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*A journal of
legal theory
and practice
“to the end
that human
rights shall
be more
sacred than
property
interests.”*

—Preamble, NLG
Constitution



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editor's preface

Shortly after 9/11 the New York Police Department, resurrecting the lawless spirit of COINTELPRO, initiated a vast surveillance and disruption program against local Islamic citizens and organizations. The program was the subject of a Pulitzer Prize-winning series of articles by Associated Press. The AP chronicled the constitutional abuses of a well-orchestrated system of policing, omnipresent but operating in secret, designed to use the most sophisticated technology and investigatory techniques to monitor, control, and harass countless Muslims and members of racial and ethnic groups commonly associated with Islam. The NYPD's program was a paradigmatic example of unconstitutional racial and religious profiling.

In *Hassan v. City of New York* the Third Circuit Court of Appeals reinterpreted the rules regarding discriminatory surveillance programs and held that those targeted by the NYPD had standing to sue. However, shortly after the court's ruling, the Department of Homeland Security initiated "The Countering Violent Extremism Grant Program," which is actuated by the same unconstitutional discrimination as the NYPD's program. Cynthia Gonzalez's "We've Been Here Before: Countering Violent Extremism through Community Policing" explains the dangers of this new program and how, because it originates in racial and religious profiling, it violates the Third Circuit's holding in *Hassan*.

Since Trump's inauguration in January his administration has been caught in a flurry of dysfunction and scandal. Every day seems to bring new revelations of corruption and incompetence. Some are serious and potentially harmful to the country, like the steady drip of information suggesting collusion with Russia to manipulate the outcome of the 2016 presidential election.

Continued inside the back cover

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Cynthia Gonzalez

**WE'VE BEEN HERE BEFORE:
COUNTERING VIOLENT EXTREMISM
THROUGH COMMUNITY POLICING**

Introduction

In the past, our courts have decided that African-Americans have no rights the white man is bound to respect,¹ separate but equal is appropriate under the federal Constitution,² it is criminal to speak against our military's involvement in a war,³ and interning Japanese-Americans is a legitimate national security measure.⁴ While these historical decisions are now universally condemned, it appears that the core ideology animating them remains strong among large swaths of the citizenry. Rather than learning from history, we are beginning to repeat it.

"It's not the worst thing to do," says President Donald Trump, referring to racially profiling the Muslim population in furtherance of law enforcement policies.⁵ Decades after minorities fought to overcome hatred and inequality during the civil rights movement, open racism has in fact been resurgent. The discriminatory rhetoric of leaders in this country, in addition to arbitrary policing policies, seems to have turned much of public opinion back to the days of Jim Crow—although now it is also directed at Muslims and Latinos.⁶ There is an increasing public disregard for the Constitution and its guarantees of freedom of expression, religion, and equal protection to all citizens, regardless of race, ethnicity, and religion.

Can any discussion about constitutional rights realistically prevent negative public sentiment from targeting the Muslim population? Khairuldeen Makhzoomi does not think so. Mr. Makhzoomi, a senior at the University of California, Berkeley, was granted asylum in the United States after his father was killed by Saddam Hussein's secret police in 2002.⁷ On April 6, 2016, Mr. Makhzoomi boarded a plane in Los Angeles headed to Oakland, California. Before boarding his flight, he called his uncle to discuss an event he had been excited to attend the day before: a dinner with United Nations Secretary-General Ban Ki-moon.⁸ He noticed a woman staring at him as he spoke to his uncle in Arabic. Within minutes of boarding, police officers removed Mr. Makhzoomi from the plane. The officers inquired into his motive for speaking Arabic. Three FBI agents, who accused him of trying to leave a "bag on the plane," interrogated him and he was searched in front of other

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passengers.⁹ This was not an isolated incident. In August 2016, two Muslim-American women were removed from an American Airlines flight “after a flight attendant said that overhearing them talking with other passengers about the lack of food and water on the flight made him uncomfortable.”¹⁰ Based on these incidents, one Muslim-American remarked that when arriving at the airport, she now “need[s] to know if I should ask my ride to stick around just to make sure I can get on the plane.”¹¹

Muslim does not mean Arab. But in this new world, panic is erasing important nuances and differentiations regarding race and religion. Islam is treated as a visible racial marker, Arab as a religious marker.¹² Ignoring the distinctions between these categories allows the lines between religious intolerance and racism to be blurred and perpetuates the stereotype that both are dangerous to public safety. Long beards and headscarves become telltale signs to watch out for.¹³ People have become afraid to speak in languages commonly associated with Islam while out in public.¹⁴

History of profiling

Racial profiling is an old story in the United States. When speaking to politically conservative audiences willing to fight terrorism at the expense of civil liberties, government officials often use euphemisms such as counterterrorism, counterradicalization, countering Islamic extremism, and fighting homegrown terrorism, rather than “racial profiling.”¹⁵ Public support for racial profiling as a method for preventing acts of espionage or terrorism is reminiscent of sentiment expressed in this country prior to the internment of Japanese-Americans during World War II.¹⁶ Then, the United States government forced the relocation and incarceration of over 110,000 Japanese-Americans.¹⁷ The government singled out a particular population based on ethnicity and national origin using national security to justify such discrimination. The federal government has since acknowledged that the internment was reprehensible by paying reparations to the victims and their descendants. Yet, at the time, the Supreme Court found this government policy to be permissible as a means of public necessity.¹⁸

The practice described above is to be distinguished from *criminal* profiling. Criminal profiling is a type of profiling that is a legitimately established law enforcement practice that incorporates social science theory and statistical methodology into crime-solving strategies.¹⁹ Criminal profiling is the “police practice of viewing certain characteristics as indicators of *criminal* behavior.”²⁰ It describes the likely idiosyncrasies of one who committed a particular crime, based on evidence and information found at a crime scene along with specific characteristics of the crime itself.²¹ Various aspects of the criminal’s personality are determined from his or her choices before, during,

and after the crime.²² This information is combined with other relevant details and physical evidence and then compared with the characteristics of known personality types and mental abnormalities to develop a practical working description of the offender.²³

By contrast, *racial* profiling does not involve social science or statistical methodology, but resorts to singling out individuals simply because of their race.²⁴ Racial profiling thus refers to the targeting of particular individuals by law enforcement authorities based not on their behavior, but rather on their personal, often immutable, characteristics,²⁵ including sometimes singling out an entire population based solely on national origin. It also generally encompasses ethnicity and religion—which are together (impermissibly) used by law enforcement to determine which individuals to stop, detain, and/or question.²⁶ The practice has been included within law enforcement activities that are premised on the erroneous assumption that individuals of a particular race, ethnicity, national origin, or religion are more likely to engage in certain types of unlawful conduct than are individuals of another race, ethnicity, national origin, or religion.²⁷

During the 2008 presidential campaign, candidate Barack Obama promised that, if elected, he would ban the practice of racial profiling by federal law enforcement agencies and provide federal incentives to state and local police departments to prohibit the practice.²⁸ During a 2009 congressional hearing, Attorney General Eric Holder similarly declared that racial profiling was “simply not good law enforcement,” and that ending the practice was a “priority” for the Obama administration.²⁹ Notwithstanding the fact that racial profiling is unconstitutional, and despite the emphatic declaration from the federal government that the practice is “invidious,” “wrong,” “ineffective,” and “harmful to rich and diverse democracy,” various community policing programs at the federal and state levels confirm that racial profiling still very much exists.³⁰

Community policing

Community policing operates on the premise that, in a democratic society, police need the assistance and resources of residents to address crime effectively.³¹ Community policing is based on trust. It requires a two-way communication between the police and the public, encouraging police to work with social service agencies to prevent crime before it occurs, and creating new channels for the police to learn more about neighborhood problems.³² However, the “community policing” that has taken place in Muslim-American communities has not been a two-sided policy inspired by methods of trust. Rather, it has come to involve choosing a select few from Muslim communities to infiltrate their own mosques and surveil their own communities.

Community policing in practice: Origins of *Hassan v. City of New York*

Once it became evident that the terrorist attacks on 9/11 were carried out by Arabs from Muslim-majority countries, the federal government immediately engaged in a sweeping “counterterrorism” campaign focused on Arabs, Muslims, and anyone perceived to be a member of these groups. In 2001, the New York Police Department (NYPD) established an informant-based, “secret spying program” to infiltrate and monitor Muslim life in and around New York City.³³ The goal was to create a human mapping system that monitored Muslims along the Eastern Seaboard and beyond.³⁴

Part of the NYPD’s surveillance was led by informants, also known as “mosque crawlers.”³⁵ Informants were selected from a pool of arrestees, prisoners, and recent immigrants or suspects, who were pressured into cooperating with law enforcement.³⁶ The NYPD recruited these informants to act as inside observers in mosques.³⁷ The informants reported on sermons, provided names of attendees, and took pictures.³⁸ Employing a method called “create and capture,” the NYPD instructed these informants to “create” conversations about jihad or terrorism with congregants, then “capture” and report responses to the police.³⁹

The surveillance program was founded on a false and unconstitutional premise: that Islamic religious belief and practices are a sufficient basis for law enforcement scrutiny.⁴⁰ The NYPD monitored or infiltrated almost every aspect of Muslim life, from mosques and student associations to private associations to Muslim-owned business establishments including halal butcher shops and restaurants.⁴¹ The program continued undiscovered for more than a decade until it was exposed by the Associated Press in 2011.⁴²

In June 2012, a group of Muslims and organizations who had been targeted for NYPD surveillance filed suit against the city in federal court, alleging violations of their rights under the First and Fourteenth Amendments of the Constitution. The plaintiffs claimed that, in addition to singling out organizations and businesses for surveillance that in some way were visibly or openly affiliated with Islam (such as mosques or businesses with prayer mats or other Islamic identifications), “the Program also intentionally targeted Muslims by using ethnicity as a proxy for faith.”⁴³

The district court dismissed the plaintiffs’ Fourteenth Amendment claim in February 2014, concluding, among other things, that the NYPD could constitutionally target the Muslim community as a proxy for “Muslim terrorist activities.”⁴⁴ The court reasoned, in a manner chillingly reminiscent of the Japanese-American internment cases, that the plaintiffs failed to state a viable equal protection claim because “[t]he more likely explanation for

the surveillance was a desire to locate budding terrorist conspiracies” than a desire to discriminate.⁴⁵ The plaintiffs appealed the decision in *Hassan v. City of New York* to the Court of Appeals for the Third Circuit.

Judicial reasoning in *Hassan v. City of New York*

The Fourteenth Amendment states: “[No] State [shall] deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”⁴⁶ These provisions are universal in their application. They protect all persons within the territorial jurisdiction of the United States—without regard to race, color, nationality, or citizenship status.⁴⁷ The plaintiffs in *Hassan* claimed that the City of New York was breaking that mandate and violating their rights by surveilling them pursuant to a program that investigates persons not because of any reasonable suspicion of wrongdoing, but solely because of their Muslim religious affiliation.⁴⁸ Accordingly, a “claim of selective investigation” by the police draws on “ordinary equal protection standards.”⁴⁹ Taking this into account, the Third Circuit first examined whether the city intentionally discriminated against a reasonably identifiable group and whether that intentional discrimination was legally justified.⁵⁰

To successfully allege a viable equal protection claim, the court explained that a plaintiff must demonstrate the government’s “intentional discrimination.”⁵¹ It further stated that, when determining whether there existed an equal protection claim, a plaintiff needs to assert more than simple surveillance by law enforcement.⁵² Rather, the claim needs to demonstrate that religious affiliation was a *substantial* factor for why the group was targeted for such surveillance.⁵³

In defense of its action the City of New York first argued that its program had the “legitimate purpose” of “analy[zing]...potential [security] threats and vulnerabilities” and that its motive was not to discriminate against the Muslim population. Rather, its purpose was counterterrorism. The court disagreed with this analysis, explaining that discriminatory motive is not a necessary element of discriminatory intent. The court explained that it is sufficient that the “state actor *meant* to single out a plaintiff because of the *protected characteristic* itself.”⁵⁴ The court took the plaintiffs’ action as an opportunity to distinguish between “intent” and “motive,” clarifying that a defendant acts intentionally when he or she desires a particular result, without reference to the impetus for such a desire.⁵⁵ Thus, motive explains the reasoning *behind* the defendant’s desired result.⁵⁶ In declaring that a viable equal protection claim does not require intentional discrimination motivated by “ill will, enmity, or hostility,” the Third Circuit set an important prec-

edent.⁵⁷ Going forward, a plaintiff could allege intentional discrimination without demonstrating a defendant's malign motive.⁵⁸ Ultimately, the court ruled that, even if NYPD officers were motivated by legitimate reasons of national security, they engaged in intentional discrimination if they would not have surveilled the plaintiffs but for their being Muslims.⁵⁹ This in itself demonstrated that religious affiliation was a substantial factor for the surveillance and sufficient to demonstrate intentional discrimination. In short, the court held that if the surveillance would not have occurred but for the subjects' religion, the plaintiffs presented a legitimate claim of intentional discrimination under the Fourteenth Amendment.

The City of New York additionally defended its actions by arguing that the plaintiffs had not provided information about "when, by whom, and how the policy was enacted and where it was written down."⁶⁰ However, the court again concluded that the plaintiffs had sufficiently alleged a facially discriminatory policy even without identifying a piece of paper on which the practice was memorialized.⁶¹ Indeed, the court noted that "direct evidence of intent is 'supplied by the policy itself.'"⁶² The court focused on the ultimate practice of the program, not the existence of its bureaucratic manifestation. Further, although the motivation may have theoretically been reasonable, the court reasoned that the ultimate intent of the city was, in practice, to treat two groups—Muslims and non-Muslims—differently. To the court, such differentiation was sufficient to assert a legitimate claim of intentional discrimination.

In addition to their equal protection claim, the plaintiffs in *Hassan* alleged violations of the First Amendment's Free Exercise and Establishment Clauses (also known collectively as the Religion Clauses). The Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."⁶³ The rights to freely exercise one's religion and to be free from government-established religious mandates, clearly forbid the government from intruding on one's personal religious beliefs.

