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

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I. Introduction

These materials provide an overview of unique issues related to the legal defense of criminal charges arising out of leftist political activism - rallies, civil disobedience or other political activity.

The focus here is on NY law and procedure, although the information offered may also have relevance to attorneys, law students and legal workers handling cases in other states and in federal court litigation. Specific topics addressed relate to representing political activist clients, legal defenses and motions based on *justification or necessity*, *international human rights law, 1st Amendment issues*, and motions to dismiss *in the furtherance of justice*. The goal, of course, is not to provide a complete treatise on these topics, but to offer a framework and a starting point for lawyers and others engaged in this type of representation. This is neither a comprehensive outline of defenses applicable to criminal cases in general, nor a manual of criminal procedure.

What time is it? First - - the bad news.

We are living in a unique time. A deep and multifaceted crisis is unfolding day-by-day relating to the continued existence in this country of fundamental principles of democracy and the constitutional rule of law. A right-wing "populist" white-supremacist administration is in power, led by a billionaire failed businessman who appears mostly uninterested in the work of governing, but is quite interested in golf, temper-tantrums, and making up "alternative" facts. What could go wrong?

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What do the words "democracy" or "rule of law" even mean at this time?

Will our "democracy" - *as limited, imperfect, racist, sexist, anti-worker, and as fundamentally flawed as it was as of January 19, 2017* - survive, much less improve?

Lawyers of good conscience have had to ask such questions before, in other countries with real (though flawed) traditions of the democratic rule of law and with real (again, flawed) traditions of independent judicial branches. For example, in Chile in 1973, South Africa in 1960, and Germany in 1933, lawyers were forced to wonder whether any semblance of democracy would continue to exist. In each of these examples, the answers quickly and unequivocally proved to be "no", as all democratic traditions, such as they were, disappeared and were destroyed when brutal, fascist regimes took complete control. And, in each of these examples, the legal system as a whole capitulated in the obliteration of all traditions of democracy and fair rule of law.

In the U.S., we have faced periods of brutal repression before, some of which continue to this day, for example, the vast system of mass incarceration.[2] The impact of governmental repression is, and has always been, experienced unequally in this country, with people of color, women, workers, LGTBQ people, and immigrants at the receiving end of brutal governmental policies and actions.

And, we have witnessed other presidentially created significant constitutional crises.[3]

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[2] On mass incarceration, see, Alexander, Michelle, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, The New Press (2012, revised edition), Gottschalk, Marie, *Caught: The Prison State and the Lockdown of American Politics*, Princeton University Press (2015). On police brutality and unconstitutional court procedures and systems, see, U.S. Dep't. Of Justice, Civil Rights Division, *The Ferguson Report,* The New Press (2015).

For earlier examples, consider, *inter alia*, the COINTELPRO program of the 1950's through 1970's, policies and actions of the FBI and other agencies to interfere with and disrupt the exercise of constitutional rights by activists and activist groups, including the Communist Party, the Black Panther Party, and Dr. Martin Luther King, Jr.(a brief summary of the work of the Church Committee, which investigated COINTELPRO, is found is at: https://www.senate.gov/artandhistory/history/common/investigations/pdf/ChurchCommittee_fullcitations.pdf); McCarthyism in the 1950's, see, Schrecker, Ellen, *The Age of McCarthyism, A Brief History With Documents*, Bedford, St. Martins (2d edition, 2001), Ginger, Ann Fagan and Christiano, David *The Cold War Against Labor*, Meikeljohn Civil Liberties Institute (1987); the genocidal nature of "Jim Crow", see, Paterson, William, et al., *We Charge Genocide, Petition of the Civil Rights Congress to the U.N.* (1951).

[3] Remember Watergate? The Iran-Contra scandal?

Yet, in my opinion, we have not previously experienced quite the scope and depth of the threat that looms over us in the early months of 2017.

I am not suggesting we are *literally* on the verge of transformation into a fascist country. I am expressing fear, based on the President's own actions and statements and the fact that some within his inner circle are - in essence - fascists, that the warning signs of fascism are real and present.

There is no value in *overstating* the danger, but it would be naive to blind ourselves to the risks. What are we to make, for example, of Trump's:

- vicious scapegoating of and attacks on Latinos, immigrants, Muslims, and people who live in "inner cities"?[4]

- his attempt to implement the "Muslim ban" he had called for on the campaign trail?[5]

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[4] There is so much that could be cited here. One thoughtful articulation of how Trump's rhetoric is racist is Baer, Drake, *Trump's 'Inner Cities' Fetish is Nostalgic, Messy Racism*, 10/12/16, NY Magazine, http://nymag.com/scienceofus/2016/10/why-trump-saying-inner-cities-is-racist-and-wrong.html

[5] See, 1/30/17 letter of Sally Yates, then Acting Attorney General, instructing Justice Department attorneys not to defend the "travel ban" Executive Order, based, in part, on concerns as to whether it unconstitutionally targeted Muslims, linked in full at http://www.huffingtonpost.com/entry/sally-yates-full-letter_us_58905a01e4b0c90efeffdd0a .

See, also, the United States Court of Appeals for the 9th Circuit's ongoing compilation of documents and filings in *State of Washington and State of Minnesota v. Trump*, https://www.ca9.uscourts.gov/content/view.php?pk_id=0000000860 , including the 9th Circuit's February 9, 2017 Order denying the President's motion for a stay of the TRO previously issued by the District Court. https://cdn.ca9.uscourts.gov/datastore/opinions/2017/02/09/17-35105.pdf . In the Order, the 9th Circuit, addressing the question of whether the "travel ban" was, in fact, a "Muslim ban", stated, "The States' claims raise serious allegations and present significant constitutional questions." Id., at p. 26.

See, also, Dorf, Michael C., *Did Trump's "Muslim Ban" Talk Permanently Taint His Immigration Policy?*, 2/20/17, Justia, in which Prof. Dorf suggests that even a new Executive Order - which, as of February 20th is expected soon, will be tainted by Trump's expressed intention to impose a "Muslim Ban". https://verdict.justia.com/2017/02/20/trumps-muslim-ban-talk-permanently-taint-immigration-policy?utm_source=Justia+Law&utm_campaign=4711f7a2aa-summary_newsletters_jurisdictions&utm_medium=email&utm_term=0_92aabbfa32-4711f7a2aa-389807385

- his profound ignorance of African-American history and culture?[6]

- his boastful and violent misogyny?[7]

- his denigration of the *concepts* of judicial review and independence of the judiciary?[8]

- his constant attacks on the press?[9]

- his war-mongering?[10]

- his placement of leaders of finance capital in leading governmental positions?[11]

