



2014

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Ladan Shelechi

J.D., Loyola Law School, 2014

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Recommended Citation

Ladan Shelechi, *Say Uncle: New York's Chokehold Over Live Performance Of Mixed Martial Arts: Whether Combat Sports Are Protectable Speech And How Much Regulation Is Appropriate For Inherently Dangerous Sports*, 33 Loy. L.A. Ent. L. Rev. 205 (2013).

Available at: <https://digitalcommons.lmu.edu/elr/vol33/iss2/4>

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“SAY UNCLE”:¹ NEW YORK’S CHOKEHOLD OVER LIVE PERFORMANCE OF MIXED MARTIAL ARTS: WHETHER COMBAT SPORTS ARE PROTECTABLE SPEECH AND HOW MUCH REGULATION IS APPROPRIATE FOR INHERENTLY DANGEROUS SPORTS

*Ladan Shelechi**

In November 2011, the Ultimate Fighting Championship (“UFC”) and several other plaintiffs, including Mixed Martial Arts (“MMA”) fighters and fans, brought suit against New York State officials, challenging the constitutionality of New York’s Unconsolidated Law section 8905-a (“Ban”), which prohibits the live performance of professional MMA events in New York. In *Jones v. Schneiderman*, the plaintiffs argued that the Ban was a violation of their First Amendment right to free speech because the sport is expressive conduct. Originally, MMA was publicized as “no holds barred” and as a blood sport with almost no regulation, which drew the attention of the public and the criticism of lawmakers. Eventually, criticism over the safety of the fighters and MMA’s violent message led to the Ban’s implementation. However, despite MMA’s unchecked beginnings, in recent years the sport has undergone major changes under the authority of the UFC, including implementation of health and safety regulations, rules regarding the time

* J.D. Candidate, Loyola Law School, 2014; B.A., University of California, Irvine, 2009. The author would like to thank her family (Shahin, Hamid, Mehrdad, and Behzad) for their unwavering support and counsel throughout the author’s life and through this process. The author would also like to thank Loyola Law School Professor Elizabeth Pollman and Professor Justin Levitt for their continuous help and guidance with editing this Note. Finally, the author would like to give special thanks to Chief Production Editor Arpine Hovasapyan, Chief Note and Comment Editor Sean Montgomery, and the editors and staffers of the *Loyola of Los Angeles Entertainment Law Review* for their tireless efforts and help in making this publication possible.

1. *Ways to Win*, UFC, <http://www.ufc.com/discover/sport/ways-to-win> (last visited Sept. 11, 2013) (discussing the various fighting techniques that may be used to win a UFC fight, among them “The Ultimate Feat,” “Memorable Victory,” and “Say Uncle”).

and manner of the game, and an overhaul of MMA's image. This Note postulates that combat sports like MMA are expressive conduct deserving First Amendment protection, subject to regulation that is reasonable, narrowly tailored and does not fundamentally change the game. Furthermore, in order to mitigate fighter injury and avoid future lawsuits, sport organizations like the UFC should take note of the shortcomings of other combat sports where regulation was not implemented.

I. INTRODUCTION

Maximus: [after swiftly dispatching another gladiator] "ARE YOU NOT ENTERTAINED??!! ARE YOU NOT ENTERTAINED??!! Is this not why you are here??"²

Inherent in sports is the assumption that, due to its physical demands, players' body parts will be bruised, broken, or cut during the game, particularly in contact sports.³ However, there is a difference between injuries sustained from a tackle during the regular course of a National Football League ("NFL") game and a surprise punch thrown to the face between plays.⁴ The latter type of violence is outside the scope of the game because it is conduct extraneous to the rules of the sport and undertaken

2. *Quotes from Gladiator (2000)*, IMDB, <http://www.imdb.com/title/tt0172495/quotes> (last visited Sept. 11, 2013) (emphasis added).

3. *See Azzano ex rel. Azzano v. Catholic Bishop of Chicago*, 710 N.E. 2d 117, 119 (Ill. App. Ct. 1999) ("An activity is a contact sport if physical contact is inevitable and inherent in the activity and the parties involved voluntarily assent to the contact by participating."); 34 C.F.R. 106.41(b) (2013) ("[C]ontact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact."); *see also* WALTER T. CHAMPION, JR., *FUNDAMENTALS OF SPORTS LAW* § 8.1, 190–91 (2d ed. 2004) (explaining how karate fighters voluntarily assume the risk of injury because they know a leg sweep can produce injury).

4. *See* CHAMPION, *supra* note 3, § 8.1, at 192 (discussing the high risk assumed by football players and arguing that "participation in games involving bodily contact does not constitute consent to contacts that are prohibited by the rules or usages of the sport, if such rules are designed for the protection of the participant and not merely to control the mode of play of the game").

without the consent of the opposing players.⁵ Thus, sports violence warrants regulation.⁶ The difficulty in regulating violence in sports, however, arises when the objective of the activity is to injure the opponent.⁷ In those cases, determining what conduct should be prohibited is much less obvious.⁸ Even more unsettling is the possibility that this particular sport may negatively impact its audience by, among other things, encouraging violence amongst fans.⁹

Since the 1970s, there has been a growing concern over the

5. See Ray Yasser, *In the Heat of Competition: Tort Liability of One Participant to Another; Why Can't Participants be Required to be Reasonable?* 5 SETON HALL J. SPORT L. 253, 256 (1995) ("The prevailing view is that although participation in an athletic contest involves manifestation of consent to those bodily contacts which are permitted by the rule of the game and are foreseeable, an intentional act causing injury, which goes beyond what is ordinarily permissible in an unforeseeable way, is an assault and battery for which recovery may be had."); see generally CHAMPION, *supra* note 3, § 8.1, at 192 ("A cause of action for personal injury that occurs during athlete competition must be predicated upon recklessness or intentional conduct and not mere negligence.").

6. See Adam Gopnik, *Hockey Without Rules*, THE NEW YORKER (Apr. 20, 2012), <http://www.newyorker.com/online/blogs/sportingscene/2012/04/hockey-violence-blackhawks.html> (discussing the need for greater regulation of unnecessary violence in hockey caused by fighting which is illegal, yet the "tacit indulgence [of violence] reinforces the premise that the rules don't count. That . . . is the real core of the problem: an atmosphere of contempt for the real rules in deference to an unwritten vigilante honor code"); see also David J. Stephenson Jr., *Competitive Sports Torts*, 19 COLO. LAW. 2457, 2458 (1990) ("[I]t is essential that citizens be able to look to their government for redress' from injuries wrongfully inflicted during athletic competition.") (citation omitted).

7. A clear example of this is boxing. Melissa Neiman, *Protecting Professional Boxers: Federal Regulations with More Punch*, 15 SPORTS LAW. J. 59, 63 (2008).

8. See Dean Richardson, *Player Violence: An Essay on Torts and Sports*, 15 STAN. L. & POL'Y REV. 133, 153 (2004) ("The possibility of physical contact and injury was seen as inherent in the game of football 'no matter who is playing the game or how it is played.' This dispute over what risks are inherent in a game of touch football once again highlights the difficulty of the search for a common sense distinction between acts that are actionable and those that are not.").

9. See JAY COAKLEY, *SPORTS IN SOCIETY: ISSUES AND CONTROVERSIES* 228 (10th ed. 2008) ("Studies of violence at the sites of events indicates that crowd violence is influenced by perceived violence on the field of play, crowd dynamics, the situation at the event itself, the overall historical and cultural contexts in which spectators give meaning to the event, and their relationships with others in attendance.").

increasingly violent nature of professional sports.¹⁰ The mass dissemination of images of players inflicting spine-chilling violence, both on television and in newspapers, has heightened this concern.¹¹ Additionally, “because professional sporting contests are observed by millions and players are idolized, acts of excessive violence on the playing field only serve to glorify violence.”¹² The fear is that “violence will compromise the purpose of sports, [and] permit more examples of ‘socially acceptable’ violence to be recognized.”¹³ One sport that raises these concerns is Mixed Martial Arts (“MMA”), which is regulated by the Ultimate Fighting Championship (“UFC”).¹⁴

The Gracie family, who is notorious in the martial arts community for their Vale Tudo fighting techniques, created the UFC, and sought to import these techniques to mainstream America through pay-per-view television.¹⁵ Although the UFC’s brutality was a successful marketing scheme, overwhelming political criticism resulted in the UFC’s ban from pay-per-view television.¹⁶ Believing that it could reshape the organization, Zuffa, LLC (“Zuffa”) acquired control of the UFC and began to rebuild the organization by implementing new rules, which allowed MMA to become sanctioned.¹⁷ Zuffa’s changes to the UFC resulted in huge growth for MMA due, in large part, to its re-emergence on pay-per-view television and

10. Linda S. Calvert Hanson & Craig Dernis, Note, *Revisiting Excessive Violence in the Professional Sports Arena: Changes in the Past Twenty Years?*, 6 SETON HALL J. SPORT L. 127, 128 (1996); see also Daniel R. Karon, Note, *Winning Isn’t Everything, It’s the Only Thing. Violence in Professional Sports: The Need for Federal Regulation and Criminal Sanctions*, 25 IND. L. REV. 147, 157-58, 160 (1991) (discussing the failure of Sports Violence Act of 1980, which would have imposed criminal liability on players who use “excessive physical force,” and the Sports Violence Arbitration Act of 1983, which would have imposed civil, rather than criminal liability on athletes); see generally David J. Stephenson Jr., *Competitive Sports Torts*, 19 COLO. LAW. 2457, 2458 (1990) (“The swelling popularity of competitive sports has been accompanied by implicit condoning of increased violence.”).

11. Hanson & Dernis, *supra* note 10, at 130; see also Kevin A. Fritz, *Going to the Bullpen: Using Uncle Sam to Strike Out Professional Sports Violence*, 20 CARDOZO ARTS & ENT. L.J. 189, 195–96 (2002) (stating that children whose role models are athletes may assume that violence is acceptable if they continually see it in professional sports).

12. Hanson & Dernis, *supra* note 10, at 130–31.

13. *Id.* at 131 (citation omitted).

14. Donald F. Walter, Jr., *Mixed Martial Arts: Ultimate Sport, or Ultimately Illegal? Part 1 of 3*, GRAPPLEARTS (Dec. 8, 2003), <http://www.grapplearts.com/Blog/2008/12/mixed-martial-arts-ultimate-sport-or-ultimately-illegal/>.