Though the City of New York argued that such claims were unfounded because of the plaintiffs' failure to show a discriminatory purpose, the court reiterated that neither clause is "confined to actions based on animus."⁶⁴ In other words, because the city's program could not be applied generally to all people, because in practice it singles out a particular group, it therefore created a First Amendment violation. In this regard, the city's motivation was irrelevant. And, due to the fact that the government's program in *Hassan* was not "generally applicable," the court found that the plaintiffs had properly asserted and demonstrated claims under the First Amendment's

Religion Clauses and, accordingly, reversed the district court's dismissal of the action.⁶⁵⁷

The program: Countering Violent Extremism

Even so, on July 6, 2016, the Department of Homeland Security (DHS) announced its commencement of a new version of “community policing”: The Countering Violent Extremism (CVE) Grant Program.⁶⁶ The purpose of the program was to develop and expand efforts at the community level to combat violent extremist recruitment and radicalization to violence.⁶⁷ The program offers funding for activities that enhance the resilience of communities being targeted by violent extremists, provides alternatives to individuals who have started down a road to violent extremism, and creates or amplifies alternative messages to terrorist/violent extremist recruitment and radicalization efforts.⁶⁸ It also seeks to develop and support efforts that counter violent extremists’ online recruitment efforts.⁶⁹

The grant was authorized in December 2015, through the Department of Homeland Security Appropriations Act.⁷⁰ Specifically, the grant appropriated \$10 million for a “countering violent extremism (CVE) initiative to help states and local communities prepare for, prevent, and respond to emergent threats from violent extremism.”⁷¹ It sought to bring together state and local communities with religious groups, mental health and social service providers, educators, and other non-governmental organizations in order to create prevention programs that addressed the root causes of violent extremism and deterred individuals who may already be radicalized toward violence.⁷² But, as already noted, CVE-type programs have existed for some time in various forms and, more often than not, resulted in dubious outcomes.⁷³ And while the stated purpose of the current program is to target *all* violent extremism, and was the alleged focus in the New York City’s program, its primary focus is to police Muslims.⁷⁴

Although descriptions of the 2015 CVE program do not necessarily identify the particular community being targeted,⁷⁵ in reality—as is clear from the White House CVE strategy and planning documents, and the February 2015 White House CVE summit—Muslim communities are currently the principal, if not sole, target of CVE programs.⁷⁶ The White House CVE strategy and planning documents suggest a focus on combating foreign fighter recruitment, particularly those from Syria and Iraq.⁷⁷ The three pilot CVE programs currently implemented in Boston, Los Angeles, and Minneapolis have directed policing toward Muslim communities and have not made any effort to address other types of domestic terrorism.⁷⁸ President Obama specifically mentioned in a January 2016 speech that the administration’s intent

is to defeat the Islamic State of Iraq and the Levant (ISIL).⁷⁹ “We have to prevent it from radicalizing, recruiting and inspiring others to violence in the first place.”⁸⁰ He continued:

At home, the Department of Homeland Security is leading a new Countering Violent Extremism Task Force. Experts from the Department of Justice, Federal Bureau of Investigation, the National Counterterrorism Center, and other agencies will work hand-in-hand in one office to ensure that we are doing everything we can in communities to prevent radicalization.⁸¹

Even though Barak Obama began his presidency with a strong stance against racial profiling, over the final two years of his presidency, both his administration and Congress promoted Countering Violent Extremism (CVE) as a “soft” counterterrorism methodology designed to empower communities and build resilience to extremism.⁸² But the defective foundation on which CVE-type programs are built ensures they will have negative consequences, including stigmatizing Muslims and reinforcing Islamophobic stereotypes, facilitating covert intelligence-gathering, suppressing dissent against government policies, and sowing discord in targeted communities.⁸³ These programs have only promoted flawed theories of terrorist radicalization which, in turn, lead to unnecessary fear, discrimination, and unjustified reporting to law enforcement against Muslims.⁸⁴ While ISIL may be the largest terrorist threat that America presently faces, it is also obvious that the focus of CVE programs inevitably portrays Muslim-Americans as inherently suspect, thus feeding into the anti-Islam narrative that is becoming increasingly dominant in our national public discourse.⁸⁵

Countering Violent Extremism: An unconstitutional program

In *Hassan* the court noted that a discriminatory intent need not be memorialized for a party to bring a viable equal protection claim. Similarly, any Muslim-American policed or surveilled under a CVE-sponsored program could allege that the program is facially discriminatory even if discriminatory intent is nowhere written down. Still, in alleging an equal protection claim, a plaintiff needs to assert more than mere surveillance by law enforcement. The claim needs to assert that religious affiliation is a *substantial* factor behind the reason the plaintiff has been targeted for surveillance. As noted above, while the CVE grant does not expressly target a particular community, the court in *Hassan* made clear that a state actor’s discriminatory intent rests on whether it would have policed the subject community in the same way if that community’s members were not of a particular nationality, race, or religion. As noted during the White House CVE summit, and as the current implementation of the program has made clear, the purpose of CVE is to combat radicalization and recruitment into

ISIL, and other forms of “Islamic extremism.” In his speeches, Obama specified, “this means defeating their ideology.”⁸⁶ He specifically called for the involvement of religious leaders as a method of “amplifying authentic voices from at-risk communities.”⁸⁷ But the proof of discrimination is in the policy— “[d]irect evidence of intent is ‘supplied by the policy itself.’”⁸⁸ All that is required in order to assert a viable equal protection claim is that the government agent(s) meant to single out an individual because of his or her protected characteristic.⁸⁹ In this sense, CVE, in practice, is a discriminatory program unlikely to pass muster under the Equal Protection Clause because the program has been specifically designed to target Muslim-American communities, making religious affiliation a *substantial* factor for why the group has been targeted. Thus, even if government officers are subjectively motivated by a legitimate law-enforcement purpose (no matter how sincere), they are engaging in intentional discrimination if they would not have surveilled certain individuals but for their Muslim faith.

Accordingly, in situations where, for example, a Muslim-American is policed at his school or members of a mosque are surveilled, the CVE program would be equivalent to the discrimination experienced faced by the plaintiffs in *Hassan*. Therefore, following the framework set in *Hassan*, members of a policed community under CVE will likely be able to establish that they were targeted solely on the basis of their religious affiliation.

In addition to asserting a viable equal protection claim, members of a Muslim-American community being surveilled under a CVE program would have a viable claim under the First Amendment’s Religion Clauses. The plaintiffs in *Hassan* had raised similar claims and the Third Circuit concluded that the plaintiffs did not need to demonstrate the government’s discriminatory purpose in order to prove that the government violated the First Amendment, since it was sufficient that it had passed a law intended to single out a particular religious group.⁹⁰

Specifically, under the Establishment Clause, the prohibition against governmental endorsement of religion precludes the government from conveying or attempting to convey a message that a religion or a particular religious belief is favored or preferred, or is disfavored or deemed undesirable.⁹¹ “When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government’s ostensible object is to take sides.”⁹² Furthermore, the Establishment Clause has a broader application than does the Free Exercise Clause, in that an individual may claim a violation of the Establishment Clause without having suffered any impairment of

their religious beliefs. A claim under the Free Exercise Clause requires a narrower allegation of direct governmental infringement on one's religious beliefs or practices.⁹³

After the exposure of the New York City program, religious leaders felt forced to censor what they said to their congregants, fearing something could be taken out of context by police officers or informants.⁹⁴ The American Civil Liberties Union reported that some religious leaders began to feel the need to regularly record their sermons in order to defend themselves against potential government mischaracterizations.⁹⁵ Further, in the midst of the program's discovery, Muslims reported feeling pressure to avoid appearing overtly religious, some even changed their dress or the length of their beards.⁹⁶ Muslim-Americans hesitated before speaking Arabic or Urdu in public⁹⁷ and they hesitated before attending religious services or joining faith-based groups.⁹⁸ News of the City's program even led college students to remain silent while in school, choosing to avoid anything that would profile them on campus or in the classroom.⁹⁹ The current CVE program will continue to feed such fears. For example, recently, in November 2016, reports surfaced that Muslim women feared wearing faith-based articles of clothing in public¹⁰⁰ and mothers all over the United States pleaded with their daughters to avoid wearing their hijabs in public.¹⁰¹

Although public sentiment and continued stigmatization against Muslims is not itself a violation of the First Amendment, CVE programs, in practice, amount to a government preference of one religion over another, which *is* a violation of the Establishment Clause. Likewise, a law or state-sponsored program that produces a change in how individuals practice their religion can be an infringement on an individual's constitutional right to freely exercise his or her religious beliefs under the Free Exercise Clause.

The rights to freedom of religious exercise and political expression are being denied to brown-skinned people suspected of being Muslim today. Under government-sanctioned racial oppression and segregation in the United States,¹⁰² Muslim-Americans have abandoned discussions about religion and politics and have avoided mosque and community spaces altogether simply to escape being branded as "at risk" or potential "terrorists" by any CVE programs.¹⁰³ Indeed, insofar as CVE trainings promote guidance for understanding "radicalization" and observing malleable "indicators" and/or "predictors" of violence, in practice, CVE initiatives are likely to result in law enforcement targeting individuals based on their political opinion and religious exercise.¹⁰⁴ But, again, these are First Amendment-protected activities—no government-sponsored programs should be allowed to chill them and law enforcement cannot use them as a basis for action.¹⁰⁵

CVE's focus on Muslim-Americans and purportedly Muslim communities stigmatizes this population as inherently suspect.¹⁰⁶ It alienates them from their neighbors and singles them out for monitoring based on faith, race, and ethnicity.¹⁰⁷ Ultimately, the Constitution requires that law enforcement programs must distinguish among individuals and segments of communities solely by their acts and not by personal characteristics, such as race or religion.¹⁰⁸ The abandonment of a law enforcement approach that counts a person's religious identity as a reason for suspicion will certainly result in not only a substantially reduced risk of violations of constitutional rights, but is also a more effective approach to law enforcement.¹⁰⁹ This is so because the time and resources currently wasted on the investigation of innocent individuals who happen to fit a racial or religious profile will be better spent on a targeted focus on those individuals who have demonstrated their criminal propensity or culpability by their actions.¹¹⁰

National security cannot perpetually trump constitutional rights

Religious discrimination, “by [its] very nature,” has long been thought “odious to a free people whose institutions are founded upon the doctrine of equality.”¹¹¹ Since our country's inception, the Founding Fathers made clear that “religious minorities as well as religious majorities were to be equal in the eyes of the political state.”¹¹² President James Madison asserted:

*A just Government...will be best supported by protecting every citizen in the enjoyment of his Religion with the same equal hand which protects his person and his property; by neither invading the equal rights of any Sect, nor suffering any sect to invade those of another.*¹¹³

The court in *Hassan* was similarly clear in its condemnation of the use of any CVE-type program that would lead to adverse treatment against religious minorities. Yet, as history has continuously shown, different racial and religious groups have

borne the brunt of majority oppression during different times.¹¹⁴ When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one[,] become separatist; antagonisms that relate to race or to religion...are generated.¹¹⁵

As evidenced by recent events in the United States, “centuries of experience testify that laws aimed at one...religious group...generate hatreds and prejudices which rapidly spread beyond control.”¹¹⁶ And while national security appears to provide compelling reasons for the implementation of such programs, “history teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure.”¹¹⁷ At the same time, we should realize that history does in fact repeat itself—and is repeating itself. While panic after the attack on Pearl Harbor

resulted in internment camps and the aggrandizement of national security over constitutional rights,¹¹⁸ “the past should not preface yet again bending our constitutional principles merely because an interest in national security is invoked.”¹¹⁹ CVE is not a groundbreaking program. It is not a brand new constitutionally-based initiative. As stated by Judge Ambro in *Hassan* and Justice Douglas in one of the Japanese-American Internment cases:

We have been down similar roads before. Jewish-Americans during the Red Scare, African-Americans during the Civil Rights Movement, and Japanese-Americans during World War II are examples that readily spring to mind. *We are left to wonder why we cannot see with foresight what we see so clearly with hindsight*¹²⁰—that “[l]oyalty is a matter of the heart and mind[,] not race, creed, or color.”¹²¹

Courts “can apply only law, and must abide by the Constitution, or [they will] cease to be civil courts and become instruments of [police] policy.”¹²² Such beliefs only seem to last, when they exist at all, until the next time there is a fear of minorities who cannot be easily sorted out from the many.¹²³

Conclusion

Racial profiling is the current generation’s favored form of racial discrimination. It has found its way into law enforcement and government-sponsored counterterrorism programs and has expanded its bounds to include ethnicity as a proxy for faith. Yet, as explained above, regardless of motivation, the discriminatory intent of the CVE program gives rise to viable First and Fourteenth Amendment claims. Though the court in *Hassan* did not rule that the program was unconstitutional, it paved the way for other victims of such surveillance to state constitutional claims against other CVE programs.

The rationale behind community policing is to develop trust between the community and law enforcement, so that eventually the community will feel comfortable maintaining constant two-way communication with law enforcement, reporting suspicious activity and potential radicalization. However, as evidenced by the failure of the New York City’s profiling program, policing was based on bias and irrational suspicion. Thus, instead of developing a trusting relationship with law enforcement, the community came to fear law enforcement. Accordingly, CVE will follow in the same path as its New York predecessor. Further, policing agencies are unlikely to be successful in creating partnerships to address violent extremism until they establish unbiased and trusting relationships with the communities they serve.¹²⁴ It must be manifestly clear to everyone that religious belief does not amount to terrorism.

U.S. courts have long held that laws which prohibit the free exercise of religion, show favor or disfavor to a particular religion, or violate equal

protection based on race, gender, nationality, or religion are unconstitutional and thus void. We now have a President who routinely insults and derogates Muslims, and inspires clear violations of the Constitution. The comments broadcast by Trump before and during his presidency have encouraged hate crimes throughout the country against the Muslim-American population. Anti-Muslim statements have been written on the walls of Muslim prayer rooms,¹²⁵ for example. Muslim students have been threatened with being set on fire unless they removed their hijabs,¹²⁶ and men have choked Muslim women and attempted to remove their hijabs.¹²⁷ The result of the 2016 election has given rise to an increased stigma on the Muslim population, one that, regardless of any CVE program, will continue to exist. Though the law prohibits an endorsement of religion, and prohibits any limitation on free expression and the freedom to exercise of religion, with his rhetoric Trump encourages both.

Prior cases involving discrimination against racial minority groups should remind us that when we allow “fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it.”¹²⁸ Sending in infiltrators and recruiting members of the Muslim community to spy on their co-religionists, as the government has consistently done, harms both the Constitution and public safety. Removing American citizens from airplanes because they choose to speak in their native tongue or because of their physical characteristics, does not prevent crime or terror. These are the acts of bigots, not crime-fighters.

Until this kind of policing stops and our counterterrorism policy is made to align with the lofty ideals of our Constitution, there will be neither liberty, safety, nor unity.

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ERRATA

In Malhar Shah’s “The Fundamental Right to Literacy: Relitigating the Fundamental Right to Education After *Rodriguez* and *Plyler*,” 73 NAT’L LAW. GUILD REV. 129, Laurence Tribe’s first name was originally misspelled “Lawrence.”

In the same article, the author originally thanked Amanda Goetting, wife of NLGR Editor-in-Chief’s Nathan Goetting, in his byline for feedback on his rough draft. That feedback came from Nathan and, because they shared the computer and software he used for editing, was mistakenly attributed to Amanda.

Laura Riley

SESSIONS' REVERSAL OF THE PRIVATE PRISON PHASE-OUT

“The degree of civilization in a society can be judged
by entering its prisons”

— Fyodor Dostoyevsky

No more than a month after President Donald J. Trump came into office, his newly appointed Attorney General, Jeff Sessions reversed¹ an executive policy established by the Obama Administration² only six months prior, reducing federal use of private prisons. Around the same time, two classes of what could be 60,000 immigrant detainees sued one of the federal government's biggest private prison contractors for using them as forced labor and other abuses.³ Sessions' reversal of the private prison phase-out makes it clear that the current administration does not acknowledge a link between private prisons and civil rights violations. Indeed, Sessions' reversal ensures continued harm⁴ by continuing to fund⁵ such abuses.

The Trump Administration's about-face brings the humanitarian crisis underlying the private corrections industry into plain view—or, at least it should. With the current administration's refusal to deal with civil rights violations in private prisons it is up to the people of the United States to notice and respond to the civil rights abuses that occur within the privatized criminal justice system—a system rooted in our country's racism and anti-immigrant sentiment. If we don't, we will soon arrive at a new height of injustice.

