CREATIVE AND INFORMED REPRESENTATION OF ACTIVISTS IN CRIMINAL CASES: DEFENSES / MOTIONS TO DISMISS

APPENDIX 1

TEN QUESTIONS FOR SOCIAL CHANGE LAWYERS
by William Quigley

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Article

*204 TEN QUESTIONS FOR SOCIAL CHANGE LAWYERS

William Quigley [FN1]

Social change lawyering starts with the idea that history shows us that systemic social change comes not from courts or heroic lawyers or law reform or impact litigation, but from social movements. [FN2] Social change lawyers work with, assist and are in constant relationship with social movements working to bring about social change. [FN3]

Social change lawyering is a process, not an achievement. It is a path we walk with others to confront the root causes of injustice. What lies ahead is not known. There is no map. Our directions are set by constantly checking a compass that points toward justice. There are obstacles that force us to change directions and ways of going forward.

*205 What follows are 10 thoughts on social change lawyering. They are questions and criteria we can use to define and evaluate social change lawyering and to help us make sure we are following that path toward justice.

1. Where does the direction for the lawyering come from?

Commercial lawyers are very clear about this--whoever pays the bills directs the work. For social change lawyers the direction of the legal work comes from the social movement that is working to bring about institutional or systemic or radical change. This work may include advice, defense, discussion, protection, advocacy or litigation.

The point is not what the work is, but why this work is chosen and who participates in making those choices. For social change lawyers, the movement makes these decisions in consultation and in ongoing relationship with the lawyer. This is unlike other types of public interest lawyering or law reform or impact litigation where the goal is often set by the lawyers themselves or the institution where they work.

2. Where does the power go?

Is the purpose of your legal work to redistribute unjust power relationships and diminish the power of the unjustly powerful and transfer that power to the unjustly disempowered? Is the legal work going to empower organizations of

people on the margins working for change? Or is this about the lawyer and choices about what is important made by the lawyer?

There is nothing at all wrong with public interest lawyers achieving personal satisfaction in their work. But that is not the primary goal of social change lawyering. The primary goal of social change lawyering is to challenge the injustices identified by social movements working to dismantle unjust structures and to shift power to the people of the movement so they can bring about change. [FN4]

3. Who gets the glory?

If the legal work or the publicity or the fundraising is about the lawyers or their legal organization, then it is not likely empowering social justice movements. If the lawyer is the media face of the work rather than the clients and ***206** the movement, then it is not too likely really in service of the movements--unless that is what the movement decides is right for the occasion. [FN5]

4. Is there an ongoing commitment to work with groups of the most impoverished and the most marginalized people?

The focus of the work must remain on these groups and their efforts to overturn the root causes of the unjust status quo. [FN6]

5. Is human rights advocacy an essential part of the work?

Human rights advocacy, though still in its infancy compared to constitutional and civil rights work, offers tremendous upside for social justice. [FN7] It is people-based, offers a radical critique to most current law, and illustrates the gap between law and justice.

6. Is the legal work just one part of the overall social change movement?

Is the lawyer part of a team in the movement working in partnership with other strategies for social change? An organizer friend of mine likes to talk about the legal component of social change as one finger on the hand--or 20 percent of the effort. Other fingers can include education, outreach, communications, and continual organizing to build the group and to expand the number of people involved. [FN8]

If the legal work is the primary part of the campaign, it is unlikely that the legal component is in relationship with a real social change movement. The civil rights era provides cautionary examples here with examples of many different types of lawyering, from the lawyer-led litigation method of the NAACP Legal Defense and Educational Fund to the grassroots lawyers who specifically rejected lawyers as leaders of the movement. [FN9]

7. What work is the lawyer actually doing?

Social change movements depend on face to face and group meetings and outreach and planning and evaluating actions. Is the lawyer spending time on the ground, going out, meeting with movement partners, participating in group *207 meetings and actions? Or is the lawyer an office advocate whose primary relationship is with the computer and law?

This is a tough challenge. Litigation, once started, tends to create its own internal life, a very demanding life of memos and briefs and legal conferences and research and writing and emails that can quickly take over. All that is important, and it is important to do it well. However, the lawyer and the social change organization she is in relationship with need to work together to maintain that relationship.

All relationships demand time. An honest examination of how the lawyer spends her time will indicate whether the lawyer is working with and for a social movement or is some other type of lawyer. No matter how demanding litigation is, social change lawyers have to create room to work and be in relationship with the people and the movement that they are taking direction from.

8. Is the lawyer willing to be uncomfortable on some sort of regular basis?

Legal education does not train anyone to be a social change lawyer--quite the opposite. Social change lawyering forces us to confront our training and our privilege and the patterns of work that sometimes constitute our definition of self. Law school culture encourages people to think of themselves not just as educated and trained but as culturally and politically and economically different from, even superior to, most other people. In order to be a social justice lawyer, people have to consciously set aside the social privilege of being a well-educated professional and rediscover their own shared humanity with the people whom our legal education would have us call clients.

This does not mean people have to stop being lawyers; it simply means to stop acting like socially privileged, specially powered individuals. Lawyers must learn that while they certainly have much to teach and to give, they also have much to learn and to receive in true social justice-based relationships. If lawyers are going to be in solidarity and service to social change movements, this is challenging but essential.

Working with groups of people involved in social change movements is often messy and chaotic compared to litigation. There is no book of rules or library *208 of precedents about how this is done, and no judge to make people behave or move on. Social change lawyers need to have good analytical tools but also need to have big hearts and understanding and patience and a willingness to participate in experiences where it is not clear that participation will necessarily translate into traditional legal work.

Consider, for example, the instructions from the Lawyers Constitutional Defense Committee to incoming volunteer grassroots social justice lawyers who were arriving to help out in the civil rights struggle in the South:

> The volunteer civil rights lawyer is not a leader of the civil rights movement. We are there to help the movement with legal counsel and representation, not to tell the movement what it should do. You may, if asked, suggest what the legal consequences of a course of action might be, but you may not tell them whether or not they should embark on it. They have more experiences than you in civil rights work in the South, and they are

> responsible for the action programs. Even if they make mistakes, they are theirs to make; your task is to defend their every constitutional and legal right as resourcefully and as committedly as you can, even if they have made a mistake. Until the time comes when they ask us to lead the movement, do not be misled by any advantage of education, worldly experience, legal knowledge, or even common sense, into thinking that your function is to tell them what they should do. The one thing that the Negro leadership in the South is rightly disinclined to accept is white people telling them any further what to do and what not to do, even well-meaning and committed white, liberal Northerners. [FN10]

9. Is the work on the margins?

If someone else is already doing the work, social change lawyers are probably needed elsewhere. Social change lawyering is a bit like leaving the main camp and going out to scout and claim some unchartered or contested territory. Working out there is social change work. If enough others come out to join in the work, it is probably time to leave that area and move to another contested area where social change organizations need a partner.

For example, the National Guestworker Alliance worked with foreign student guestworkers to organize a challenge to the State Department's J-1 cultural visa program. The program, which turned a cultural exchange opportunity into the nation's largest temporary worker program, was overturned when State banned a leading sponsor company from bringing any more foreign students ***209** to the United Statesfor summer jobs. Students, with help from the National Guestworker Alliance and its legal team, protested working conditions at a plant in Pennsylvania that packed Hershey's chocolates, and they ultimately forced significant changes in the program. [FN11]

10. Is it work with people?

Work on "issues" alone is not social change lawyering and, for most people, is not sustainable. You have to be in relationships with the people you are working with and for. You have to give but also realize you have to take--you teach but you also learn. Only people offer opportunities for excitement and joy and hope and love.

