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**MMA FIGHTING IS A RIGHT WORTHY OF PROTECTION  
UNDER THE FIRST AMENDMENT**

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The men who take part in these fights are as hard as nails, and it is not worthwhile to feel sentimental about their receiving punishment which as a matter of fact they do not mind. Of course, the men who look on ought to be able to stand up with the gloves, or without them, themselves; I have scant use for the type of sportsmanship which consists merely in looking on at the feats of someone else.<sup>1</sup>

—Theodore Roosevelt

**INTRODUCTION**

There is a greater purpose to fighting than bruising and knocking out your opponent.<sup>2</sup> There is a greater purpose to winning a belt or trophy than placing it on your home mantel for visitors to view.<sup>3</sup> Most people recognize that MMA fighting is mental and physical. But it is more than that. This introduction will explain how MMA fighting is (1) a platform for fighters to express their ideas and views, (2) spiritual, and (3) similar to

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<sup>1</sup> Brett McKay & Kate McKay, *Boxing: A Manly History of the Sweet Science of Bruising*, THE ART OF MANLINESS (May 30, 2009), <http://www.artofmanliness.com/2009/05/30/boxing-a-manly-history-of-the-sweet-science-of-bruising>.

<sup>2</sup> Henry Cejudo is the #2 Flyweight UFC champion with a 10-1-0 record as of November 20, 2016. *Henry Cejudo*, UFC, <http://www.ufc.com/fighter/henry-Cejudo?id=> (last visited Nov. 20, 2016).

<sup>3</sup> *Id.*

dancing.<sup>4</sup> Specifically, this portion of the introduction will describe that MMA fighting is a **hybrid right** because it is spiritual and expressive. Next, this introduction will (4) briefly explain why MMA is a positive influence for our children and (5) give a brief overview of New York’s MMA ban (now overturned). Finally, the introduction will conclude with (6) an overview of this note’s argument.

*(1) Henry Cejudo: Expressing Ideas and Views*

Henry Cejudo<sup>5</sup> aids us in understanding how MMA is a platform for fighters to express their ideas and views by demonstrating that fighting and achieving success is not all that matters.<sup>6</sup> Cejudo explains that, through fighting, he has been able to prove there is no circumstance that is too difficult to overcome.<sup>7</sup> In an interview, Cejudo stated that he knows what success is, and success in MMA fighting is not what everyone thinks it is.<sup>8</sup> Cejudo clarifies that it is merely a tool and platform for a greater message, and from there is where his nickname, “The Messenger,” comes.<sup>9</sup> The UFC and a world title is Cejudo’s platform for something greater.<sup>10</sup> Cejudo’s story is one of many prime illustrations in which fighting has served as a platform for persons to spread their ideas and values.<sup>11</sup>

Cejudo was not always an inspirational figure.<sup>12</sup> His story is one of rags to riches—a Mexican-American born in Los Angeles to undocumented immigrants.<sup>13</sup> Without a father figure,

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<sup>4</sup> Arvind Gupta, *Why Do I Fight in a Cage? Spiritual Lessons from Mixed Martial Arts*, MBG (Apr. 11, 2013), <http://www.mindbodygreen.com/0-8238/why-do-i-fight-in-a-cage-spiritual-lessons-from-mixed-martial-arts.html>.

<sup>5</sup> Cejudo, *supra* note 2.

<sup>6</sup> Mike Bohn, *Henry Cejudo: UFC’s Immigrant Son Fights for the American Dream*, ROLLING STONE (Nov. 20, 2015), <http://www.rollingstone.com/sports/videos/henry-cejudo-ufcs-immigrant-son-fights-for-the-american-dream-20151120>.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> The Associated Press, *Son of Illegal Immigrants Henry Cejudo Gives U.S. Olympic Gold*, DAILY NEWS (Aug. 19, 2008, 10:43

Cejudo took charge of his life and began wrestling.<sup>14</sup> By the age of 21, he took gold at the Beijing Olympics and became the youngest American athlete to earn a medal in wrestling.<sup>15</sup> Today, Cejudo works closely with numerous charities, outreach programs and non-profit organizations, adamant that “anything is possible if you set your mind, your body, your soul and your faith to it.”<sup>16</sup> He also published a book called *American Victory*, which he describes as a more momentous accomplishment than winning a trophy or medal.<sup>17</sup>

(2) *Brian Wood: Fighting is Spiritual*

Brian Seraiah Wood began wrestling at the young age of nine, but eventually his path led him to MMA and a quest for self-experience and self-control.<sup>18</sup> Wood studied extensively alongside Kung Fu masters, absorbing multiple styles of Kung Fu: Wing Chun, Muay Thai, Qigong.<sup>19</sup> Eventually, Wood created his own style—Dragon Tao—which had its own unique flow and energy.<sup>20</sup> He believes that meditation is the missing link, not only in his personal life, but in athletics as well.<sup>21</sup> His passion for Yoga and meditation steered him to China and Thailand, where he studied Buddhist and Taoist meditation. Wood also believes that dancing is, “one of his most cherished forms of opening both the heart and soul to greater freedom and personal awareness of self.”<sup>22</sup> He suggests that no type of mental

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AM), <http://www.nydailynews.com/latino/son-illegal-immigrants-henry-cejudo-u-s-olympic-gold-article-1.314601>.

<sup>14</sup> *Id.* at 7.

<sup>15</sup> *Id.* at 7, 13.

<sup>16</sup> Bohn, *supra* note 6.

<sup>17</sup> *Id.*

<sup>18</sup> *Martial Arts*, DRAGONTAOSERAIAH.COM, <http://www.seraiah.com/martial-arts.html> (last visited Sep. 11, 2016).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*; see also *Dragon Tao Systems*, DRAGONTAOSERAIAH.COM, <http://www.seraiah.com/dragon-tao.html> (last visited Nov. 15, 2016) (stating that Dragon Tao “is reminiscent of Bruce Lee’s Jeet Kune Do” because “it meshes many styles into one ever-evolving and expanding system”).

<sup>21</sup> *Seraiah Training Bio*, DRAGONTAOSERAIAH.COM, <http://www.seraiah.com/training-bio.html> (last visited Nov. 15, 2016).

<sup>22</sup> *Id.*

and physical training can break through patterns of conditioning the way dance does.<sup>23</sup> Wood further explains:

I believe that the true purpose of the human being is to experience life as a spirit within the mortal shell . . . I am reminded of the words of Bruce Lee “To me, martial arts means honestly expressing oneself.” I remind myself regularly that the purpose of training is to cultivate oneself and to experience enlightenment through the searching of the soul. I believe that the faith I have in my training, conditioning and mental preparedness allows me to understand that a win only comes with sacrifice and a humble heart filled with humility.<sup>24</sup>

(3) *Artem Lobov: Dancing and MMA*

Artem Lobov is not the emblematic MMA fighter you normally see.<sup>25</sup> Lobov’s “footwork, awkward stance, distance and hand movement set him apart from anyone else in the sport.”<sup>26</sup> Lobov does not have an MMA background and did not start practicing MMA until he was 21 years old.<sup>27</sup> His mother did not want him to fight, so, at the age of seven, Lobov took up dancing instead.<sup>28</sup> His training in ballroom dance is the reason Lobov has established a particular elegance inside the ring that few can match.<sup>29</sup> Lobov moves easily and naturally around the ring.<sup>30</sup> Lobov knows how his body works and moves, and he believes it is due to his experience with ballroom dancing.<sup>31</sup> His coach proclaims he has yet to meet a good fighter who is a bad

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<sup>23</sup> *Id.*

<sup>24</sup> Jamie Squires, *Spirituality on the MMA Mat?*, ELEPHANT J. (Feb. 9, 2012), <http://www.elephantjournal.com/2012/02/spirituality-on-the-mma-mat-jamie-squires>.

