

Me and Muhammad

Michael Meltsner

Follow this and additional works at: <http://scholarship.law.marquette.edu/sportslaw>



Part of the [Entertainment and Sports Law Commons](#)

Repository Citation

Michael Meltsner, *Me and Muhammad*, 12 Marq. Sports L. Rev. 583 (2002)
Available at: <http://scholarship.law.marquette.edu/sportslaw/vol12/iss2/4>

This Essay is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.

ME AND MUHAMMAD

MICHAEL MELTSNER*

My father had a cynical notion about his boxing bets, which, unlike his other gambles, were almost always profitable. Making money from gambling was notable in itself for a man whose loyalty to games of chance was such that his bookmaker gave him Christmas presents.

“Look at the fighter’s record,” he instructed me, “and ask yourself whether if the guy you like wins, will there be a lucrative rematch. If the answer is yes, then bet him. If not, pass up the fight or bet his opponent.”

Boxing did not interest me much so I never “liked” any fighter, but for a time in the nineteen-fifties I followed any sport my father had taken up. When he started betting on boxing I had to learn something about it. I did this by listening with him to the frenetic Friday night radio broadcasts of boxing matches from Madison Square Garden and reading copies of Ring Magazine at the local barber shop. This way, I collected gym lore about the leading champions of the time—Willie Pep, Ray Robinson, Joe Walcott—as well as about dozens of leading contenders. Some day, I supposed, I might have to support myself by figuring out which boxer’s victory would lead to the big rematch. Little did I know how my store of boxing trivia would come in handy.

By the time I first heard of Muhammad Ali, then called Cassius Clay, my father was dead and his gambling lectures forgotten, or so I thought. Since Ali turned professional, shortly after winning the 1960 Olympic light heavyweight title in Rome, his life has been chronicled like a head of state. He was news then and, as the press-declared best-known face on the planet, he is news now. With the publication of two adoring biographies by Thomas Hauser¹ and David Remnick,² and the Ali battering *Ghosts of Manila*³ curiously little has been said about his epoch courtroom struggle thirty years ago to return to the

* Matthews Distinguished Professor of Law, Northeastern University School of Law. A.B., 1957, Oberlin College; J.D., 1960, Yale University. Visiting Professor of Law, Harvard Law School; Director, First Year Lawyering Program. Many thanks to Roger Abrams and Jeffrey Eugenides. Email: meltsner@law.harvard.edu.

1. THOMAS HAUSER, MUHAMMAD ALI: HIS LIFE AND TIMES (1991).
2. DAVID REMNICK, KING OF THE WORLD: MUHAMMAD ALI AND THE RISE OF AN AMERICAN HERO (1998).
3. MARK KRAM, GHOSTS OF MANILA: THE FATEFUL BLOOD FEUD BETWEEN MUHAMMAD ALI AND JOE FRAZIER (2001).

ring.

From the beginning, Ali stood out, even in the hype-driven promotional world of boxing. He made outrageous victory predictions, called himself "The Greatest" and delivered his doggerel verses to an eager audience. By 1964, when Ali knocked out the overwhelming favorite, Heavyweight Champion Sonny Liston, in the seventh round of his first championship fight, I was a fulltime staff member of the NAACP Legal Defense Fund, and I thought of him less as a fighter than a racial icon. If Joe Louis, the heavyweight champion of my father's generation, presented the white world a version of patience and restraint mixed with the superhuman strength of the good, loyal black man beloved of white mythology, then Ali was the irreverent voice of a court jester and the symbol of a liberated race that would only be defined on its own terms. Louis gracefully occupied the place he had been given, while Ali was out to define, to seize, his. Naturally, whites could not figure him out. Was he serious? Or putting them on?

At first, the underdog Olympian's brashness just seemed the freshness of youth, but like the Sixties themselves, the man and his image soon turned problematic and contradictory for most Americans. When Cassius Clay became Muhammad Ali, an outspoken proponent of Elijah Muhammad's separatist Lost Found Nation of Islam, his popularity plummeted among whites. The Nation of Islam was wildly feared by those who understood its message as one of condemnation of the entire white race—as Satan, murderers and thieves. However, while Ali often praised Elijah Muhammad he rarely, if ever, repeated a message of hate.

