

REBELLIOUS LAWYERING IN THE SECURITY STATE

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What do forms of lawyering in opposition to state power that is deployed in the name of national security teach us about the possibilities of rebellious lawyering? This article takes as its main focus a single aspect of the authors' clinical practice: supporting individuals and their mostly-Muslim communities in New York City during FBI attempts to question them under the guise of counterterrorism, and for purposes of intelligence gathering. While there is an emerging critical literature around the jurisprudence of security, counterterrorism policies, and related legal issues, there have not been many attempts to subject lawyering in this area to closer scrutiny. This article begins to fill that gap and, in the tradition of rebellious lawyering literature, we root our reflection in our clients' and their communities' experiences, offering where we can concrete illustrations and client-based discussion to inform our analysis. Our intended audience goes beyond our students and other clinicians. We also hope to engage with practitioners, advocates, and community leaders alike in considering some of the obstacles to the legal and organizing responses to aggressive law enforcement policies and practices at a time when they are only expanding. Indeed, as public rhetoric and government policies targeting Muslim and other demonized communities reach a new fever pitch, and as many of the practices unleashed on these communities seep into other areas of law enforcement and official activity, such an undertaking might be especially timely.

Picture a typical home in a quiet residential neighborhood anywhere in America. An unmarked, plain-looking sedan pulls up. Three white men in street clothes step out of the vehicle. They approach the home's doorway and ring the doorbell. A minute passes

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and no one has come to the door. The men ring again. Finally, a resident asks the men, from behind the door, who they are. One of them responds, vaguely: “Police.”¹

RESIDENT

Do you have a warrant?

AGENT

A warrant for what?

RESIDENT

For whatever you’re here for.

AGENT

Just open the door. We just want to talk to you.

RESIDENT

Which agency are you guys with?

AGENT

I can’t hear you, buddy. It’s loud out here. Just open the door, buddy. Just wanna talk to you.

RESIDENT

What is your name?

AGENT

If you come out the door, we’ll talk, alright?

RESIDENT

Anything you want to talk to me about, you guys are going to have to go through my lawyer.

AGENT

Do you want to come down to the FBI office and talk to us?

One of the two agents then starts ringing the bell repeatedly.

RESIDENT

Can you please not do that?

AGENT

Just open the door!

¹ Based on an audio recording captured using a smartphone by a client of the Creating Law Enforcement Accountability & Responsibility (CLEAR) project at Main Street Legal Services, Inc., the clinical arm of CUNY School of Law.

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RESIDENT

Do you guys have any ID or contact info?

AGENT

We can't hear you.

RESIDENT

I can hear you just fine.

AGENT

Look, buddy, I got a few questions I want to ask you. I don't know how long you want to run and hide from us, but it's not gonna stop. Just because you hide behind a lawyer and behind the door, I'm not gonna stop trying to come talk to you. Do you want to have a man-to-man conversation outside or do you want to hide behind the door?

RESIDENT

You can leave your contact information behind the door. I'm going to slide my lawyer's contact info under the door. You guys can contact my lawyer and they'll be happy to talk to you guys.

AGENT

Are you giving that to us?

RESIDENT

I'm asking for your contact info as well.

AGENT

You wanna talk to us, I'm right here!

RESIDENT

Do you guys carry a card with you?

AGENT

No. Are you gonna come out and talk to us?

RESIDENT

No, I'm not coming out, guys.

AGENT

I can't hear you.

RESIDENT

I'm not coming out. No, thanks.

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AGENT

Here you are, a grown man, talking from behind the door. This is ridiculous

RESIDENT

I appreciate your acknowledgment of me being a grown man, thank you. You wanna talk, you can reach out to my lawyers.

AGENT

Just give me a few seconds out here.

RESIDENT

I'm going to leave the card from my lawyers right here.

AGENT

If you open the door, you can give it to us.

RESIDENT

No, it's right here, you guys can see it. You wanna take the info down, be my guest, go for it. And, again, if you guys have your contact info, leave it on the floor and I'll pick it up after. Alright? Thank you.

AGENT

I can't hear you.

Variations on this scene have unfolded hundreds of times, between residents of New York City and representatives of different law enforcement agencies seeking to question them at their homes, their workplaces, their houses of worship, their community centers, or their schools.² Even though this interaction lasted almost half an hour, the

² The Federal Bureau of Investigation refers to this practice as a "voluntary interview." *DOJ Orders, Incentivizes, 'Voluntary' Interviews of Aliens to Obtain Information on Terrorists; Foreign Students, Visa Processing Under State Dept. Scrutiny*, 78 INTERPRETER RELEASES 1816, 1817-19, Appendix I (2001). See also FEDERAL BUREAU OF INVESTIGATION, Domestic Investigations and Operations Guide §18.5.6.3 (2013), <https://vault.fbi.gov/FBI%20Domestic%20Investigations%20and%20Operations%20Guide%20%28DIOG%29> [hereinafter "2013 DIOG"]; Amna Akbar, *Policing Radicalization*, 3 U.C. IRVINE L. REV. 809, 859-861 (2013). The federal law enforcement agency's euphemistic term of choice performs valuable political work in service of its goals, signaling, importantly, that these interactions are devoid of coercion. The reality experienced by our clients and others on the receiving end is quite different, of course. An unannounced FBI visit, in view of neighbors, coworkers, or fellow congregants, often including more than the usual pair of agents, sometimes wearing jackets emblazoned with FBI in loud, yellow lettering, can be inherently coercive. It becomes even more coercive when one factors in the actual tenor and tone of the verbal exchange, as illustrated by the scene transcribed above (with minor adaptations). It is worth noting that in their own internal parlance, FBI agents refer to the practice of showing up unannounced to question someone not as "voluntary" but more appropriately as a "confrontational interview." *This Ameri-*

resident was among the fortunate few. This was not his first time being approached for questioning and, in the past, he had answered questions without the advice of counsel. He had participated in a rights awareness workshop and had sought counsel prior to this event so, by the time it happened, he was prepared. He also had counsel on the phone with him as it was all unfolding at his doorstep. In a sense, then, the above is a best case scenario. Most people approached by law enforcement for questioning do not exercise their rights as vigorously or as steadfastly.

INTRODUCTION

This article attempts a critical reflection on lawyering in support of clients and communities who face FBI questioning campaigns. Guiding this examination is Gerald López's model of rebellious lawyering. López thought it necessary to reinvent "the very idea of law practice," how lawyers saw "their priorities, their routines, . . . their know-how, their sense of a job well done," and to reject notions of and approaches to legal practice that were "decidedly orthodox."³ His ambition was to bridge the gulf he saw separating legal training from the demands of an activist law practice.⁴ Driving it all was an urgent sense that "lawyers and law practice are too important to activist work to leave to the influence of lawyers alone."⁵

The central question this article poses, then, is the following: what do forms of lawyering in opposition to state power that is deployed in the name of security and counterterrorism teach us about the possibilities of rebellious lawyering? With every new era and every new threat to the rights of minorities and marginalized groups comes an opportunity to reexamine and reinvent how communities under threat and the lawyers who support them use law and its systems to resist.⁶ This holds true in this context, where clients and communities face aggressive police action and surveillance. It is worth taking stock of what this moment can reveal about the relevance and vitality of rebellious lawyering principles and practices in meeting one of the day's

can Life: The Fix is In, CHICAGO PUBLIC RADIO 45:57 (Sept. 15, 2000), <https://www.thisamericanlife.org/radio-archives/episode/168/the-fix-is-in>.

³ GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* 2 (1992).

⁴ *Id.* at 3.

⁵ *Id.* at 10.

⁶ It is worth pausing to take stock of the literature's larger trajectory through different historical contexts. Gerald López wrote about Chicanos in the 1990s; Ian Haney López wrote about Chicanos in Los Angeles a decade later in 2004; Critical Race Theory had begun earlier. See IAN F. HANEY LÓPEZ, *RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE* (2004).

most salient threats to justice, equality, and dignity.

For purposes of grounding our discussion, this article takes as its main focus a single aspect of the authors' practice: supporting individuals and their communities in New York City during government attempts to question them under the guise of counterterrorism.⁷ Our intended audience goes beyond our students and other clinicians. We also hope to engage with practitioners, advocates, and community leaders alike in considering some of the challenges to the legal and organizing responses to aggressive law enforcement policies and practices at a time when they are only expanding. Indeed, as public rhetoric and government policies targeting Muslim and other demonized communities reach a new fever pitch, and as many of the practices unleashed on these communities seep into other areas of law enforcement and official activity, such an undertaking might be especially timely.⁸

Moreover, the so-called "national security" field of law practice has been fairly isolated from critical examination. While there is an emerging critical literature around the jurisprudence of security, counterterrorism policies, and related legal issues, there have not

⁷ Indeed, attorneys working with Muslim communities – or those perceived to be Muslim – must often manage a diverse docket that reflects the various the types of scrutiny these populations experience. These include (without limitation) immigration complications related to alleged security concerns; local or federal law enforcement surveillance; placement on opaque federal watchlists without meaningful recourse; delays and questioning at airports and international borders; aggressive scrutiny of charitable giving or international transactions; and targeting for informant recruitment. For an overview of the range of law enforcement practices falling under the rubric of "national security" law enforcement, see Akbar, *supra* note 2, at 815, n.22, 854-868; Ramzi Kassem, *Do High-Profile Terrorism Arrests Actually Help the Islamic State?*, VICE (May 27, 2015), https://www.vice.com/en_us/article/do-high-profile-terrorism-arrests-actually-help-the-islamic-state-527; Ramzi Kassem, *The Long Roots of the NYPD Spying Program*, THE NATION (June 14, 2012), <https://www.thenation.com/article/long-roots-nypd-spying-program/>; Diala Shamas, *Four Ways the U.S. is Already Banning Muslims*, WASH. POST (Dec. 17, 2015), <https://www.washingtonpost.com/posteverything/wp/2015/12/17/four-ways-the-u-s-is-already-banning-muslims/>

⁸ The campaign leading up to the U.S. elections of November 2016, and events since the presidential inauguration, have only amplified preexisting fears and vulnerabilities within American Muslim, as both official and private anti-Muslim rhetoric have intensified. On January 27, 2017 President Donald Trump issued an Executive Order temporarily banning refugees as well as immigrant and non-immigrant visa holders from seven Muslim-majority countries from entering the United States, leading to it being called a "Muslim ban." Exec. Ord. No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017). Hate crimes directed at Muslims have also increased. See, e.g., Lauren del Valle, *2 Muslim Women, Babies Attacked in Alleged Hate Crime in New York*, CNN (Sept. 10, 2016, 12:49AM) <http://www.cnn.com/2016/09/10/us/brooklyn-muslim-women-attacked/index.html>; Kristine Guerra, *'It's A Sickness': Letters Calling for Genocide of Muslims Sent to Mosques Across the Country*, WASH. POST (Nov. 29, 2016), https://www.washingtonpost.com/news/acts-of-faith/wp/2016/11/27/trump-will-do-to-you-muslims-what-hitler-did-to-the-jews-mosques-get-threatening-letters/?utm_term=.7f05b53dd81d.

been, to our knowledge, many attempts to subject lawyering in this area to closer scrutiny.⁹ We hope to start filling that gap and, in the tradition of rebellious lawyering literature, root our reflection in our clients' and their communities' experiences, offering where we can concrete illustrations and client-based discussion to inform our analysis.