Real social change work will partner us with people who live on the edge. Life at that edge seems precarious and insecure from the perspective of the traditional legal profession. But working with people at the edge is amazing because where the world sees poverty, oppression, and want--at that same place you will find people and organizations demonstrating generosity, beauty, courage, community, and solidarity in inspiring acts that will radically transform your life.

This will give you the energy to keep challenging the status quo in your work and in your personal life. This is the essence of social change lawyering-- addressing the root causes of injustice by putting your legal skills at the service of social justice movements and the people in them.

A Final Word

These are just some preliminary thoughts of one person. They surely leave out many ideas and probably misstate some others. You must figure out your own way of being a social justice lawyer--but you have to do it as part of a team. There are no solo social justice actors; everyone is on a team.

Being on a team is critical because social change lawyers are swimming upstream against the current of our profession and usually the law itself. Law, as an institution and as a profession, is primarily about commerce and either maintaining the status quo or altering the current order slightly to accommodate modest change. It is uninterested in, if not hostile to, systemic social ***210** change. Any type of justice-based lawyering is therefore only a tiny bit of the profession and is actually--despite high-minded pledges to do justice and the like--profoundly countercultural to the law and legal profession.

Further, we lawyers are not educated at all about social justice change or social justice movements unless we do it outside of legal education. Lawyers, like everyone else, take pride and satisfaction in their skills and the development of their abilities. Because of our training, our profession, and our models of lawyering, social change lawyering seems to challenge the idea of being a good lawyer because it seems to take skills and ideas and work outside of our skill set.

There is a good reason why we want to continue to do what we have been doing-- we are comfortable and confident in those skills and in who we are. That is fine. That might even be some beneficial type of lawyering, but it is not social change lawyering.

All of us need to work continuously to re-center ourselves to become social change lawyers. We will fail many times, and we will make lots of mistakes. But when we fall, if we are willing to get back up and keep trying along with the rest of the team, we will be on the path to social change lawyering.

[FN1]. William Quigley is Janet Mary Riley Distinguished Professor of Law at Loyola University New Orleans College of Law, where he also directs the Law Clinic and the Gillis Long Poverty Center.

[FN2]. See The Concise History of Woman Suffrage (Mari Jo Buhle & Paul Buhle, eds., 2005); Frances Fox Piven & Richard A. Cloward, Poor People's Movements: Why They Succeed, How They Fail (1979); F. Arturo Rosales, Chicano: The History of the Mexican American Civil Rights Movement (1996), Gene Sharp, From Dictatorship to Democracy: A Conceptual Framework for Liberation (The Albert Einstein Institution, 4th ed. 2010).

[FN3]. Consider the experiences of Nelson Mandela, who, as a young lawyer, worked with the South Africa freedom movement. See Nelson Mandela, Long Walk to Freedom: The Autobiography of Nelson Mandela 60-195 (1995).

[FN4]. Arthur Kinoy, a legendary social change lawyer, worked with and represented the Mississippi Freedom Democratic Party in its challenge to the all white Mississippi delegation to the national Democratic convention. They fought before, during, and after the convention for the rights of black voters, especially those in Mississippi. When it ended, Kinoy wrote: "As I considered the result, I felt that we as people's lawyers, now not just a tiny band but hundreds of us all over the country, had fulfilled our responsibilities. We had found ways to use our knowledge, our skills, and our techniques for the purpose of assisting and advancing the struggle of millions of people for their fundamental rights to freedom, liberty, and equality." Arthur Kinoy, Rights on Trial: The Odyssey of a People's Lawyer 294 (1994)..

[FN5]. "Another problem is when the lawyer comes in and just takes over and becomes the leader and the spokesperson and it disempowers the community. The lawyer becomes the one everyone wants to talk interview and everybody wants to talk to. Then the media and the powerful don't ever talk directly to the people any more. The community's struggle becomes the lawyer's struggle and not the people's struggle.... I find it real destructive when outside people speak for the community. It is the simple folk that sustain us as people--not some lawyer or nun or hot shot organizer who comes in and does work in the community." Community organizer Barbara Major, quoted in William Quigley, Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations, 21 Ohio N. U. L. Rev. 455, 462-63 (1994).

[FN6]. Consider the excellent social justice lawyering work done at worker centers around the country. See Jennifer Gordon, American Sweatshops: Organizing workers in the global economy, Bos. Rev. (Summer 2005), http:// bostonreview.net/BR30.3/gordon.php.

[FN7]. One great example is the Vermont Healthcare is a Human Right Campaign detailed in James Haslam, Lessons From the Single Payer State, In These Times (Oct. 27, 2011), http://www.inthesetimes.com/article/12122/help_wanted_lessons_ from_the_single-payer_state/.

For a wider, more detailed discussion of the opportunities and challenges of human rights advocacy internationally and domestically, see Caroline Bettinger-Lopez et al., Redefining Human Rights Lawyering Through the Lens of Critical Theory: Lessons for Pedagogy and Practice, 18 Geo. J. on Poverty L. & Pol'y 337, 366-77 (2011).

[FN8]. Eric Mann, Playbook for Progressives: 16 Qualities of the Successful Organizer (2011).

[FN9]. See Thomas Hilbink, The Profession, the Grassroots and the Elite: Cause Lawyering for Civil Rights and Freedom in the Direct Action Era, in Austin Sarat & Stuart Scheingold, Cause Lawyers and Social Movements 60-83 (2006).

[FN10]. Id. at 73.

[FN11]. See Julia Preston, Hershey's Packer is Fined Over its Safety Violations, N.Y. Times (Feb. 21, 2012), http://www.nytimes.com/2012/02/22/us/hersheys-packer-fined-by-labor-department-for-safety-violations.html?_r=1&ref=juliapreston.

17 Pub. Int. L. Rep. 204

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CREATIVE AND INFORMED REPRESENTATION OF ACTIVISTS IN CRIMINAL CASES: DEFENSES / MOTIONS TO DISMISS

APPENDIX 2

Excerpts from Affirmation of Mark S. Mishler in support of pretrial motions in *People v. Wilson, et al.*

STATE OF NEW YORK CITY OF ALBANY
POLICE COURT COUNTY OF ALBANY

THE PEOPLE OF THE STATE OF NEW YORK,

-against- AFFIRMATION

ERIC WILSON, SUSAN R. WRAY,
MICHELLE WILSEY, THOMAS SWAN,
RON OSTERTAG, JANE McALEVEY,

Defendants.

MARK S. MISHLER, an attorney duly licensed to practice law in the Courts of this State, affirms under the pains and penalties of perjury as follows:

1. I am one of the attorneys for the Defendants in this case and make this affirmation in support of Defendants' pre-trial Omnibus Motion. I am fully familiar with the papers and proceedings herein and make this affirmation upon information and belief. The basis of my information and the source of my beliefs are conferences with the Defendants and investigations of the facts of these cases.

2. The Defendants were originally charged with criminal trespass in the third degree in violation of Section 140.10 of the Penal Law. A copy of the Information is attached as Exhibit "A". The Defendants were arraigned on April 25, 1985, and entered pleas of not guilty.

