A. ANTI-SOCIAL ACTIVITY

Before players can win races or tournaments, they must be eligible to compete in the first place. One of the major functions of the organization in charge of any sport is to determine who can play in each event. In team sports, the key decisions are made by the management of each team, which decides whether to keep an existing player or to bring in a replacement. In individual sports such as golf and tennis, these decisions are now made by a body composed of, or at least accountable to, the players themselves. In a similar setting, medicine, the Supreme Court has questioned on antitrust grounds the delegation of authority to committees of doctors to judge whether one of the members of their specialty should gain or retain staff privileges in a hospital where they might compete for the same patients.[1] Judicial concern is likely to be even greater in the world of sports, where there is no compelling need to protect patients from risky medical treatment.

The violent and, at times, corrupt world of professional boxing produced a distinctive strategy of public regulation of sports. Boxing was once outlawed as savagery in violation of state criminal laws. Starting in the early twentieth century, boxing was allowed only under the comprehensive regulation of state public authorities, typically called "athletic commissions." State legislatures established these administrative bodies to set eligibility and licensing standards for all persons involved in the sport in their states. The New York and Nevada Athletic Commissions have been the most important public players because most important boxing matches have taken place in those jurisdictions.

On April 27, 1967, Muhammad Ali, the world's heavyweight boxing champion and most celebrated athlete, refused to be inducted into the U.S. armed forces on the ground of a conscientious religious objection. On April 28, 1967, the New York State Athletic Commission revoked Ali's license to box, and all the other state commissions soon followed suit. Ali sued the New York commission:

MUHAMMAD ALI v. STATE ATHLETIC COMMISSION

United States District Court, Southern District of New York, 1970.
316 F.Supp. 1246.

MANSFIELD, J.

In this action for a declaratory judgment and injunction, plaintiff, Muhammad Ali, popularly known as Cassius Clay, has moved for a preliminary injunction restraining defendants from denying him a license to box in the State of New York. For the reasons stated below the motion is granted.

The essential facts are not in dispute. From 1961 until April 1967, Ali was licensed to box in New York, where he was recognized as the World Heavyweight Champion. On April 28, 1967, the New York State Athletic Commission ("Commission" herein) suspended his license because of his refusal to submit to induction in the Armed Forces of the United States. On September 30 of the same year, Ali's license automatically expired pursuant to N.Y. Unconsolidated Laws § 8910, which provides that all such licenses are for one year's duration and automatically expire on that date.

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[1] See *Patrick v. Burget*, 486 U.S. 94 (1988). See also James F. Blumstein and Frank A. Sloan, *Antitrust and Hospital Peer Review*, 51 L. and Contemp. Prob. 7 (1988); Josephine M. Hammack, *The Antitrust Laws and the Medical Peer Review Process*, 9 J. Contemp. Health L. & Pol'y 419 (1993).

On June 20, 1967, Ali, after a jury trial, was convicted in the United States District Court for the Southern District of Texas of the federal felony of refusing to submit to induction into the Armed Forces, and was sentenced to a term of five years imprisonment. The sentencing judge indicated that he might be disposed to consider a reduction of the sentence if the conviction should be affirmed. The conviction was affirmed by the Fifth Circuit Court of Appeals, Clay v. United States, 397 F.2d 901 (5th Cir.1968), but the Supreme Court remanded the case to the district court on March 24, 1969, to determine whether the conviction was tainted by evidence obtained through unlawful electronic surveillance.

During all of these proceedings in his criminal case, Ali has been at liberty upon a $5,000 bond. On September 22, 1969, he applied to the Commission for renewal of his license to box in New York. On October 14, 1969, the Commission unanimously denied his application because his "refusal to enter the service and [his] felony conviction in violation of Federal law is regarded by this Commission to be detrimental to the best interests of boxing, or to the public interest, convenience or necessity." In a letter to Ali dated October 16, 1969, defendant Dooley, Chairman of the Commission, reviewed the criminal proceedings, noted that Ali had no other criminal record, notified him of the Commission's denial of his application, and advised him that if the conviction should be reversed and he should reapply for a license, the Commission would "be more than pleased to reconsider this determination."

Approximately four months after the Texas district court's reaffirmation of Ali's conviction the present action was begun. Invoking our jurisdiction under 28 U.S.C. §§ 1343(3) and 1332(a), the complaint as originally drawn charged that the defendants' action in denying Ali a license because of his conviction for refusing to serve in the Armed Services violated his First and Fourteenth Amendment rights and constituted cruel and unusual punishment in violation of the Eighth Amendment, thus giving rise to a claim of 42 U.S.C. § 1983. Ali's Due Process claim was based on his general charge that defendants' action was arbitrary and capricious, his contention being that a conviction for draft evasion had no rational relationship to the regulated activity of boxing and was therefore irrelevant to defendants' proper exercise of their functions. Ali charged additionally, but apparently as makeweights, that defendants' action impeded his freedom of religion and constituted cruel and unusual "punishment."