In Part I, we detail both the problem at hand – FBI questioning and its framework – as well as the legal practice deployed in response to that problem. Part II unpacks the challenges encountered when representing clients and partnering with communities that bear the brunt of FBI questioning campaigns. Without overlooking significant historical continuities, we try to highlight the features and vulnerabilities that are unique to this context and client population. Finally, in Part III, we outline the lessons learned from – and about – rebellious practice opposite the sprawling U.S. security state.

I. THE PRACTICE

A. *The Problem at Hand: FBI Questioning and its Framework*

In New York City, a host of law enforcement agencies run simultaneous, sometimes overlapping questioning campaigns. Those include the Federal Bureau of Investigation (FBI), the New York City Police Department's (NYPD) Intelligence Bureau, Homeland Security Investigations (HSI), and the local Joint Terrorism Task Force (JTTF), led by the FBI, which draws its personnel from all of these agencies and others.

The agencies take the position that they are free to attempt to question individuals who are not charged with any crimes, whether they view those individuals as potential sources, informants, witnesses, or suspects. Such questioning is often undertaken in an aggressive fashion and is often not connected with a specific crime that has occurred or is about to take place. Far more frequently, it is a form of intelligence gathering and community or ideological mapping, disproportionately focusing on Muslims and justified as preventive policework. For the FBI, this practice is an outgrowth of the post-September 11, 2001 shift in the agency's mission away from its historic law enforcement, crime-fighting, and counter-intelligence responsibili-

⁹ See, e.g., WADIE E. SAID, *CRIMES OF TERROR: THE LEGAL AND POLITICAL IMPLICATIONS OF FEDERAL TERRORISM PROSECUTIONS* (2015); Akbar, *supra* note 2; Ramzi Kassem, *Implausible Realities: Iqbal's Entrenchment of Majority Group Skepticism Towards Discrimination Claims*, 114 PENN. ST. L. REV. 1443 (2010); Ramzi Kassem, *Passport Revocation as Proxy Denaturalization: Examining the Yemen Cases*, 82 FORDHAM L. REV. 2009 (2014); Shirin Sinnar, *Questioning Law Enforcement: The First Amendment and Counterterrorism Interviews*, 77 BROOK. L. REV. 41 (2011).

ties and towards duties as a “national security organization” that aims to gather intelligence in order to prevent “terrorism.”¹⁰

Some of our clients have described being questioned about their prayer habits, their religious views, their recent family vacations, their immigration status, or their opinions on world events. Others have been questioned about their friends, colleagues, or community contacts. If the individuals approached are known to have retained counsel, law enforcement agents and their in-house counsel also frequently take the position that agents do not have to go through counsel and can attempt to question clients directly at their homes or workplaces.

Of course, the consequences of these questioning attempts can be severe and vary. They are intimidating, disempowering, and often cause deep anguish. But they may also carry legal consequences: an individual may unwittingly provide false information – say, regarding a minor immigration matter – and suffer potentially serious criminal or immigration consequences as a result, or pressure to become an informant.¹¹

Narrowing our focus to a single agency, for purposes of illustration, it is worth examining the Domestic Investigations and Operations Guide (DIOG) as the main source of FBI policy on all investigations, including attempts to question individuals who have not been charged with a crime. The most recent publicly available version of the FBI DIOG is one dated October 16, 2013, but only released in heavily redacted form in 2016.¹²

The rules give federal agents great leeway in their investigations.¹³ When FBI agents approach someone who is not charged with a crime at their home, workplace, or elsewhere to question them, those agents are conducting what the DIOG terms an “assessment.”¹⁴ To launch an authorized assessment, the DIOG does not require an FBI agent to possess firm evidence of criminal or terrorist activity – in fact, it requires “no factual predication.”¹⁵ According to FBI General

¹⁰ Indeed, in both rhetoric and practice, the FBI has redefined itself as “an intelligence-driven and threat-focused national security organization with both intelligence and law enforcement responsibilities,” in that order of priority. See <https://www.fbi.gov/about>.

¹¹ 18 U.S.C. §1001 (2016) (penalizing false statements); 8 U.S.C. §1227 (2016) (setting forth classes of deportable aliens).

¹² 2013 DIOG, *supra* note 2.

¹³ For a more complete treatment, see JEROME P. BJELOPERA, CONG. RESEARCH SERV., R41780, THE FEDERAL BUREAU OF INVESTIGATION AND TERRORISM INVESTIGATIONS (2013), <https://www.fas.org/sgp/crs/terror/R41780.pdf>.

¹⁴ 2013 DIOG, *supra* note 2, at § 5.

¹⁵ 2013 DIOG, *supra* note 2, at §5.1. The next category of investigation is called a “preliminary investigation.” This type of investigation requires a factual basis and may be opened with “any ‘allegation or information’ indicative of possible criminal activity or threats to the national security.” *Id.* at §6.1. Finally, the highest level of investigation is a “full investigation,” which requires an “‘articulable factual basis’ of possible criminal or

Counsel, however, assessments must be based on “leads.”¹⁶ The DIOG itself does not define the term “lead.”¹⁷ It only says that it cannot be based solely on the exercise of First Amendment rights, or solely on the race, national origin, or religion of the subject.¹⁸ Individuals are also frequently approached for recruitment as informants. In those cases, agents need not be pursuing any leads.¹⁹

It is only if an individual is known to be represented by counsel *in a particular matter* pending at the time that the DIOG requires review by FBI counsel before any questioning is attempted without prior notice to counsel.²⁰ In the absence of any pending matter, the DIOG – at least insofar as its unredacted and public parts permit us to discern – seems to provide no guidance, protocol, or limitation on approaching a represented person without first contacting known counsel.

Of course, the phenomenon is not limited to New York City. While there are no officially reported numbers of questioning attempts nationwide, there has been sporadic reporting in the press on specific questioning campaigns.²¹ We also know that in the immediate aftermath of the September 11, 2001 attacks, the FBI questioned thousands of Muslim and Arab male noncitizens throughout the United States based primarily on their country of origin, first targeting citizens of 15 countries and later expanding that list to include 26 countries.²² And FBI questioning campaigns haven’t occurred only as part of past emergency measures. There are also reports of different waves of questioning in connection with more recent events.²³ Our own experience at CLEAR suggests that FBI attempts to question

national security threat activity.” *Id.* at §7.1.

¹⁶ *Id.* at §5.1 (permitting “prompt and extremely limited checking out of initial leads”). See Charlie Savage, *FBI Agents Get Leeway to Push Privacy Bounds*, N.Y. TIMES (June 12, 2011), <http://www.nytimes.com/2011/06/13/us/13fbi.html>.

¹⁷ Although difficult to define, “no particular factual predication” for an FBI assessment is less than the “information or allegation” required for a preliminary investigation. 2013 DIOG, *supra* note 2, at §5.1.

¹⁸ *Id.*

¹⁹ *Id.* at §5.6.3.4. See also Alberto Gonzales, ATTORNEY GENERAL’S GUIDELINES REGARDING THE USE OF FBI CONFIDENTIAL HUMAN SOURCES 4 (2006).

²⁰ 2013 DIOG, *supra* note 2, at §18.5.6.4.5.

²¹ U.S. GEN. ACCOUNTING OFFICE, GAO-03-459, HOMELAND SECURITY: JUSTICE DEPARTMENT’S PROJECT TO INTERVIEW ALIENS AFTER SEPTEMBER 11, 2001 (2003); Katie Mettler, *FBI Questioned American Muslims in 8 States Over Weekend About Possible Pre-election Terrorism, Says Civil Rights Group*, WASH. POST (Nov. 7, 2016), https://www.washingtonpost.com/news/morning-mix/wp/2016/11/07/fbi-questioned-american-muslims-in-8-states-about-possible-pre-election-terror-says-civil-rights-group/?utm_term=.10bc41070aff; Mary Beth Sheridan, *Interviews of Muslims to Broaden*, WASH. POST, July 17, 2004, at A1 (referring to another wave of interviews of American Muslims).

²² See *supra* note 20. See also Sinnar, *supra* note 9, at 47.

²³ Mettler, *supra* note 21 (describing FBI questioning of American Muslims in eight states prior to 2016 election in relation to suspicion of terrorism).

individuals are a matter of course in some particularly targeted communities.²⁴

People hailing from Muslim, Arab, and South Asian communities bear the overwhelming brunt of aggressive policing in this realm, in the specific form of FBI assessments, for the most part.²⁵ It is important to place these questioning campaigns in their broader context – one characterized by profiling and gross stereotypes regarding the targeted communities. This has translated to federal and local practices such as suspicionless surveillance based on religion and national origin, targeting these same communities for heightened immigration scrutiny,²⁶ passport revocation of Yemeni-Americans' U.S. passports,²⁷ or placement on U.S. government watchlists with little or no opportunity for recourse.²⁸ Mandatory registration is also a recent re-

²⁴ At rights awareness workshops, CLEAR attorneys sometimes begin by polling the room, asking who has been approached by the FBI or knows someone who has been approached. In many communities, most of the hands in the room will be raised. See, e.g., Diala Shamas, *Where's the Outrage When the FBI Targets Muslims?*, THE NATION (Oct. 31, 2013), <https://www.thenation.com/article/wheres-outrage-when-fbi-targets-muslims/> (describing anecdotal evidence of widespread questioning in some communities).

²⁵ For example, the New York City Police Department listed twenty-eight “ancestries of interest” to identify targets for surveillance, almost all of which were countries with large Muslim populations, with the exception of the “American Black Muslim.” See CLEAR, MACLC, & AALDEF, *MAPPING MUSLIMS: NYPD SPYING AND ITS IMPACT ON AMERICAN MUSLIMS* 7 (2013), <http://www.law.cuny.edu/academics/clinics/immigration/clear/Mapping-Muslims.pdf> [hereinafter “MAPPING MUSLIMS”]; Cora Currier, *Revealed: The FBI's Secret Methods for Recruiting Informants at the Border*, THE INTERCEPT (Oct. 5, 2016, 2:52 PM), <https://theintercept.com/2016/10/05/fbi-secret-methods-for-recruiting-informants-at-the-border> (describing reports that the FBI provides Customs and Border Patrol with a list of countries of origin to watch for at the border and to approach for questioning and recruitment as potential informants); Cora Currier, *The FBI Wanted to Target Yemenis Through Student Groups and Mosques*, THE INTERCEPT, (Sept. 29, 2016, 11:33 AM), <https://theintercept.com/2016/09/29/the-fbi-wanted-to-target-yemenis-through-student-groups-and-mosques/>; Sinnar, *supra* note 9, at 51-53, 55 (mentioning instances where travelers with U.S. citizenship were told they were selected for questioning based on their place of birth).

