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The sport of mixed-martial arts ("MMA") continues to grow wildly in popularity. It boasts an avid and involved fan base and is widely available and watched on television. Yet, professional MMA events are banned in New York State. New York State is one of the last remaining bastions in MMA's quest for legitimacy, regulation, and inclusion in mainstream culture. In each of the last several years, the New York State Senate has passed a bill that would legalize MMA in New York, but each time, the bill is blocked from reaching the floor of the State Assembly. The reasons for the continuing ban on live professional events in New York can be distilled down to: the risk of participant injury, a potentially dangerous or wrong message delivered to "our youth" and the "effect upon youth", as well as the "civilization" and the "disgust" factor (see *Jones v. Schneiderman*, 888 F Supp (2d) 421 (NY Dist Ct 2013), Defendant's Reply Memorandum of Law in Support of Initial Limited Motion to Dismiss the Fourth and Fifth Causes of Action in the Complaint at 7-8).

MMA continues to attract participants and viewers through what fans often see as a compelling display of a realistic street-fighting strategy that deploys a variety of different fighting techniques. There is a sense that anyone could potentially become a fighter, which is also the message communicated in the narratives of fighters such as Georges St. Pierre (GSP) in his autobiography *The Way of the Fight*. This accessibility is not only buttressed by reality TV shows, such as *The Ultimate Fighter*, that reveal the humanity and everyday interactions of aspiring fighters, but also through participatory outlets like *UFC Fight Pass* that allow fans to access and become immersed in the world of MMA. It is a sport accessible in ways many other brands of entertainment are not, and one that has developed a deep sense of community among those involved.

The MMA community has taken and continues to take an active role in pushing to have the New York State ban removed, but to no avail. In order to have their interests represented and acknowledged by the dominant and formal legal framework, this community harnesses grassroots mobilization techniques and has become an active participant in political lobbying as well as unconventional public interest and strategic litigation, notably demonstrated by the *Jones v. Schneiderman* lawsuit, which alleges a violation of the First Amendment rights of MMA community members. Here, the framework of First Amendment rights is being used to create a dialogue with the judiciary, which demonstrates the use of popular resistance by a social movement operating as popular constitutionalism, with the goal of enabling a shift in constitutional interpretation. It is an example of the MMA community formulating its internal norms, values, and rules into a language that can be comprehended by the dominant legal framework of the State—that of constitutionalism and First Amendment rights.

The resistance shown by New York against the sanctioning of professional MMA events has thus led to an interesting use of public interest litigation as an alternative to lobbying.

The use of public interest litigation in this context exemplifies the new realities of the mechanism. Traditionally, public interest law used to be considered primarily a tool of economic or socially marginalized groups, and the phrase "public interest litigation" leads one to think of communities or groups that are more recognizably marginalized than the MMA community. This, however, betrays a biased valuation of cultural practices and perceived "worth" of leisure activities. From a purely critical perspective, divorced from typical notions of who is or should be involved in public interest litigation, the MMA community harnesses the tool of public interest litigation well. This form of public interest litigation also demonstrates the ideological shift within current public interest litigation where both liberal and conservative interests are now included. This is perhaps off-putting, but through the inclusion of commercial interests in public interest litigation, it is now becoming a tool for the middle class, and even the economically or socially dominant of society. As succinctly stated by Laura Beth Nielsen and Catherine Albiston, "Private power has realized that it too can lay claim to the mantle of 'public interest'." (see "The Organization of Public Interest Practice: 1975-2004" (2006) 84 NCL Rev 1591 at 1621).

Turning back to MMA, interests exist beyond the commercial and financial ones looking to cash in on the attraction of holding MMA events in New York. With the sanctioning of professional MMA events comes the ability to institute and enforce greater regulations for the safety and well-being of MMA participants themselves, many of which make little to no money at their chosen sport and, as with any athlete, deal with numerous painful injuries. The MMA community is also interested in growing and promoting the sport they align themselves with and, regardless of how others feel about this choice or the violence embodied in MMA, there are specific cultural values at stake.

Professional MMA events in New York are important to MMA fighters because, among other reasons, participation in one's first professional event is seen as a crucial rite of passage in truly "becoming" a legitimate fighter within the MMA community (see also the great ethnography by Dale Spencer entitled *Ultimate Fighting and Embodiment: Violence, Gender, and Mixed Martial Arts*). Additionally, having their sport banned in their home state requires fighters to make a choice between their passion and their home, family, and place where they identify themselves the most. It also increases their cost of participation.

**The Lawsuit: *Jones v. Schneiderman***

The *Jones v. Schneiderman* lawsuit forwards six principle reasons for the invalidity of the New York ban on live professional MMA events: "(1) [it] violates Plaintiffs' First Amendment rights of expression; (2) [it] is overbroad on its face, in violation of the First Amendment; (3) [it] is unconstitutionally vague, in violation of the Due Process Clause; (4) [it] violates the Equal

Protection Clause; (5) [it] lacks a rational basis,  in violation of the Due Process Clause; and (6) [it] violates the Commerce Clause" (see *Jones v. Schneiderman*, pages 2-3). Presently, only the claim relating to unconstitutional vagueness has not been dismissed. This is certainly a small victory as the other claims formed a substantial part of the lawsuit. Moving forward, March 2014 was the listed day for scheduled depositions according to the "Scheduling Order" submitted to the court. It is surmised that New York will submit a summary judgment motion to dismiss the as-applied unconstitutional vagueness claim and that, if the plaintiffs manage to avoid another motion to dismiss, a trial will likely take place in 2014.

