

HUMAN RIGHTS, NATIONAL SECURITY, AND THE ROLE OF LAWYERS IN THE RESISTANCE

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President Donald Trump came to power suggesting, at times, that he would round up millions of undocumented immigrants, expand stop-and-frisk policing nationwide, torture suspected terrorists and murder their families, intensify surveillance and profiling of domestic communities, and ban all Muslim immigrants from entering the United States. Since his election, Trump has nominated individuals to several key national security posts who share his hostility to human rights, undocumented immigrants, and Muslims. Attorney General nominee Jeff Sessions voted against legislation to ban torture, defended Trump's proposal to ban Muslim immigration, and staunchly opposed a path to legalization for undocumented immigrants. Incoming National Security Adviser General Michael Flynn once called Islam a "malignant cancer," questioned its status as a religion at all, and served as an adviser to an anti-Muslim hate group.¹ The contempt for human rights and racial equality demonstrated by the President and key members of his administration, as well as their apparent belief in a global clash of civilizations, portends a dark period ahead for rights and liberties.

What can ordinary lawyers and law students do to counteract the impending threats to human rights from U.S. national security policies? One place to start, in venturing answers, is recent history: as extreme as the new challenges are, they

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1. See Stephen Piggott, *Following Trump Appointments, Anti-Muslim ACT for America May See Growing Influence*, S. POV. L. CTR. (Nov. 28, 2016), <https://www.splcenter.org/hatewatch/2016/11/28/following-trump-appointments-anti-muslim-act-america-may-see-growing-influence> (detailing Gen. Flynn's connections to ACT for America, the "largest grassroots anti-Muslim hate group").

grow out of policies proposed, and in some cases implemented, during the past fifteen years. The lessons of human rights advocacy in that period can inform social justice lawyering today—most importantly, in spurring greater attention to the need for popular participation and mobilization in resisting unjust national security policies.

I. REVISITING RECENT HISTORY

Shortly after the September 11, 2001 attacks, Vice President Cheney warned that the United States would have to go over to the “dark side” to fight terrorism worldwide. The Bush administration lived up to that threat: the United States held terror suspects incommunicado in secret CIA “black sites” around the world, tortured dozens of detainees, and confined hundreds of others in the attempted legal black hole of Guantanamo Bay. At home, in the aftermath of the 9/11 attacks, federal officials rounded up over 700 Muslim immigrants and held them for months as terrorist suspects, often based on nothing more than vague tips about “suspicious-looking” Middle Eastern men, and with no factual basis to suspect terrorism. The following year, the Bush administration adopted a de facto Muslim registry, requiring thousands of immigrant men from twenty-five, almost entirely Muslim-majority countries, to submit to stigmatizing interrogations, fingerprinting, and registration at government offices nationwide. While some of these programs ended during the Bush or Obama administrations, many human rights challenges persisted and some intensified: the aggressive policing and surveillance of Muslim communities at home continued, for example, while President Obama vastly expanded drone attacks premised on a unilateral executive authority to target suspected terrorists for assassination.

This brief recitation of history suggests, first, that Trump’s national security proposals are an extreme version of, but continuous with, U.S. policies in the recent past. Recognizing this point should prevent us from misdiagnosing the present political moment as utterly aberrational, a moment of crisis requiring an intense but ultimately short-term response. Legal scholars Joseph Margulies and Hope Metcalf, writing in 2011, argued that the legal academy in the previous decade had mistakenly portrayed repressive post-9/11 policies as “regrettable but temporary deviations from a hypothesized liberal norm,” which would lead to a restoration of norms after the passing of the national emergency.² According to Margulies and Metcalf, this prevailing narrative of “deviation and redemption” ignored a “more persistent, and decidedly illiberal, authoritarian tendency in American thought to demonize communal ‘others’”—a tendency exhibited by the long history of anti-Semitism and anti-Catholicism, slavery and Jim Crow, the treatment of Native Americans, continuous U.S. support of torture by foreign