²⁶ See Part II, *infra*, on immigration vulnerabilities (describing CARRP and other federal programs).

²⁷ Ramzi Kassem, *Passport Revocation as Proxy Denaturalization: Examining the Yemen Cases*, 82 FORDHAM L. REV. 2009 (2014); Liz Robbins, *Rights Group Seek Inquiry of Revoked Passports at U.S. Embassy in Yemen*, N.Y. TIMES, Jan. 27, 2016, https://www.nytimes.com/2016/01/28/nyregion/rights-groups-ask-for-investigation-of-revoked-passports-at-embassy-in-yemen.html?smid=tw-share&_r=0; Liz Robbins, *Yemeni-Americans, Thrust Into Limbo, Say U.S. Embassy Unfairly Revokes Passports*, N.Y. TIMES (May 27, 2015), https://www.nytimes.com/2015/05/28/nyregion/yemeni-americans-thrust-into-limbo-say-us-embassy-unfairly-revokes-passports.html?ref=nyregion&_r=0.

²⁸ Jenifer Fenton, *Does FBI Use No-Fly List to Pressure Muslims to Become Informants?*, AL JAZEERA AMERICA (June 11, 2015), <http://america.aljazeera.com/articles/2015/6/11/does-fbi-use-no-fly-list-to-pressure-muslims-to-become-informants.html>; Adam Goldman, *Lawsuit Alleges FBI is Using No-Fly List to Force Muslims to Become Informants*, WASH. POST (Apr. 22, 2014), https://www.washingtonpost.com/world/national-security/lawsuit-alleges-fbi-is-using-no-fly-list-to-force-muslims-to-become-informants/2014/04/22/1a62f566-ca27-11e3-a75e-463587891b57_story.html?utm_term=.b69c5adda517; Rose

ality in these communities.²⁹ Over a decade of overaggressive prosecution of Muslim individuals has sowed further fears in these communities.³⁰ While an in-depth discussion of these practices is beyond the scope of this article, it is important to note that many of our clients who have been targeted for FBI questioning often also experience several of these other policies, further compounding the fears and vulnerabilities described in this article.

B. *Our Practice in this Area*

The Creating Law Enforcement Accountability & Responsibility project (CLEAR) was launched in 2009 by faculty and students at the City University of New York (CUNY) School of Law with the aim of supporting communities targeted by law enforcement practices pursued under the banner of counterterrorism.³¹ It is a cross-clinical collaboration combining students, faculty, and resources from across the practice areas covered by Main Street Legal Services, Inc., CUNY School of Law's clinical arm. Through CLEAR, we and our students have worked with local communities and clients who bear the brunt of surveillance, human mapping, police infiltration and other so-called

Hackman, *American, Muslim and Under Constant Watch: The Emotional Toll of Surveillance*, THE GUARDIAN (Mar. 27, 2016), <https://www.theguardian.com/us-news/2016/mar/27/american-muslim-surveillance-the-emotional-toll>; Ramzi Kassem and Baher Azmy, *Spying or No Flying?*, AL JAZEERA AMERICA (May 7, 2014), <http://www.aljazeera.com/indepth/opinion/2014/05/spying-no-flying-201457125644834437.html>.

²⁹ Beginning in 2002, the federal government required "special registration" of non-citizen, non-immigrant males from a list of countries, all but one of which have significant Muslim populations: Afghanistan, Algeria, Bahrain, Bangladesh, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, North Korea, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates, and Yemen. *See, e.g.*, Registration of Certain Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg. 67766 (Nov. 6, 2002); 67 Fed. Reg. 70526 (Nov. 22, 2002); 67 Fed. Reg. 77642 (Dec. 18, 2002); 68 Fed. Reg. 2363 (Jan. 16, 2003). More than 80,000 males registered in compliance with this program, to the country's lasting shame. AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, NSEERS: THE CONSEQUENCES OF AMERICA'S EFFORTS TO SECURE ITS BORDERS 9 (2009), <http://www.adc.org/fileadmin/ADC/Pdfs/nseerspaper.pdf>. On December 23, 2016, the outgoing President of the United States, Barack H. Obama, finally dismantled the regulatory framework for this registration program as a result of significant grassroots organizing and mobilizing. Removal of Regulations Relating to Special Registration Process for Certain Nonimmigrants, 81 Fed. Reg. 94231 (Dec. 23, 2006) (to be codified at 8 C.F.R. pts. 214 & 264 (noting that NSEERS is "obsolete").

³⁰ HUMAN RIGHTS WATCH, ILLUSION OF JUSTICE: HUMAN RIGHTS ABUSES IN US TERRORISM PROSECUTIONS 7 (2014), https://www.hrw.org/sites/default/files/reports/usterrorism_0714_ForUpload_0_0_0.pdf [hereinafter "ILLUSION OF JUSTICE"] (discussing how overaggressive prosecution and related practices have severed trust between Muslim communities and law enforcement agencies).

³¹ Ramzi Kassem is the founding director of CLEAR, a project launched with CUNY School of Law students in 2009. He continues to direct CLEAR. Diala Shamas joined CLEAR in 2011 as a Liman Fellow, later becoming Senior Staff Attorney and Acting Director. She worked with the project for over four years.

“counterterrorism” policies and practices deployed by both local and national law enforcement agencies.

A significant part of CLEAR’s practice involves counseling and representing individuals who are not charged with any crime but are approached by law enforcement for questioning. In CLEAR’s internal jargon, student attorneys and supervising attorneys refer to these as “contact cases,” a reference to law enforcement coming into contact with a client. Since its inception, CLEAR has handled hundreds of contact cases—involving primarily Muslim clients—in New York City, CLEAR’s primary catchment area.³²

There is no single, one-size-fits-all approach to contact cases. Lawyers who represent clients in connection with questioning attempts must carefully gather facts and weigh options on a case-by-case basis, in conversation with each client. Irrespective of the chosen course of action, however, almost all such cases will involve, as a relatively early step, the intervention of the attorney on behalf of her client to act as a buffer between the client and law enforcement. Similarly, almost all of these cases will require a certain amount of guessing in what is a particularly opaque area of law enforcement: guesswork about what – if any – concrete reasons the agents have for approaching a particular individual, the client’s vulnerabilities, the credibility of any threats the agents may have directed at the client,³³ the likelihood of escalation of the situation into a formal proceeding, and even as to the source of the agents’ authorities, if any.³⁴ This results in an uneven balance of power between the federal government and our clients.

As we will describe further below, there are many challenges that are either unique to or uniquely articulated in the so-called “national security” context, although they have yet to be subjected to more sustained critical examination. Such an examination is important for our own practice, as we strive to navigate and improve an emerging area of lawyering while remaining loyal to rebellious principles. In engaging in this critical analysis, we strive to follow the longstanding clinical tradition of being self-reflective and deliberate about our own law-

³² Recently, however, CLEAR practitioners have fielded a rising number of contact cases involving non-Muslim-identified anti-war and environmental activists, which offers some evidence that state security tactics and methods, once established, tend to expand naturally to other demographics.

³³ Unlike in a more structured criminal defense practice where attorneys are involved and eventual criminal prosecution is envisioned, there are few structural incentives preventing FBI agents from misrepresenting the facts to our clients, or to their attorneys.

³⁴ As discussed further below, the rules governing FBI agents’ conduct in this area are both permissive, and opaque. See *infra* Pt III about how lawyers and clients engage in problem-solving together.

ying and practice.³⁵

II. THE CHALLENGES

*Doctor Azem's case is among the more extreme examples of the level of aggression our clients can face – as well as its consequences.*³⁶ Dr. Azem is a medical doctor who was approached by FBI agents. When they first visited his home, his wife and newborn were there and the agents told him that they were following up on a complaint they received about the Dr. Azem's behavior on a flight. The family allowed the agents into their home and answered all of their questions. The agents then returned on several occasions, behaving in an increasingly threatening manner, yet without presenting Dr. Azem with any way to resolve the alleged complaint. Dr. Azem eventually reached out to CLEAR, and we contacted the agents. They refused to provide us with much detail regarding their interest in our client and indicated that they would continue to reach out to him directly, both at his home and possibly his workplace. Although the agents acknowledged that our client had the legal right to refuse to speak with them, they told us that they nevertheless would continue to pressure him. Our attempts to reach out to FBI supervisors were also met with broad, vague responses. The agents began showing up at Dr. Azem's home in multiple vehicles, knocking on his neighbors' doors, and pointing to his house. On one occasion, he opened the door to speak with the agents, hoping that he might be able to reason with them. They pushed their way past him, entered his home, threatening and intimidating him all the while, but without any specific questions for him. After months of this, Dr. Azem expressed deep anxiety, inability to focus at work, difficulty sleeping, and fear for his family's safety. He believed that he was being followed by cars and that his car had been broken into and searched. He noted that he lived in an apartment complex that housed many former military veterans. In the midst of

³⁵ Anthony G. Amsterdam, *Clinical Legal Education—A 21st-Century Perspective*, 34 J. LEGAL EDUC. 612, 616 (1984) (noting that the essence of clinical education is “to teach students how to learn systematically from experience”); Gary Bellow, *On Teaching the Teachers: Some Preliminary Reflections on Clinical Education As Methodology*, in CLINICAL EDUCATION FOR THE LAW STUDENT: LEGAL EDUCATION IN A SERVICE SETTING 374 (Council on Legal Educ. for Prof'l Responsibility, ed., 1973) (core of clinical education is to foster introspection and facilitate understanding of lawyering and the legal order); Elliott S. Milstein, *Clinical Legal Education in the United States: In-House Clinics, Externships, and Simulations*, 51 J. LEGAL EDUC. 375, 378-81 (2001) (identifying goals of the legal clinic, including “theory-driven preparation and advocacy” and “reflective practice”); Ascanio Piomelli, *Appreciating Collaborative Lawyering*, 6 CLINICAL L. REV. 427, 431 (2000) (clinicians are “focused on what lawyers do and how we do it, our aim is not simply to describe practice but to improve it”).

³⁶ The client's name and some facts were altered to preserve confidentiality.

rising reports of hate crimes against Muslims, he was keenly aware that menacing behavior at and around his apartment by FBI agents might have consequences. Eventually, he and his family moved out of New York City.

We now turn to examine some of the challenges encountered when representing clients and partnering with communities that are on the receiving end of FBI questioning campaigns, many of which are on display in Dr. Azem's case. While not all of these challenges are unique to lawyering in the face of "counterterrorism" policing, we will spotlight some unique variants and detail how they might inhibit the realization of a vision of rebellious lawyering in this context.³⁷

Individuals targeted for these questioning attempts come from diverse backgrounds, and this practice is not limited to Muslim populations,³⁸ although those targeted by present day policing efforts in the name of "counterterrorism" seem to be overwhelmingly Muslim or Muslim-identified.³⁹ Beyond that single common denominator, there are other characteristics shared by the target groups that can challenge a rebellious practice centered on transformative movement building and collective demands in the face of aggressive police action.

