any competition or bout when any participant has received severe punishment or is in danger of suffering serious physical injury.”<sup>207</sup>

Furthermore, the New York law at issue creates criminal and civil penalties for a person who “knowingly advances” or “profits” from a combative sport.<sup>208</sup> The statute explains that a person “advances a combative sport” when, “acting other than as a spectator,” that person “engages in conduct which materially aids any combative sport.”<sup>209</sup> Effectively targeting promoters of MMA and the po-

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204. *Id.* § 8905-a(1).

205. *See id.* (listing approved organizations in following order: U.S. Judo Association, U.S. Judo, Inc., U.S. Judo Federation, U.S. Tae Kwon Do Union, North American Sport Karate Association, U.S.A., Karate Foundation, U.S. Karate, Inc., World Karate Association, Professional Karate Association, Karate International, International Kenpo Association, or World Wide Kenpo Association).

206. *See id.* (stating no MMA organizations have yet been approved by commission).

207. *Id.* § 8905-a(1)(a-c) (quoting statute).

208. *See id.* § 8905-a(3)(a),(d) (explaining that if found guilty of violation, first charge will result in class A misdemeanor, and if “convicted in the previous five years of violating this subdivision from a combative sport,” class E felony). Also, power is vested in the attorney general to recover civil penalties “not to exceed for the first violation ten thousand dollars or twice the amount of gain derived therefrom whichever is greater, or for a subsequent violation twenty thousand dollars or twice the amount of gain derived therefrom whichever is greater.” *See id.*

209. *Id.* § 8905-a(3)(b) (“Such conduct includes but is not limited to conduct directed toward the creation, establishment or performance of a combative sport, toward the acquisition or maintenance of premises, paraphernalia, equipment or apparatus therefor, toward the solicitation or inducement of persons to attend or

tential venue owners where events would be held, the statute then describes that a person “profits from a combative sport” when that person “accepts or receives money or other property with intent to participate in the proceeds of a combative sport activity.”<sup>210</sup> Thus, the statute also brings the athletes themselves subject to discipline for participating in paid MMA events in the state of New York.

## V. FIRST AMENDMENT FREEDOM OF SPEECH AND ITS APPLICATION TO PROFESSIONAL SPORTS

### A. First Amendment Generally

The proponents of MMA filed suit in the United States District Court for the Southern District of New York, claiming that the New York law is unconstitutional, facially and as applied, as a content-based restriction on their freedom of expression.<sup>211</sup> Recent Supreme Court decisions have consistently held that content-based restrictions on speech are presumptively unconstitutional.<sup>212</sup> Thus, in cases where a content-based restriction is found, the government would be subject to strict judicial scrutiny; meaning the law will be presumed void and the government will have the burden of showing that the law is necessary to achieve a compelling government interest, as well as having to show that the law is narrowly tailored to meet that interest in order to continue its enforcement.<sup>213</sup>

However, there are some exceptions to this “strict scrutiny” restriction placed on government, and these exceptions come in the form of “well-defined” and “narrowly limited classes of speech,” referred to as unprotected speech.<sup>214</sup> These categories of unpro-

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participate therein, toward the actual conduct of the performance thereof, toward the arrangement of any of its financial or promotional phases, or toward any other phase of a combative sport. One advances a combative sport activity when, having substantial proprietary or other authoritative control over premises being used with his or her knowledge for purposes of a combative sport activity, he or she permits such to occur or continue or makes no effort to prevent its occurrence or continuation.”).

210. *See id.* § 8905-a(3)(c) (quoting statute).

211. *See* Complaint, *supra* note 3, at 234-43 (listing plaintiffs as mixed martial artists Jon Jones, Gina Carano, Frankie Edgar, Matt Hamill, Brian Stann, and Jennifer Santiago; MMA fans; Daniel Hobioka, Beth and Donna Hurrle, Joseph Lozito, Chris Reitz; and MMA instructors Steve Kardian & Erik Owings). Defendants are Eric T. Schneiderman, Attorney General of the State of New York and Cyrus R. Vance, District Attorney for New York County. *Id.*

212. *See* Nadine Strossen, *United States v. Stevens: Restricting Two Major Rationales for Content-Based Speech Restrictions*, 67 CATO SUP. CT. REV. 77 (2009-10) (analyzing recent Supreme Court case on speech restrictions).