In a characteristically thorough and well-considered opinion Judge Frankel dismissed Ali's complaint as thus originally drawn, pointing out that the defendants' right to deny a boxing license because of an applicant's prior felony conviction was established beyond doubt and that the claims based on freedom of religion and cruel and unusual punishment were baseless. Ali v. Division of State Athletic Commission et al., 308 F. Supp. 11 (S.D.N.Y. 1969). Noting, however, that Ali broadly claimed arbitrary discrimination in violation of his rights under the Equal Protection clause without asserting any essential supporting facts, Judge Frankel granted leave "to replead the broad allegation so that plaintiff may attempt, if he responsibly deems it possible, to supply some concrete and specific content for his charge," id.

On January 27, 1969, pursuant to the leave thus granted, plaintiff amended his complaint to make the following charge:

> "E. Defendants have arbitrarily, capriciously and invidiously refused to renew plaintiff's professional boxer's license in violation of plaintiff's right to equal protection of the laws guaranteed by the Fourteenth Amendment. Although defendants have denied plaintiff a boxer's license on the basis of his refusal to submit to induction and consequent conviction, defendants have on other occasions licensed professional boxers who had been convicted of crimes involving moral turpitude, to wit: (1) Jeff Merritt, who currently holds a New York State boxer's license, has been convicted of robbery; (2) Joey Giardello, who was granted a New York State boxer's license on August 4, 1965, had been convicted of assault; (3) Rocco Barbella, also known as Rocky Graziano, who was licensed to box in

New York State from approximately 1942 to 1947, and from May, 1949, to an unknown date, had been twice convicted of petty larceny and in addition was court martialed while serving in the United States Army and convicted of being absent without leave and of disobeying orders and sentenced to one year at hard labor and a dishonorable discharge.

In addition, on October 3, 1962, defendants recognized Sonny Liston, who had been convicted of armed robbery and of assault with intent to kill, as heavyweight boxing champion in the State of New York. On information and belief, defendants have in their possession records of all professional boxers licensed in New York State which reveal other instances in which individuals convicted of a crime of moral turpitude have nonetheless been licensed to box in the State of New York."

On August 18, 1970, Judge Frankel denied defendants' motion to dismiss the complaint as thus amended.

Forced as we are to assume jurisdiction over this federalized dispute, even though we would prefer that Ali invoke New York state court procedures (e.g., an Article 78 proceeding) rather than risk exacerbation of our relations with the state and its agency, the Athletic Commission, we must now decide whether plaintiff has adduced sufficient evidence to demonstrate a strong likelihood that the Commission's action violated his equal protection rights and that he will suffer irreparable injury unless preliminary relief is granted.

Following the filing of the amended complaint, Ali's counsel, exercising his rights of pretrial discovery, investigated the Commission's current files for the purpose of determining whether it had licensed other boxers who had been convicted of crimes or military offenses. The fruits of this investigation are rather astounding.

The Commission's records reveal at least 244 instances in recent years where it has granted, renewed or reinstated boxing licenses to applicants who have been convicted of one or more felonies, misdemeanors or military offenses involving moral turpitude. Some 94 felons thus licensed include persons convicted for such anti-social activities as second degree murder, burglary, armed robbery, extortion, grand larceny, rape, sodomy, aggravated assault and battery, embezzlement, arson and receiving stolen property. The misdemeanor convictions, 135 in number, were for such offenses as petty larceny, possession of narcotics, attempted rape, assault and battery, fraud, impairing the morals of a minor, possession of burglar's tools, possession of dangerous weapons, carrying concealed weapons, automobile theft and promotion of gambling. The 15 military offenses include convictions or dishonorable discharges for desertion from the Armed Forces of the United States, assault upon an officer, burglary and larceny. On the basis principally of these undisputed records, plaintiff now seeks preliminary injunctive relief.