A. *Fear, Stigmatization and Isolation*

Decades of surveillance, and the prominence of intelligence gathering through questioning attempts have resulted in widespread fear, stigmatization, and isolation of targeted individuals and communities.⁴⁰ This affects the ability or willingness of people to assert their rights, to reach out to counsel, or to publicly demand accountability or transparency with regard to these government practices.

The psychological impact of being targeted for questioning can be deep and insidious, characterized by withdrawal, anxiety, depression,

³⁷ For example, being under-resourced and unable to always meet significant client needs is a constant challenge to our practice – and to lawyering rebelliously – but one that we don't address here. Similarly, this list is a description of the challenges drawing on contact cases but can apply more broadly to other areas of lawyering on behalf of American Muslim communities, many of which CLEAR engages in, too. For ease of analysis, however, we will use the lens of contact cases.

³⁸ Questioning campaigns were used in the 1960's and 1970's to target black or anti-war activists, their supporters, and their acquaintances, with the purpose of disrupting or chilling their activities. See SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, SUPPLEMENTARY DETAILED STAFF REPORTS ON INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, S. DOC. NO. 94-755, at 44 (2d Sess. 1976). See also Amna A. Akbar, *Law's Exposure: The Movement and the Legal Academy*, 65 J. LEGAL EDUC. 352 (2015).

³⁹ See *supra* note 25 (detailing religion-based discrimination).

⁴⁰ Liz Robbins, *Accusations of Terrorism Worry Brooklyn's Uzbek Community*, N.Y. TIMES (May 10, 2015), https://www.nytimes.com/2015/05/11/nyregion/accusations-of-terrorism-worry-brooklyns-uzbek-community.html?_r=0.

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and suspicion or lack of trust.⁴¹ This colors every stage of our representation. A typical CLEAR intake begins with a phone call, a greeting followed by silence, or a statement that the caller or visitor saw a CLEAR brochure at the mosque or received one from a friend, again followed by silence. It is almost as though they are unable to name what happened. Recognizing the familiar confusion, our attorneys or students will prod.

“Did you receive a visit?”

“Yes.”

“Are you comfortable telling me on the phone what happened?”

The answer is frequently: “I’m not sure.”

Their uncertainty is understandable. Targets of questioning attempts are often unable to understand the reason they were approached, gauge the seriousness of what they might be facing, or assess whether they should trust us or our organization.

This affects the attorney-client relationship in myriad ways, and adds yet another layer of difficulty in establishing trust. Many attorneys working with predominantly Muslim communities have had the experience of clients entering their office, dismantling their phones, looking out the windows, or speaking in whispers. When we discuss confidentiality and our obligations towards them, our clients often don’t believe us – either because they’re unsure whether to trust us, or because of an assumption that anything they tell us is being recorded surreptitiously.

Our initial encounters often begin with our clients presenting a series of disclaimers or explanations, as though they need to prove to their attorneys that they are not terrorists or bad people, despite the FBI’s suggestion otherwise. They might explain why they attend their mosque, or note, almost apologetically, that they recently started praying more frequently or became more “visibly Muslim.”⁴² They

⁴¹ See MAPPING MUSLIMS, *supra* note 25, at 28 (discussing the stigma and fear associated with questioning by the FBI and NYPD); Matthew Rothschild, *FBI Talks to Muslim High School Student About “PLO” Initials on His Binder*, THE PROGRESSIVE (Dec. 23, 2005), http://www.progressive.org/mag_mc122305 (reporting that high school student became hesitant to express his political views after FBI interview). Mental health literature has supported this general observation. See *infra* note 45.

⁴² See MAPPING MUSLIMS, *supra* note 25, at 15-17 (discussing how American Muslim are aware of the possible scrutiny that dressing, looking or acting Muslim might invite as a result of known law enforcement practices and ambient theories of radicalization). See generally Akbar, *supra* note 2, at 878; Matt Apuzzo & Adam Goldman, *NYPD Keeps Files on Muslims Who Change Their Names*, ASSOCIATED PRESS (Oct. 26, 2011), <http://ap.org/>

might explain in great detail the purposes of their travels, if that was raised by the agents. They might tell us why they felt angry and posted something critical of the U.S government on their social media accounts. They share that they have listened to a sermon by preachers that are known to be subjects of FBI interest, or watched certain propaganda videos online.

Of course, none of these elements will affect our representation. Rather, they are a sign that our clients, like much of the rest of society, have internalized ambient government rhetoric, casting as suspicious certain types of religious Muslim expression, certain factions of Islam.⁴³ In many cases, we observe our clients' gradual withdrawal. They ask us if they should scrub their Facebook accounts. They wonder if they should leave the United States, change their degree from political science or engineering to something less controversial, if they should step down from leadership positions in their student organizations, or stop attending their mosque altogether.

In response, we try to impart context and perspective, often spending time explaining the broader political environment, noting that what they are experiencing is unfortunately common, or that they are not alone. We explain that, based on our experience, it does not appear that they were targeted because of any unlawful behavior – or even precursory behavior. We offer suggestions for self-care, and encourage them to continue participating in their communities and in society at large. That said, our efforts to address these consequences are limited by our skill-set. We still feel obligated to try because those clients who seek mental health support often report being unable to find practitioners who can understand their experiences without dismissing them, or whom they felt they can trust. After observing a number of clients expressing isolation, mistrust, and fear, we reached out to practitioners in the mental health community in the hope of developing a network of professionals who understand the particularities of our clients' experiences.⁴⁴ The medical community, however, has only made limited strides so far in diagnosing or serving our client population and others who have shared their specific experiences.⁴⁵

Content/AP-In-The-News/2011/NYPD-keeps-files-on-Muslims-who-change-their-names.

⁴³ See MITCHEL D. SILBER & ARVIN BHATT, NYPD INTELLIGENCE DIV., *RADICALIZATION IN THE WEST: THE HOMEGROWN THREAT* 31 (2007) (purporting to identify markers of radicalization). See also Akbar, *supra* note 2, at 870-871, 876-879.

⁴⁴ See CLEAR, BROCHURE, *IMPACTS OF TARGETING & DISCRIMINATION POST 9/11, CARING FOR YOURSELF AND YOUR COMMUNITY* (on file with authors).

⁴⁵ There is an emerging medical literature in this area. See, e.g., Kevin L. Nadal et al., *Subtle and Overt Forms of Islamophobia: Microaggressions toward Muslim Americans*, 6 J. OF MUSLIM MENTAL HEALTH, issue 2, 2012 at 15 (studying implications of Islamophobia on Muslim mental health); Cécile Rousseau et al., *Perceived Discrimination and Its Association with Psychological Distress Among Newly Arrived Immigrants Before and After Sep-*

In addition, being subjected to law enforcement questioning often results in isolation from one's own community. There is a public, performative aspect to these interrogation attempts: agents often approach individuals at their workplaces, or in their home in front of their relatives, children, neighbors – aware of the potential anxiety and stigma that they are causing, even making references to this potential to incentivize a private meeting. Agents have threatened to return to clients' workplace, or to speak to neighbors if our clients do not agree to speak with them. Our clients have agreed to step into agents' cars to avoid being seen by their neighbors or relatives. In communities that are already aware of extensive surveillance, being approached by the FBI publicly can act as a scarlet letter, and individuals may then be viewed with either suspicion or fear by their own communities.⁴⁶ When clients have expressed concerns about alienation or stigmatization, we sometimes offer to speak with their community members or relatives to help dispel any causes for concern and to counteract the stigmatization. Demystifying FBI questioning campaigns to do away with the associated stigma is also one of the aims of CLEAR's rights awareness workshops in affected communities.

Still, this environment makes targets of questioning attempts less likely to take a more assertive stance and to speak to others about their experiences, and less willing to engage in organizing and push-back, to lodge complaints with the FBI, or to take action that the agents may mischaracterize as “uncooperative.”⁴⁷

B. Painting Basic Rights as Inherently Suspect

FBI scrutiny tends to stigmatize Muslim communities, painting them as suspicious, un-American, or potentially criminal. This is par-

tember 11, 2001, 101 AM. J. PUB. HEALTH 909 (2011) (study showing correlation between perceptions of discrimination and psychological distress among recent Arab and Haitian immigrants to Montreal); Dena M. Hassouneh & Anahid Kulwicki, *Mental Health, Discrimination, and Trauma in Arab Muslim Women Living in the US: A Pilot Study*, 10 MENTAL HEALTH, RELIGION & CULTURE 257 (2007) (preliminary study suggesting that Arab-American Muslim women are at increased risk for experiencing depressive and anxiety symptoms and multiple stressors such as acculturative stress, discrimination, and trauma).

⁴⁶ See MAPPING MUSLIMS, *supra* note 25, at 29 (Interviewee: “I don't trust a lot of our leadership within Islamic organizations in New York City. I think many of them have already been contacted by NYPD or the FBI.”); Murad Hussain, Note, *Defending the Faithful: Speaking the Language of Group Harm in Free Exercise Challenges to Counterterrorism Profiling*, 117 YALE L. J. 920, 934 (2008) (discussing stigmatic harms and how profiling of a community can encourage observers to draw inaccurate conclusions about that group). See, e.g., *Tabbaa v. Chertoff*, 509 F.3d 89 (2d Cir. 2013).

⁴⁷ See Shamas, *supra* note 24 (describing students who have been approached for FBI interviews withdrawing from membership in Muslim organizations to avoid driving away other students who may fear unwanted suspicion).

ticularly the case for those individuals or communities that attempt to push back against government policies. The net effect is to further isolate them from their broader communities, neighborhoods, colleagues, potential allies, or inter-faith coalitions, depriving them of significant sources of support necessary to a more assertive stance.

In our experience, FBI agents perpetuate the notion that individuals approached for questioning who exercise their rights not to submit to questioning at all or without a lawyer must have something to hide. The “nothing to hide” argument is repeated frequently by agents and targeted community members alike. It persists despite the fact that it has been thoroughly critiqued and debunked, by scholars who have unpacked the many reasons that perfectly law-abiding individuals and communities would want to oppose mass-intelligence gathering – including for law enforcement purposes.⁴⁸

Yet, when it comes to Muslim communities, the debate has been far less abstract, and the question put more pointedly. FBI agents raise it in far more directly threatening fashion, with the full-throated backing of some politicians and sometimes even the press. For example, a common response by FBI agents to an individual wanting to have a lawyer present before submitting to questioning is that he must have something to hide. “Only criminals get attorneys,” agents often tell our clients. Some agents have not hesitated to repeat the same line to CLEAR attorneys and students, too, often feigning surprise – if not anger – at receiving a call from an attorney on behalf of an individual whom they attempted to question.

