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Understanding and Regulating the Sport of Mixed Martial Arts

Brendan Maher

University of Connecticut School of Law, brendan.maher@law.tamu.edu

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Understanding and Regulating the Sport of Mixed Martial Arts

by

BRENDAN S. MAHER^{*}

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^{*} Assistant Professor, Oklahoma City University School of Law. Harvard Law School, J.D.; Stanford University, A.B. Much of my previous scholarship has touched on the Employee Retirement Income Security Act of 1974 (“ERISA”)—see, e.g., Brendan S. Maher, *Creating a Paternalistic Market for Legal Rules Affecting the Benefit Promise*, 2009 WIS. L. REV. 657 (proposing changes to ERISA)—a subject area in which a great deal of foundational work has already been done. This Article, in contrast, tackles a subject area that has not yet received comprehensive treatment by legal scholars: the young sport of mixed-martial arts (“MMA”). The project was exhilarating, but would have been impossible without the assistance of several people. In particular, I owe many thanks to Nick Lembo, Counsel to the New Jersey State Athletic Control Board, the regulatory body which oversees MMA events within New Jersey; Keith Kizer, Executive Director of the Nevada State Athletic Commission, the regulatory body which oversees MMA events in Nevada; Zach Arnold, MMA journalist and publisher of *FightOpinion.com*; Ivan Trembow, MMA journalist; and David Meltzer, MMA journalist and publisher of the *Wrestling Observer Newsletter*, a leading trade publication covering the business of MMA.

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“[Mixed martial arts] has grown up. The rules have been adopted to give its athletes better protections and to ensure fairer competition.”¹

I. Introduction

One of the most important figures in contemporary sports is a pudgy and passionate bald man named Dana White. White is not an athlete; he is the president and part owner of the Ultimate Fighting Championship (“UFC”).² The UFC is the country’s largest promoter of America’s newest and fastest-growing sport: mixed martial arts (“MMA”).³

MMA is a hybrid combat sport whose participants engage in and combine a variety of fighting disciplines within one match.⁴ Contrary to the perceptions of the uninformed, MMA has many, many rules—a fact White will proudly declare at any available opportunity.⁵

1. Gareth Davies, *Combat Night Proves a Hit*, DAILY TELEGRAPH, Nov. 20, 2007, at 14 (quoting senator John McCain). Senator McCain was originally a fierce opponent of MMA, criticizing it in 1994 as a “visual feast of broken bones and blood” that runs “until there is a designated winner, according to the company’s press release, by means of knockout, surrender, doctor’s intervention, or death.” *Health and Safety of Professional Boxing: Hearings Before the Comm. on Commerce, Science, and Transp.*, 103d Cong. 2 (1994) (statement of Sen. John McCain about MMA).

2. White and billionaires Lorenzo Fertitta and Frank Fertitta III (who also own Station Casinos, Inc.) own ninety percent of the UFC, having recently sold a ten-percent stake to Flash Entertainment, an Abu Dhabi entertainment company. Arnold M. Knightly, *UFC Sells 10% to Mideast Company*, LAS VEGAS REVIEW-JOURNAL, Jan. 11, 2010, available at http://www.lvrj.com/news/breaking_news/UFC-sells-10-percent-to-Mideast-company-81192552.html. The current ownership breakdown between White and the Fertittas has not been disclosed. *Id.* Prior to the ten-percent sale to Flash Entertainment, Mr. White owned ten percent and the Fertittas ninety percent. Matthew Miller, *Ultimate Cash Machine*, FORBES, May 5, 2008, at 80, 80, 82. Zuffa, LLC (“Zuffa”) is the corporate holding company used by the Fertittas to operate the UFC. *Id.* at 82. Zuffa acquired the UFC in 2001. *Id.*

3. *Id.*

4. See, e.g., NEV. ADMIN. CODE § 467.00285 (2008) (defining “mixed martial arts” as “unarmed combat involving the use . . . of a combination of techniques from different disciplines of the martial arts”). Such disciplines include, for example, kickboxing, wrestling, karate, and jiu-jitsu.

5. See Part III, *infra*. See also Gregory H. Bledsoe et al., *Incidence of Injury in Professional Mixed Martial Arts Competitions*, 5 J. SPORTS SCIENCE & MED. 136, 139 (2006), available at <http://www.jssm.org/combat/1/18/v5combat-18.pdf> (“Though initially promoted as brutal, no-holds-barred contests, Mixed Martial Arts competitions in the United States have changed dramatically and now have improved regulations to minimize injury.”). White and others at Zuffa (see *supra* note 2) have done little to correct the common belief that they were the first to add rules and obtain state sanction for what had previously been a banned, no-rules game. This common belief is wrong. Prior to acquisition of the UFC in 2001 by Zuffa, the state of New Jersey had already sanctioned the sport of MMA, and the UFC under its prior ownership had already instituted many of

For better or worse, White is the face of the UFC, coming to public prominence as a result of his memorable onscreen role in the UFC's flagship reality television series, *The Ultimate Fighter*. On the show, aspiring MMA athletes, not under contract with the UFC, live together in a large house, train under the tutelage of established fighters who serve as coaches, and then compete in a tournament held over the course of several weeks, with the winner receiving a UFC contract.⁶ During the show's first season in 2005, White's appearances demonstrated his infectious passion for the sport and foreshadowed how tirelessly he would work to promote its appeal. The unfiltered vigor of his enthusiasm has kept him in the public eye ever since.⁷

The Ultimate Fighter, however, has accomplished a great deal more than introducing the world to the salty White: it has educated millions of new viewers about the evolution of MMA from spectacle to sport. Unlike earlier MMA competitions, in which talentless barflies swung wildly at mustached opponents who claimed to be ninjas or assassins, *The Ultimate Fighter* showcased a rules-oriented, physically challenging athletic competition with hard-working, devoted competitors. Viewers noticed the difference, and liked what they saw. The April 2005 season finale of the show—a live card of exciting bouts on the male-oriented *Spike TV*—attracted over three million viewers.⁸ American appetite for MMA was whetted.

Since then, by any measure, the UFC (and MMA in general) can only be described as ascendant. The UFC's television programs on *Spike TV* continue to draw viewers, and the UFC's pay-per-view events in recent years have been astonishingly successful. Although the UFC is privately held and does not release pay-per-view revenues, it reportedly "generated \$300 million in pay-per-view revenue in 2008, surpassing both boxing and pro wrestling for the second straight year."⁹ In July 2009, the company's *UFC 100* blockbuster pay-per-view card reportedly attracted approximately 1.6 million buys, among

the rules in effect today. See Part I.A., *infra*. Today, MMA is certainly more heavily regulated than it was during the sport's infancy. This, no doubt, is partially due to the admirable efforts of Zuffa. But significant rules and regulation were in place before Zuffa arrived on the scene. See Part I.A., *infra*, and *infra* note 52, with accompanying text.

6. See generally, *The Ultimate Fighter, Season 1: The Quest Begins* (*Spike TV* television broadcast Jan. 17, 2005). See also Don Kaplan, *Spike Gets in the Ring*, THE N.Y. POST, June 28, 2004, at 89.

7. White's energy often manifests itself in aggressive criticism. For example, he once remarked: "I don't like Showtime. I don't like 'em. That's the only reason I even fuck around with them and do what I do because I want to kick them in their balls." Zach Arnold, *Dana White Sounds Off on Showtime and Strikeforce on CBS 11/7 Show*, FIGHTOPINION.COM, Sept. 18, 2009, <http://www.fightopinion.com/2009/09/18/dana-white-sounds-off-on-showtime-and-strikeforce-on-cbs-117-show/>.

8. Press Release, UFC & Spike TV, Spike TV and UFC Announce Strategic Partnership, (May 3, 2005), (<http://www.ufc.com/index.cfm?fa=news.detail&gid=1218>) (noting peak viewership of 3.3 million for *The Ultimate Fighter* season one finale).

9. Sean Gregory & James Osborne, *Ultimate Fighting's Cold War Gets Hotter*, TIME, July 10, 2009, available at <http://www.time.com/time/printout/0,8816,1909703,00.html>.

the most viewed pay-per-view sporting events ever.¹⁰ In 2008, Forbes estimated the UFC to be worth \$1 billion.¹¹ Today that number is almost certainly higher.

In terms of athletic skill, the UFC's five current champions—heavyweight Brock Lesnar, light heavyweight Lyoto Machida, middleweight Anderson Silva, welterweight Georges St. Pierre, and lightweight B. J. Penn—are all patently world-class athletes. MMA also has pop culture salience: former light heavyweight champions Chuck “Iceman” Liddell and Forrest Griffin both recently wrote popular books.¹² When White desperately tried and failed to sign a Russian heavyweight named Fedor Emelianenko—the best MMA fighter not under UFC contract, and arguably the best pound-for-pound MMA fighter in the world—it received widespread and critical media attention, including from the thoughtful *Slate.com*.¹³ There is hardly a greater sign of cultural relevance for a professional sport than roster criticism by mainstream media.

Of course, MMA is more than the UFC. Calling MMA “ultimate fighting” is akin to calling a tissue a “Kleenex” or a photocopy a “Xerox.” MMA promotions, other than the UFC, have put on events, and countless training gyms have arisen around the country. One promotion, Elite XC, landed a network television deal with CBS in 2008, an historic first.¹⁴ Another promotion, Strikeforce—which recently inked a deal with CBS—put on the biggest MMA female match in history this summer, in which Christine “Cyborg” Santos defeated Gina Carano.¹⁵ Heralded director Steven Soderbergh subsequently cast the comely Carano as the heroine in his upcoming film *Knockout*.¹⁶

This Article is a searching treatment of the history, legitimacy, and regulation of MMA. In Part II, this article explains the history and

10. E-mail from David Meltzer, Publisher, Wrestling Observer Newsletter, to author (Sept. 27, 2009, 20:59 CST) (on file with author).

11. See Miller, *supra* note 2, at 80.

12. See generally CHUCK LIDDELL & CHAD MILLMAN, ICEMAN: MY FIGHTING LIFE (2008) and FORREST GRIFFIN, GOT FIGHT?: THE 50 ZEN PRINCIPLES OF HAND-TO-FACE COMBAT (2009).

13. Tim Marchman, *The Not-Quite-Ultimate Fighting Championship*, SLATE, Aug. 19, 2009, <http://www.slate.com/id/2225717/> (discussing the UFC-Emelianenko negotiations).

14. See David Meltzer, *Elite XC Down for the Count*, YAHOO! SPORTS, Oct. 21, 2008, <http://sports.yahoo.com/mma/news?slug=dm-elitexc102008&prov=yhoo&type=lgns> (reporting on CBS deal). Elite XC, however, recently folded. See *id.*

15. See Josh Gross, *Cyborg's Upset of Carano Could Bode Well for Women's MMA*, SI.COM, Aug. 17, 2009, http://sportsillustrated.cnn.com/2009/writers/josh_gross/08/16/strikeforce.women/index.html (discussing Santos-Carano result) and David Meltzer, *Fedor's Strikeforce Debut Airs on CBS*, YAHOO! SPORTS, Sept. 17, 2009 <http://ca.sports.yahoo.com/mma/news?slug=dm-fedorfight091709&prov=yhoo&type=lgns> (discussing CBS-Strikeforce deal).

16. Michael Fleming, *Soderbergh Hits Up Carano for Film*, VARIETY, Sept. 7, 2009, <http://www.variety.com/article/VR1118008212.html?categoryid=1236&cs=1>.

development of MMA, tracing it from its crude, brutish beginnings to its current incarnation. In Part III, this article offers a pragmatic account of the social utility and legitimacy of MMA, considers objections to its practice, and compares it to other more established sports and entertainment in America. In Part IV, this article reviews the state-based and administrative nature of MMA regulation; in so doing, the objective is to identify and categorize three conceptual groupings of existing MMA regulation crucial to understanding the relationship between legitimacy and oversight. The article concludes in Part V by highlighting two reform possibilities—federalization and unionization—that should be of interest to researchers, reformers, stakeholders, and fans considering future development of the sport.

II. Understanding Mixed Martial Arts

Unarmed combat sports have a long history.¹⁷ Wrestling is one of the oldest sports in the world;¹⁸ boxing bouts occurred in classic antiquity and earlier;¹⁹ and sumo may be between 1,300 and 2,000 years old.²⁰ Although older combat sports remain popular, a new combat sport—MMA—has arisen in the United States and around the globe in the past fifteen years.

MMA is so named because participants fluidly mix a variety of individual martial arts disciplines (boxing, wrestling, karate, etc.) within one match.²¹ In order to have any meaningful chance of success, present day competitors must be operationally facile in three conceptual categories of combat: (1) striking, i.e., using hands, feet, knees, and elbows to strike the opponent; (2)

17. MICHAEL B. POLIAKOFF, *COMBAT SPORTS IN THE ANCIENT WORLD* 7 (1995) (“Boxing, wrestling and pankration, a sport that allowed a variety of unarmed fighting tactics, were the three important forms of combat sport in the ancient world.”). In several ways, pankration was the ancient version of MMA. See L. JON WERTHEIM, *BLOOD IN THE CAGE: MIXED MARTIAL ARTS, PAT MILETICH, AND THE RISE OF THE UFC* 13 (2007) (explaining that MMA can be traced to pankration).

18. See, e.g., DONALD G. KYLE, *SPORT AND SPECTACLE IN THE ANCIENT WORLD* 26–27 (discussing Sumerian reference to wrestling circa 2700 B.C.); POLIAKOFF, *supra* note 17, at 10 (noting that wrestling was mentioned on an Akkadian stone tablet over 3,700 years old).