Like every other well-known racial figure of the Sixties, Ali soon came to our professional attention at the Legal Defense Fund (LDF). His local draft board in Louisville, Kentucky had earlier classified him as unacceptable for military service due to a low score on a mental acuity test. Two years later, the Selective Service System was told to increase the number of young men available for Vietnam war service, and thus it lowered the intelligence test passing grade. Consequently, along with thousands of others, Ali was reclassified 1A and fit for service. Ali's response was to complain that he had not been given any warning of the shift, and to appear before his draft board claiming for the first time that he was a conscientious objector who had "no personal quarrel with those Vietcongs."⁴ He also sought exemption from a 1A classification because he supported his mother, paid alimony to his wife, and felt military service would cause him serious financial loss—"I may never be able to overcome this time of loss of boxing sharpness and come back from the service and earn the kind of money required to pay off these financial

4. BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS* 137 (1979).

obligations”⁵

Along with these grounds, the core of Ali’s claim—that his religion taught him “not to take part in any way with infidels or any nonreligious group”⁶—was rejected by the local board as well as an appeal board. The matter was forwarded for possible prosecution to the Department of Justice (DOJ), and, as was the practice, referred to an independent investigator—Lawrence Grauman, a retired Kentucky judge—for evaluation. Grauman reviewed the evidence and concluded Ali was of good character, sincere in his religious exemption claim and legally entitled to it.⁷

Despite Judge Grauman’s recommendation, no one was surprised when lawyers at the DOJ ignored it and concluded that Ali’s beliefs were based on political and racial doctrines, not religious or ethical precepts. According to the DOJ, Ali opposed only certain wars, not war in all its forms, because he excepted a holy war to defend Islam from his general condemnation. Thus, he was not a conscientious objector.⁸

Ali’s lawyer at the time, Hayden Covington, was a legendary figure in legal circles. As the counsel to the Watchtower Bible and Tract Society, the formal organization of the Jehovah’s Witnesses, Covington was as familiar as any lawyer in America with the labyrinthian regulations governing religious exemptions from Selective Service. Between 1939 and 1963, he had appeared as the Witnesses’ attorney in 111 Supreme Court cases. In fact, largely through Covington’s efforts the Witnesses held a unique place in American constitutional law. Their belief in spreading the gospel through door-to-door proselytizing and refusal to serve in the Armed Services had spawned hundreds of Selective Service appeals as well as successful challenges to local regulation of speech and religion.

Covington had increasingly prevailed in the Supreme Court in these cases. At first, the Court turned away many of the Witnesses’ claims, but as new Justices appointed by Franklin Roosevelt developed confidence in their more expansive view of the First Amendment, judicial attitudes changed. The key case was the Court’s reversal—despite wartime passions—of a three-year old precedent that permitted public schools to require children to salute the American flag.⁹ Despite involvement in epochal cases like the flag salute case, Covington was hardly a sophisticated constitutional advocate. He did,

5. *Clay v. United States*, 397 F.2d 901, 918 n.13 (5th Cir. 1968), *vacated sub nom.* *Giordano v. United States*, 394 U.S. 310 (1969).

6. *Id.* at 918.

7. *Id.*

8. *Id.* at 919.

9. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

however, have custody of important cases in which the conflict in values between the Constitution and local political and police officials was manifest, and he knew how to frame constitutional questions that would attract the Court's interest.