<sup>25</sup> Shawn Smith, *Artem Lobov, MMA, and the Art of Ballroom Dancing*, FIGHTLAND (Aug. 27, 2014), <http://fightland.vice.com/blog/artem-lobov-mma-and-the-art-of-ballroom-dancing>.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *See id.*

<sup>30</sup> *See id.*

<sup>31</sup> *Id.*

dancer.<sup>32</sup> He further asserts that there is unquestionably a correlation between the two.<sup>33</sup>

*(4) MMA is a Positive Influence for our Children*

Although fighting has proven to be an incredibly positive influence on fighters' lives, there is a common fallacy that children should not participate in MMA because it will make them more violent, aggressive, and predisposed to starting a fight.<sup>34</sup> However, fighting may actually do the opposite.<sup>35</sup> Studies have shown that "[p]utting kids in a controlled environment that gives them a safe and fun place to get out aggression is an excellent way to make sure they aren't overly aggressive outside of the gym."<sup>36</sup> It teaches children to live a healthy lifestyle and teaches them self-defense.<sup>37</sup> To date, there are approximately 3.2 million children under the age of thirteen who participate in MMA.<sup>38</sup> Like Henry Cejudo, many of these children have poor upbringings and MMA can provide them with an outlet to change their lives.<sup>39</sup>

*(5) Overturning New York's MMA Ban*

In 1997, the New York State Senate approved a bill banning professional MMA fighting.<sup>40</sup> To date, New York has been the only state that had a ban on professional MMA fighting,

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Jayden Bell, *Why Children Benefit from MMA*, SCI FIGHTING (May 3, 2013, 8:30 AM), <http://www.scifighting.com/2013/05/03/3737/why-children-can-benefit-from-mma>.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Conor Orr, *The Star-Ledger: Still Illegal in New York, MMA Fighting Continues to Benefit New Jersey Hosts*, MMAFACTS (Feb. 9, 2011, 6:30 AM), <http://www.mmafacts.com/index.cfm?fa=main.news&ContentGroupID=>.

<sup>40</sup> Mike McAndrew, *Senate Passes Bill to Legalize Mixed Martial Arts in New York*, SYRACUSE.COM (Feb. 1, 2016, 4:39 PM), [http://www.syracuse.com/state/index.ssf/2016/02/senate\\_passes\\_bill\\_to\\_legalize\\_mixed\\_martial\\_arts\\_in\\_new\\_york.html](http://www.syracuse.com/state/index.ssf/2016/02/senate_passes_bill_to_legalize_mixed_martial_arts_in_new_york.html).

while the other 49 states simply regulated the sport.<sup>41</sup> However, in March of 2016 the New York State Senate approved a bill overturning its ban on MMA fighting.<sup>42</sup> It is now time for the legislators and courts to recognize the constitutionality of professional MMA fighting.

(6) *Overview*

The stories of Henry Cejudo, Brian Wood, and Artem Lobov illustrate the tremendous opportunities that MMA fighting may provide for athletes; opportunities that go above improving their life financially, providing a platform to convey their stories and spiritual beliefs. Despite the influence that fighting has had on American culture and individuals' lives, courts have yet to recognize fighting as an activity protected by the First Amendment. This note will argue that fighting has had a tremendous role in providing an outlet for individuals to express their culture, ideas, and spirituality, and that courts should recognize MMA fighting as a form of "expressive conduct" deserving First Amendment protection. In support of this proposal, this note will proceed as follows: Section I will provide background information and will include three parts. Part A will describe the history and development of MMA fighting. Part B will discuss spiritual development in MMA. Part C will discuss the types of activities that have traditionally garnered protection under the First Amendment and the First Amendment tests that courts have applied in determining what sort of activities constitute "expressive conduct." Section II will argue that MMA fighting should be deemed a form of "expressive conduct" under the First Amendment. Section III will discuss why MMA fighting is a hybrid right. Finally, Section IV will provide alternative arguments as to why MMA fighting deserves First Amendment protection.

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<sup>41</sup> Michelle Breidenbach, *Mixed Martial Arts vs New York: Banned Sport Closer to Decision in Albany*, SYRACUSE.COM (Apr. 6, 2015, 9:00 AM), [http://www.syracuse.com/politics/index.ssf/2015/04/mixed\\_martial\\_arts\\_vs\\_new\\_york\\_moving\\_closer\\_to\\_decision\\_in\\_albany.html](http://www.syracuse.com/politics/index.ssf/2015/04/mixed_martial_arts_vs_new_york_moving_closer_to_decision_in_albany.html).

<sup>42</sup> Damon Martin, *New York Legalizes MMA After Nearly 20 Year Ban on the Sport*, FOX SPORTS (Mar. 22, 2016, 6:30 PM), <http://www.foxsports.com/ufc/story/ufc-new-york-legalizes-mma-after-nearly-20-year-ban-on-the-sport-032216>.

## BACKGROUND

### A. THE HISTORY OF FIGHTING IN THE UNITED STATES

The influence of fighting in American culture cannot be easily described; nevertheless, fighting is an enormous part of American culture and the success of many.<sup>43</sup> Beginning with the championship reign (1908-15) of the prominent African American boxer Jack Johnson, “boxing has been a crucible for issues of race and masculinity.”<sup>44</sup> Many of these boxers were minorities who all wanted the same thing: to escape poverty.<sup>45</sup> During the 20th century, the U.S. economy boomed and immigrants arrived to pursue a safe haven in the “New World.”<sup>46</sup> By 1915, the Irish became the dominant national group in boxing.<sup>47</sup> African Americans also excelled in boxing, and in 1908 Jack Johnson became the first African-American champion heavyweight boxer.<sup>48</sup> As a result of the rampant societal racism against African-Americans, Jack Johnson’s victory caused uproar because Mike Sullivan, a professional Irish-American boxer, refused to defend his World Champion title against Johnson.<sup>49</sup> This type of persecution lasted until the last quarter of the 20th century when African-American fighters dominated the sport of boxing.<sup>50</sup> The early 20th century often promoted fights that operated on ethnic and racial antagonisms.<sup>51</sup>

In the latter half of the 20th century, advocates within the Muscular Christianity movement began boxing, viewing sports as a way to increase a man’s physical strength, and more

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<sup>43</sup> GARY W. McDONOGH ET AL., ENCYCLOPEDIA OF CONTEMP. AM. CULTURE 98 (2001).

<sup>44</sup> *Id.* at 154.

<sup>45</sup> *Id.*

<sup>46</sup> *The History of Fighting*, FIGHT CLUB AMERICA, <http://fightclubamerica.com/about/history-of-boxing/> (last visited Nov. 16, 2016).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* Some notable boxers—Henry Armstrong, “Sugar” Ray Robinson, Archie Moore, Ezzard Charles, “Jersey” Joe Wolcott, Floyd Patterson, Sonny Liston, Muhammad Ali, and Joe Frazier all won World Champion titles in various weight groups.

<sup>51</sup> McKay, *supra* note 1.

importantly, his moral strength.<sup>52</sup> Theodore Roosevelt was a firm advocate of the movement and was nervous that American men would lose their masculinity.<sup>53</sup> In fact, Roosevelt boxed throughout college and his Presidency.<sup>54</sup> While sparring, Roosevelt was struck and blinded in his left eye.<sup>55</sup> Roosevelt, however, did not give up fighting altogether; instead, he gave up boxing and took up jujitsu.<sup>56</sup>

Two of the critical figures that increased the public awareness of boxing were Muhammad Ali and Mike Tyson.<sup>57</sup> Not only was Ali a boxing star, but many looked up to him for his anti-war and “black is beautiful” activism, which inevitably made him one of the most famous men alive.<sup>58</sup> Although not as publicly vocal as Ali, Mike Tyson was also able to express important concerns of African American culture.<sup>59</sup> Tyson’s rise to popularity was largely due to his troubled upbringing.<sup>60</sup> In a 2015 appearance for *The Nightly Show with Larry Wilmore*, Tyson was asked what “advice he’d give to aspiring boxers.”<sup>61</sup> He simply responded, “go to MMA.”<sup>62</sup>

There is debate as to when MMA first started as a professional sport.<sup>63</sup> Many people wrongly believe that the

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Mike Conklin, *Teddy Roosevelt’s Little-Known Secret*, CHICAGO TRIBUNE (Oct. 7, 2002), [http://articles.chicagotribune.com/2002-10-07/features/0210070158\\_1\\_boxing-final-bout-theodore-roosevelt-association](http://articles.chicagotribune.com/2002-10-07/features/0210070158_1_boxing-final-bout-theodore-roosevelt-association).

<sup>57</sup> MCDONOGH ET AL., *supra* note 43, at 99.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *See id.* at 100.