15. *Id.*

16. *Id.*

17. *Id.*

the acquisition of two of its biggest competitors.¹⁸ Despite Zuffa's changes, however, the sport's opponents remained concerned about MMA's violent nature.¹⁹ These concerns culminated in the enactment of New York's Unconsolidated Law section 8905-a ("Ban"), a statute that prohibits combative sports from being "conducted, held or given within the state of New York."²⁰

This Note argues that combative sports like MMA are expressive conduct, which deserve First Amendment protection, but are subject to regulation that is reasonable, narrowly tailored, and does not fundamentally change the game. Part II examines the advent of MMA and the sport's controversial history. This background information provides the context behind the Ban and the latest lawsuit brought by MMA owners, fighters, and fans challenging the Ban's constitutionality. Part III deconstructs the purpose of the Ban, the activity it aims to regulate, and explores how it may achieve this purpose without violating the First Amendment and altering the game. Through an examination of case precedent in Part IV, three separate tests assist to determine what kind of speech falls within the scope of First Amendment protection. Their application to the current UFC lawsuit demonstrates that MMA falls within the purview of free speech as expressive conduct. Furthermore, Part V explores the possibility that the Ban's actual purpose may be to regulate the effect that MMA has on its audience. Taking this "effect" reasoning into consideration, this Note examines the differences between taped and live MMA, and suggests that the effect of permissible taped performance may be as equally harmful as live performance. Finally, this Note proposes solutions to maintain the integrity of the sport and to provide adequate safety measures for players. These solutions can stem from narrowly tailored regulations and lessons from the past mistakes of other combative sports.

II. MIXED MARTIAL ARTS AND THE ADVENT OF THE ULTIMATE FIGHTING CHAMPIONSHIP

Professional Mixed Martial Arts ("MMA") is a contact sport that debuted in the United States in 1993, and it is based on the full contact

18. *Id.*

19. *Id.* at Part 3.

20. N.Y. UNCONSOL. LAWS § 8905-a (McKinney 1997) ("A 'combative sport' shall mean 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 or opponents.").

sport of Vale Tudo in Brazil.²¹ It is a competition between two trained athletes, engaged in “various martial and combat arts, including karate, jiu-jitsu, boxing, kickboxing, grappling, judo, Muay Thai, and freestyle and Greco-Roman wrestling.”²² Utilizing such techniques, unarmed fighters go head-to-head to decide which fighter’s technique is supreme.²³ This is determined by judges, positioned around the Octagon, who allocate high scores based on “effective striking, effective grappling, control of the fighting area and effective aggressiveness and defense,” while factoring in the total number of blows landed by a contestant, successful takedowns, and which fighter is controlling the pace, location, and position of the fight.²⁴ Another important figure is the referee, who has sole discretion to end the contest, but is permitted to consult a ringside physician or the Commission regarding this decision.²⁵ The referee and the ringside physician are the only individuals authorized to enter the Octagon during the actual fight.²⁶ These rules are applicable to both non-championship and championship MMA contests.²⁷

Beginning in the early 1990s and prior to the adoption of the codified safety rules, MMA fights were marketed with the motto “There Are No Rules!” and characterized as “‘no holds barred’ and as a ‘blood sport or fights to the death.’”²⁸ This is because “[e]ach match [ran] until there [was] a designated winner—by means of knock-out, surrender, doctor’s intervention, or death.”²⁹ These descriptions resulted from the sport’s minimal regulations during the first six Ultimate Fighting Championships (“UFC”) because “there were no weight classes, no time limits or rounds,

21. *The Sport*, UFC, <http://www.ufc.com/discover/sport/index> (last visited Sept. 11, 2013).

22. Complaint at 1, *Jones v. Schneiderman*, 888 F. Supp. 2d 421 (S.D.N.Y. 2012) (No. 11 Civ. 8215 KMW).

23. *The Sport*, *supra* note 21.

24. *Rules and Regulations*, UFC, <http://www.ufc.com/discover/sport/rules-and-regulations> (last visited Sept. 11, 2013).

25. *Id.*

26. *Id.*

27. In a non-championship MMA contest, there are three rounds, with five minutes as the maximum time per round and a one minute rest period between each round, while in a championship MMA contest, there are five rounds, not to exceed five minutes per round, with a one minute rest period between each round. *Id.*

28. Memorandum of Law in Support of Motion to Dismiss at 4, *Jones v. Schneiderman*, 888 F. Supp. 2d 421 (S.D.N.Y. 2012) (No. 11 Civ. 8215 (KMW)(GWG)) [hereinafter Motion to Dismiss].

29. Complaint, *supra* note 22, at 10.

and no mandatory safety equipment. The only rules were that fighters could not eye gouge, bite or fish hook.”³⁰ As a result, throughout the 1990s, politicians and reporters “regularly used the phrase ‘human cockfighting’ to discredit the UFC.”³¹ Despite the lack of rules, there were no deaths in early MMA until 2007 when a fighter suffered a massive stroke after “taking a hard right to the chin.”³²

The sport, however, began to develop into what is now commercially advertised MMA in 2001, producing “well-rounded, balanced fighters that could fight standing or on the floor.”³³ This advancement was the result of Zuffa, LLC (“Zuffa”) taking ownership of the UFC brand in 2001³⁴ and reorganizing the sport into a controlled combat competition in order to distribute it across different cable and satellite providers.³⁵ According to Lorenzo Feritta, the Chairman of Zuffa, “[T]he UFC has gone to great lengths to impose health and safety regulations to M.M.A. making it as safe or even safer than many other sports activities. The sport allows fighters to honorably tap out with fewer hits.”³⁶ The New Jersey State Athletic Control Board ratified these regulations in May 2001, which include “licensing, medical examinations, approved gloves, weight classes, time limits, rounds and mandatory drug testing.”³⁷ Additionally, MMA fighters must pass the same physical exam used to screen boxers, including a

30. Walter, *supra* note 14.

31. Peter Hess, *The Development of Mixed Martial Arts: From Fighting Spectacles to State-Sanctioned Sporting Events*, 4 WILLAMETTE SPORTS L.J. 1, 9 (2007) (quoting Peter Sennhauser, *Resistance is Futile: Extreme Fighting is in Your Background*, THE STRANGER (Dec. 17, 2003), <http://www.thestranger.com/seattle/Content?oid=16515>).

32. Dave Doyle, *MMA Myths Debunked Again*, YAHOO! SPORTS (May 20, 2008), <http://sports.yahoo.com/mma/news?slug=dd-mmamyths052908>; see also Dave Meltzer, *MMA Fighter Vasquez Dies Weeks After Fight*, YAHOO! SPORTS (Dec. 2, 2007), <http://sports.yahoo.com/mma/news?slug=dm-fighterdeath120207> (discussing the death of Sam Vasquez, a 35-year-old fighter, after he suffered a seizure apparently brought on by a punch during an MMA event in Houston, Texas).

33. *The Sport*, *supra* note 21.

34. *The History: The Sport's Path to Regulation, Popularity, and Legitimacy*, MMA FACTS, <http://www.mmafacts.com/index.cfm?fa=main.history> (last visited Sept. 11, 2013).

35. *The UFC*, UFC, <http://www.ufc.com/discover/ufc> (last visited Sept. 11, 2013).

36. Ceylan Yeginsu, *UFC Sues NY State for Right to Fight*, INT'L BUS. TIMES (Nov. 15, 2011, 5:21 AM), <http://www.ibtimes.com/ufc-sues-ny-state-right-fight-651587> (citation omitted).

37. *The History: The Sport's Path to Regulation, Popularity, and Legitimacy*, *supra* note 34.

cerebral MRI before they are licensed to fight,³⁸ and if they are diagnosed with a concussion, they are required to refrain from any contact for 45 days and to refrain from competition for 60 days.³⁹

Despite the transformation of the sport and the addition of such safety regulations, many critics remain unconvinced that MMA has truly evolved into a bona fide sport.⁴⁰ The critics' persistence led to enactment of laws banning live MMA within states, including the current New York Unconsolidated Law section 8905-a ("Ban").⁴¹

III. THE CURRENT STATE OF LAW: BACKGROUND OF *JONES V. SCHNEIDERMAN* AND THE NEW YORK UNCONSOLIDATED LAW SECTION 8905

A. Background of Jones v. Schneiderman

In January 1997, the New York State Athletic Commission enacted New York Unconsolidated Law section 8905-a ("Ban"), which "prohibits the exhibition or matches of professional combat sports not otherwise exempted or regulated by law."⁴² The Ban makes it illegal to "knowingly advance[] or profit[] from a combative sport activity," and further clarifies that:

A person advances a combative sport activity when, acting other than a spectator, he or she engages in conduct which materially aids any combative sport. 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 person to attend or participate therein, toward the actual conduct of the performance thereof, toward the arrangement of any of its

38. Gregory H. Bledsoe, et al., *Incidence of Injury in Professional Mixed Martial Arts Competitions*, J. SPORTS SCI. & MED. (COMBAT SPORTS SPECIAL ISSUE) 136, 139 (July 2006), available at <http://www.mmafacts.com/images/content/HOPKINS%20MMA%20STUDY.pdf>.

39. *Health and Safety*, MMA FACTS, http://www.mmafacts.com/images/content/UFC_FighterSafety.pdf (last visited Sept. 11, 2013).

40. See, e.g., Eric Holden, *Will New York Legislators End Ban on MMA in 2013?*, YAHOO! NEWS (Jan. 7, 2013), <http://news.yahoo.com/york-legislators-end-ban-mma-2013-195000703.html> (discussing New York Assemblyman Bob Reilly's support for the Ban).

41. N.Y. UNCONSOL. LAWS § 8905-a (McKinney 1997).

42. Motion to Dismiss, *supra* note 28, at 7–8; see also UNCONSOL. § 8905-a.

financial or promotional phases, or toward any other phase of combative sport.⁴³

With the United States' debut of televised MMA in November 1993 and the growing public attention of MMA violence in the ensuing years, the New York Legislature held hearings in 1996 and 1997 to discuss whether to reject this new sport; it subsequently passed the Ban in the 1997 hearing.⁴⁴ During these hearings, a myriad of individuals, including experts, testified against permitting MMA to proceed within New York because of the physical damage incurred by the fighters,⁴⁵ and—significantly for this Note—the violent message the sport conveyed.⁴⁶ Senator John McCain led the crusade against MMA by “sending letters to all 50 governors urging them to ban what he called ‘human cockfighting.’”⁴⁷ Roy Goodman, New York State Senator, used violent MMA clips, including footage of MMA fighter Keith Hackney repeatedly striking his opponent’s unprotected groin, to campaign against the sport.⁴⁸ Governor George Pataki and Mayor Rudy Giuliani publicly criticized the sport through the press.⁴⁹ Specifically, Mayor Giuliani released statements conveying his disgust with MMA and stated that MMA extended beyond

43. UNCONSOL. § 8905-a.

44. Motion to Dismiss, *supra* note 28, at 4, 6–8. While MMA was at the crux of these debates, the Ban specifically exempted other sports including boxing, sparring, wrestling or martial arts, from such regulation. See UNCONSOL. § 8905-a; see also T.P. Grant, *MMA Origins: UFC I*, SB NATION (Mar. 26, 2012, 3:00PM), <http://www.bloodyelbow.com/2012/3/26/2890710/mma-origins-ufc-1-MMA-History>.