19. Boxing was part of the ancient Olympics in 668 B.C. See, e.g., SHIRLEY GLUBOK & ALFRED TAMARIN, *OLYMPIC GAMES IN ANCIENT GREECE* 77 (1976). There is even evidence of its practice almost a thousand years before. See Kyle, *supra* note 18, at 40 (describing Minoan fresco of boxing circa 1625 B.C.). By 500 A.D., Roman Emperor Theodoric banned boxing for being too violent. The late Roman version, however, was obviously quite different than modern boxing. It included a metal strap and a metal spike in the wraps, making many bouts fatal after one punch. See Michael T. Flannery & Raymond C. O’Brien, *Mandatory HIV Testing of Professional Boxers: An Unconstitutional Effort to Regulate a Sport that Needs to Be Regulated*, 31 U.C. DAVIS L. REV. 409, 420 (1998) (citations omitted).

20. CLYDE NEWTON & GERALD J. TOFF, *DYNAMIC SUMO* 48 (1994) (discussing sumo’s history).

21. The UFC Fact Sheet, <http://www.ufc.com/index.cfm?fa=LearnUFC.FactSheet#section2> (last visited October 2, 2009) (describing MMA as “an intense and evolving combat sport in which competitors use interdisciplinary forms of fighting that include jiu-jitsu, judo, karate, boxing, kickboxing, wrestling and others to their strategic and tactical advantage in a supervised match”).

wrestling, i.e., using power and position to take down and/or control one's opponent; and (3) submission grappling, i.e., using leverage and various holds to render the opponent unwilling or unable to continue. They must also have the ability to defend against each type of attack. From this perspective, MMA is itself a distinct cross-disciplinary martial art.

The expectation that professional MMA fighters will have skill in all three areas—striking, wrestling, grappling—is fairly new, and essentially an accidental outgrowth of the sport's origins. A brief review of MMA's modern history, which begins in the early 1990s, will explain the initial negative reaction to the sport and provide a fuller understanding of the sport as it stands today.

A. History and Evolution

For years, one of the liveliest speculations by combat sport fans revolved around whether an expert in one particular discipline (e.g., boxing) would win a "real fight" against an expert in another discipline (e.g., wrestling). Obviously, a trained boxer would defeat a trained wrestler in a boxing match. Similarly, a trained wrestler would undoubtedly defeat a trained boxer in a wrestling match. For many, however, the intriguing question was: What if a boxer and a wrestler (or a karate master, a sumo, a judoka, etc.) simply *fought*, with few or no rules?²² Who would win?

During the late nineteenth and throughout the twentieth centuries, exhibition bouts between boxers, wrestlers, and other martial artists occurred (most notoriously Muhammad Ali versus Japanese professional wrestler Antonio Inoki).²³ Since the contests often involved at least one participant who routinely participated in "professional" (i.e., scripted) wrestling matches,²⁴ few considered the outcomes of these infrequent bouts as credible

22. See, e.g., WERTHEIM, *supra* note 17, at 55–56 (describing UFC co-founder Art Davies' fascination with the question of who would prevail in a "sporting contest among experts" of different fighting disciplines).

23. According to promoter Bob Arum, the Ali-Inoki match, although billed as a legitimate contest, was intended to be fixed with a "script for the fight" that involved dramatic twists and turns. THOMAS HAUSER, MUHAMMAD ALI: HIS LIFE AND TIMES 336–37 (1992). But allegedly Ali had qualms about deceiving the public, and immediately prior to the fight he refused to cooperate. *Id.* at 337. Arum accordingly claims the ensuing match was real—and incredibly boring, because Inoki essentially laid on his back kicking at Ali's legs for fifteen rounds while Ali threw "six punches." *Id.* The fight was declared a draw and taken seriously by no one. *Id.*

24. For more than 100 years, "professional" wrestlers have engaged in bouts whose outcomes (and often specifics of the match) are predetermined. See generally SCOTT M. BEEKMAN, RINGSIDE: A HISTORY OF PROFESSIONAL WRESTLING 38–41 (2006) (discussing origins of cooperative outcomes in professional wrestling). Many early professional wrestlers had legitimate wrestling backgrounds and likely engaged in some legitimate contests. *Id.* Yet by the early twentieth century, most professional wrestling matches' outcomes were predetermined by agreement, to enhance their entertainment appeal. *Id.*

answers to the question of combat discipline supremacy.²⁵ Thus, in the early 1990s, for many American sports fans, the question remained: Which fighting discipline was best?

The UFC organization was formed in America to specifically answer that question.²⁶ Not coincidentally, one of the UFC co-founders—Rorion Gracie—felt quietly confident that he had the answer. Rorion was a member of the Gracies, a Brazilian family who had spent decades practicing a little-known (to Americans) martial art named Brazilian jiu-jitsu (“BJJ”).²⁷ BJJ is a martial art that focuses on submitting one’s opponent; its practitioners use positioning and body weak points (e.g., neck, shoulder, arm, knee, ankle) to pull opponents to the ground and then subdue them with a series of chokes, holds, and cranks.²⁸ In Brazil, the Gracie family, over many years, participated in a series of formal and informal challenges with various fighters in no-rules or minimal-rules bouts and concluded that an experienced BJJ fighter would likely defeat the practitioner of a different combat discipline.²⁹

With two American executives, Art Davie and Robert Meyrowitz, Rorion Gracie agreed to stage and promote a true combat tournament, with masters of different disciplines competing.³⁰ Rorion’s intent was to include a Gracie BJJ expert, who Rorion expected to win, and thus gain worldwide renown for BJJ and the Gracie schools that taught it.³¹ That tournament, which brought together eight fighters for a one-night tournament with a prize of \$50,000, was called simply “the Ultimate Fighting Championship,” and it occurred in Denver, Colorado, on November 12, 1993.³² As Rorion Gracie expected, the

25. For example, early judo practitioner Mitsuya Maeda traveled the world giving fight exhibitions, winning most. But it was “hard to say which of the fights were legitimate contests and which were part of his wrestling act.” JONATHAN SNOWDEN, *TOTAL MMA: INSIDE ULTIMATE FIGHTING* 13 (Michael Holmes ed., 2008). There certainly were contests that were legitimate, most famously a mid-century match in Brazil between Helio Gracie and judo legend Masahiko Kimura. *Id.* at 20. Kimura—for whom today’s “Kimura” submission hold of the shoulder is named—prevailed. *Id.* But, owing to the infrequency or obscurity of legitimate bout results, the question of which martial art was supreme remained, for virtually all American fans, an open question.

26. *Id.* at 26 (explaining the UFC was originally intended to be a “battle of styles in which the various martial arts would compete for supremacy”).

27. See Todd Martin, *UFC Retrospective Series Part 1: The Pioneer*, CBSSPORTS.COM, May 18, 2009, <http://www.cbssports.com/mma/story/11761069> (discussing fighting pedigree of Gracie family).

28. Cf. OHIO ADMIN. CODE § 3773:7-01(A) (2009) (describing BJJ).

29. See SNOWDEN, *supra* note 25, at 14–23.

30. See WERTHEIM, *supra* note 17, at 55–57.

31. *Id.* at 56 (noting that Rorion believed the UFC fights “would be the perfect format to demonstrate the superiority of Gracie jiu-jitsu”). See also SNOWDEN, *supra* note 25, at 28–29 (explaining that Rorion “saw in the UFC an opportunity to expose to the world the truths and fallacies inherent in contemporary martial arts theory”).

32. See David Meltzer, *First UFC Forever Altered Combat Sports*, YAHOO! SPORTS, Nov. 12, 2007, http://sports.yahoo.com/mma/news;_ylt=AuvUi2TrSN_ILBVsuNLmsjk9Eo14?slug=dm-earlyufc111207&prov=yhoo&type=lgs [hereinafter Meltzer, *First UFC*] (describing UFC 1). The first UFC has subsequently been renamed “UFC 1 – The Beginning.”

BJJ entrant—176-pound Royce Gracie, Rorion's brother—won the tournament after defeating several larger men: catch-wrestler Ken Shamrock, boxer Art Jimmerson, and savate expert Gerard Gordeau.³³

As originally conceived, the UFC was largely intended as a curiosity, rather than a sport.³⁴ Its primary objective was merely to answer two questions: (1) which martial arts discipline was best and (2) who was the world's "best fighter." The event was intended to be "a battle of styles" and representative of "real" fighting, therefore few rules constrained the combatants.³⁵ Accordingly, early events were billed as no-rules, anything-goes, judge-free competitions; there was a deliberate attempt to compare the bouts to quasi-legal street fights, as opposed to skilled athletic contests.³⁶ These early fights did not take place in a ring, but in the "Octagon" (a mat surrounded by an eight-sided "cage"); there were no weight classes, time limits, or judges; competitors did not wear protective gear; and bouts could only be stopped by "knockout, submission or a fighter's corner throwing in the towel."³⁷

Promotional efforts to attract attention highlighted the danger perceived to arise from unarmed combat with such minimal rules, i.e., the "bloodsport" nature of the contests.³⁸ One particularly infamous pitch highlighted the possibility that a participant could die in a UFC fight.³⁹ Such vulgar promotional efforts, combined with the unusual spectacle of seeing men—some of whom were evidently unfit or unskilled⁴⁰—engage in bloody bare-knuckle fights inside of a cage, resulted in a notoriety for the UFC that

33. *Id.*

34. *Id.* (reporting Campbell McLaren, the head of marketing for the first UFC, as saying he did not believe the UFC was a new sport and that the "last thing we want is for this to be a sport").

35. See WERTHEIM, *supra* note 17, at 56 (describing UFC co-founder Davie as viewing the tournament as "[e]ssentially no-holds barred, may the best man win"). The rules of the early UFCs varied, but they were extremely minimal. See Meltzer, *First UFC*, *supra* note 32. Eye-gouging, however, was always prohibited. *Id.*

36. See SNOWDEN, *supra* note 25, at 38–39 (describing the original marketing approach of the early UFC events as promoting "blood and violence[]").

37. See Meltzer, *First UFC*, *supra* note 32. See also CLYDE GENTRY III, NO HOLDS BARRED: ULTIMATE FIGHTING AND THE MARTIAL ARTS REVOLUTION 51–52 (Milo Books 2005) (2002) (discussing first UFC event); WERTHEIM, *supra* note 17, at 56.

38. Todd Martin, *UFC Retrospective Series Part 2: The Dark Days*, CBSSPORTS.COM, May 25, 2009, <http://www.cbssports.com/mma/story/11786392> (explaining that early UFCs were promoted as "bloody spectacle" rather than a sport).

39. On the videotape release of the first UFC event, the tape's sleeve boasts that victory in the matches was attainable by "knockout, submission, or death." Meltzer, *First UFC*, *supra* note 32.

40. For example, at *UFC 8*, a grossly overweight competitor named Thomas Ramirez ludicrously claimed to have been undefeated in 400 fights. Ramirez, a bouncer from Puerto Rico, was matched against Don Frye, a former collegiate wrestler who also had trained in boxing. Frye knocked Ramirez unconscious in seconds in an embarrassingly uncompetitive contest. See ULTIMATE FIGHTING CHAMPIONSHIP CLASSICS, VOL. 8 (Lions Gate 1996) (*UFC 8* event video including the Frye-Ramirez bout).

accomplished two things: (1) it convinced some fans and legitimate athletes that a true sport could arise and evolve from the UFC's imperfect start, and (2) it convinced various politicians and sportswriters that the early UFC (and MMA) was a disgusting spectacle with no place in American sporting life.

Regarding the latter, Senator John McCain denounced MMA as a "visual feast of broken bones and blood"⁴¹ and more famously as "human cockfighting."⁴² Others similarly disapproved.⁴³ As a result of political pressure, cable companies refused to carry UFC pay-per-views—undermining the revenue base for the company and threatening the viability of the organization.⁴⁴ Nonetheless, while political and commercial troubles menaced the UFC, the underlying sport of MMA began to evolve along several lines.

First, MMA competitors began to acquire cross-disciplinary skills. Kickboxers learned to wrestle, wrestlers learned BJJ, BJJ artists learned to kickbox, and so on. Generally these early cross-disciplinary participants would hail from one fight discipline but pick up defensive capability in other disciplines in order to compete effectively. In other words, a kickboxer would learn to defend against a wrestler's takedowns and a BJJ artist's submission attacks, a wrestler would learn to avoid strikes and submissions, a BJJ artist would learn to defend against strikes and takedowns, and so forth. By developing such cross-disciplinary skills, a competitor would no longer be totally vulnerable to a practitioner of a foreign art should the latter gain an advantageous position in a particular match. As such, bouts were more likely to be closely contested and, thus, attractive to paying fans. As one might expect, the physical size of the competitors began to play a larger role in determining bout outcomes as the sport evolved and participants familiarized themselves with more fighting techniques. The importance of weight classes in promoting competitive bouts became self-evident and they were soon used.⁴⁵

41. *Health and Safety of Professional Boxing: Hearings Before the Comm. on Commerce, Science, and Transp.*, 103d Cong. 2 (1994) (statement of Sen. John McCain about MMA).

42. Davies, *supra* note 1 (reporting that McCain referred to MMA as "human cockfighting").

43. See, e.g., James Dao, *Senate Chief in Albany, Reversing Himself, Says He Backs a Ban on Ultimate Fighting*, N.Y. TIMES, Feb. 11, 1997, at B7 (quoting ban advocate State Senator Roy M. Goodman describing MMA as "human cockfighting, a disgraceful, animalistic and disgusting contest which can result in severe injuries to contestants"). See also Woody Paige, *State's Deadly Sin: No Commission, No Consensus*, DENVER POST, Dec. 1, 1995, at C1 (describing MMA as "a disgusting display of . . . pay-per-view human cockfighting").

