

**HITTING BELOW THE BELT: FLORIDA'S TAXATION  
OF PAY-PER-VIEW BOXING PROGRAMMING IS A  
CONTENT-BASED VIOLATION OF THE FIRST  
AMENDMENT**

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*Why are you a boxer, Irish featherweight champion Barry McGuigan was asked. He said: "I can't be a poet. I can't tell stories . . . ."*<sup>1</sup>

INTRODUCTION

Numerous states authorize a boxing programming tax, imposed on "telecast promoters," and collected on gross receipts of all in-state telecasts, regardless of where a boxing event takes place.<sup>2</sup> No similar tax is levied on other pay-per-view events,<sup>3</sup> likely because

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<sup>1</sup> JOYCE CAROL OATES, ON BOXING 8 (1995)

<sup>2</sup> See, e.g., FLA. STAT. ANN. § 548.06 (West 2004) (promoters must pay 5% tax on gross receipts of in-state pay-per-view telecasts); MO. REV. STAT. § 317.006 (2004) (promoters must pay 5% tax on gross receipts of in-state pay-per-view telecasts); 5 PA. CONS. STAT. § 916 (2004) (promoters must pay 3% tax on gross receipts of in-state pay-per-view telecasts). State boxing commissions may implement and administer these boxing programming taxes via rule-making authority. FLA. STAT. ANN. § 548.06 ("The Florida State Boxing Commission is created and is assigned to the Department of Business and Professional Regulation for administrative and fiscal accountability purposes.").

<sup>3</sup> The statutory schemes in Florida, Pennsylvania and Missouri, for

few pay-per-view programs generate as much revenue as boxing.<sup>4</sup> Selectively taxing one type of pay-per-view program but no others ought to be treated as a content-based violation of promoters' First Amendment rights. However, neither boxing, nor other sports, have enjoyed first amendment protections. In a recent case, *Top Rank v. Florida State Boxing Commission*, a Florida court dismissed a First Amendment challenge to the special pay-per-view tax on boxing and held that boxing is not a form of

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example, have specific provisions for taxing pay-per-view boxing and wrestling, yet none of these states have a similar provision taxing any other type of pay-per-view event. FLA. STAT. ANN. § 548.06; MO. REV. STAT. § 317.006; 5 PA. CONS. STAT. § 916. However, boxing and wrestling are not the only live events televised by pay-per-view—for instance, these states do not tax live telecasts of pay-per-view concerts.

<sup>4</sup> For example, the HBO pay-per-view broadcast of the Oscar De La Hoya-Bernard Hopkins middleweight-championship bout on September 18, 2004 generated \$56 million in revenue (at \$54.95 per buy). R. Thomas Umstead, *Not Golden, But Lucrative*, MULTICHANNEL NEWS, Sept. 27, 2004, at 3 [hereinafter Umstead, *Not Golden*]. Heavyweight championships generate even more substantial revenues: the Mike Tyson-Lennox Lewis bout garnered a record 1.8 million buys and \$106.8 million in revenue. R. Thomas Umstead, *Events Struggle to Recapture Past Glory; Slumps for Boxing, Wrestling and Lack of Marquee Events Spur a Falloff*, MULTICHANNEL NEWS, May 3, 2004, at 90 [hereinafter Umstead, *Events Struggle*].

Moreover, pay-per-view boxing's earning potential is enhanced by the quantity of telecasts broadcast each month. According to Time Warner Cable of New York City's website, there will be at least four nationally distributed pay-per-view boxing telecasts in April 2006, ranging in price from \$19.95-\$44.95 per buy. Time Warner Cable of New York City, April 2006 Events, (April 26, 2006), available at [http://www2.twnyc.com/index2.cfm?c=ppv/events\\_re](http://www2.twnyc.com/index2.cfm?c=ppv/events_re). During the same month, there are two *annual* bodybuilding competitions (at \$19.95 and \$29.95 per buy), one English Premier League Soccer season package (at \$19.95 per buy), , and one concert event (at \$19.95 per buy).

In contrast, live concert pay-per-view broadcasts are significantly less profitable. See Umstead, *Not Golden*, *supra*, at 3. According to Ken Hershman, Senior Vice President and General Manager of Showtime Sports and Event Programming, "performers themselves have become disenchanted with the PPV-event category and would rather get a fee than assume the risks tied to buy-rate performance." *Id.* Faced with comparatively unfavorable economics, "the [entertainment] industry has forced events like Britney [Spears] from what would normally be PPV to Showtime." *Id.*

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expression protected by the First Amendment.<sup>5</sup>

The *Top Rank* court relied on judicial opinions holding that sports, such as college football and professional figure skating, are not expressive conduct.<sup>6</sup> The cases cited in *Top Rank* should not stand for the blanket proposition that all sports are merely physical activities.<sup>7</sup> Instead, they can be better read as case-specific analyses applying First Amendment speech doctrines to physical conduct.<sup>8</sup> In *Spence v. Washington*,<sup>9</sup> the Supreme Court emphasized two factors in determining whether conduct was sufficiently communicative to constitute speech under the First

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<sup>5</sup> 837 So. 2d 496 (Fla. Dist. Ct. App. 1<sup>st</sup> Dist. 2003), *cert. denied*, 124 S. Ct. 1045 (2004).

<sup>6</sup> *Top Rank*, 837 So. 2d at 498. The court summarily stated:

We recognize that athletic events provide people with a great deal of entertainment. We, however, agree with the views expressed in the previously cited cases that *most* athletic events do not convey any message, symbolic or otherwise . . . . Thus, the regulated activity in this case is clearly distinguishable from [a statute imposing a financial burden on the speaker because of the content of his speech].

*Id.* at 502 (emphasis added).

<sup>7</sup> *Id.* at 502. In a footnote, Judge Wolf opined, “I am in fact an enthusiastic sports fan, but I do not believe we should dilute the significance of First Amendment protection by making it applicable to *all* athletic endeavors.” *Id.* at 502 n.1 (emphasis added). This footnote, coupled with the court’s prior language, “*most* athletic events do not convey any message, symbolic or otherwise,” *Id.* at 502 (emphasis added), precludes a reading of the case that would support the blanket proposition that *all* athletic events do not convey any message, symbolic or otherwise.

<sup>8</sup> See *Texas v. Johnson*, 491 U.S. 397, 404 (1989); *Spence v. Washington*, 418 U.S. 405, 410 (1974). The relevant inquiry in First Amendment cases involving expressive conduct is the subjective intent of the speaker in question and the objective likelihood that his listeners will comprehend his message. *Johnson*, 491 U.S. at 404; *Spence*, 418 U.S. at 410. The language in these cases clearly indicates that the analysis should be applied to the *conduct in question*, and makes no reference to similar conduct. However, as explained *infra*, the *Top Rank* court appeared to incorporate “guilt by association” into its First Amendment analysis, seemingly holding that if other sports could not be categorized as expressive conduct under the First Amendment, neither should boxing.

<sup>9</sup> 418 U.S. 405 (1974).

Amendment: the intent to convey a “particularized message” and, given the surrounding circumstances, the likelihood that the message would be understood by those who viewed it.<sup>10</sup> Since time immemorial, fighting has been a form of expression,<sup>11</sup> and the sport of boxing is merely a legal fight sanctioned by the state.<sup>12</sup> Further, in the sport of boxing, each fight conveys its own particular message.<sup>13</sup> For example, Joe Louis, a black fighter, defeated German Heavyweight Max Schmeling in 1938 and single-handedly debunked the Nazi propaganda machine in front of the world.<sup>14</sup> Boxing deserves the First Amendment protections that have been granted to other physical, yet expressive, conduct.<sup>15</sup> However, whether boxing receives full or partial protection under the First Amendment, pay-per-view boxing programming taxes are content-based regulations subject to strict scrutiny because they single out boxing, while no other pay-per-view events are similarly taxed.<sup>16</sup>

This Note critiques the holding in *Top Rank v. Florida State*

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<sup>10</sup> *Id.* at 410-11.

<sup>11</sup> See MICHAEL B. POLIAKOFF, *COMBAT SPORTS IN THE ANCIENT WORLD: COMPETITION, VIOLENCE, AND CULTURE* 113-115 (1995) (discussing how, *inter alia*, boxers in ancient societies expressed their status as heroes and benefactors to society by engaging in their sport.)

<sup>12</sup> See, e.g., FLA. STAT. ANN. § 548.008 decrees that professional or amateur fights which do not meet the requirements set forth by either Chapter 548 of the Florida Statutes or promulgated by the Florida State Boxing Commission are subject to criminal liability. Fighters are subject to criminal penalties.

<sup>13</sup> See, e.g., Norman Mailer, *King of the Hill*, in JOYCE CAROL OATES & DANIEL HALPERN, *READING THE FIGHTS* 124 (1988).

<sup>14</sup> See generally CHRIS MEAD, *CHAMPION: JOE LOUIS* 137-50 (1986).

<sup>15</sup> At the very least, boxing is as expressive as nude dancing, which is recognized as “speech.” *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

<sup>16</sup> *Leathers v. Medlock*, 499 U.S. 439, 447 (1991) (utilizing strict scrutiny to invalidate discriminatory taxes imposed upon some speakers but not others). See also *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 112 (1991) (statute inflicting a financial burden on speakers because of the content of their speech is “presumptively inconsistent with the First Amendment”); *Arkansas Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987) (content-based speech restrictions are invalid unless narrowly tailored to promote a “compelling state interest”).

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*Boxing Commission* that boxing events are not subject to the protections of the First Amendment, and proposes that boxing can pass the test set forth by the Supreme Court in *Spence v. Washington*,<sup>17</sup> whereby conduct can be deemed expressive speech. Part I examines the *Top Rank* decision against Supreme Court decisions which extend First Amendment protections beyond speakers to protect promoters of speech, as well as other decisions by courts which have considered similar boxing-specific taxes on pay-per-view broadcasts. Part II analyzes the cases which the *Top Rank* court used to support its determination that boxing is mere sport which is undeserving of the protections of the First Amendment. Lastly, Part III presents an historical and literary analysis of boxing in order to demonstrate that boxing satisfies the *Spence* test and is worthy of the protections of the First Amendment.

I. THE *TOP RANK* DECISION

Top Rank, Inc. is a Nevada corporation that promotes boxing matches and produces pay-per-view cable television boxing programs.<sup>18</sup> The company is run by International Boxing Hall of Fame promoter Bob Arum, whose stable of talent has included Muhammad Ali, Roberto Duran, George Foreman, Joe Frazier, Larry Holmes, Marvin Hagler, Thomas Hearns, “Sugar” Ray Leonard, and Oscar De La Hoya.<sup>19</sup> Arum has participated in most of the top-grossing fights in boxing history such as Hagler-Leonard, Chavez-De La Hoya, Holyfield-Foreman, Ali-Frazier II and both Ali-Spinks fights.<sup>20</sup>

The controversy in *Top Rank* revolved around several matches promoted by Top Rank, held outside the state of Florida, and subject to taxation in Florida under FLA. STAT. ANN. § 548.06 and FLA. ADMIN. CODE ANN. r. 61K1-1.042. Florida’s Joe Lang

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<sup>17</sup> 418 U.S. 405, 410 (1974).

<sup>18</sup> *Top Rank v. Florida State Boxing Commission*, 837 So. 2d 496, 497-98 (Fla. Dist. Ct. App. 1st Dist. 2003), *cert. denied*, 124 S.Ct. 1045 (2004).

<sup>19</sup> Top Rank, Inc., A Look @ Bob Arum, <http://www.toprank.com/Bob.htm>.

<sup>20</sup> *Id.*

Kershaw Act regulates the sports of professional boxing and kickboxing within the state of Florida.<sup>21</sup> The relevant portion of the Kershaw Act requires that boxing promoters<sup>22</sup> pay a tax of five percent on the “gross receipts”<sup>23</sup> derived from boxing matches.<sup>24</sup> The Act empowers the Florida State Boxing Commission to promulgate and enforce implementing regulations.<sup>25</sup> Specifically, Rule 61K1-1.042 requires promoters to pay a five percent tax on each telecast of a pay-per-view boxing event ordered by a Florida subscriber. The rule applies to all matches “viewed within Florida, whether originating in Florida or not.”<sup>26</sup>

In 2000, Top Rank challenged the portions of the Act that imposed taxes on pay-per-view boxing events featuring matches held outside the state of Florida.<sup>27</sup> Because the tax applies only to boxing programming, Top Rank alleged that it was a content-based restriction on speech violative of the First Amendment.<sup>28</sup> Top Rank sought a refund of taxes already paid, as well as an injunction against the imposition of further taxes under the Florida statute and implementing regulations.<sup>29</sup> The trial court granted the Florida Boxing Commission’s motion for summary judgment, finding §548.06 facially valid.<sup>30</sup>

On appeal, the District Court of Appeal for Florida upheld the trial court’s ruling, holding that a boxing match is not pure nor symbolic speech, thus declining to extend First Amendment

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<sup>21</sup> FLA. STAT. ANN. §§ 548.001-.079 (2004).

<sup>22</sup> The Act defines “promoter” as “any person. . .who produces, arranges, or stages any match involving a professional.” FLA. STAT. ANN. § 548.02(19).

<sup>23</sup> The Kershaw Act defines taxable “gross receipts” to include income from ticket sales, concessions and the “gross price charged for the sale or lease of broadcasting, television, and motion picture rights.” FLA. STAT. ANN. § 548.06(1)(a)-(c).

<sup>24</sup> *Id.* at § 548.06.

<sup>25</sup> FLA. STAT. ANN. at § 548.003; FLA. ADMIN. CODE ANN. r. 61K-1.001, et seq. (2004).

<sup>26</sup> FLA. ADMIN. CODE ANN. r. 61K1-1.042(4).

<sup>27</sup> *Top Rank*, 837 So. 2d at 497-99.

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

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 498.