2. Joseph Margulies & Hope Metcalf, *Terrorizing Academia*, 60 J. LEGAL EDUC. 433, 436 (2011).

regimes, and the treatment of prisoners at home.³ Margulies and Metcalf argued that, by portraying repressive policies as temporary responses to an emergency, legal scholars primed the Left for complacency when the Obama administration took office, allowing it to backslide on promises to restore rights.⁴ Moreover, this narrative facilitated legal scholars' misplaced focus on courts to declare and enforce rights—diverting attention from the “hard work of long-term change” involving public opinion and politics.⁵

Taking these lessons to heart, a starting point for understanding the unfolding human rights challenges is to recognize the continuities between current proposals and past efforts, and between practices within and outside the national security context. This is not to say that these challenges are not intensified by the inauguration of a president who openly dismisses facts, attacks journalists, and undermines the legitimacy of democratic processes; they surely are. But many of his repressive national security and immigration policies grow out of deeper xenophobia and Islamophobia that have become increasingly dominant in right-wing circles and popular among segments of the public. As a result, the task for lawyers and law students is not to respond to an urgent but temporary crisis, but to engage deliberately and consistently in the “hard work of long-term change.”

Margulies's and Metcalf's reflections also help us begin to analyze the human rights successes and shortcomings of the post-9/11 period in order to identify what lawyers can do now. Drawing on earlier critiques of the “myth of rights”⁶ and applying them to struggles on behalf of Guantanamo detainees, Margulies and Metcalf warn us that even when civil rights lawyers win in court, judicial decisions do not automatically lead to the realization of the rights declared; indeed, they often generate backlash as opponents use such decisions symbolically to support a cultural narrative of a threatened national identity.⁷ This warning against an overemphasis on legal rights and the courts—a warning long issued in other social justice contexts⁸—is worth heeding as we resist the coming assault on human rights.

Apart from Margulies' and Metcalf's essay, one of the most significant reflections on the lessons of post-9/11 advocacy is Georgetown Law Professor David Cole's recent account of the role of “citizen activists” in shaping constitutional law.⁹ Through case studies of the marriage equality campaign, gun

3. *Id.* at 437 and n.8.

4. *Id.* at 439-40.

5. *Id.* at 440.

6. *See generally* STUART SCHEINGOLD, *THE POLITICS OF RIGHTS* (2004).

7. Margulies & Metcalf, *supra* note 2, at 463-64.

8. For some classic critiques, see, e.g., GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2008); GERALD P. LOPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1992).

9. DAVID COLE, *ENGINES OF LIBERTY: THE POWER OF CITIZEN ACTIVISTS TO MAKE CONSTITUTIONAL LAW* (2016).

rights movement, and human rights advocacy in the “war on terror,” Cole argues that citizen activists, rather than the Supreme Court, play a leading role in shaping constitutional rights. Cole highlights the role of lawyers at the Center for Constitutional Rights, the ACLU, and other organizations in exposing the Bush administration’s torture program and pushing the Supreme Court to issue unprecedented decisions rejecting assertions of executive power, even in wartime.¹⁰ He argues that civil liberties and human rights groups pushed the Bush administration to curb its worst abuses not just through litigation, but also through more creative strategies, including advocating with foreign governments, leveraging international opinion, and deploying credible messengers (such as generals opposed to torture) to push for policy change.¹¹

Cole justly celebrates the role of human rights lawyers in achieving victories against considerable odds. Yet his focus on lawyer-heroes is simultaneously unsettling. Especially when juxtaposed with his descriptions of the marriage equality and gun rights movements, which he portrays as broad-based, citizen-led movements for constitutional reform, Cole depicts the struggle for human rights in the national security context as an elite, lawyer-led campaign that rarely mobilized broad segments of society or made deep inroads into American public opinion.

If this depiction is correct, it is troubling. Some might view a campaign dominated by legal rights organizations as an inevitable feature of a human rights struggle whose victims were often foreigners portrayed as terrorists. But one wonders how a social justice struggle only tenuously connected to broader popular movements can achieve real, lasting change. At a moment when majorities of the American public voice support both for torture and for the exclusion of Muslims, the consequences of a failure to build deeper support for human rights seems readily apparent.