44. Greg Beato, *Bleeding into the Mainstream*, REASON (October 2007), available at <http://www.reason.com/news/show/122016.html> (explaining that, because of widespread political denunciations of MMA, in 1997 large cable operators such as TCI and Time Warner refused to show UFC pay-per-view events and almost drove the UFC out of business).

45. The UFC first used weight classes at UFC 12. There were two weight classes: a class for competitors 200 pounds or more, and a class for competitors less than 200 pounds. See ULTIMATE FIGHTING CLASSICS, VOL. 12 (Lions Gate 1997) (video of the UFC 12 event). See also Sean Lealos,

Second, MMA promoters (including the UFC) began to realize that various rules—e.g., a detailed list of certain prohibited moves (groin strikes, small joint manipulation, head butts, etc.), an interventionist referee, etc.—made the fights both more entertaining and competitive, without compromising the underlying appeal of the contests. For example, after Royce Gracie left the UFC, the next set of dominant competitors were powerful wrestlers who would take their opponents to the ground, lay on top of them, and pummel them with head butts or infrequent short punches. Such matches lacked excitement (and the requirement of much skill beyond the ability to perform a takedown), and thus head butts were soon prohibited.⁴⁶ Similarly, referees were endowed with the authority to “stand up” the competitors if little fighting effort was being made on the ground, giving an advantage to striking disciplines.⁴⁷ Another rule change that benefitted striking—which was, and is, widely believed to be attractive to casual and devoted fans alike—was to require lightweight, open-fingered gloves (to permit grappling).⁴⁸ This requirement was adopted because striking an opponent’s body with a bare hand was extremely likely to result in a hand injury that could end an otherwise competitive and exciting bout.⁴⁹

Third, MMA became more palatable to legislators and regulators because of the adoption of the rules discussed above. After 1997—when most cable distributors, because of political pressure, refused to carry MMA cards on pay-per-view—MMA entered a “dark age” where the survival of the sport in the United States was in question.⁵⁰ By the late 1990s, promoters believed that the sport’s survival depended on persuading sport regulators in New Jersey and Nevada that MMA had progressed from a no-rules spectacle to a rule-bound sport deserving of official sanction.⁵¹ In 2001, the sport was sanctioned by the Nevada State Athletic Commission (“NSAC”); shortly

DVD Review: UFC 11 and 12, CHUD.COM, March 11, 2009, <http://www.chud.com/articles/articles/18455/1/DVD-REVIEW-UFC-11-and-12/Page1.html>; Matt McEwen, *The History of the UFC: UFC XII—Judgment Day*, 411MANIA.COM, July 9, 2007, http://www.411mania.com/MMA/video_reviews/56843/The-History-of-the-UFC-UFC-XII---Judgement-Day.htm.

46. DAVID MAYEDA & DAVID CHING, *FIGHTING FOR ACCEPTANCE: MIXED MARTIAL ARTISTS AND VIOLENCE IN AMERICAN SOCIETY* 146 (2008) (explaining that former UFC champion Randy Couture believed that head butts were wisely banned because they require no skill).

47. MMA Terms and Definitions (defining “stand-up rule”), http://elitemmareferees.com/index.php?option=com_content&view=article&id=44&Itemid=53 (last visited Jan 20, 2010).

48. See, e.g., SNOWDEN, *supra* note 25, at 87.

49. *Id.* (explaining optional and then mandatory use of gloves, which “protects the striker’s hand, not the recipient’s head”).

50. See, e.g., David Plotz, *Fight Clubbed*, SLATE, Nov. 17, 1999 (describing late 1990s UFC as “increasingly desperate” and having “gone underground”).

51. SNOWDEN, *supra* note 25, at 143–47.

thereafter, cable companies agreed to again show MMA on pay-per-view.⁵² Four years later, in 2005, *The Ultimate Fighter* re-introduced millions to contemporary MMA; seven years later, in 2008, UFC pay-per-view revenue exceeded that of boxing.⁵³

B. Contemporary Players

Understanding contemporary MMA necessarily requires familiarity with its cast of characters, which are briefly described below. The first category consists of the athletes themselves.⁵⁴ Except for those fighters at the very top of the profession, the financial rewards are extremely modest.⁵⁵ Indeed, even for some athletes competing in the UFC—the most successful and wealthiest domestic promotional organization—payouts per fight, with only a few fights a year for a given athlete, are under \$10,000. For example, at *UFC 100*, the biggest MMA event in history, three fighters—Paulo Thiago, Matt Grice, and T. J. Grant—received fight purses of \$8,000, \$7,000, and \$5,000 respectively.⁵⁶ And in a recent UFC card televised on *Spike TV*, the loser of the *main event*, Melvin Guillard, received only \$14,000.⁵⁷

Few fighters possess the necessary skills to capably manage their professional interests. As such, the second category of MMA player consists of the managers and agents who handle the administrative and business side of a fighter's career—such as striking deals with MMA promoters or

52. The first sanctioned MMA show in New Jersey was not held by the UFC; it was held by a promotional organization called the IFC. *Id.* at 147. Before being acquired by Zuffa—see Miller, *supra* note 2—the UFC, under its prior ownership, held its first event sanctioned by New Jersey in November 2000. *Id.* Accordingly, it is not the case that MMA had no rules and no sanctioning before Zuffa acquired the UFC, as is commonly believed. It is true that in 2001, when Zuffa acquired the UFC, MMA was not yet sanctioned in Nevada. See, e.g., Todd Martin, *UFC Retrospective Series Part 3: The New Ownership*, CBSSPORTS.COM, June 1, 2009, <http://www.cbssports.com/mma/story/11809856> (reporting that Zuffa purchased the UFC in January 2001 and “scored victories” when Nevada subsequently sanctioned MMA). On the heels of Nevada’s sanctioning of MMA, cable pay-per-view providers agreed to carry UFC events. *Id.*

53. See Gregory & Osborne, *supra* note 9.

54. Most fighters do not train alone: Many are affiliated with MMA training gyms, from whom each fighter receives athletic instruction, training, and in-fight advice.

55. See, e.g., Gary Wimsett, *Follow the Money*, FIVEOUNCESOFPAIN.COM, May 12, 2009, <http://fiveouncesofpain.com/2009/05/12/follow-the-money/> (explaining that many fighters “either eke out a modest living or struggle from fight to fight”).

56. *UFC 100 Fighters Salaries: Lesnar and St-Pierre Get Top Paydays in \$1.8 Million Payroll*, MMAJUNKIE.COM, July 13, 2009, <http://mmajunkie.com/news/15498/ufc-100-fighters-salaries-brock-lesnar-and-georges-st-pierre-top-earners-from-x-x-million-payroll.mma>. Such pay does not include endorsement contracts, profit-sharing on pay-per-revenues, or other compensation. But the vast majority of professional fighters are unlikely to receive significant, if any, compensation outside of their fight purses.

57. *UFC Fight Night 19 Fighters Salaries: Nate Quarry Tops Event's \$476,000 Payroll*, MMAJUNKIE.COM, Sept. 21, 2009, <http://mmajunkie.com/news/16263/ufc-fight-night-19-fighters-salaries-nate-quarry-tops-events-476000-payroll.mma>.

sponsors—often for a percentage of the fighter’s purses or sponsorship deals.⁵⁸ In addition to business acumen, desirable managers/agents are expected to have fertile relationships with MMA promoters and/or potential sponsors. Because fight purses are not particularly large, most fighters need the extra money earned from even modest sponsorship arrangements. Unfortunately, many unestablished fighters—either those beginning their careers or those who lack the talent to compete at the sport’s highest levels—likely lack capable, if any, representation to assist them in their professional development.

The third category of MMA actor consists of the promotional organizations (often called “promotions” or “promoters”), which fund, promote, and stage MMA events.⁵⁹ Such promotional organizations contractually engage fighters to compete on their cards, and the contractual terms between a promotion and a fighter can vary significantly depending on the organization and the fighter signing the agreement.⁶⁰ By far the largest current promoter in the United States is the UFC. The UFC is privately held and does not release its financial information, but in 2008, Forbes estimated the company to be worth \$1 billion.⁶¹ Other domestic promoters include Strikeforce, which currently has a broadcast deal with CBS, and Bellator Fighting Championship, a tournament-centric MMA promotion.⁶²

Regulatory officials associated with licensing, rule-making, oversight, and discipline constitute the fourth category of MMA player. Regulation in MMA is an active enterprise, with promoters routinely interfacing with regulators on compliance matters. The UFC, for example, employs former Nevada State Athletic Commission executive director Marc Ratner as its Vice President of Regulatory Affairs.⁶³

Few dispute that state sanction and regulation of MMA was pivotal in the sport’s re-emergence and burgeoning cultural acceptance, and there is little

58. Cf. NEV. ADMIN. CODE § 467.0028 (2009) (defining “manager”). See also Mike Harris, *End of an Era: Fighter-Manager Handshake Deals Die as MMA Grows*, SHERDOG.COM, Jan. 13, 2009, <http://www.sherdog.com/news/articles/2/End-of-an-Era-Fighter-Manager-Handshake-Deals-Die-as-MMA-Grows-15757> (discussing role of managers and agents); Gary Wimsett, *Choosing Management: An MMA Fighter’s Guide*, FIVEOUNCESOFPAIN.COM, May 27, 2009, <http://fiveouncesofpain.com/2009/05/27/choosing-management-an-mma-fighters-guide> (discussing importance of selecting a quality manager).

59. Cf. NEV. ADMIN. CODE § 467.0031 (2009) (defining “promoter”). See also *id.* § 467.052 (promoter must demonstrate, *inter alia*, “financial stability” to obtain license).

60. See, e.g., Gary Wimsett, *Promotions and the Use of Exclusive Fighter Agreements in MMA*, FIVEOUNCESOFPAIN.COM, May 19, 2009, <http://fiveouncesofpain.com/2009/05/19/promotions-and-the-use-of-exclusive-fighter-agreements-in-mma> (discussing promotional contracts).

61. See Miller, *supra* note 2, at 81.

62. Bellator Fighting Championships, <http://bellator.com> (last visited Jan 14, 2010).

63. Press Release, UFC, Marc Ratner to Join Zuffa, LLC, (Mar. 24, 2006) (<http://www.ufc.com/index.cfm?fa=news.detail&gid=2377>).

question that sensible regulatory oversight will remain crucial to MMA's continued development. However, an ever-present concern with regulators is that they will be beholden, informally or formally, to those who they are regulating.⁶⁴ Like elsewhere in the modern regulatory state, it is difficult to limit the influence powerful private actors might have on regulators. In addition, regulators are state employees, and the state has a financial interest in holding attractive bouts because the state collects fees and taxes in connection with MMA events. Accordingly, the regulator is often not a fully disinterested party. While some existing regulation has attempted to address this concern, see Part III.C., *infra*, as not-yet Justice Louis Brandeis said almost a century ago, "[s]unlight is said to be the best of disinfectants."⁶⁵ Happily, MMA bloggers and journalists have taken this principle to heart, practicing an acute vigilance in reporting and criticizing regulatory conduct perceived as incompetent or biased.⁶⁶ So it should continue.

III. The Legitimacy of Mixed Martial Arts

For some, MMA still appears more like barbarism than sport; recently an opinion piece in *The Boston Globe* called it "human dog-fighting,"⁶⁷ and in New York, professional MMA remains illegal.⁶⁸ While MMA certainly may

64. See, e.g., Ian Ayres & F. Clayton Miller, "I'll Sell It to You at Cost": *Legal Methods to Promote Retail Markup Disclosure*, 84 NW. U. L. REV. 1047, 1070 n.87 (1990) ("Regulated agencies . . . can be 'captured' by the very firms they are mandated to regulate."). See generally Sam Peltzman, *The Growth of Government*, 23 J.L. & ECON. 209 (1980) (discussing administrative capture); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971) (discussing administrative capture).

65. LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY, AND HOW THE BANKERS USE IT* 92 (Frederick A. Stokes Co., 1914) (1913).

66. For example, when California State Athletic Commission Executive Officer Armando Garcia resigned in November 2008, one might expect encomiums from the MMA community, as Mr. Garcia "was instrumental in the passage of MMA regulations in California in late 2005 and oversaw the first regulated event in March 2006" Loretta Hunt, *Garcia Resigns from CSAC*, SHERDOG.COM, Nov. 10, 2009, <http://www.sherdog.com/news/news/garcia-resigns-from-csac-15087>. Not so; Garcia was roundly criticized as incompetent and his resignation cheered. See, e.g., E-mail from Zach Arnold, Publisher, FightOpinion.com, to author (Sept. 26, 2009 18:33 CST) (summarizing reasons why MMA observers were critical of Garcia) (on file with author); Posting of Cannon Jacques to BloodyElbow.com, <http://www.bloodyelbow.com/2008/11/9/657258/armando-garcia-leaves-csac> (Nov. 10, 2008, 08:24 EST) (comments applauding Garcia's departure).

67. Peter Funt, Op-Ed., *The Disturbing Appeal of 'Human Dogfighting'*, BOSTON GLOBE, July 29, 2009, at Letters 10 (citation omitted) (criticizing MMA). Dogfighting and cockfighting analogies, while rhetorically colorful, are inapt. Animals are incapable of consenting to the risk of harm to pursue athletic ends; humans are.