Covington's influence on Ali's increasingly complicated legal situation could be seen in August 1966, when he added a claim of the sort that the Witnesses often employed: He asked the Selective Service System to consider Ali exempt from military service because he was a "minister" of the "Lost Found Nation of Islam."¹⁰ Despite Judge Grauman's finding that Ali's beliefs were sincere, this sort of claim—that the Heavyweight Champion was also a full-time man of God—brought out the knives of even more editorial writers.¹¹

The press had paid great attention to Ali's efforts to avoid induction to the Armed Forces. This spawned mountains of hate mail and adverse editorial comment across the nation: He was affiliated with the reviled and feared Muslims and considered a draft dodger (by definition an unpatriotic American), as well as a provocative and assumedly rich black public figure. The storm of criticism receded somewhat while Covington bought delay with the administrative appeals, but it broke anew on April 28, 1967 when Ali declined to take the traditional step forward signifying induction into the Armed Services.¹²

Edwin Dooley, the chairman of the New York State Athletic Commission, was a defeated Republican office holder who had wangled his job regulating boxing from Governor Nelson Rockefeller by threatening to run as a spoiler, thereby splitting the GOP vote in a New York Congressional election. Within hours of Ali's refusal of induction, Dooley went public with the news that the Commission had lifted the champ's license. Preening before reporters, Dooley announced that Ali could no longer box in the state and that New York no longer regarded him as heavyweight champion. There was no notice, no hearing, no waiting for the formalities of trial and conviction, just the Commission's conclusion that licensing a man who refused induction was "detrimental to the best interests of boxing."¹³ You can get a measure of Ali's unpopularity in 1967 from the fact that within days, even before he was actually convicted, almost every important state boxing commission in the nation had followed Dooley's lead. Ali was totally barred from fighting in the United States.

Indictment and trial followed with lightning speed. By June 1967, Ali had

10. *Clay*, 397 F.2d at 917.

11. HAUSER, *supra* note 1, at 170.

12. *Clay*, 397 F.2d at 906.

13. *Ali v. Division of State Athletic Comm'n*, 308 F. Supp. 11, 14 (S.D.N.Y. 1969).

been convicted and sentenced to the maximum five years in prison and a \$10,000 fine by a Texas federal judge, Joe Ingraham.¹⁴ Ali moved to Houston and transferred his Selective Service file to a local draft board, in part because of the supposed liberal orientation of the Fifth Circuit Court of Appeals, which would have ultimate jurisdiction over any criminal case. Covington's defense strategy was to preserve the conscientious objector claims, while also urging federal courts to stop classification and induction of blacks until they were represented on local Selective Service boards in proportion to the population.¹⁵ Hoping the boards would be treated like trial juries, Covington aimed at getting Ali's induction postponed while the issue of black board members was litigated. It was a serious miscalculation because no federal judge was going to block conscription of a sizable proportion of the eligible population on any theory, much less this one.

Another strategy was to seek extensive discovery of Selective Service documents and records in Ali's case to search for evidence of prejudice. A subpoena sought statements by General Lewis B. Hershey, the director of Selective Service, and Representative Mendel Rivers, Chair of the House Armed Service Committee.¹⁶ Rivers had threatened Congressional action if Ali was deferred,¹⁷ and Hershey had made an unusual public statement predicting that the conscientious objector petition would not be granted.¹⁸ If the subpoena was not quashed, the defense would have ammunition for its arguments, but if it was quashed, the defense would at least have an issue to appeal.

But the Fifth Circuit rejected these and all other claims raised by a new team of lawyers, including high profile movement attorneys like Charles Morgan and Howard Moore of Atlanta.¹⁹ The judges pointed out that under established law the court could only reverse the conviction, if Ali's classification was without basis in fact.²⁰ In other words, even if the evidence favored Ali on his conscientious objector claim, he could lose because Congress had given the courts very limited room to review draft boards' procedures for classifying registrants. Regular or duly ordained ministers were exempt from service, but the law was meant to protect leaders of

14. *Clay*, 397 F.2d at 906-07.

15. In Kentucky, 0.2% of local Kentucky draft board members were black even though they were 7% of the population. In Texas, the situation was just as bad with 1.1% black members out of a state black population of 12.4%.

16. *Clay*, 397 F.2d at 914.

17. HAUSER, *supra* note 1, at 155.

18. *Clay*, 397 F.2d at 914.