This article presents a brief history of the United States' use of private prisons, which has been relatively short in duration when compared to its other longstanding penal schemes and systems. It will also introduce the major private prison corporations and analyze their market share and strategies, with particular focus on how these corporations' political contributions affect that market share. Next, it looks at the human toll wrought by these companies over the past decade, examining the various civil rights violations that have occurred at private prisons as well as the litigation ensuing from those abuses.

It will then examine and compare the Obama Administration's phase-out policy with the Trump Administration's revised stance. These approaches will be viewed side-by-side with stock price comparisons of the major private prison companies, which will reveal the effects that certain political mile-

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stones—specifically, Trump’s election and his administration’s major policy announcements—have had on private prison stock prices.

The Trump Administration’s reversal of the private prison phase-out in fact only serves the business interests of the private prison companies that support the Trump Administration. The article further contends that the Trump Administration’s promise to continue contracting with private facilities will only exacerbate existing civil rights violations within those detention and prison complexes.

An overview of private prisons and incarceration rates in the U.S.

In 1925 the U.S. Department of Justice’s Bureau of Justice Statistics began recording the number of persons sentenced to state and federal correctional institutions.⁶ In 1981 it released a report that analyzed the annual increase of incarcerated individuals over the prior sixty years. This report revealed that the average annual increase in incarceration was 2.4 percent, a rate that increased dramatically to 7.1 percent beginning in 1974.⁷

However, in the early 1980s, two the largest private prison corporations, CoreCivic (formerly Corrections Corporation of America, herein referred to by its New York Stock Exchange (NYSE) symbol “CXW”)⁸ and GEO Group, Inc. (GEO),⁹ were founded. Shortly thereafter in 1983, CXW secured its first contract with the federal government to design and construct a so-called “Processing Center,” an immigration detention facility, for Immigration and Naturalization Services (INS) in Houston, Texas.¹⁰ Four years later, GEO received its first government contract.¹¹

Coinciding with the early rise of prison privatization, in 1984 prisons experienced inmate population growth of nearly 6 percent—despite prior judicial interventions aiming to prevent facility overcrowding.¹² The Bureau of Justice Statistics report mischaracterized the 6 percent increase as “sharp growth.” The increase was the same as the year prior (5.6 percent) and only half the rate of growth for the years 1981 and 1982 (12.2 percent and 11.9 percent, respectively).¹³ Put more simply, the 6 percent growth was a marked downturn when compared to prior years.

Over the next two decades, the number and percentage of individuals in the custody of private prison and detention facilities continued to increase. By 2015, the most recent year for which there is data available, the Bureau reported that there were 91,300 individuals in the custody of privately-operated state prisons and 26,000 people in the custody of privately-operated federal prisons.¹⁴ These numbers account for over 7 percent and 13 percent, respectively, of the incarcerated population nationwide.

Major Industry Players

The three major corporate players in the private prison industry are, in order of market share, CXW, GEO, and the privately held Management and Training Corporation. Together, these companies control 62 percent of the industry's \$5.3 billion annual revenue in the U.S.¹⁵ The remainder of this article will focus exclusively on CXW and GEO, the two largest private prison companies, both publicly traded. In 2016, CXW had a 34.9 percent market share of the private prison industry revenue and GEO had 27.1 percent.¹⁶ Since GEO's founding in 1988, there is small risk of new private prison market entrants gaining market share control because of high capital costs to enter the industry, accreditation requirements, and government regulations. Market concentration has only continued to solidify over the past two decades. In 2010, for example, GEO acquired a former industry player, Cornell Companies.

Although the major industry players' market control has only increased, the private prison industry does face some risk. First, for much of the public the notion of a private prison company has the same immeasurable "ick" factor of a for-profit school. Moreover, although as Alexander Volokh remarked that "there is no systematic information about [public] reaction to prisoner abuse in public and private prisons,"¹⁷ one indicator of public hostility towards private prisons is that, in correctional facility abuse cases, juries have been more willing to award large verdicts against corporations than against governments. Second, private prison facilities, as Deputy Attorney General for the Obama Administration Sally Yates once stated, "simply do not provide the same level of correctional services, programs and resources ... [and] they do not maintain the same level of safety and security."¹⁸

For these reasons, the Obama Administration issued his executive order phasing out federal private prison contracting in late 2016. After the announcement of the phase-out plan, but before the 2016 Presidential election results, IBISWorld released a Correctional Facilities report noting that the market for private correctional services tended to be immune from economic cycles because their revenues stem from state and federal contracts.¹⁹ Therefore, private corrections corporations more readily withstand market fluctuations normally experienced in private industries. Despite such insulation, the report rated corrections market volatility as "medium," since it is affected by judicially-imposed changes to sentencing practices and mandatory sentencing schemes, as well as phase-out policies such as the one implemented by the Obama Administration.²⁰ Indeed, as noted by the ACLU, "in a 2010 Annual Report filed with the Securities and Exchange Commission, Corrections Corporation of America (CCA), the largest private prison company, stated:

‘The demand for our facilities and services could be adversely affected by . . . leniency in conviction or parole standards and sentencing practices . . .’”²¹

In response to these market risks, it is unsurprising that CXW and GEO have increased their political spending. Since the Supreme Court’s 2010 decision in *Citizens United v. Federal Election Commission*,²² public corporations do not have to disclose their political donations. Despite calls for corporate transparency from investors and advocacy groups, there is no requirement that companies like CXW or GEO disclose any information regarding their political contributions.

Yet we know that corporations make sizeable contributions to promote their business interests.²³ The American Civil Liberties Union (ACLU) reports that CXW “alone spent over \$18 million on federal lobbying between 1999 and 2009” and that “[b]etween 2003 and 2011, according to the National Institute on Money in State Politics, [CXW] hired 199 lobbyists in 32 states . . . During the same period, GEO hired 72 lobbyists in 17 states.”²⁴

CXW and GEO also spend money combating industry reforms. IBIS-World reported that CXW and GEO jointly spent over \$1.5 million fighting against the Private Prison Information Act,²⁵ which would have subjected private correctional facilities to the Freedom of Information Act in the same way as government-run prison and detention facilities.²⁶ Moreover, CXW and GEO have their own Political Action Committees (PACs) that funneled \$218,700 and \$454,700, respectively, into the 2014 mid-term election cycle.²⁷ USA Today reported that GEO gave \$225,000 (through one of its subsidiaries) to a super PAC focused on electing Trump and, later, directly gave \$250,000 to Trump’s inauguration.²⁸ CXW likewise contributed \$250,000 to Trump’s inauguration.²⁹

The Trump administration has welcomed the financial support of these major corporate players, a self-interested and insidious move on Tump’s part. Beyond the financial incentive to encourage the growth of the private prison industry, Trump and his administration use punitive rhetoric towards those groups most affected by privatization (through increased immigration enforcement and harsher criminal sentences). As evidenced by the examples of private prison abuses described below, a link between private prison growth and human rights abuses has emerged. Acknowledging this link is essential to improving litigation, lobbying, and policy efforts aiming to counteract this trend.

Human impact of private prison businesses: Lowlights and lawsuits

The crucial critique that civil rights advocates levy against the private prison business model is that the greater number of immigrants and inmates

who are detained and/or convicted, the higher the demand for these companies' products and services. Accordingly, private prison corporations have a financial incentive to ensure that increased (and prolonged) detention and convictions occur. They also have "perverse incentives to maximize profits and cut corners—even at the expense of safety and decent conditions," which "may contribute to an unacceptable level of danger in private prisons."³¹



First, corporations may cut costs by hiring non-unionized prison staff, providing only minimal healthcare to inmates and detainees, and/or allowing facility overcrowding.³² Second, private prisons contractors may also pay their non-union employees less than their governmental counterparts.³³ As a result, the companies have higher worker turnover, which may be one of the causes of increased prison violence behind and across bars.³⁴

These cost-cutting measures undermine the safety of prison staff and those who are incarcerated. Indeed, as exemplified by the numerous lawsuits detailed below, the elevated human risk attendant to the privatization of the penal system is unacceptable.³⁵

Both CXW and GEO have a history of being sued for the egregious and ongoing abuses that have occurred at their facilities. The charges against them range from criminal neglect and sexual violence to, more recently, unjust enrichment due to the forced and coerced labor of inmates. The ACLU's report "Banking on Bondage: Private Prisons and Mass Incarceration" describes many of these lawsuits, but there are others.³⁶

In one case in 2000, GEO was ordered to pay \$42.5 million to the family of Gregario de la Rosa, who resided in one of GEO's Texas facilities.³⁷ The jury found that prison officials stood by while de la Rosa was beaten to death by other inmates.³⁸ The extent of the abuse and GEO's attempt to cover it up resulted in one of the largest punitive damages ever awarded against a private prison company.³⁹

In 2007, GEO settled a lawsuit brought by the Texas Civil Rights Project on behalf of LeTisha Tapia's family for \$200,000.⁴⁰ In that case, 23-year-old Tapia was held in a cell with male inmates. She reported being raped and beaten. Subsequently, she hanged herself.

In 2008, a GEO prison administrator pleaded guilty to federal charges that she "knowingly and willfully [made] materially false, fictitious, and fraudulent statements to senior special agents"⁴¹ by covering up GEO's pervasive and improper hiring of prison guards—nearly one hundred had not received mandated criminal background checks.⁴²

More recently, in 2014, detained and formerly detained immigrants sued GEO for wage theft and civil rights violations stemming from one of GEO's ICE-contracted facilities. Specifically, the violations were non-compliance with Colorado minimum wage laws, forced labor under the Trafficking Victims Protection Act, and unjust enrichment based on these violations.⁴³ The second and third claims survived summary judgment and on February 27, 2017, a federal judge certified the class of plaintiffs as to these claims, allowing as many as 60,000 un- and undercompensated immigrant detainees to move forward with their suit.⁴⁴ If the case continues to move forward it could both allow for as many as 60,000 immigrant detainees to be compensated for their forced labor and disrupt the economic incentives private prison companies have with involuntary labor.

Such inhumane practices are neither accidental nor incidental to a capitalist ethos of cost-savings. They deliberately criminalize immigrants and marginalize black and brown communities, in turn leading to fewer immigrants on the path to citizenship and more disenfranchised people of color. But abuse within the private prison industrial complex is not limited to the prisoners. Private prison staff have also experienced their share of exploitation and violence.

For example, in 2013, CXW (then Corrections Corporation of America) was found in civil contempt of a settlement agreement it had reached with a class of prison staff for failing to fill positions that were mandated to be filled under its contract with the Idaho Department of Corrections.⁴⁵ The

deficiency arose out of CXW's falsification of staffing records in order to cover up the staffing shortages which had created safety concerns.

That same year, GEO also entered into a settlement agreement⁴⁶ with the Occupational Safety and Health Administration (OSHA) as a result of allegations of serious workplace violence issues at GEO's East Mississippi Correctional Facility. The settlement required GEO to hire a third party corrections consultant to, among other things, audit the adequacy of staff plans, conduct a workplace hazard assessment, develop and implement a Workplace Violence Prevention and Safety Program, and provide employee training.⁴⁷ These requirements extended to GEO's correctional and adult detention facilities nationwide.

In 2013, GEO also paid \$140,000 to settle a sexual harassment lawsuit brought by the Equal Employment Opportunity Commission (EEOC) and Arizona Civil Rights Division on behalf of female employees.⁴⁸ The civil rights groups alleged that GEO "had an extreme tolerance for sexual harassment" at a prison facility in Florence, AZ and that "male managers at GEO sexually harassed numerous female employees and fostered an atmosphere of sexual intimidation" through multiple and ongoing incidences of serious verbal harassment and physical harassment.

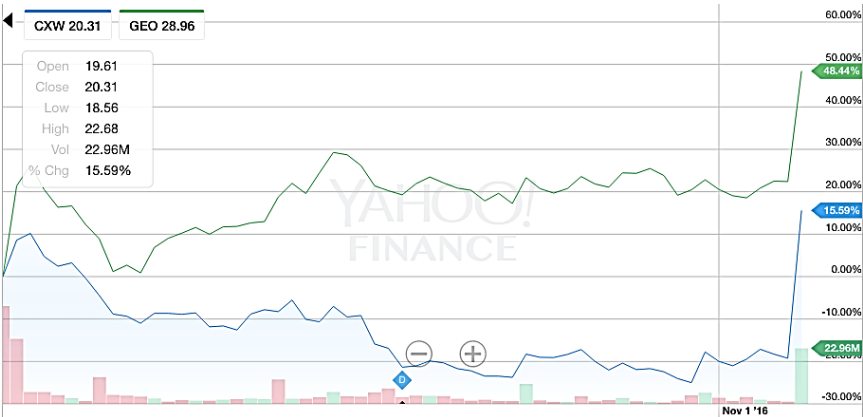
Although litigation and settlement agreements can serve as effective enforcement mechanisms for protecting prisoner rights on a long-term basis, there are limitations. Occasionally, subsidiary corporations do not comply with their parent corporation's obligations. Likewise, sometimes a prison corporation will fail to monitor its subcontractors. This occurred in 2016, when GEO's private medical contractor, Corizon Health, settled with several prisoners for approximately \$4.6 million. In that case, one of Corizon's doctors provided medically unnecessary rectal examinations and inadequate medical care amounting to multiple instances of sexual assault.⁴⁹ These civil rights violations led the Obama Administration to formally phase out the use of private prison contractors.

Obama administration policy & stock price effect

As discussed above, on August 18, 2016, then-Deputy Attorney General Sally Yates issued a memorandum reducing federal use of private prisons,⁵⁰ signaling a shift in the Obama Administration's prior use of private prison contracts.⁵¹ In her memorandum, Yates stated: "I am directing that, as each contract [with a private prison corporation] reaches the end of its term, the Bureau should either decline to renew that contract or substantially reduce its scope in a manner consistent with the law and the overall decline of the Bureau's inmate population."⁵² The release of this memorandum had a sub-

stantial impact on CXW and GEO. Each experienced a significant decline in stock value following its release.⁵³

Stock Price Comparison from August 18, 2016 – November 8, 2016



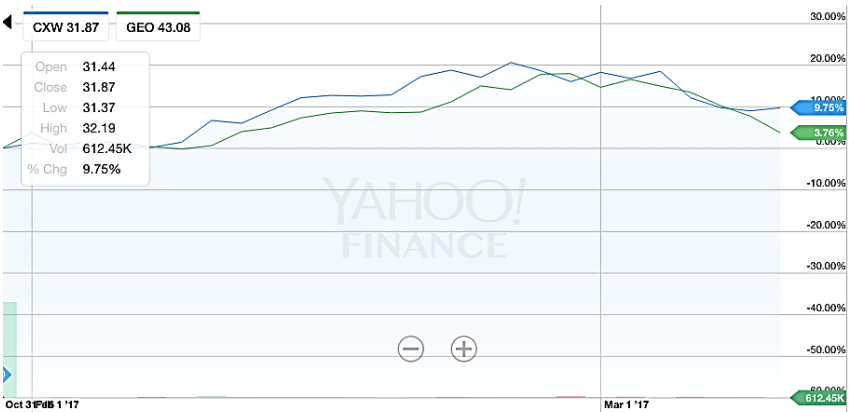
However, after the Yates memorandum, the graph above reveals that, CXW’s and GEO’s February 2017 stock decline not only leveled off but regained and surpassed their initial values after Trump’s election.