213. *See id.* at 77 (discussing test for content-based speech restrictions).

214. *See* *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (noting some speech is unprotected).

tected speech include obscenity,<sup>215</sup> incitement,<sup>216</sup> defamation,<sup>217</sup> fraud,<sup>218</sup> speech integral to criminal conduct,<sup>219</sup> and fighting words.<sup>220</sup> These categories receive no protection under the First Amendment, making them subject to restrictions and regulations by government based on their content.<sup>221</sup> Recently, the Supreme Court has held that new classes of unprotected speech may not be added to these existing categories solely due to the fact that a legislature finds the speech intolerable.<sup>222</sup>

This was the decision in *United States v. Stevens*, a case in which the Court found a violation of the First Amendment in a federal statute that criminalized the creation, sale, or possession of depictions of animal cruelty.<sup>223</sup> Speaking for the majority, Chief Justice Roberts rejected the government's argument that it could create new categories of unprotected speech by applying an "ad hoc balancing of relative social costs and benefits."<sup>224</sup> *Stevens* held that depictions of animal cruelty could not simply be added to the categories of unprotected speech by the will of the legislature, and since the depiction of animal cruelty is not included in any historically or "previously recognized, long established category of unpro-

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215. See *Roth v. United States*, 354 U.S. 476, 481 (1957) (holding that "Court has always assumed that obscenity is not protected by the freedoms of speech and press.").

216. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (observing exception to constitutional protection "where such advocacy is directed to inciting or producing imminent action and is likely to incite or produce such action.").

217. See *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (identifying when libel is malicious defamation).

218. See *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (holding constitutional protection does not apply to fraud).

219. See *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949) (holding "[i]t rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute.").

220. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (finding fighting words as exception to free speech).

221. See *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010) (identifying "few limited areas" where government may regulate speech by content).

222. See *id.* at 1585-86 ("Our decisions in *Ferber* and other cases cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment.").

223. See *id.* at 1582, 1592 (finding statute substantially overbroad and therefore invalid).

224. See *id.* at 1585 (citing *Marbury v. Madison*, 5 U.S. 137 (1803)) (explaining that the "First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs" discussing where Chief Justice Marshall wrote that the Constitution is not a document "prescribing limits, and declaring that those limits may be passed at pleasure.").

tected speech,” the government was not entitled to an exception in this situation.<sup>225</sup>

Applying this holding to MMA and the current lawsuit, it seems clear that New York would likely be unsuccessful in attempting to assert an exception to the First Amendment by claiming that the performance of professional MMA is a category of unprotected speech. In line with the decision in *Stevens*, the sport has not previously been recognized as grounded in any category of historically unprotected speech; therefore, this preliminary exception will not be available to the government.

Since the performance of MMA is likely not to be considered unprotected speech, the court will next analyze the First Amendment claims asserted in the action. The first claim asserted by the proponents of the sport is that even if the performance of professional MMA does in fact convey a violent message, banning that message because of its violence is a patent violation of the First Amendment.<sup>226</sup> The proposition for this assertion comes from another recent Supreme Court case, *Brown v. Entertainment Merchants Association*.<sup>227</sup>

*Brown* dealt with the constitutionality of a California law that prohibited the sale or rental of violent video games to anyone under the age of 18.<sup>228</sup> Speaking for the majority, Justice Scalia ruled the same way as did Justice Roberts in the *Stevens* case, rejecting the government’s attempts to categorize violent video games as unprotected speech and explaining that violent video games do not fall into the “obscenity” exception, as only depictions of “sexual conduct” fall in that category.<sup>229</sup> Furthermore, Scalia says that the “obscenity exception to the First Amendment does not cover whatever a legislature finds shocking.”<sup>230</sup> After dismissing the preliminary exception, Scalia then went on to analyze the California law under the strict scrutiny approach, explaining that it is a demanding standard and that in order to restrict speech based on its

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225. *See id.* at 1586 (holding that identifying such categories is not simply on basis of cost-benefit analysis).

226. *See* Complaint, *supra* note 3, at 8-9.

227. *Brown v. Entm’t Merchants Ass’n*, 131 S. Ct. 2729 (2011) (holding “video games qualify for First Amendment protection.”).

228. *See id.* at 2732 (holding that “California failed to satisfy burden of showing either that law was justified by compelling government interest, or that law, which was both over-and underinclusive, was narrowly drawn to serve that interest.”).