3. On May 9, 1985, the charge against each of the Defendants was reduced by the Honorable Thomas W. Keegan (City of Albany Police Court Judge), with the consent of the People, to

the charge of trespass in violation of Section 140.05 of the Penal Law.

MOTION TO DISMISS IN THE INTEREST OF JUSTICE

4. The Court has broad discretion to dismiss an information when prosecution or conviction of the Defendant would be an injustice. Ten factors are to be considered by a Court in determining whether to exercise this discretion. CPL 170.40. These factors, which will be discussed in sequence below, are:

> (a) the seriousness and circumstances of the offense;
> (b) the extent of harm caused by the offense;
> (c) the evidence of guilt, whether admissible or inadmissible at trial
> (d) the history, character and condition of the defendant;
> (e) any exceptionally serious misconduct of law enforcement personnel in the investigation, arrest and prosecution of the defendant;
> (f) the purpose and effect of imposing upon the defendant a sentence authorized for the offense;
> (g) the impact of a dismissal on the safety or welfare of the community;
> (h) the impact of a dismissal upon the confidence of the public in the criminal justice system;
> (i) where the court deems it appropriate, the attitude of the complainant or victim with respect to the motion;
> (j) any other relevant fact indicating that a judgment of conviction would serve no useful purpose.

5. Your deponent submits that dismissal of the Information in these cases is required due to the existence of compelling factors, considerations and circumstances, described below, which clearly demonstrate that prosecution or conviction

of the Defendants on the within charges would be an injustice.

6. The Defendants request that the Court take judicial notice of the laws of South Africa and of the fact that all aspects of the lives of the Black majority are restricted, segregated and controlled.

7. The current charge against each of the Defendants, trespass (140.05), is a violation, the least serious charge possible under the New York Penal Law.

8. At the time of their arrests, the Defendants were peacefully participating, along with approximately twenty other students, in a peaceful and orderly sit-in at the Business Office of the Central Administration of SUNY. The sit-in was an expression of protest against the SUNY Board of Trustees which had met that day and had refused to adopt a resolution to divest SUNY from financial interests in corporations which do business with the apartheid government of South Africa. (See Affidavits of Eric Wilson and Susan Wray, attached and incorporated herein.)

9. Your deponent believes that no harm was caused by the alleged offense. However, to the extent that SUNY believes that they were harmed by this peaceful and orderly expression of protest, any alleged harm to SUNY is clearly outweighed by the continuing harm to the non-white majority in South Africa who face countless degradations, abuses and injuries under the apartheid regime which is supported and maintained by foreign investment, including investment by US companies. (See Affidavits of Neo Mnumzana and Jennifer Davis, attached and incorporated

herein.)

10. Your deponent submits that the Defendants believe that they were present in the building based upon a license or privilege, and therefore no offense was committed. Thus, there is no evidence of guilt.

11. As shown in Eric Wilson's Affidavit, and the Affidavits of the other Defendants, the Defendants have deep and longstanding commitments to participating in activity to correct inequities and injustices in the world. For some, this commitment stems, in part, from their religious upbringing and from the public education they have received in New York State. The Defendants all believe that the eradication of apartheid in South Africa is among the significant tasks facing the world at this time. The conduct of the Defendants on April 24, 1985, was the most appropriate method available for them to express their views regarding the refusal of the SUNY Board of Trustees to divest from South Africa.

12. The decision by SUNY to "close" the building and to arrest the Defendants and twenty other peaceful protesters was a violation of Defendants' rights of freedom of expression, freedom of assembly, freedom of association, freedom of religious exercise and freedom to petition the government for redress of grievances. (See paragraphs 19 to 37, infra.) Thus, these decisions and the implementation of the decisions constitute serious misconduct on the part of law enforcement personnel.

13. No purpose would be served by imposing upon the

Defendants any sentence authorized for this offense. The Defendants do not believe they have done anything wrong or illegal and, in fact, believe their conduct was required by law, see paragraphs 38 to 51, infra, or at the least authorized pursuant to a license or privilege, see paragraphs 52 to 57, infra. No sentence would deter them from engaging in similar conduct in the future. In addition, the imposition of a sentence upon the Defendants could have the harmful effect of encouraging misconduct on the part of SUNY, in particular, to continue to violate constitutionally protected rights of expression, association, assembly, religion, and petition and to continue to invest in companies which help to support the apartheid regime in South Africa.

14. Dismissal of this Information would have no adverse impact on the safety and welfare of the community. As stated, above, the Defendants are likely to engage in similar conduct in the future, regardless of the outcome of this case. Even if it is accepted that this conduct harms the community, which the Defendants do not believe to be true, dismissal does not provide any protection to the community regarding the possibility of such conduct recurring. In addition, the beliefs of the Defendants regarding apartheid are shared by many people. As evidenced by the numerous sit-ins, demonstrations, and other manifestations of public opinion which have occurred throughout the country in recent months, such conduct on the part of others is likely to continue regardless of the outcome of this case.

15. Due to the widespread acceptance of the Defendants' beliefs regarding apartheid, the dismissal of this charge will increase the confidence of the public in the criminal justice system.

16. Protests against apartheid have taken place in numerous other cities in recent months. These protests have resulted in the arrests of thousands of individuals. In virtually all of these cases, the charges have been dismissed with no apparent negative impact on the confidence of the public in the criminal justice system and with no negative impact on the safety and welfare of the community. See certified transcript of disposition hearing in People v. Daughtry attached hereto as Exhibit "B" and incorporated herein.

17. Based upon all of the above stated reasons, the attached Affidavits, and upon the additional motions to dismiss discussed, infra, your deponent respectfully submits that these charges should be dismissed in the interest of justice.

18. The Defendants respectfully request that a pre-trial hearing be held for the purpose of gathering factual evidence regarding this motion to dismiss in the interest of justice.

* * *

MOTION TO DISMISS ON THE GROUNDS THAT THE DEFENDANTS' CONDUCT IS AUTHORIZED BY INTERNATIONAL LAW

38. The Defendants were arrested while participating in a peaceful and orderly sit-in protesting the refusal of the SUNY Board of Trustees to divest from holdings in companies which do business in South Africa.

39. Your deponent respectfully submits that the Defendants' conduct was authorized by international law as recognized in the United States and that the Informations should be dismissed pursuant to Penal Law 35.05 which states, in part:

> ...conduct which would otherwise constitute an offense is justifiable and is not criminal when:
>
> 1) Such conduct is required or authorized by law or by a judicial decree...

40. Your deponent submits that three sources of international law -- the United Nations Charter, the Nuremberg principles, and the international condemnation of apartheid -- combine to create an affirmative obligation on the part of individuals and governments to engage in concrete action against the continuation of the apartheid system.

41. Provisions of international law can become binding on Courts in the United States as treaties or agreements ratified or signed by the United States and thus made part of the supreme law of the land pursuant to Article 4, Section 2 of the United States Constitution and Article 6, Section 2 of the United States

Constitution. International law can also be given effect in Courts in the United States as part of the customary "law of nations". The Paquette Habana, 175 US 677 (1900) (the law of nations is "part of our law" (175 US, at 700)); Filartiga v. Pena-Irala, 630 F.2d 876 (2nd Cir., 1980) ("Courts must interpret international law...as it has existed and evolved among nations of the world today." (630 F.2d, at 881)).