Stock Price Comparison from 2007-2017 (Obama First-Term – Trump Election)



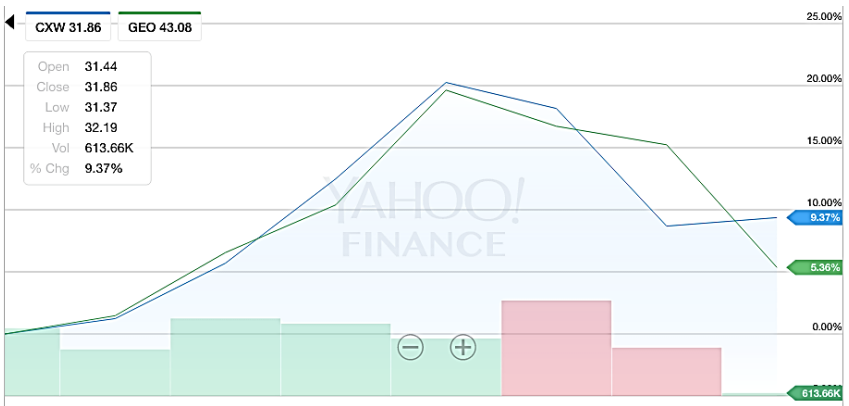
And, as demonstrated above, over the course of ten years leading up to Trump’s election, the major players in the private prison industry experienced overall growth. However, the spike after Trump’s election proved remarkable.

Stock Price Comparison from November 8, 2016 – March 8, 2017



Furthermore, CXW and GEO's stocks have only continued to increase since Trump's election,⁵⁴ spurring multiple news outlets to describe Sessions' reversal as a victory for CXW and GEO.⁵⁵ In a way, those media outlets were correct—CXW and GEO stock prices peaked around the date the Justice Department withdrew the phase-out policy. This can be seen most clearly in the chart below, which tracks CXW and GEO stock values between Trump's Inauguration and March 1, 2017. (Notably, while the stock prices went down slightly in the days following Attorney General Session's February 23 announcement, they were still up from their pre-election values).

Stock Price Comparison from January 20, 2017 – March 1, 2017



It is important to note that the initial appreciation in private prison stock prices and subsequent decreased volatility reflects a greater likelihood that the federal government will grant new CXW and GEO contracts. As the market predicted, in April 2017 the Trump Administration awarded a \$110 million contract to GEO to build a 1000-bed immigration prison facility.⁵⁶ The risk of revenue loss that CXW and GEO faced as a result of the Obama Administration's phase-out policy has been lowered, if not entirely eliminated. The future thus seems bright for the private prison industry—at least for now.

Business risks and rewards, civil rights opportunities and threats

Businesses examine operational risks and rewards.⁵⁷ In light of the changing political climate surrounding incarceration, industry giants such as GEO and CXW have largely shifted from a defensive position of lobbying and opposition, to an offensive one. As the Trump administration has made clear—by accepting political donations from CXW and GEO and by its retraction of the Obama Administration's commitment to phase out private prisons—the private prison industry, faces no political threat to its growth objectives from the Executive Branch. In addition, the private prison industry no longer has to concern itself with the Obama Administration's sentencing reforms that eliminated or reduced sentences for certain drug crimes and moved away from incarceration for non-violent crimes—reforms that vitiated the need for new prison facilities.⁵⁸ Even so, the private prison industry still faces opposition.⁵⁹

Corrections U.S.A., the largest organization of public correctional officers in the country, represents approximately 80,000 public prison officers and touts itself as the “leader in the fight against prison privatization.” The company furthers its stated position against prison privatization by supplying members with educational materials to organize around fighting the privatization of prisons.⁶⁰ Its mobilization efforts could help sway public perception, along with its federal lobbying and PAC activity could sway certain legislators, in ways that would be unfavorable to CXW and GEO.

In addition, some civil codes, like the California Civil Code,⁶¹ exempt the government and its subdivisions and agencies from punitive damages. This exemption does not apply to private contractors, such as CXW or GEO, which has permitted large jury verdicts against such companies. Large punitive damages can mean a big hit to the company's bottom line.

Finally, assuming that, in a democracy, politicians represent the will of the people, public perception may have its effect on Executive Branch policy by way of the 2018 mid-term elections.⁶²

Conclusion

The Reason Foundation, a Los Angeles-based research organization, estimated that outsourcing incarceration to private prisons could cut the cost of housing inmates up to 15 percent.⁶³ We should consider why this might be the case. These savings would not be the product of efficient operations. History teaches us that they would be the result of forced labor practices and a failure to provide the number and quality of staff required to provide a safe living environment.

With the Trump Administration's guarantee of continuing contracts with private detention centers and prisons, human harm in such centers will only continue to increase. Although civil rights advocates are making great strides through their use of innovative legal theories that connect conditions of confinement to the perverse economic incentives within the industry, we must continue to demand transparency of the private prison industrial complex in order to slow its growth and its abuses.

NOTES

1. As reported in, among other outlets, Matt Zapotosky, *Justice Department Will Again Use Private Prisons*, WASH. POST (Feb. 23, 2017), https://www.washingtonpost.com/world/national-security/justice-department-will-again-use-private-prisons/2017/02/23/da395d02-fa0e-11e6-be05-1a3817ac21a5_story.html?utm_term=.62a290273603.
2. Memorandum from the U.S. Dept. Justice Office of Deputy Attorney General to the Acting Director Federal Bureau of Prisons (Aug. 18, 2016), *available at* <https://www.justice.gov/opa/file/886311/download>.
3. *See, e.g.*, Alene Tchekmedyan, *Thousands of Immigrant Detainees Sue Private Prison Firm Over 'Forced' Labor*, L.A. TIMES (Mar. 5, 2017, 5:00 AM), <http://www.latimes.com/nation/la-na-immigrant-workers-20170305-story.html>. The Trafficking Victims Protection Act ("TVPA") 18 U.S.C. § 1589, the basis for one of the claims that was certified in a class action, makes it unlawful for anyone who "knowingly provides or obtains the labor or services of a person by any one of, or by . . . means of force." 18 U.S.C. § 1589(a)(1). The subsequent sections of the statute prohibit other labor practices that can be characterized as coercive, as opposed to forced. *See, e.g., id.* at § 1589(a)(4) (prohibition against "any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint"). While forced and coercive labor practices differ, they are both encapsulated in this statute and referred to in *Alejandro Menocal v. The GEO Group, Inc.*, Civil Action No. 14-cv-02887-JLK (D. Colo. Feb. 27, 2017) (Order Granting Motion for Class Certification Under Rule 23(b)(3) and Appointment of Class Counsel Under Rule 23(g) (EFC No. 49)), *available at* http://deportationresearchclinic.org/Menocal-Et-Al_v_GEO_Cert-2-27-2017.pdf.
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5. *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, *AMERICA FIRST: A BUDGET BLUEPRINT TO MAKE AMERICA GREAT AGAIN, FISCAL YEAR 2018* (2017),

available at https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/2018_blueprint.pdf (In March 2017, the 2018 Budget Proposal recommended an increase of \$1.5 billion for “expanded detention, transportation, and removal of illegal immigrants.”). See also Daniel M. Kowalski, *GEO Group Gives Money to Trump, Gets \$110M Immigration Prison Contract*, LEXISNEXIS LEGAL NEWSROOM IMMIGRATION LAW (Apr. 21, 2017, 12:44 PM), <https://www.lexisnexis.com/legalnewsroom/immigration/b/outsidenews/archive/2017/04/21/geo-group-gives-money-to-trump-gets-110m-immigration-prison-contract.aspx?Redirected=true> (In April 2017, the Trump Administration awarded a \$110 million immigration prison contract to GEO Group to build a 1000-bed immigration prison facility in the same town outside Houston where it already has one., where the facility is expected to “generate \$44M in annualized revenues.”); Mirren Gidda, *Private Prison Company GEO Group Gave Generously to Trump and Now Has Lucrative Contract*, NEWSWEEK (May 11, 2017, 5:00 AM), <http://www.newsweek.com/geo-group-private-prisons-immigration-detention-trump-596505>.

6. Staff of Bureau of Justice Statistics, *Bulletin: Prisoners 1925-81*, U.S. DEPT. OF JUSTICE (Dec. 1982), available at <https://www.bjs.gov/content/pub/pdf/p2581.pdf>.
7. *Id.*
8. See *The CCA Story: Our Company History*, CCA, <http://www.cca.com/our-history> (last visited July 9, 2017).
9. See *GEO Group History Timeline*, GEO, https://www.geogroup.com/history_timeline (last visited July 9, 2017).
10. See *The CCA Story*, *supra* note 8.
11. See *GEO Group History Timeline*, *supra* note 9 (like CXW, GEO was hired to build “the Aurora Processing Center, providing secure care, custody, and control of 150 immigration detainees” for the INS in Aurora, Colorado).
12. STEPHANIE MINOR-HARPER & ALLEN J. BACK, BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, PRISONERS IN STATE AND FEDERAL INSTITUTIONS ON DECEMBER 31, 1984 (Feb. 1987), available at: <https://www.bjs.gov/content/pub/pdf/psfi84.pdf>.
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15. IBISWORLD, CORRECTIONAL FACILITIES IN THE US: INDUSTRY REPORT 56121 (Nov. 2016).
16. *Id.*
17. *Developments in the Law: The Law of Prisons*, 115 HARV. L. REV. 1838, 1841 (2002).
18. *Id.*
19. CORRECTIONAL FACILITIES, *supra* note 15.
20. *Id.*
21. *Banking On Bondage: Private Prisons And Mass Incarceration*, ACLU, <https://www.aclu.org/banking-bondage-private-prisons-and-mass-incarceration> (last visited June 9, 2017).
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23. Eduardo Porter, *Corporations Open Up About Political Spending*, N.Y. TIMES (June 9, 2015), <https://www.nytimes.com/2015/06/10/business/corporations-open-up-about-political-spending.html>.
24. *Banking On Bondage*, *supra* note 21, at 38.
25. CORRECTIONAL FACILITIES, *supra* note 15, at 22.

26. Private Prison Information Act of 2014, H.R. 5838, 113th Cong. (2014), *available at* <https://www.congress.gov/bill/113th-congress/house-bill/5838/text>.
27. *Id.*
28. Fredreka Schouten, *Private Prisons Back Trump and Could See Big Payoffs with New Policies*, USA TODAY (Feb. 23, 2017, 1:10 PM), <http://www.usatoday.com/story/news/politics/2017/02/23/private-prisons-back-trump-and-could-see-big-payoffs-new-policies/98300394/>.
29. *Id.*
30. Cartoon by Khalil Bendib on Erin Rosa, *GEO Group, Inc.: Despite a Crashing Economy, Private Prison Firm Turns a Handsome Profit*, CORPWATCH, (Mar. 1, 2009), <http://www.corpwatch.org/article.php?id=15308>.
31. *Banking On Bondage*, *supra* note 21, at 23.
32. *See, e.g., Do Private Prisons Really Save Us Money?* AFGE (July 29, 2016), <https://www.afge.org/article/do-private-prisons-really-save-us-money/>.
33. Cody Mason, *Too Good to be True: Private Prisons in America*, THE SENTENCING PROJECT (Jan. 2012), *available at* <http://sentencingproject.org/wp-content/uploads/2016/01/Too-Good-to-be-True-Private-Prisons-in-America.pdf>.
34. *Banking On Bondage*, *supra* note 21, at 27.
35. For example, in private immigration detention facilities, U.S. Immigration and Customs Enforcement (ICE) maintains office space for its personnel. In addition to processing detainee intake and conducting interviews, ICE personnel “should be systematically encouraged to report indications of deficiencies, errors, and particularly more serious abuses” by private prison staff and “should also assure that channels are clearly defined for detainees and their families and representatives to report such problems” when they arise. *See* HOMELAND SECURITY ADVISORY COUNCIL, REPORT OF THE SUBCOMMITTEE ON PRIVATIZED IMMIGRATION DETENTION FACILITIES (2016), *available at* <https://www.dhs.gov/sites/default/files/publications/DHS%20HSAC%20PIDF%20Final%20Report.pdf>. But, ICE fails to properly monitor human rights abuses in private facilities. This leaves one to question whether it is possible for ICE to function as an independent entity that can be accountable for providing this check given that it is permanently located within the facility it is supervising.
36. *Banking On Bondage*, *supra* note 21.
37. Solomon Moore, *Inmate's Family Wins \$42.5 Million Judgment*, N.Y. TIMES, Apr. 10, 2009, http://www.nytimes.com/2009/04/10/us/10brfs-INMATESFAMIL_BRF.html.
38. Emma Perez-Trevino, *Beating Death Lawsuit Ends in Settlement*, BROWNSVILLE HERALD (Jan. 7, 2010, 12:00 AM), http://www.brownsvilleherald.com/article_7d219672-6121-569a-bb89-43f33119e6b4.html.
39. *Id.*
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41. *Id.*
42. *Id.*
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44. *Alejandro Menocal v. The GEO Group, Inc.*, Civil Action No. 14-cv-02887-JLK (D. Colo. Feb. 27, 2017) (Order Granting Motion for Class Certification Under Rule 23(b) (3) and Appointment of Class Counsel Under Rule 23(g) (EFC No. 49)), *available at*: http://deportationresearchclinic.org/Menocal-Et-Al_v_GEO_Cert-2-27-2017.pdf.

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46. Sec’y of Labor v. The GEO Group, Inc., OSHRC Docket No. 12-1381 (Occupational Safety and Health Rev. Comm’n Dec. 20, 2013) (Stipulation of Settlement), *available at* <https://www.osha.gov/enforcement/cwsa/geo-group-inc-12202013>.
47. *Id.*
48. Press Release, U.S. Equal Employment Opportunity Comm’n, GEO Group to Pay \$140,000 to Settle Sexual Harassment Suit Filed by EEOC and ACRD (Apr. 29, 2013) (on file with author), *available at* <https://www.eeoc.gov/eeoc/newsroom/release/4-29-13.cfm>.
49. Thomas J Cole, *Inmates Receive \$4.6 Million in Settlements*, ALBUQUERQUE JOURNAL (June 29, 2016, 12:02 AM), <https://www.abqjournal.com/799917/inmates-get-46m-in-settlements.html>.
50. Memorandum from the U.S. Dept. Justice Office of Deputy Attorney General, *supra* note 2. *See also* Commentary, U.S. Dept. of Justice, Phasing Out Our Use of Private Prisons (Aug. 18, 2016), *available at* <https://www.justice.gov/archives/opa/blog/phasing-out-our-use-private-prisons> [hereinafter Phasing Out Our Use of Private Prisons].
51. Phasing Out Our Use of Private Prisons, *supra* note 50.
52. Memorandum from the U.S. Dept. Justice Office of Deputy Attorney General, *supra* note 2.
53. Notably, however, the stock prices do not take into account other corporations that contract with them or otherwise benefit from governmental prison contracts. Nonetheless, the outlook for revenue growth in larger correctional facilities industry largely tracks the growth and stock price trajectory of CXW and GEO.
54. Zapotosky, *supra* note 1.
55. *See, e.g.*, Robert Ferris, *Prison Stocks are Flying on Trump Victory*, CNBC (Nov. 11, 2016, 1:50 PM), <http://www.cnbc.com/2016/11/09/prison-stocks-are-flying-on-trump-victory.html>; Jeff Sommer, *Trump’s Win Gives Stocks in Private Prison Companies a Reprieve*, N.Y. TIMES (Dec. 3, 2016), <https://www.nytimes.com/2016/12/03/your-money/trumps-win-gives-stocks-in-private-prison-companies-a-reprieve.html>.
56. Kowalski, *supra* note 5 and accompanying text; Gidda, *supra* note 5 and accompanying text.
57. Some private prison business risks were discussed previously. *See* CORRECTIONAL FACILITIES, *supra* note 15.
58. Ashley Southall, *Justice Dept. Joins Calls for Drug Sentencing Reform*, N.Y. TIMES BLOG (Apr. 29, 2009, 3:41 PM), <https://thecaucus.blogs.nytimes.com/2009/04/29/justice-dept-joins-calls-for-drug-sentencing-reform/>.
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61. Cal. Gov. Code §§ 814-895.
62. In turn, the government’s appropriation of the private correctional facility budget will correspond with investor confidence in CXW and GEO and their potential for continued growth. Thus, CXW, GEO, and other private prison corporations’ current growth may be shortlived.
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Brett DeGroff

BETSY DEVOS AND THE VOUCHER VISION OF EDUCATION

Betsy DeVos's appointment as United States Secretary of Education might be the best thing to happen to public education in decades.