229. *See id.* at 2734 (explaining refusal to categorize video games as unprotected speech).

230. *See id.* (noting limits of obscenity exception).

content, “the state must specifically identify an ‘actual problem’ in need of solving, and the curtailment of free speech must be actually necessary to the solution” of that problem.<sup>231</sup>

Scalia held that California did not meet its burden in *Brown* because it could not introduce compelling evidence that showed a “direct causal link between violent video games and harm to minors.”<sup>232</sup> The evidence used by the government in the case relied primarily on the research of psychologists that purported to reveal these harmful effects on children; however, the studies only showed a correlation between the two and not causation.<sup>233</sup> Also, Scalia noted that the evidence only showed “miniscule real-world effects,” if any, exhibited by children after playing video games; these effects included reactions such as the making of louder noises minutes after playing the violent games.<sup>234</sup>

Furthermore the *Brown* Court took into consideration the fact that the research psychologist who conducted the report, Dr. Craig Anderson, admitted that the effects exhibited by children after playing violent video games was “about the same” as those experienced by children exposed to violence on television and even non-violent television and video games.<sup>235</sup> Therefore, the Court held that the California law was underinclusive in light of its asserted justifications, due to the fact that it did not restrict “Saturday morning cartoons” or other non-violent video games.<sup>236</sup> Scalia noted that “underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint,” eventually coming to the conclusion that California has singled out “purveyors of video games” over cartoonists and movie producers without a compelling reason for doing so.<sup>237</sup>

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231. *See id.* at 2738 (citing *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 822-23 (2000)); *see also* *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992).

232. *See Brown*, 131 S. Ct. at 2738-39 (noting lack of evidence in studies’ results).

233. *See id.* at 2739 (explaining how studies also suffered from admitted methodology flaws).

234. *See id.* (stating lack of evidence of increased violence in children who played violent video games).

235. *See id.* (noting Dr. Anderson admitted these same effects have been found when children watch cartoons featuring Bugs Bunny or the Road Runner, or other non-violent video games rated “E” for everyone, like “Sonic the Hedgehog”).

236. *See id.* at 2740 (noting California was only restrictive of violent video games).

237. *See id.* (discussing California’s arbitrary disfavoring of video games).

In light of the holding in *Brown*, it is unlikely that the state of New York would succeed in meeting its burden of proof under a strict scrutiny approach. As discussed earlier, the state of New York has advanced three justifications for the ban on professional MMA: fighter safety, the effect upon the youth, and the civilization or disgust factor. One possible source of evidence for the latter two government interests that could possibly suggest a causal link between either of the two and the curtailment of professional MMA could come in the form of a poll taken by the Siena College Research Institute.<sup>238</sup> Conducted in 2011, the poll asked whether MMA should be legal in the state of New York and the result was that, forty-one percent said it should not, thirty-nine percent said it should, eighteen percent said they did not know, and two percent had no opinion.<sup>239</sup> These results, although indicative of a stance against the legalization of MMA in the state, are far from providing a direct causal link between professional MMA and the effect upon the youth or other feelings of disgust or distaste, reasons advanced by the state for the necessity of the law.

Another form of evidence New York may advance to support its position is a Johns Hopkins University study which found that forty percent of MMA matches ended with at least one injury, forty-eight percent of which came in the form of facial lacerations, thirteen percent hand injuries, and ten percent nose injuries.<sup>240</sup> This study presents data that suggests a more concrete causal link between the compelling government interest in athlete safety and professional MMA than did the study in *Brown* comparing violence in video games and harm to children. However, the John Hopkins study also concluded that MMA has an injury rate similar to other sports and even has a lower knockout rate than boxing.<sup>241</sup> Comparing these findings to the ones in *Brown*, the court will likely hold that the New York law is underinclusive as it does not restrict other violent sports that produce the same, or sometimes even more, inju-

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238. See, e.g., Mike Gavin, *Jeter Greater Than Ruth, Survey Says*, NEWSDAY (New York), Mar. 16, 2011, at A47, available at <http://www.newsday.com/sports/baseball/jeter-better-than-ruth-survey-says-1.2760885> (providing example of what poll's findings look like).