45. Motion to Dismiss, *supra* note 28, at 5–6. For instance, Dr. Lundberg testified that participants were not always evenly matched, and “the fighters did not wear protective head gear, mouth pieces or gloves.” *Id.* at 6. Additionally, fighters were permitted to strike “blows to any part of the party,” sometimes resulting in “brain concussions and hemorrhages, skin and scalp cuts and lacerations, broken and bloody noses, eye damage, and blindness, fractures of various bones, including the cervical spine, spinal cord and brain stem damage.” *Id.*

46. Complaint, *supra* note 22, at 13–14 (“Extreme fighting poses yet another equally sinister threat to our society. ‘In particular it sends a dangerous message to our youth at a time when we are searching for ways to effectively communicate to them the need to resolve conflicts peacefully.’”) (citing to *In the Matter of Should New York State Ban Extreme Fighting?: Hearing Before the S. Comm. on Investigations, Taxation, & Gov’t Operations*, 37-38 (1996) [hereinafter *Hearing*] (statement of Hon. Robert Farley, Deputy New York State Att’y Gen)).

47. Jonathan Snowden, *Legal No Holds Barred: The UFC Takes on New York in a Battle for MMA’s Future*, BLEACHER REP. (Feb. 10, 2013), <http://bleacherreport.com/articles/1522924-legal-no-holds-barred-the-ufc-takes-on-new-york-in-a-battle-for-mmas-future>.

48. *Id.*

49. *Id.*

boxing because it was “people brutalizing each other.”⁵⁰ In an interview with *Forbes* magazine, Bob Reilly, a New York State Assemblyman, justified the ban on MMA it was a violent sport and “violence begets violence.”⁵¹ Furthermore, he stated that permitting the UFC to host fights would contradict the legislature’s attempts to eradicate all forms of violence in New York.⁵²

Since the Ban’s enactment, there have been many unsuccessful legislative attempts to legalize MMA in New York.⁵³ More recently, the proponents have sought relief in the courts.⁵⁴ *Jones v. Schneiderman* is the latest case to involve Zuffa.⁵⁵

B. *Jones v. Schneiderman*

1. Plaintiffs’ Arguments

In the lawsuit, William Jones (“Jones”), a professional MMA athlete and one of the several plaintiffs, asserted that the Ban suppressed the sport’s expressive conduct as live entertainment⁵⁶ and was, therefore, an unconstitutional restriction of free speech.⁵⁷ More specifically, Jones argued that the Ban contravened with the fighters’ “constitutional protections to fulfill their livelihoods and express themselves in their choice of entrance music, battle clothing, and conduct in the ring (known as

50. *Id.*

51. Mike Ozanian, *Assemblyman Bob Reilly Tells Me Why He Does Not Want MMA in New York*, FORBES (June 10, 2011, 9:29 AM), <http://www.forbes.com/sites/mikeozanian/2011/06/10/assemblyman-bob-reilly-tells-me-why-he-does-not-want-mma-in-new-york/>.

52. *Id.*

53. “The bill to legalize MMA in New York was stalled in the state Assembly last June [2010]. It passed through the State Senate by a vote of 42-18 in May, then went through both the Tourism and Codes committees in the Assembly. The bill then stalled in the Ways and Means Committee and never made it to the Assembly floor for a full vote. It was the third straight year the bill was defeated.” Mark La Monica, *UFC Files Suit Against New York State*, NEWSDAY (Nov. 15, 2011, 5:02 PM), <http://www.newsday.com/sports/mixed-martial-arts/ufc-files-suit-against-new-york-state-1.3323383>.

54. See Richard Sandomir, *U.F.C. Sues State Over Ban on Mixed Martial Arts Bouts*, N.Y. TIMES, Nov. 16, 2011, at B18.

55. *Jones v. Schneiderman*, 888 F. Supp. 2d 421 (S.D.N.Y. 2012).

56. Complaint, *supra* note 22, at 84–85.

57. See *IOTA XI Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 389 (4th Cir. 1993) (“First Amendment principles governing live entertainment are relatively clear: short of obscenity, it is generally protected.”).

the Octagon).”⁵⁸ Moreover, the plaintiffs asserted that like “ballet, music, or theater, for an audience, attending a live MMA event is an experience that cannot be replicated on a screen.”⁵⁹ Similar to any theatrical actor who dreams of performing on Broadway for millions of fans, these fighters dream of expressing themselves in some of the biggest and well-known arenas in the nation, such as Madison Square Garden.⁶⁰ Professional MMA fighter Frankie Edgar, another plaintiff in the action, expressed his lifelong dream to perform in Madison Square Garden, and indicated that through a live MMA performance, he is able to connect and “provide [his audience] with a fight performance that they can experience with all of their senses—something that can only be captured live.”⁶¹

Additionally, similar to actors who find solace in their performances, the fighters view the sport as giving meaning to their lives. For Brian Stann, MMA events allowed him to continue to connect and inspire fellow veterans.⁶² Along the same lines, Matt Hamill became an inspiration to deaf athletes around the world because he did not allow his disability to deter him from pursuing his dream.⁶³ Similarly, Gina Carano believed that MMA allowed her to showcase her skills, and send a positive message about the power and drive of women.⁶⁴

These explanations illustrate how MMA is analogous to theatre, a

58. Eriq Gardner, *New York Moves to Uphold Live Fighting Ban as UFC Popularity Soars*, THE HOLLYWOOD REP. (Jan. 30, 2012, 12:17 PM), <http://hollywoodreporter.com/thresq/new-york-live-fighting-ban-ufc-285759>; see also Complaint, *supra* note 22, at 5.

59. Complaint, *supra* note 22, at 53.

60. According to Sarah Goodlaxson, an up-and-coming MMA fighter, “Madison Square Garden is one of the most famous arenas in the world, and it would be an honor to fight there.” Holden, *supra* note 42; see also Dahlia Lithwick, *First Amendment Smackdown*, SLATE (Nov. 23, 2011, 2:54 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2011/11/is_there_a_first_amendment_right_to_beat_your_mma_opponent_senseless_2.html.

61. Complaint, *supra* note 22, at 60.

62. “Performing MMA live in front of a crowd is an unrivaled experience and allows me to speak to my fans. . . . I was attracted to MMA during my time in the Marine Corps, after I returned from my first deployment to Iraq in 2005 and was looking for a path that allowed me to stay motivated, and inspire others, particularly fellow veterans. MMA is a brotherhood that demands respect for your fellow fighters and rewards mental discipline and skill. It has given countless veterans a way to rehabilitate and connect with other military veterans and I am grateful every day for the ability to compete and inspire my fans.” *UFC Sues to Overturn NY Ban on MMA*, UFC (Nov. 15, 2011), <http://www.ufc.com/news/UFC-Sues-to-overturn-NY-Ban-on-MMA>; see Complaint, *supra* note 22, at 63.

63. Complaint, *supra* note 22, at 61.

64. *Id.* at 58–59.

form of expressive conduct.⁶⁵ Similar to performers who take measures to prepare for their roles prior to conveying their message to their audience, MMA fighters “express themselves with their bodies and with their abilities, conveying messages of, among other things, skill, courage, self-discipline, self-confidence, the value of intense training, humility, strategic thinking, and respect for one’s opponent.”⁶⁶ Each fighter’s performance in front of a live audience is expressive in a unique way, yet such expression does encompass violence.⁶⁷

The plaintiffs also pointed to the positive shift in the MMA’s development as a legitimate sport. They presented evidence that illustrated MMA’s evolution into a safer sport with the addition of a regulatory organization, with codified safety rules, and by the presence of medical doctors to monitor the health and safety of the fighters.⁶⁸ Additionally, they emphasized the attitude shifts of former MMA critics, like Former New York Governor George Pataki and Senator John McCain who now support the sport, in light of changes the UFC has made since its early years.⁶⁹ Moreover, the plaintiffs countered the contention that “the sport is inherently unsafe,”⁷⁰ by highlighting MMA’s strong safety record and indicating how MMA may be safer than boxing, a sport that is exempted from the Ban.⁷¹ Lastly, the plaintiffs underscored the inconsistency of allowing amateur MMA activity that is sometimes unregulated, yet banning skilled professionals from demonstrating their sport.⁷²

Fan testimony was also submitted to emphasize that skill and “appreciat[ion] [of] the artistry displayed by the fighters” is what attracts

65. See *id.* at 46 (describing the personas of individuals who enter the arena, such as Jason “Mayhem” Miller, who “has entertained fans with entrance shows complete with costumes and light shows”); see also James M. McGoldrick, Jr., Note, *Symbolic Speech: A Message from Mind to Mind*, 61 OKLA. L. REV. 1, 17 (2008) (noting that one type of symbolic speech involves acting in plays or theater pieces); see generally Michael Billington, *There’s Little Difference Between Theatre and Sport*, THE GUARDIAN, (June 17, 2008), <http://www.guardian.co.uk/stage/theatreblog/2008/jun/17/thereslittledifferencebetwe> (discussing the close relationship between sports and art).

66. Complaint, *supra* note 22, at 4–5.

67. *Id.* at 5.

68. *Health and Safety*, *supra* note 39; *Rules and Regulations*, *supra* note 24.

69. Complaint, *supra* note 22, at 17–18.

70. *Id.* at 11.

71. *Id.* at 28.

72. *Id.* at 26–27.

fans to the sport, rather than the violence.⁷³ One testimonial described the thought and skill required to set up a play during a fight, analogizing the sport to a chess match where “the guys that can set up th[eir] moves [in advance] win.”⁷⁴ These testimonies accentuate the fact that fans are drawn to the authenticity of the sport:

In a world rife with fake sports (professional wrestling), fake interactive adventures (video games), and even fake reality (reality television), MMA stands out as distinctly “real.” The message conveyed by MMA athletes is a pure one: they are using their hard-practiced skill, strategy, mental conditioning, and determination to achieve victory.⁷⁵

These arguments were present in the plaintiffs’ claim that the Ban is an unconstitutional restriction on the First Amendment⁷⁶ for two reasons. First, the Ban is a violation as applied to plaintiffs because it is a content-based restriction on free speech and expressive conduct.⁷⁷ Here, the plaintiffs did not argue that New York should not be able regulate MMA, but rather, that a complete ban on professional MMA before a live audience was unconstitutional.⁷⁸ Second, the Ban is overly broad and facially invalid⁷⁹ under the First Amendment because it makes it a crime to engage in a constitutionally protected activity in any way that “advances or profits from a combative sport activity.”⁸⁰

2. Defendants’ Arguments

Conversely, defendants argued that MMA is not an expressive conduct warranting First Amendment protection, since this protection does

73. *Id.* at 50.

74. *Id.*

75. Complaint at 51, *Jones v. Schneiderman*, 888 F. Supp. 2d 421 (S.D.N.Y. 2012) (No. 11 Civ. 8215 KMW).

76. U.S. CONST. amend. I.

77. Complaint, *supra* note 22, at 85.

78. *Id.*

79. *Vill. of Ruidoso v. Warner*, 274 P.3d 791, 794 (N.M. Ct. App. 2012) (“According to our First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech.”) (citation omitted).