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protection to the promoters of a boxing match.<sup>31</sup> The Court framed this issue as “whether boxing, *an athletic event where the participants are attempting to win prize money*, is a form of conduct containing elements of communication or involving pure speech or symbolic speech protected by the First Amendment.”<sup>32</sup>

The court opined that “[I]n its most basic form, athletic competition does not constitute pure speech; rather, participation in athletic competition constitutes physical activity or conduct.”<sup>33</sup> Analogizing boxing to professional wrestling, college football and surfing, the court concluded that “most athletic events do not convey any message, symbolic or otherwise,” that would allow for protection under the First Amendment.<sup>34</sup> The court did not take into account any differences between boxing and the aforementioned sports, but instead relied on “guilt by association”—since courts have held that other sports are mere conduct, the *Top Rank* court simply concluded that boxing matches must be mere conduct as well.<sup>35</sup> Judge Wolf (who is not an expert on the sport of boxing) found that the only message conveyed by a boxing match is each fighter’s attempt to win prize money.<sup>36</sup> As such, boxing is not sufficiently imbued with elements of communication to warrant First Amendment protection.<sup>37</sup>

*A. Boxing Promoters are Members of the Media*

Florida’s tax on pay-per-view boxing telecasts runs afoul of the First Amendment, irrespective of whether the sport of boxing itself is speech because boxing promoters are members of the media. Taxation discriminating against members of the media implicates the First Amendment regardless of the content of the underlying speech, but the *Top Rank* court held that *Top Rank* was not a

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

<sup>32</sup> *Top Rank*, 837 So. 2d at 500 (emphasis added).

<sup>33</sup> *Id.* (citing *Justice v. NCAA*, 577 F. Supp. 356 (D. Ariz. 1983) (declining to extend First Amendment protection to college football)).

<sup>34</sup> *Id.* at 502 (internal citations omitted).

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

<sup>36</sup> *Id.* at 500-02.

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

“member of the media” and therefore the First Amendment did not apply.<sup>38</sup>

On the issue of Top Rank’s status as a First Amendment speaker, the District Court of Appeal found that since boxing promoters were not commonly regarded as members of the media, they were too far removed from the actual speech in question to be considered a medium of communication.<sup>39</sup> The trial court drew a distinction between Top Rank as promoter and Showtime, the television broadcaster of the pay-per-view event at issue.<sup>40</sup> Top Rank is a licensed boxing promoter responsible for “[arranging] live professional boxing events.”<sup>41</sup> These events are in turn made available to consumers on a pay-per-view basis through licensing agreements with various distributors or broadcasters.<sup>42</sup> Top Rank is the *sine qua non* of the entire event. Regardless of whether Top Rank is characterized as a member of the media, the government’s power to impose content-based taxes on speech should not vary based on the speaker’s identity.<sup>43</sup> Indeed, any entity contracting with a First Amendment speaker to transmit his speech becomes part of the medium of communication.<sup>44</sup>

In *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, the Supreme Court struck down New York’s “Son-of-

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<sup>38</sup> *Top Rank*, 837 So. 2d at 500.

<sup>39</sup> *Id.* at 498.

<sup>40</sup> *Id.*

Showtime claimed that it could be considered a promoter under Florida law and thus potentially liable for the tax; it joined Top Rank and America Presents in filing a complaint in which the three sought declaratory and injunctive relief based on allegations that the statute imposing the tax is unconstitutional under the First Amendment. The trial court granted a motion to dismiss Showtime on the basis that Showtime lacked standing since it had not yet been assessed the boxing tax.

*Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Simon & Schuster v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991).

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

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Sam” law<sup>45</sup> as content-based restriction on the dissemination of speech by the media.<sup>46</sup> New York’s Son-of-Sam Law required that an accused or convicted criminal’s income from works describing his crime be deposited in an escrow account; these funds were used to reimburse crime victims for the harm they had suffered.<sup>47</sup> *Simon & Schuster* involved the contract that led to Nicholas Pileggi’s book *Wiseguy: Life in a Mafia Family*, which eventually became Martin Scorsese’s hit mob film “Goodfellas.”<sup>48</sup> In August 1981, admitted organized crime figure Henry Hill entered into a contract with author Nicholas Pileggi for the production of a book about Hill’s life. Subsequently, publisher Simon & Schuster entered into a publishing agreement under which Simon & Schuster agreed to make payments to both Hill and Pileggi.<sup>49</sup> The collaboration between Hill and Pileggi resulted in *Wiseguy*, a first-person narrative in which Hill “depicts in colorful detail, the day-to-day existence of organized crime.”<sup>50</sup> “Throughout *Wiseguy*, Hill frankly admits to having participated in an astonishing variety of crimes.”<sup>51</sup>

On May 21, 1987, the New York State Victim’s Crime Board ordered Simon & Schuster to suspend all payments to Hill pursuant

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<sup>45</sup> N.Y. EXEC. LAW § 632-a (McKinney 1982 and Supp. 1991). The “Son-of-Sam” law gained its name from serial killer David Berkowitz, a/k/a the “Son of Sam.” Between 1976 and 1977, Berkowitz went on a killing spree around the city of New York that left seven dead and six others injured. Firstamendmentcenter.org, “Son-of-Sam” Laws, Oct. 31, 2005, [http://www.firstamendmentcenter.org/Speech/arts/topic.aspx?topic=son\\_of\\_sam](http://www.firstamendmentcenter.org/Speech/arts/topic.aspx?topic=son_of_sam). Berkowitz’s “Son of Sam” moniker came from his claim that a ghost named Sam spoke to him through his neighbor’s dog and ordered him to kill his victims. *Id.* After Berkowitz pled guilty and was sentenced to 365 years in jail, he was offered “substantial sums of money” for the rights to his story. *Id.* In response to this, the New York Legislature passed N.Y. EXEC. LAW § 632-a to prevent criminals from profiting from their crimes, and to recompense the victims. *Id.*

<sup>46</sup> *Simon & Schuster*, 502 U.S. at 118-21.

<sup>47</sup> N.Y. EXEC. LAW § 632-a.

<sup>48</sup> *Simon & Schuster*, 502 U.S. at 112-15.

<sup>49</sup> *Id.* at 112.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

to the “Son-of-Sam” law:

The Board determined that *Wiseguy* was covered by N.Y. EXEC. LAW § 632-a, that Simon & Schuster had violated the law by failing to turn over its contract with Hill to the Board and by making payments to Hill, and that all money owed to Hill under the contract had to be turned over to the Board to be held in escrow for the victims of Hill’s crimes. The Board ordered Hill to turn over the payments he had already received, and ordered Simon & Schuster to turn over all money payable to Hill at the time or in the future.<sup>52</sup>

As a threshold matter, the Court found that the “Son-of-Sam” law was a content-based restriction and therefore subject to strict scrutiny. The law “single[d] out income derived from expressive activity for a burden the State place[d] on no other income, and it [was] directed only at works with a specified content,” i.e., crime.<sup>53</sup> Since a statute that imposes a financial burden on speakers because of the content of their speech “is presumptively inconsistent with the First Amendment,” the Court held that the statute was subject to strict scrutiny.<sup>54</sup> It was of no import to the Court whether the First Amendment speaker was Henry Hill, who was taxed “because of the story he has told,” or Simon & Schuster, which published books as a result of those stories. The tax at issue operated as a “disincentive to speak,” with respect to the content of the speech, not the identity of the speaker.<sup>55</sup>

Even if Henry Hill, not Simon & Schuster, was the “speaker,” the tax was still a content-based restriction of the “media.”<sup>56</sup> The Court dismissed the Board’s argument that even if the First Amendment prohibits content-based financial regulation the media, the Son-of-Sam law was different, since it imposed “a general burden on any ‘entity’ contracting with a convicted person to transmit that person’s speech.”<sup>57</sup> The Court, however, held that whether the actor is characterized as a “member of the media” is

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<sup>52</sup> *Id.* at 114-15.

<sup>53</sup> *Id.* at 115-16.

<sup>54</sup> *Simon & Schuster*, 502 U.S. at 115-16.

<sup>55</sup> *Id.* at 116-17.

<sup>56</sup> *Id.* at 117.

<sup>57</sup> *Id.* at 117.

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irrelevant, for “[t]he government’s power to impose content-based financial disincentives on speech surely does not vary with the identity of the speaker.”<sup>58</sup> Indeed, prior to its decision in *Simon & Schuster*, the Supreme Court applied strict scrutiny to content-based regulation of cable broadcasts in *Leathers v. Medlock*.<sup>59</sup>

*B. Content-Based Taxation Warrants Strict Scrutiny*

Even if the sport of boxing itself did not fall within the ambit of protected speech under the First Amendment, the Kershaw Act still ought to be subject to strict scrutiny. “A tax on the dissemination of entertainment based on content must pass strict scrutiny, regardless of its subject matter.”<sup>60</sup> Content-based speech restrictions are thus subject to strict scrutiny, and they are invalid unless “necessary to serve a compelling state interest” and “narrowly drawn to achieve that end.”<sup>61</sup> The Supreme Court has applied this principle to taxes on speech, utilizing strict scrutiny to invalidate discriminatory taxes imposed upon some speakers but not others.<sup>62</sup> Laws burdening speech “must satisfy the same rigorous scrutiny” as laws “banning speech.”<sup>63</sup>

Denying Top Rank the status of speaker in the Florida case, deprived the promoter of the benefit of strict scrutiny of the Kershaw Act. The Florida regulation does not apply a general tax to all pay-per-view events. Instead, Florida’s Kershaw Act singles out pay-per-view boxing for taxation.<sup>64</sup> There is no other Florida

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

<sup>59</sup> *Leathers v. Medlock*, 499 U.S. 439, 444 (1991).

<sup>60</sup> *United States Satellite Broad. Co. v. Lynch*, 41 F. Supp. 2d 1113, 1121 (D. Cal. 1999) (citing *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991); *Arkansas Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987)).

<sup>61</sup> *Arkansas Writers’ Project*, 481 U.S. at 231.

<sup>62</sup> *See Leathers v. Medlock*, 499 U.S. 439, 447 (1991).

<sup>63</sup> *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 812 (2000).

<sup>64</sup> *See* FLA. STAT. ANN. § 548.06. Presently, there is no information as to whether the Florida Boxing Commission has enforced the pay-per-view tax as to telecasts of other pugilistic exhibitions as set forth in FLA. STAT. ANN. § 548.002 (kickboxing and mixed martial arts).

statute taxing any other type of pay-per-view telecast, even though there is a multitude of pay-per-view events besides boxing.<sup>65</sup> Accordingly, the tax should be subject to strict scrutiny and should have been invalidated unless Florida could show that it is narrowly tailored to promote a compelling state interest. Florida's tax on boxing telecasts cannot meet this burden. In enacting the Kershaw Act, neither the Florida legislature nor the Florida State Boxing

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<sup>65</sup> Compare FLA. STAT. ANN. § 548.06 (promoters must pay 5% tax on gross receipts of in-state pay-per-view telecasts) and FLA. STAT. ANN. § 548.002(19) (defining "promoter" as "any person . . . who produces, arranges, or stages any match involving a professional"), with FLA. STAT. ANN. § 202.12 (levies a tax upon "every person who engages in the business of selling communications services at retail in [the state of Florida]"); FLA. STAT. ANN. § 202.19 ("The governing authority of each county and municipality [in Florida] may, by ordinance, levy a discretionary communications services tax"); FLA. STAT. ANN. § 202.11 (3) (defines "communications services" as any point-to-point "transmission, conveyance, or routing of . . . cable services by any conceivable means) and FLA. STAT. ANN. § 202.11(2) (defines "cable service" as "the transmission of video, audio, or other programming service to purchasers, and the purchaser interaction, if any, required for the selection or use of any such programming service . . . including . . . pay-per-view [services]).

The only other Florida statute to address the concept of pay-per-view is the Communications Services Tax Simplification Law (FLA. STAT. ANN. § § 202.10, et seq.) [hereinafter CS Tax]. In contrast to the Kershaw Act, the CS Tax does not single out any type of service or provider. Conversely, the CS Tax casts a broad net, taxing nearly every means and provider of audio, video data, and other types of information or signals. In fact, the CS Tax's drafters appeared to have gone to great lengths to do so, *viz.*, FLA. STAT. ANN. § 202.11 (delineating the CS Tax's scope in broad terms with very narrow exceptions). For example, in defining "cable service," the framers purported to cover every link in the information supply chain. *See* FLA. STAT. ANN. § 202.11 (2). Moreover, the framers intended for the CS Act's scope to remain broad in the future, *viz.*, FLA. STAT. ANN. § 202.11 (3) (defines means or method of "transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals" to encompass both any medium or method "now in existence or hereafter devised, regardless of the protocol used for such transmission or conveyance").

On the other hand, the Kershaw Act pertains exclusively to the taxation of boxing. Unlike the CS Tax, which covers to every means, method and provider within its broad jurisdiction (communications), the Kershaw Act is simply a device to tax all revenue streams to flowing through its narrow jurisdiction (pugilistic exhibitions). *See also supra* note 4.

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Commission included findings to support the proposition that the tax on boxing programming furthers a legitimate state interest. The generation of tax revenue is not a sufficient justification for a content-based speech restriction.<sup>66</sup> Since Florida's content-based burden on speech lacks a compelling interest in the taxation of pay-per-view boxing programming, the tax is unconstitutional. The *Top Rank* court erred in upholding the tax, and Top Rank should have prevailed.

Florida's isolation of boxing for special tax treatment is equivalent to an Oregon boxing tax held to be a content-based restriction in *TVKO v. Howland*,<sup>67</sup> as well as a California boxing tax that the court refused to enforce in *United States Satellite Broad. Co. v. Lynch*.<sup>68</sup> "[I]f no [boxing] match is shown, no tax is imposed."<sup>69</sup> Thus, like the taxes in *TVKO* and *U.S. Satellite*, the Kershaw Act constitutes a content-based restriction on speech.<sup>70</sup>

*I. United States Satellite Broad. Co. v. Lynch*

In *United States Satellite Broad. Co. v. Lynch*, the U.S. District Court for the Eastern District of California struck down a California statute<sup>71</sup> imposing a five percent gross receipts tax exclusively on telecasts of boxing and other combat sports, because it inflicted an unjustified financial burden on the speaker.<sup>72</sup> The controversy in that case centered on U.S. Satellite's refusal to pay the tax following the live pay-per-view broadcast of the

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<sup>66</sup> See *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. at 585 (1983).

