

REPRESENTING RACIAL JUSTICE AND OTHER PROGRESSIVE ACTIVISTS

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*That Justice is a blind goddess,
Is a thing to which we black are wise:
Her bandage hides two festering sores,
That once perhaps were eyes.*

Langston Hughes (1923)

*Once the classic method of lynching was the rope. Now it
is the police-man's bullet. . . . We submit that the
evidence suggests that the killing of Negroes has become
police policy in the United States and that police policy is
the most practical expression of government policy.*

We Charge Genocide,

Petition of the Civil Rights Congress to the U.N. (1951)

*Until the killing of Black men, Black mothers' sons,
becomes as important to the rest of the country as the
killing of a White mother's son, we who believe in
freedom cannot rest until this happens.*

Ella Baker (1964)

Two weeks that shook the world. That's how history will recall the period from the end of May 2020 to the date of this program.

It feels more like a decade.

And, it has been three months since the beginning of the COVID-19 public health emergency, in which communities of color and low income communities have borne the brunt of illness, death, risky and unsafe working conditions, lack of access to PPEs, lack of access to quality health-care, and economic devastation. That feels like a lifetime.

And, so we do not forget, it has been . . .

- 401 years since the first kidnaped Africans were brought as enslaved people to what is now the United States,
- 189 years since Nat Turner led a rebellion of enslaved people in Virginia,
- 171 years since Harriet Tubman escaped from slavery and began her work as a conductor on the underground railroad,

- 157 years since the Emancipation Proclamation,
- 144 years since the betrayal of reconstruction, the re-installment into power in the South of the white racist plantation aristocracy and the emergence of Jim-Crow laws,
- 139 years since Black women organized the Atlanta Washerwomen Strike, with thousands of participants, and won wage increases and better working conditions for women throughout the city,
- 99 years since whites in Tulsa massacred the Black community,
- 77 years since Velma Hopkins and other Black women led a 38 -day strike for racial justice and workers' rights at the R.J. Reynolds factory in Winston-Salem, NC, went on to organize a militant union, Local 22 of the Food, Tobacco, Agricultural and Allied Workers of America-CIO.
- 69 years since the Civil Rights Congress presented the historic petition to the United Nations calling the racist policies of the United States a form of genocide under international law,
- 65 years issue the lynching of Emmett Till in Mississippi,
- 59 years since Diane Nash led the Freedom Rides from Birmingham, Alabama, to Jackson, Mississippi, in the face of brutal violence,
- 57 years since Dr. Martin Luther King, Jr. in his “I Have a Dream” speech, said, “We can never be satisfied as long as the Negro is the victim of the unspeakable horrors of police brutality”, *and* since white supremacist terrorists bombed a Black church in Birmingham, killing four young girls.
- 36 years since Eleanor Bumpurs was shot and killed by the NYPD,
- 29 years since the brutal beating of Rodney King by the L.A. police,
- 21 years since Amadou Diallo was killed by the NYPD,
- 17 years since Angela Davis published, *Are Prisons Obsolete?*, arguing that the prison system was so integrally connected with racism and brutality that we had to imagine and fight for alternatives,
- 7 years since Alicia Garza, Patrisse Cullors, and Opal Tometi started Black Lives Matter,

- 6 years since Eric Garner was killed by the NYPD *and* Michael Brown was killed by the Ferguson, MO police,
- 4 years since Colin Kaepernick took a knee during the national anthem to protest racial injustice and police brutality towards people of color.

No wonder Black people, other people of color, and all who care about justice are outraged and tired.

George Floyd's horrifying murder on May 25th by the Minneapolis police sparked a transformational nation-wide uprising for racial justice (also responding to the police murder of Breonna Taylor in March, the lynching of Ahmaud Arbery in February and countless other cases of Black people killed in racially motivated violence by police or white supremacist vigilantes.)

Hundreds of thousands, if not millions, are voicing outrage, pain, impatience with incremental reforms, and are demanding de-funding the police, greater accountability and oversight, and other changes. Children, teenagers, young adults, middle-aged and elderly. Black, brown, white, all with a common call to end racism and white supremacy in this country. And, the activists also often connect the struggle against police brutality with environmental justice, school funding, community empowerment, access to health-care, worker rights, women's rights, LGBTQ rights, and a range of other issues. This movement will continue, will grow stronger, will use many strategies and tactics, but will not waiver on the fundamental principle that Black lives matter.