Which is not to say DeVos herself is likely to be any friend to public education. Nothing could be further from the truth. As things stand, the damage DeVos inflicts on public education might be limited only by the ineptitude of the Trump administration and perhaps DeVos herself. But maybe, at long last, her appointment will raise enough awareness to change where things stand.

We Americans love our schools. But for years we've been told that our schools are "failing." Naturally, our response is to try to fix the problem. So when we're offered policies packaged as solutions and labeled with jargon like "choice," "competition," and "accountability," we have been willing to give them a try. But none of this is making public schools any better. At best these policies have been experiments based on shaky hypotheses which have produced mixed to poor results over decades of trial and error. At worst, they are failed ideas no longer meant to fix public education, but to corporatize and monetize it. As the larger political pendulum has oscillated, the conversation on public education has careened forward with both major political parties enamored of experimenting with our schools. In Betsy DeVos, we have a Secretary of Education who is a caricature of every absurdity inherent in the failed corporatist experiments mentioned above. Maybe her appointment is finally enough to get our policy back on course.

The sinister thing about the choice and voucher movement championed by DeVos is that it uses our desire to improve our schools to motivate us to subject them to experimentation and allow public resources to be diverted to private profits. For the most part, Americans are satisfied with the schools their children attend. In a 1999 national survey, 71 percent of respondents rated their children's school with an A or B, and a study in Michigan found a similar result recently.¹ But Americans are less sure about schools they don't see every day. The national survey found that just 23 percent of parents thought the nation's schools deserved an A or B overall, and in Michigan, DeVos's home state, a clear majority marked the state's schools with a C or lower.² Because each of us wants every child to have a school as good as

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our own child's school, we set out to fix those other schools. The irony is that the data shows most people don't want their own schools "fixed" and that the experiments advocated by "reformers" like DeVos target schools that students and their parents are perfectly happy with.

It's difficult to connect DeVos to precise policies she intends to "fix" our schools with given her lack of public track record. Before being nominated to her current post, DeVos had never been employed by a public school, nor had she held elected office and been forced to go on the record to defend specific policies. As the daughter of one billionaire and the wife of an even wealthier one, she has never attended a public school nor sent any of her children to them. DeVos has never formally studied education or pedagogy. Famously, during her confirmation hearing, DeVos seemed confounded by whether students should be assessed in terms of proficiency or growth, revealing an embarrassing ignorance about literally the first thing one needs to know about standardized testing. Despite her lack of any actual experience in public education, we know the broad strokes of the policies she favors. Her right-wing ideology is no secret.

DeVos has been at the forefront of promoting policies connected with vouchers, charter schools, standardized testing, and school ranking. These aren't new ideas, nor are they confined to one political party. In 1996 President Clinton's reelection platform contained the goal of "[s]upporting public school choice."³ President Clinton also called on "all 50 states to pass laws to provide for the creation of charter schools . . ."⁴ President G. W. Bush gave us No Child Left Behind. Under NCLB schools would forgo federal funding if they did not test students in reading and math in grades 3 through 8 and once in high school. States were required to bring all students to proficient level.⁵ President Obama gave us Race to the Top. Under that scheme, states competed for federal money by pursuing policies such as standardized testing, ranking schools, and closing the lowest performing schools.⁶

Administration to administration, year to year, the story has been the same. Our schools are failing, so try these experiments. And always the experiments have drawn on this voucher vision of education promoted by Betsy DeVos.

The voucher vision is a wild departure from the public vision which has been responsible for the best successes in our education system. The public vision is familiar to most of us. In the public vision, schools are local entities run by locally elected officials. We pay for schools with local taxes, and when our officials want more money, we have a local vote. The public school is open to all the community's children.

In the public vision, the school doesn't belong just to the children and parents, it belongs to the community. Today's student is tomorrow's community member, employee, and voter. The better job we do educating our community's children today, the better off we'll all be tomorrow. Education is a responsibility of the community in the public vision. But we also get more than that from our schools.

In many communities, the public schools are the de facto hub of public life. People come together at football games and plays. The school's playground does double duty as the local park. People roll up their sleeves for fundraisers and parent groups. They serve on school boards and attend meetings. Each of these small acts of civic engagement may not seem like much by itself, but year after year, these are the things that bind our communities together.

We do these things because it is all for *our* schools. We're proud of our schools because they are ours, and because they are ours we work hard to make them something to be proud of. This is the incentive behind the public vision of education. It's hopeful, it's powerful, and in communities across the country it has worked and continues to work today.

Betsy DeVos's voucher vision of education is different. The voucher vision is a cynical one which pits us against one another in a competition for scarce resources. Children take standardized tests, and schools are labeled "failing" based on the results. Failing schools are penalized either by being closed and hoping a charter operator fills the void, or by allowing students to take their piece of public funding elsewhere in the form of a voucher.

In the voucher vision, the incentive is self-interest and fear. Parents and children scramble for the "best" school. Schools scramble for the children. What's hyped as a race to the top really ends up as a crush to stay off the bottom. But someone has to be on the bottom.

There are plenty of casualties in the voucher vision. Kids for one. When a school's existence depends on the yearly test scores, the incentive is high to jettison the low scoring students. Public schools can't do that. In 1975 the United States Supreme Court held that when a state extends the benefit of education, it cannot withdraw it through expulsion without Due Process.⁷ But charter schools are not bound by the Court's ruling because the public school system is available to take charter schools' castoffs.⁸ States are moving toward statutory mandates that test scores are incorporated into teacher evaluations. The pressure to produce scores is so intense that some teachers have resorted to changing their students answers, and wound up in prison.⁹ And of course, there are the communities which lose their schools. A charter

might crop up to replace a closed school. But a charter could also be closed for poor test scores, or because it's not profitable, or really for any reason its owner sees fit. When that happens, the community has no recourse, because the charter is not theirs

In the voucher vision, parents and children are reduced to mere customers in a marketplace. They have no recourse at the ballot box if they have a problem with the school. Their only remedy is to take their "business" elsewhere—which of course assumes there is somewhere else to go. And communities are left out completely.

Maybe all this could be forgiven if the voucher vision outperformed the public vision. But that comparison really makes no sense. It's a bit like asking if a parasite outperforms its host. The voucher vision could never operate without public funding and the remnants of public districts to take the students the voucher vision can't handle. But let's suppose for a moment that the comparison did make sense. Even by the gold standard of the voucher vision, standardized test scores, none of these DeVos-backed policies are helping. In Michigan, where DeVos has been so politically active, 73 percent of charter schools performed below the average public school in 2012.¹⁰ And while Michigan has been ground zero for everything "choice" and "voucher" the state constitution will allow, it continues to fall further behind other states.¹¹

There has never been any evidence to support the notion that any of these "choice" and "voucher" experiments will improve our schools. To the contrary, the evidence leads to the opposite conclusion. DeVos has been profiting from the proliferation of for-profit universities—educational scams of the worst kind that have saddled students from vulnerable populations with debt and worthless diplomas—and stands to take a financial hit if government extends early childhood education benefits.¹² Making money off education might be DeVos's only real qualification for her current post. And maybe, at long last, with this caricature of greed and incompetence as the public face of our disastrous education policy, the debate on these issues will finally turn a corner.

NOTES

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Marjorie Cohn

JAMES MATTIS: TRUMP'S MILITARY DECIDER

“‘Mad Dog’ Mattis ‘Closest Thing We Have to Gen. George Patton,’”¹ Donald Trump tweeted, as he nominated retired Marine General James Mattis to serve as his Secretary of Defense. Trump was impressed with Mattis’s tough-guy reputation. War criminal Henry Kissinger, with whom Mattis had worked at the Hoover Institution, Stanford University’s right-wing think tank, vouched for the retired general.² Trump has given Mattis “total authorization”³ to launch military operations and to determine how many U.S. troops will serve in Iraq and Syria. Mattis changed the rules of engagement in Yemen and Somalia so that lower level generals can authorize some attacks.

A former defense official who has known Mattis for years told Dexter Filkins of the *New Yorker*, “Mattis wants to win. He wants victory. He wants to kick ass. The White House is much looser now. They’re turning to the military and saying, ‘You do it. We trust you. You’re the pros.’” He added, “I’m worried the pendulum is swinging the other way, and that the military gets whatever the hell they want. Because General Mattis is a warrior. He has spent forty years killing people, and his whole career has been built to win.”⁴

“It’s fun to shoot some people”

Indeed, Mattis declared in 2005, “It’s fun to shoot some people.”⁵ That was a year after he presided over the Battle of Fallujah in Iraq, which was triggered by the killing and mutilation of four Blackwater mercenaries. In retaliation, U.S. troops killed between 700 and 1,000 people, at least 60 percent of them women and children. NBC News correspondent Kevin Sites, embedded with the Marines in Iraq, heard Staff Sgt. Sam Mortimer radio, “Everything to the west is weapons-free.” That “means the Marines can shoot whatever they see—it’s all considered hostile,” Sites explained.⁶ The rules of engagement were set at the top, and Mattis was in charge.

“There is plenty of evidence that either the U.S. was targeting civilians or that the U.S. was conducting indiscriminate attacks without knowing, or taking sufficient precautions to determine, whether individuals were combatants or civilians,” Cardozo law professor Gabor Rona, an adviser to the International Committee of the Red Cross, told Filkins.⁷

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Civilian casualties on Mattis's watch

In 2005, as retaliation for the death of their comrade from a roadside bomb, U.S. Marines executed 24 unarmed civilians in Haditha, Iraq, in a three-to-five-hour rampage. The victims included a 76-year-old amputee in a wheelchair holding a Koran, and children aged 1, 3, 4, 5, 10 and 14. The Marines falsely and knowingly claimed the civilians were killed by a roadside bomb blast, then said it was in a running gun battle. They didn't come clean until *Time* ran an exposé. Rep. John Murtha (D-Pennsylvania), a former Marine, told ABC there was "no question" that the U.S. military tried to "cover up" the incident, which Murtha called "worse than Abu Ghraib."⁸ The following year, seven Marines and a Navy corpsman executed a civilian in Hamdania, Iraq, then put a shovel near the body to make it look like the man had been trying to plant a bomb. Sergeant Lawrence Hutchins told his men, "Gents, congratulations. We just got away with murder."⁹

Mattis decided who would be charged for the Haditha and Hamdania incidents. In the Hamdania case, the servicemen were charged with murder and kidnapping, but received lenient sentences.¹⁰ But in the Haditha case, Mattis charged four Marines with murder and four for dereliction of duty. Only one of the men Mattis charged was convicted—of dereliction of duty.¹¹

Shortly after Trump's inauguration, with very little deliberation, he accepted Mattis's recommendation that the U.S. mount a military strike in Yemen. During the resulting firefight, 14 members of al Qaeda, 30 civilians¹² and one Navy Seal were killed.¹³ Reacting to media reports that the attack produced little actionable intelligence, Trump faulted "the generals." The senior official told Filkins, "Mattis owed it to Trump to let him know that things might go wrong. But there was no process."¹⁴

Since that "botched" raid, the U.S. military has killed record numbers of civilians in Iraq and Syria. Mattis's statement at a May 19, 2017 press conference, "There has been no change to our continued extraordinary efforts to avoid innocent civilian casualties,"¹⁵ rings hollow.

In April, the Air Force dropped the "Mother of all Bombs" on Afghanistan. The largest conventional weapon ever launched, it weighed 22,000 pounds. And Trump sent 59 Tomahawk missiles into Syria in retaliation for a chemical attack allegedly carried out by the Bashar al-Assad government. But as Pulitzer Prize-winning journalist Seymour Hersh determined, it is not clear that Assad was responsible for the chemical attack.¹⁶

Wary of war with North Korea and Iran

As Trump rattles his sabers at North Korea, Mattis appears clear-eyed. In May 2017, Mattis stated on CBS's "Face the Nation" that a military conflict in

North Korea “would be probably the worst kind of fighting in most people’s lifetimes.”¹⁷ And he told the media at his May 19, 2017 press conference, “As you know, if this goes to a military solution, it is going to be tragic on an unbelievable scale, and so our effort is to work with the UN, work with China, work with Japan, work with South Korea to try to find a way out of this situation.”¹⁸ Diplomacy will not work, however, unless North Korea is also included in the process.

When he appeared before the House Appropriations Committee, Mattis said if the U.S. were to fight North Korea, “I will suggest that we will win... It will be a war more serious in terms of human suffering than anything we’ve seen since 1953... It will involve the massive shelling of an ally’s capital [Seoul, South Korea], which is one of the most densely packed cities on earth.” Mattis added, “It would be a war that fundamentally we don’t want, but we would win at great cost.”¹⁹

Mattis has been of two minds on Iran. The year after Barack Obama refused Mattis’s request for authority to attack Iran in 2012, Mattis resigned as head of the U.S. Central Command. Mattis had sought to intensify U.S. military activity against Iran, which the Obama administration opposed. In 2016, Mattis said the Iranian regime is “the single most enduring threat to stability and peace.”²⁰ But although Mattis was a harsh critic of Obama’s nuclear agreement with Iran, the general said, “there’s no going back” on the deal.²¹

Wary of what he calls “mission creep,” Mattis insists the Pentagon aims only to defeat the Islamic State and opposes being pulled into a war with Iran. Mattis is reportedly pushing back against some White House officials who wish to open up a border front against Iran and its supporters in southeastern Syria, “viewing it as a risky move that could draw the United States into a dangerous confrontation with Iran,” according to defense officials interviewed in June 2017 by *Foreign Policy*.²²

Critical of Israel, opposes torture—but will he restrain Trump?

To his credit, Mattis is critical of U.S. policy on Israel. He thinks the United States is paying a “security price” in the Middle East because it is considered biased in favor of Israel.²³ Mattis criticized Israel for building settlements in the occupied West Bank, noting they “are going to make it impossible to maintain the two-state option.”²⁴ He said the settlements might weaken Israel as a Jewish and Democratic state and could lead to apartheid. “If I’m in Jerusalem and I put 500 Jewish settlers out here to the east and there’s 10,000 Arab settlers in here, if we draw the border to include them, either it ceases to be a Jewish state or you say the Arabs don’t get to vote—apartheid,”²⁵ Mattis stated.