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[6] See, Smiley, Tavis, *Donald Trump Co-Opted Black History Month and Got it All Wrong*, 2/2/17, http://time.com/4657862/donald-trump-black-history-month/ ; Maloy, Simon, *Trump's "Amazing" Ignorance: The President's Black History Month Celebration Was Embarassing*, 2/1/17, http://www.salon.com/2017/02/01/trumps-amazing-ignorance-the-presidents-black-history-month-celebration-was-embarrassing/

[7] Is a citation really necessary? If so, here is a compilation of Trump's sexist comments: Cohen, Claire, *Donald Trump Sexism Tracker: Every Offensive Comment in One Place*, 1/20/17, The Telegraph, http://www.telegraph.co.uk/women/politics/donald-trump-sexism-tracker-every-offensive-comment-in-one-place/

[8] See, Davis, Julie Hirschfeld, *Supreme Court Nominee Calls Trump's Attacks on Judiciary 'Demoralizing'*, NY Times, 2/8/17, https://www.nytimes.com/2017/02/08/us/politics/donald-trump-immigration-ban.html?_r=0

[9] See, Grynbaum, Michael M., *Trump Calls the News Media the "Enemy of the American People"*, 2/17/17, NY Times, https://www.nytimes.com/2017/02/17/business/trump-calls-the-news-media-the-enemy-of-the-people.html?_r=0

[10] See, Friedersdorf, Conor, *Trump is Often More Hawkish Than Washington Elites*, 9/29/16, The Atlantic, https://www.theatlantic.com/politics/archive/2016/09/donald-trump-is-often-more-hawkish-than-the-washington-elites/502145/

See, also, Murphy, Gabe, *Trump's Vision for Iraq: "To the Victor belong the Spoils"*, 1/24/17, Peace Action's Groundswell, https://peaceblog.wordpress.com/2017/01/24/trumps-vision-for-iraq-to-the-victor-belong-the-spoils/

[11] See, Berman, Russell, *The Donald Trump Cabinet Tracker*, 2/16/17, The Atlantic, https://www.theatlantic.com/politics/archive/2017/02/trump-cabinet-tracker/510527/

See, also, Schapiro, Rich and Slattery, Denis, *Protestors in Swamp-Thing Masks Rally to Oppose Goldman Sachs Execs Joining Trump Administration*, 1/29/17, NY Daily News, http://www.nydailynews.com/new-york/manhattan/protesters-swamp-thing-masks-rally-goldman-sachs-article-1.2949044

And, truly, what can one say (other than "fascist-like") about Chief White House Strategist Stephen "I don't want my kids going to a school with too many whiny Jews or too many Chanukah books in the school library" Bannon (sentiments his ex-wife credibly claimed in sworn legal statements that Bannon had expressed), or Senior White House Policy Advisor Stephen "the powers of the President are very substantial and *will not be questioned*" Miller (as he stated on CBS's Face the Nation 2/12/17)? Or of the love expressed for Trump by actual Nazis?[12]

We - as lawyers and others engaged in the lifework of fighting to protect and expand human rights - are faced with profound, and well justified, apprehension as to whether the universe of rules, laws, and constitutional rights in which we work will continue to exist.

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[12] But, what is fascism? One classic definition says "fascism in power . . is the open terrorist dictatorship of the most reactionary, most chauvinistic and most imperialist elements of finance capital." Dimitrov, Georgi, *The Fascist Offensive and the Tasks of the Communist International in the Struggle of the Working Class Against Fascism* (1935) (Main Report delivered at the Seventh World Congress of the Communist International.) Of interest to us as lawyers committed to creative representation of progressive political activists in this time of danger is that Dimitrov had first-hand knowledge of the complex ways in which democratic traditions and the rule of law can co-exist with brutal repression during a period of transition to fascism. Dimitrov was a defendant in the infamous "Reichstag fire" trial in Germany in 1933 - after Hitler's rise to power - in which Dimitrov defended himself *pro se* from the Nazi accusation that he had been part of a communist conspiracy to burn down the Reichstag, the German parliament building. How could the outcome of the trial have been anything other than a conviction, considering the consolidation of power by the Nazis and the importance to the Nazis of establishing that there were "radical" threats to German society? Yet, Dimitrov was acquitted, indicating that at the early stages of fascist rule there can still be legal procedures, rules and traditions that exist *somewhat* independently of the regime. There are lessons there for us as lawyers in this time of crisis.

Another often cited reference describes fourteen properties of fascist ideology, including, the "cult of tradition", the "rejection of modernism" (i.e, rejection of science and scientific method), the premise that disagreement is treason and is a sign of diversity (which is viewed as inherently bad), selective populism, antagonism to parliamentary democracy, use of "newspeak". Eco, Umberto *Ur-Fascism*, NY Review of Books, June 22, 1995.

I submit that the definitional components of fascism as defined by Dimitrov in 1935 and, somewhat differently, by Eco in 1995, are present, although, certainly not yet in full control in our country today.

The good news.

The *good* news is that this workshop takes place at a time of an unprecedented and tremendous upsurge in the breadth and scope of the progressive activist movement in this country. Look at the remarkable energy, creativity and persistence of the "Black Lives Matter" movement and the comprehensive and visionary program articulated in 2016 by the Movement for Black Lives.[13] Look at the millions who joined in the "women's marches" on January 21st [14], united behind an inclusive and radical progressive program.[15] Look, for example, at the broad support for the "Water is Life" Native American led movement to stop the DAPL pipeline, the growth of the climate change and anti-fracking movements, the militancy of the "fight for $15" campaigns, the rapid and huge mobilizations against Trump's "Muslim ban" Executive Order, the re-emergence of sanctuary city movements, and the upsurge in radical activism on college campuses.

This current level of activism builds on the enthusiasm of the Occupy movements, as well as numerous other movements of the past several years, as well as, of course, the historic struggles the movements for peace, civil rights, worker's rights, women's equality, LGTBQ liberation, and African-American liberation. The creativity and courage of the (mostly) young activists in the past several years has opened new

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[13] The Movement for Black Lives, Platform https://policy.m4bl.org/platform/ (accessed 2/19/17).

[14] In Albany, NY, location of this CLE program, an unprecedented estimated more than 7,000 people attended the Inaugurate Resistance March (a sister march to the Women's March in Washington, DC) on 1/21/17. Bump, Bethany, *Crowd of 7,000 Marches in Albany*, 1/21/17, Times Union, http://www.timesunion.com/local/article/Albany-activists-Inaugurate-Resistance-on-10873758.php

[15] Women's March on Washington, https://www.womensmarch.com/ , the full statement of the Guiding Vision and Definition of Principles for the Women's March can be accessed at: https://static1.squarespace.com/static/584086c7be6594762f5ec56e/t/587ffb31d2b857e5d49dcd4f/1484782386354/wmw+guiding+vision+%26+definition+of+principles.pdf (accessed 2/19/17)

avenues for social and political change, has unleashed new forms of state repression[16], and has created new challenges for activists and activist lawyers.