80. Complaint, *supra* note 22, at 86.

not extend to conduct that a person simply *intends* to be expressive.⁸¹ If such an extension was granted, then a “limitless variety of conduct” would be labeled speech, and protection would be granted to conduct that should not fall under the umbrella of the First Amendment.⁸²

Furthermore, defendants relied on case precedent to illustrate that “competitive sports are generally not protected by the First Amendment.”⁸³ They referenced *SEG Sports Corp. v. Paterson*, where the court held that it was unclear “whether plaintiffs have a First Amendment right to exhibit Ultimate Fighting,”⁸⁴ and *Fighting Finest, Inc. v. Bratton*, where the court held that New York City police officers’ public participation in amateur boxing was not protected by the First Amendment.⁸⁵ Here, the defendants rejected MMA as an art form and discarded the argument that carefully planned techniques used by fighters conveyed a specific message to their audience.⁸⁶ Instead, they viewed these techniques as “common to virtually every professional sport and [with] certainly no more than the artistry of Ted Williams’ swing, Billie Jean King’s net game or Muhammad Ali’s footwork.”⁸⁷ Therefore, any message conveyed from the fighters to the fans did not “transform the fights themselves into speech or expressive conduct subject to First Amendment protection.”⁸⁸ Additionally, defendants argued that while the First Amendment may protect depictions of violence, actual violence is not protected.⁸⁹ Finally, defendants stated that even if MMA was expressive conduct, the State’s interest in regulating MMA to prevent physical harm to the fighters justified such limitations.⁹⁰ However, this Note disagrees; the remainder of this Note argues that MMA

81. Defendant Schneiderman’s Memorandum of Law in Support of His Motion to Dismiss the First Amended Complaint at 6–7, *Jones v. Schneiderman*, 888 F. Supp. 2d 421 (S.D.N.Y. 2012) (No. 11 Civ. 8215 (KMW)(GWG)) [hereinafter Motion to Dismiss First Amended Complaint] (emphasis added).

82. *Id.* at 6.

83. *Id.* at 7 (citing *SEG Sports Corp. v. Paterson*, No. 97 Civ. 712(MGC), 1998 WL 230993, at *4 (S.D.N.Y. May 5, 1998)); see, e.g., *Fighting Finest, Inc. v. Bratton*, 898 F. Supp. 192, 195 (S.D.N.Y. 1995), *aff’d on other grounds*, 95 F.3d 224 (2d Cir. 1996).

84. *SEG Sports Corp.*, 1998 WL 230993, at *4.

85. *Fighting Finest*, 898 F. Supp. at 195.

86. Motion to Dismiss the First Amended Complaint, *supra* note 81, at 8.

87. *Id.*

88. *Id.* at 8–9.

89. *Id.* at 10.

90. *Id.*

is expressive conduct protectable as speech rather than simple conduct undeserving of First Amendment protection.

IV. THE NEW YORK STATE LEGISLATURE SHOULD LEGALIZE MMA LIVE PERFORMANCE: INHERENTLY VIOLENT SPORTS ARE SPEECH AND CAN BE REGULATED WITHOUT VIOLATING THE FIRST AMENDMENT

A. *The Scope and Reasoning Behind First Amendment Protections*

The First Amendment states in pertinent part that “Congress shall make no law . . . prohibiting the free exercise thereof; or abridging the freedom of speech.”⁹¹ It protects pure speech, like writing and speaking, as well as symbolic or expressive speech “such as voting, nude dancing, wearing a black armband at school to protest government action, using public streets to picket, and displaying an American flag with a peace symbol affixed.”⁹² Entertainment, political speech, movies, television and radio shows, and live entertainment like theatrical and musical shows are also protected speech.⁹³

The four most prevalent reasons for free speech are: (1) guaranteeing individual self-fulfillment; (2) advancing knowledge and determining truth; (3) allowing for members in society to participate in decision-making; and (4) achieving a balance for both dissent and consensus.⁹⁴ Nonetheless, protection for pure speech and expressive speech is limited.⁹⁵ Pure speech is unprotected if it is obscene,⁹⁶ constitutes fighting words⁹⁷ or incitement.⁹⁸

91. U.S. CONST. amend. I. The Fourteenth Amendment’s “privileges and immunities” clause subjects state laws to First Amendment guarantees. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925).

92. *Coleman v. City of Mesa*, 265 P.3d 422, 429 (Ariz. Ct. App. 2011).

93. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981).

94. Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 591 (1982) (citation omitted).

95. *See Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1058-59 (9th Cir. 2010) (noting that pure speech that “falls within one of the categories of speech. . . [is] fully outside the protection of the First Amendment” and stating that the government has a “freer hand in restricting expressive conduct” protected by the First Amendment than pure speech (internal quotations and citations omitted)); *State v. T.B.D.*, 656 So.2d 479, 480 (Fla. 1995) (“The First Amendment promotes the free flow of ideas and information in our society by prohibiting government from restricting speech or expressive conduct because of the message expressed.”).

96. *Roth v. United States*, 354 U.S. 476, 487 (1957) (“Obscene material is material which deals with sex in a manner appealing to prurient interest.”).

Expressive speech is protected only if it intends to convey a particularized message, and there is a great likelihood that the viewer will understand that message.⁹⁹ Courts are reluctant to recognize expressive conduct that is not “sufficiently imbued with elements of communication” because it would permit limitless kinds of conduct to be labeled as speech.¹⁰⁰ Expressive speech may be restricted if it passes strict scrutiny, which requires a compelling governmental interest for the restriction, and the restriction must be no more than necessary to achieve the government’s goal.¹⁰¹ Restrictions on both types of speech will be examined in depth later in this Note.

B. Are Inherently Violent Sports Expressive Speech?

The Supreme Court has developed three tests to determine which expressive conduct falls under the umbrella of protected speech.¹⁰² These tests create a road map for the expressive conduct inquiry. It should be noted, however, that there still remains some ambiguity in the language of some of the tests, which will be addressed later in this Note.

1. *Texas v. Johnson*: What Counts as Speech?

The Supreme Court considered whether physical action fell within the purview of expressive conduct deserving First Amendment protection in *Texas v. Johnson*. There, the central issue concerned the constitutionality of Johnson’s physical conduct of “[unfurling] the American flag, [dousing] it with kerosene, and [setting] it on fire.”¹⁰³ Johnson was charged with violating Texas Penal Code section 42.09(a)(3), which made it a crime to

97. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (stating that fighting words are “those which by their very utterance inflict injury or tend to incite an immediate breach of the peace”).

98. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (stating that incitement is advocacy “directed to inciting or producing imminent lawless action and is likely to incite or produce such action”).

99. *Anderson*, 621 F.3d at 1058 (citing *Spence v. Washington*, 418 U.S. 405, 409–11 (1974)).

100. *Spence*, 418 U.S. at 409.

101. *Anderson*, 621 F.3d at 1063.

102. See, e.g., *Brown v. Entm’t Merch. Ass’n*, 131 S. Ct. 2729, 2933–34 (2011); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 567 (1991) (discussing the “O’Brien Test”); *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (discussing the “Texas Test”).

103. *Johnson*, 491 U.S. at 399.

desecrate a venerated object, and was sentenced to one year in prison and a \$2000 fine.¹⁰⁴ The Supreme Court found that Johnson's conviction was inconsistent with the First Amendment.¹⁰⁵ The Court explained that "In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have [to ask] whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.'"¹⁰⁶

In applying what is now known as the "Texas Test," the Court noted that "The very purpose of a national flag is to serve as a symbol of our country; it is, one might say, 'the one visible manifestation of two hundred years of nationhood.'"¹⁰⁷ Johnson's action was within the context of a political demonstration, and it clearly and overtly demonstrated his intent to make a political statement.¹⁰⁸ Furthermore, the magnitude of such a gesture's message could hardly be misunderstood by anyone who viewed it.¹⁰⁹

This test, however, contains ambiguities.¹¹⁰ First, it asks whether there is intent to convey a particularized message, and second, whether the message would be understood by those who viewed it.¹¹¹ It is unclear if the second step should be read as whether the viewer understood the intended message, or whether it is sufficient for the viewers to understand *any* message.¹¹² The Court does not clarify which reading is favored.¹¹³ In

104. *Id.* at 400.

105. *Id.* at 399.

106. *Id.* at 404 (quoting *Spence*, 418 U.S. at 410–11).

107. *Id.* at 405 (citation omitted).

108. *Id.* at 406.

109. See *Johnson*, 491 U.S. at 406 (1989) (discussing Johnson burning an American flag during a political demonstration to protest Reagan administration policies).

110. See *id.* at 404 (quoting *Spence*, 418 U.S. at 410–11); see also Katherine Hessler, *Where Do We Draw the Line Between Harassment and Free Speech?: An Analysis of Hunter Harassment Law*, 3 ANIMAL L. 129, 147 (1997) (discussing the ambiguity in analyzing the second step of the "Texas Test").

111. *Johnson*, 491 U.S. at 404 (quoting *Spence*, 418 U.S. at 410–11).

112. See Hessler, *supra* note 110, at 147 (emphasis added).

113. See *Johnson*, 491 U.S. at 404 (noting the requirement that "the likelihood was great that the message would be understood by those who viewed it" but not providing further guidance on this element) (citing *Spence*, 418 U.S. at 410–11).

practice, this may be problematic¹¹⁴ because it may lead to inconsistent results.¹¹⁵ This Note adopts the view that the message conveyed must be intended, and the audience must understand that specific message. Notwithstanding, this message does not need to be the only message that the audience understands, nor the most prominent. But to create a clearer rule and to be expressive conduct, evidence is needed to support the idea that the audience understood the particular message meant to be conveyed.

2. *Barnes v. Glen Theatre, Inc.*: The Limitations on Expressive Speech

In *Barnes v. Glen Theatre, Inc.*, the Supreme Court found that although nude dancing fell within the confines of expressive conduct, it was not entitled to First Amendment protection.¹¹⁶ At contention was an Indiana statute, which prohibited public nudity and called for all dancers to wear “pasties” and “G-strings.”¹¹⁷ Two establishments that wished to provide completely nude dancing as entertainment challenged the law on the ground that it violated the First Amendment.¹¹⁸

The Court relied heavily on the standards and reasoning set forth by *United States v. O’Brien* to reach its holding.¹¹⁹ There, the Court held that

114. For example, ambiguity may arise in the context of hunting, where protesters make different gestures to show hunters their anti-hunting intent. Hessler, *supra* note 110, at 147 (“Again, it is likely, though not certain, that the hunters will be able to understand the protesters’ message. If the ‘Silent Vigil’ protesters wish to be assured of constitutional protection, they may need to include some clear indication of the message they wish to communicate.”).

115. See *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 569 (1995) (“[A] narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a ‘particularized message,’ would never reach the unquestionably painting of Jackson Pollack, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll.”); R. George Wright, *What Counts As “Speech” in the First Place?: Determining the Scope of the Free Speech Clause*, 37 PEPP. L. REV. 1217, 1245 (2010) (“Audience members may perceive a fairly wide range of intended messages, and in some cases, only a fraction of the audience will perceive any intended message, let alone the actual intended message.”). For example, in applying this test to determine whether a Jackson Pollock art piece is speech, it is unquestionable that the artist intends to convey a particular message. However, under the second prong of the test, it is difficult to affirmatively state that the painting’s audience will understand the exact message conveyed by the painter, rather than any arbitrary and subjective message.