19. *Id.* at 924.

20. *Id.* at 916.

religions, not members. Ali's claim that he spent 90% of his time as a minister had been supported by 43 affidavits and the signatures of 3612 persons who had participated in his ministry.²¹ The court ruled against him largely because he had listed his vocation as a professional boxer, and he never claimed that he was a minister until after he had been reclassified as inductible.²² The court also ruled that there was sufficient evidence for a draft board to conclude that he did not fall within the legal definition of a conscientious objector.²³

Such a ruling would ordinarily have ended Ali's hopes to avoid jail, but while his final appeal was pending before the United States Supreme Court, one of those unpredictable events took place that have marked Ali's public life. Erwin Griswold, who as Solicitor General represented the United States before the Court, informed the Justices that defendants in a number of pending cases, including Ali's, had been the subject of potentially illegal wire tapping by the FBI.²⁴ Because Ali had been a party to five calls, which had been intercepted by taps on phones used by Elijah Muhammad and Martin Luther King, Jr., the Court sent his case back to the lower courts to decide whether the taps had gathered illegally obtained evidence, which affected the draft dodging conviction.²⁵ If not for this reprieve, Ali's conviction undoubtedly would have been affirmed, and he would have been sent to jail.

During the months that followed, Ali's Chicago business lawyer Chauncey Eskridge began to seriously consider, for the first time, the LDF's offer to challenge the boxing ban. He had held off, he told me, because he feared that if Ali did start fighting, pressures from veterans groups would make it more likely that a judge would send Ali to prison. Four months after the Supreme Court sent the case back to him, Judge Ingraham decided that the conversations tapped by the FBI contained innocuous materials, which had nothing to do with Ali's conviction and thus upheld it.²⁶ Feeling he had nothing to lose, Eskridge finally agreed to a court challenge to restore Ali's license, and he also thought attitudes toward the war were shifting. More to the point, perhaps, Ali was running out of money after almost three years of inactivity.

In November 1969, we went to federal court in New York against Commissioner Dooley while other lawyers once again appealed the criminal

21. *Id.* at 917.

22. *Id.*

23. *Id.* at 920-21.

24. *Giordano*, 394 U.S. at 312.

25. HAUSER, *supra* note 1, at 192.

26. *United States v. Clay*, 386 F. Supp. 926, 930-32 (S.D. Tex. 1969), *aff'd*, 430 F.2d 165 (5th Cir. 1970), *rev'd*, 403 U.S. 698 (1971).

case to the Fifth Circuit. The licensing case was in my hands and those of Ann Wagner. A recent graduate of NYU Law School, Ann had done research for LDF as a student, and was willing to take whatever piecework she could find until a regular staff slot opened. Ann was bright and aggressive, but her most important skill for this case was her experience with New York's often arcane record keeping system, gained by working during law school in the New York courts sifting through records to determine whether alleged criminals showed sufficient community ties to warrant release on low bail.

We decided that Ali's case would go nowhere in New York state courts and took it to federal court, which required identifying federal constitutional rights the Boxing Commission had denied Ali. We had a cluster of claims, but very little precedent to back them up. The main ones were: refusing induction in the Armed Services on grounds of conscience had nothing to do with the evils the Commission was supposed to cure by licensing boxers, and by permitting Ali to remain free while appealing, the courts had waived any interest they had in keeping him from working. These claims evolved from a criticism of the criminal justice system popular at the time. Restrictions on the ability of convicted criminals and ex-convicts to gain employment made the difficulty of rehabilitation greater. For example, a national crime commission had recommended that such "civil disabilities" be limited to those that related closely to the crime committed by the offender, such as not letting a convicted embezzler be a bank teller.²⁷ Today, many doubt the power of rehabilitation (and that skepticism is often used to justify an undifferentiated punitiveness), but in 1969 we thought that the lack of relationship between regulatory purpose and Ali's conduct clearly exposed how the government officials in question were out to get him.