68. N.Y. UNCONSOL. LAW § 8905-a (McKinney 2008) (banning professional "combative sports," which includes MMA). A movement is afoot, however, to lift the ban. See, e.g., Chris Parry, *Legislative Deadlock Places Hurdle Before New York MMA Regulation Bill*, VANCOUVER SUN, June 23, 2009, available at <http://www.vancouversun.com/Sports/Legislative+deadlock+places+hurdle+before+York+regulation+bill/1725748/story.html> (discussing status of efforts to change NY ban on MMA).

not appeal to all on grounds of taste, this author oft-made claim that MMA is somehow inherently illegitimate in any meaningful sense of the term. MMA is a legitimate sport/activity, meaning that, in its current incarnation, MMA does not offend customary notions of what Americans accept as sport or entertainment. In comparative terms, MMA is no different (and certainly not more objectionable) than many other forms of sport and entertainment found flourishing on the broad stage of American culture.⁶⁹

A. Social Utility

Societies have long prized athletic valor and physical competition—i.e., sport—for reasons large and small.⁷⁰ Because few dispute that sport *qua* sport is socially valuable, only a brief acknowledgement of its utility is necessary here. To wit, athletics promote many things considered positive, such as recreational satisfaction and physical fitness.⁷¹ But sport is more than enjoyable exertion; it is also competitive, goal-oriented, and rule-bound. The competitive aspect of sport encourages practice and commitment to craft in pursuit of the maximum development of one's potential, so that victory and/or the meeting of performance goals are more likely.⁷² For the same reason, sport also promotes strategic and tactical thinking, and often the acceptance of instruction from a more knowledgeable practitioner. Moreover, sport familiarizes athletes with the notion of rules, and seems likely to instill an appreciation for the benefits of observing agreed-upon rules; i.e., fair play. These lessons of sport—pushing oneself, disciplined dedication to craft, improved strategic thinking, understanding the value of fair play—have long been believed (or hoped) to beneficially affect the athlete's outside-of-sport conduct.⁷³ Sport's lessons are further hoped to exert a positive, if more

69. My analysis is pragmatic and comparative by design. I deliberately do not make or consider the libertarian-style argument that, even if we assume MMA utterly lacks utility and is life-threateningly dangerous, it is nonetheless a legitimate activity to the extent that it reflects the choice of the two consenting contestants. It is not that I necessarily reject such an argument; rather, I simply think it need not be reached. Given MMA's current characteristics, there is in my view no persuasive claim that it is materially different than the other sports and activities American society currently accepts as legitimate.

70. See, e.g., GRAHAM MCFEE, *SPORT, RULES AND VALUES: PHILOSOPHICAL INVESTIGATIONS INTO THE NATURE OF SPORT* 129–77 (2004) (discussing value of sport). See also generally WILLIAM JOHN MORGAN ET AL., *ETHICS IN SPORT* (2001).

71. See, e.g., *Stimson v. Carlson*, 11 Cal. App. 4th 1201, 1206 (Cal. Ct. App. 1992) (describing sport as a “socially desirable activity that improves the mental and physical well-being of its participants”).

72. See, e.g., David Horton, *Extreme Sports and the Assumption of Risk: A Blueprint*, 38 U.S.F. L. REV. 599, 614 (2004) (citation omitted) (noting that sport fosters “self-monitoring, goal-setting, problem solving, and self-reward”).

73. Cf. EDWARD J. SHEA, *ETHICAL DECISIONS IN SPORT: INTERSCHOLASTIC, INTERCOLLEGIATE, OLYMPIC AND PROFESSIONAL* 132 (1996) (discussing the positive “self-realization” aspect of sport). Certainly there exist criticisms of how modern sports are practiced—

modest, influence on spectators, in addition to the vicarious pleasure fans experience when watching—often with friends or family—a favored sport, team, or athlete.

For these reasons and others, American society accepts the presumptive utility of sport. Combat sports historically have had an additional, acutely instrumental justification: utility in preparing practitioners for actual military combat, the ancient kind, fought with hand to hand weapons.⁷⁴ Today, of course, unarmed combat is of lesser military value than it was hundreds or thousands of years ago (although the United States Army Modern Combatives Program does teach a modified form of MMA).⁷⁵ However, training and competing in combat sports—particularly multidisciplinary MMA—does increase a participant's ability to defend himself/herself in a situation where (s)he may very well need to intentionally harm an attacker, which has obvious instrumental value.

B. Objections and Responses

Against the broad presumptive utility of sport and the instrumental self-defense utility of the specific sport of MMA, challenges to its legitimacy should be considered. Objectors rarely present their complaints in formal terms. Instead, critics brand MMA as illegitimate because it is “disgraceful” or “bloodsport,” or some similarly pejorative term designed to end, rather than begin, a considered examination of the question.⁷⁶ Nonetheless, this article identifies and considers below four potential objections to MMA's legitimacy: (1) the excessive danger of the sport, (2) the lack of skill required, (3) the injurious intent of its competitors and a concomitant erosion of empathy and anti-violence norms, and (4) the uninformed choices made by its practitioners.

1. *Excessive Danger*

Because virtually all sports pose some physical risk to participants, risk alone does not undermine the legitimacy of a sporting contest between willing athletes. Yet as the physical risk of a given sport becomes more acute, objections to the propriety of the sport increase.⁷⁷ Thus, perhaps the most

particularly the “win at all costs” mentality—but such criticism addresses sport's excesses, not the fundamental utility and legitimacy of sport.

74. See, e.g., THOMAS ELYOT, *THE GOVERNOR* 60 (1962) (praising wrestling for use “in wars or other necessity”); POLIAKOFF, *supra* note 17, at 23 (noting that wrestling “tests an array of martial virtues: cunning, boldness, courage, self-reliance, and perseverance”).

75. Michelle Tan, *Lords of the Ring*, *ARMY TIMES*, Dec. 12, 2006, available at <http://www.armytimes.com/legacy/new/1-292925-2416338.php> (describing United States Army Combatives Program).

76. See *supra* notes 42 and 43.

77. For example, at the turn of the century, college football was considered excessively dangerous, frequently criticized, and threatened with bans by state legislatures. See Kevin E. Broyles,

popular legitimacy objection to MMA is that it is exceptionally dangerous, as compared to other sports, and that its danger quotient exceeds some intuitive limit about how dangerous a legitimate athletic contest should be.

Available evidence and considered examination reveal, however, that MMA is vastly less dangerous than it is perceived by critics to be. For example, for all the concern about the sport being deadly, in the sixteen years that MMA has been practiced in the United States, there has been exactly *one* confirmed bout-related death.⁷⁸ Other sporting activities—such as hunting, rodeo, boating, bicycling, and swimming—have had far more fatalities.⁷⁹

Of course, the relevant comparison is not absolute deaths, but deaths per some quantum of activity; i.e., a fatality rate. One way to express a fatality rate is deaths per 1,000 participants—and many are surprised to learn that, using that metric, numerous mainstream sports have significant fatality rates.⁸⁰ There is currently no reliable data, however, on the precise volume of MMA activity (in terms of either aggregate minutes or total participant count). Accordingly, one cannot today calculate an MMA fatality rate to compare to the fatality rates of other sports. Even if one were to reliably estimate the total volume of MMA activity to date, it might be too small to be confident that the fatality rate was the true long-term rate.

Nonetheless, some inferences can be drawn. First, regarding sports or athletic pursuits that have comparatively high numbers of fatalities—such as hunting, horse-racing, rodeo, car-racing, mountaineering, and skydiving—MMA is almost certainly less deadly. The reason is because in those sports,

NCAA Regulation of Intercollegiate Athletics: Time for a New Game Plan, 46 ALA. L. REV. 487, 489–90 & n.16 (1995) (citations omitted) (discussing fatalities in turn of the century college football and the early history of the NCAA). The IAAUS (the forerunner to the NCAA) was established to formalize rules and improve game safety. *Id.* at 490.

78. David Meltzer, *MMA Fighter Vasquez Dies Weeks After Fight*, YAHOO! SPORTS, Dec. 2, 2007, <http://sports.yahoo.com/mma/news?slug=dm-fighterdeath120207&prov=yhoo&type=lgns>. In the 1990s, in an unsanctioned bout in Kiev, Ukraine, an American named Douglas Dredge died following a match, but there were indications of a pre-existing medical condition. *Id.*

79. In the year 2000 alone, for example, there were approximately ninety hunting fatalities, 800–900 bicycling fatalities, 800–900 boating fatalities, and over 1,000 swimming fatalities. See James A. Swan, *Peaceful Arms: Hunting and Sport Shooting*, 8 TEX. REV. L. & POL. 189, 192–93 (2003) (collecting fatality data). See also Paul Harasim, *Riding Out the Pain*, LAS VEGAS REVIEW-JOURNAL, Dec. 10, 2004, available at http://www.reviewjournal.com/lvrj_home/2004/Dec-10-Fri-2004/news/25435607.html (reporting on a research study finding fourteen rodeo deaths between 1981 and 2000).

80. Sports with significant fatality rates include horse-racing (12.8 fatalities per 1,000 participants), sports parachuting (12.3 fatalities per 1,000 participants), hang-gliding (5.6 fatalities per 1,000 participants), mountaineering (5.1 fatalities per 1,000 participants), scuba diving (1.1 fatalities per 1,000 participants), motorcycle racing (0.7 fatalities per 1,000 participants), and college football (0.3 fatalities per 1,000 participants). See Robert J. McCunney & Pearl K. Russo, *Brain Injuries in Boxing*, 12 THE PHYSICIAN & SPORTS MED. J. 53, 57 (1984) (collecting fatality data). See also Thomas A. Gonzales, *Fatal Injuries in Competitive Sports*, 146 J. AM. MED. ASS'N 1506, 1510–11 (1951) (concluding that, from 1918 to 1950, boxing produced fewer deaths, proportionately, than baseball or football).

the fatality risk arises from exposure to a massively powerful instrumentality (e.g., a gun, a car, a horse, or a mountain) where loss of control of the instrumentality exposes the athlete to profound and life-threatening physical danger. To the extent that loss of control of the instrumentality is systematically inherent in the sport—e.g., that it is simply impossible for a jockey to always control and stay on his horse—*fatal* injuries are a likely result. In contrast, in combat sports, participants face risk of a lower magnitude (e.g., getting punched is less dangerous than getting trampled by a horse), but a higher frequency (e.g., boxers get hit many times each fight, while jockeys usually stay on their horses). Accordingly, combat sport risk tends to correlate with accumulated blows.⁸¹ While single and accumulated blows can be damaging in other ways, they pose less overall *fatality* risk than does infrequent exposure to profound risk (such as a parachute not opening during a jump).⁸²

Certainly, MMA puts its participants at considerable risk for certain non-fatal injuries,⁸³ but recent research suggests that it is not appreciably more dangerous than other combat sports commonly accepted as legitimate.⁸⁴ Indeed, even absent long-term studies, MMA is overwhelmingly likely to be *far* less dangerous than boxing, which poses significant risk of brain injury. Boxing involves considerably more blunt trauma to the head over a longer period of time, and accumulated trauma is believed to be the driver of long-term damage.⁸⁵ In contrast, accumulated head trauma in MMA is much less likely, for several reasons. First, MMA incorporates maneuvers other than striking, so in a given MMA bout, far less blows will be thrown and absorbed than in a comparable boxing or kickboxing match of similar length. Second, MMA bouts are shorter than boxing matches, with correspondingly fewer strikes exchanged. Third, MMA has fight-finishing offense other than knockouts; bouts can end via submissions—moves that force an opponent to

81. See Robert G. Morrison, *Medical and Public Health Aspects of Boxing*, 255 J. AM. MED. ASS'N 2475, 2476–77 (1986) (explaining that brain damage in boxing rises with accumulation of blows). See also Gregory H. Bledsoe et al., *Incidence of Injury in Professional Mixed Martial Arts Competitions*, 5 J. SPORTS SCI. & MED. 136, 140 (2006) (concluding that the “giving and receiving of high velocity blows seems to be the best correlation of whether a sport will have an increased risk of [non-fatal] injury.”).

82. Kevin M. Walsh, *Boxing: Regulating A Health Hazard*, 11 J. CONTEMP. HEALTH L. & POL'Y 63, 67 (1994) (noting that few boxers “die due to injuries sustained while in the ring” and that “[t]he fatality rate among American boxers . . . is similar to or lower than death rates among athletes in other high-risk sports such as sky diving or motorcycle racing.”).

83. Like in boxing, facial lacerations and hand injuries in MMA are very common. See Bledsoe et al., *supra* note 81, at 137–39 (detailing relatively high frequency of facial lacerations and hand injuries in MMA). See also Morrison, *supra* note 81, at 2475 (discussing relatively high frequency of facial lacerations and hand injuries in boxing). Facial lacerations and hand injuries are not considered serious because they pose little risk of long-term damage. *Id.*

84. Bledsoe et al., *supra* note 81, at 140.

85. See McCunney & Russo, *supra* note 80, at 57; Gonzales, *supra* note 80, at 1510.

surrender before actually suffering a serious injury—resulting in decisive victory without further damaging one’s opponent.⁸⁶ Fourth, MMA fighters are less likely than boxers or kickboxers to suffer extended beatings when overmatched. A boxer or kickboxer has a ten-count to recover and may accordingly survive the knockdown blow, but continue on to suffer several rounds of additional punishment.⁸⁷ Since MMA gloves are smaller than boxing gloves and there is no ten-count,⁸⁸ if an MMA fighter becomes momentarily disoriented or knocked down after a blow, he is more likely to lose the bout immediately than is a boxer or kickboxer.

The point, of course, is not that MMA is the safest sport in the country. It is not. Rather, the point is that American society accepts (1) that sport in general has value and combat sports have additional instrumental military and self-defense value; (2) that virtually all sport and athletic activity pose risks, which vary depending on the particular activity; and (3) that, accordingly, we do not interfere with an individual’s choice to engage in or watch a given sport or activity unless it is so lacking in utility or so acutely dangerous that society is simply unwilling to tolerate its practice.⁸⁹ Compared to the wide range of sporting activity Americans accept as legitimate, MMA is not an outlier on either utility or danger grounds.