READ: Plaintiff's Memorandum in Opposition to Motion to Dismiss

Due to the interesting nature of the strategic and public interest litigation strategy chosen, a closer look is merited into the arguments forwarded regarding the New York MMA ban's violation of the First Amendment right of expression (even though ultimately dismissed in this case, it provides a view into the culture of MMA as a community looking for legitimacy) as well as the unconstitutional vagueness claim.

The fuel for the freedom of expression argument is provided via narratives of the plaintiffs and MMA community members. The narratives used can be divided into three messages: artistic, technical, and personal. The reasons of the decision identify each plaintiff, their ring name if applicable, along with their connection to the MMA community. This allows for a more personalized portrayal of the plaintiffs and their interests in advancing their claims.

In terms of the artistic message conveyed and the narrative used, Jon "Bones" Jones, UFC Light Heavyweight Champion and the youngest to hold a title in the history of the UFC, for example, describes the artistic aspect embodied in the "walkout" as the fighter enters the arena and proceeds to the octagon. The fighter chooses particular entrance music and battle clothing to convey a message to the viewers—a message that is continuously conveyed via the fighter's conduct while in the octagon. Fighters often see themselves as having performative value in addition to athletic value, and to be exhibiting an art form, not just an athletic skill. After all, it is called "martial arts" in the end, not "martial sports".

In addition to the artistic message, it is argued that a message is communicated through the technical elements of the live MMA event. Each fighter deploys a hybridized and unique fighting technique that is strategically constructed to answer to their strengths and the perceived weaknesses of the opponent. The narratives of the plaintiffs reveal that the particular techniques deployed not only send a message about the superiority of a particular fighter, but also inform the viewer as to which fighting techniques are dominant. While some in the past have called MMA "human cockfighting", there are others that call it "human chess", something with a very different and perhaps even noble connotation.

Finally, the narrative of fighters, such as Gina "Conviction" Carano, display a personal message conveyed including, in her case, the strength and determination of women to succeed. Another example of this is Matt "The Hammer" Hamill, another listed plaintiff, who is congenitally deaf. Judge Wood notes Hamill's hopes—that in performing he sends the message that a disability should not keep someone from following their dreams.

Unfortunately, the result of the First Amendment argumentation is not successful on face value—which isn't to diminish the awareness-raising value of the arguments presented through the narratives of MMA community members. Judge Wood ultimately found that the plaintiffs have not demonstrated that MMA is "sufficiently imbued with the elements of communication" to qualify for First Amendment protection. While Judge Wood did find that the plaintiffs subjectively demonstrate an intent to communicate a particularized artistic, technical, or personal message, they do not succeed in establishing that objectively there is a "great likelihood" that viewers will comprehend the particular message conveyed (see the Decision at 21-23). Judge Wood further found that while MMA may be at best nearing the periphery of protected speech, peripheral protection does not apply as not all live entertainment qualifies for First Amendment protection.

READ: Opinion and Order in *Jones v. Schneiderman*

In addition, Judge Wood found that the technical message conveyed regarding the dominant technique exhibited is typical of organized sporting competitions and that protecting this "message" would blur the line between conduct and speech (see the Decision at 28). In addressing the performative and spectacle-based elements of MMA events, Judge Wood found them to be the "surrounding fanfare" rather than primarily intended to express a message to the viewer (Decision at 29-30).

In maintaining the plaintiff's void for vagueness claim, the plaintiffs again used their narratives to advance their cause, although the primary reason for Judge Wood's agreement with this claim is based on the inconsistency, back-peddling, and contradictions that ultimately characterize the defendant's arguments on the matter. The inconsistent history of the application of New York's ban on live professional MMA events is a glaring flaw in the defendant's argumentation and is determinative in Judge Wood's decision.

**Moving Forward**

While the use of public interest litigation to advance the cause of the MMA community in New York may be seen as an innovative strategy, whether or not the outcome is successful, the reality is that this is a last-resort strategy. Political lobbying is certainly a more straightforward and likely less costly approach. But, where MMA faces the same false hope year after year, seeking the availability of any other option becomes an inevitable reality. As Barry Friedman, NYU professor, expert in popular constitutionalism, and lawyer for the

plaintiffs, notes: after five years of lobbying, recourse to the courts and to this type of litigation strategy were the last remaining options (see, for example, Daniel Berger's article "Constitutional Combat: Is Fighting a Form of Free Speech? The Ultimate Fighting Championship and its Struggle Against the State of New York Over the Message of Mixed Martial Arts" (2013) 20 Jeffrey S Moorad Sports Law Journal 381 at 382, footnote 5).

Nonetheless, individuals and communities engaging in awareness-raising dialogue with the courts and the formal legal system will ideally sow the seeds for a rethinking and possible deconstruction of preconceived notions that continue to exist as barriers to the removal of New York's ban on professional MMA events. The use of the court system is not only the contact zone where the substance of constitutional law is negotiated, but the awareness-raising dialogue created through litigation and the use of narratives as evidence allow judges to observe social movements at close range and how these social movements interact with society, which in turn could allow for a shift in judicial view as to Constitutional meaning. It also keeps the fight for legalizing MMA in New York in the public eye while the New York State Assembly continues to block efforts to deal with the issue legislatively.

**Author Bio:**

Sara Ross is an incoming PhD student at Osgoode Hall Law School in Toronto and a member of the Bar of Ontario. She is a former Editor-in-Chief of the *McGill Law Journal*, and is graduating from the LLM program at the University of Ottawa this summer. She holds an LLB and BCL with a major in Commercial Negotiation and Dispute Resolution from McGill, and two BAs in culturally related fields.

View her full paper at SSRN: "From the Octagon to the Courtroom: The Right to Fight, Subaltern Cosmopolitanism, and Public Interest Litigation as Tool for Mixed Martial Arts as a Community/Cultural Normative System"