Why does it matter to lawyers what "time" it is?

If we, as lawyers and others involved in the legal system, are to fulfill our potential (and necessary) roles as advocates for political activists and as shields against governmental repression and abuse, we must have an understanding of the existing legal structures as well as the ways in which these structures are in transition. We also must know our clients. What moves and motivates leftist political activists in 2017? What do our clients see in the current political framework that, perhaps, we as lawyers have missed? Has there been a change regarding the extent to which we can depend on the police, prosecutors, or courts to uphold fundamental constitutional rights?[17]

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[16] See, Water Protector Legal Collective, Press release, 11/28/16, *Water Protector legal Collective Files Suit for Excessive Force Against Peaceful Protestors*, https://waterprotectorlegal.org/water-protector-legal-collective-files-suit-excessive-force-peaceful-protesters/

See, also, United Nations Special Rapporteur on the Rights to Freedom of Assembly and of Association, *USA: Inequality Casts Dark Shadow Over Exercise of Assembly and Association Rights, UN Expert Says*, 7/28/16, Press release, http://freeassembly.net/news/usa-visit-recap/

See, also, Amnesty International, *On the Streets of America: Human Rights Abuses in Ferguson*, 10/20/14, documenting numerous violations by the authorities in Ferguson of the rights to peaceful assembly, association and expression, including imposition of restrictions on protests, intimidation of protesters, improper use of tear-gas, rubber bullets and "long-range acoustic devices", and restrictions on the media and on legal and human rights observers. http://www.amnestyusa.org/research/reports/on-the-streets-of-america-human-rights-abuses-in-ferguson

[17] I am not suggesting that we *could* depend on the police , prosecutors or courts to uphold constitutionally protected rights prior to the election of Trump. Rather, my point is that these issues are in a state of flux and we must be cognizant of the complexities that exist in this time of profound change. What are the fissures within the ruling class? How do these divisions get expressed in the legal system? What forums provide us with the best options for defending and protecting the rights of our clients? I do not have answers to these questions, but I believe we are not doing our job as lawyers if we fail to ask these questions and, at least, discuss them among ourselves as well as with our clients and with the broader universe of political activists.

What is the role of progressive lawyers?

Progressive lawyers play a unique, if sometimes confusing, conflicted and contradictory, role in assisting activists and activist organizations and movements due to our specialized knowledge and experience in the court system and due to the privileges which can accompany our status as lawyers and "officers of the court".[18]

It is, at the outset, worth noting that a lawyer representing an arrested demonstrator or a group of demonstrators in a cases involving planned (or unplanned)

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[18] For writings and work exploring these issues, see, *inter alia*,

Brown-Nagin, Tomiko, *Does Protest Work*, 56 Howard L. J. 721 (2013) (Reviews history of the role of lawyers in protest movements from the civil rights movement through Occupy.)

Ginger, Ann Fagan, *The Relevant Lawyers: Conversations Out of Court on Their Clients, Practice, Politics and Life Style*, Simon & Schuster, 1972. (Interviews with numerous radical movement lawyers.)

Kunstler, W., *Open Resistance: In Defense of the Movement*, Juris Doctor, January 1971 (re-printed in *Law Against the People, Essays to DeMystify Law, Order and the Courts*, edited by Robert Lefcourt, Vintage Books, 1971.) Kuntsler says:

> . . . what is the role of the progressive American lawyer at a time somewhere between the ballot and the barricades? Created and licensed by the very system that seeks to destroy, isolate, or immobilize many of his clients, operating under its substantive and procedural rules, indeed serving as an "officer" of its tribunals, he is, at the same time, painfully aware that he is himself perpetuating one of its cruelest illusions - that justice is truly evenhanded. . . . he must, if he has any sensibilities at all, wonder whether he can continue to live with a paradox that daily confronts and confounds him.

Marton, Janos D., *Representing an Idea: How Occupy Wall Street's Attorneys Overcame The Challenges of Representing Non-Hierarchical Movements*, 39 Fordham Urb. L. J. 1107 (Article reviews experiences of Occupy lawyers around the country and explores how attorneys "got involved with the Occupy movement, liaised with it, worked with the consensus process, and addressed their clients' needs through a legal system that is part of the broader political system against which the Occupy movement protests." Id., at1110.)

Quigley, William, *Ten Questions for Social Change Lawyers*, 17 Pub. Int. L. Rep. 204 (2012). (Attached to these materials as **Appendix 1**.)

Rebellious Lawyering conferences (annual law-student organized conferences inspired by Lopez, Gerald, *Rebellious Lawyering*, Westview Press, 1992), information on the 2017 conference, which occurred one week ago, can be found at: http://reblaw.yale.edu/

civil disobedience faces considerations that may be quite different from issues raised in non-political cases.[19]

Your client may have:

1. acted as part of a non-hierarchical collective,

2. intended to be arrested,

3. given much advanced thought to his/her actions,

4. been motivated by a moral conviction that his/her action was necessary,

5. vast knowledge regarding the political issue his/her action focused on,

6. a belief that his/her action was an exercise of 1st amendment protected conduct,

7. opposition to contesting his/her commission of the alleged acts,

8. a belief system leading to insisting on making decisions collectively with his/her co-defendants (or other political colleagues or comrades) rather than individually,

9. a high degree of distrust the legal system in general,

10. reasons to decline proposed dispositions which other non-political defendants would quickly accept,

11. an interest in raising novel or out-of-the-ordinary defenses,

12. reasons to refuse to raise ordinary criminal law or criminal procedure defenses,

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[19] There are significant distinctions and different issues that arise depending on whether one is involved in a case of *planned* civil disobedience as compared with one in which activists are, for example, set-up by informants or provocateurs, or in which people are arrested at a protest *without* having intended to get arrested (and without having engaged in any conduct that could remotely provide a basis for arrest), or cases in which, arguably, a person has engaged in conduct (such as vandalism) providing a basis for an arrest. Different types of cases require different strategies.

13. a strategy to use the courtroom as a forum for raising or further promoting the political agenda that led to the action in the first place,

14. an interest or wish to proceed *pro* se, even if lawyers are available, (and even if having a lawyer would be a good idea, from a legal perspective),

15. a political reason to be deliberately uncooperative in regard to police procedures, court procedures or directives from the court,

16. a political basis to consider him/herself to be a political prisoner or a prisoner of war, and might reject any notion that the court system even has the legitimate right to put him/her on trial.

For lawyers accustomed to handling non-political, "ordinary" criminal cases, civil disobedience/political defendants and cases can present many unique challenges.