2. *No Skill*

A second objection to MMA is that it involves little or no skill, that it is simply talentless brawling that lacks the general utility of sport (which, by definition, requires skill) and the specific utility of combat sport (which, by definition, requires knowledge of particular offensive and defensive techniques), and thus needlessly exposes its participants to danger. This argument, essentially, treats MMA as equivalent to the imaginary game of “head-falling.” Head-falling is a contest between two men to see who can fall from a higher distance onto a concrete floor on one’s head without losing consciousness. The falls begin low, at one foot, and then increase at six inch intervals until one man is unconscious. Head-falling requires no skill. It’s

86. Cf. Sam Caplan, *Demian Maia: The Gentleman Black Belt*, FIVEOUNCESOF PAIN.COM, Feb. 17, 2009, <http://fiveouncesofpain.com/2009/02/17/demian-maia-the-gentleman-black-belt/> (quoting top middleweight fighter Demian Maia as preferring, if possible, to win by submission “without a scratch to me or my opponent”).

87. See, e.g., NEV. ADMIN. CODE § 467.740 (2009).

88. See, e.g., *id.*

89. For example, gunfighting, i.e., consensual dueling, might have military or self-defense utility, but is far too dangerous for society to permit. Indeed, there is little doubt that consensual gunfighting—with real bullets, no protective gear, and to the death—might attract (1) talented risk-seekers willing to risk death for the thrill of competition and financial reward, and (2) people eager to watch it. Yet for an array of reasons (which we need not explore here) American society does not normally condone or permit choices where death is certain or highly likely. MMA does not fall within that category.

simply a contest that exposes its participants to injury, and thus there is little reason to consider it a legitimate activity to perform or watch.⁹⁰

It is easy to see why the “no skill, only danger” objection may have appeared valid in the early days of MMA. Many early competitors lacked virtually anything appealing: skill, fitness, brains, or charisma. Today, however, the claim that MMA does not require skill—that it is like the imaginary game of head-falling—is demonstrably absurd. MMA participants include All-American and national champion wrestlers, national and world jiu-jitsu champions, former pro boxers, and Olympic athletes.⁹¹ Current UFC welterweight champion Georges St. Pierre recently won Sportnet’s Canadian Athlete of the Year for the second year in a row, defeating NHL wunderkind Sidney Crosby.⁹²

3. *Injurious Intent and Erosion of Norms*

Another objection to MMA is that the sport is illegitimate because, unlike other athletic competitions, harm toward one’s opponent is intended, rather than incidental. The concern is that condoning and promoting the intentional injuring of other human beings fosters, among both participants and spectators, a diminished concern for the health and well-being of others. Normally, society has strong prohibitions against intentionally injuring others, which are relaxed only in extreme circumstances, such as when one is acting in defense of one’s person, family, property, or country. Intentional harm, in most other cases, is severely punished; here, the objection goes, it is glorified, which, when exposed to a broad audience, could undermine empathy norms and promote violent behavior.

The intent to harm in MMA is explicitly contingent upon the other athlete’s consent and constrained by clear rules. In other words, it is a *sporting* intent to harm, to achieve victory in an agreed-upon circumstance, rather than a malicious intent to harm the opponent. Intentional injury in combat sport—and thus the violence to which observers are exposed—occurs because the participants are *voluntarily* subjecting themselves to rule-governed

90. Cf. *supra* note 69 (explaining that I do not here assert a libertarian defense of consensual activities as by definition legitimate because such an argument is unnecessary, given the compelling pragmatic and comparative justifications of MMA’s legitimacy).

91. See, e.g., Fighter Detail: Brock Lesnar, <http://www.ufc.com/BrockLesnar> (last visited Oct. 2, 2009) (explaining that UFC Heavyweight Champion Brock Lesnar is a former national collegiate wrestling champion and a four-time All American); Fighter Detail: B. J. Penn, <http://www.ufc.com/BJPenn> (last visited Oct. 2, 2009) (explaining that UFC Lightweight Champion B.J. Penn is a former jiu-jitsu world champion); Fighter Detail: Marcus Davis, <http://www.ufc.com/MarcusDavis> (last visited Oct. 2, 2009) (explaining that UFC welterweight Marcus Davis is a former professional boxer); Fighter Detail: Dan Henderson, <http://www.ufc.com/DanHenderson> (explaining that UFC middleweight Dan Henderson is a former Olympic wrestler).

92. Two in a Row for GSP as Canadian Athlete of the Year, <http://www.ufc.com/index.cfm?fa=news.detail&gid=32930> (last visited December 26, 2009).

intentional harm under *very* particular circumstances (e.g., a discrete bout governed by a referee).

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. Moreover, if one were to insist that MMA is illegitimate on those grounds, the argument would encompass far more than just MMA. Under this argument, all other full-contact sports would be swept up as illegitimate, almost certainly including football, where the defensive object is to *forcefully* ground your opponent.⁹³ In addition, in 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.⁹⁴ Indeed, action movies, violent video games, and war footage involve neither consenting players nor clear contextual bounds on the appropriateness of harming others, aside from vague notions that the recipients of the violence deserve it.⁹⁵ These other examples of violence in American life impart a far more troubling message about the propriety of intentional harm than a consensual rule-bound contest between trained athletes overseen by a referee. Acceptance of large swathes of the American sports, entertainment, and media landscape as legitimate requires a similar acceptance of MMA.

4. *Uninformed Choices*

The last objection challenging MMA's legitimacy arises from the concern that participants are making uninformed, irrational, or otherwise sub-optimal choices in subjecting themselves to the risks associated with the activity. Choice deficiencies are a real concern, but one partial cure is to require, by regulation, that an expert's risk assessment—i.e., a physician's or regulatory official's—be substituted for that of the participant's on matters regarding whether the participant is capable or healthy enough to fight, to continue an existing fight, or even to train. In many states, precisely such regulations exist.⁹⁶

93. See, e.g., Dean Richardson, *Player Violence: An Essay on Torts and Sports*, 15 STAN. L. & POL'Y REV. 133, 134 (2004) (quoting former Oakland Raider Jack Tatum as saying his best hits "border on felonious assault").

94. Cf. Clay Calvert, *The Two-Step Evidentiary and Causation Quandary for Medium-Specific Laws Targeting Sexual and Violent Content: First Proving Harm and Injury to Silence Speech, then Proving Redress and Rehabilitation Through Censorship*, 60 FED. COMM. L.J. 157, 160–61 (2008) (citations omitted) (noting broad prevalence of violent images on television, the Internet, and in movies).

95. Cf. *American Amusement Machine Ass'n v. Kendrick*, 244 F.3d 572, 579 (7th Cir. 2001) ("When Dirty Harry or some other avenging hero kills off a string of villains, the audience is expected to identify with him, to revel in his success, to feel their own finger on the trigger.").

96. See *infra* Part III.A.

Nonetheless, even the most optimistic proponents of regulation would concede that regulation is unlikely to ensure optimal decision-making. Even strong regulation may be unable to overcome cognitive biases⁹⁷ that afflict the young adult males who overwhelmingly constitute those interested in taking up MMA, or to counterweigh financial incentives that might impel poor young men to take physical risks they would not otherwise take.

A genuine concern about choice deficiencies should not rob us of perspective. First, it should not be ignored that some participants may be making a choice that seems unwise to third-party observers, but that actually is consistent with the choice-maker's *true* preference. Second, the risk of imperfect choices—e.g., choices made for short-term circumstantial reasons, choices impaired by cognitive biases, or choices made absent necessary information—are no more likely to occur in the MMA context than in other areas of life that may have greater, and possibly injurious consequences for poor decision-makers. American tradition prizes individual choice, even absent certainty that these choices are not in some way burdened by circumstantial considerations, cognitive biases, or incomplete information. Consumption choices of tobacco, alcohol, and fatty foods are an obvious example. While those goods are regulated, American society at large accepts their consumption, notwithstanding evidence that some players may very well be choosing to smoke, drink, or eat donuts because of decisions based on cognitive biases. Similarly, it is accepted that lower-income individuals may be more likely to choose dangerous non-sporting occupations that they might have avoided were they financially better off. It is unpersuasive to brand MMA as illegitimate merely because the choice process may not be perfect. Few choices are immune to that criticism.

IV. Regulating Mixed Martial Arts

Where present, MMA regulation is largely state-based. The various state legislatures pass laws regulating MMA and commonly delegate authority to an administrative body—often a state athletic commission/board—to perform rule-making, licensing, operational, and enforcement functions.⁹⁸ MMA

97. Cognitive biases “are subconscious mental processes that impair rational thought-processes and ultimately lead to ‘irrational’ choices.” Michael A. McCann, *It's Not About the Money: The Role of Preferences, Cognitive Biases, and Heuristics Among Professional Athletes*, 71 BROOK. L. REV. 1459, 1468 (2006). One example of a cognitive bias immediately relevant to MMA is “optimism bias,” where people assume they will be unusually successful in securing desirable outcomes and avoiding unpleasant ones. *Id.* at 1471–72. See also Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 217 (1995) (“[W]hen people rate their chances for personal and professional success, most unrealistically believe that their chances are better than average.”) (citation omitted).

98. See, e.g., CAL. BUS. & PROF. CODE § 18602.1 (West 2009) (discussing Athletic Commission's “licensing, regulatory, and disciplinary functions”); CAL. BUS. & PROF. CODE § 18640

organizations, such as the UFC and smaller promoters, have their own organizational regulations which, although they cannot conflict with state regulations, may, within those bounds, differ between organizations.⁹⁹ Accordingly, the relevant regulations will vary depending on the state or tribal land in which a contest occurs and the organization holding the bout.

Given the critical role regulation has played and will continue to play in the development of MMA as a culturally legitimate athletic activity, a conceptual organization of MMA's contemporary regulatory universe will be useful for scholars, legislators, and reformers seeking to understand, research, or reform the sport. To wit, a significant portion of current legislative, administrative, and organizational regulation of MMA can be grouped into three broad substantive categories: (1) rules addressing athlete safety; (2) rules aimed at ensuring true and fairly-administered contests; and (3) rules constraining or prohibiting certain undesirable relationships among the various MMA players.¹⁰⁰ This categorical architecture serves as a productive schema to organize the myriad regulations that undergird and legitimize the sport.

A. Athlete Safety

Although MMA is less dangerous than is commonly thought, the sport obviously poses considerable physical risk to competing athletes. Unsurprisingly, a significant portion of regulation targets combatant safety, particularly (1) the MMA rules of sport, (2) regulations banning performance enhancing drugs, and (3) discretionary safeguards vested within regulators and physicians.

1. *Rules of Sport*

Central among MMA's safety regulations are the core "rules of sport" that define the contours of MMA and distinguish it from anything-goes brawling.¹⁰¹ The classic expression of MMA's rules of sport is New Jersey's Mixed Martial Arts Uniform Rules of Conduct ("Uniform Rules" or "Unified

(West 2009) (the Athletic Commission has "sole direction, management, control of, and jurisdiction over . . . all forms and combinations of forms of full contact martial arts contests, including mixed martial arts, and matches or exhibitions conducted, held, or given within this state.").

99. For example, the UFC famously conducts all of its bouts in the "Octagon." See Part I.A. *supra*. In contrast, other promotions may hold their bouts inside a ring.

100. The four categories of MMA player are set forth in Part I.B., *supra*.

101. In addition to the "rules of sport" discussed herein, states use other mandatory safety rules to protect athlete health. See, e.g., NEV. ADMIN. CODE § 467.149 (2009) (requiring promoters to provide health insurance that covers in-bout injury); *id.* § 467.414 (requiring ambulance and emergency medical personnel to be on site for bouts); *id.* § 467.472 (requiring a minimum amount of time between bouts for a given fighter); *id.* § 467.642 (requiring ringside physician be present during bouts); and CAL. BUS. & PROF. CODE § 18654 (requiring that a licensee report an injury or knockout suffered by another licensee during training).

Rules”).¹⁰² The Unified Rules owe their provenance to an April 3, 2001, meeting organized by the New Jersey State Athletic Control Board (“NJSACB”).¹⁰³ On that day, the NJSACB convened a meeting of MMA regulators and other players interested in formalizing bout rules.¹⁰⁴ Based on that lengthy meeting, as well as the NJSACB’s prior study of MMA, the NJSACB promulgated the Unified Rules, the latest version of which are in effect in New Jersey today.¹⁰⁵ States with significant MMA activity such as Nevada, California, and Ohio have adopted near-identical rules of sport.¹⁰⁶

The Unified Rules address a wide variety of bout characteristics, such as: maneuvers prohibited because they are exceptionally dangerous and thought to require little skill (e.g., biting, eye-gouging, and groin-strikes), equipment standards (e.g., groin protectors, gloves, mouthpieces), weight classes, round length, rest time between rounds, and total rounds in a contest, and the ability of referee or ringside physician to stop a fight.¹⁰⁷ The obvious rationale for

102. N.J. ADMIN. CODE §§ 13:46-24A.1–13:46-24B.5 (2009).

103. See New Jersey State Athletic Control Board, Mixed Martial Arts Unified Rules of Conduct, Additional Mixed Martial Arts Rules, Summary of agency proposal, <http://www.state.nj.us/lps/sacb/docs/martial.html> (last visited Jan. 20, 2010).

104. E-mail from Nick Lembo, Counsel to the New Jersey State Athletic Control Board, to author (Sept. 28, 2009, 08:30 CST) (on file with author) (setting forth attendees and their affiliations).