Our other major argument had very different origins. Reading the sports pages to learn how to follow my father's gambling strategies had taught me that many professional boxers had not only been brushed by the law, but they also had been squeezed hard by it. I could not remember the names and dates, but I was certain that felons and others involved with the criminal law had been commonly licensed to box in New York State. So why, I asked myself, not Ali?

Of course, making this into a successful legal argument would take time. It depended on digging up facts showing exactly what the Commission's licensing practices had been in the past, as well as persuading a federal judge that any unequal treatment of the Champ was serious enough to violate the U.S. Constitution.

27. Task Force Report: Corrections, The President's Commission on Law Enforcement and the Administration of Justice (1967).

Because Chauncey was now pressing us to get Ali a license to fight before he was jailed, we had to go ahead with our other arguments in the hopes of getting a judge to order Ali's suspension illegal without the necessity of a factual investigation. We were elated when we drew Marvin Frankel, a former Columbia Law professor, LDF consultant, and a close friend of our boss, Jack Greenberg. The case, however, had barely been filed when Judge Frankel threw our claims out of court. The Supreme Court, he concluded, had often approved of denying state licenses to felons and, in a business so much given to corruption, boxing commissions had broad discretion to decide what did and did not relate to the good character of its licensees.

But Frankel also saved us from defeat. In one of those technical moves that only a litigator can fully appreciate, he gave us a chance, before dismissing the case for good, to prove that the Commission had been unlawfully selective and only taken criminal conviction into account when dealing with Muhammad Ali.

Ann took up residence for a time in the Commission's Manhattan office, and what she discovered was so astonishing that Judge Walter Mansfield, Frankel's successor on the case, condemned the state officials and enjoined them from denying Ali a license.²⁸ Over the years, state regulators had licensed at least 244 men seriously involved with the criminal law, including murderers, rapists, burglars, robbers and army deserters. Though the names of the men were not disclosed to protect their privacy, it was obvious that among them were both champions and prominent contenders. Some had been licensed after indictment and before conviction; others after conviction—Ali's current status—as well as while on parole or probation.

It did not seem to matter. In fact, looking at these files led to the conclusion that the Commission never regarded involvement with the criminal law as a negative. No case could be found of anyone the Commission had treated like Ali, making it all too plain that the Commission had maliciously attempted to punish him for what he represented. The Muslim. The Draft Dodger. The self-defined, outrageously provocative black champion.

Judge Mansfield (a former Marine Corps major with a brilliant war record) did not, however, try to plumb motives. He found the Commission's conduct arbitrary and ordered it stopped.²⁹ A few weeks later, Jack Greenberg called Louis Lefkowitz, the State Attorney General, and persuaded him that New York had no legal grounds, or political interest for that matter, to appeal. Lefkowitz must have been moved by the overwhelming statistics Ann had gathered and by the intervention of at least one prominent black Republican,

28. *Ali v. Division of State Athletic Comm'n*, 316 F. Supp. 1246, 1253 (S.D.N.Y. 1970).

29. *Id.*

but by 1970 the Vietnam War had another face. Politicians of all stripes were now against it, and they differed only in who they blamed and how they wanted to get out. Ali looked very different from the man who much of white, and even black America, had vilified in 1967.

Promoters quickly scheduled a Garden warm-up with journeyman heavyweight Oscar Bonavena, but Ali's real goal was the great payday that would follow an attempt to regain his crown from the current Heavyweight Champion, Joe Frazier. Still standing in his way was the five-year sentence handed down by Judge Ingraham in the criminal case.