This larger context turns a simple message that is widely accepted as basic in many other communities – contact an attorney if you’re approached for questioning by a law enforcement agency – into a controversial, suspect, or disloyal proposition in Muslim communities.⁴⁹ CLEAR experienced this phenomenon first hand when the media reported on a workshop that our students had facilitated, in which we relayed that fundamental message urging people who are approached for questioning to contact a lawyer. Press coverage of the workshop

⁴⁸ See, e.g., Daniel J. Solove, *I’ve Got Nothing To Hide’ And Other Misunderstandings Of Privacy*, 44 SAN DIEGO L. REV. 745 (2007).

⁴⁹ For instance, the Council on American Islamic Relations – a national organization with chapters that provide legal services to Muslims who are contacted by the FBI – has been accused of fomenting and supporting terrorism. See, e.g., Jordan Schachtel, *CAIR Advised Muslims to ‘Use Caution’ Speaking to FBI about ‘Draw Muhammad’ Event Shooter in 2010*, BREITBART (May 4, 2015), <http://www.breitbart.com/national-security/2015/05/04/cair-advised-muslims-to-use-caution-speaking-to-fbi-about-draw-muhammad-event-shooter-in-2010/>; Todd Starnes, *CAIR Says Poster Warning Against Helping FBI is Misinterpreted*, FOX NEWS (Jan. 13, 2011), <http://www.foxnews.com/us/2011/01/13/cair-says-anti-fbi-poster-misinterpreted.html>.

suggested that we were telling people not to be “cooperative.”⁵⁰

In other contexts, attorneys (as well as activists and artists) have urged individuals to refuse to take plea deals or agree to become criminal informants and participate in sting operations, citing how the system incentivizes informants to lie and thus devastates entire communities.⁵¹ This is different from advising people that they should seek counsel when approached and, yet, it offers a useful comparison, highlighting the heightened stakes at issue when dealing with the rhetoric of terrorism, and the low public tolerance for even modest efforts to push back against law enforcement abuses or to advocate for the exercise of the most basic rights.

The challenges of lawyering in a hostile political environment is in no way unique to this setting. Nor are the challenges of representing politically marginalized and silenced communities unique to attorneys working in the so-called national security setting.⁵² For example, youth activists for the DREAM act have directly confronted the challenges of building a political movement for reform while being crippled by vulnerability stemming from the very immigration policies that they are challenging.⁵³ Young activists have risked deportation when they engaged in civil disobedience.⁵⁴ They have confronted their stigmatization by campaigning to “come out” as “undocumented, unafraid and unapologetic.”⁵⁵ In the same vein, attorneys and allies

⁵⁰ Amna Akbar & Ramzi Kassem, *Are Muslims Allowed Rights?*, AL JAZEERA (Nov. 28, 2011), <http://www.aljazeera.com/indepth/opinion/2011/11/2011112415501938290.html>.

⁵¹ See, e.g., PAUL BUTLER, *LET'S GET FREE: A HIP HOP THEORY OF JUSTICE* 81-86 (2009). Law professor and former prosecutor Paul Butler notes the devastating impact of the culture of informants in the criminal justice system on communities of color, and urges an end to the practice of becoming informants in exchange for money or reduction in sentencing. Professor Butler takes care to distinguish being an informant from being a witness or reporting crimes in one's community. See also ALEXANDRA NATAPOFF, *SNITCHING, CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE* 121-128 (2009).

⁵² López's vision of rebellious lawyering is in fact premised on the assumption that progressive lawyers have clients that are subordinated – whether that subordination is social, economic or based on race, sexual orientation, or other identifiers, chosen or imposed.

⁵³ See WALTER J. NICHOLLS, *THE DREAMERS: HOW THE UNDOCUMENTED YOUTH MOVEMENT TRANSFORMED THE IMMIGRANT RIGHTS DEBATE* (2013).

⁵⁴ *3 Undocumented Immigrants Risk Deportation in Protest for Passage of Dream Act*, DEMOCRACY NOW!, May 20, 2010 (two of the three were arrested and placed in removal proceedings, although they were later terminated) http://www.democracynow.org/2010/5/20/3_undocumented_immigrants_risk_deportation_to. See also Allegra M. McLeod, *Immigration, Criminalization, and Disobedience*, 70 U. MIAMI L. REV. 556 (2016) (arguing that immigrant youth are reimagining a vision for immigration justice and that attorneys should follow – as opposed to focusing on more robust immigration procedural protections, or extending to immigrants more enhanced, judicially enforced protections, such as a right to counsel).

⁵⁵ This language drew on the LGBTQ movement's earlier efforts to combat stigmatization. In fact, many of the leaders of the DREAM Act movement were young, queer and undocumented. See, e.g., Carlos Padilla, *Undocumented. Unafraid. Queer. Unshamed*,

working with Muslim communities face similar challenges in creating the circumstances to begin this process of de-stigmatization, be it by supporting community spaces and facilitating conversations that demystify the widespread experience of FBI questioning, or by ensuring legal representation for those who exercise their rights and push back against the practice.

C. *Immigration Vulnerabilities*

A large part of the population targeted by law enforcement for questioning and other intrusive surveillance techniques are either themselves immigrants or have close ties with immigrant communities. They either have immediate family living outside the United States, or have relatives who do not have status in the United States. This leaves them vulnerable to a number of pressure tactics that FBI agents deploy.

First, FBI agents have used immigration status as a lever to pressure individuals to speak with them, or to become informants.⁵⁶ They frequently approach individuals, claiming that they wish to discuss a pending immigration matter, and then make promises or threats regarding assistance, or possible deportation. Many of these threats are not empty, although they are often overstated. While the ultimate authority on immigration matters rests with the U.S. Citizenship and Immigration Services (USCIS) and other components of the Department

HUFFINGTON POST (Feb. 2, 2016), http://www.huffingtonpost.com/carlos-padilla/undocumented-unafrraid-que_b_6664164.html. See also Rose Cuison Villazor, *The Undocumented Closet*, 92 N.C. L. REV. 1 (2013); McLeod, *supra* note 54.

⁵⁶ See AMERICAN CIVIL LIBERTIES UNION, UNLEASHED AND UNACCOUNTABLE: THE FBI'S UNCHECKED ABUSE OF AUTHORITY 40 (2013), <https://www.aclu.org/sites/default/files/assets/unleashed-and-unaccountable-fbi-report.pdf> [hereinafter "UNLEASHED AND UNACCOUNTABLE"] (citing to an FBI training presentation suggesting that agents exploit immigration vulnerabilities in order to recruit informants); AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, MUSLIMS NEED NOT APPLY: HOW USCIS SECRETLY MANDATES THE DISCRIMINATORY DELAY AND DENIAL OF CITIZENSHIP AND IMMIGRATION BENEFITS TO ASPIRING AMERICANS 30-31 (2013), https://www.aclusocal.org/sites/default/files/field_documents/161849063-muslims-need-not-apply-aclu-socal-report.pdf [hereinafter "MUSLIMS NEED NOT APPLY"] (listing examples of how FBI agents routinely use a secret government program allowing them to delay immigration applications in order to pressure individuals to become informants); ILLUSION OF JUSTICE, *supra* note 30, at 170 (interviewing a lawyer reporting that FBI has threatened to stall asylum application of her clients); Cora Currier, *Revealed: The FBI's Secret Methods for Recruiting Informants at the Border*, THE INTERCEPT (Oct. 5, 2016, 2:52 PM), <https://theintercept.com/2016/10/05/fbi-secret-methods-for-recruiting-informants-at-the-border/> (describing internal FBI documents instructing agents to use an "immigration relief dangle" when attempting to recruit informants); Mary Beth Sheridian, *Immigration Law as an Anti-Terrorism Tool*, WASH. POST (June 13, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/06/12/AR2005061201441.html>; Peter Waldman, *A Muslim's Choice: Turn U.S. Informant or Risk Losing Visa*, WALL STREET JOURNAL (July 11, 2006), <http://www.wsj.com/articles/SB115258258431002991>.

of Homeland Security, FBI agents have significant discretion and may make recommendations to USCIS to delay (sometimes indefinitely) or deny an immigration benefit, including citizenship, asylum, or legal residency.⁵⁷

A formal USCIS program enabling this was uncovered through Freedom of Information Act requests and subsequent litigation, even though its consequences were known for years to individuals subjected to delays and pretextual denials, and their attorneys. The Controlled Application Review and Resolution Program (CARRP) had been secretly implemented since 2008, and has been used to deny or delay otherwise earned immigration benefits, effectively ceding some control of key components of the immigration system to the FBI.⁵⁸ CARRP results in flagging immigration applications of individuals from Muslim-majority countries for delayed processing or outright denial, relying on overbroad religious, national origin or associational profiling to flag applicants of concern. While some of the details of this program are now publicly available, much remains unknown.⁵⁹ An individual subjected to a CARRP hold does not get notice that her application has been placed on a so-called security hold, although she might be waiting for years for her citizenship or other application to be processed. As a result, CLEAR, immigration practitioners, and others who work with Muslim communities are engaged in a guessing game, with little recourse other than federal litigation. Our clients are thus kept in limbo, with no clear answers in sight, making it all the more difficult for them to turn away agents who promise to facilitate their immigration processing in exchange for information.⁶⁰

CLEAR client experiences vividly illustrate FBI excess in this arena. Within weeks of each other, we received unrelated calls from two young professionals with Iranian citizenship who had obtained an O-1 visa and were in the process of applying for permanent residence.⁶¹ FBI agents reached out to them telling them they wanted to schedule an interview with them at their home or at a nearby cafe in relation to their immigration applications. The individuals each reached out to CLEAR for advice, rightly questioning the informality of a procedure presented by the FBI as a requirement. When we

⁵⁷ See MUSLIMS NEED NOT APPLY, *supra* note 56.

⁵⁸ See generally MUSLIMS NEED NOT APPLY, *supra* note 56, for the publicly available information about the CARRP program, and details about how it harms predominantly Muslim, law-abiding individuals.

⁵⁹ *Id.* at 9.

⁶⁰ The use of CARRP to pressure individuals to provide information to the FBI has been documented extensively. See MUSLIMS NEED NOT APPLY, *supra* note 56, at 3, 5, 8, 30-31.

⁶¹ Reserved for “Aliens of Extraordinary Ability.”

reached out to the FBI, they abandoned the pretense that their initiative was somehow required as part of the immigration processing, and instead clarified that it formed part of what they termed as “community outreach.” When pressed, they further clarified that they wanted to interview our clients about their knowledge of Iranian politics and any activism in which they may have been involved in Iran.⁶²

Beyond immigration holds, FBI agents can also place individuals on terrorist watchlists with little to no oversight, despite the severe consequences that flow from such placement – from denials of boarding,⁶³ to delays or bars on immigration benefits or applications,⁶⁴ and lengthy delays at airports and border controls.⁶⁵ Our efforts on behalf of clients placed on watchlists face significant hurdles, as the process for challenging placement on these lists is either non-existent, or wholly inadequate.⁶⁶ An individual placed on a watchlist is not provided with notice, adding yet another layer of uncertainty to our practice. Thus, when an FBI agent approaching a client for questioning suggests or threatens that a client might be on a watchlist, we have no way to gauge the credibility of that statement. A regular part of our practice involves engaging in a guessing game with our clients, advising them to book flights and accompanying them to the airport in order to test out the agent’s threat. The lack of transparency is disempowering to clients and attorneys alike.