116. *Barnes*, 501 U.S. at 567.

117. *Id.* at 563.

118. *Id.* at 563–64. (describing how one of the establishments offered “live entertainment at the ‘bookstore’ consist[ing] of nude and seminude performances and showings of the female body through glass panels.” Customers could pay to sit in a booth for periods of time to watch live nude and seminude dancers).

119. See *id.* at 567.

designating conduct as symbolic speech or expressive conduct does not automatically grant full First Amendment protection.¹²⁰ This is because “when ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms.”¹²¹

In *Barnes*, speech and non-speech elements were present. The erotic message conveyed by the dancing constituted the speech element because it communicated sexual excitement, passion and lust.¹²² The non-speech element was present in the act of removing all articles of clothing, and thus being nude in public.¹²³ Thus, the Court applied the *O’Brien* test, where:

[A] government regulation is sufficiently justified [(1)] if it is within the constitutional power of the Government; [(2)] if it furthers an important or substantial governmental interest; [(3)] if the governmental interest is unrelated to the suppression of free speech; and [(4)] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.¹²⁴

Accordingly, the Court found that the Indiana statute was a legitimate curtailment of constitutionally protected expressive conduct.¹²⁵ The statute’s intent was to regulate the non-speech element—removing clothing and preventing nudity in public—rather than to regulate eroticism, the speech element.¹²⁶ It was within the legislature’s power to act to protect order and morality.¹²⁷ The government’s interest was not to suppress the free speech message of erotic dancing, but to prevent public nudity regardless of its expressive message.¹²⁸ Lastly, the statute was narrowly tailored because asking dancers to wear at least pasties and G-strings was a

120. *United States v. O’Brien*, 391 U.S. 367, 376–77 (1968); *see also Barnes*, 501 U.S. at 567.

121. *O’Brien*, 391 U.S. at 376–77; *see also Barnes*, 501 U.S. at 567.

122. *Barnes*, 501 U.S. at 566.

123. *Id.*

124. *Id.* at 567 (quoting *O’Brien*, 391 U.S. at 376–77).

125. *Barnes*, 501 U.S. at 567.

126. *See id.* at 570–71.

127. *Id.* at 569.

128. *See id.* at 571.

basic request, which did not interfere with the exotic message being put forth.¹²⁹ This holding, therefore, highlights that there is still room for legislative limits on protectable expressive speech if there is a substantial government interest and if the regulation is narrowly tailored to address the concern.¹³⁰

3. *Brown v. Entertainment Merchants Ass'n*: Categories of Unprotected Speech

In its more recent case, *Brown v. Entertainment Merchants Ass'n*, the Supreme Court found that violent video games deserved full First Amendment protection despite their violent nature.¹³¹ This case provides a test for determining when courts can restrict a new medium of speech, like violent video games, based on its effects.¹³² In *Brown*, video game and software industries challenged the California Assembly Bill 1179 (“Act”).¹³³ The Act prohibited the sale or rental of violent video games to minors, and required their packaging to be labeled “18.”¹³⁴ It specifically targeted games that were violent in nature “in which the range of options available to the player includes killing, maiming, dismembering, or sexually assaulting an image of a human being.”¹³⁵ A game violated the Act when a reasonable person would view it unsuitable for minors, and its effect simply promoted deviousness rather than any other value.¹³⁶ The Act’s purpose, therefore, was rooted in the State’s interest to aid parents as well as its independent interest in children’s well-being.¹³⁷

The Court did not question whether video games qualified for First Amendment protection.¹³⁸ Rather, the Court addressed whether a violent-

129. *Id.* at 572.

130. *See id.* at 571–72.

131. *Brown*, 131 S. Ct. at 2733.

132. *See id.* at 2734.

133. CAL. CIV. CODE ANN. §§ 1746–1746.5 (West 2009), *invalidated by Brown*, 131 S. Ct. 2729.

134. *Id.* §§ 1746.1–1746.2.

135. *Id.* § 1746(d)(1).

136. *See id.* § 1746(d)(1)(A)(i).

137. Margaret E. Jennings, Note, *Blood, Brains and Bludgeoning, But Not Breasts: An Analysis and Critique of Brown v. Entertainment Merchants Association*, 32 LOY. L.A. ENT. L. REV. 87, 108 (2012).

138. *See Brown*, 131 S. Ct. at 2733 (acknowledging that video games do qualify for First Amendment protection).

speech regulation fit within the existing three categories of unprotected speech and whether a new category of unprotected speech was constitutional.¹³⁹ More specifically, the Court stated that government could not regulate speech because of its “message, its ideas, its subject matter or its content” unless such speech fell squarely within the three categories of unprotected speech: obscenity, incitement, or fighting words.¹⁴⁰ Regulation of violent-speech, such as those found in video games, did not fit into any of the already established categories of unprotected speech like obscenity.¹⁴¹ Therefore, the State was not permitted to take violent speech that does not fall within one of these categories and alter it to fit into a category like obscenity to restrict it.¹⁴² Ultimately, the Court determined it was unwarranted to create a new fourth category of unprotected speech and attempt a balancing test “that weighs the value of a particular category of speech against its social costs and then punishes that category . . . if it fails the test” for the sole purpose of protecting children.¹⁴³

In reaching its holding, the Court discussed how video games communicated ideas and social messages similar to other protected mediums like books and movies through similar literary devices like “characters, plot, dialogue and music.”¹⁴⁴ The Court emphasized that “‘the basic principles of freedom of speech and the press, like the First Amendment’s command, do not vary,’ when a new and different medium for communication appears”¹⁴⁵ and especially not when the government disagrees with the message of the new medium.¹⁴⁶

In addition, although First Amendment protections have been sacrificed in lieu of moral-based justifications,¹⁴⁷ the Court reasoned that the State’s power to protect minors from harm “does not include a free-

139. *See id.* at 2733–35.

140. *Id.* at 2733.

141. *See id.* at 2733–34.

142. *Id.* at 2734.

143. *Id.*

144. *Brown*, 131 S. Ct. at 2733.

145. *Id.* (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)).

146. *See Brown*, 131 S. Ct. at 2733.

147. *See, e.g., Chaplinsky*, 315 U.S. at 572 (emphasizing a “social interest in order and morality”); Rick Kozell, Note, *Striking the Proper Balance: Articulating the Role of Morality in the Legislative and Judicial Processes*, 47 AM. CRIM. L. REV. 1555, 1559 (2010) (“[T]he Court in *Champion v. Ames* applied morals-based reasoning to the Commerce Clause by upholding a federal law that restricted the transportation of lottery tickets. . . .”).

floating power to restrict the ideas [or images] to which children may be exposed.”¹⁴⁸ This extends to violent video games where “[v]ictims are dismembered, decapitated, disemboweled, set on fire, and chopped into little pieces” because these are insufficient to restrict speech.¹⁴⁹ The only justification for the restriction on violent video games was whether the State could have proven that the games had an “aggressive” effect on minors.¹⁵⁰ More specifically, the Court stated that:

Because the Act imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest. . . . 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.¹⁵¹

California failed to satisfy its burden¹⁵² because it could not establish a causal connection between violent video games leading “minors to *act* aggressively (which would at least be a beginning)” despite the State’s reliance on research that purported to show this connection.¹⁵³ Conversely, the same researchers used by the State conceded that similar “aggressive” effects had been found in children watching arguably non-violent material like Bugs Bunny cartoons.¹⁵⁴ In its concluding remarks, the Court noted that California could not create a completely new category of regulations aimed solely at restricting speech directed at children.¹⁵⁵

In sum, after *Brown*, there must be an assessment of whether the conduct in question is expressive so as to constitute speech, and whether it falls within one of the three established categories of restricted speech.¹⁵⁶ If the speech falls within the category of obscenity, incitement, or fighting

148. *Brown*, 131 S. Ct. at 2736.

149. *Id.* at 2738.

150. *Id.*

151. *Id.*

152. *See id.* at 2731.

153. *Id.* at 2739.

154. *Brown*, 131 S. Ct. at 2739.

155. *Id.* at 2731.

156. *See id.*

words, then the conduct may be restricted.¹⁵⁷ If, however, the conduct is speech that does not fall within one of these three categories, the court must apply a strict scrutiny test, which requires a compelling government interest to restrict this conduct and it must be narrowly tailored to achieve the government's goal.¹⁵⁸ The aforementioned tests will be applied in the next section to the pending MMA lawsuit.

C. MMA Falls Within the Protection of the First Amendment

In the current MMA lawsuit pending in the Southern District of New York, the court should find that MMA falls within the scope of protectable speech. The court can employ the three tests previously discussed in reaching its decision.

1. The *Texas* Test Applied to MMA

First, the *Texas* test must be applied to determine whether MMA is speech. As stated previously, this requires “[a]n intent to convey a particularized message” and a great likelihood “that the message would be understood by those who viewed it.”¹⁵⁹ There is sufficient evidence that fighters intend to convey messages directly to their fans through the practice of their sport.¹⁶⁰ As mentioned previously, their intended messages include the value of strategy, humility, strength, and respect for their opponent and their craft.¹⁶¹ MMA fighters’ communication occurs during the competition as well as during the rituals preceding the competition, which include their entrance music, clothing, and conduct as they enter the Octagon.¹⁶² Taken together, these elements speak volumes about the fighters’ state of mind and persona they wishes to convey.¹⁶³

157. See *id.* (citing *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2001)).

158. *Brown*, 131 S. Ct. at 2738.

159. *Johnson*, 491 U.S. at 404 (citing *Spence*, 418 U.S. at 410–11).

160. “Performing MMA live in front of a crowd is an unrivaled experience and allows me to speak to my fans,” said Plaintiff and UFC competitor Brian Stann. ‘I was attracted to MMA during my time in the Marine Corps, after I returned from my first deployment to Iraq in 2005 and was looking for a path that allowed me to stay motivated, and inspire others, particularly fellow veterans. MMA is a brotherhood that demands respect for your fellow fighters and rewards mental discipline and skill. It has given countless veterans a way to rehabilitate and connect with other military veterans and I am grateful every day for the ability to compete and inspire my fans.’” *UFC Sues to Overturn NY Ban on MMA*, *supra* note 62.