<sup>67</sup> 15 Or. Tax 335 (2001), *aff'd*, 335 Or. 527 (2003).

<sup>68</sup> *United States Satellite Broadcasting Co. v. Lynch*, 41 F. Supp. 2d 1113 (E.D. Cal. 1999).

<sup>69</sup> *TVKO*, 15 Or. Tax at 345.

<sup>70</sup> Although the *TVKO* and *U.S. Satellite* cases deal with taxes levied on broadcasters of pay-per-view boxing, rather than on promoters of the telecast, the analysis as to whether such regulations are facially content-based is the same because in each case, assuming that boxing is expressive conduct, the laws in question deal with the telecast of speech protected under the First Amendment.

<sup>71</sup> CAL. BUS. & PROF. CODE § 18600 et seq. (1999).

<sup>72</sup> *U.S. Satellite*, 41 F. Supp. 2d at 1121-22.

infamous fight between Evander Holyfield and Mike Tyson on June 28, 1997.<sup>73</sup> The fight took place in Nevada; U.S. Satellite's only contact with the state of California in the matter arose from its sale of telecasts within the state.<sup>74</sup>

The *U.S. Satellite* court held that a tax on the dissemination of entertainment based on content must pass First Amendment strict scrutiny, regardless of its subject matter.<sup>75</sup> It observed that it does not matter whether the First Amendment protects or even applies to boxing.<sup>76</sup> Rejecting the defendants' argument that pay-per-view boxing telecasts should not enjoy First Amendment protection because "boxing is somehow 'less valuable' than other subjects," the court stated:

The First Amendment does not protect murder, yet the court feels confident that news broadcasts of murder, killing, or war may not be censored to suppress their content. Nor is a hurricane protected by the First Amendment; yet a broadcaster with an audience has a right under the First Amendment to broadcast images of a hurricane.<sup>77</sup>

To hold otherwise would "[run] contrary to every principle of the Free Speech Clause itself."<sup>78</sup> Thus, taxing a pay-per-view broadcast based on its content must pass strict scrutiny, regardless of its underlying subject matter.<sup>79</sup>

The court further held that such a tax did not advance a compelling state interest, and even if it had, it was not narrowly tailored to advance that interest.<sup>80</sup> The court dismissed California's general interest in raising revenue as insufficient to justify a content-based tax on speech, opining that "while speech may be taxed to help pay for the costs created by the speech itself . . . the

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<sup>73</sup> This was the fight where referee Mills Lane disqualified Mike Tyson because he bit off Evander Holyfield's ear.

<sup>74</sup> *U.S. Satellite*, 41 F. Supp. 2d at 1116.

<sup>75</sup> *Id.* at 1121.

<sup>76</sup> *U.S. Satellite*, 41 F. Supp. 2d at 1121.

<sup>77</sup> *Id.*

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

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

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state may not merely use supposed ‘administrative costs’ as a guise for raising revenue.”<sup>81</sup> One of the “administrative costs” claimed by California was “its efforts to keep boxing clean.”<sup>82</sup> The court was unconvinced that this was a compelling interest because the California Boxing Commission did not mention the yearly cost of “keeping boxing clean.”<sup>83</sup> Thus, even if the court concluded that the state had raised compelling interests, it could not conclude that the tax in question was narrowly tailored to serve them.<sup>84</sup> The Commission also “[presented] no evidence or argument whatsoever on the amount of the costs, if any, incurred to the Commission by plaintiff’s telecasts into private homes of boxing matches which occur in another state.”<sup>85</sup> Furthermore, the court noted that the Commission deposited tax revenues in the state general fund, and “did not directly spend all of the revenues raised by the tax.”<sup>86</sup>

The *U.S. Satellite* court held that the imposition of the tax on tickets sold to live boxing events held in California did not justify extending that tax to pay-per-view broadcasts of boxing events regardless of whether they were held in California.<sup>87</sup> The court found that the state’s argument that the tax prevented promoters from evading the live events tax by moving their matches out of state “simply [devolved] to the [general] interest in raising revenue, which [did] not justify a content-specific tax.”<sup>88</sup> The court likewise rejected the contention that the tax served as an equalizer “to avoid disadvantaging promoters of live matches in California.”<sup>89</sup> The court opined that promoters of live boxing matches in California would be better served via a tax structure that “made no reference to the content of the telecast.”<sup>90</sup>

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<sup>81</sup> *U.S. Satellite*, 41 F. Supp. 2d at 1121-22.

<sup>82</sup> *Id.* at 1122.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *U.S. Satellite*, 41 F. Supp. 2d at 1122-23.

<sup>88</sup> *Id.* at 1123.

<sup>89</sup> *Id.*

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

## 2. TVKO v. Howland

More recently, in *TVKO v. Howland*, the Supreme Court of Oregon also held that taxing television transmissions of boxing matches held out of state is repugnant to the First Amendment.<sup>91</sup> In that case, an Oregon statute would have required the distributor of a pay-per-view boxing match that took place in New York City to pay a 6% tax on gross receipts earned on the broadcast within the state of Oregon.<sup>92</sup> The *TVKO* court noted that the tax in question was only imposed upon the telecasts or transmissions of boxing matches; simply put, “[I]f no [boxing] match is shown, no tax is imposed.”<sup>93</sup> Since the tax was content-based, it was subject to strict scrutiny.<sup>94</sup>

Subsequently, the court refused to find any of Oregon’s proffered interests in the tax sufficiently compelling to justify its disparate treatment of boxing.<sup>95</sup> Oregon has a legitimate interest in regulating boxing matches in that state.<sup>96</sup> Indeed, the court noted that the state may promulgate “such laws, rules, or regulations as it deems necessary or good to protect the public’s health and welfare.”<sup>97</sup> However, taxing the broadcast of an out-of-state boxing match did nothing to further this goal, but was instead a circuitous and unjustified attempt to regulate communication.<sup>98</sup>

Even if Oregon had a legitimate interest in regulating communication, the court held that the tax was not narrowly tailored to achieve that end.<sup>99</sup> Specifically, the court rejected the state’s argument that the tax paid for the industry in which TVKO

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<sup>91</sup> *TVKO v. Howland*, 15 Or. Tax 335, 343-45 (2001), *aff’d*, 335 Or. 527 (2003). The *TVKO* court passed on the issue of whether the tax as applied to in-state telecasts was also unconstitutional.

<sup>92</sup> *TVKO*, 15 Or. Tax at 337-38.

<sup>93</sup> *Id.* at 345.

<sup>94</sup> *Id.* at 344.

<sup>95</sup> *Id.* at 344-45.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 345.

<sup>98</sup> *Id.*

<sup>99</sup> *TVKO*, 15 Or. Tax at 346.

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did business.<sup>100</sup> The court emphasized that TVKO's only connection to Oregon was the broadcast of a boxing match that took place outside of Oregon.<sup>101</sup> Accordingly, Oregon had no jurisdiction to regulate boxing matches held outside the state.<sup>102</sup>

## II. SPORTS AND THE FIRST AMENDMENT

In *Top Rank*, the District Court of Appeals for Florida not only denied Top Rank status as a speaker, but also denied that boxing, or any sport, was protected by the First Amendment. The Supreme Court has yet to rule on whether sport in general is entitled to First Amendment protection. However, the Court has firmly established that the First Amendment's guarantee of freedom of speech applies to conduct, as well as words. The Court set forth the test for determining what conduct constitutes protected speech in *Spence v. Washington*.<sup>103</sup> Under the Spence test, conduct constitutes protected speech when there exists: (i) an intent to convey a specific message, and (ii) a substantial likelihood that the message would be understood by those receiving it.<sup>104</sup>

Entertainment, as well as political and ideological speech, is protected by the First Amendment.<sup>105</sup> This protection applies to speech "in any medium that either informs or entertains, [including] books, motion pictures, radio, television programs, live entertainment, poetry, painting, music, dramatic works, comics and commercials."<sup>106</sup> Indeed, all ideas having "even the slightest redeeming social importance" have full protection under the First Amendment.<sup>107</sup> Thus, video games,<sup>108</sup> live music,<sup>109</sup> and even nude

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<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 145-46.

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

<sup>103</sup> 418 U.S. 405 (1974).

<sup>104</sup> *Johnson*, 491 U.S. at 404; *Spence*, 418 U.S. at 410.

<sup>105</sup> See *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981) (holding that live entertainment is speech); *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977) (holding that broadcast entertainment is speech).

<sup>106</sup> *Doe v. TCI Cablevision of Missouri*, 30 Media L. Rep. 2409 (Mo. Ct. App. 2002).

<sup>107</sup> *Roth v. U.S.*, 354 U.S. 476 (1957).

dancing<sup>110</sup> enjoy first Amendment protection.

The Court stated in *Roth v. United States*, “the protection given speech and press was fashioned to assure unfettered interchange of ideas for bringing about of political and social changes desired by the people.”<sup>111</sup> All ideas having “even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests.”<sup>112</sup> Boxing meets this minimum standard of having “even the slightest redeeming social importance.” Whether viewed as simply a fight divorced from its illegal components, entertainment, or as a contest capable of expressing a social or political message,<sup>113</sup> the sport of boxing is more than mere conduct.

#### *A. Sports and the Outer Perimeters of Speech*

The *Top Rank* court relied on cases involving sports, in which the deciding courts were reluctant to apply the protections of the First Amendment to conduct that does not fall within the traditional notions of political and ideological speech.<sup>114</sup> Some of those cases precede the Supreme Court’s decision in *Spence v. Washington*, in which a test was formulated for determining whether conduct may be considered expressive speech.<sup>115</sup> All of the cases relied on by the *Top Rank* court predate the Supreme Court’s recognition of First Amendment protection for promoters of speech, as in *Simon & Schuster*. These examinations of sports were all considered prior to the Supreme Court’s holding in *Barnes v. Glen Theatre, Inc.* that the First Amendment may protect

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<sup>108</sup> *E.g.*, *Video Software Dealers Ass’n v. Maleng*, 325 F. Supp. 2d 1180 (W.D. Wash. 2004).

<sup>109</sup> *E.g.*, *Collins v. Ainsworth*, 382 F.3d 529 (5th Cir. 2004)

<sup>110</sup> *E.g.*, *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

<sup>111</sup> *Roth*, 354 U.S. at 484.

<sup>112</sup> *Id.* at 484-85.

<sup>113</sup> As did the Schmeling-Lewis fight.

<sup>114</sup> See discussion, Part II.A.5.

<sup>115</sup> *Spence*, 418 U.S. at 410.

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expression on “the outer perimeters of the First Amendment.”<sup>116</sup> Lastly, the cases relied on by the decision in *Top Rank* reflect the dilution of First Amendment protections which occurs when free speech is pled while seeking equitable relief from courts.

*I. Murdock v. City of Jacksonville: Professional Wrestling*

In *Murdock v. City of Jacksonville*, the United States Court for the Middle District of Florida held that professional wrestling was not speech.<sup>117</sup> In that case, a private wrestling promoter challenged a resolution of the Jacksonville City Council granting an exclusive lease to a competing wrestling promoter, which effectively prohibited him from holding professional wrestling matches in the Jacksonville Coliseum.<sup>118</sup> In addition to other claims, the promoter argued that the exclusive lease on the public venue prevented him from “entertaining large crowds for wrestling matches” and thus violated his right to free speech under the First Amendment.<sup>119</sup>

While the court in *Murdock* acknowledged that the First Amendment applied to symbolic speech, it held that protection does not extend to a “purely entertainment pastime” such as wrestling or the promotion of a wrestling match for entertainment.<sup>120</sup> The court noted that the First Amendment was meant to protect acts such as speech by a political figure, and placed heavy emphasis on its notion that entertainment “is just not free speech, akin to free speech, nor a symbolic act.”<sup>121</sup> However, in subsequent years, the Supreme Court has rejected the proposition that the First Amendment does not apply to

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<sup>116</sup> *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-66 (1991). As stated in one of the cases discussed below, “exposition of an athletic exercise is on the periphery of protected speech (for the purposes of a balancing of conflicting interests), as opposed, for example, to political speech, which is the core of the First Amendment protection.” *Post Newsweek Stations-Connecticut, v. Travelers Ins. Co.*, 510 F. Supp. 81 (D. Conn. 1981).

<sup>117</sup> 361 F. Supp. 1083 (D. Fla. 1973).

<sup>118</sup> *Id.* at 1085.

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

<sup>120</sup> *Id.* at 1086.

<sup>121</sup> *Id.* at 1096 (internal quotations omitted).

entertainment.<sup>122</sup> The holding in *Murdock* rests on the premise that a sporting event should be denied First Amendment protection on the ground that it is promoted for the purpose of entertainment,<sup>123</sup> but more recent Supreme Court decisions have held that the scope of the First Amendment extends beyond political speech.<sup>124</sup>

Intervening change in First Amendment jurisprudence aside, the *Murdock* court had additional reasons to find against the promoter. The plaintiff sought an order directing the City of Jacksonville “to rent the [Jacksonville Coliseum] to him on any open days of the week,”<sup>125</sup> relief that the plaintiff should not have expected from the court. The court noted that “mandamus will not lie to review or control the acts of public officers in respect to matters as to which they are vested with discretion.”<sup>126</sup> Since “the decision of whether to lease City property,” as well as to whom it will be leased, rested with the City of Jacksonville, it was a discretionary task and not subject to mandamus.<sup>127</sup> At most, the resolution vested impermissible discretion in Jacksonville city officials.<sup>128</sup> The resolution at issue neither banned nor inhibited professional wrestling matches; it merely determined that only one promoter would be permitted to present wrestling matches in the Jacksonville Coliseum during the pendency of the lease.

As in further cases below, the request for inapposite relief in *Matlock* caused the court to find against First Amendment protection with respect to conduct on the fringes of expression.

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<sup>122</sup> *E.g.*, *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977).

<sup>123</sup> *See Murdock*, 361 F. Supp. at 1086.