The most notorious of these watchlists is the No Fly List, which results in denial of boarding on any flight that travels over U.S. air-

⁶² See also MAPPING MUSLIMS, *supra* note 25, at 29, describing vulnerabilities among immigrant communities as a result of targeting by the NYPD’s spying program.

⁶³ Placement on the “No Fly List” results in denial of boarding any flight over U.S. airspace. NAT’L COUNTERTERRORISM CENTER, WATCHLISTING GUIDANCE 50-53 (2013) https://www.eff.org/files/2014/07/24/2013-watchlist-guidance_1.pdf [hereinafter “WATCHLISTING GUIDANCE”]; FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 392-93 (2002), <https://9-11commission.gov/report/> [hereinafter “THE 9/11 COMMISSION REPORT”]; DEPARTMENT OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, FOLLOW-UP AUDIT OF THE TERRORIST SCREENING CENTER xiii-xvii, 31-33 (2007), <https://oig.justice.gov/reports/FBI/a0741/final.pdf> [hereinafter “DOJ OIG REPORT”]; Jeremy Scahill & Ryan Devereaux, *The Secret Government Rulebook for Labeling You a Terrorist*, THE INTERCEPT (July 23, 2014, 2:45 PM), <https://theintercept.com/2014/07/23/blacklisted/>.

⁶⁴ See generally MUSLIMS NEED NOT APPLY, *supra* note 56.

⁶⁵ WATCHLISTING GUIDANCE, *supra* note 63, at 50, 54; THE 9/11 COMMISSION REPORT, *supra* note 63, at 392-93; See DOJ OIG REPORT, *supra* note 63, at 31-33; Scahill & Devereaux, *supra* note 63.

⁶⁶ The Ninth Circuit has held that the TRIP process is constitutionally inadequate. *Latif v. Holder*, 686 F.3d 1122 (9th Cir. 2013); *Ibrahim v. Department of Homeland Security*, 669 F.3d 983 (9th Cir. 2012). See also, Ramzi Kassem, *I Help Innocent People Get Off Terrorism Watch Lists. As a Gun Control Tool, They’re Useless.*, WASH. POST (June 28, 2016), <https://www.washingtonpost.com/posteverything/wp/2016/06/28/i-help-innocent-people-get-off-terror-watch-lists-as-a-gun-control-tool-theyre-useless/>.

space.⁶⁷ While being unable to travel by air is oppressive to most people, it is particularly coercive to those who have immediate family or relatives overseas. Our clients Muhammad Tanvir, Jameel Algibhah and Awais Sajjad – all U.S. citizens or lawful permanent residents, and all placed on the No Fly List in retaliation for their refusal to become FBI informants – had parents, grandparents, children, and spouses overseas who they were not able to see for years.⁶⁸ Although their refusal to associate with the government or others on those terms was well within their rights, our clients still faced consequences that their lawyers could not immediately remedy⁶⁹ – at least, not without significant resources, engaging with the FBI agents themselves, their supervisors, undertaking FOIA appeals, and ultimately filing suit in federal court.⁷⁰ While the government removed our clients from the No Fly List in a bid to moot part of their case, their tales serve as a cautionary note to others.⁷¹ In fact, we experienced this directly: at several know-your-rights workshops facilitated by CLEAR teams, as we delivered a basic message about the dangers of speaking with the FBI without an attorney present, audience members pointed to the possibility that they would be watchlisted, having read the news coverage of our clients' stories and heard of others' accounts first hand.⁷² The irony was not lost on us: CLEAR, our co-counsel and other colleagues have often turned towards the media to expose abusive FBI practices in order to encourage public scrutiny and eventually reform. This highlighted, in a very real way, the possibility that by advertising the FBI's tactics, we may have contributed to the overall chilling that these tactics are arguably intended to achieve.⁷³

⁶⁷ WATCHLISTING GUIDANCE, *supra* note 63, at 33. (setting a low, “reasonable suspicion” threshold for placement on the No Fly List).

⁶⁸ Complaint, *Tanvir v. Lynch*, 128 F. Supp. 3d 756 (S.D.N.Y. 2015) (No. 1:13CV06951), 2013 WL 5529762. *See also* Petra Bartosiewicz, *Deploying Informants, The FBI Stings Muslims*, THE NATION (June 14, 2012), <https://www.thenation.com/article/deploying-informants-fbi-stings-muslims/>.

⁶⁹ *See infra* Part I for a discussion of opaque tools at FBI agents' disposal in the counterterrorism context.

⁷⁰ In *Tanvir v. Comey*, CLEAR recruited the Center for Constitutional Rights and eventually a law firm to assist in the resource-intensive litigation.

⁷¹ They were informed that they would be able to fly on the eve of oral argument.

⁷² *See supra* note 27.

⁷³ *See, e.g.*, BRIAN GLICK, WAR AT HOME: COVERT ACTION AGAINST U.S. ACTIVISTS AND WHAT WE CAN DO ABOUT IT 9-10, 20-34 (1989) (discussing disruptive purpose of voluntary interviews of black and anti-war activists during the COINTELPRO era); *see also* UNLEASHED AND UNACCOUNTABLE, *supra* note 56, at 41 (noting that the FBI might be using overt investigative tactics to disrupt political activism); RAMZI KASSEM, *A Culture of Surveillance*, HUFFINGTON POST (June 9, 2014), http://www.huffingtonpost.com/pen-american-center/a-culture-of-surveillance_b_5462382.html (“In other words, the suppression of dissent; the silencing of unpopular viewpoints held by members of marginalized communities; the dissolution of vital social ties in those same communities; the censorship

D. *Culturally-Rooted Silence*

A related challenge faced by organizers and lawyers working to support resistance to the FBI practice of widespread questioning in Muslim immigrant communities stems from the fact that those communities often hail from places where any confrontation with law enforcement or agents of the state is a dangerous, even life-threatening undertaking. Navigating culturally- or historically-rooted hesitation or fear of this nature is a mainstay of our practice. We frequently attempt to normalize the basic right to only submit to questioning with counsel, presenting it as “the most American thing to do.”⁷⁴ During our rights awareness workshops, we also reference recent events and popular culture, pointing to the fact that Bill Clinton, Martha Stewart, or, more recently, Hillary Clinton, would never meet with the FBI without a lawyer.

One story illustrates this: a U.S.-born college student came to CLEAR after having attended one of our know-your-rights workshop. He informed us that his family had been visited by FBI agents on several occasions, and that his parents, who were born Bangladesh, regularly allowed them into their home, despite these visits causing significant stress and anxiety to his parents and siblings. However, he could not prevail upon his parents to stop letting the agents into their home, even though he was able to explain to them in an impressively sophisticated way why they would be fully within their rights to do so. He requested that CLEAR relay the same message that he had delivered, on the theory that his parents might take more seriously the advice from a lawyer, someone to whom they would attribute authority. We obliged and arranged a meeting for a CLEAR attorney with both the father and son. At the meeting we essentially confirmed the son’s proposed course of action, framing it as our own, embracing the regnant lawyer-client dynamic in order to more effectively counter the gravitas that the agents had in the eyes of the father.

This generational divide plays out in mosques and community centers. In our experience, it is often the U.S.-born or raised youth who are most primed for the message, who are in a position to push out the message to their elders, who lobby to incorporate a rights-awareness curriculum during Sunday school, who place a know-your-rights workshop on the mosque board meeting’s agenda, who arrange

or self-censorship of critical perspectives opposing major U.S. foreign policy endeavors in our current historical moment; the general slackening of resistance — all of these are welcome disruptions in our rulers’ eyes.”).

⁷⁴ *This American Life: The Convert*, CHICAGO PUBLIC RADIO (Aug. 10, 2012), <https://www.thisamericanlife.org/radio-archives/episode/471/the-convert> (capturing part of a CLEAR know-your-rights workshop at a community center in New York City).

informal youth group meetings, and who want to break taboos around informants, infiltration, and surveillance.⁷⁵ Sometimes, their elders, the gatekeepers, are less ready to understand the importance of access to counsel when approached for questioning by the government.

In some Muslim congregations or families, the leadership or elders actively encourage members to agree to uncounseled meetings with FBI agents, sometimes even facilitating them. In a few cases, we have noticed that those mosque leaders or family elders report quite positive experiences with FBI agents, detailing how the agents told them that they facilitated their immigrations benefits, visas, or other matters. The net effect amounts to a *quid pro quo* of sorts. Because community leaders and elders are offered preferential and respectful treatment of the sort that we rarely see with the run of our clients, those leaders and elders become that much more likely to open the doors of their communities and families to the FBI and to take the agents at their word when they assure those leaders and elders that there is no need for legal support.

This noticeable difference might be the result of a deliberate practice by FBI field offices to cultivate positive relationships with some Muslim leadership in the hope that they will in turn encourage their congregants to engage with the FBI without seeking separate legal counsel. This is in stark contrast to the African-American Muslim communities. One out of every three American Muslims is African-American. In the New York City area, mosques that have a large proportion of African-American congregants, or whose leadership is African-American, have a long history of responding to various forms of targeting by law enforcement, including the FBI's COINTELPRO programs in the sixties, seventies and eighties.⁷⁶ In our experience, leadership at black Muslim mosques have been more prepared to handle their congregants' queries, counsel their congregations about the risks involved in submitting to questioning by the FBI, and immediately refer contact cases to attorneys at CLEAR.

E. Politically Marginalized Client Populations

A third of American Muslims are African-American, with the rest being immigrants or descended from immigrants. Neither the "indigenous" nor the immigrant part of the American Muslim commu-

⁷⁵ See MAPPING MUSLIMS, *supra* note 25, at 29-30, 35-45 (describing the chilling of speech, community relations and activism as a result of concerns about infiltration and informants, silencing conversations about surveillance in the very spaces that are subjected to it).