161. Complaint, *supra* note 22, at 5.

162. Gardner, *supra* note 58.

163. See Complaint, *supra* note 22, at 5.

To illustrate this point, imagine in one scenario a fighter in full karate gear and headband, with a black belt tied around his waist, as the fighter strides confidently and quickly into an arena blasting Rohff's "Dirty Hous."¹⁶⁴ The fighter does not look around at the crowd but stares straight at the fighting arena and occasionally pounds his fist against his chest.¹⁶⁵ The announcers comment on the look of determination in the fighter's eyes, the look of a juggernaut.¹⁶⁶ This fighter conveys a no-nonsense strength and respect for the origins of his craft.¹⁶⁷ In another scenario, there is a different fighter, wearing a red tracksuit flanked by a team of men wearing matching black tracksuits.¹⁶⁸ One of these men carries a UFC championship belt over his shoulder while, in the background, DMX's cover of "No Sunshine" plays as this fighter takes his time to saunter into the arena,¹⁶⁹ punching into an invisible opponent as he goes and occasionally moving to the music as he smiles at the crowd and sings along.¹⁷⁰ This fighter conveys a bold confidence and arrogance.¹⁷¹ His flashy entrance and vibrant outfit choice convey his "nothing can touch me" attitude.¹⁷² Through these different entrances, the fighters' conduct alone evidences their intent to convey strong, albeit somewhat different, messages to their audiences about themselves.¹⁷³ While violence or aggression may be one of these messages, it is not the only message that the sport can convey.¹⁷⁴

Furthermore, as these illustrations demonstrate, the second prong of the *Texas* test—whether the likelihood is great that those who view it would understand the message¹⁷⁵—is also satisfied. While the fighters'

164. See Makaveli25x, *Best Ever UFC Entrance*, YOUTUBE (June 26, 2009), <http://www.youtube.com/watch?v=6Qa6Ifbijjo>.

165. See *id.*

166. See *id.*

167. See *id.*

168. See Yadmeister, *Anderson Silva UFC90 Entrance*, YOUTUBE (July 2, 2009), <http://www.youtube.com/watch?v=LdNdeBd5qb4&feature=related>.

169. See *id.*

170. See *id.*

171. See *id.*

172. See *id.*

173. See Gardner, *supra* note 58.

174. See Complaint, *supra* note 22, at 51.

175. See *Johnson*, 491 U.S. at 404 (quoting *Spence*, 418 U.S. at 410–11).

messages may vary, the audience viewing the performance understands those messages.¹⁷⁶ A study of MMA fans found that they watched the sport not for the violence, but to see the skill and range in talent involved, to feel the excitement of the show, and for the bonding experience.¹⁷⁷ Therefore, the MMA fighters conduct can conceivably be understood as falling within the realm of speech.

2. The *Barnes* Test Applied to MMA

Next, the *Barnes* test must be applied to determine what conduct is being targeted specifically.¹⁷⁸ The New York Unconsolidated Law section 8905 (“Ban”) makes it illegal to hold live performances of MMA, and it prohibits any activity that furthers or aids the performance of the combative sport from taking place.¹⁷⁹ Any person who partakes in a live performance as a fighter, or any person who sells the equipment or offers a space for a live performance would violate this law.¹⁸⁰ Interestingly, the Ban is only aimed directly at prohibiting the live exhibition of a MMA fight, not the practice of it.¹⁸¹ The Ban still allows “mixed martial arts gyms, amateur fights and the component disciplines of M.M.A., like judo, tae kwon do, karate and kenpo.”¹⁸² Thus, it is questionable whether New York is attempting to regulate a message that the sport sends to its audience (speech) or whether New York is attempting to regulate the safety of the fighters or problems that may arise during the course of actually hosting a live event in the State (non-speech).¹⁸³

While the Ban’s language does not clarify this issue, the statements of the Ban’s proponents sheds some light on what is being targeted. During a New York State Senate debate, Senator Liz Krueger noted her various concerns, which included “submissions and chokeholds [that occur during the fight], the marketing of the sport to children and offensive symbolism

176. See Complaint, *supra* note 22, at 51.

177. *Id.* at 52.

178. See *Barnes*, 501 U.S. at 576.

179. N.Y. UNCONSOL. LAWS § 8905-a (McKinney 1997).

180. *Id.*

181. See Sandomir, *supra* note 54, at B18.

182. *Id.*

183. *Id.*

on clothing and tattoos.”¹⁸⁴ Senator Krueger pointed to the marketing of MMA as a clear message of violence.¹⁸⁵ Senator Brad Hoylman described MMA as “the human equivalent of hydrofracking,”¹⁸⁶ and stated, “There are a multitude of arguments on why we as a legislative body should not sanction of glorify MMA’s violence, especially the impact it would have on our children.”¹⁸⁷ Senator Kenneth P. LaValle asked, “What’s next, the gladiators in the Roman Coliseum?”¹⁸⁸

In his letter to the Governor of New York, the Ban’s principal proponent Assemblyman Bob Reilly cited his concerns with the dangers of the sport, stating that despite the UFC’s claim that they have cleaned up the sport, it continues to subject its fighters to grave injury, and “encourage[s] rather than mitigate[s] knockouts and concussions.”¹⁸⁹ He not only described how “MMA competitors are subjected to repeated blows from punches, kicks and knees directly to the head as well as choke holds rendering them helpless and possibly brain damaged” but more strikingly, drew on an example of a relatively recent fight where a fighter was knocked partially unconscious and yet his opponent continued to administer blows to the head.¹⁹⁰ He stated his belief that “economic significance to the State of the legalization of MMA has been grossly overstated and the violent nature of the sport is antithetical to the anti-violence message [the State is] trying to deliver to children and adults.”¹⁹¹ He warned that MMA “would put New York State in a very precarious position,” similar to the explosion of lawsuits being brought in the NFL by

184. Mark La Monica, *UFC’s Fight to Legalize MMA in New York*, NEWSDAY (Mar. 14, 2013, 12:23 AM), <http://www.newsday.com/sports/mixed-martial-arts/ufc-s-fight-to-legalize-mma-in-new-york-1.4811225>.

185. *Id.*

186. Casey Seiler, *Senate Approved MMA Bill 47-14*, CAPITOL CONFIDENTIAL (Mar. 6, 2013, 4:48 PM), <http://blog.timesunion.com/capitol/archives/180864/watch-livecast-of-senate-mma-debate/>.

187. TG Branfalt Jr., *MMA Bill Passes Senate, Heads to Assembly... Again*, LEGIS.GAZETTE.COM (Mar. 11, 2013), <http://www.legislativegazette.com/Articles-Top-Stories-c-2013-03-11-82928.113122-MMA-bill-passes-Senate-heads-to-Assembly-again.html>.

188. La Monica, *supra* note 184.

189. Letter from Bob Reilly, Member of Assembly 109th District, to Andrew Cuomo, Governor New York State (Mar. 30, 2012), *available at* <http://www.scribd.com/doc/88591147/Brain-Injury-Mma>.

190. *Id.*

191. *Id.*

retired players who had sustained head injuries.¹⁹² Lastly, he hypothesized that if the Ban is lifted, then the State would incur the high costs of treating injured and crippled fighters.¹⁹³

Assemblyman Reilly's letter illustrates that the policy behind the Ban includes targeting both its speech and the non-speech elements. The Ban's proponents wish to curtail the message of violence that they see being communicated to the audience (speech) while protecting the safety of the fighters and the state against litigation (non-speech).¹⁹⁴ However, those on the other side of the issue believe the perceived message of violence is the actual reason for concern.¹⁹⁵ For Bruce Johnson, a partner at Davis Wright Tremaine, "It sounds very straightforward: the government seems to be trying to regulate the message, which is very different from trying to regulate what's healthy or unhealthy about the sport."¹⁹⁶ Entertainment itself is protected by the First Amendment."¹⁹⁷ During the New York Senate debate, Democrat Gustavo Rivera argued against proponents of the Ban by stating, "It is not a spectacle of violence, it is a spectacle of skill."¹⁹⁸ Because the Ban targets only live professional performance, while permitting all other kinds of performances, it's highly probable that New York is specifically targeting the message of MMA.¹⁹⁹ Statements like those offered by Senator Krueger and Senator Hoylman support the

192. *Id.*; see Jim Avila, Enjoli Francis & Lauren Pearle, *Former NFL Players File Lawsuit Against League on Concussions*, ABC NEWS (Jun. 7, 2012), <http://abcnews.go.com/US/nfl-players-file-lawsuit-league-concussions/story?id=16514359#.UKTKwOOe-zl>.

193. Letter from Bob Reilly, *supra* note 189.

194. See Letter from Bob Reilly, *supra* note 189; see also 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 6–7, *Jones v. Schneiderman*, 888 F. Supp. 2d 421 (S.D.N.Y. 2012) (No. 11 Civ. 8215 (KMW)(GWG)). [hereinafter Motion to Dimiss the Fourth and Fifth Causes of Action]

195. See Sandomir, *supra* note 54, at B18,

196. *Id.*

197. *Id.*; see, e.g., *Schad*, 452 U.S. at 65.

198. Mike Chiappetta, *UFC, New York Senators Implore Assembly Speaker to Bring MMA Bill Up for Full Vote*, SB NATION (Mar. 7, 2013, 3:27 PM), <http://www.mmfighting.com/2013/3/7/4076054/ufc-new-york-state-senators-implore-assembly-speaker-to-bring-mma>.

199. See Stephen Kershner, *Mixed State Message on MMA*, THE OBSERVER (Nov. 30, 2011), <http://www.observertoday.com/page/content.detail/id/566044/Mixed-state-message-on-MMA.html>.

inference that their discomfort mainly comes from the message of MMA.²⁰⁰ If the state was truly concerned about the health of the fighters and deemed the sport too dangerous, then the Ban would have been constructed to include all performance of MMA.²⁰¹

Since MMA contains both speech and non-speech elements, then according to *Barnes*, only a “sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms.”²⁰² The four-part *O’Brien* test must be applied to determine whether the government regulation would be justified even when the conduct is expressive speech.²⁰³ The first factor states that “government regulation is justified if it is within the constitutional power of the Government.”²⁰⁴ Here, the first factor is satisfied as the New York Legislature has the power to create laws affecting the state and is acting within the constitutional power of the government.²⁰⁵

The second prong examines whether the regulation furthers an important or substantial governmental interest.²⁰⁶ The protection of its citizens, which includes the safety of the fighters, is certainly within the purview of the State and does constitute a substantial governmental interest, especially in light of the argument that New York may end up bearing the burden of covering the medical expenses of injured and disabled fighters.²⁰⁷ However, the motives behind this governmental interest are questionable because the Ban does not target other violent sports, such as hockey or boxing.²⁰⁸ It is suspect considering that sports like boxing may equally warrant governmental regulation for its dangerous

200. See *La Monica*, *supra* note 184; see also *Branfalt*, *supra* note 187.

201. N.Y. UNCONSOL. LAWS § 8905-a (McKinney 1997).

202. *Barnes*, 501 U.S. at 567.

203. See *O’Brien*, 391 U.S. at 376–77.

204. *Id.* at 377.

205. See N.Y. CONST. art. III, § 1; *People ex rel. Hon Yost v. Becker*, 96 N.E. 381, 383 (N.Y. 1911).

206. *O’Brien*, 391 U.S. at 376–77.

207. Letter from Bob Reilly, *supra* note 189; see generally Darren Rovell, *Teams Face Workers’ Comp Threat*, ESPN OUTSIDE THE LINES, (last updated Aug. 30, 2012), http://espn.go.com/espn/otl/story/_/id/8316657/nfl-teams-facing-large-bills-related-workers-compensation-claims-head-injuries.