<sup>61</sup> Lee Cleveland, *Boxing’s Popularity Decline in the U.S.: The Real Reason Why*, FIGHT SAGA (Mar. 25, 2015, 12:07 AM), <http://www.fightsaga.com/news/item/5441-Boxing-s-popularity-decline-in-the-U-S-The-real-reason-why>.

<sup>62</sup> *Id.* (explaining a significant reason why mainstream boxing seems to be less popular is because the sport has become more competitive, and, that with more competition, it becomes “more difficult for any one nation, like the U.S., to boast a ‘Dream Team’ of world champions and superstars”).

<sup>63</sup> *The History of MMA Mixed Martial Arts*, MMA HISTORY, <http://mmahistory.org/who-invented-mma/> (last updated Mar. 24, 2015).



Ultimate Fighting Championship (“UFC”) created MMA.<sup>64</sup> To be fair, there were many inspirations of modern MMA competition in the United States, even long before it became popularly known as MMA.<sup>65</sup> There were several innovators that developed MMA.<sup>66</sup> The most notable of these innovators were Bruce Lee and Gene LeBell.<sup>67</sup> In spreading the art of fighting, Bruce Lee would preach that the best fighter is not only a boxer, karate man, or judo man; rather, the best fighter is one who can adjust to all styles.<sup>68</sup> It is a fighter who “kicks too good for a boxer, throws too good for a karate man, and punches too good for a judo man.”<sup>69</sup> However, Bruce Lee and Gene LeBell’s contributions to MMA, while revolutionary, did not create an open, regulated sport.<sup>70</sup> Even forty years after Bruce Lee’s death, his fighting philosophies can be seen in cages around the world, and fighters still idolize and credit him for his influence.<sup>71</sup>

One of MMA’s best-kept secrets is that it was formed a decade before UFC marketing.<sup>72</sup> In 1993, Art Davie believed he was the first to create the Ultimate Fighting Championship.<sup>73</sup> To his disbelief, MMA had already started in Pittsburgh, Pennsylvania a decade earlier.<sup>74</sup> CV Productions<sup>75</sup> was a

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<sup>64</sup> *Id.* The Ultimate Fighting Championship (UFC) is simply an American mixed martial arts promotion company.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> Kevin Iole, *Bruce Lee’s Impact on Mixed Martial Arts Felt Nearly 40 Years after His Death*, YAHOO SPORTS (Nov. 4, 2012, 7:05 PM), <http://sports.yahoo.com/news/mma--bruce-lee-impact-on-mixed-martial-arts-ufc-felt-nearly-40-years-after-his-death.html>.

<sup>70</sup> MMA HISTORY, *supra* note 63.

<sup>71</sup> Iole, *supra* note 69.

<sup>72</sup> MMA HISTORY, *supra* note 63.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> CV Productions, Inc. was founded in 1979 and is a Pittsburgh, Pennsylvania-based mixed martial arts company. It’s considered the first MMA based company in the United States and responsible for creating the blueprint for modern mixed martial arts competition. *CV Productions*, MMA HISTORY, <http://mmahistory.org/cv-productions/> (last visited Nov. 24, 2016).

premonition of the Zuffa<sup>76</sup> era, while UFC 1 was devised as a phenomenon that slowly transformed into a sport over time.<sup>77</sup> While Art Davie was a true innovator with regard to the concept of cage fighting and propagating MMA on television, he was not the first to package MMA.<sup>78</sup>

Whereas other sports leagues have lost many in their fan bases, the UFC is currently the “fastest-growing sports league in the country.”<sup>79</sup> When the UFC first entered the sports world, it was hard for many martial artists to conform. MMA fighting is not about one discipline; it is a combination of boxing, wrestling, and jujitsu.<sup>80</sup> At first, people harvested many apprehensions about the UFC due to the assumption that fighters may be seriously injured or killed in caged combat.<sup>81</sup> Today, however,

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<sup>76</sup> Zuffa, LLC is an American sports promotion company specializing in mixed martial arts. It was founded in January 2001 in Las Vegas, Nevada, by Station Casinos executives Frank Fertitta III and Lorenzo Fertitta to be the parent entity of the Ultimate Fighting Championship (UFC) after they purchased it from the Semaphore Entertainment Group. Lorenzo Fertitta is the company’s CEO and chairman while Dana White runs the day-to-day operations. Zuffa is co-owned by Fertitta brothers (40.5% each), Dana White (9%) and Flash Entertainment (10%). *What is Dana White’s Net Worth?*, DAVEMANUEL.COM, <http://www.davemanuel.com/net-worth/dana-white/>; *History of MMA*, OCKICKBOXING.COM, <http://ockickboxing.com/blog/mma/history-of-mma-mixed-martial-arts/> (last visited Nov. 24, 2016).

<sup>77</sup> “His vision ‘There are no Rules’ was a far cry from anything that resembled sport.” MMA HISTORY, *supra* note 63.

<sup>78</sup> *Id.*

<sup>79</sup> ‘World’s Fastest Growing Sport’ – Fact or Hype?, CAGEPOTATO, <http://www.cagepotato.com/worlds-fastest-growing-sport-fact-or-hype/> (last visited Mar. 9, 2016).

<sup>80</sup> Jay Dann, *Mixed Martial Arts: 11 Things You REALLY Need to Know About the World’s Fastest Growing Sport*, MIRROR (Mar. 24, 2014, 3:34 PM), <http://www.mirror.co.uk/sport/other-sports/mma/11-things-you-really-need-3277676>; Joseph Eitel, *Fighting Styles in the MMA*, LIVESTRONG.COM, <http://www.livestrong.com/article/477972-comparison-of-boxing-gloves-mma-type-gloves/> (last updated Aug. 13, 2015).

<sup>81</sup> See Jonathan Gottschall, *Hey UFC, Bring Back Bare-knuckle Fights to Stop Brain Trauma*, THE DAILY BEASTY (July 24, 2015, 9:13 PM), <http://www.thedailybeast.com/articles/2015/07/25/hey-ufc-bring-back-bare-knuckle-fights-to-stop-brain-trauma.html>; see also Sergio Hernandez, *MMA Isn’t Safe: Concussions*,

the tap-out rule<sup>82</sup> makes the UFC safer than boxing.<sup>83</sup> The UFC's approach with *no rules* changed in 2001 when it implemented the Unified Rules of Mixed Martial Arts.<sup>84</sup> According to Dana White,<sup>85</sup> the UFC will one day grow bigger than any other fighting event in the world.<sup>86</sup> Dana White further explains that our youth are growing up with MMA, so they will not "be satisfied with watching a fighter employing just his fists, when he has so many other weapons and skills at his disposal."<sup>87</sup> To

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*Brain Injuries and What Can Be Done About Them*, MMA MANIA (May 3, 2012, 6:00 PM), <http://www.mmamania.com/2012/5/3/2996615/mma-ufc-concussions-brain-injuries>.

<sup>82</sup> "If one fighter achieves a submission hold, the fighter trapped in the hold can call defeat by tapping out on his opponent's body or the mat, or by making a verbal announcement. Some defeated fighters fail to tap out and become incapacitated. *MMA Rules and Regulations*, CAGEWARSNOW.COM, <http://cagewarsnow.com/about/25-mma-rules-and-regulations> (last visited Nov. 28, 2016). In such cases, the referee calls an end to the fight." Frank Shamrock & Mary Van Note, *Rules of Mixed Martial Arts Fighting*, DUMMIES, <http://www.dummies.com/how-to/content/rules-of-mixed-martial-arts-fighting.html> (last visited Mar. 9, 2016).

<sup>83</sup> Gregory H. Bledsoe et. al., *Incidence of Injury in Professional Mixed Martial Arts Competitions*, 5 J. OF SPORTS SCI. & MED. 136, 140 (2006), <http://www.jssm.org/gec/jssm-05-CSS11-136.xml.xml>; see Luke O'Brien, *Why Brain Damage Isn't an Issue in MMA, According to Dana White and UFC Fighters*, DEADSPIN (Dec. 9, 2011, 2:30 PM), <http://deadspin.com/5866683/why-brain-damage-isnt-an-issue-in-mma-according-to-dana-white-and-ufc-fighters>.