105. See, e.g., N.J. ADMIN. CODE § 13:46-24A.1 (2009) (weight classes); § 13:46-24A.2 (fighting area requirements); § 13:46-24A.3 (stools for seconds within fighting area); § 13:46-24A.4 (water bucket and water bottle must be provided); § 13:46-24A.5 (hand wrap requirements); § 13:46-24A.6 (mandatory mouthpiece); § 13:46-24A.7 (groin protection for men, chest protection for women); § 13:46-24A.8 (gloves mandatory and must be approved by Commission); § 13:46-24A.9 (mandatory or prohibited apparel); § 13:46-24A.10 (physical appearance); § 13:46-24A.11 (round and bout lengths); § 13:46-24A.12 (referee and ringside physician may stop bout); § 13:46-24A.13 (judging criteria); § 13:46-24A.14 (referee warning for specified infraction); § 13:46-24A.15 (fouls); § 13:46-24A.16 (consequence of injury during bout); § 13:46-24A.17 (possible bout outcomes).

Strictly speaking, the term “Uniform Rules” originally referred to the entirety of the original subchapter 24A of the New Jersey Administrative Code, which set forth “the rules that were universally agreed upon” at the April 3, 2001 meeting described in the text. See New Jersey State Athletic Control Board, *supra* note 103 (describing proposed subchapter 24A). Today, the terms “uniform rules” or “unified rules” are often informally used as a reference to the list of prohibited maneuvers in an MMA bout, which today is reflected in N.J. ADMIN. CODE § 13:46-24A.15 (2009).

106. See e.g., NEV. ADMIN. CODE §§ 467.795–7968 (2009) (setting forth MMA-specific Nevada regulations); CAL. CODE REGS. tit. 4, §§ 500–546 (2009); OHIO ADMIN. CODE §§ 3773:7-01–3773:7-22 (2009). Interestingly, “the Ohio Athletic Commission regulates more MMA events per year than any other commission[], including those in Nevada and California, thanks to the state’s rapidly growing MMA fan base.” John Morgan & Dann Stupp, *Hang On Sloopy: WEC Could Take UFC’s March Slot in Columbus, Ohio*, MMAJUNKIE, Sept. 18, 2009, <http://mmajunkie.com/news/16236/hang-on-sloopy-wec-could-take-ufcs-march-slot-in-columbus-ohio.mma>.

107. See N.J. ADMIN. CODE § 13:46-24A.15(a) (2009). The list of maneuvers prohibited by New Jersey (and essentially mirrored in other states with significant MMA activity) is quite long:

(a) The following are fouls and will result in penalties if committed:

1. Butting with the head;
2. Eye gouging of any kind;
3. Biting or spitting at an opponent;

such rules is that they protect athlete safety while still permitting skillful and dramatic contests.

2. *Drug Prohibitions*

Regulations prohibiting the use of performance-enhancing drugs ("PED") by MMA competitors are also safety rules of fundamental importance.¹⁰⁸ PEDs are dangerous to the user and to the user's opponent, particularly in combat sports. The opponent's risk when competing against a physically enhanced adversary is two-fold: He faces (1) a heightened risk of injury and (2) a heightened risk of defeat. Accordingly, MMA athletes wishing to remain competitive with PED-using peers will need to use PEDs themselves, with the attendant costs. The irony is that if everyone uses PEDs then no advantage is gained, but all bear the costs of use: both in long-term deteriorative effects and the short term cost of additional in-ring injuries inflicted by chemically enhanced fighters. Widespread PED use is also likely to undermine public confidence and reduce willingness to follow the sport.¹⁰⁹ Obviously, an anti-PED rule on the books is not enough; it must be rigorously enforced. The strength of enforcement is largely based on the discretion of state commission officials, and, regrettably, varies from state to state.¹¹⁰

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4. Hair pulling;
 5. Fish hooking;
 6. Groin attacks of any kind;
 7. Intentionally placing a finger in any opponent's orifice;
 8. Downward pointing of elbow strikes;
 9. Small joint manipulation;
 10. Strikes to the spine or back of the head;
 11. Heel kicks to the kidney;
 12. Throat strikes of any kind;
 13. Clawing, pinching, twisting the flesh or grabbing the clavicle;
 14. Kicking the head of a grounded fighter;
 15. Kneeing the head of a grounded fighter;
 16. Stomping of a grounded fighter;

25. Spiking an opponent to the canvas on his or her head or neck.

108. See, e.g., NEV. ADMIN. CODE § 467.850 (2009) (prohibition of use of certain drugs by bout participant); CAL. CODE REGS. tit. 4, § 303 (2009).

109. See Thomas H. Murray, *The Ethics of Drugs in Sports*, in DRUGS AND PERFORMANCE IN SPORTS 11, 15 (Richard H. Strauss, ed. 1987) ("[PEDs] should be banned because they do not reflect the forms of human excellence that sports are intended to honor.").

110. Compare CAL. CODE REGS. tit. 4, § 303(b) (2009) (requiring testing, but vesting discretion with commission representative as to when drug test occurs) with NEV. ADMIN. CODE § 467.850(5) (2009) (test of athlete occurs "if the commission or the commission's representative directs him to do so.") and 16 TEX. ADMIN. CODE § 61.30(p) (2009) ("Executive Director may order a drug screen at any time for good cause."). In a UFC event recently held in Texas, Texas regulators tested no athletes because there was no "good cause" to do so. Steve Sievert, *UFC Requests Drug Testing for*

3. *Discretionary Safeguards*

Although the application of virtually all rules in some sense depends on the discretion of those charged with enforcement, there is an important group of MMA safety regulations that are discretionary in a very particular way: they substitute the judgment of an expert actor for that of the fighter, regarding the fighter's fitness for participation in MMA activity. Such discretionary regulatory power is commonly vested in the athletic commission itself or in physicians working in furtherance of applicable legislative or administrative rules.

In California, the athletic commission has broad discretionary powers over all MMA events. California has declared that "[n]o event shall take place without the prior approval of the commission."¹¹¹ In addition to the commission's plenary discretion regarding event approval, all MMA fighters must obtain a license to fight.¹¹² In making its licensure decision, the commission considers the applicant's "ability to perform" as well as the "totality of the person's physical condition."¹¹³ California's athletic commission also relies heavily on the judgment of physicians, requiring that fighters pass medical examinations both to obtain a license and in advance of given bouts.¹¹⁴ The self-evident aim of these discretionary safeguards is to prevent unskilled or medically at-risk athletes from competing in the first place. California has further discretionary safeguards regarding in-competition and post-competition conduct: Physicians can stop bouts for medical reasons, and athletes are subject to post-bout medical examinations and suspension from training and fighting depending on the severity of injury suffered.¹¹⁵

UFC 103, *Despite Lack of Requirement In Texas*, MMAJUNKIE, Sept. 17, 2009, <http://mmajunkie.com/news/16205/ufc-requests-drug-testing-for-ufc-103-despite-lack-of-requirement-in-texas.mma>.

111. CAL. BUS. & PROF. CODE § 18640 (West 2009).

112. *Id.* ("No person shall engage in the promotion of, or participate in, a boxing or martial arts contest, match, or exhibition without a license, and except in accordance with this chapter and the rules adopted hereunder."). See also CAL. BUS. & PROF. CODE § 18642 (West 2009) (license from the commission required for MMA participation).

113. CAL. BUS. & PROF. CODE § 18642.5 (West 2009) (an MMA "fighter shall, prior to licensure by the commission, demonstrate his or her ability to perform [and if] at any time a . . . fighter's ability to perform is questionable the commission shall revalidate the licensee using standards adopted in regulation by the commission."). See also CAL. CODE REGS. tit. 4, § 281(a) (2009) (licensure evaluation takes into account "totality of the person's physical condition," including age, injuries, and record, and flatly denies licensing to an individual "who has suffered cerebral hemorrhage or any other serious head injury"). Although section 281(a) uses the term "boxer," unless otherwise specified "all of the professional boxing rules apply to martial arts contests or matches . . ." CAL. CODE REGS. tit. 4, § 502 (2009).

114. CAL. BUS. & PROF. CODE § 18706 (West 2009) (pre-bout medical examination); § 18711 (medical examinations for licensing and renewal).

115. CAL. CODE REGS. tit. 4, § 308 (2009) (medical suspensions).

Although varying in substance and vigor of application, similar sets of discretionary regulations exist in other states that regulate MMA.¹¹⁶

B. True and Fairly Administered Contests

A second conceptual grouping of regulations important to MMA's sporting legitimacy is those intended to ensure the integrity of MMA bouts. Specifically, these regulations serve to make sure that MMA bouts are (1) true, rather than sham, contests and (2) fairly-administered contests. A true contest is one where both competitors are exerting genuine effort to win. A fairly administered contest is one where the referee and judges are both knowledgeable and impartial. Disappointingly, sports history has seen its fair share of sham or unfairly administered matches.¹¹⁷

1. *True Contests*

As a preliminary matter, there are two ways in which a contest can be a sham, and thus two things responsive regulations could address. The first way in which a contest can be a sham is if both participants agree on the outcome in advance; i.e., they collaborate, rather than compete. Such is the case in professional wrestling, where a jointly predetermined match is called a "work."¹¹⁸ The second way a contest can be a sham is when the contest is "thrown;" i.e., one participant enters the match with the intent to deliberately lose or to keep the match closer than it would have been for some financial benefit. The most famous example of a thrown sporting event is the 1919 World Series.¹¹⁹

Both worked and thrown matches are, at best, entertainment, not sport, and permitting athletes to collectively or unilaterally determine contest outcomes poses a fatal threat to MMA's sporting legitimacy.¹²⁰ All sporting audiences expect honest displays of skill, not theater or fraud. Tolerance of

116. See, e.g., OHIO ADMIN. CODE § 3773:7-02 (2009) (commission's broad scope of authority); § 3773:7-16 (licensing); § 3773:7-21 (medical licensing requirements); § 3773:7-19 (medical suspensions).

117. See, e.g., ANDREW JENNINGS, *THE NEW LORDS OF THE RINGS: OLYMPIC CORRUPTION AND HOW TO BUY MEDALS* 79–92 (1996) (discussing corruption during 1988 Olympics); DECLAN HILL, *THE FIX: SOCCER AND ORGANIZED CRIME* (2008) (fixing of soccer matches); Richard H. McLaren, *Corruption: Its Impact on Fair Play*, 19 MARQ. SPORTS L. REV. 15, 29 (2008) (discussing NBA referee betting scandal).

118. "Worked" matches may very well be entertaining—indeed, that was why, early in the twentieth century, legitimately skilled wrestlers began to collaborate on outcomes, rather than contest them. See BEEKMAN, *supra* note 24, at 38–41. But such is not sport.

119. See generally ELIOT ASINOF, *EIGHT MEN OUT: THE BLACK SOX AND THE 1919 WORLD SERIES* (1963).

120. See McLaren, *supra* note 117, at 15 (arguing that match fixing and biased refereeing make sport entertainment, not sport, and therefore "gnaws away at the fundamental foundations of sport and therefore of sporting integrity").

sham contests also drives away those viewers who prefer to make wagers on their sport of choice. Where the betting public has little confidence that the contests are genuine, betting will evaporate, and ticket-buyers and event-watchers enticed to watch to see the outcome of their wager will be lost.

Sham contests in MMA are discouraged by laws of general applicability against throwing or fixing any sporting event for financial gain, as well as regulations promulgated by state athletic commissions requiring that athletes give honest effort in contests in which they participate.¹²¹ Ohio goes so far as to explicitly reserve the right to refuse to license fighters or promoters who associate with gamblers or criminals.¹²² In addition, athletic commissions are frequently given broad power to protect the best interests of the sport and, accordingly, to discipline or ban individuals involved in sham contests.¹²³

2. *Fairly Administered Contests*

Credible and impartial bout officials—e.g., referees, judges, and ringside physicians—are critical to MMA's legitimacy. Audiences are unlikely to embrace a sport which does not routinely provide knowledgeable and impartial contest administration. Because combat sports, particularly boxing,¹²⁴ have been historically rife with instances of untrained, inept, or outright corrupt officiating or judging, regulation designed to prevent such conduct in MMA is crucial to long-term acceptance of the sport. In addition, fair and competent officiating in MMA is especially important because negligent or fraudulent officiating can result in serious injury to competitors.

Impartial officiating is obviously of foundational importance. As when participants engage in a worked fight, referees or judges fixing fights constitutes sporting disaster, rendering a match a charade rather than a contest. Of course, corruption in officiating can be more subtle than betting on fights or taking bribes; a licensed official might have an informal relationship with a promoter, manager, or fighter, and thus quietly put a

121. See, e.g., NEV. ADMIN. CODE § 467.723 (2009) (participant not honestly competing may be disqualified and have his purse held by the Commission pending investigation); § 875 (failure to report to Commission that a licensee has been approached with a suggestion that a contest not be conducted honestly is grounds for disciplinary action). See also CAL. BUS. & PROF. CODE § 18860 (West 2009) (fighter purse can be withheld should it "appear that such contestant is not competing honestly").

122. OHIO ADMIN. CODE § 3773:1-09(B)–(C) (2009). See also NEV. ADMIN. CODE § 467.885(6) (2009) (consorting with felons, gamblers and "reputed underworld character[s]" grounds for license denial or suspension).

123. See, e.g., NEV. ADMIN. CODE § 467.885(6)(f) (2009) (Commission may discipline for any conduct "that is detrimental to the best interests of unarmed combat").