Imagine, for example, a client who makes choices based on what is perceived to be best for the entire group, even if it is not the most advantageous decision for the individual client. (For example, if a prosecutor offers dispositions to a group of demonstrators that are harsher for individuals with prior records and less harsh for those without, the entire group - including those individuals who would benefit from the more lenient proposed disposition - might decide to reject the offers.)

Or, imagine a client who refuses an "adjournment in contemplation of dismissal" based on a desire to go to trial even if there is little likelihood of winning a trial.

Or, imagine a client who insists on taking the stand to testify for the purpose of stating exactly what s/he did to, for example, trespassed or obstructed traffic. (That is, who insists on admitting all of the elements of the charged offense.)

Or, imagine a group (as was often the case with Occupy actions) where there are numerous defendants, all arrested at the same time and all sharing some basic principles as to why they did what they did, but who each have quite different ideas about how to respond to the criminal charges.

Despite these significant differences between the interests and wishes of clients in civil disobedience cases and those of an "ordinary" client in a non-political case, the lawyer's ethical and political obligations are to provide zealous and effective

representation within the bounds of the law and with undivided loyalty to the client(s).[20]

These obligations mean that a lawyer handling a case of an arrested demonstrator / political activist must be open to hearing the wishes of the client, must be respectful of his/her wishes, must be understanding of the reasons s/he decided to deliberately risk arrest or to engage in the action, must be willing to learn new arguments, explore new areas of law, and to be creative in finding ways within the context of the legal system to assist the client in the expression of his/her political goals. [21]

II. Pre-trial motion practice

Pre-trial motion practice is irrelevant in many civil disobedience cases. Often the goal of the clients, with good reason, is to spend as little time in the court system as possible. And, often, prosecutors and judges are willing to resolve protest arrest cases quickly and easily.

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[20] Hostility of prosecutors and/or the Courts in political cases can lead to challenges not faced in non-political criminal cases. Some upstate New York examples:

The bizarre actions of the Town of Reading Justice Court in 2014 provide a good example of some of the unique challenges facing lawyers for political activist defendants. Passavant, Paul A., *A Report From the Frontlines of the War Against Fracking*, Counterpunch, December 26, 2014. http://www.counterpunch.org/2014/12/26/a-report-from-the-frontlines-in-the-war-against-fracking/

See, also, the Occupy Albany related litigation, *People v. Donnaruma, et al*, in which the D. A. declined to prosecute four individuals involved in peaceful protest actions, yet an Albany City Court Judge refused to dismiss the charges and threatened to hold the D.A. in contempt. *Soares v. Carter*, 25 NY 3d 1011 (2015) (A trial court cannot order a prosecutor - who has declined to prosecute a case - to present evidence at a pretrial hearing, nor can the court seek to enforce such a directive through its contempt powers.)

[21] For background on the varied theories and practices of civil disobedience, see, *inter alia,* Dr. Martin Luther King, Jr., *Letter from a Birmingham Jail*, 1963 (available from many sources, including on the web); William O. Douglas, *Points of Rebellion*, Random House, New York, 1970; Howard Zinn, *Disobedience and Democracy, Nine Fallacies on Law and Order*, Vintage Books, New York, 1968.

For a client-centered description of being a defendant in a political case, see, Titled Scales Collective, *A Tilted Guide to Being a Defendant* (Combustion Press, 2016), which, from the book's description, "was written by dedicated legal support activists and draws on the wisdom of dozens of people who have weathered the challenges of trials and incarceration." An excerpt is available on-line at: http://www.tangledwilderness.org/the-criminal-legal-system-for-radicals/

However, there are situations where the prosecutor and/or court take harsher positions (making it more difficult for the defendant to accept a proposed plea bargain) and/or where the protesters wish to use the court system as a forum for continuing to present their political arguments.

I suggest there are no inherently "right" or "wrong" decisions in political cases regarding whether to accept or reject a proposed plea bargain. These are case-by-case determinations and depend on numerous factors, including, the political calculation by the group as to how to most effectively advance their cause.

The role of attorneys in these situations is to provide clear and accurate assessments as to the legal and factual issues involved in the case as well as pragmatic information as to how long the process will take, how many court appearances will be required, expenses and fees that may be required, and the likelihood of being permitted to present political defenses and evidence at a trial.

The specific areas of justification, international law, First Amendment, and motions dismiss in the furtherance of justice are addressed below.

I will briefly summarize the basic components of criminal pre-trial motion practice in New York.[22]

Potential pretrial motions include motions for discovery[23], for *Brady* material[24],

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[22] Many excellent and comprehensive resources exist to assist lawyers in preparing pre-trial motions. See, e.g., Muldoon, Gary, *Handling A Criminal Case in New York*, Thomson Reuters (annual editions).

[23] See, Criminal Procedure Law, Article 240.

[24] *Brady v. Maryland*, 373 U.S. 83 (1963) (Prosecution must turn over all exculpatory evidence to the defense.) This is a constitutional right and is also an ethical obligation on the part of the prosecutor. 22 NYCRR 1200.30(b) (Rule 3.8 of the NY Rules of Professional Conduct, as adopted by the Appellate Divisions.) See, also, Formal Opinion 2016-3 "Prosecutors' Ethical Obligations to Disclose Information Favorable to the Defense", Assoc. of the Bar of the City of NY, finding that Rule 3.8 requires a prosecutor to disclose evidence and information known to the prosecutor that tends to negate the defendant's guilt, mitigate the degree of the offense, or reduce the sentence and the Rule does not contain the "materiality" limitation contained in some case-law. Such disclosure must be timely, meaning as soon as is reasonably practical.
http://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/formal-opinion-2016-3-prosecutors-ethical-obligations-to-disclose-information-favorable-to-the-defense

suppression[25], for dismissal on the grounds that the accusatory instrument is jurisdictionally defective[26], dismissal on speedy trial or readiness for trial grounds[27], for dismissal (indictment) on the grounds that the indictment is defective, that the evidence before the grand jury was not legally sufficient, or that the grand jury proceeding was defective[28], or for any other Order which would be helpful to the defense.

The procedure for pre-trial motions is governed primarily by CPL Article 255. The deadline for filing pre-trial motions is generally 45 days after the arraignment (CPL 255.20). Many local courts have their own unique procedures regarding scheduling of motion practice and it is well worth ascertaining the local procedures.

Although I have separated these more "ordinary" pre-trial motions from the discussion below of more explicitly political-based motions, the distinction between "political" and "non-political" is not always so clear.