II. THE FORGOTTEN PROMISE OF ORGANIZING FOR SOCIAL CHANGE

While legal rights organizations often led the resistance to national security policies over the past fifteen years, there were moments where local communities mobilized in support of rights and liberties, formed grassroots coalitions spanning causes and racial lines, and created the potential for a deeper resistance. That potential has mostly been unfulfilled. But these forgotten examples of popular resistance suggest that there are opportunities to recast a campaign largely driven by cause lawyers to one more firmly anchored in communities.

One notable campaign to rally local communities against repressive national security policies came on the heels of the passage of the USA Patriot Act. Congress enacted the Patriot Act, which expanded government surveillance and detention powers, with overwhelming support six weeks after the September 11

10. *See id.* at 153-54, 160-63.

11. *Id.* at 153-54.

attacks. But within months, activists in several states convinced cities to adopt resolutions criticizing the Patriot Act and affirming support for the Bill of Rights.¹² Within four years, local activists had convinced over 400 cities, representing 80 million people, to pass resolutions opposing the Patriot Act and, in some cases, directing local officials to refuse to comply with provisions that violated constitutional rights.¹³ Analyzing the diffusion of this campaign, two sociologists called it the “the broadest grassroots effort to protect civil liberties in the history of the United States.”¹⁴

Although national organizations like the Bill of Rights Defense Committee and the ACLU provided technical assistance to these campaigns,¹⁵ local activists led them. These activists were not primarily from established civil liberties organizations, but from the broader social movement community: they included individuals active in peace and social justice groups, women’s rights groups, gay rights organizations, churches, and labor unions.¹⁶ While led by progressives, these campaigns also engaged libertarians, professional associations, local businesses, and others; in fact, the support of right-leaning or centrist political groups was crucial to passage of the resolutions in more conservative cities, such as Dallas.¹⁷ The two sociologists who studied the campaign noted that, in post-9/11 America, the “cards were stacked” against a campaign protesting the Patriot Act, not least because the groups most directly at risk—Arabs and Muslims—had little political capital.¹⁸ Nevertheless, the campaign succeeded because it drew on the “capacity of groups with different agendas, traditions, and core beliefs to combine around a common banner.”¹⁹

It is difficult to measure the tangible impact of these campaigns, in isolation from broader national and international developments. But the Patriot Act resolutions may well have contributed to a changing national political climate. By the middle of the Bush administration, concern for civil rights and liberties had markedly grown. Some members of Congress cited the Bill of Rights resolutions—and the popular support they indicated—as part of their inspiration

12. Ion Bogdan Vasi & David Strang, *Civil Liberty in America: The Diffusion of Municipal Bill of Rights Resolution after the Passage of the USA PATRIOT Act*, 114 AM. J. SOC. 1716, 1720-21 (2009).

13. *Id.* at 1717-18. Eight states also passed such resolutions. See *Patriot Act*, NEW YORK CIVIL LIBERTIES UNION: LIBERTY AND SECURITY, <http://www.nyclu.org/issues/liberty-and-security/patriot-act>.

14. Vasi & Strang, *supra* note 12, at 1718.

15. See, e.g., *Draft Resolution: Model Local Resolution to Protect Civil Liberties*, AMERICAN CIVIL LIBERTIES UNION, <https://www.aclu.org/other/draft-resolution>; Local Ordinances and Resolutions, BILL OF RIGHTS DEFENSE COMMITTEE, <http://bordc.org/campaigns/local-ordinances-and-resolutions>.

16. Vasi & Strang, *supra* note 12, at 1741-43, 46.

17. *Id.* at 1743, 1747.

18. *Id.* at 1746.

19. *Id.* at 1748.

for seeking to reform the Patriot Act.²⁰ Although Congress voted to reauthorize expiring provisions of the law in 2004, it did so with far more votes in opposition than in 2001 and only after considerable debate. Meanwhile, an attempt to pass an even more draconian law dubbed “Patriot Act II” died quickly after igniting widespread controversy.²¹ Unfortunately, the local coalitions formed during the Bill of Rights campaigns largely disbanded after passage of the resolutions, and therefore failed to provide an enduring base for grassroots opposition to national security overreach. But this example suggests the potential for cross-cutting, local organizing campaigns even in the politically unfavorable and federally dominated terrain of national security.