During the presidential campaign, Trump promised to reinstitute waterboarding and said he would “bring back a hell of a lot worse than

waterboarding.”²⁶ Mattis may have changed Trump’s mind, when he told the president, “I’ve never found it to be useful. I’ve always found, give me a pack of cigarettes and a couple of beers and I do better with that than I do with torture.”²⁷ Trump was “very impressed by that answer. I was surprised, because he’s known as being like the toughest guy.”²⁸

When he sent the Tomahawk missiles into Syria, Trump went from scoundrel-in-chief to national hero, virtually overnight. The corporate media, the neoconservatives and most of Congress hailed him as strong and presidential. “The instant elevation of Trump into a serious and respected war leader was palpable,”²⁹ wrote Glenn Greenwald. This sent Trump, who is obsessed with being liked, a frightening message: Bombing makes you popular.

“Mattis could well turn out to be a brake on Trump’s impulsive tendencies,” Filkins opined. “But it’s also possible that, with the President uninterested in many details of international affairs, the military will also lack restraint.”³⁰

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Paul Von Blum

**BOOK REVIEW:
WRITING TO SAVE A LIFE:
THE LOUIS TILL FILE**

**John Edgar Wideman, *Writing to Save a Life: The Louis Till File*,
Scribner, 2016, 208 pp. \$25.00.**

The tragic story of fourteen- year-old African American Emmett Till's 1955 lynching in Mississippi is well known for its unspeakable brutality, grotesque injustice when an all-white jury freed his two murderers, and its significance as one of the catalysts in the modern civil rights movement. Seeing the image of young Emmett Till's mutilated body in an open casket has haunted countless Americans throughout their lives. His mother, Mamie Till, performed an enduring public service when she decided to show the world what racist killers had done to her only child. It was a grim reminder of the tragic history of violence against African Americans, which began with slavery and continues to the present.

But few people know the equally tragic story of Emmett Till's father, Louis Till, who was hanged, probably unjustly, by the United States military in 1945, ten years before his son was lynched. John Edgar Wideman, one of contemporary America's premier literary figures in contemporary America, now reveals this hidden history with the publication of *Writing to Save a Life: The Louis Till File*.

This remarkable new book is an engaging fusion of fiction, memoir, investigative journalism, speculation, and fact that defies easy categorization. It falls into no conventional literary genre, which augments its power and effectiveness. Above all, it is an exquisite rumination of collective and individual memory, a treatment of American racist brutality that implicates the entirety of U.S. history, which includes its flawed system of law and justice.

The book is divided into three sections: "Louis Till," "The File," and "Graves." Yet each section is not fully distinct and transcends its formal title. Like the volume as a whole, they move seamlessly from subject to subject across national, legal, and personal history. That structure, while perhaps initially jarring, becomes a source of the book's overall power and strength.

Paul Von Blum is a longtime member of the California State Bar and has taught at the University of California for over 40 years. He is currently senior lecturer in African American Studies at UCLA.

The first section, “Louis Till,” begins with the author’s reflection about the murder of the senior Till’s son in 1955. Wideman was exactly Emmett’s age when he learned of the murder. Their birthdays in 1941 were a little more than a month apart. “I was fourteen the first time I saw the photo in *Jet*,” he writes. “Emmett Till’s age that summer they murdered him. Him colored, me colored. Him a boy, me too.” He reveals his reaction even more disconcertingly: . . . “a dead colored boy murdered in Money, Mississippi, whose mutilated face looked like a bug squashed under his thumb.” Many young African American boys in 1955 could also imagine themselves in the place of young Emmett, spared only because they were in Pittsburgh or Los Angeles or New York, instead of Money, Mississippi.

The Emmett Till case outraged older African Americans and reminded them painfully of the infamous history of thousands of lynchings of their fellow black men, women, and even children since the end of Reconstruction. When *Jet Magazine* published the photograph of Emmett Till’s mangled face, its predominantly black viewers saw the raw face of racism that had despoiled American history since its inception. Appalled and disgusted, very few were surprised.

The phony trial of Till’s killers also reinforced African Americans’ deep suspicion about the fairness of the American legal system, especially in the South. The monstrous injustice of that farcical proceeding was apparent to all who observed it. As Wideman reports from the Chicago Defender account of the trial, the black press was limited to four seats while the white press had twenty-two in a racially segregated courtroom. Wideman further quotes that the *Jackson Daily News*’ account of the local Sheriff’s denial regarding Emmett Till’s body: “The whole thing looks like a deal made by the NAACP.” That was the official story. For white segregationist public officials, only communist-inspired civil rights organizations could concoct such a tale about a vicious murder of a teenage black boy from Chicago.

Early in the book’s first section, Wideman turns directly to the troublesome case of Emmett’s father, Louis Till. Instead of employing actual quotations from news sources, Wideman draws on his powerful talents as a fiction writer to express the racism of the American military in World War II and the near universal attitudes of African American soldiers in that conflict:

Army lies . . . Treat us like slaves. Like animals. Yes they did. And nothing we could do about it. . . . Treat us colored soldiers like they own us, like they got the God-given right to kick us, spit on us and the only right we got is salute and say, Yes sir. Here’s my behind, sir. Kick it again, sir. . . . White man lie say you’re guilty—you’re guilty. Case closed.

By using the expressiveness of black language, Wideman reveals the deeper essence of the structural military racism during that time. This was the environment that led to the arrest, trial, and execution of Louis Till, Mamie Till's husband and Emmett Till's father.

Those sentiments accurately reflect the historical reality of African American participation in the United States armed forces. As late as World War II, black soldiers and sailors were treated neither equally nor decently. They served in racially segregated units, often performing menial tasks under white officers. It was not until 1948, when President Harry Truman issued Executive Order 9981, that the military finally desegregated all its operations.

The second section of *Writing to Save a Life* involves the government's file on Louis Till (The File), which Wideman requested through the Freedom of Information Act. That file reflects the shoddy treatment that soldiers of color experienced in the military justice system during World War II. Wideman waited a long time for its arrival and was actually convinced for a while that it would never come. When it did, Wideman discovered that its pages were not numbered consecutively and the entries were not arranged chronologically. He had to pencil numbers on the file's pages in order to make any sense of it.

Wideman read the Louis Till file cover to cover many times, trying to make sense of its "frustrating discontinuities, helter-skelter chronology, bits and pieces of handwritten military dispatches and typed correspondence tossed in with no apparent rhyme or reason." At one level, this is probably a function of bureaucratic ineptitude. At a deeper level, however, the military has little inclination to be transparent about its flawed criminal processes, especially when the result was the execution of two black men, Till and Fred McMurray.

Whether deliberate or not, the confusing file itself reflects the institutional racism that underlies the case as a whole and the grimmer reality of the grossly disproportionate death sentences during World War II imposed on African American military personnel. Prof. Alice Kaplan of Yale University indicated that 83 percent of the men executed in Europe, North Africa, and the Mediterranean for the crimes of rape and murder during World War II were African Americans. This reflects the systematic racial bias of the military justice system where very few African American officers were available to sit on courts martial and review boards. This mirrored the general U.S. criminal justice system (including the trial of Emmett Till's killers) where white judges and juries were the dominant reality.

Louis Till and Fred McMurray were accused, tried, convicted, and executed for rape and murder of white civilians in June 1944 in Civitavecchia,

Italy. The entire process followed from an order from the Supreme Commander of the Allied Forces in Europe, Dwight D. Eisenhower, which called for an expeditious resolution of all pending cases alleging capital crimes that U.S. service personnel committed against foreign nationals.

The facts of the Louis Till case are ambiguous. On the evening of June 27, 1944, while antiaircraft artillery rumbled in the background, “all hell broke loose,” as Wideman reports. Two Italian women were allegedly raped and one Italian woman was murdered. American soldiers were in the vicinity, including Privates Louis Till and Fred McMurray. Masked intruders, according to the file, were responsible for the crimes, including one who carried a gun. When they burst through the door where one of the rape victims, Frieda Mari, lived, one of them lit a match, ostensibly allowing the inhabitants to identify them as “three colored men.” But the witness accounts were sketchy and vague, probably an inevitable response in light of the horrific crimes they experienced.

Wideman expresses the tragedy of the scene with graphic, literary candor: “No doubt about it. Some brutal, ugly shit went down in Civitavecchia.” The issue is whether sufficient evidence existed to condemn Louis Till to death. The file reveals astonishingly accurate descriptions of the perpetrators. Witness statements are precise, indicating the exact height of the men (5’10” and 5’6”). But these are the written reports from Army Criminal Investigation Division agents, hardly disinterested figures in the saga. They are translated from Italian to English and from centimeters and meters to inches and feet.

At the court martial itself, however, no victim could actually identify Till or McMurray. That is not unusual in criminal and other trials. Eyewitness testimony is notoriously problematic, especially back then. Wideman makes no attempt in his book to perform a systematic review of the actual evidence and its striking contradictions, as a competent appellate lawyer would do, especially in a capital case. *Writing to Save a Life* has deeper objectives, far beyond its specific factual critique of a probable individual legal injustice.

As a writer and public intellectual, John Wideman seeks to expose the systemic racism among the legal personnel charged with administering the military justice system in 1945. His text shows how agents had ample and irresistible opportunities for abuse, reflecting their fundamental attitudes and General Eisenhower’s desire to expedite existing criminal matters in the European theater at the end of the war.

Wideman claims reasonably, given the powerful racial biases of the era, that interrogators planted information and coaxed and coerced witnesses to provide information used to convict the defendants. More chilling, he

likens the entire procedure to the logic of Southern lynch “law.” Louis Till and Fred McMurray were black men accused of raping white women, the infamous excuse for murdering black men for centuries in the United States. In essence, the military hanging of Louis Till in 1945 was a real life version 30 years after the infamous Ku Klux Klan lynching of the character Gus in D.W. Griffith’s racist “classic,” “Birth of a Nation.”

Privates Till and McMurray were sentenced to death, as Wideman bitterly maintains, “on the basis of being the wrong color in the wrong place at the wrong time.” He concludes that the Louis Till File is replete with lies and is little more than a cover for a rush to judgment that has regularly occurred with black men accused of crimes against whites, especially rape. The swift “justice” in the military system at that time is scarcely different from the 1944 South Carolina case where 14 year-old African American George Stinney was convicted of murder by an all-white jury in ten minutes and almost immediately executed in the electric chair. It also bears a disconcerting resemblance to the 1945 Mississippi case of Willie McGee, a black man accused of raping a white woman. He was convicted by an all-white jury in three minutes and executed six years later despite international protests.

By lambasting the racism of the military justice system in 1945, Wideman nevertheless seeks no whitewash of Louis Till himself. Till was, at best, a problematic figure who quite possibly had something to do with the grisly events in Civitavecchia that June night in 1945. He had previously assaulted his wife Mamie and was judicially forced to enlist in the United States Army rather than face jail time. But his unsavory character is likely no different from that of many other victims of injustice over the years. Some persons executed but tried and convicted under racist or other deplorable circumstances were probably guilty of the crimes for which they were originally charged. It is also possible that some African American lynching victims may have raped their white female victims.

That is beside the point. The United States Constitution—as well as common decency—requires that persons accused of crimes be afforded rigorous due process protections. The Louis Till case falls absurdly short of that standard. John Wideman provides a service by bringing the case to public attention. The sketchy files that Wideman received and reviewed reveal that due process was conspicuously missing. No one should have been convicted, much less executed, on this corrupt example of judicial indifference, even contempt, for the truth and for the rights of the accused.

The third and final section of this book is titled “Graves.” This segment exhibits the most complex features of the work and gives readers a compelling sense of the powerful implications of the Louis Till case. These implications

reflect African American historical consciousness, which includes personal recollections (some extremely intimate), family memories, and collective racial flashbacks of political and legal injustices and oppression, among many other elements.

After reading and rereading the Louis Till file, Wideman flew to France to find and visit Louis Till's grave. Till is buried in a small plot of land outside the official grounds of the Oise-Aisne American cemetery in France, which contains the remains of 6,012 American war dead from World War I. Till is buried in Grave 73, Row 7, Plot E, a separate, hidden section approximately 100 yards away. Here, there are 96 small markers made of marble squares with numbers and no names. They are allotted half the space given the other graves across the road. They are the American military prisoners, mostly black, who were executed, by hanging or firing squad: the "dishonored dead." No flag flies over Plot E. None are encouraged to visit.

Ambivalent about the journey, he visited the grave site and walked along the beach in Northern France. The trip catalyzed a flood of personal memories that returned him to his Pittsburgh childhood in the 1940s and 1950s. Several personal stories permeate the final section of the book, reinforcing its overall nonlinear structure and adding significantly to its strength and appeal.

Wideman's French journey also generated even more disturbing feelings and speculations about the fate of Private Till, as well as the anguish of his fellow black prisoners who endured brutal treatment from their white captors. The prisoners were confined at the Disciplinary Training Center at Metato, near Pisa, Italy. Wideman calls it a black hole, where African American soldiers constituted approximately 25 percent of the inmates. They were at the mercy of white officers, most of whom were overtly racist. They were subjected to beatings, humiliations, and oppressive labor. As Wideman puts it, they were born again slaves, not dissimilar to the obscenely large number of African American inmates imprisoned in America today.

Above all, this remarkable book is a meditation on the complex history that people of African ancestry have endured over the centuries in this country. It is a glimpse into collective memory that includes mundane features of personal life as well as the continuing oppression of legal and political institutions. Wideman's literary style, which sometimes abruptly moves from an examination of a legal file to a rumination about his early sexual encounter with his first girlfriend or childhood visits to the barbershop, can be unsettling to audiences, like lawyers, who may prefer straightforward analytic treatments of complex subject matter.

But memory is never straightforward and recollections of oppressed peoples likewise range widely across the personal and political landscapes. Wideman's style reflects the realities of people who may share pleasant memories of family life while experiencing egregious discrimination (or worse) from police, judges, prison officials, and other legal officials. Millions of African Americans shift rapidly from loving treatment, or the opposite, in black families and schools to recollections of lynch victims and legal injustices. The latter recollections, especially for older people, often remind them of the cases of George Stinney, Willie McGee, and countless others. Millions too, like John Wideman himself, have images of Emmett Till their memory. With this book, the specter of Louis Till has been added to the mix.

Writing to Save a Life is not a hopeful book. In many ways it is quite the opposite. It is the lament of a 75 year-old distinguished writer who has also experienced profound personal tragedy, with both a brother and a son serving long prison terms. In 2017 African Americans have little cause for optimism. To be sure, the United States military is no longer the segregated institution it was during the time of Louis Till. The Uniform Code of Military Justice, passed by Congress in 1950 and signed by President Harry Truman, provides many of the due process rights conspicuously missing during the Louis Till fiasco. Moreover, while the death penalty remains in the law, it has become extremely rare, nothing like the veritable bloodbath it was during the Second World War. Still, Wideman's deeper pessimism about the law as it affects and oppresses African Americans, personified in the 1945 case of Private Louis Till, is entirely justified.

The events of the very recent past fortify the vision emanating from this book. In 1991, for example, when several Los Angeles Police Department officers savagely beat Rodney King with fifty-six baton blows and several kicks, many African Americans were not surprised. They believed that the only difference between what happened to King and what happens to many other black men was that someone happened to have a video camera. Although outraged, many blacks were likewise not surprised when the state court jury acquitted three of the officers and deadlocked on the fourth.

Similarly, in Los Angeles, the killer of 15 year-old African American Latisha Harlans in 1992 received only five years of probation and 400 hours of community service. That case exposed the raw emotions of millions of African Americans and entered the storehouse of memory that Wideman expresses so effectively. What Emmett Till was for his generation, Rodney King and Latasha Harlans were for theirs.