<sup>124</sup> *See, e.g.*, *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981) (First Amendment protection extended to live entertainment); *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977) (First Amendment protection extended to broadcast entertainment).

<sup>125</sup> *Murdock*, 361 F. Supp. at 1096.

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

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

<sup>128</sup> *Id.* Although “a public official may not be vested with broad discretion for determining arbitrarily and without standards in what manner and by whom activities protected by the First [Amendment] may be conducted.” *Id.* (internal citation omitted). However, the court did not reach the issue, since it determined that wrestling was protected speech.

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2. *Post Newsweek Stations-Connecticut v. Travelers Ins. Co.:*  
*Figure Skating*

The *Top Rank* court relied on *Post Newsweek Stations-Connecticut v. Travelers Ins. Co.*<sup>129</sup> as holding that figure skating “[does] not convey any message, symbolic or otherwise” sufficient to bring it under the ambit of the First Amendment.<sup>130</sup> *Post Newsweek* can better be read as standing for the proposition that courts will not allow parties to use the First Amendment to circumvent the express terms of a contract negotiated at arms’ length. Contract provisions prohibiting a television station from broadcasting footage of the 1981 World Figure Skating Championships were challenged on First Amendment grounds in *Post Newsweek*. The network holding the exclusive broadcast rights required contracting stations to wait until the network had completed its broadcast of the event, which was conducted at the Hartford Civic Center and operated by the City of Hartford.<sup>131</sup> The plaintiff television station asserted that the denial of television coverage restricted its First Amendment right “to provide immediate reporting” of the newsworthy event and sought a preliminary injunction to allow it to broadcast despite the contractual agreement.<sup>132</sup>

The *Post Newsweek* court did not apply the *Spence* test to the sport of figure skating; rather, the case was analyzed as a restriction on the use of a public forum. The court decided the case “by weighing the nature of the forum and the conflicting interests involved.”<sup>133</sup> On the one hand, the court considered the severity of the restriction on the plaintiff, which it found did not amount to censorship. On the other hand, the court considered the impact on the public at large and decided that allowing plaintiff to broadcast the World Figure Skating Championships via television would severely diminish the commercial value of the event.<sup>134</sup> Even

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<sup>129</sup> 510 F. Supp. 81 (D.C. Conn. 1981).

<sup>130</sup> *Top Rank*, 837 So. 2d at 502.

<sup>131</sup> *Post*, 510 F. Supp at 83-84.

<sup>132</sup> *Id.* at 84.

<sup>133</sup> *Id.* at 87.

<sup>134</sup> *Id.* at 84. The court refused to factor into its calculus the worldwide

though the plaintiffs could not broadcast live television coverage, “[t]he general public [had] ready access to the event, the event [would] be reported by newspaper and radio media without any time or manner restriction, and the plaintiff [was allowed] attend and report on the [figure skating] championships. . . .”<sup>135</sup>

The court held that the “exposition of an athletic exercise is on the periphery of protected speech (for the purposes of a balancing of conflicting interests), as opposed, for example, to political speech, which is the core of the first amendment [sic] protection.”<sup>136</sup> Noting that figure skating is a “uniquely visual sport,” the court decided that a live television broadcast would diminish the “commercial value” of the World Figure Skating Championships in a way that newspaper or radio coverage would not.<sup>137</sup> Allowing plaintiffs to cover the event in spite of the restriction would amount to a constitutional right of special access to the event.<sup>138</sup> Such a right would jeopardize revenue resulting from comparable entertainment contracts going forward, since “similar events would be placed in private arenas where broadcast coverage could be more effectively restricted.”<sup>139</sup>

### 3. Justice v. National Collegiate Athletic Association: *College Football*

In *Justice v. National Collegiate Athletic Association*,<sup>140</sup> student athletes on the University of Arizona varsity football team filed an application for injunctive relief against the National Collegiate Athletic Association to prevent enforcement of the NCAA’s sanctions which rendered their football team ineligible to

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attention that would be focused on the World Figure Skating Championships, observing that, “First Amendment guarantees do not fluctuate in response to the whims of public approval. The relative popularity of the particular speech at issue is not a factor in assessing first amendment protection.” *Id.* at 87.

<sup>135</sup> *Id.* at 86.

<sup>136</sup> *Post*, 510 F. Supp. at 86.

<sup>137</sup> *Id.*

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

<sup>139</sup> *Id.*

<sup>140</sup> 577 F. Supp. 356 (D. Ariz. 1983).

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participate in post-season competition or to play in a game broadcast on national television for two years. Amongst their claims, the athletes alleged that the sanctions functioned as an “unconstitutional prior restraint of their First Amendment right to freedom of expression.”<sup>141</sup>

The court’s sole charge in that case was to ensure that the sanctions imposed by the NCAA were neither arbitrary nor irrational. The *Justice* court was not permitted to “evaluate the relative efficacy of the particular means chosen by the NCAA to achieve its objectives.”<sup>142</sup> Since the plaintiffs had violated clearly defined rules that had clearly delineated consequences, and were punished accordingly, the NCAA’s actions were neither arbitrary nor capricious. A holding to the contrary would have subverted the NCAA’s role as a voluntary athletic association.<sup>143</sup>

As in *Post Newsweek*, the court was asked to recognize conduct as capable of being categorized as First Amendment speech. The court in *Justice*, was “unwilling” to grant the plaintiff athletes relief from the NCAA’s authority.<sup>144</sup> Allowing the plaintiffs to invoke the First Amendment to avoid the NCAA sanctions would have undermined the NCAA’s disciplinary and rulemaking authority.<sup>145</sup> The plaintiffs in *Justice* had a lot to lose

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<sup>141</sup> *Id.* at 373.

<sup>142</sup> *Id.* at 372 (citing *Shelton v. NCAA*, 539 F.2d 1197, 1198 (9th Cir. 1976)).

<sup>143</sup> *Id.*

<sup>144</sup> The *Justice* court uses the term “unwilling” as opposed to using “unable.” 577 F. Supp. at 374. The former would denote reluctance to exploit a possibility, while the latter would denote impotence do so, regardless of one’s desire. MERRIAM-WEBSTER’S DESK DICTIONARY 2, 634 (1995) (defining “able” as “having sufficient power, skill, or resources to accomplish an object” and defining “willing” as “inclined or favorably disposed in mind”).

<sup>145</sup> The *Justice* court described such authority during the pendency of that litigation:

The NCAA is an unincorporated association that regulates a substantial part of the nation’s intercollegiate athletics. It is composed of approximately 960 four-year colleges and universities located throughout the United States. Approximately fifty percent of its members are private institutions and fifty percent are funded by the federal or state governments. The policies of the NCAA are established

but the court was unwilling to use the First Amendment to tip the balance of the equities involved. The penalties exacted upon the University of Arizona would likely cause substantial hardship on its football program's ability to recruit going forward, and would also deprive the university of any revenues that would have been realized as a result of any television appearances that would have been made but for the punishment.

With respect to challenging the NCAA sanctions on First Amendment grounds, the above "arbitrary and capricious" standard seems to only have required the *Justice* court to have had some sort of plausible basis for concluding that the conduct in question, football, was not First Amendment speech. Therefore the court was in effect charged with deciding whether football was rationally capable of being characterized as mere conduct, as opposed to speech.<sup>146</sup> "In its most basic form," the *Justice* court observed, "athletic competition does not constitute pure speech;

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by its member universities and colleges at annual conventions and are carried out by the NCAA Council. The Council is composed of 46 persons who are elected by the membership at the annual conventions. 1983-84 NCAA Manual, NCAA Constitution, Article 5, Section 1. The University of Arizona is a public institution and at all pertinent times has been a member of the NCAA . . . The NCAA publishes annually a manual which contains the NCAA constitution, bylaws, executive regulations, enforcement procedures, recommended policies, and rules of order. The NCAA constitution states in Article 2, Section 2, that "[a] basic purpose of the Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between college athletics and professional sports." The constitution also sets forth certain principles for the conduct of intercollegiate athletics.

*Id.* at 361.

<sup>146</sup> The court's exact holding was "plaintiffs' argument that the players have been denied a constitutional right to expression through football is unfounded," *Id.* at 374. This language would seem at first blush to suggest that football is not capable of falling under the ambit of the First Amendment. However, when read in light of an "arbitrary and capricious" standard, it is better read as saying that it was not entirely irrational for a court to find that the NCAA's sanctions did not deny the players a constitutional right to expression through football.

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rather, participation in athletic competition constitutes physical activity or conduct.”<sup>147</sup> Application of the Spence test led the court to conclude that “[i]ntercollegiate football, like other sports, is primarily a conduct-oriented activity, and as such it does not warrant ‘the same First Amendment protection that other more ‘communicative’ forms of entertainment have been afforded.’”<sup>148</sup>

4. *Sunset Amusement Co. v. Bd. of Police Commissioners of the City of Los Angeles: Roller Skating*

In *Sunset Amusement Co. v. Bd. of Police Commissioners of the City of Los Angeles*,<sup>149</sup> the Supreme Court of California held that operating a recreational roller skating rink was not speech protected by the First Amendment.<sup>150</sup> In *Sunset Amusement*, the owners of the Roller Bowl roller skating rink challenged the Board of Police Commissioners of the City of Los Angeles’s denial of a renewal permit to operate their rink for two consecutive years.<sup>151</sup> The operators asserted that the denial of the permit infringed upon their First Amendment rights because such denial prevented them from “amusing” and “entertaining” their patrons.<sup>152</sup>

In a decision that predated *Spence v. Washington*, the court observed that “no case has ever held or suggested that simple physical activity falls within the ambit of the First Amendment, at least in the absence of some element of communicating or

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

<sup>148</sup> *Id.* The athletes in *Justice* also alleged that “the NCAA sanctions den[ie]d the public at large its right to entertainment. . . .” *Id.* at 374. The United States District Court for the District of Arizona observed that under *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), “a litigant is not permitted to assert the rights of third parties unless the regulation at issue constitutes a ‘real and substantial’ deterrent to legitimate expression.” *Id.* at 374-75 (citing *Young*, 427 U.S. at 60). The court’s determination that playing college football was not a “protectable, legitimate form of expression,” thus precluded the plaintiffs from demonstrating that the NCAA sanctions “constituted a ‘real and substantial’ deterrent to freedom of expression.” *Id.* at 375.

<sup>149</sup> 101 Cal. Rptr. 768 (1972).

<sup>150</sup> 101 Cal. Rptr. 773-74.

<sup>151</sup> *Id.* at 770-71.

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

advancing ideas or beliefs.”<sup>153</sup> The court did look for communicative elements in rollerskating, seeking some nexus between the speaker and potential listeners, as would be the case between a performer and his audience.<sup>154</sup> Although the court found that some rink spectators might be “entertained or amused” by skaters’ activities, since patrons primarily used the facilities for “physical exercise and personal pleasure,” the element of communication between an artist or performer and his audience “[was] entirely lacking.”<sup>155</sup> The *Sunset* court found that physical activity standing alone was insufficient to constitute communication.<sup>156</sup> To fall within the protection of the First Amendment, the court held, a speaker must *purposefully* engage in conduct aimed at “communicating or advancing ideas or beliefs.”<sup>157</sup> As the *Spence* test would subsequently mandate, the court looked not to whether the skaters’ actions *may* have conveyed any number of messages to onlookers, but to whether that was the purpose of skating.<sup>158</sup>

The decision in *Sunset Amusement* is analogous to later First Amendment jurisprudence invoking the “secondary effects doctrine,” applied to zoning ordinances affecting adult movie theaters.<sup>159</sup> Jurisprudence aside, the court decided not to renew Roller Bowl’s permit because it presented a substantial public safety risk.<sup>160</sup> There was substantial evidence at trial that Roller Bowl had violated “applicable Los Angeles ordinances requiring the

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<sup>153</sup> *Id.*

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

<sup>155</sup> *Sunset Amusement*, 101 Cal. Rptr. at 774.

<sup>156</sup> *Id.* at 773.

<sup>157</sup> *Id.* at 774.

<sup>158</sup> The *Sunset Amusement* case was decided two years before the Supreme Court promulgated the *Spence* test. Had this case been decided under *Spence*, the court would have reached the same result, as the first element of the *Spence* test is subjective intent to communicate.

<sup>159</sup> See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986) (upholding a city ordinance which imposed a moratorium on licensing adult movie theaters because the ordinance was “aimed not at the *content* of the films shown at “adult motion picture theatres,” but rather at the *secondary effects* of such theaters on the surrounding community.”).

<sup>160</sup> *Id.* at 77.

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maintenance of off-street parking” and that the parking facilities that it did provide “were too inadequate to comport with the ‘peace, health, safety, convenience . . . and general welfare of the public.’”<sup>161</sup>

Instead of signifying the blanket proposition that sports in general are not First Amendment speech, *Sunset Amusement* simply demonstrates that a court will not recognize a sport as speech where doing so under the facts and circumstances of that particular case will endanger the “peace, health, safety, convenience . . . and general welfare of the public.”<sup>162</sup>

*5. MacDonald v. Newsome: Surfing*

In *MacDonald v. Newsome*, the United States District Court for the Eastern District of North Carolina applied a similar rationale to find that recreational surfing was not expressive conduct under the First Amendment.<sup>163</sup> In that case, a surfing enthusiast brought First Amendment challenge to a county ordinance prohibiting surfboarding in specified coastal waters. As in *Sunset Amusement*, the *MacDonald* court focused on the plaintiff’s lack of intent to communicate. The court held that as one surfs along the prohibited coastal area he neither “protects [the coast] or endeavors to make a public declaration or statement.”<sup>164</sup> Unlike protesters sleeping in a public park overnight in an effort to further public protest,<sup>165</sup> or wearing an arm band at a public school to protest the Vietnam War,<sup>166</sup> “surfing is more of an avocation or sport,” and as such does not warrant First Amendment protection.<sup>167</sup>

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<sup>161</sup> *Id.* at 77-78.

<sup>162</sup> *Id.*

<sup>163</sup> 437 F. Supp. 796 (E.D.N.C. 1977).