These are not new issues, as shown by the above (very incomplete) historical timeline and the quotes from Langston Hughes, Ella Baker, and the 1951 Petition to the United Nations.

There is, however, a new urgency and a new strength and breadth to the struggle to end racism and white supremacy in this country.

Simultaneously with this righteous human rights and anti-racist uprising across our country, many of our governmental structures quickly sank to unbearable depths of irresponsibility, authoritarianism, brutality, racism, and infringement of constitutional rights.

We may not know now what the lasting impact of this period will look like, but we each have a part to play in determining the outcome: either there will be a fundamental, long overdue, and healing reckoning with the central role of racism in our nation's history and present circumstances, or a descent into all-pervasive authoritarianism.

What are lawyers, law students, legal workers called upon to do in this extraordinary and unprecedented moment in which we face multiple layers of economic, public health, and human rights crises? What side are we on?

This is an update of sorts to materials I prepared in 2017 on *Creative and Informed Representation of Activists in Criminal Cases*, for a CLE conference at Albany Law School titled “Advocacy and Activism Today”. (A copy is attached to this update.)

At that time, early 2017, the Trump administration was new. Many were terrified at the anticipated extraordinary harm the new administration would inflict on immigrants, workers, people of color, women, the labor movement, Muslims, youth, LGBTQ people, and on our democratic institutions. I asked, “What time is it?”, and offered an answer that warned of the danger of brutal repression and fascism in this country, but also voiced optimism that the people of our country would ultimately come through and stand for justice. In hindsight, both my fears and hopes as of early 2017 were fairly accurate, though I underestimated the full breadth or scope of the attacks on democracy by the administration, the pain that would be experienced as the administration carried out its agenda, the resurgence of violent white supremacist groups, or the ways in which people would rise up and demand justice and liberation.

This is an emergency situation. I wanted to prepare new materials for this CLE. But, the urgency of coming together now, sharing information, and organizing as a legal community to protect constitutional rights and to support fundamental change, did not permit that.

Instead of a full update of the 2017 materials my intention here is to suggest a context and framework for understanding the current situation and to summarize: (1) examples of the new authoritarian order in which we are living, (2) significant changes in New York law since 2017 which impact on providing representation to racial justice activists at this time, (3) new COVID related court procedures, and (4) other useful resources.

First, what are the new and unbearable depths of irresponsibility, brutality, lack of accountability, and racism to which I contend many of our government structures have sunk? A few, representative illustrations:

- In NYC, for more than a week, night after night, NYPD officers and supervisors showed that they believed a “curfew” order gave them license to wantonly attack and arrest people, that it is their routine practice to randomly pepper spray and beat people exercising 1st amendment protect rights, and, based on video after video showing the callousness with which they acted, that they obviously believe there will be no accountability for the actions of police officers running wild on the streets on NYC in a campaign of terror directed against poor communities and people of color.
- In L.A., according to a recent Complaint, 2600 protesters have been arbitrarily arrested, “subjected to excessively tight and prolonged handcuffing, held on buses and in garages for long periods of time, without access to bathrooms or water” *and* at least 10,000 people “were struck by so-called ‘rubber bullets’ and/or baton strikes administered

without lawful justification” in a manner designed to inflict maximum injury. Complaint, *Black Lives Matter Los Angeles, et al. v. City of L.A., et al.*, USDC, Central District of California, 2:20-cv-05027 (6/5/20).

- In Denver, a federal judge issued a TRO against the City, noting “video evidence of numerous incidents in which officers used pepper-spray on individual demonstrators who appeared to be standing peacefully, . . . none of whom appeared to be engaging in violence or destructive behavior. . . . video evidence of officers using projectiles on several journalists . . . video evidence in which a projectile struck and knocked out a peaceful protestor . . . video evidence of four incidents in which police projectiles struck the eyes of peaceful demonstrators, in some cases resulting in facial fractures, in some cases resulting in permanent loss of vision. . . . [and] video evidence of three incidents in which officers threw tear gas or shot pepper balls into peaceful crowds.” Order on Plaintiffs’ Motion for a TRO, *Abay, et al. v. City of Denver*, USDC, District of Colorado, 1:20-cv-01616 (6/5/20).
- In Buffalo, on June 4th, tactical police officers violently pushed a peacefully protesting 75 year old man to the ground, causing a serious head injury, failed to stop and ensure the man received medical attention, and then lied about their actions. In a display of what can only be categorized as akin to the behavior of fascistic bullies, the entire 57 member squad resigned from the special unit in protest after the City was compelled by public outcry to suspend two officers, and over 100 officers showed up at the criminal arraignment of the two officers on felony assault charges to express their apparent belief that police officers can engage in unjustified brutality with impunity.
- In cities throughout the country, police have also targeted National Lawyers Guild (NLG) Legal Observers, many of whom have been arrested or injured while monitoring demonstrations against racialized police brutality. NLG LOs attend protests to document police activity and ensure demonstrators’ legal rights. They wear distinctive neon green hats labeled “NLG Legal Observer” to identify their role, and are trained to observe, document, and obtain names of arrestees, but this visibility and role has also made them a target for police. In the past week, police have arrested, attacked, and tear gassed LOs in at least a dozen cities, including at least three shot with rubber bullets or similar munitions, others beaten, punched, shoved, pepper-sprayed, tear gassed and/or arrested. The NLG concluded from the evidence gathered that police are intentionally targeting LOs. NLG, *Police Targeting NLG Legal Observers at Black Lives Matter Protests*, Press Release, June 7, 2020.