<sup>84</sup> Robert Harding, *MMA in New York: 'The Brawl,' the Ban and UFC's Push to Legalize the Sport in 2016*, AUBURNPUB (Dec. 30, 2015), [http://auburnpub.com/blogs/eye\\_on\\_ny/mma-in-new-york-the-brawl-the-ban-and-ufc/article\\_c827a11c-adae-11e5-9e5e-ffb95d3a6c8f.html](http://auburnpub.com/blogs/eye_on_ny/mma-in-new-york-the-brawl-the-ban-and-ufc/article_c827a11c-adae-11e5-9e5e-ffb95d3a6c8f.html); see *Unified Rules and Other Important Regulations of Mixed Martial Arts*, UFC, [http://media.ufc.tv//discover-ufc/Unified\\_Rules\\_MMA.pdf](http://media.ufc.tv//discover-ufc/Unified_Rules_MMA.pdf) (last visited Mar. 8, 2016).

<sup>85</sup> Dana White is the President of UFC. Lara O'Reilly, *The Hugely Popular Mixed Martial Arts League UFC Has Been Sold for \$4 Billion*, BUSINESS INSIDER (July 11, 2016, 5:04 AM), <http://www.businessinsider.com/mixed-martial-arts-league-ufc-sold-for-4-billion-to-wme-img-2016-7?r=UK&IR=T>.

<sup>86</sup> Marc Wickert, *Dana White and the Future of UFC*, FIGHT TIMES (Oct. 1, 2004), <https://magazine.fighttimes.com/dana-white-and-the-future-of-ufc>.

<sup>87</sup> *Id.*

top off the rise of the sport, in the next 20 years, MMA will likely be included in the Olympic Games because of the growing participation by so many countries.<sup>88</sup>

#### B. SPIRITUAL DEVELOPMENT IN MARTIAL ARTS

How do we define the term *spiritual*? With an air of mystery and flexibility, the term is defined at least twelve different ways.<sup>89</sup> “Spirituality is derived from the Latin word *spiritus*, which means ‘breath of life.’”<sup>90</sup> Fighters use their spirituality to focus and prepare their mind, body, and spirit in order to address weaknesses and “face both victory and defeat with equal reflection and respect.”<sup>91</sup> MMA fighters believe that mind, body, and spirit are what make a complete mixed martial artist.<sup>92</sup> Some fighters claim that a true martial artist appreciates the spiritual aspect of fighting.<sup>93</sup> In fact, any individual who has trained in MMA can confirm that the experience is ethereal because the innate sense of fulfillment cannot be simply described.<sup>94</sup>

MMA is not merely about war or self-defense; it is a form of art, “created to help human beings maximize their potential on many different levels in order to live life to the fullest.”<sup>95</sup> Essentially, an unconscious state of mind (empty-mindedness) is free of all distractions and applies to all creative activities, including, “*dancing* and swordplay.”<sup>96</sup> While

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<sup>88</sup> Patrick Johnston, *Mixed Martial Arts Will Be an Olympic Sport, Say UFC*, REUTERS (Aug. 30, 2013, 6:02 AM), <http://www.reuters.com/article/us-olympics-mma-idUSBRE97T0BK20130830>.

<sup>89</sup> K.G. McGlade, *The Way: Fighting and Spirituality*, THE LOWDOWN (Feb. 1, 2010), [http://thelowdown-juvenile.blogspot.com/2010/02/way-fighting-and-spirituality\\_01.html](http://thelowdown-juvenile.blogspot.com/2010/02/way-fighting-and-spirituality_01.html).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *See id.*

<sup>93</sup> *Id.*; *see also Most Spiritual Fighter*, TAPOLOGY (last visited Nov. 17, 2016), <http://www.tapology.com/rankings/378-most-spiritual-fighter> (listing some of the most spiritual MMA fighters).

<sup>94</sup> Eric Higaonna, *Martial Arts Through the Ages*, IOGKF INT’L (last visited Nov. 17, 2016), [http://www.iogkf.com/newsletter/edition\\_2010\\_3/articles\\_pg\\_06.htm](http://www.iogkf.com/newsletter/edition_2010_3/articles_pg_06.htm).

<sup>95</sup> *Id.*

<sup>96</sup> *See* Robert James Buratti, *The Spiritual Dimensions of the Martial Arts*, NEW DAWN (Jan. 15, 2014),

numerous types of martial arts in the world exist through many diverse cultures, one aspect is common: the “soul of the art itself.”<sup>97</sup> Because MMA is universal, it bonds like-minded people that are on a journey to connect mind, body, and spirit.<sup>98</sup> While perfection is unattainable, the idea of perfection yields perseverance.<sup>99</sup> Each martial artist wants to attain the goal of true, long-term happiness, which can be humbly achieved by the act of doing.<sup>100</sup>

MMA is not only about learning proper techniques. The true value lies with attaining specific internal qualities developed through the learning process.<sup>101</sup> For example, footwork teaches students about qualities such as energy, ebb, and flow, as well as creative and destructive potential.<sup>102</sup> Moreover, handwork patterns teach balance, dynamics, and the awareness of one’s physical spirit.<sup>103</sup> Every distinctive movement that an MMA fighter uses—such as blocking or striking—are elements that are often attributed to the human spirit.<sup>104</sup> One of the most important elements of spirituality is confronting death, as the “fear of death is the greatest obstacle for the martial artist.”<sup>105</sup>

MMA is certainly not simply the remnants of “old cultures,” but a fruitful technique to spiritual enlightenment.<sup>106</sup> To date, martial arts remain the oldest and most successful system to achieve spiritual development.<sup>107</sup> Demian Maia,<sup>108</sup> a professional MMA fighter, believes that competing in MMA at a

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<http://www.newdawnmagazine.com/articles/the-spiritual-dimensions-of-the-martial-arts> (emphasis added).

<sup>97</sup> *See id.*

<sup>98</sup> *See* McGlade, *supra* note 89.

<sup>99</sup> *See* Buratti, *supra* note 96.

<sup>100</sup> Gupta, *supra* note 4.

<sup>101</sup> Buratti, *supra* note 96.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *See id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Martial Arts*, ENCYCLOPEDIA.COM,

<http://www.encyclopedia.com/sports-and-everyday-life/sports/sports/martial-arts> (last visited Dec. 18, 2016).

<sup>108</sup> *See Biography*, DEMIAN MAIA JIU JITSU, <http://www.demianmaia.com/demian> (last visited Sept. 11, 2016).

higher level is not just about fighting, but something much deeper.<sup>109</sup> He explains:

Some see the spiritual journey of a fighter, particularly those from eastern religions/philosophies as an internal battle with self. Overcoming that voice inside us that tells us to quit in the midst of struggle or have a prideful reaction to defeat. That is our ego, and a fighter must strive to confront it and constantly challenge it in order to grow in humility and evolve. If they can come to terms with who they are and the world they find themselves in, then they can be a more content and effective person and fighter.<sup>110</sup>

### C. THE FIRST AMENDMENT

The text of the First Amendment provides that, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”<sup>111</sup> The First Amendment’s prohibition against the infringement of an individual’s freedom of speech is directed at Congress, but its protections are made applicable to the states through the Due Process Clause of the 14th Amendment.<sup>112</sup> As far as freedom of speech is concerned, it is unclear precisely what the First Amendment freedom actually guarantees.<sup>113</sup> What is known, however, is that the First Amendment “prohibits government from interfering with the individual’s right to receive and disseminate ideas and

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<sup>109</sup> Chris Palmquist, *Demian Maia: Fighting is Spiritual*, THE UNDERGROUND (Oct. 4, 2011), <http://www.mixedmartialarts.com/news/Demian-Maia-Fighting-is-spiritual>.

<sup>110</sup> McGlade, *supra* note 89.

<sup>111</sup> U.S. CONST. amend. I.

<sup>112</sup> Angelica M. Sinopole, “No Saggy Pants”: *A Review of the First Amendment Issues Presented By the State’s Regulation of Fashion in Public Streets*, 113 PA. ST. L. REV. 329, 335 (2008). The author explains why an ordinance banning saggy pants violates the First Amendment rights “by targeting a particular mode of expression—clothing choice or appearance.” *Id.* at 332.