⁷⁶ WARD CHURCHILL & JIM VANDER WALL, AGENTS OF REPRESSION, 58, 63-100 (2002) (describing COINTELPRO targeting of black liberation movements and civil rights leaders).

nity currently enjoys political presence and influence. Moreover, generally, the democratic political process rarely favors disenfranchised and stigmatized minority groups, and is particularly unforgiving when the specter of “national security” is used to justify government policy.⁷⁷

F. High-Stakes Environment

The label of “terrorism” or “national security” – no matter how much of a misnomer – tends to raise the perceived stakes in any interaction between government agencies and private individuals or their communities. Collecting intelligence from and about Muslim communities has become an FBI priority.⁷⁸ This imperative, and the perceived heightened stakes involved, carry over to street-level incidents. It can be measured in the zeal and aggression that agents bring to their interactions with our clients, the rhetoric and attitudes those agents adopt, and their responses to any interruption or protest – no matter how lawful. The upshot is that advising our clients to resist agents’ attempts to question them without counsel risks immediate escalation, even though we anticipate that, in the long run, they, or their communities, will be safer as a result.⁷⁹

Our clinical practice has exposed us to a range of aggressive agent behavior. As described above, CLEAR students and attorneys routinely call FBI agents to inform them that our clients will only speak

⁷⁷ See *Hamdi v. Rumsfeld*, 542 U.S. 507, 545 (2004) (Souter, J., dissenting) (“In a government of separated powers, deciding finally on what is a reasonable degree of guaranteed liberty whether in peace or war (or some condition in between) is not well entrusted to the Executive Branch of Government, whose particular responsibility is to maintain security.”); Aziz Z. Huq, *Structural Constitutionalism as Counterterrorism*, 100 CAL. L. REV. 887, 921 (2012); Shirin Sinnar, *Protecting Rights from Within? Inspectors General and National Security Oversight*, 65 STAN. L. REV. 1027 (2013).

⁷⁸ DEPARTMENT OF JUSTICE, *Fact Sheet: Justice Department Counter-Terrorism Efforts since 9/11*, Sept. 11, 2008, <https://archives.fbi.gov/archives/news/pressrel/press-releases/fact-sheet-justice-department-counter-terrorism-efforts-since-9-11> (emphasizing “outreach” to Muslim, Arab and Sikh communities). See also ACLU, *ACLU Eye on the FBI: The FBI is using the guise of “community outreach” to collect and illegally store intelligence information on Americans’ political and religious beliefs*, (Dec. 1, 2011), https://www.aclu.org/files/assets/aclu_eye_on_the_fbi_alert_-_community_outreach_as_intelligence_gathering_0.pdf; Cora Currier, *Spies Among Us: How Community Outreach Programs to Muslims Blur Lines Between Outreach and Intelligence*, THE INTERCEPT (Jan. 21, 2015, 11:10AM), <https://theintercept.com/2015/01/21/spies-among-us-community-outreach-programs-muslims-blur-lines-outreach-intelligence/>; Michael Price, *Community Outreach or Intelligence Gathering? A Closer Look at “Countering Violent Extremism,”* BRENNAN CENTER FOR JUSTICE (Jan. 29, 2015), https://www.brennancenter.org/sites/default/files/analysis/Community_Outreach_or_Intelligence_Gathering.pdf.

⁷⁹ As with a street stop, there’s a real risk that an assertion of rights that is supposed to end an interaction with law enforcement in theory plays out very differently in practice. We always advise individuals to use their judgment on what will help them exit an uncounseled interaction as safely and promptly as possible.

with the FBI through counsel. Many – if not most – FBI agents respect that request. Too frequently, however, they refuse to honor client desires or attorney instructions. Their responses range from attempts to negotiate, to expressions of resentment, to offensive, *ad hominem* attacks on the attorney, and even, in the extreme, threats of continuous harassment of our clients. Some agents have informed us that despite client wishes, they will persist in their attempts to approach or question them. Others have attempted to undermine our attorney-client relationships by suggesting that our clients have lied to us, questioning our or our students' legal credentials or the soundness of our advice, or telling our clients that we do not have their best interests in mind. There is nothing in the unredacted and publicly available parts of the current FBI guidelines that would hinder FBI agents from repeatedly attempting to question our clients against their wishes.⁸⁰

In our practice, we have to account for the possibility of retaliation and, where appropriate, have the responsibility of raising that possibility when counseling our clients or community partners. While we emphasize that declining an uncounseled interrogation is ultimately safest for our clients and their communities, people may have to make their own judgment call on how to de-escalate a given situation. We have had clients who have declined questioning by the FBI only to find themselves placed on watchlist. We have sued numerous agents as a result and have succeeded in compelling our clients' removal from watchlists.⁸¹

But retaliation for exercising the basic right not to submit to FBI questioning at all or without counsel can take many other, often insidious forms. We prepare our clients for the possibility that agents may not respect their wishes or their attorneys' instructions, that the agents may well continue to attempt to approach and question them, that they may even question others about them. We name these possibilities for what they are: pressure tactics and intimidation. And fear of retaliation is widespread in targeted communities. We hear about it in our conversations with clients and during the workshops and organizing meetings that we attend in those communities. The concerns range from the realistic – such as fear of being placed on a watchlist for being too rights-assertive – to more improbable ones, fueled by

⁸⁰ During the course of an assessment or investigation, an FBI agent may question any individual to attempt to gather “pertinent” information. 2013 DIOG, *supra* note 2, at §18.5.6.1.

⁸¹ Complaint, *Tanvir*, 128 F. Supp. 3d 756 (No. 1:13CV06951) (alleging that FBI agents wrongly placed or maintained five CLEAR clients on the No Fly List after they refused to speak with the FBI, or to become FBI informants).

sensationalized reporting of U.S. government excess in a post-9/11 world, like extraordinary rendition to a foreign government's custody, disappearance in a U.S. government "black site," or being sent to Guantánamo.

III. REBELLIOUS LESSONS FROM PRACTICE IN THE U.S. SECURITY STATE

Knowledge and habits can be acquired by exposure and emulation. Working closely with or alongside colleagues and supervisors at various institutions who, each in their own way, were and are operationalizing rebellious lawyering concepts in their clinical practice, we could not have remained impervious to López's ideas. His articulation of the rebellious philosophy of lawyering had so pervasively penetrated the ethos of certain clinical circles that it could be passed on across generations of clinicians without necessarily being named. It had become the framework within which we operated, the canvas we painted on, the silent, open-source software we all processed, all-encompassing and defining.

However, the different dimensions of CLEAR's work in their own historical context often seem to defy the rebellious-regnant dichotomy that cuts across López's seminal work. Our interventions, those of our student attorneys at CLEAR, and those of our colleagues who are also lawyering against a sprawling security state can appear, at first blush, quite conventional, if not outright regnant at times. A valuable lesson, perhaps, about what makes lawyering rebellious can be gleaned from a closer examination of those interventions, one that attempts to isolate how they might operate rebelliously in spirit and intuition, notwithstanding appearances.⁸² That examination might lead to a polymorphous understanding of rebellious lawyering, one less anchored to specific approaches and more attuned to the underlying analysis and spirit driving any approach. We can carry out that examination while retaining our focus on CLEAR's lawyering work in support of community efforts to respond to and reshape FBI questioning campaigns.

A. *Direct Legal Representation and Consultation*

The most direct expression of CLEAR's (and others') work supporting communities that are the object of the FBI's attention can be found in the legal representation and advice provided community

⁸² Muneer I. Ahmad, *Resisting Guantánamo: Rights at the Brink of Dehumanization*, 103 Nw. U. L. REV. 1683, 1762-63 (2009) (offering moving proof that even seemingly conventional approaches can be deeply rebellious).

members as they respond to attempted questioning. Some might perceive dissonance between an idealized and rigid conception of rebellious legal practice and the lawyering required in a charged, high-stakes setting fraught with jeopardy for the client. The practice of lawyering in service of these particular communities, opposite an assertive security apparatus can seem to unfold in disempowering and decidedly un-rebellious ways. The lawyer steps in, appearing to divest the client of her agency in the interaction with the state, taking the lead in the exchange with the FBI. The lawyer might even inform the FBI that the client is acting on advice of counsel in declining to submit to questioning, which seems to further strip the client of her agency in that dynamic. A commitment to lawyering rebelliously is by definition a commitment to client empowerment, which, in turn, would seem to require a self-effacing lawyer.

That sort of inconspicuousness, however, could be reckless in a contact case involving a client whom law enforcement aggressively seeks to question. In that context, interposing oneself as a lawyer or law student between a client and the FBI can be a profoundly rebellious intervention depending on the analysis and process leading to that act and following it. But the practice is not without its significant challenges. The rules governing FBI conduct are not only permissive, but their publicly available version is also heavily redacted.⁸³ Contact cases do not typically entail any formal filing, attorneys intercede largely as negotiators and as buffers. Formal complaint mechanisms tend to have limited benefit, in our experience.⁸⁴ The ambiguity of the practice at that investigative phase is reflected in agents' responses to our clients' assertion of their rights, or our own intervention. For example, although the FBI Guidelines are clear that any information collected must have been provided voluntarily,⁸⁵ our clients asserting their right not to submit to questioning at all or at least not without an attorney are often confronted with feigned puzzlement and push-back by agents. "You don't have the right to an attorney," the agents will say to our clients, or "but you are not under arrest." Both of these responses seem to reference the Fifth Amendment prohibition on interrogation of someone who has invoked their right to silence in the distinct custodial setting.

In this connection, López's insight that even subordinated people

⁸³ 2013 DIOG, *supra* note 2. For confidential human sources, they must also follow the CHS guidelines, *supra* note 19.

⁸⁴ Some scholars have found promise in self-regulation and oversight mechanisms but, even in the best scenario, those play out over the longer term and are of little immediate help in individual cases. See, e.g., Shirin Sinnar, *Protecting Rights from Within? Inspectors General and National Security Oversight*, 65 STAN. L. REV. 1027, 1029-1030 (2013).

⁸⁵ 2013 DIOG, *supra* note 2, at §18.5.6.3.

wield considerable power is something we discuss explicitly with our clients and partner communities.⁸⁶ To our clients who are being harassed at home and at work by FBI agents who want to question them about their political and ideological leanings and about their faith community, we often describe a triangular relationship connecting them, the FBI, and CLEAR students and attorneys as their counsel. We try to highlight the counter-intuitive truth that, in that triangle, the client wields significant power. He can transfer his power over the situation to the government by talking to them without support, or he can empower his counsel and allies to mediate interactions with the government, in the hope of correcting the asymmetries of power and information that exist between the client and the federal government. We do this for a very practical reason, too: As is evident through the opening interaction, agents can be relentless and our clients are often the ones bearing the brunt of the interaction on their own.

Engaging in problem-solving hand in hand with clients is a praxis guided by rebellious intuitions and a desire to work in solidarity and partnership with clients in a situation fraught with risk for all but the state. Moreover, irrespective of the ultimate role distribution in a given performance moment or who takes center-stage in any “remedial ceremony,” to reprise López’s terms,⁸⁷ the lack of transparency and the relative novelty of the issues at play are arguably equalizing aspects in the attorney-client relationship. Indeed, the counterterrorism setting also provides agents with a set of investigative and coercive mechanisms that are either new or evolving, while simultaneously being mired in secrecy. The lawyer’s guess as to the FBI agents’ true motivation and intentions is often no better than the client’s. In this way, lawyer and client become co-strategists. The lawyer’s expertise is derived from being a repeat-player, drawing on knowledge gleaned from a heavy case load, identifying multiple trends and engaging in a deductive process.