A more recent local mobilizing success also provides grounds for hope. In 2011, the Associated Press revealed that the New York Police Department had conducted a secret surveillance program of American Muslim communities in the region, monitoring Muslim businesses, restaurants, places of worship, and communities wholesale without a specific basis for suspicion.²² As news of the intrusive program spread, legal organizations such as the ACLU, Center for Constitutional Rights, Muslim Advocates, and the CLEAR project at CUNY Law School challenged the program in court on constitutional grounds.²³ Outside court, local communities sprang into action: Muslim, Arab, and South Asian grassroots organizations united with African American and Latino communities that had long protested the NYPD’s policing tactics in communities of color. A broad-based coalition, Communities United for Police Reform, rallied to combat the use of stop-and-frisk, the Muslim surveillance program, and other discriminatory policing practices.

This diverse and concerted organizing campaign bore fruit. In 2013, the coalition succeeded in securing passage of the Community Safety Act, a package of bills to curtail profiling and establish an independent Inspector General over the police. In 2014, in response to sustained community pressure, the NYPD formally disbanded its Demographics Unit, the police unit that had sent plainclothes detectives to spy on Muslim neighborhoods.²⁴ Moreover, in late

20. See 150 Cong. Rec. S3898 (2004) (Statement of Sen. Durbin).

21. See Timothy Scahill, *The Domestic Enhancement Act of 2003: A Glimpse into a Post-PATRIOT Act Approach to Combating Domestic Terrorism*, 6 CR: THE NEW CENTENNIAL REV. 69, 69-70 (2006). Some provisions of the proposed new law were passed piecemeal, however. See *id.* at 70.

22. Matt Apuzzo & Adam Goldman, *With CIA Help, NYPD Moves Covertly in Muslim Areas*, SEATTLE TIMES (Aug. 25, 2011), <http://www.seattletimes.com/seattle-news/politics/with-cia-help-nypd-moves-covertly-in-muslim-areas/>.

23. See, e.g., *Hassan v. City of New York*, 804 F.3d 277, 307 (3d Cir. 2015); *Raza v. City of New York*, 998 F. Supp. 2d 70, 78-81 (E.D.N.Y. 2013); *Handschu v. Police Dep’t*, 2016 WL 7048839, at *16-18 (S.D.N.Y. Oct. 28, 2016).

24. Matt Apuzzo & Joseph Goldstein, *New York Drops Unit That Spied on Muslims*, N.Y. TIMES (Apr. 15, 2014), <https://www.nytimes.com/2014/04/16/nyregion/police-unit-that-spied-on-muslims-is-disbanded.html>.

2016, a federal judge took the remarkable step of rejecting a settlement agreement between civil liberties groups and the NYPD as *too weak*. In calling for greater oversight of the police, the judge appeared to have been moved both by a critical report of the newly formed Inspector General as well as by the statements of numerous community members worried about the settlement.²⁵ Meanwhile, for community organizations, the experience of working alongside each other cemented cross-racial solidarity: for instance, Muslim civil liberties activists quashed a police group's attempt to honor a Muslim officer who had killed a black teenager, saying they had "worked too long to build bridges" across communities of color to allow such coalitions to be destroyed.²⁶

These efforts mobilizing communities deserve far more attention than they have received. Indeed, they are not the only examples of broad local coalitions pushing for reform of national security programs.²⁷ They show that, even in the politically challenging terrain of national security, broad-based mobilization can occur—and succeed. That message aligns with the experience of other marginalized communities, who have organized in the face of incredible challenges—whether it is undocumented students braving enormous risk to advocate for themselves,²⁸ inmates protesting inhumane conditions at a maximum security prison designed to thwart their communication,²⁹ or the Standing Rock Sioux protesting the installation of a natural gas pipeline through

25. See *Handschu v. Police Dep't*, 2016 WL 7048839, at *16-18 (S.D.N.Y. Oct. 28, 2016) (calling for the strengthening of the role of a civilian representative in police investigations oversight and noting that that demand had generated more comments from the Muslim community and the public than any other issue); see also Matt Apuzzo & Adam Goldman, *Judge Rejects Settlement Over Surveillance of Muslims by New York Police Department*, N.Y. TIMES (Oct. 31, 2016), <https://www.nytimes.com/2016/11/01/nyregion/nypd-muslim-lawsuit-settlement.html>; Ryan Devereaux, *Judge Who Approved Expanding NYPD Surveillance of Muslims Now Wants More Oversight*, THE INTERCEPT (Nov. 7, 2016), <https://theintercept.com/2016/11/07/judge-who-approved-expanding-nypd-surveillance-of-muslims-now-wants-more-oversight/>.