<sup>113</sup> *Id.*

information, and to form and hold opinions or beliefs based upon that free exchange.”<sup>114</sup> Fundamentally, communication of ideas does not always transpire through written or spoken words, but can transpire through actions.<sup>115</sup> This is referred to as “expressive conduct.”<sup>116</sup> As First Amendment scholar David L. Hudson Jr. stated, “[f]lashing headlights, honking horns, armbands, crosses, tattoos and even strange-colored hair—what could they possibly have in common? Answer: They can all trigger the protections of the First Amendment free-speech clause.”<sup>117</sup> He goes on to say that people use expressive conduct every day.<sup>118</sup> This shows that “our liberty extends much deeper and allows other creative ways for people to express themselves.”<sup>119</sup>

Furthermore, in 1943, Justice Robert H. Jackson explained that expressive conduct or symbolic speech that is protected under the First Amendment involves communicative conduct that is the behavioral equivalent of speech.<sup>120</sup> Furthermore, in 1969, the Supreme Court held that “symbolic expression [is] ‘akin to pure speech’ when [students] wore black peace armbands to protest the Vietnam War.”<sup>121</sup> As recently as 1989, courts found that statutes prohibiting the desecration of the U.S. flag restrict the free expression of speech.<sup>122</sup>

Plenty of outlandish First Amendment cases have plagued our judicial system. For example, the Supreme Court generally strikes down prohibitions on nudity and erotic dancing.<sup>123</sup> On the other hand, for example, the Supreme Court

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<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> David L. Hudson Jr., *First Amendment Protects More Than Just Words*, FIRST AMEND. CTR. (Sept. 23, 2011), <http://www.firstamendmentcenter.org/first-amendment-protects-more-than-just-words>.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> See generally *W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

<sup>121</sup> The author also noted that, in *Texas v. Johnson* (1989), the Court ruled “that the act of burning the flag was a form of free expression.” Hudson, *supra* note 116.

<sup>122</sup> See *Tex. v. Janson*, 491 U.S. 397 (1989).

<sup>123</sup> See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

upheld an Indiana statute banning nude dancing.<sup>124</sup> Justice Rehnquist indicated that “nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we viewed it as only marginally so.”<sup>125</sup> According to the Court, the statute “furthers a substantial government interest in protecting order and morality” and the prohibition on public nudity is extraneous to the erotic significance the dancers intend to express.<sup>126</sup> While not all dancing is entitled to First Amendment protection, Justice David Souter explained, “dancing as a performance directed to an actual or hypothetical audience” can constitute expressive conduct where the dancing “gives expression at least to generalized emotion or feeling . . . .”<sup>127</sup> In the case of nude dancing, the feeling being expressed is “eroticism, carrying the endorsement of erotic experience.”<sup>128</sup> As such, it is a form of expressive conduct deserving of protection under the First Amendment.

When “extending First Amendment protection to actions or conduct, the Court has recognized that actions often convey ideas just as well as actual words.”<sup>129</sup> Traditionally, courts use various tests to determine whether conduct is “expressive” and thereby falls within the scope of the First Amendment.<sup>130</sup> In 1974 the Supreme Court established a two-part test for determining whether conduct is communicative and expressive enough to receive First Amendment protection.<sup>131</sup> The two-part test first requires the “speaker” to intentionally convey a particular message.<sup>132</sup> And, secondly, it requires that others reasonably understand the expression.<sup>133</sup> Using the Supreme Court’s two-part test, some plaintiffs were successful in arguing that “honking” or “flashing headlights” should be held to constitute

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<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> See Sinopole, *supra* note 111.

<sup>130</sup> Hudson, *supra* note 116.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> See *Spence v. Wash.*, 418 U.S. 405 (1974) (protesting the National Guard shootings at Kent State University, a college student affixed peace symbols to a flag and hung it upside from his dorm window); see also Hudson, *supra* note 116.



“expressive conduct” that is protected by the First Amendment because the actions convey a reasonably clear message.<sup>134</sup>

In addition, the Free Exercise Clause of the First Amendment, attributed to the States by the Fourteenth Amendment, provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .”<sup>135</sup> Principally, the government cannot, (1) exclude religious beliefs, (2) prohibit a person’s right to believe and recognize a religion, (3) induce affirmation of religious beliefs, (4) punish the expression of a religion that it believes to be untrue, (5) impose special disabilities on the basis of religious views or status, or (6) lend power to one or the other side in controversies over religious authority.<sup>136</sup> In *Employment Division v. Smith*, the respondents went beyond a traditional Free Exercise challenge.<sup>137</sup> The respondents (plaintiffs) argued that the use of peyote for their religious practice went “beyond the reach of a criminal law that is not specifically directed at their religious practice.”<sup>138</sup> In the past, the Supreme Court barred religiously motivated action by involving other constitutional protections that attached with the Free Exercise clause (also known as a “hybrid right”).<sup>139</sup> The Court reasoned that Respondents’ free exercise claim was independent from a communicative activity.<sup>140</sup> Thus, the Court held that no hybrid right existed in this case.<sup>141</sup>

With respect to MMA fighting, whether the sport is deserving of protection hinges on whether the activity expresses messages that spectators can understand.<sup>142</sup> To this point, some

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<sup>134</sup> Hudson, *supra* note 116.

<sup>135</sup> U.S. CONST. amend. I.

<sup>136</sup> See *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 717–25 (1976); *Presbyterian Church v. Hull Church*, 393 U.S. 440, 446–52 (1969); *Sherbert v. Verner* 374 U.S. 398, 402, 410 (1963); *Torcaso v. Watkins*, 367 U.S. 488, 492–93, 495–96 (1961); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 114–19 (1952); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

<sup>137</sup> *Emp’t Div. v. Smith*, 494 U.S. 872, 877–79 (1990).

<sup>138</sup> *Id.* at 878.

<sup>139</sup> *Id.* at 881–82.

<sup>140</sup> *Id.* at 882.

<sup>141</sup> *Id.* at 882.

<sup>142</sup> Genevieve Lakier, *Sport as Speech*, 16 U. OF PA. J. OF CONST. L. 1109, 1113–15 (2014).

First Amendment scholars claim that sports are vital for communication in America and have a direct impact on Americans.<sup>143</sup> They explain,

there is more to the watching and the playing of sports than just the competitive and entertaining facets that it consists of. An athlete can exude and relay his way of life and certain messages through his or her play to the crowd and spectators around him. Games of spectator sports are in fact dense symbolic performances that communicate messages about, among other things, individual excellence and virtue, political identity, race, gender, sexuality, and even beauty.<sup>144</sup>

In *Joseph Burstyn, Inc. v. Wilson*, the Court acknowledged that public school students should not be required to pay money to participate in sports.<sup>145</sup> By doing so, the State is essentially choosing which student messages will or will not be heard, and if a student cannot make the payments, “they are left without the opportunity to express themselves through the sport and are effectively stripped of an important tool of expression.”<sup>146</sup> Furthermore,

participating in sports is in its essence more than a political or verbal expression, it is an action that is not only taken for entertainment and recreational purposes, but taken to give a visually artistic representation of a plethora of messages. Messages that can consist of form, teamwork, community enthusiasm, mastery of a skill, and excellence and even messages of a political agenda.<sup>147</sup>

The First Amendment, however, does not protect all activities. In *Dallas v. Stanglin*, the Supreme Court contemplated whether

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<sup>143</sup> Graham Fox, *Expression Through the Participation in Sports*, THE DIGITAL VOICE (Dec. 15, 2015, 2:27 PM), <http://wordpress.philau.edu/thevoice/2015/12/expression-through-the-participation-in-sports-by-graham-fox>.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*; see also *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

<sup>146</sup> Fox, *supra* note 142.

<sup>147</sup> *Id.*

“laws that prohibited certain age groups from recreational dance halls . . . embrace[] a ‘right to association’ in certain circumstances.”<sup>148</sup> The Court ruled that the First Amendment does not protect recreational dancing, and that “teenagers [who] went to the Texas dance halls were not members of any organizational association, most were strangers to one another, and there was no suggestion that the people who sought to dance would take ‘positions on public questions’ or anything coming close to such an activity by dancing.”<sup>149</sup> Interestingly, people who partake in sports are “typically members of an organization such as a team or in the case of individualized sporting events, still under the blanket of a community name.”<sup>150</sup> Additionally, they are not strangers, nor are they interacting with spectators; instead, they “gather [as] a collective unit to express their personal, public, and community views as well as their artistic representation of the sports in which they play.”<sup>151</sup> While progress has been made to extend rights to motion pictures, visual art, theater, etc., the courts have not been so eager to extend the same First Amendment protections to sports and sporting events.<sup>152</sup>

In general, courts have been unwilling to deem athletic participation in sports as protected by the First Amendment.<sup>153</sup> In support of this, they reason that the First Amendment protects speech, and sporting activities involve conduct that is generally not communicative enough to fall within the scope of the Amendment.<sup>154</sup> In *Justice v. NCAA*, the court held that sanctions on the right to play football did not constitute a violation of the First Amendment.<sup>155</sup> Similarly, in *MacDonald v. Newsome*, the Court held that surfing was not protected under the First

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<sup>148</sup> *Id.*

<sup>149</sup> *Id.*; see *Roberts v. Jaycees*, 468 U.S. 609 (1984); see also *Dallas v. Stanglin*, 490 U.S. 19 (1980).