42. Article 55 of the United Nations Charter states:

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
>
> a. higher standards of living, full employment, and conditions of economic and social progress and development;
> b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
> c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

43. Article 56 of the United Nations Charter states:

> All members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.

44. The United Nations charter, a treaty approved by the United States Senate on July 28, 1945, and ratified by the President of the United States on August 8, 1945, is part of the supreme law of the United States and thus is binding in the

Courts of New York State.

45. In the aftermath of World War II, the United States and the other allied powers established an International Military Tribunal which held trials of the major nazi leaders and organizations. These trials (known as the Nuremberg Trials) were conducted pursuant to an agreement and charter signed by the United States and the other allied powers. 59 Stat. 1544 (1945).

46. The judgment of the Nuremberg Tribunal, 6 FRD 69 (1946), enunciated principles of individual responsibility which, pursuant to a unanimous General Assembly resolution proposed by the United States, were codified by the International Law Commission in 1950. Principles VI and VII of the Nuremberg principles state:

> Principle VI. The crimes hereinafter set out are punishable as crimes under international law:
>
> (a) Crimes against peace:
> (i) Planning, preparation, initiation or waging of a war or aggression or a war in violation of international treaties, agreements or assurances;
> (ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).
>
> (b) War crimes:
> Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave-labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or

devasation not justified by military necessity.

(c) Crimes against humanity: Murder, extermination, enslavement, deportation, and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connexion with any crime against peace or any war crime.

Principle VII. Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law.

47. The apartheid system in South Africa is a genocidal system which has been characterized repeatedly by the United Nations as a crime against humanity and as a violation of international law. See, e.g., Security Council resolutions 134 (1960), 181 (1963), 182 (1963), 191 (1964), 282 (1970), 392 (1976), 417 (1977), and 473 (1980). These are selected examples of the numerous condemnations of apartheid by the United Nations which has called for complete isolation of the South African government.

48. The crime of apartheid is directly aided by the presence and investment in South Africa by foreign transnational corporations, including United States based companies. See Affidavits of Neo Mnumzana and Jennifer Davis, attached hereto and incorporated herein.

49. These provisions of law -- the United Nations

Charter, the Nuremberg Principles, and the international characterization of apartheid as a crime against humanity -- authorize and require individuals to take concrete action against apartheid.

50. The actions of the Defendants were specifically aimed at increasing the isolation of the South African government and therefore were in furtherance of efforts to stop the crime of apartheid.

51. For the above-stated reasons, the Informations should be dismissed as the Defendants' conduct was authorized by law.

* * *

MOTION TO DISMISS ON GROUNDS THAT THE DEFENDANTS' CONDUCT WAS JUSTIFIED

58. Penal Law 35.05(2) states that conduct which would otherwise constitute an offense is justifiable and not criminal when:

> 2. Such conduct is necessary as an emergency measure to avoid an imminent public or private injury which is about to occur by

> reason of a situation occasioned or developed through no fault of the actor, and which is of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding such injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue. The necessity and justifiability of such conduct may not rest upon considerations pertaining only to the morality and advisability of the statute, either in its general application or with respect to its application to a particular class of cases arising thereunder.

59. Your deponent restates paragraphs 1 to 58, supra., and incorporates herein all of the attached Affidavits and Exhibits. Based upon the facts recited in the above referenced paragraphs and Affidavits, it is respectfully submitted that the situation in South Africa is an injury of such urgency that the desirability and urgency of avoiding the injury clearly outweighs the desirability of avoiding the injury sought to be prevented by the statutes defining trespass in New York and that the actions of the Defendants were emergency measures to avoid the imminent injury caused by apartheid.

60. The crisis in South Africa has developed through no fault of the Defendants.

61. For the above stated reasons the Informations should be dismissed on the grounds that the Defendants' conduct was justified pursuant to Penal Law 35.05(2).

* * *

CREATIVE AND INFORMED REPRESENTATION OF ACTIVISTS IN CRIMINAL CASES: DEFENSES / MOTIONS TO DISMISS

APPENDIX 3

Motion to Dismiss in City of Chicago v. Occupy Chicago defendants.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
MUNICIPAL DEPARTMENT, CRIMINAL DIVISION

CITY OF CHICAGO,	)	
	)	
Plaintiff,	)	
	)	No.
vs.	)	
	)	
	)	
	)	
Defendant.	)	

MOTION TO DISMISS

Defendants, participants in the social movement OCCUPY CHICAGO, move to dismiss the charges against them on the grounds that these charges violate the defendants' rights under the First Amendment to the United States Constitution to freedom of speech, to assemble, and to petition the government for redress of grievances. In support of this motion, defendants state:

1. The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. The First Amendment binds municipalities such as the City of Chicago, and forbids them from abridging freedom of speech, and preventing the people from peaceably assembling and petitioning the Government for redress of grievances.

3. OCCUPY CHICAGO is a grass roots political movement which has organized itself to represent the 99% of the population who have not profited from the corporate abuses which have infected this country for several years.

4. OCCUPY CHICAGO has set forth broad political goals. Its mission statement

states:

> We are Chicagoans, and most importantly, Americans, gathered together in solidarity to exercise our Constitution-guaranteed rights of free speech and to peacefully assemble.
> We welcome support from our sisters and brothers across the nation and the world.
> "Occupy Chicago is here to fight corporate abuse of American democracy in solidarity with our brothers and sisters around the world."
> Declaration of Nonviolence
> "Occupy Chicago reassures its members and the public that we are a social movement dedicated to nonviolent action."

http://occupychi.org/about-us (accessed November 4, 2011)

5. **OCCUPY CHICAGO** is part of a broader political and social movement which is based on outrage about the manner in which the richest and most powerful 1% of our society have seized for themselves an ever-increasing share of what should be our common wealth. The movement has as its rallying cry, "We are the 99%."

> The term, "We are the 99%" is a political slogan, Internet meme and implicit economic claim used by demonstrators involved in the "Occupy" protests. It is intended as a statement of a trend, since the 1970s, for wealth and income to become concentrated within the top 1% of the United States population. According to the Congressional Budget Office, between 1979 and 2007, incomes of the top 1% of Americans have grown by an average of 275%, versus just 40% for the 60 percent of Americans who are in the middle of the income scale. The top 1% of the American population controls about 40% of total wealth in the country and the top 10% controls 73%. Since 1979, average pre-tax income for the bottom 90% of households decreased by $900, and that of the top 1% increased by over $700,000, as federal taxation became less progressive. While over the last 30 years, the top 1% has borne a larger percentage of the tax burden, up from 15% in 1979 to to 37% in the year 2009, the 400 taxpayers with the highest incomes saw their income increase by 392%. The average income of the 1% was $960,000 in 2009 with a minimum income of $343,927.

http://en.wikipedia.org/wiki/Occupy_Wall_Street#We_are_the_99.25 (accessed November 4, 2011) (footnotes omitted).

6. An integral part of the **OCCUPY** movement is the continuous occupation of a

physical location in the vicinity of the workplaces of the 1%. The occupation itself is part of the expressive act, in that it is intended to bring public outrage to bear on the excesses of the 1% while the 99% are faced with unemployment, poverty, cuts in social services, unaffordable health care and a raft of other social ills. The occupation is not just a demonstration; it is an expression of the participants' willingness to undergo physical discomfort and to contribute their bodies to the struggle, in an effort to bring attention to bear on the scandalous state of our country's current economic system.