The question now before us, unlike that before Judge Frankel, is not whether the Commission may in its discretion deny a boxing license to an applicant because of his conviction of a felony or military offense. We concur in Judge Frankel's recognition of such power in the Commission. Boxing as a sport poses such serious risks of death or physical harm, brutality, corruption or "fixes," and fraud that the State of New York, in the exercise of its police power, could (and for a time did) lawfully abolish public boxing exhibitions, or it could subject professional boxing and those connected with it to thorough regulation, which it has done. By statute, it created the Commission, Unconsolidated Laws § 8901, and placed boxing under its "sole discretion, management, control and jurisdiction." All those connected with professional boxing exhibitions, including ticket takers, doormen, ushers, managers, announcers, and special policemen as well as boxers themselves, are required to obtain licenses from the Commission.

Sham and collusive exhibitions are a basis for revocation of the licenses of all those involved, and the Commission is empowered to seek heavy civil penalties against those who violate the boxing law or the rules and orders of the Commission.

The legislature has authorized the Commission to grant licenses to engage in public boxing exhibitions only if the "character and general fitness" of an applicant are such that his participation in boxing "will be consistent with the public interest, convenience or necessity and that the best interests of boxing * * * generally and in conformity with the purposes of this act." In addition it is specifically provided that the Commission may "refuse to renew or issue a license, if it shall find that the applicant * * * has been convicted of a crime in any jurisdiction."

The state's power to deny a license because of the applicant's prior conviction has usually been upheld on the ground that the conviction relates directly to the standards of character and conduct properly demanded of a person engaged in certain activities affecting the public, such as the practice of law, medicine, or voting. Although conviction of a crime involving moral turpitude should have little or no effect upon a boxer's athletic skill or physical prowess in the ring, it could bear upon his proclivity to corruption or upon the general reputation of professional boxing as a sport. For these reasons the action of a state or its agency in barring convicted persons from certain types of employment affecting the public has been upheld as constitutional.

Although the state possesses broad powers to regulate boxing, however, it may not exercise those powers in such a way as to deny to an applicant the equal protection of the state's laws, which is guaranteed to him by the Fourteenth Amendment. A deliberate and arbitrary discrimination or inequality in the exercise of regulatory power, not based upon differences that are reasonably related to the lawful purposes of such regulation, violates the Fourteenth Amendment. In determining whether there has been such an arbitrary denial of equal protection, the acts of the state's duly constituted Athletic Commission or similar agency are deemed to be those of the state itself. In short, the exercise of state power by a state agency in the issuance or refusal of licenses to engage in a regulated activity should not represent the exercise of mere personal whim, caprice or prejudice on the part of such agency. It should, and constitutionally must, have some rational basis.

If the Commission in the present case had denied licenses to all applicants convicted of crimes or military offenses, plaintiff would have no valid basis for demanding that a license be issued to him. But the action of the Commission in denying him a license because of his refusal to serve in the Armed Forces while granting licenses to hundreds of other applicants convicted of other crimes and military offenses involving moral turpitude appears on its face to be an intentional, arbitrary and unreasonable discrimination against plaintiff, not the even-handed administration of the law which the Fourteenth Amendment requires. It is not suggested that any rational basis exists for singling out the offense of draft evasion for labeling as "conduct detrimental to the interests of boxing" while holding that all other criminal activities such as murder, rape, arson, burglary, robbery and possession of narcotics are not so classified. All other things being equal, the convicted murderer, burglar, rapist, or robber would seem to present a greater risk of corruptibility as a licensed boxer, and a greater likelihood of bringing boxing into disrepute, than would the person who openly refused to serve in the Armed Forces. We find it even more difficult to detect any rational basis for distinguishing between a deserter from the Armed Forces, to whom a boxing license has been granted by the Commission, and a person who frankly refuses in the first place to serve.

[The district court also rejected the Commission's claim that it was rational to deny Ali a license because his conviction is "recent" because it did not make that distinction in other cases. Similarly, the Commission never denied a license because the applicant was yet to serve his sentence.]

Upon the record before us, therefore, plaintiff demonstrates a strong likelihood of success on the merits and the evidence compels us to find that the Commission's action in denying him a boxing license because of his conviction and refusal to serve in the Armed Forces constituted an arbitrary and unreasonable departure from the Commission's established practice of granting

licenses to applicants convicted of crimes or military offenses. Thus the Commission has denied Ali his right under the Fourteenth Amendment to equal protection of the laws of the State of New York.

Denial of a license to box has barred Ali from pursuing in New York his chosen trade, from which he earned his living for most of his adult years prior to 1967, with but a limited number of years remaining in which he can meet the rigorous physical standards essential to engaging in such activity. It is clear that unless preliminary relief is granted, he will suffer irreparable injury. The harm to Ali cannot be measured in damages. Accordingly his motion is granted and the defendants are enjoined from denying him a license to box because of his conviction for refusal to serve in the Armed Forces of the United States.

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