The examples from the early twenty-first century are similarly grim: Trayvon Martin, Michael Brown, Eric Garner, Tamir Rice, and Freddie

Gray—all of whose killers have been exonerated by the American legal system. Their stories have entered the memories of contemporary African Americans. A literary successor to John Wideman may well relate some of those stories as part of a meditation on African American historical consciousness. Until Americans fully realize that the ghosts of the past remain deeply embedded in African American consciousness, nothing will change, especially in the perilous years of the Donald Trump regime.



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Kris Hermes

**BOOK REVIEW: A TILTED
GUIDE TO BEING A DEFENDANT**

**Tilted Scales Collective, *A Tilted Guide to Being a Defendant*,
Combustion Books, 2017. Paperback. 347 pages. \$18.00.**

A Tilted Guide to Being a Defendant was written for those political defendants and their supporters who want to stop the state from “[using] criminal charges to dismantle, destroy, and neutralize radical movements.”

The Tilted Scales Collective is made up of a small number of “dedicated legal support organizers who have spent years supporting and fighting for political prisoners, prisoners of war, and politicized prisoners.” The collective and the idea for *A Tilted Guide* were both borne out of conversations at an Anarchist Black Cross conference, combined with a strong determination to “help radicals and revolutionaries figure out how to protect themselves and their comrades when faced with state repression, while strengthening their movements advancing the fight for liberation.”¹

In the U.S. legal system where more than 90 percent of criminal defendants plead guilty before trial—because there’s no way the system could sustain even a majority of defendants demanding a trial—prosecutors and defense attorneys alike are compelled to resolve criminal cases before going to trial. Prosecutors typically seek easy convictions. Defense attorneys and their clients are often backed into corners and forced to weigh an early guilty plea against a potentially costly trial and the prospect of much harsher punishment if convicted.

But what happens when activists and others are arrested and prosecuted on politically-motivated charges? The goals, interests, and considerations of activists or political defendants can be very different from the routine arrestees that are funneled through an odious, oppressive, and racist legal system.

It’s in the interest of activists to use the legal system to advance and strengthen their social movements and political goals. That often means politicizing the prosecution, using theatrics and other tactics to bring

Kris Hermes has been an active, award-winning legal worker-member of the NLG and has been a part of numerous law collectives and legal support efforts. He is the author of *Crashing the Party: Legacies and Lessons from the RNC 2000* (PM Press), which examined how Philadelphia helped develop and usher in today’s model of policing political protest. His book explains how activists and legal workers used a collective, defendant-led strategy to push back against the legal system and win.

politics into the courtroom. One of the most common strategies used by political defendants to buck the system is to refuse plea bargains and demand jury trials.

A Tilted Guide is careful to underscore up front the collective's framework for looking at political defendants. "[A]ll criminal charges [are] political," states the Introduction. "[P]eople would not be in jail if private property and the state did not exist, and if racism, hetero-patriarchy, capitalism, and the like did not run our world."

The Tilted Scales Collective is explicit in naming political defendants as those whom "the government targets as a threat to the ruling power structures and social orders," including people arrested at a protest, charged with committing an illegal act, swept up in a campaign of state repression, entrapped, or targeted while incarcerated.

While the Tilted Scales Collective is circumspect about the risks involved in fighting criminal charges and concedes that there are "many perfectly valid reasons to opt for a quick resolution," the collective is also clear about the emphasis it places on the value of fighting charges and "getting some kind of victory out of the fight."

We take inspiration from the many political prisoners and prisoners of war who have continued to engage in and contribute to their struggles despite the state's best efforts to break their wills and isolate them from their communities and movements. Stories from our captured comrades are spread throughout this guide to show how much their struggles in court and in prison have strengthened and added to our movements. Their strength, resolve, and resilience show that people can figure out ways to handle their situations with dignity, integrity, and a commitment to the radical principles that made them targets of state repression in the first place.

Fortunately for political defendants, the National Lawyers Guild and its members have had a long tradition of fighting their charges. But there are many practicing attorneys who are generally unfamiliar with political cases and have little understanding of the motivations and goals held by their radical activist-clients. Even lawyers who consider themselves "movement attorneys" are often at odds with the legal and political strategies their clients want to employ. But, while *A Tilted Guide* might help lawyers to better understand their clients' motivations, it was written for defendants with the promise of a forthcoming "companion guide for lawyers."

In the meantime, *A Tilted Guide to Being a Defendant* can be used to supplement the advice of those criminal defense attorneys who are either too uninformed about litigating politicized cases or too motivated by other interests to help educate their clients on how to navigate the legal terrain as

a political defendant and how to use certain legal strategies and tactics to fight back against the state.

Perhaps not since the *Bust Book: What To Do Until the Lawyer Comes*¹ has there been as useful or helpful a tool for radical political defendants caught up in the criminal legal system.

How-tos for political defendants

A Tilted Guide opens with the chapter “On Being a Defendant,” which prepares political defendants for the often complicated and overwhelming criminal legal process. It reminds defendants that they are not alone, that support is available and accessible, and it covers how to talk about the case with comrades, loved ones, and the media.

One of the most important chapters of *A Tilted Guide* is the second, “Setting and Balancing Personal, Political, and Legal Goals,” which examines the need to respect all of the potential (and sometimes competing) interests of a political defendant. From being sincere about one’s limitations in doing prison time if convicted, to contemplating the political goals of defendants’ comrades and social movements, and the very real legal consequences of engaging in a political trial, *A Tilted Guide* pushes us to look at these different goals with an equitable and honest eye.

The following chapter on “Common Legal Situations” offers general advice on what to expect from the prosecution in addition to important information on grand juries, surveillance and infiltration, as well as the prevalence and use of conspiracy charges, entrapment, and terrorism statutes to undermine political movements.

The next three chapters review the important considerations for working with lawyers, co-defendants, and defense committees, which can be crucial to political, legal and emotional support throughout the prosecution.

The chapter on “Working with the Media” takes a rare look at utilizing the various forms of mainstream, independent, and social media to craft and seize the narrative. Without shying away from the risks associated with defendants putting themselves out in the public eye, *A Tilted Guide* addresses the importance of exploiting media opportunities and using the media strategically in order to advance defendants’ political and legal goals.

A Tilted Guide closes with chapters on “Resolving Your Case” and “Surviving in Prison.”

The chapter “Resolving Your Case” explains how a conspiracy against defendants permeates the criminal legal system in which “only around 5 percent of criminal cases make it to trial,” with the rest ending in plea agree-

ments or, on rare occasion, charges being dropped. Essentially, the deck is stacked against the vast majority of defendants, and especially political defendants. But, that doesn't prevent defendants from exploiting possible legal or political points of leverage.

Sometimes, just the threat of going to trial produces sufficient leverage for the prosecution to dismiss a case or negotiate a more favorable plea agreement. But understanding the political vulnerabilities of key officials in positions of authority, and employing political strategies to shift public opinion can often significantly change the outcomes of criminal cases. Using certain legal strategies that serve to reveal the methods and motivations of the state as well as incorporate a political narrative into the case—both before and during a trial—can also have a positive effect favoring the plight of political defendants.

A Tilted Guide stresses the importance of not resolving one's case at the expense of their co-defendants or political principles. In order to gain convictions and an upper hand, the state will often try to pit co-defendants against each other by encouraging cooperation with the prosecution. As such, *A Tilted Guide* encourages support for all defendants, despite (or perhaps because of) higher level charges imposed against some defendants, in order to avoid cooperating plea deals.

The chapter "Surviving in Prison" is a gem, with stories from our political prisoners and prisoners of war who have endured years behind bars in the U.S. and managed to retain their principles and their dignity. "[A] common theme," declares the Tilted Scales Collective, "is that prison is a hard place that makes living difficult, especially living according to your revolutionary principles. Yet another theme is that staying connected to loved ones and radical movements is possible—doing so just takes a lot of sustained effort and internal fortitude."

The invaluable comments in this chapter show how our political prisoners and prisoners of war "have managed to survive while maintaining their revolutionary ideals and their connections to radical struggle. Their continued commitment to struggle makes them an integral part of our movements and communities, and an inspiration to those of us on the outside."

Some of the recommendations from the Titled Scales Collective and people who have weathered time in prison include staying true to one's principles and integrity, developing one's political knowledge, understanding, and skills, as well as staying connected to friends, loved ones, and supporters. According to Tilted Scales, it can also be important to maintain the legal fight from inside, but have reasonable expectations of success.

Even the appendix on “The Criminal Legal Process” is chock-full of helpful information in which the Tilted Scales Collective demystifies the criminal legal process and familiarizes defendants with the legal mechanisms of repression. From the secrecy of grand jury deliberations to the arraignment process and from the nuances of bail hearings to pretrial hearings and trial, the collective lays out helpful step-by-step explanations of a sometimes complicated and often terrifying process.

Much-needed guidance

Ever since the escalation of unrest that occurred after the 2014 murder of Michael Brown in Ferguson, MO, many Black Lives Matter organizers have been targeted, violently attacked, arrested and charged with felonies. Water protectors at Standing Rock, who endured violence by the state as well as private security companies, were charged with federal felonies and are facing years in prison for nonviolent protest. *A Tilted Guide* was written to help support defendants like these.

Most recently, on January 20, the day of Donald Trump’s inauguration, hundreds of protesters, journalists, legal observers, and bystanders were trapped and indiscriminately attacked by police using chemical and projectile weapons. Ultimately, more than 200 people were arrested and, in an unprecedented move, all were indicted on at least eight felonies each and face the potential of 75 years in prison if convicted on all charges.

J20 defendants, as they refer to themselves, are taking a page both figuratively and literally from *A Tilted Guide* in order to help them navigate dangerous legal terrain and to forge a collective legal strategy that aims to advance both their political and legal goals. Many of the defendants, some of whom have now read *A Tilted Guide*, agreed to work together under the banner #DefendJ20Resistance and to reject attempts by the state to coerce cooperation against fellow defendants.

Even some of the J20 defense attorneys have read *A Tilted Guide*. It has helped them better understand the organizing methods and motivations of their political clients. While the J20 attorneys have often been puzzled or frustrated by defendants’ actions, the learning process assisted by *A Tilted Guide* has been invaluable and insightful for everyone involved. In a situation fraught with peril, J20 defendants are very fortunate to have *A Tilted Guide* to refer to and use as a tool for fighting back against today’s form of political repression.

As political protesters and movement attorneys steel themselves for difficult times ahead with President Trump’s already exhibited intolerance of dissent, activists and lawyers alike can and should turn to *A Tilted Guide* as

a real-world resource for navigating the rough terrain of politically-motivated prosecutions. Hopefully, in the coming months and years, *A Titled Guide* will strengthen the work of defendants and their attorneys in mounting effective strategies to mitigate legal harm and help advance our political struggles.

More than thirty years after radical activists wrote the *Bust Book*, *A Titled Guide* brings a much-needed tool to radical activists at a time of increased political repression in the streets and in the courts.

NOTES

1. KATHY BOUDIN, BRIAN GLICK, ELEANOR RASKIN A& GUSTIN REICHBACH, *BUST BOOK, WHAT TO DO UNTIL THE LAWYER COMES* (Grove Press, 1970). *Bust Book* was published at a time of great unrest in the U.S. and, rather than the theoretical approaches commonly offered by the legal community, *Bust Book* offered practical approaches to political activists, arrestees and defendants for dealing with the state, whether on the street, in jail or in the courtroom.



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Michael Avery

**BOOK REVIEW:
BLOOD IN THE WATER:
THE ATTICA PRISON UPRISING
OF 1971 AND ITS LEGACY**

Heather Ann Thompson, *Blood in the Water: The Attica Prison Uprising of 1971 and Its Legacy*, Pantheon; 2016. Hardcover: 752 pages. \$35.00.

Blood in the Water, by Heather Ann Thompson, provides a remarkable historical record of the tragedy of the Attica prison rebellion. In prose that at times will stop your heart, she takes the reader from the uprising on September 9, 1971 to the final settlement of the last set of claims on July 12, 2005. Throughout, the brutality and racism of the State and its officials weigh heavily on the narrative.

In September 1971, I had been a lawyer for one year. I was nearing the end of my employment by the ACLU, representing Black Panthers and others who protested the murder trial of Bobby Seale, Erika Huggins, and others in New Haven. I was dimly aware of the events at Attica and the trials that followed. I knew friends from the National Lawyers Guild (NLG) who had gone to New York to handle those cases. But Attica hovered only on the edge of my radar screen. I became busy with police misconduct litigation in New Haven, and later Boston. To my embarrassment today, I knew very few details of what was happening in the aftermath of Attica. I mention this because, even though over the years I have handled horrible cases for the families of victims of police murder and innocent defendants who spent decades in prison as a result of government frame-ups, reading *Blood in the Water* was stunning. I was simply not prepared for the shock of Thompson's painstaking recreation of the brutal retaking of the prison by the state police, or for her detailed account of the decades long callous indifference of New York State officials to the consequences of their actions.

Thompson sets the stage by recounting the abominable conditions at Attica before the rebellion. Prisoners were required to work, but few earned more than six cents per day. The prison supplied little by way of necessary supplies—one bar of soap and one roll of toilet paper per month. The men received only one shower per week and only two quarts of water per day, with

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which they had to do all their washing, take care of their personal hygiene, and keep their cells clean. Exercise opportunities were severely limited. There were no newspapers, few books, no television, and only three available radio stations. Talking in one's cell was forbidden after eight p.m. Only two doctors served the more than twenty-two hundred prisoners, and they were largely unresponsive to the men's needs. The prison provided no books in Spanish, and officials refused to deliver any letters from the outside that were not written in English. The untrained and underpaid guards often had to work a second job, leaving them stressed and exhausted. Brutality was common and tensions at the prison were high.

Political consciousness among the prisoners had been increasing. News of protests and rebellions in other institutions had raised hopes for change. Activists from the Black Panthers, The Nation of Islam, the Weather Underground, and the Young Lords Party assumed leadership roles in the Attica population. Attempts to obtain reforms by drafting manifestos and communicating with state officials led nowhere.

Concern over the safety of two men who had been taken to punishment cells was the immediate precipitating factor for the rebellion. Prisoners believed the men had been beaten and attacked the guard they believed was responsible. Events rapidly spiraled out of control. Prisoners seized keys from guards, broke down a gate that separated two parts of the prison, obtained more keys and eventually gained access to all the cell blocks. In the process, guard William Quinn was knocked unconscious and trampled. He would later die in the hospital, creating the likelihood that some prisoners would be prosecuted for murder. This dramatically compromised the possibility of negotiating an amnesty once discussions between the prisoners and officials began.

Guards and state troopers succeeded in taking back most of the other cell blocks later in the day, and eventually the rebelling prisoners congregated in D Yard, with guards and civilians as hostages. The stand-off lasted five days. Thompson provides a fascinating account of how the prisoners governed themselves during this period. After an initial period of dangerous anarchy, they established a security detail to keep order. Eventually, officials allowed several outside observers, including Tom Wicker from the New York Times and Attorney Bill Kunstler, into D Yard. The observers attempted to broker a settlement. The prisoners could not give in without an assurance of amnesty. There was no possibility the State would agree to it. Thompson's description of the daily back and forth between the prisoners inside and the politicians outside is suspenseful, creating an increasing sense of foreboding, although the reader knows that failure was inevitable.