For example, it is, in my opinion, "political" to insist that a court uphold the right of a defendant to be prosecuted on the basis of a jurisdictionally sound accusatory instrument or to insist that the prosecution be ready for trial within the proscribed time limitations. A defendant's rights, for example, to receive proper notice as to the allegations against him/her or to have a speedy trial are *political* rights secured as the result of historical struggles against government repression. We, as lawyers, should not underestimate the significance of these rights and we can play a role in educating our clients as to these issues.

It is also worth noting that many of our victories as criminal defense lawyers are not "reported" cases, as our "wins" often consist of an informal determination by a prosecutor or judge to dismiss a case, or a written decision by a lower court that never is

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[25] See, generally, CPL Article 710.

[26] See, CPL 10015(3) and 100.40 regarding misdemeanors and the provisions of CPL Article 210 as relate to indictments; *People v. Alejandro*, 70 NY 2d 133 (1987) (misdemeanor criminal charge must be dismissed if the accusatory instrument fails to allege facts regarding an element of the offense), *People v. Casey*, 95 NY 2d 354 (2000) (non-hearsay nature of allegations in misdemeanor accusatory instrument must be clear on the face of the instrument), *People v. Dryden*, 15 NY 3d 100 (2010) (misdemeanor accusatory instrument is no good if it provides solely conclusory statements regarding a necessary element of the offense).

[27] See, CPL Article 30.

[28] See, CPL article 210.

"reported". This is why it is of such importance for lawyers engaged in this work to share experiences and resources with each other and to join together, for example, in the National Lawyers Guild (www.nlg.org) and the NLG's Mass Defense Committee to share and learn from each other.

III. Justification / necessity defenses

Article 35 of the NYS Penal Law establishes the defenses of "justification". This is a *defense* (as compared with an *affirmative* defense), meaning that when it is raised at trial, the prosecution has the burden of disproving the defense beyond a reasonable doubt. Penal law § 25.00 (1). Penal law § 35.05 provides:

> Unless otherwise limited by the ensuing provisions of this article defining justifiable use of physical force, conduct which would otherwise constitute an offense is justifiable and not criminal when:
>
> 1. Such conduct is required or authorized by law or by a judicial decree, or is performed by a public servant in the reasonable exercise of his official powers, duties or functions; or
>
> 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. Whenever evidence relating to the defense of justification under this subdivision is offered by the defendant, the court shall rule as a matter of law whether the claimed facts and circumstances would, if established, constitute a defense.

This provision creates two distinct, yet related, categories of "justification" relevant to political civil disobedience cases.[29]

First, conduct otherwise constituting an offense is not criminal if *required or authorized by law.*

Second, such conduct is not criminal if *necessary as an emergency measure to avoid an imminent public or private injury.*

As is relevant here, the *required or authorized by law* category relates primarily to obligations of individuals and of government entities which arise under the broad topic of "international human rights law". This is addressed below, under the heading of "International Law".

The *necessary as an emergency measure* category offers the opportunity for demonstrators to present a defense premised on the urgency of their civil disobedience action, the seriousness of the harm they were attempting to prevent, and a balancing of the desirability of avoiding such injury as compared with the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue. [30]

The justification defense has not been broadly interpreted by the courts in New York in political cases. For two reported decisions recognizing the applicability of the justification defense (and granting dismissals based on the defense), see:

People v. Bordowitz, et al. . 155 Misc. 2d 128 (Cr. Ct. of the City of NY, 1991)

> Defendants acquitted, after a nonjury trial, of the charge of criminally possessing a hypodermic instrument (Penal Law § 220.45) since they established that their conduct in

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[29]Article 35 also establishes several other categories of "justification", most notably, the use of force in self-defense (Penal Law 35.15) and in defense of premises (Penal Law 35.20).

[30] For two excellent scholarly examinations of the use of the justification (or "necessity") defense in civil disobedience cases, see, Quigley, William P., *The Necessity Defense in Civil Disobedience Cases: Bring in the Jury*, 38 New Eng. L. R. 3 (2003) (https://billquigley.wordpress.com/publications/quigley____necessity_defense/) and Cohan, John Alan, *Civil Disobedience and the Necessity Defense*, 6 Pierce L. R. 111 (http://law.unh.edu/assets/images/uploads/publications/pierce-law-review-vol06-no1-cohan.pdf). Neither article focuses on New York law, but they provide useful background on the use of the necessity defense in political cases.

> providing clean needles to drug addicts in Manhattan as part of a needle exchange program, which included health care counseling, was justified by the exigencies created by the AIDS epidemic and thus falls within the standards of the medical necessity defense (Penal Law § 35.05 [2]).

People v. Gray, et al. , 150 Misc. 2d 852 (Cr. Ct of the City of NY, 1991)

> Defendants, members of an organization devoted to the promotion of nonvehicular, ecologically sound means of transportation, acquitted of disorderly conduct charges (Penal Law § 240.20 [5], [6]) resulting from their participation in a demonstration at the entrance to the Queensboro Bridge, in opposition to the opening to vehicular traffic a lane that had previously been reserved for bicycles and pedestrians, since defendants met their initial burden of establishing a *prima facie* case of the necessity defense (Penal Law § 35.05 [2]), and the People failed to disprove the defense beyond a reasonable doubt.

Judge Safer-Espinoza's opinion in *Gray* includes a detailed analysis of the elements of the justification defense and is useful as a primer on the applicability of such defenses and the standards to be utilized by the courts in evaluating the proof when a justification defense is raised.

Decisions in which the justification defense was not accepted include:

People v. Bucci, et al, 2016 NY Slip Op 51855(U), Justice Court of the Town of Cortlandt (McCarthy, J.), decided 12/1/16, a recent decision in which a Town Justice rejected a "justification defense" in a case involving protests relating to a gas pipeline. The defendants presented testimony and evidence in support of their justification defense, including that of experts on the dangers and environmental hazards of the pipeline project. The Court held that:

> . . . the defense is inapplicable and unsupported as a matter of law and based primarily on the subjective and speculative personal views and opinions of the defendants.

The Town Court cited to *People v. Craig*, 78 NY 2d 616 (1991) (protestors had occupied a congressional office to protest the government's policy in Nicaragua), in

which the Court of Appeals rejected the justification defense in what the Cortlandt Town Justice called an "analogous situation", noting the requirement that the harm be "imminent" and "about to occur" and that it is an "objective" standard, not one based on the defendant's subjective or speculative state of mind.

People v. Scutari, et al., 148 Misc. 2d 440 (District Court, Nassau County, 1990)

> Defendants could not assert the defense of justification (Penal Law § 35.05 [2]) in their trial for criminal trespass (Penal Law § 140.05) for remaining in the office of a U.S. Congressman after the 5:00 P.M. closing to protest the continuation of aid to the government of El Salvador in the face of alleged ongoing human rights violations in that country since defendants failed to demonstrate that there existed an emergency or necessity that compelled them to commit criminal trespass.