- In Washington, D.C., federal authorities have deployed officers who are heavily armed, but unidentifiable and with no indication of what agency they represent, to intimidate protesters. This raises what the NY Times calls “the specter of a ‘secret police’ force”, similar to the worst dictatorships in the world. Zolan Kanno-Youngs, *Unidentified Federal Police Prompt Fears Amid Protests in Washington*, NY Times, 6/4/20.
- In Albany, NY, with no findings that justify such a drastic and unprecedented infringement on constitutional rights, and without immediately making the text of the orders available to the public, the Mayor declared a “curfew” on May 30th, and then, in a separate order, again on May 31st, making it a crime for anyone to be “in a public place”, (except for emergency personnel or those commuting to or from essential functions). These orders provided the legal basis for some of the police actions against protesters and others, and, thus, are relevant for representation of any person arrested during the time these were in effect. Copies of the Albany “Emergency Orders” are attached.¹
- In Albany, for what I believe to be the first time ever, or at least in many decades, police used tear gas, rubber bullets, and military style armored vehicles against people resulting in multiple injuries, risk of adverse health consequences in the neighborhoods where these extraordinary weapons were utilized, and, likely in violation of international human rights standards and the APD’s own use of force policies.

¹ Other municipalities in the Capital Region have also imposed at least temporary curfews during this period - Schenectady, Watervliet, Menands, Green Island, and more.

Municipal curfews raise constitutional concerns: due process, 1st Amendment, freedom of movement, right to travel, and, as curfews inherently give police wide enforcement discretion, they typically are applied in a racially disparate manner. Such orders, by their nature and as their purpose, infringe upon constitutionally protected rights, often without appropriate notice or clear rules. Thus, curfew orders are subject to strict constitutional scrutiny. As articulated by the U.S. District Court for the District of Columbia, “The right to walk the streets, or to meet publicly with one's friends for a noble purpose or for no purpose at all and to do so whenever one pleases is an integral component of life in a free and ordered society.” *Waters v. Barry*, 711 F. Supp. 1125 (D.D.C. 1989), see, also, *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), *Hague v. CIO*, 307 U.S. 496 (1939) (“Wherever the title of streets and parks may rest, they 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. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.” Id., at 515. To be constitutional and to pass the strict scrutiny test, there must be a close nexus between the alleged harm or risk of harm and the governmental restrictions and infringements on constitutional rights that are imposed. It is questionable whether that factual nexus has been met in the Albany curfew orders.

Second, significant changes in NY law since February 2017 when the attached materials were prepared must be noted, specifically, regarding pretrial discovery, bail, and age of criminal responsibility.

- Pretrial discovery in criminal cases in NY changed in 2019 with the repeal of Criminal Procedure Law Article 240 and the enactment of a new Criminal Procedure Law Article 245. Criminal defendants in NY now have far greater protections in regard to pretrial discovery, both in the scope of materials provided and the timing of disclosure by the People. (The changes enacted in 2019 were later modified by the Chapter 56 of the Laws of 2020, PART HHH, though it remains accurate that pretrial discovery in NY looks quite different now than in 2017.)
- Bail and pretrial release laws were completely overhauled in 2019 by the enactment of Chapter 59 of the Laws of 2019, PART JJJ. (Subsequently modified by Chapter 56 of the Laws of 2020, Part UU.)
- The age of criminal responsibility was raised from 16 to 18, a new category of “adolescent offender” was established, and major procedural changes were implemented regarding how youth are treated in the criminal or family court systems, all part of the “Raise the Age” legislation adopted in April 2017 as Chapter 59 of the Laws of 2017, PART WWW.