A comparison to similar issues arising in other historical contexts might shed helpful light here. Campaigns among political activists, both past and present, will often feature calls not to speak to the FBI and sometimes even calls to resist grand jury subpoenas deemed to be political witch hunts.⁸⁸ Of course, there are significant historical con-

⁸⁶ See LÓPEZ, *supra* note 3, at 41-50.

⁸⁷ *Id.* at 39-40.

⁸⁸ See, e.g., Casey Jayword, *So You Want to Protest: A Beginner’s Guide*, SEATTLE WEEKLY (Jan. 8, 2017), <http://www.seattleweekly.com/news/so-you-want-to-protest-a-beginners-guide/>; Matt Pearce, *As Activists Prepare to Protest the RNC, the FBI Comes Knocking*, LA TIMES, June 27, 2016, <http://www.latimes.com/nation/la-na-gop-convention-security-snap-story.html>; WATER PROTECTOR LEGAL COLLECTIVE, *Grand Jury Resistance*, Dec.

tinuities between those contexts and a practice in the counterterrorism setting, which, in many ways, draws on and grows out of those earlier iterations. Still, some key differences will inevitably lead practitioners to a distinct brand of rebellious legal representation.

Targeted political, labor, anti-war, or civil rights activists often share a baseline set of ideological views and common goals. Under the guise of counterterrorism today, people are targeted largely because they happen to belong to a faith community, or are deemed particularly religious. The resulting target population is diverse in ways that defy political generalizations. It would be difficult to assume any single set of shared outlooks or worldviews, let alone a shared commitment to resistance.

While this makes the targeting of First Amendment-protected activities no less excusable in either context, it calls for an adjusted set of expectations from movement lawyers. As discussed above, many clients lack the means to retain counsel, the cultural instinct to seek counsel, or the civic reflex of refusing to submit to questioning or at least pausing before acceding to the demands of law enforcement. Some are politically progressive while others are conservative.

When lawyering on behalf of a more ideologically monolithic group of activists, it might be fair to assume that clients are likely to understand, agree with, and follow through on a particular course of action with respect to attempted questioning by the police or FBI. It might even be fair to assume that those clients would readily accept the risk of retaliation over disruption of their political agendas or relationships.

In the context where CLEAR and others operate, lawyering in support of besieged Muslim communities, the process often must be more gradual. It begins in conversation with individual clients, persuading them to assert their rights with more confidence, to refuse to submit to questioning without an attorney present. Depending on the client, the relationship can morph into one where we help an individual client connect with and contribute to a movement or organizing effort that aims to remedy his current predicament. This part of the practice is guided by the rebellious instinct that legal representation in a vacuum, unmoored from larger mobilization, won't lead to the broader transformation sought by many of the clients and communities we serve.

15, 2016, <https://waterprotectorlegal.org/grand-jury-resistance/>; see also Michael E. Deutsch, *The Improper Use of Federal Grand Jury: An Instrument for the Internment of Political Activists*, 75 J. CRIM. L. & CRIMINOLOGY 1159 (1984).

B. *Rights Awareness and Mobilization*

CLEAR teams facilitate know-your-rights workshops at mosques, youth centers, Muslim student associations, study groups, and other community centers.⁸⁹ Incorporating self-help and community education into legal work has been a bedrock of our clinical practice at CLEAR for two principal reasons. First, and most obviously, community members can't exercise their rights in the face of FBI encroachment unless they know those rights. Second, and perhaps more importantly, widespread and ingrained rights awareness in a given community can help trigger a collective sense of outrage and a drive to mobilize when rights are consistently flouted by the state. In that way, through our rights awareness campaigns, we aim to support local communities as they work to transform their relationships and power dynamics with law enforcement agencies.

The workshops are tailored to the needs articulated by the local communities that CLEAR serves, but the most popular workshop focuses on people's rights in interactions with law enforcement, including, most often, the FBI. The levels of immigration privilege within a community (the extent to which community members might be undocumented in the United States), of English- and rights- proficiency, and of politicization will all determine that community's propensity towards rebellious modes of engagement with state power and its receptivity to the idea that one can say no to the FBI. Concretely, this means that not all communities are "ripe" for train-the-trainers campaigns, geared towards community education that is led by community members. In some communities, at least for some time, the effort to spread rights awareness must be more didactic, with outside teams of law students or lawyers facilitating workshops in order for the message to be welcomed and taken seriously. Here, too, the process leading to a more archetypally rebellious form of community lawyering can be gradual.

For those reasons, at the invitation of community organizers, we and our students have facilitated scores of rights awareness workshops in various urban and suburban community centers, youth centers, and houses of worship. The conversation often gravitates around the likelihood of police surveillance of various types, infiltration by informants and undercovers, and the possibility that the FBI might come knocking. Community members sometimes also quiz us about our cases, including our challenge to the FBI's abuse of the No Fly List to

⁸⁹ This dimension of CLEAR's work is featured in an episode of *This American Life*. *This American Life: The Convert*, CHICAGO PUBLIC RADIO (Aug. 10, 2012), <https://www.thisamericanlife.org/radio-archives/episode/471/the-convert?act=0>.

punish or pressure clients who refused to become informants.

But by working to help raise awareness and understanding in targeted communities of the real threats that exist, we are uncomfortably aware that we may be also spreading fear and paranoia, chilling organizing impulses, and unwittingly pushing people towards what may seem to them to be the path of least resistance – what the FBI would call “cooperation.” It is also no secret that “disruption” for its own sake has figured among the FBI’s objectives when it has set its sights on domestic political movements and organizing.⁹⁰ The possibility that we are effectively carrying water for the FBI, bringing its frightening message into beleaguered communities is not lost on us.

For that reason, in our workshops, we and our students try to remain mindful not to cross the sometimes thin line between awareness-raising and fear-mongering. Our hope is that participants come away from those workshops feeling informed and empowered, not discouraged from political or religious activism. We expressly stress the importance of remaining aware of concrete risks without giving into suspicion and political inertia. We encourage our partners to remain politically engaged and offer them our clinic’s support in that realm.

Of course, all of that requires time, harkening back to López’s keen observation that “[o]nly time and shared experiences . . . will renegotiate the terms of [the] relationship.”⁹¹ With the student attorneys practicing under our supervision, we’ve tried to make that investment and share those experiences over time. Now, after years of facilitating workshops, attending community organizing meetings, and supporting efforts and initiatives as best we could, CLEAR has earned some trust within the communities we seek to serve.

This has enabled us, in some instances, to support local community organizing campaigns in New York City and nationally responding to and trying to reshape so-called “national security” and “counterterrorism” policies and practices, including rampant FBI questioning of community members. In that setting, we strive to learn about and teach student attorneys to look for “opportunities for collaboration with others”⁹² and to move towards an understanding of legal practice “as anything but isolation.”⁹³ To capitalize on capacity-building and collaborative opportunities, together we try to generate and refine “productive strategies”⁹⁴ of resistance to and advocacy against police encroachment.

⁹⁰ See *supra* note 73.

⁹¹ See LÓPEZ, *supra* note 3, at 37.

⁹² *Id.* at 18.

⁹³ *Id.* at 36.

⁹⁴ *Id.* at 8.

It is this area of our clinical practice that offers what is perhaps the most suitable terrain to teach and learn about the centrality of humility in rebellious law practice. Exemplifying that brand of humility, Lopez describes how one of his rebellious lawyers “just sat quietly throughout the meeting.”⁹⁵ Knowing how to work with, not just on behalf of, individuals and communities, and, crucially, being willing to listen and learn, rather than pontificate and prescribe are hallmarks of the sort of humility that anyone who wants to lawyer against subordination must display.

It is also here that we rely most heavily on allies and fellow travelers to help us deploy an ever-increasing array of advocacy and resistance measures, also offering our support for their struggles in return. By no stretch of the imagination are Muslim communities the only ones subjected to aggressive law enforcement agents. Communities and their lawyers in other contexts have developed lawyering and resistance strategies that have required navigating similarly high stakes. Current national movements around police reform have been prominent on this front: from Cop Watch programs to street law trainings and broader Black Lives Matter activism, movement lawyers are regularly thinking about how best to strike a balance between asserting rights and devising resistance strategies while avoiding escalation.⁹⁶ Historically, lawyers involved in supporting the black civil rights and anti-war movements subjected to COINTELPRO programs also devised approaches that would balance staying safe with push-back to surveillance and targeting, incorporating individual representation with broader support strategies.⁹⁷

Like them, through our own contemporary collaborative processes, we strive to identify new audiences and remedial ceremonies, to create and refine our persuasive stories.⁹⁸ Together, we hope to develop “problem-solving, domination-fighting capacity.”⁹⁹

⁹⁵ *Id.* at 36.

⁹⁶ See, e.g., Elizabeth Dwoskin, *Stop-and-Frisk 101: Arrest Training?*, VILLAGE VOICE (July 28, 2009), <http://www.villagevoice.com/news/stop-and-frisk-101-arrest-training-6391995> (telling story of high school students who were “taught” how to handle a police interaction, all of whom were ultimately arrested). For more information about New York City’s Cop Watch programs, see the Malcolm X Grassroots Movement (<http://mxgm.org>) and the People’s Justice Coalition (<http://peoplesjustice.org>).

⁹⁷ See, e.g., GLICK, *supra* note 73, at 69-73. Among the strategies that Glick lays out are investigative research and FOIA work to reveal covert programs; public education campaigns; support for specific victims of domestic covert action; direct action, protesting recruitment by the FBI or the police, in conjunction with teach-ins; and, finally, lawsuits and legislative campaigns, and coalition-building.

⁹⁸ See LÓPEZ, *supra* note 3, at 39.

⁹⁹ *Id.* at 8.

CONCLUSION

Our work at CLEAR has taught us that being aware and deliberate is perhaps more central to rebellious lawyering than any outward trappings. Regnant lawyers engage in conventional lawyering unconsciously. But it isn't the mere fact of resorting to conventional or seemingly regnant methods that puts those lawyers in the regnant camp. The intent and analysis beneath the method define the whole far more meaningfully. The transformative power is there, in the consciousness that drives and enfolds any lawyer's intervention, and not simply in the tools she chooses. That insight gives permission to a host of possibilities, freeing lawyers committed to a rebellious practice to wield conventional approaches selectively or strategically.

It is no less true today than it was at the time López wrote that legal institutions are hardly friends to the clients and communities we serve.¹⁰⁰ Although we still realize on some level that, by going to law school, people choose to leave their most radical selves behind, López armed us with the language to express and concretize a vision of activist law practice, to engage with the law and society on more favorable terms through that practice, and to bring legal training in line with the demands of that practice. We owe López, the many others whose compelling work he inspired, as well as those who inspired all of them a heavy debt: the knowledge that, despite often overwhelming odds, we can carry on with our clients and allies, “defiantly making strengths of our weaknesses.”¹⁰¹

¹⁰⁰ *Id.* at 1.

¹⁰¹ *Id.* at 7-8.