208. See N.Y. UNCONSOL. LAWS § 8905-a (McKinney 1997).

effects.²⁰⁹

The third prong examines whether this governmental interest is to suppress the speech itself or something else.²¹⁰ Here, the purported governmental interest is the safety of the fighters, the non-speech portion.²¹¹ However, the State also does not want the violent message it thinks the sport encourages to affect a live audience of children and adults.²¹² This concern was made clearer from the aforementioned statements made by the Ban's proponents.²¹³ This is similar to *Barnes* where the public indecency law had a two-fold effect.²¹⁴ Yet, while in *Barnes* the Court found that the incidental restriction was not more than necessary to achieve a legitimate public interest,²¹⁵ here the New York Legislature is not imposing an incidental restriction, but is disguising its moral-based reasoning behind player safety.²¹⁶

Assuming that the third prong was satisfied, the final inquiry asks whether the restriction is no more than necessary to achieve the goal.²¹⁷ Here, the analysis is convoluted because only the live performance of professional MMA is banned, not the sport altogether.²¹⁸ This narrow focus on banning live performance is questionable when taking into account the fact that the act of MMA is still violent in nature whether or not

209. George Shunick, *Myth-Busting: Is MMA Really 'Safer than Boxing'?* CAGE-POTATO, <http://www.cagepotato.com/myth-busting-is-mma-really-safer-than-boxing/> (last visited Sept. 11, 2013) (noting that when asked if there is a discernable difference between the brain health of boxers and MMA Fighters, Dr. Charles Bernick, who is in charge of Professional Fighters Brain Health Study, which examines the brain health of professional fighters, stated: "There isn't a huge difference between boxers and MMA guys. If you kind of match them for the number of fights they've had, their age, education and number of fights, there's not a huge difference.").

210. *O'Brien*, 391 U.S. at 377.

211. Motion to Dismiss the Fourth and Fifth Causes of Action, *supra* note 194, at 6.

212. See Letter from Bob Reilly, *supra* note 189.

213. La Monica, *supra* note 184.

214. *Barnes*, 501 U.S. at 560.

215. *Id.* at 561.

216. Complaint, *supra* note 22, at 13–14 ("Extreme Fighting poses yet another equally sinister threat to our society. In particular, it sends a dangerous message to our youth at a time when we are searching for ways to effectively communicate to them the need to resolve conflicts peacefully.") (citing to *Hearing*, *supra* note 46).

217. *Barnes*, 501 U.S. at 567.

218. See N.Y. UNCONSOL. LAWS § 8905-a (McKinney 1997).

it is in front of a live audience.²¹⁹ Additionally, if safety is the ultimate concern, then the restrictions could be more narrowly tailored than simply banning live professional performance of the sport. Regulations can be enacted that prohibit the kinds of techniques the fighters use so as to avoid serious injuries, or that require fighters to be examined by a physician before and after a fight to assess any serious harm.²²⁰ These types of regulations should apply equally to both amateur and professional fighters to ensure the safety of all participants, not simply professional fighters.²²¹ In a letter sent by the Association of Boxing Commissions (“ABC”) to New York State politicians, unregulated amateur MMA is criticized for the danger to its players since “fighters on unregulated cards aren’t drug tested, there is no requirement for an ambulance or a physician to be on site, and athletes who are knocked out or suffer concussions are not protected by a system of mandatory disclosure and subsequent medical review.”²²² A more narrowly tailored restriction that only protects the health of the fighter might be even more necessary for amateur fighters who would not be participating in a live ring. These fighters lack the experience of professional MMA athletes and are prone to more injuries because of lack of knowledge on how to protect themselves.²²³ The Ban would fail under an application of the *O’Brien* test because it is greater than necessary to take care of the safety interests of MMA players.

219. See generally Ulysses S. Wilson, Note, *The Standard of Care Between Coparticipants in Mixed Martial Arts: Why Recklessness Should ‘Submit’ to the Ordinary Recklessness Standard*, 20 WIDENER L.J. 375, 402 (2011) (discussing “the inherently violent nature of the sport”).

220. See generally Charles E. Rainey, *Determining the Prevalence and Assessing the Severity of Injuries in Mixed Martial Arts Athletes*, 4 N. AM. J. SPORTS PHYSICAL THERAPY 190, 197 (2009), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2953351/pdf/najspt-04-190.pdf> (“Preventative measures should focus on improving protective equipment during training, and possible competition rule modifications to further minimize participant injury.”).

221. See Mike Woods, *N.Y. MMA Legalization Push Continues*, ESPN NEW YORK (Jan. 25, 2013, 6:04 PM), http://espn.go.com/new-york/story/_id/8881747/association-boxing-commissions-working-legalize-mma-new-york (advocating safety regulations in amateur and professional MMA bouts); see Letter from Association of Boxing Commissions to Andrew Cuomo, Governor, N.Y. State, Eric T. Schneiderman, Attorney Gen., N.Y. State, Sheldon Silver, Assembly Speaker, N.Y. State, Cesar A. Perales, Sec’y, N.Y. State, and Dean G. Skelos, Majority Leader, N.Y. State (Jan. 24, 2013), available at http://assets.sbnation.com/assets/2065229/2013_01_24_Letter_to_Governor.pdf. [hereinafter Letter from Association of Boxing Commissions]

222. Letter from Association of Boxing Commissions, *supra* note 221; see also Woods, *supra* note 221.

223. See Michael R. Daum, *Intelligent Defense: A Call for Federal Regulation of Mixed Martial Arts*, 21 SETON HALL J. SPORTS & ENT. L. 247, 265 (2011).

3. The *Brown* Test Applied to MMA

The Ban, therefore, would only be constitutional if it fell under one of the three exceptions—obscenity, incitement, or fighting words—because it is regulating a new form of speech.²²⁴ *Brown* demonstrated that when a new form of speech is found, the basic principles of speech do not change.²²⁵ It is unwarranted to create new categories of unprotected speech simply because the government disagrees with the message.²²⁶ Here, there is strong evidence that the proponents of the Ban disliked MMA and are legislating based on such biased opinions.²²⁷

The legislative history as a whole strongly suggests that this moral and aesthetic reaction—which could be labeled a ‘civilization’ or a ‘disgust’ factor—was key in the legislature’s and the Governor’s motivation to enact the Ban because there was a strong sense that society had progressed beyond an activity that ‘brings to mind the grotesque spectacle of the Roman Coliseum in which gladiators fought to the death.’²²⁸ Yet, this is insufficient for the curtailment of speech. Here, the message being conveyed is not obscene because there is no sexual element.²²⁹ Likewise, the message is not meant to incite or encourage any kind of illegal action.²³⁰ The fighters are not encouraging audiences to pursue violence.²³¹ Furthermore, the message would not constitute fighting words since the fighters are not trying to engage audiences into arguments.²³² As one author highlighted, “MMA violence is far more

224. See *Brown*, 131 S. Ct. at 2734.

225. See *id.* at 2733.

226. See *id.*

227. See Motion to Dismiss the Fourth and Fifth Causes of Action, *supra* note 194, at 6–8.

228. *Id.* at 8 (internal citation omitted).

229. See Complaint, *supra* note 22, at 4–5 (“These professionals express themselves with their bodies and with their abilities, conveying messages of, among other things, skill, courage, self-discipline, self-confidence, the value of intense training, humility, strategic thinking, and respect for one’s opponent.”); see also *Brown*, 131 S. Ct. at 2733.

230. See Complaint, *supra* note 22, at 52 (discussing how MMA seems to have positive effects on fans and encourages “social bonding, rather than antisocial effects.”); see also *Brown*, 131 S. Ct. at 2732.

231. See Complaint, *supra* note 22, at 52 (noting that fans were not attracted to the sport for its violence and that “there was no evidence suggesting that watching MMA made viewers more violent”); see also *Brown*, 131 S. Ct. at 2731.

232. See Complaint, *supra* note 22, at 5 (“None of this expression is about violence.”); see also *Brown*, 131 S. Ct. at 2731.

contextually constrained than are depictions of violence found elsewhere in modern American life, such as video games, actions films, police dramas, war documentaries, and a large portion of newscasts.²³³ The author noted that these other forms of violence send a more troubling message than MMA regarding intentional harm.²³⁴ Whereas these examples show general violence in American life, MMA violence is in a controlled setting where both parties have consented to the fight.²³⁵

While violence is inherently built into the message conveyed by the fighters,²³⁶ a message of violence or aggressiveness is not enough to merit a restriction on speech, unless the speech is inciting others to commit nonconsensual violent acts.²³⁷ The intent to harm another opponent is always contingent on the other athlete's consent and is constrained by the rules of the sport.²³⁸ While the sport is designed to take down the other opponent, it is motivated by the desire to demonstrate greater skill and not any malicious intent towards the other.²³⁹ The kinds of injuries that fighters incur are the result of their voluntary participation in a sport they understand can inflict injury.²⁴⁰

Since the speech in question here does not fall within one of the exceptions, the State's regulation is only permitted if the regulation passes strict scrutiny, which requires a compelling governmental interest and a narrowly tailored regulation for that purpose.²⁴¹ Mere dislike of violent speech is an insufficient interest to restrict the speech,²⁴² but the preservation of the safety of fighters could suffice.²⁴³ Regulating fighters' safety should apply to both professional and amateur players, and should be narrowed to specifically harmful moves or plays, rather than an outright ban. Here, the State would fail to satisfy its burden of justifying the live

233. Brendan S. Maher, *Understanding and Regulating the Sport of Mixed Martial Arts*, 32 HASTINGS COMM. & ENT. L.J. 209, 228 (2010).

234. *Id.*

235. *Id.* at 227–28.

236. See Wilson, *supra* note 219, at 402.

237. *Brown*, 131 S. Ct. at 2735.

238. Maher, *supra* note 233, at 227–28.

239. See *id.*

240. *Id.*

241. *Brown*, 131 S. Ct. at 2738.

242. See *id.* at 2731.

243. See *id.* at 2741.

restriction on MMA because other rules could be implemented to make the sport safe enough for the players without restricting the player's right to express themselves. There is enough testimonial evidence from the proponents of the Ban to suggest that the message is a significant part of the reasoning in support of the Ban.²⁴⁴ While New York could potentially justify a restriction on live MMA if the legislation was more narrowly tailored, it cannot create a completely new category of restrictions aimed only at restricting violent speech towards an audience.