<sup>150</sup> Fox, *supra* note 142.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Justice v. Nat’l Collegiate Athletic Ass’n*, 577 F. Supp 356, 374 (D. Ariz. 1983).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 375.

Amendment.<sup>156</sup> The most important of these court decisions, as it relates to the thesis of this note, is the Court's holding in *Top Rank, Inc. v. Florida State Boxing Comm'n.*<sup>157</sup> In that case, the Court held that the act of boxing did not involve either pure or symbolic speech.<sup>158</sup> In *Sunset Amusement Co. v. Board of Police Comm'rs of Los Angeles*, holding that roller skating is not a constitutionally protected activity, the Court explained that "no case has ever held or suggested that simple physical activity falls within the ambit of the First Amendment, at least in the absence of some element of communicating or advancing ideas or beliefs."<sup>159</sup> The Court in *Post Newsweek Stations-Connecticut v. Travelers Insurance Co.*, however, stated that entertainment involving "athletic exercise," which in this case was figure skating, "is on the periphery of protected speech."<sup>160</sup>

So, if other athletic sports cannot gain protection under the First Amendment, where does this leave MMA fighting?

## II. DISCUSSION

This note will now discuss why MMA fighting is a form of expressive conduct and deserving of protection under the First Amendment. The discussion will progress in five parts. First, this note will discuss the similarities between MMA fighting and other forms of dance that are protected under the First Amendment. Second, this note will explain how MMA fighting's fundamental connection to American culture makes the activity a form of expressive conduct under the Supreme Court's jurisprudence. Third, this note will discuss how the spiritual component of MMA distinguishes it from other sporting activities that are not protected under the First Amendment. Fourth, this note will explain why MMA should be considered a hybrid right due to its spirituality and expressiveness. Finally, this note will conclude by explaining alternative ways MMA

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<sup>156</sup> *MacDonald v. Newsome*, 437 F. Supp. 796, 798 (E.D.N.C. 1977).

<sup>157</sup> *Top Rank, Inc. v. Florida State Boxing Comm'n.*, 837 So. 2d 496, 498 (Fla. Dist. Ct. App. 2003).

<sup>158</sup> *Id.*

<sup>159</sup> *Sunset Amusement Co. v. Board of Police Comm'rs of Los Angeles*, 7 Cal. 3d 64, 74 (1972).

<sup>160</sup> *Post Newsweek Stations-Connecticut, Inc. v. Travelers Ins. Co.*, 510 F. Supp 81, 86 (D. Conn. 1981).

fighting can be protected if the Court determines that a First Amendment argument is still insufficient.

#### A. MMA FIGHTING IS SIMILAR TO NUDE DANCING

Courts have previously categorized certain types of dancing as outside the protection of the First Amendment. As discussed in Part C, social dancing is not protected under the First Amendment, but nude dancing is marginally protected because it is performed directly to an actual or hypothetical audience, and the performer is expressing a generalized emotion or feeling—namely, the feeling of eroticism. Similarly, MMA is performed directly to an actual audience when a fighter is in the cage with his opponent, or to a hypothetical audience when he is practicing his moves in the gym. In addition, the MMA fighter's performance clearly expresses certain emotions and ideas, most obviously, the feeling of aggression, such that no audience could rationally believe that the activity is expressionless conduct. Each performance in the fighting cage carries with it, among others, the expression of self-development and struggle, which will be further discussed in later parts.<sup>161</sup>

The expression of ideas and emotions are not the only similarities between MMA fighting and dancing. Although not intuitively, the activities themselves are actually quite similar. Both MMA and dancing are governed by principles of body control, choreography, and performance.

##### 1. *Body Control*

While on the exterior, MMA and nude dancing seem to be two activities located on distinct sides of a spectrum, they share many essential features. Dancing is a form of expression that allows others to see your body control through movements.<sup>162</sup> Dancing involves developing muscle memory to control the lines, balance, speed, and strength of your body.<sup>163</sup> Dancing shares an even stronger correlation with MMA fighting when one dances with a partner. When dancing with a partner,

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<sup>161</sup> See *infra* Sections B and C.

<sup>162</sup> See Evan Zhou, *How to Be a Cleaner Dancer*, STEEZY (June 16, 2015), <http://blog.steezy.co/how-to-be-a-cleaner-dancer>.

<sup>163</sup> See Johnny N, *Dance Lessons for Boxing*, EXPERTBOXING.COM (Nov. 21, 2011), <http://www.expertboxing.com/boxing-techniques/body-movement/dance-lessons-for-boxing>.

the goal is to control a resisting subject.<sup>164</sup> Usually, the lead controls the couple's movements with certain signals that allow them to achieve a synergy as well as express themselves.<sup>165</sup> Similarly, a fighter's goal is to control a resisting subject while using his body structure in the most efficient way for maximum effect.<sup>166</sup> An MMA fighter uses his body control to emphasize different angles while fighting an opponent and using muscle memory to help control his movements. It is important for an MMA fighter to use his body control to dictate his speed. A fighter who tires out too quickly will not succeed in a fight.

## 2. *Choreography*

There is no doubt that footwork is essential to dancing. It is also essential to MMA fighting. Footwork is the basis for MMA, not only as an effective strategy to attack your opponent, but also as an expression of each fighter's style.<sup>167</sup> At minimum, to succeed in fighting, a fighter must be able to move his feet.<sup>168</sup> An MMA fighter may not express himself through music and sounds, but he reacts to the movements and rhythm of his opponent in a manner that produces a unique dance. A dance that no other fighter will be able to exactly replicate. A dancer repeatedly practices the same move and always tries to make it better, because the move is his own. Likewise, a MMA fighter religiously practices his techniques. Like dancers, fighters start to develop their own unique style and moves. For example, Nate Diaz is well-known for his "Stockton slap."<sup>169</sup> It is a move that is uniquely his own.

## 3. *Performance*

In sum, the Supreme Court's rationale for protecting nude dancing under the First Amendment also extends to MMA fighting. Like nude dancing, MMA fighting involves the

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<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *See id.*

<sup>167</sup> Luke Thomas, *Technique Talk: Dominick Cruz and the Deliberate Dance of Footwork*, MMA FIGHTING (Apr. 14, 2014, 9:00 AM), <http://www.mmafighting.com/2014/4/14/5608650/technique-talk-dominick-cruz-and-the-delicate-dance-of-footwork>.

<sup>168</sup> *Id.*

<sup>169</sup> Jack Slack, *The Stockton Slap: Why Slapping is the New Punching?*, FIGHTLAND (Mar. 9, 2016), <http://fightland.vice.com/blog/the-stockton-slap-why-slapping-is-the-new-punching>.

performance of a skilled and artful activity that is directed to an audience. Moreover, like nude dancing's expression of eroticism, MMA fighting also carries with it the clear expression of emotions and feelings. The precise nature of these emotions and feelings will now be further elucidated.