<sup>164</sup> 437 F. Supp. at 798.

<sup>165</sup> See *United States v. Abney*, 534 F.2d 984 (D.D.C. 1976).

<sup>166</sup> See *Tinker v. Des Moines School District*, 393 U.S. 503, 89 S. Ct. 733 (1969).

<sup>167</sup> *MacDonald*, 437 F. Supp. at 797-98. The irony in the *MacDonald* court’s holding is that most top surfing competitions include an unscored component “expression session” where the surfers are out on the water solely to have fun and express themselves through their surfing.

Similar also to *Sunset Amusement*, what swayed the court in *MacDonald* was its concern for public safety:

[P]art of the attraction of surfing is the speed the surfer achieves when maneuvering his board across the face of a wave. Given the fact that bathers and surfers tend to congregate in the same area, the speed the surfer reaches coupled with the unpredictability of ocean waves, poses a risk of injury to both surfers and swimmers. Furthermore, it is conceivable that when a surfer stations himself near a pier waiting for a wave or when riding a wave in that direction, he may be struck by an errant fishing lure cast by an angler standing on a pier.<sup>168</sup>

Thus, *MacDonald* reinforces the proposition that a court will not grant full First Amendment protection to a sport where doing so would jeopardize public safety. This is consistent with both the “secondary effects doctrine,”<sup>169</sup> as well as the Supreme Court’s recognition of “the outer perimeters of the First Amendment.”<sup>170</sup>

### *B. Boxing as First Amendment Protected Expression*

There are only two boxing cases involving the application of the First Amendment, and the decisions in those cases have differing results. In the first case, *United States Satellite Broadcasting Co. v. Lynch*,<sup>171</sup> the United States District Court for the Eastern District of California suggested that any participant in

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<sup>168</sup> *Id.* at 800.

<sup>169</sup> See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986) (upholding a city ordinance which imposed a moratorium on licensing adult movie theaters because the ordinance was “aimed not at the *content* of the films shown at “adult motion picture theatres,” but rather at the *secondary effects* of such theaters on the surrounding community”).

<sup>170</sup> *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-66 (1991). As stated in one of the cases discussed below, “exposition of an athletic exercise is on the periphery of protected speech (for the purposes of a balancing of conflicting interests), as opposed, for example, to political speech, which is the core of the First Amendment protection.” *Post Newsweek Stations-Connecticut, v. Travelers Ins. Co.*, 510 F. Supp. 81 (D. Conn. 1981).

<sup>171</sup> 41 F. Supp. 2d 1113 (E.D. Cal.1999) (any participant in the broadcast or promotion of a boxing event is a speaker for First Amendment purposes).

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the broadcast or promotion of a boxing event is a speaker for First Amendment purposes.<sup>172</sup> Similar to *Top Rank*, the plaintiff in *U.S. Satellite* brought suit seeking a declaration that the California Boxing Act, which levied a 5% tax on receipts from pay-per-view boxing and wrestling, was unconstitutional.<sup>173</sup> The *U.S. Satellite* court ultimately struck down the California Boxing Act because of the Act's disparate treatment of combat sports vis-à-vis other pay-per-view telecasts.<sup>174</sup> Although the court rested its holding on the fact that that the speaker in that case was a broadcaster and that the speech being taxed was a television broadcast, the court noted in dicta that First Amendment protection also attaches to boxing matches.<sup>175</sup>

Chief Judge Shubb stated, "defendants have not convinced the court that First Amendment protection does not attach to a live boxing match organized, held, and televised for the purpose of entertaining live and remote viewers."<sup>176</sup> The court emphasized that the First Amendment protects live entertainment, as well as political and ideological speech.<sup>177</sup> Thus, "a general law that

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<sup>172</sup> *Id.* at 1120-21.

<sup>173</sup> CAL. BUS. & PROF. CODE § 18600 et seq. (2004). The California Boxing Act provided that:

Every person who charges and receives a fee for exhibiting a simultaneous telecast of any live, current, or spontaneous contest or wrestling exhibition on a closed-circuit telecast viewed within this state shall . . . pay to the commission a 5 percent tax, exclusive of federal taxes thereon, of the amount paid for admission or subscription telecast, as defined in Section 18830, to the showing or viewing of the contest or wrestling exhibition.

CAL. BUS. & PROF. CODE § 18832.

<sup>174</sup> 41 F. Supp. 2d at 1120-22.

<sup>175</sup> *Id.* at 1120-21. The court stated:

As a threshold matter, defendants have not convinced the court that First Amendment protection does not attach to a live boxing match organized, held, and televised for the purpose of entertaining live and remote viewers. The First Amendment protects entertainment. It protects live entertainment, including even the expressive content of nude dancing.

*Id.* at 1120 (internal citations omitted).

<sup>176</sup> *Id.* at 1120.

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

impacts conduct with expressive and non-expressive elements must be ‘within the constitutional power of the government,’ and in furtherance of ‘an important or substantial governmental interest [that] is unrelated to the suppression of free expression.’”<sup>178</sup>

Yet singling out a boxing telecast for disparate tax treatment is not the “application of a general law, such as a ban on public nudity, on the burning of draft cards, or on physical combat, to conduct with both expressive and non-expressive elements.”<sup>179</sup> Instead, since First Amendment protection attaches to the dissemination of live entertainment, the court found that the tax would impermissibly regulate expressive conduct.<sup>180</sup> The court, however, declined to formally address whether the sport of boxing itself could garner First Amendment protection.<sup>181</sup> Therefore, if the plaintiff had not been a broadcaster, it is unclear whether the *U.S. Satellite* court would have reached the same conclusion. Further, even if it did, the question would still remain as to whether tax was

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<sup>178</sup> *Id.* (quoting *United States v. O’Brien*, 391 U.S. 367 (1968)). *O’Brien* involved a challenge to a statute prohibiting the “knowing destruction” of one’s draft card. In that case, defendant was convicted for publicly burning his draft card in protest of the Vietnam War. Although defendant’s actions qualified as speech under the First Amendment, The Court held that a sufficient governmental interest justified the conviction because of the government’s substantial interest in assuring the continuing availability of issued Selective Service certificates, since the statute condemned only the independent non-communicative impact of conduct within its reach, and because the non-communicative impact of defendant’s act frustrated the government’s interest. *Id.* at 376-91.

Likewise, in *Barnes v. Glen Theatre, Inc.*, the Court applied the same analysis to nude dancing. *Barnes*, 501 U.S. 560. Although nude dancing was expressive conduct under the First Amendment, the Court held that an Indiana statute requiring nude dancers to wear pasties and G-strings did not violate the First Amendment since prevention of public nudity was a sufficiently important government interest to justify regulating the non-speech element of the expressive conduct. *See Barnes*, 501 U.S. 567-72.

<sup>179</sup> *U.S. Satellite*, 41 F. Supp. 2d at 1121.

<sup>180</sup> *Id.* at 1120-21.

<sup>181</sup> *Id.* The court observed, that “it simply does not matter in the instant case whether the First Amendment protects or even applies to boxing,” since “[a] tax on the dissemination of entertainment based on content must pass strict scrutiny, regardless of its subject matter.” *Id.* at 1121 (internal citation omitted).

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unconstitutional because it was a content-based regulation of either the boxing match itself, or of the dissemination of live entertainment.

On the other hand, the District Court for the Southern District of New York in *Fighting Finest, Inc. v. Bratton* refused to extend First Amendment protection to boxing.<sup>182</sup> Fighting Finest, Inc. (FFI) was a nonprofit organization established to organize and operate an amateur boxing team composed of New York City police officers.<sup>183</sup> Initially, FFI was permitted to post notices of upcoming events on New York Police Department (NYPD) premises.<sup>184</sup> Subsequently, New York City Police Commissioners Kelly and Bratton denied FFI this right and instead granted the same right to another boxing team composed of police officers, which was affiliated with the Patrolman's Benevolent Association (PBA), the New York City police officers' collective bargaining agent.<sup>185</sup> FFI brought suit against the New York City Police Commissioner Bratton, alleging that its denial of access to the NYPD's internal communication system "[interfered] with [its] First Amendment right to participate in the social, athletic and charitable activities of FFI, all of which, they [claimed, were] forms of expressive speech."<sup>186</sup>

The court in that case rejected the argument that New York City police officers' participation in the sport of amateur boxing subjectively and objectively conveys "the particularized message . . . that police officers are individuals of character pursuing excellence and adhering to ethical standards of fair play and sportsmanship."<sup>187</sup> The court purported to base its decision on the notion that taken to its logical conclusion, "[a] limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."<sup>188</sup> Applying the

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<sup>182</sup> 898 F. Supp. 192, 195-98 (S.D.N.Y. 1995).

<sup>183</sup> *Id.* at 193.

<sup>184</sup> *Id.* at 194.

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

<sup>186</sup> *Id.* at 195.

<sup>187</sup> *Id.* (internal citations omitted).

<sup>188</sup> *Fighting Finest, Inc. v. Bratton*, 898 F. Supp. 192, 195 (S.D.N.Y. 1995) (internal citations omitted).

*Spence* test, the court held that although dance, when combined with nudity, can “inexorably convey a message of eroticism,”<sup>189</sup> a boxing match in which police officers participate “inexorably conveys any message other than that police officers can be pugilists.”<sup>190</sup>

Despite this observation, the court did not reason that this message does not warrant First Amendment protection.<sup>191</sup> The court did not differentiate between nude dancing and police participation in amateur boxing or justify why a message of eroticism is protected but not a message of pugilism.

As in other cases considering sports, the *Fighting Finest* court looked beyond the original two prongs of the *Spence* test in reaching its conclusion. The subtext of FFI’s complaint was that Commissioners Kelly and Bratton “sought to curry favor with [the PBA’s financial secretary] . . . and withdrew recognition and support from FFI in an order to maintain good labor relations.”<sup>192</sup> Observing that such politicking was “hardly pure or pristine,” the court found that it was nonetheless rational.<sup>193</sup>

As collective bargaining agent of New York City police officers, the PBA is an entity that is “integral to the smooth running of the NYPD.”<sup>194</sup> As such, the court found that Bratton’s and Kelly’s efforts on behalf of the NYPD to maintain good relations with the PBA were neither irrational nor unreasonable, “even if they [did] entail acceding to the arguably inappropriate desire of a PBA official to have a police boxing team of his

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<sup>189</sup> *Id.* (citing *Barnes*, 501 U.S. at 565-66).

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 195-96. Indeed, without any further justification, the court conclusively stated, “[w]hile we recognize that dance, when combined with nudity, can inexorably convey a message of eroticism, we are not convinced that a boxing match, in which police officers participate, inexorably conveys any message other than that police officers can be pugilists.” *Id.* (citations omitted). Thus, the court held that the plaintiffs had failed to state a First Amendment claim relative to their boxing activity. *Id.* at 196.

<sup>192</sup> *Fighting Finest, Inc. v. Bratton*, 898 F. Supp. 192, 195-96 (S.D.N.Y. 1995).

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

<sup>194</sup> *Id.* at 195.

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own.”<sup>195</sup> Since PBA plays a crucial role in the NYPD’s official business, excluding FFI from the internal communication system served the official interests of both the PBA and the NYPD. The court averred that “this fact [was] enough . . . to justify giving the PBA preferential access to the non-public forum at issue.”<sup>196</sup>

Within the forum-analysis framework, several factors opposed the police officers’ interest in expressing themselves through the sport of boxing. First, FFI did not allege any burden on the officers’ boxing activity which would violate the First Amendment.<sup>197</sup> Second, FFI did not allege facts sufficient to indicate that the NYPD’s internal communication system was designated “as a place for expressive activity by the public at large.”<sup>198</sup> Third, FFI did not allege any fact indicating Kelly and Bratton denied access to the internal communications system based on any viewpoint advocated by FFI.<sup>199</sup>

In sum, these cases do not stand for the proposition that boxing is incapable of protection under the First Amendment. Instead, in each case, there was an overriding policy concern that prevented the court from finding that the sport in question falls under the ambit of the First Amendment.

### III. BOXING AS EXPRESSIVE CONDUCT

Contrary to Judge Wolf’s notion in *Top Rank*, boxers communicate more than their desire to win prize money.<sup>200</sup> With each fight, a boxer must prove that he is the superior fighter. The boxer intends to demonstrate this to himself and others who may be watching, by his participation in the fight. When a fighter scores a knockout or wins on the cards, he has demonstrated to spectators,

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<sup>195</sup> *Id.* at 195-96. As an aside, the court noted that had such desire stemmed from a reason “that was unconstitutional in and of itself, [*e.g.*], a desire to form an all-white team” would entail a different result. *Id.*

<sup>196</sup> *Id.* at 197-98.

<sup>197</sup> *Id.* at 195.

<sup>198</sup> *Id.* at 197.

<sup>199</sup> *Id.*

<sup>200</sup> *See Top Rank*, 837 So. 2d 496 at 500-02.

or at least a panel of judges,<sup>201</sup> that he is the better fighter. Indeed, one of the most appealing aspects of boxing is that, as a fight, it is easily understood by spectators, regardless of their level of understanding of the sport. But the sport of boxing communicates more than just pugilistic prowess. Whether viewed merely as a legalized fight or something more, an analysis of the conduct shows that if nude dancing can warrant First Amendment protection as expressive conduct, so too should boxing.

*A. Boxing Conveys a Message*

The Supreme Court has held that fighting is not speech.<sup>202</sup> However the sport of boxing removes harmful elements from fighting while preserving its status as a form of expressive combat.<sup>203</sup> While there has been no Supreme Court decision addressing the communicative aspects of boxing, the issue of whether the expression of hatred through violence can be punished separately from the violence itself was considered in *Wisconsin v. Mitchell*.<sup>204</sup> The Supreme Court has held that violence that produces special harms distinct from their communicative impact are entitled to no constitutional protection.<sup>205</sup> However, in *Mitchell*, the Court left open the possibility that in the absence of “special harms” that remove conduct from First Amendment

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<sup>201</sup> Either of which would be “those receiving the message” in First Amendment parlance.