7. Additionally, an occupation, as opposed to a march or demonstration, has the ability to reach more people with its message because of its stationary location maintained over an extended period of time which provides participants a greater ability to communicate their message and attract additional supporters to their cause.

8. Various participants in Occupy Chicago have continually stated that the occupation itself is a statement, and constitutes opposition to the current social and economic situation in this country. As one participant wrote in the Chicago Tribune:

> Why I occupy
> I occupy because corporations are not people, and money is not the same thing as free speech.
> I occupy because I believe in united citizens, not Citizens United.
> I occupy because our military is spending billions of dollars to occupy foreign countries while jobs, infrastructure and the economy suffer at home.
> I occupy because my generation should have opposed these wars in greater numbers and with greater outrage to start with.
> I occupy because I am tired of going to the polls and trying to decide which politician is least likely to attempt to sell a Senate seat to the highest bidder.
> I occupy because I am tired of seeing executives of failed companies receiving bonuses while their employees are laid off without severance.
> I occupy because I believe in the First Amendment and the civil liberties it grants us.

I occupy because the system is not broken but relies on this kind of active participation to remain strong.
I occupy because it is exciting to see democracy working.
I occupy because after seven years combined of undergraduate and graduate studies, I have student loan debt but not the gainful employment necessary to pay it down.
I occupy because I have been underemployed since finishing school, often working two or three part-time jobs to try to make ends meet.
I occupy because I have spent half of this year unemployed altogether, through no fault of my own. I occupy because the unemployed cannot afford to be invisible statistics any longer.
I occupy because the alternative is sitting in my parents' basement writing cover letters that won't even be rejected, just ignored.
I occupy because if it weren't for the safety net my parents have provided, I would be sitting on a street corner all day asking for a different kind of change.
I occupy because my dreams have been deferred, and it was only a matter of time before they would explode.

http://www.chicagotribune.com/news/opinion/ct-vp-1030voiceletterssbriefs-20111030-17,0,7568817.story (Accessed November 4, 2011).

9. In accordance with these expressions of political opinion, the OCCUPY CHICAGO movement established a physical presence outside the Federal Reserve Bank, 230 S. LaSalle, Chicago, Illinois, on or about September 22, 2011.

10. Since that time, OCCUPY CHICAGO has maintained that presence, but has been constantly faced with harassment from the City of Chicago, which has refused to allow it to express its political viewpoints through the mechanism of an occupation.

11. This harassment has been on-going, and has been authorized at the highest levels of the City government, and in particular by Mayor Rahm Emanuel and Police Superintendent Garry McCarthy.

12. In accordance with this harassment and refusal to allow participants in OCCUPY CHICAGO to express their political views, police officers have been ordered to prevent

participants from having a continuous physical presence outside the Federal Reserve Bank. In particular, on day 12 of the occupation, a participant noted:

> Around 2am this morning there was an issue with the cops and us needing to make immediate action to make all things there 100% mobile, all bodies must be constantly moving, and absolutely no sitting/sleeping. This resulted in a 3am emergency assembly to discuss how we were going to address this and the long term necessity of an HQ where people can actually camp and stuff can remain setup.

http://occupychi.org/home?page=6 (Accessed November 4, 2011).

13. Subsequently, on day 14, a participant reported:

> Late Monday night, members of the CPD were ordered to crackdown on Occupy Chicago for non-compliance regarding issues of storage of supplies and donations and lack of mobility. This crackdown greatly challenged the ability of Occupy Chicago to maintain functionality, community support, and individual participation. For the first time, CPD warned that non-compliance would lead to citations and arrests. It seems clear that the severity of this crackdown, given the mutual level of respect and cooperation between CPD and Occupy Chicago, was not an action taken directly by the CPD, but instead orders from above.

http://occupychi.org/2011/10/06/phase-ii-mobilization

14. **OCCUPY CHICAGO** recognized that as part of its expressive activity and ability to petition for redress of grievances, it needed to find a location where participants could occupy and not need to continually move. In accordance with this recognition, **OCCUPY CHICAGO** sought to communicate with the City of Chicago in an attempt to locate an area where the occupation could continue, and where the participants would not continually be forced to move, at all hours of the night.

15. The City of Chicago has refused to meaningfully negotiate with **OCCUPY CHICAGO** concerning its demand for a physical location in the area of downtown Chicago for

the occupation, and has refused to make any efforts to permit **OCCUPY CHICAGO** to exercise its First Amendment Right to occupy a space as a form of political expression and speech.

16. On the evening of October 15-16, **OCCUPY CHICAGO** determined to exercise its First Amendment rights to freedom of speech, to peaceably assemble and to petition for a redress of grievances by occupying a location in Grant park, on the northeast corner of Michigan Avenue and Congress Parkway, and setting up tents to show that participants intended to occupy that area as part of their political expression.

17. **OCCUPY CHICAGO** informed the City of Chicago and the Chicago Police Department of their intention prior to occupying this area, and informed the City and the police department that this occupation was part of their political expression.

18. **OCCUPY CHICAGO** did then peaceably occupy this area. The occupation did not disrupt pedestrian or vehicular traffic, and was in a public area and positioned so it would not prevent anyone from passing freely on the street or sidewalk or from using the park space.

19. Despite the fact that the participants were assembling in this area to peacefully express their political views and to express their grievances, the City of Chicago, through its police department and at the express direction of the Mayor, arrested the participants in the occupation, destroyed their tents and other belongings, and charged the defendants with violation of a Chicago Park District ordinance which provides that persons should not be in the park after 11:00 p.m.

20. The defendants who bring this motion were some of the participants in this occupation, and were participating in **OCCUPY CHICAGO** and in this occupation in order to

express their political views and to petition for redress of their grievances.

21. Because the City of Chicago had refused to provide the participants in OCCUPY CHICAGO with an adequate forum in which to express their political views and petition for redress of grievances, arresting these defendants and charging them with violation of the Chicago Park District ordinance violated their rights under the First Amendment to the United States Constitution.

22. Additionally, the arrest of the participants in the OCCUPY CHICAGO occupation violated their rights under the Equal Protection clause of the Fourteenth Amendment in that Chicago police do not routinely arrest persons who are in the park after 11 p.m. but rather either ignore that these persons are in the park, or at the most write citation tickets.

23. The United States Supreme Court long ago recognized that members of the public retain strong free speech rights when they venture into parks, "which 'have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983) (quoting *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 515 (1939) (opinion of Roberts, J.)).

24. The First Amendment to the United States Constitution protects expression and the ability to assemble and petition for the redress of grievances against governmental interference and restraint. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975). Extremely broad protection is afforded to political expression in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354

U.S. 476, 484 (1957). In fact, "there is practically universal agreement that a major purpose of the [First] Amendment was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). Moreover, the First Amendment reflects the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

25. While the Occupy movement has substantial public support, even if it did not, it would nevertheless be protected under the First Amendment, since advocacy of politically controversial viewpoints is the essence of First Amendment expression. See, e.g. *Citizens United v. Fed. Election Comm'n*, __ U.S. __, 130 S.Ct. 876, 892 (2010) (holding that political speech is "central to the meaning and purpose of the First Amendment"); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995). Efforts by governmental agencies to burden core political speech are weighed with "exacting scrutiny" and may be upheld only if narrowly tailored to serve an overriding state interest. *McIntyre*, 514 U.S. 334, 337.