People v. Chachere, 104 Misc. 2d 521 (District Court, Suffolk County, 1980)

> Defendant, arrested after he climbed a fence at a nuclear power plant during a mass demonstration, despite being warned not to do so, failed to establish the elements of the defense of justification (Penal Law, § 35.05), namely that he reasonably believed an emergency existed, that the action he took was reasonable in light of the circumstances, that the harm sought to be prevented was greater than the harm committed, and that there was a reasonable certainty that the condition acted against would be stopped or overcome, and, accordingly, he was found guilty of trespass.

The justification defense does not need to be raised in the pre-trial motions, it can be raised for the first time at trial. However, in a political case - where the point is to raise the political issues - raising justification as part of the pre-trial omnibus motions offers an excellent opportunity for the activists to present the reasons for their actions in writing. The legal documents can be a useful public education and public relations tool, assisting the activists in getting their message out to the public. An example of this is attached as **Appendix 2** - excerpts from pre-trial motions in *People v. Wilson, et al.* a civil disobedience case in Albany, NY, from the mid-1980's relating to university divestment from apartheid South Africa.

IV. International human rights law

An entire body of law - international human rights law - exists to assist in analyzing and addressing issues of, *inter alia*, the right to access to clean water, the right to peace, the rights of protest, assembly and free expression, the right to be free from racism, etc. The various codes and covenants that make up this body of law are, for the most part, an integral part of the law of the United States, yet most U.S. lawyers know little about this area of law and it is rarely utilized in litigation.

A full presentation on international human rights law is far beyond the scope of these materials.[31] However, it is possible to *briefly* point to certain useful resources and to encourage attorneys concerned with violations of human rights to begin to make use of these principles, particularly in the context of providing advice and representation to human rights activists.

International human rights law is part of the supreme law of the United States pursuant to Article 6, clause 2, of the U.S. Constitution.[32]

The United States, as a state entity, has signed - and therefore obligated itself to compliance with - *inter alia,* the United Nations Charter, the Universal Declaration of

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[31] Fortunately, another presentation at this CLE will focus on the use of international human rights law to protect rights in this country. The materials relating to that presentation are, likely, an excellent source of information and background on this important topic.

[32] Despite the clarity of the Constitution on the inclusion of international treaties as part of the supreme law of the land, there is case-law which makes this less clear. The Supreme Court has created a doctrine of "non-self-executing"treaties, which are enforceable in the U.S. only by specific implementing legislation. As examples of the confusing state of Supreme Court jurisprudence regarding the relevance and applicability of international human rights law in the U.S., see: *Lawrence v. Texas*, 539 U.S. 558 (2003) (Court invalidated consensual sodomy laws, relying, in part, on international law), *Roper v. Simmons*, 543 U.S. 551 (2005)(Court invalidated the death penalty for individuals whose crimes were committed as juveniles, again, relying, in part on international human rights law principles), and *Medellin v. Texas*, 552 U.S. 491 (2008) (Court declined to halt the Texas execution of a Mexican national despite arguments that such an execution would be in violation of internal law). The issues in *Lawrence* and *Roper* were not related to the question of whether a particular treaty was "self-executing" or "non-self-executing", but that issue was squarely addressed by the majority in *Medellin*. This issue - self-executing vs. non-self-executing - is important, but, is not necessarily relevant to the use of international human rights law principles as part of a defense strategy in a political civil disobedience case. We should cite to and refer to international human rights law as a basis for our clients' actions, regardless of whether a particular treaty has been deemed "self-executing" or not. The point is that these international norms establish principles the U.S. has committed to in some form and provide a basis in law for civil disobedience directed at violations of international human rights norms.

Human Rights, as well as many other covenants and conventions.[33] So, under Article 6 of the Constitution, these treaties are part of the supreme law of the United States! (Did you learn that in law school?)

International human rights law provides useful models and standards by which governmental actions in the U.S. can be measured.[34]

In addition, the U.S.'s obligation, under certain treaties, to periodically provide detailed reports to the United Nations or to UN affiliated bodies, offers unique opportunities for human rights lawyers and activists to push the U.S. government to engage in accurate and complete reporting and to raise concerns in international fora about U.S. human rights violations. [35]

The framework of international human rights law offers compelling advocacy and organizing opportunities.

Here are some recent examples :

- Activists in Chicago working on police brutality issues organized a widely-publicized delegation of young people to travel to Geneva, Switzerland in November 2014 to present testimony to the UN.[36]

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[33]The complete texts of the UN Charter and the Declaration of Human Rights can be found at the United Nations website http://www.un.org/en/documents/index.shtml .

[34] Examples of this, include the 1951 "We Charge Genocide" petition to the United Nations and numerous reports issued by Amnesty International and Human Rights Watch (e.g., Amnesty International: *United States of America, Rights for All*, 1998, and Human Rights Watch: *Shielded from Justice, Police Brutality and Accountability in the United States*, 1998) and the recent comprehensive assessment of the police response in Ferguson, "On the Streets of America: Human Rights Abuses in Ferguson", issued by Amnesty International in October 2014.

[35] See, e.g., the various official reports and "shadow reports" submitted to the United Nations Committee on the Elimination of Racial Discrimination pursuant to the treaty obligation of the United States to report on progress made towards eliminating racial discrimination, as well as the Concluding Observations of the UN Committee in response to the United States, all of which can be accessed at http://www.ohchr.org/EN/countries/LACRegion/Pages/USIndex.aspx .

[36] See: http://wechargegenocide.org , specifically, the report on the Geneva delegation, at: http://wechargegenocide.org/summary-of-we-charge-genocide-trip-to-united-nations-committee-against-torture/ .

- Activists in Detroit working against the municipal water shut-offs in the context of the City of Detroit's bankruptcy raised this as an issue of human rights - the human right to access to water - and affirmatively reached out to the United Nations. The result was hugely successful, at least as an organizing and public education strategy.[37]

- Anti-fracking activists in Australia prepared a detailed analysis of how the proposed fracking would be in violation of international human rights law, specifically in regard to the impact on the rights the indigenous Mitkatha People. [38]

Finally, and most relevant to these materials, international human rights law can be used by litigators and advocates on behalf of clients.

There are, for example, legal service offices which have established projects with the goal of bringing international human rights law into the day-to-day advocacy on behalf of poor people.[39] This work is easily adapted for criminal defense lawyers.