<sup>202</sup> “[A] physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment.” *Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993) (citing *Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984) (“[V]iolence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection”) and *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982) (“The First Amendment does not protect violence”)).

<sup>203</sup> NED BEAUMONT, CHAMPIONSHIP STREETFIGHTING: BOXING AS A MARTIAL ART 8-9 (1997). In other words, boxing is legal, but the safeguards present in a boxing match do not detract from its categorization as a form of combat able to express its particular message via violence.

<sup>204</sup> *Wisconsin v. Mitchell*, 508 U.S. 476 (1993). See also *Barclay v. Florida*, 463 U.S. 939 (1983).

<sup>205</sup> *Wisconsin*, 508 U.S. at 487.

protections, physical violence may be expressive speech.<sup>206</sup>

*1. Nude Dancing as Speech: A Comparison to Boxing*

Boxing matches are fighting demonstrations, thus they have expressive qualities similar to erotic performances which have garnered First Amendment protection from the Supreme Court.<sup>207</sup> The Supreme Court first indicated that nude dancing was protected under the First Amendment in *Schad v. Borough of Mt. Ephraim*.<sup>208</sup> But the Supreme Court added a slight modification to *Schad* in *Barnes v. Glen Theatre, Inc.*<sup>209</sup> In that case, the Court ruled that Indiana's public-indecency law totally preventing nude dancing did not violate the First Amendment.<sup>210</sup> The Court held that a state may regulate nude dancing so long as the law: (i) is clearly within the constitutional power of the state; (ii) furthers substantial governmental interests; (iii) is unrelated to the suppression of free expression; and (iv) restriction in the statute is narrowly tailored.<sup>211</sup>

Indiana's public-indecency statute made it a misdemeanor to appear nude in a public place, and it effectively required female dancers to wear at least "pasties" and a "G-string" while dancing.<sup>212</sup> Two "gentlemen's clubs" in South Bend, Indiana wishing to provide all-nude dancing as entertainment, Glen Theatre, Inc. and the Kitty Kat Lounge, sued in an Indiana federal district court to enjoin the enforcement of Indiana's public-

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<sup>206</sup> *Id.* at 487 ("Whereas the ordinance struck down in *R.A.V.* was explicitly directed at expression (i.e., 'speech' or 'messages'), the statute in this case is aimed at conduct unprotected by the First Amendment.").

<sup>207</sup> See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), *rev'g* 904 F.2d 1081 (1990), *rev'g* 726 F. Supp. 728 (1985); *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981).

<sup>208</sup> 452 U.S. 61 (1981). In *Schad*, the Court struck down a city ordinance prohibiting all live entertainment which was used to shut down a nude dancing establishment. The Court noted, "nude dancing is not without its First Amendment protections from official regulation." *Id.* at 66.

<sup>209</sup> *Barnes*, 501 U.S. 560.

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

<sup>211</sup> *Barnes*, 501 U.S. at 567.

<sup>212</sup> *Id.* at 563.

indecenty statute. The plaintiffs claimed that Indiana's prohibition of nudity in public places violated the First Amendment.<sup>213</sup>

As a threshold matter, the plurality noted that "nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so."<sup>214</sup> But the Court also observed that the public indecency statute was content-neutral: Indiana has not banned nude dancing as such but has proscribed public nudity across the board.<sup>215</sup> As such, it was subject to intermediate scrutiny.<sup>216</sup>

Although nude dancing was symbolic speech, the Court noted that it was not entitled to full First Amendment protection:

[w]hen "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.<sup>217</sup>

Consequently, the Court applied the four-part test for regulating symbolic speech promulgated under *United States v. O'Brien*, which determined that government regulation of symbolic speech is adequately justified:

[i]f it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.<sup>218</sup>

Under the *O'Brien* test, the Court found Indiana's public-indecency statute was justified, in spite of its limitations on an expressive activity. First, the statute was clearly within the

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<sup>213</sup> *Id.* at 562-64.

<sup>214</sup> *Id.* at 566.

<sup>215</sup> *Id.* This is in contrast to Florida's boxing tax, which is content-based, since it regulates only pay-per-view boxing programming, as opposed to pay-per-view programming across the board.

<sup>216</sup> *Barnes*, 501 U.S. at 567.

<sup>217</sup> *Id.* (quoting *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968)).

<sup>218</sup> *Id.*

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constitutional power of the state.<sup>219</sup> Second, the statute served the purpose of “protecting societal order and morality.”<sup>220</sup> Third, the statute was not directed at the message conveyed by nude dancing, but instead reflects public morality; the Court observed, “[t]he perceived evil that Indiana seeks to address is not erotic dancing, but public nudity.”<sup>221</sup> Finally, the Court opined that requiring dancers to don pasties and G-strings did not deprive nude dancing of its erotic message, but merely made the message “slightly less graphic.”<sup>222</sup>

In his concurring opinion, Justice Scalia argued that Indiana’s public-indecency law should be upheld because it is a “general law regulating conduct and not specifically directed at expression.”<sup>223</sup> Rather than be held “to some lower level of First Amendment scrutiny,” the statute was constitutional because “moral opposition to nudity supplied a rational basis for its prohibition.”<sup>224</sup> Justice Souter also concurred in the judgment, emphasizing the secondary effects of nude dancing:

Legislation seeking to combat the secondary effects of adult entertainment need not await localized proof of those effects, [and] the State of Indiana could reasonably conclude that forbidding nude entertainment of the type offered at the Kitty Kat Lounge and the Glen Theatre [furthers] its interest in preventing prostitution, sexual assault, and associated crimes.<sup>225</sup>

Note the statute at issue in *Barnes* is not analogous to the Florida statute at issue in *Top Rank*.<sup>226</sup> Since the Indiana statute is not directed at any conduct in particular, it is subject to intermediate scrutiny under *O’Brien*. However, as discussed throughout this piece, Florida’s Kershaw Act singles out boxing from all other forms of pay-per-view programming and is therefore

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<sup>219</sup> *Id.*

<sup>220</sup> *Id.* at 568.

<sup>221</sup> *Id.* at 571.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at 572.

<sup>224</sup> *Id.* at 580.

<sup>225</sup> *Barnes*, 501 U.S. at 584.

<sup>226</sup> *See supra* note 215.

subject to strict scrutiny. Thus, there would be no O'Brien analysis. Further, unlike the case with Indiana, Florida did not enact the Kershaw Act to combat any invidious secondary effects of boxing; it is merely a means of raising revenue. As such, the Kershaw Act would not meet intermediate scrutiny even if we were to assume *arguendo* that intermediate scrutiny was applicable to Florida's taxation statute.

## 2. *Boxing's Message*

Similar to an erotic dancer, a boxer speaks with his "command of the body."<sup>227</sup> Through a combination of power and ring generalship, boxers engage in a dialogue that "[goes] deep into the heart of each other's matter, [as if] they are [conversing] with their physiques."<sup>228</sup> In effect, fighters communicate amongst themselves and with their audiences as plainly if they were putting the "subtleties of their states in words," yet they accomplish this end entirely using their bodies.<sup>229</sup> In *On Boxing*, Joyce Carol Oates

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<sup>227</sup> Mailer, *supra* note 13, at 124.

<sup>228</sup> *Id.* at 124-25.

<sup>229</sup> In *King of the Hill*, Norman Mailer commented on the how the personal, intimate nature of the boxing, combined with the struggle it depicts, makes boxing a form of communication in itself:

There are languages other than words, languages of symbol and languages of nature. There are languages of the body. And prizefighting is one of them. There is no attempting to comprehend a prizefighter unless we are willing to recognize that he speaks with a command of the body which is a detached, subtle, and comprehensive in its intelligence as any exercise of mind by such social engineers as Herman Kahn or Henry Kissinger. . . . so many a good average prizefighter, just a little punchy, does not speak with any particular *éclat*. That doesn't mean he is incapable of expressing himself with wit, style, and an aesthetic flair for surprise when he boxes wit his body, any more than Kahn's obesity would keep us from recognizing that his mind can work with strength. Boxing is a dialogue between bodies. Ignorant men, usually black, and usually next to illiterate, address one another in a set of conversational exchanges which go deep into the heart of each other's matter. It is just that they converse with their physiques. . . . Boxing is a rapid debate between two sets of intelligence. It takes place rapidly

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characterized boxing as a story without words, and observed that a fight is a pure art form rather than a sport.<sup>230</sup> Thus, if boxing is the message, then the boxing match is the medium. Boxers are akin to characters in a play.<sup>231</sup> Once the bell rings, the plot unfolds and the characters begin to interact in 3 minute scenes. The dialogue continues until the climax, where one fighter emerges the better man.<sup>232</sup>

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because it is conducted with the body rather than the mind. . . [Boxers] speak to each other with their bodies, they signal with their clothes. They talk with many a silent telepathic intelligence. And doubtless feel the frustration of being unable to express the subtleties of their states in words, just as the average middle-class white will feel unable to carry out dreams of glory by the uses of his body.

*Id.*

<sup>230</sup> Oates, *supra* note 1, at 11. Oates explained:

Because a boxing match is a story without words, this doesn't mean that it has no text or no language, that it is somehow "brute," "primitive," "inarticulate," only that the text is improvised in action; the language a dialogue between the boxers of a most refined sort (one might say, as much neurological as psychological: a dialogue of split-second reflexes) in a joint response to the mysterious will of the audience which is always that the fight be a worthy one so that the crude paraphernalia of the setting—ring, lights, ropes, stained canvas, the staring onlookers themselves—be erased, forgotten. . . Ringside announcers give to the wordless spectacles a narrative unity, yet boxing as performance is more clearly akin to dance or music than narrative.

<sup>231</sup> *Id.* at 9.

<sup>232</sup> Michael Stephens, *Poetics of Boxing*, in *READING THE FIGHTS*, *supra* note 13, at 124. Michael Stephens best articulated the analogy:

Aristotle placed plot above character, although as plot is character, and the reverse, it could also be said that a fighter is the fight, too. A fighter brings his character to the fight, but that character can only be defined in terms of the course of its actions in the ring. The best fights are not Stallone-like pushes and pulls between good and evil. . . but rather, in the best cases, two rights colliding, or a right and a left, and so on, until the cumulative effect of choices unmasks one opponent. In drama it is called the recognition scene; in boxing it could be called the telling round. Each fight breaks down into those scenes we call rounds. . . Each round, like a scene, has its peaks and valleys, its goals, objectives,

Boxing is not just a violent interaction and has elements differentiating the sport from common streetfights. An example is the fighters' use of gloves. While gloves make a difference in a fight, contrary to the common misconception, they do not protect fighters from damage done by their opponent's punches.<sup>233</sup> Indeed, the 8 to 10 oz. gloves used by professional fighters are too light to do so.<sup>234</sup> Instead, gloves protect the fighters' fists from damage done by throwing punches throughout the course of a bout.<sup>235</sup> The boxers' ability to land punches without hurting their hands therefore increases the potential duration of the bout without affecting the damage done to the other fighter.

The division of a boxing match into rounds not only distinguishes the sport from a common fight, but also serves to further extend the exposition without impacting the basic message. Boxing matches are generally divided into up to twelve three-minute rounds.<sup>236</sup> Conversely, street fights are of indeterminate duration. Given the strenuous nature of fighting, a chance to rest every three minutes allows a boxer to fight longer in the ring than on the street, therefore increasing the duration of the fight.<sup>237</sup> Therefore, whereas G-strings and pasties arguably diminished the message conveyed by nude dancing, the rules, regulations and equipment that differentiate boxing from a streetfight serve to

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“through lines,” and obstacles, and the result of ineluctable choices creating the rhythm of that action. . . . As drama is physicalized this way, words, as words becomes actions, boxing speaks to those who want to listen to it; ideas are given actions. Like drama, something happens, and most often the players are never the same as a result of what happens, those various choices; they are changed; they have been transformed.

*Id.*

<sup>233</sup> BEAUMONT, *supra* note 203, at 31.

<sup>234</sup> See WORLD BOXING ASSOCIATION, REGULATIONS AND RULES GOVERNING CHAMPIONSHIP CONTESTS § 10 (2004) [hereinafter WBA RULES].

<sup>235</sup> BEAUMONT, *supra* note 203, at 31-32.

<sup>236</sup> *E.g.*, WBA RULES, *supra* note 247, at § 10.

<sup>237</sup> One commentator estimated that the ratio of the duration of a street fight versus that of a boxing match was 6:1. That is, a street fight will go 30 seconds for every three minute round a fighter would be able to last in a bout divided into three minute rounds. BEAUMONT, *supra* note 203, at 8-9.

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enhance the message transmitted by boxers.

Finally, civilians generally fight to accomplish either of two nonexclusive objectives: pain or possession.<sup>238</sup> Through a physical attack on a wrongdoer, a person at once denounces a wrongful act and restores his own dignity and self-respect.<sup>239</sup> The boxer, on the

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<sup>238</sup> See WALTER J. ONG, *FIGHTING FOR LIFE* 29 (1981). In *Fighting for Life*, Ong asserts that each participant in a contest of hostility “fights to hurt his enemy.” *Id.* (emphasis added). Nonetheless, he does not expand on *how* an adversary must hurt his enemy. Intuitively, the term “hurt” ought to encompass not only physical pain, such as that which would accompany a broken nose, but should also include emotional pain, such as the embarrassment of suffering a public humiliation.