D. Even Where New York Cannot Regulate the Speech, the State is Also Trying to Regulate the Effect of Live MMA

Notwithstanding the State's regulation of protected speech is the issue of whether the State can regulate the effect of live MMA. The proponents of the Ban are concerned that the conveyed violent message will cause the audience and, particularly the youth, to believe that this kind of conduct is acceptable.²⁴⁵ By enacting the Ban, "lawmakers wanted to send a message to young people that the brutality of the sport had no place in a civilized society."²⁴⁶ Assemblyman Stephen Kaufman stated, "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."²⁴⁷ Although MMA is dangerous for its fighters, "it has an even worse effect, and that is the abominable example which it sets for youngsters of the coming generation," according to New York Senator Roy Goodman.²⁴⁸ Deputy Attorney General Farley stated that the sport was designed to have the effect of appealing to our worst and most innate instincts of "blood lust and human suffering," and boldly suggested that UFC and MMA sport only serve to escalate violence.²⁴⁹

However, while the effect on the youth is certainly a large and valid concern, the law as it stands has a few key flaws. Similar to *Brown*,²⁵⁰ here, the law attempts to take a new medium of speech and restrain its

244. See, e.g., La Monica, *supra* note 184; Seiler, *supra* note 186.

245. See Gardner, *supra* note 58.

246. *Id.*

247. Motion to Dismiss the Fourth and Fifth Causes of Action, *supra* note 194, at 7.

248. Complaint, *supra* note 22, at 12 (internal citation omitted).

249. Complaint, *supra* note 22, at 14 (citing to *Hearing*, *supra* note 46).

250. *Brown*, 131 S. Ct. at 2741.

message on moral grounds.²⁵¹ While in *Brown* the Court tried to fit video games into the three categories of unprotected speech,²⁵² here, the State rejected the notion that this was speech altogether.²⁵³ Additionally, both state laws were drafted poorly to be underinclusive.²⁵⁴ The danger of this is that it suggests that the State is singling out a specific form of speech with no explanation of why other forms are being excluded.²⁵⁵

Another flaw in the Ban is there is no distinction between the prohibition against live and taped performance.²⁵⁶ While legislators cannot prohibit taped or television broadcast of the sport within the state, they choose to ban the live performance of MMA.²⁵⁷ Yet, this does not prevent the MMA's purportedly violent message from reaching children because the Ban cannot prevent the effect that the televised version of the sport may have on them.²⁵⁸ In fact, the taped version of MMA may actually have an equal or worse effect on the youth than the live version because the viewer is one step removed from the violence and is, therefore, desensitized to the violence on the screen.²⁵⁹ Consider the effect of a child witnessing the casualties of a bomb explosion in person versus watching such a scene in a theater. The child is removed from the real-life experience of seeing a real person in pain, and therefore, can become desensitized to what that person might be experiencing, and desensitized to images of violence in general.²⁶⁰ While in person, a performance or sporting event may be violent, there is at

251. Complaint, *supra* note 22, at 13–14 (“Extreme fighting poses yet another equally sinister threat to our society. In particular it sends a *dangerous message* to our youth at a time when we are searching for ways to effectively communicate to them the need to resolve conflicts peacefully.”) (citing to *Hearing, supra* note 48).

252. *Brown*, 131 S. Ct. at 2735.

253. Motion to Dismiss First Amended Complaint, *supra* note 81, at 6–7.

254. *Brown*, 131 S. Ct. at 2742; *see generally* N.Y. UNCONSOL. LAWS § 8905-a (McKinney 1997).

255. *Brown*, 131 S. Ct. at 2742.

256. The Ban only addresses the live exhibition of MMA in New York. *See* UNCONSOL. § 8905-a.

257. *Id.*

258. *Id.*

259. *See* Jeanne B. Funk, et al., *Violence Exposure in Real-Life, Video Games, Television, Movies, and the Internet: Is There Desensitization?* 27 J. ADOLESCENCE 23, 26 (2004) (“Violence in screen-based media may affect empathy by desensitizing viewers to the true consequences of violent actions.”) (internal citation omitted).

260. *See id.*

the very least a greater chance for the viewer to experience empathy.²⁶¹ The inquiry then becomes *why* there is more concern with some forms of live violence but not others. As noted by one author:

It is difficult to see how intentional harm committed in such explicitly constrained and voluntary sporting circumstances threatens to erode cooperative norms and encourage violent behavior. . . [I]n comparative terms, MMA violence is *far* more contextually constrained than are depictions of violence found elsewhere in modern American life, such as in certain video games, action films, police dramas, war documentaries, and a large portion of many newscasts.²⁶²

Therefore, if one of the real motivations behind the Ban is to regulate this perceived negative effect, that alone is not sufficient to regulate the expressive conduct. Furthermore, the allowance of some forms of MMA, like taped and amateur MMA, seems to contradict the purpose of regulating live MMA.

E. Regulating MMA Without Curtailing the First Amendment Protection and Without Altering the Fundamental Integrity of the Sport

To maintain the integrity of the sport and balance that against the interest of the State to protect the safety of the fighters, measures such as more streamlined health and safety restrictions on the sport must be implemented. It would be necessary to examine other sports like boxing, wrestling, and football where players take repeated hits to the head from the same sources.²⁶³ This information would be helpful because it would provide clues as to exactly what kind or what level of blow may be causing the most amount of harm. It may become necessary, once there is more reliable research, to impose limitations on the types of techniques the fighters can utilize depending on the impact and harm resulting from each

261. *See id.*

262. Maher, *supra* note 235, at 228.

263. *See* Trent Reinsmith, *Can the UFC Help MMA Become the Safest Contact Sport in the World?*, BLEACHER REP. (Jan. 10, 2013), <http://bleacherreport.com/articles/1479851-can-the-ufc-help-mma-become-the-safest-contact-sport-in-the-world> (discussing how the UFC should look at the problems in sports like football and also find solutions in other sports leagues like the National Hockey League).

move.²⁶⁴ It would even be in the State's best interest to create a special committee dedicated to MMA and devote funds to research the sport's violence in order to obtain a more comprehensive understanding of the problem. Currently, the New York State Athletic Commission, which is composed of three appointed members, a physician and a medical advisory board, regulates boxing and wrestling within the state of New York.²⁶⁵ In order to oversee MMA, New York could echo the existing standards for boxing and wrestling, and add an additional division dedicated to promoting the sport of MMA and maintaining the health and safety of the MMA fighters, and the integrity of the MMA sport.²⁶⁶

Additionally, aside from state regulation, it would be in MMA's and UFC's best interest to make adjustments and regulate the sport. Recently, more than 2000 former National Football League ("NFL") players filed suit against the NFL, alleging "that the 'NFL exacerbated the health risk by promoting the game's violence' and 'deliberately and fraudulently' misled players about the link between concussions and long-term brain injuries."²⁶⁷ To prevent a similar incident, there should be an increased awareness and education in MMA for its fighters so they are aware of the gravity of danger to which they are exposing themselves.

The UFC's argument that MMA should be afforded the same legality as football and a non-restricted sport like boxing because it is safer does not hold much weight since a statute simply cannot be unconstitutional due to underinclusiveness.²⁶⁸ Further, this argument is short-sighted because it

264. Junion Seau, *Family Joins Long List of NFL Lawsuits*, FANTASYGURU (Feb. 26, 2013) available at http://www.fantasyguru.com/football/subscribers/view_article_details.php?id=xml/771292.xml ("There is no case that is cut and dry," Boston-based attorney Ken Kolpan said. "I think the scientific evidence linking multiple concussions to [chronic traumatic ecephalopathy] CTE is getting stronger and stronger each day. I think also the research is showing a disproportionate amount of depressed former NFL players when compared to the normal population. So from that regard, the science is really on their side. The science was probably there earlier, but the NFL was in a position of denying what neurologists and others in the field knew about traumatic brain injury.").

265. *New York State Athletic Commission*, N.Y. ST., <http://www.dos.ny.gov/athletic/about.html> (last visited Apr. 7, 2013).

266. *See id.*

267. Avila, *supra* note 192.

268. *See Reply Memorandum of Law in Further Support of the Limited Motion to Dismiss*, at 10, *Jones v. Schneiderman*, 888 F. Supp. 2d 421 (S.D.N.Y. 2012) (No. 11 Civ. 8215 (KMW) (GWG)); *see also* Peter Brandon Bayer, *Rationality—And the Irrational Underinclusiveness of the Civil Rights Laws*, 45 WASH. & LEE L. REV. 1, 54 (1988) ("An under-inclusive classification contains all similarly situated people but excludes some people who are similar to them in terms of the purpose of the law.").

ignores the reality that some level of regulation or limitation is needed to avoid the problems that other combat-sport industries are currently facing.²⁶⁹ As a possible sign of things to come, the New York State Attorney General Eric Schneiderman, in a March 2012 filing stated, “Indeed, increased legislative and regulatory attention to sports such as boxing, football, and hockey may well be coming.”²⁷⁰ If MMA is to succeed as a successful and legitimate sport, then it would be in the best interest of UFC to examine the short-comings of other combat sports and seriously take note. Should the UFC ignore such forewarnings, then the chances of fighter injury and future lawsuits will be inevitable.

V. CONCLUSION

MMA is expressive conduct deserving of First Amendment protection and live MMA should be legalized in New York. While there is certainly room for narrowly tailored restrictions to protect fighters’ health and safety, the State may not create an unreasonable ban on live performance of the sport that falls under the protection of the First Amendment.²⁷¹ Furthermore, the State cannot impose moral-based regulations on the MMA’s message unless it falls within one of the already established exceptions: obscenity, incitement or fighting words.²⁷² Where the State tries to regulate the effect rather than the message of the MMA, it fails to explain why the effect of live MMA is worse than the effect of watching taped MMA.²⁷³ For both legislators and supporters of MMA, the best solution would be to learn from the mistakes of other combative sports and make adjustments to the sport.²⁷⁴ While some die-hard fans of the original MMA will advocate for a return to the pure state of MMA where soccer kicks and head stomps were allowed,²⁷⁵

269. Avila, *supra* note 192.

270. Jared F. Bartie, Richard L. Brand, Maidie E. Oliveau & Matthew D. Pace, *UFC vs. State of New York—A True Heavyweight Battle*, LEXOLOGY (Aug. 6, 2012), <http://www.lexology.com/library/detail.aspx?g=1de102ff-944e-4a38-8571-cc3e1a8dbad4>.

271. *See* Brown v. Entm’t Merchs. Ass’n, 131 S. Ct. 2729, 2738 (2011).

272. *See id.* at 2733.

273. *See generally* Funk, *supra* note 259, at 26 (discussing potential evidence to support the theory that violence in screen-based media may desensitize viewers to real violence and decrease empathy) (internal citations omitted).

274. *See* Reinsmith, *supra* note 263.

275. *See* Matt Saccaro, *UFC Rule Changes: Why There Is NOTHING Wrong with Soccer Kicks*, BLEACHER REP. (June 25, 2012), <http://bleacherreport.com/articles/1235767-ufc-rule-changes-why-there-is-nothing-wrong-with-soccer-kicks>.

most fans agree that such restrictions may actually save MMA from tapping out in the end.²⁷⁶

276. See Corey Adams, *Pride Rules: Is There a Place for the Brutality of the Past in Today's MMA Landscape?*, THE MMA CORNER (July 3, 2012), <http://themmacorner.com/2012/07/03/pride-rules-is-there-a-place-for-the-brutality-of-the-past-in-todays-mma-landscape/>.