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[37] See, *Detroit: Disconnecting water from people who cannot pay - an affront to human rights, say UN experts*, http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14777&LangID=E, and Badger, Emily, *The U.N. says water is a fundamental human right in Detroit*, The Washington Post, 10/23/14, http://www.washingtonpost.com/blogs/wonkblog/wp/2014/10/23/the-u-n-says-water-is-a-fundamental-human-right-in-detroit/

[38] See: December 3, 2014 letter from the Mitkatha People to the UN Special Rapporteur on the Rights of Indigenous Peoples, https://mithaka.files.wordpress.com/2014/11/submission-to-the-special-rapporteur-by-the-mithaka-people-03-12-2014.pdf

[39] See, e.g., Maryland Legal Aid Bureau, Inc. which has explicitly adopted a "human rights framework" guided by international human rights law.http://www.mdlab.org/about-us/human-rights-framework

See, also, the Center for Human Rights & Humanitarian Law at American University, Washington College of Law, which has published *Human Rights in the U.S., A Handbook for Legal Aid Attorneys* (2014), a link is at http://www.wcl.american.edu/humright/center/locallawyering.cfm .

See, also, resources at the website of the Bringing Human Rights Law Home Lawyer's Network of Columbia Law School, http://www.law.columbia.edu/human-rights-institute/bhrh-lawyers-network

See, also, Ginger, Ann Fagan, editor, *Challenging U.S. Human Rights Violations Since 9/11* , Prometheus Books, 2005, which focuses primarily on advocacy on issues arising out of the U.S. government's responses to 9/11, but is a valuable resource on the substance of international human rights

How can these principles be utilized in our criminal defense of activists?

These requirements of international human rights law may provide a basis to argue that our clients' actions were required or authorized by law, a basis for the first type of justification defense discussed above. For example, in cases relating to crimes against peace, or crimes against humanity, the principles of international law codified in the Nuremberg principles create an affirmative obligation on the part of individuals to take steps to stop such crimes. (See: excerpt from motions in *People v. Wilson, et al*, paragraphs 38 - 51, attached as **Appendix 2.)**

In addition, such principles also provide a basis for a "necessary as an emergency measure to avoid an imminent public or private injury" argument, the second category of justification discussed above. See: **Appendix 2**, paragraphs 58 - 61.

V. 1st Amendment

If an argument can be made that the conduct of the civil disobedience defendant(s) was protected 1st amendment activity, or, that the law enforcement officials arbitrarily made a decision to arrest in response to protected activity, then a motion to dismiss can be made asserting that the arrest and prosecution are in violation of the 1st amendment. This area - particularly in the wake of the Occupy movement - is in a state of evolution. The full impact of Occupy cases around the country has yet to be determined, but it is safe to say, in general, Occupy resulted in a more expansive framework for 1st Amendment analysis in the court system as well as a much broader understanding among activists of the importance of advocating for a broad interpretation of the 1st Amendment.

As one example of 1st Amendment advocacy, see **Appendix 3**, an affirmation on behalf of Occupy activists in Chicago, which sets forth the guiding principles of a broad view of the 1st Amendment rights of protesters.[40]

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law and procedures for utilizing such law.

[40] The 1st Amendment arguments were accepted by the lower court and the charges against 92 Occupy defendants were dismissed. See:
http://peopleslawoffice.com/wp-content/uploads/2012/09/Decision-Ruling-in-Favor-of-Occupy-Chicago1.pdf
Unfortunately, in December 2014, an Illinois appellate court overturned the lower court dismissals.
http://peopleslawoffice.com/wp-content/uploads/2014/12/Occupy-Chicago-Appellate-Opinion.pdf

The law in New York remains quite restrictive regarding the rights of protesters on private property, even when a compelling argument can be made that there was state action. See: *Downs v. Crossgates, et al.*, 70 AD 3d 1228 (3rd Dept. 2010) (activist arrested for refusing, on the eve of the Iraq War, to remove a "peace" tee-shirt at mall does not have 1st Amendment claim because it was private property), appeal dismissed, *sua sponte*, by Court of Appeals due to the absence of a substantial constitutional issue, 15 NY 3d 742 (2010).

A recent NY case provides another example of the restrictive view of 1st amendment rights, but, fortunately, there is a wonderful dissenting opinion which is helpful. In *People v. Carty*, 2016 NY Slip Op 26418, Appellate Term, 1st Dept., 12/14/16, the majority of the Appellate Term rejected the first amendment defense raised by an activist arrested and convicted of disorderly conduct arising out of her participation in an "Occupy Wall Street" protest. Citing and quoting from *Schneider v. State*, 308 US 147 (1939), the majority in *Carty* held that "it is well settled that a state may prohibit a speaker from taking [her] stand in the middle of a crowded street, contrary to traffic regulations . . . since such activity bears no necessary relationship" to the freedom of speech.

However, Justice Doris Ling-Cohan, in her dissenting opinion engaged in a careful review and assessment of the 1st Amendment issues and case-law, and concluded that the NPD's "order"that the protesters disperse was not a lawful order as the City "cannot bar an entire category of expression [lying on the sidewalk] to accomplish this accepted objective [of keeping sidewalks free of congestion] when more narrowly drawn regulations will suffice." Therefore, for Justice Ling-Cohan, the order was unconstitutional and could not provide the basis for an arrest or conviction.

Justice Ling-Cohan also cited to *Hague v. Committee for Indus. Org*., 307 US 496 (1939), a leading, though old, case involving the rights of protesters to use the streets and other public places which held that people have an inherent right to use the streets for the exercise of the right to free speech and peaceable assembly.

One lesson from the majority opinion in *Carty* is for activists and lawyers to emphasize, where appropriate, the nexus between the *site and mode of protest* and the *issue(s) being addressed*. The sidewalk in front of a police station where individuals have been subjected to brutality might have a stronger 1st Amendment claim, under existing law, than a similar protest just in a busy intersection.

VI. Furtherance of Justice

The Criminal Procedure Law provides, in compelling circumstances, that a court has the power to dismiss a criminal charge regardless of guilt or innocence in the "furtherance of justice". CPL § 170.40. The statute states:

> Motion to dismiss . . . in furtherance of justice
>
> 1. An information, a simplified traffic information, a prosecutor's information or a misdemeanor complaint, or any count thereof, may be dismissed in the interest of justice, as provided in paragraph (g) of subdivision one of section 170.30 when, even though there may be no basis for dismissal as a matter of law upon any ground specified in paragraphs (a) through (f) of said subdivision one of section 170.30, 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 or count would constitute or result in injustice. In determining whether such compelling factor, consideration, or circumstance exists, the court must, to the extent applicable, examine and consider, individually and collectively, the following:
>
> (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.

2. An order dismissing an accusatory instrument specified in subdivision one in the interest of justice may be issued upon motion of the people or of the court itself as well as upon that of the defendant. Upon issuing such an order, the court must set forth its reasons therefor upon the record.

(Also, see: CPL 210.40 for analogous provision regarding indictments.)