#### B. MMA FIGHTING IS INTERTWINED WITH THE AMERICAN CULTURE

Some argue that MMA is not rooted in our culture.<sup>170</sup> Others argue that MMA fighting has not developed to the extent that it should have.<sup>171</sup> Jamie Samuelson of the Detroit Free Press argues that MMA is an attraction, but not a participation sport.<sup>172</sup> However, how many NFL fans play football on the weekends?<sup>173</sup> Additionally, how many of those fans play on a recreational flag league or just play *Madden*?<sup>174</sup> For whatever reason, the popularity of the NFL appears unharmed.<sup>175</sup> Hence, just because a person has not participated in high school wrestling or has only been in a fight with a sibling, does not mean they cannot be a fan of MMA fighting.<sup>176</sup> As explained earlier, combat for competition has roots in America. It is hardly hyperbolic to say, "Americans love violence almost as much as they love sports" and this is not just part of American culture, but it is part of human culture.<sup>177</sup> Many point to this fascination with violence as a criticism of humans generally.<sup>178</sup> But humans have also shown that they especially enjoy violence when it is coupled with qualities like mutual respect, sportsmanship, and fair play.<sup>179</sup>

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<sup>170</sup> Ben Fowlkes, *MMA and the Hardcore Fringe of American Culture*, CAGEPOTATO, <http://www.cagepotato.com/mma-and-the-hardcore-fringe-of-american-culture/> (last visited Mar. 8, 2016).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> Fowlkes, *supra* note 169.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> Dean Burnett, *James Foley's Murder, And the Psychology of Our Fascination with the Gruesome*, THE TELEGRAPH (Aug. 20, 2014, 2:54 PM), <http://www.telegraph.co.uk/news/worldnews/11045833/James-Foleys-murder-and-the-psychology-of-our-fascination-with-the-gruesome.html>.

<sup>179</sup> Fowlkes, *supra* note 169.

The First Amendment generally protects freedom of speech from government interference. The protection under the First Amendment includes expressive conduct that manifests itself into more than just words; it manifests itself in the form of actions.<sup>180</sup> To reiterate, in determining whether an action falls within the scope of expressive conduct, courts will generally apply a two-part test. First, the person must intend to convey a particular message through their action.<sup>181</sup> Second, the message must be one that is reasonably understood by others.<sup>182</sup> The following discussion will apply this two-part test to MMA fighting.

### *1. Intent to Convey a Message*

For many, participating in professional fighting is not just a sport; it is a way for them to convey their message to the world. For instance, to Henry Cejudo, fighting is not simply about winning and being the best. In each fight, Cejudo conveys a message to children and adults alike that no circumstance is too difficult to overcome.<sup>183</sup> Through his MMA success, Cejudo helps others by expressing his message not only inside the ring, but outside of the ring.<sup>184</sup> His help with charities and other organizations reflects a bigger message than just fighting; he is teaching others to believe in themselves.<sup>185</sup> He is expressing a clear message that whether a person wants to be a UFC champion or an astronaut, it is possible as long as they set their mind, their soul, and their faith to it. So, if one has grown up fatherless like Cejudo or grown up in other difficult situations, one can persevere and accomplish anything to which one is devoted. Men and women of all ages and backgrounds look up to MMA fighters like Cejudo; and their voices hold power that can change the lives of many. With the 3.2 million children that are participating in martial arts to date,<sup>186</sup> who else would be their role model if not for fighters like Cejudo? Furthermore, out of

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<sup>180</sup> Hudson, *supra* note 116.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> Bohn, *supra* note 6.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> See e.g., Max Holton, *Martial Arts: Traditional, Modern*, Pagan, FIGHT TIMES (Oct. 28, 2011), <https://magazine.fighttimes.com/martial-arts-traditional-modern-paganoh-my>.



those 3.2 million children, how many of them are growing up “in a home ransacked by abuse and alcoholism” like Frank Shamrock?<sup>187</sup> Or, someone like Mike Tyson, who was a juvenile delinquent with a rough background that made it to fame despite his “gangster rap image.”<sup>188</sup> And despite his background, he went on to win a title in 1988.<sup>189</sup> The message that all of these fighters are conveying is simple: no matter what your hardship is, you can make something of yourself by passionately devoting yourself to something that you love.

## 2. *Reasonably understood*

Fighting is deeply rooted in the American culture, which has been demonstrated continuously throughout United States history. Throughout our history, people have strongly identified with fighters like Mike Tyson, Muhammad Ali, and Jack Johnson. During the careers of these three fighters, African Americans did not have a similar platform as white Americans to display their talents and succeed in America. Boxing gave minorities a way to convey a message in a way others would reasonably understand, and with which they would identify.<sup>190</sup> The viewers likely understood why men like Mike Tyson, Muhammad Ali, or Jack Johnson were fighting. Jack Johnson was very outspoken about his displeasure with racism.<sup>191</sup> But fighting was his loudest tool.<sup>192</sup> His success fighting showed others that it was possible to go from rags to riches and fame, even for African Americans. In fact, his success fighting conveyed such a powerful message that many white Americans scorned him for it.<sup>193</sup>

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<sup>187</sup> Orr, *supra* note 39.

<sup>188</sup> ROBERT GREGG ET AL., *ENCYCLOPAEDIA OF CONTEMP. AM. CULTURE* 99 (Routledge 2005).

<sup>189</sup> *Id.*

<sup>190</sup> See, e.g., David Mayo, *Column: Muhammad Ali Used Fists to Convey a Message of Peace and Tolerance*, MLIVE (June 4, 2016, 11:59 AM), [http://www.mlive.com/boxing/index.ssf/2016/06/column\\_muhammad\\_ali\\_used\\_fists.html](http://www.mlive.com/boxing/index.ssf/2016/06/column_muhammad_ali_used_fists.html).

<sup>191</sup> See Gerald Early, *Rebel of the Progressive Era*, PBS (Jan. 2005), <http://www.pbs.org/unforgivableblackness/rebel>.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

Fighting was a way in which an African American during this era could become a hero to his race and use the fighting arena as a platform to stand up against inequality. In doing so, all persons, black or white, could understand the fighter's message. Muhammad Ali was "one of the most famous men alive" and he would use boxing to speak out against the Vietnam War.<sup>194</sup> His message was fueled by his performance in the ring. Recall, a central tenet of the Muscular Christianity movement was that kicking and punching one's opponent, if done successfully, could bolster a fighter's perceived moral and physical strength.<sup>195</sup> Accordingly, each time Muhammad Ali stepped in the ring and knocked out his opponent through his slick footwork and unrivaled boxing prowess, he increased his perceived physical and moral strength. These perceived attributes caused his criticisms of the Vietnam War to garner tremendous support.<sup>196</sup> The actual physical acts of moving in the ring and punching opponents therefore contributed to Ali's message. Understood this way, the acts involved in fighting are a form of expressive conduct reasonably understood by most Americans.

#### C. MMA'S SPIRITUALITY DISTINGUISHES IT FROM OTHER SPORTING ACTIVITIES

The Supreme Court has unwaveringly held that sports are not considered expressive conduct because the conduct is not generally communicative enough. The Supreme Court's jurisprudence in this area raises a number of questions: Why are sports like basketball and boxing not communicative enough, while figure skating is on the verge of being expressive conduct? Why is figure skating considered "athletic exercise," but basketball and boxing are not? While there are no complete answers to these questions, a strong argument exists as to why MMA fighting is communicative enough and dissimilar from other sports.

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<sup>194</sup> GREGG ET AL., *supra* note 187.

<sup>195</sup> McKay, *supra* note 1.

<sup>196</sup> See Justin Block, *Muhammed Ali Risked It All When He Opposed the Vietnam War*, The Huffington Post (Jun. 6, 2016, 12:56 AM), [http://www.huffingtonpost.com/entry/muhammad-ali-risked-it-all-when-he-opposed-the-vietnam-war\\_us\\_5751e545e4b0c3752dcda4ca](http://www.huffingtonpost.com/entry/muhammad-ali-risked-it-all-when-he-opposed-the-vietnam-war_us_5751e545e4b0c3752dcda4ca).

MMA fighting is unique from other sports because of its spiritual aspect. There is undeniably no other creative activity or sport that demands the participant to alter their lifestyle the way MMA does.<sup>197</sup> Like many sports, MMA involves commitment and persistence. But to a greater degree than all other sports, MMA also requires practitioners to alter the way they think about the world around them in order to master the arts, which cannot be achieved without spiritual development.<sup>198</sup>

While other sports certainly involve the preparation of one's mind and body, the purpose and effects of doing so are distinct from MMA fighting. In other sports, one prepares his mind and body primarily to properly execute the activity and ultimately achieve success. This is not entirely distinct from MMA fighting, which requires a fighter to achieve a synergy between his mind and body to properly execute fighting techniques.