239. See *id.* (explaining results of survey polling 801 New York residents).

240. See Kenneth Lovett, *Jon (Bones) Jones Hoping for the Best: 'Ultimate' Showdown Set For Assembly Floor*, N.Y. DAILY NEWS, May 25, 2011, at 21, available at <http://www.nydailynews.com/new-york/jon-bones-jones-hoping-best-ultimate-fighting-showdown-set-floor-assembly-article-1.142613> ("The study found that 40% of matches ended with at least one injured fighter - the bulk suffering facial cuts (48%), hand injuries (13%) and nose injuries (10%).").

241. See *id.* (explaining that study also concluded that lower knockout rate in MMA could help prevent brain injury to athletes).

ries to participants. The safety of combative sports participants is an asserted justification for the necessity of the law, yet the government still allows other dangerous combative sports that put participants in jeopardy, making its law underinclusive as it essentially singles out the sport of MMA.

### B. First Amendment and Sports as Speech

Although the law described above likely will be found underinclusive, the Court will not analyze arguments for either side unless it first concludes that the performance of professional MMA is actually speech under the First Amendment. If the court does not make that finding, the New York law at issue would be deemed not to interfere with any fundamental rights. This would mean that the law carries with it a strong presumption of constitutionality and must be upheld if rationally related to legitimate governmental interests.<sup>242</sup> The question has not been directly addressed by any court to date, and only an affirmative answer on the issue will present a real chance for the proponents of MMA to succeed on their constitutional claims.

To answer the question, the court will likely look to the operative language of the First Amendment, which provides that “Congress shall make no law . . . abridging the freedom of speech.”<sup>243</sup> On a general level, the Supreme Court has held this declaration to mean that “government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”<sup>244</sup> In *Brown*, the court held that video games were entitled to First Amendment protection because “like the protected books, plays, and movies that preceded them, video games communicate ideas – and even social messages – through many familiar literary devices (such as character, dialogue, plot, and music) and through features distinctive to the medium.”<sup>245</sup> *Brown* explains that the features distinctive to the medium of video games are the player’s interaction with the virtual world.<sup>246</sup> *Brown* also addresses the violence found in the games, holding that under the Constitution any moral or

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242. See generally Nadine Strossen, *supra* note 212 (providing commentary on standards for content-based speech regulation to be upheld by courts in light of recent opinion).

243. See U.S. CONST. amend. I. (establishing freedom of speech).

244. See *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 573 (2002) (quoting opinion of Court).

245. See *Brown v. Entm’t Merchants Ass’n*, 131 S. Ct. 2729, 2733 (2011) (referencing Court’s opinion).

246. See *id.* (commenting on features unique to video games).

esthetic judgments on the nature of the games “are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority.”<sup>247</sup>

For many of the same reasons, the performance of professional MMA, like movies, plays, and video games, communicates ideas and social messages through literary devices and features distinctive to its medium. The UFC’s complaint argues that the live professional MMA it produces is more than just a sporting event, but is also entertainment and theatre, labeling its fighters as both athletes and performers who use live professional MMA events as a distinctive way to “tell the world their story.”<sup>248</sup> One feature distinctive to the medium of a MMA performance is the “walkout,” which happens just moments before a match as the athlete walks from the dressing room into the arena. During this time the mixed martial artist interacts with fans and members of the audience while entering the arena to music they have chosen and attire they have picked themselves.<sup>249</sup> Some fighters choose to enter the arena for competition with props to enhance patriotic or religious messages they wish to convey to the audience; this is often the case with Tito Ortiz, who carries American and Mexican flags into the arena, and now-retired fighter Kimo Leopoldo, who once entered the arena for competition tied to a cross, bearing the word “Jesus” printed across his chest.<sup>250</sup> Mixed martial artists also convey messages during actual competition; this is due to the fact that the matches themselves are not simply composed of randomly combined techniques but of planned strategies that utilize various martial art forms. This ability to showcase any style of martial art during competition is uniquely distinctive to the medium of MMA and gives unlimited creative opportunities, allowing the athletes to send a message to those in attendance: presumably, that their style of martial art is the most effective and desired discipline to follow.

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247. *See id.* (quoting *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 822-23 (2000)).

248. *See* Complaint, *supra* note 3, at 124 (describing UFC’s argument in complaint filed with court).