Chauncey Eskridge had a habit of trying to deploy lawyers like a football coach shuttling substitutions in a search for the winning combination. As he focused on Ali's last chance to upset the criminal conviction in the Supreme Court, he changed lawyers again, bringing in Jonathan Shapiro, a Harvard graduate who had done civil rights work in Mississippi before joining LDF. Shapiro pressed hard the notion that Ali's beliefs were more religious in nature than others the Court had accepted as grounds for exemption, and that his willingness to defend Islam was more a theocratic than a practical reservation about war. But before the Court could consider Shapiro's theory, once again a concession from the United States came to Ali's aid. The Solicitor General admitted that Ali's beliefs were founded on the basic tenets of the Muslim religion (rather than had been argued earlier, politics or race), and that he was sincere in his beliefs.³⁰ Since the draft board gave no reason for denial of Ali's claim there was no way of knowing which of the reasons given it had relied upon. As two of the three grounds were now admitted to be invalid, the source of Ali's conviction might have been—no one could know—one of the illegal two. Thus, the conviction was set aside.³¹

The reasoning applied by the Court had a respectable history, but it has not always been used when it could have been. If Bob Woodward and Scott Armstrong's 1979 book, *The Brethren*, is correct, the original vote of the Court had come out five to three against Ali.³² But heeding the pleas of his law clerk, Justice Harlan, a member of the majority, sequestered himself with background materials about the Muslims and after studying them, changed his vote.³³ He now thought that the government had mislead Selective Service and the courts by insisting that Ali's religious beliefs were not authentically

30. *Clay v. United States*, 403 U.S. 698, 702-03 (1970) (per curiam).

31. *Id.* at 705.

32. WOODWARD & ARMSTRONG, *supra* note 4, at 137. Thurgood Marshall had been Solicitor General earlier in the case and recused himself. *Id.*

33. *Id.*

anti-war.³⁴ According to Woodward and Armstrong, after Chief Justice Warren Burger read an earlier draft of Harlan's opinion, he told a clerk that Harlan had become "an apologist for the Black Muslims."³⁵

It was a moderate Justice, Potter Stewart, who pushed, the "might have been illegal," solution as a way to persuade all the Justices to reverse the conviction, but without exposing the Court to criticism that its decision was a broad endorsement of the Muslim religious views as pacific.³⁶ Burger was relieved. Harlan went along. Ali won and the country was spared the prospect of a deeply decisive imprisonment.

As for Ali-Frasier, the actual fight succeeded as much as a boxing match as a symbol of vindication. It was hugely profitable for the fighters and promoters. According to Hauser's *Muhammad Ali: His Life and Times*, the fighters were each paid \$2.5 million, ringside tickets were \$150.00 a seat, and the gross was apparently close to \$30 million—all records for the time, though today the numbers look puny.³⁷ The two men soon seemed genuinely out to damage each other physically. Ali had viciously bad-mouthed Frasier before the fight, as chronicled by Kram,³⁸ converting the story line from "Ali Returns" or even "Christian versus Muslim" to "Black Hero Against The Gorilla, The Uncle Tom."³⁹ Instead of the old standby Great White Hope, we had the first politically correct brother fight. Ali's trash talk had injected a measure of spite between the men that has never truly disappeared.

What I remember most about the fight was not the glitter of the celebrity crowd, garnished with an amazing display of fur-coated men who looked like very successful drug dealers, or the brilliantly dressed women, or the sea of rhetoric evoked in almost every journalist and writer who could snare a ticket, or even The Great Return in which I could justly claim a significant role, but the fury of the physical battle itself. Frasier just kept coming. Nothing could stop him. Ali was his imaginative self, jabbing as he moved back and to the side to escape the full force of Frasier's blows, but he had been rusted by the years of inactivity and was not yet truly fit. Frasier was relentless, and dedicated to his task despite the costs to his body. After fifteen brutal rounds he was rightly awarded the decision.

And then as Ann and I stood around the Garden afterwards unable like many others to leave, too stunned by the impact of the fight to say much, I

34. *Id.*

35. *Id.* at 138.

36. HAUSER, *supra* note 1, at 239.

37. *Id.* at 218-19.

38. *See generally* KRAM, *supra* note 3; *See also* HAUSER, *supra* note 1, at 220-23.

39. KRAM, *supra* note 3, at 129.

remembered my father's rule and realized that once again he would have had the winner. Because Frazier had won, there would certainly be a rematch and then another. The money would flow and the clever gamblers would be happy.