26. Christie Thompson, *Officer Who Killed 16-Year-Old Kimani Gray Declines "Cop of the Year" Award Due to Community Pressure (Updated)*, THINK PROGRESS (May 11, 2014), <https://thinkprogress.org/officer-who-killed-16-year-old-kimani-gray-declines-cop-of-the-year-award-due-to-community-pressure-fc5ad8be198> (quoting statement of Linda Sarsour, executive director of the Arab American Association of New York).

27. In San Francisco, for instance, a coalition of 80 civil rights and civil liberties organizations won passage of a city Civil Rights Ordinance to reassert local control over San Francisco police participation in FBI counterterrorism efforts. Neel Lalchandani, *To Protect and Spy: The San Francisco Police Department & the Civil Rights Ordinance*, 26 STAN. L. & POL. REV. 701, 704 (2015); see also Veena Dubal, *The Demise of Community Policing? The Impact of Post-9/11 Federal Surveillance Programs on Local Law Enforcement*, 19 ASIAN AM. L.J. 35, 48-50 (2012) (describing formation of Coalition for a Safe San Francisco).

28. See, e.g., OUR HISTORY, <http://unitedwedream.org/about/history/> (last visited Feb 1, 2017) (describing history of organizing efforts led by undocumented youth).

29. Keramet Reiter, *23/7: Prisoner-led Movement is a Model for Organizing Under Next Administration*, CTR. FOR CONST. RTS: DAILY OUTRAGE BLOG (Nov. 23, 2016), <https://ccrjustice.org/home/blog/2016/11/23/237-prisoner-led-movement-model-organizing-under-next-administration>.

their ancestral lands.³⁰ In all of this, there are signs for hope.

III. WHAT LAWYERS AND LAW STUDENTS CAN DO

So we return to the question that prompted this essay. What can lawyers and law students do in the face of the coming human rights onslaught? The brief reflections that follow primarily address the many lawyers and law students who seek to volunteer their time, rather than the smaller number of lawyers already working at public interest organizations.

The first reflection is overarching and informs all the more specific suggestions that follow: lawyers can learn from, and partner with, community groups in serving affected communities. By virtue of education and professional status, lawyers are enormously privileged. That privilege requires modesty, self-reflection, and a commitment to listen and learn; as many have noted, lawyers have too often dominated coalitions, undermined community efforts at self-empowerment, or channeled resources into narrow, legalistic strategies.³¹ But awareness of one's privilege is not a reason to step aside; rather, it should be the basis for a sense of heightened responsibility to use one's social capital in support of the struggle. Using one's assets in service of communities requires engaging with communities and partnering with organizers. It starts from asking, "What can I do to help?" rather than presuming that, as lawyers, we have the answers. It starts with a commitment to building power in communities, not swooping in to rescue them.

Second, recognizing that the assault on human rights will require wide-scale and sustained political resistance, lawyers can contribute to that resistance in their role as citizens. Taking their lead from affected communities, lawyers can organize the networks to which they already belong in support of the broader movement. This can take many forms. Lawyers at tech firms can push their companies to declare that they will not help create government registries of Muslims or any other minority group—as a number of tech companies recently did. If community organizers call for it, lawyers can help push the cities in which they live to enact ordinances opposing rights-infringing national security policies and limiting cooperation with federal deportation programs. Lawyers can organize or join people in their neighborhoods to lobby members of Congress to fight the racist aspects of President Trump's agenda.³² Law students can work

30. Leah Donnell, *The Standing Rock Resistance Is Unprecedented (It's Also Centuries Old)*, NPR (Nov. 22, 2016), <http://www.npr.org/sections/codeswitch/2016/11/22/502068751/the-standing-rock-resistance-is-unprecedented-it-s-also-centuries-old>.