249. *See id.* at 132 (explaining that many fighters choose walkout songs that pay tribute to their heritage, such as Native Hawaiian fighter B.J. Penn, who walks out to traditional Hawaiian music; or Montreal, Quebec native George St. Pierre, who typically walks out to music by local French hip hop artists).

250. *See id.* at 135 (exhibiting example of competition walkouts); *see also* GENTRY III, *supra* note 15, at 83 (exemplifying fighters conveying particular message).

C. Previous Court Decisions Dealing With Sports as Speech

Although the arguments seem favorable for the proponents of MMA, it is difficult to predict how a court will rule on a subject it has not previously dealt with. Thus, decisions handed down in other First Amendment cases dealing with the issue of sports and the freedom of expression offer further support.

In *Murdock v. City of Jacksonville*, a wrestling promoter brought suit alleging an infringement of his First Amendment right to promote wrestling exhibitions, following a refusal by the city to grant him a lease to hold the shows.<sup>251</sup> The court said that the resolution of the issue depended on “whether wrestling, as plaintiff intended to promote it, is an activity protected by the First Amendment as Free Speech.”<sup>252</sup> During deposition for the case, plaintiff affirmed that his brand of wrestling did not seek to promote any political or social messages, but was only intended for the entertainment of those in attendance.<sup>253</sup> From this admission the court established that the wrestling at issue in the case was not “pure speech” and did not constitute a symbolic act that would be “akin to free speech.”<sup>254</sup> Thus, the court held that the promotion of these types of wrestling matches were not protected by the First Amendment, as they are simply a “purely entertainment pastime.”<sup>255</sup>

While the ruling in *Murdock* seems troublesome for MMA, the reality is that the decision was an extremely narrow one and in a district that has no jurisdiction over the current case. More importantly, *Murdock* simply said that the type of wrestling at issue in the case, as produced by the plaintiff, was not afforded the protections of the First Amendment; it did not hold that all other wrestling matches are also denied the privilege or protections of the Constitution.

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251. See *Murdock v. City of Jacksonville*, 361 F. Supp. 1083, 1085, 1094 (M.D. Fla. 1973) (explaining that promoter was denied lease because city was already engaged in an exclusive contract at the Coliseum with another wrestling promoter). Further, the Coliseum was the only place in Jacksonville to stage such a show; thus, the promoter brought the First Amendment action along with a Fourteenth Amendment equal protection claim and also filed a separate antitrust case. See *id.* (stating claims brought).

252. *Id.* at 1094.

253. See *id.* at 1094-95 (arguing entertainment value of plaintiff’s wrestling style).

254. See *id.* at 1095 (citing *Tinker v. Des Moines Cmty. Sch. Dist.*, 393 U.S. 503 (1969)) (referencing holding by Supreme Court that “symbolic act” of wearing politically significant armbands to protest Vietnam war was “akin to free speech.”).

255. See *id.* at 1096 (explaining court’s holding).

Furthermore, in distinguishing MMA from the wrestling matches in *Murdock*, it has been shown that mixed martial artists do convey messages and can also present thought provoking questions to the audience during a live event. This situation was most clearly witnessed and widely felt during the very first UFCs in which Royce Gracie was able to overcome his competitors with his families style of jiu-jitsu, prompting many who witnessed the events to understand the importance of the Brazilian ground fighting art. Gracie presents the most notable example of a message being sent by the sport and its participants; however, as history has shown, it is not the first such occurrence. Maeda sent society an important message about Judo during his competitive challenge matches at the start of the 1900s and LeBell resent the same sociological wake-up call during America's earliest recorded MMA match.

*Sabin v. Butz* presents another case where a First Amendment claim was rejected, this time when a downhill ski instructor contended that an administrative action infringed on his constitutional right to communicate and express ski instructions to his students.<sup>256</sup> In the case, the instructor applied for a special use permit to teach skiing to a group of individuals in the White River National Forest, land that was already under permit for such winter activities to other entities.<sup>257</sup> The court said there was no protection for this activity because it would do no more than carry out a commercial transaction and because "such communication would not convey information, express opinion, recite grievances, protest claimed abuses or seek financial support for a movement of public interest and concern."<sup>258</sup>

In contrast to the ski instructor in *Sabin*, mixed martial artists do a lot more than facilitate commercial transactions; whether through their distinctive walkouts or unique style of martial arts on display, the athletes regularly convey information to the audience. Mixed martial artists also express their opinions through their choice of technique in particular situations during competition and by the choice of the base disciplines in which they choose to train and specialize while preparing for competition. Spectators are aware of these choices made by the athletes and use this informa-

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256. *See Sabin v. Butz*, 515 F.2d 1061, 1065 (10th Cir. 1975) (detailing facts of case).