The Second Defenestration of Prague in 1618 is an example of suffering emotional pain via public humiliation. See BLACK’S LAW DICTIONARY (8th ed. 2004), WESTLAW, BLACKS (defenestration is the “[a]ct of throwing someone or something out a window”). In retaliation to Holy Roman Emperor Ferdinand II’s attempts to crush Czech Protestantism, an assembly of Protestants found several imperial regents guilty of violating the religious-liberty guarantee of 1609 and subsequently defenestrated them from atop the council room of Prague Castle into a pile of manure below. ENCYCLOPEDIA BRITANNICA ONLINE, *Prague, Defenestration of* (Oct. 31, 2004), <http://www.britannica.com/ebc/article?tocId=9375796&query=defenestration&ct=>. See also John L. Hoh, Jr., *Defenestration of Prague, available at* <http://www.suite101.com/article.cfm/lutheranism/99284>. None of the regents was seriously hurt as a result of the fall, but they, and the Holy Roman Empire, had been publicly humiliated by what they viewed as Protestant Rabble. See wordiQ.com, *Definition of Defenestrations of Prague*, [http://www.wordiq.com/definition/Defenestrations\\_of\\_Prague](http://www.wordiq.com/definition/Defenestrations_of_Prague). In fact, the Holy Roman Empire was so disgraced by the incident that Ferdinand II was deposed, thus ushering in the Thirty Years’ War. See, e.g., infoplease.com, *Thirty Years War: The Bohemian Period*, <http://www.infoplease.com/ce6/history/A0861529.html>.

In sum, the Holy Roman Empire was “hurt” by the Second Defenestration because its monarch was deposed and a long and bloody struggle raged throughout Europe as a result. Yet the incident itself caused little, if any, physical pain to the defeated adversaries. This illustration proves that physical pain is a sufficient, but not necessary, condition to “hurt” one’s enemy in a contest of hostility.

<sup>239</sup> There is a similarity between the concept of reprobation in a fisticuffs, on one hand, and the concept of “public prejudice” in antebellum American dueling. See C.A. Harwell Wells, *The End of the Affair? Anti-Dueling Laws and Social Norms in Antebellum America*, 54 VAND. L. REV. 1805, 1808-11 (2001).

other hand, aims simultaneously to dominate his opponent and affirm his identity as a superior fighter. By inflicting pain upon his opponent *this time*, a boxer also seeks to dissuade the opponent from future challenges “in order to avoid further unpleasantness, as well as, to communicate to others that he will not tolerate similar challenges.”<sup>240</sup> A fighter wants to “make an example” out of his adversary.<sup>241</sup> Finally, a boxer may also fight to exert possession over a trophy or a championship belt. Although this can be viewed as a contest for possession over an object, it is also symbolic of the message of self-affirmation—the trophy or belt is the physical embodiment of the concept “may the best man win”—the belt holder is the champion of the world, affirming that he is the best fighter in his weight class.

*B. Boxing’s Message is Understood by its Audience*

Boxers convey a message that is not only *likely* to be understood by their audience, but is *in fact* understood by their audience.<sup>242</sup> Boxing is like no other sport.<sup>243</sup> Indeed, the term

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“Public prejudice’ demanded that a gentleman either defend his honor in a duel or else sacrifice the respect of his peers.” *Id.* at 1809. Indeed, the act of dueling itself communicated to others “that the duelists were men of honor.” *Id.* at 1810. This resembles the expression inherent in a modern street fight: participation such a fight evinces the participant’s will to defend his honor by fighting to simultaneously decry his opponent’s malicious acts and reinstate his own self-worth. 1 CHARLES E. TORCIA, WHARTON’S CRIMINAL LAW § 2 (15<sup>th</sup> ed. Supp. Nov. 2003), WESTLAW, CRIMLAW at 2 [hereinafter WHARTON].

<sup>240</sup> See WHARTON, *supra* note 252, at 3.

<sup>241</sup> See *id.*

<sup>242</sup> See *e.g.*, Robert W. Enzenauer & Patrick J. Kelly, *The Borrowed Imagery of Boxing*, 264 JAMA 1531 (1990). In *The Borrowed Imagery of Boxing*, the authors discuss the use of boxing imagery in Pfizer’s promotion of their antibiotic Cefobid. *Id.* Pfizer touted Cefobid as “the infection fighter that defeats nosocomial pneumonia and knocks out infections.” *Id.* To illustrate the slogan, a series of ads pictured a boxer’s hands raised in victory, a pair of boxing gloves, or a pair of boxing trunks. *Id.* Pfizer stated that they used the borrowed imagery of boxing as a way to communicate graphically “the image of strength and power, and the ability to triumph over infections.” *Id.*

<sup>243</sup> See generally Oates, *supra* note 1, at 8-11.

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“sport” does not do justice to categorizing the “Sweet Science.”<sup>244</sup> At once, it is an amorphous conglomeration of art, drama and sport packaged in three-minute increments. It defies neat categorization. As Joyce Carol Oates remarked in her seminal work, *On Boxing*, about boxing’s impact on her:

Nor can I think of boxing in writerly terms as a metaphor for something else. No one . . . is likely to think of boxing as a symbol of something beyond itself, as if its uniqueness were merely an abbreviation, or iconographic; though I can entertain the proposition that life is a metaphor for boxing—for one of those bouts that go on and on, round following round, jabs, missed punches, clinches, nothing determined, again the bell and again you and your opponent so evenly matched it’s impossible not to see that your opponent *is* you: and why this struggle on an elevated platform enclosed by ropes as in a pen beneath hot crude pitiless lights in the presence of an impatient crowd?—that sort of hellish-writerly metaphor. Life *is* like boxing in many unsettling respects. But boxing is only like boxing.<sup>245</sup>

At the most rudimentary level, boxing is a fight sanctioned by the state that pits two fighters together in a struggle.<sup>246</sup> The goal is simple: defeat your opponent.<sup>247</sup> The message sent in doing so is

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<sup>244</sup> The phrase “sweet science of boxing” (commonly shortened to “sweet science”) was popularized by A.J. Liebling, a literary journalist and the author of a collection of articles in the 1950s entitled *The Sweet Science*. Liebling borrowed the expression from Pierce Egan, who in the 1700s wrote a collection of boxing articles entitled *Boxiana*. See Jon Christensen, *The Sweet Science of Stories*, available at <http://www.greatbasinweb.com/gb2-2/sweetstories.htm> (1997).

<sup>245</sup> Oates, *supra* note 1, at 4 (emphasis in original).

<sup>246</sup> That is, sanctioned by the state. See FLA. STAT. ANN. § 548.008, *supra* note 12.

Considered in the abstract the boxing ring is an altar of sorts, one of those legendary spaces where the laws of a nation are suspended: inside the ropes, during an officially regulated three-minute round, a man may be killed at his opponent’s hands but he cannot legally be murdered.

Oates, *supra* note 1, at 19.

<sup>247</sup> This can be accomplished either by knocking out your opponent, or

understood by those who view a match.<sup>248</sup> Each boxing match is a story, “a unique and highly condensed drama without words.”<sup>249</sup> Boxers are there to establish themselves in front of the fans, their trainers, and the world<sup>250</sup> in “a public accounting of the outermost limits of their beings.”<sup>251</sup> Boxers communicate “what physical and psychic power they possess—of how much or how little they are capable.”<sup>252</sup> The objective message received by the audience is readily apparent: “‘the Sweet Science of Bruising’ celebrates the physicality of men, even as it dramatizes the limitations, sometimes tragic, more often poignant, of the physical.”<sup>253</sup> Oates observed, “To enter the ring near-naked and to risk one’s life is to make of one’s audience voyeurs of a kind: boxing is so intimate.”<sup>254</sup>

Expressing oneself to society through boxing is not a novel endeavor. As far back as Ancient Greece, boxers were viewed as heroes much in the same vain as Heracles and Ajax.<sup>255</sup> Combat sports champions<sup>256</sup> received heroes’ honors, and were more

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outscored him on the judges’ scorecards. *See* WBA RULES § 1, 3 (delineating ways in which a boxer can win a fight).

<sup>248</sup> Indeed, there is more expressed than simply the desire to win prize money. For example, amateur bouts, which can be some of the most ferocious confrontations, often have no fight purse. If the message communicated by participants in the sport of boxing is one of greed, as asserted by the *Top Rank* court, how would they categorize the message in these prizeless prizefights?

<sup>249</sup> Oates, *supra* note 1, at 8.

<sup>250</sup> This is especially true in the case of global telecasts. But needless to say, boxing is a truly global sport, hence why the top prize is “champion of the world.” Fighters come from, and compete, all around the world (*e.g.*, Mike Tyson (U.S.A.), Lennox Lewis (U.K.), Vitali Klitschko (Germany via Kazakhstan), Roberto Duran (Panama), Hector “Macho” Camacho (Mexico), David Tua (New Zealand), Ben Tackie (Ghana), Yoshihiro Irie (Japan)). As a result, even in the early days of their careers, boxers compete in a global arena and try to make a name for themselves in the eyes of the world.

<sup>251</sup> Oates, *supra* note 1, at 8.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> *Id.* at 7.

<sup>255</sup> *See* COMBAT SPORTS IN THE ANCIENT WORLD at 128-29. *supra* note 11

<sup>256</sup> *E.g.*, boxing, wrestling and pankration (a Greek sport combining boxing, kicking, wrestling throws, strangle holds and pressure locks). *See id.* at 54.

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revered than even soldiers who had fallen in battle.<sup>257</sup> Fighters distinguished themselves as individual champions, much in the way that Homer's great warriors had sought out and defeated suitable opponents for themselves in the melees of the *Iliad*.<sup>258</sup> These champions brought "delight and honor" to their city-states, and were viewed as public benefactors, a reflection of the high esteem and regard held for boxing.<sup>259</sup> Like his counterpart in Ancient Greece, a modern boxer strives to be seen by his audience "not only to be a champion but to be a great champion—an immortal."<sup>260</sup>

Despite the passage of millennia since boxing's inception, the status of the modern boxer-hero persists.<sup>261</sup> Regarding the modern applicability of the Hellenic hero-athlete, Nietzsche remarked, "[e]very talent must unfold itself in fighting."<sup>262</sup> But prowess in the ring garners more than mere recognition as a role model or talented athlete for the modern boxer. There is still a link between the fighter and his audience, similar to that between the ancient pugilist and his audience.<sup>263</sup> His performance in the ring communicates to the audience who he is as a person and where he stands in society.<sup>264</sup> Like his Greco-Roman counterpart, a boxer's feats of pugilism serve to immortalize him in the eyes of spectators.<sup>265</sup>

However, boxing's message is not confined to the concept of status. Especially in the twentieth century, boxing was a vehicle of

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<sup>257</sup> *Id.* at 128.

<sup>258</sup> *Id.* at 113.

<sup>259</sup> *Id.* at 128.

<sup>260</sup> Oates, *supra* note 1, at 6.

<sup>261</sup> Anthony J. Cortese, *The Notre Dame Bengal Bouts: Symbolic Immortality Through Sport*, 8/1/97 J. SPORT BEHAV. 347 (1997), available at 1997 WL 12852129 (discussing the role of the modern boxer as a hero-immortal).

<sup>262</sup> See Oates, *supra* note 1, at 9.

<sup>263</sup> Cortese, *supra* note 261, at \*4.

<sup>264</sup> *Id.* Cortese noted, "[p]ublics are served by [boxers] and make active demands on them; they provide role-support (and, occasionally, nonsupport)." *Id.*

<sup>265</sup> *Id.*

social communication and change. In 1910, for example, boxing broke down the color barrier in American professional sports.<sup>266</sup> In that year, Jack Johnson, a black fighter, fought for the heavyweight title against Jim Jeffries, a white fighter dubbed the “Great White Hope,” in what was called “a fight for all the racial marbles.”<sup>267</sup> Until this point, there had never been a black heavyweight champion.<sup>268</sup> This was largely a function of the remnant of post-Civil War racism that labeled blacks as inferior, as well as some deft maneuvering by those who determined which fighters could qualify for a shot at the title.<sup>269</sup> The fight was advertised as “a match of civilization and virtue against savagery and baseness.”<sup>270</sup>

Despite the controversy, and a nation’s collective denial that a black man could be heavyweight champion, the fight took place as scheduled in Las Vegas, Nevada.<sup>271</sup> Johnson conducted himself with grace and decorum, responding to the crowd’s numerous boos, jeers and epithets in a manner that *Collier’s* described as “the good sense [and] cleverness to keep the respectful ingratiating ways of the Southern [black].”<sup>272</sup> Likewise, in response to the racially charged taunts of Jeffries and his corner man, former heavyweight champ “Gentleman” Jim Corbett, Johnson “politely responded and smiled.”<sup>273</sup>

More importantly, Johnson rose above his opponent in terms of boxing ability.<sup>274</sup> Johnson completely dominated Jeffries for fifteen rounds; he definitively proved himself the better fighter.<sup>275</sup> Finally,

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<sup>266</sup> See generally RANDY ROBERTS, PAPA JACK: JACK JOHNSON AND THE ERA OF WHITE HOPES 85-107 (1985).

<sup>267</sup> *Id.* at 85-86.

<sup>268</sup> *Id.* at 86-90.

<sup>269</sup> *Id.*

<sup>270</sup> *Id.* at 85. White America was so offended by the prospect of a black champion that they launched a myriad of protests to stop the fight altogether, including a letter writing campaign, where the Governor of California received nearly 1 million postcards imploring, “STOP THE FIGHT, THIS IS THE 20<sup>TH</sup> CENTURY.” *Id.* at 94.

<sup>271</sup> *Id.* at 104.

<sup>272</sup> ROBERTS, *supra* note 266, at 105.

<sup>273</sup> *Id.*

<sup>274</sup> *Id.* at 105-07.

<sup>275</sup> *Id.* Some commentators at the time believed that Johnson was merely

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late in the fifteenth round, Johnson launched a barrage of over twenty punches to Jeffries's bloodied and swollen face. Tens seconds later, Jack Johnson became the first black heavyweight champion of the world.<sup>276</sup> Thus, by breaking the color barrier with respect to the heavyweight championship, Jack Johnson used boxing to prove to the world that blacks were not inferior and were capable athletes. His feats in the ring on that day in 1910 paved the way for future black athletes to compete on equal ground in mainstream professional sports. His victory transcended the ring, as it was a milestone in healing the wounds of slavery and creating an integrated society in America.<sup>277</sup>

Boxing was also used to fire America's first shots against Nazism during World War II. On June 22, 1938, Joe Louis, a black American, fought a rematch against Max Schmeling, the German heavyweight champion of the world, in a bout that pitted the free world against Nazism.<sup>278</sup> At the time of the fight, the Nazi machine had already begun to engulf Europe into its cloud of fascist oppression.<sup>279</sup> During this dark time, Americans looked to Joe Louis as their bastion of good, standing against the evil that the Nazis represented.<sup>280</sup>

The symbolism of the match was readily apparent in the press coverage of the fight. Americans believed that doling out a defeat to Schmeling, an Aryan, at the hands of a black fighter would

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toying with Jeffries, and could have ended the fight much earlier, but instead wanted to humiliate his opponent and make him suffer for his remarks made before and during the fight. *Id.* at 105-06.