124. See Gary Smith, *One Tough Bird*, Sports Illustrated, June 26, 1995, available at <http://vault.sportsillustrated.cnn.com/vault/article/magazine/MAG1006753/1/index.htm> (judges banned in the aftermath of highly suspect decision loss for American boxer Roy Jones Jr. at the 1988 Olympics).

thumb on the scale when officiating a given bout. To protect against corruption, states usually give the athletic commission the sole authority to select a bout's officials.¹²⁵

Competent officiating is also crucial, and because MMA is a fairly new sport, the country does not abound with knowledgeable officials.¹²⁶ Although many states require officials to be licensed, stronger regulation may be warranted to ensure more MMA officials are truly competent. For example, the Association of Boxing Commissions ("ABC") is an advisory group of state athletic commission representatives from different states that recently established an MMA sub-group ("ABC-MMA").¹²⁷ During its July 30, 2009, meeting, the ABC-MMA proposed that it certify MMA referee/judge training courses, so that individual state commissions could have reliable evidence that applicants had relevant and high-quality training prior to granting a license.¹²⁸ The ABC-MMA committee also recommended that commissions conduct post-event review and regular training of licensed officials.¹²⁹ Although the ABC-MMA's recommendations are not binding, they carry persuasive weight.

C. Restriction of Relationships

A third important conceptual grouping of regulation relates to rules governing permissible relationships and deal terms among the various MMA players. Presently, MMA relationship regulation primarily focuses on (1) preventing conflicts of interest and (2) enforcing bargained-for arrangements. Limits on the content of deals struck between the various players are the subject of far weaker regulation.

1. *Conflicts of Interest*

As discussed in Part I.B., *supra*, a primary concern regarding regulators is that they will be subtly biased in favor of some of the players they are charged with regulating. Of particular concern is the "revolving door" problem, namely, that regulators will come from the private sector and, after their

125. See, e.g., CAL. CODE REGS. tit. 4, § 370 (2009) (commission shall select referee).

126. Josh Gross, *For MMA Officials, Anonymity Means a Job Well Done*, SL.COM, Mar. 27, 2009, http://sportsillustrated.cnn.com/2009/writers/josh_gross/03/26/referees/index.html ("California has 20 [referees] dedicated full-time to MMA; Ohio, close to 15; Nevada, seven.").

127. Dann Stupp, *NJAC's Nick Lembo to Head ABC's New MMA Committee*, MMAJUNKIE, July 15, 2008, <http://mmajunkie.com/news/4808/njacs-nick-lembo-to-head-abcs-new-mmacommittee.mma> (discussing formation of ABC committee focusing on MMA).

128. NICK LEMBO, ET AL., SUMMARY REPORT: DISCUSSION AND REVIEW OF UNIFIED RULES OF MIXED MARTIAL ARTS, (2009), http://www.abcboxing.com/unified_mma_rules.html (last visited Jan. 22, 2010) (discussing ABC committee findings regarding training for referees and judges).

129. *Id.*

tenure of public service, return there.¹³⁰ The fear is that regulators may strategically discharge their duties in a way that is not always in the best interest of the sport, but rather in the best interest of the regulator's past or future private employer, whether it be a promoter, manager, or fighter. To address this concern, states such as California have limited eligibility for a seat on the state athletic commission to people who have not been licensed in the previous two years.¹³¹ Prohibitions against an immediate transition into the private sector after regulatory service is concluded would be a further safeguard against undesirable influence.

Regarding conflicts of interest in the manager and promoter context, managers are expected to negotiate on behalf of the fighter to secure the most lucrative possible engagement terms from the promoter. To the extent that a promoter and a manager share interests, the fighter's interest will be put at risk. Accordingly, existing regulation imposes significant restraints on arrangements between promoters and managers, including prohibiting a promoter from acting as a manager or owning an interest in a manager's or fighter's earnings, and barring assignment of a manager's fees to a promoter.¹³²

2. Promoting Deal Enforcement

Other MMA relationship regulation aims to ensure contract performance. For example, to discourage breach of managerial deals with fighters, Nevada requires that the managerial contract be filed with the Commission prior to a given bout.¹³³ These regulations protect against post-bout deal modification that might occur if deals were oral or if the contract was not filed. Regarding promoters, Nevada requires that a "bout agreement"—on a form set forth by the NSAC—be filed, and that in advance of the bout the promoter "deliver to

130. See, e.g., Christopher N. Camponovo, *Indecent Proposal: Abraham Sofaer, Libya and the Appearance of Impropriety*, 21 J. LEGAL PROF. 23, 27–28 (1997) (discussing four manifestations of the "revolving door" concern). This is not to say that there are not benefits of personnel traffic between the public and private sectors, there are. See Edna Earle Vass Johnson, *Agency "Capture": The "Revolving Door" Between Regulated Industries and Their Regulating Agencies*, 18 U. RICH. L. REV. 95, 97–99 (1983) (identifying positives and negatives of public-private personnel movement). But an appropriate balance must be struck.

131. See, e.g., CAL. BUS. & PROF. CODE § 18602 (2009) (no person licensed in the last two years can serve on the Commission).

132. See, e.g., NEV. ADMIN. CODE § 467.102 (2009) (no assignment without Commission approval); § 467.104 (promoter cannot act as manager or have interest in manager or fighter's earnings); CAL. BUS. & PROF. CODE § 18848 (2009) (promoter who manages fighter without Commission approval is subject to discipline), § 18849 (promoter cannot have "proprietary interest" in fighter "competing on the premises owned, leased, or rented by the promoter" without Commission approval).

133. NEV. ADMIN. CODE § 467.102 (2009) (managerial contract must be filed). Cf. CAL. BUS. & PROF. CODE § 18852 (2009) (manager must keep "documentation" regarding fighter payments for five years).

the Commission, checks, letters of credit or another method of payment that is approved by the Commission for distribution to the entitled persons.”¹³⁴ The aim of such provisions is to ensure fighters get the money they were promised. Yet such regulations have limited force, because fighters and promoters may be bound by a number of agreements other than a bout agreement.¹³⁵

3. Deal Content

While there is some regulation concerning the content of deals between promoters and fighters (such as Nevada’s bout agreement requirement), and between managers and fighters (such as restrictions on the length of a managerial contract and a limit on contingent pay),¹³⁶ outside of conflict of interest limitations, deal content is largely determined by player bargaining. Whether this is a salutary regulatory position is open for debate. In boxing, for example, fighters have long been believed to face considerable bargaining disadvantages, causing some to urge legislative or regulatory limits on deal content that provides boxers with substantive protections or specialized remedies.¹³⁷ No “shovel-ready” solutions present themselves for those desirous of providing deal-content protections to MMA fighters, although two possibilities that deserve further study are federalization and unionization, highlighted in Part IV below.

D. Regulation in Action: “Greasegate”

MMA regulation has proven to be a lively area; each year, several regulatory stories capture the attention of the MMA community. One of 2009’s most contentious regulatory matters was a bitter episode concerning an errant dollop of petroleum jelly. “Greasegate,” as it was popularly called,¹³⁸ demonstrates the seriousness with which MMA players view regulation and illustrates the degree to which contemporary MMA has evolved from its early 1990s ancestor.

On January 31, 2009, the day before Super Bowl XLIII, welterweight champion Georges St. Pierre defended his welterweight title against lightweight champion B. J. Penn in Las Vegas, Nevada. The fight, a rematch,

134. NEV. ADMIN. CODE § 467.112 (2009) (bout agreement); § 467.142(2) (pre-paid requirement).

135. See Wimsett, *supra* note 60 (explaining the various contracts promoters and fighters may enter into).

136. See, e.g., NEV. ADMIN. CODE § 467.102 (2009) (managerial contract cannot be longer than four years, and cannot award more than 33.3% of fighter’s purses to manager).

137. See Part IV.A., *infra*.

138. See, e.g., Andy Samuelson, ‘Grease-Gate’ Still a Slippery Subject, LAS VEGAS SUN, Mar. 17, 2009, available at <http://www.lasvegassun.com/news/2009/mar/17/grease-gate-still-slippery-after-hearing/> [hereinafter Samuelson, *Slippery Subject*].

was the product of enormous hype: Both Penn and St. Pierre were believed to be among the best “pound-for-pound” fighters in the world.¹³⁹ They were both current world champions, and their first fight was extremely close.¹⁴⁰ As it were, the match proved a bit of letdown. St. Pierre had improved since the first fight and exploited his superior size and strength to take Penn down repeatedly and manhandle him.¹⁴¹ After four rounds of being dominated, Penn failed to answer affirmatively when his corner asked if he wished to continue the fight.¹⁴² The ringside doctor, with Penn’s corner men in agreement, sensibly stopped the fight.¹⁴³

Post-fight controversy arose because it was alleged that, during the fight, St. Pierre’s corner man Phil Nurse had applied Vaseline® to St. Pierre’s body inappropriately.¹⁴⁴ Vaseline® is used as a protectant and coagulant on the face of boxers and MMA fighters, but because MMA incorporates grappling and jiu-jitsu, Vaseline® on the body can constitute an advantage by making the “greased” fighter more slippery and thus less susceptible to submission holds. The allegation was that after applying Vaseline® to St. Pierre’s face, corner man Nurse did not adequately clean his hands before rubbing down St. Pierre’s neck and upper torso, thus applying Vaseline® to St. Pierre’s body.¹⁴⁵ Penn is a world-class jiu-jitsu artist, and concern arose that the Vaseline® had rendered Penn unable to utilize defensive and offensive jiu-jitsu against St. Pierre, thus explaining, for Penn and his fans, the ease with which St. Pierre controlled and damaged Penn during the ground portions of the fight.¹⁴⁶

As obscure as such a complaint seems to the uninitiated, there was, in fact, a Nevada regulation directly on point concerning the use of “grease,” which provides in pertinent part that “[t]he excessive use of grease or any other foreign substance may not be used on the face or body of an unarmed combatant. The referees or the Commission’s representative in charge shall

139. David Meltzer, *Is St. Pierre the New Pound-for-Pound King?*, YAHOO! SPORTS, Feb. 1, 2009, <http://ca.sports.yahoo.com/mma/news?slug=dm-gsp020109&prov=yahoo&type=lgns>.

140. See, e.g., Jeff Haney, *Hype Is Fervent Ahead of Rematch*, LAS VEGAS SUN, Jan. 24, 2009, available at <http://www.lasvegassun.com/news/2009/jan/24/hype-fervent-ahead-rematch/>.

141. See, e.g., Sergio Non, *St-Pierre Crushes Penn to Retain Welterweight Title at UFC 94*, USA TODAY, Feb. 2, 2009, available at http://www.usatoday.com/sports/mma/2009-02-01-ufc94_N.htm.

142. Josh Gross, *St. Pierre Floors Penn in 4th at UFC 94*, SI.COM, Jan. 31, 2010, available at http://sportsillustrated.cnn.com/2009/writers/josh_gross/01/31/stpierre.penn.blog/.

143. See Non, *supra* note 141.

144. See Samuelson, *Slippery Subject*, *supra* note 138.

145. See, e.g., Andy Samuelson, *‘Grease-Gate’ Clouds Superfight*, LAS VEGAS SUN, Feb. 3, 2009, available at <http://www.lasvegassun.com/news/2009/feb/03/grease-gate-clouds-st-pierres-dominant-win/> [hereinafter Samuelson, *Superfight*]. See also Samuelson, *Slippery Subject*, note 138.

146. See, e.g., Andy Samuelson, *Penn’s Camp Asks for Review in Vaseline Allegation*, LAS VEGAS SUN, Feb. 4, 2009, available at <http://www.lasvegassun.com/news/2009/feb/04/penns-camp-asks-nsac-review-vaseline-allegation/>.

cause any excessive grease or foreign substance to be removed.”¹⁴⁷ Once aware that St. Pierre’s corner men appeared to be applying some indefinite amount of Vaseline® to St. Pierre’s torso, state officials used a towel to wipe down St. Pierre in between rounds to remove any possible Vaseline® on his body.¹⁴⁸

Penn was unpersuaded that the officials’ in-bout action was sufficient. He complained in writing to the NSAC, claiming that St. Pierre and his corner men had intentionally violated the rules, affected the outcome of the match, and that the fight should be declared a “no contest.”¹⁴⁹ The Commission declined to take any action against St. Pierre or his corner men, presumably believing that, lacking any further information, the actions of St. Pierre’s corner men neither changed the outcome of the contest nor constituted “excessive” grease.¹⁵⁰ Although the specific St. Pierre-Penn match result was not changed, the controversy did result in a review and change of the existing “grease” rule by the NSAC. On August 19, 2009, the NSAC voted to amend the Nevada Administrative Code to make it a foul to “[a]pply[] any foreign substance to the hair or body that could result in an advantage.”¹⁵¹

The “Greasegate” episode is noteworthy because it highlights the many ways in which MMA has matured since its vulgar beginnings. The bout that gave rise to the controversy involved two enormously skilled professional athletes, and it was stopped because one competitor had no hope of winning. The controversy involved a very specific rule that resulted from careful thought about ensuring fair bouts. Ringside observers were familiar with the rule, and state regulatory officials leapt into action upon being informed of a possible rules violation. The losing competitor then filed papers with a regulatory body seeking relief, which was denied, but after the NSAC conducted a review of the rule in question, it was ultimately changed. This is

147. NEV. ADMIN. CODE § 467.598(2) (2009).

148. See Samuelson, *Superfight*, *supra* note 145.

149. See, e.g., Tom Hamliin, *Penn Files Formal Complaint with NSAC*, MMAWEEKLY, Mar. 11, 2009, <http://www.mmaweekly.com/absolutenm/templates/dailynews.asp?articleid=8357>.

150. See, e.g., Tom Hamliin, *No Penalties, But GSP vs Penn May Spur Change*, MMAWEEKLY, Mar. 17, 2009, <http://www.mmaweekly.com/absolutenm/templates/dailynews.asp?articleid=8406&zoneid=13>. Few observers believe any errant grease changed the fight outcome, and even fewer believe St. Pierre intentionally broke any rule. Importantly, I want to make clear I am not criticizing Mr. St. Pierre, Mr. Penn, or the NSAC regarding the episode.