257. *See id.* at 1063-64 (explaining that lands were already under permit for winter activities to Aspen Mountain, Aspen Highlands, Buttermilk, and Snowmass and that Forest Service will not authorize individuals to "operate concessions or ski schools on an area under permit to another party without that party's consent.").

258. *See id.* at 1065 (explaining court's rationale).

tion to form their own opinion of the techniques and disciplines being put to use. These situations present examples of communication which the court in *Sabin* cited as characteristics lacking in the speech of the ski instructor.

Lastly, another First Amendment ruling concerning sports, specifically surfing, can be distinguished from MMA in the case *MacDonald v. Newsome*. In *MacDonald*, a group of surfboarders challenged a county ordinance that prohibited surfboard riding in specific locations, contending that the regulations deprived surfboarders in the county of the guarantees of the First Amendment.<sup>259</sup> The court disagreed with the surfers and held that the ordinance did not infringe on their freedom of expression because surfboard riding is more of “an avocation or sport” and because plaintiffs did not claim that they endeavored to make public declarations or statements while enjoying the activity.<sup>260</sup>

The decision in *MacDonald* demonstrates the idea that an individual’s interaction with the “natural elements” does not warrant First Amendment protection.<sup>261</sup> However, mixed martial artists do not only interact with the natural elements, but with audience members, each other, and everyone else in attendance. Furthermore, MMA is more than just an avocation or sport; it is a unique forum that allows professional mixed martial artists the ability to make public statements and declarations while partaking in an activity they enjoy.

## VI. CONCLUSION AND POSSIBLE OUTCOMES

Born in Endicott, New York, lead plaintiff in the UFC lawsuit and current Light Heavyweight Champion Jon Jones commented that MMA “is probably one of the most advanced chess games you could ever watch,” once you understand what you’re watching.<sup>262</sup> The champ made this statement in April of 2012 at the Equinox gym off 19th Street in New York City, while he trained for an upcoming fight in Atlanta against Rashad Evans, a native of Niagara

259. See *MacDonald v. Newsome*, 437 F. Supp. 796, 796-97 (E.D.N.C. 1977) (describing how county ordinance prohibiting surfboarding in specific locations did not deprive surfboarders in county of First Amendment guarantees).

260. See *id.* at 797 (asserting no First Amendment violation because plaintiffs failed to show making of public declarations or statements while surfing).

261. See *id.* at 798 (explaining court’s holding).

262. See Jason Gay, *A Formidable Champ in a Forbidden City*, WALL ST. J., (Apr. 18, 2012, 8:25PM), <http://online.wsj.com/article/SB10001424052702303513404577352201300015654.html> (claiming that MMA is complex and burgeoning sport and Jones states: “To the untrained eye, you look at two guys punching each other in the face. But this is the fastest growing sport on the planet for a reason. . .”).

Falls, New York. Marc Ratner points out the flawed logic and reasoning in the government's stance and scenarios like the one above: "if the premise is you're trying to protect people, it's already on network television, it's on pay-per-view, Showtime, Spike TV, all you're doing is holding hostage fans that want to see it in person."<sup>263</sup> Ratner's statement is accurate but overall misses the mark; as not only is New York outlawing the best professional martial artists from displaying their craft, the ban is also facilitating the rise of unregulated underground MMA events in the state.<sup>264</sup> Adding to this dangerous irony, New York also allows MMA gyms and training facilities to operate within its territory and even harbors an MMA summer camp for kids.<sup>265</sup> Nevertheless, despite the abundance of mixed martial artists in the state, the New York legislature and the NYSAC continue to criminalize and outlaw the most crucial forum these athletes have to communicate with their fans in state.

If the court agrees and the proponents of MMA are successful in their constitutional claims, securing a declaration or court-ordered injunction against the enforcement of the law, then mixed martial artists from New York, like Jones and Evans, will finally have the opportunity to communicate with fans from their home state in a live setting. Furthermore, a ruling for the plaintiffs would bring New York in line with the overwhelming majority of states that currently sanction the sport, receive profits from it, and provide the activity as an opportunity which allows its citizens to communicate through their preferred medium of choice.