Governor Nelson Rockefeller made the decision to attack. On September 13, helicopters dropped CS gas into the yard. State police, corrections officers, sheriff's deputies, and park police, armed with carbines, shotguns, and all manner of personal weapons, stormed the prison. They came in literally with guns blazing. The prisoners had no firearms. It was a massacre. Among those massacred were several guards who had been taken hostage, shot to death by law enforcement officers. Sustained beating and torture of prisoners followed the armed assault. Racism ran rampant.

One of the most painful accounts Thompson presents is taken from the testimony in a later trial of Frank Smith, known as "Big Black." Thompson writes:

Black's testimony transported the jury back to the hazy, gas-choked prison yard where he and hundreds of other men had been forced to strip naked and crawl or stumble across the muddy rutted yard while suffering repeated blows from troopers and COs.

Officers made Black lie naked on a table with a football under his chin for six hours. A photograph documents this horror. Guards threatened to shoot him if he allowed the ball to fall, repeatedly struck him on his testicles, dropped burning cigarettes on his body, and subjected him to racial insults. After they let him up, they forced Black to run a gauntlet of officers across a glass littered floor while they beat him with ax handles and batons. They beat him further in a dark room until he passed out, and then required him to lie naked, spread-eagled, on a cold cement floor. Officers continued to hit his genitals and forced him to submit to Russian roulette.

The catastrophic results of the senseless means used to retake the prison triggered an avalanche of investigations, commissions, reports, and litigation. Thompson spent ten years researching this material. The State of New York contrived to hide, destroy, or otherwise deny access to much of the relevant documentation. Nonetheless, Thompson's unrelenting determination succeeded in gaining her sufficient access to primary materials to compile a detailed and truthful record of the uprising and its legacy.

The story of the defense of criminal charges brought against the prisoners and the prosecution of civil claims brought against state officials is a tribute to the members of the NLG and the National Jury Project who participated. Lawyers, law students, and legal workers came from across the country to represent the prisoners and their families. Although there were some guilty pleas and a few convictions of prisoners after trial, there were significant exonerations. In 1976, the remaining prosecutions were dismissed and Governor Hugh Carey granted clemency to all the convicted defendants. Thompson's detailed account of the trials, and the courtroom and political

strategies employed, demonstrates how essential the sustained commitment of the NLG was to the result. The civil class action on behalf of the prisoners and their families was not settled until January 2000. Although many people participated in that litigation, the settlement was due in great part to the extraordinary commitment of the late Liz Fink, the New York NLG lawyer who had been involved from the beginning of the Attica saga.

Thompson's account is a powerful indictment of New York state officials for their heartless indifference to justice over a thirty-four-year period. The final chapters describe the settlement of claims on behalf of deceased and injured guards and their families in 2005. Ironically, this was the last group of claimants to receive compensation. The author provides a shocking account of how the State attempted to defraud these people. Officials repeatedly promised to "take care of" the families of the guards who had been killed and injured. When recipients cashed small checks from the State, purportedly for food or necessary expenses, the government took the position that by doing so they had elected to receive paltry Workers' Compensation remedies, precluding them from suing for fair damages for the negligence and intentional acts of the state actors who caused the injuries and deaths. It took years to overturn this maneuver.

Heather Ann Thompson made an outstanding commitment to compile this encyclopedic account of the Attica saga. To be honest, it requires a significant commitment on the part of the reader to consume the entire story. The reader who makes that commitment, however, will be well rewarded. Thompson is a powerful writer. She tells this story in rich detail, with a compassionate understanding for all the victims. When it comes to the culpable officials, she names names, and provides detailed evidence, from Governor Rockefeller to Attica Superintendent Vincent Mancusi and the sadistic officers who beat and tortured defenseless prisoners, as well as the bevy of lawyers, bureaucrats, and elected officials who attempted to cover up the truth. One cannot read this book without developing a strong sense of shame for how our society treated the men at Attica, and continues to treat the vast numbers of our people whom we incarcerate.



Alan Levine

**ON ACCEPTING THE
CHAMPION OF JUSTICE AWARD,
NY CITY CHAPTER OF THE NATIONAL
LAWYERS GUILD ON JUNE 9, 2017**

I am deeply honored to be recognized by this award from the city chapter of the Guild, whose relentless defense of political activists I have admired during all my years as a lawyer.

To accept this award in the presence of so many friends and colleagues and family is a great joy. My children—Emma, Alex, and Abby—thank you for being here. And thank you for being who you are.

To my wife, Donna—you have modelled for me a life of tremendous commitment, passion, integrity, and love that inspires me every day. I thank you for that, and much more. I am the luckiest.

Then there's the pleasure of sharing this night with Lucy Billings, with whom I—and Gideon Oliver—had a memorable meeting one morning at 5am at an upper west side coffee shop in November 2011 when she signed a temporary restraining order barring the police from excluding protesters from Zuccotti Park. It's nice to see you again, Judge Billings, particularly at such a civilized hour. And let me just say to those of your colleagues who are critical of what you did that early November morning— it bears remembering that the police had attacked a group of peaceful protesters aggressively and without warning. What you did took great courage, for which we are all grateful.

So, a few thoughts about what, after all these years, I have come to believe about radical and community lawyering.¹

The first has to do with change and how change happens. I came to social justice lawyering in the 1960s. First in the south, working with civil rights workers during the freedom summer of 1964 and into 1965, then with the NYCLU in the 1970s.

Those were heady times politically, and lawyers were in the middle of a lot of it, winning some cases and believing that the law was an instrument—even the instrument—of social change. It was a fairly naïve view both of

Alan Levine began his civil rights career representing activists in Mississippi and Alabama during the Freedom Summer of 1964. During his storied career he has represented Vietnam war protesters, Occupy movement activists, and countless others facing punishment for seeking a more humane and just society.

the law and of how change comes about. As my politics developed and as I worked alongside activists and organizers, I slowly came to a certain humility about the role of lawyering in the process of social change.

My “a-ha!” moment came during the two years Donna and I lived in Costa Rica and worked with an indigenous organization that was fighting the loss of Indian lands to white settlers. A Costa Rican anthropologist and I obtained funding for a legal project that seemed, at first, to be about a simple issue of land rights. It turned into something else entirely. The project worked with indigenous leaders to conduct a series of workshops, a process from which emerged a history that had largely been lost to the community. It was a history that revealed the connections between their loss of land and the dominant society’s imposition upon them of an alien form of governance. And so, despite what had at first seemed perfectly clear to me, the legal challenge turned from one about land rights to a claim under international law for the right of self-governance.

So that was my lesson about what it means to put my legal expertise in the service of a true collaboration with community-based activists. It’s a lesson that has informed my lawyering ever since.

Aside from working with communities and activists and doing the things we all do in court, there is one other role for us as radical lawyers that I want to talk about briefly. I believe our legal training gives us a particular capacity—and responsibility—to speak out against those forms of repression that are done in the name of the law. There are many examples.

One is the so-called “war against terror,” a war that is deeply Islamophobic—subjecting Muslims to flimsy prosecutions and imposing pervasive surveillance on the Muslim community. It is a war that demonizes Muslims and has not a shred of law enforcement justification.

In addition, this war has been transformed into a war on dissent. As we now know, assaults on the Occupy encampments across the country were led by the Department of Homeland Security, an agency created to combat terrorism.² We learned while protecting the rights of protesters in the 2004 RNC Litigation of the NYPD’s concern about the “tripartite threat of terrorism, violence, and protest.”³ And just last weekend, at protest of the Israel Day Parade, the NYPD deployed its strategic response group,⁴ whose mission is both terrorist situations and protest control.⁵

A mindset that uses terrorism and protest in the same sentence is one that insures aggressive and hostile policing of dissent. There is a reason the First Amendment protects not only freedom of speech, but also the “right of the people to peaceably assemble.” Parades, marches, encampments, ral-

lies—all impact public policy differently than other forms of speech. So in doing our important defense of protest cases, it is important that we speak out about the larger political forces that are at work.

A second example: the First Amendment has been getting lots of attention lately regarding episodes on college campuses where students have disrupted talks by spokespersons for various far-right causes. The criticism of the students in the media is about violating the speakers' First Amendment rights.⁶ Whether you disagree with the students or not, the one thing that is not at issue when speech is curtailed by students is the First Amendment, which can only be abridged by the state.

Notably the ACLU, which knows a lot about the Constitution, has been largely silent about these incidents. On the other hand, an organization called The Foundation for Individual Rights in Education (FIRE), has been loudly and consistently critical of the students. FIRE, it turns out, is bankrolled by a group of right-wing donors, including the Koch brothers.⁷ Those donors know that what's at stake in these controversies is not free speech, but rather preserving elite colleges' legacies of white male privilege. The students know that, too.

These colleges, with their history of discriminatory admissions and hiring policies, buildings named after racists, indifference to sexual assaults and racist abuse, courses and programs that fail to challenge foundational principles of white male supremacy, have utterly failed in their obligation to insure that their increasingly diverse student bodies live on a campus that affords them dignity, respects and honors their differences, and reinforces, rather than undermines, their self-worth.⁸ Read the students' demands.⁹ That's what these controversies are about. I think it's important that we, as lawyers, say so.

Finally, Palestine and Israel. My involvement is both as a lawyer and an activist. Before I say why I think the legal issues should compel our attention, let me say that, for me, the struggle of the Palestinian people for justice is one of the great moral issues of our time. This is true for a number of reasons: As a citizen of the U.S., because my government funds Israel's apartheid regime and blocks international action against its human rights abuses; as a resident of New York City, whose police department collaborates with Israeli security forces¹⁰ and thereby facilitates their violent and daily oppression of Palestinians; as a Jew in whose name Israel purports to act when it does all these things.

As for the legal issues, Israel and its supporters have imposed their power to pervert justice, suppress speech, and endanger people's lives and

jobs. Then there are the various state laws and orders penalizing those who support the peaceful, constitutionally protected boycott of Israel.¹¹ The Center for Constitutional Rights and Palestine Legal devote their time and energy working tirelessly with activists to protect their rights. It is an issue on which we lawyers have a particular capacity to be heard.

Your award calls me a champion of Justice. In truth it is the political activists, including so many of my clients, who have been the most remarkable champions of justice. I have been greatly privileged to represent and to have learned so deeply from them. It is in that spirit—as a lawyer for champions of justice—that I gratefully accept your award.

NOTES

1. These remarks were revised for publication.
2. Matt Sledge, *Homeland Security Tracked Occupy Wall Street ‘Peaceful Activist Demonstrations,’* HUFFPOST (Apr. 2, 2013, 8:58 PM), http://www.huffingtonpost.com/2013/04/02/homeland-security-occupy-wall-street_n_3002445.html.
3. See Statement, RNC Plaintiffs’ Attorneys, 1800 People Arrested During 2004 Republican National Convention Settle Lawsuits Against NYPD (Jan. 15, 2014), *available at* <http://nlgny.org/wp-content/uploads/2014/01/PressStatement-RNC-FINAL.pdf>.
4. *No Apartheid In Our Name: LGBT Jewish Groups Block “Celebrate Israel” Parade*, CHANGENEWS, <http://changenews.tk/news/No-Apartheid-in-Our-Name:-LGBT-Jewish-Groups-Block-%22Celebrate-Israel%22-Parade> (last visited July 19, 2017).
5. Dean Meminger, *Heavily Armed Police Unit, Focused on Terror Attacks, Fans Out Across All Boroughs*, SPECTRUM NEWS NY1 (Dec. 22, 2015, 7:01 PM), <http://www.ny1.com/nyc/all-boroughs/criminal-justice/2015/12/22/heavily-armed-police-unit-focused-on-terror-attacks-fans-out-across-all-boroughs.html>
6. Brooke Singman, *College Students Testify: Free Speech Under Assault on Campuses*, FOX NEWS (June 20, 2017), <http://www.foxnews.com/politics/2017/06/20/college-students-testify-free-speech-under-assault-on-campuses.html>.
7. Cecilia Capuzzi Simon, *Fighting for Free Speech on America’s Campuses*, N.Y. TIMES (Aug. 1, 2016), <https://www.nytimes.com/2016/08/07/education/edlife/fire-first-amendment-on-campus-free-speech.html>.
8. See Wendy Leo Moore & Joyce M. Bell, *The Right to Be Racist in College: Racist Speech, White Institutional Space, and the First Amendment*, 39 LAW & POL’Y 99 (2017).
9. See WeTheProtesters, *Campus Demands*, THE DEMANDS, <http://www.thedemands.org> (last visited Aug. 1, 2017).
10. Ali Winston, *U.S. Police Get Antiterror Training in Israel on Privately Funded Trips*, ALTERNET (Sept. 23, 2014, 6:38 AM), <http://www.alternet.org/civil-liberties/us-police-get-antiterror-training-israel-privately-funded-trips>.
11. CCR, *National Lawyers Guild, and Palestine Legal Urge California Legislators to Oppose Anti-Boycott Bills*, CTR. FOR CONSTITUTIONAL RIGHTS (Feb. 10, 2016), <https://ccrjustice.org/ccr-national-lawyers-guild-and-palestine-legal-urge-california-legislators-oppose-anti-boycott-bills>.



Some, like his tweets attacking journalists, merely confirm Trump's bizarre and dangerous personality. Pushed into the background, however, are under-reported, yet important, policy decisions.

Laura Riley's "Sessions' Reversal of the Private Prison Phase-out" shines a spotlight on one such decision. Shortly after assuming office Attorney General Jeff Sessions announced that he would abandon the Obama administration's decision to scale back the federal government's reliance on private prisons. The Obama administration's decision was based on strong evidence of rampant prisoner abuse, poor working conditions for correctional staff, and a host of other problems. In this article, Riley explains how the symbiotic relationship between the corporations who run these prisons and the Trump administration makes the escalation of for-profit incarceration both inevitable and dangerous.

The next two features in this issue profile two members of Trump's cabinet. In "Betsy DeVos and the Voucher Vision of Education" Brett DeGroff, an attorney and education activist from Michigan, DeVos's home state, explains the dangers of the new Secretary of Education's right-wing ideology and contempt for public education. In "James Mattis: Trump's Military Decider" Marjorie Cohn describes the military record and political views of the new Secretary of Defense. Only in an administration led by someone like Donald Trump is it reasonable to hope, as so many have begun to, that a Defense Secretary who once said "be polite, be professional, but have a plan to kill everybody you meet" might be a stabilizing influence.

Next are three book reviews that should be of special interest to *NLGR* readers. Paul Von Blum reviews *Writing to Save a Life: The Louis Till File* by John Edgar Wideman, which explores the racist military criminal procedures whereby Louis Till, father of famous murder victim Emmitt Till, was hanged during World War II. Kris Hermes reviews *A Tilted Guide to Being a Defendant* by The Tilted Scales Collective, designed to aid political dissenters and activists charged with crimes. And Michael Avery reviews *Blood in the Water* by Heather Ann Thompson, a massive tome chronicling the legendary Attica prison uprising.

Alan Levine's career as a people's lawyer began during 1964's Freedom Summer when he represented civil rights activists in the most racially segregated and hostile parts of the nation. For over 50 years he's boldly embodied the Guild's values in his legal practice. It is a privilege to close this issue with his speech upon accepting the "Champion of Justice" Award from the Guild's NYC Chapter.

—Nathan Goetting, *editor in chief*