151. E-mail from Keith Kizer, Executive Director, Nevada State Athletic Commission, to author (Sept. 28, 2009, 08:45 CST) (on file with author). The amendment takes effect October 27, 2009. *Id.* See also Adopted Regulation of the Nevada Athletic Commission of the Department of Business and Industry, LCB File No. R003-09, <http://www.leg.state.nv.us/register/2009Register/R003-09A.pdf> (last visited Jan. 20, 2010) (adopting new regulation NEV. ADMIN. CODE § 467.7962(32)); Steven Marrocco, *The ‘B.J. Penn Rule’ Instituted in Nevada*, MMAWEEKLY, Aug. 19, 2009, <http://www.mmaweekly.com/absolutenm/templates/dailynews.asp?Articleid=9411&zoneid=3> (describing new rule as the “B.J. Penn” rule).

a far cry indeed from the first UFC bout, in which Gerard Gordeau kicked Teila Tuli in the face, got some of Tuli's teeth stuck in his foot, and shocked the stunned referee into stopping the fight even though the referee lacked stoppage power at *UFC 1*.¹⁵² No one longs for that past.

V. Reform Horizons

Flourishing within a cradle of sensible regulation, MMA is rapidly becoming an accepted part of the American sporting landscape. However, the sport, and particularly the legal and regulatory regime it exists in, is far from mature. Continued evolution is to be expected. Below, this article briefly highlights two potential changes to MMA's landscape that are likely to receive future attention by reformers and students of the sport, namely (1) federalization and (2) unionization.

A. Federalization

The comparatively strict regulations in states like California and New Jersey are not present in all states. For example, some states require far less searching medical examinations to obtain or keep a fighter license than do other states.¹⁵³ Strict regulation, by definition, will operate to prevent some bouts from ever occurring within the state's borders, consequently resulting in a loss of revenue for promoters, managers, and fighters, as well as a loss of taxes for the state. This creates a potential "race to the bottom" scenario that threatens maximum effectiveness of otherwise sound regulation. Promoters and fighters, in pursuit of a payday, have an incentive to conduct bouts in states where regulation is more lax, and thus, states have a financial incentive to be less strict than their neighbors.

One possible solution is federal regulation. The rationale is that federal regulation and enforcement would provide uniform, national standards and limit the degree to which MMA players could cross state borders to avoid salutary regulation. The problem is well known in boxing, where a federalization approach has been tried with mixed results.¹⁵⁴

152. See WERTHEIM, *supra* note 17, at 58–59 (discussing the Tuli-Gordeau bout).

153. For example, California's medical licensing requirements are more demanding than those of Kentucky. Compare CAL. BUS. & PROF. CODE § 18711 (2009) (medical examinations for licensing and renewal include "a neuro-psychological examination, a brain imaging scan, and an electrocardiogram (EKG)") with KY. REV. STAT. ANN. § 229.111 (2009) (general requirement of medical examination) and 201 KY. ADMIN. REGS. 27:016 (2009) ("[p]articipants shall apply for license onsite after preflight physicals . . ."). Cf. Melissa Neiman, *Protecting Professional Boxers: Federal Regulations with More Punch*, 15 SPORTS LAW. J. 59, 81 (2008) (noting forum shopping by boxers precluded for medical reasons from boxing in a given state).

154. See John McCain & Ken Nahigian, *A Fighting Chance for Professional Boxing*, 15 STAN. L. & POLY. REV. 7, 16 (2004) (describing, in the boxing context, the regulatory deficit when industry players take advantage of disparate regulation between states).

The two relevant pieces of federal boxing legislation are the Professional Boxing Safety Act ("PBSA") and the Muhammad Ali Boxing Reform Act ("Ali Act").¹⁵⁵ The PBSA was intended "to improve and expand the system of safety precautions that protects"¹⁵⁶ boxers, which it accomplished by: (1) requiring that states honor medical suspensions of other states,¹⁵⁷ (2) requiring that all boxing matches be overseen by a state, or joint-state, commission;¹⁵⁸ (3) requiring that a pre-fight medical examination by a physician certifying that a boxer is "physically fit to safely compete" occur,¹⁵⁹ and (4) requiring the continuous ringside presence of a licensed physician and an ambulance.¹⁶⁰ The Ali Act, an amendment to the PBSA enacted in 2000, was intended to protect the economic interest of boxers by banning certain "coercive contracts" between promoters and boxers and by creating conflict of interest "firewall[s]" between regulatory personnel, promoters, and managers.¹⁶¹ Although the Ali Act also called for the Association of Boxing Commissions to develop "minimum contractual provisions [to] be included in bout agreements and boxing contracts," it did not make such "minimum contractual provisions" mandatory.¹⁶²

Knowledgeable boxing observers have contended that existing federal boxing legislation has, in practice, been mildly positive, but mostly ineffective. A key criticism is that the legislation vests too much discretion in the individual state commissions to interpret and apply the new (and not terribly strong) federal protections.¹⁶³ State regulatory officials have exercised this discretion unwisely, leaving uncured the race-to-the-bottom problem.¹⁶⁴ Such

155. The latter, passed in 2000, amended the former, passed in 1996. 15 U.S.C. §§ 6301–6313 (2006).

156. 15 U.S.C. § 6302(1) (2006).

157. 15 U.S.C. § 6306 (2006).

158. 15 U.S.C. § 6303 (2006). States that lack commissions can have matches overseen by another state's commission, or, if no other state commission can serve that purpose, by an "association of boxing commissions" to which a majority of states belong. *Id.*

159. 15 U.S.C. § 6304(1) (2006).

160. 15 U.S.C. §§ 6304(2)–(3).

161. 15 U.S.C. § 6307b (2006) (protection against "coercive contracts"); § 6308 (conflict of interest "firewall[s]"). See also McCain & Nahigian, *supra* note 154, at 20 (explaining that the "Ali Act was designed to protect professional boxers from the often egregious and onerous business practices of the industry.").

162. The Act provides simply that "[i]t is the sense of the Congress that State boxing commissions should follow these ABC guidelines." 15 U.S.C. § 6307(a) (2006). Although the ABC consists of representatives of all the state boxing commissions, it is a non-profit advisory group with no regulatory authority.

163. 15 U.S.C. § 6307(a). Senator McCain himself has written that "federal, state, and tribal enforcement of the PBSA and the Ali Act remain woefully inadequate." McCain & Nahigian, *supra* note 154, at 22.

164. McCain & Nahigian, *supra* note 154, at 22. See also Michael J. Jurek, Note, *Janitor or Savior: The Role of Congress in Professional Boxing Reform*, 67 OHIO ST. L.J. 1187, 1202 (2006) (criticizing federal

criticism has prompted calls for the creation of a federal regulatory boxing authority with broad rule-making and enforcement powers.¹⁶⁵ To date, no such reform proposals have become law.

While the checkered success of the partial federalization of boxing should serve as a lesson for MMA reform advocates, it does not mean federal regulation cannot play a role in MMA's continuing evolution. Certainly the appeal of a federalization proposal depends upon the details and attendant political realities. However, we are in an era where federal regulation—the lack of which is significantly blamed by many for creating the current economic crisis¹⁶⁶—may be more appealing and likely than it was a half-decade ago. The question of federal MMA regulation deserves, and will undoubtedly receive, further examination.

B. Unionization

Existing state regulation does little to regulate the terms of the deals between promoters, managers, and fighters. While some regulation exists,¹⁶⁷ deal terms are largely the result of market bargaining between parties subject to background law generally applicable to contracts. Like laborers elsewhere, MMA athletes face significant bargaining disadvantages, relative to promoters, in terms of financial and legal resources, education, and alternative employment. Unfair or even exploitative arrangements are likely to result, and concerns about low compensation and onerous contractual obligations are beginning to gain traction with many MMA observers.¹⁶⁸ These concerns are unsurprising. As Erwin Krasnow and Herman Levy wrote in the *Georgetown Law Journal* almost fifty years ago, “reliance on owner benevolence is a rather tenuous solution” to addressing inequitable treatment of athletes.¹⁶⁹ Given its

boxing legislation because “states are left to enforce the terms of the law” and they have done a poor job of doing so).

165. For example, in 2002 Senator McCain proposed the “Professional Boxing Amendments Act,” which would have created the United States Boxing Association; i.e., a federal regulatory body for boxing. See McCain & Nahigian, *supra* note 154, at 30 (discussing the proposed Act). The bill did not become law, and subsequent efforts of Senator McCain to expand federal regulation of boxing have been unsuccessful.

166. See, e.g., Roger Altman, *Modern History's Greatest Regulatory Failure*, FIN. TIMES (London), Sept. 17, 2008, at 15 (attributing America's financial meltdown to “the greatest regulatory failure in modern history.”); Francis Fukuyama, *The Fall of America, Inc.*, NEWSWEEK, Oct. 4, 2008, at 29 (“Washington failed to adequately regulate the financial sector and allowed it to do tremendous harm to the rest of the society.”).

167. See Part III.C, *supra*.

168. See, e.g., Kelsey Philpott, *The Champion's Clause: An MMA Comparative*, MMAPAYOUT.COM, Sept. 7, 2009, <http://mmapayout.com/2009/09/the-champions-clause-an-mma-comparative/> (comparing clauses binding champion fighters to their current promotion).

169. Erwin Krasnow & Herman Levy, *Unionization and Professional Sports*, 51 GEO. L.J. 749, 772 (1963).

success elsewhere in professional sports, several fighters have discussed unionization as a means to level the bargaining table for MMA athletes.¹⁷⁰

Identification and resolution of the many policy and legal complexities attending unionization will not be discussed here. But one interesting threshold issue deserves mention. The National Labor Relations Act (“NLRA”), which protects the right to self-organize, extends its protections to “employees” but not independent contractors.¹⁷¹ The test for whether a person qualifies as an “employee” under the NLRA relies on agency principles and explores whether indicia of an employer’s “right to control” are present.¹⁷² At first glance, MMA athletes appear to be more like independent contractors, rather than employees. Promotional contracts often explicitly categorize fighters as contractors (although that is not determinative) and fighters exercise almost total control over their day-to-day activities prior to the match. Conversely, many promotional contracts, such as those of the UFC, are exclusive, a fact that has, in other contexts, been afforded significant weight as evidence of “control.”¹⁷³ Furthermore, the engaged fighter’s work constitutes “an essential part of the [promoter’s] normal operations,” which the Supreme Court has previously identified to be a material factor in finding an individual to be an “employee.”¹⁷⁴ Ultimately, the “employee” determination is case specific and heavily depends on the facts and

170. See, e.g., Posting of Gary Wimsett to SportsAgentBlog, <http://www.sportsagentblog.com/2009/02/09/pat-miletich-on-wmma-the-ufc-and-unionization/print/> (Feb. 9, 2009, 09:00 EST) (quoting former UFC champion Pat Miletich as remarking that “there are a lot of people talking about forming a fighter’s union . . .”).

171. The National Labor Relations Act provides in pertinent part that “[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .” 29 U.S.C. § 157 (2006).

172. “[T]here is no doubt that we should apply the common-law agency test here in distinguishing an employee from an independent contractor.” *N.L.R.B. v. United Ins. Co. of America*, 390 U.S. 254, 256 (1968). The National Labor Relations Board (“NLRB” or “Board”) has explained that “the Board has consistently held that the Act required application of the ‘right of control’ test The resolution of this question depends on the facts of each case, and no one factor is determinative.” *News Syndicate Co., Inc.*, 164 N.L.R.B. 422, 423 (1967). Common indicia include the right to hire and fire; whether the worker profits from people under him; control of the premises where the work occurs; whether the nature of the working relationship is permanent; the skill required; the right to designate the location where the work occurs. See generally *N.L.R.B. v. Phoenix Mut. Life Ins. Co.*, 167 F.2d 983, 986 (7th Cir. 1948).

173. *Seven-Up Bottling Co., of Boston, Inc. v. N.L.R.B.*, 506 F.2d 596, 600 (1st Cir. 1974) (affirming finding of employee and noting the significance of the fact that none of bottling company’s distributors “perform delivery services for anyone but the company”).

174. *United Ins. Co. of America*, 390 U.S. at 259. See also *Herald Co. v. N.L.R.B.*, 444 F.2d 430, 433–35 (2d Cir. 1971) (newspaper distributors, although categorized as independent contractors, qualified as employees).

circumstance of the alleged employer-employee relationship in question.¹⁷⁵ To date neither the courts nor the National Labor Relations Board has ruled on the issue with respect to MMA athletes.

VI. Conclusion

Over the past fifteen years, MMA has evolved from a vulgar spectacle involving men of questionable character and ability to a legitimate sport involving skilled and dedicated athletes. Instrumental to MMA's evolution and path to acceptance was sensible regulation designed to protect the competitors, ensure legitimate and entertaining matches, and limit exploitative or undesirable relationships among the players.

Looking forward, further maturation of the sport is to be expected. Crucial to MMA's continued development will be how successfully scholars, industry players, and regulators collectively address two concerns: first, that desirable regulation is not undermined by "race-to-the-bottom" forum-shopping; and second, that MMA athletes receive equitable economic treatment. Boxing, once among the most popular sports in the country, has seen its status diminish, in large part because of years of failure on these two fronts. MMA should keep that in mind.

175. See, e.g., *Lorenz Schneider Co. v. N.L.R.B.*, 517 F.2d 445, 446 (2d Cir. 1975) (employee question requires "case-by-case determinations whether the relationship between a business enterprise and other persons is that of employer and employee").

* * *