On the other hand, if the New York government is able to secure a ruling in its favor, it would likely be due to the fact that the court felt the law is rationally related to legitimate government in-

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263. See Katie Strang, *Mixed Martial Arts: Making MMA legal in New York could be profitable*, NEWSDAY (New York), Mar. 22, 2009, at A72, available at <http://www.newsday.com/columnists/other-columnists/mixed-martial-arts-making-mma-legal-in-ny-could-be-profitable-1.767792> (explaining how ban on MMA is ineffective, as it forces fans to watch fights at home and resort to other measures to see live shows).

264. See Tyler Dunne, *Jason Trzewieczynski Trains MMA Fighters for the Day the Sport Becomes Legal in New York State*, BUFFALO NEWS, July 8, 2009, at D1, available at 2009 WLNR 13120495 (explaining that underground fights are very secretive and held in obscure places). He explains further that tickets are sold well before event, but purchasers do not find out where the event will take place until usually one day prior via "text message, Facebook or anything else that quietly spreads the word." See *id.*

265. See *id.* (describing how New York allows MMC gyms to operate within its territory); see also Douglas Quenqua, *The Fight Club Generation*, N.Y. TIMES, Mar. 15, 2012, at E1, available at <http://www.nytimes.com/2012/03/15/fashion/mixed-martial-arts-catches-on-with-the-internet-generation.html?pagewanted=all> (explaining that MMA summer camp is run out of "Westchester MMA-Fit a school in Mount Kisco," New York).

terests. If this outcome is the conclusion of the case, the decision to bring suit by Zuffa could prove to be a critical piece of leverage for those wishing to continue the ban. This is because the possible legal ruling embodies the arguments that opponents of MMA have advanced and continue to advance in the media and legislature in support of their position. Thus, in a way, the decision would give congressmen support from another branch of the government and could possibly be used as a tool against future attempts at legalization through the legislature.

Lastly, one final outcome that cannot be ignored is the chance that the case will be dropped, something that is a real possibility if the sport gets a favorable vote in the legislature before a ruling can be handed down in the case. Economically, this possible conclusion makes sense for the largest plaintiff in the suit, the UFC, as it has already invested over \$2.2 million in political campaigns and legislative lobbying in support of its previous sanctioning efforts in the state.<sup>266</sup> These figures suggest that the company would not be opposed to dropping the suit, since apart from an injunction and declarations, two things that would be unnecessary if the state passes a sanctioning bill, the only other relief proponents of MMA seek are attorney's fees, one thing they could feasibly do without if the legislature decides to legalize the sport.

This possible outcome gained momentum on April 18, 2012, when the New York State Senate once again passed a bill to legalize MMA; making 2012 the third straight year a bill proposing to legalize the sport has passed the body.<sup>267</sup> However, the proposed law will still have to go through the Assembly, where it has stalled every year it has been introduced before reaching a full vote.<sup>268</sup> Offering somewhat of a hope for legalization, or at least a chance to vote on the topic, Assembly Speaker Sheldon Silver recently commented

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266. See John Eligon, *Fate of Mixed Martial Arts in New York State Again Rests With Assembly*, N.Y. TIMES, Apr. 20, 2012, at 18, available at <http://www.nytimes.com/2012/04/20/nyregion/fate-of-mixed-martial-arts-in-new-york-rests-with-assembly.html> (explaining that "Zuffa, the U.F.C.'s parent company, has made nearly \$270,000 in contributions to New York lawmakers over the past four years, and spent over \$2 million on lobbying over the past five years. The company has donated \$92,800 to Gov. Andrew M. Cuomo, a Democrat; \$5,500 to Mr. Morelle; and \$3,000 to Senator Joseph A. Griffo, a Republican from Utica who sponsored the [2012] Senate bill. It also has contributed tens of thousands of dollars to the state's Democratic committee.").

267. See *id.* (describing how New York State Senate passed bill in 2012, on its third attempt, to legalize MMA).

268. See *id.* (explaining that bill will have to meet Assembly's approval before it is ratified).

that although MMA is violent, New York “may be better off having strict regulation” over MMA events in the state.<sup>269</sup>

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269. *See id.* (implying that legalization of MMA may lead to better regulation of sport).