A motion to dismiss in the furtherance of justice may be appropriate in many civil disobedience cases. Such a motion provides the activist/defendant an opportunity to present the "compelling factor" or consideration which justifies dismissal of the charge(s), that is, the defense can present - in a legally prescribed format - the political basis for the defendant(s)' actions.[41] Many judges are open to dismissing political civil disobedience cases, but want to have a legalistic basis for doing so. Motions to dismiss in the furtherance of justice can provide such a basis.[42]

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[41] It should be noted that a dismissal of a criminal charge in the furtherance of justice is not, *per se*, considered a "favorable termination" for purposes of a subsequent civil action for malicious prosecution. *Cantalino v. Danner*, 96 N.Y.2d 391 (2001) (The question of whether a dismissal in the furtherance of justice is a "favorable termination" is to be determined on a case-by-case basis). Note that an adjournment in contemplation of dismissal does not, under any circumstances, satisfy the "favorable termination" element of a malicious prosecution claim. The question of whether a disposition meets the elements of the tort of malicious prosecution is not likely to be a consideration in most cases of planned civil disobedience, but may be relevant in situations where a demonstrator is arrested without having so intended, particularly if there is concern that the police over reacted to a demonstration or simply grabbed people at random. The law regarding malicious prosecution is set forth in *Smith-Hunter v. Harvey*, 95 NY 2d 191 (2000).

[42] But, see, *People v. Donnaruma*, 48 Misc. 3d 825 (City Court, Albany, 2015), in which the Court - after having been instructed by the Court of Appeals in *Soares v. Carter*, 25 NY 3d 1011 (2015) that it could not order the prosecutor - who had declined to prosecute a case - to present evidence at a pretrial hearing, finally, and begrudgingly granted a motion to dismiss in the furtherance of justice which had initially been filed much earlier in the process.

Lower courts have broad, but not unlimited discretion regarding motions to dismiss in the furtherance of justice. The authority to dismiss a case in the furtherance of justice is a "safety valve" for the criminal justice system, one that recognizes that some circumstances are extraordinary and call for an out-of-the-ordinary exercise of compassion and flexibility. As stated by the Court of Appeals in *People v. Rickert*, 58 NY 2d 122 (1983) this "inherent power" of the courts has "ancient roots" and "its thrust, even to the disregard of legal or factual merit, has been 'to allow the letter of the law gracefully and charitably to succumb to the spirit of justice.' ", *Rickert*, at 126, citing and quoting *People v. Davis*, 55 Misc 2d 656.

Some examples of lower court dismissals that have been upheld are as follows: *People v. Rickert*, 58 NY2d 122 (1983) (Court of Appeals unanimously reversed County Court which had reversed City court dismissals in the furtherance of justice in five separate cases, holding that the City Court decisions in question had properly reviewed the facts and the statutory factors in deciding to grant dismissals in the furtherance of justice and had not abused its discretion.); *People v. Marrow*, 20 AD3d 682 (3rd Dept. 2005) (Dismissal in the furtherance of justice in A-1 felony case affirmed by Third Department as lower court did not abuse its discretion.); *People v. Doan*, 266 AD2d 732 (3rd Dept. 1999) (Third Department affirmed lower court dismissal in the furtherance of justice in rape 3rd degree case, finding that the lower court "properly examined and considered the statutory criteria which must form the basis for the exercise of judicial discretion on a motion to dismiss in the interest of justice" and that the lower court did not abuse its discretion even though one of the factors relied upon by the lower court - religious and cultural factors - should not have been considered.); and *People v. Wong*, 227 AD2d 852 (3rd Dept. 1996) (Third Department affirmed dismissal in the furtherance of justice of burglary 2nd degree charge, finding that the lower court had properly exercised its discretion in basing such dismissal on medical grounds). See, also, *People v. Rivera*, 108 AD3d 452 (1st Dept. 2013) (First Department affirmed furtherance of justice dismissal of felony criminal possession of a weapon charges.); *People v. Spagnola*, 19 Misc. 3d 16 (Appellate Term of the S. Ct., Second Department, 2008) (Appellate Term affirmed dismissal in the furtherance of justice based on their review of the record which showed the lower court was "objective and adherent to statutory standards rather than emotional or specious in reaching its disposition".)

A recent example of a denial of a well-pleaded and presented motion to dismiss in the furtherance of justice in a protest case is *People v. Miller, et al.*, 2015 NY Slip Op 50103(U) (City Court, Rochester, 2/6/15, Morse, J.). *Miller* involved a protest in the Monroe County Office Building by three activists the Court called "ardent advocates for the rights of Rochester's homeless population". Judge Morse carefully reviewed the statutory factors for a dismissal in the furtherance of justice, but determined that the

"evidence does not demonstrate compelling proof why continuation of this case at this point would constitute an injustice." As we can often learn much from unsuccessful efforts, a copy of *Miller* is attached as **Appendix 4** to these materials.

An example of a motion to dismiss in the furtherance of justice in a political civil disobedience case is at Appendix 2, paragraphs 4 - 18.

VII. Other defenses

This brief outline of justification, international law, constitutional concerns and motions to dismiss in the furtherance of justice is not meant to preclude consideration by counsel of a wide range of other potential pre-trial motions in civil disobedience cases. Creativity is okay.[43] Decisions as to what motions to file, what issues to raise and how to raise them, must always be made in close consultation with the clients. In political cases, the clients might have very specific ideas about what points they want raised and how they wish the issues to be presented.

VIII. Conclusion

Our clients know that freedom is a constant struggle.

Activists count on us as activist lawyers to protect them and to raise their voices in the often difficult terrain of the legal system.

We can, and must, particularly at this time, do all we can to fulfill our role as progressive activist lawyers.

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[43] I encourage, in particular, creative and expansive demands and motions relating to discovery in political cases - e.g., requesting all law enforcement policies relating to demonstrations, all police video-tapes, radio transmissions, etc.. Motion practice in these cases also calls for innovation in regard to supporting affidavits. For example, in a case involving a protester arrested at the official NYS celebration of Dr. King's birthday for interrupting the proceedings by chanting "build jobs and schools not prisons", we submitted affidavits from Rev. Jesse Jackson, Prof. Arthur Kinoy (attorney who represented Dr. King during the civil rights movement) and Prof. Manning Marable (a leading authority on the history of the civil rights movement), all of whom said that this individual's conduct was exactly what Dr. King would have done under similar circumstances. In a case involving students arrested in a sit-in regarding sweatshops, we submitted an affidavit from John Sweeney, President of the AFL-CIO, commending the students and asking that the charges be dismissed. We (and, more importantly, our clients) are the experts here - in regard to the political issues raised by activists and the protections our clients have, or should have - and we ought to use the opportunities presented by litigation to educate the court, the public, and to give voice to the commitment and dedication of our activist clients.