<sup>276</sup> *Id.*

<sup>277</sup> *See id.* at 13.

<sup>278</sup> *See generally* CHRIS MEAD, CHAMPION JOE LOUIS: BLACK HERO IN WHITE AMERICA 139-42 (Penguin Sports Library ed. 1986).

<sup>279</sup> *See id.* at 139.

<sup>280</sup> *Id.* at 139-40. Rumors about the actors in the fight evince the sentiment at the time. For example, there were rumors that Adolf Hitler would make Schmeling Minister of Sport if he defeated Louis, and that Schmeling said that no black man could beat a member of the master race. *Id.* at 139. Another rumor was that Max Machon, Schmeling's trainer, had a Nazi uniform in his closet. *Id.* Even though these rumors proved to be false, Joe Louis was "led to hate Schmeling and what the Nazis stood for." *Id.*

disgrace the Nazi propaganda machine.<sup>281</sup> In addition to fears that a Louis defeat would represent a victory for the Nazis, Americans were also concerned that if a German became champion, Hitler would effectively steal the title from America for good.<sup>282</sup> In sum, Germans, via Schmeling, represented “one of the worst enemies in the world,” and Joe Louis was America’s great hope in defeating the enemy.<sup>283</sup>

Given the dramatic hype surrounding the bout, the event itself was almost anticlimactic. Living up to his nickname “the Brown Bomber,” Louis quickly pummeled Schmeling into submission.<sup>284</sup> Schmeling landed only one punch before his corner man Max Machon threw in the towel to end the fight.<sup>285</sup> In the end, Joe Louis, deemed racially inferior by the Nazis, defeated an “Aryan superman,” proving to the world that so-called Aryans were not the superior beings that Nazi propaganda had made them out to be and,

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<sup>281</sup> *Id.* at 140. One newswire reported:

German fans leave only one choice for [Schmeling]—a comeback. His German admirers—and there are millions, from Reichsfürer Hitler down—hate the thought of defeat. . . . Newspapers do not say it, but it is tacitly understood that a Louis victory would be taken [in Germany] as a disgrace from the Nazi racial viewpoint.

*Id.*

<sup>282</sup> *Id.* at 140. One reporter feared that Schmeling wanted the title on behalf of himself and the German nation, and if successful would never again allow an American to vie for it. *Id.* Another journalist posited that even if American preclusion were farfetched, “Nobody with a sense of fairness wants to see the next heavyweight championship fight staged in the land bossed by Hitler.” *Id.*

<sup>283</sup> *Id.* at 141. On the eve of the bout, a journalist in New York stated:

Race prejudice should have no place in sports. But Hitler has created a situation which the civilized world cannot and will not overlook. In trying to prove that the Germans are supreme in all things he has made an 18-karat jackass of himself and caused the Nazis to be despised throughout the world. . . . Using sentiment—and judgment too—I choose Joe Louis, an American Negro, to beat the ears off Max.

*Id.*

<sup>284</sup> Bob Considine, *The Second Louis-Schmeling Fight*, in FIRESIDE BOOK OF BOXING 83 (W.C. Heinz ed. 1961).

<sup>285</sup> *Id.*

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more importantly, that they could be beaten.

*C. Boxing Passes the Spence Test as Conduct that is First Amendment Speech*

History demonstrates that boxing is within the ambit of the First Amendment, but the *Top Rank* court overlooked this historical analysis.<sup>286</sup> The *Top Rank* decision reflects modern courts' narrow notion of symbolism, whereby courts accept conduct as symbolic if it can easily be categorized into concrete concepts.<sup>287</sup> For example, wearing a black armband<sup>288</sup> or burning a draft card<sup>289</sup> evinced messages that one is protesting the Vietnam War. Burning a flag evinced discontent with the Reagan administration.<sup>290</sup> Thus, physical conduct labeled "communication" can be boiled down by the courts into tangible words, numbers or symbols, *e.g.*, nude dancing conveys "eroticism."<sup>291</sup> Although the expression inherent in boxing cannot be neatly categorized, it is expressive conduct that conveys a specific message that has a substantial likelihood of being understood nonetheless.<sup>292</sup> A boxer speaks with a language of the

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<sup>286</sup> *Top Rank*, 837 So. 2d at 500. The court conclusorily stated that boxers can only communicate their desire to win prize money.

<sup>287</sup> See *Texas v. Johnson*, 491 U.S. 397 (1989).

<sup>288</sup> *Texas v. Johnson*, 491 U.S. 397 (1989); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560; *Spence*, 418 U.S. 405; *United States v. O'Brien*, 391 U.S. 367 (1968).

<sup>289</sup> *O'Brien*, 391 U.S. 367.

<sup>290</sup> *Johnson*, 491 U.S. 397.

<sup>291</sup> *Barnes*, 501 U.S. 560.

<sup>292</sup> Norman Mailer, *King of the Hill*, in JOYCE CAROL OATES & DANIEL HALPERN, *READING THE FIGHTS* 124 (1988). In *King of the Hill*, Norman Mailer lamented on this very point:

[T]wo great fighters in a great fight travel down subterranean rivers of exhaustion and cross mountain peaks of agony, stare at the light of their own death in the eye of the man they are fighting, travel into the crossroads of the most excruciating choice of karma as they get up from the floor against all the appeal of the sweet swooning catacombs of oblivion—it is just that we do not see them this way, because they are not primarily men of words, and this is the century

body that defies words, yet communicates a message.<sup>293</sup>

Despite court determinations that professional wrestling,<sup>294</sup> figure skating,<sup>295</sup> recreational surfing,<sup>296</sup> recreational roller skating,<sup>297</sup> and college football<sup>298</sup> are unworthy of First Amendment protection, the *Spence* test calls for a sport-by-sport analysis. Boxing is distinct from any other sport.<sup>299</sup> Unlike football and other team sports, there is an individual focus in boxing.<sup>300</sup> Since each side is represented by only one individual, emphasis is squarely on the two players fighting for superiority in the “squared circle.”<sup>301</sup> In this way, the more intimate nature of boxing delivers a more “particularized” message than does a team sport.<sup>302</sup>

Indeed, individual expression is the core of boxing because boxers must express their individual role-identity to their audience.<sup>303</sup> “One does not play boxing”;<sup>304</sup> as a survival game,

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of words, numbers, and symbols. Enough.

*Id.*

<sup>293</sup> Mailer, *supra* note 13, at 124-25.

<sup>294</sup> *Murdock*, 361 F. Supp. 1083.

<sup>295</sup> *Post*, 510 F. Supp. 81.

<sup>296</sup> *MacDonald*, 437 F. Supp. 796.

<sup>297</sup> *Sunset Amusement*, 101 Cal. Rptr. 768.

<sup>298</sup> *Justice*, 577 F. Supp. 356.

<sup>299</sup> See e.g., Oates, *supra* note 1, at 20-21.

<sup>300</sup> Football and other team sports are better viewed as the collective action of many individuals. While each athlete doubtless has a back story, and the teams are playing for a common goal, collective action presents a difficulty in that it is extremely difficult, if not impossible for many to come together and convey a particularized message other than the collective desire to score and win. Further, boxing is a fight—primal instinct, yet a language in itself. Since time immemorial, fighting has conveyed a message—dominance over territory or an item, rightful partner to a mate, etc. Thus, team sports lack the expressive dialogue-like quality inherent in boxing.

<sup>301</sup> It is even different than professional wrestling, which is generally a scripted match, and is more akin to pure entertainment. There is an alternative argument that due to its substantial pure entertainment component, pro wrestling should receive First Amendment protection in the way a play or film would. However, to pursue this argument would go beyond the scope of this note.

<sup>302</sup> See e.g., *Justice*, 577 F. Supp. 356.

<sup>303</sup> Regarding the Bengal Bouts at Notre Dame, Cortese observed:

Since [a boxing match is] a public event and because the

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boxing expresses an image of humanity and the struggle for self-preservation in a manner that other sports do not.<sup>305</sup> Boxing's

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distinction between success and failure in boxing is clear (one either wins or loses), the boxer must put his role-identity on the line. Unlike some other sports (e.g., football, hockey, soccer), there are no ties. Boxing is ultimately an individual rather than team effort. There is no one to replace you; you cannot call time-out after you have been knocked punch-drunk with a vicious uppercut to the chin. You cannot rest when you have had the wind knocked out of you with a sweeping hook to the mid-section.

Cortese, *supra* note 261, at \*4-5.

<sup>304</sup> Oates, *supra* note 1, at 20

<sup>305</sup> *Id* at 20-21. Oates observed:

I have no difficulty justifying boxing as a sport because I have never thought of it as a sport. . . . There is nothing fundamentally playful about it; nothing that seems to belong to daylight, to pleasure. At its moments of greatest intensity it seems to contain so complete and so powerful an image of life—life's beauty, vulnerability, despair, incalculable and often self-destructive courage—that boxing *is* life, and hardly a mere game. During a superior match . . . we are deeply moved by the body's communion with itself by way of another's intransigent flesh. The body's dialogue with its shadow-self—or Death. Baseball, football, basketball—these quintessentially American pastimes are recognizably sports because they involve play: they are games. One *plays* football, one does not *play* boxing.

Observing team sports, teams of adult men, one sees how men are children in the most felicitous sense of the word. But boxing in its elemental ferocity cannot be assimilated into childhood. . . . Spectators at public games derive much of their pleasure from reliving the communal emotions of childhood but spectators at boxing matches relive the murderous infancy of the race.

Considered in the abstract the boxing ring is an altar of sorts, one of those legendary spaces where the laws of a nation are suspended: inside the ropes, during an officially regulated three-minute round, a man may be killed at his opponent's hands but he cannot legally be murdered. Boxing inhabits a sacred space predating civilization; or, to use D.H. Lawrence's phrase, before God was love. If it suggests a savage ceremony or a rite of atonement it also suggests the futility of such gestures. For what possible atonement is the fight waged if it must shortly be waged against . . . and again? The boxing match is the very image, the more terrifying for being so stylized, of mankind's collective aggression; its ongoing historical madness.

exhibition of the individual in his most basic and savage state sets it apart from other sports.<sup>306</sup> Each boxer's individual message of survival and prowess combine in an expressive manner that satisfies the *Spence* test.<sup>307</sup> As to the first prong of *Spence*, the fighter subjectively intends to communicate his ability to survive. Further, as to the second prong, by participating in the sport, spectators are likely to understand that the boxer is trying to do so.

As demonstrated by the decision in *Top Rank*, there are significant policy interests weighing in favor of categorizing boxing as protected speech. If the *Top Rank* decision stands, other states will promulgate content-based taxes on pay-per-view boxing programming similar to the Kershaw Act. Indeed, Pennsylvania has already done so.<sup>308</sup> This could exacerbate the current split amongst courts that have examined boxing taxes. On the one hand, *Top Rank* would allow content-based measures to stand. On the other hand, *TVKO* and *U.S. Satellite* dictate that such measures are repugnant to the First Amendment.

In addition, Florida's Kershaw Act "imposes a financial penalty on Direct Broadcast Satellite [(DBS)] providers that offer viewers programming involving boxing, and ultimately penalizes viewers themselves based on the content of the programs they choose to watch."<sup>309</sup> The Kershaw Act thus limits programming choices for viewers outside of Florida. Since DBS providers broadcast identical telecasts to subscribers throughout the continental United States, the Kershaw Act may cause DBS providers not to offer programming that gives rise to the tax:

[where] DBS providers choose not to offer pay-per-view telecasts involving boxing (or to offer fewer such telecasts)

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*Id.* (emphasis in original). Thus, even individual sports such as figure skating, where there would ostensibly be more potential for individualized expression, do not transmit as powerful a message as boxing because they cannot provide the same concentrated expression of the human condition as does boxing.

<sup>306</sup> *Id.*

<sup>307</sup> *Spence*, 418 U.S. at 410.

<sup>308</sup> 5 PA. CONS. STAT. § 916 (2004) (promoters must pay 3% tax on gross receipts of in-state pay-per-view telecasts).

<sup>309</sup> Brief for the Satellite Broadcasting and Communications Association as Amicus Curiae in Support of Petitioner, at 1. *U.S. Satellite*, 41 F. Supp. 2d 1113.

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because of the costs that Florida's tax imposes on such programming, then subscribers in other parts of the country—including those states where courts have invalidated taxes identical to Florida's—may suffer a corresponding decrease in available programming content.<sup>310</sup>

A disparity among states' regulation of satellite television broadcasts would visit significant administrative burdens upon pay-per-view providers. As a result, identical transmissions would "[give] rise to differing obligations, depending on the jurisdiction of the subscriber."<sup>311</sup>

These increased burdens and costs, coupled with the decrease in programming available to viewers resulting from taxes such as the Kershaw Act, outweigh the importance of generating increased revenue in a single state.

## CONCLUSION

Florida is one of numerous states to authorize a tax specific to telecasts of boxing. As these taxes are specific to a type of television programming, they should be held by courts to be content-based restrictions on speech. However, boxing and other sports have been denied the protections of the First Amendment because they are deemed to be non-expressive. An historical and literary analysis of boxing demonstrates that the sport satisfies the *Spence* test because boxers intend to express particularized messages which are understood by their audiences. When strict scrutiny is applied to taxes on boxing telecasts, the state's interest in raising revenue is outweighed by boxers'—and their promoters'—freedom of expression.

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<sup>310</sup> Br. for the Satellite Broadcasting and Communications Association as Amicus Curiae in Supp. of Petitioner at 4-5.

<sup>311</sup> Br. for the Satellite Broadcasting and Communications Association as Amicus Curiae in Supp. of Petitioner at 13.