But, in MMA fighting, the true value in obtaining a spiritual synergy between one's mind and body is in attaining specific internal attributes. Proper MMA footwork teaches a fighter about qualities such as energy, ebb, and flow as well as creative and destructive potential. Handwork patterns teach balance, dynamics, and the awareness of one's human spirit. And all of the distinctive movements that an MMA fighter uses are elements that are often attributed to the human spirit. In addition, one of the most important elements of spirituality is confronting death. Notwithstanding extraordinary cases, no other sport shares this feature. When it comes to spiritual development, therefore, MMA fighting stands on a platform of its own.

### III. MMA FIGHTING IS A HYBRID RIGHT

This note separates the discussion into three focal arguments suggesting why MMA fighting should be protected under the First Amendment. But these arguments coincide with each other, differentiating MMA fighting from other sports. Those claiming that MMA fighting should be protected under the First Amendment certainly have strong arguments to rely on under the (1) *Spence v. Washington* two-part test; (2) MMA's similarity to nude dancing, and; (3) its dissimilarity from other sports. Individually, however, these arguments are not likely to

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<sup>197</sup> See *Biography*, *supra* note 107.

<sup>198</sup> See *id.*

persuade a Court that MMA fighting should be protected under the First Amendment. But, in combination, these arguments show that MMA fighting is a *hybrid right*.

Unlike in *Employment Division*, where the respondents' free exercise claim was independent from a communicative activity, MMA's spirituality is not an independent communicative activity. The Supreme Court generally has barred religiously motivated actions that do not involve other constitutional protections that attach with the Free Exercise Clause.<sup>199</sup> But in the case of MMA fighting, there is a cogent argument to be made that the activity's expressiveness under the First Amendment attaches with its spirituality under the Free Exercise Clause. Specifically, like nude dancing, MMA fighting is a performance of an activity that is directed at an audience while carrying clear expression, emotions, and feelings. Moreover, MMA fighting is also expressive because its expression is reasonably understood by most people, which should pass the *Spence v. Washington* two-part test.<sup>200</sup> MMA fighting's expressiveness, in combination with its religious spirituality, clearly shows that MMA fighting is not an independent communicative activity. Therefore, MMA fighting should be considered a hybrid right that is worthy of protection under the First Amendment.

#### IV. ALTERNATIVE ARGUMENTS

As discussed in Section II of this note, athletic participation in sports is usually not protected by the First Amendment because sporting activities involve conduct that is generally not communicative enough to fall within the scope of the Amendment.<sup>201</sup> If the Supreme Court were to find that MMA

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<sup>199</sup> See *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708–25 (1976); *Presbyterian Church v. Hull Church*, 393 U.S. 440, 445–52 (1969); *Sherbert v. Verner* 374 U.S. 398 (1963); *Torcaso v. Watkins*, 367 U.S. 488 (1961); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 95–119 (1952); see also *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

<sup>200</sup> See *Spence v. Washington*, 418 U.S. 405, 410 (1974) (discussing the portion of the two-prong test that relies on the likelihood that the message would be understood by those who viewed it).

<sup>201</sup> See *Top Rank Inc. v. Florida State Boxing Comm'n*, 837 So. 2d 496, 498 (Fla. Dist. Ct. App. 2003) (discussing that boxing does not involve pure or symbolic speech); *Justice v. National Collegiate*

fighting is still not worthy of protection under the First Amendment, state constitutional provisions can be used to protect this right. All states have constitutional provisions, but usually federal constitutional provisions cannot be amended by state legislatures or courts.<sup>202</sup> States, however, can ratify these constitutional provisions.<sup>203</sup> To date, Congress has not passed a law banning MMA fighting.<sup>204</sup> The issue has been left entirely to state courts.<sup>205</sup> While the New York MMA ban was lifted in March of 2016, no constitutional provisions in any state would stop a similar ban from reoccurring in the future.

Furthermore, due to public policy, state courts have been reluctant to accept MMA fighting as a right. The concerns largely stem from MMA fighting's violence<sup>206</sup> and possible steroid use.<sup>207</sup> Since the implementation of the Unified Rules of Mixed Martial Arts, MMA fighting in the UFC is no longer as violent as once believed.<sup>208</sup> Starting in September of 2016, New York is taking enormous strides to secure MMA fighters with one-million-dollar coverage for dangerous brain injuries.<sup>209</sup> New York's State Athletic Commission, legislature, and governor

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Athletic Ass'n, 577 F. Supp 356, 374 (D. Ariz. 1983) (holding that sanctions on the right to play football did not violate the First Amendment); *MacDonald v. Newsome*, 437 F. Supp. 796, 798 (E.D.N.C. 1977) (holding that surfing was not protected under the First Amendment).

<sup>202</sup> Phil M. Fowler, *What is a Constitutional Provision?*, LEGAL BEAGLE, <http://legalbeagle.com/5806070-constitutional-provision.html> (last visited Oct. 28, 2016).

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> See Devin Burstein, *The Muhammad Ali Boxing Reform Act: Its Problems and Remedies, Including the Possibility of a United States Boxing Administration*, 21 CARDOZO ARTS & ENT. L.J. 433, 438–44 (2003).

<sup>206</sup> See *The Disturbing Rise of Ultimate Fighting*, THE NEW YORK TIMES (Jan. 22, 2009, 7:19 PM), <http://theboard.blogs.nytimes.com/2009/01/22/the-disturbing-rise-of-ultimate-fighting>.

<sup>207</sup> See *Steroids in UFC*, EVOLUTIONARY.ORG, <http://www.evolutionary.org/ufc-steroids-busts> (last visited Oct. 30, 2016).

<sup>208</sup> Harding, *supra* note 84.

<sup>209</sup> *MMA Fighters to Need \$1 Mil. Insurance Policies*, WKBW BUFFALO (Jul. 19, 2016, 10:54 AM), <http://www.wkbw.com/news/state-news/mma-fighters-to-need-1-mil-insurance-policies>.

Andrew Cuomo are stepping up and not only legalizing MMA fighting in New York, but also addressing the state's public policy concerns.<sup>210</sup> In regard to steroid use, the UFC went through enormous changes in its drug testing standards.<sup>211</sup> The implementation of the UFC's new policy will increase drug testing and prompt harsher punishments for athletes that fail.<sup>212</sup> In reality, steroid use is not solely in MMA fighting, but the implementation of a stricter drug testing standard will help filter the MMA fighters who decide to continue using steroids. If every state took the initiative to address MMA fighting's public policy concerns and enact either constitutional provisions or legislation, MMA fighting would be on its way to being protected in all 50 states.

In principle, if the First Amendment is insufficient, states can enact constitutional provisions to protect MMA fighting in its state. Another alternative is for state legislators to take affirmative action, like the legislature in New York, and recognize that MMA fighting is a hybrid right worthy of protection in its state.<sup>213</sup> While there are many measures that have been taken with sports to be protected under the First Amendment, a lot of work remains before MMA fighting will be protected constitutionally in the United States.

### CONCLUSION

MMA fighting should be protected under the First Amendment because it is a hybrid right. First Amendment jurisprudence dictates that for an activity to constitute expressive conduct, the Supreme Court's two-part test in *Spence v. Washington* must be satisfied. This test provides that an activity is expressive conduct when the activity conveys a message and the message is reasonably understood by viewers. Admittedly, not every sport activity is sufficiently communicative enough to satisfy the two-part test in *Spence v. Washington*. However, MMA fighting is different. Like nude dancing, MMA fighting

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<sup>210</sup> *Id.*

<sup>211</sup> Mookie Alexander, *UFC Drug Policy Includes Increased Punishments, Year-Round Testing Starting July 1*, BLOODY ELBOW (June 3, 2015, 4:13 PM), <http://www.bloodyelbow.com/2015/6/3/8724873/ufc-usada-drug-policy-includes-increased-punishments-year-round-testing-july-1-mma-news>.

<sup>212</sup> *Id.*

<sup>213</sup> *New York v. United States*, 505 U.S. 144, 168–71 (1992).

involves a performance to a specific audience, and it portrays clear emotions and feelings. Moreover, MMA fighting is so uniquely intertwined with the history and development of American culture that its messages speak loud and clear. The stories of Henry Cejudo, Mike Tyson and Muhammad Ali have proven this. Through fighting, these individuals have conveyed incredibly influential messages that have impacted people throughout the United States. Moreover, MMA fighting is dissimilar from other sports because of its spiritual aspect. This fact, in combination with the activity's expressiveness, makes MMA fighting a hybrid right. An activity with such a strong hybrid right is surely worthy of protection under the First Amendment.