26. Moreover, preventing First Amendment activities before they pose a clear and present danger is a First Amendment violation. *Carroll v. President and Com'rs of Princess Anne*, 393 U.S. 175, 180-81 (1968); Laurence Tribe, *American Constitutional Law* § 12-34, at 1041 (2d. ed. 1987).

27. The only clear and present danger which the **OCCUPY CHICAGO** occupation posed was to the illicit conduct of the 1% and their determination to continue and increase their control of our country's resources, which should be equitably divided.

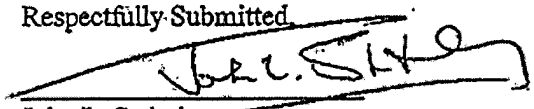
28. The arrests and charging of the defendants in this case also violated the First

Amendment prohibition on content-based discrimination, since it was the strong political message of the participants in **OCCUPY CHICAGO**, and in particular their determination to engage in an occupation as political speech, which was a substantial factor in the City arresting and charging these defendants.

Wherefore, because the arrests and charging of these defendants violated their rights under the First Amendment to the United States Constitution, the charges should be immediately dismissed.

Dated: November 4, 2011

Respectfully Submitted,



John L. Stainthorp
Sarah Gelsomino, Joey L. Mogul
Janine L. Hoft
People's Law Office
1180 N. Milwaukee Avenue
Chicago, Illinois 60642
773 235-0070

*Paralegal Brad Thomson from People's Law Office participated in the formulation of this motion.

CREATIVE AND INFORMED REPRESENTATION OF ACTIVISTS IN CRIMINAL CASES: DEFENSES / MOTIONS TO DISMISS

APPENDIX 4

People v. Miller, et al., Rochester City Court, 2/6/2015.

15 N.Y.S.3d 713 (Table)

The PEOPLE of the State of New York
v.
Grace M. Miller, RYAN DAVID ACUFF, and JOHN THOMAS MALTHANER, Defendants.

No. 14–10731.

City Court, City of Rochester, New York.

Feb. 6, 2015.

Shani Mitchell, ADA.

Edward P. Hourihan, Esq., for the Defendants.

Opinion

THOMAS RAINBOW MORSE, J.

Ryan Acuff, John Malthaner and Sister Grace Miller, ardent advocates for the rights of Rochester's homeless population, were arrested on September 15, 2014 for trespassing in the Monroe County Office Building (hereinafter the "COB"). It is alleged that at least two of them refused repeated requests by law enforcement that they return downstairs from a second floor COB office. They assert they had gone to Room 210 to attempt to re-schedule a meeting with local officials regarding a shelter for homeless men and women displaced from the Civic Center Garage (hereinafter the "Garage"). Before going to room 210, they and other community members who shared their concerns had peacefully gathered for over two hours outside the County Clerk's and County Executive's offices in a "designated protest area" on the first floor protesting the plight of the homeless.[1] The prosecution has offered to have their cases adjourned for six months in contemplation of dismissal (hereinafter "ACD").[2] Although the defendants have not rejected that offer, they have moved for dismissal of the charge immediately in the furtherance of justice (hereinafter "DIFJ"). The People have opposed that motion. For the reasons that follow, the motion is denied.

New York law allows a court to dismiss a charge in the furtherance of justice "when, even though there may be no basis for dismissal as a matter of law ... such dismissal is required as a matter of judicial discretion by the existence of some compelling factor, consideration or circumstance clearly demonstrating that conviction or prosecution of the defendant upon such accusatory instrument ... would constitute or result in injustice."[3] Long ago, New York's highest court recognized that the statute's "thrust ... has been to allow the letter of the law gracefully and charitably to succumb to the spirit of justice."[4] While "the decision to dismiss an information lies within the discretion of the trial judge, it is clear that ... discretion is neither absolute nor uncontrolled."[5] It remains an extraordinary remedy which necessitates that a judge undertake "a sensitive balancing of the interests of the individual and of the People."[6] When deciding a DIFJ motion "the court must, to the extent applicable, examine and consider, individually and collectively" ten factors[7] upon which this opinion is focused.[8]

The Seriousness and Circumstances of the Offense

The defendants were charged with Criminal Trespass even though the COB was open to the public at that time. Under the Penal Law an individual can be charged with trespassing for remaining on a premises after the privilege to be there has been revoked.[9] Yet, the accusatory instrument in this case may be insufficient on its face because at the time of the arrest the building was not "fenced or otherwise enclosed in a manner designed to exclude intruders."[10] The defendants, however, have not made a motion to dismiss the accusatory instrument on that basis. Neither have the People moved to amend the

charge to the non-criminal offense of simple Trespass.[11] The court believes the legal severity of the offense is that of a violation, not a crime.

Such a starting point, however, actually favors the People's position on this motion. A compelling case might be made that, under the circumstances presented, a criminal conviction for these dedicated advocates for the homeless would result in an injustice. Yet, that argument loses much of its force when any conviction would be no more serious than a speeding ticket.

The Extent of Harm Caused by the Offense

The People have alleged that the defendants acted in a disruptive manner while making their way from the "designated protest area" to Room 210. While counsel for the defendants characterizes the People's claim that the defendants were "banging on doors' and disrupting the business of the county' " in the perimeter hallway of the cavernous COB atrium as an "attempt to obfuscate the facts", the prosecution's assertion was not disputed.[12] Although perhaps irrelevant at trial, the defendants' alleged behavior while proceeding to the second floor is pertinent to whether the record before the court at this point supports the extra ordinary remedy of dismissal in the furtherance of justice.

The Evidence of Guilt, Whether Admissible or Inadmissible at Trial

The accusatory instrument alleges the defendants were arrested for not leaving the second floor after repeatedly being told to go. In their affidavits, defendants Malthaner and Miller essentially admit those facts. They deny that they "asked" to be arrested, however, they do not contest that they were told to leave room 210 and return to the designated protest area and did not. They assert they had a right to go to room 210 to request a meeting with county officials. Defendant Acuff, on the other hand, purports to have left the office when asked. In his affidavit he asserts that after leaving the office he began video-taping the events on the second floor when he was arrested. Unlike his co-defendants, he asserts his complete innocence.

Obviously, any disposition short of trial will leave the question of what really happened unanswered,[13] since a court does not rule on the accuracy of facts in an accusatory instrument when deciding a DIFJ motion.[14] As noted recently by a court in denying a DIFJ motion involving members of Occupy Wall Street "[a] motion to dismiss in the interest of justice should not be used as a substitute for a trial, or when the motion merely raises a trial defense."[15] Thus, allowing this matter to proceed to trial is really the only way culpability can be determined.

The History, Character and Condition of the Defendant

Each of these defendants has dedicated considerable time and energy to making sure Rochester's mostly invisible and often forgotten homeless population is provided with the shelter, sustenance and services they need. The defendants have been committed to caring for the homeless for years.[16] They have chosen to provide a safe haven for those individuals who "suffer from substance abuse, the mentally ill and those who are chronically homeless."[17] Defendants Malthaner and Miller together with others from The House of Mercy and St. Joseph's House are also involved in the *Housing First* project seeking to provide "no strings attached" housing for the most challenged of the homeless population in our area. Such housing would appear apropos for many of the 30–50 homeless men and women who have historically called the Garage their home and have now had to relocate. The professed purpose of the defendants' initial presence in the COB, and later, a trip to room 210 "to arrange a meeting with county officials in

order to find alternative shelter space for those forced out of the Civic Center Garage"[18] is consistent with their altruism. Their history of selfless acts speak volumes about their commendable character.