Third, the COVID-19 public health crisis has resulted in major, though temporary, changes to court procedures. The Chief Judge issued a series of Administrative Orders as has each Judicial District. These can all be found at [Https://www.nycourts.gov/index-ao.shtml](https://www.nycourts.gov/index-ao.shtml) and practitioners are advised to regularly check the state-wide rules as well as district rules to note changes in court procedures, including arraignment procedures and in-person as opposed to virtual appearances.

Fourth, resources:

Here are web-sites of organizations advocating for real change in policing and the entire criminal legal system and that offer a way to learn about and keep up with the demands and goals of this broad movement. (Not a complete list, but a starting point.)

- Communities United for Police Reform
A key organization working for change in NYC and at the state level.
Active in advocating at the state legislature.
<https://www.changethenypd.org/>

- Justice Committee.
The Justice Committee has been at the forefront of fighting on behalf of families of individuals killed by the NYPD.
<https://www.justicecommittee.org/>
- The Movement for Black Lives.
A national coalition arising out of the Black Lives Movement, with policy platforms and a national strategy for change.
<https://m4bl.org/>
- Black Lives Matters.
The organization started by Alicia Garza, Patrisse Cullors, and Opal Tometi in 2013, continuing to provide national leadership in the movement. <https://blacklivesmatter.com/>
- Critical resistance.
National organization that has worked for decades on ending the prison industrial complex and for police abolition. Considered a key source of both scholarly and grass-roots resources and strategic thinking on these issues. <http://criticalresistance.org/>
- Immigrant Defense Project.
Key immigrant rights advocacy group in NYS, with fantastic resource for attorneys representing immigrants, particularly in criminal cases. <https://www.immigrantdefenseproject.org/>

To understand why many in the Capital Region are angry, fed-up, and are demanding change, here is a sampling of *recent* local cases, with links to information about each case:

- Andrew Kearse.
Black man. Died in the custody of the Schenectady Police in 2017. No officers criminally charged.
<https://medium.com/@riseandresist/2-years-ago-today-andrew-kearse-died-in-the-custody-of-schenectady-ny-police-officer-mark-wee-kes-b4a97e393c7d>
- Dontay Ivy.
Black man. Killed by the Albany Police in 2015. No officers criminally charged.
<https://truthout.org/articles/we-still-can-t-breathe-justice-for-dontay-ivy/>

- Edson Thevenin.
Black man. Killed by a Troy Police officer in 2016. No officers criminally charged.
<https://ag.ny.gov/press-release/2018/ags-special-investigations-and-prosecutions-unit-releases-report-death-edson>
- Ellazar Williams.
Black man. Shot and paralyzed by an Albany Police detective in 2018. No officers charged.
<https://theappeal.org/albany-police-shot-a-teen-in-the-back-and-paralyzed-him-the-da-said-it-was-justified/>

Attached are the following:

- Copies of the “curfew” orders issued by Albany Mayor Kathy Sheehan on May 30th and May 31st, 2020.
- Mishler, *A Need for Disruption*, Op-Ed, Albany Times Union, June 10, 2018. Discusses the theory and practice of non-violent civil disobedience in the context of the Poor People’s Movement in Albany.
- Mishler, *Creative and Informed Representation of Activists in Criminal Cases*, materials prepared for CLE conference at Albany Law School titled “Advocacy and Activism Today”. February 2017.

Concluding thoughts --

As should be obvious, I am an activist, part of the movement for racial justice.

I do not expect that all who read through these materials will agree with my opinions or framework. We don’t have to agree. However, as lawyers, if we are going to effectively, ethically, and in a client-centered manner represent individuals engaged in action for racial justice during this period, it is incumbent upon us to listen, read, think, and be open to understanding the experiences and positions of our client(s). I particularly urge those who, like me, are white, to accept the profound gift of this moment to begin, or, for most, to continue a process of listening, learning, and thinking about the history of racism in this country and the ways in which our legal system continues to reflect, enforce, and perpetuate white supremacy.

What are we as lawyers, law students, legal workers compelled to do at this time? Choose sides. Take a stand. Reject the status quo in the legal system. Listen to and stand with the Black community and join the creative, courageous, inclusive, transformational, multi-racial, multi-generational, multi-issue movement Black people in this country are leading and inspiring. Use our knowledge and skills to advance a bold vision of justice.

(prepared June 7, 2020)