31. For a discussion of some of these critiques, see Scott L. Cummings & Deborah L. Rhode, *Public Interest Litigation: Insights from Theory and Practice*, 36 *FORDHAM URB. L.J.* 603, 606 (2008).

32. For one revealing guide to grassroots advocacy written by former progressive congressional staffers, see *INDIVISIBLE: A PRACTICAL GUIDE FOR RESISTING THE TRUMP AGENDA*, <https://www.indivisibleguide.com/> (last visited Feb. 1, 2017).

alongside undocumented students on college campuses to advocate that their universities take stronger steps to protect those at risk of deportation.

In addition to all of these concrete efforts, each of us can speak out in support of vulnerable members of our communities through all the groups we belong to, whether they are campus organizations, religious congregations, parent groups, alumni associations, or local civic or business associations. At a time of existential fear among many communities in America, these gestures of solidarity offer much-needed support and hope.

Third, lawyers can answer the call to represent individuals at risk from new policies, whether it is undocumented immigrants subject to deportation, individuals required to register with the government on account of their religion or national origin, or community members subject to intensified FBI interviews and surveillance. As civil rights organizations painfully recognized in the post-9/11 period, many harmful government programs cannot be challenged in court, either because they are not illegal or because a host of procedural or substantive doctrines effectively blocks judicial review. In such cases, individual representation can still protect some victims of these policies: it may stave off an immigrant's deportation or deter government misconduct in an encounter with a law enforcement official. Many legal organizations and bar associations are already beginning to recruit volunteer lawyers to provide individual representation, and more such efforts will be needed as Trump administration programs are rolled out.³³ Similarly, as Americans engage in political resistance to the new repression—whether it is through protests and civil disobedience from the outside or whistleblowing from the inside—they will need legal support from criminal defense practitioners, employment lawyers, and legal observers trained by groups like the National Lawyers Guild.

Fourth, lawyers can push their firms to co-counsel with public interest organizations engaging in strategic litigation for human rights. Law firms with appellate practices, established pro bono programs, and a track record of partnering with public interest groups are often in demand. Many of the toniest firms in New York and Washington represented pro bono Guantanamo detainees challenging their detentions—even in the face of political attacks by government officials and threats to ruin these firms' reputations.³⁴ But elite firms are not the only ones that can play a role in law reform. In one remarkable example, McManis Faulkner, a mid-sized private law firm in San Jose, California, single-handedly represented a Malaysian woman challenging her designation on a terrorist watch list, spending more than eight years and millions of pro bono hours on the case and ultimately obtaining the first-ever court decree finding that

33. For instance, in the San Francisco Bay Area, legal groups including the Bar Association of San Francisco, the Asian Law Caucus, the Council on American-Islamic Relations, and Muslim Advocates have organized conferences and legal trainings for attorneys volunteering to represent individuals affected by Trump policies.

34. Neil A. Lewis, *Official Attacks Top Law Firms Over Detainees*, N.Y. TIMES (Jan. 13, 2007), <http://www.nytimes.com/2007/01/13/washington/13gitmo.html>.

the watch list violated constitutional rights.³⁵ That law firm's unusual decision to take the case turned on an interest expressed by a young associate at the firm and a founding partner's strong sense that an injustice had been done. Even at private firms, lawyers have agency.

There is enormous work to be done, and a comprehensive response will require advocacy at all the levers of influence in our society—in courts and legislatures; at the local, state, and federal levels; in traditional media and social media; in international tribunals and organizations; in churches, synagogues, temples, mosques, and gurdwaras; and yes, on the streets. Reflection on the many social justice struggles of our history can help us confront, with vision and grit, the heartrending challenges ahead.

35. For more on this case, *Ibrahim v. Dep't of Homeland Security*, see Shirin Sinnar, *Towards a Fairer Terrorist Watchlist*, 40 ADMIN. & REG. L. NEWS 4 (2015).