Any Exceptionally Serious Misconduct of Law Enforcement Personnel In the Investigation, Arrest and Prosecution of the Defendant

Other than defendant Acuff's claim that he had complied with the request to leave and was arrested only as he filmed the scene with his phone, there are no allegations of even minimal misconduct in this matter.

The Purpose and Effect of Imposing upon the Defendant

A Sentence Authorized for the Offense

A fair reading of the papers submitted on behalf of the defendants is that they acted out of concern for the health and safety of the homeless in a manner consistent with each defendant's conscience. While civil disobedience has long been part of the fabric of our society, the notion that those who engage in such activities should not suffer consequences for their actions is a relatively new phenomenon.[19] As recently as 1963, the Rev. Dr. Martin Luther King, Jr. recognized that accepting the consequences of direct action was a component of civil disobedence.[20] He wrote that "[n]onviolent direct action seeks to create such a crisis and foster such a tension that a community which has consistently refused to negotiate is forced to confront the issue. It seeks so to dramatize the issue that it can no longer be ignored."[21]

One could argue that based on their decision to leave the "designated protest area" the refusal of defendants Malthaner and Miller to leave the second floor office when asked may represent such direct action and constitute a pre-meditated conscious choice made by them to risk arrest in order to raise public awareness of the plight of the homeless on that day.[22] In addition, it is not uncommon in our internet era for social activists to assign one of a group's members the task of documenting the acts of others for later use at trial. Sometimes it is filmed and the video is posted on the Web to exponentially disseminate their message and hopefully gain broad public support.[23] Certainly, a casual observer might wonder whether defendant Acuff was fulfilling that role on September fifteenth.[24] Yet, even if that were so, this is not a case which cries out for harsh punishment should a conviction result from a trial after rejection of the People's ACD offer.

The Impact of a Dismissal on the Safety or Welfare of the Community

Since the unconditional plea bargain offered by the People would result in dismissal six months from now, it does not appear that the prosecution anticipates any specific threat to the safety of the community. The court concurs.[25]

The Impact of a Dismissal upon the Confidence of the Public in the Criminal Justice System

No one has argued in this case that if the defendants had been able to meet with a county representative onSeptember 15th the problems of Rochester's homeless would have been resolved that day, that week or even within the next month. Their arrests took place in midSeptember when the manifest need for shelter and services for the homeless had not reached the epic proportions presented in January or February. If the defendants were unable to schedule a meeting on that day, a reasonable alternative might have been to send a certified letter to the county official with whom they wished to meet with an enclosed copy of the entire letter they claim to have received from the county which declared a meeting with advocates "unnecessary". By so doing, they might have accomplished their goal without taking a

chance on disrupting those working in room 210 and the rest of the COB by undergoing arrest. The public's confidence in law enforcement authorities to keep order in public buildings would have been assured and the defendants would have moved forward toward their goal to meet with county officials. If keeping the issue in the "public eye" was also a goal that day, that could have been met by providing the letter to various media outlets on September fifteenth.

It might not be unreasonable, however, for one to suspect that the defendants, as seasoned social activists, were hoping for the best (a meeting with county officials) while planning for the worst (no meeting), willing to risk arrest to force the issue and garner publicity for their cause. Such sincere acts of peaceful civil disobedience are a part of our democratic heritage, as is respect for the rule of law. While granting immediate dismissal might strengthen the former, it could seriously weaken the later in cases involving broad social issues the appropriate resolution of which are subject to debate along a wide spectrum of public opinion.

The case law in New York State supports that premise. A number of those cases order dismissal in the furtherance of justice when an individual is arrested while attempting to prevent immediate harm to a particular person.[26] Nonetheless, absent a compelling factor such as a defendant's youth,[27] cognitive challenges,[28] or "[a]n unusually sympathetic back story"[29] such dismissal is rarely granted in cases in which mature individuals consciously risk arrest protesting a societal issue which they fervently believe warrants such action. In a case wherein the People have already forgone full prosecution by offering an ACD, it is the court's view that a dismissal in the furtherance of justice would be more likely to have a negative impact on the public's confidence in the criminal justice system.

Where the Court Deems it Appropriate, The Attitude of the Complainant or Victim with Respect to the Motion

Putting aside the feelings of anyone working in room 210 on September 15th, no individual victim of the alleged violation of Penal Law Article 140 has expressed an interest in the outcome of this case. Thus, this court has no cause to consider the attitude of the complainant or victim in this case.[30]

Any Other Relevant Fact Indicating That a Judgment of Conviction Would Serve No Useful Purpose

In the papers submitted and oral argument of this motion it has been suggested that by the court "plac[ing] it's imprimatur on the larger conduct here"[31] a DIFJ by the court would "give the vulnerable hope that somebody is fighting for them and that their needs are being addressed."[32] However, the potential for a finding of guilt continues to rest squarely in the defendants' hands since the ACD they have been offered preserves their presumption of innocence resulting in a dismissal in the interest of justice in six months time. Arguably, with the "no strings attached" ACD offer, the District Attorney's office has already, in part, accomplished the defendants' second goal of hope for the homeless.

When illegal action is taken to mitigate immediate individual harm to society, it may be appropriate to find that the spirit of the law trumps its letter. Dismissal, however, might not be in the interest of justice on those occasions when advocates engage in civil disobedience regarding broad social issues about which they care deeply as the basis for the illegal conduct. If courts were to routinely excuse intentional violations of law by good people convinced they were right in doing so because they were advocating for a compelling community cause the judicial branch might be seen as usurping

responsibilities constitutionally assigned to the executive and legislative branches.[33] As one editorial writer has observed a good judge "needs the independence of the Swiss" and be "as fair minded as the umpire behind the plate in a Yankees–Red Sox game."[34] Placing a judicial seal of approval on the position of or tactics employed by proponents of one side of a societal issue being debated is antithetical to those qualities which this court believes our community rightly expects a judge to possess.

Accordingly, based on the record before this court, the evidence does not demonstrate compelling proof why continuation of this case at this point would constitute an injustice. The defendants' motions for an immediate dismissal in the furtherance of justice are denied.

The foregoing constitutes the decision and the order of the court.

Notes:

[1] Activities on the first floor of the COB were consistent with every citizen's right to assemble, speak their mind and petition their government. There is no allegation that advocates for the homeless were not able to fully advocate their concern for the plight of the homeless on September 15th in this area COB. Such "regulations of time, place, and manner of expression are enforceable if they are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *People v. Barton* 8 NY3d 70, 76 (2006) (citation and punctual omitted).

[2] CPL § 170.55(2) ("An adjournment in contemplation of dismissal is an adjournment of the action without date ordered with a view to ultimate dismissal of the accusatory instrument in furtherance of justice"). In cases such as this, "the granting of an ACD is not in and of itself a final dismissal. When an ACD is granted, the defendant is released on his own recognizance and the process only matures to a dismissal if the case is not restored to the calendar upon application made within six months"). Peter Preiser Commentary, McKinney's CPL § 170.55.

[3] McKinney's CPL § 170.40. Cf. *People v. Douglass* 60 N.Y.2d 194, 204 (1983) ("courts never had inherent power to dismiss, *sua sponte*, a criminal prosecution for any reason until 1881, and that power was limited to situations where the court found such dismissal to be in furtherance of justice").

[4] *People v. Rickert* 58 N.Y.2d 122, 126 (1983) (citation and internal quotation marks omitted).

[5] *People v. Wingard* 33 N.Y.2d 192, 195–96 (1973) (citation omitted). See also *People v. Belge* 41 N.Y.2d 60, 62–63 (1976) ; *People v. Insignares* 109 A.D.2d 221, 234 (1st Dept., 1985) lv. denied 65 N.Y.2d 928 (1985) ; *People v. Loria* 214 A.D.2d 1043 (4th Dept., 1995) ; *People v. Rucker* 144 A.D.2d 994 (4th Dept., 1988) lv. denied 73 N.Y.2d 926 (1989).

[6] *Rickert* supra at 126–27. See *People v. Rahmen* 302 A.D.2d 408 (2nd Dept., 2003)

[7] The subheadings that follow in this opinion are those set forth in CPL § 170.40(a)-(j).

[8] *People v. Berrus* 1 NY3d 535, 536 (2003) (a court must "[take] into consideration the factors considered in CPL 170.40 "); see also *People v. Clayton* 41 A.D.2d 204 (2nd Dept., 1973) (common law basis for DIFJ); *People v. Belkota* 50 A.D.2d 118 (4th Dept., 1975) ; *People v. Mitchell* 64 A.D.2d 1012(4th Dept., 1978).

[9] McKinney's Penal Law § 140.00(5).

[10] McKinney's Penal Law § 140.10(a). *People v. Moore* 5 NY3d 725, 726 (2005) ("The plain language of the statute as amended, however, clearly requires that both buildings and real property be fenced or otherwise enclosed in

order to increase the level of culpability from trespass to criminal trespass in the third degree").

[11] McKinney's Penal Law § 140.05 ("A person is guilty of trespass when he knowingly enters or remains unlawfully in or upon premises").

[12] See *People v. Gruden* 42 N.Y.2d 214, 217–18 (1977) (a party's duty to controvert facts in pre-trial motions in a criminal case).

[13] *Ryan v. New York Telephone Co.* 62 N.Y.2d 494, 504–05 (1984) ("A dismissal in the interest of justice' is neither an acquittal of the charges nor any determination of the merits. Rather, it leaves the question of guilt or innocence unanswered).

[14] *People v. Thomas* 4 NY3d 143, 146 (2005). Nor is such a determination made when a case is ACD'd. "The granting of an adjournment in contemplation of dismissal shall not be deemed to be a conviction or an admission of guilt. No person shall suffer any disability or forfeiture as a result of such an order. Upon the dismissal of the accusatory instrument pursuant to this section, the arrest and prosecution shall be deemed a ity and the defendant shall be restored, in contemplation of law, to the status he occupied before his arrest and prosecution". CPL § 170.55(8).

[15] *People v. Pesola* 37 Misc.3d 569, 577 (N.Y.Crim. Ct., 2012) (citations omitted).

[16] According to the affidavits filed they have lived with the homeless for: four years (Acuff ¶ 1); fifteen years (Malthaner ¶ 1); and nineteen years (Miller ¶ 2).

[17] Miller affidavit ¶ 7.

[18] *Id.* at ¶ 29.

[19] See *Civil Disobedience:an American Tradition,* Lewis Perry, Yale University Press, 2013.

[20] "One who breaks an unjust law must do so openly, lovingly, and with a willingness to accept the penalty." *Letter from a Birmingham Jail* on April16, 1963.

[21] *Id.*

[22] Such personal sacrifice is the hallmark of issue-focused civil disobedience which seeks to raise public awareness of social issue advocates demand be addressed by public or private institutions. "Protest actions may be collective ... but decisions to break the law are made by individuals, regardless of whatever influence or inspiration comes from others." *Id.* This category of collective action with individual sacrifice includes, but is not limited to: nineteenth century abolitionist activities; early twentieth century women's suffrage efforts; as well as the more recent civil rights protests of the 1950's and 1960's; anti-Vietnam war demonstrations and draft card burnings; Operation Rescue blockades; Earth First tree sitting and the Occupy Movement. In fact, while being tear gassed and clubbed, demonstrators who did not disperse at the 1968 Chicago Democratic Convention chanted "The whole world is watching."

[23] Activities over the past year in the U.S. Supreme Court by a group designating itself as "99Rise" who are upset about the Court's decision in *Citizens United* fit that pattern. The protest by that group in the Supreme Court Chamber in February, 2014 is such an example. They repeated the same activities on January 21st of this year. *The Daily Record* Vol. 107 Number 15 at page 3 (1/23/15). Although one of the non-protesting members was arrested on the twenty-first for filming, the leader of the group suggested in an e-mail to reporter Mark Sherman that "more than one person had a camera on Wednesday and promised to post footage on line." *Id.*

[24] After he complied with the officer's request that he leave Room 210, he "began videotaping the scene with [his] phone from outside the office." Affidavit of Ryan Acuff ¶ 30.

[25] Cf. *People v. Kleckner* 33 Misc.3d 1219(A)(N.Y. Crim Ct., Mennin, J., 2011) (DIFJ denied-safety).

[26] *People v. Federman* 19 Misc.3d 478 (N.Y.Crim. Ct., Kennedy, J., 2008).

[27] *People v. Grayert* 1 Misc.3d 646, 649 (N.Y.Crim. Ct., Cooper, J., 2003) (17 year old anti-war protestor lying down on NYC sidewalk).

[28] *People v. Colon* 86 N.Y.2d 861 (1995).

[29] See e.g. *People v. LaFont* 43 Misc.3d 384 (N.Y.Crim. Ct., Statsinger, J., 2014) (recent surgery).

[30] Statutorily, all criminal court cases are brought in the name of "the people of the state of New York as plaintiff against a designated person, known as the defendant." CPL § 1.20(1).

[31] This citation is from the oral argument of counsel Edward Hourihan for the defendants responding to the court's question regarding the need for an immediate dismissal in the furtherance of justice rather than one entered in six months following the adjournment in contemplation of dismissal offered by the People.

[32] This point is made in the affidavits of all three defendants on the impact of dismissal on public confidence in the judicial system.

[33] People of good conscience can disagree. For instance, as to the issue of abortion, the yearly polling by Gallup shows, consistent patterns since 1975, with between 48% and 55% expressing the opinion that it should be legal in only certain circumstances. Since 1980, the greatest gap between the percentage of people who consider themselves "pro-choice" and those who identify as "pro life" has been nine percentage points with the former being 47% and the later being 46% in 2014. See http://www.gallup.com/poll/1576/Abortion.aspx?version page 1. What if on the anniversary of *Roe v. Wade* pro-choice and pro-life advocates simultaneously staged sit-ins at the offices of legislators who didn't share their view on abortion? Would a court be required to dismiss all charges of trespass against all members of both factions to be fair to both sides of this issue which cuts to the core of the conscience, spiritual and religious beliefs of so many Americans? Would a court be required to do that for as long as such civil disobedience occurs? Would widespread repetitive dismissals truly further justice? Compare *People v. Goetz* 73 N.Y.2d 751, 753 (1988) (jury ification "is not a legally sanctioned function of the jury and should not be encouraged by the court"); *People v Weinberg* 83 N.Y.2d 262, 268 (1994) (same).

[34] Editorial by Rex Smith in the Albany Times Union on April 12, 2008.
